

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

In re:

Mohammed Abdullah Saleh Al-Asad and The
Republic of Djibouti

Communication No. 383/2010

**HUMAN RIGHTS CENTER OF THE UNIVERSITY OF
BUENOS AIRES LAW SCHOOL — HUMAN RIGHTS CLINIC'S
BRIEF OF AMICUS CURIAE**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
A. Statement of Interest	1
B. Statement of Purpose	2
II. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM’S EXTENSIVE JURISPRUDENCE ON ENFORCED DISAPPEARANCES SHOULD INFORM THE COMMISSION’S APPROACH TO THIS CASE	4
III. THE UNIQUE CIRCUMSTANCES OF ENFORCED DISAPPEARANCE CASES DICTATE A FLEXIBLE STANDARD OF PROOF AND MAY BE PROVEN BY INDIRECT AND CIRCUMSTANTIAL EVIDENCE	7
A. The Inter-American System’s Approach to Enforced Disappearance Cases Recognizes Victims’ Difficulties in Accessing Evidence	8
B. To Meet The Court’s Standard of Proof, a Complainant Need Only Establish That His Specific Case Can Be Linked to the Systematic Practice of a State.....	11
C. In Enforced Disappearance Cases, the Inter-American System Applies a Flexible Standard of Proof Based on Sound Judicial Discretion	13
D. Circumstantial and Indirect Evidence are Legitimate Means of Proving Enforced Disappearances	15
CONCLUSION.....	18
APPENDIX – LIST OF AMICI	

I. INTRODUCTION

A. Statement of Interest

1. The Human Rights Center (hereinafter, “HRC”) of the University of Buenos Aires Law School, located at Figueroa Alcorta Av. 2263, Autonomous City of Buenos Aires, Argentina, represented by its director Mr. Martín Sigal,¹ respectfully submits this *amicus curiae* brief before the African Commission on Human and Peoples’ Rights (hereinafter, “the Commission”) in the matter between Mohammed Abdullah Saleh Al-Asad and The Republic of Djibouti (Communication No. 383/2010).

2. This *amicus curiae* brief is filed pursuant to Rule 99(16) of the Rules of Procedure of the Commission. The HRC respectfully requests the admission and consideration of this brief and is available to make oral submissions if the Commission so requires.

3. The HRC’s central mission is to contribute to the protection of human rights both domestically and abroad. The HRC undertakes a wide variety of work to strengthen human rights standards, combat global injustice and enhance the protection of human beings.² The submission of *amicus curiae* briefs is a core objective of the HRC’s work.

4. This brief was written by law students and recent graduates of the Law Clinic of the HRC at the University of Buenos Aires Law School: Jimena Posleman, Andrea Pietrafesa,

¹ Appointed by Resolution No. (CD) 1386/15 from February 20, 2015, as Director of the Human Rights Center at the University of Buenos Aires Law School. Mr. Sigal is a graduate of the University of Buenos Aires Law School (1999) and holds an LLM in Human Rights from Columbia University (2006). He is a Member of the Board of Amnesty International Argentina and Asociación Civil por la Igualdad y la Justicia (www.acij.org.ar). He is the co-founder and former co-director (2003-2013) of the Asociación Civil por la Igualdad y la Justicia. Since 2000, Mr. Sigal has participated in human rights cases by filing complaints in individual and collective actions and *amicus curiae* briefs. He has litigated cases of structural discrimination, consumer rights, education rights, health rights, labor rights and disability rights, among others. He is a clinical professor and teaches in the Human Rights LLM program at the University of Buenos Aires Law School.

² For further details please see Centro de Derechos Humanos, *Quiénes Somos*, Facultad de Derecho, Universidad de Buenos Aires, <http://www.derecho.uba.ar/institucional/centro-derechos-humanos/quienes-somos.php> (last visited Dec. 12, 2017).

Belén María Ibañez, María Barraco, Samantha Singer, and Candela Loreti Gambaccini. After conducting thorough research on the Inter-American Human Rights System's jurisprudence and doctrine, debates were held within the Law Clinic to elaborate the main standards developed by this regional human rights system. The group worked together in writing the brief and received comments to previous versions from Professor Ariel Dulitzky of the University of Texas.

5. The co-signatories to this brief include former presidents and officials of the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, the United Nations Working Group on Enforced or Involuntary Disappearances, and the Human Rights Committee; a former United Nations Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; members of civil society organizations from 11 countries in Latin America; and prestigious academics with vast experience in human rights law, international law, and the Inter-American System of Human Rights.

B. Statement of Purpose

6. The purpose of this *amicus curiae* brief is to present the honorable Commission with the evidentiary standards developed by the Inter-American Human Rights System in cases of enforced disappearances. Given the pivotal role the Inter-American System has played addressing violations resulting from secretive practices carried out by states, its unique approach to enforced disappearance cases is instructive in the present matter.

7. The practice of enforced disappearances poses strong challenges to both victims seeking redress and the international bodies and tribunals seeking to resolve their cases. Perpetrating states carry out enforced disappearances in ways intentionally and specifically designed to conceal evidence and evade accountability. Any traces of direct evidence that remain will typically be held within the control of the perpetrating state itself, allowing such state to

destroy it and further obfuscate its actions. Moreover, states rarely meaningfully cooperate with courts and tribunals during fact-finding.³

8. As will be explained *infra*, the Inter-American Human Rights System has developed a *jurisprudence constante* on the subject of enforced disappearances. Its experience is based on a robust docket of cases that emerged from almost two decades of dictatorial regimes in the region, wherein states repeatedly carried out a systematic practice of enforced disappearances (though enforced disappearances continued to occur in times of democracy). Erasing all types of evidence of the kidnapping and whereabouts of victims was a central part of this practice's policy and design.

9. Faced with a secretive system and little available direct evidence, the Inter-American Commission and Inter-American Court responded with a unique approach to evaluate enforced disappearance claims and provide avenues to justice.

10. Crucial to this approach was the development of adequate and flexible standards of proof to address the difficulty of obtaining direct evidence.

11. Therefore, we respectfully believe that such jurisprudence is relevant to discussions in this case regarding the evidence and standards of proof required to determine the Republic of Djibouti's international responsibility.

³ Helen Keller and Corina Heri, *Enforced Disappearance and the European Court of Human Rights, A Wall of Silence, Fact Finding Difficulties and States as "Subversive Objectors"*, 12 J. INT'L CRIM. JUST. 735, 738 (Sept. 2014); Ophelia Claude, *A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence*, 5 INTERCULTURAL HUM. RTS. L. REV. 407, 415-16 (2010).

II. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM'S EXTENSIVE JURISPRUDENCE ON ENFORCED DISAPPEARANCES SHOULD INFORM THE COMMISSION'S APPROACH TO THIS CASE

12. Together with other international bodies,⁴ the Inter-American Human Rights System became an essential venue for guaranteeing the defense of human rights, victims' access to justice, and fair reparations in enforced disappearance cases during times of dictatorship.⁵ This was due to the impossibility of pursuing justice at a domestic level. The practice of enforced disappearances was coupled with many other human rights violations, including severe obstacles to access to justice. Victims and their next of kin were prevented from filing complaints before the authorities, making it almost impossible to obtain redress.

13. The Inter-American Human Rights System has both allowed victims' families to pursue claims and played a crucial role in drawing the international community's attention towards human rights violations occurring in the region. The Inter-American Human Rights System's two competent bodies, the Inter-American Commission on Human Rights (hereinafter, the "Inter-American Commission") and the Inter-American Court of Human Rights (hereinafter, the "Inter-American Court"), have complementary roles in monitoring states' compliance with their international human rights obligations under the American Convention on Human Rights. The Inter-American Commission has published numerous reports on state practices that violated

⁴ For instance, the Working Group on Enforced or Involuntary Disappearances, which performed Country Visits in the region. *See*: Comm'n on Human Rights, Rep. on the visit to Peru by two members of the Working Group on Enforced or Involuntary Disappearances (17-22 June 1985), U.N. Doc. E/CN.4/1986/18/Add.1 (Jan. 8, 1986); Comm'n on Human Rights, Rep. of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1985/15 (Jan. 23 1985); Comm'n on Human Rights, Rep. on the visit to Guatemala by two members of the Working Group on Enforced or Involuntary Disappearances (5-9 October 1987), U.N. Doc. E/CN.4/1988/19/Add.1 (Dec. 21, 1987).

⁵ Christian Vidal, *La Desaparición Forzada en el contexto interamericano*, LECCIONES Y ENSAYOS, 255, 265 (2005), <http://www.derecho.uba.ar/publicaciones/lye/revistas/81/la-desaparicion-forzada-en-el-contexto-interamericano.pdf>.

human rights.⁶ These enhanced the Inter-American Commission's credibility and produced tangible positive impacts within the affected countries.⁷ The Inter-American Commission has also addressed a substantial number of enforced disappearance cases⁸ that have not been litigated before the Court.⁹

14. The Inter-American Court began to hear its first contentious cases in the mid-1980s as democratization spread in Latin America. The previous period was characterized by dictatorial regimes, during which several governments carried out a systematic practice of enforced disappearances. Enforced disappearances have continued in some states, but on a less systematic basis.¹⁰

⁶ See for example: Inter.-Am. Comm'n H.R., *Report on the Situation of Human Rights in Argentina*, OEA/Ser.L/V/II.49 doc. 19 corr.1 Ch. III (Apr. 11, 1980); Inter.-Am. Comm'n H.R., *Report on the Situation of Human Rights in Chile*, OEA/Ser.L/V/II.66 doc.17 Ch. III (Sept. 9, 1985); Inter.-Am. Comm'n H.R., *Report on the Situation of Human Rights in Paraguay*, OEA/Ser.L/V/II.71 doc.19 rev. ¶ 1 Ch. II (Sept. 28, 1987).

⁷ For further detail see Robert K. Goldman, *History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 HUM. RTS. Q. 856 (2009).

⁸ *Muñoz Guzmán v. Mexico*, Case 12.130, Inter-Am. Comm'n H.R., Report No. 2/06 (Feb. 28, 2006), <https://www.cidh.oas.org/annualrep/2006eng/MEXICO.12130eng.htm>; *Extrajudicial Executions & Forced Disappearances of Persons v. Peru*, Case 10.247, Inter-Am. Comm'n H.R., Report No. 101/01, OEA/Ser.L/V/II.114, doc. 5 rev. (2001); *Zavala Martínez v. Peru*, Case 10.820, Inter-Am. Comm'n H.R., Report No. 44/00, OEA/Ser.L/V/II.106, doc. 6 rev. (1999); *Trujillo v. Colombia*, Case 10.337, Inter-Am. Comm'n H.R., Report No. 7/00, OEA/Ser.L/V/II.106, doc. 6 rev. (1999); *Velásquez v. Guatemala*, Cases 10.588, 10.608, 10.796, 10.856, 10.921, Inter-Am. Comm'n H.R., Report No. 40/00, OEA/Ser.L/V/II.106, doc. 6 rev. (1999); *Sandoval Flores v. Peru*, Case 10.670, Inter-Am. Comm'n H.R., Report No. 43/00, OEA/Ser.L/V/II.106, doc. 6 rev. (1999); *Ul Musicue v. Colombia*, Case 9853, Inter-Am. Comm'n H.R., Report No. 4/98, OEA/Ser.L/V/II.98, doc. 6 rev. (1997); *Medina Charry v. Colombia*, Case 11.221, Inter-Am. Comm'n H.R., Report No. 3/98, OEA/Ser.L/V/II.98, doc. 6 rev. (1997); *De La Cruz Gómez v. Guatemala*, Case 10.606, Inter-Am. Comm'n H.R., Report No. 11/98, OEA/Ser.L/V/II.98, doc. 6 rev. (1997); *Pratdesaba Barillas v. Guatemala*, Case 8074, Inter-Am. Comm'n H.R., Report No. 53/96, OEA/Ser.L/V/II.95, doc. 7 rev. (1996).

⁹ This is due to the fact that, according to Article 45 of its Rules of Procedure, the Inter-American Commission is allowed to decide on a case-by-case basis if a petition should reach the Court. This is done by giving "fundamental consideration to the obtainment of justice in the particular case based, among other factors, on the position of the petitioner, the need to develop or clarify the case-law of the system, the nature and seriousness of the violation and the future effect of the decision within the legal systems of the American Convention on Human Rights' Member States." The Inter-American Commission issues the corresponding reports pursuant to the procedure established in Articles 44 to 51 of the American Convention on Human Rights.

¹⁰ For example, in March 2011, civil society human rights organizations reported that, based on their estimates, more than 3,000 people have been forcibly disappeared in Mexico since 2006, see: Inter.-Am. Comm'n H.R., *Situation of Human Rights in Mexico*, OEA/Ser.L/V/II. doc. 44/15 Ch. IV (Dec. 31, 2015), <https://www.oas.org/en/iachr/reports/pdfs/Mexico2016-en.pdf>.

15. Enforced disappearances have been some of the most litigated issues before the Inter-American Court, with over thirty cases heard during its more than thirty-five years of existence.¹¹

¹¹ *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988); *Godínez Cruz v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5 (Jan. 20, 1989); *Fairén-Garbi v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 6 (Mar. 15, 1989); *Blake v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36 (Jan. 24, 1998); *Durand v. Perú*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 50 (Aug. 16, 2000); *Bámaca-Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000); *19 Merchants v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109 (July 5, 2004); *Serrano Cruz Sisters v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120 (Mar. 1, 2005); *Gómez Palomino v. Perú*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 136 (Nov. 22, 2005); *Blanco Romero v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 138 (Nov. 28, 2005); *Goiburú v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153 (Sept. 22, 2006); *La Cantuta v. Perú*, Judgment, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006); *Pueblo Bello Massacre v. Colombia*, Judgment, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006); *Heliodoro Portugal v. Panamá*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 186 (Aug. 12, 2008); *Tiu Tojín v. Guatemala*, Judgment, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 190 (Nov. 26, 2008); *Ticona Estrada v. Bolivia*, Judgment, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 191 (Nov. 27, 2008); *Radilla-Pacheco v. Mexico*, Judgment, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 209 (Nov. 23, 2009); *Anzualdo Castro v. Perú*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202 (Sept. 22, 2009); *Cárdenas v. Bolivia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 217 (Sept. 1, 2010); *Chitay Nech v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212 (May 25, 2010); *Gomes Lund (“Guerrilha do Araguaia”) v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219 (Nov. 24, 2010); *Cabrera García v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220 (Nov. 26, 2010); *Contreras v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232 (Aug. 31, 2011); *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011); *Fleury v. Haiti*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 236 (Nov. 23, 2011); *Gudiel Álvarez (“Diario Militar”) v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 253 (Nov. 20, 2012); *García v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 258 (Nov. 29, 2012); *González Medina v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 240 (Feb. 27, 2012); *Río Negro Massacres v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250 (Sept. 4, 2012); *Osorio Rivera v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 290 (Nov. 26, 2013); *Rochac Hernández v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 285 (Oct. 14, 2014); *Rodríguez Vera (“The Disappeared from the Palace of Justice”) v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 287 (Nov. 14, 2014); *Members of the Vill. of Chichupac v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 328 (Nov. 30, 2016); *Vereda La Esperanza v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 341 (Aug. 31, 2017).

16. The Inter-American Court has therefore acquired extensive experience in enforced disappearance cases, becoming a reference on the matter not only for national courts within the region, but also for other international human rights tribunals.¹²

17. In short, the Inter-American Human Rights System's active role in providing access to justice, in times where no justice could be found within states nor were serious efforts made to locate victims, together with the positive and tangible results of its interventions, has enabled it to gain legitimacy and substantial experience on the subject of enforced disappearances over the course of many years.

18. Therefore, the ways in which the Court analyzes evidence in enforced disappearance cases should be considered a relevant resource in developing jurisprudential solutions to overcome the lack of direct evidence that is a consistent feature of these cases.

III. THE UNIQUE CIRCUMSTANCES OF ENFORCED DISAPPEARANCE CASES DICTATE A FLEXIBLE STANDARD OF PROOF AND MAY BE PROVEN BY INDIRECT AND CIRCUMSTANTIAL EVIDENCE

19. The Inter-American Human Rights System has developed a unique and important approach to the admission and analysis of evidence in enforced disappearance cases. First, the core proposition established by the Court is of *jurisprudence constante*, which stipulates that whenever a disappearance case may be linked to a proven practice of disappearances, either carried out by the state or tolerated by it, the enforced disappearance is proven. Second, the Court accepts that such disappearance may be proven using indirect or circumstantial evidence. Third, the Court uses

¹² Inter-American Ct. H.R., *La Corte Interamericana de Derechos Humanos Un Cuarto de Siglo: 1979-2004* 388 (2005), <http://www.corteidh.or.cr/sitios/libros/todos/docs/cuarto-siglo.pdf>. See also the following cases in which the European Court of Human Rights referred to the Inter-American Court's jurisprudence: *Akdivar v. Turkey*, App. No. 21893/93, 23 Eur. H.R. Rep. 143, 185 (1996); *Kurt v. Turkey*, App. No. 24276/94, 27 Eur. H.R. Rep. 373, 398 (1998); *Ertak v. Turkey*, App. No. 20764/92, First Section, ¶ 106 (Eur. Ct. H.R. May 9, 2000), <http://echr.ketse.com/doc/20764.92-en-20000509/view/>; *Marguš v. Croatia*, App. No. 4455/10, Grand Chamber, ¶¶ 56, 66 (Eur. Ct. H.R. May 27, 2014), <http://hudoc.echr.coe.int/eng?i=001-144276>.

a flexible standard to evaluate circumstantial and indirect evidence based on the *sana crítica*, or sound judicial discretion. Finally, the Court admits different evidentiary means when evaluating enforced disappearance cases. Flexibility has been the rule, rather than the exception, for the Inter-American Court in the admission and analysis of evidence, in conscious recognition of the difficulties entailed in proving enforced disappearances.

20. Thus, the Court may decide cases based on indirect or circumstantial evidence, evaluated under the *sana crítica* criterion. The Court will consider a disappearance proved if the specific case can be linked to a general practice of enforced disappearances that are either carried out or tolerated by the state.

A. The Inter-American System’s Approach to Enforced Disappearance Cases Recognizes Victims’ Difficulties in Accessing Evidence

21. The Inter-American System has recognized that victims have difficulty accessing direct evidence in enforced disappearance cases because states tend to erase, destroy, and hide evidence.

22. The nature of state conduct in enforced disappearance cases required the Inter-American Court to be flexible in the evidentiary requirements imposed upon complainants to prove their case. If the Court were to impose a stricter standard of proof or to require that complainants submit direct evidence, state impunity would be almost guaranteed.

23. Enforced disappearances are carried out by means that are carefully designed by states to erase any traces of evidence of the kidnapping or the disappeared person’s whereabouts.¹³ This makes it difficult for plaintiffs to prove their case and for Courts to determine the existence

¹³ *Velásquez Rodríguez v. Honduras*, ¶ 131; *Cárdenas v. Bolivia*, ¶ 168; *González Medina v. Dominican Republic*, ¶ 134.

of an enforced disappearance, since they do not have access to direct evidence. Furthermore, states tend not to cooperate with Courts in these cases and often deny the relevant facts.¹⁴

24. As Thomas Buergenthal, former judge of the Inter-American Court, explains, “the very nature of making someone disappear implies that meticulous steps are undertaken by the government to erase any evidence of the disappearance.”¹⁵

25. The Inter-American Court is not the only international human rights body that has emphasized this evidentiary difficulty. It has also been recognized in several cases before the European Court of Human Rights and the United Nations Human Rights Committee.¹⁶ Helen Keller, a judge of the European Court of Human Rights, has stated that in refusing to acknowledge the occurrence of an enforced disappearance, national authorities effectively build a “wall of silence” that makes it extremely difficult for the Court to establish the facts.¹⁷

26. The Inter-American Court has recognized that imposing a high evidentiary requirement upon claimants often guarantees state impunity. In *Gomez Palomino v. Perú*, the Court highlighted the clandestine nature of enforced disappearances and found it impermissible

¹⁴ Helen Keller and Corina Heri, *Enforced Disappearances and the European Court of Human Rights, A Wall of Silence, Fact Finding Difficulties and States as “Subversive Objectors”*, 12 J. INT’L CRIM. JUST. 735, 737-38 (Sept. 2014).

¹⁵ Thomas Buergenthal, *Judicial Fact-Finding: Inter-American Human Rights Court*, in FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS 269, 270 (Richard B. Lillich, ed., 1991).

¹⁶ *El-Masri v. Former Yugoslav Republic of Macedonia*, App. No. 39630/09, ¶ 151 (Eur. Ct. H.R. Dec. 12, 2012), <http://hudoc.echr.coe.int/eng?i=001-115621>; Human Rights Comm., *Shikmuradova v. Turkmenistan*, Communication No. 2069/2011, U.N. Doc. CCPR/C/112/D/2069/2011 ¶ 6.2 (2015); Human Rights Comm., *Muftah Younis Muftah Al-Rabassi v. Libya*, Communication No. 1860/2009, U.N. Doc. CCPR/C/111/D/1860/2009 ¶ 7.2 (2014); Human Rights Comm., *El Hassy v. Libyan Arab Jamahiriya*, Communication No. 1640/2007, U.N. Doc. CCPR/C/91/D/1422/2005 ¶ 6.7 (2007); Human Rights Comm., *Medjnoune v. Algeria*, Communication No. 1297/2004, U.N. Doc. CCPR/C/87/D/1297/2004 ¶ 8.3 (2006); Human Rights Comm., *Il Khwildy v. Lybia*, Communication No. 1804/2008, U.N. Doc. CCPR/C/106/D/1804/2008 ¶ 7.2 (2013).

¹⁷ Helen Keller and Corina Heri, *Enforced Disappearances and the European Court of Human Rights, A Wall of Silence, Fact Finding Difficulties and States as “Subversive Objectors”* 12 J. INT’L CRIM. JUST. 735, 742 (Sept. 2014).

for a state to enact legislation that imposed an unclear burden of “due proof” on victims and their families, stating that this would deprive victims of their right to obtain justice.¹⁸

27. This led the Inter-American Court to affirm that states “cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation.”¹⁹ The Court also developed precedent on the need for flexible standards of proof, discussed *infra*.

¹⁸ *Gómez Palomino v. Peru*, ¶¶ 106-08.

¹⁹ *Velásquez Rodríguez v. Honduras*, ¶ 135. See also, *Bámaca-Velásquez v. Guatemala*, ¶ 152. In his concurrent opinion in the *Bámaca-Velásquez* case, Judge Sergio García Ramírez stated in paragraph 31 that “However, there are hypotheses where the burden of proof is naturally displaced from the person who asserts a fact to the person who denies it, when the latter is in a better position to prove what is said — the fact or the situation on which his defense is based — taking into account the circumstances of the case. In my opinion, this is what the expression contained in the judgment implies, . . . : ‘in cases of forced disappearance, the State's defense cannot rely on the impossibility of the plaintiff to present evidence in the proceedings since, in such cases, it is the State that controls the means to clarify the facts that have occurred in its jurisdiction and, therefore, in practice, it is necessary to rely on the cooperation of the State itself in order to obtain the required evidence.’”

B. To Meet The Court’s Standard of Proof, a Complainant Need Only Establish That His Specific Case Can Be Linked to the Systematic Practice of a State

28. It is established jurisprudence at the Court that, where it can be shown that a state has engaged in or tolerated²⁰ a practice of enforced disappearances, and that a specific disappearance can be linked to that practice, that disappearance is considered proven.²¹ The Court has also established that its determination can stand on both indirect and circumstantial evidence, asserting that in the absence of direct evidence, the complainant may legitimately use circumstantial evidence, indicia, or presumptions to support the allegation of a disappearance,²² when those “lead to consistent conclusions with regards to the facts.”²³

29. In reaching this conclusion in the *Velásquez Rodríguez* case, the Inter-American Court followed the argument proposed by the Inter-American Commission: given that a systematic policy of enforced disappearances, “designed to conceal and destroy evidence”, had existed in Honduras,²⁴ an individual’s disappearance could be proven through indirect or circumstantial evidence, or even logical inference. In the words of the Inter-American Commission: “otherwise, it would be impossible to prove that an individual has been disappeared.”²⁵

30. Following the Inter-American Commission’s line of reasoning, the Court explained the vital importance of allowing circumstantial or presumptive evidence in allegations of enforced

²⁰ In this regard, the Court understood in paragraph 172 of the *Velásquez Rodríguez* case that the practice may be a direct practice by the state or its “tolerance”, implied by a lack of due diligence to prevent human rights violations committed by third parties or to respond to them as required by the American Convention on Human Rights.

²¹ *Velásquez Rodríguez v. Honduras*, ¶ 126; *Godínez Cruz v. Honduras*, ¶ 132; *Rivera v. Peru*, ¶ 146.

²² *Velásquez Rodríguez v. Honduras*, ¶ 130; *González Medina v. Dominican Republic*, ¶ 134.

²³ *Blake v. Guatemala*, ¶ 49.

²⁴ *Velásquez Rodríguez v. Honduras*, ¶ 124.

²⁵ *Id.*

disappearances because they are “characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim.”²⁶

31. This line of reasoning was confirmed by many subsequent decisions of the Inter-American Court, including *Godínez Cruz* and *Bámaca-Velásquez*.²⁷

32. Based on such established reasoning, the Court stated that any of the elements of an enforced disappearance, including the deprivation of liberty, could be proven through indicative evidence.²⁸ In *González Medina v. Dominican Republic*, the Court used indicative evidence to conclude that the victim had been detained and thereafter forcibly disappeared.²⁹ In the case of *Osorio Rivera v. Perú*, the Court affirmed the state’s international responsibility by inferring that the victim’s detention had continued after an order for release, and that therefore an enforced disappearance had been proven.³⁰

33. The Inter-American Court has thus recognized that when an uncooperative state eliminates, withholds, conceals, or refuses to disclose evidence of its clandestine practice of disappearances, the only possible means to protect the victim’s rights is to give substantial weight to circumstantial and indirect evidence. The Court has described the importance of circumstantial evidence as “evidence which is used in every judicial system and which may be the only means available, when human rights violations imply the use of state power for the destruction of direct

²⁶ *Id.* ¶ 131.

²⁷ *Godínez Cruz v. Honduras*, ¶ 132; *Bámaca-Velásquez v. Guatemala*, ¶ 130; *Blake v. Guatemala*, ¶ 49.

²⁸ The Court underlined that this criteria is shared by the European Court of Human Rights “which has indicated that, in cases in which the detention of an individual by State authorities has not been proved, this detention may be presumed or inferred if it is established that the individual entered a place under the control of the State and has not been seen since.” See *Rodríguez Vera (“The Disappeared from the Palace of Justice”) v. Colombia*, ¶ 233.

²⁹ *González Medina v. Dominican Republic*, ¶¶ 164, 169.

³⁰ *Osorio Rivera v. Peru*, ¶ 155.

evidence in an attempt at total impunity or the crystallization of some sort of perfect crime.”³¹ The Court thus views the use of this type of evidence as absolutely necessary “to meet the object and purpose of the American Convention on Human Rights and allow the Court to effectively carry out the functions that the Convention assigns to it.”³²

C. In Enforced Disappearance Cases, the Inter-American System Applies a Flexible Standard of Proof Based on Sound Judicial Discretion

34. The Court has established that the overarching interpretative criterion in its assessment of evidence is governed by the principle of *sana crítica*, often referred to as “sound judicial discretion.”³³ According to this principle, the Court grounds its judgments on logical analysis of the available evidence.

35. The Court has thus expressed that human rights tribunals may apply sound judicial discretion to evaluate and assess evidence submitted for their consideration regarding any relevant matters of fact.³⁴ The Court has repeatedly applied this principle to cases of enforced disappearances.³⁵

³¹ *Godínez Cruz v. Honduras*, ¶ 155.

³² *Id.*

³³ Also referred to as “sound criticism”, “judgment based on admissible evidence”, “competent analysis”, “healthy criticism”, “reasonable credit”, “sound judgment”, “principles of reasoned judgment”, among others. *See, Baena Ricardo v. Panama*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶ 70 (Feb. 2, 2001); *19 Merchants v. Colombia*, ¶ 79; *Gómez Palomino v. Peru*, ¶ 50; *Almonacid Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 69 (Sept. 26, 2006); *Dacosta Cadogan v. Barbados*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204, ¶ 35 (Sept. 24, 2009).

³⁴ *Almonacid Arellano v. Chile*, ¶ 69; *Ximenes Lopes v. Brazil*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 44 (July 4, 2006); *Baldeón García v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 62 (Apr. 6, 2006).

³⁵ *Blake v. Guatemala*, ¶ 50; *Bámaca-Velásquez v. Guatemala*, ¶ 100; *Durand v. Perú*, ¶ 53; *García v. Guatemala*, ¶ 41.

36. In applying such a standard, the Court noted that neither the Convention, nor the Court's Statute, nor its Rules of Procedure had an established standard of proof,³⁶ and emphasized that international jurisprudence has recognized the courts' power to freely evaluate evidence presented before them.³⁷

37. The Court has recognized that international tribunals devoted to the protection of human rights have their own established means of conducting proceedings, with particular characteristics and which differ in important ways from domestic courts. International human rights tribunals are out of necessity more flexible, less formal, and grant more room to base decisions on the court's sound judicial discretion in evaluating evidence.³⁸ The Court has repeatedly stated that the features and requirements of domestic legal procedures are not automatically applicable to international proceedings, especially in cases concerning human rights violations.³⁹

38. Further, the Court has noted that the standards of proof are less formal and more flexible in an international proceeding than in a domestic proceeding.⁴⁰

39. The Court has also repeatedly recognized another important distinction between international tribunals and courts in domestic criminal cases, in that the goal of an international human rights court is not to punish an individual, but "to protect the victims [of human rights abuses] and provide for the reparation of damages resulting from the acts of the States [sic] responsible."⁴¹

³⁶ *Velásquez Rodríguez v. Honduras*, ¶ 127.

³⁷ *Id.*

³⁸ *Durand v. Perú*, ¶ 45; *19 Merchants v. Colombia*, ¶ 65; *Blake v. Guatemala*, ¶ 50.

³⁹ *Velásquez Rodríguez v. Honduras*, ¶ 132; *Godínez Cruz v. Honduras*, ¶¶ 138-39.

⁴⁰ *Velásquez Rodríguez v. Honduras*, ¶ 128.

⁴¹ *Velásquez Rodríguez v. Honduras*, ¶ 134.

40. Other international human rights courts have taken a similar approach. The European Court of Human Rights also has tailored standards for establishing facts in cases in which the state does not cooperate. It has developed specific and flexible rules and mechanisms, which include conducting its own factual analysis and shifting the burden of proof.⁴²

41. In sum, the Inter-American Court has adapted to the unique difficulties posed by enforced disappearance cases by establishing a flexible criterion for evaluating evidence based on sound judicial discretion (*sana crítica*), allowing for the consideration of indirect or circumstantial evidence, and considering a specific disappearance to be established if it is linked to a state practice.

D. Circumstantial and Indirect Evidence are Legitimate Means of Proving Enforced Disappearances

42. The Court has accepted several types of evidence in cases of enforced disappearance. Specifically, it has admitted documentary evidence,⁴³ testimony evidence,⁴⁴ expert evidence,⁴⁵ and press clippings.⁴⁶

⁴² As Helen Keller, European Court of Human Rights judge affirms, “A shift in the burden of proof is thus very necessary in these instances, which often entail insurmountable difficulties of proof for applicants, compounded by state behavior”. See Helen Keller and Corina Heri, *Enforced Disappearances and the European Court of Human Rights, A Wall of Silence, Fact Finding Difficulties and States as “Subversive Objectors”* 12 J. INT’L CRIM. JUST. 735, 740 (Sept. 2014); See also *El-Masri v. Former Yugoslav Republic of Macedonia*, ¶¶ 152-53.

⁴³ *Velásquez Rodríguez v. Honduras*, ¶ 140; *Godínez Cruz v. Honduras*, ¶ 146; *Serrano Cruz Sisters v. El Salvador*, ¶ 37; *Tiu Tojín v. Guatemala*, ¶ 34; *Gelman v. Uruguay*, ¶ 36; *Rochac Hernández v. El Salvador*, ¶ 39; *Gutiérrez Hernández v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 339, ¶ 36 (Aug. 24, 2017).

⁴⁴ *Velásquez Rodríguez v. Honduras*, ¶¶ 141-145; *Godínez Cruz v. Honduras*, ¶¶ 147-151; *La Cantuta v. Perú*, ¶ 64; *Heliodoro Portugal v. Panama*, ¶ 68; *Gomes Lund v. Brazil*, ¶ 52; *Gelman v. Uruguay*, ¶¶ 39-40; *Rodríguez Vera v. Colombia*, ¶ 69-70; *Gutiérrez Hernández v. Guatemala*, ¶ 41.

⁴⁵ *Bámaca-Velásquez v. Guatemala*, ¶¶ 93, 113; *Serrano Cruz Sisters v. El Salvador*, ¶¶ 35, 46; *Cárdenas v. Bolivia*, ¶¶ 40, 47-48; *Gomes Lund v. Brazil*, ¶¶ 52, 75-76; *Gelman v. Uruguay*, ¶¶ 35, 39; *Gutiérrez Hernández v. Guatemala*, ¶¶ 35, 41.

⁴⁶ *Velásquez Rodríguez v. Honduras*, ¶ 146; *Gómez Palomino v. Perú*, ¶ 53; *Ticona Estrada v. Bolivia*, ¶ 42; *González Medina v. Dominican Republic*, ¶ 67; *Rodríguez Vera v. Colombia*, ¶ 57.

43. The Court has admitted documentary evidence that was not opposed by the state nor of questionable authenticity.⁴⁷

44. Further, the Court has accepted the probative value of documentary reports to show that enforced disappearances constituted a generalized practice by the state. It has accepted the “United Nations 1990 Report of Working Group on Enforced or Voluntary Disappearances,”⁴⁸ the “Report [of the Ombudsman’s Office issued on September 2, 2004] on the enforced disappearance of the children Ernestina and Erlinda Serrano Cruz, its current impunity and the pattern of violence surrounding such disappearances,”⁴⁹ the “[J]oint report of the Special Rapporteur on the question of torture, Mr. Nigel S. Rodley and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Barce Waly Ndiaye, submitted pursuant to Commission on Human Rights [of the United Nations Economic and Social Council] resolutions 1994/37 and 1994/82: Visit by the Special Rapporteurs to the Republic of Colombia from 17 to 26 October, 1994, E/CN.4/1995/111 of January 16, 1995,”⁵⁰ the “Report from the Commission for Historical Clarification, ‘Guatemala, Memoria del Silencio’ [Guatemala, Memories of Silence], Guatemala Office of Service for National Unity Projects, 1999,” and the “Office for Human Rights of the Archbishop of Guatemala (ODHAG) ‘Guatemala Nunca Más’, [Guatemala Never Again], Report by the Interdiocesan Project ‘Recuperación de la Memoria Histórica’ [Recuperation of Historical Memory].”⁵¹

45. Furthermore, the Court has granted special probative value to the reports of truth or historical clarifications commissions as “relevant evidence in the determination of the facts and

⁴⁷ *La Cantuta v. Perú*, ¶ 62; *Radilla-Pacheco v. Mexico*, ¶ 70; *Rodríguez Vera v. Colombia*, ¶ 56; *Gutiérrez Hernández v. Guatemala*, ¶ 36.

⁴⁸ *Blake v. Guatemala*, ¶ 48.

⁴⁹ *Serrano Cruz Sisters v. El Salvador*, ¶ 42.

⁵⁰ *Pueblo Bello Massacre v. Colombia*, ¶ 79.

⁵¹ *Chitay Nech v. Guatemala*, ¶ 54 n. 35.

the international responsibility of the States.”⁵² As the Court has described, “according to the object, procedure, structure, and purpose of its mandate, those Commissions may contribute to the construction and preservation of the historical memory, the elucidation of the facts, and the determination of institutional, social and political responsibilities during specific historical periods of a society.”⁵³ In *Radilla-Pacheco*, for example, the Court gave special evidentiary value to the “Report issued by the Special Prosecutor’s Office for Social and Political Movements of the Past.”⁵⁴

46. The Inter-American Court has recognized the value of press reports in three situations: first, when they contain “well-known public facts” that “do not require further proof;” second, when “they textually reproduced public statements,” and were thus evidence thereof; and third, when “they corroborate testimony.”⁵⁵

47. In addition, the Inter-American Court has accepted electronic links to websites of documents hosted by international or local organizations,⁵⁶ and used those documents to establish facts surrounding disappearances.⁵⁷

48. The Court has recognized experts in rendering technical or personal testimony related to their special knowledge or experience.⁵⁸ The Court analyzes such evidence under the *sana crítica* (sound judicial discretion) criterion together with other evidence.

⁵² *Radilla-Pacheco v. Mexico*, ¶ 74. See also, *Almonacid Arellano v. Chile*, ¶ 82; *Vélez v. Ecuador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 166, ¶ 128.

⁵³ *Radilla-Pacheco v. Mexico*, ¶ 74; *Osorio Rivera v. Peru*, ¶ 147.

⁵⁴ *Radilla-Pacheco v. Mexico*, ¶¶ 73, 75-76.

⁵⁵ *Velásquez Rodríguez v. Honduras*, ¶ 146; See also, *Gómez Palomino v. Perú* ¶ 53; *Ticona Estrada v. Bolivia*, ¶ 42; *Gudiel Álvarez v. Guatemala*, ¶ 38; *Rochac Hernández v. El Salvador*, ¶ 40.

⁵⁶ *Tiu Tojín v. Guatemala*, ¶ 38; *Chitay Nech v. Guatemala*, ¶ 54; *Rodríguez Vera v. Colombia*, ¶ 58.

⁵⁷ *Tiu Tojín v. Guatemala*, ¶¶ 40-42; *Chitay Nech v. Guatemala*, ¶¶ 64-69, 72-73, 77-78.

⁵⁸ *Anzualdo Castro v. Peru*, ¶ 28; *Chitay Nech v. Guatemala*, ¶ 57; *Gomes Lund v. Brazil*, ¶ 75.

49. The Court has accepted articles and academic texts, and noted that their assessment “is not subject to the required formalities of testimonial evidence. Nevertheless, their evidentiary value depends on whether they corroborate or refer to issues related to the specific case.”⁵⁹

50. The Court has stated that in rebutting complainant witness testimony, the state must demonstrate with concrete evidence that the witness has lied. This is the case even if “certain factors may influence a witness’s truthfulness.”⁶⁰ Further, the Court has understood that statements by victims and their next of kin are admissible, and must be analyzed together with the entire body of evidence.⁶¹

51. In contrast, the Inter-American Court has rejected documents that were not authentic, presented defects, or did not comply with the minimum formal requirements of admissibility.⁶²

52. In sum, the Inter-American Court has found that the disappearance of a specific individual may be demonstrated by means of indirect and circumstantial evidence, assessed by *sana crítica* (sound judicial discretion), in the context of a widespread practice of disappearances.

CONCLUSION

53. In conclusion, the Inter-American System has earned respect among the international community for developing an essential and original approach to cases of enforced disappearances, and the Inter-American Court has instituted a consistent and established jurisprudence on the acceptability of evidence in proving these disappearances. Whenever a state engages in a systematic practice of enforced disappearances and a specific case is linked to such

⁵⁹ *Gomes Lund v. Brazil*, ¶ 55. See also, *Radilla-Pacheco v. Mexico*, ¶ 72.

⁶⁰ *Velásquez Rodríguez v. Honduras*, ¶ 143; *Godínez Cruz v. Honduras*, ¶ 149.

⁶¹ *19 Merchants v. Colombia*, ¶ 80; *Radilla-Pacheco v. Mexico*, ¶ 93; *Chitay Nech v. Guatemala*, ¶ 56; *Gomes Lund v. Brazil*, ¶ 69; *Cabrera García v. Mexico*, ¶ 39; *Gelman v. Uruguay*, ¶¶ 39-40.

⁶² *Bámaca-Velásquez v. Guatemala*, ¶ 105.

practice, the Court applies a flexible standard (*sana crítica*, or sound judicial discretion), and allows and gives weight to all types of evidence, including circumstantial evidence, indicia, and presumptions.

54. The very nature of states' conduct in enforced disappearances requires this flexibility. Otherwise, it would be impossible for victims to overcome states' intentional destruction and concealment of evidence. This lack of flexibility would assure complete state impunity for enforced disappearances and shield states from international responsibility for serious human rights violations.

55. Given the extent of the Inter-American System's experience on the evidentiary difficulties of proving enforced disappearances, we humbly suggest that its jurisprudence is relevant to this case.

Respectfully Submitted.

A handwritten signature in black ink, consisting of a series of fluid, connected strokes that form a stylized, somewhat abstract shape.

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Dated: February 1, 2018

APPENDIX: LIST OF AMICI

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2. *Ariel Dulitzky*. Clinical Professor of Law and Director of the Human Rights Clinic of the University of Texas. Former Member of the United Nations Working Group on Enforced or Involuntary Disappearances (2010-2017).
3. *Robert Goldman*. Former President and Judge of the Inter-American Court of Human Rights (1996-2003).
4. *Juan Méndez*. Professor of Human Rights Law in residence at the Washington College of Law. Former United Nations Special Rapporteur on Torture (2010-2016).
5. *Pedro Nikken*. Former President (1983-85) and Judge of the Inter American Court of Human Rights (1980-1989).
6. *Hernán Salgado Pesantes*. Former President and Judge of the Inter-American Court of Human Rights (1992-2003).
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8. *Olivier de Frouville*. Member of the Committee of Human Rights of the United Nations, Member of the Institut Universitaire de France and Director of the Center of Research on Human Rights and Humanitarian Law (C.R.D.H.).
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