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DISAPPEARANCES AND THE INTER-AMERICAN COURT: REFLECTIONS ON A LITIGATION EXPERIENCE

*Juan E. Méndez**
*José Miguel Vivanco***

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I. INTRODUCTION

For the last twenty years, repressive regimes in Latin America have resorted to a particularly insidious technique that brutally quashes dissent and denies accountability. Its victims, the *desaparecidos* (disappeared ones), number in the tens of thousands and the dispute over efforts to determine their fate and whereabouts tears at the fabric of many Latin American societies. The struggle against disappearances —

both to abolish and prevent the practice and to hold the malefactors accountable — has challenged and shaped the human rights movement in new ways. New entities representing the relatives of the *desaparecidos*, by definition single-issue oriented, have joined other human rights organizations and now engage in advocacy both at the national and international levels.¹ Since “deniability” is central to the policy of disappearances, international human rights organizations are frequently thwarted in their efforts to prevent torture, obtain the release of unjustly imprisoned persons, and press governments for speedy trials. All the tried and true techniques developed by inter-governmental and non-governmental organizations (IGOs and NGOs) for those purposes must be re-examined to deal with disappearances. Finally, the phenomenon of disappearances has generated the need for a renewed effort to create substantive and procedural standards in international law.

A major battle in the struggle against disappearances was recently won. The Inter-American Court of Human Rights,² a judicial body of the Organization of American States (OAS), heard three significant cases between 1986 and 1989 involving disappearances attributed to the armed and security forces of Honduras. The Court found that Honduras was responsible for violating the American Convention on Human Rights³ by designing and implementing, between 1981 and 1984, a deliberate plan to cause forced disappearances which eventually claimed the lives of more than 140 victims. The decisions reached in *Velásquez*, *Godínez* and *Fairén and Solís*,⁴ have already become a

1. Perhaps the best-known of these groups is the Mothers of Plaza de Mayo, based in Buenos Aires, Argentina, founded in 1977. Similar organizations exist in many other countries where disappearances have become a major human rights problem. In 1984, the Guatemalan counterpart of the Argentine group, Grupo de Apoyo Mutuo (GAM), became the first human rights organization to establish a permanent presence in that country in 1984, after many years during which any human rights advocacy was harshly repressed. See Americas Watch, *Guatemala: The Group for Mutual Support* (1985). There are also international organizations of relatives: the Federación de Familiares de Desaparecidos de América Latina (FEDEFAM) was founded in 1981 and has offices in Caracas, Venezuela. The Asociación Centro-Americana de Familiares de Desaparecidos (ACAFADE), based in San José, Costa Rica, since 1982, played a large role in the cases discussed in this article. See ACAFADÉ *Desaparecidos en Centroamérica en 1989* [The Disappeared in Central America in 1989](1990).

2. Hereinafter “the Court.”

3. Also known as “Pact of San José, Costa Rica” signed on November 22, 1969, Organization of American States (OAS), *Treaty Series*, no. 36; United Nations (UN) Register, August 27, 1979, no. 17955 [hereinafter “the Convention”].

4. *Velásquez* Judgment, INTER-AM. CT.H.R. (ser. C) No. 4 (1988); *Godínez* Judgment, INTER-AM. CT.H.R. (ser. C) No. 5 (1989); *Fairén Garbí and Solís Corrales* Judgment, INTER-AM. CT.H.R. (ser. C) No. 6 (1989).

milestone in the development of international safeguards for human rights. The holdings and language of the Court will add precedential strength to the arguments of those seeking to abolish disappearances. Furthermore, the developments in the course of litigation, spanning more than four years, will undoubtedly yield valuable lessons to human rights practitioners.

Though the cases have already generated some press attention as well as scholarly articles,⁵ the necessary in-depth examination of these cases has only just begun. The present article is an effort to contribute to a critical debate, not only on what has already been accomplished, but also on what needs to be done next to completely abolish forced disappearances.

II. THE PHENOMENON OF DISAPPEARANCES

A. *Conceptual Problems*

The term "disappearance" is really a euphemism: in practical terms it means that a person has been arbitrarily arrested, yet the authorities deny it. The term was first used in Guatemala in the 1960s when many political opponents of the regime were abducted, never to be heard from again. In Chile and Argentina during the 1970s this technique became systematic; it became the main feature in the repressive arsenal of the Argentine military dictatorship that ruled the country between 1976 and 1983. Thousands of people disappeared in El Salvador in the early 1980s, along with thousands more whose bodies were eventually found.

In most countries, such as Chile, Argentina and Honduras, disappearances are conducted during a definite period and at some point the practice stops. In others such as Guatemala, El Salvador, Peru and Colombia, a steady stream of disappearances is recorded every year, and though there may be a pronounced decrease in numbers the practice never seems to stop altogether. At the same time, disappearances are not restricted to military regimes: currently, the highest number of re-

5. Note, *The Inter-American Court of Human Rights: Towards Establishing an Effective Regional Contentious Jurisdiction*, 13 B.C. INT'L & COMP. L. REV. 127 (1990); Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 FORDHAM INT'L L.J. 1 (1990); Shelton, *Judicial Review of State Action by International Courts*, 12 FORDHAM INT'L L.J. 361 (1989); Drucker, *Governmental Liability for 'Disappearances': A Landmark Ruling by the Inter-American Court of Human Rights*, 25 STAN. J. INT'L L. 289 (1989); Deodhar, *First Contentious Cases Before the Inter-American Court of Human Rights*, 3 AM. U. J. INT'L L. & POL'Y 283 (1988); *Human Rights Court in Honduras (sic): Velásquez Case*, 83 AM. J. INT'L L. 361 (1989); Drucker, *Sweet Justice*, 115 COMMONWEAL 455 (1988).

ported cases comes from Peru and Colombia, both governed by democratically elected authorities. It is apparent, however, that disappearances take place in countries where the military establishment is either in power or has a high degree of autonomy from civilian authority.

The victim is generally arrested by the security forces or by persons acting under some form of governmental authority. In many countries the units that plan, implement and execute the program are generally specialized, highly secret bodies within the armed or security forces. They are generally directed through a separate, clandestine chain of command but they have the necessary credentials to avoid or prevent any interference by the "legal" police forces. These authorities take their victims to secret detention centers where they subject them to interrogation and torture without fear of judicial or other controls. In fact, a necessary feature of the policy of disappearances is to ensure insulation from court inspections and controls. As a result, *habeas corpus* relief and other institutional safeguards to protect individuals from abuse are rendered completely ineffective.

In many countries there are victims who have survived the experience. For the most part, however, the policy includes the decision to eliminate the victim as soon as he or she ceases to provide any intelligence, and to dispose of the corpse in a way to ensure the continued "deniability" of the process.

The victim of a disappearance generally fits the profile of a grassroots or rank-and-file political activist in opposition to the government. The victims are often students, teachers, labor organizers, peasant leaders, lawyers who defend political prisoners or religious workers. For the most part, the authorities who design the strategy have in mind a relatively targeted sector: if they are trying to defeat an armed insurgency, they cause to disappear not only armed guerrillas but also suspected members of networks providing logistical or political support. Soon, however, the net that is cast broadens, and many victims no longer have any relationship with the insurgency and, indeed, in many cases are known to have repudiated it. There may be an initial military criterion for the determination of victims, but in all cases the selection of targets is soon based on ideology.

Human rights organizations confronted the phenomenon, mostly in the late 1970s, and were faced with a variety of handicaps. The previously perfected techniques used to pressure governments for the release of political prisoners were useless when governments denied holding the victim. There was always sketchy information, if any, about the victim and, more importantly, relating the circumstances of his or her abduc-

tion. NGOs shared experience and information to develop effective tactics against disappearances.

An initial challenge was to find a workable definition of the phenomenon, to distinguish it from situations that could be analogous but would clearly warrant different responses. Some of those similar situations are: persons missing in the course of catastrophes or armed conflict; persons subjected to prolonged incommunicado detention; and abduction for ransom or hostage-taking by insurgents.

Some colleagues in the human rights movement insist that the definition should be broad, and need only include the element of deliberate concealment. The authors have chosen a concept that is somewhat more narrow, one that we believe is the prevailing definition.⁶ The existence of a deliberate, state-sponsored plan is the central element in disappearances. Occasions on which authorities are slow to acknowledge a detention because of bureaucratic lassitude are therefore not included. Premeditated governmental plans will usually be devised in response to a certain political challenge; as a result, a policy of disappearances is directed against political "enemies of the State." Even though this definition includes the decision to eventually eliminate most of the *desaparecidos*, there will always be survivors who are spared for different reasons. Thus, distinguishing between "permanent" and "temporary" disappearances is useful, as long as a clear intent to deny the fact of the arrest can be found in the latter.

B. *Disappearances and International Law*

The existing human rights instruments were drafted before disappearances became a recognizable practice that shocked the conscience of humankind.⁷ As a result, those instruments do not contemplate dis-

6. Amnesty International, *DISAPPEARANCES: A WORKBOOK* (April 1981); Asamblea Permanente de Derechos Humanos (APDH), *LA DESAPARICIÓN: CRIMEN CONTRA LA HUMANIDAD [DISAPPEARANCES: A CRIME AGAINST HUMANITY]*(1988).

7. Declarations and multi-lateral treaties on human rights of a general nature came into being after World War II. Universal Declaration of Human Rights (UDHR), adopted and proclaimed by UN General Assembly Resolution 217-A (III) (December 10, 1948); Int'l Covenants on Civil and Political and on Social, Economic and Cultural Rights, adopted and opened for signature, ratification and accession by G.A. Res. 2200 A (XXI) (December 16, 1966); the Covenant on Civil and Political Rights entered into force on March 23, 1976, and the Covenant on Economic, Social and Economic Rights on January 3, 1976. Law-making in the area of human rights is not over yet, but present efforts are directed at the creation of mechanisms of protection (European Convention on the Protection of Detainees from Torture and from Cruel, Inhuman or Degrading Treatment or Punishment, adopted by Recommendation 971 (1983), Parliamentary Assembly of the Council of Europe (1983); Rapporteurs and Working Groups created by the UN Commission on Human Rights of the Economic and Social Council), or deal with specific forms of

appearances as a specific violation. Nonetheless, separate aspects of disappearances clearly violate fundamental rights contemplated in those instruments. Similarly, they constitute clearly defined violations of different standards in domestic law, even if "disappearance" is not contemplated as a specific crime. An act of forced disappearance violates the right to be free from arbitrary arrest, the right to the physical integrity of the person and, eventually, the right to life. The deliberate deprivation of access to judicial relief for the arbitrary arrest is, itself, a violation of the right to due process of law. The special conditions of detention of a disappeared person violate several provisions of the U.N. Standard Minimum Rules for the Treatment of Prisoners.⁸ Some have argued that a State's refusal to acknowledge the arrest also violates a person's right to be recognized as a person under the law.⁹

The existing body of international law is more than sufficient to find that disappearances are a serious abuse of a State's international obligations. Even so, efforts have been undertaken to draft and enact multi-lateral instruments to define and delegitimize the practice, and to create effective mechanisms to deter it and provide relief for the victims.

A major effort is under way to develop a consensus to define disappearances as a "crime against humanity."¹⁰ This concept was developed during the Nuremberg trials and carries the effect of raising the specific violation to the level of an "international crime." Offenses of this nature are not subject to statutes of limitations, perpetrators cannot benefit from the political exception to extradition, and in addition, governments have a duty to investigate, prosecute and punish each action.¹¹ The drafting efforts presently under way with regard to disap-

violations (Conventions on the Prevention and Punishment of Genocide, approved and proposed for signature and ratification or accession by G.A. Res. 260 A (III) of December 9, 1948 (entered into force on January 12, 1951); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 1984 (entered into force June 1987)).

8. U.N. Economic and Social Council (ESC) E.S.C. Res. 663, 24 U.N. ESCOR Supp. 1, U.N. Doc. E/3048 (July 31, 1957); E.S.C. Res. 2076, 62 U.N. ESCOR Supp. 1, U.N. Doc. E/5988 (1977).

9. Article 16, International Covenant on Civil and Political Rights and Article 3, American Convention. See UN/ECOSOC, *Report of the Working Group on Enforced and Involuntary Disappearances*, UN Comm'n of Human Rights, 40th Session, E/CN.4/1984/21 (December 9, 1983).

10. Article 4, Draft Inter-American Convention on the Forced Disappearance of Persons, proposed by the Inter-American Comm'n on Human Rights to the OAS General Assembly, Comm'n Annual Report 1987-88, OAS/Ser.L/V/11.74, at 351; Report of the Working Group, *supra* note 9; *La Desaparición*, *supra* note 6; Colloquium: The Policy of Forced Disappearances, Paris (January 31-February 1, 1981), Resolutions and Declarations, APDH, Buenos Aires (1981).

11. Crimes against humanity include "inhuman acts such as murder, extermination, en-

pearances include specific language delineating these procedures and attendant consequences.

A temporary setback was suffered by the international human rights movement when a U.S. district court in San Francisco ruled that "disappearances" do not have sufficient recognition as an international crime to warrant consideration as a "tort against the law of Nations" under the Alien Tort Claims Act.¹² The case involved an action for damages under the *Filartiga v. Peña Irala* precedent. The court accepted the action for torture and arbitrary arrest, but denied it for disappearance because no United States legal precedent could be found citing disappearances as a crime against humanity. This decision prompted the filing of briefs *amicus curiae*, as well as a motion to reconsider by the plaintiffs. Citing international law precedents, rather than relying solely on U.S. decisions, the Court reversed its earlier ruling and accepted disappearance as a cause of action.¹³

In addition to legislative activity, IGO's are creating mechanisms to monitor disappearances in individual cases and to provide the means to respond promptly, thus securing the release of disappeared persons to save lives. The United Nations has devised a useful program in the Working Group on Forced and Involuntary Disappearances, created in

slavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious, or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities." Draft Code of Offenses Against the Peace and Security of Mankind, art. 2 & 11, 2 Y.B. INT'L L. COMM'N. 150, U.N. Doc. A/CN.4/SER.A/1954/Add.1 (1954). See also Charter of the Int'l Military Tribunal art. 6(c), in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL NUREMBERG 10, 11 (1947).

12. Forti and Benchoam v. Suárez Mason, 672 F.Supp. 1531 (D.Cal. 1987). The Alien Tort Claims Act, 28 U.S.C. § 1350 (1988), provides for federal court jurisdiction for suits on torts for crimes committed abroad, as long as the acts constitute "crimes against the law of nations." General Carlos Guillermo Suárez Mason was the only high-ranking officer in the Argentine Army who fled Argentina rather than face charges for his role in human rights violations, as the notorious "lord of life and death" in the First Army Corps, which included Buenos Aires, between 1976 and 1978. After living clandestinely for several years, he was arrested in San Francisco in 1987, and finally extradited to Argentina the following year. He is currently in custody in Argentina, and the case against him is the only pending prosecution for the crimes of the so-called "dirty war." While in custody in California, six Argentine citizens (including Alfredo Forti and Débora Benchoam) who were in the United States and had been his victims or relatives of his victims, filed three separate lawsuits for damages under 42 U.S.C. § 1983 and the precedent in *Filártiga v. Peña Irala*, 630 F.2d. 876 (2d Cir. 1980). All three plaintiffs eventually won default judgments.

13. Forti v. Suárez Mason, no. C-87-2058-DLJ (N.D. Cal. July 6, 1988), amended 694 F. Supp. 707 (1988). Amnesty International - USA filed an *amicus* brief on December 16, 1987 supporting the proposition that disappearances are internationally recognized as a violation of international law and as a "crime against humanity." Suárez Mason was ultimately sentenced to pay more than \$80 million in damages to the plaintiffs in this and in the other two related lawsuits.

1980 by the U.N. Commission on Human Rights of the Economic and Social Council (ECOSOC). With staff support provided by the U.N. Center for Human Rights based in Geneva, Switzerland, the Working Group receives complaints, addresses governments, conducts on-site visits and publishes periodic reports.¹⁴

The NGO community has long attempted to push a Convention on Disappearances through the U.N. Commission on Human Rights.¹⁵ Although this attempt appears stalled, an effort to enact a declaration seems to be gathering momentum.¹⁶ A convention is a multi-lateral treaty binding on the States that sign and ratify it. A declaration is a non-binding statement by the international community. The content of declarations, however, is sometimes considered evidence that the international community has recognized that some standard has become customary international law. The U.N. General Assembly has had occasion to issue declarations on disappearances.¹⁷

C. *Actions at the Regional Level*

In the Americas, disappearances generated important activity by the Inter-American Commission on Human Rights ("Commission"), a body of the Organization of American States created in 1959. During the 1970s the staff of the Commission was flooded with complaints and urgent appeals on behalf of *desaparecidos* from several countries. In response, the Commission opened numerous case files and processed the complaints in accordance with the Convention's procedures. It also developed a system of immediate urgent action for cases where a recent arrest had yet to be acknowledged: the Commission staff in Washington, D.C. would issue urgent appeals by telegram, by telephone and by letter, directed at the foreign ministries or at the diplomatic representation of each country before the OAS. In many well-known cases, this

14. The Working Group was created by the U.N. Commission on Human Rights by Res. 20 (XXXVI), February 1980. It presents annual reports to the Commission. See Report of the Working Group, *supra* note 9, at 1, para. 1.

15. See Colloquium, *supra* note 10; LA DESAPARICIÓN, *supra* note 6.

16. The U.N. Working Group on Detention is drafting such a Declaration in cooperation with the Working Group on Disappearances and several "experts" drawn from the NGO community. U.N. Commission on Human Rights, Sessional Working Group on Detentions, *Draft Declaration on the Protection of all Persons Against Enforced or Involuntary Disappearances*, E/CN.4/Sub.2/1989/WG.1/WP.6 (August 22, 1989).

17. Resolution of December 20, 1978, adopted without a vote, A/Res-33/173); Res.40/147, December 13, 1985; Res. 41/145, December 4, 1986. See also Velásquez, *supra* note 4, at para. 16 (Observations of the Commission on the Preliminary Objection of the Government of Honduras, March 20, 1987).

procedure resulted in an acknowledgement of the detention, or in the quiet release of the victim.

The Commission simultaneously devoted considerable attention to disappearances in the context of on-site missions to countries where the practice was in effect. The Commission delegation issued public announcements of its interest on the matter and received testimony from numerous persons seeking information on the fate and whereabouts of their loved ones. The delegation would also request information on specific cases from governmental authorities and would insist on inspecting prisons and detention sites that were thought to hold *desaparecidos*.

These highly publicized on-site visits had the effect of forcing the release or "legalization" of some prisoners. As a result, the pace of disappearances slowed, or the system halted altogether. At the same time a national awareness of the problem made disappearances more complicated after the Commission mission left the country.

The Commission's reports on individual countries regarding disappearances are the high mark of that body's work over the years.¹⁸ These reports are important not only to document specific cases of disappearances, but they also establish evidence of governmental responsibility, as well as to help define and describe the practice. The Commission engaged the Inter-American community of nations by raising concern about the proliferation of disappearances. At the request of the Commission, the General Assembly of the OAS called disappearances "a crime against humanity" and "an affront to the conscience of the hemisphere."¹⁹ General Assembly resolutions instructed the Commission to work on specific aspects of the problem, and to draft instruments to outlaw it. In 1988, the Commission published a special report on disappeared children, which was presented to the General Assembly in November of that year.²⁰ The Commission drafted a Convention on Disappearances, which has been widely debated — and generally supported — by the NGO community. The 1988 General Assembly considered this draft, and submitted it to the Commission on Legal and Political Affairs in order to receive comments from member States. At the 1989 General Assembly the delegates decided to keep the process

18. Commission, *Report on the Situation of Human Rights in Chile*, OAS Doc. OEA/ser.L/V/II.66, doc.17 (1985); *Report on the Situation of Human Rights in El Salvador*, OAS Doc. OEA/ser.L./V/II.46, doc. 23 rev. 1 (1978); *Report on the Situation of Human Rights in Argentina*, OAS Doc. OEA/ser.L/V/II.49, doc. 19 (1980).

19. OAS G.A. Res. 666 (XIII-0/83) (November 18, 1983); later, the OAS General Assembly ratified the notion that disappearances constitute a "crime against humanity." Res. 742 (XIV-0/84) (November 17, 1984).

20. See Commission's Annual Report 1987-88, *supra* note 10, at 331.

open for further comments. To date, only four countries have submitted comments, and there appears to be little interest in moving ahead.²¹

In 1986, a major breakthrough was achieved when the Commission decided to try a different strategy: in three cases of disappearances involving two Honduran and two Costa Rican citizens, the Commission found the Government of Honduras responsible for violations of the Convention and submitted the cases to the Court under the latter's contentious jurisdiction. Precipitating this strategy were the approximately 140 disappearances between 1981 and 1984 in Honduras under a plan devised by General Gustavo Alvarez Martínez, then Commander of the Armed Forces.²²

Angel Manfredo Velásquez, a married Honduran student and labor activist with three children, was abducted while driving his car in downtown Tegucigalpa on September 12, 1981. Eyewitnesses told his family that he was forcibly placed in a small van in a parking lot and driven away. Saúl Godínez Cruz, a high school teacher and activist in the teachers' union, married with one daughter, was abducted in his home town of Choluteca, on July 22, 1982 when he was intercepted on his motorcycle as he left town for classes in a neighboring city. His captors included at least one uniformed soldier, according to one eyewitness. Francisco Fairén Garbi and Yolanda Solís Corrales, both Costa Rican citizens, were students and worked full time. They left San José on December 8, 1981, according to relatives, on a vacation that would have taken them to Mexico. When no news came from either of them by Christmas, their families initiated contacts with consulates and issued public requests for information about them. The Nicaraguan consular offices promptly responded that border post records showed that they had entered Nicaragua on the day of their departure and left for Honduras on December 11, 1981. At first Honduras denied that they had ever entered Honduran territory, as did Guatemala and El Salvador. In late December, the Fairén family received an issue of a Tegucigalpa newspaper with a photograph of a slain young man. The caption said that police had reported that the man was an unidentified guerrilla who had died in an "armed confrontation" with police. The photograph bore a striking resemblance to Fairén Garbi.

With the active support of the Costa Rican government, Francisco

21. *Id.*

22. See Americas Watch, *Human Rights in Honduras: Signs of the Argentine Method* (1982).

Fairén Almengor, father of the victim, travelled to Honduras in January 1982 looking for information. He discovered that the remains of the young man were buried, but an autopsy had been performed which revealed that he had been shot execution-style, while kneeling and hand-cuffed. He also discovered that this and other human remains had been located in a desolate area called La Montañita, not far from Tegucigalpa. At the request of the Costa Rican authorities, the President of Honduras promised an investigation, including an exhumation of the "corpse of La Montañita" to permit comparison with pre-mortem dental records of Fairén Garbi.

Such an exhumation never took place despite the initial insistence of Costa Rica, and later the repeated requests by the Commission. In late January, Guatemalan authorities changed their response and claimed that Fairén and Solís had entered Guatemala on December 12, less than twenty-four hours after they crossed the Nicaragua-Honduras border, and had left for El Salvador on December 14. After this new information emerged, Honduras announced that its immigration records indicated that the two young persons had entered Honduras and left for Guatemala. El Salvador continued to insist that they had never entered its territory. Costa Rican authorities and the families of both victims remained convinced that they "disappeared" in Honduras, though there were no eyewitnesses to an arrest, nor a specific date or place in which it happened.

At different dates in 1982, the Committee for the Defense of Human Rights in Honduras (CODEH), a non-governmental group based in Tegucigalpa, filed complaints with the Commission, charging Honduras with responsibility for the abductions. After processing these and other cases on Honduras for several years, the Commission submitted these three cases to the Court, presumably because they were the most advanced in the process and had the best potential for the development of evidence. From 1979 until 1986, the Court had exercised only its advisory jurisdiction.²³ These cases, which were tried as one by the Court, became the first — and so far only — exercise of the Court's contentious jurisdiction. It is highly significant that the first international-law trial under this mechanism involved the practice that has been most distinctive of repression in Latin America in recent years.

23. See below for a description of the Court's two forms of jurisdiction and for the Commission's role in each.

III. OVERVIEW OF THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS PROTECTION

The bodies responsible for the protection of fundamental freedoms in the Inter-American system are the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights. Both bodies are empowered by the American Convention on Human Rights to protect and promote human rights. The Commission is also empowered to monitor human rights according to the American Declaration of the Rights and Duties of Man.²⁴ This last instrument is technically a "recommendation,"²⁵ but has gained enforceability in practice and is applied by the Commission to OAS member states which have not ratified the Convention.²⁶ Nevertheless, today the legal elements under both the Convention and the Declaration are basically the same.²⁷ The Commission may seek a settlement in a case involving State Parties to the Convention or, in the alternative, refer a case to the Court if it involves a State that has recognized the Court's jurisdiction.²⁸

A. The Commission

The Commission is an autonomous entity of the OAS whose principal function is to promote the observance and defense of human rights and to serve as an advisory body to the OAS.²⁹ It is a quasi-

24. *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/ser.L.V./II.71, doc. 6 rev. 1, at 17 (1987) [hereinafter "Declaration"]; see Buergethal, *The Inter-American System for the Protection of Human Rights*, in *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 470 (Meron ed. 1984). For a discussion of different issues on the Inter-American system, see generally OAS Inter-American Commission on Human Rights, *DERECHOS HUMANOS EN LAS AMERICAS. HOMENAJE A LA MEMORIA DE CARLOS A. DUNSHEE DE ABRANCHES* (HUMAN RIGHTS IN THE AMERICAS, HOMAGE TO THE MEMORY OF CARLOS A. DUNSHEE DE ABRANCHES)(1984); *LA CONVENCION AMERICANA SOBRE DERECHOS HUMANOS* (OAS Inter-American Commission on Human Rights)(1980).

25. Resolution XXX, Final Act of the Ninth International Conference of American States, Bogota, Colombia, March 30 - May 2, 1948, at 48 (Pan American Union, 1948).

26. See Farer & Rowles, *The Inter-American Commission on Human Rights*, in *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 47 (J. Tuttle ed. 1978); Garcia Amador, *Atribuciones de la Comision Interamericana de Derechos Humanos en Relacion con los Estados Miembros de la OEA que no son Partes en la Convencion de 1969*, in *HUMAN RIGHTS IN THE AMERICAS*, supra note 24, at 177; see also P. NIKKEN, *LA PROTECCION INTERNACIONAL DE LOS DERECHOS HUMANOS: SU DESARROLLO PROGRESIVO* 284 (1987)(Instituto Interamericano de Derechos Humanos, editorial Civitas, S.A.).

27. These include requirements for admissibility, procedure, rules of evidence and characteristics of the resolutions of the Commission.

28. See P. NIKKEN, supra note 26, at 303-08.

29. Article 1, *Regulations of the Inter-American Commission on Human Rights*, Organization of American States, June 29, 1987. See Buergethal, supra note 24, at 452-54.

judicial body with legal, diplomatic and political powers, established in 1959 by Resolution VI of the Fifth Meeting of Consultation of Ministers of Foreign Affairs in Santiago, Chile.³⁰ Since its creation, the Commission has been the subject of reforms intended to broaden its powers.³¹

The most important legal reform affecting the work of the Commission occurred in 1969 with the adoption of the Convention.³² Today, the majority of OAS member states have become State Parties to the Convention.³³ The Convention, unlike the Declaration, is an international treaty. It established a sophisticated procedure for individual petitions, similar to its European counterpart and, more significantly, established the Court.³⁴

The Commission and the Court, according to the Convention, are each made up of seven experts in the human rights field, elected in their individual capacities and not as government representatives. Both organs include an Executive Secretariat whose function is to support members in the performance of their duties.³⁵

The Commission's members³⁶ are elected by the General Assembly's member states, independent of their ratification of the Convention.³⁷ Only State Parties to the Convention, however, may elect mem-

30. For a good overview of the evolution of the Commission and its principal legal challenges since its creation, see C. MEDINA QUIROGA, *THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM* (1988).

31. The Second Special Inter-American Conference in Rio de Janeiro in 1965 required the Commission to examine individual denunciations of alleged human rights violations and to submit an annual report to the Inter-American Conference or Meeting of Ministers of Foreign Affairs. In 1967 the Commission became a principal organ of the OAS as a result of an amendment (Article 51) to the Charter of the Organization (Protocol of Buenos Aires).

32. The Convention, or Pacto de San Jose was signed in San Jose, Costa Rica, on November 22, 1969 and entered into force on July 18, 1978 with the requisite eleven OAS member state ratifications.

33. The United States, Brazil, Chile, Trinidad and Tobago, Dominica, St. Lucia, Antigua and Barbuda, Saint Vincent and the Grenadines, and the Bahamas have all *not* ratified the Convention. *Informe Anual de la Comisión Interamericana de Derechos Humanos, 1988-89*, OEA, 18 septiembre 1989, pag. 6.

34. See Articles 25-55 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Convention and other important human rights instruments are reproduced in L. HENKIN, R. PUGH, O. SHACHTER & H. SMIT, *INTERNATIONAL LAW, CASES AND MATERIALS* (1987).

35. Article 13, *Regulations of the Inter-American Commission on Human Rights*; Article 10, *Rules of Procedure of the Inter-American Court of Human Rights*.

36. They are not required to be attorneys. However, they must be persons of high moral character, with a recognized level of competence in the field of human rights. Article 34 of the American Convention on Human Rights.

37. *Id.* Article 36.

bers of the Court. In contrast to Commission members, the Court's judges should be jurists and nationals of the member states of the OAS.³⁸

The Commission has three primary functions: processing individual complaints of alleged human rights violations; preparing reports on human rights situations in OAS member states; and proposing measures to be taken by the OAS to increase respect for human rights in the region.³⁹

1. *Processing Individual Complaints*

Individuals may petition the Commission directly or through representatives, with complaints based upon alleged violations of the Convention. Similarly, NGOs can file petitions on behalf of individuals for alleged violations of the Convention.⁴⁰ By contrast, the European Convention only allows petitions from those individuals who claim to have had their fundamental rights violated.⁴¹ When the Commission receives a petition, it may solicit information from the State concerned, which has the obligation to cooperate with the proceeding.⁴² In serious and urgent cases, the Commission, with the consent of the State involved, may carry out an independent, on site, fact-finding investigation.⁴³ In serious cases the Commission may also request the State to adopt precautionary measures, a type of preliminary injunction, to avoid irreparable harm to individuals.⁴⁴ The Commission's request for such measures, however, is without prejudice to the State's interest in the final

38. Judge Thomas Burgenthal, a distinguished American legal scholar, became a member of the Court on May 22, 1979, nominated by the government of Costa Rica without relevance to U.S. ratification of the Convention.

39. Article 41 of the Convention. On the subject of the Commission's current powers, see MEDINA, *supra* note 30, at 113-56.

40. Since 1965 the Commission has processed over 10,000 petitions; Article 44 of the Convention, Article 26 of the Regulations of the Commission. A detailed examination of the individual petition procedure may be found in Norris, *The Individual Petition Procedure of the Inter-American System for Protection of Human Rights*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (H. Hannum ed. 1984).

41. Article 25 of the European Convention of Human Rights.

42. Article 48, para. 1(d) of the Convention.

43. Article 48, para. 2 of the Convention; Article 44, para. 2 of the Rules of the Commission.

44. This is a very broad power that can be applied to States whether or not they are parties to the Convention. Frequently, governments ignore the Commission's requests for an individual's protection. Governments also assure the Commission there is no cause for concern. In a few cases, local authorities have interviewed the individual and offered him/her "police protection" which itself would facilitate targeting the individual. Article 29, Article 34, para. 2 of the Regulations of the Commission.

disposition of the case.⁴⁵ As part of the precautionary measures, the Commission may contact the Ministry of Foreign Relations of the State asking for an urgent reply to the requested, pertinent information.⁴⁶

The Commission also has the power to turn to the Court and request the adoption of provisional measures when the State involved has ratified the Convention.⁴⁷ The Commission can exercise this power even in matters not yet submitted to the Court, although so far it has never used this power.⁴⁸ This preliminary injunction requested by the Commission appears to be the final recourse available within the Inter-American system to prevent irreparable harm to individuals.

For the Commission to admit a petition, the request must satisfy certain minimal, formal requirements such as the identification of the person or NGO filing the complaint; a description of the facts surrounding the alleged violation(s); the State allegedly responsible; the specific rights of the Convention that were allegedly violated; and the exhaustion of domestic remedies.⁴⁹ In situations where the State concerned does not afford due process, or the petitioner does not have access to, or is prevented from exhausting the applicable domestic remedies, or there is an unjustified delay in rendering a final judgment, the requirement that domestic remedies be exhausted is waived.⁵⁰

A petitioner must file his or her claim no more than six months after notification of the final disposition in a domestic case which represents the exhaustion of remedies. However, the Commission has the flexibility to accept or deny petitions, setting aside statutory limitations, by taking into account the particular circumstances of a case.⁵¹ During

45. Article 29, para. 4 of the the Regulations of the Commission.

46. Article 34, para. 2 of the Regulations of the Commission.

47. Article 63, para. 2 of the Convention; Article 76 of the Regulations of the Commission; Article 23, para. 2 of the Regulations of the Court. According to Judge Buergenthal, the Court can adopt provisional measures only in matters where it involves a State Party to the Convention that has accepted its jurisdiction, or where a State Party to the Convention accepts temporary jurisdiction in response to a request by the Commission or the Court. *See* Buergenthal, *supra* note 24, at 465-66.

48. When witnesses in the Honduran cases were murdered, the Commission, as a precautionary measure (invoking Article 29 of its Regulations) sent a message to the Honduran government requesting a full investigation and protection for other witnesses. Separately, the Court, using its own powers adopted interim measures with regard to the same incident. Article 23 para. 1 of the Rules of Procedure of the Court. *See infra*, Section VII, Protection of Witnesses.

49. Article 32 of the Regulations of the Commission.

50. Article 37 of the Regulations of the Commission.

51. Article 38, para. 1 of the Regulations of the Commission. "The six month deadline for petitioners to file a complaint has held little practical importance for the Commission." D. O'DONNELL, *PROTECCIÓN INTERNACIONAL DE LOS DERECHOS HUMANOS* 441 (1988). Nonetheless

the preliminary objections in *Fairen-Solis*, the Commission restated its flexible policy regarding the issue of time.⁵²

Petition processing may be characterized as adversarial, since a bilateral discussion occurs between the petitioner (individual or NGO) and the accused State. In this investigative phase, the Commission plays a passive role, mediating the discussion between the parties.⁵³ It acts as carrier and investigator soliciting responses to the petitioner's claims from the State, and transmitting information between the parties. In overseeing the exchange, the Commission limits the response time available to each party.⁵⁴

The Commission is interested in promoting a fluid discussion between the parties concerned; the discussion will provide the Commission with the information required to adopt a resolution. In some cases, communication is only a formality. For example, a State may respond so generally to specific points in an individual's complaint that the Commission, *ex officio* or at the petitioner's request, may submit a separate questionnaire about controversial or confusing points in the complaint which have not been clarified by the State in its response. In such a manner, the Commission not only reestablishes communication between the parties, but clarifies relevant issues and improves its own record of information in order to form an opinion of the case.⁵⁵

Where a State completely fails to cooperate, the Commission may issue a warning that it intends to apply Article 42 of its Regulations, which establishes a presumption of truth regarding pertinent facts in favor of the petitioner. This Article is an original creation of the Commission and represents the "last resort," intended to persuade the State to cooperate with the Commission. It has also been perceived as a sanction against a State's insensitivity or unwillingness to work with the Commission.⁵⁶ The Commission, however, must use this provision

the Commission will require the filing of a petition within a reasonable time.

52. See *Fairén Garbí and Solís Corrales*, Case 7951, Observations of the Commission, March 20, 1987, at 52.

53. The Commission's behavior is often too passive in this stage, and if the petitioner does not understand his or her crucial active role, the case could be paralyzed because of inaction. Article 48, para. 1(b) of the Convention. Therefore, in practice the responsibility for expediting a case rests with the petitioner, who must be in constant contact with the Commission staff member in charge of the case.

54. Articles 34.5, 34.6 & 34.7 of the Regulations of the Commission. In practice, the Commission permits this dialogue between the parties to continue even beyond its own regulations until it considers that the case is "ripe" enough for a final resolution.

55. Articles 34 & 35 of the Regulations of the Commission.

56. Aguilar, *Procedimiento que Debe Aplicar la Comisión Interamericana de Derechos Humanos en el Examen de las Peticiones o Comunicaciones Individuales sobre Presuntas Viola-*

prudently.

Dialogue with the State increases the Commission's sources of information, even where there exist varying degrees of State cooperation. The Commission must also maximize its sources of information and base its decisions on detailed and rigorous analysis of all available evidence. Indeed, resolutions based exclusively on Article 42's presumption often damage the weight of a pertinent case.

The Commission has been extraordinarily flexible and informal with regard to rules of evidence. It has permitted the admission of affidavits, videotaped testimonies, personal documents, newspaper clippings, and technical expert testimony, viewing broadly what might serve as evidence.

During the initial investigative period, the petitioner plays a fundamental role. If the petitioner so chooses, he or she may appear in a private hearing during the Commission's sessions personally, or through a representative, to explain his or her version of the alleged facts and present relevant evidence.⁵⁷

During its annual meetings, the Commission, on its own initiative or at the request of either of the parties, may offer to mediate a friendly settlement of the case.⁵⁸ This procedure may be used only if in the Commission's judgment the alleged facts are sufficiently precise and the nature of the case is susceptible to the use of the friendly settlement mechanism.⁵⁹ In any case, all settlements must be based on the respect for human rights recognized in the Convention.⁶⁰

Finally, if the Commission believes that a State has violated any of the rights protected under the Convention or Declaration, it may approve a resolution condemning the State as well as make certain recommendations. If the State does not adopt the Commission's recommendations or provide new facts or invoke additional legal arguments within a ninety day period, the Commission may then publish the resolution in its Annual Report which is submitted to the General Assembly.⁶¹ For State Parties to the Convention that have accepted the con-

ciones de Derechos Humanos, in HUMAN RIGHTS IN THE AMERICAS, *supra* note 24, at 211.

57. Should the circumstances require, a hearing before the Commission during its Period of Sessions is perhaps the most timely opportunity to request an on-site investigation by the Commission or a special mission by the attorney of the Secretariat in charge of the cases in petitioner's country. See Articles 15, 28 and 67 of the Regulations of the Commission.

58. Article 45, para. 1 of the Regulations of the Commission.

59. *Id.* para. 2.

60. *Id.*; see also *Godínez Judgment* INTER-AM. CT.H.R. (ser. C) No. 3 paras. 45-49 (1987)(Judgment on Preliminary Objections).

61. Articles 51-54 of the Regulations of the Commission.

tentious jurisdiction of the Court, the Commission is empowered to submit a case to the Court. Yet the Commission has exercised this power only once.⁶² On two other occasions, the Commission unsuccessfully called upon State Parties to the Convention to recognize the Court's jurisdiction in resolving specific cases.⁶³

2. *Preparing Reports on Human Rights*

As a consequence of the Commission's own initiative⁶⁴ or by invitation from a particular State, the Commission conducts on-site investigations from which it usually prepares reports on the situation of human rights in that specific State.⁶⁵ The request for a mission by the Commission can also be made by a political body of the OAS, such as the Meeting of Consultation of Foreign Ministers.⁶⁶ All visits conducted by the Commission for the purpose of reporting on human rights conditions in a country require the prior consent of the State concerned.⁶⁷ Obviously, the weight of the Commission's investigation is stronger when it has access to sources of information through direct contact in the field.

The on-site investigations⁶⁸ of the Commission and the special

62. On April 24, 1986 the Commission submitted the first contentious cases to the Court: *Manfredo Velásquez Rodríguez*, Case 7920; *Saul Godínez Cruz*, Case 8097; *Francisco Fairén Garbí and Yolanda Solís Corrales*, Case 7951.

63. Article 62, para. 2 of the Convention; Article 50, para. 3 of the Regulations of the Commission; see *Edgar Macías*, Case 9102, Res. no. 29/86 against Nicaragua; *Hugo Spadafora*, Case 9726, Res. no. 25/87 against Panama. See cases cited *supra* note 4.

64. See *Godínez* Preliminary Judgment, at paras. 50-58.

65. During the last fifteen years, the Commission has prepared country reports on human rights in the following countries: Argentina, Bolivia, Colombia, Chile, Cuba, El Salvador, Guatemala, Haiti, Nicaragua, Panama, Paraguay, Suriname and Uruguay.

66. See Vargas, *Las Observaciones In Loco Practicadas Por La Comisión Interamericana de Derechos Humanos*, in *HUMAN RIGHTS IN THE AMERICAS*, *supra* note 24, at 290. It is noteworthy that a second visit to Panama was carried out by the Commission in response to a request by the President of the Twenty-First Meeting of Consultation of Foreign Ministers for the purpose of "completing and updating the information on the situation of human rights in that country," in August 24, 1989. As a result of its visits to Panama, the Commission published a special report on Panama. See OEA/ser.L./V/II.76, doc.16 rev.2 (1989).

67. Article 48, para. 2 of the Convention; Article 44, paras. 55-62 of the Regulations of the Commission.

68. *In loco* visits are local, on-site investigations by the Commission where it has the chance to make personal contact with local government officials and human rights NGOs, and directly receive testimony from victims or witnesses in the cases. In summary, the Commission has the opportunity to observe the general human rights conditions and political climate in the country. Some of the states in which the Commission has conducted visits *in loco* are: Argentina, Chile, El Salvador, Guatemala, Haiti, Nicaragua, Panama, and Peru. References to important on-site investigations by the Commission in the early 1980s are contained in Norris, *Observations in loco: Practice and Procedure of the Inter-American Commission on Human Rights 1979-83*, 19 TEX.

country reports which may follow have been extraordinarily effective in the defense of human rights, particularly during the 1970s and early 1980s when military regimes were numerous in Latin America.

The country reports, for example, have helped the Inter-American system of human rights protection to confront gross and massive human rights violations in the region, even in those countries where the Commission was denied government consent to conduct an on-site investigation.⁶⁹ Country reports, however, are an indirect channel of protection against abuse. The reports are strongest in their capacity to expose and denounce human rights violations. Through the publication of its country reports, the Commission can alert the domestic and international community (particularly for debates during the General Assembly of the OAS) to the unacceptable behavior of States or to a particular phenomenon, such as the practice of disappearances or extrajudicial executions. These publications have the salutary effect of provoking strong reaction from democratic governments, the public, the media, NGOs and other political actors.

The best instrument for human rights protection in Latin America is the effective and persistent processing of individual cases by the Commission. As more elected civilian governments take power in Latin America and recognize the contentious jurisdiction of the Court, individual petitions may be pursued more aggressively. One of the most significant challenges for the Commission today is to apply the high standards delineated in its human rights reports over the past 15 years to individual cases brought to its attention.

3. *Proposing Measures for the OAS*

Through the Annual Reports it submits to the OAS General Assembly, the Commission also focuses on the promotion of human rights and the steps necessary toward a full observance of the rights set forth in the Declaration and the Convention. These include the draft of the Inter-American Convention to Prevent and Punish Torture (submitted in 1978 and signed in Colombia on December 9, 1985), the draft of the

INT'L L.J. 285 (1984).

69. The Commission has not carried out a visit *in loco* in Chile since 1974 because of the Chilean government's denial of consent; however, the Commission has produced four reports on the situation of human rights in Chile since that time. On the other hand, the Paraguayan government granted its consent to a visit *in loco* in 1978, only to renege on its invitation because it was unable to set an appropriate date. After twelve years, in 1990 Paraguay permitted the Commission to visit the country. This maneuver by the Paraguayan government, however, did not prevent the Commission from publishing two special reports on the human rights situation in Paraguay.

Additional Protocol to the American Convention on Human Rights Relevant to Economic, Social and Cultural Rights (submitted in 1986 and signed in El Salvador on November 17, 1988) and the draft of the Inter-American Convention on Forced Disappearance of Persons (submitted in 1988). The Commission has also submitted specific proposals to the General Assembly on such issues as the independence of the judiciary, refugee rights, and the rights of indigenous populations.

B. The Court

The Inter-American Court of Human Rights is an autonomous judicial institution of the Inter-American system. The Court's purpose is to apply and interpret the Convention.⁷⁰ The Court was established in 1979, after the Convention entered into force.⁷¹

1. Advisory Jurisdiction

The Convention confers on the Court two distinct judicial functions: advisory jurisdiction and contentious jurisdiction. Cases adjudicated under contentious jurisdiction are binding upon State Parties to the Convention, those under advisory jurisdiction are not.⁷² The Court also has the special jurisdiction to adopt provisional measures in certain matters, at the request of the Commission.

The Court's advisory jurisdiction is very broad: it allows the Court to interpret the Convention as well as other treaties on the protection of human rights in the member States and to examine the compatibility of domestic law with those instruments.⁷³

Advisory opinions may be requested by all OAS member states, regardless of whether they have ratified the Convention, and by permanent organs of the OAS, such as the Commission, in matters relating to

70. Article 1 of the Statute of the Court.

71. Edmundo Vargas, Executive Secretary of the Inter-American Commission on Human Rights, explained the background and legal efforts that preceded the creation of the Inter-American Court. Vargas, *La Corte Interamericana de Derechos Humanos*, in *PERSPECTIVAS DEL DERECHO INTERNACIONAL CONTEMPORANEO: EXPERIENCIA Y VISION DE AMERICA LATINA* 129 (Vol. II Instituto de Estudios Internacionales, Santiago, Chile 1981); see also Zovatto, *Antecedentes de la Creación de la Corte Interamericana de Derechos Humanos* in *LA CORTE INTERAMERICANA DE DERECHOS HUMANOS, ESTUDIOS Y DOCUMENTOS* 207 (IIDH 1985).

72. See *Interpretation of Peace Treaties*, I.C.J. Reports, Opinion 30 (III) 50, 71-72 (1950).

73. Article 64 para. 1 of the Convention; Advisory Opinion on "Other Treaties" Subject to the Advisory Jurisdiction of the Court, INTER-AM. CT.H.R.(ser. A) para. 1 (1982); Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 27 (1985).

their functions.⁷⁴

In the last ten years, the Court has issued ten advisory opinions with varying effect.⁷⁵ For example, an advisory opinion reaffirming restrictions to the death penalty as established in Article 4 of the Convention⁷⁶ was particularly effective in stopping a State Party which reserved its ratification of the Convention on this article. Guatemala ceased its practice of executing individuals allegedly involved in common crimes related to political offenses shortly before the Court issued its opinion.⁷⁷ Equally significant was the Court's opinion establishing the principle that even under states of emergency, the writ of *habeas corpus* could not be suspended as an essential judicial guarantee for the protection of individual rights.⁷⁸

The government of Nicaragua, which had previously suspended *habeas corpus* during states of emergency, halted this policy coincidentally following the Court's opinions. On the other hand, the Panamanian government, even after several pleas by the Commission to stop, continued to suspend *habeas corpus* during states of emergency without any acknowledgement of the Commission's requests.⁷⁹

2. Contentious Jurisdiction

Under its contentious jurisdiction, the Court has binding authority to consider and decide cases concerning the interpretation and applica-

74. Article 64 para. 2 of the Convention.

75. Of those opinions, the Commission has requested three. State Parties that requested advisory opinions by the Court include: Peru, Costa Rica, Uruguay and Colombia. For a detailed examination on the exercise of the advisory jurisdiction of the Court, see generally M. Ventura & D. Zovatto, *LA FUNCIÓN CONSULTIVA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS 1982-1987* (IIDH 1989).

76. "In no case shall capital punishment be inflicted for political offenses or related common crimes." Article 4 para. 4 of the Convention; see also Article 4 para. 2 of the Convention.

77. Lockwood, *Advisory Opinions of the Inter-American Court of Human Rights*, 13 DEN. J. INT'L L. & POL'Y, 245-67 (1984); Moyer & Padilla, *Executions in Guatemala as Decried by Court of Special Jurisdiction in 1982-82: A Case Study*, 6 HUM. RTS. Q. 507 (1984); Burgerenthal, *The Inter-American Court, Human Rights and the OAS*, 7 HUM. RTS. L.J. 157-64 (1986).

78. The suspension of *habeas corpus* is prohibited by the Convention. INTER.-AM. CT.H.R., *Habeas Corpus in Emergency Situations* (Articles 27 para. 2; 25 para. 1; and 7 para. 6 of the American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987, series A, no. 8.

79. Under Article 51 of the Panamanian Constitution, *habeas corpus* may be suspended under states of emergency. During 1987-89, Panamanian authorities declared states of emergency on several different occasions, suspending *habeas corpus*. See Inter-American Commission on Human Rights (OAS), *Report on the Situation of Human Rights in Panama*, OEA/ser.L./V./II.76, at 9-13 (1989).

tion of the Convention. Upon a finding of violation of the Convention by a State Party, the Court may decide that an injured party must be guaranteed the exercise of his or her violated right and, if appropriate, order the payment of fair compensation.⁸⁰

Only State Parties with prior recognition of the Court's jurisdiction, or that recognize jurisdiction for a particular case, and the Commission may submit cases to the Court.⁸¹ Nineteen OAS member states have ratified the Convention, ten of which have recognized the contentious jurisdiction of the Court.⁸² The Commission has unsuccessfully requested State Parties that have not recognized the Court's jurisdiction to accept it in particular cases.⁸³

Judgments of the Court are final and not subject to appeal. A judgment for compensatory damages may be executed in the country concerned in accordance with domestic procedures. However, in cases of disagreement over the meaning or scope of a judgment, parties must request a clarification from the Court within ninety days after notification of the judgment.⁸⁴

In situations of non-compliance by States with Court judgments or recommendations, the Court may submit such cases for review to a regular session of the General Assembly or to the Permanent Council when the Assembly is not in session.⁸⁵

In 1981 the Costa Rican government directly submitted a case against itself to the Court, bypassing the Commission process. Two years later, the Court dismissed the case holding that a State cannot waive the proceedings before the Commission.⁸⁶ The Costa Rican sub-

80. Article 63 para. 1 of the Convention.

81. Article 61 para. 1 of the Convention.

82. To date, State Parties that have recognized the Court's jurisdiction in conformity with Article 62 of the Convention include: Argentina, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Jamaica, Peru, Uruguay, Venezuela. OEA/ser. A/16, no. 36, Treaty Series. Some countries (e.g. Argentina in 1984, Colombia in 1985, and Guatemala in 1987) have limited the Court's jurisdiction to violations that occur after the date of acceptance. See *Basic Documents Pertaining to Human Rights in the Inter-American System*, *supra* note 24; see also *Governmental Liability for 'Disappearances': A Landmark Ruling by the Inter-American Court of Human Rights*, *supra* note 5, at 296.

83. See *supra* cases cited in note 63.

84. Articles 67, 68 of the Convention. Currently, the judgments for compensatory damages in *Velásquez* and *Godínez* have been presented to the Court for clarification. See *infra* Section VIII (Damages).

85. Article 65 of the Convention; see Buergethal, *supra* note 24, at 467.

86. The case involved a Costa Rican woman who was killed by a member of the civil guard while imprisoned. Costa Rica waived the requirement of exhaustion of domestic remedies and agreed to be bound by the Court's ruling. In *the Matter of Viviana Gallardo et al.*, INTER-AM. Ct.H.R. (ser. A) No. G 101/81.

mission was the closest that the Court came to exercising its contentious jurisdiction until 1986 when the Court received its first contentious cases, submitted by the Commission regarding disappearances in Honduras.

IV. THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS IN THE CASE AGAINST HONDURAS

A. Institutional Cooperation

From the beginning, private human rights organizations were involved in bringing these cases and pushing them through the proceedings. In the *Velasquez* and *Godinez* cases, the initial complaints before the Commission were filed in 1981 and 1982 by the *Comité para la Defensa de los Derechos Humanos en Honduras* (CODEH),⁸⁷ that country's foremost civil institution dedicated to monitoring human rights. In the subsequent proceedings before the Commission, CODEH and its chairman, Dr. Ramón Custodio López, presented new evidence, appeared in person at hearings in Washington D.C., responded to presentations by the Honduran government and submitted legal arguments. At some points CODEH was joined by the relatives of the victims, as well as by institutions of which those relatives were members: the Honduran *Comité de Familiares de Desaparecidos* (COFADEH)⁸⁸ and the San José-based *Asociación Centro-Americana de Familiares de Desaparecidos* (ACAFUDE).⁸⁹

In 1986, when the original complainants were advised of the submission of the cases to the Court, they decided to form a legal team to represent them through the newly opened stages. Attorneys and professors of international law were contacted in the United States, Honduras and Costa Rica. Most proceedings took place in Washington, D.C. and in San José, Costa Rica and not only demanded considerable personal time by attorneys offering their services *pro bono publico*, but also important institutional support. For that reason, the team which finally represented the interests of the relatives included Professor Claudio Grossman and the authors of this article, all based in Washington, D.C., and Mr. Hugo Muñoz Quesada, of San José.⁹⁰ Several

87. In *Fairén-Solis*, Mr. Francisco Fairén Almengor filed the complaint before the Commission.

88. Committee of Relatives of the Disappeared in Honduras.

89. Central-American Association of Relatives of the Disappeared.

90. Professor Grossman is the Director of International Legal Studies at the Washington College of Law, The American University, and a member of the Executive Committee of the

distinguished Honduran lawyers provided important assistance in domestic law and fact development; however, intense governmental and public pressure including threats and intimidation prevented them from joining the team in any formal capacity.

A major effort was needed from the start to coordinate the tasks of the complainants, the relatives and the lawyers, as well as to decide appropriate legal strategies, to obtain and develop evidence in at least four different countries, and to find and persuade witnesses to testify. Neither the Court nor the Commission provided funding for travel by witnesses or lawyers to attend hearings. Trips by lawyers to look for evidence in Honduras and Guatemala also had to be financed privately. Raising funds independently became necessary to defray the costs of attending at least six hearings in San José, including travel by seventeen witnesses from different countries. ACAFADE and Americas Watch provided all of the funds through generous contributions by foundations in the United States and in Europe.⁹¹

B. *Individual Participation in the Honduras Cases*

The struggle for justice in human rights requires individuals and NGOs alike to carve out a separate space for themselves. In Latin America, the Inter-American system presents a formal arena for human rights protection, yet one in which individuals and NGOs are still fighting to become autonomous and principal actors.⁹²

1. *The First Important Legal Issue: The Victims' Standing*

The first issue that the petitioners confronted was to define their

International Human Rights Law Group, a Washington-based NGO. Mr. Vivanco was, in 1986, a staff attorney for Americas Watch. In 1987 he joined the staff of the Commission and continued to work in these cases. Mr. Méndez was then the Director of the Washington office of Americas Watch, a human rights organization with headquarters in New York. Since 1989, Mr. Méndez is the Executive Director of Americas Watch, which in that year became part of Human Rights Watch. Mr. Muñoz is a former Minister of Justice of Costa Rica.

91. The importance of the issue and the novelty of the process undoubtedly made it relatively easy to raise funds. Nonetheless, litigating the case over more than four years became a very expensive proposition. The authors feel that important lessons should be drawn, perhaps as the subject of a future article, on how to develop evidence for future cases.

92. The history of *amicus curiae* briefs in the Court demonstrates that without its specific regulations in the Inter-American system, human rights NGOs as well as individuals have been capable of having a relationship with the Court. See Moyer, *The Role of Amicus Curiae in the Inter-American Court of Human Rights, La Corte Interamericana*, *supra* note 71; see also Shes-tack, *Sisyphus Endures: The International Human Rights NGO*, 24 N.Y.U. L. Rev. 79 (); Note, *The Role of Nongovernmental Organizations in Implementing Human Rights in Latin America*, 7 GA. J. INT'L. & COMP. L. 477 (1977).

legal standing before the Commission and the Court. While counsel recognized the limitations they faced within the system, they were also conscious of their strengths: full-time professional personnel, access to financial support, and most importantly, direct contact with vital sources of information - the relatives of the victims and grass-roots organizations in the region.

The need for an official and institutional liaison with the organs of the Inter-American system handling the cases became apparent a few months after the Honduras cases were submitted to the Court in 1986. Without this link, the opportunity to influence the process would evaporate. The immediate objective was then to establish concrete access to the system.

Counsel essentially had two main options: to seek independent and autonomous representation for the relatives of the victims before the Court, or to secure through the Commission the chance to represent their interests in a symbiotic relationship with the bodies of the Inter-American system.

2. *European Precedent*

Since no precedent on an individual's legal standing existed in the Inter-American system, counsel turned to the European system of human rights protection, upon which the Inter-American system is based, for relevant analogies and guidelines. Although the European and American systems are similarly restrictive with respect to the individual's participation before the Court, the European system allows the individual to participate directly once proceedings have been initiated by its Commission or by a State Party.⁹³ European organs have been extraordinarily creative in contentious matters, gradually lifting the European Convention's limitations on individual participation.

This progressive, independent participation of the individual before the European Court began in 1960 with the *G.R. Lawless* case in which the European Commission recognized the right of the individual to participate in the process before the European Court.⁹⁴ In *G.R. Lawless*, the European Commission ordered that all the petitioners be given access to any relevant information regarding the procedures in order to

93. Article 61 para. 1 of the Convention and Article 44 of the European Convention on Human Rights.

94. Judgment of November 14, 1960 in the *Lawless* Case, 12 Eur. Ct. H.R. (ser. A), at 14 (1960-61).

submit written observations to the European Court.⁹⁵ While the State Party argued against such access for the individual, the European Commission supported it, stating that it had "great doubts as to whether it may be understood that the authors of the Convention wished to create such an extreme degree of inequality in the participation of the two parties in a case before an international tribunal."⁹⁶

As a result, the European Court affirmed the European Commission's proposal to allow the participation of individuals, determining that the practice was necessary for the adequate and timely administration of justice. The result of the decision meant that the European Commission could communicate freely and expeditiously with petitioners, giving petitioners an opportunity to express themselves. Individual petitioners could also appoint an adviser to work with the European Commission's delegates in cases before the European Court.⁹⁷ In the *Vagrancy* case, the European Court further developed its expansion of individual participation, allowing attorneys for the petitioners to advise the European Commission on their clients' behalf.⁹⁸

By 1982 the European Court had developed statutory measures to include the participation of individuals. Petitioners could be directly involved as soon as proceedings were initiated, designate their advisers, and intervene in all legal procedures. They were granted rights equal to those of States and the European Commission in submitting evidence to the European Court. Today, the participation of the individual begins as soon as the European Court receives a case — it immediately notifies "the individual, non-governmental organization or group of individuals that have petitioned" and requests a response within two weeks from the individual "if s/he wishes to participate in the proceeding pending before the Court."⁹⁹

Based on analogous arguments used in the evolution of the European system, counsel in the Honduras cases informed the Commission of its status as the petitioners' representatives and asked the Commission to inform the Court of that status.¹⁰⁰

95. P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 142 (1984).

96. *Lawless*, 12 Eur. Ct. H.R. (ser. B), at 257.

97. *Lawless*, 12 Eur. Ct. H.R., (ser. A), at 14-15.

98. Article 29 of the Rules of the European Court of 1959; Judgment of November 18, 1970 in the *Vagrancy* Case, 12 Eur. Ct. H.R. (ser. A), at 6-8 (1971).

99. Article 33 of the Rules of the Eur. Ct. H.R., as modified in 1982.

100. Public Hearings of the Commission's Annual Session, September 25, 1986.

3. *Autonomous Standing*

As would be available to individual petitioners before the European Court, petitioners requested a right to participate independently of the Commission's supervision and to have access to all information related to the proceeding.

When the Commission did not respond, counsel decided to organize a meeting with all the petitioners. The meeting occurred in San Jose, Costa Rica in January, 1987, and was the first personal contact between the families and any of the attorneys in the cases. Counsel checked important evidence, defined litigation strategies, and most importantly, discussed expectations for the outcome of the cases with the petitioners.

Following the meeting in Costa Rica, one attorney for the petitioners¹⁰¹ traveled to Honduras in search of evidence for the cases. During his investigation, he examined more than 100 similar cases and studied the legal instruments used by the relatives of victims. Specifically, counsel was able to obtain information regarding the ineffectiveness of the guarantee of *habeas corpus* in Honduras. This evidence was critical in establishing the pattern of disappearances that occurred in Honduras between 1981 and 1984. Counsel also interviewed Honduran human rights lawyers, victims of human rights violations, journalists familiar with the repression in the country, congressmen and activists, some of whom later testified in the hearings before the Court.

Subsequent to the investigation in Honduras, and after realizing the impossibility of obtaining independent status from the Commission, counsel began working with the Executive Secretary of the Commission. The attorneys provided technical support to produce a joint document with the Commission which responded to the preliminary objections presented by the Honduran government. In the same document,¹⁰² the Commission notified the Court that some of the representatives of the petitioners were officially appointed as the Commission's *ad hoc* advisers in the cases.

Despite the complexity and controversial process of these first contentious cases, a productive relationship was established between the Commission and the petitioners' representatives (advisers). Nevertheless, at the end of the trial when compensatory damages were to be determined, disagreement arose over the amount of the compensation

101. José Miguel Vivanco.

102. On March 20, 1987.

and the inclusion of punitive damages as part of the compensation.¹⁰³

Independent status for petitioners is the best approach for future contentious cases before the Court. This direct and autonomous participation will also strengthen the effectiveness of the Inter-American system for the protection of human rights. In Europe, greater individual participation has become increasingly possible because both the European Commission and the Court were willing to interpret the European system ideally, recognizing that the principal purpose of such institutions is to protect the rights of individuals, offer an independent and balanced procedural opportunity, and permit the direct confrontation of interests (State and individual) without third party interference.

V. THE TRIAL

A. *Initial Motions*

As submitted by the Commission, the three cases consisted mainly of the exchange of correspondence between the complainants, the Government of Honduras and the Commission. The Government of Honduras simply denied any knowledge of the whereabouts of the missing persons and in effect refused to investigate the matter at all. The complainants showed that they had tried to use applications for *habeas corpus*, criminal complaints and administrative inquiries to determine what had happened to the victims — all to no avail. The Commission had ruled that Honduras was responsible for the disappearances, mostly on the circumstantial evidence submitted by the complainants and on Honduras' evident lack of cooperation.¹⁰⁴ The Court asked Honduras to reply, which it did, challenging the Commission's decision to submit the cases to the Court and asserting that the Court lacked jurisdiction.¹⁰⁵ The Commission responded by submitting its observations which constituted the Commission's comprehensive statement of the case.¹⁰⁶

103. See *infra* Section VIII(C) for a discussion of punitive damages.

104. Commission Resolution of April 24, 1986 (cited in *Godínez Judgment*, at paras. 1-12). The Commission applied Article 42 of its Regulations and presumed the truth of the allegations against Honduras on the ground of its lack of cooperation with the system. The Commission found Honduras guilty first in 1983, and then in 1986 confirmed the same resolution.

105. Honduras brief ("Memoria") of October 31, 1986 (cited in *Velásquez Judgment*, at para. 16).

106. Observations of the Commission to the Brief filed by the Government of Honduras. See *Velásquez Judgment*, INTER-AM. CT.H.R. (ser. C) No. 4 (1988); *Godínez Judgment*, INTER-AM. CT.H.R. (ser. C) No. 5 (1989); *Fairén Garbí and Solís Corrales Judgment*, INTER-AM. CT.H.R. (ser. C) No. 6 (1989).

The *Observations* brief was prepared by the Commission staff in cooperation with the relatives' lawyers. The brief presented the Commission's theory of the case: that these three cases manifested a deliberate, government-inspired and executed plan to use forced disappearances as a tool to control and suppress a certain segment of political opponents. The plan further included a deliberate decision to prevent the normal functioning of Honduras' judicial institutions and other guarantees for the protection of individual rights. The brief offered to prove the existence of this plan, as well as specific evidence pertaining to each case with the testimonies of witnesses that included Honduran human rights activists, survivors of the campaign of disappearances, and relatives of the disappeared. Other witnesses included in the proffer of evidence were Honduran, Guatemalan and Costa Rican government officials. The *Observaciones* brief also described the process followed by the Commission to address the specific complaints and defended the legality of the decisions adopted by the Commission, including the decision to seek the Court's involvement. The brief also notified the Court that the Commission would be represented by a delegation which included the lawyers for the families as *ad hoc* advisers.

B. Preliminary Objections

On the basis of these briefs, the Court decided that a controversy existed in regard to jurisdiction and treated the Honduras brief, in part, as the presentation of preliminary objections. Consequently, the Court scheduled a hearing on preliminary objections.¹⁰⁷

The Honduran Government, represented by a delegation of lawyers from different branches of government, was led by the Honduran Ambassador to Costa Rica. The Commission's delegation was led by the Chair of the Commission, Ms. Gilda Russomano, and included the four lawyers for the families. The Honduran delegation did not object to the participation of counsel for the victims and the Court accepted the Commission's decision in this respect.

Honduras asserted that the case was improperly before the Court because the Commission had not followed the procedures established in the Convention for the treatment of cases denounced to the Commission. In particular, Honduras claimed that the Commission had not declared at an early stage that the cases were admissible in accordance with the Convention;¹⁰⁸ that the Commission had neglected to offer its

107. The hearing was held on June 15, 1987 in San José, Costa Rica.

108. Articles 47 & 48 of the Convention.

services to both parties in the controversy for the purposes of a "friendly settlement";¹⁰⁹ that the Commission had not conducted an on-site investigation;¹¹⁰ and that the complainants had not exhausted their domestic remedies before submitting the case to an international mechanism.¹¹¹ Honduras argued with regard to domestic remedies that criminal investigations and potential prosecution for these abductions were pending before Honduran courts, and that the relatives still had available to them a variety of judicial actions and appeals (*recursos*) which had not been used.

The Commission responded that none of the objections were raised by Honduras during the lengthy process before the Commission, even though the Government had been given ample opportunity to do so. It further maintained that the "friendly settlement" procedure was discretionary. In response to the exhaustion of domestic remedies, the Commission offered evidence that the relatives had attempted a variety of judicial and diplomatic actions without success. The Commission also argued that the remedies that need be exhausted before recourse to an international body are only those actions in domestic law that are likely to produce the desired result. In an unacknowledged detention the application for *habeas corpus* is the only action which, if treated seriously by the authorities, can determine the whereabouts of a detainee, as well as the reasons for his or her arrest. In such cases, *habeas corpus* is the only remedy that could reasonably be required of relatives before they reach out to the international arena. The relatives here had filed several requests for *habeas corpus* relief, among other actions.

The Commission also defended a doctrine of its own creation regarding the exhaustion of remedies. This doctrine evolved from the Commission's practice and experience and is now reflected in the Commission's Regulations and Article 46 of the Convention.¹¹² It is not necessary to exhaust any remedies at all when the petitioner is prevented from exercising them or when there is unjustified delay in the government's response to them. In practice the doctrine applies to cases where remedies are clearly useless under circumstances of the particular time and place. This has special importance to cases of disappearances because the process inherently shields the abductors from any outside control, rendering judicial remedies completely ineffective. Moreover, forcing the "reappearance" of a victim, in the Commission's experi-

109. Article 48.1(f) of the Convention.

110. Article 48.2 of the Convention.

111. Article 46.1(a) of the Convention.

112. Article 37.2 of the Regulations of the Commission.

ence, requires immediate intervention in the first few days after the abduction. Finally, the Commission argued that the preliminary objections should be joined to the merits of the case to allow both parties to offer and produce evidence on them.

On June 26, 1987, the Court issued its rulings on the preliminary objections in all three cases. It found that the Commission was not obligated to make a determination of admissibility, except if the Commission were to find that the case was clearly inadmissible according to the Convention and to the Commission's own regulations. It also agreed with the Commission that the "friendly settlement" procedure was not a mandatory step in the process if there was no common ground on which to base a settlement. The Court held that on-site investigations are absolutely discretionary for the Commission. All of the objections based on the Commission's internal regulations were rejected, thus upholding the authority of the Commission. The only remaining objection was the all-important issue of exhaustion of domestic remedies which the Court decided to join to the merits.¹¹³

In its decision on the merits in *Velásquez*, the Court ruled on the exhaustion of remedies.¹¹⁴ The Court fully agreed that in each case all reasonable remedies had in fact been exhausted before resorting to the Commission. In a ruling of landmark precedential value, the Court further agreed with the Commission's doctrine that a petitioner need only exhaust those remedies that can be reasonably expected to produce the desired result: an end to the specific violation of human rights that is the subject of the complaint. The Court also supported the Commission's waiver of the exhaustion requirement when the remedies are meaningless under the circumstances, even if formally available.¹¹⁵

C. *Hearings on the Merits*

A full week of hearings took place between September 30 and October 7, 1987. The Court heard a total of 21 witnesses. Leaders of human rights organizations described their efforts to document disappearances and to force authorities to acknowledge detentions. A lawyer who worked on cases of the disappeared narrated his own imprisonment and torture for the Court. Relatives explained the extensive actions

113. *Velásquez, Godínez and Fairén and Solís* Preliminary Judgments.

114. *Velásquez* Judgment, Case 7920, INTER-AM. CT.H.R. (ser. C) No. 4 (1988). The same legal analysis and decision on the matter was later repeated in *Godínez* Judgment, Case 8097, INTER-AM. CT.H.R. (ser. C) No. 5 (1989); *Fairén Garbí and Solís Corrales* Judgment, Case 7951, INTER-AM. CT.H.R. (ser. C) No. 6 (1989).

115. *Velásquez* Judgment, at paras. 50-81.

each of them undertook in their anguished quest for news about their loved ones. A former prisoner informed the Court that he had briefly seen Angel Manfredo Velásquez in a police lock-up only days after his abduction. Former Costa Rican government officials gave testimony about their diplomatic initiatives to find Francisco Fairén Garbi and Yolanda Solís Corrales, describing the lack of cooperation they received from the Honduran government. Each witness was first examined by a member of the Commission's delegation, then cross-examined by a member of the Honduran delegation, and finally examined individually by each member of the Court.

The most revealing testimony came from Inés Consuelo Murillo and Florencio Caballero. Ms. Murillo is a Honduran law graduate who spent eighty days in clandestine detention in 1983 before international pressure forced the Government to acknowledge her arrest. She then spent more than a year in prison and was finally expelled from Honduras, living in exile first in Germany and then in Mexico. Ms. Murillo described her abduction near San Pedro Sula and the torture she suffered while being held in two different clandestine detention centers until she was eventually turned over to regular police authorities. She identified by name some of her captors and torturers.¹¹⁶

Florencio Caballero was an interrogator for the secret Battalion 316, the unit of the Honduran armed forces that conducted the campaign of disappearances between 1981 and 1984. He defected in 1986 and was living as a refugee in Canada when he travelled to Costa Rica to testify. He gave details of the organization and history of Battalion 316, of its composition and tactics, as well as of the Battalion's involvement in several celebrated cases. He informed the Court that he and other members of the Battalion had been trained in the United States and that American intelligence agents maintained close contact with Battalion 316 at the height of the 1981-84 disappearances campaign.¹¹⁷

The Commission had proposed one witness, Sergeant José Isaías Vilorio, who did not appear at the first hearing. Sergeant Vilorio was implicated in the abduction of Manfredo Velásquez. The Court asked the Honduran government to locate Mr. Vilorio, as well as two higher-ranking officers whose names had come up during the hearings for their involvement in Battalion 316: Lieutenant Colonel Alexander Hernández and Lieutenant Marco Tulio Regalado Hernández. The Court

116. ACAFADE, *Honduras: Desaparecidos, Juicio y Condena* [Honduras: The Disappeared, Trial and Condemnation](partial, unofficial transcript of some of the hearings).

117. *Id.*

set a new hearing for January 1988, and ordered all three to appear. Additionally, the Court requested a description of the command structure of Battalion 316.

In the ensuing negotiations, Honduras revealed that Vilorio would not appear before the Court. The Honduran delegation offered "an explanation" by the Honduran Chief of Army Intelligence, Colonel Roberto Núñez Montes: Vilorio was murdered in Honduras only a few days before he was to appear at a second hearing set by the Court, and exactly one day after the Government had publicly announced that he would appear. The other three officers did, however, testify.¹¹⁸ Núñez admitted the existence of Battalion 316 and its intelligence function, though he claimed that it was an inoffensive training unit. He and Alexander Hernández categorically denied that the latter had ever been assigned to Battalion 316, though a year later Alexander Hernández twice admitted his involvement with Battalion 316 in Honduran press interviews. Regalado insisted that he had been no more than a traffic cop.¹¹⁹ Although there were no important revelations, their wooden explanations and demeanor raised serious doubts about their credibility. Consequently, their appearance strengthened the Commission's case.

D. Documentary Evidence and Investigatory Efforts

The Honduran government did not call a single witness. Both the Commission and the Honduran government produced some documentary evidence. It remained for the Commission, however, to search for and produce the most important documents. Essentially, the effort to search through judicial and administrative records looking for a paper trail was left entirely to the lawyers for the relatives with the assistance of Honduran human rights activists. The Court did not commission any of its officials to look for documentary evidence outside of its seat.

Mr. Vivanco found records of some of the applications for *habeas corpus*, as well as the autopsy report of the corpse thought to belong to Francisco Fairén Garbi. He and Mr. Méndez later searched in Guatemala for immigration and customs records to clarify whether Fairén and Yolanda Solís had actually entered Guatemala. Some of these records were then submitted to document examiners who produced expert reports. Well-known forensic anthropologists from the United

118. The hearing for the Honduran Army officers was held in private over the Commission's objections.

119. See transcripts of the Jan. 20, 1988 hearing. For Hernández's contradictions, see *infra* text accompanying note 214.

States and Argentina were asked to determine from the autopsy report the likelihood that the corpse of "La Montanita" belonged to Fairén on the basis of comparison with pre-mortem dental records. The results were inconclusive. An exhumation of the corpse for an actual comparison was never done because the government never identified the place where the remains were buried.¹²⁰

The failure to find the remains purported to belong to Fairén — a fact that if verified would have changed the outcome of the *Fairén* case — illustrates the attitude of the Honduran government throughout the proceedings. Its delegation attended every hearing and used its opportunities to cross-examine witnesses and to make legal and factual arguments. But it was totally uncooperative with the Commission and later with the Court in providing any useful information or facilitating the gathering of evidence.¹²¹ In addition to a performance by its attorneys that, to be generous, can be regarded as lackluster, Honduras participated in the case without any interest in finding out the truth or in contributing to the development of an important protection mechanism. Repeated press statements by government officials (including some who participated as attorneys for Honduras) made it clear that the government thought that it deserved great credit for not pulling out of the proceedings altogether. Legally, however, pulling out was not an option for Honduras since its acceptance of the Court's jurisdiction is without condition or reservation.

120. See reports by *Equipo Argentino de Antropología Forense* (dated in Buenos Aires, Nov. 21, 1987) with Dr. Mariano Castex of the Academy of Medicine of Buenos Aires, and by Dr. Clyde Snow (Oklahoma City, December 1987), both entered into the record of the Court. Dr. Snow and the *Equipo* have obtained well-deserved recognition for their work in identifying remains of victims of the "dirty war" in Argentina and elsewhere. Two members of the *Equipo*, Mercedes Doretti and Luis Fondebrider, were given the Reebok Human Rights Award for 1989. Snow, Stover & Hannibal, *Scientists as Detectives*, *TECHNOLOGY REV.* (Feb./Mar. 1989); T.M.B., *Ningún Nombre: Identifying Argentina's 'desaparecidos,'* *SCIENTIFIC AM.* (Nov. 1989); Unsworth, *The Body Hunters*, *INDEPENDENT MAG.* (Sept. 30, 1989); Constable, *More Painful Memories Unearthed in Argentina*, *The Boston Globe*, April 27, 1987, at 1; Golden, *No-name Graves Tell Story of Argentine Killings*, *The Miami Herald*, Dec. 3, 1987.

121. The Court issued a severe reprimand of this conduct in the *Fairén and Solís* Judgment: "La falta de diligencia, cercana a veces al obstruccionismo, mostrada por el Gobierno al no responder a reiteradas solicitudes. . . [The lack of diligence, sometimes approaching obstructionism, shown by the Government in not responding to repeated requests. . .]," *Fairén and Solís* Judgment, at para. 160.

VI. ANALYSIS OF THE DECISIONS IN *Velásquez, Godínez* AND *Fairén and Solís*

A. *Findings of Fact: A Deliberate, Systematic Pattern of Disappearances*

The decisions in *Velásquez, Godínez* and *Fairén and Solís* provide support to the work of the human rights movement, which for years has strived to describe and publicize the horrendous practice of disappearance to the international community. Human rights NGOs as well as inter-governmental organizations have frequently tried to expose elements and characteristics involved in this crime. The Commission, in response to the preliminary objections of the Honduran government, exposed and later proved through witnesses and documented evidence, different aspects of the practice during the Court's public hearings.¹²² The objective behind the evidence presented by the Commission was to demonstrate the existence of a systematic pattern of disappearances conducted by the Honduran Armed Forces from 1981 to 1984, with at least the acquiescence of the government.

The Court, accepting the Commission's allegations, found that between 100 and 150 persons disappeared in Honduras during that period under the following circumstances (*modus operandi*):

(1) Abduction "of the victim by force, often in broad daylight and in public places, by armed men in civilian clothes and disguises, who acted with apparent impunity and who used vehicles without any official identification, with tinted windows and with false license plates or no plates at all."¹²³ When the abduction is carried out in the daytime and in a public place the purpose may be to terrorize the local community or simply to act with brutality, displaying publicly the consequences of behavior the authorities consider "unacceptable" or "dangerous." The abduction may also occur under more controlled circumstances, in private, and without witnesses. Such a secret abduction makes the act harder to prove and the search for justice harder to achieve.

(2) The victims were usually individuals Honduran officials considered dangerous to State security and who sometimes had been under surveillance.¹²⁴

(3) The arms employed were reserved for the official use of the military and police, and the vehicles used had tinted glass, which requires spe-

122. Observations of the Commission on the Preliminary Objections of the Government of Honduras, March 20, 1987 (*Velásquez*, at 13).

123. *Velásquez* Judgment, at para. 147(b).

124. *Id.* at para. 147(d)(i).

cial, official authorization.¹²⁵

(4) The abductors blindfolded the victims, and took them to secret and unofficial detention centers. They interrogated the victims and subjected them to cruel, humiliating treatment and torture. Some were ultimately murdered and their bodies buried in clandestine cemeteries.¹²⁶

(5) When questioned (by relatives, attorneys and even judges exercising writs of *habeas corpus*), the authorities systematically denied any knowledge of the detention and the whereabouts of the victims.¹²⁷ The perpetrators were essentially shielded by official "ignorance."

B. Lack of Adequate Judicial Protection

The judicial, political and military authorities in the country either denied the practice of disappearances or were incapable of preventing, investigating or punishing those responsible for the acts.¹²⁸ The Honduran judicial system did not produce any relevant result during 1981-84. This lack of adequate judicial protection was considered by the Court to be part of the deliberate and systematic pattern, as the Commission had pleaded.¹²⁹ The total ineffectiveness of *habeas corpus* deliberately left Honduran citizens without even the minimum domestic remedies to confront this State practice.¹³⁰ The Commission proved (and the Court later declared) the ineffectiveness of *habeas corpus* by using multiple forms of evidence, among them witnesses who testified that they were temporarily disappeared themselves under the typical *modus operandi*, and "later reappeared in the hands of the same authorities who had systematically denied holding them or knowing their fate."¹³¹ In any case, the reappearance of the victims was not the result of any legal measure on their behalf, "but rather the result of other circumstances such as the intervention of diplomatic missions or action taken by human rights organizations."¹³²

125. *Id.* at para. 147d(ii).

126. *Id.* at para. 147(d)(iii).

127. *Id.* at para. 147(d)(iv).

128. *Id.* at para. 147(d)(v).

129. *Supra* note 122.

130. The ineffectiveness of *habeas corpus* was further clarified:

[A]lthough there might have been legal remedies in Honduras that occasionally allowed a person detained by the authorities to be found, those remedies were ineffective because the imprisonment was clandestine, formal requirements made them inapplicable in practice, the authorities against whom they were brought simply ignored them, or attorneys and judges were threatened or intimidated by those authorities.

Velásquez Judgment, para. 80.

131. *Velásquez* Judgment, at para. 147(d)(iv).

132. *Id.* at para. 77.

In this sense, the case of Inés Consuelo Murillo is extraordinarily illustrative and dramatic. Murillo was abducted and remained disappeared for eighty days.¹³³ During her disappearance, Murillo's family presented several legal actions on her behalf which proved totally ineffective. The government repeatedly denied involvement. At the same time, Murillo's family mobilized domestic and international human rights NGOs and diplomatic missions,¹³⁴ as well as the assistance of the Honduran Ambassador in Canada (Murillo's uncle). This combined pressure, and not the legal measures sought by her family, resulted in Murillo's reappearance in the hands of military officials.¹³⁵

C. Distinction Drawn by the Court in Fairén-Solis: The Victims' Identity as Part of the Pattern

As part of the pattern of disappearances in Honduras, the Court declared that the victims were not *neutral* but "persons Honduran officials considered dangerous to State security."¹³⁶ The Commission highlighted this element when describing the phenomenon of disappearances. It said "the victims of disappearances *may* be persons suspected of posing a threat to the security of the State, but the designation of "targets" of repression extends to others as well."¹³⁷ The Commission sought to illustrate the use of disappearance to selectively eliminate political dissidents, but the Commission did not discount the possibility of indiscriminate repression.

The Court drew upon the Commission's analysis in the *Velásquez* and *Godínez* cases. In both, the victims had been involved in activities considered dangerous by the government.¹³⁸ The exception applies, however, when the case of *Fairén-Solis* is considered. As far as anyone knows, neither Fairén nor Solís were involved in similar activities. The Court found that Honduras was not responsible for the disappearances

133. Murillo was abducted in San Pedro Sula, Honduras on March 13, 1983. During her detention, Murillo was interrogated, tortured and sexually abused by her captors in a clandestine location.

134. The government of the Federal Republic of Germany was closely involved in efforts to locate Murillo because of her mother's German origin.

135. *Velásquez* Judgment, at paras. 84, 85, 86, 87 & 118(c).

136. *Velásquez* Judgment, at para. 147(d)(i); *Godínez* Judgment, at para. 153(d)(i); *Fairén-Solis* Judgment, at para. 153(d)(i).

137. Observations of the Commission of the Preliminary Objections of the Government of Honduras (emphasis added). *Fairén-Solis* Judgment, at 66-67.

138. Velásquez was a student leader at the Autonomous National University of Honduras. *Velásquez* Judgment, at para. 3 & 147(g)(i). Godínez was a leader of the teachers' union in the town of Choluteca. *Godínez* Judgment, at para. 154.

inter alia because the victims lacked the political activity of Velásquez and Godínez. Apparently the Court considered this characteristic to be critical in showing State involvement. In its final judgment the Court declared: "the connection between the disappearances of Francisco Fairén Garbi and Yolanda Solís Corrales and the mentioned governmental practice has not sufficiently been proved. There is no evidence that they were the subject of Honduran government surveillance or suspected as dangerous. . . ."139

A careful examination of the decision reveals that the Commission and the parents of the victims were not aware of any political activities on the part of Fairén or Solís, which in the logic of the Court could have made them a target of repression. However, the decision itself refers to an investigation conducted in Costa Rica by the local judicial authorities that shows the victims were apparently involved in some kind of support of political activities in Guatemala and El Salvador, and that their final destination could have been either of those countries.¹⁴⁰ The Court did not analyze this report, except as part of the presumptions that the Court used to demonstrate that the Costa Rican couple "would have been able to continue their trip from Honduras to Guatemala and, possibly to El Salvador,"¹⁴¹ suggesting that they could have disappeared outside Honduras.

It is an error to relieve the Honduran government of responsibility in the disappearances of Fairén and Solís because the extent of their political activity was unclear.

The victims' character and activities must be an element of analysis in ascertaining State responsibility but it ought not be the main determinant of such responsibility. Under the Court's rationale, a victim would not qualify for regional protection if his or her political activities were even so discreet as to preclude the family's knowledge (which could apply perfectly to the present case) or if the family fails to prove that their relative was a threat to the security to the State.

Moreover, the Court itself, drawing upon existing knowledge of the practice, states that when this kind of policy is officially enforced, impunity is insured for those responsible. In the *Godínez* case, the Court said "the practice of disappearances itself creates a climate incompatible with the guarantee of human rights by the States Parties in the Convention, in that it relaxes the minimum standards of conduct

139. *Fairén-Solís* Judgment, at para. 158.

140. The investigation was conducted by the Organization of Judicial Investigations of the Costa Rican judiciary in 1982. See *Fairén and Solís* Judgment, at para. 119.

141. *Fairén and Solís* Judgment, at para. 119, referring to para. 156.

that should govern security forces and allows such forces to violate those rights with impunity."¹⁴² In other words, this special climate of repression leaves ample room for any kind of abuse and encourages multiple violations of human rights by security forces against political and non-political victims.¹⁴³

D. The Court's Vision of Disappearances: A Crime Under the Convention

In its submissions to the Court and during the public hearings, the Honduran government argued that it had not violated the Convention because forced disappearance is not specified as a crime in the Convention.¹⁴⁴ The Commission strongly rejected this argument in its response and warned the government of the dangerous logic of a proposition suggesting that disappearances are permissible because the Convention is silent on this matter.

The Court established that disappearance is a repressive technique used by governments in a systematic manner, not only to bring about the disappearance of individuals, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear among the public.¹⁴⁵ The Court mentioned many of the initiatives taken by the international community in order to combat this practice, such as the United Nations Working Group on Disappearances and the adoption by the Inter-American system of many resolutions condemning this phenomenon. Although there is no specific convention against disappearances in force yet, the Court acknowledged that the international practice and doctrine have often categorized disappearances as a crime against humanity.¹⁴⁶

142. *Godínez* Judgment, at para. 167.

143. See *Miguel Angel Rivas Hernández*, Res. No. 28/88, Case No. 9844, El Salvador, OEA ser.L/V/11.74, doc.10 rev.1, at 16 (1988). This is a case of a non-political victim who was disappeared by military agents over a personal dispute; "Some individuals are abducted incidentally — because they happen to be in the wrong place at the wrong time." Berman & Clark, *State Terrorism: Disappearances*, 13 *RUTGERS L.J.* 531, 533 (citing J. TIMMERMAN, *PRISONER WITHOUT A NAME. CELL WITHOUT A NUMBER*); see also *Nunca Más, Report of the National Commission on Disappearance of Persons* (1984).

144. Submission of the Government of Honduras in *Fairén-Solis*, at 24.

145. In Latin America, this instrument of repression has been applied both indiscriminately and selectively, depending on the political circumstances of the country. Disappearances have not been used exclusively by military dictatorships. In civilian governments with democratic origins, there have been and continue to exist disappearances. The most serious human rights violations and massive disappearances in Honduras history occurred during the civilian government of Roberto Suazo Cordova, following many years of military dictatorships.

146. *Velásquez* Judgment, at paras. 151, 152, 153. Crimes against humanity, such as geno-

The Court, responding to the challenge of the Honduran government regarding the inapplicability of the Convention to disappearances, declared "the forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee."¹⁴⁷ Therefore, for the Court the practice of disappearance constitutes a radical breach of the Convention and implies ". . . a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the Inter-American system and the Convention."¹⁴⁸

E. Articles of the Convention that were Violated

I. Violations of Articles Four, Five and Seven

The Court sustained the Commission's petition and held the Honduran government responsible, in *Velásquez* and *Godínez*, for violating Article 4, 5 and 7 of the Convention. Specifically, those articles of the Convention which protect the right to life, right to humane treatment, right to personal liberty and the general obligation to respect and guarantee rights were violated through the practice of disappearance.

The practice of disappearances assumes the clandestine execution of the individual and then the hiding of the cadaver so as to assure that the whereabouts can never be found. For the family of the victim, the experience will be one of permanent anguish, for they will never be able to trace the fate of their loved one. The Court established that this kind of repression is a blatant violation of the right to life embodied in the Convention¹⁴⁹ and often "meant secret execution without trial, followed by concealment of the body."¹⁵⁰ The Court found that Article 4 was violated in *Velásquez* and *Godínez*. In both cases the context in which the victims' disappearances took place and the lack of knowledge about their fate many years later was sufficient to create the reasonable presumption that they were killed. Even if there is a minimum chance of the victims being alive, the Court recognized that there is a strong presumption of their murder, particularly taking into account that they

cide and slavery carry the implied effect that they are subject to universal jurisdiction, that statute of limitations is inapplicable, and that States are obligated to extradite culprits for the purpose of prosecution.

147. *Velásquez* Judgment, at para. 155.

148. *Velásquez* Judgment, at para. 158; see also Articles 4, 5, 7 & 1.1 of the Convention.

149. "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." Article 4 of the Convention.

150. *Velásquez* Judgment, at 68, para. 157.

were abducted "by authorities who systematically executed detainees without trial and concealed their bodies in order to avoid punishment."¹⁵¹

The Convention forbids torture, and any other forms of cruel and inhuman treatment, and states that "all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."¹⁵² As a typical aspect of the *modus operandi* that characterizes the practice of disappearances, the Court held that victims who were disappeared both temporarily and permanently were systematically subjected to "merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment."¹⁵³

Furthermore, one of the most important contributions of the judgments has been to give an expansive interpretation of Article 5, establishing a new principle of human rights protection in the Inter-American system. The Court declared that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person." Hence, State Parties may be condemned for cruel and inhuman treatment for the prolonged isolation of a prisoner, independent of any physical ill-treatment by the authorities. In the cases of Manfredo Velásquez and Saul Godínez, although there was no direct proof that either was tortured, the Court condemned the government of Honduras based upon the above interpretation of Article 5 of the Convention.¹⁵⁴ By elevating the common practice of abusive *incommunicado* detention to the status of cruel and inhuman treatment, the Court permits a more effective protection of human rights throughout the continent.

The Court determined that the abduction of the victim, which is the first step in the criminal practice of disappearances, violates Article 7 of the Convention which guarantees "every person the right to personal liberty and security." Applying Article 7, the Court held that "the kidnapping of a person is an arbitrary deprivation of liberty which also violates the right of the person detained to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest. . . ."¹⁵⁵ Specifically, the Court held that Velás-

151. *Velásquez* Judgment, at para. 188; *Godínez* Judgment, at para. 198.

152. Article 5 of the Convention.

153. *Godínez* Judgment, at para. 153(d)(iii) with reference to para. 164; *Velásquez* Judgment, at para. 147(d)(iii) with reference to para. 156.

154. *Velásquez* Judgment, at paras. 96 & 187; *Godínez* Judgment, at para. 197.

155. *Velásquez* Judgment, at para. 155; *Godínez* Judgment, at para. 163. Article 7 also extends its protection to include the right to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings.

quez and Godínez, as a result of their disappearances, were the victims of arbitrary detentions which deprived them of their physical liberty without legal cause.¹⁵⁶

2. *Establishing State Responsibility: Violation of Article 1.1*

Another important contribution by the Court was the application of Article 1.1 of the Convention to the cases against Honduras, establishing a significant precedent in the Inter-American system. The Commission did not allege this violation. However, the Court established the international responsibility of the Honduran government relying extensively on the duties created by Article 1.1 of the Convention.¹⁵⁷ In making this determination, the Court was faced with the challenge of examining the circumstances under which a specific act in violation of the Convention can be attributed to a State Party.¹⁵⁸

Article 1.1 of the Convention is a general article that establishes the duty of governments to respect the human rights of individuals and to guarantee the enjoyment of those rights recognized in the Convention. Under the Court's analysis, each of the Convention's rights must be interpreted in conjunction with Article 1.1, which is "the generic basis for the protection of the rights recognized by the Convention. . . ."¹⁵⁹ Consequently, where the Court determines a violation of any right by a State Party, it *ipso jure* establishes the violation of Article 1.1.¹⁶⁰

The Court interpreted this article in two different ways: first, it recalled that State Parties have the obligation to respect all the rights embodied in the Convention. Even in serious emergency situations, the Court reaffirmed the principle that the State under no circumstances may suspend the exercise of a basic category of "non-derogable" rights such as the right to life, the right to humane treatment, and the right to juridical personality.¹⁶¹

Second, and even more importantly, the Court stated that Article 1.1 creates the positive obligation of States Parties to take all necessary

156. *Velásquez* Judgment, at para. 186; *Godínez* Judgment, at para. 196.

157. *Velásquez* Judgment, at para. 163. The Court applied the general principle of law, *iura novit curia*, under which a court has the power and the duty to apply the legal provisions relevant to a proceeding, even when the parties do not expressly invoke them.

158. *Id.* at para. 160. On the issue of State responsibility under international law, see Shelton, *supra* note 5.

159. *Id.* at para. 163.

160. *Id.* at para. 162.

161. See Articles 3, 4 and 5 of the Convention. *Velásquez* Judgment, at para. 154 in reference to para. 165; see also *supra* note 78, at para. 23.

measures to guarantee the free and full exercise of all the rights contained in the Convention. In order to achieve this end, the State must organize the governmental machinery and structures of political power in a way that offers an effective remedy for human rights violations. If the State negligently fails to assume this active role, it can be held liable under international law for human rights violations.¹⁶²

As a consequence of this affirmative obligation, the State has the concrete duties to prevent, investigate, punish, disclose and compensate (when restoration is impossible) victims or their relatives for human rights violations.¹⁶³

However, the State cannot pretend that only the existence of a formal legal system of human rights protection fulfills the requirements of Article 1.1 of the Convention. On the contrary, the State must demonstrate an effective and coherent conduct which is aimed at resolving human rights matters within its territory.¹⁶⁴ In accordance with this principle, a State may be liable for crimes such as disappearance, because it has failed to perform its Article 1.1 duties.¹⁶⁵

Confronted with the need to establish State responsibility under international law for the acts of State agents in disappearances, the Court developed a broader concept of State accountability designed to expand liability to different case scenarios. For instance, a State may be liable under any circumstance in which a State organ, representative or public entity, in the exercise of its official powers, violates the rights guaranteed in the Convention.¹⁶⁶ In order to enhance the effectiveness of international protection, the Court added that a State is responsible for such acts or omissions of its agents, regardless of whether they constitute violations of domestic law or are done outside the sphere of official authority.¹⁶⁷ Furthermore, according to Article 1.1, a State is not excused from liability should an agent's identity remain unknown.¹⁶⁸

When human rights violations are not committed by governmental agents but by an independent group or private individual, the Court, again interpreting Article 1.1, distinguished two types of situations in which a State could be accountable: first, if it is proved that such an independent group acted with the tolerance or acquiescence of the

162. *Id.* at para. 166.

163. *Id.*

164. *Id.* at para. 167.

165. *Id.* at para. 182.

166. *Id.* at para. 169.

167. *Id.* at para. 170.

168. *Id.* at para. 173.

State;¹⁶⁹ second, where a private individual violates human rights and the State fails to show diligence in his or her prosecution. In this second case, the State is obviously not responsible for acts of private persons themselves, but liability attaches due to its failure to offer adequate judicial protection. This interpretation provides grounds for State liability in cases where the government tries to conceal the investigation to safeguard its own interests, thereby engaging in an obstruction of justice.¹⁷⁰

With regard to the facts of *Velásquez* and *Godínez*, the Court found a total failure on the part of the Honduran judicial and political systems to take even the minimal steps necessary to prevent and investigate these cases.¹⁷¹ The Court also declared that there was sufficient evidence to sustain a conclusion that the victims' disappearances were carried out by agents of the State, acting under cover of public authority. Although the Court was convinced that these disappearances were performed by governmental agents, it noted that, even if that fact had not been proven, the State apparatus had created a climate in which the crime of enforced disappearance was committed with impunity. After the disappearance of Saul Godínez, the government's failure to act — which the Court found to be clearly proven — constituted a failure on the part of Honduras to fulfill its duties under Article 1.1 of the Convention, which obligated it to ensure Saul Godínez the free and full exercise of his human rights."¹⁷²

Similarly, despite the fact that in *Velásquez* and *Godínez* there was no evidence that their disappearances were the result of official orders, under Article 1.1 the Court found this factor irrelevant in finding State liability.¹⁷³ It also recognized that although there was no direct proof that *Velásquez* and *Godínez* had been tortured, the State was liable because of its failure to comply with the duties imposed by Article 1.1 since they had been abducted and imprisoned by "governmental authorities who have been shown to subject detainees to indignities, cruelty and torture. . . ."¹⁷⁴

The Court's treatment of Article 1.1 offers an excellent mechanism in establishing State liability, particularly in disappearance cases where the crime by definition supposes complete impunity and an ab-

169. *Id.* at para. 173 in reference to para. 176.

170. *Id.* at para. 172.

171. *Velásquez* Judgment, at paras. 178-80; *Godínez* Judgment, at paras. 189-90.

172. *Godínez* Judgment, at para. 192; see also *Velásquez* Judgment, at para. 182.

173. *Velásquez* Judgment, at para. 183; *Godínez* Judgment, at para. 193.

174. *Velásquez* Judgment, at para. 187; *Godínez* Judgment, at para. 197.

sence of direct evidence.

F. Dictum About the Obligation of the State to Prevent, Investigate, Punish, Disclose and Compensate

In accordance with the above interpretation of Article 1.1, the State is under a legal duty to take reasonable steps to prevent human rights violations.¹⁷⁵ The State must show a record which reveals a clear will and commitment on its part to fully implement the rights stated in the Convention. For instance, the State shall adopt and develop all legal, political, administrative and cultural policies necessary to promote human rights and ensure that those responsible for abuses are properly penalized.¹⁷⁶

The Court ruled that the State has the obligation to conduct a serious investigation of human rights violations and identify those responsible.¹⁷⁷ If the investigation does not produce concrete results, the State, under its duty to prevent violations, must at least demonstrate that it has attempted seriously to search for the truth "and not as a mere formality preordained to be ineffective."¹⁷⁸ In other words, the State should do whatever is within its means to investigate human rights violations and should assume this obligation as a State duty rather than one dependent upon private initiative.¹⁷⁹

The Court stated that:

[I]f the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, it has failed to comply with its duty to guarantee the free and full exercise of those rights to the persons within its jurisdiction.¹⁸⁰

The Court further explained that if the violation is committed by a private party and the State fails to conduct a serious investigation, it may be deemed to have aided or supported the perpetrator and it will, therefore, be liable at an international level.¹⁸¹

Because disappearance is a crime that involves multiple and continuous violations of rights protected by the Convention, the effects of

175. *Velásquez* Judgment, at para. 166.

176. *Velásquez* Judgment, at paras. 172, 174-5.

177. *Id.* at para. 174.

178. *Id.* at para. 177.

179. *Velásquez* Judgment, at paras. 177 & 180.

180. *Id.* at para. 176.

181. *Id.* at para. 177.

which are prolonged over time, the State's duty to investigate exists as long as there remains any uncertainty about the fate of the disappeared.¹⁸²

The duty to punish human rights violators is repeatedly mentioned in the Court's decisions as one of the State's basic affirmative duties contained in Article 1.1 of the Convention.¹⁸³ Nevertheless, in its analysis of a State's duty to conduct a serious investigation of the fate of the disappeared person, the Court apparently watered down this important obligation, accepting the existence of legitimate circumstances under which those responsible for violations cannot be punished. The Court held that:

Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and as may be the case, the location of their remains.¹⁸⁴

The Court did not explain what circumstances would make it legally impossible to punish these crimes. If the Court was referring to the statute of limitations or to the effect of amnesty laws in crimes of disappearance, this would be an unfortunate holding. The international community, international practice and doctrine, and the Court itself have recognized that disappearances are crimes against humanity, to which a statute of limitations or any other restriction on punishment is inapplicable.¹⁸⁵

The Court's statement, nonetheless, unquestionably reaffirms the absolute right of the relatives to demand and obtain information from the State regarding the fate and whereabouts of the victim. The State has an obligation to satisfy this demand or it will be held liable under Article 1.1 of the Convention.

G. *Standard of Evidence and Burden of Proof*

The *Velásquez* and *Godínez* judgments each included a section explaining the creative legal guidelines the Court considered when it examined the evidence.¹⁸⁶ Many of the Court's criteria reaffirmed and

182. *Id.* at paras. 155 & 181.

183. *Velásquez* Judgment, at paras. 166, 172, 174-76, 178.

184. *Velásquez* Judgment, at para. 181.

185. *Velásquez* Judgment, at para. 153; *Godínez* Judgment, at para. 161.

186. *Godínez* Judgment, at paras. 128-145; *Velásquez* Judgment, at paras. 122-139. The Court recognized that there was no rule on point in the Inter-American system. See *Godínez*

further developed conceptual elements previously introduced by the Commission in its briefs and oral arguments during the trial.¹⁸⁷

The Commission assumed the role of a true prosecutor, openly stating since the beginning of the proceeding that its task was to demonstrate that during a specific period (1981-1984) in Honduras, there was an official policy of disappearances carried out or tolerated by the government. The Commission had to prove, not only the existence of a practice, but also that such a policy was designed *inter alia* to conceal and destroy evidence of the crime. Manfredo Velásquez, Saul Godínez, Francisco Fairén and Yolanda Solís, the Commission argued, were typical victims of this practice. Their disappearances could be proven only through circumstantial or indirect evidence or by logical inference; it was otherwise impossible to prove that an individual had been made to disappear.¹⁸⁸

With regard to the burden of proof, the Court confirmed the Commission's approach in a very precise manner, ruling that because the Commission was accusing the government of the disappearances of Velásquez and Godínez, it bore the burden of proving the facts in its *prima facie* case.¹⁸⁹ Therefore, according to the Court's criteria, once the official practice of disappearances in Honduras had been proved, the next step for the Commission was to prove that the disappearances of Velásquez and Godínez were part of the official practice because, for instance, they had occurred through the same *modus operandi*.¹⁹⁰ The Court found that the Commission did establish the link between the disappearances of Velásquez and Godínez and the pattern employed during the specific period. In future disappearance cases, therefore, it will be necessary first to prove the pattern and then, how the specific case is connected to it.¹⁹¹ Conversely, in *Fairén and Solís*, the Court again found that a pattern existed, but ruled that there was insufficient evidence to show that the disappearance of the two Costa Rican citizens was part of the pattern.

The Court also found that the Honduran government played an excessively passive role in the production of evidence by simply assert-

Judgment, at para. 133; *Velásquez* Judgment, at para. 127.

187. See "Commission's Observations in *Velásquez, Godínez and Fairén and Solís*, March 20, 1987; see also "Commission's Observations in *Velásquez, Godínez and Fairén and Solís*, July 13, 1988, rejected by the Court as untimely; Brief *Amicus Curiae* of the Association of the Bar of the City of New York, June 8, 1988.

188. *Godínez* Judgment, at para. 130; *Velásquez* Judgment, at para. 124.

189. *Godínez* Judgment, at para. 129; *Velásquez* Judgment, at para. 123.

190. *Godínez* Judgment, at para. 132; *Velásquez* Judgment, at para. 126.

191. *Godínez* Judgment, at para. 153; *Velásquez* Judgment, at para. 147.

ing that the Commission failed to prove a practice of disappearance.¹⁹² Honduras cited a lack of direct proof in the *Velásquez* and *Godínez* cases¹⁹³ and questioned the credibility of the Commission's witnesses.¹⁹⁴ The government did not offer a single piece of documentary evidence on the merits of the cases.¹⁹⁵ Furthermore, the Honduran government neither attempted to explain the facts nor to prove the allegation that Velásquez and Godínez had been abducted by common criminals or had voluntarily disappeared.¹⁹⁶ The Court warned Honduras that its lack of cooperation, silence and elusive or ambiguous answers during the litigation could be interpreted as an acknowledgment of the truth of the allegations.¹⁹⁷

The Court ruled that in the crime of disappearance, fairness would require shifting the burden of proof to the State once a *prima facie* case had been made, and that the Court was empowered to compel Honduras to produce exculpatory evidence.¹⁹⁸ The fact that States have a virtual monopoly of access to definitive evidence was particularly relevant for the Court. Although the Court was reluctant to apply this procedural principle automatically, it reserved its discretion to consider Honduras's silence or inaction in evaluating the evidence as a whole.¹⁹⁹

As to the standard of evidence, the Court recognized that the evidence presented should convincingly establish the truth of the charges, especially taking into account the seriousness of finding a State responsible for engaging in or tolerating a practice of disappearances.²⁰⁰ Citing international jurisprudence, the Court held that as an international tribunal it had the power to weigh evidence freely, without the constraints of a rigid rule as to the quantum of proof necessary to support its decision.²⁰¹ The standard of evidence in the international legal process is therefore less formal than in a domestic setting.²⁰²

The Court gave three reasons explaining its holding. First, the

192. *Godínez* Judgment, at para. 131; *Velásquez* Judgment, at para. 125.

193. *Godínez* Judgment, at para. 154(b)(vi).

194. *Godínez* Judgment, at paras. 147-51; *Velásquez* Judgment, at paras. 141-145.

195. *Godínez* Judgment, at para. 143; *Velásquez* Judgment, at para. 137.

196. *Godínez* Judgment, at para. 154(b)(vi); The only explanation by the Honduran authorities of both disappearances was a claim that Godínez and Velásquez had joined subversive groups or had gone to Cuba. See *Godínez* Judgment, at para. 154(b)(v); *Velásquez* Judgment, at para. 147(h).

197. *Godínez* Judgment at para. 144; *Velásquez* Judgment, at para. 138.

198. *Id.*

199. *Id.*

200. *Godínez* Judgment, at para. 135; *Velásquez* Judgment, at para. 129.

201. *Godínez* Judgment, at para. 133; *Velásquez* Judgment, at para. 127.

202. *Godínez* Judgment, at para. 134; *Velásquez* Judgment, at para. 128.

Court distinguished the nature and purpose of the international protection of human rights from the objectives of a domestic criminal justice system. The aim of international human rights law is not to punish the perpetrators of violations — the State does not appear before the Court as a defendant in a criminal action. Rather, the aim of international human rights law is to protect the victims and order a compensation for damages resulting from acts of State responsibility.²⁰³ Second, because the State has complete control over the verification of facts which occur within its territory, international human rights supervision may often be conditioned on State collaboration in searching for the evidence.²⁰⁴ Beyond its own prestige, the Court has no real power to compel a State to produce a witness or to search for evidence.²⁰⁵

In contrast to domestic criminal law, where the prosecution must to prove its charges beyond a reasonable doubt, the Court declared that, in international human rights proceedings, the State is not allowed to rely on the petitioner's failure to present evidence when it cannot be obtained without the State's cooperation.²⁰⁶

The final reason the Court provided for a less formal standard of proof at an international level was related to the unique nature of the crime of disappearance and the difficulty of proving an actual occurrence. The special characteristics of the crime of disappearance are that there are often no witnesses and, should one exist, chances are great he or she will be afraid to testify; agents perform with official impunity in clandestine centers of detention and driving unidentified cars; officials deny the detention; there is no corpse or it may never be found; and, there is complete absence of a judicial remedy. Inherent to the practice is a deliberate use of the State's power to destroy direct evidence. Indeed, as the Commission noted on many occasions during the hearings, the practice of disappearances is a clear attempt by the

203. *Godínez Judgment*, at para. 140; *Velásquez Judgment*, at para. 134.

204. On the issue of the Commission's on-site investigation, see Article 48.2 of the Convention. For instance, as previously stated, the power of the Commission to conduct a fact-finding mission requires the prior consent of a sovereign State.

205. *Velásquez Judgment*, at paras. 39-49; *Godínez Judgment*, at paras. 41-52; *Fairén and Solís Judgment*, at paras. 62-74; another example of this ineffectiveness was the Court's lack of power to subpoena witnesses Israel Morales Chinchilla, Jorge Solares Zavala, Mario Méndez Ruiz, Mario Ramírez and Fernando Antonio López Santizo (*Fairén and Solís Judgment*, at para. 35). All of them were Guatemalan immigration officials who could have shed light on whether Fairén and Solís had actually entered Guatemala. The fruitless requirements issued by the Court to the Honduran government to obtain the exhumation of the corpse found in "La Montañita" are yet other examples. See *Fairén and Solís Judgment*, at paras. 48-61.

206. *Godínez Judgment*, at para. 141; *Velásquez Judgment*, at para. 135.

State to commit the perfect crime.²⁰⁷

Confronted with the lack of direct testimonial or documentary evidence, the Court, conscious of the objectives of the Convention and of the responsibilities the Convention assigns, it ruled that circumstantial evidence and indicia on which a judicial presumption could be built are the only means available to prove the crime of disappearance. The Court held that presumptive or inferential evidence, so long as it leads to conclusions consistent with the facts, is a legitimate judicial mechanism, used not only by international courts but by domestic courts as well.²⁰⁸

VII. PROCEDURAL HIGHLIGHTS

A. *Protection of Witnesses*

The most dramatic moments in the litigation came immediately after the first set of hearings on the merits, in September and October of 1987. The hearings were widely covered in the Honduran press. In the following days, Dr. Ramón Custodio and other witnesses received death threats and were publicly accused of betraying the nation and seeking its humiliation. As the threats became more serious, the President (Chief Justice) of the Court, Colombian jurist Rafael Nieto Navia,²⁰⁹ took the unusual step of sending a message to the government of Honduras requesting special protection for the witnesses and an investigation into the threats against Custodio and others. Two of the witnesses decided to leave the country, heading into exile in November.

On January 5, 1988, José Isaias Vilorio, who was scheduled to testify a few days later, was murdered in a suburb of Tegucigalpa.²¹⁰ He was killed by unknown assailants in front of many eyewitnesses, the day after the government announced that Vilorio would indeed appear before the Court in Costa Rica. His killers left a banner identifying themselves with the Cinchoneros guerrilla organization, a small armed group that had been inactive for some time.

On January 14, 1988, an unknown assailant riding on a motorcycle killed Miguel Angel Pavón in front of his house in San Pedro Sula.

207. *Godínez Judgment*, at para. 130; *Velásquez Judgment*, at para. 124.

208. *Godínez Judgment*, at paras. 136-37, 155; *Velásquez Judgment*, at paras. 130-31.

209. See Court Resolutions of January 15 & 18, 1988.

210. Vilorio, a sergeant in the Honduran police and a member of Battalion 316, had been implicated by witnesses in the abduction of Manfredo Velásquez. For that reason, the Commission insisted on his testimony. After the initial set of hearings at which Vilorio's name came up, the Court ordered Honduras to produce him.

Pavón was an alternate member of the Honduran legislative assembly for a small opposition party, vice-president of CODEH and its representative in San Pedro Sula. On September 30, 1987, he had been the Commission's lead witness as the trial on the merits began.

Meeting in San José on January 15, 1988, the Court issued a resolution, in the form of an injunction ("interim measures") demanding that Honduras protect the witnesses. On January 18th, the Commission's delegation requested a special hearing on the matter which was held on January 19th. At the Commission's request, the Court amended its initial decision and ordered Honduras to provide information to the Court within two weeks on the steps taken to investigate both murders, as well as on measures taken to ensure the safety of all other persons involved in the case.²¹¹

Honduras observed the deadline but provided very sketchy information. Three weeks after the Pavón murder there had been no autopsy, no ballistic tests and no questioning of potential suspects. As for the Vilorio case, the government evidently thought that the attribution of responsibility to the Cinchoneros exonerated it of any obligation to investigate the crime. To this date both episodes remain unaccounted for.

The Lawyers Committee for Human Rights (LCHR), a New York-based NGO acting as *amicus curiae*, filed a brief in July 1988, as the trial on the merits wound to an end, recommending that the Court act to protect the integrity of its proceedings by renewing its demands for an investigation and retaining jurisdiction over the murders as connected to the principal.²¹² In the *Velásquez* judgment a few days later, the Court acknowledged receipt of this brief but did not act on the suggested action.²¹³ In December 1988, as a new session of the Court approached with decisions in *Godínez* and *Fairén-Solis* still pending, the LCHR filed a new *amicus* brief insisting on its petition. In the *Godínez* decision the Court again ignored the request.

B. Perjury by Witnesses

In the meantime, Honduran media reported that Lieutenant Colonel Alexander Hernández had admitted in radio interviews that he had

211. Article 23 of the Rules of Procedure of the Court. Instituto Inter-Americano de Derechos Humanos, REV. I.I.D.H. 73, para. 7 (Jan.-June 1988).

212. Lawyers Committee for Human Rights Brief *Amicus Curiae*, *Question of Witness Protection Under Article 63(2) of the American Convention on Human Rights* (July 8, 1988).

213. *Velásquez* Judgment, at para. 37.

been the Chief of Battalion 316, while denying that he or the unit had engaged in any forced disappearance of persons.²¹⁴ The LCHR filed a new *amicus* brief in July 1989, noting that such an admission was in direct and flagrant contradiction with what both Colonel Núñez Montes and Hernández himself had told the Court under oath at the January 1988 hearings. The LCHR went on to suggest that in order to preserve the integrity of the proceedings the Court should demand either that Honduras punish both officers with the penalties contemplated for perjury in its domestic law, or initiate criminal proceedings for perjury against them.²¹⁵

In July 1989, the Court acknowledged receipt of this brief but rejected the petition and simply resolved to relay the information to the Honduran government. On the subject of the proper role of *amici curiae*, the Court said, somewhat cryptically, that: "it [*amici's* role] could not be other than collaboration with the Court in the study and resolution of matters submitted to its jurisdiction, but not to make petitions that might obligate [the Court] to act or decide in one way or the other."²¹⁶ As far as can be determined, no inquiry has taken place to determine whether Núñez and Hernández had indeed lied to the Court under oath. Both officers remain in active duty.

C. A Hearing Behind Closed Doors

From the start the Commission requested the testimony of José Isaías Vilorio, whose name had been linked to the disappearance of Manfredo Velásquez early in the proceedings. Vilorio did not show up at the initial hearings on the merits, so the Commission requested that the Honduran government order him to appear. In addition, the Court *sua sponte* ordered the appearance of Alexander Hernández and Marco Tulio Regalado Hernández, officers whose names had come up in the witness stand as belonging to Battalion 316. The Court also requested that Honduras provide an explanation of the command structure of that unit. Honduras agreed to require the officers to testify, and in lieu of a document about Battalion 316, offered the testimony of the Army Chief of Intelligence. For purported security reasons, however, Honduras asked the Court to hold the hearing in Tegucigalpa, Hondu-

214. *El Heraldo*, December 3, 1988, at 45; *El Heraldo*, January 17, 1989, at 3.

215. Lawyers Committee for Human Rights, *Sobre la Falsa Deposition de los Testigos Alexander Hernández and Roberto Núñez Montes* [Concerning the Perjury of Witnesses . . .], Brief *Amicus Curiae* entered into the record, July 1989.

216. Resolution of July 21, 1989 in all three cases.

ras, and in private.

The Commission objected to this proposal, citing not only the need for its delegation to be able to cross-examine the witnesses, but also the desirability that all of the Court's hearings be held in public, so that any person in possession of useful information could come forward with it.²¹⁷ In negotiations between the Court and Honduras an agreement was reached that the hearing would be held in San José, Costa Rica, but the Court granted the petition that it be closed to the public. On January 20, 1988, the Court met at a previously undisclosed location, to which the Commission's delegates were driven. As it turned out, the hearing took place at a Costa Rican police facility within the San José airport, with the cooperation of the Costa Rican government. The three officers (Vilorio had been killed a few days earlier) were flown in for examination. The public was not allowed to be present, but otherwise the hearing was conducted in the same manner as the rest, and the Commission's lawyers had ample opportunity to cross-examine.

The decision to hold a closed hearing was severely criticized by the relatives of the victims and by their support organizations. Regalado Hernández was uncooperative and incredible to the extent that many in attendance wondered whether the man taking the stand was in fact Regalado or a substitute. If the hearing had been public, persons who knew the real Regalado Hernández, either in attendance or examining images taken by the press, could have settled the question of the identity of the witness.

The Court has discretion under its own rules to decide whether a hearing will be open or closed to the public.²¹⁸ Whether or not a subterfuge took place, however, the decision to hold a closed hearing to take the testimony of military men constitutes an unfortunate precedent. A closed hearing should be allowed *only in the most extraordinary circumstances*. An unwarranted distinction was made here between witnesses, only because some of them wore military uniforms.

D. Opportunities for Expert Testimony

The facts in these cases presented several opportunities for the development of evidence using advanced scientific techniques, which in turn promotes the involvement of scientists and experts from several disciplines in the protection of human rights.²¹⁹ The exhumation of the

217. See *Velásquez Judgment*, at 103, para. 32.

218. Article 14.1, Rules of Procedure of the Court.

219. The American Association for the Advancement of Science (AAAS), through its Com-

“corpse of La Montañita” would have been such an opportunity. Dr. Snow and the Equipo Argentino de Antropología Forense (EAAF) had agreed to travel to Honduras for the exhumation and identification, but Honduras never disclosed to the Court where the remains had been buried. The Court asked the experts to compare the autopsy report (which included some descriptive information about the body, including a description of the deceased’s teeth) with dental X-rays of Francisco Fairén Garbi. In separate reports, the EAAF and Dr. Snow (in the latter case with the assistance of a forensic dentistry expert) found that the information in the autopsy report was insufficient to make a positive identification.

The expert testimony clearly meant that *it could not be ruled out* that Francisco Fairén Garbi and the corpse found in La Montañita were the same person. This fact, added to the evident lack of cooperation by Honduras in facilitating an exhumation, should have created a presumption that Fairén had been captured and killed in Honduras. The autopsy report made clear that the deceased had been killed point-blank, while handcuffed and kneeling down; also evident is that police authorities deliberately lied about these circumstances when they gave the photograph to the press and claimed that the victim had died “in a confrontation.” In the interest of getting to the bottom of the matter, however, the Commission requested that the Court insist on its order to Honduras to provide the location of the remains.

On January 20, 1989, the Court so ordered, adding that failure by Honduras to comply would give rise to a presumption against it.²²⁰ On February 17, 1989, Honduras reported to the Court that it was impossible to locate the remains because of disorganization in the cemetery’s files and because a recent hurricane had removed the earth in extensive areas of the cemetery destroying many of the markings.²²¹ No explanation was given for the government’s failure to locate, exhume — or at

mittee on Scientific Freedom and Responsibility, has been engaged for years in promoting the application of new skills and technology to human rights work. It was at the initiative of the AAAS that Dr. Clyde Snow developed his pioneering forensic research in Argentina, and trained the young physicians and anthropologists who formed the *Equipo Argentino de Antropología Forense* (EAAF), as mentioned *supra* note 120. For other examples of science applied to human rights, see E. STOVER & E. NIGHTINGALE, *THE BREAKING OF BODIES AND MINDS: TORTURE, PSYCHIATRIC ABUSE AND THE HEALTH PROFESSIONS* 1 (1985); and 5 *AM.J. FORENSIC MED. & PATH.* No. 4 (1984)(special issue on the use of forensic sciences in investigations of human rights violations).

220. *Fairén and Solís Judgment*, at para. 59.

221. Honduras brief of February 17, 1989 (cited in *Fairén and Solís Judgment*, at para. 60).

least preserve — the remains since 1982, in spite of promises made to the Costa Rican government and to the Commission. In March, the Commission asked the Court to enforce the presumption.²²² The language in the final *Fairén and Solís* judgment suggests that the Court did not enforce the presumption, in spite of its own clear notice to Honduras: citing the January 20, 1989 order, the Court says that lack of compliance “could give rise to a presumption. . . .”²²³

Other opportunities for expert testimony were presented by the discovery, by the authors of this article, of a form filed in the records of a customs office in the border between Guatemala and Honduras, which reflected the temporary importation of a motor vehicle into Guatemala and carried a legible signature with the words “Francisco Fairén Garbi.” A document examiner with extensive experience in the United States compared the form to authentic writings and signatures of Francisco Fairén Garbi, and noticed several differences. He requested more authentic models for comparison before issuing a final judgment on whether the signature had been forged. The Commission presented the document to the Court, together with the expert’s preliminary opinion.²²⁴ The Court decided to hire its own document examiner, and submitted the document, with additional authentic writings of Fairén Garbi, to Venezuelan expert Dimas Oliveros Sifontes. The report produced by this expert squarely stated that the signature was authentic.²²⁵

This report seems to have carried great weight with the Court. In effect, however, it simply states the general theory about differences between signatures by the same person. It acknowledges differences between the writing in the questioned document and the way Fairén habitually signed, but gives no explanation for those differences. There was no discussion, for example, of the possibility that Fairén had indeed signed the document but done so under duress. In a brief filed on December 5, 1988, the Commission pointed out the weaknesses in the

222. Commission Brief of March 10, 1989, entered into the record of *Fairén and Solís*.

223. *Fairén and Solís* Judgment, at para. 160: “. . . podría dar lugar a la presunción. . . .”

224. Report by David P. Grimes, Examiner of Questioned Documents, entered into the record of the *Fairén and Solís* case, by Commission brief of January 19, 1988. The Commission simultaneously presented other findings of the fact-gathering trip to Guatemala which suggested the fabrication of immigration records perpetrated in early 1982. On March 2, 1988, the Guatemalan government submitted a report to the Court stating that, after an internal investigation, it now was of the opinion that Fairén and Solís had never entered Guatemalan territory. See *Fairén and Solís* Judgment, at para. 39.

225. Report of August 12, 1988 (cited in *Fairén and Solís* Judgment, at paras. 38 & 45).

Oliveros report, and the fact that it was at least inconsistent with the findings of another, very highly qualified expert. The Commission also submitted the affidavit of a recent defector of Battalion 316 who stated that document forgery was a specific task of some Battalion operatives. The December 5th brief did not, however, request an opportunity to cross-examine the Venezuelan expert (the Commission had offered to produce Mr. Grimes for a hearing if the Court so desired). In retrospect, since the Court relied so heavily on the Venezuelan's report, it would have been important for the evidence he produced to be openly confronted and cross-examined. The Court itself should have called the expert witness to answer each member's questions about the rationale behind his findings.²²⁶

New opportunities for expert testimony took place in the context of *Godínez* and *Velásquez* after the decision on the merits, during special proceedings to determine the extent of damages to be paid to the families. The Commission team obtained the *pro bono* cooperation of noted psychiatrists Federico Allodi from Toronto, Cecile Rousseau from Montreal, and Walter Pereira from San José, Costa Rica. The psychiatrists travelled to Honduras to conduct an evaluation of the psychological effects of the disappearances of Godínez and Velásquez on their wives and children. After extensive interviews, they presented a full report to the Court.²²⁷ At a hearing on the issue of damages, Dr. Allodi took the stand to expand on the report and to answer questions about it.

E. The Court's Control of the Record

On July 13, 1988, the Commission filed a long, comprehensive brief, only two weeks before the Court was to meet for the decision in *Velásquez*. The President rejected the brief and excluded it from the record on July 14, 1988, citing "the procedure opportunely established" that supposedly barred any further proffers of evidence or arguments. A section of the Commission's brief was entered into the record, because it dealt with a response to a specific request by the Court about

226. Commission brief of December 5, 1988. See also *Fairén and Solís* Judgment, at para. 46.

227. Allodi, *et al*, *Evaluación de Efectos psicológicos de las desapariciones de Godínez y Velásquez sobre sus esposas e hijos* [Evaluation of psychological effects of the disappearance of Godínez and Velásquez on their wives and children] entered into the record of *Velásquez* and *Godínez* cases, by Commission brief and by separate brief by lawyers for relatives, both of March 10, 1989. *Godínez*, Compensation Judgment, paras. 8 & 9.

an inquiry with the Government of Guatemala.²²⁸ The July 14th ruling also made reference to the need for maintaining procedural balance between the parties to the litigation. Otherwise, there was no mention of any regulation of the Court, or of any decision by the Court, properly notifying the parties of time limits or deadlines for the submission of briefs. In addition, this standard was applied inconsistently, because six months later the Commission was allowed to file a brief which was indistinguishable in nature from the July 13th motion, though making different arguments.

The genesis of the President's decision seems to be that, in the weeks before the Court was to meet again, the Honduras Delegate (who is also Honduran Ambassador to Costa Rica) informally approached the Court and asked verbally if his Government could file a brief summarizing its position. The President was consulted and the answer was no: there were no further opportunities for submissions.²²⁹ The "procedure opportunely established" in the July 14th ruling is an apparent reference to a verbal agreement allegedly reached between the parties and the President, during an earlier session of the Court. If so, in the absence of clear procedural standards in the Court's regulations, the President should have at least issued a ruling earlier on, to make sure that all interested participants were properly placed on notice.

This procedural matter is important because of the significance of the July 13th submission. In that brief, the Commission team had attempted to summarize the evidence presented and to comment on it. At the first full session on the merits there had been an opportunity for closing arguments (October 7, 1987); however, at least seven other witnesses testified afterwards, and multiple pieces of documentary evidence were incorporated afterwards as well. The brief was also an opportunity to comment on important matters such as the standard of evidence to be used in a *sui generis* proceeding and on the protection of witnesses. The brief also specifically requested the imposition of attorneys' fees and court costs. The Court later ruled that no court costs or attorneys' fees would be assessed to Honduras because the matter had not been brought up.²³⁰

Since it was mid-July, the decision in *Velásquez* was almost ready

228. *Fairén and Solís* Judgment, at paras. 41-42 (citing Commission brief of July 13, 1988, called *Observaciones Finales* [Final Observations] and July 14 decision by the President of the Court (Chief Justice)).

229. Authors' interview with Court officials, July 29, 1988.

230. *Velásquez* Judgment, at para. 193.

and the Court may have wanted to avoid a delay, especially considering that the Court meets only twice a year. The *Godínez* and *Fairén-Solis* cases were not decided in July, but went on for several more months. Without overturning the balance between the parties, the Court could have allowed the July 13th brief to be entered into the record of those two cases and given the Honduran government an opportunity to respond.

VIII. DAMAGES

The Court ordered the Honduran government to compensate the families of Velásquez and Godínez for the harm caused to them as a result of the disappearances of their relatives.²³¹ In this matter the Convention provides that:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.²³²

The Court's majority opinion in *Velásquez* directed negotiations to take place between the Commission and the Honduran government, with respect to the matter of form and amount of compensation. The only issue which caused dissent within the Court was the negotiation process in the *Velásquez* decision. Justice Rodolfo Piza Escalante disagreed with the exclusion of Manfredo Velásquez's relatives from direct participation in the negotiation process. Under Justice Piza's interpretation of the rules of the Commission and of the Court, the families must be considered parties in the process.²³³

The Court retained jurisdiction over the case for the purpose of verifying the agreement between Honduras and the Commission, or to settle it if an agreement was not reached within six months.²³⁴

In fact, the negotiations were totally fruitless. The Honduran government, involved with internal disputes over the fairness of the sentence, showed no interest in even meeting with the Commission.²³⁵ Af-

231. *Velásquez* Judgment, at para. 194.5; *Godínez* Judgment, at para. 203.5.

232. Article 63(1) of the Convention.

233. See *Velásquez* Judgment (Dissenting Opinion of Judge Piza Escalante).

234. *Velásquez* Judgment, at paras. 194.6 & 194.7.

235. It is important to note that Honduran officials, according to press reports, expressed

ter repeatedly seeking a dialogue, the Commission did meet on one occasion with the Honduran government in Tegucigalpa in January 1989.²³⁶

Because the *Velásquez* negotiations failed, the Court did not insist on applying the same technique in the *Godínez* judgment. Instead, it ruled that after hearing from interested parties, the Court would determine the form and amount of compensation.²³⁷ In this manner the Court was able to reach a unanimous judgment, without raising again the issue of who would be a "party" under the Convention. Moreover, on the same day of the *Godínez* judgment on the merits, the Court issued separate resolutions in *Godínez* and *Velásquez*, authorizing the President of the Court to ask the relatives of the victims, the Commission and the Honduran government their respective opinions on the matter of damages or compensation. This resolution left the door open for a hearing on the issue.²³⁸ A special hearing on damages was held on March 15th, 1989, at the request of the families' representatives.²³⁹

The Commission stated its perspective about compensation within a somewhat limited theoretical framework. The strategy exposed the purpose of avoiding predictable disagreements between the Commission and the families. In effect, two major differences divided them: first, the amount of money that the Commission was willing to request was significantly lower than that proposed by the families, and second, the Commission was reluctant to incorporate the concept of punitive damages as part of the compensation the government of Honduras should pay.

Representatives of the families, with the consent of the Commission, elicited the assistance of three well-known professors of psychiatry specialized in therapy for victims of human rights violations.²⁴⁰ The team of doctors traveled to Honduras and interviewed relatives of *Godínez* and *Velásquez* in preparation for showing the gravity of their

reluctance to accept the Court's decision.

236. The Commission was placed in the uncomfortable position of not having any real mandate from the relatives of the victim to engage in negotiations over delicate issues concerning their exclusive interests. During the only meeting between the Commission and Honduras both parties agreed only on the identity of the recipients of damages. See *Velásquez* Compensation Judgment, at para. 22.

237. *Godínez* Judgment, at para. 201.

238. The Court's interim resolutions in *Velásquez* and *Godínez*, January 20, 1989.

239. *Velásquez* Compensation Judgment, at paras. 6 & 12; *Godínez* Compensation Judgment, at paras. 5 & 11.

240. They were Federico Allodi, M.D. and Cecile Rousseau, M.D. of Canada, and Walter Pereira, M.D. of Costa Rica.

suffering since the disappearance of the victims. The psychiatrists produced a report which was submitted by the Commission to the Court as proof of the extent of emotional injuries.²⁴¹ One of the psychiatrists later testified at the hearing before the Court.²⁴²

The Commission and the relatives of the victims agreed that reparation pursuant to Article 63(1) of the Convention should provide not only for monetary compensation but for ethical redress as well. Both presentations essentially requested ethical reparation grounded on the Convention's principle that obligates the government to repair all consequences of human rights violations, in addition to the government's duty to pay an injured party fair compensation.²⁴³ According to both the Commission and the lawyers for the families, such an ethical duty required the Honduran government to conduct an exhaustive investigation and to prosecute those responsible for the disappearances.²⁴⁴ In addition, as part of the ethical reparation, the parties asked that the Honduran government publicly repudiate the policy of forced disappearances and also publicly apologize to the families.

According to the Commission and the relatives, monetary damages should include out-of-pocket expenses, or *damnum emergens* (court costs, past and future medical treatment); loss of income, or *lucrum cessans* (based on the last salary of the victims and possible promotions until their deaths); and emotional damages (for psychological injury suffered by the next of kin as a result of the anguish and uncertainty surrounding the fate of the victims). In Latin American countries, damages for pain and suffering are commonly known as "moral damages" (*daño moral*). The families added punitive damages because of the extreme gravity of the violation.²⁴⁵

The Honduran government objected to the demand that it should publicly condemn the practice of disappearance and conduct an investigation as a part of the compensation requested by the Commission and

241. *Velásquez Compensation Judgment*, at para. 10.

242. *Id.* at para. 12.

243. "It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party." Article 63(1) of the Convention (emphasis added). Article 63(1) clearly gives the Court the authority to order a government to remedy any effects of State criminal activities.

244. The families asked to go beyond this, requiring the Court to draw up a schedule and to monitor the government's compliance. See *Velásquez Compensation Judgment* at para. 9.

245. The relatives' representatives estimated the total amount of damages in the *Velásquez* case as approximately \$3,270,000 and \$3,000,000 in the *Godínez* case. *Velásquez Compensation Judgment*, at para. 9; *Godínez Compensation Judgment*, at para. 8.

families. The government stated: "[it] (the judgment) is very clear and precise as to the obligation imposed on Honduras to pay damages, namely, to pay fair *compensation to the next of kin of the victim, and nothing more.*"²⁴⁶ The Honduran government also proposed that monetary compensation should be based on Honduran domestic law. The government explained that the "most beneficial" system offered in Honduras would be applied in determining compensation. The most beneficial system was supposed to be the National Teacher's Social Security Institute's schedule for cases of accidental death, and there were no procedural problems since both victims happened to have been teachers.²⁴⁷ The Honduran government offered 150,000 lempiras (approx. \$50,000) as compensation for the relatives of Manfredo Velásquez and 60,000 lempiras (approx. \$20,000) for the family of Saúl Godínez.²⁴⁸

A. *The Decision of the Court*

On July 21, 1989 the Court issued judgments on damages in *Velásquez* and *Godínez*. The Court took particular care to clarify that international jurisprudence and human rights treaties embrace the concept of reparation for injury caused by a breach of a State's international obligation as a clear principle of international law.²⁴⁹ The Court further stated that reparation implied full restitution (*restitutio in integrum*), which includes "restoration of the previous situation and reparation for the consequences of the breach, plus payment of an indemnity to compensate for property and non-property damages, including moral damage."²⁵⁰ Rejecting Honduras' claim, the Court held that compensation should be settled based on the Convention and international principles, without reference to Honduran domestic law.²⁵¹

With respect to the demands for ethical reparations the Court refused to include them expressly as part of the compensation. In the

246. *Velásquez* Compensation Judgment, at para. 14; *Godínez* Compensation Judgment, at para. 13.

247. According to the Commission's information, the best system of compensation in Honduras is offered by the Institute of Military Pensions. See *Velásquez* Compensation Judgment, at paras. 11, 43 & 44; *Godínez* Compensation Judgment, at paras. 10 & 41.

248. *Id.*

249. *Velásquez* Compensation Judgment, at paras. 25, 28 & 29; *Godínez* Compensation Judgment, at paras. 23, 26 & 27.

250. *Velásquez* Compensation Judgment, at para. 26; *Godínez* Compensation Judgment, at para. 24.

251. *Velásquez* Compensation Judgment, at paras. 30 & 31; *Godínez* Compensation Judgment, at paras. 28 & 29.

Court's view, Article 63(1) of the Convention only provides for monetary reparation as part of compensation to the victims' families.²⁵²

The Court did, however, refer to the judgment on the merits as establishing an obligation on the part of the government to prevent, investigate and punish the perpetrators of violations, and to disclose all information available to the families. In the decisions on damages, the Court held that this duty remains binding, with the same force as the operative part of the judgment, until the Honduran government fully complies.²⁵³

The Court held that out-of-pocket expenses (*damnum emergens*) was a legitimate element of compensation, but ruled that they had neither been adequately documented nor claimed on time.²⁵⁴

Before determining the amount of lost income, the Court declared that any assessment should be made prudently and on a case by case basis, keeping in mind that there exist two different situations: first, when the recipient is the actual victim who may be left incapacitated; and second, when the recipients are relatives of a deceased victim. Following this distinction, the Court held that the amount of compensation should be less in the second situation because relatives have, at least in principle, "the possibility, currently or in the future, of working or earning income on their own."²⁵⁵

The Court declared that loss of income should be calculated on the basis of the amount the victim would have earned up until his or her natural death. It strongly rejected the Honduran government's effort to treat the disappearances of Manfredo Velásquez and Saúl Godínez as "accidental deaths."²⁵⁶ Instead of calculating the projected earnings of both victims for their expected natural lives, the Court settled the amount of lost income in *Velásquez* at 500,000 lempiras (approx. \$165,000) and in *Godínez* at 400,000 lempiras (approx. \$133,000).²⁵⁷

252. "Measures of this sort would constitute part of the reparation for the consequences of the situation in violation of the rights and freedoms, *but not of the compensation cited in Article 63.1 of the Convention.*" *Velásquez* Compensation Judgment, at para. 33 (emphasis added); *Godínez* Compensation Judgment, at para. 31.

253. *Velásquez* Compensation Judgment, at paras. 34-36; *Godínez* Compensation Judgment, at paras. 32-34.

254. *Velásquez* Compensation Judgment, at paras. 41 & 42; *Godínez* Compensation Judgment, at paras. 39 & 40.

255. *Velásquez* Compensation Judgment, at paras. 47-48; *Godínez* Compensation Judgment, at paras. 45 & 46.

256. *Velásquez* Compensation Judgment, at para. 46; *Godínez* Compensation Judgment, at para. 44.

257. *Velásquez* Compensation Judgment, at para. 49; *Godínez* Compensation Judgment, at para. 47.

In practical terms, the Court's rationale frustrates the purpose of deterrence. What results is that a government that engages in disappearances and extrajudicial executions is held to pay more monetary compensation for a victim left alive but incapacitated than for one who is murdered. Thus, the Court's ability to deter unjust and inhumane behavior through its decisions may have produced just the opposite result. The Court's rationale for reducing the compensation based upon the wives' and children's ability to work is not persuasive. The family's ability to work is irrelevant because their ability to work is not dependent on whether or not the father lives. The income lost because of the father's disappearance or disability is unavailable to them in either case.

The Court based its determination of the amount of moral damages principally on the medical report and oral testimony of one of the psychiatrists about the serious psychological injury suffered by the relatives of the victims as a direct result of the disappearance of Manfredo Velásquez and Saúl Godínez. The Court also found it obvious that the disappearances had led harmful psychological consequences on the families of the victims. The Court ordered Honduras to pay, as moral damages, 250,000 lempiras (approx. \$80,000) to each of the families of Velásquez and Godínez.²⁵⁸

B. Form of Payment: Some Observations

The Court ruled that compensation was to be paid within ninety days of the date of the judgment.²⁵⁹ However, the Court allowed Honduras to pay in six monthly payments if it so chose, the first one to be due in ninety days and the rest during the successive months, with interest.²⁶⁰

Only one fourth of the total compensation is to be paid to the spouses of the victims, who shall receive the money directly. The remainder is to be distributed among the children by way of a trust established in the Central Bank of Honduras "under the most favorable terms available in Honduran banking practice."²⁶¹ The children will be able to earn interest on the trust at monthly intervals, and each one will

258. *Velásquez Compensation Judgment*, at paras. 50-52; *Godínez Compensation Judgment*, at paras. 48-50.

259. On October 21, 1989, the deadline for payment expired.

260. *Velásquez Compensation Judgment*, at para. 57; *Godínez Compensation Judgment*, at para. 52.

261. *Velásquez Compensation Judgment*, at para. 58; *Godínez Compensation Judgment*, at para. 53.

receive his or her equal portion of the trust at the age of twenty-five. The Court shall supervise all parts of Honduras' compliance in this process.²⁶²

The Compensation judgment contains no protection with respect to the effect of devaluation of the local currency. This point is particularly relevant in Latin America, a continent with highly dependent and unstable economies, where inflation and loss of buying power are serious and recurring historical problems. Between 1983 and 1988, Latin America suffered an average inflation of 721 percent, an annual average of 144 percent.²⁶³

This issue is particularly dramatic in the case of the younger children of the victims. Emma Patricia, the daughter of Saúl Godínez, was born on May 2, 1982 and will receive her portion seventeen years from now. If the Court does not establish some kind of mechanism to protect Emma Patricia's compensation, she will very likely receive a symbolic check in May of 2007. Interest rates constitute a partial protection against inflation, since they will presumably keep some relationship with it. They will not, however, protect against sudden devaluation of the Honduran currency. Besides, since the Court has ordered the payment of interest, the beneficiaries are owed interest under a separate title than the principal, the integrity of which needs specific protection. Without some preventive measures against devaluation, the children's right to fair compensation is not only subject to sudden peril but the reparatory value of the Court's judgment is weakened.

The Commission requested a clarification from the Court on the question of protecting the trust, based on Article 67 of the Convention and Article 48 of the Rules of the Court. The request of the Commission suggested some mechanisms to protect the stability of the purchasing power of the award. It was presented to the Court on September 29, 1989 and is still awaiting the Court's final decision.

C. *The Issue of Punitive Damages*

There is no doubt that the Court's judgments represent an extraordinary precedent in the field of international human rights law and provide concrete and useful guidelines for the defense of human rights in Latin America. These decisions have crystallized a long and

262. *Velásquez Compensation Judgment*, at para. 59; *Godínez Compensation Judgment*, at para. 54.

263. Report of the Inter-American Economic and Social Council, OEA/ser.H-X/47/CIES-4455 (1989)(orig. Spanish).

often lonely struggle by human rights NGOs to condemn the crime of disappearances throughout the continent. Finally, their efforts have received the institutional support of an international court of law.

The families' lawyers, committed to seeking the most effective human rights protection in Latin America and total eradication of the practice of disappearances, requested punitive damages as part of the full compensation to be paid by Honduras.²⁶⁴

Given the Convention's purpose, to promote human dignity and prevent future human rights violations, the attorneys creatively interpreted the Convention to mean that Honduras was required to pay punitive damages. In addition, the families' lawyers argued that the exemplary character of such compensation would help reestablish social peace in Honduras, restore confidence in the rule of law, and act as an impediment to the repetition of this perverse practice. Essentially, punitive damages could provide a vital check on the abuse of power and protect and promote truth and trust.²⁶⁵

In their efforts to obtain punitive damages, the relatives' lawyers stated that the Court was not confronting an isolated and private crime, but a series of crimes: horrendous human rights violations which resulted from deliberate and official State policies; violations of fundamental rights and imperative rules of international law (*jus cogens*) and crimes that represent — in the words of the OAS General Assembly — “an affront to the conscience of the hemisphere and constitute a crime against humanity.”²⁶⁶

A group of prominent law professors from eight different countries affirmed that monetary compensation must act as a deterrent against State-sponsored crime and must be fashioned so as to discourage future human rights violations, especially disappearances. The jurists urged the Court not to treat the issue of compensation as a private tort case, which might result from accidental or wrongful death.²⁶⁷ The award

264. On the issue of punitive damages, the first reported cases are: *Wilkes v. Wood*, 98 Eng. Rep. 489 (1763) and *Huckle v. Money*, 95 Eng. Rep. 768 (1763). Both cases involved police searches with no or insufficient warrants in England against political dissidents. For a discussion on punitive damages, see 40 ALA. L. REV. 1 (1989)[the entire issue is dedicated to the topic of punitive damages].

265. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 739 (1989).

266. *Velásquez* Judgment, at para. 153; *Godínez* Judgment, at para. 161.

267. *Amici Curiae* on the issue of compensation presented to the INTER-AM. CT. H.R. by Professors Jean-Denis Archambault, Alejandro Artucio, Alfredo Etcheberry, Gustavo Gallón Giraldo, Diego García-Sayán, Alejandro M. Garro, Robert K. Goldman, Jorge Mera, Denis Racicot, Joaquín Ruiz Giménez, Arturo Valencia Zea and Eugenio Raúl Zaffaroni, March 10, 1989, at 30. On the same issue, ACAFADE also submitted a Brief *Amicus Curiae*. See *Velásquez* Compensation Judgment, at para. 19; *Godínez* Compensation Judgment, at para. 19.

should take into consideration the vile and wanton nature of the crime itself, as well as its societal repercussions at the national and international levels. In the view of the prestigious "friends of the Court," in the present cases there existed "not only the necessity for justice in a particular case, but also the prestige of the Court [was involved], as well as the credibility of the Inter-American system for human rights protection and the interest of the international community in human rights promotion."²⁶⁸

These legal scholars also expanded the concept of an "injured party" to cover not only the direct victim of the violation, but also Honduran society, the State Parties to the Convention, and the international community.²⁶⁹ Thus, punitive damages concern not only injuries to the victim and his or her family, but to the entire community that shares collective values.²⁷⁰

The Court, interpreting the provisions of Article 63(1) as compensatory and not punitive in character, refused to accept the punitive damages demand. The Court strictly limited the concept of "injured party" to apply only to the families of the victim, and declared — without further explanation — that the notion of punitive damages is not a current principle of international law.²⁷¹

D. Lack of Compliance by Honduras

In accordance with the Court's order, Honduras should have paid the full amount of the awards by October 20, 1989. As of this writing, however, no payment has been made. In November of 1989, the government of Honduras submitted a bill to its Congress to make a budgetary provision to confront this obligation. Congress went into recess, however, without acting on the request.

In January of 1990, the Commission asked the Court to insist on prompt payment. In February of 1990, the government of Honduras sent a note to the Court explaining that the new request for appropriation had been submitted to the Honduran legislature. It is expected that the matter will come before the Court again in July of 1990.

268. *Id.* at 16.

269. The State violated an obligation considered under international law as an *erga omnes* obligation. *Id.* at 6-7; see also *Barcelona Traction Light & Power Co. Ltd.*, I.C.J. paras. 33-34 (1970).

270. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079, 1102 (1989).

271. *Velásquez Compensation Judgment*, at paras. 37-39; *Godínez Compensation Judgment*, at paras. 35-37.

X. CONCLUSION

The case against Honduras is not quite complete; the government of Honduras has yet to pay the amounts established by the Court as damages to the widows and children of Saúl Godínez and Manfredo Velásquez. The Court also has yet to rule on the interpretation requested by the Commission on means to protect the damages award from devaluation. For the most part, however, the litigation is over. The authors believe that a major, historical step has been taken to improve the international protection of fundamental human rights. The critique of different aspects of the proceedings and of the decisions, as set forth in the preceding pages, in no way detracts from the spectacular achievement of having put "disappearances" on trial, and having issued the first judicial condemnation of that criminal practice.

The experience of three years of litigation coming to an end, it is now a good time to take stock of what has been accomplished and what must be improved upon in future cases. The preceding pages are written in that spirit. We cannot end this article, however, without observing that there are no new "contentious" (adversarial) cases before the Court. Since the Honduras cases, the Commission has only twice "invited" a State to accept the jurisdiction of the Court on an *ad hoc* basis, and in both cases that invitation has been declined.²⁷²

The commission has not submitted any case against a State that is bound by the Court's jurisdiction. Petitioners have submitted to the Commission dozens of cases that could be forwarded to the Court under either of these procedures. Though the several steps in the procedure before the Commission are long and cumbersome, there are many cases that are ripe for submission to the Court, and yet their resolution by the Commission has been repeatedly postponed. The Commission continues to avoid sending cases to the Court, in exercise of what it interprets it to be its very broad discretion as to which cases to submit.

Justices of the Court have spoken out and have published comments regarding this issue, expressing their opinions that it is a serious problem for the future of the system.²⁷³ They advocate a regimen by which every contentious case would routinely be submitted to the Court after the Commission has ruled on the merits of the complaint. Given the large number of cases in the Commission's docket, this proposal

272. See note 63 and accompanying text.

273. Speech by Thomas Buergenthal at the American University, October 28, 1988; speech by Hector Gros Espiell at Instituto de Estudios Internacionales, University of Chile, August 18, 1989.

presents logistical and practical problems. We believe, nonetheless, that it would be preferable to the present system, in which the Court is grossly underutilized. The Commission could very well issue internal guidelines regulating the exercise of the discretionary powers that it now enjoys in this regard, and determining — for example — that all cases in which the Commission ruled against a State on the merits would automatically be submitted to the Court. If this were to happen, the Commission would need to reorganize its daily work so as to maintain a manageable docket of active cases. As it happens, there are many complaints in which the action of the Commission is most valuable as an emergency procedure; in those cases, with the consent of the complainants, the Commission could treat them as urgent actions and not open up a “case” file under the procedure stipulated by the Convention. A smaller number of cases could then be rigorously processed, creating substantial records with the active cooperation of complainants and governments. Terms and mandatory steps would then be observed more strictly and, once a full record has been created including all relevant facts and valid legal arguments, each case could be submitted to the Court.

We think that such a proposal is viable and desirable, and we do not think that it would demand greater expenditures during a severe budgetary crisis at the Organization of American States. In fact, with proper reorganization of its resources, the Commission can treat cases in this manner while at the same time continue to conduct on-site visits and country reports and proposals for international law-making, all of which have distinguished its work in the past.

If such a proposal is not adopted, we think that the Commission must at least prepare and publish clear guidelines for the submission of cases to the Court. Victims of human rights abuse have a right to know what kind of burden they have to meet if they want to have their cases heard by an international tribunal. Under the present system, when victims come to practitioners in this field, the latter are obliged to tell them that there is simply no assurance that, at the end of years of patient processing before the Commission, the case will get to the Court. In fact, practitioners must tell their prospective clients that a decision to submit the case will be made, when the time comes, on purely political or diplomatic grounds, not on the merits of legal arguments. There is no question that, under the Convention, the Commission enjoys broad discretion to make such a decision.²⁷⁴ Discretion,

274. As explained *supra* note 81 and accompanying text, the only other way to take a case

however, can and should be regulated, because otherwise it lends itself to whim and arbitrariness. If complainants knew at the start what kind of showing they have to make to get their cases submitted to the Court, it would greatly facilitate the work of human rights organizations and practitioners, and it would also make the Commission's work more efficient and effective.

In addition, the Commission and the Court must use their staff and material resources more effectively in the production of evidence and in fact-finding. By the time a case is ripe to go to the Court, the Commission must have built a solid record that leaves no useful fact out. The cooperation of complainants (and occasionally of the State) is now the only tool used by the system to create a record. Yet there is nothing in the Convention or in the regulations that prevents the Commission from deploying staff attorneys to look for documentary or testimonial evidence at the Commission's own initiative. In many cases, important information and documentation is simply unavailable to the victim of human rights abuse, but the authorities may decide to make it available to the Commission. In the Honduras litigation, the inactivity of the Commission (and of the Court) forced the victims, the petitioners and their attorneys to conduct very expensive fact-finding and to bring witnesses from several countries before the Court at different times. Generous contributions from several sources were not hard to raise for this purpose, given the historic nature of this first case; it is safe to predict, however, that such support will not always be there.

The Court must also use its own resources to get closer to the truth. Justices and officials of the Court are empowered to travel to other countries, to request and look for documents and records, and to interview witnesses who, for a variety of reasons, may not be brought to the seat of the Court for a public hearing.²⁷⁵ In many cases, that might be the only way in which such evidence can be produced. In the Honduras cases, there were witnesses interviewed by the authors of this article that simply could not be convinced of the need to come forward and travel to Costa Rica for a public hearing. Under existing rules, however, they could have been interviewed by an officer of the Court, or even by a commission of the members of the Court duly delegated,

to the Court is through a petition of a State party to the Convention. Except in the very unlikely case of a national of a country who is wronged by a different State (and both States being parties to the Convention), this avenue is simply unavailable to the victims of human rights violations for political and diplomatic reasons.

275. Article 25, Statute of the Court; Articles 4.2, 6.2 and especially 22.2 & 34.2, Rules of Procedure of the Court.

and their information could have been before the Court. There is no need to insist on the advantages that the Court enjoys over private litigants when it comes to access to official documents and information. As long as an effort is made to maintain the necessary procedural guarantees of equality of and balance between the parties to the litigation, a dynamic and aggressive search for the truth can only benefit the credibility of the Court and its effectiveness.