



# Putting the Victim's families first: The comparative analysis of the Inter-American Court of Human Rights and the European Court of Human Rights on the Right to be Free from Torture in cases of Enforced Disappearances

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## Abstract

This article aims to assess the American Convention on Human Rights in relation to the European Convention on Human rights on the topic of decisions made in cases of enforced disappearances. Case law, peer-reviewed articles, books, and legislation were used in the course of the article. The argument in this article is that the Inter-American Court of Human Rights is more responsive to the vulnerability of the applicant to the Court, in cases of enforced disappearances, in comparison to the European Court of Human Rights. This is because the Inter-American Court uses a lesser standard of proof than beyond a reasonable doubt when assessing violations of the right to be free from torture. In contrast, the European Court uses the standard of beyond a reasonable doubt only when dealing with allegations of violations of Article 3 of the ECHR, which is the prohibition of torture. This use of the standard is inappropriate given that the role of international human rights law is not to be punitive, for that is the role of a criminal court, but rather to give reparation and redress to the victims and families of victims of human rights violations. The article finds that the Inter-American Court is more progressive than the European Court when addressing the right to be free from torture in cases of enforced disappearances due to its extensive experience, its lack of a rigid standard of proof, and its opinion on the responsibility of burden of proof.

## Introduction

The aim of this article is to critically assess the role of the American Convention on Human Rights (ACHR), in comparison to the European Convention on Human Rights (ECHR) on the topic of the development of human rights law and protecting rights of victims. This article will make its argument through the analysis of case law, journal articles, and books. The article will argue that because the Inter-American Court of Human Rights (IACtHR or the Court) relies on a lesser standard of proof in comparison to the standard of proof of the European Court of Human Rights (ECtHR or the Court), in relation to alleged violations of Article 3 of the ECHR, and because of this, the ACtHR is able to better support and protect the families of victims of enforced disappearances. The IACtHR's reasoning for using a lesser standard of proof is because cases of alleged enforced disappearances often lack direct evidence that the alleged violation occurred. This is due to both the presumption that State would have the resources to destroy all evidence that a crime occurred and the understanding that the disappeared are under complete control by the State and therefore the rights of the disappeared are always already in question.

The article will recommend the ECtHR refer the ACtHR case of *Velásquez Rodríguez v. Honduras* to allow for a more flexible standard of proof. By referring to this case the ECtHR will better resolve cases of enforced disappearances by ruling in favour of applicants in that an enforced disappearance is a violation of the right to be free from torture. The final argument of the article is that the standard of beyond a reasonable doubt is inappropriate in international human rights proceedings and a lesser standard of proof will promote better treatment of victims and the families of victims.

## The definition of Enforced Disappearance

### Inter-American Convention on Forced Disappearances of Persons

Enforced disappearances have been recognised as a globally occurring phenomenon by the Working Group on Enforced or Involuntary Disappearances (WGEID).<sup>1</sup> The Inter-American Convention on Forced Disappearances of Persons regards enforced or forced disappearances as:

...the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.<sup>2</sup>

The act of enforced disappearance is performed with the authorisation of the State, in which the whereabouts and wellbeing of the disappeared individual are withheld by the State and the State actively impedes the legal process by refusing to acknowledge that a violation and a deprivation of a freedom occurred. States use enforced disappearances in order to silence an individual that is seen as a threat to the State's security and policy.<sup>3</sup> These are often activists, teachers, students, and community leaders. The goal of the State is to eliminate the threat against their current political sovereignty and to avoid implication by the public for involvement in the disappearance. Therefore, the State has the intention to eliminate all evidence of the State's involvement with the victim, and because of the authority position they are in, the State has the power to do so.<sup>4</sup> Thus, it can be reasonably assumed that there would be a lack of physical evidence available to demonstrate an enforced disappearance.

### UN Declaration on the protection of persons from forced disappearance

Similarly, the United Nations Declaration on the Protection of All Persons from Enforced Disappearances acknowledges the phenomenon of enforced disappearances as an act in which 1) persons are arrested, detained or abducted against their will 2) the act is conducted by or on behalf of the Government 3) the whereabouts of the persons are withheld 4) the government refuses to acknowledge their involvement 5) the persons are held outside the realm of the law.<sup>5</sup> These definitions set the foundation that it can be reasonably assumed that when a person with a political connection or involvement that could be perceived as a threat to the power of the State vanishes, it is a case of enforced disappearance and that person is facing risk of torture or inhuman, degrading or ill-

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<sup>1</sup> United Nations General Assembly, 'Report of the Working Group on Enforced or Involuntary Disappearances' [2014] A/HRC/27/49 ¶ 34.

<sup>2</sup> Inter-American Convention on Forced Disappearance of Persons, Article II

<sup>3</sup> Marthe Lot Vermeulen, 'Living Beyond Death': Torture and Ill-Treatment Claims in Enforced Disappearances Cases' [2008] Inter-Am. & Eur. Hum. Rts. J. 159, 161.

<sup>4</sup> *ibid* 161.

<sup>5</sup> United Nations Declaration on the Protection of All Persons from Enforced Disappearances A/RES/47/133

treatment because they are at the complete mercy of the State and are being deprived of their fundamental human rights.

## Admissibility of Evidence

### The Inter-American Court of Human Rights

International human rights courts typically have difficulty with cases of enforced disappearances due to the admissibility of evidence.<sup>6</sup> In cases of alleged enforced disappearances by a State, it can be assumed that if human rights violations through an enforced disappearance had occurred, the government would have taken detailed steps to erase any evidence of a crime. This puts applicant's families in a precarious situation. The families know their loved-one was disappeared by the State but lack enough sufficient evidence, which would hold up to a traditional standard of proof, to demonstrate a violation occurred. Therefore, in these cases there is a substantial lack of physical evidence that a crime even occurred. In an effort to account for this, the IACtHR uses a lesser standard for the admission of evidence in cases of alleged enforced disappearances, which allows the Court to make reasonable presumptions in lieu of direct evidence.<sup>7</sup> Given that direct evidence of alleged enforced disappearances by a State is unavailable, international courts, such as the IACtHR and the ECtHR, have had to decide what degree of flexibility the court wants to allow for the admissibility of evidence.

In order to account for the lack of direct evidence, the IACtHR allows for a wider range of evidence to be admitted. For instance, Article 47 of the Rules of Procedure of the IACtHR States that the Court is allowed to 'obtain, on its own motion, any evidence it considers helpful and necessary'.<sup>8</sup> In other words, the IACtHR has free range to admit evidence that the Court deems necessary. Article 47 continues on to State that it may allow the IACtHR to hear any person whose testimony is deemed relevant to the case.<sup>9</sup> This gives the Court room to include perhaps non-traditional evidence or evidence that would not typically be permitted in other domestic courts.

The greater latitude of the IACtHR allows for circumstantial and presumptive evidence to be admitted to the Court. In the case of *Velásquez Rodríguez v. Honduras*, the Court stated the importance of the admission of circumstantial and presumptive evidence in cases of alleged disappearances given the notion much of the information about the whereabouts of the victim has been suppressed.<sup>10</sup> Understanding that much of the direct or physical evidence of the whereabouts of an alleged disappearance victim would be suppressed by the State in question, the IACtHR recognizes that circumstantial evidence may be all the evidence available:

Circumstantial 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.<sup>11</sup>

An example of the Court allowing the admission of circumstantial evidence is present in the case of *Velásquez-Rodríguez v. Honduras*. The IACtHR allowed the admission of newspaper press clippings into evidence.<sup>12</sup> Although the IACtHR could not consider the press clippings as documentary evidence by the standard of the Commission, the Court was able to

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<sup>6</sup> Ophelia Claude, 'A comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence' [2010] Intercultural Human Rights Law Review 407, 410.

<sup>7</sup> *ibid*, 423.

<sup>8</sup> Rules of Procedure of the Inter-American Court of Human Rights, Article 47 'Procedure for Taking Evidence' (1).

<sup>9</sup> *ibid*, (1).

<sup>10</sup> *Velásquez Rodríguez v. Honduras* [1988] 4 C 1 (Inter-Am. Ct. H.R.) ¶131.

<sup>11</sup> *ibid*, ¶131.

<sup>12</sup> *ibid*, ¶146.

use the press clippings to reproduce public statements and to corroborate testimony that implicated the Honduran military and police as responsible for the disappearances.<sup>13</sup> In sum, the circumstantial evidence became a key piece of evidence to support the applicant's argument that the Honduran government was responsible for the disappearances.

### The European Court of Human Rights

Comparatively, the European Court (ECtHR) rules of admission of evidence are similar to that of the Inter-American Court.<sup>14</sup> It has already been established that the IACtHR uses indirect and circumstantial evidence when dealing with cases of enforced disappearances.<sup>15</sup> Similarly to the IACtHR, the ECtHR is allowed to rely on evidence on any kind, given that it is relevant to the case at hand.<sup>16</sup> For example, in the case of *Ireland v. United Kingdom*, the ECtHR acknowledged that, much like the ACtHR, the ECtHR is not bound under the Convention, or under the principles applicable to international tribunals, to any strict rules of evidence.<sup>17</sup> Therefore, the Court has the liberty to look at essentially any evidence of any kind as long as it is deemed relevant to the case:

In order to satisfy itself, the Court is entitled to rely on evidence of every kind, including, insofar as it deems them relevant, documents or statements emanating from governments, be they respondent or applicant, or from their institutions or officials.<sup>18</sup>

Correspondingly, the European Convention organs have adopted the system known as the 'free evaluation of evidence',<sup>19</sup> in which 'all relevant evidence is admissible and no person is incompetent as a witness'.<sup>20</sup> That is to say, testimony, opinion, or declaration from anyone reasonably involved and relevant to the case can be a part of the evidence in order to give the Court a full idea of what occurred. Similarly, to the ACtHR, the ECtHR adopts a flexible approach because the Court recognises that it is difficult to obtain evidence to prove a violation occurred.<sup>21</sup> The U.N. General Assembly in 1977 acknowledged the difficulty of obtaining evidence to prove a violation of Article 3 of the ECHR, which is the prohibition of torture:

[...] evidence was difficult to obtain since in the twentieth century people were not usually tortured in public, torturers did not wear any identification, and the police would not admit breaking the law if complaints could not be entertained owing to a state of emergency.<sup>22</sup>

In other words, direct evidence that would satisfy the standard of 'beyond a reasonable doubt' can be inaccessible in cases of alleged human rights violations such as, in this case, torture. This is because the individuals that are committing the violation, such as police and government officials, are in a position of power in which they can eliminate all evidence of the violation. The U.N. General Assembly understood the difficulty of obtaining evidence for a violation and with that the European Convention bodies realized that, in order to address these violations, the Convention needed to have more liberal standards for the admission of evidence.

Furthermore, the rules of the ECtHR also account for the possibility of a lack of evidence and it may work in favour of the applicant. For instance, rule 44C States that if a party fails to "adduce

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<sup>13</sup> *ibid*, ¶146.

<sup>14</sup> Claude [n 6] 412.

<sup>15</sup> Ugur Erdal, 'Burden and standard of proof in proceeding under the European Convention' [2001] *Eur. L. Rev.* 1, 4.

<sup>16</sup> *ibid*, 4.

<sup>17</sup> *Ireland v. United Kingdom* [1978] 5310/7 (Eur. Ct. H. R.) ¶209.

<sup>18</sup> *ibid*, ¶209.

<sup>19</sup> Erdal [n 15] 4.

<sup>20</sup> *ibid*, 4.

<sup>21</sup> *ibid*, 4.

<sup>22</sup> B. G. Ramcharan, 'Evidence' in B.G. Ramcharan (eds), *International Law and Fact-Finding in the Field of Human Rights* (1<sup>st</sup>, Martinus Nijhoff Publishers, The Hague 1982) 1, 68.

evidence or provide information requested by the Court or to divulge relevant information of its own motion or otherwise fails to participate effectively in the proceeding, the Court may draw such inferences as it deems appropriate.”<sup>23</sup> In other words, the rules of the Court can be interpreted to rule in favour of the applicant. Meaning that if the State does not provide evidence to demonstrate their involvement, or lack of involvement, in the disappearance of the victim then the Court would be allowed to draw inferences from that failure. The Court could potentially infer, from the failure to adduce evidence, that the respondent State had involvement in the disappearance of the victim. That being said, the ECtHR has relied less on indirect evidence than the IACtHR when addressing certain human rights violations.<sup>24</sup> In particular, the European Court routinely rejects allegations involving torture or inhumane treatment without direct evidence<sup>25</sup> and the ECtHR does not necessarily find that enforced disappearances are a violation of Article 3 of the Convention,<sup>26</sup> which prohibits torture, as well as inhuman or degrading treatment or torture.<sup>27</sup>

An example of the ECtHR's reluctance to find enforced disappearances as a violation of Article 3 is present in the case of *Kurt v. Turkey*. In this case of an alleged enforced disappearance at the responsibility of State, the ECtHR Stated that the applicant had not provided the Court with any direct evidence that her son was a victim of an Article 3 violation, and therefore the ECtHR subsequently rejected the applicant's argument on that particular article in question. The ECtHR Stated, “In particular, the applicant has not presented any specific evidence that her son was indeed the victim of ill-treatment in breach of Article 3.”<sup>28</sup> Due to the lack of direct evidence, presumably not because the violation did not occur but because the State had the power to cover up the violation, the court did not rule in favour of an Article 3 violation for the victim of the enforced disappearance. However, the Court ruled in favour of the applicant on several violations, including a violation of the applicant's own Article 3 right to the prohibition of torture.<sup>29</sup>

This particular decision of the ECtHR in the case of *Kurt v. Turkey* seems contradictory. For on the one hand, the ECtHR allows for wider range of evidence to be admitted due to an acknowledgment that direct evidence could have been erased by the State but then, on the other hand, the ECtHR still relies on strict standards of proof to which circumstantial evidence does not satisfy the standard. Therein lies the difference between admissibility of evidence and standard of proof. For instance, in *Kurt v. Turkey*, Judge Gölcüklü of the ECtHR did not affirm that the disappearance of the applicant's son was a case of enforced disappearance on behalf of the State. Instead Judge Gölcüklü voted in favour of finding no violation because the facts were not proved beyond a reasonable doubt.<sup>30</sup> While the Court did rule in favour of the applicant, and Judge Gölcüklü held a dissenting opinion, this does represent the concern of the inflexibility of the ECtHR on the standard of proof applied in cases of enforced disappearances. Thereby, although the ECtHR may admit any evidence of any kind as long as it is relevant to the case, this does not mean that it takes the same approach as the IACtHR on determining if the evidence supports a violation. This point then leads us away from the admissibility of evidence and towards the standards of proof in the Inter-American Court and European Court of Human Rights.

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<sup>23</sup> Rule 44C, Rules of the European Court of Human Rights.

<sup>24</sup> Claude [n 6] 413.

<sup>25</sup> Claude [n 6] 413.

<sup>26</sup> *Kurt v. Turkey* [1998] 15/1997/799/1002 (Eur. Ct. H.R.) ¶ 116.

<sup>27</sup> Convention for the Protection of Human Rights and Fundamental Freedoms [1950] ECHR Art. 3.

<sup>28</sup> *Kurt v. Turkey* [n 26] ¶116.

<sup>29</sup> *ibid*, “For these Reasons, the Court.”

<sup>30</sup> *ibid*, “Dissenting opinion of Judge Gölcüklü.”

## Standard of Proof

### The Inter-American Court of Human Rights

Similarly to its procedure on admissibility of evidence, the IACtHR also maintains a more flexible standard of proof when compared to criminal or domestic courts.<sup>31</sup> For instance, the IACtHR maintains no statutory authority in establishing a standard of proof required for cases to be heard before the court.<sup>32</sup> In the case of *Velásquez Rodríguez v. Honduras*, the IACtHR established that neither the Convention, the Statute of the Court nor the Rules of Procedure provide a definitive answer to the standard of proof necessary in cases of enforced disappearances.<sup>33</sup> Moreover, international jurisprudence has avoided giving a rule regarding the amount of proof necessary to a support a judgment. With this the Court has free range to weigh the evidence:

The Court must determine what the standards of proof should be in the instant case. Neither the Convention, the Statute of the Court nor its Rules of Procedure speak to this matter. Nevertheless, international jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment.<sup>34</sup>

In other words, the standard of proof required by the IACtHR is flexible and is determined on a case-by-case basis, which is extremely important when the Court hears cases that deal with little or no direct evidence, such as cases of enforced disappearances. Embedded in the Court's ability to weigh the evidence freely as to what constitutes enough proof to support a judgment, the IACtHR has the flexibility to alter the standard of proof required depending on the violation in question.<sup>35</sup> In sum, the IACtHR is not bound by any judicial standard of proof but rather the standard of proof is up to the discretion of the Court.

The IACtHR argues that it uses a lesser standard of proof due to the seriousness of enforced disappearances. For instance, in the Honduras cases of enforced disappearances the IACtHR recognized the seriousness of finding that a State had participated in enforced disappearances and argued that the standard of proof must reflect that seriousness:<sup>36</sup>

The Court cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court to apply a standard of proof, which considers the seriousness of the charge...<sup>37</sup>

The IACtHR serves in favour of the victims and the victims' families by giving them an easier opportunity to present convincing, but not direct evidence, that their loved one was disappeared by the State and that this disappearance constitutes a violation of Article 3. The standard of proof that the IACtHR uses is much weaker than that of the ECtHR, in that, as demonstrated with Judge Gölcüklü in *Kurt v. Turkey*, the ECtHR refers to the standard of 'beyond a reasonable doubt' when assessing ECHR Article 3 violations in relation to cases of alleged enforced disappearances.<sup>38</sup>

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<sup>31</sup> *Velásquez Rodríguez v. Honduras* [n 10] ¶128.

<sup>32</sup> Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Courts of Human Rights* (1<sup>st</sup>, Cambridge University Press, Cambridge 2003) 1, 213.

<sup>33</sup> *Velásquez Rodríguez v. Honduras* [n 10] ¶127.

<sup>34</sup> *ibid*, ¶127.

<sup>35</sup> Pasqualucci [n 32] 213.

<sup>36</sup> *Velásquez Rodríguez v. Honduras* [n 10] ¶129.

<sup>37</sup> *ibid*, ¶129.

<sup>38</sup> Claude [n 6] 424.

In *Velásquez Rodríguez v. Honduras*, the IACtHR explained that the difference of the standard of proof between the IACtHR and that of criminal courts is based on the intrinsic difference between human rights and criminal justice.<sup>39</sup> In the case of international protection of human rights, States do not appear before the Courts as defendants of a criminal action.<sup>40</sup> Moreover, the objective of the Court is not to punish individuals who are found guilty of violations but rather to protect victims of violations and provide reparation for the violations caused by the State.<sup>41</sup> To put it another way, the IACtHR is not seeking to punish members of the Government behind the disappearances. That is the responsibility of a criminal court. The IACtHR is seeking the truth in order to protect the families of the victims of the enforced disappearances and to provide reparations and redress to the families.

Therefore, instead of a standard of beyond a reasonable doubt, that a criminal court would use, the IACtHR has adopted a standard of 'reasoned judgment'.<sup>42</sup> This allows Judges to come to a conclusion based on a logical analysis of the evidence presented.<sup>43</sup> For example, in the case of *Castillo-Paéz v. Peru* the IACtHR explained its ability to use reasoned judgment:

Given that fact, this Court has always been flexible with the standard of proof it applies for receiving evidence. International jurisprudence has recognized the power of the courts to weigh the evidence freely, but has consistently avoided a rigid rule regarding the amount of proof necessary to support a judgment.<sup>44</sup>

As already established in the case of *Velásquez Rodríguez v. Honduras*, the IACtHR has the power to weigh the evidence freely using its judgment. The IACtHR also maintains its flexibility of the standard of proof and has avoided instituting a rigid rule regarding the amount of proof needed. This is because the IACtHR recognizes that not all allegations of violations will have access to the evidence needed to support a judgment at the criminal court standard of beyond a reasonable doubt. Therefore, in order to give the families of victims the opportunity to make a case, the standard of proof needs to fit the seriousness of the human rights violation.

### The European Court of Human Rights

According to the European Convention on Human Rights, the European Commission has consistently maintained the standard of proof of beyond a reasonable doubt when analysing cases of alleged violations of Article 3 of the ECHR.<sup>45</sup> Therefore, in terms of cases concerning enforced disappearances, the ECtHR is reluctant to find that enforced disappearances constitute Article 3 violations without direct evidence that can satisfy the standard of proof. The high standard of beyond a reasonable doubt was first established in the 1968 Greek case.<sup>46</sup> It was with this case that the Commission determined that it must maintain a certain standard of proof when dealing with cases of allegations of torture or ill treatment:<sup>47</sup>

It must, therefore, maintain a certain standard of proof, which is that in each case the

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<sup>39</sup> *ibid*, 423.

<sup>40</sup> *Velásquez Rodríguez v. Honduras* [n 10] ¶134.

<sup>41</sup> *ibid*, ¶134.

<sup>42</sup> *Claude* [n 6] 423.

<sup>43</sup> *ibid*, 423.

<sup>44</sup> *Castillo-Páez v. Peru* [1998] 63 C 1 (Inter-Am. Ct. H.R.) ¶38.

<sup>45</sup> Uğur Erdal, Hasan Bakırcı, *Article 3 of the European Convention on Human Rights: A Practitioner's Handbook* (1<sup>st</sup>, World Organization Against Torture (OMCT), Geneva 2006) 4, 256.

<sup>46</sup> *ibid*, 256.

<sup>47</sup> Yearbook of the European Convention of Human Rights, The Greek Case, 1969 (Martinus Nijhoff Publishers, The Hague, Netherlands 1972) 1, 196 ¶30.

allegations of torture or ill-treatment, as breaches of Article 3 of the Convention, must be proved beyond a reasonable doubt.<sup>48</sup>

Therefore, as Stated in the previous section, in cases of alleged enforced disappearances, the ECtHR does not usually find that they constitute violations of Article 3 of the European Convention on Human Rights given that the ECtHR employs the standard of proof beyond a reasonable doubt.

Comparatively, the IACtHR considers enforced disappearances a violation of Article 5 of the ACHR, which is the right to be free from torture or cruel, inhuman, or degrading treatment, in cases relying on circumstantial or indirect evidence or through logical inference.<sup>49</sup> This is because it can be reasonably assumed that enforced disappearances involve the isolation of a person to be held in an unknown place without communication to their friends and family and fearful for their fate.<sup>50</sup> Meanwhile, according to the procedure of European Commission on alleged Article 3 violations, the ECtHR will only declare the existence of Article 3 violations if there is direct evidence.<sup>51</sup>

In light of this, the ECtHR may not seem as sympathetic to the families of victims because it uses a very high standard of proof that may be unattainable in cases of alleged enforced disappearances.<sup>52</sup> In other words, the ECtHR is not understanding of a victim's alleged suffering unless there is direct evidence to substantiate it. As María Fernanda Pérez Solla puts it, 'The focus of the ECtHR on the State attitude is hardly acceptable, as it denies the pain that a disappearance causes'.<sup>53</sup> Therefore, by using the standard of beyond a reasonable doubt for allegations of violations of Article 3 the ECtHR is inadvertently giving the perpetrators of the torture, such as the Government, the opportunity to destroy direct evidence and the ability to shield itself from liability from the ECHR.<sup>54</sup>

Furthermore, the standard of beyond a reasonable doubt was used in the case of *Ireland v. United Kingdom*, in that the judges refer to the Greek case for reliance on the Commission's standard of proof. In which the Court States, "As in the 'Greek case',<sup>55</sup> the standard of proof the Commission adopted when evaluating the material it obtained was proof "beyond reasonable doubt".<sup>56</sup> In the case of *Ireland v. United Kingdom*, the Court found that there was a violation of inhuman, degrading treatment or punishment but not a violation of the prohibition of torture.<sup>57</sup> This is because of the high standard of proof applied to cases concerning Article 3 violations. The use of employing the standard of beyond a reasonable doubt helped set an international precedent that acts of extreme harm doing by the government against detained individuals would not be considered torture. This has given governments great latitude in the use of intensive interrogation techniques and has led to the systemic torture of individuals detained in Guantanamo Bay under the Bush Administration.<sup>58</sup>

However, despite its frequent use, there has not been a substantial amount written on how to interpret or apply the standard of beyond a reasonable doubt.<sup>59</sup> The Commission has defined it as, 'A reasonable doubt means not a doubt based on a merely theoretical possibility or raised in order to

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<sup>48</sup> *ibid*, 196 ¶30.

<sup>49</sup> American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32) Art. 5.

<sup>50</sup> María Fernanda Pérez Solla, *Enforced Disappearances in International Human Rights* (1<sup>st</sup>, McFarland & Company, North Carolina 2006) 1, 84.

<sup>51</sup> *ibid*, 84.

<sup>52</sup> *ibid*, 84.

<sup>53</sup> *ibid*, 84.

<sup>54</sup> Gobind Singh Sethi, 'The European Court of Human Rights' Jurisprudence on Issues of Forced Disappearances' [2001] WCL 29, 31.

<sup>55</sup> Yearbook of the Convention, 1969, The Greek case, p. 196, para. 30

<sup>56</sup> *Ireland v. United Kingdom* [n 17] ¶161.

<sup>57</sup> *ibid* 'For These Reasons, The Court' ¶4.

<sup>58</sup> See generally, U.S. Senate Select Committee on Intelligence, 'Study of the CIA's Detention and Interrogation Program – Foreword, Findings and Conclusions, and Executive Summary' [2014] U.S. Senate 1 – 499.

<sup>59</sup> Ugur Erdal, 'Burden and standard of proof in proceeding under the European Convention' [2001] Eur. L. Rev. at HR/74.



avoid a disagreeable conclusion, but a doubt for which reasons can be given drawn from the facts presented'.<sup>60</sup> This allows room for the Court to interpret the standard in a way that the Court thinks appropriate but it also leads to uncertainty of how to apply the standard consistently.

This apparent rigidity of the standard has led to judges questioning its use in human rights cases, given that the standard of proof beyond a reasonable doubt is typically used in criminal cases. In the case of *Labita v. Italy*, eight of the seventeen judges on the case wrote a dissenting opinion that criticized the use of the beyond a reasonable doubt standard:

We are accordingly of the view that the standard used for assessing the evidence in this case is inadequate, possibly illogical and even unworkable since, in the absence of an effective investigation, the applicant was prevented from obtaining evidence and the authorities even failed to identify the warders allegedly responsible for the ill-treatment complained of.<sup>61</sup>

This is acknowledging that this standard is not workable for human rights cases given that the State in question withholds information from the Court. The dissenting opinion then went on to note that the ECtHR should not follow a standard akin to a criminal court because its motives and goals are different:

Lastly, it should be borne in mind that the standard of proof "beyond all reasonable doubt" is, in certain legal systems, used in criminal cases. However, this Court is not called upon to judge an individual's guilt or innocence or to punish those responsible for a violation; its task is to protect victims and provide redress for damage caused by the acts of the State responsible.<sup>62</sup>

This argument is clearly comparable to that of the IACtHR in the *Velásquez Rodríguez v. Honduras* case.<sup>63</sup> Based on the dissenting opinion in the case *Labita v. Italy*, it would seem that judges are becoming more inclined to move away from the beyond all reasonable doubt standard and change to something more workable like that of the Inter-American Court of Human Rights.<sup>64</sup>

## Burden of Proof

### The Inter-American Court of Human Rights

To further support the rights of victims, the IACtHR has demonstrated willingness and inclination to place the responsibility of the burden of proof on to the State. This is because the Court is acting under the assumption that in alleged cases of enforced disappearances the State will either have access to the evidence or will have destroyed the evidence.<sup>65</sup> For example, in the case of *Velásquez-Rodríguez v. Honduras*, the Court ruled that in proceedings to determine human rights violations the State could not rely on the defence that the complainant failed to present evidence given that the evidence would have to be obtained with the State's cooperation:

In contrast to domestic criminal law, in proceedings to determine human rights violations

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<sup>60</sup> Yearbook of the European Convention of Human Rights [n 47] 196 ¶30.

<sup>61</sup> *Labita v. Italy* [2000] 26772/95 (Eur. Ct. H.R.) (Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič, dissenting).

<sup>62</sup> *ibid.*, (Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič, dissenting).

<sup>63</sup> *Velásquez Rodríguez v. Honduras* [n 10] ¶134.

<sup>64</sup> Claude [n 6] 425.

<sup>65</sup> *ibid.* 416.

the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation.<sup>66</sup>

Moreover, the Court has been critical of the role of the State of Honduras throughout the fact-finding portion of the investigation into disappearances. In the case of *Godínez Cruz v. Honduras* the Court argued that the State has the means to verify evidence.<sup>67</sup> While the Commission has investigatory powers, they are unable to exercise them without the cooperation of the State in question, 'The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State'.<sup>68</sup> In sum, the IACtHR has been critical of the lack of cooperation of States when dealing with cases of alleged enforced disappearances and while the Court is not explicit with shifting the burden of proof onto the State, it does recognize that the State has control over the evidence, which would therefore allude that the State bears the burden of proof.<sup>69</sup>

### The European Court of Human Rights

Similarly to the IACtHR, the ECtHR has been critical of the role of States during cases of alleged enforced disappearances. The ECtHR has taken on the opinion that the State, in question, during an investigation of an alleged enforced disappearance, needs to provide explanation when a person is taken into State custody prior to their disappearance.<sup>70</sup> Furthermore, if the State fails to provide a reasonable explanation for the disappearance than the individual is to be presumed dead.<sup>71</sup> This reasoning was first established in the case of *Akkum and others v. Turkey*, in which the Court argued that if the State fails to cooperate with the Court in order to establish the facts of the case, the Government must provide a conclusive explanation of why Government documents cannot corroborate the allegations, or the Government must provide a satisfactory and convincing explanation of how the events occurred.<sup>72</sup> Moreover, if the State fails to provide the Court this information, then the State is in violation of Article 2 and/or 3 of the Convention.<sup>73</sup>

Similarly, with this reasoning, the ECtHR indicated in the case of *Togcu v. Turkey* that the burden of proof is shifted onto the government when an applicant has already made out a *prima facie* case.<sup>74</sup> These two cases of *Akkum and others v. Turkey* and *Togcu v. Turkey* demonstrate the willingness of the ECtHR to shift the burden of proof on to the State given the circumstances of the case. In order to shift the burden of proof onto the State, the applicant needs to demonstrate a *prima facie* case, meaning evidence that is sufficient to establish a fact unless disproved. For example, in the case of *Togcu v. Turkey* the Court stated in the evaluation of the facts that the Court is aware of the difficulties for an applicant to obtain evidence in support of the allegation if the government fails to submit relevant documentation. The Court then stated that in order to shift the burden of proof from the applicant on to the Government the applicant has to have already established a *prima facie* case.<sup>75</sup> This demonstrates that the burden of proof of the ECtHR is more in line with the IACtHR than the standard of proof. Thus, the ECtHR is demonstrating its responsiveness with dealing with the serious nature of enforced disappearances.

<sup>66</sup> *Velásquez-Rodríguez v. Honduras* [n 10] ¶135.

<sup>67</sup> *Godínez Cruz v. Honduras* [1989] 5 C 1 (Inter-Am. Ct. H.R.) ¶142.

<sup>68</sup> *ibid* ¶142.

<sup>69</sup> Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Courts of Human Rights* (1st, Cambridge University Press, Cambridge 2003) 210.

<sup>70</sup> *Claude* [n 6] 418.

<sup>71</sup> *ibid*, 418.

<sup>72</sup> *Akkum and Others v. Turkey* [2005] 21894/93 (Eur. Ct. H.R.) ¶211.

<sup>73</sup> *ibid*, ¶211.

<sup>74</sup> *Togcu v. Turkey* [2005] 27601/95 (Eur. Ct. H.R.) ¶95.

<sup>75</sup> *ibid* ¶95.

## Supporting Attitudes

### The Human Rights Committee

There have been other sources that regard the very act of enforced disappearances as always already an act of torture. For instance, the Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR) by State parties, acknowledged in the case of *Mojica v. Dominican Republic* that the very act of enforced disappearance violates the freedom from torture or cruel, inhuman or degrading treatment or punishment.<sup>76</sup> The case of *Mojica v. Dominican Republic* was a violation by the government of the Dominican Republic of Article 7 of the ICCPR, which states that, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”<sup>77</sup> The Committee stated that there was a strong inference that the victim, Rafael Mojica, had experienced torture or cruel and inhuman treatment given the circumstances of his disappearance and the threats made against him.<sup>78</sup> The Committee then stated that the disappearance of persons is inherently connected to a violation of Article 7 of the ICCPR, “Aware of the nature of enforced or involuntary disappearances in many countries, the Committee feels confident to conclude that the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7.”<sup>79</sup> Therefore, the ICCPR has set international precedent that the act of enforced disappearance in and of itself is an act of torture, cruel and inhuman or degrading treatment or punishment. This is contradiction with the previous decisions of the ECtHR, which believes that the Court would need direct evidence of torture in order to that there had been a breach of Article 3 of the convention, even in cases of enforced disappearances.

## Evaluation of Evidence : what constitutes a breach of Article 5?

### The Inter-American Court of Human Rights

Despite the inclination to regard all cases of enforced disappearances as also cases of a violation against the prohibition of torture, inhuman or degrading treatment, it is not accepted as an automatic violation.<sup>80</sup> In fact, the IACtHR looks at four key factors: “(1) prolonged incommunicado detention; (2) the manner in which the person was arrested; (3) the mental suffering of the ‘disappeared’; and (4) the existence of either a systematic practice of torture or other ill-treatment or a general context of such violence.”<sup>81</sup> Arguably, the most important factor in the decision-making process of an Article 5 violation is the prolonged incommunicado detention. In the *Velásquez-Rodríguez v. Honduras* case the Court ruled that “prolonged isolation and deprivation of communication”<sup>82</sup> are violations of Article 5 of the ACHR and constitutes cruel and inhuman treatment because isolation and deprivation of communication are infringements on the respect of mental integrity.<sup>83</sup>

#### 1) Prolonged incommunicado detention

First, in the case of *Juan Humberto Sánchez v. Honduras* the IACtHR extrapolates on the scope of ‘prolonged incommunicado detention.’ In this case, the alleged victim, Juan

<sup>76</sup> Vermeulen [n 3] 166.

<sup>77</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 7.

<sup>78</sup> *Mojica v. Dominican Republic* [1994] 449/1991 (CCPR) ¶5.7.

<sup>79</sup> *ibid* ¶5.7.

<sup>80</sup> Vermeulen [n 3] 166.

<sup>81</sup> *ibid* 166.

<sup>82</sup> *Velásquez-Rodríguez v. Honduras* [n 10] ¶156.

<sup>83</sup> *ibid* ¶156.1.

Humberto Sánchez was kidnapped and detained twice over the period of two days by the First Battalion of Territorial Forces of Honduras.<sup>84</sup> During the kidnapping, the armed forces threatened his family.<sup>85</sup> It was acknowledged that the armed forces intended to keep the alleged victims in solitary confinement, interrogate him using torture and then execute him without giving explanation to the alleged victim's family.<sup>86</sup> Juan Humberto Sánchez was discovered, deceased, some days later after the second kidnapping. His hands were tied in behind his back, his testicles, nose, and ears were severed, some of his teeth were missing as was a part of his scalp and his legs were bruised.<sup>87</sup> The Court regarded both illegal detentions as an infringement of Sánchez's mental and moral integrity and a violation of international human rights law despite the fact that there was no additional evidence as to the treatment of the victim during the detention.<sup>88</sup> From this we can infer that the even a couple hours of detention constitutes a breach of the prohibition of torture, inhuman and degrading treatment.<sup>89</sup>

## 2) Manner of the Arrest

Secondly, the case of *Castillo-Páez v. Peru* demonstrates that the manner in which a person is arrested may also contribute to finding a violation of the freedom to be free from torture in a case of an enforced disappearance.<sup>90</sup> Eyewitnesses such as Joe Roberto Ruiz-Huapaya and María Elena Castro-Osorio testified that they saw the arrest of victim, Ernesto Rafael Castillo-Páez, in which police officers detained Castillo-Paéz and placed him in the trunk of their vehicle.<sup>91</sup> The Court determined that the placement of Castillo-Páez into the trunk of an official vehicle after being detained by the police constitutes an infringement of Article 5 of the Convention.<sup>92</sup> Moreover, the Court stated, that even if no other physical or other ill-treatment occurred, this action alone violates the respect and inherent dignity of a person.<sup>93</sup>

## 3) Mental Suffering of the Disappeared

Thirdly, in the case of "*Street Children*" (*Villagran-Morales et al.*) *v. Guatemala* the court determined that there was a violation of torture based on the amount of time spent in the power of the abductors and the assumed mental suffering that involved.<sup>94</sup> For example, two of the youths, Juárez Cifuentes and Figueroa Túnchez were in the power of their abductors for at least 10 hours.<sup>95</sup> Meanwhile, the abductors kept Contreras and Caal Sandoval for at least 21 hours.<sup>96</sup> The cause of death of all four street children was injuries stemming from a gunshot to the head.<sup>97</sup> The Court determined that "creating a threatening situation or threatening an individual with torture may, at least in some circumstances, constitute inhuman treatment."<sup>98</sup> In other words even when there is no other evidence other than the time in which the street children were detained it is reasonable to conclude that the treatment they experienced was aggressive and violent, which constitutes a violation of Article 5.<sup>99</sup> The Court determined that while the four youths were being held by the abductors, they experienced severe psychological suffering and were aware that their lives were in danger.<sup>100</sup>

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<sup>84</sup> *Juan Humberto Sánchez v. Honduras* [2003] 99 C 1 (Inter-Am. Ct. H. R.) ¶71 b.

<sup>85</sup> *ibid* ¶71 b.

<sup>86</sup> *ibid* ¶71 b.

<sup>87</sup> *ibid* ¶92 b.

<sup>88</sup> *ibid* ¶98.

<sup>89</sup> Vermeulen [n 3] 167.

<sup>90</sup> *ibid* 167.

<sup>91</sup> *Castillo-Páez v. Peru* [n 44] ¶30 b, ¶30 c.

<sup>92</sup> *ibid* ¶66.

<sup>93</sup> *ibid* ¶66.

<sup>94</sup> "*Street Children*" (*Villagran-Morales et al.*) *v. Guatemala* [1999] 63 C 1 (Inter-Am. Ct. H.R.) ¶162

<sup>95</sup> *ibid* ¶82.

<sup>96</sup> *ibid* ¶82.

<sup>97</sup> *ibid* ¶81.

<sup>98</sup> *ibid* ¶165.

<sup>99</sup> *ibid* ¶162.

<sup>100</sup> *ibid* ¶163.

#### 4) Systematic Practice of Torture or a General Context of such Violence

Finally, the Court has a history of determining Article 5 breaches by looking at the existence of a systematic practice of torture or ill treatment or a general context of such violence in cases of enforced disappearances when there is no other evidence available. For instance, in the case of *“Street Children” (Villagran-Morales et al.) v. Guatemala*, the Court made it clear that Guatemala had a “common pattern of illegal acts perpetrated by State security agents against “street children”.”<sup>101</sup> Moreover, in the Court’s assessment of the violation of Article 5 Right to Humane Treatment, the Court included the general context of violence and against street children as part of their reasoning. The Court concluded that the Court believes ill treatment and torture was practiced by the same persons, acting on behalf of the State, who abducted and killed the youths. Therefore, the State is responsible for the ill-treatment of the street children.

### Experience of cases of Enforced Disappearances

#### The Inter-American Court v The European Court

Comparatively, the IACtHR has significantly more experience in dealing with cases of enforced disappearances than the ECtHR;<sup>102</sup> and the IACtHR has found a violation of the freedom from torture and inhuman treatment in nearly all cases of enforced disappearances.<sup>103</sup> The ECtHR has not had as much experience as the IACtHR because the Court has traditionally been called upon to assess civil and political rights in Western Europe.<sup>104</sup> At present, the IACtHR has over 25 years of experience with cases of enforced disappearance whereas the ECtHR has far fewer, having only recently began addressing the issue with the increasing allegations of forced disappearances in Turkey in the early 2000s.<sup>105</sup> Due to its lack of experience, the ECtHR’s jurisprudence is not as responsive to the nature of enforced disappearances as that of the IACHR, with regard to the violation of the right to be free from torture, degrading, or inhuman treatment.<sup>106</sup> However, the ECtHR is more aligned with the seriousness nature of enforced disappearances and perhaps more progressive than the IACtHR with regard to the issue of shifting the burden of proof on to the State in question.

### Conclusion

#### The ACHR is more developed than the ECHR

In light of all this, at this present time the jurisprudence of the ECHR on the issue of enforced disappearances is not as well developed as the ACHR. Thus use of the standard of beyond a reasonable doubt in alleged violations of Article 3 of the ECHR puts the evidentiary burden on the applicant despite the fact that the State would have access to the necessary information on whether or not an Article 3 violation occurred. This burden is inappropriate and follows too closely to the standard used in criminal justice proceedings even though international human rights protections are more akin to civil proceedings. As stated by the IACtHR in *Velásquez-Rodríguez v. Honduras*, ‘States do not appear before the Court as defendants in a criminal action’.<sup>107</sup> The goal of the adjudication of human rights courts is not to punish the individual but to provide reparation and redress to the victims

<sup>101</sup> *ibid* ¶79.

<sup>102</sup> Sethi [n 54] 29.

<sup>103</sup> MF Pérez-Solla, *Enforced Disappearances in International Human Rights* (1<sup>st</sup>, McFarland & Company, North Carolina 2006) 1, 74.

<sup>104</sup> Joseph Barrett, ‘Chechnya’s Last Hope – Enforced Disappearances and the European Court of Human Rights’ [2009] *Harv. Hum. Rts. J.* 133, 135.

<sup>105</sup> Sethi [n 48] 29.

<sup>106</sup> *ibid* 29.

<sup>107</sup> *Velásquez Rodríguez v. Honduras* [n 5] ¶134.

and the families of the victims. Therefore, there is no need for the high standard of proof of beyond a reasonable doubt because the Court is not punishing an individual. In order for the ECHR to rise to the standard and experience of the ACHR with regards to cases of enforced disappearance, it needs to lower the evidentiary burden for torture claims to better protect victims from abuse of hegemonic State power.

## Bibliography

### European Court of Human Rights:

- *Akkum and Others v. Turkey* [2005] 21894/93 (Eur. Ct. H.R.)
- *Imakayeva v. Russia* [2006] 7615/02 (Eur. Ct. H.R.)
- *Ireland v. United Kingdom* [1978] 5310/7 (Eur. Ct. H. R.)
- *Kurt v. Turkey* [1998] 15/1997/799/1002 (Eur. Ct. H.R.)
- *Labita v. Italy* [2000] 26772/95 (Eur. Ct. H.R.) (Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič, dissenting)
- *Togcu v. Turkey* [2005] 27601/95 (Eur. Ct. H.R.)

### Inter-American Court of Human Rights:

- *Castillo-Páez v. Peru* [1998] 63 C 1 (Inter-Am. Ct. H.R.)
- *Cesti Hurtado v. Peru* [1999] 78 C 1 (Inter-Am. Ct. H.R.)
- *Godínez Cruz v. Honduras* [1989] 5 C 1 (Inter-Am. Ct. H.R.)
- *Juan Humberto Sánchez v. Honduras* [2003] 99 C 1 (Inter-Am. Ct. H. R.)
- *Loayza-Tamayo v. Peru* [1997] 33 C 1 (Inter-Am. Ct. H.R.)
- *"Street Children" (Villagran-Morales et al.) v. Guatemala* [1999] 63 C 1 (Inter-Am. Ct. H.R.)
- *Velásquez Rodríguez v. Honduras* [1988] 4 C 1 (Inter-Am. Ct. H.R.)

### International Treaty Bodies:

- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
- *Mojica v. Dominican Republic* [1994] 449/1991 (ICCPR).

### Legislation:

- American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32) Art. 5
- Convention for the Protection of Human Rights and Fundamental Freedoms [1950] European Convention on Human Rights Art. 3.

### Reports:

- United Nations General Assembly, 'Report of the Working Group on Enforced or Involuntary Disappearances' [2014] A/HRC/27/49.
- U.S. Senate Select Committee on Intelligence, 'Study of the CIA's Detention and Interrogation Program – Foreword, Findings and Conclusions, and Executive Summary' [2014] U.S. Senate 1 – 499.

### Rules of Court:

- Rules and Procedures of the Inter-American Court of Human Rights, Article 47 'Procedure for Taking Evidence' (1)
- Rules of the European Court of Human Rights, Rule 44C 'Failure to Participate Effectively'

## Articles:

- Barrett J, 'Chechnya's Last Hope – Enforced Disappearances and the European Court of Human Rights' [2009] Harv. Hum. Rts. J. 1, 133.
- Claude O, 'A comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence' [2010] Intercultural Human Rights L. Rev. 407, 464.
- Erdal U, 'Burden and standard of proof in proceeding under the European Convention' [2001] Eur. L. Rev. 1, 14.
- Sethi GS, 'The European Court of Human Rights' Jurisprudence on Issues of Forced Disappearances' [2001] WCL 29, 29.
- Vermeulen ML, "Living Beyond Death": Torture and Ill-Treatment Claims in Enforced Disappearances Cases' [2008] Inter-Am. & Eur. Hum. Rts. J. 159, 198.

## Books:

- Pasqualucci JM, *The Practice and Procedure of the Inter-American Courts of Human Rights* (1st, Cambridge University Press, Cambridge 2003) 1, 210.
- Loucaides LG, *Essays on the Developing Law of Human Rights*, (1st, Martinus Nijhoff, Dordrecht 1995).
- Solla MFP, *Enforced Disappearances in International Human Rights* (1st, McFarland & Company, North Carolina 2006) 1, 84.
- Kazazi M, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (1st, Kluwer Law International, The Hague 1996) 1, 325.
- Erdal U, Bakırcı H, *Article 3 of the European Convention on Human Rights: A Practitioner's Handbook* (1st, World Organization Against Torture (OMCT), Geneva 2006) 4, 256.
- *Yearbook of the European Convention of Human Rights, The Greek Case, 1969* (Martinus Nijhoff Publishers, The Hague 1972) 1, 196.

## Chapters in edited books:

- Ramcharan BG, 'Evidence' in B.G. Ramcharan (eds), *International Law and Fact-Finding in the Field of Human Rights* (1st, Martinus Nijhoff Publishers, The Hague 1982) 64, 82.

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