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Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights' Approach

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Abstract

This Note examines the different approaches of the European and Inter-American Courts in assessing state liability for a violation of the right to life in disappearance cases. Part I discusses the phenomenon of disappearances. It also provides background on the European and Inter-American systems of human rights as well as on the concept of the right to life in the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") and in the American Conventions on Human Rights ("American Convention"). Finally, Part I examines the Inter-American Court's approach to assessing state responsibility for disappearances in the Velasquez Rodriguez Case ("Velasquez Rodriguez"). Part II discusses the problem of disappearances in Turkey and then explores the European Court's approach to adjudicating disappearances by examining three recent cases. Part III argues that the European Court's approach to adjudicating disappearances is problematic and that the European Court should adopt the Inter-American Court's model of adjudication to ensure the just determination of disappearance cases.

NOTES

ADJUDICATING DISAPPEARANCE CASES IN TURKEY: AN ARGUMENT FOR ADOPTING THE INTER-AMERICAN COURT OF HUMAN RIGHTS' APPROACH

*Irum Taqi**

INTRODUCTION

On May 6, 1994, Turkish soldiers raided a rural village in southeastern Turkey.¹ They used the loudspeaker from the minaret of the village mosque to command the villagers to gather their belongings, informing them that they were going to burn down the village.² After the soldiers burned the villagers' homes, the villagers obtained permission to remain among the ruins so that they could harvest their crops, which had not been burnt.³ Two weeks later, Turkish soldiers apprehended three of the villagers, two brothers, Mehmet Selim Örhan, Hasan Örhan, and their nephew, Cezair Örhan.⁴ Relatives inquired about the men, but the authorities denied that they were in custody.⁵ One month later, a witness told the relatives that he had seen the three men in custody, and that they appeared to be in bad condition.⁶ No one has seen them since then.⁷

* J.D. Candidate, May 2001, Fordham University School of Law. I would like to thank Professor Martin Flaherty, whose class inspired me to write this. This Note is dedicated to my parents and sister for all of their help and encouragement.

1. See AMNESTY INTERNATIONAL, TURKEY: A POLICY OF DENIAL 11 (1995) [hereinafter AMNESTY, POLICY OF DENIAL] (relaying that Turkish soldiers arrived in village of Deveboyu, located in southeastern Turkey).

2. See *id.* (reporting villager's account that as soldiers burned down village, four helicopters were circling above scene).

3. See *id.* (relaying that villagers went to gendarmerie headquarters to obtain permission to stay in tents in village until they could harvest their crops); AMNESTY INTERNATIONAL, TURKEY: NO SECURITY WITHOUT HUMAN RIGHTS 3 (1996) [hereinafter AMNESTY, NO SECURITY] (explaining that gendarmes are soldiers who assume police duties in rural areas of Turkey).

4. See *id.* (recounting that four Turkish soldiers took three men into custody).

5. See *id.* (stating that worried relatives went to local security post where authorities told them to go to nearby village of Kulp, but authorities in Kulp denied knowledge of villagers' whereabouts). Subsequent inquiries were fruitless because authorities denied that the three men were in custody. See *id.*

6. See *id.* (noting that authorities interrogated witness in same detention facility where he saw three men).

The multilateral treaties and declarations⁸ designed to ensure the international protection of human rights⁹ do not specifically prohibit disappearances.¹⁰ Scholars note, nevertheless, that aspects of the practice of disappearances violate the fundamental rights promulgated by these instruments.¹¹ Because gov-

7. *See id.* (confirming that since witness saw three men, no one else has claimed to have seen them).

8. *See generally* Imre Sazbo, *Historical Foundations of Human Rights and Subsequent Developments in* 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 21 (Karel Vasek ed., 1982) (explaining that human rights treaties were created and adopted in response to atrocities committed during World War II); LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS 1 (1981) [hereinafter HENKIN, INTERNATIONAL BILL OF RIGHTS] (noting that general human rights treaties enumerate universal rights that everyone is entitled to possess). These general multilateral treaties include the Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR 3d. Sess. Pt. 1, at 71, U.N. Doc. A/810 (1948), the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) and the International Covenant on Economic, Social and Cultural Rights, 999 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICCPR]. *See* HENKIN, INTERNATIONAL BILL OF RIGHTS, *supra* note 8. Regional human rights treaties include the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, Eur. T.S. No.5 (entered into force Sept. 3, 1953) [hereinafter European Convention] and the American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 9 I.L.M. 673 (entered into force July 18, 1978) [hereinafter American Convention]. *See* LOUIS HENKIN, ET AL., HUMAN RIGHTS 523, 551 (1999) [hereinafter, HENKIN, HUMAN RIGHTS].

9. *See* Makau wa Mutua, *Looking Past the Human Rights Committee: An Argument for Demarginalizing Enforcement*, 4 BUFF. H. RTS. L. REV. 211 (1998) (noting that one purpose of human rights law is to deter governments from violating citizens' individual rights); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977), *quoted in* HENKIN, HUMAN RIGHTS, *supra* note 8, at 77 (asserting that individual rights are political trumps that impose obstacles on government action); HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 117-65 (1996) (explaining that settled principle of international law is that states' treatment of its citizens are not solely matter of domestic jurisdiction).

10. *See* AMNESTY INTERNATIONAL, DISAPPEARANCES, A WORKBOOK 75 (1981) [hereinafter AMNESTY, WORKBOOK] (explaining that press in Guatemala first used term "disappearance" to describe governmental practice in 1960s when death squads abducted and assassinated political opponents, and subsequently denied involvement); Linda Drucker, *Recent Development, Governmental Liability for "Disappearances": A Landmark Ruling by the Inter-American Court of Human Rights*, 25 STAN. J. INT'L. L. 289, 290 n.4 (1989) (noting that death squad is popular term in Latin America referring to paramilitary groups that engage in abduction, torture, and execution of political dissidents); *see also* Juan E. Mendez et al., *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 507, 512 (1990) (confirming that existing human rights instruments do not contemplate disappearances as specific human rights violation); Drucker, *supra* note 10, at 300 (noting that American Convention does not specifically prohibit disappearances).

11. *See, e.g.,* Mendez et al., *supra* note 10, at 513 (explaining that disappearances violate several rights enumerated in human rights instruments); Drucker, *supra* note 10,

ernments that disappear¹² individuals kidnap, torture, and usually kill them, the practice violates the individuals' right to liberty,¹³ right to humane treatment,¹⁴ and, most significantly, right to life.¹⁵ International and regional human rights institutions, including the European Court of Human Rights ("European Court") and the Inter-American Court of Human Rights ("Inter-American Court"), were created to protect and enforce these rights.¹⁶

This Note examines the different approaches of the European and Inter-American Courts in assessing state liability for a violation of the right to life in disappearance cases. Part I discusses the phenomenon of disappearances. It also provides background on the European and Inter-American systems of human rights as well as on the concept of the right to life in the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") and in the American

at 290-91 (discussing how practice of disappearances constitutes separate acts of kidnaping, torture, and murder, which violate various provisions of American Convention).

12. See Drucker, *supra* note 9, at 290 n.9 (explaining that Spanish word *desaparecer*, to disappear, used as verb in Latin America to connote kidnapping, torturing, and executing individuals by agents of military and paramilitary).

13. See ICCPR art. 9; European Convention art. 5; American Convention art. 7 (guaranteeing right to liberty).

14. See ICCPR art. 7; European Convention art. 3; American Convention art. 5 (guaranteeing right to humane treatment).

15. See ICCPR art. 6; European Convention art. 2; American Convention art. 4 (guaranteeing right to life); see also Haluk A. Kabaalioglu, *The Obligations to 'Respect' and to 'Ensure' the Right to Life*, in THE RIGHT TO LIFE IN INTERNATIONAL LAW 160-61 (B. G. Ramcharan ed., 1985) (stating that right to life is most important of all human rights); Richard B. Lillich, *Global Protection of Human Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW 121 (Theodor Meron ed., 1984) (stating that right to life is essential right on which other rights are based); Theodoor C. van Boven, *Distinguishing Criteria of Human Rights*, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 44 (Karel Vasak ed., 1982) (remarking that right to life is most elementary of all human rights); see, e.g., *Ilhan v. Turkey*, App. No. 22277/93, para. 75 (2000), at <http://www.coe.int.eng/judgments.htm> (reasoning that right to life is basic value of democratic societies and, therefore, circumstances justifying deprivation of life should be strictly construed).

16. See European Convention art. 45 (providing that European Court of Human Rights' ("European Court") primary function is to interpret European Convention); American Convention art. 62 (providing that Inter-American Court of Human Rights ("Inter-American Court") shall interpret American Convention); see also ICCPR art. 28 (establishing Human Rights Committee). The Human Rights Committee is charged with enforcing the rights enumerated in the ICCPR; see *id.* arts. 40-42. See generally DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (1991) (providing in depth discussion of role of Human Rights Committee).

Conventions on Human Rights ("American Convention").¹⁷ Finally, Part I examines the Inter-American Court's approach to assessing state responsibility for disappearances in the *Velásquez Rodríguez Case* ("*Velásquez Rodríguez*").¹⁸ Part II discusses the problem of disappearances in Turkey and then explores the European Court's approach to adjudicating disappearances by examining three recent cases. Part III argues that the European Court's approach to adjudicating disappearances is problematic and that the European Court should adopt the Inter-American Court's model of adjudication to ensure the just determination of disappearance cases.

I. DISAPPEARANCES AND REGIONAL HUMAN RIGHTS SYSTEMS

The practice of disappearing individuals to curtail political opposition emerged as a systematic human rights problem in Latin America in the 1970s.¹⁹ All disappearances share several defining characteristics, including a lack of accountability for the victim, which contributes to evidentiary difficulties in proving that they occurred.²⁰ The European and Inter-American systems of human rights possess the means, however, to investigate and adjudicate disappearance cases.²¹

A. *Defining Disappearances*

The practice of systematically disappearing individuals to

17. See generally Szabo, *supra* note 8, at 33 (explaining that conventions are multi-lateral instruments of international law, and upon ratification, state signatories undertake to guarantee rights enumerated in them).

18. *Velásquez Rodríguez Case*, ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS [hereinafter INTER-AM. CT. H.R.] 35, OAS/ser. L./V./III.19, doc. 13 (1988), reprinted in HUMAN RIGHTS, THE INTER-AMERICAN SYSTEM (Thomas Buergethal & Robert E. Norris, eds., 1991).

19. See AMNESTY, WORKBOOK, *supra* note 10, at 75-76 (explaining that disappearances came to international community's attention in 1970s); see, e.g., AMNESTY INTERNATIONAL, MEXICO "DISAPPEARANCES": A BLACK HOLE IN THE PROTECTION OF HUMAN RIGHTS 3 (1998) (noting that practice of disappearances in Mexico specifically began in 1970s).

20. See, e.g., AMNESTY INTERNATIONAL, HONDURAS: THE BEGINNING OF THE END OF IMPUNITY? 4-9 (1995) [hereinafter AMNESTY, HONDURAS] (discussing impediments to investigating disappearances).

21. See European Convention art. 19 (creating European Commission and European Court to investigate and adjudicate violations of European Convention); American Convention art. 33 (establishing Inter-American Commission and Inter-American Court to investigate and adjudicate violations of American Convention).

eliminate political opposition is a relatively new human rights problem.²² Disappearances became widespread in Chile and Argentina during the 1970s, attracting international attention.²³ Although disappearances are widely associated with Latin American nations, a substantial number of countries worldwide employ this technique as well.²⁴

Definitions of disappearances vary.²⁵ Experts note, nevertheless, that there are several common characteristics to disappearances.²⁶ First, individuals are abducted and subjected to secret detention, torture, and, typically, death.²⁷ Second, the ab-

22. See Maureen R. Berman et al., *State Terrorism: Disappearances*, 13 *RUTGERS L.J.* 531 (1982) (remarking that phenomenon of disappearances is new human rights issue).

23. See AMNESTY, WORKBOOK, *supra* note 10, at 75-76 (explaining that after 1973 military coup in Chile and 1976 military coup in Argentina disappearances attracted attention worldwide). See generally Ian Guest, *BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS* (1990) (discussing United Nations' involvement in protecting human rights in response to disappearances in Argentina).

24. See Berman et al., *supra* note 22, at 532 (1982) (noting that apart from Argentina, Chile, and Uruguay, massive disappearances have been reported in Afghanistan, Cambodia, Ethiopia, Equatorial Guinea, Philippines, and Uganda); see also *Report of the Working Group on Enforced or Involuntary Disappearances*, U.N. Doc. E/CN.4/1435, at 21 (1981) (receiving information on approximately 12,000 cases of disappearances from 15 countries during its first year of activities).

25. See Mendez et al., *supra* note 10, at 512 (commenting that some human rights experts define disappearances broadly, as deliberate concealment of detention, while others more narrowly emphasize state-sponsored plan as central element defining disappearances); see also AMNESTY, WORKBOOK, *supra* note 10, at 75 (explaining that term disappearance used because it does not have exact definition and can describe situations in which specific details about fate of victim are unknown). A disappearance can occur when it is likely that the victim has been taken into custody by authorities, authorities deny that the victim is in their custody, and reasonable grounds exist to doubt that denial. *Id.* at 88. The Inter-American Convention on Forced Disappearance of Persons states that:

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

See Inter-American Convention on Forced Disappearance of Persons art. II, 24th Sess. Gen. Assemb. OAS (entered into force Mar. 28, 1996) available at <http://www.oas.org/juridico/English/treaties/a-60.html>.

26. See Berman et al., *supra* note 22, at 532 (remarking on similarities in treatment of disappeared persons); Mendez et al., *supra* note 10, at 511 (commenting on general manner that security forces carry out disappearances).

27. See Berman et al., *supra* note 22, at 532 (noting that authorities take victims to

ductors are well organized, armed, and usually members of the military or police forces.²⁸ Third, the practice is a deliberate governmental policy aimed at eliminating perceived threats from individuals who oppose the government.²⁹ The abductions, therefore, are often carried out by government agents or with the authorities' tacit approval.³⁰ Fourth, the disappearance has a dual function of extracting information from the detainee, while intimidating the victim and society alike in order to prevent participation in groups or activities considered dissident by the government.³¹

Proving governmental involvement in the disappearance of a particular individual is generally exceedingly difficult³² because the perpetrators conceal their identities.³³ In addition, witnesses or family members are usually afraid to speak out publicly or to testify.³⁴ Participants in the disappearances also may be threatened if suspected of revealing information to outsiders.³⁵ Further, the central piece of evidence in a disappearance

secret detention centers, subjecting them to interrogation and torture); Mendez et al., *supra* note 10, at 511 (explaining that typical practice consists of killing victims and concealing their corpses after authorities' obtain information from them).

28. See Berman et al., *supra* note 22, at 532 (noting that abductors might also be government agents or dress in civilian attire and identify themselves as members of security forces); Mendez et al., *supra* note 10, at 511 (remarking that agents who carry out disappearances are usually acting under some form of governmental authority).

29. See Mendez et al., *supra* note 10, at 511 (commenting that victims of disappearances are typically political activists opposed to government, including teachers, labor organizers peasant leaders, and religious workers); Berman et al., *supra* note 22, at 537 (noting that targets include lawyers, journalists, and students).

30. See Berman et al., *supra* note 22, at 533 (remarking that some governments grant security agents authority to arrest, interrogate, imprison, and kill citizens); see also Mendez et al., *supra* note 10, at 511 (explaining that in many countries, units that plan and carry out disappearances are specialized, highly secret groups within armed or security forces typically directed through clandestine chain of command).

31. See Berman et al., *supra* note 22, at 537 (noting that disappearances not only eliminate political opponents, but serve to terrorize others).

32. See Mendez et al., *supra* note 10, at 556 (emphasizing that inherent to government practice of disappearances is intentional use of State's power to eliminate direct evidence).

33. See AMNESTY, WORKBOOK, *supra* note 10, at 91 (explaining that, by their nature, disappearances conceal identity of perpetrator).

34. See Berman et al., *supra* note 22, at 533 (noting that family members may fear for their own safety or for further endangering disappeared victim).

35. See Drucker, *supra* note 10, at 309 (remarking that participants also may be assassinated if suspected of disclosing information).

case, the body, is usually deliberately concealed.³⁶ Finally, authorities deny that the detention ever occurred.³⁷ Disappeared victims simply vanish, allowing governments to escape the application of legal standards that ensure individual rights.³⁸

B. *Two Systems of Adjudication*

The European and Inter-American systems are two of the three regional human rights systems in the world.³⁹ The conventions of both systems enumerate substantive rights that state parties undertake to guarantee.⁴⁰ In addition, supervisory organs

36. See AMNESTY, WORKBOOK, *supra* note 10, at 91 (emphasizing that if there is no prisoner, no body, and no victim, then authorities cannot be accused of wrongdoing).

37. See Berman et al., *supra* note 22, at 533 (commenting that denial of accountability is factor that makes disappearances unique among human rights violations); Mendez et al., *supra* note 10, at 511 (noting that techniques used by human rights organizations to pressure governments to release political prisoners rendered useless when governments denied detaining victim). Domestic remedies also are difficult to obtain when authorities refuse to acknowledge the detention of an individual. See Velásquez Rodríguez Case, INTER-AM. CT. H.R., 35, OAS/ser. L./V./III.19, doc. 13 (1988), reprinted in HUMAN RIGHTS, THE INTER-AMERICAN SYSTEM (Thomas Buergenthal & Robert E. Norris, eds., 1991) at 147, para. 65 (remarking that writ of habeas corpus is inadequate remedy in disappearance case because only hearsay evidence is available regarding detention).

38. See Berman et al., *supra* note 22, at 536 (noting, however, that someone has caused victims to disappear and should be held accountable for their fate). The central difference between a disappearance and an arrest is the extrajudicial nature of a disappearance. See Drucker, *supra* note 10, at 299.

39. See INTERNATIONAL HUMAN RIGHTS, DOCUMENTARY SUPPLEMENT vii. (Richard B. Lillich & Hurst Hannum eds., 1995) (providing texts of three regional human rights treaties). The third established regional human rights system is in Africa, organized under the African (Banjul) Charter on Human Rights and People's Rights. See African (Banjul) Charter on Human Rights and People's Rights, O.A.U. Doc. CAB/LEG/67/3/rev. 5, 21 I.L.M. 59 (1982). The Charter establishes an African Commission on Human Rights and People's Rights. See *id.* art. 30. Its mandate, however, does not extend to juridical functions for individual cases. See *id.* art. 45.

40. See European Convention arts. 2-18 (enumerating rights); American Convention arts. 1-25 (listing rights); see also European Convention pmb. (emphasizing that purpose of European Convention is to protect fundamental freedoms. The preamble states, in part:

Reaffirming [the high contracting parties'] profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend. . . have agreed [to] secure to everyone within their jurisdiction the rights and freedoms [of] this Convention.

Id. See also American Convention pmb. (declaring that, "the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby

protect human rights in both systems.⁴¹

1. European System of Human Rights

The European system of human rights consists of three organs.⁴² The European Convention codifies the human rights that state parties undertake to guarantee their citizens.⁴³ Until the passage of Protocol Number 11 to the European Convention ("Protocol 11"),⁴⁴ the European Commission investigated allegations of human rights violations.⁴⁵ The European Court then

everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights").

41. See European Convention art. 19 (establishing European Commission and European Court "[t]o ensure the observance of engagements undertaken by the High Contracting Parties"); American Convention art. 33 (creating Inter-American Commission and Inter-American Court to oversee "matters relating to the fulfillment of the commitments made by the States Parties").

42. See FRANCIS G. JACOBS ET AL., *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 6 (2d ed. 1996) (providing that European system consists of European Convention, that established European Commission and European Court).

43. See European Convention arts. 2-18 (enumerating substantive rights states are obliged to guarantee).

44. See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, Eur. T.S. No. 155 [hereinafter Protocol No. 11] (replacing European Commission with single European Court). Protocol No. 11 creates a new text for the European Convention, leaving Articles 1-18 intact but re-ordering the rest of the Convention. See *id.* arts. 19-51 (establishing single European Court and its composition, competence, and procedures); see Nicola Rowe et al., *The Protection of Human Rights in Europe after the Eleventh Protocol to the ECHR*, 23 EUR. L. REV. 1, 3 (1998) (discussing weaknesses of old system, including backlog of cases and challenges posed to review system with geopolitical extension of European Convention's jurisdiction as numerous central and eastern European states acceded to European Convention in early 1990s); see also Alastair R. Mowbray, *The Composition and Operation of the new European Court of Human Rights*, 218 PUBLIC LAW 219 (1999) (detailing operation of new European Court); Siobhan Leonard, *The European Convention on Human Rights: A New Era for Human Rights Protection in Europe?*, in HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY 43-45 (Angela Hegarty & Siobhan Leonard eds., 1999) (explaining how complaints processed). The three Turkish cases discussed *infra* Part II were brought before the passage of Protocol 11 and, therefore, the European Commission investigated the allegations before referring the cases to the European Court. See *Kurt v. Turkey*, 27 EUR. H.R. REP. 373, at 399, para. 84 (1998) (indicating that applicant brought case to European Commission on November 23, 1994); *Çakici v. Turkey*, App. No. 23657/94, para. 68 (1999) at <http://www.coe.int/eng/judgments.htm> (stating that applicant applied to European Commission on May 2, 1994); *Timurtas v. Turkey*, App. No. 23531/94, para. 9 (2000) at <http://www.coe.int/eng/judgments.htm> (stating that applicant brought complaint to European Commission on February 9, 1994).

45. See European Convention art. 28 (conferring power to European Commission to investigate cases).

ruled whether a violation occurred.⁴⁶ With the recent entry into force of Protocol 11, the European Commission and European Court have merged into a single European Court, combining their previous functions.⁴⁷

a. Structure of European Convention

After World War II, the Council of Europe⁴⁸ adopted the European Convention in an effort to unify Europe and to promote democracy.⁴⁹ Articles 2-18 of the European Convention delineate the substantive rights and freedoms that Member States undertake to guarantee.⁵⁰ The European Convention also established the European Commission and the European Court and set out their composition, competence, and basic procedures.⁵¹ Since the European Convention's inception, eleven

46. *Id.* art. 51 (requiring that European Court provide reasons for its judgments).

47. *See* Protocol 11, *supra* note 44, art. 19 (creating new, single European Court).

48. *See* DONNA GOMIEN ET AL., *LAW AND PRACTICE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 11* (1996) (explaining that Council of Europe is regional organization aimed at achieving unity among Member States by furthering field of human rights, among others, through adoption of recommendations, conventions, and dissemination of information).

49. *See* A. H. ROBERTSON ET AL., *HUMAN RIGHTS IN EUROPE 3-4* (1993) (noting that Council of Europe was committed to human rights and rule of law after World War II to protect against dictatorship and promote European unity). The European Convention entered into force on September 3, 1953, and is currently in force in all 41 Member States of the Council of Europe. *See* Council of Europe, Chart of Signatures and Ratifications of Protocol 11 to the European Convention, available at <http://conventions.coe.int/teaty/htm> (showing that European Convention, including most recent protocol, is in force in all 41 signatory states, which are also Member States of Council of Europe). Current members of the Council of Europe are: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom. *Id.*

50. European Convention arts. 2-18 (enumerating civil and political rights). These articles must be read in conjunction with Article 1. *See id.* art. 1 (requiring that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention"). *See generally* JACOBS ET AL., *supra* note 42 (providing discussion of rights protected under European Convention).

51. *See* European Convention art. 19 (stating that "[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up: 1. A European Commission; 2. A European Court"); *id.* arts. 20-56 (detailing functions of European Commission and European Court). With the passage of Protocol 11, however, articles 19-56 have been replaced to provide for the

protocols have modified its provisions or added new substantive rights.⁵²

i. European Commission

Until the passage of Protocol 11, the European Commission⁵³ reviewed complaints alleging violations of the European Convention.⁵⁴ After the European Commission declared a complaint admissible, it examined the merits of the case and prepared a report giving its opinion as to whether the European Convention had been violated.⁵⁵ The reports, though not binding, had strong persuasive authority and the European Court generally accepted the European Commission's findings and decisions.⁵⁶

ii. European Court

The European Court could only consider cases that were referred by the European Commission, a state party, or an individual applicant who had first lodged a complaint with the European Commission.⁵⁷ Its main function was to interpret and ap-

establishment of a new Court and its composition, competency, and procedures. See Protocol No. 11 arts. 19-51 (replacing articles 19-56 describing former European Commission and former European Court's functions with article 19-51 describing new European Court's functions).

52. See GOMIEN ET. AL., *supra* note 48, at 18 (explaining that some protocols focus on procedure, while others establish additional rights).

53. See European Convention art. 20 (providing that number of members of European Commission shall be equal to state parties to European Convention).

54. See *id.* art. 24 (allowing any state to complain to European Commission of alleged breach of European Convention). Article 25 of the European Convention allowed states to accept the optional jurisdiction of the European Commission to receive complaints from individuals. See *id.* art. 25.

55. See European Convention art. 31 (stating that European Commission may make "such proposals as it thinks fit" in its report).

56. See J. G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 15-16 (1993) (noting that European Court need not follow decisions of European Commission, but frequently adopted European Commission's approach); see also Çakici v. Turkey, App. No. 23657/94 para. 72 (1999), at <http://www.coe.int/eng/judgments.htm> (stating that "while the [European] Court is not bound by the [European] Commission's findings of fact and remains free to make its own assessment in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area").

57. See European Convention art. 48 (stating that European Commission, state party, or individual may refer case to European Court if respondent state accepted compulsory jurisdiction of European Court); Rolv Ryssdal, *Forward by the President of European Court of Human Rights to Peter Kempees*, in *A SYSTEMATIC GUIDE TO THE CASE-LAW OF THE*

ply the substantive provisions of the European Convention to determine whether a violation occurred.⁵⁸ The European Court typically began its examination of a case based on written proceedings.⁵⁹ The oral proceedings consisted of arguments by the European Commission, the applicant's legal representative, and the respondent State's representative.⁶⁰ At the request of one of the parties involved, the European Court would also hear witness or experts.⁶¹ The European Court based its decisions on these proceedings.⁶² The judgments of the European Court were final,⁶³ and state parties were obligated to abide by its decisions.⁶⁴

b. Rights Under European Convention

The three central rights implicated in disappearance cases are set forth in the European Convention.⁶⁵ Article 2, the right to life, requires state parties to the European Convention to undertake both negative and positive obligations to protect the lives of their citizens.⁶⁶ Article 3 guarantees the right to humane

EUROPEAN COURT: 1960-1994 at ix (1996) (noting that European Court is located in Strasbourg, France).

58. See European Convention art. 45 (stating that "[t]he jurisdiction of the [European] Court shall extend to all cases concerning the interpretation and application of the present Convention). See generally MERRILLS, *supra* note 56, at 14 (explaining that role of precedent is not decisive to European Court). The European Court should be free to revise or adapt past judgments to conform to current ideas. *Id.*

59. See generally P. VAN DIJK, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1984) (examining European Court's procedures).

60. See GOMIEN ET AL., *supra* note 48, at 78 (noting that oral hearing consisted of at least these three arguments).

61. See *id.* (explaining that European Court could also hear from any other person who could provide assistance).

62. See JACOBS ET AL., *supra* note 50, at 385 (noting that proceedings were based on written and oral procedures and European Commission's report).

63. See European Convention art. 52 (providing that "[t]he judgment of the [European] Court shall be final").

64. See *id.*, *supra* note 8, art. 53 (stating that "[t]he High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties"); see also *id.* art. 54 (stating that Committee of Ministers shall supervise execution of judgments); GOMIEN ET AL., *supra* note 48, at 13 (describing Committee of Ministers as supervisory mechanism for European Convention and decision-making body of Council of Europe).

65. See European Convention art. 2 (guaranteeing right to life); *id.* art. 3 (guaranteeing right to humane treatment); *id.* art. 5 (guaranteeing right to security and liberty).

66. *Id.* art. 2. Article 2 states:

- (1.) Everyone's right to life shall be protected by law. No one shall be deprived of life intentionally save in the execution of a sentence of a court

treatment.⁶⁷ Article 5 guarantees individuals the right to security and liberty.⁶⁸

i. Right to Life

The right to life is the first right enumerated in the European Convention.⁶⁹ Article 2 of the European Convention requires State parties to protect the right to life by law.⁷⁰ Article 2 protects individuals from the arbitrary deprivation of life by the state.⁷¹ The European Court and the European Commission have interpreted Article 2 not only to prohibit the intentional deprivation of life by states, but also to impose certain positive duties on states to protect life.⁷² Under Article 2, therefore, states must create and maintain legal mechanisms to prevent the taking of life by any state actor, and ensure that its agents, including its security forces, do not violate the right to life of its nationals.⁷³

The European Commission and European Court have found a procedural rule under Article 2 to further protect the

following his conviction of a crime for which this penalty is provided by law.

- (2.) Deprivation of life shall not be regarded as inflicted in contravention of this Article from the use of force which is no more than absolutely necessary:
- (a) in defense of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Id.

67. *See id.* art. 3 (stating that “[n]o one shall be subjected to torture or to inhuman or degrading treatment”).

68. *See id.* art. 5 (guaranteeing right to liberty and security of person).

69. *See id.* art. 2 (guaranteeing right to life). The right to life provision in the European Convention is more detailed than the wording of its predecessor, Article 3 of the Universal Declaration of Human Rights, which simply guarantees the right to life, liberty, and security of person. *See* Universal Declaration of Human Rights art. 3 (stating that “[e]veryone has the right to life, liberty, and security of person”).

70. *See* European Convention art. 15 (prohibiting derogations from Article 2).

71. *See* GOMIEN ET AL., *supra* note 48, at 94 (concluding that underlying principle of Article 2 is to protect individual against any arbitrary deprivation of life by state).

72. *See* RALPH BEDDARD, *HUMAN RIGHTS AND EUROPE* 75 (1993) (discussing European Court’s opinion that state’s obligation under Article 2 includes positive, as well as negative aspects).

73. *See* GOMIEN ET AL., *supra* note 48, at 94 (stating that Article 2 protects against taking of life by state).

right to life.⁷⁴ This requires states to conduct effective, official investigations into alleged violations of the right to life.⁷⁵ The failure of a government, therefore, to conduct an adequate investigation into an alleged violation of the right to life can itself constitute a violation of the right to life.⁷⁶

ii. Other Rights

Article 3 of the European Convention prohibits torture and inhuman or degrading treatment.⁷⁷ The European Court has set a high threshold for conduct prohibited by this article.⁷⁸ Article 5 guarantees the liberty and security of individuals.⁷⁹ The first paragraph of Article 5 details the conditions under which an individual may be deprived of his or her liberty,⁸⁰ while the rest

74. See generally Kara E. Irwin, Note, *Prospects for Justice: The Procedural Aspect of the Right to Life Under the European Convention on Human Rights and its Applications to Investigations of Northern Ireland's Bloody Sunday*, 22 *FORDHAM INT'L. L. J.* 1822, 1842-1851 (1999) (tracing development of procedural aspect of right to life by European Court).

75. See *McCann and Others v. United Kingdom*, 324 *EUR. CT. H.R. (ser. A)* at 49, para. 161 (1995) (stating that European Convention requires, by implication, that governments conduct effective investigations into deaths of individuals killed by state agents).

76. See *Kaya v. Turkey*, App. No. 22729/93, 28 *EUR. H. R. REP.* (1998) at 46, para. 92 (holding that Turkish authorities' failure to conduct effective investigation into death of applicant's brother constituted violation of Article 2 of European Convention); see also *Cakici v. Turkey*, App. No. 23657/94 (1999), at <http://www.echr.coe.int/eng/judgments.htm>, para. 86. The European Court stated that,

The [European] Court reiterates that Article 2 of the Convention, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention and . . . enshrines one of the basic values of the democratic societies making up the Council of Europe. The obligation imposed is not exclusively concerned with intentional killing resulting from the use of force by agents of the State but also extends, in the first sentence of Article 2 § 1, to imposing a positive obligation on States that the right to life be protected by law. This requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.

Id.

77. See European Convention art. 15 (prohibiting derogations from Article 3).

78. See *Ireland v. United Kingdom*, 2 *EUR. H.R. REP. (ser. A)* No. 25 (1990) at 65, para. 162, (finding that conduct must "attain a minimum level of severity" to be prohibited by Article 3).

79. See European Convention art. 5(1) (declaring that "[e]veryone has the right to liberty and security of the person").

80. See *id.* The first paragraph of Article 5 of the European Convention states:

1. Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

of the article provides certain rights for detainees.⁸¹

2. Inter-American System of Human Rights

The Organization of American States⁸² ("OAS") created the Inter-American system of human rights to supervise human rights protection in North, South, and Central America.⁸³ The

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- (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court in order to secure the fulfillment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence of fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of bringing him in before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of spreading infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Id.

81. *Id.* Paragraphs 2-4 of Article 5 provide:

- (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
- (3) Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Id.

82. See Charter of the Organization of American States, 119 U.N.T.S. 3 (entered into force Dec. 13, 1951); amended by Protocol of Buenos Aires, 721 U.N.T.S. 324 (entered into force Feb. 27, 1970); Protocol of Cartagena de Indias, O.A.S.T.S. No. 1-E (entered into force Nov. 16, 1988) (establishing that Organization of American States ("OAS") is regional international organization committed to promote peace, justice, cooperation, and democracy).

83. See Dinah L. 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 (1988) (stating that Inter-American human rights system provides ambitious institutional framework for promoting human rights in region).

system is comprised of three organs.⁸⁴ The American Convention delineates the substantive rights state parties undertake to guarantee.⁸⁵ The Inter-American Commission investigates allegations of human rights violations.⁸⁶ The Inter-American Court interprets the rights set forth in the American Convention and determines whether a violation has occurred.⁸⁷

a. Structure of American Convention

The OAS adopted the American Convention in 1969.⁸⁸ The format of the American Convention is similar to the European Convention.⁸⁹ The American Convention contains a detailed list of civil and political rights in its first twenty-five articles.⁹⁰ The American Convention also established the Inter-American Commission and the Inter-American Court.⁹¹

i. Inter-American Commission

The Inter-American Commission is composed of seven members.⁹² The Inter-American Commission's two main tasks

84. See David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 1* (David J. Harris ed., 1998) (stating that substantive guarantee of human rights protections found in American Convention while Inter-American Commission and Inter-American Court are supervisory organs).

85. See American Convention arts. 1-25 (enumerating fundamental rights protected by American Convention).

86. See *id.* art. 41 (specifying functions of Inter-American Commission).

87. See *id.* arts. 61-69 (detailing Inter-American Court's functions and jurisdiction).

88. See Harris, *supra* note 84, at 1 (explaining that, upon becoming member of Council of Europe, there is political obligation to ratify European Convention but no such obligation exists within OAS).

89. See Thomas Buergenthal, *Inter-American System for the Protection of Human Rights*, in 2 *HUMAN RIGHTS IN INTERNATIONAL LAW 441* (Theodor Meron ed., 1984) (remarking that American Convention's framework is similar to that of European Convention's).

90. See American Convention arts. 1-25 (enumerating rights that Member States are obligated to protect); Buergenthal, *supra* note 89, at 442 (commenting that more rights are protected by American Convention than by European Convention and that many of American Convention's provisions establish more advanced and progressive guarantees than provisions of European Convention).

91. See American Convention arts. 33-73 (establishing Inter-American Commission and Inter-American Court and detailing their respective composition, functions, and procedures).

92. See *id.* art. 34 (stating that "[t]he Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights"). See generally SCOTT DAVIDSON, *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 101-18* (1997) (providing in depth discussion of Inter-American Commission's functions).

involve the preparation of country reports on the general state of human rights in a particular country⁹³ and the examination of petitions by individuals alleging violations of human rights.⁹⁴ Once the Inter-American Commission receives a petition, it must determine its admissibility.⁹⁵ If the petition is admissible, the Inter-American Commission begins to investigate the allegations.⁹⁶ The Inter-American Commission then prepares a report,⁹⁷ consisting of its recommendations, which it may forward to the Inter-American Court.⁹⁸

ii. Inter-American Court

The Inter-American Court has the power to adjudicate contentious cases relating to claims that a state party has violated the American Convention, provided that the Inter-American Commission has first examined the case.⁹⁹ The Inter-American

93. See American Convention art. 41 (establishing that Inter-American Commission shall, among other functions, prepare country reports to promote respect for human rights); see also Harris, *supra* note 87, at 20. (remarking that Inter-American Commission, faced with gross violations of American Convention by military regimes, prioritized need to publicize human rights abuses and to seek change by negotiation).

94. See American Convention art. 44 (stating that “[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more Members States of the Organization, may lodge petitions with the [Inter-American] Commission containing denunciations or complaints of violation of this Convention by a State Party”); see also Harris, *supra* note 87, at 20 (commenting that, in practice, Inter-American Commission focuses on country reports and individual petitions, although it has several other functions).

95. See American Convention art. 46 (setting forth individual admissibility requirements).

96. See *id.* art. 48 (stating that Inter-American Commission may request oral and written statements from parties); see also *Regulations of the Inter-American Commission on Human Rights*, reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, arts. 43, 44 (1992) (allowing Inter-American Commission to hold hearing or conduct on-site investigation). The Inter-American Commission can also attempt to work with the parties to achieve a friendly settlement to the dispute. See American Convention art. 48(1)(f).

97. See American Convention art. 50(1) (stating that if settlement is not reached, Inter-American Commission should prepare report with facts and conclusions).

98. See *Regulations of the Inter-American Commission on Human Rights*, *supra* note 96, art. 47(2) (allowing Inter-American Commission or respondent government to transmit case to Inter-American Court).

99. See American Convention art. 63 (allowing Inter-American Court to rule that injured party’s rights were violated). The state involved, however, must expressly recognize the Inter-American Court’s contentious jurisdiction, pursuant to Article 62 of the American Convention. *Id.* The state party must declare that it recognizes the Inter-American Court’s jurisdiction. *Id.* art. 62. The Inter-American Court also has advisory jurisdiction whereby an OAS Member State may consult the Inter-American Court re-

Court, comprised of seven judges,¹⁰⁰ begins its decision-making process once it hears the merits of the case.¹⁰¹ The Court's judgments are binding.¹⁰²

b. Rights Under American Convention

Article 4 of the American Convention protects the arbitrary taking of life by the state.¹⁰³ Article 5 forbids torture and cruel or inhuman treatment.¹⁰⁴ Article 7 protects the right to liberty and security.¹⁰⁵

i. Right to Life

Article 4 of the American Convention requires states to protect the right to life by law.¹⁰⁶ According to the Inter-American Court, this requirement, along with the general obligation in Article 1 that states act positively to ensure the rights guaranteed in the American Convention, means that states must take adequate steps to safeguard human life.¹⁰⁷ States, therefore, must make the taking of life by the State illegal and investigate, punish, and compensate victims or their families for the taking of life.¹⁰⁸

garding its interpretation of American Convention. *Id.* art. 64. See generally Antônio Augusto Cançado Trindade, *The Operation of the Inter-American Court of Human Rights*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 131 (David J. Harris & Stephen Livingstone eds., 1998) (stating that Inter-American Court is located in San José, Costa Rica).

100. See American Convention art. 52 (outlining Inter-American Court's organization).

101. See Victor Rodríguez et al., *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L.SCH. J. HUM. RTS. 593, 614 (2000) (explaining that Inter-American Court comes to decision after hearing witness and expert testimony and oral arguments by parties involved).

102. See American Convention art. 67 (stating that Inter-American Court's judgments are final and not subject to appeal).

103. See *id.* art. 4 (protecting right to life).

104. See *id.* art. 5 (also protecting moral and mental integrity).

105. See *id.* art. 7 (protecting personal liberty).

106. See *id.* art. 4 (stating in that "[e]very person has the right to have his life respected). Article 4 further provides that "[t]his right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. *Id.*

107. See Velásquez Rodríguez Case, INTER-AM. CT. H.R., 35, OAS/ser. L./V./III.19, doc. 13 (1988), reprinted in *HUMAN RIGHTS, THE INTER-AMERICAN SYSTEM* (Thomas Buergenthal & Robert E. Norris eds., 1991) at 184, para. 167 (finding that states must make taking of life by state agents illegal and provide for proper policing to enforce law).

108. See *id.* at 187, paras. 176-76 (requiring states to effectively investigate, punish, and compensate for deprivation of life).

ii. Other Rights

Article 5 of the American Convention protects the right to humane treatment.¹⁰⁹ Article 7 protects the right to personal liberty and security.¹¹⁰ Article 7, therefore, prohibits the arbitrary arrest or imprisonment of any individual and requires that detained persons be informed of the charges against them.¹¹¹

c. *Velásquez Rodríguez*

In *Velásquez Rodríguez*, the Inter-American Court established

109. See American Convention art. 5(1) (stating that “[e]very person has the right to have his physical, mental, and moral integrity respected”). Article 5(2) states that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.” *Id.* art. 5(2).

110. See *id.* art. 7(1) (stating that “[e]very person has the right to personal liberty and security”).

111. See *id.* art. 7(3) (stating that “[n]o one shall be subject to arbitrary arrest or imprisonment”). Article 7(4) states that “[a]nyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.” *Id.* art. 7(4). Both the European and American Conventions have similar substantive guarantees concerning the right to life, the right to humane treatment, and the right to liberty. See European Convention arts. 2, 3, 5 (providing substance of these three rights); American Convention arts. 4, 5, 7 (detailing state parties’ obligations for protection of right to life, right to humane treatment, and right to liberty). The human rights courts, however, operate in different political contexts. See David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 2 (David J. Harris ed., 1998) [hereinafter Harris, *Regional Protection*]. While, historically, the European system regulated democratic countries, the Inter-American system has had to contend with military dictatorships throughout the region. *Id.* at 2. Since 1960, the region has been ripe with violent repression of political opposition, intimidated judiciaries, and terrorism, whereas European countries observe the rule of law, have independent judiciaries, and are democracies. *Id.* As a result, the Inter-American system has been confronted with gross and systematic violations of human rights, such as disappearances, murder, and torture of political opponents, rather than issues such as the right to a fair trial or freedom of expression, which have concerned the European system historically. *Id.* In an effort to end the practice of disappearances, the OAS adopted Inter-American Convention on the Forced Disappearances of Persons on June 9, 1994. See Inter-American Convention on Forced Disappearance of Persons, *supra* note 25, at pmb. (providing that goal of Convention is to prevent, punish, and eliminate disappearances); see also Harris, *supra*, *Regional Protection*, at 2 (comparing American system for dealing with gross violations to European system); Aisling Reidy et al., *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey*, 15 NETH. Q. OF HUM. RTS. 161, 172-73 (1997) (remarking that individual complaints of disappearances in Turkey present new challenges to European system of human rights). Complaints before the European Court of gross human rights violations that have emerged from the conflict in Turkey could be indicative of trend, especially in light of ethnic conflicts in Eastern and Central Europe. *Id.* at 173.

new evidentiary standards to adjudicate disappearance cases.¹¹² The Inter-American Court established a rule by which it assumes governmental responsibility for the disappearance of an individual if the government carries out a general practice of disappearances and the specific case can be linked to that practice.¹¹³ Even if the complainant fails to prove that the government participated in a practice of disappearances, a government can still be held liable for failing to investigate allegations of a specific disappearance.¹¹⁴ The Inter-American Court found Honduras liable for the disappearance of Angel Manfredo Velásquez Rodríguez ("Velásquez Rodríguez") and that the State had violated his right to life.¹¹⁵

i. Facts

Heavily armed men wearing civilian clothes kidnapped Velásquez Rodríguez, a student, in broad daylight on September 12, 1981.¹¹⁶ A witness stated that while he was held in custody, someone in an adjoining room asked him for help and identified himself as Velásquez Rodríguez.¹¹⁷ Since then, no one has admitted to seeing Velásquez Rodríguez or to knowing of his whereabouts.¹¹⁸ The Inter-American Commission referred the case to the Inter-American Court in April of 1986, requesting that the Inter-American Court determine whether Honduras had violated Article 4 of the American Convention, the right to life, by causing Velásquez Rodríguez's disappearance.¹¹⁹

112. See *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 166, para. 127 (establishing relaxed standard).

113. See *id.* at 166, para. 126 (providing that complainant must prove both elements to satisfy requisite standard of proof).

114. See *id.* at 189, para. 154 (ruling that states have affirmative duties to investigate allegations of disappearances).

115. See *id.* at 192, para. 188 (finding reasonable presumption that authorities killed Velásquez Rodríguez).

116. See *id.* at 175, para. 147(g)(i) (stating that witness testimony confirmed that Velásquez Rodríguez participated in activities Honduran authorities considered dangerous to state security); see *id.* para. 47(g)(ii) (stating that men who kidnapped Velásquez Rodríguez used vehicle without license plates).

117. See *id.* at 162, para. 115 (testifying that he heard Velásquez Rodríguez's "pained voice" asking him for help).

118. See *id.* at 175, para. 147(e) (stating that when proceedings before Inter-American Court began, seven years had passed since Velásquez Rodríguez's kidnapping without news about him).

119. See *id.* at 124, para. 2 (stating that Inter-American Commission's complaint also alleged that Honduras violated Article 5 and Article 7 of American Convention).

Before issuing its judgment, the Inter-American Court heard witness testimony regarding the generalized practice of government-sponsored and government-tolerated disappearances in Honduras between 1981 and 1984.¹²⁰ Confronted with this evidence, the Inter-American Court found that between 1981 and 1984, Honduran authorities systematically disappeared between 100-150 people.¹²¹ The Inter-American Court further found that the disappearances followed a similar pattern.¹²² The victims were usually individuals whom Honduran authorities considered dangerous to the State's security.¹²³ Once the State targeted someone, armed men in civilian clothes would forcibly kidnap the victim, using vehicles without official identification.¹²⁴ The kidnapers blindfolded the victims and took them to secret detention centers where the victims were interrogated and tortured.¹²⁵ The kidnapers eventually killed the victims and buried their bodies in secret cemeteries.¹²⁶ When questioned, the authorities¹²⁷ consistently denied knowledge of the detentions and the whereabouts of the victims.¹²⁸ Authorities also failed to prevent or investigate allegations of disappearances

Velásquez Rodríguez's family had filed a complaint with the Inter-American Commission alleging that Honduran authorities executed Velásquez Rodríguez. *Id.*; see also Drucker, *supra* note 10, at 293 (stating that Defense of Human Rights in Honduras, non-governmental organization, assisted Velásquez Rodríguez's family in bringing case to Inter-American Commission).

120. See *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 153-55, paras. 83-87 (recounting witness testimony of general practice of disappearances in Honduras). The Inter-American Court had also ordered the submission of additional testimonial and documentary evidence. See *id.* at 131, para. 25.

121. See *id.* at 172, para. 147(a) (stating that disappeared victims were never heard from again).

122. See *id.* at 172, para. 147(b) (stating that pattern began with kidnapping).

123. See *id.* at 173, para. 147(d)(i) (stating that victims usually had been under surveillance for long periods of time).

124. See *id.* at 172, para. 147(b) (noting that vehicles usually had tinted windows with false license plates or no license plates). Often, the kidnappings occurred in broad daylight and in public places. *Id.*

125. See *id.* at 174, para. 147(d)(iii) (reporting that kidnapers typically moved victims from one unofficial detention center to another and subjected them to cruel and humiliating treatment and torture).

126. See *id.* (stating that "[s]ome were ultimately murdered and their bodies buried in clandestine cemeteries").

127. See *id.* at 174-75, para. 147(d)(v) (noting that authorities consisted of military and police officials, as well as officials from executive and judicial branches).

128. See *id.* at 174, para. 147(d)(iv) (describing that individuals sometimes were found in custody by same authorities who had denied holding them).

or to punish those responsible.¹²⁹

ii. Inter-American Court's Evidentiary Standard and Two-Prong Test

The Inter-American Court noted that before weighing the evidence, it must determine what standard of proof to apply in disappearance cases.¹³⁰ Given the gravity of finding the Honduran government guilty of carrying out a practice of disappearances, the Inter-American Court required that the standard of proof convincingly establish the validity of the allegations.¹³¹ At the same time, to take into account the unique evidentiary difficulties in proving disappearances, the Inter-American Court allowed for the liberal reliance on circumstantial evidence.¹³² The Inter-American Court, therefore, adopted a relaxed, informal standard on which to weigh the evidence.¹³³

129. *See id.* at 174-75, para. 147(d)(v) (noting that investigative committees established by government and armed forces failed to prevent or investigate disappearances and that domestic judicial proceedings were slow "with a clear lack of interest").

130. *See id.* at 166, para. 127 (emphasizing that "international jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule about the amount of proof necessary to support its judgment"). The Inter-American Court also asserted that "[t]he standards of proof are less formal in an international legal proceeding than in a domestic one. The latter recognize different burdens of proof, depending on the nature, character and seriousness of the case"). *Id.*

131. *See id.* at 167, para. 129 (requiring standard of proof to be "capable of establishing the truth of the allegations in a convincing manner").

132. *See id.* at 167, para. 131 (finding that "[c]ircumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim"). Paragraph 130 states that "[c]ircumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts." *Id.*

133. *See id.* at 167, para. 128 (stating that in international legal proceeding, standard of proof is less formal than in domestic setting); *see also* Drucker, *supra* note 10, at 306 (noting that Inter-American Court did not adopt stringent standard of proof); JULIANE KOKOTT, *THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS LAW* 201 (1998) (explaining that Inter-American Court's standard is lower than beyond reasonable doubt standard but higher than preponderance of evidence standard); Drucker, *supra* note 10, at 306 (remarking that Inter-American Court's generous allowance of hearsay testimony indicates its lenient standard of proof); Dinah L. Shelton, *Judicial Review of State Action by International Courts*, 12 *FORDHAM INT'L. L. J.* 361, 386 (1989) [hereinafter Shelton, *Judicial Review*] (reasoning that clear and convincing standard that Inter-American Court adopted is appropriate where allegations of systematic and grave violations of human rights exist). In adopting a relaxed and informal evidentiary standard, the Inter-American Court stressed that the goal of international human rights law is to protect the victims of human rights abuses, not to punish the

Faced with a lack of direct evidence that the government disappeared Velásquez Rodríguez, the Inter-American Court established a novel, two-step process for adjudicating disappearance cases.¹³⁴ First, a complainant must prove that the government engaged in a systemic practice of disappearances.¹³⁵ Second, the complainant must establish a link between that practice and the individual case.¹³⁶ Once the complainant has satisfied both prongs to the requisite standard of proof,¹³⁷ the burden of

perpetrators of such violations. See *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 168, para. 134 (noting that states appearing before Inter-American Court are not defendants in domestic criminal action where prosecution must prove its charges beyond a reasonable doubt). See also Shelton, *Judicial Review*, *supra*, at 387 (noting that criminal standard would be overly burdensome for most applicants bringing human rights complaints); *id.* at 397 (recognizing that main purpose of international human rights tribunal is to ensure that state parties comply with their obligations under conventions, rather than to resolve disputes); КОКОТТ, *supra* at 199-200 (commenting that equating state accused of human rights violations with criminal defendant is inappropriate because such reasoning would subvert individual's interest and obstruct effective operation human rights tribunals).

134. See Drucker, *supra* note 10, at 313 (noting that *Velásquez Rodríguez* opinion established new, two-step procedure for inferring state liability from evidence of general government practice of disappearing people); see also Shelton, *Judicial Review*, *supra* note 133, at 398 (noting that reliable procedures are necessary for individuals, commission, and governments in preparing cases and that Inter-American Court's guidelines will be useful in future cases). The Inter-American Court's approach to disappearance cases indicates to those alleging such cases the degree and kind of proof necessary to challenge state action. *Id.* Further, predictable procedures ensure reliable decisions that states cannot ignore. *Id.*

135. See *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 166, para. 126 (stating that complainant must show official practice of disappearances in Honduras either carried out or tolerated by government); see also Shelton, *Judicial Review*, *supra* note 133, at 377 (remarking that scope of Inter-American Court's inquiry is wider than European Court's because Inter-American Court reviews local practices).

136. See *id.* at 166, para. 124. In *Velásquez Rodríguez* the Inter-American Court found that:

[t]he [Inter-American] Commission's argument relies upon the proposition that the policy of disappearances, supported or tolerated by the Government, is designed to conceal and destroy evidence of disappearances. When the existence of such a policy or practice has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence or by logical inference. Otherwise, it would be impossible to prove than an individual has been disappeared.

Id.

137. See *id.* at 166, para. 126. The Inter-American Court reasoned that:

[i]f it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of . . . Velásquez Rodríguez can be linked to that practice, the [Inter-American] Commission's allegations will have been proven to the [In-

proof shifts to the government to refute the allegations.¹³⁸ If the government fails to disprove the allegations, the Inter-American Court could presume government liability for the disappearance.¹³⁹

iii. Conclusions of Inter-American Court

The Inter-American Court found that between 1981 and 1984, Honduran authorities carried out or tolerated a practice of disappearances and that the disappearance of Velásquez Rodríguez fell within this systematic practice.¹⁴⁰ The Inter-American Court also found that the Honduran government failed to produce evidence of its innocence.¹⁴¹ The Inter-American Court inferred State liability for Velásquez Rodríguez's disappearance because of Honduras' failure to rebut the evidence regarding his disappearance or the practice of disappearances generally.¹⁴²

ter-American] Court's satisfaction, so long as the evidence presented on both points meets the standard of proof in cases such as this.

Id.

138. *See id.* at 168-69, para. 138 (ruling that fairness required shifting burden of proof to State to produce exculpatory evidence once complainant made prima facie case); *see also* Drucker, *supra* note 10, at 317 (summarizing that under Inter-American Court's ruling, governments can attempt to rebut evidence of either practice of disappearances or link between practice and particular case, or both, but it cannot remain silent to escape liability).

139. *See Velásquez Rodríguez*, INTER-AM. CT. H.R. at 168, para. 136 (reasoning that state has virtually exclusive control over information relating to particular disappearance). The state, therefore, cannot rely on the complainant's failure to present evidence that would be impossible to obtain without the State's cooperation. *Id.* The Inter-American Commission cannot investigate allegations in state's jurisdiction without state's assistance. *Id.* The Inter-American Court required the state to set forth affirmative proof of its innocence rather than relying on weaknesses in the petitioners' case. *Id.*

140. *See id.* at 177, para. 148 (finding that Honduran government also "failed to guarantee the human rights affected by that practice").

141. *Id.* at 168, para. 137 (noting that government failed to produce documentary evidence). The government failed to present evidence that witnesses testified untruthfully, but instead made general observations about their alleged impartiality. *Id.* Honduras made little attempt to explain the facts or to attempt to provide alternative explanations for Velásquez Rodríguez's disappearance. *Id.* The government also failed to corroborate evidence containing rumors that Velásquez Rodríguez had joined a rebel group. *Id.* at 176, para. 147(h).

142. *See id.* at 168-69, para. 138 (reasoning that "the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law"); *see also* Mendez et al., *supra* note 10, at 555 (noting that while Inter-American Court was hesitant to shift burden of proof automatically, it reserved its discretion to consider state's silence or inaction in assessing all evidence on

The Inter-American Court further found that the government breached its obligations under Article 4 of the American Convention.¹⁴³ According to the Inter-American Court, the context in which Velásquez Rodríguez disappeared, combined with his continued disappearance, created a reasonable presumption that authorities killed him and that the government, therefore, bore responsibility for his death.¹⁴⁴ This presumption, along with the government's failure to investigate the allegations of Velásquez Rodríguez's disappearance, comprised a violation of his right to life under the American Convention.¹⁴⁵

The Inter-American Court found Article 1 of the American Convention¹⁴⁶ a necessary part of imputing human rights violations to state parties.¹⁴⁷ According to the Inter-American Court, each of the rights set forth in the American Convention must be

record); Shelton, *Judicial Review*, *supra* note 133, at 398 (remarking that human rights tribunals may be more willing to presume truth of allegations from state's failure to cooperate).

143. See *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 192, para. 188 (stating that Honduran government failed to ensure inviolability of right to life and right not to have one's life taken arbitrarily).

144. See *id.* (stating that "[e]ven if there is a minimal margin of doubt in this respect, it must be presumed that his fate was decided by authorities who systematically executed detainees without trial and concealed their bodies in order to avoid punishment").

145. See *id.* (finding that presumption of Velásquez Rodríguez's death, along with government's failure to investigate allegations of his disappearance, "is a violation by Honduras of a legal duty under Article 1(1) of the [American] Convention to ensure the rights recognized by Article 4(1)"). The Inter-American Court found the State in violation of Article 5 of the American Convention because "those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment." *Id.* at 180, para 156. In addition, the Inter-American Court found that Honduras breached Article 7 of the American Convention because kidnapping constitutes an arbitrary deprivation of liberty. *Id.* at 179, para 155.

146. American Convention art. 1(1). The American Convention provides that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Id.

147. See *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 183, para. 163 (finding Article 1(1) applicable in any case even when parties do not allege such violation because it forms "generic basis of the protection of the rights recognized by the [American] Convention").

interpreted in conjunction with Article 1.¹⁴⁸ Where the Inter-American Court determines a violation of any right by a state party, it *ipso jure* establishes the violation of Article 1.¹⁴⁹

The Inter-American Court interpreted Article 1 as imposing an affirmative duty on states to take all necessary measures to ensure the free and full exercise of all of the rights enumerated in the Inter-American Convention.¹⁵⁰ States, therefore, possess affirmative duties to prevent,¹⁵¹ investigate,¹⁵² and punish¹⁵³ human rights abuses.¹⁵⁴ Under the Inter-American Court's interpretation of Article 1, a state may be held liable for violating the right to life even where evidence of direct governmental involvement in a disappearance is weak or impossible to obtain.¹⁵⁵ The Inter-American Court concluded that Honduran agents car-

148. *Id.* at 182, para. 162 (stating that Article 1 details duty assumed by state party in relation to every right protected by American Convention).

149. *Id.* (stating that claim alleging violation of any right in American Convention necessarily entails violation of Article 1(1)).

150. *See id.* at 184, para. 166 (stating that this obligation requires states to organize governmental apparatus and political structures in manner that provides effective remedies for human rights violations); *see also id.* para. 165 (requiring that states respect rights embodied in American Convention).

151. *See id.* at 187, para. 175 (declaring that "[t]his duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts").

152. *See id.* at 188, para. 177 (requiring that "[a]n investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government").

153. *See id.* at 187, para. 176 (finding that "[i]f the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction").

154. *See id.* at 184, para. 166 (adding that states also have affirmative duty to establish system of compensation for damages stemming from violations).

155. *Id.* at 186, para. 172. In *Velásquez Rodríguez* the Inter-American Court found that:

[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention.

Id.; *see also* AMNESTY, WORKBOOK, *supra* note 10, at 91 (noting that where systematic pattern of serious human rights violations exists, blame can be attributed to governments concerned because states' central responsibility is to protect safety of their citizens).

ried out Velásquez Rodríguez's disappearance.¹⁵⁶ Nevertheless, the Inter-American Court stated that it would have held Honduras liable for his disappearance in the absence of evidence of such direct involvement because the government blatantly failed to comply with its duties under Article 1.¹⁵⁷

II. DISAPPEARANCES IN TURKEY

Observers note that, historically, the Turkish government has repressed the Kurdish minority¹⁵⁸ in Turkey.¹⁵⁹ Recently, a large number of Kurdish citizens have applied to the European Commission, alleging gross human right violations by security forces in the southeast region of the country.¹⁶⁰ In *Kurt v. Turkey*, *Cakici v. Turkey*, and *Timurtas v. Turkey*, the applicants alleged that Turkey was responsible for disappearances, thereby violating the victims' right to life.¹⁶¹

A. Background

Approximately one-fifth of Turkey's population is ethnically

156. See *Velásquez Rodríguez*, INTER-AM. CT. H.R. at 190, para. 182 (finding that agents acting "under cover of public authority" disappeared Velásquez Rodríguez).

157. See *id.* (finding that even if State agents hadn't disappeared Velásquez Rodríguez, Honduras failed to take even minimal steps necessary to prevent and investigate the case, breaching its duties under Article 1 of American Convention).

158. See Paul J. Magnarella, *The Legal, Political, Cultural Structures of Human Rights Protections and Abuses in Turkey*, 3 D.C.L. J. INT'L. L. & PRAC. 439, 459 (1994) (explaining that Kurds are most likely descendants of Indo-European peoples who settled in area of Iran, Iraq, and Turkey in 2000 B.C.); HELSINKI WATCH, *THE KURDS OF TURKEY: KILLINGS, DISAPPEARANCES AND TORTURE 1* (1993) [hereinafter HELSINKI WATCH, KURDS] (noting that Kurds share common language, religion, and culture).

159. See, e.g., Aram Nigogosian, *Turkey's Kurdish Problem: Recent Trends*, in *THE KURDISH NATIONALIST MOVEMENT IN THE 1990s* 39 (Robert Olson ed., 1996) (noting that since Republic of Turkey came into existence, it has used military repression, cooperation, and forced assimilation against Kurds); Olivia Q. Goldman, *The Need for an Independent International Mechanism to Protect Group Rights: A Case Study of the Kurds*, 2 TULSA J. COMP. & INT'L. L. 45, 70 (1994) (explaining that since 1920s, Turkish government has sought to eliminate public vestiges of separate Kurdish identity).

160. See Reidy et al., *supra* note 111, at 161 (noting recent influx of cases before European Commission and European Court brought by individuals of Kurdish origin against Turkey).

161. See *Kurt v. Turkey*, 27 EUR. H.R. REP. 373 (1998) at 439, para. 84 (alleging that Turkish government was responsible for disappearance of her son); *Cakici v. Turkey*, App. No. 23657/94, para. 81 (1999), at <http://www.coe.int/eng/judgments.htm> (claiming that Turkish authorities disappeared his brother); *Timurtas v. Turkey*, App. No. 23531/94 (2000), para. 60, at <http://www.coe.int/eng/judgments.htm> (alleging that Turkish authorities disappeared his son).

Kurdish.¹⁶² Although they have never had a country of their own, some commentators note that the Kurds claim the region encompassing southeastern Turkey as their traditional homeland.¹⁶³ Scholars explain that since the 1920s, Turkey has repressed its Kurdish population.¹⁶⁴ During the 1970s and 1980s, a number of Kurdish organizations, among them, the Kurdistan Worker's Party¹⁶⁵ ("PKK"), began to advocate for Kurdish political and cultural rights.¹⁶⁶

The PKK began an armed guerilla campaign in the southeastern provinces of Turkey in 1984, with the aim of establishing a secessionist Kurdish state.¹⁶⁷ These attacks provoked a major counter-offensive by Turkish military forces.¹⁶⁸ Gross human rights violations, including disappearances¹⁶⁹ and death in de-

162. See Human Rights Watch, *Ocalan Trial Monitor: Background on Repression of the Kurds in Turkey*, at <http://www.hrw.org/campagains/turkey/kurd.htm> (2000) [hereinafter, Human Rights Watch, *Ocalan*] (estimating that Turkey's total population is roughly 63 million people); see also Goldman, *supra* note 159, at 66 (reporting that Kurdish population is estimated between 20 and 25 million people worldwide).

163. See Goldman, *supra* note 159, at 66 (explaining that Kurdistan, Kurd's historical homeland, is located in mountainous region connecting Turkey, Iran, and Iraq); AMNESTY, NO SECURITY, *supra* note 3, at 5 (noting that majority of Kurds living in Turkey inhabit southeast part of country).

164. See HELSINKI WATCH, *KURDS*, *supra* note 162, at 1 (noting that Turkish government continues to use harsh means in attempt to assimilate Kurdish population, including banning Kurdish language, names, schools, publications, music, and associations). From 1922-1938, there were three major revolts against Turkey's assimilationist policies. See Magnarella, *supra* note 158, at 460 (stating that Kurds rebelled against government's policies of "Turkification").

165. See Magnarella, *supra* note 158, at 460 (explaining that Kurdistan Worker's Party ("PKK") was most prominent of these pro-Kurdish groups); see also Human Rights Watch, *Ocalan*, *supra* note 162 (noting that denial of cultural and political rights has resulted in long-standing sense of grievance among segments of Kurdish minority, leading them to join illegal radical armed organizations, particularly the PKK).

166. See EDGAR O'BALANCE, *THE KURDISH STRUGGLE 1920-1994*, at 146 (1996) (noting that PKK differed from other Kurdish resistance organizations by its goal of achieving Kurdish independence through violence).

167. See Magnarella, *supra* note 158, at 460 (estimating that death toll reached over 10,500 people); see also AMNESTY, NO SECURITY, *supra* note 163, at 6 (noting that PKK now more narrowly aims for some degree of autonomy for southeast region of Turkey).

168. See Magnarella, *supra* note 158, at 460 (explaining that Turkey responded to attacks by mass arrests of suspected PKK members and imposition of martial law); *id.* at 461 (asserting that Turkish military forces contributed to increase in violence by arbitrarily arresting and mistreating Kurdish civilians).

169. See AMNESTY, *POLICY OF DENIAL*, *supra* note 1, at 10-11 (1995) (noting that majority of disappeared victims were Kurdish villagers detained during security raids because they were suspected of helping PKK).

tention by the Turkish security forces,¹⁷⁰ characterized the peak of the conflict between 1992-1995.¹⁷¹ During this period, the government intensified its counterinsurgency campaign against the PKK, burning villages and forcibly evacuating residents,¹⁷² while the PKK committed politically motivated assassinations.¹⁷³

B. Cases

In three landmark cases, relatives of the disappeared victims applied to the European Commission, alleging that the Turkish government failed to protect the victims' lives, in violation of Article 2 of the European Convention.¹⁷⁴ After investigating the facts of each case, the European Commission referred the cases to the European Court.¹⁷⁵ The European Court failed to find a violation of the right to life in *Kurt*, but it did find Turkey responsible for the deaths of the disappeared victims in *Çakici* and *Timurtas*.¹⁷⁶

170. See AMNESTY, NO SECURITY, *supra* note 163, at 2 (noting that security forces allegedly responsible for disappearances are sometimes difficult to identify).

171. See Human Rights Watch, *Violations of Free Expression in Turkey*, available at <http://www.hrw.org/hrw/reports/1999/turkey> [hereinafter, Human Rights Watch, *Violations*] (remarking that over 2500 depopulated villages believed to be result of government's counterinsurgency campaign). Between 1992-1995, over 1000 suspected PKK members were killed. *Id.*

172. See Reidy et al., *supra* note 111, at 162 (explaining that Turkish government insists that PKK is terrorist organization and, therefore, civilian deaths either are responsibility of PKK or occur legitimately in context of combating terrorism).

173. See *Human Rights Watch, Violations, supra* note 171 (reporting that PKK assassinated teachers, former PKK members, and civil servants suspected of cooperating with Turkish government).

174. See *Kurt v. Turkey*, 27 EUR. H.R. REP. 373 (1998) at 439, para. 84 (alleging that Turkey breached its obligation to protect life); *Çakici v. Turkey*, App. No. 23657/94, para. 81 (1999), at <http://www.coe.int/eng/judgments.htm> (claiming that Turkey in violation of Article 2 of European Convention, guaranteeing right to life); *Timurtas v. Turkey*, App. No. 23531/94, para. 60 (2000) at <http://www.coe.int/eng/judgments.htm> (alleging that Turkey violated right to life by disappearing his son).

175. See *Kurt*, 27 EUR. H.R. REP. at 399, para. 72 (stating that European Commission referred case to European Court on January 22, 1997); *Çakici*, App. No. 23657/94, para. 1 (stating that European Commission referred case to European Court on September 14, 1998); *Timurtas*, App. No. 23531/94, para. 1 (stating that European Commission referred case to European Court on March 8, 1999).

176. See *Kurt*, 27 EUR. H.R. REP. at 444, para. 109 (finding Article 2 inapplicable); *Çakici*, App. No. 23657/94, para. 87 (finding Turkey in violation of Article 2); *Timurtas*, App. No. 23531/94, para. 86 (finding that Turkey breached its obligations under Article 2).

1. *Kurt v. Turkey*

Koçeri Kurt, the applicant, claimed that Turkish security forces were responsible for her son's, Üzeyir Kurt's ("Üzeyir"), disappearance.¹⁷⁷ The European Commission, however, failed to find the Turkish government liable for Üzeyir's disappearance.¹⁷⁸ According to the European Court, the circumstantial evidence on which the applicant relied was insufficient to find the State responsible for Üzeyir's presumed death.¹⁷⁹

a. Factual Allegations

Koçeri Kurt and the Turkish government disputed the facts in *Kurt*.¹⁸⁰ According to Koçeri Kurt, Turkish security forces abducted Üzeyir, and since then, no one has seen him again.¹⁸¹ Relying on the Inter-American's findings in *Velásquez Rodríguez*, Koçeri Kurt claimed that despite specific evidence that the authorities killed Üzeyir, the European Court should presume Turkey's responsibility for his death.¹⁸² The Turkish government, on the other hand, denied that security forces detained Üzeyir, and therefore, it claimed that no breach of Article 2 occurred.¹⁸³

i. Applicant

Koçeri Kurt applied to the European Commission on May 11, 1994, alleging that the Turkish government was responsible for Üzeyir's disappearance.¹⁸⁴ According to Koçeri Kurt, Turkish security forces entered her village in southeast Turkey on November 23, 1993, in response to government intelligence reports that Üzeyir, a suspected PKK member, lived there.¹⁸⁵ Koçeri

177. See *Kurt*, 27 EUR. H.R. REP. at 439, para. 84, (claiming that facts proved that Turkish government responsible for Üzeyir's disappearance).

178. See *id.* at 410, para. 187, (failing to infer that Üzeyir was killed).

179. See *id.* at 444, para. 108 (finding Kocer Kurt's claims unsubstantiated).

180. See *id.* at 384, para. 9 (stating that facts surrounding Üzeyir's disappearance in dispute).

181. See *id.* at 386, para. 15 (alleging that last time anyone saw Üzeyir was when he was apprehended by Turkish soldiers in his village).

182. See *id.* at 442-443, para. 101 (invoking Inter-American Court's approach in *Velásquez Rodríguez* to instant case).

183. See *id.* at 410, para. 186 (arguing that Kocer Kurt's claims were unsubstantiated).

184. See *id.* at 399, para. 84 (alleging that Turkey also violated Articles 3 and 5 of European Convention by disappearing Üzeyir).

185. See *id.* at 385, para. 14, (alleging that security forces were looking for two

Kurt claimed that security forces, comprised of gendarmes and village guards,¹⁸⁶ searched each house in the village, burned down her house,¹⁸⁷ and apprehended Üzeyir, who had been hiding.¹⁸⁸ Two days later, Koçeri Kurt claimed that she saw Üzeyir, who had bruises and swelling on his face as though he had been beaten, surrounded by approximately fifteen soldiers.¹⁸⁹ Koçeri Kurt maintained that no one has seen Üzeyir elsewhere after that time.¹⁹⁰ She also claimed that she made various attempts to locate her son, but she received no help from authorities.¹⁹¹

Koçeri Kurt claimed that the State breached its affirmative obligations under Article 2 of the European Convention for several reasons.¹⁹² First, she argued that the European Court should presume that authorities killed Üzeyir in custody, despite a lack of direct evidence, based on the Inter-American Court's

other suspected PKK members as well and that clashes followed security forces' arrival in village).

186. See AMNESTY, POLICY OF DENIAL, *supra* note 1, at 8 (discussing village guard system, whereby Turkish government offers villagers money in exchange for bearing arms against members of PKK). When the Turkish government established the village guard system in the 1980s, village guards were meant to defend their villages. *Id.* Now, village guards positioned as paramilitary forces participate in armed struggles against other villages. *Id.*; see also KEMAL KIRISCI ET AL., THE KURDISH QUESTION AND TURKEY: AN EXAMPLE OF A TRANS-STATE ETHNIC CONFLICT 129 (1997) (noting that village guard system used by Turkey in order to assess loyalty of villagers).

187. See Kurt v. Turkey, 27 EUR. H.R. REP. 373 (1998) at 385, para. 14 (alleging that security forces burned down between 10 and 12 houses).

188. See *id.* at 385-86, para. 15 (claiming that security forces gathered villagers in schoolyard while searching for Üzeyir and found him hiding at his aunt's house). Üzeyir allegedly spent the night of November 24, 1993 with soldiers at another villager's home. *Id.*

189. See *id.* (asserting that Üzeyir requested cigarettes and she brought them to him as he was surrounded by about 10 soldiers and five village guards on November 25, 1995).

190. See *id.* (claiming that she returned second time to bring Üzeyir his jacket and socks, that soldiers told her to leave, and that was last time she saw her son).

191. See *id.* at 386, paras. 16-17 (claiming that she made inquiries at prosecutor's office twice, gendarme headquarters, and State Security Court to no avail, and finally contacted Diyarbakir Human Rights Association for help). Koçeri Kurt further claimed that since applying to the European Commission, authorities have intimidated her so she would withdraw her application. See *id.* at 386-87, paras. 19-24 (claiming that authorities forced her to retract certain statements accusing security forces of disappearing Üzeyir).

192. See *id.* at 443, para. 101 (maintaining that Üzeyir's disappearance occurred in life-threatening context); para. 185 at 410 (explaining that "lack of accountability of the security forces in the conduct of their operations represents a threat to the right to life"); para. 185 at 410 (arguing that Turkey responsible for Üzeyir's fate since he was last seen in security forces' custody).

approach in *Velásquez Rodríguez*.¹⁹³ Second, Koçeri Kurt alleged that a practice of disappearances existed in Turkey, leading to the inference that Üzeyir was killed.¹⁹⁴ Third, she maintained that the government violated Article 2 of the European Convention by failing to provide a plausible explanation as to what happened to Üzeyir once he was in the custody of authorities and by failing to investigate his disappearance.¹⁹⁵

ii. Government

The government conceded that clashes occurred between security forces and suspected PKK members, as Koçeri Kurt alleged, but denied that security forces took Üzeyir into custody.¹⁹⁶ It claimed that Üzeyir had joined or been kidnapped by the PKK.¹⁹⁷ The government also noted that the only person who claimed to have last seen Üzeyir was Koçeri Kurt, whose accounts were contradictory, inconsistent, and unsubstantiated.¹⁹⁸ The Turkish government denied that security forces detained Üzeyir and, therefore, claimed that no issue could arise under Article 2.¹⁹⁹

b. European Commission's Findings

The European Commission found the evidence consistent with Koçeri Kurt's description of the events that transpired once

193. *See Kurt*, 27 EUR. H.R. REP. at 442-43, para. 101, (claiming that despite lack of evidence that authorities killed Üzeyir, European Court could still find violation of Article 2 by adopting *Veslásquez Rodríguez* approach).

194. *See id.* at 443, para. 102 (asserting that well-documented, high incidence of torture and unexplained death in custody in south-east Turkey constituted compelling evidence of governmental practice of disappearances). The Inter-American Court concluded in *Velásquez Rodríguez* that Honduras violated the right to life provision of the American Convention based on evidence of practice of disappearances. *Id.*

195. *See id.* at 443, para. 103 (claiming that failure to conduct prompt, thorough, and effective investigation of disappearance constitutes separate violation of Article 2).

196. *See id.* at 388, para. 27 (stating that Üzeyir had no record of detention or problems with Turkish authorities).

197. *See id.* at 388, para. 28 (claiming that other members of Üzeyir's family had joined PKK and that villagers stated they had heard he had been kidnapped by PKK). The Government also claimed that Üzeyir might have fled the village at night because villagers routinely escaped to the mountains at the beginning of any military action. *Id.*

198. *See id.* at 388, para. 30 (noting, for example, that Koçeri Kurt told European Commission that villagers assembled in schoolyard were blindfolded, and subsequently, retracted that statement).

199. *See id.* at 410, para. 186 (stating that Koçeri Kurt failed to substantiate her allegations that Üzeyir's disappearance occurred in custody).

soldiers entered the village.²⁰⁰ The European Commission accepted her statement that the last time she saw Üzeyir was when he was surrounded by security forces.²⁰¹ In the absence of evidence as to what happened to Üzeyir in custody, however, the European Commission failed to infer that authorities killed Üzeyir.²⁰² The European Commission, therefore, did not find the Turkish government in violation of Article 2 of the European Convention.²⁰³

c. European Court's Analysis

The European Court noted that it must determine whether evidence existed for it to conclude, beyond reasonable doubt, that Turkish authorities were responsible for the death of Üzeyir.²⁰⁴ According to the European Court, Koçeri Kurt's claims were based on presumptions and generalities relating to an alleged practice of disappearances in Turkey.²⁰⁵ The Euro-

200. *See id.* at 393, para. 47 (finding that evidence established that villagers were gathered in schoolyard and that Üzeyir not present). Government agents carried out searches and, following a clash between villagers and agents, Koçeri Kurt's house was burned down. *Id.*

201. *See id.* at 394-95, para. 53 (stating that European Commission found "no basis to infer that Koçeri Kurt's testimony was influenced by reluctance to place blame on PKK"). Rejecting the government's claim, the European Commission found Koçeri Kurt's statements credible. *Id.* at 394, para. 51.

202. *See id.* at 411, para. 189 (finding that lack of evidence establishing practice of disappearance in Turkey or indicating subsequent fate of Üzeyir prevented it from inferring that authorities killed him).

203. *Id.* at 443, para. 105. The European Court stated that:

[t]he cases examined by the [European] Commission under Article 2 have hitherto related to instances where an individual has in fact lost life or suffered known injury or illness. There is yet no precedent for finding a violation of this provision where it is alleged that a situation is such as to place a person's life at risk or to disclose a lack of respect for the right to life.

Id.

The European Commission, however, did find that Turkey violated its obligations under Article 5 of the European Convention by failing to take reasonable steps to safeguard against disappearances. *Id.* at 411, para. 189.

204. *Id.* at 444, para 107 (stating that "[t]he [European] Court must carefully scrutinise whether there does in fact exist concrete evidence which would lead it to conclude that her son was, beyond reasonable doubt, killed by the authorities either while in detention in the village or at some subsequent stage"). The European Court noted that four and half years have passed without any information about Üzeyir and that under "such circumstances the applicant's fears that her son may have died in unacknowledged custody at the hands of his captors cannot be said to be without foundation." *Id.*

205. *See id.* at 444, para. 108 (finding that "[t]he applicant's case rests entirely on presumptions deduced from the circumstances of her son's initial detention bolstered

pean Court found that her claims were insufficient to establish that Üzeyir was killed in custody.²⁰⁶ According to the European Court, Article 2 of the European Convention, therefore, did not apply to the circumstances surrounding Üzeyir's disappearance.²⁰⁷

2. *Çakici v. Turkey*

Izzet Çakici applied to the European Commission alleging that Turkish security forces were responsible for the disappearance of his brother, Ahmet Çakici ("Ahmet").²⁰⁸ Before referring the case to the European Court, the European Commission found Turkish authorities in violation of Article 2 by detaining and presumably killing Ahmet.²⁰⁹ The European Court agreed with the European Commission and determined that sufficient circumstantial evidence existed for it to conclude that Ahmet died at the hands of authorities.²¹⁰ Accordingly, the European Court found that Turkey breached its obligations under Article 2 of the European Convention.²¹¹

a. Factual Allegations

The facts were disputed in this case.²¹² Izzet Çakici alleged that authorities detained, tortured, and presumably killed

by more general analyses of an alleged official tolerated practice of disappearances and associated ill-treatment and extra-judicial killing of detainees in the respondent State"). The European Court also found that Koçeri Kurt failed to substantiate her claim of an officially tolerated practice of disappearances in Turkey. *Id.*

206. *See id.* (finding Koçeri Kurt's allegations insufficient without "more persuasive indications" that security forces killed Üzeyir).

207. *See id.* at 444, para. 109 (stating that Turkey's failure to protect Üzeyir's life should be assessed under Article 5 of European Convention). The European Court found no violation of Article 3 due to a lack of specific evidence that authorities mistreated Üzeyir in custody. *Id.* at 445, para. 116. The European Court found, however, that Turkey violated Article 5 by failing to explain what happened to Üzeyir after he was detained in the village and by failing to investigate Koçeri Kurt's claims that he was in custody and that she feared for his life. *Id.* at 449, para. 128.

208. *See Çakici v. Turkey*, App. No. 23657/94, para. 68 (1999) at <http://www.coe.int/eng/judgments.htm> (alleging that security forces took Ahmet into custody and that no one has seen him since).

209. *See id.* para. 84 (finding strong probability that security forces killed Ahmet). The European Commission referred Izzet Çakici's application to the European Court on September 14, 1998. *Id.* para. 1.

210. *See id.* para. 85 (presuming that government agents killed Ahmet).

211. *See id.* para. 87 (finding Turkish government responsible for Ahmet's death).

212. *See id.* para. 9 (stating that Izzet Çakici and Turkish government disagreed about facts of Ahmet's disappearance). Since the facts were disputed, the European

Ahmet.²¹³ According to the applicant, the Turkish government, consequently, violated Article 2 of the European Convention.²¹⁴ The Turkish government denied that Ahmet was ever in custody, claiming instead that he was killed during an armed clash between Turkish security forces and the PKK.²¹⁵

i. Applicant

Izzet Çakici applied to the European Commission on May 2, 1994, claiming that the Turkish authorities disappeared Ahmet.²¹⁶ According to Izzet Çakici, on November 8, 1993, Turkish security forces detained Ahmet during a military operation in a village located in the southeastern part of the country.²¹⁷ Ahmet attempted to hide, but security forces found him and took him into custody.²¹⁸ Izzet Çakici maintained that security forces then detained and tortured Ahmet.²¹⁹ In May of 1996, Izzet Çakici learned of the authorities' claim that Ahmet died in an armed clash between the PKK and security forces.²²⁰ Izzet Çakici alleged that a strong probability existed that the authorities were responsible for Ahmet's death, in violation of Article 2 of the European Convention.²²¹ He also alleged that the Turkish authorities failed to adequately investigate the circumstances surrounding Ahmet's disappearance, which constituted a

Commission conducted its own investigation through documentary and oral evidence given by parties and witnesses. *Id.* para. 43.

213. *See id.* para. 82 (referring to European Commission's findings).

214. *See id.* para. 81 (alleging that Turkish government was responsible for Ahmet's death).

215. *See id.* para. 20 (claiming that Ahmet's body was found with other dead PKK members).

216. *See id.* para. 68 (alleging that State violated Articles 2, 3, and 5 of European Convention by disappearing Ahmet).

217. *See id.* para. 14 (stating that gendarmes and village guards carried out operation in Çitilbahçe).

218. *See id.* (alleging that other villagers saw security forces take Ahmet from village).

219. *See id.* para. 15 (stating that three other men shared room with Ahmet for approximately 16 days and that authorities beat and electrocuted Ahmet). Security forces allegedly detained Ahmet for 85 days in the same facility and then transferred him to another facility where he was kept for several months. *Id.* para. 16.

220. *See id.* para. 17 (stating that government's claim was based on identification card allegedly found on dead body after clash).

221. *See id.* para. 82 (claiming that government assumes special obligation for safety and right to life of detained person and has duty to account for detainee's whereabouts).

separate violation of Article 2.²²²

ii. Government

The government denied that security forces detained Ahmet.²²³ Instead, the government claimed that Ahmet was a militant member of the PKK and that he was killed during an armed clash with Turkish security forces.²²⁴ Relying on the European Court's decision in *Kurt*,²²⁵ the government claimed that Article 2 did not apply in this case because of a lack of evidence that security forces killed Ahmet in detention.²²⁶

b. European Commission's Findings

The European Commission found that a military operation occurred on November 8, 1994, as Izzet Çakici alleged, with the purpose of apprehending Ahmet for his suspected involvement in the PKK.²²⁷ The European Commission further found that security forces apprehended,²²⁸ detained,²²⁹ and tortured

222. *See id.* (claiming that once suspicious death has occurred in custody, government is obligated to investigate and that here, public prosecutor took no measures to investigate government's own claim that Ahmet was killed in battle).

223. *See id.* para. 19 (stating that custody records failed to indicate that Ahmet was detained).

224. *See id.* para. 20 (claiming that Ahmet's body was found among 55 other dead PKK members in southeastern Turkey).

225. *See Kurt v. Turkey*, 27 EUR.H.R. REP. 373 at 444, paras. 108-09 (1988) (finding that lack of concrete evidence that Üzeyir was killed while in detention gave rise to examination of State's duty under Article 5, not under Article 2).

226. *See Çakici v. Turkey*, App. No. 23657/94, para. 83 (1999), at <http://www.coe.int/eng/judgments.htm>. The European Court cites *McCann and Others v. United Kingdom*, illustrating the applicability of Article 2 where European Court established that security forces killed individual. *Id.* *See generally* *McCann and Others v. United Kingdom*, 324 EUR. CT. H.R. (ser. A) at 161 (1995) (finding violation of Article 2 of European Convention where death of individual established).

227. *See Çakici*, App. No. 23657/94, para. 46 (stating that Ahmet was wanted by authorities and that Turkish security forces intended to apprehend him and others suspected of PKK membership).

228. *See id.* para. 47 (finding witness testimony credible that security forces took Ahmet from village).

229. *See id.* para. 50 (accepting testimony of witness held in same cell as Ahmet). The European Commission found that authorities made no entry in the detention facility record indicating that Ahmet was taken into custody. *See id.* para. 49. The European Commission also found that the entries were not in sequential or chronological order and that all entries in the registry were in same handwriting. *Id.* The European Commission concluded that the record was inaccurate and that Ahmet might have been taken into custody. *Id.*

Ahmet.²³⁰ The government provided no documents relating to the identification of Ahmet's body, and, consequently, the European Commission rejected the government's claim that Ahmet was killed during an armed clash between the PKK and Turkish security forces.²³¹ The European Commission found, a strong probability, based on the circumstances, that the Turkish authorities killed Ahmet, in violation of Article 2 of the European Convention.²³²

c. European Court's Analysis

The European Court accepted the European Commission's finding that Ahmet was the victim of an unreported detention and ill treatment.²³³ The European Court, therefore, distinguished the circumstances of this case from *Kurt*, in which, the European Court noted, that although security forces detained Üzeyir, no other evidence existed regarding his treatment or fate subsequent to the detention.²³⁴ The European Court found sufficient circumstantial evidence to conclude, beyond reasonable doubt, that security forces killed Ahmet at some point after his apprehension and detention.²³⁵ The European Court, therefore, found the State responsible for his death, in violation of Article 2 of the European Convention.²³⁶ The European Court also found a separate violation of Article 2 because of the inade-

230. *See id.* (accepting witness testimony that Ahmet had dried blood on his clothing and that authorities broke Ahmet's rib, injured his head, and electrocuted him).

231. *See id.* para. 52 (stating that security forces made no official report as to alleged finding of Ahmet's identification card on body of dead PKK member after clash and European Commission, therefore, could not find that Ahmet was killed as alleged by government).

232. *See id.* para. 84 (explaining that probability of Ahmet's death arose in context of secret detention and findings of ill-treatment). The European Commission found that the prosecutor failed to inspect custody record or to verify that Ahmet's body was among the dead PKK members following the armed clash. *Id.* para. 54

233. *See id.* para. 85 (stating that European Court accepted European Commission's findings of fact).

234. *See id.* (stating that in *Kurt*, the European Court examined circumstances of disappearance under Article 5 of European Convention).

235. *See id.* (stating that "[v]ery strong inferences may be drawn from the authorities' claim that his identity card was found on the body of a dead [PKK] terrorist"). The [European] Court found that, "there is sufficient circumstantial evidence, based on concrete elements, on which it may be concluded beyond reasonable doubt that Ahmet Çakici died following his apprehension and detention by the security forces." *Id.*

236. *See id.* para. 87 (holding that "[a]s Ahmet Çakici must be presumed dead following an unacknowledged detention by the security forces, the [European] Court finds that the responsibility of the respondent State for his death is engaged").

quate investigation of Ahmet's disappearance.²³⁷

3. *Timurtas v. Turkey*

The applicant, Mehmet Timurtas, claimed that Turkish security forces disappeared his son, Abdulvahap Timurtas ("Abdulvahap").²³⁸ In the European Commission's assessment, insufficient evidence existed to conclude that Turkish authorities killed Abdulvahap in custody.²³⁹ Accordingly, the European Commission failed to find State liability for his death.²⁴⁰ The European Court, however, ruled in opposition to the European Commission's findings.²⁴¹ The European Court distinguished this case from *Kurt*, and held that sufficient circumstantial evidence existed to infer that authorities killed Abdulvahap while he was in their custody and that Turkey, therefore, breached its obligations under Article 2 of the European Convention.²⁴²

a. Factual Allegations

The facts surrounding Abdulvahap's disappearance were disputed.²⁴³ Mehmet Timurtas claimed that Turkish authorities killed Abdulvahap while he was in an unacknowledged detention.²⁴⁴ Consequently, Mehmet Timurtas alleged that Turkey failed to protect Abdulvahap's life.²⁴⁵ The government main-

237. *See id.* (stating that "[h]aving regard to the lack of effective procedural safeguards disclosed by the inadequate investigation carried out into the disappearance and the alleged finding of Ahmet Çakici's body, the [European] Court finds that the respondent State has failed in its obligation to protect his right to life . . . on this account also"). The European Court also found that Turkey violated Article 3 of the European Convention. *Id.* para. 92. The European Court ruled that witness testimony supported a finding, beyond reasonable doubt, that authorities tortured Ahmet when he was detained. *Id.* The European Court, therefore, found that Turkey violated Article 5 by failing to adequately investigate Ahmet's disappearance. *Id.* paras. 106-07.

238. *Timurtas v. Turkey*, App. No. 23531/94, para. 9 (2000), at <http://www.coe.int/eng/judgments.htm> (claiming that Turkish government was responsible for Abdulvahap's presumed death).

239. *See id.* para. 78 (finding lack of concrete evidence to presume security officers killed Abdulvahap).

240. *See id.* (concluding that Turkey did not breach its obligations to protect Abdulvahap's life).

241. *See id.* para. 86 (rejecting European Commission's conclusions).

242. *See id.* (finding Turkish government responsible for Abdulvahap's death).

243. *See id.* para. 10 (stating that Mehmet Timurtas and government disagreed about facts underlying Abdulvahap's disappearance).

244. *See id.* para. 73 (alleging that Abdulvahap was killed in custody).

245. *See id.* (claiming that Turkey breached its obligation under Article 2).

tained that Mehmet Timurtas' allegations were unsubstantiated, but did not specifically address the claim that it violated Abdulvahap's right to life.²⁴⁶

i. Applicant

Mehmet Timurtas applied to the European Commission on February 9, 1994, alleging that the State was responsible for the disappearance of Abdulvahap.²⁴⁷ Mehmet Timurtas claimed he received an anonymous telephone call on August 13, 1993, informing him that Turkish soldiers had apprehended Abdulvahap earlier that day.²⁴⁸ Once learning of his son's apprehension, Mehmet Timurtas immediately attempted to obtain information about him.²⁴⁹ Mehmet Timurtas alleged that he spoke to two confessors²⁵⁰ who had been detained in the same facility as Abdulvahap.²⁵¹ According to Mehmet Timurtas, he went to the prosecutor's office and named the two confessors as witnesses, at which point the prosecutor took his statement.²⁵² Mehmet Timurtas claimed that Abdulvahap was killed in detention and that the Turkish government, therefore, breached its obligations under Article 2.²⁵³

ii. Government

The government asserted that prosecutors, during their investigation, obtained statements from the witnesses named by

246. *See id.* para. 77 (maintaining that witness statements failed to corroborate Mehmet Timurtas' allegations).

247. *See id.* para. 9 (alleging that circumstances surrounding Abdulvahap's disappearances triggered state liability).

248. *See id.* para. 15 (stating that Mehmet Timurtas later learned that security officers took Abdulvahap to number of villages to see if villagers recognized him).

249. *See id.* para. 16 (claiming that he took photograph of Abdulvahap to gendarmerie headquarters where commander stated that he did not recognize Abdulvahap).

250. *See id.* para. 17 n.1 (defining confessors as "persons who co-operate with the authorities after confessing to having been involved with the PKK").

251. *See id.* para. 18 (stating that confessors claimed that Abdulvahap was still alive when they left detention center).

252. *See id.* para. 20 (stating that Mehmet Timurtas also made repeated inquiries to authorities about Abdulvahap).

253. *See id.* para. 73 (positing that Turkey failed to protect Abdulvahap's life when security officers killed him in detention). The European Court found that authorities detained Abdulvahap and failed to provide an explanation for his whereabouts or to investigate allegations of his disappearance, and, therefore, held that Turkey violated Article 5. *Id.* paras. 102-04.

Mehmet Timurtas.²⁵⁴ According to the government, none of these statements corroborated Mehmet Timurtas' allegations that security forces apprehended or detained Abdulvahap.²⁵⁵ The government, however, did not specifically address Mehmet Timurtas' allegation that authorities violated Abdulvahap's right to life.²⁵⁶

b. European Commission's Findings

The European Commission found that security forces likely apprehended Abdulvahap because of his involvement in the PKK.²⁵⁷ It also found that Mehmet Timurtas attempted to obtain information about Abdulvahap.²⁵⁸ According to the European Commission, however, insufficient evidence existed for it to conclude that the two confessors had been detained at the same time, when, according to Mehmet Timurtas, they had seen Abdulvahap.²⁵⁹ Despite the strong probability that Turkish security forces killed Abdulvahap in detention, the European Commission found a lack of concrete evidence that Abdulvahap was killed or sustained injuries while in custody.²⁶⁰ Accordingly, the European Commission found that Turkish security forces did not violate Abdulvahap's right to life.²⁶¹

254. *See id.* para. 22 (stating that preliminary investigation carried out by public prosecutors).

255. *See id.* para. 22 (noting further that Abdulvahap had left home two years before and that Mehmet Timurtas had not heard from him since then).

256. *See id.* para. 77 (stating that government simply maintained that all available evidence was investigated at domestic level).

257. *See id.* para. 42 (finding also that Mehmet Timurtas had shown photograph of Abdulvahap to commander of gendarmerie headquarters).

258. *See id.* para. 47 (finding that Mehmet Timurtas contacted various authorities within one week of Abdulvahap's apprehension, but first documented action by authorities was not until two months later). The European Commission found that official inquiries into Abdulvahap's detention at that particular facility were not made until almost two years after Abdulvahap's alleged apprehension. *Id.* According to the European Commission's findings, authorities then took a considerable amount of time to obtain statements from witnesses named by Mehmet Timurtas. *Id.* Many of these statements were unhelpful, in the European Commission's view, because authorities merely asked witnesses whether they knew Abdulvahap or Mehmet Timurtas. *Id.*

259. *See id.* (noting that government failed to provide relevant custody ledgers to verify their detention).

260. *See id.* para. 78 (stating that majority of European Commission found strong probability that Abdulvahap died in detention).

261. *See id.* (finding that "in the absence of concrete evidence that Abdulvahap had in fact lost his life or suffered known injury or illness, this probability [that

c. European Court's Analysis

The European Court rejected the European Commission's finding and instead presumed that Abdulvahap was killed in custody, based on circumstantial evidence.²⁶² One such piece of circumstantial evidence, according to the European Court, was the elapsed time since the Abdulvahap's detention.²⁶³ The European Court reasoned that the more time that had elapsed without any news of the detainee, the more likely that he or she had died.²⁶⁴ Applying the factor of time to the circumstances of Abdulvahap disappearance, the European Court noted that six and a half years had elapsed since his apprehension and detention.²⁶⁵ The European Court distinguished this period of time from the four and a half years of Üzeyir's disappearance in *Kurt*, concluding that six and a half years is significantly longer.²⁶⁶

The European Court further distinguished the circumstances of Abdulvahap's disappearance by noting that the facts established with certainty that security forces took Abdulvahap to a detention facility, in contrast to *Kurt*.²⁶⁷ In addition, the European Court found that the evidence established that

Abdulvahap died in detention] was insufficient to bring the facts of the case within the scope of Article 2").

262. *See id.* para. 86 (stating that "the [European] Court is satisfied that Abdulvahap Timurtas must be presumed dead following an unacknowledged detention by the security forces"). The European Court reasoned that:

Whether the failure on the part of authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the [European] Convention will depend on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody.

Id. para. 82.

263. *See id.* para. 83 (stating that period of time that has elapsed since individual placed in detention, though not decisive, is factor to consider in disappearance cases).

264. *See id.* (reasoning that "[t]he passage of time may therefore to some extent affect the weight to be attached to other elements of circumstantial evidence before it can be concluded that the person concerned is to be presumed dead").

265. *Id.* para 81 (noting that over six and half years have passed without information about Abdulvahap's whereabouts).

266. *Id.* para. 85 (stating that "six and a half years have now elapsed since Abdulvahap Timurtas was apprehended and detained—a period markedly longer than the four and a half years between the taking into detention of the applicant's son and the [European] Court's judgment in the case of Kurt").

267. *See id.* (stating that while Üzeyir was last seen surrounded by soldiers in his village, facts did not establish that authorities detained him).

Abdulahap, unlike Üzeyir, was wanted by authorities for his alleged PKK activities.²⁶⁸ The European Court therefore found Abdulvahap's death in detention probable.²⁶⁹ Because the authorities provided no explanation as to what transpired after Abdulvahap's apprehension, the European Court found the Turkish government liable for his death, and consequently, in violation of Article 2 of the European Convention.²⁷⁰

The European Court agreed with the European Commission that the authorities' investigation into Abdulvahap's disappearance was superficial and ineffective.²⁷¹ The European Court concluded that the government breached its duty to protect Abdulvahap's life.²⁷² Accordingly, the European Court also found that the State violated the procedural guarantees of Article 2 of the European Convention.²⁷³

d. Dissent

The dissenting judge rejected the European Court's analysis, finding no violation of Article 2.²⁷⁴ The dissent found that the European Court's conclusion was irreconcilable with its decision in *Kurt* because in both cases the applicant failed to prove, beyond reasonable doubt, that the victims died in detention.²⁷⁵ The dissent maintained that the majority erroneously distinguished *Kurt* from the present case.²⁷⁶ First, the dissent noted

268. *See id.* (remarking that "there were few elements in the *Kurt* case file identifying Üzeyir Kurt as a person under suspicion by the authorities, whereas the facts of the present case leave no doubt that Abdulvahap Timurtas was wanted by the authorities for his alleged PKK activities").

269. *See id.* (recognizing that "[i]n the general context of the situation in south-east Turkey in 1993, it can by no means be excluded that an unacknowledged detention of such a person would be life-threatening").

270. *See id.* para. 86 (noting that government was liable because authorities failed to justify use of deadly force by their agents against Abdulvahap).

271. *Id.* para. 88. (acknowledging that "the [European] Commission in its report analyzed the investigation as dilatory, perfunctory, superficial and not constituting a serious attempt to find out what had happened to the applicant's son").

272. *See id.* para. 90 (stating that Turkey breached its procedural obligations under Article 2).

273. *Id.* (finding separate violation of Article 2).

274. *See Timurtas v. Turkey*, App. No. 23531/94, para. 1. (2000) at <http://www.coe.int/eng/judgments.htm> (Gölcüklü, J., dissenting) (rejecting presumption that Abdulvahap died in custody).

275. *See id.* para. 5 (stating that *Timurtas* was indistinguishable from *Kurt* and that circumstances of both failed to establish, beyond reasonable doubt, victims' deaths in detention).

276. *See id.* para. 3 (finding that "the majority—wrongly in my view—refers to cer-

that the time period that elapsed without news of Üzeyir's whereabouts or fate was not significantly longer than the circumstance surrounding Abdulvahap's disappearance.²⁷⁷ Second, the facts established in *Kurt* that the victim was detained, as in the instant case.²⁷⁸ Third, the dissenting judge noted that the European Commission's investigation in the two cases clearly indicated that both Üzeyir and Abdulvahap had been accused of collaborating with the PKK.²⁷⁹ Finding the two cases indistinguishable, the dissenting judge concluded that Article 2 did not apply in *Timurtas* and that, consequently, the Turkish government was not liable for his death.²⁸⁰

III. THE EUROPEAN COURT SHOULD ADOPT THE INTER-AMERICAN COURT'S MODEL OF ADJUDICATING DISAPPEARANCE CASES

The European Court's approach to adjudicating disappearance cases, which imposes a high standard and burden of proof on the plaintiff, is problematic. First, it fails to take into account the evidentiary difficulties specific to disappearance cases. Second, the European Court's approach results in the inadequate protection of individual rights. Third, the imposition of a high standard and burden of proof on the plaintiff fails to deter defendant governments from engaging in disappearances. Fourth, the European Court's approach has resulted in inconsistent judgments. In order to alleviate these problems, the European Court should adopt the Inter-American Court's approach, articulated in *Velásquez Rodríguez*, to adjudicate disappearance

tain features distinguishing the *Timurtas* from *Kurt* case and justifying a different conclusion being reached in the instant case").

277. See *id.* para. 4 (asserting that "[i]n cases of forced disappearance, what difference does it make whether the period has been six and half years or four and a half years?").

278. See *id.* (noting that European Court found violation of Article 5, protecting right to liberty and security, in *Kurt*, meaning security forces detained him); see also *Kurt v. Turkey*, 27 EUR. H.R. REP. 373 at 449, para. 129 (1998) (finding that Üzeyir was held in unacknowledged detention, in total absence of safeguards provided in Article 5).

279. See *Timurtas*, App. No. 23531/94, para. 4. (Gölcüklü, J., dissenting) (stating that both Üzeyir and Abdulvahap were suspected of PKK membership). The dissenting judge points out that "[w]hen the security forces arrived in the village and did not find Üzeyir Kurt among the villages assembled in the square, they immediately asked where he was and arrested him in a house where he had been hiding." *Id.*

280. See *id.* para. 5 (noting that *Timurtas* was, however, distinguishable from *Çakici*, where European Commission and European Court presumed Ahmet had died in detention).

cases. The Inter-American Court's adjudication model encompasses a lower standard of proof,²⁸¹ an initial two-step inquiry regarding the presumption of death of the disappeared victim,²⁸² and, upon satisfaction of that inquiry, a shifting of the burden of proof to the government to rebut the plaintiff's *prima facie* case.²⁸³

A. *The European Court's Approach Fails to Account for Evidentiary Difficulties in Proving Disappearance Cases*

The European Court's approach fails to account for the circumstances under which disappearance occur. The European Court requires a plaintiff to prove, beyond a reasonable doubt, that the state is responsible for violating the right to life of the disappeared person.²⁸⁴ This high standard of proof is virtually impossible for plaintiffs to meet because of a lack of direct evidence implicating the government in disappearances.²⁸⁵ Indeed, the ultimate point behind the practice of disappearances is a lack of accountability for the fate of the victim.²⁸⁶ Further, the European Court places the burden of proof solely on the plaintiff, despite the state's control over the relevant evidence. Faced with a lack of direct evidence as to the fate of the disappeared victim, allowing a plaintiff to show that a practice of disappearances exists and to circumstantially link the case at issue to that practice, as the Inter-American Court allows, is often all that the applicant can do.²⁸⁷ Additionally, under the Inter-American Court's adjudication model, once a plaintiff makes a *prima facie* case, the burden shifts to the government to disprove the allegations.²⁸⁸ Adopting the Inter-American's Court two-step threshold inquiry and burden shifting scheme facilitates the

281. See *supra* notes 130-33 and accompanying text (expounding on Inter-American Court's informal, relaxed evidentiary standard).

282. See *supra* notes 134-36 and accompanying text (discussing Inter-American Court's two-prong test).

283. See *supra* note 138 (describing burden shifting scheme).

284. See *supra* notes 204, 235, 262 and accompanying text (applying European Court's standard of beyond reasonable doubt to facts of disappearance cases).

285. See *supra* notes 25-37 and accompanying text (discussing secrecy surrounding disappearances and deliberate concealment of evidence).

286. See *supra* notes 33, 37-8 and accompanying text (discussing lack of accountability as specific feature of practice of disappearances).

287. See *supra* notes 136-37 and accompanying text (detailing Inter-American Court's two step inquiry).

288. See *supra* notes 138-39 and accompanying text (explaining burden-shifting

plaintiff's ability to prove disappearances, which is necessary in the context of the unique evidentiary difficulties presented by disappearance cases.

B. *The European Court's Approach Fails to Adequately Protect Individual Rights*

The European Court applies the same evidentiary standards for a criminal trial to a disappearance case, even though the balance of power between the parties is reversed, since the plaintiff is an individual citizen and the defendant is the state. The European Court's imposition of a high standard and burden of proof serves to protect the state's interests to the detriment of the individual plaintiff. Its approach, therefore, runs counter to an underlying purpose of the European Convention: to ensure fundamental rights to individuals.²⁸⁹ By imposing an inappropriately high evidentiary standard, the European Court fails to ensure the most basic of rights, the right to life.²⁹⁰ In contrast, the Inter-American Court, through its imposition of a lower standard of proof, has given full meaning to the right to life proclaimed in the American Convention²⁹¹ as well as to the purpose of that Convention.²⁹² The Inter-American Court reasoned that the goal of disappearance cases is to protect victims, rather than to punish perpetrators in a domestic criminal law context in which the prosecution must prove its charges beyond a reasonable doubt.²⁹³ The Inter-American Court, therefore, requires plaintiffs to prove their case to a lower level of proof.²⁹⁴ The European Court, likewise, should adopt this lower standard of proof in order for State Parties to the European Convention to ensure the protection of their citizens' right to life.²⁹⁵

and Inter-American Court's requirement of affirmative proof of government's innocence).

289. See *supra* note 40 and accompanying text (quoting preamble to European Convention).

290. See *supra* note 15 (discussing paramount importance of right to life).

291. See *supra* note 106 and accompanying text (quoting Article 4 of American Convention, guaranteeing right to life).

292. See *supra* note 40 and accompanying text (quoting preamble to American Convention).

293. See *supra* note 133 and accompanying text (discussing differences between disappearance case and domestic criminal case).

294. See *id.* (analyzing Inter-American Court's less stringent standard of proof).

295. See *supra* note 66 and accompanying text (citing Article 2 of European Convention).

C. *The European Court's Approach Fails to Deter States from Carrying out Disappearances*

The European Court's imposition of the burden of proof solely on the plaintiff defeats a goal of human rights law: to deter governments from engaging in human rights abuses.²⁹⁶ While the Inter-American Court allows a plaintiff to prove a violation of the right to life of the victim by the government's failure to investigate the disappearance and to provide an adequate remedy,²⁹⁷ a plaintiff before the European Court must still pass the presumption of death inquiry.²⁹⁸ Under *Velásquez Rodríguez*, even where a plaintiff fails to make the necessary showing of a presumption of death according to the two-step process, the Inter-American Court still inquires into the government's efforts to prevent or investigate the disappearance.²⁹⁹ This additional inquiry is a deterrent because governments are not shielded from liability based on an individual plaintiff's failure to prove it *prima facie* case.³⁰⁰ The *Velásquez Rodríguez* model also serves to deter governments from engaging in the practice of disappearances because the key feature of disappearances, a lack of accountability for the victim, is lost. Holding governments liable for failing to prevent and investigate disappearances, or for failing to affirmatively disprove the plaintiff's allegations, forces those governments to account for disappearing their citizens, even where direct government involvement in a disappearance is weak or impossible to prove.³⁰¹

D. *The European Court's Approach Results in Inconsistent Judgments*

The European Court's imposition of a high standard and burden of proof, along with its failure to shift the burden of proof between the plaintiff and the State, lead it to inconsistent and illogical conclusions in the three Turkish cases. In *Çakici*,

296. See *supra* note 9 and accompanying text (discussing deterrence as one objective of human rights law).

297. See *supra* notes 153-54 and accompanying text (requiring states to investigate, punish, and compensate victims).

298. See *supra* notes 237, 271-73 and accompanying text (finding procedural violation of Article 2 once it was established that victim was killed).

299. See *supra* notes 150-57 and accompanying text (discussing states' affirmative duties to prevent and investigate disappearances).

300. See *supra* notes 138, 142 (discussing requirement under *Velásquez Rodríguez* that government prove its innocence).

301. See *supra* notes 150-55 (discussing broad conception of state responsibility).

the European Court found strong circumstantial evidence that Turkish authorities killed the victim.³⁰² The European Court, however, failed to establish a coherent rule or rationale for what constituted sufficient circumstantial evidence or to explain how such evidence could possibly meet the requisite standard of proof. Though the European Court formally required a high standard of proof, it implicitly applied a lower standard than beyond reasonable doubt where it found for the plaintiff and allowed circumstantial evidence to prove the disappearance. Furthermore, it failed to justify attaching greater weight to certain pieces of evidence as compared to others.

Because of the European Court's *ad hoc* approach, it is not surprising that it reached opposing results in the *Kurt* and *Timurtas* cases,³⁰³ even though the circumstances surrounding both of the disappearances were similar.³⁰⁴ In *Kurt*, the European Court held that insufficient evidence existed for it to conclude that Üzeyir was a suspected PKK member, despite compelling evidence to the contrary.³⁰⁵ In *Timurtas*, on the other hand, the European Court found that evidence of a practice of disappearing PKK members existed in Turkey such that authorities likely killed Abdulvahap.³⁰⁶ While the European Court's analysis in *Timurtas* is close to the *Velásquez Rodríguez* model because it held that the circumstantial evidence of a governmental practice of disappearances created a presumption that authorities killed the victim,³⁰⁷ the European Court had no basis to allow in and weigh such evidence because of its high reasonable doubt standard.

The European Court also attached more weight to the amount of time that had elapsed since the victim's disappearance in *Timurtas* than it did in *Kurt*.³⁰⁸ Further attempting to

302. See *supra* note 235 and accompanying text (finding, beyond reasonable doubt, that authorities killed Ahmet sometime during his illegal detention).

303. See *supra* notes 206, 262 and accompanying text (finding insufficient evidence to presume Üzeyir's death but sufficient evidence to conclude Abdulvahap killed by authorities).

304. See *supra* notes 276-79 and accompanying text (noting similar circumstances in both cases).

305. See *supra* notes 185, 188-89, 279 and accompanying text (recounting evidence supporting conclusion that Üzeyir was suspected PKK member).

306. See *supra* note 269 and accompanying text (alluding to Turkey's practice of disappearing suspected PKK members).

307. See *id.* (discussing practice of disappearances in southeast Turkey).

308. See *supra* notes 263-66, 277, and accompanying text (distinguishing length of

distinguish the two cases, the European Court stated in its *Timurtas* decision that it was unclear whether authorities had detained Üzeyir in the *Kurt* case. In *Kurt*, however, the European Court had previously found that authorities violated Üzeyir's rights by detaining him.³⁰⁹

The European Court's inconsistent approach in assessing circumstantial evidence under a reasonable doubt standard creates a situation where two plaintiffs can make virtually the same showings and end up with opposite results.³¹⁰ Though the European Court found the Turkish government responsible for failing to protect the right to life by disappearing individuals in *Çakici* and *Timurtas*, and even if it continues its trends of finding states liable, it cannot justify those decisions because it has created no predictable framework for adjudicating these cases.³¹¹ In addition, by maintaining a high standard and burden of proof, the European Court keeps the possibility open for more decisions like *Kurt*, in which the government escaped liability despite circumstances similar to *Çakici* and *Timurtas*. Under its current approach, all of these results are plausible. As a result, the European Court has undermined its own moral and legal authority even where it correctly finds government liability for disappearances.³¹²

The Inter-American Court, by contrast, recognized that the unique situation of disappearances required a specifically tailored approach in order to achieve justice.³¹³ Adopting the *Velasquez Rodriguez* model will correct the *ad hoc* approach currently used by the European Court, thereby eliminating divergent and inconsistent results that are the product of flawed

time of Üzeyir's disappearance compared to Abdulvahap's and discussing irrationality of European Court's analysis).

309. See *supra* note 207 and accompanying text (ruling that authorities' arbitrarily detained Üzeyir).

310. See *supra* notes 184-91, 247-53 (noting applicants' similar allegations in *Kurt* and *Timurtas*).

311. See *supra* notes 56, 261-62 (discussing how European Court rarely departs from European Commission's findings, but, in *Timurtas*, European Court rejected European Commissions findings that lack of concrete existed to presume Turkey responsible for Abdulvahap's disappearance); see also *supra* note 134 and accompanying text (discussing necessity of reliable and predictable procedures in human rights cases).

312. See *supra* note 134 and accompanying text (noting that predictable procedures guarantee respected decisions by international human rights tribunals).

313. See *supra* notes 130-39 and accompanying text (discussing Inter-American Court's particular approach).

reasoning.³¹⁴ The adoption of the Inter-American Court's coherent adjudication model would give the European Court a rational basis to make the findings it apparently seeks to make, that the Turkish government has violated the right to life of the European Convention by disappearing Kurdish citizens.

CONCLUSION

The Inter-American Court is an expert in the area of disappearance cases.³¹⁵ The social and political context in Latin America lead the Inter-American Court to adopt the adjudication model in *Velásquez Rodríguez* in order to fairly try disappearance cases.³¹⁶ State liability based on circumstantial evidence of a violation of the right to life, failure to adequately investigate disappearances, or failure to disprove the plaintiff's allegations, will become more necessary to the European Court to the degree that new Member Nations joining the Council of Europe engage in disappearances and other systematic human rights violations.³¹⁷ Adopting the *Velásquez Rodríguez* model of adjudicating disappearances, as a matter of policy, will correct many of the problems that the European Court currently faces. The model recognizes the context under which disappearances occur, protects victims of disappearances, deters governments from engaging in the practice, and will lead to consistent judgments. These goals are necessary to end a practice that violates the most fundamental right that an individual possesses, the right to life, and that ignores government responsibility to its citizens as well as to the international community.³¹⁸

314. See *supra* note 58 and accompanying text (discussing European Court's freedom to revise its interpretations of European Convention).

315. See *supra* note 111 and accompanying text (discussing Inter-American Commission and Inter-American Court's experience with systematic human rights violations stemming from military dictatorships in Latin America).

316. See *id.* (discussing political and social context).

317. See *id.* (remarking that European Court is beginning to hear systematic human rights abuse cases).

318. See *supra* note 9 and accompanying text (noting that state's treatment of its citizens is matter of legitimate international concern).