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.
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. 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. 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. Two weeks later, Turkish soldiers apprehended three of the villagers, two brothers, Mehmet Selim Orhan, Hasan Orhan, and their nephew, Cezair Orhan. Relatives inquired about the men, but the authorities denied that they were in custody. 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. No one has seen them since then.

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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 declarations designed to ensure the international protection of human rights do not specifically prohibit disappearances. Scholars note, nevertheless, that aspects of the practice of disappearances violate the fundamental rights promulgated by these instruments. Because gov-

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


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 HAMLIN 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 disappear individuals kidnap, torture, and usually kill them, the practice violates the individuals' right to liberty, right to humane treatment, and, most significantly, right to life. 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.

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

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"). Finally, Part I examines the Inter-American Court’s approach to assessing state responsibility for disappearances in the Velásquez Rodríguez Case ("Velásquez Rodríguez"). 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. All disappearances share several defining characteristics, including a lack of accountability for the victim, which contributes to evidentiary difficulties in proving that they occurred. The European and Inter-American systems of human rights possess the means, however, to investigate and adjudicate disappearance cases.

A. Defining Disappearances

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

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


\textsuperscript{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); \textit{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).

\textsuperscript{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); \textit{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. \textit{Id.} at 88. The Inter-American Convention on Forced Disappearance of Persons states that:

\begin{quote}
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.
\end{quote}


\textsuperscript{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).

\textsuperscript{27} See Berman et al., supra note 22, at 532 (noting that authorities take victims to
Adjudicating Disappearance Cases

Adjudicators are well organized, armed, and usually members of the military or police forces. Third, the practice is a deliberate governmental policy aimed at eliminating perceived threats from individuals who oppose the government. The abductions, therefore, are often carried out by government agents or with the authorities' tacit approval. 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.

Proving governmental involvement in the disappearance of a particular individual is generally exceedingly difficult because the perpetrators conceal their identities. In addition, witnesses or family members are usually afraid to speak out publicly or to testify. Participants in the disappearances also may be threatened if suspected of revealing information to outsiders. Further, the central piece of evidence in a disappearance would be the 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.\textsuperscript{36} Finally, authorities deny that the detention ever occurred.\textsuperscript{37} Disappeared victims simply vanish, allowing governments to escape the application of legal standards that ensure individual rights.\textsuperscript{38}

B. Two Systems of Adjudication

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

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.


\textsuperscript{40} See European Convention arts. 2-18 (enumerating rights); American Convention arts. 1-25 (listing rights); see also European Convention pmbl. (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 pmbl. (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.\textsuperscript{41}

1. European System of Human Rights

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

a. Structure of European Convention

After World War II, the Council of Europe adopted the European Convention in an effort to unify Europe and to promote democracy. Articles 2-18 of the European Convention delineate the substantive rights and freedoms that Member States undertake to guarantee. The European Convention also established the European Commission and the European Court and set out their composition, competence, and basic procedures. 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).
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/treaty/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.  

i. European Commission

Until the passage of Protocol 11, the European Commission reviewed complaints alleging violations of the European Convention. 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. The reports, though not binding, had strong persuasive authority and the European Court generally accepted the European Commission's findings and decisions.

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. Its main function was to interpret and establish 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.\textsuperscript{58} The European Court typically began its examination of a case based on written proceedings.\textsuperscript{59} The oral proceedings consisted of arguments by the European Commission, the applicant's legal representative, and the respondent State's representative.\textsuperscript{60} At the request of one of the parties involved, the European Court would also hear witness or experts.\textsuperscript{61} The European Court based its decisions on these proceedings.\textsuperscript{62} The judgments of the European Court were final,\textsuperscript{63} and state parties were obligated to abide by its decisions.\textsuperscript{64}

b. Rights Under European Convention

The three central rights implicated in disappearance cases are set forth in the European Convention.\textsuperscript{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.\textsuperscript{66} Article 3 guarantees the right to humane

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\item European Court: 1960-1994 at ix (1996) (noting that European Court is located in Strasbourg, France).
\item 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.
\item See GOMIEN ET AL., supra note 48, at 78 (noting that oral hearing consisted of at least these three arguments).
\item See id. (explaining that European Court could also hear from any other person who could provide assistance).
\item See JACOBS ET AL., supra note 50, at 385 (noting that proceedings were based on written and oral procedures and European Commission's report).
\item See European Convention art. 52 (providing that "[t]he judgment of the [European] Court shall be final").
\item See id., supra note 8, art. 58 (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).
\item 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).
\item Id. art. 2. Article 2 states:
\begin{enumerate}
\item 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
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treatment. Article 5 guarantees individuals the right to security and liberty.

i. Right to Life

The right to life is the first right enumerated in the European Convention. Article 2 of the European Convention requires State parties to protect the right to life by law. Article 2 protects individuals from the arbitrary deprivation of life by the state. 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. 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.

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. This requires states to conduct effective, official investigations into alleged violations of the right to life. 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.

ii. Other Rights

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

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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.\textsuperscript{81}

2. Inter-American System of Human Rights

The Organization of American States\textsuperscript{82} ("OAS") created the Inter-American system of human rights to supervise human rights protection in North, South, and Central America.\textsuperscript{83} The

(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.\textsuperscript{81} 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.


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

a. Structure of American Convention

The OAS adopted the American Convention in 1969. The format of the American Convention is similar to the European Convention. The American Convention contains a detailed list of civil and political rights in its first twenty-five articles. The American Convention also established the Inter-American Commission and the Inter-American Court.

i. Inter-American Commission

The Inter-American Commission is composed of seven members. 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 country and the examination of petitions by individuals alleging violations of human rights. Once the Inter-American Commission receives a petition, it must determine its admissibility. If the petition is admissible, the Inter-American Commission begins to investigate the allegations. The Inter-American Commission then prepares a report, consisting of its recommendations, which it may forward to the Inter-American Court.

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. 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, begins it decision-making process once it hears the merits of the case. The Court’s judgments are binding.

b. Rights Under American Convention

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

i. Right to Life

Article 4 of the American Convention requires states to protect the right to life by law. 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. 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.

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100. 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).
101. See American Convention art. 67 (stating that Inter-American Court’s judgments are final and not subject to appeal).
102. See id. art. 6 (protecting right to life).
103. See id. art. 5 (also protecting moral and mental integrity).
104. See id. art. 7 (protecting personal liberty).
105. 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 id. at 187, paras. 176-76 (requiring states to effectively investigate, punish, and compensate for deprivation of life).
Article 5 of the American Convention protects the right to humane treatment. Article 7 protects the right to personal liberty and security. Article 7, therefore, prohibits the arbitrary arrest or imprisonment of any individual and requires that detained persons be informed of the charges against them.

c. Velásquez Rodríguez

In Velásquez Rodríguez, the Inter-American Court established
new evidentiary standards to adjudicate disappearance cases. 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. 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. 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.

i. Facts

Heavily armed men wearing civilian clothes kidnapped Velásquez Rodríguez, a student, in broad daylight on September 12, 1981. 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. Since then, no one has admitted to seeing Velásquez Rodríguez or to knowing of his whereabouts. 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.

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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.\textsuperscript{20} Confronted with this evidence, the Inter-American Court found that between 1981 and 1984, Honduran authorities systematically disappeared between 100-150 people.\textsuperscript{121} The Inter-American Court further found that the disappearances followed a similar pattern.\textsuperscript{122} The victims were usually individuals whom Honduran authorities considered dangerous to the State's security.\textsuperscript{123} Once the State targeted someone, armed men in civilian clothes would forcibly kidnap the victim, using vehicles without official identification.\textsuperscript{124} The kidnappers blindfolded the victims and took them to secret detention centers where the victims were interrogated and tortured.\textsuperscript{125} The kidnappers eventually killed the victims and buried their bodies in secret cemeteries.\textsuperscript{126} When questioned, the authorities\textsuperscript{127} consistently denied knowledge of the detentions and the whereabouts of the victims.\textsuperscript{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. \textit{Id.; see also} Drucker, \textit{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).

\textsuperscript{120.} \textit{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. \textit{See id.} at 131, para. 25.

\textsuperscript{121.} \textit{See id.} at 172, para. 147(a) (stating that disappeared victims were never heard from again).

\textsuperscript{122.} \textit{See id.} at 172, para. 147(b) (stating that pattern began with kidnapping).

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

\textsuperscript{124.} \textit{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. \textit{Id.}

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

\textsuperscript{126.} \textit{See id.} (stating that “[s]ome were ultimately murdered and their bodies buried in clandestine cemeteries”).

\textsuperscript{127.} \textit{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).

\textsuperscript{128.} \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{132} The Inter-American Court, therefore, adopted a relaxed, informal standard on which to weigh the evidence.\textsuperscript{133}

\textsuperscript{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").

\textsuperscript{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").

\textsuperscript{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").

\textsuperscript{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.

\textsuperscript{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); Juli\-ane Korr\-ott, 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
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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. First, a complainant must prove that the government engaged in a systemic practice of disappearances. Second, the complainant must establish a link between that practice and the individual case. Once the complainant has satisfied both prongs to the requisite standard of proof, 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); KOKOTT, 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.\textsuperscript{138} If the government fails to disprove the allegations, the Inter-American Court could presume government liability for the disappearance.\textsuperscript{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.\textsuperscript{140} The Inter-American Court also found that the Honduran government failed to produce evidence of its innocence.\textsuperscript{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.\textsuperscript{142}

\textsuperscript{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).

\textsuperscript{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. \textit{Id}. The Inter-American Commission cannot investigate allegations in state’s jurisdiction without state’s assistance. \textit{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. \textit{Id}.

\textsuperscript{140}See \textit{id}. at 177, para. 148 (finding that Honduran government also “failed to guarantee the human rights affected by that practice”).

\textsuperscript{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. \textit{Id}. Honduras made little attempt to explain the facts or to attempt to provide alternative explanations for Velásquez Rodríguez’s disappearance. \textit{Id}. The government also failed to corroborate evidence containing rumors that Velásquez Rodríguez had joined a rebel group. \textit{Id}. at 176, para. 147(h).

\textsuperscript{142}See \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{145}

The Inter-American Court found Article 1 of the American Convention\textsuperscript{146} a necessary part of imputing human rights violations to state parties.\textsuperscript{147} According to the Inter-American Court, each of the rights set forth in the American Convention must be

\textsuperscript{143}See Velásquez Rodríguez, \textit{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).

\textsuperscript{144}See \textit{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").

\textsuperscript{145}See \textit{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." \textit{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. \textit{Id.} at 179, para 155.

\textsuperscript{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.

\textit{Id.}

\textsuperscript{147}See Velásquez Rodríguez, \textit{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.\textsuperscript{148} Where the Inter-American Court determines a violation of any right by a state party, it \textit{ipso jure} establishes the violation of Article 1.\textsuperscript{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.\textsuperscript{150} States, therefore, possess affirmative duties to prevent,\textsuperscript{151} investigate,\textsuperscript{152} and punish\textsuperscript{153} human rights abuses.\textsuperscript{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.\textsuperscript{155} The Inter-American Court concluded that Honduran agents car-

\begin{itemize}
  \item\textsuperscript{148} \textit{Id.} at 182, para. 162 (stating that Article 1 details duty assumed by state party in relation to every right protected by American Convention).
  \item\textsuperscript{149} \textit{Id.} (stating that claim alleging violation of any right in American Convention necessarily entails violation of Article 1(1)).
  \item\textsuperscript{150} \textit{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); \textit{see also id.} para. 165 (requiring that states respect rights embodied in American Convention).
  \item\textsuperscript{151} \textit{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”).
  \item\textsuperscript{152} \textit{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”).
  \item\textsuperscript{153} \textit{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”).
  \item\textsuperscript{154} \textit{See id.} at 184, para. 166 (adding that states also have affirmative duty to establish system of compensation for damages stemming from violations).
  \item\textsuperscript{155} \textit{Id.} at 186, para. 172. In \textit{Velásquez Rodríguez} the Inter-American Court found that:

\begin{quote}
[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.
\end{quote}

\textit{Id.; see also Amnesti, Workboo, 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. 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 minority in Turkey. 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. 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).


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).
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. Scholars explain that since the 1920s, Turkey has repressed its Kurdish population. During the 1970s and 1980s, a number of Kurdish organizations, among them, the Kurdistan Worker's Party ("PKK"), began to advocate for Kurdish political and cultural rights.

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

162. See Human Rights Watch, Ocalan Trial Monitor: Backgrounder on Repression of the Kurds in Turkey, at http://www.hrw.org/campaigns/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).


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,\textsuperscript{170} characterized the peak of the conflict between 1992-1995.\textsuperscript{171} During this period, the government intensified its counterinsurgency campaign against the PKK, burning villages and forcibly evacuating residents,\textsuperscript{172} while the PKK committed politically motivated assassinations.\textsuperscript{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.\textsuperscript{174} After investigating the facts of each case, the European Commission referred the cases to the European Court.\textsuperscript{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.\textsuperscript{176}

\begin{itemize}
  \item \textsuperscript{170} See Amnesty, No Security, supra note 163, at 2 (noting that security forces allegedly responsible for disappearances are sometimes difficult to identify).
  \item \textsuperscript{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.
  \item \textsuperscript{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).
  \item \textsuperscript{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).
  \item \textsuperscript{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).
  \item \textsuperscript{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).
  \item \textsuperscript{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).
\end{itemize}
1. Kurt v. Turkey

Koçeri Kurt, the applicant, claimed that Turkish security forces were responsible for her son's, Üzeyir Kurt's ("Üzeyir"), disappearance.\textsuperscript{177} The European Commission, however, failed to find the Turkish government liable for Üzeyir's disappearance.\textsuperscript{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.\textsuperscript{179}

a. Factual Allegations

Koçeri Kurt and the Turkish government disputed the facts in Kurt.\textsuperscript{180} According to Koçeri Kurt, Turkish security forces abducted Üzeyir, and since then, no one has seen him again.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{185}

\textsuperscript{177.} See Kurt, 27 EUR. H.R. REP. at 439, para. 84, (claiming that facts proved that Turkish government responsible for Üzeyir’s disappearance).
\textsuperscript{178.} See id. at 410, para. 187, (failing to infer that Üzeyir was killed).
\textsuperscript{179.} See id. at 444, para. 108 (finding Koceri Kurt’s claims unsubstantiated).
\textsuperscript{180.} See id. at 384, para. 9 (stating that facts surrounding Üzeyir’s disappearance in dispute).
\textsuperscript{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).
\textsuperscript{182.} See id. at 442-443, para. 101 (invoking Inter-American Court’s approach in Velásquez Rodríguez to instant case).
\textsuperscript{183.} See id. at 410, para. 186 (arguing that Koceri Kurt’s claims were unsubstantiated).
\textsuperscript{184.} See id. at 399, para. 84 (alleging that Turkey also violated Articles 3 and 5 of European Convention by disappearing Üzeyir).
\textsuperscript{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, searched each house in the village, burned down her house, and apprehended Üzeyir, who had been hiding. 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. Koçeri Kurt maintained that no one has seen Üzeyir elsewhere after that time. She also claimed that she made various attempts to locate her son, but she received no help from authorities.

Koçeri Kurt claimed that the State breached its affirmative obligations under Article 2 of the European Convention for several reasons. 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).


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

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. According to the European Court, Koçeri Kurt’s claims were based on presumptions and generalities relating to an alleged practice of disappearances in Turkey. The Euro-

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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:

[The] 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.\textsuperscript{206} According to the European Court, Article 2 of the European Convention, therefore, did not apply to the circumstances surrounding Üzeyir's disappearance.\textsuperscript{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").\textsuperscript{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.\textsuperscript{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.\textsuperscript{210} Accordingly, the European Court found that Turkey breached its obligations under Article 2 of the European Convention.\textsuperscript{211}

a. Factual Allegations

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

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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. \textit{Id.}
\textsuperscript{206} See \textit{id.} (finding Koçeri Kurt’s allegations insufficient without “more persuasive indications” that security forces killed Üzeyir).

\textsuperscript{207} See \textit{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 9 due to a lack of specific evidence that authorities mistreated Üzeyir in custody. \textit{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. \textit{Id.} at 449, para. 128.

\textsuperscript{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).

\textsuperscript{209} See \textit{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. \textit{Id.} para. 1.

\textsuperscript{210} See \textit{id.} para. 85 (presuming that government agents killed Ahmet).

\textsuperscript{211} See \textit{id.} para. 87 (finding Turkish government responsible for Ahmet’s death).

\textsuperscript{212} See \textit{id.} para. 9 (stating that Izzet Çakici and Turkish government disagreed about facts of Ahmet’s disappearance). Since the facts were disputed, the European
\end{small}
Ahmet. According to the applicant, the Turkish government, consequently, violated Article 2 of the European Convention. 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.

i. Applicant

Izzet Çakici applied to the European Commission on May 2, 1994, claiming that the Turkish authorities disappeared Ahmet. 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. Ahmet attempted to hide, but security forces found him and took him into custody. Izzet Çakici maintained that security forces then detained and tortured Ahmet. In May of 1996, Izzet Çakici learned of the authorities’ claim that Ahmet died in an armed clash between the PKK and security forces. 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. He also alleged that the Turkish authorities failed to adequately investigate the circumstances surrounding Ahmet’s disappearance, which constituted a
separate violation of Article 2.  

ii. Government

The government denied that security forces detained Ahmet. 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. Relying on the European Court’s decision in Kurt, 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.

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. The European Commission further found that security forces apprehended, detained, 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 E UR. 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).


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. 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. 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.

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. 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. 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. The European Court, therefore, found the State responsible for his death, in violation of Article 2 of the European Convention. The European Court also found a separate violation of Article 2 because of the inade-

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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 “very 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.\textsuperscript{237}

3. Timurtas v. Turkey

The applicant, Mehmet Timurtas, claimed that Turkish security forces disappeared his son, Abdulvahap Timurtas ("Abdulvahap").\textsuperscript{238} In the European Commission’s assessment, insufficient evidence existed to conclude that Turkish authorities killed Abdulvahap in custody.\textsuperscript{239} Accordingly, the European Commission failed to find State liability for his death.\textsuperscript{240} The European Court, however, ruled in opposition to the European Commission’s findings.\textsuperscript{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.\textsuperscript{242}

a. Factual Allegations

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

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{239} See id. para. 78 (finding lack of concrete evidence to presume security officers killed Abdulvahap).

\textsuperscript{240} See id. (concluding that Turkey did not breach its obligations to protect Abdulvahap’s life).

\textsuperscript{241} See id. para. 86 (rejecting European Commission’s conclusions).

\textsuperscript{242} See id. (finding Turkish government responsible for Abdulvahap’s death).

\textsuperscript{243} See id. para. 10 (stating that Mehmet Timurtas and government disagreed about facts underlying Abdulvahap’s disappearance).

\textsuperscript{244} See id. para. 73 (alleging that Abdulvahap was killed in custody).

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{248} Once learning of his son's apprehension, Mehmet Timurtas immediately attempted to obtain information about him.\textsuperscript{249} Mehmet Timurtas alleged that he spoke to two confessors\textsuperscript{250} who had been detained in the same facility as Abdulvahap.\textsuperscript{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.\textsuperscript{252} Mehmet Timurtas claimed that Abdulvahap was killed in detention and that the Turkish government, therefore, breached its obligations under Article 2.\textsuperscript{253}

ii. Government

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

\textsuperscript{246} See id. para. 77 (maintaining that witness statements failed to corroborate Mehmet Timurtas' allegations).

\textsuperscript{247} See id. para. 9 (alleging that circumstances surrounding Abdulvahap's disappearances triggered state liability).

\textsuperscript{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).

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

\textsuperscript{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").

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

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

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

b. European Commission's Findings

The European Commission found that security forces likely apprehended Abdulvahap because of his involvement in the PKK.\textsuperscript{257} It also found that Mehmet Timurtas attempted to obtain information about Abdulvahap.\textsuperscript{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.\textsuperscript{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.\textsuperscript{260} Accordingly, the European Commission found that Turkish security forces did not violate Abdulvahap's right to life.\textsuperscript{261}

\begin{itemize}
\item \textsuperscript{254} See \textit{id.} para. 22 (stating that preliminary investigation carried out by public prosecutors).
\item \textsuperscript{255} See \textit{id.} para. 22 (noting further that Abdulvahap had left home two years before and that Mehmet Timurtas had not heard from him since then).
\item \textsuperscript{256} See \textit{id.} para. 77 (stating that government simply maintained that all available evidence was investigated at domestic level).
\item \textsuperscript{257} See \textit{id.} para. 42 (finding also that Mehmet Timurtas had shown photograph of Abdulvahap to commander of gendarmerie headquarters).
\item \textsuperscript{258} See \textit{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. \textit{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. \textit{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. \textit{Id.}
\item \textsuperscript{259} See \textit{id.} (noting that government failed to provide relevant custody ledgers to verify their detention).
\item \textsuperscript{260} See \textit{id.} para. 78 (stating that majority of European Commission found strong probability that Abdulvahap died in detention).
\item \textsuperscript{261} See \textit{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. One such piece of circumstantial evidence, according to the European Court, was the elapsed time since the Abdulvahap’s detention. 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. 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. 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.

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. 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.

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).
Abdulvahap, unlike Üzeyir, was wanted by authorities for his alleged PKK activities. The European Court therefore found Abdulvahap’s death in detention probable. 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.

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

d. Dissent

The dissenting judge rejected the European Court’s analysis, finding no violation of Article 2. 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. The dissent maintained that the majority erroneously distinguished Kurt from the present case. 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 southeast 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).


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. Second, the facts established in Kurt that the victim was detained, as in the instant case. 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. 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.

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 cases.

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. (Gölçüklü, 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

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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).
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. By imposing an inappropriately high evidentiary standard, the European Court fails to ensure the most basic of rights, the right to life. 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 Convention as well as to the purpose of that Convention. 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. The Inter-American Court, therefore, requires plaintiffs to prove their case to a lower level of proof. 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.

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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. 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 even though the circumstances surrounding both of the disappearances were similar. 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. 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. 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, 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. 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 Velásquez Rodríguez 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. 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. 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. 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. 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.

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).