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INTEREST OF AMICI CURIAE

The Harvard Law Student Advocates for Human Rights is an officially recognized student-run group at Harvard Law School, operating with the support of the Harvard Law School Human Rights Program. HLS Advocates promotes human rights and the rule of law in partnership with non-governmental organizations throughout the world. The views expressed in this submission do not necessarily reflect the view of Harvard Law School or Harvard University.

Human Rights Watch is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. Human Rights Watch has monitored and reported on enforced disappearances in a number of contexts, most recently in Chechnya, Algeria and Angola. It has filed amicus briefs before various bodies, such as U.S. courts of appeal and the Inter-American Commission.

FACTS

In 1995, in two writ petitions filed before the Supreme Court of India, *Committee for Information and Initiative on Punjab vs. State of Punjab* and *Paramjit Kaur vs. State of Punjab and Ors.,* petitioners made serious allegations about large scale cremations

committed by the Punjab Police from 1984 to 1994.[1] In November 1995, the Supreme Court asked the Central Bureau of Investigation ("CBI") to investigate these allegations.[2] In December 1996, the Supreme Court concluded that the final report by the CBI in India disclosed that 2,097 illegal cremations had been carried out by Indian security agencies in three crematoria in Amritsar, Punjab.[3] Of these cremations, the CBI report indicated that in 585 cases the bodies had been fully identified, in 274 cases the corpses had been partially identified, and in 1,238 cases the victims had not been unidentified.[4] On December 12, 1996, noting that the report "discloses flagrant violations of human rights on a mass scale," the Supreme Court of India directed the National Human Rights Commission ("NHRC"), a body created under the Protection of Human Rights Act ("PHRA") in 1993, "to have [this] matter examined in accordance with [the] law and determine all the issues which are raised before the commission by the learned counsel for the parties."[5]

In January 1997, the NHRC requested submissions on the question of whether it had been designated as a body *sui generis* to perform certain functions and adjudicate certain issues entrusted and referred to it by the Supreme Court or whether it was acting in its capacity established under the PHRA.[6] The Union government and the Punjab government and police argued that the NHRC was bound by the PHRA, which does not give the NHRC adjudicatory powers and consequently the Supreme Court could not

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[1] *Committee for Information and Initiative on Punjab vs. State of Punjab & Paramjt Kaur, Writ Petitions (Crl.) Nos. 497/95 and 447/95*.
[2] Order dated November 15, 1995.
[3] Order dated December 12, 1996.
[4] *Id.*
[5] *Id.*
[6] Committee for Information and Initiative on Punjab, *Reduced to Ashes* 116 (2003).

extend the Commission's jurisdiction to investigate these matters.[7] The counsel for the NHRC argued that its jurisdiction derived not only from the Act, but also from the December 1996 order and the mandate of the International Covenant on Civil and Political Rights ("ICCPR").[8] As such, it argued the NHRC was bound to act by the imperatives of Article 32 of the Indian Constitution as an instrument of the Supreme Court, and also to implement India's commitments under the ICCPR.[9] With the additional jurisdiction granted by the Supreme Court, the NHRC argued it had the power to investigate, inquire and determine liabilities and duties and identify persons and authorities responsible for violations of human rights and take steps to enforce such determinations.[10] The Committee on Information and Initiative on Punjab ("CIIP") argued that the powers of the NHRC in this matter derived from the Supreme Court in exercise of its jurisdiction under Article 32 of the Constitution and therefore, the NHRC was not limited by any provisions of the PHRA.[11]

On August 4, 1997, the NHRC determined that it was a *sui generis* designate of the Supreme Court, deriving its jurisdiction under Article 32 of the Constitution, which binds the Supreme Court to act on all complaints of human rights violations.[12] The NHRC first noted that the concept of *sui generis* is often used to resolve disputes in the context of international law.[13] It then stated that the only reasonable way to interpret the Supreme Court's order was to hold that the Commission had been "referred to only for purposes of identifying it as the body to which the Supreme Court was turning, in this

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[7] *Id.* at 118-19.
[8] *Id.* at 119.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 117-18.
[12] *Id.* at 119-20.
[13] Order dated August 4, 1997.

instance, for the protection of fundamental rights."[14] It concluded that the whole matter had been referred to the Commission without any limitation under the PHRA.[15]

The Government of India challenged this decision of the NHRC before the Supreme Court, which upheld the NHRC's decision in September 1998.[16] The Supreme Court reiterated, "[i]n deciding the matters referred by this Court, the National Human Rights Commission is given a free hand and is not circumscribed by any conditions."[17] The Court held that the NHRC "does not function under the provisions of the Act but under the remit of the Supreme Court."[18] In addition, it found that "the powers of the Commission in carrying out this mandate are not limited by Section 36(2) or other limiting provisions, if any, under the [PHRA]."[19]

Nonetheless, in January 1999, the NHRC issued an order confining its mandate to the alleged illegal 2,097 cremations in Amritsar and rejecting the contention that it should investigate enforced disappearances and other allegations of human rights violations throughout the entire state of Punjab.[20] The NHRC stated that the Supreme Court's original November 15, 1995 order directing the CBI to undertake an inquiry had been limited to the allegations made by Jaswant Singh Khalra in his January 1995 press note.[21] As such, its investigation would thus be limited to the Amritsar, Tarn Taran and Patti cremation grounds, despite the fact that there were statements in the press note about common patterns of police abductions, disappearances and extra-judicial killings

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[14] *Id.*
[15] *Id.*
[16] Committee for Information and Initiative on Punjab, *supra* note 6, at 123.
[17] Order dated September 10, 1998.
[18] *Id.*
[19] *Id.*
[20] Order on the Scope of Inquiry, dated January 13, 1999, discussed in *Reduced to Ashes*, *supra* note 6, at 125-26.
[21] *Id*.

throughout the state.[22] The NHRC also argued that the CBI's investigations into only these three crematoria showed that the CBI also believed that the scope of the inquiry was limited.[23] Though the NHRC acknowledged that some paragraphs of the petition filed by the CIIP referred to disappearances alleged to have occurred throughout the state, it held that the CIIP had not furnished any material to support these allegations.[24] According to the NHRC, since the Supreme Court remitted the matter to the NHRC in light of this report, the scope of the inquiry had to be restricted to what was contained in the report.[25] The NHRC also stated that the expansive language of the December 1996 order did not enlarge the scope of the inquiry, but only related to issues of compensation and relief.[26]

The CIIP subsequently filed a review petition before the NHRC in which it, *inter alia*, requested it to seek directions from the Supreme Court on the scope of its inquiry.[27] After the NHRC rejected its request, the CIIP turned to the Supreme Court for a clarification on the mandate of the NHRC, arguing that the mandate attributed to the NHRC was not limited to the three cremation grounds.[28] To buttress its contention, the CIIP produced additional material evidence, including municipal corporation records of illegal cremations at six other crematoria outside Amritsar as well as victim testimony and survivor statements that established that grave human rights violations had occurred all across Punjab.[29] On October 11, 1999, the Supreme Court also rejected the CIIP's

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[22] *Id.* at 126-27.
[23] *Id.* at 126.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 130.
[28] *Id* at 130-31.
[29] *Id.* at 132.

application and stated it was not prepared to interfere with the order of the NHRC at that stage.[30]

Pursuant to its January 1999 order, the NHRC published public notices inviting claims from only those legal heirs whose kin had been cremated at one of the three cremation grounds that had been investigated by the CBI.[31] The NHRC received only 88 claims from people in Punjab despite the fact that it was clear that thousands had disappeared in that state.[32] Subsequently, the State of Punjab divided the 88 claims it had received into three categories: 23 claims were rejected because the disappeared body had been cremated in a crematorium that was not one of the three investigated; it deemed 47 claims were to be disputed; and it offered compensation in 18 cases without rendering a decision on the merits of the claim.[33] All 18 families in this latter group rejected the Punjab government's offer of compensation without determination of liability.[34] The CIIP then filed an application, along with the affidavits of all 18 claimants, and argued that the NHRC could not limit itself to examining only the claims received since its mandate bound it to investigate all 2,097 cases.[35] The NHRC reaffirmed its commitment to investigate all 2,097 cases on February 15, 2001 and subsequently asked the CBI and the Punjab government to make available for inspection all materials in their possession concerning the cremations.[36] At present, the NHRC has asked for the government of Punjab, in the first instance, to file replies in the cases of the 582 identified cremations.[37] As of September 2003, the State of Punjab has filed affidavits in 577 of the 582 cases of

[30] *Id.* at 134.
[31] *Id.* at 137.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 139.
[35] *Id.*
[36] *Id.* at 139-140.
[37] *Id.* at 146.

the identified cremations.[38] In five cases it contended that the records had not been made available by the CBI.

SUMMARY OF ARGUMENT

International law establishes that forced disappearances are grave human rights abuses that violate the right to be free from arbitrary arrest, the right to be free from cruel and inhuman treatment, the right to liberty, and the right to life, all rights guaranteed by the Indian Constitution. International law, embodied in treaties and the jurisprudence of international tribunals, requires that States investigate all cases of forced disappearances in which State liability is at issue. States are obligated to conduct effective and thorough investigations of all allegations of forced disappearances and to provide a remedy for those whose rights have been violated. Consequently, the government of India is obligated under international law to investigate all cases of alleged disappearances across Punjab.

International law also recognizes that the crime of forced disappearance is one in which the State has an unfair advantage over the victim of the crime. Proving allegations of a disappearance presents unique evidentiary difficulties because the very evidence necessary to establish liability is often under the exclusive control of the State, which has an incentive to conceal this evidence. As a consequence of this distinctive characteristic of disappearances, international human rights bodies have held circumstantial and testimonial evidence, including hearsay, to be admissible in disappearance cases. Recognizing the difficulties involved in establishing a disappearance, international fora have repeatedly relaxed traditional evidentiary standards. In civil law countries,

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[38] *Id.*

witnesses are generally subjected to a series of preliminary questions, taken under oath, regarding their relationship with the litigants. The relevant information sought includes the witness's family ties to the parties, feelings toward the parties, financial or other interest in the suit, and any other facts that might prejudice their testimony. In addition, certain people are not allowed to testify, including spouses and close relatives. In disappearance cases, however, it is often the testimony of witnesses who have an interest in the suit, such as spouses or close family or friends, which forms the bulk of the evidence. Such evidence is necessarily admissible, since otherwise, evidence that is probative in disappearance cases would be wrongly excluded. Furthermore, such evidence is admissible because states would otherwise be allowed to commit violations, hide the evidence, and thus avoid liability. In this manner, international law recognizes that there are inherent difficulties distinctive to proving allegations of disappearance, and consequently, establishes that different evidentiary rules apply. International law not only lowers the bar for admissibility of evidence in disappearance cases, it also requires that such evidence be considered and weighed properly. To this end, international jurisprudence has established that such evidence can shift the burden of proof to the State to refute any allegation of forced disappearance. If the State cannot effectively refute the allegations, it must be held presumptively liable.

The Indian government, at the very least, is obligated to enforce the rights to life, liberty and security guaranteed by the ICCPR since it is a party to the covenant. The ICCPR's own investigatory body, the Human Rights Committee ("HRC"), holds that this means the State is responsible for thoroughly investigating allegations of disappearances and for effectively refuting these allegations. Thus, the Indian government is obligated

to investigate all the allegations of disappearances that have come to light through the evidence collected by the CIIP and the Committee for Coordination on Disappearances in Punjab ("CCDP") from victims' family members and survivors. Furthermore, not only must an investigation occur if the evidence indicates a violation by the State, but if the evidence is sufficient, it must also be allowed to shift the burden of proof onto the State to refute the allegations of disappearances. If the State cannot refute these allegations, its liability must be presumed.

In this matter, the Supreme Court has turned to the NHRC to enforce the duties of the State of India. It has done so because this latter body was created to ensure the observance of international human rights standards. As a guardian of international human rights, the NHRC must look to the procedures established under international law, which dictate both the investigation of forced disappearances and the admission of circumstantial and testimonial evidence in cases of disappearances. The Supreme Court has recognized that when international law effectuates the fundamental rights at issue under Article 32, international law should be incorporated and relied upon as facets of those fundamental rights. It is clear from the unidentified bodies found in the three crematoria that the most fundamental human right, the right to life, has been violated by the Indian government. In order to uphold the meaning of Article 32, the NHRC is required by international law to first agree to investigate all allegations of disappearances in Punjab, and secondly, to allow circumstantial and testimonial evidence to be admitted and weighed in these cases of forced disappearances.

ARGUMENT

I. THE NATIONAL HUMAN RIGHTS COMMISSION OF INDIA MUST INVESTIGATE ALL ALLEGATIONS OF FORCED DISAPPEARANCES IN PUNJAB UNDER ARTICLE 32 OF THE INDIAN CONSTITUTION AND UNDER INTERNATIONAL LAW

A. The National Human Rights Commission of India Must Investigate All Allegations of Forced Disappearances in Punjab in Order to Enforce the Fundamental Rights Guaranteed Under Article 32 of the Indian Constitution

The decisions of the Supreme Court of India indicate that the NHRC, as an arm of the Supreme Court and in its own capacity, is required to implement international law to the extent it effectuates the fundamental rights of Indian citizens, as required by Article 32. As discussed below, international law requires that all allegations of disappearances be investigated and that circumstantial evidence be admitted and considered in those investigations. Therefore, in this matter, the only way to effectuate Article 32 is to guarantee that all allegations of disappearances in Punjab are investigated effectively and thoroughly.

Under Article 32 of the Indian Constitution, the Supreme Court has the obligation to enforce the fundamental rights of all its citizens.[39] In this matter, the Supreme Court delegated this authority to the NHRC of India. When a question arose as to whether or not this meant the NHRC was bound by its own statute or was free to act as an agent of

[39] India Const. art. 32 (1950). The Article guarantees: (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

the Supreme Court, the Supreme Court upheld the NHRC's finding that it was a *sui generis* body to which the Supreme Court had turned for the protection of fundamental rights.[40] Therefore, in this matter, the NHRC has all the same powers that the Supreme Court would have in dealing with the enforcement of fundamental rights.

The NHRC's mandate is to enforce fundamental rights guaranteed by international covenants and norms and Indian legislation. In effectuating these rights, the NHRC noted in its annual report of 1988-89 that it had a statutory responsibility to "study treaties and other international instruments on human rights and make recommendations for their effective implementation."[41] It further noted that the opinions of India's own Supreme Court were of particular importance concerning human rights law.[42] The NHRC noted that the Supreme Court, in the case of *Visakha vs. State of Rajasthan,* 1997(6) SCC 241, held that "[a]ny international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [the statutes] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."[43] The NHRC also noted that the Court had found "it is now an accepted rule of judicial construction that regard must be had to international conventions and norms for constructing domestic law when there is no inconsistency between them and there is a void in the domestic laws."[44] The ruling thus indicates that even if a treaty ratified by India has not been incorporated into domestic legislation, it is still enforceable.[45] The NHRC also noted that in *Apparel Export Promotion Council vs. A.K. Chopra,* 1999(1)

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[40] 1998 Order, *supra* note 17.
[41] National Human Rights Commission of India, *Annual Human Rights Report* ¶4.6 (1998-99), *available at* http://nhrc.nic.in/ar98_99.htm.
[42] *Id.* at ¶4.9.
[43] *Id.*
[44] *Id.*
[45] Committee for Information and Initiative on Punjab*, supra* note 6, at 118.

SCC 759*,* the Supreme Court found that courts are not only obliged to give due regard to international law when construing domestic laws, but "more so, when there is no inconsistency between them and there is a void in domestic law" and that "…[i]n cases involving violation of human rights, the country must forever remain alive to international instruments and conventions and apply the same to a given case where there is no inconsistency between the international norms and the domestic law occupying the field."[46] Noting the above, the NHRC undertook to focus in greater detail on the effective implementation of treaties and international instruments on human rights.[47]

In the case of *People's Union for Civil Liberties vs. Union of India,* (1997) 2 JT 311**,** the Supreme Court further held that international law can be incorporated into the fundamental rights under the Indian Constitution:

> For the present, it would suffice to state that the provisions of the [ICCPR], which elucidate and…effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such….[48]

Thus, the standards of international human rights law, including the rights to life and liberty and the right to an effective remedy in cases of disappearance, are all part of the fundamental rights under the Indian Constitution, especially given India's obligation as a party to the ICCPR. As such, the NHRC is obligated to effectively investigate the allegations of disappearances in order to enforce the fundamental rights guaranteed under Article 32 of the Indian Constitution.

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[46] National Human Rights Commission of India, *supra* note 41, at ¶4.10.
[47] *Id*. at ¶4.11.
[48] *People's Union for Civil Liberties & Anr vs. Union of India* (1997) 2 JT 311, 318.

B. THE NATIONAL HUMAN RIGHTS COMMISSION OF INDIA MUST INVESTIGATE ALL ALLEGATIONS OF FORCED DISAPPEARANCES IN PUNJAB ACCORDING TO INTERNATIONAL LAW WHICH ESTABLISHES THAT STATES HAVE AN AFFIRMATIVE DUTY TO INVESTIGATE ALL CASES OF FORCED DISAPPEARANCES

International law has firmly established that States have a positive duty to investigate all allegations of forced disappearances. What follows is a review of international and national decisions in cases of disappearances.[49]

The ICCPR guarantees the rights to liberty (Article 9), humane treatment (Article 7) and life (Article 6), all of which are violated in the instant case by the Indian government's explicit and implicit sanctioning of the disappearances of thousands of Sikhs in the state of Punjab.[50] The Indian Constitution itself provides that no one "shall be deprived of his life or personal liberty except according to procedure established by law."[51] As a direct consequence of this guarantee, the government of India is required to investigate allegations of detention, disappearance and extra-judicial killings in Punjab. Under the ICCPR, the right to life is non-derogable as is the duty to investigate serious crimes. Thus, any argument by the Indian government of derogation from its duty to protect the victims or perform any investigations because of a public emergency, such as a national security threat, cannot be justified since the Indian government cannot derogate from its responsibility to protect life and perform investigations.[52] Furthermore, the ICCPR also mandates that a State party ensure that any person whose rights have been

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[49] We recognize that the rulings and policies of the different tribunals and commissions are mostly not binding on India *per se*, but that they portray a virtually universal consensus regarding the content of international law. We present the decisions of these bodies to demonstrate the depth of this consensus and to provide the NHRC with examples of how different institutions, such as the HRC, Inter-American Court, ECHR and various national commissions, in different contexts have honored these international obligations.

[50] *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, arts. 6(1), 7 9(1), 999 U.N.T.S. 171, 178 (entered into force Mar. 23, 1976), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm [hereinafter ICCPR].

[51] India Const., *supra* note 39, at art. 21.

[52] ICCPR, *supra* note 50, at arts. 4, 4(2).

violated be given an effective remedy, notwithstanding the official capacity of the violator.[53] Consequently, the government of India must not only investigate all the allegation of disappearances in Punjab, but also provide the victims with one or more effective remedies. The HRC, the adjudicatory body that receives complaints for violations of the ICCPR, has recognized that these investigations must be effective, impartial and thorough.

The United Nations Declaration *on the Protection of All Persons from Enforced Disappearances* and the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* reiterate the principle that no circumstances can justify the crime of forced disappearance. Similarly, the minimal evidence required by the Working Group on Enforced and Involuntary Disappearances further highlights the responsibility of States to investigate all allegations of disappearances.

In the Inter-American system, the duty to investigate disappearances is codified through the rights to personal liberty and security (Article 7), humane treatment (Article 5), and life (Article 4), which are guaranteed to all persons in the American Convention on Human Rights.[54] Article 7 of the Inter-American Convention on Forced Disappearance of Persons, ratified by 10 of the 16 states in the Organization of American States, also states that there shall be no statute of limitations on the criminal prosecution and punishment of perpetrators of forced disappearances.[55] The Inter-American Court of Human Rights ("Inter-American Court"), has also recognized the necessity of an effective, impartial and thorough investigation. The Inter-American Court has found that

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[53] *Id.* at art. 2(3).
[54] American Convention on Human Rights, Nov. 22, 1969, arts. 4, 5, 7 (entered into force July 18, 1978), *available at* http://www.oas.org/juridico/english/Treaties/b-32.htm.
[55] Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, art. 7 (entered into force Mar. 28, 1996), *available at* http://www.oas.org/juridico/english/Treaties/a-60.html.

when a State fails to comply with its duty to investigate disappearances, it may be held liable even if there is no direct evidence of involvement in the disappearance. These requirements have similarly been upheld by the European Court of Human Rights ("ECHR") in its interpretation of the rights to liberty (Article 5), humane treatment (Article 3) and life (Article 2) that are guaranteed in the European Convention on Human Rights.[56]

The formation of several national commissions to investigate the crime of forced disappearance in many countries that have experienced patterns of this abuse further highlights that the State of India is responsible for ensuring the adequate investigation of disappearances across Punjab according to international law and norms**.**

1. *The Human Rights Committee Recognizes the Responsibility of States to Investigate Forced Disappearances*

The HRC has formally recognized the responsibility of the State to investigate disappearances. In its decision in *Joaquín David Herrera Rubio et al. v. Colombia*, Communication No. 161/1983, U.N. Doc. CCPR/C/31/D/161/1983 (1987), the HRC noted that when there is reason to believe that the State bears responsibility for the disappearance and death of nationals, the State "should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life."[57] Again, in *María del Carmen Almeida de Quinteros, et al. v. Uruguay*,

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[56] European Convention on Human Rights, arts. 2, 3, 5, (entered into force 3 September 1953) *available at* http://www.hri.org/docs/ECHR50.html#Convention [hereinafter European Convention].

[57] *Joaquín David Herrera Rubio et al. v. Colombia*, Communication No. 161/1983, U.N. Doc. CCPR/C/31/D/161/1983 at ¶10.3 (1987), *available at* *http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/1333fa547f442b3dc1256abc0051*

Communication No. 107/1981, U.N. Doc. CCPR/C/19/D/107/1981 (1983), the HRC stated that:

> The Committee reiterates that it is implicit in Article 4(2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation[s] of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to the Committee the information available to it.[58]

This principle was reiterated in the case of *Mojica v. Dominican Republic*, Communication No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 (1994), in which the HRC found that under Article 2(3) of the Covenant, the State party was under an obligation to provide the author with an effective remedy. [59] The State was thus urged to investigate thoroughly the disappearance of Rafael Mojica, the alleged victim, to bring to justice those responsible for his disappearance, and to pay appropriate compensation to his family.[60]

In *José Vicente and Amado Villafañe Chaparro, Luís Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia*, Communication No. 612/1995, U.N. Doc. CCPR/C/60/D/612/1995 (1997), the HRC noted that the State has a duty to investigate alleged violations of human rights thoroughly, particularly enforced disappearances and violations of the right to life, and to

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63ec?OpenDocument. *See also Bautista de Arellana v. Colombia*, Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 at ¶8.3 (1995), *available at* http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/3a9eb3fc49aea4d68025670b003e78d1?OpenDocument (regarding the alleged disappearance of a supposed member of the terrorist M-19 group in Colombia).

[58] *Maria del Carmen Almeida de Quinteros, et al. v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/19/D/107/1981 at ¶11 (1983), *available at* http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/fdf2d0b8f0b02386c1256ab8002fa99b?OpenDocument&Highlight=0,quinteros.

[59] *Mojica v. Dominican Republic,* Communication No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 at ¶7 (1994), *available at* http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/510213ee6c3b84ab8025672700592383?OpenDocument&Highlight=0,mojica.

[60] *Id.*

criminally prosecute and punish those deemed responsible for such violations.[61] This duty applies *a fortiori* in those cases in which the perpetrators of such violations have been identified."[62] The Committee also noted in this case that "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies…in the event of particularly serious violations of human rights, especially when violation of the right to life is alleged…"[63] Thus, the State "has an obligation to ensure that Mr. José Vicente and Mr. Amado Villafañe and the families…shall have an effective remedy, which include a compensation for loss and injury…The State party also has an obligation to ensure that similar events do not occur in the future."[64]

In the case of *Rodríguez v. Uruguay,* Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 at ¶12.3 (1994), the HRC noted that because Article 2, paragraph 3(a) of the ICCPR clearly stipulates that each State party undertakes "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity," all allegations of torture must be fully investigated by the State.[65] The HRC also noted that national laws that exclude the possibility of investigation into past abuses and prevent the State from providing effective remedies to the victims help to develop a climate of impunity which may give rise to further human

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[61] *José Vicente and Amado Villafañe Chaparro, Luís Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v. Colombia,* Communication No. 612/1995, U.N. Doc. CCPR/C/60/D/612/1995 at ¶8.8 (1997), *available at* http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/55e04b863e6de76b80256715005428ab?OpenDocument&Highlight=0,vicente; *see also Bautista,* Communication No. 563/1993, at ¶8.6.

[62] *Id.*

[63] *José Vicente,* Communication No. 612/1995, at ¶ 8.2.

[64] *Id.* at ¶10.

[65] *Rodríguez v. Uruguay,* Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 at ¶12.3 (1994), *available at* http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/c6100f530629eae4802567230055 3422?OpenDocument&Highlight=0,322%2F1988.

rights violations.[66] While it may not be possible to establish that all the victims in Punjab were tortured, the crime of disappearance is so grave that the Indian Commission should apply these same principles.

2.The Declarations and Resolutions of the United Nations General Assembly and Human Rights Commission Demonstrate that International Law Demands that States Investigate All Allegations of Forced Disappearances

The Declaration on the Protection of All Persons from Enforced Disappearances codifies the principle that States must investigate all cases of disappearance. Under Article 2, no State is to practice, permit or tolerate the practice of enforced disappearances. In addition, States must ensure that the crime is a national offense and shall take effective legislative, administrative, judicial or any other measures to prevent and terminate the practice.[67] No circumstances, including a threat of war or an order by any public authority, may be used to justify the crime.[68] Thus, any argument on behalf of the Indian government or the Punjab police for its actions based on national security reasons cannot justify the crime of enforced disappearance. Article 14 provides that States should take "any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control."[69] Most importantly, the Declaration notes that a State should have a competent authority to investigate complaints regarding disappearances.[70] Article 17 of the Declaration notes that a disappearance is a continuing offence so long as the fate and whereabouts of the victim continue to be obscured and the

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[66] *Id.* at ¶12.4.
[67] Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (adopted Dec. 18, 1992), arts. 3-4, *available at* http://www1.umn.edu/humanrts/instree/h4dpaped.htm.
[68] *Id.* at art. 7.
[69] *Id.* at art. 14.
[70] *Id.* at art. 13.

facts of the case remain unclarified.[71] Thus, until the 2,097 cases before the Commission today are thoroughly investigated, as well as all of the other allegations of disappearances across Punjab, the crimes continue; as such, the government remains obligated to thoroughly investigate these allegations. The Declaration further notes that the statute of limitations should be suspended if remedies for cases of disappearance are ineffective.[72]

In 1985, The U.N. General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which called for States to enact and enforce legislation prohibiting acts that violate international human rights norms, to strengthen the means of investigating, prosecuting and sentencing perpetrators of violations, and providing recourse for victims where national channels are insufficient.[73] The Implementation Principles call on States to "conduct impartial investigations as soon as possible into all deaths and serious physical and mental injuries apparently caused by law enforcement, military…and other personnel."[74]

Due to the serious nature of the crime of enforced disappearance, the United Nations Working Group on Enforced or Involuntary Disappearances was formed in 1980, by Resolution 20 (XXXVI) on February 29, 1980, in which the Commission on Human Rights decided to "establish for a period of one year a working group consisting of five of its members, to serve as experts in their individual capacities, to examine questions relevant to enforced or involuntary disappearances of persons."[75] Since then, the mandate

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[71] *Id.* at art. 17.
[72] *Id.*
[73] *See* Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power , G.A. Res. 40/34, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (adopted November 29, 1985), *available at* www1.umn.edu.humanrts/instree/9dbpjv.htm.
[74] *See* Naomi Roht-Arriaza, *State Responsibility To Investigate and Prosecute Grave Human Rights Violations in International Law* in 78 Cal. L. Rev. 449, 498 (1990).
[75] *See* Working Group on Enforced or Involuntary Disappearances, Fact Sheet No.6 (Rev.2), *at* http://www.unhchr.ch/html/menu6/2/fs6.htm#admis.

and terms of reference of the Working Group have been renewed by the Commission and approved by the Economic and Social Council each year. Since 1986 this has been done biennially and, since 1992, on a three-yearly basis.[76]

The Working Group, operating on the principle that allegations of investigations must be investigated by the State, contacts the respective government, requesting it to carry out an investigation and to report on the results, based on minimal evidence.[77] Though the Working Group does not perform its own investigations, it accepts information from "all reliable sources," including NGOs, governments, intergovernmental organizations and individuals, implicitly acknowledging that it is the Government that will have more evidence in these cases and that it is the Government's duty to investigate allegations of disappearances, based simply on the claim of a family member or friend.[78]

Thus, the establishment and continuance of the Working Group and the General Assembly Declarations are further evidence that until the 2,097 cases before the NHRC today, as well as all of the other allegations of disappearances across Punjab are investigated thoroughly, the government of India, through its ongoing failure to investigate thoroughly and prosecute those responsible for the allegations of forced disappearances, is in violation of its international obligations.

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[76] *Id.*

[77] The only information required is the: (a) Full name of the missing person; (b) Date of disappearance, i.e. day, month and year of arrest or abduction or day, month and year when the missing person was last seen; (c) Place of arrest or abduction or where the missing person was last seen; (d) Parties presumed to have carried out the arrest or abduction or to hold the missing person in unacknowledged detention; and, (e) Steps taken to determine the fate or whereabouts of the missing person, or at least an indication that efforts to use domestic remedies were frustrated or otherwise inconclusive. *See id.*

[78] *Id.*

3. *The Inter-American System Mandates that States Investigate All Allegations of Forced Disappearances*

In the landmark *Velásquez Rodríguez* case, Inter-Am. Ct. H.R. Ser. C No. 4 (1988) (Judgment), the Inter-American Court established the duty of the State to investigate allegations of disappearances. In this case, the Inter-American Court found the Honduran government liable for violations of international human rights norms through its failure to produce evidence to rebut the allegations of its involvement both in the singular case of the disappearance of Velásquez as well as in the practice of disappearances generally.[79] This presumption, coupled with the facts of the Honduran government's failure to investigate the allegation, to compensate the victim's family, and to prosecute and punish the guilty, led the Inter-American Court to find a violation by the government of Honduras of the right to life under Article 4 of the American Convention on Human Rights, among others.[80] The Inter-American Court held that Article 1.1 of the American Convention, which requires that states ensure and respect human rights, must be read in conjunction with all of the enumerated rights so that any right that is violated automatically implies a violation by State parties.[81] The Court further held that an act which might not at first be imputable to the State, for instance, if it is the act of a private person, may still lead to State responsibility, not because of the act, but because of the failure of the State to prevent the violation or respond to it as required by the Convention.[82] Under Article 1.1, parties to the American Convention on Human Rights have an affirmative duty to take all necessary measures to ensure the free and full exercise of all the rights enumerated in the American Convention.[83] Consequently, the Inter-American Court in *Velásquez Rodríguez* held that the Honduran government could still be held liable even if there had been no direct evidence of its involvement because the government failed to comply with its duties to prevent, investigate, and prosecute disappearances.[84] The Inter-American Court in *Velásquez Rodríguez* held that:

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[79] The *Velásquez Rodríguez* Case, Inter-Am. Ct. H.R. Ser. C No. 4 at ¶148 (1988) (Judgment), *available at* http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html.
[80] *Id.* at ¶¶178, 194.
[81] *Id.* at ¶¶182, 186-88.
[82] *Id.* at ¶172.
[83] *Id.* at ¶161.
[84] *Id.* at ¶¶174, 176, 178, 182.

> [T]he State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If 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. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.[85]

The jurisprudence of the Inter-American Court thus illustrates that the State must investigate all allegations of disappearances. The State's failure to adequately investigate can lead to imputed State liability for the disappearance even if there is no direct evidence of the State's involvement in the underlying crime.

4. *The Jurisprudence of the European Court of Human Rights Affirms that States Have an Obligation to Investigate All Allegations of Forced Disappearances*

The European Court of Human Rights has found that States are under a positive duty to investigate disappearances. In arriving at this decision, the Court has relied on three provisions of the European Convention on Human Rights: Article 2 (right to life), Article 5 (right to personal liberty) and Article 13 (right to effective remedies). [86]

In *Çakici v. Turkey*, Application no. 23657/94 (1999)(Judgment), the ECHR held that the obligation under Article 2 to protect life is not limited to the prohibition of excessive use of force by agents of the State, but also extends to impose a positive obligation on States to protect the right to life. [87] The ECHR held that this obligation

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[85] *Id.* at ¶176.
[86] European Convention, *supra* note 54, at arts. 2, 5, 13.
[87] *Çakici v. Turkey*, Application no. 23657/94 at ¶86 (1999)(Judgment), *available at* http://www.echr.coe.int/Eng/Judgments.htm. Article 2 reads:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court 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 when it results from the use of force which is no more than absolutely necessary:
    - (a) in defence of any person from unlawful violence;

requires effective official investigation when individuals have been killed as a result of the use of force.[88] In *Ertak v. Turkey*, Application no. 20764/92 (2000)(Judgment), the ECHR referred to the procedural protection of the right to life inherent in Article 2 of the European Convention and held that this placed authorities under an obligation to subject the use of force to independent and public scrutiny capable of determining whether the use of force was or was not justified in a particular circumstance.[89]

In *Timurtaş v. Turkey*, Application no. 23531/94 (2000)(Judgment), the ECHR noted:

> [T]hat the obligation to protect life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", 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.[90]

The ECHR noted that the delay in starting an investigation, the inadequate questions put to witnesses and the manner in which relevant information had been ignored and denied together established that the government of Turkey had not met its obligation to conduct a thorough and effective investigation.[91] Thus, the investigation was deemed inadequate and in breach of the State's procedural obligation to protect the right to life.[92] Accordingly, the State had violated Article 2 of the Convention.[93] In *Taş v. Turkey*, Application no. 24396/94 (2000)(Judgment), the ECHR held that actions such

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- (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

[88] *Id.*
[89] *Ertak v. Turkey*, Application no. 20764/92 at ¶ 134 (2000)(Judgment), *available at* http://www.echr.coe.int/Eng/Judgments.htm.
[90] *Timurtaş v. Turkey*, Application no. 23531/94 at ¶87 (2000)(Judgment), *available at* http://www.echr.coe.int/Eng/Judgments.htm.
[91] *Id.* at ¶89.
[92] *Id*.
[93] *Id.*

as the failure to examine key witnesses, the delay in launching an investigation, and, most importantly, the failure of an independent institution to conduct the investigation, all called into question the validity of an investigation and constituted a breach of the State's duty to protect life and a violation of Article 2. [94] Similarly in *İ Bilgin*, Application no. 25659/94 (2001)(Judgment), the ECHR found an official inquiry inadequate and thus a violation of Article 2 where police impunity restricted the public prosecutor's ability to investigate.[95]

More recently, in *Orhan v. Turkey*, Application no. 25656/94 (2002)(Final Judgment), the ECHR laid down criteria to be met for an investigation to be effective. The ECHR emphasized that authorities must act on their own initiative once the matter has come to their attention and cannot leave the responsibility to conduct an investigation up to the relatives of the alleged victims.[96] The ECHR also stressed that the investigating institution must be independent.[97] It held that the investigation must be of the kind that is capable of leading to the identification and punishment of those responsible and, in addition, highlighted that the investigation must be prompt and expeditious.[98] Because these requirements were not met in the instant case, the State was liable.[99]

Article 5 of the European Convention on Human Rights guarantees the right to personal liberty and provides a set of substantive rights that is intended to ensure that the

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[94] *Taş v. Turkey*, Application no. 24396/94 at ¶¶68-72 (2000) (Judgment)(subject to editorial revision), *available at* www.ewchr.coe.int/Eng/Judgments.htm.
[95] *İrfan Bilgin v. Turkey*, Application no. 25659/94 at ¶¶142-45 (2001)(Judgment), *available at* http://www.echr.coe.int/Eng/Judgments/htm.
[96] *Orhan v. Turkey,* Application no. 25656/94 at ¶334 (2002)(Final Judgment), *available at* http://www.echr.coe.int/Eng/Judgments.htm.
[97] *Id.* at ¶335.
[98] *Id.* at ¶335-36.
[99] *Id.* at ¶348.

any deprivation of liberty must be subject to judicial scrutiny.[100] In *Tas,* the ECHR found that Article 5 requires "effective measures to be taken to safeguard against risk of disappearances and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since."[101] In *Çakici*, the ECHR held that, given their responsibility to account for individuals under their control, authorities are bound to conduct a prompt and effective investigation into any arguable claim that a person has been taken into custody and has not been seen since.[102] In *Timurtaş*, the ECHR found that the detention of the victim had not been recorded in any official document and that this enabled those responsible for the act of deprivation of liberty to escape accountability.[103] This holding was also followed in *Taş* and *Orhan,* cases in which the ECHR found that there were no official records regarding the custody of the victim.[104] In *Çiçek v. Turkey,* Application no. 25704/94 (2001)(Final Judgment), the ECHR, after emphasizing the duty of the State to conduct an effective investigation into disappearances, criticized the perfunctory manner in which the

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[100] Article 5 reads:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
    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 or in order to secure the fulfilment 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 of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
    d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
    e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
    f. 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.

[101] *Tas*, Application no. 24396/94, at ¶84.
[102] *Çakici*, Application no. 23657/94, at ¶104.
[103] *Timurtaş*, Application no. 23531/94, at ¶105.
[104] *Taş*, Application no. 24396/94, at ¶82.; *Orhan*, Application no. 25656/94, at ¶¶371-72.

investigation had been conducted by the public prosecutor, who refused to go beyond the statement of the security officials that the victims had not been taken into custody.[105] Consequently, the State's failure to offer any credible and substantiated explanations for the detainee's whereabouts after the detention meant the State had violated Article 5.[106]

Article 13 of the European Convention on Human Rights provides for an effective remedy before a national authority for the violation of the rights under the Convention.[107] In *Çakici*, the ECHR explained that the State was bound to conduct an investigation as part of its obligations under Article 13, given the fundamental character of the rights involved.[108] The notion of an effective remedy for purposes of Article 13 entails payment of compensation, a thorough and effective investigation, capable of leading to identification and punishment of those responsible and individual effective access for relatives to investigatory procedures.[109] Thus, Article 13 requires more than the Article 2 obligation on the State to conduct an effective investigation into a disappearance.[110] This rationale has been followed in several subsequent cases.[111] These decisions of the ECHR once again illustrate that under international law and norms, a State is responsible for the investigation of allegations of forced disappearances.

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[105] *Çiçek v. Turkey,* Application no. 25704/94 at ¶ 167 (2001)(Final Judgment), *available at* http://www.ewchr.coe.int/Eng/Judgments.htm.
[106] *Id.* at ¶¶168-69; *Orhan*, Application no. 25656/94, at ¶¶374-75; *Tas*, Application no. 24396/94, at ¶¶84-85, 87.
[107] Article 13 reads: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."
[108] *Çakici*, Application no. 23657/94, at ¶¶113-14.
[109] *Id.* at ¶178.
[110] *Id.*
[111] *See İ Bilgin*, Application no. 25659/94, at ¶¶156-58; *Çiçek*, Application no. 25704/94, at ¶¶178-81; *Orhan*, Application no. 25656/94, at ¶¶384, 396.

5. Various National Courts and Commissions Have Found that States Must Investigate Forced Disappearances

a. The Truth Commission and Courts of Chile Confirm that a State Must Investigate its Own Alleged Responsibility for Human Rights Violations, Such as Forced Disappearances

The government of Chile's actions with regard to the mass disappearances that occurred in the country demonstrates that the state has an affirmative obligation to investigate all cases of disappearance. With *Supreme Decree No. 355* of the Ministry of the Interior, Chilean President Patricio Aylwin Azócar set established the National Commission for Truth and Reconciliation ("NCTR"), on May 9, 1990.[112] The Commission's primary objective was to determine what had happened in every case in which human rights had been seriously violated.[113] The decree establishing the Commission refers to "acts in which the moral responsibility of the state is seen to be compromised as a result of actions by its agents or by persons in their service." [114] According to the Commission, it interpreted that phrase to mean:

> [T]he kind of responsibility which may rightly be attributable to the state due to acts committed by its agents (or by persons serving them) in compliance with policies or orders from state agencies, or due to actions carried out by such persons without specific policies or orders, provided that their actions were subsequently approved by state agencies or that the protection of, or inaction by, state agents allowed their behavior to go unpunished.[115]

While the Commission did not have the authority to conduct trials of the armed forces or police responsible for the acts of disappearances, it forwarded all incriminating

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[112] *Report of the Chilean National Commission on Truth and Reconciliation* at 13 (Phillip E. Berryman trans.) (1993)[hereinafter Chilean Truth Commission Report].
[113] *Id.* at 14.
[114] *Id.* at 33.
[115] *Id.*

evidence it had gathered to Chilean courts, in accordance with its founding decree.[116] Based on this information, some courts reactivated judicial investigations of disappearances and brought a number of political assassinations to trial.[117]

Recently, Chile again reaffirmed its commitment to investigate allegations of disappearances through the establishment of the Roundtable on June 13, 2000, a continuation of the Truth Commissions, which was enacted into legislation by n overwhelming majority.[118] When the Roundtable produced flawed information concerning the disappearances, the Supreme Court renewed the mandate of more than twenty "special judges" appointed to investigate, exclusively or with priority, the fate of hundreds of people who "disappeared" under military rule.[119] The Chilean Supreme Court thus acknowledged that the duty of the State to investigate should not simply be a formalistic requirement, but rather a substantive and comprehensive obligation.[120]

b. The Establishment of the Office of the Human Rights Ombudsman in El Salvador Demonstrates that States Have an Obligation to Investigate Forced Disappearances

The creation of the Office of the Human Rights Ombudsman, with the power to investigate all human rights violations, including disappearances, was an outgrowth of the Peace Accords in 1992.[121] Like the Truth Commission, this permanent human rights office is spread throughout the departments in the country, with no jurisdictional or

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[116] *See* José Zalaquett Daher, *Introduction to Report of the Chilean National Commission on Truth and Reconciliation*, at xxiii (Phillip E. Berryman trans.) (1993).
[117] *Id.*
[118] The National Corporation for Reparation and Reconciliation ("NCRR") was a successor organization to the NCTR. The Roundtable followed the NCRR. *See* Human Rights Watch, *World Report: Chile—Mesa de Dialogo* (2000), *available at* http://www.hrw.org/press/2000/07/mesa0720.htm.
[119] Human Rights Watch, *World Report: Chile* (2003), *available at* http://hrw.org/wr2k3/americas3.html.
[120] *Id.*
[121] La Asamblea Legislativa De La Republica De El Salvador, *Ley De La Procuraduría Para La Defensa De Los Derechos Humanos Decreto Nº 183,* arts. 24-39 (March 6, 1992) *available at* http://www.pddh.gob.sv/Leyregla.htm.

geographical restrictions on its operations.[122] Abuses must be investigated and upon sufficiently strong evidence, a certain level of compensation is recommended for the victim and the victim's family, and any legal proceedings that the Office believes should take place are instituted.[123] As part of its investigations, the Office is empowered to interview witnesses, carry out inspections of public places without previous warning, and demand the delivery of any documents or evidence that it needs as part of its investigations.[124] The establishment of this office, like the work of the Roundtable in Chile, indicates that the investigation of human rights violations is an ongoing obligation of States that must be taken seriously.

c. The Work of the Commission on Historical Clarification in Guatemala Confirms the Obligation of the State to Investigate Forced Disappearances

Emerging out of peace negotiations, the Historical Clarification Commission's ("CEH") mandate included "clarifying with full objectiveness, equity and impartiality, human rights violations and incidents of violence related to the armed confrontation that have caused suffering to the Guatemalan population."[125] The mandate also included an express provision for providing compensation to victims.[126] Because its primary goal and its legal obligation was to reveal the truth about the abuses that occurred, the Commission did not in any way limit its jurisdiction or impose geographical restrictions on the sources

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[122] *Id.* at arts. 24-25.
[123] *Id.* at art. 30.
[124] *Id.* at arts. 24-25.
[125] Commission for Historical Clarification, *Guatemala: Memory of Silence, Conclusions and Recommendations, available at* http://shr.aaas.org/guatemala/ceh/report/english/toc.html [hereinafter *Memory of Silence Conclusions and Recommendations*].
[126] *Id.* ("The CEH considers that truth, justice, reparation and forgiveness are the bases of the process of consolidation of peace and national reconciliation. Therefore, it is the responsibility of the Guatemalan State to design and promote a policy of reparation for the victims and their relatives. The primary objectives should be to dignify the victims, to guarantee that the human rights violations and acts of violence connected with the armed confrontation will not be repeated and to ensure respect for national and international standards of human rights.")

of testimony or evidence.[127] Seeking to facilitate the access of all Guatemalans to the CEH, the Commission established offices throughout the entire country – particularly in areas where the violence had been the most severe. Teams of investigators were mobile and traveled throughout the country to reach each of the offices.[128] Not satisfied with the extent of the investigation after the year it had been granted, the CEH requested an additional six months to complete its work.[129]

After the CEH closed its investigations, it transferred the responsibility of investigating human rights violations to the Human Rights Ombudsman, the chief prosecutor of a constitutionally mandated human rights commission which was charged with investigating all complaints of violations based on the rights granted to Guatemalans by their Constitution.[130] In addition, the Commission is mandated to make public all violations that are found and to advocate for judicial action or recourse for such violations. Similar to the CEH, the Ombudsman has offices throughout the country and illustrates the obligation of a State to investigate human rights violations.[131]

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[127] Informe de la CEH, *Guatemala: Memoria del Silencio* (June 1999), *available at* http://shr.aaas.org/guatemala/ceh/mds/spanish/toc.html, (conclusions and recommendations in English available at http://shr.aaas.org/guatemala/ceh/report/english/) [hereinafter *Memoria*]

[128] *Id.* at 33.

[129] *Id.* at Mandato y Procedeimiento, at 104-05.

[130] Constitución Política de la República de Guatemala, 1985 con reformas de 1993 arts. 274-275, *available at* http://www.georgetown.edu/pdba/Constitutions/Guate/guate93.html.

[131] *Id.* Unlike the CEH, the Commission has its origins in Article 275 of the Guatemalan Constitution. The rights guaranteed by the Guatemalan Constitution are therefore the same rights that are sought to be enforced by the Commission. Article 2 is perhaps the most critical in establishing state accountability for human rights violations, as it recognizes "the duty of the state to guarantee the citizens of Guatemala their life, liberty, justice, security, peace and self-development". Article 263 discusses the right to personal appearance – "Whoever is illegally imprisoned, detained, or restricted in their enjoyment of their personal freedom, threatened with its loss…even when the detention is grounded in the law, has the right to request immediate appearance before tribunals of justice, with the goal of guaranteeing or restoring their liberty." The article continues, "If the tribunal decrees that the person is illegally detained, the person will be freed in that time and place." Article 264 goes on to discuss the accountability of those who deny the detained these rights, stating that such individuals will be punished in accordance with the law. The Constitution therefore makes a strong statement about the responsibility of the state to guarantee the human rights of its citizens, to detain them lawfully, and to provide recourse for illegal state actions by mandating the investigation of human rights abuses.

d. The Mexican National Commission on Human Rights Holds that All Allegations of Forced Disappearances Must be Investigated in Order to Guarantee the Human Rights of Mexican Citizens

In accord with its recognition of a State's obligation to investigate and uncover the facts behind reported "disappearances," the Mexican National Commission ("CNDH") has instituted a Special Program on Disappearances.[132] Between the years 2000 and 2002, the Program has conducted nearly 3,000 investigations.[133] The Program has concluded over 300 cases on disappeared citizens.[134]

In its November 2001 report to Mexican President Vincente Fox, the CNDH noted that a failure to investigate disappearances constituted a violation of the State's duty to guarantee each person subject to its jurisdiction the inviolability of his or her rights.[135]

e. The Office of the Peruvian Ombudsman Has Recognized the State's Duty to Effectively Investigate Forced Disappearances

The Office of the Peruvian Ombudsman has recognized Peru's affirmative duty to investigate properly all reported cases of disappearances. In its official report, *The Forced Disappearance of Persons in Peru*, the National Ombudsman for Human Rights (Defensoria de Pueblo)("DDP") affirmed that "as a consequence of the obligation of States Party to guarantee the exercise of the rights recognized in the [American]

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[132] CNDH, *Informe de Actividades del 16 de noviembre de 1999 al 15 de noviembre de 2000,* at 76 (2001), *at* http://www.cndh.org.mx/Principal/document/infrec/informe%202000.pdf [hereinafter *Informe 2000*].
[133] *Id.* at 76-77. *See also* CNDH, *Informe de Actividades del 1 de enero al 31 de diciembre de 2002,* at 319 (2003), *at* http://www.cndh.org.mx/Principal/document/la_cndh/activid/2002/informe2002.pdf [hereinafter *Informe 2002*]; *See* CNDH, *Recomendacion 26/10, in Informe de Actividades del 16 de noviembre de 2000 al 31 de diciembre de 2001,* at 152 (2002), *at* www.cndh.org.mx/Principal/document/la_cndh/activid/2001/informe2001.pdf [hereinafter *Informe 2001*].
[134] *See Informe 2002*, *supra* note 133, at 321; *Informe 2001, supra* note 133, at 154; *Informe 2000, supra* note 132, at 80.
[135] *See Informe 2001, supra* note 133, at 217.

Convention [on Human Rights] there arises the duty on the part of the States to…investigate with absolute seriousness…the violation of such rights."[136] The DDP further emphasized that the State's duty to investigate is the counterpart to the right of victims to know the truth about the whereabouts of their family members despite the adoption of amnesty laws and the uncertainty of the whereabouts of the victim's body.[137] In accordance with its recognition of the State's duty to investigate, the DDP conducted oversight of the 5,525 investigations conducted by the Public Prosecutor's Office (Ministerio Público)("MP"), into cases of disappearances from 1983 to 1996. Finding that the investigations were insufficient to satisfy the State's duty to investigate, the DDP has called upon, *inter alia*, the President, the Legislature, the Ministry of Justice, and the MP to take the steps necessary to make the investigations of disappearances more efficient and more effective, which accords with the obligations under international law.[138]

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[136] DDP, Informe No. 55, *La Desaparición Forzada de Personas en el Perú: 1980-1996* at 34-35 (2002) (citing the *Velásquez-Rodríguez Case*, Inter-Am. Ct. H.R. Ser. C No. 4 at ¶177 (1988)[our translation], *at* http://www.ombudsman.gob.pe/modules/Downloads/Informes/desapar/informe55-1.pdf.

[137] *Id.* at 35.

[138] *Id.* at 251-55. Such steps would include the divulgation of archived materials relevant to the cases of disappearances, the criminalization of the act of destroying evidence relevant to disappearances, and the establishment of a Truth Commission to investigate further matters of disappearances.

II. THE NATIONAL HUMAN RIGHTS COMMISSION OF INDIA MUST CONSIDER CIRCUMSTANTIAL AND TESTIMONIAL EVIDENCE ADMISSIBLE AND RELEVANT IN ITS INVESTIGATIONS OF FORCED DISAPPEARANCES TO ENSURE THE FUNDAMENTAL RIGHTS GUARANTEED UNDER ARTICLE 32 OF THE INDIAN CONSTITUTION AND UNDER INTERNATIONAL LAW

A. The National Human Rights Commission of India Must Consider Circumstantial and Testimonial Evidence Admissible and Relevant in Its Investigations of Forced Disappearances to Ensure the Fundamental Rights Guaranteed Under Article 32 of the Indian Constitution

Since the NHRC is an agent of the Supreme Court in this matter, it is bound by the approach taken by the Supreme Court in handling cases arising under Article 32. In the case of *Bandhua Mukti Morcha vs. Union of India & Others***,** 1984(3) SCC 161, the Supreme Court stated:

> While interpreting Article 32, it must be borne in mind that our approach must be guided not by any verbal or formalistic canons of construction but by the paramount object and purpose for which this article has been enacted as a fundamental right in the Constitution.[139]

Again in the case of *M.C. Mehta vs. Union of India,* 1987(1) SCC 395, the Court observed:

> …It may now be taken as well settled that Article 32 does not merely confer power on this Court to issue a direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental, and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights. It is in realisation of this constitutional obligation that this Court has in the past innovated new methods and strategies for the purpose of securing enforcement of the fundamental rights…(*emphasis added*)[140]

The Supreme Court's articulations highlight that it is most concerned with fulfilling the purpose of Article 32, which is to "devise new methods and adopt new strategies for the purpose of making fundamental rights meaningful for the large masses

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[139] *Bandhua Mukti Morcha vs. Union of India & Others***,** 1984(3) SCC 161, 185-86.
[140] *M.C. Mehta vs. Union of India,* 1987(1) SCC 395, 405.

of people."[141] The Supreme Court further noted that Article 32 confers on the Supreme Court power to "enforce the fundamental rights in the widest terms" and that the framers of the Constitution did not intend for "procedural technicalities to stand in the way of enforcement of fundamental rights."[142] Thus, the Supreme Court found that the standard adversarial procedure need not be applied in cases under Article 32:

> The adversarial procedure with evidence led by either party and tested by cross-examination by the other party and the Judge playing a passive role has become part of our legal system because it is embodied in the Code of Civil Procedure and the Indian Evidence Act. But these statutes obviously have no application where a new jurisdiction is created in the Supreme Court for enforcement of a fundamental right.[143]

In its September 1998 order in the Punjab illegal cremations matter, the Supreme Court only explicitly referred to Sections 17 and 18 of the PHRA in reference to investigations of the allegations after announcing that the NHRC would not be constrained by any limiting provisions of the PHRA.[144] Under Section 17 of the Act, the NHRC has the ability to initiate an inquiry on its own into a complaint.[145] Under Section 18, it can recommend initiating proceedings for prosecution against concerned persons or recommend interim relief as necessary.[146] By referring to only these two sections, the Court established a floor, emphasizing that the NHRC should have the ability to conduct a proper investigation and hold violators liable. Read in conjunction with the requirements of Article 32, these provisions imply that the NHRC has the obligation to investigate all allegations of disappearances to enforce citizens' fundamental rights. In doing so, the NHRC is not limited by its parent statute nor the standard procedures or

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[141] *Bandhua,* 1984(3) SCC, at 189.
[142] *Id.* at 187.
[143] *Id.* at 188-89.
[144] Committee for Information and Initiative on Punjab*, supra* note 6, at 124.
[145] The Protection of Human Rights Act ¶17 (1993), *available at* http://nhrc.nic.in/hract.htm.
[146] *Id*. at ¶18.

rules of evidence. Indeed, as a body formulated to enforce international human rights standards, the NHRC is free, and indeed obligated, to follow international law, which allows for the admission and consideration of circumstantial evidence in its investigations to determine State liability for alleged forced disappearances.

B. International Law Requires that the National Human Rights Commission Apply More Flexible Criteria in its Decision to Accept and Weigh Evidence in Cases of Forced Disappearances

Given the grievous nature of the crime of forced disappearances and the fact that the evidence in these cases is often in the hands of the perpetrator of the crime, the State, various international tribunals have found that circumstantial evidence is admissible and relevant in cases of disappearances to determine State liability. These international, and other national bodies, have recognized that a more flexible admissibility standard must be employed. Thus, testimony that might otherwise be considered inadmissible in other situations is accepted, as is evidence such as newspaper clippings or human rights reports. Furthermore, these international bodies have consistently found that this evidence must be given due weight and can shift the burden to the State to refute the allegations against it. If the State cannot refute the allegations, it may be held liable. Applying these principles to the case at bar, the NHRC must consider the vast evidence collected by the CIIP. If the evidence is sufficient, the burden must shift to the State to rebut these allegations. If the State cannot effectively refute the allegations, it must be held liable.

1. The Human Rights Committee Admits a Broad Range of Evidence and Views this Evidence, When Unrefuted by the State, as Sufficient to Create a Presumption of State Liability in Cases of Forced Disappearances

Under the Optional Protocol to the International Covenant on Civil and Political Rights, states party to the Convention recognize the competence of the Human Rights Committee ("HRC") to receive individual complaints from victims of a violation by the State of any rights in the Covenant, including the various rights violated in cases of disappearances.[147] India is not a party to the Protocol and thus the complainants in this case could not bring their cases to the HRC. However, the decisions by the HRC under the Optional Protocol demonstrate what is required of a State in order for it to comply with its obligation under the ICCPR. The HRC's decisions indicate that testimonial and documentary evidence is admissible in cases of disappearances under international law. The HRC has found that where little direct evidence exists, testimonial evidence, received as written forms of statements of witnesses, is admissible. Furthermore, if the HRC accepts a communication alleging disappearance, which is often based on testimony, then the State *must* respond to the allegations. A State's failure to respond or rebut this evidence gives rise to a presumption that the State is either involved directly in the disappearance or is liable for failing to prevent or investigate the disappearance.

In *María del Carmen Almeida de Quinteros, et al. v. Uruguay,* the author of the complaint was the mother of the victim, Elena Quinteros. The mother alleged that her daughter had been arrested at her home by police officials and recaptured by military personnel when she attempted to escape near Venezuelan Embassy grounds in Montevideo.[148] In her complaint, the petitioner submitted testimony from a witness who

[147] ICCPR, *supra* note 50, at arts. 6(1), 9(1).
[148] *Quinteros,* Communication No. 107/1981, at ¶1.1, 1.2.

had been detained at the same center as the victim and recalled both hearing and seeing her.[149] The second testimony came from a witness who had taken refuge at the Venezuelan Embassy along with other individuals.[150] To supplement the testimony of the two witnesses, the author also enclosed an extract from a booklet entitled "Missing Uruguayan Women and Children," which indicated that the Ambassador of Uruguay to the UN Commission on Human Rights had told the petitioner her daughter had been a prisoner of the Uruguayan army.[151] Upon the State's failure to adequately respond to these allegations, the communication was deemed admissible.[152] The mother then also submitted three additional statements by both Venezuelan and Uruguayan officials which indicated that Elena Quinteros had been detained by Uruguayan officials.[153] After receiving this evidence, the HRC noted that:

> In cases where the author has submitted to the Committee allegations supported by substantial witness testimony, as in this case, and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.[154]

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[149] *Id.* at ¶1.5.
[150] *Id.* at ¶1.6.
[151] *Id*. at ¶1.4.
[152] *Id.* at ¶¶3, 5(a), (c), 8.
[153] These statements included: (i) a letter sent to the author in January 1977 by the Secretary-General of the Office of the Presidency of the Republic of Venezuela, in which he stated that the Government "will continue to press for the release of your daughter, Elena Quinteros Almeida" and expressed the desire that "in the end justice will be done and this wrong will be redressed;" (ii) a Declaration adopted by the Chamber of Deputies of Venezuela on April 26, 1978, which stated that "on 28 June 1976 last, the Uruguayan citizen, Elena Quinteros, was arrested by the Uruguayan police authorities when she was seeking diplomatic asylum in the Venezuelan Embassy at Montevideo", and that "... not only does this action constitute a flagrant violation of the right of asylum but, in addition, the Uruguayan police authorities assaulted two diplomatic representatives of our country, thus violating the most elementary rules of diplomatic immunity and international courtesy"; and (iii) statements made to the Working Group on Enforced or Involuntary Disappearances by the representative of Uruguay to the Commission on Human Rights on December 1, 1981, stating that "[t]he disappearance of Elena Quinteros has caused us considerable problems. It led to the severing of our relations with Venezuela. It gave rise to a controversy in the Uruguayan newspapers, some of which asked whether or not the Uruguayan authorities were implicated ..."*Id.* at ¶10.7.
[154] *Id.* at ¶11. *See also Hector Alfredo Romero v. Uruguay*, Communication No. 85/1981, U.N. Doc. CCPR/C/21/D/85/1981 at ¶12.3 (1984), *available at*

Based on this evidence and the State's repeated failure to sufficiently reply to the allegations, the HRC found the State responsible for the disappearance of Elena Quinteros and that it had an obligation to conduct a full investigation and to pay compensation.[155] The Committee also found that not only were the rights of the victim violated in this case, but the rights of her family as well (the mother of a disappeared daughter is also "a victim of the violations of the Covenant suffered by her daughter").[156]

In *Mojica v.The Dominican Republic*, the complainant alleged that the Dominican Republic military had been responsible for the disappearance of his son, Rafael Mojica, a dock worker in the port of Santo Domingo.[157] According to the father, witnesses had seen his son enter a taxi in which other, unidentified, men were traveling.[158] The author also contended that his son had received death threats from some military officers for his presumed Communist ties.[159] The Committee considered these allegations and found the communication admissible, noting the absence of cooperation on the part of the State.[160] The HRC, receiving no reply from the State, found that due weight had to be given to the author's allegations regarding violations of Rafael Mojica's rights to liberty and life to the extent they had been substantiated since the State had failed to investigate thoroughly the allegations and to make available the information at its disposal.[161] The HRC thus found that the circumstances of Mojica's disappearance, including the threats made against him, and the very nature of enforced disappearances, gave rise to an inference that

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http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/f043cd29b54a0a61c1256ab8004e2eba?OpenDocument&Highlight=0,romero (holding this applies in cases of detention).

[155] *Quinteros,* Communication No. 107/1981, at ¶¶6, 8.1, 9. 16.

[156] *Id.* at ¶14.

[157] *Mojica,* Communication No. 449/1991, at ¶2.1.

[158] *Id.*

[159] *Id.* at ¶2.2.

[160] *Id.* at ¶¶4.1, 4.3.

[161] *Id.* at ¶5.2.

he had been tortured or subjected to inhuman treatment, especially given that the State could not dispel this inference.[162] The Committee also observed that:

> [T]he State party has not denied that Rafael Mojica (a) has in fact disappeared and remains unaccounted for since the evening of 5 May 1990, and (b) that his disappearance was caused by individuals belonging to the Government's security forces. In the circumstances, the Committee finds that the right to life enshrined in article 6 has not been effectively protected by the Dominican Republic, especially considering that this is a case where the victim's life had previously been threatened by military officers. [163]

The State was thus in violation of Mojica's rights to liberty, humane treatment, and life under the ICCPR.[164] The HRC urged the State to investigate thoroughly the disappearance of Rafael Mojica, to bring to justice those responsible and to pay appropriate compensation to his family.[165]

In *Joaquín David Herrera Rubio et al. v. Colombia*, the complainant argued that his parents, José Herrera and Emma Rubio de Herrera, had been killed by Colombia security forces, after his father had already been beaten twice by Colombian armed forces and he himself had been kidnapped and tortured and told that his parents would be killed if he did not confess to being a guerrilla.[166] Based on these allegations, the HRC asked the State to furnish autopsy reports and reports of any inquiries undertaken with respect to the Herreras' deaths.[167] The State failed to respond on time and the communication was deemed admissible.[168] When asked to respond again, the State argued that the killings of Jose and Emma Herrera were duly investigated and no evidence had been

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[162] *Id.* at ¶5.7.
[163] *Id.* at ¶5.6.
[164] *Id.* at ¶6.
[165] *Id.* at ¶7.
[166] *Herrera Rubio,* Communication No. 161/1983, at ¶¶1.2, 1.5.
[167] *Id.* at ¶2.
[168] *Id.* at ¶¶3, 5(b).

found to hold military personnel liable.[169] The author refuted the State's arguments, pointing out that it was inconsistent for the State to argue that his parents were killed by a guerrilla group when his mother was a sympathizer with the guerrilla group and that the military department that killed his parents was part of a military counterinsurgency operation under which various crimes were committed.[170] The State again failed to respond adequately and the HRC found that though the government had determined that armed groups had been responsible, its failure to establish the identity of those responsible was inadequate in light of its obligation to investigate the disappearances thoroughly.[171] The HRC consequently held that the State had violated Article 6 of the Covenant in its failure to prevent the disappearances and its subsequent failure to investigate the deaths.[172]

In *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay*, Communication No. 30/1978, U.N. Doc. CCPR/C/OP/1 (1985) the author alleged that her father, Eduardo Bleier, had been arrested, held incommunicado in detention, subjected to cruel treatment and punishment and, as a result, died.[173] The HRC decided that this communication was admissible and requested the State to respond, based on the author's and Bleier's wife's assertions of irrefutable proof based on witness testimony.[174] The State's subsequent failure to address the substance of the allegations, in light of the detailed information provided by family members and eyewitness testimonies, led the HRC to find that Bleier

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[169] *Id.* at ¶6.1.
[170] *Id.* at ¶7.2.
[171] *Id.* at ¶10.3.
[172] *Id.* at ¶11.
[173] *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay*, Communication No. 30/1978 (1982), U.N. Doc. CCPR/C/15/D/30/1978 at 109 at ¶¶2.2-2.4 (1982), *available at* http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/c932c40a308bd292c1256ab5002a6fd0?OpenDocument&Highlight=0,bleier.
[174] *Id.* at ¶¶5, 6, 7.

was either still detained or dead.[175] In response to the State's argument that this decision was hastily made, The HRC noted the State had ignored its repeated requests for a thorough inquiry into the allegations and stated:

> With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit…that the State party has the duty to investigate in good faith all allegations of violation[s] of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to the Committee the information available to it.[176]

The HRC then articulated its position that the allegations of arrest and torture were indeed substantiated by: (i) the information, unexplained and substantially unrefuted by the State, that Eduardo Bleier's name was on a list of prisoners read out once a week at an army unit in Montevideo where his family delivered clothing for him, and (ii) by the testimony of other prisoners that saw him in Uruguayan detention centers and could testify that he had been subjected to severe torture while in detention.[177] The HRC thus found breaches of Bleier's rights to liberty and humane treatment by the State of Uruguay and voiced its concern that the ultimate breach of Bleier's right to life had also occurred and requested the State to reconsider its position.[178]

2. The Inter-American Court Applies Flexible Criteria in its Decisions to Admit and Weigh Evidence to Determine State Liability in Cases of Forced Disappearances

In its landmark opinion in the *Velásquez Rodríguez* Case, Inter-Am. Ct. H.R Ser. C No. 4 (1988) (Judgment), the Inter-American Court found that circumstantial evidence

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[175] *Id.* at ¶11.2.
[176] *Id.* at ¶¶12, 13.1-13.3.
[177] *Id.* at ¶13.4.
[178] *Id.* at ¶¶14-15.

is admissible in cases of disappearances. The Inter-American Court established that circumstantial evidence was probative in both establishing an individual case of disappearance and in linking that disappearance to a state practice of disappearance, which could then shift the burden onto the State to refute such allegations, or otherwise, be held presumptively liable.

a. *Velásquez Rodríguez* Establishes that if There is a Pattern of Systematic Disappearances and an Individual Disappearance Can Be Linked to this Pattern of Forced Disappearance, the State May Be Held Liable

According to the allegations in *Velásquez Rodríguez*, several heavily armed men in civilian clothing who were driving a white Ford vehicle without license plates kidnapped Angel Manfredo Velásquez Rodríguez in a parking lot in Tegucigalpa, Honduras.[179] The petitioners alleged that Velásquez's kidnappers were members of the National Office of Investigations and the Armed Forces of Honduras and that Velásquez and others were taken to a Public Security Forces Station and accused of "political crimes and subjected to harsh interrogation and cruel torture" after the abduction.[180] The petitioners further alleged that Velásquez was subsequently moved to the First Infantry Battalion where the interrogation continued.[181] Police and security forces, however, denied that Velásquez had ever been detained.[182]

In *Velásquez Rodríguez*, the Inter-American Court established that if evidence can show that a State has carried out a general practice of forced disappearances, and the same events underlie the petitioner's case, then the State will be found presumptively

[179] *Velásquez Rodríguez,* Inter-Am. Ct. H.R Ser. C No. 4 at ¶107.
[180] *Id*. at ¶ 3.
[181] *Id*.
[182] *Id*.

liable.[183] In this case, the Inter-American Court found that the Honduran government was responsible for between 100 and 150 cases of disappearances, all of which followed a pattern of targeting victims the State found dangerous to its own security.[184] It found that State agents forcibly kidnapped victims, often utilizing vehicles without official identification.[185] It found that the kidnappers often blindfolded the victims, taking them to secret detention centers where they interrogated and tortured them.[186] The Inter-American Court found that the victims were eventually killed and buried in secret cemeteries.[187] Afterwards, the authorities often denied any knowledge about the whereabouts of the victims or knowledge of the detentions in question.[188] The Inter-American Court further found that State authorities failed to prevent or even investigate these allegations or to punish those responsible.[189]

According to the Inter-American Court, Velásquez's kidnapping fell into this systematic pattern of disappearances.[190] The testimony of various individuals confirmed that he was a student involved in activities the authorities considered "dangerous," that his kidnapping had been carried out in broad daylight by men dressed in civilian clothes who utilized a vehicle without license plates, and that "there were the same type of denials by his captors and the Armed Forces, the same omissions of the latter and of the Government in investigating and revealing his whereabouts, and the same ineffectiveness of the courts" in taking appropriate steps to respond to criminal and *habeas corpus*

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[183] *Id*. at ¶126-39.
[184] *Id.* at ¶¶147(a), 147(d)(i).
[185] *Id*. at ¶147(b).
[186] *Id*. at ¶147(d)(iii).
[187] *Id*.
[188] *Id.* at ¶147(d)(iv).
[189] *Id.* at ¶147(d)(v).
[190] *Id.* at ¶147(g).

petitions.[191] Thus, the Inter-American Court found that the Honduran government carried out or tolerated a practice of disappearances, that Velásquez disappeared at the hands of or with the acquiescence of those officials within the framework of that practice, and that the Government of Honduras failed to guarantee the human rights affected by that practice.[192]

b. *Velásquez Rodríguez* Establishes that Circumstantial Evidence is Admissible and Can Shift the Burden of Proof to the State to Refute Allegations of Liability in Cases of Forced Disappearances

In *Velásquez Rodriguez*, the Inter-American Court allowed for wide reliance on circumstantial evidence to prove such allegations due to the inherent and unique difficulties in proving disappearances by direct evidence. [193] Recognizing that States often conceal relevant information, The Court stated **"**[w]hen the existence of such a policy or practice [of disappearances] 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 that an individual has been disappeared."[194] It further noted:

> 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.[195]

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[191] *Id.* at ¶¶147(g)(i)-(iii).
[192] *Id.* at ¶¶148.
[193] *Id.* at ¶130-131.
[194] *Id.* at ¶124.
[195] *Id.* at ¶131; *See also* The *Godínez Cruz* Case, Inter-Am. Ct. H.R. Ser. C No. 5 at ¶137 (1989)(Judgment) *available at* http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html.

The Inter-American Court thus held that "the State cannot rely on the defense that the complainant has failed to present [adequate] evidence when it cannot be obtained without the State's cooperation."[196]

In order to find a systematic practice of disappearances in *Velásquez Rodríguez*, the Court accepted the testimony of such various sources as other kidnapping victims, the President of the Committee for the Defense of Human Rights in Honduras, and a former member of the Honduran Armed Forces.[197] Additionally, it considered old newspaper clippings from the Honduran press.[198] The Court also heard testimony of the victim's sister, who stated that eyewitnesses had told her that her brother had been detained by armed men in civilian clothing.[199] The State objected to her testimony because she had an interest in the case, but the Court allowed her testimony to be heard and considered.[200] Upon the strength of such evidence, the Inter-American Court found that Velásquez's abduction was part of a pattern of disappearances occurring at the time.[201] In the actual case of *Velásquez Rodriguez*, though no eyewitness testimony was given, there was evidence from an ex-soldier and the victim's sister.[202] Nonetheless, the Court found that Velásquez'*s* abduction was part of the pattern of disappearances occurring at the time based on this evidence.[203] Thus, in *Velásquez Rodríguez*, the Inter-American Court established that in cases of disappearances, circumstantial evidence is not only admissible in determining State liability, but that it can be sufficient to shift the burden of proof to

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[196] *Velásquez Rodríguez,* Inter-Am. Ct. H.R Ser. C No. 4 at ¶135.
[197] *Id.* at ¶¶ 83, 96, 100.
[198] *Id.* at ¶106.
[199] *Id.* at ¶107.
[200] *Id.* at ¶¶ 110-11.
[201] *Id.* at ¶¶147-48; *See e.g.* Roht-Arriaza*, supra* note 74, at 470.
[202] Roht-Arriaza, *supra* note 74, at 470.
[203] *Velásquez Rodríguez,* Inter-Am. Ct. H.R Ser. C No. 4, at ¶148.

the State to refute allegations of liability. If the State cannot refute these allegations, it must be held presumptively liable.

c. Inter-American Jurisprudence Consistently Recognizes that a Broad Range of Evidence that is not Often Admissible in Other Contexts is Admissible in Cases of Forced Disappearances

In the case of *Godínez Cruz*, Inter-Am. Ct. H.R. Ser. C No. 5 (1989)(Judgment), heard at the same time as *Velásquez Rodríguez***,** the Court addressed the forced disappearance of a school teacher in Honduras.[204] In this case, the Court again noted that in cases of disappearances, it is the State that controls the means to verify acts occurring within its territory so that an investigatory body cannot exercise its power properly unless it has the cooperation of the State.[205] The Court explained:

> The Court must emphasize in this respect that, in cases of forced disappearances of human beings, circumstantial evidence on which a judicial presumption is base[d] is especially valid…This is evidence which is used in every judicial system and which may be the only means available, when human rights violations imply the use of State power for the destruction of direct evidence in a[n] attempt at total impunity or the crystalization of some sort of perfect crime, to meet the object and purpose of the American Convention and permit the Court to carry out effectively the functions that the Convention assigns it.[206]

The Court also noted that allegations of State liability can be proven by the State's elusive or ambiguous answers, which may be interpreted as an acknowledgement of the truth of the allegations, as long as the record or the law does not indicate the contrary, unlike in criminal law.[207]

The Court looked at evidence similar to that presented in *Velásquez Rodríguez*, including the testimony of lawyers, relatives of disappeared persons, former disappeared

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[204] *Godínez Cruz,* Inter-Am. Ct. H.R. Ser. C No. 5, at ¶3.
[205] *Id.* at ¶142.
[206] *Id.* at ¶155.
[207] *Id.* at ¶144.

persons, and newspaper clippings.[208] The State objected to the testimony of witnesses whom they argued were not impartial because of ideological reasons, family relations, nationality, or a desire to discredit the government of Honduras.[209] The State even insinuated that the testimony was disloyal to the nation. [210] Representatives of Honduras also relied on criminal records and pending charges as a basis for excluding witnesses.[211] The Court found that though some of the witnesses who were testifying had strong family ties to the victims, the fact that the State did not present any concrete evidence to show that the witnesses had not told the truth and instead relied on general statements regarding their alleged impartiality and incompetence was insufficient to rebut testimony which was fundamentally consistent with the testimony of other witnesses.[212] Furthermore, the Court held that having a criminal record or charges pending, in and of itself, was not enough to declare a witness incompetent to testify.[213]

In the end, none of the evidence received by the Court directly demonstrated that government agents had been responsible for the disappearance of Saul Godínez.[214] There was considerable circumstantial evidence with sufficient weight, however, to establish the individual presumption that the disappearance had been carried out within the pattern of abuses practiced by the State.[215] The entire defense of the government rested solely on the lack of direct proof of state involvement, but the Court found this was not sufficient to rebut the allegations.[216] Therefore, in this case as well, the Court found that the

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[208] *Id.* at ¶81.
[209] *Id.* at ¶148.
[210] *Id.*
[211] *Id.*
[212] *Id.* at ¶149.
[213] *Id.* at ¶151.
[214] *Id.* at ¶154(b).
[215] *Id.*
[216] *Id.* at ¶15(b)(vi).

government of Honduras had failed to guarantee the human rights of its citizens based on the presentation of circumstantial and testimonial evidence.[217]

In the *Caballero-Delgado and Santana* Case*,* Inter-Am. Ct. H.R. Ser. C No. 22 (1995)(Judgment), the Inter-American Court again considered circumstantial and testimonial evidence, including, hearsay evidence. In this case, it was alleged that Colombian military patrols had detained Isidro Caballero Delgado, and his companion, María del Carmen Santana, based on Caballero Delgado's involvement in a teacher's union.[218] The Court considered evidence which included copies of testimony from witnesses, newspaper clippings, diagrams, maps and reports.[219] The Court also considered the testimony from María Nodelia Parra Rodríguez, Caballero Delgado's common-law wife. The Court accepted her testimony that Caballero Delgado had received death threats by telephone, that he had been involved in other trade organizations, that she had met with other witnesses who had told her they had seen him detained, that she knew other witnesses who had been threatened, and that she knew other teachers who had been assassinated in the area.[220] The Court accepted the testimonies of various other witnesses, including hearsay testimony, regarding what they had learned from other eyewitnesses who had seen the victim being detained and denials by military personnel to the contrary.[221] The Court also accepted a report in which a military official admitted that he had been involved in the detention of Caballero Delgado and a report on human rights in Colombia that had been issued by the Colombian Attorney General.[222]

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[217] *Id.* at ¶156.
[218] The *Caballero-Delgado and Santana* Case*,* Inter-Am. Ct. H.R. Ser. C No. 22 at ¶3 (1995)(Judgment), *available at* http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html.
[219] *Id.* at ¶29.
[220] *Id.* at ¶34.
[221] *Id.* at ¶¶35-46.
[222] *Id.* at ¶47 (a), (d).

After evaluating such circumstantial and hearsay evidence, the Court found that there had been intense paramilitary activity going on in the region where the victims had been detained and that the detention and disappearances of the two victims were carried out by members of the Colombian army.[223]

In the *Castillo Páez* Case, Inter-Am. Ct. H.R. Ser. C No. 34 (1997)(Judgment), the Inter-American Court examined the disappearance of Ernesto Rafael Castillo Páez, who had been arrested by Peruvian police on the day they were attempting to capture members of The Shining Path for detonating explosives in Lima.[224] The Court permitted the testimony of the victim's father and the plaintiff's lawyer over Peru's objection that they had a direct interest in the case.[225] The Court also received testimony of individuals whose statements had been made anonymously and the testimony of individuals who had not been heard prior to that time.[226] Finding such evidence admissible, the Court noted:

> To that end, the Court repeats that the criteria used in evaluating the evidence before a human rights tribunal possesses special characteristics, since the determination of a State's international responsibility for violation of the rights of a human person bestows greater latitude in the evaluation of the testimony it has heard on the pertinent facts, in accordance with the rules of logic and on the basis of experience.[227] (citation omitted)

Having lost the admissibility argument, the State next argued that the eyewitness testimony could not be given credence since none of the witnesses knew the victim and could not identify which car he had been abducted in, when it should have been obvious since the license plate numbers were painted in big characters on the back of the cars.[228]

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[223] *Id.* at ¶53(a)-(b).
[224] The *Castillo Páez* Case, Inter-Am. Ct. H.R. Ser. C No. 34 at ¶¶43(a)-(c) (1997)(Judgment), *available at* http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html.
[225] *Id.* at ¶¶24, 26, 39.
[226] *Id.*
[227] *Id.* at ¶39.
[228] *Id.* at ¶50.

The State also presented evidence that the victim had not been arrested or detained.[229] The Court, however, gave weight to the testimony of the eyewitnesses who "agreed that two policemen wearing green uniforms and red berets, traveling in a white patrol vehicle, violently detained Ernesto Rafael Castillo Páez, identified by his appearance and his clothes, put him into the trunk of the vehicle and took him away to an unknown destination".[230] The Court held that such evidence helped to prove that Castillo Páez had been kidnapped by State officials and that any inconsistencies in testimonies was due to the condition of the witnesses and the time that had elapsed since the occurrence of the events.[231]

To then determine whether there had been a practice of disappearances in Peru, the Court admitted into evidence the testimony from an expert witness, newspaper clippings, and reports from both the United Nations and the National Human Rights Coordinator in Peru.[232] The Court found that this evidence was sufficiently compelling to conclude that there had been a general practice of disappearances in Peru at the time the victim disappeared.[233] Consequently, the Court found that the Peruvian government was responsible for the violation of Castillo Páez's right to life, despite its argument that this could not be proved in the absence of a body:

> The State's argument that the fact that there is no knowledge of a person's whereabouts does not mean that he has been deprived of his life, since "*the body in the crime ... would be missing,*" which it claims to be a requirement of contemporary criminal doctrine, is inadmissible. This reasoning is unsound since it would suffice for the perpetrators of a forced disappearance to hide or destroy a victim's body, which is frequent in such

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[229] *Id.* at ¶51-52.
[230] *Id.* at ¶53.
[231] *Id.* at ¶53-54.
[232] *Id.* at ¶42.
[233] *Id.*

> cases, for there to be total impunity for the criminals, who in these situations attempt to erase all traces of the disappearance.[234]

In the *Blake* case*,* Inter-Am. Ct. H.R. Ser. C No. 36 (1998) (Judgment), the Inter-American Court examined the alleged disappearance of an American journalist by civilian patrolmen of the State. The Court accepted the use of evidence, such as copies of witness statements, reports, documents, photographs, sketches, and video recordings of interviews.[235] The Court examined testimony from only four individuals: two of the victim's brothers, the testimony of a teacher who had investigated the victim's case, and the testimony of the Vice Consul at the United States Embassy in Guatemala.[236] The Court significantly noted that while none of the witnesses directly witnessed the victim's detention, disappearance and death, it was not necessary that they had done so in order to evaluate their testimony in a broad sense.[237] The Court noted:

> [I]n the exercise of its judicial functions and when ascertaining and weighing the evidence necessary to decide the cases before it, the Court may, in certain circumstances, make use of both circumstantial evidence and indications or presumptions on which to base its pronouncements when they lead to consistent conclusions as regards the facts of the case... (citation omitted).[238]

Thus, the Court deemed it possible for the disappearance of a specific individual to be demonstrated "by means of indirect and circumstantial testimonial evidence, when taken together with their logical inferences, and in the context of the widespread practice of disappearances."[239] As such, the Court gave probative value to the testimony of the four witnesses described above and the submission of the United Nations 1990 Report of

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[234] *Id.* at ¶73.
[235] *Blake,* Inter-Am. Ct. H.R. Ser. C No. 36, at ¶43.
[236] *Id.* at ¶31.
[237] *Id.* at ¶46.
[238] *Id.* at ¶47.
[239] *Id.* at ¶49.

Working Group on Enforced or Voluntary Disappearances to establish that there had been a general practice of forced disappearances in Guatemala at the time.[240] In doing so, the Inter-American Court not only accepted the Commission's use of circumstantial testimony, but weighed it and found that it was sufficient to hold the State of Guatemala liable for the forced disappearance of the victim.

In *Bámaca Velásquez,* Inter-Am. Ct. H.R. Ser. C No. 70 (2000) (Judgment), the Inter-American Court considered the case of Efrain Bámaca Velásquez, who allegedly disappeared after an encounter with the Guatemalan army. The Court yet again relied on presumptive and circumstantial evidence. The State of Guatemala first objected to the admission of newspaper articles as evidence, but the Court noted that though newspaper cuttings were not real documentary evidence, they could be taken into consideration when they covered well-known or public facts, or declarations of State officials, or when they corroborated what had already been established in other testimonies or documents.[241] As such, newspaper articles were probative evidence that could help to verify the truth of the case in conjunction with other evidence that had been presented.[242]

In this case, as in *Castillo Páez,* the State also objected to testimonial evidence that it alleged was self-interested, incompetent and contradictory. The State objected to the testimony of the victim's wife, who, it contended, had a financial interest in the case.[243] The Court found that this was not enough to invalidate her testimony.[244] The State also objected to the testimonies of two witnesses, Otoniel de la Roca Mendoza and

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[240] *Id.* at ¶¶48, 51.
[241] The *Bámaca Velásquez* Case, Inter-Am. Ct. H.R. Ser. C No. 70 at ¶107 (2000) (Judgment), *available at* http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html.
[242] *Id.*
[243] *Id.* at ¶114(d).
[244] *Id.* at ¶118.

Santiago Cabrera López, both of whom had been former Guatemalan guerrillas who had been captured by the military and were tortured for information concerning the guerrillas.[245] The State first objected, contending that the testimonies of these two witnesses were contradictory and inaccurate.[246] Next, the State argued that the testimony of Roca Mendoza was given in order to obtain political asylum while the testimony of López contained irregularities as to his position and function in the Guatemalan Army since it varied from what other witnesses had declared.[247] Thus, the State objected to the alleged lack of competence or impartiality of such witnesses, based on the testimonies of agents of the State.[248] The Court found that the testimonies of such State agents, who had a direct interest in the case, were not sufficient to invalidate Mendoza and Lopez's testimonies, noting that their account coincided fundamentally with other types of evidence.[249] The Court also noted that the testimonies of López and Mendoza were concordant while the testimonies of the agents of the State were mere denials or expressions of a lack of knowledge about the disappearance.[250] The Court thus gave the former testimonies probative value, noting their value as direct testimony:

> Taking this into account, the Court attributes a high probative value to testimonial evidence in proceedings of this type, that is, in the context and circumstances of cases of forced disappearance, with all the attendant difficulties, when, owing to the very nature of the crime, proof essentially takes the form of indirect and circumstantial evidence[251]

The Court went on to note:

> [F]orced disappearance 'frequently involves secret execution [of those detained], without trial, follow[ed] by concealment of the corpse in order

[245] *Id.* at Testimonial Evidence: (a), (h).
[246] *Id.* at ¶114(b)-(c).
[247] *Id.* at ¶114(a), (c).
[248] *Id.* at ¶115.
[249] *Id.*
[250] *Id.* at ¶116.
[251] *Id.* at ¶131. *See also Blake,* Inter-Am. Ct. H.R. Ser. C No. 36, at ¶51.

> to eliminate any material evidence of the crime and to ensure the impunity of those responsible.' Due to the nature of the phenomenon and its probative difficulties, the Court has established that if it has been proved that the State promotes or tolerates the practice of forced disappearance of persons, and the case of a specific person can be linked to this practice, either by circumstantial or indirect evidence, or both, or by pertinent logical inference, then this specific disappearance may be considered to have been proven.[252]

The Court thus found, based on circumstantial and direct evidence, that Bámaca Velásquez's disappearance was linked to a practice of disappearances carried out by the State and that the State was responsible for his disappearance.[253]

3. The European Court of Human Rights Permits the Inclusion of a Broad Range of Evidence and Permits that Evidence to Shift the Burden of Proof to the State to Refute Allegations of Forced Disappearances

In order to address the unique evidentiary problem in disappearance cases, the ECHR developed a new legal category, "presumption of death." The development of this legal category accords with the particular character of disappearances, in which the body of the alleged victim may not be located and specific evidence relating to the detention of the individual is largely within the control of the government. The Court developed the "presumption of death" doctrine to respond to the void created by the language of Article 2 of the European Convention which concerns only the *actual* loss of life, often impossible to prove in cases of disappearances. Once this presumption is established, there is an automatic violation of Article 2.

In assessing evidence in disappearance cases, the Court has adopted the standard of proof "beyond reasonable doubt." However, such proof may follow from:

> [T]he co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities,

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[252] *Bámaca Velásquez,* Inter-Am. Ct. H.R. Ser. C No. 70, at ¶130.
[253] *Id.* at ¶¶132-33.

> as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.[254] (citation omitted)

Like the Inter-American Court, the ECHR also allows circumstantial and testimonial evidence to meet this burden. Such evidence is admissible to weigh the factors that can determine State liability: when the victim has last been seen alive, whether considerable time has lapsed since then, and whether or not there has been a pattern of violation of human rights occurring in the State in question during that time. A State's lack of cooperation in sharing evidence or its failure to refute allegations of disappearances must also be weighed in determining State liability. Just as in *Velásquez Rodriguez*, the ECHR recognizes that it is relevant if a petitioner is able to show a link between the individual case and a general climate in which State authorities have carried out detentions and disappearances. Furthermore, such a link can be shown through circumstantial and testimonial evidence, shifting the burden of proof to the State to refute such allegations.

The acceptance and use of circumstantial and presumptive evidence to establish State liability in cases of disappearances has been established through a series of cases. In *Ertak v. Turkey*, the applicant alleged that the Government had stopped his son, Mehmet Ertak, a coal miner, at a security checkpoint and had taken him into custody, never to be seen again by the applicant.[255] The government argued that Ertak had never been detained by security forces.[256] The Commission gathered written evidence presented

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[254] *Anguelova v. Bulgaria*, Application no. 38361/97 at ¶111 (2002)(Final Judgment), *available at* www.ewchr.coe.int/Eng/Judgments.htm.
[255] *Id.* at ¶¶ 14-15.
[256] *Id.* at ¶25.

before the Court, including: a complaint lodged by the applicant with a public prosecutor, the ruling by the public prosecutor that he did not have jurisdiction in the case, and documents concerning official investigations.[257] The Commission also heard testimony from several individuals.[258] The Court upheld the Commission's findings of fact and noted that very strong inferences could be drawn from the evidence given by: (1) Süleyman Ertak, the victim's cousin who had been present when the victim had allegedly been arrested by State agents; (2) Mustafa Malay, the Şırnak provincial governor who acknowledged that he had met people in his office who said that they had seen Mehmet Ertak while they were in police custody; and (3) Abdurrahim Demir, a lawyer who had been held in detention with the victim and testified to the ill-treatment of the victim and likely death at the hands of State agents.[259]

The Government argued that any findings which relied on the "inconsistent, manifestly ill-founded and contradictory statements" by Süleyman Ertak and Abdurrahim Demir should not be given credence.[260] The government further argued that the Commission had only considered evidence from certain witnesses. [261] It contended that the Court should examine all the statements obtained at the hearings and give weight to the testimony of an investigating officer who had previously found that the complaints were ill-founded after considering the same evidence given by the four witnesses mentioned in the petition.[262] The Court found that there was sufficient evidence to show that after Ertak had been arrested, he had been ill treated and subsequently died in the

[257] *Id.* at ¶¶ 27-32.
[258] *Id.* at ¶¶ 34-79.
[259] *Id.* at ¶¶ 113, 131.
[260] *Id.* at ¶127.
[261] *Id.*
[262] *Id.*

hands of security forces.[263] Thus, despite the government's contentions of contradictory and insufficient evidence, the Court found that the witnesses for the petitioner were credible and that the State of Turkey was liable for the death of Ertak.[264]

In *Timurtaş v. Turkey*, a father filed a petition against the government of Turkey for the disappearance of his son, Abdulvahap Timurta*ş*, who he alleged had been apprehended by Turkish soldiers.[265] In support of his allegations, the father submitted statements he made to the Human Rights Association in Diyarbarkir and to the public prosecutor in Silopi.[266] Looking at this case, the European Commission of Human Rights also considered statements taken by a public prosecutor of members of the villages near where the applicant's son had been kidnapped, a photocopy of an operation report establishing that the applicant's son had been detained and found to be a leader of a rebel group, and custody records which did not include the victim's name.[267] The Commission then requested the government to find the original operation report and submit other relevant custody ledgers, but the Government argued that the photocopy of the operation report was not authentic and that the original report with the same number was classified as secret and thus did not submit the original nor the copies of the additional custody entries.[268]

Given the contradictory evidence, the Commission had conducted an investigation in which it accepted documentary evidence, including written statements and oral evidence taken from six witnesses.[269] In its assessment of the evidence, the ECHR noted

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[263] *Id.* at ¶131.
[264] *Id.* at ¶133.
[265] *Timurtaş,* Application no. 23531/94, at ¶¶ 9, 15.
[266] *Id.* at ¶23.
[267] *Id.* at ¶¶24-29.
[268] *Id.* at ¶¶28-29.
[269] *Id.* at ¶39.

that there were contradictory and conflicting factual accounts of events and that the Commission was faced with a difficult task of determining events in the absence of potentially significant evidence because only six of the eleven witnesses appeared before the Commission.[270] However, because the applicant had provided some evidence supporting his claims and because the State had not presented evidence either disproving the applicant's claims or the authenticity of the operation report, the Commission had found that Abdulvahap had been detained by security forces.[271] The Court accepted this and dismissed the Government's argument that the operation report was inauthentic, holding that it was insufficient for the Government to rely on the allegedly "secret nature of that document."[272] Thus, the Court could draw an inference from the State's failure to produce the original document without a satisfactory explanation, emphasizing that:

> [C]onvention proceedings do not in all cases lend themselves to rigorous application of the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation)…It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent State has access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information as is in their hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations…but may also give rise to the drawing of inferences as to the well-foundedness of the allegations. In this respect, the Court reiterates that the conduct of the parties may be taken into account when evidence is being obtained.[273] (citation omitted)

This principle was also followed in *Orhan v. Turkey*, a case in which the ECHR held that the conduct of the parties when evidence is being obtained would also be considered and that adverse inferences could be drawn from a lack of cooperation by the

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[270] *Id.* at ¶40.
[271] *Id.* at ¶45.
[272] *Id.* at ¶67.
[273] *Id.* at ¶¶66-67.

State authorities. [274] In *Orhan,* the government's negligence in producing material witnesses and relevant documents was found to be significant enough to draw positive inferences about the petitioner's allegations.[275]

Again, in the case of *Timurtaş*, the Court noted that whether or not there had been a violation of the alleged victim's right to life, in the absence of a body, depended on the existence of sufficient circumstantial evidence to presume that the detained person had died in custody.[276] The Court then noted that the passage of time is a relevant factor in making this determination:

> The 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. In this respect the Court considers that this situation gives rise to issues which go beyond a mere irregular detention in violation of Article 5. Such an interpretation is in keeping with the effective protection of the right to life as afforded by Article 2, which ranks as one of the most fundamental provisions in the Convention.[277] (citation omitted)

The Court subsequently found that the victim could be presumed dead and held the State liable, citing the following factors: the passage of six and a half years, the fact that the victim had been wanted by the authorities for alleged rebel activities, the nature of the situation in the area, the credibility of the application, and the concealment of the operation report.[278]

In the case of *İ Bilgin v. Turkey*, the applicant alleged that his son, Kenan Bilgin had been arrested by government officials at a taxi rank.[279] The government stated that while Bilgin had been known to be a part of the Communist party, he had been neither

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[274] *Orhan*, Application no. 25656/94, at ¶266.
[275] *Id.* at ¶274.
[276] *Id.* at ¶82.
[277] *Id.* at ¶83.
[278] *Id.* at ¶¶84-86.
[279] *İ Bilgin*, Application no. 25659/94, at ¶8.

detained nor wanted by the State.[280] In this case, the ECHR received evidence from: the applicant (the victim's brother), eleven people who had been in custody at the relevant time at the Ankara Security Directorate and who alleged that they had met the victim there and had witnessed his ill-treatment, two public prosecutors who investigated the case, a deputy director at the Ankara Security Directorate and a police officer from the anti-terrorist branch at the Ankara Security Directorate.[281] The Court looked at these various written and oral statements from the eleven witnesses, prior petitions lodged by the applicant, documents relating to the investigation by the Ankara Public Prosecutor, the findings of the Delegates of the Commission on their visit to the Ankara Security Directorate, and the custody records.[282] In its assessment, the Court noted that the "co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact and, in addition, the conduct of the parties when evidence is being obtained may be taken into account."[283] These similar presumptions concerning government actions taken against left wing groups and the disappearance of Bilgin were found to exist from the consistent written statements and oral statements of the eleven eyewitnesses.[284] Furthermore, the Court noted that that the police officers' statements were mere categorical denials and did not provide adequate explanations for all the eyewitnesses' accounts.[285] Consequently, the Court found that Kenan Bilgin had been held in detention by State security forces.[286]

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[280] *Id.* at ¶18.
[281] *Id.* at ¶7.
[282] *Id.* at ¶¶19-110.
[283] *Id.* at ¶122.
[284] *Id.* at ¶¶125-127.
[285] *Id.* at ¶129.
[286] *Id.* at ¶131.

To answer the question of whether or not there had been a violation of the victim's right to life, the Court noted that there was an obligation on the State to account for the whereabouts of any person taken into detention who is placed under the control of the authorities. [287] It then noted that, in the absence of a body, it is necessary to see if there is sufficient circumstantial evidence, to conclude that a detained person should be presumed to have died while in custody.[288] In this case, the passage of six and a half years of time affected the weight to be attached to other elements of circumstantial evidence presented. Citing the strong inferences that could be drawn from the testimony of the eyewitnesses, including the State's refusal to furnish a list of police officers on duty at the material time, the general status of criminal law protection in south-east Turkey, and the State's lack of any explanation as to what happened to the victim, the Court found Turkey liable for the disappearance of Kenan Bilgin.[289]

In *Çiçek v. Turkey*, the petitioner alleged that the State of Turkey was responsible for the disappearance of her two sons, Tahsin and Ali İhsan Çiçek, and her grandson, Çayan Çiçek during a military operation carried out by the government.[290] The government denied that the operation had taken place and that it had ever detained the alleged victims.[291] In holding the State liable, the Court gave weight to the credible and consistent testimony on behalf of the petitioner and discounted the State's reliance on custody records and testimony that was not credible.[292] Again, the Court concluded that the State was liable, citing the passage of six and a half years since the victims were first

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[287] *Id.* at ¶138.
[288] *Id.*
[289] *Id.* at ¶¶137-141.
[290] *Çiçek,* Application no. 25704/94, at ¶¶ 10-18.
[291] *Id.* at ¶19.
[292] *Id.* at ¶¶19, 127-28, 137.

apprehended and detained and the fact that the two brothers were taken to a place of detention by agents of the State and were not released with the other villagers, indicating that they were under suspicion by the authorities.[293] The Court also cited the fact that there had been a general practice of detention and disappearance in this area at the time:

> In the general context of the situation in south-east Turkey in 1994, it can by no means be excluded that the unacknowledged detention of such a person would be life-threatening. It is to be recalled that the Court has held in earlier judgments that defects undermining the effectiveness of criminal law protection in the south-east during the period relevant also to this case, permitted or fostered a lack of accountability of members of the security forces for their actions (citations omitted).[294]

Since there was no evidence as to the whereabouts of the two brothers and no satisfactory explanation to the contrary by State authorities, the Court held that they must be presumed dead at the hands of State agents and that the State was liable for their deaths.[295] The ECHR used this lack of accountability of security forces and the prevalence of widespread abuses as bases for evidence of State responsibility in later disappearance cases as well.[296]

4. Various National Commissions Have Applied a Relaxed Evidentiary Standard in their Decisions to Admit and Weigh Evidence in Investigations of Forced Disappearances

a. The South African Truth and Reconciliation Commission Endorsed the Admission and Active Collection of a Broad Range of Evidence in its Investigations of Human Rights Violations

The South African government established the South African Truth and Reconciliation Commission ("TRC") in 1995 under *The Promotion of National Unity and Reconciliation Bill, No. 30 of 1995* to investigate allegations of human rights abuses,

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[293] *Id.* at ¶146.
[294] *Id.*
[295] *Id.* at ¶147.
[296] *See Tas*, Application no. 24396/94, at ¶66; *see also Akdeniz and Others v. Turkey*, Application no. 23954/94 at ¶88 (Judgment)(2001), *available at* http://www.echr.coe.int/Eng/Judgments.htm.

including disappearances, that occurred during Apartheid and to review applications for amnesty submitted by perpetrators of human rights violations. The TRC's principle function was to devise procedures for reparation for those whom it determined had been victims of gross human rights violations committed by state and non-state actors within and outside of South Africa between 1960 and 1994. The post-Apartheid government recognized that this was a moral and legal duty.[297] The TRC obtained its legal authority to grant reparations from its mandate, which stated it should "tak[e] measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights." [298] South Africa was thus obligated to compensate victims as a signatory to several international treaties that recognize the right to reparation for victims of gross human rights violations.[299] Though disappearance was not the most common form of human rights abuse under the South African Apartheid regime, several families of disappeared victims received reparations from the TRC. Reparations were based on statements made by family members in depositions, public hearings, as well as the corroborative evidence discussed below.

Sensitive to the lack of official documentation of the disappearances and other human rights abuses committed under Apartheid, the South African Commission actively sought to allow in a wide variety of evidence to establish whether an applicant for reparation was a victim of a gross human rights violation. The TRC promoted the

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[297] Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission Report* vol.1 at 29 (1998) [hereinafter Truth and Reconciliation vol. 1].
[298] Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission Report* vol. 5 at ch. 5 (1998), *available at* http://www.news24.com/Content_Display/TRC_Report/5cp5.htm [hereinafter Truth and Reconciliation vol. 5].
[299] *Id.* at 170-71. South Africa is a signatory to the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and the Inter-American Conventions on Human Rights which the TRC report cites mandate state compensation of victims of gross human rights violations.

gathering and receiving of information and evidence, which established the identity of victims, their fate or present whereabouts, and the nature and extent of the harm they suffered, from any person, including persons claiming to be victims of such violations or the representatives of such victims.[300] The TRC also collected evidence and articles relating to gross violations of human rights "from any [community] organization, commission or person."[301] In a report, *Justice in Transition*, the Commission noted the perpetrators' reluctance to disclose abuses they had committed and the state's concealment and destruction of documents substantiating these abuses: "articles have been destroyed … in order to conceal violations of human rights or acts associated with a political objective."[302] As such, the Commission re-affirmed its obligation to seek out and use evidence from all quarters.[303] Granting applicants an opportunity to relate their own accounts of the violations and recommending reparation measures with respect to personal testimonies helped to establish and make known the whereabouts of victims and to restore their dignity.[304]

The Commission had the responsibility to create a record that gave a full picture of human rights violations in South Africa under Apartheid. It oversaw the collection of statements from victims of human rights violations, conducted public hearings at which individual victims were invited to testify about their experiences, and held investigative hearings at which people were subpoenaed to appear for questioning by lawyers and the

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[300] Truth and Reconciliation Commission of South Africa, *A Summary of Reparation and Rehabilitation Policy, Including Proposals to be Considered by the President* at Question 4.1, *available at* http://www.doj.gov.za/trc/reparations/summary.htm#who.
[301] Truth and Reconciliation Commission of South Africa, *Justice in Transition: Explaining the Role of the TRC, available at* http://www.doj.gov.za/trc/legal/justice.htm.
[302] *Id.*
[303] *Id.*
[304] *Id.*

Commission.[305] Once it had recorded victims' statements, the TRC initiated an investigative process to seek corroborative evidence to substantiate the statements it received. Often, documentary evidence (court records, police occurrence books, inquest records, prison registers, hospital or other medical records) was unavailable: "all too often…either the normal passage of time or deliberate concealment had led to [such documents] being destroyed." [306] In such cases, the investigative team tracked down the deponent or other witnesses for further statements and recommend findings based on whether the "details of date, place, event and perpetrators were sufficiently accurate and consonant with known incidents to allow a finding to be made on a balance of probabilities."[307] Corroborative material and background research provided the Commissioners with the additional information they needed to make their findings, establishing whether the allegations in the statements were, on balance of probability, true.[308] Thus, the South African TRC adopted the 'balance of probability' standard in such cases to determine liability.

b. The National Commission on Disappeared People and the Argentine Judiciary Have Admitted and Actively Sought a Broad Range of Evidence in their Investigations of Forced Disappearances

Following a coup in 1976, Argentina's armed forces kidnapped, tortured, and killed thousands of individuals. Security forces forcibly disappeared at least 8,960 individuals.[309]

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[305] Truth and Reconciliation vol. 5, *supra* note 298, at 8.
[306] *Id.* at 10.
[307] *Id.*
[308] Truth and Reconciliation vol. 1, *supra* note 297, at 142.
[309] CONADEP, *Nunca Más – Informe de la CONADEP, Conclusions (*1984), *available at* http://www.nuncamas.org/investig/investig.htm.

On December 15, 1983, the National Commission on Disappeared People ("CONADEP") was established to clarify events relating to the disappearance of persons in Argentina and to investigate their fates or whereabouts[310]. The Commission received depositions and evidence concerning these events and submitted that information to courts, as appropriate. The courts that received material from the Commission's investigations would thereupon determine responsibility and try the guilty parties.

The Commission declared testimonial evidence valid, especially in situations where evidence was destroyed deliberately.[311] Testimonial evidence was deemed a useful tool when dealing with crimes, such as forced disappearances, in which evidence was difficult to obtain. CONADEP accepted testimony from individuals who had been kidnapped and tortured by the military as well as testimonial accounts from bishops and priests in its investigations of complaints it had received from family members whose relatives had been arrested, kidnapped, or disappeared. [312] CONADEP also considered testimony from prisoners, testimony from people who were forced to participate in the torture and kidnapping of victims, testimony from family and friends, and anonymous testimony. In addition, news and press clippings were found to be admissible.[313]

Currently, there are various trials throughout Argentina, and the judiciary itself has been engaged in active investigations of disappearances in accordance with international standards and practices. [314] Individually, the Federal Court of La Plata has considered more than 2,000 cases of disappearances, including many new ones that were

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[310] Decree No. 187, dated December 15, 1983.
[311] Causa 13, *Juicio a la Juntas Militares-Introducción* (1985), *available at* http://www.nuncamas.org/juicios/juicios.htm.
[312] *Id.*
[313] *Id.*
[314] For more information on the Argentine truth trials, *see* http://www.nuncamas.org/juicios.

not included in the CONADEP report.[315] In three years of hearings, the court has questioned nearly 400 people. These witnesses have included relatives, friends, and associates of victims, former and active military and police officers, priests and army chaplains, and doctors who signed death certificates for unidentified victims. The court's judges have personally inspected police archives in addition to the archives at the La Plata police stations, sites of former secret detention centers, and cemeteries.[316]

c. The National Commission on Truth and Reconciliation of Chile Permitted and Actively Sought the Inclusion of a Broad Range of Evidence in its Investigations to Establish State Liability in Cases of Forced Disappearances

In 1973, a dictatorial military regime led by Augusto Pinochet overthrew democratically-elected President Salvador Allende and ruled until 1990. On May 9, 1990, the newly elected President of the Republic created the NCTR by decree.[317] The Commission's purpose was to help the nation come to a clear overall understanding of the most serious human rights violations committed during the Pinochet years in order to aid in the reconciliation of all Chileans.[318] This Commission was charged with four tasks:

a) To establish as complete a picture as possible of those grave events, as well as their antecedents and circumstances;
b) To gather evidence that might make it possible to identify the victims by name and determine their fates or whereabouts;

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[315] *See* Human Rights Watch, *Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators"* Ch. IV (Dec. 12, 2001), *available at http://*www.hrw.org.
[316] *Id.*
[317] The NCTR was established by Supreme Decree No. 355 of the Ministry of the Interior in the *Diario Official*.
[318] Chilean Truth Commission Report, *supra* note 112, at 13.

c) To recommend such measures of reparation and the restoration of people's good name as it regarded as just; and

d) To recommend the legal and administrative measures, which in its judgment should be adopted, in order to prevent further grave human rights violations from being committed. [319]

The government established the NCTR to investigate the cases of disappearances and other gross violations of human rights committed during the military regime of 1973-1990 and invited family members of victims to register their cases for documentation.[320] In addition to basic information about what had happened, the families provided the Commission with names of agencies or organizations that had already made some inquiry into the case.[321] The Commission then obtained evidence from these organizations, as well as copies of initial court records, to start a file on each case received.[322] The Commission then conducted an interview session with family members who could give "any evidence that might serve to advance the investigation, such as the names of witnesses, and any information concerning proceedings initiated in the courts, human

[319] *Id.*
[320] *Id.* at 15.
[321] *Id.* The Commission received information, evidence, and testimony from the various branches of the armed forces and from the police as well as from other organized groups, such as business, labor, and professional organizations, which had gathered evidence of such violations. Thus seven professional associations, the army, the navy, the air force, the police, the investigative police, the Socialist party, the Communist party, the MIR (Revolutionary Left Movement), the Vicariate of Solidarity, the Chilean Human Rights Commission, FASIC (Christian Churches Foundation for Social Welfare), CODEPU (Commission for the Rights of the People), the Pastoral Office for Human Rights of the Eighth Region, the Sebastian Acevedo Movement Against Torture, CORPAZ (the National Corporation to Defend Peace), FRENAO (National Front of Independent Organizations), the Group of Relatives of those Arrested and Disappeared, the Group of Family Members of those Executed for Political Reasons, the CUT (Unified Labor Federation), and the National Commission of the Organization of Democratic Neighbors all brought their lists of victims to the Commission.
[322] *Id.*

rights organizations, and other agencies."[323] The Commission utilized this information to ascertain the truth about what happened in these cases, and also as a basis for devising policies for making reparations.[324]

After conducting interviews and obtaining materials from human rights organizations and victims' families, the Commission took additional steps to obtain new evidence and substantiate the accounts already received. For the disappearance cases, the Commission requested birth and death certificates from the Civil Registrar's Office, in case a death might have been registered without the family's knowledge.[325] The NCTR questioned international police and the Electoral Register to see if victims might have left the country or registered in some manner during the time period in which they were thought to have disappeared.[326] The NCTR further consulted The National Archives, the General Comptroller's Office, the Chilean Police and hospitals for any information they might have.[327] The Commission made more than 2,000 formal informational requests and received responses in approximately 80% of the cases.[328] In addition, for almost every case in which the evidence and information obtained made it possible to determine that a particular person had been involved, the Commission requested that the person give testimony to find out his or her version of the events.[329]

In its investigations of all cases, the Commission verified the manner of death through autopsies or examination of death certificates, whenever possible. The Commission established circumstances of death in each case through statements by

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[323] *Id.*
[324] *Id.*
[325] *Id.*
[326] *Id.*
[327] *Id.* at 18.
[328] *Id.*
[329] *Id.* at 19.

witnesses that the Commission itself took or through testimonies and written accounts gathered from court cases, human rights organizations, or the press. In those cases in which such accounts pointed to involvement by government agents or persons working for them, the Commission sent official requests to the relevant institutions to send the available documentation. With rare exceptions, the answers did not provide additional information on such cases.[330]

In a few cases, the Commission concluded that the person had suffered forced disappearance even though it did not have direct proof.[331] To make such a determination, the Commission looked at various factors: the victim's political activism, the time and place of the events, the knowledge that other activists with proven ties to the victim had been arrested during the same time and also disappeared, the fact that relatives had been searching for fifteen or sixteen years without any results, and the lack of any records of subsequent travel or registration to vote by the victim.[332]

The Commission's use of circumstantial evidence to determine the fate of the disappeared individuals is exemplified throughout its various cases. In *Emperatriz del Tránsito Villagra, Disappeared on September 11, 1973*, the Commission concluded that Emperatriz del Tránsito Villagra had been a victim of the violence reigning at that time in Chile even though it could not determine the precise circumstances in which she had disappeared or had been killed. [333] The conviction was based on evidence of the victim's prior family circumstances (it was unlikely that she would abandon her children at the very moment when it was particularly dangerous in the country), evidence that during

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[330] *Id.* at 720.
[331] *Id.* at 42.
[332] *Id.*
[333] *Id.* at 158.

those days a large number of people had disappeared or died as a result of the reigning violence, and evidence that since the time of her disappearance there had been no indication of her whereabouts.[334]

In *Ernesto Traubmann Riegelhaupt, Disappeared on September 13, 1973*, the Commission found that Ernesto Traubmann had been an active Communist party member who had been stopped by policemen, along with another party activist, on September 13, 1973.[335] Both were taken to the Seventh Police Station and then to the Ministry of Defense.[336] The Commission concluded that Traubmann disappeared at the hands of government agents based on evidence that indicated he was known to have been arrested and held at the Ministry and evidence of his Communist political activity and Czechoslovakian nationality.[337]

In *Gregorio Mimica Argote, Disappeared*, the Commission considered the case of Gregorio Mimica, in which a military patrol arrested Mimica, an active Communist, at his house on September 14, 1973, shortly after he returned from spending two days under arrest in the Chilean National Stadium.[338] From the time of his arrest, no information had been available on his whereabouts.[339] The Commission believed that government agents were responsible for his disappearance.[340] The Commission considered testimony from family and friends and gave great weight to the evidence which indicated that Mimica

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[334] *Id.*
[335] *Id.* at 163.
[336] *Id.*
[337] *Id.*
[338] *Id.* at 16.
[339] *Id.*
[340] *Id.*

had been a politically active student leader who had been previously imprisoned in the Stadium.[341]

Similarly, in *Pablo Ramón Aranda Schmied, Disappeared*, the Commission found that Aranda Schmied had been an active member of the Young Communists who had been abducted from the University of Chile campus.[342] The Commission considered testimony from witnesses who had seen him in an empty lot where he had been taken along with other prisoners.[343] Since the circumstances of his arrest were ascertained in this case, and witnesses had seen him in the hands of his abductors, the Commission concluded that he had been abducted by force and presumably executed by government agents.[344]

In the case of *Jenny del Carmen Barra Rosales and Hernán Santos Pérez Alvarez, Disappeared in October 1977*, Jenny Barra was found to have been arrested on October 17, 1977.[345] The Commission considered testimonies from the many witnesses who observed the abduction and saw the license plate number of one of the vehicles. Eyewitnesses testified that they had seen Jenny Barra inside the vehicle surrounded by three individuals.[346] After a judicial investigation into the ownership of the vehicle and hearing the witnesses' testimonies, the Commission determined that the arrests and disappearances were the work of DINA, the regime's secret police.[347]

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[341] *Id.*
[342] *Id.* at 172.
[343] *Id.*
[344] *Id.*
[345] *Id.* at 669-70.
[346] *Id.*
[347] *Id.*

d. The Commission on Historical Clarification in Guatemala Admitted and Actively Sought a Broad Range of Evidence in its Investigations of Forced Disappearances

Guatemala has a legacy of political violence, large-scale massacres, forced disappearances, and extrajudicial executions.[348] The majority of these human rights violations took place during the country's thirty-six year civil war.[349] During the war, over 200,000 people fled the country while another 200,000 were killed. Of those killed, 50,000 were forcibly disappeared.[350] The CEH was established through the Accord of Oslo on June 23, 1994:

> I. To clarify, with full objectiveness, equity, and impartiality, human rights violations and incidents of violence related to the armed confrontations that caused suffering in the Guatemalan population;
>
> II. To prepare a report that contains the findings of the investigations conducted, offers objective information about what transpired during this period, and includes all factors, both internal and external;

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[348] Rachel Sieder, *The Politics of Memory in Guatemala in Burying the Past: Making Peace and Doing Justice After Civil Conflict* at 184, 186-188 (Nigel Biggar, ed. 2001).

[349] Human Rights Watch, *World Report: Guatemala* (2003), *available at* http://hrw.org/wr2k3/americas6.html ("Guatemalan human rights defenders were subject to numerous acts of intimidation. The Inter-American Commission on Human Rights stated that it had received reports of "more than 100 attacks and acts of intimidation against legal defenders") But see Human Rights Watch update, *available at* http://www.hrw.org/update/2003/03.html#2. ("On March 13, 2003, the Guatemalan government and human rights advocates reached a historic agreement to establish a three-member commission of inquiry to investigate clandestine groups that are responsible for attacks on human rights defenders, justice officials, witnesses in key cases, and civil society leaders. The commission, which addresses one of the worst legacies of Guatemala's civil war, will also examine these groups' alleged links to both state agents and organized crime.")

[350] Sieder, *supra* note 348, at 186.

III. To formulate specific recommendations to encourage national harmony and peace in Guatemala.[351]

In some cases, especially those dealing with forced disappearances or executions where there were no witnesses, the Commission based its conclusions on the accumulation of circumstantial evidence, such as the status of the victim, the modus operandi of the state or organization in question, the circumstances surrounding the time and place of the event, and the existence of other similar cases.[352]

To publicize the work of the CEH and to encourage as many people as possible to offer information, non-governmental as well as governmental organizations conducted outreach in different communities, informing people of the existence of the CEH and the opportunity to speak about what they had witnessed or experienced.[353] Radio, periodicals and other news media were used extensively to spread the word about the CEH.[354] During the year in which investigations took place, the CEH talked with over 20,000 people in all and interacted with 1,000 key witnesses, including members of the armed forces, government officials, members of the guerrilla force and civil society organizations.[355] The CEH even sought testimony from witnesses located in the United States, Canada, Mexico, and Europe in order to successfully comply with its responsibility to investigate violations of human rights.[356]

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[351] *See Guatemala: Agreement on the Establishment of the Commission for the Historical Clarification of Human Rights Violations and Incidents of Violence that Have Caused Suffering to the Guatemalan Populations* (June 23, 1994). *See also Memory of Silence Conclusions and Recommendations, supra* note 125, at Prologue.
[352] *Memory of Silence Conclusions and Recommendations, supra* note 125, at 56.
[353] *Memoria, supra* note 127, Mandato y Procedimiento, at 50.
[354] *Id.*
[355] *Id* at 104-105.
[356] *Id.*

In carrying out its investigations, the CEH admitted the testimony of all witnesses and victims both collectively and individually.[357] Any Guatemalan could provide testimony or information. Using the testimony of eyewitnesses to establish the truth of an event, the Commission used the testimony of other witnesses to verify events and to help unravel the reasons and patterns behind the violence.[358] The CEH also sought documents from government and army insiders, as well as from universities, students, and other civil society groups.[359] The CEH also sought to substantiate the claims of witnesses and other groups with information from other governments. Exhumations, which were carried out across the country by both governmental and non-governmental organizations, obtained privileged status in the determination of the facts.[360]

In order to establish claims of forced disappearances, the CEH relied on circumstantial evidence such as the modus operandi of the state forces at the time in addition to patterns of behavior that were known during that time and place and other cases that had been already been established and took place around that time period.[361]

The CEH used different degrees of evidentiary certainty to establish the truth behind the cases. The first category was full evidence that consisted of testimony from eyewitnesses whose credibility was established by the Commission through other sources of information and testimony.[362] The second category included evidence that was not

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[357] *Id.* at 108. ("The CEH considers that truth, justice, reparation and forgiveness are the bases of the process of consolidation of peace and national reconciliation. Therefore, it is the responsibility of the Guatemalan State to design and promote a policy of reparation for the victims and their relatives. The primary objectives should be to dignify the victims, to guarantee that the human rights violations and acts of violence connected with the armed confrontation will not be repeated and to ensure respect for national and international standards of human rights.")
[358] *Id.* at 109-110.
[359] *Id.* at 111-13, 120.
[360] *Id.* at 125, 135.
[361] *Id.* at 111-13, 120.
[362] *Id.* at 156-68.

from eyewitnesses, but which was still substantiated through other evidence and therefore valid in the eyes of the CEH.[363] The third category of evidence was made up of collective, non-eyewitness testimony that was consistent with public knowledge and that the CEH could therefore still find reliable.[364]

In *Illustrative Case No. 8, Morán and the Search for His Disappeared Children,* the CEH concluded that two brothers, Lázaro and Edmundo Salvador Morán, had been detained, forcibly disappeared, and eventually killed by the Guatemalan armed forces, in violation of their rights to life, liberty, and personal integrity. [365] The CEH came to this conclusion after weighing testimony from their father and respective spouses as to the sequence of events leading to their disappearances.[366] The CEH also concluded that the state of Guatemala had violated the rights to due process and judicial protections based on the testimony of the victims' family members regarding the state's inaction in conducting an investigation.[367]

In *Ilustrative Case No. 28, Execution of Mario Lopez Larrave,* the CEH concluded that Guatemalan state agents executed Mario López Larrave. Mario López Larrave was an active labor rights advocate and thus was perceived as a threat to the state. [368] The CEH came to its conclusions after considering testimony from family and friends and the status of the victim, who had been previously investigated by state

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[363] *Id.*
[364] *Id.* Anything that did not satisfy at least this third level of evidence was not accepted by the CEH. By recording the date, the facts, the events, the witnesses, etc., into a database, the CEH was able to keep track of valid cases and cases that were consistent with each other. In addition, the database allowed a statistical analysis of the victims and violators, as well as established the number of violations in different areas of the country. *Id.* at 172.
[365] *Memoria, supra* note 127, annexo 1, Casos Ilustrativos at 8.
[366] *Id.*
[367] *Id.*
[368] *Memoria, supra* note 127, annexo 1, Casos Illustrativos at 102.

intelligence agents.[369] The CEH also considered the procedures and weapons used in his execution[370] It also noted that such events were a common occurrence at the time due to hostility between the government and individuals involved with the San Carlos University and the union movement.[371] Viewing all this evidence together, the CEH concluded that a violation had occurred.[372]

e. The Mexican National Commission on Human Rights Has Accepted and Actively Sought a Broad Range of Evidence in Its Investigations of Forced Disappearances

Although not to the same extent as Guatemala, Mexico also suffers from a continuing legacy of forced disappearances. In the 1970s and early 1980s, Mexican security forces targeted members of armed opposition groups as well as others considered by the authorities to be political opponents, such as political activists and social leaders, for arbitrary detention, torture, disappearance, and extrajudicial execution.[373] In this period, over 400 people "disappeared".[374] In the mid-1990s, with the return of violence in southern Mexico, reported cases of disappearances began to increase again.[375]

On September 13, 1999, article 102, section B of the Mexican Constitution was amended to establish the Comisión Nacional de los Derechos Humanos, CNDH, as an independent organization with its own budget, as well as its own legal personality. The

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[369] *Id*.
[370] *Id*.
[371] *Id*.
[372] *Id*.
[373] Amnesty International, *Mexico—'Disappearances': An Ongoing Crime* (June 28, 2002), *available at* http://web.amnesty.org/library/Index/ENGAMR410202002?open&of=ENG-MEX.
[374] *Id.*
[375] *Id.*

CNDH's main objective is the protection, monitoring, promotion, dissemination, and study of human rights guaranteed by the Mexican legal order.[376]

The CNDH accepts a broad range of evidence in its investigations, including evidence from public archives, visual inspections, expert reports, and interviews with relatives and persons who have both directly and indirectly witnessed disappearances.[377] From such evidence, the CNDH has been able to confirm the forcible detention, interrogation, and subsequent disappearance of at least 275 persons by governmental authorities during the late 70s and early 80s in Mexico.[378] In its report to President Fox, the CNDH explained the rationale for adopting a lower evidentiary standard:

> Forced disappearances regularly are characterized as such on account of the fact that their authors were able to avoid leaving evidence of their actions. [Therefore] in the analysis of the evidence, published news articles played a fundamental role…for, although it is clear that is not possible to grant them plain probative value, still they constitute facts that are public and notorious insofar as they are to be considered public declarations…as national and international human rights jurisprudence recognizes; yet even more so when they can be corroborated with testimony and documents linked to the illegal privations of liberty and the attribution of the referenced facts to public servants.[379]

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[376] CNDH, *Attribuciones de la CNDH*, *available at* http://www.cndh.org.mx/Principal/document/la_cndh/funcion/framatri.htm.

[377] CNDH, *Informe Especial Sobre Las Quejas en Materia de Desapariciones Forzadas Ocurridas en la Década de los 70 y Principios de los 80*, *available at* http://www.cndh.org.mx/Principal/document/portada.htm.

[378] *Id.* In its findings, the CNDH found several governmental organizations directly culpable. Among these were the "Brigada Especial o Brigada Blanca" and the since disbanded "Dirección Federal de Seguridad."

[379] *Informe 2001, supra* note 133, at 211-12. [our English translation].

CONCLUSION

It is clear that there has been a pattern of human rights violations in Punjab during the late eighties and the early nineties.[380] It is not surprising that the Supreme Court has turned to the NHRC to ensure that the perpetrators of these human rights violations do not act with impunity since the NHRC was established to enforce international human rights standards in India. Under Article 32 of the Indian Constitution, the Supreme Court has the duty to enforce all citizens' fundamental rights. In this matter, the Supreme Court has turned to the NHRC to carry out this responsibility. Both bodies have recognized that international law must be evaluated in construing the nature and scope of the fundamental rights under the Indian Constitution.

International law recognizes that, in the cases of disappearances, an investigation is the most basic way to effectuate the most fundamental rights of citizens—the very task given to the NHRC. The jurisprudence of the Human Rights Committee, the Inter-American Court and the European Court of Human Rights all establish that States are responsible not only for carrying out an investigation, but for ensuring that the investigation is impartial, fair, effective and thorough. Various national commissions in countries that have been similarly affected by mass disappearances have adopted this same standard.

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[380] Addressing these abuses, the ECHR stated in *Chahal v. United Kingdom,* Application no. 00022414/93 at ¶100 (1996)(Judgment), *available at* http://www.echr.coe.int/Eng/Judgments.htm, that "[t]he Court is persuaded by this evidence, which has been corroborated by material from a number of different objective sources, that, until mid-1994 at least, elements in the Punjab police were accustomed to act without regard to the human rights of suspected Sikh militants….". Noting this, the ECHR makes clear that during the relevant period, the Indian security forces were not being held accountable for the gross abuses occurring in Punjab.

Similarly, international law requires the admissibility of the widest variety of evidence because the crime of forced disappearance presents a unique evidentiary situation in which States often conceal or destroy the evidence that would otherwise be available. The decisions of international tribunals and the methods utilized by other national human rights commissions reflect that in cases of disappearances, the State has an unfair evidentiary advantage. As such, it is imperative that circumstantial and testimonial evidence be admissible in order to keep States from acting with impunity. Such evidence is understood not to be limited by the normal standards of evidence. Thus, newspapers, human rights reports, pictures, and self-interested testimony from individuals who may be precluded from testifying in some domestic legal systems are admissible.

Upon the admission of such evidence, the investigatory body maintains the capacity and duty to determine the evidence's credibility and assess the proper weight that must be given to it. All the international bodies that have addressed this question, including the ECHR, which has a higher burden of proof, recognize that circumstantial evidence, when taken as a whole, can shift the burden of proof to the State to refute allegations of disappearances. In the instant case, the information gathered by the CIIP and CCDP indicates that a pattern of gross human rights violations has occurred. Under the broadly adopted standards discussed above, the NHRC is required to admit the information gathered by the CIIP and CDDP regarding disappearances in Punjab. The NHRC must consider this evidence and determine if it carries sufficient weight to shift the burden of proof onto the State, keeping firmly in mind that disappearances present a unique situation in which the evidentiary bar is lowered.

If this burden is met, then the State must effectively rebut these allegations or be found liable. Given that these guidelines are obligatory under international law, and completely consistent with the Indian government's duty under the Indian Constitution to protect life and liberty and to ensure the fundamental rights of all its citizens, the NHRC is obligated to adopt them.

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Respectfully submitted,

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_____

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