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EVIDENCE REVISITED: A CASE FOR FREEDOM FROM TORTURE CLAIMS IN 'DISAPPEARANCE' CASES

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A 'disappearance'[1] begins when a person is detained by State agents, yet their whereabouts are concealed and their custody is denied by those same authorities. The secrecy and indefiniteness of duration make the cruelty of this phenomenon far beyond the scope of imagination.[2] It is difficult to conceive what is more inhuman than letting someone simply vanish with no contact to the outside world, beyond the protection of the law. In addition, the 'disappeared' is under the total control of the authorities, vulnerable to torture. At the same time, due to the secrecy, this human rights violation is one of the most complex since direct evidence of what has happened to the 'disappeared' is unlikely to be obtained. However, in the Inter-American Court of Human Rights and the European Court of Human Rights, the common standard of proof for finding a violation of the freedom from torture is that of 'beyond reasonable doubt'. Should, then, the evidentiary difficulties inherent to 'disappearance' cases impede such findings?

The Inter-American Court has compensated for the special nature of 'disappearance' cases by adopting a specific approach to evidence. First, the Inter-American Court has developed a two-pronged approach that allows for the use of presumptions and circumstantial evidence on the basis of the existence of an official practice of 'disappearances'.[3] If the applicant can prove that the State engaged in an official practice that involves torture, and that there is sufficient evidence that the individual case is linked to this practice, then the burden of proof shifts and it is for the Government to disprove the allegations.[4] If that Government fails to do so, the Court holds the State accountable for a violation of the right to humane treatment, as in cases against Honduras,[5] Peru[6] and Guatemala.[7] Second, the Inter-American Court has incorporated the obligation to 'ensure' human rights in the right to humane treatment. Accordingly, it has stated, 'subjecting a person to official, repressive bodies that practise torture and assassination with impunity is itself a breach of the duty to prevent violations of that right, even if that particular person is not tortured, or if those facts cannot be proven in a concrete case.' [8]

By contrast, the starting point of the European Court seems to be, 'where an apparent forced disappearance is characterised by total lack of information, whether the person is alive or dead or the treatment which she or he may have suffered can only be a matter of speculation.'[9] Even though the Court has recognized that 'independent, objective medical evidence or eyewitness testimony was unlikely to be forthcoming and that to require either as a prerequisite of a finding of a violation of Article 3 [freedom from torture, inhuman or degrading treatment or punishment] would undermine the protection afforded by that provision',[10] the implications of this observation are not clear in practice. So far, the European Court has found a violation of freedom from torture or other ill-treatment only when the evidence showed 'beyond reasonable doubt', through several consistent eye-witness accounts, that such a violation occurred.[11] In 'disappearance' cases against Turkey, applicants have argued a breach of Article 3 based on the existence of an official practice of 'disappearances' that includes torture.[12] Although the European Court has recognized similar conditions for the existence of an official practice as the Inter-American Court,[13] it has rejected these claims based on insufficient evidence. Interestingly, besides a clear modus operandi and the testimony of a former member of the security force, the evidence of a practice in Turkey mirrors the evidence before the Inter-American Court concerning the

countries where the latter has found such practice.[14] Moreover, even though the European Court has found Turkey to be responsible for torture in detention centres,[15] it has not adopted a similar approach to the Inter-American Court of finding a violation of torture in 'disappearance' cases based on the duty to prevent.

The horrendous nature of 'disappearances' has gone unrecognised due to the inherent lack of evidence. The gravity of such acts demands that the regional Courts alter their approach to 'disappearance' cases accordingly. While the Inter-American Court has largely remedied the deficiency by adjusting the standard of proof and burden of proof, the European Court has practically failed to do so. However, there are tendencies in the Court's jurisprudence of applying a less strict standard of proof with respect to certain violations. For example, the European Court has edged away from the standard of proof 'beyond reasonable doubt' in cases of the right to life. It found a substantive violation of this right based on presumptions of death through circumstantial evidence.[16] These developments are potentially an opening for a more lenient evaluation of evidence in torture claims as well. There are a number of cases pending at the European Court against the Russian Federation concerning 'disappearances' in Chechnya. These cases are likely to provide the European Court with the opportunity to acknowledge the evidentiary difficulties inherent to 'disappearances' and to recognize them as violations of the right to freedom from torture.

[1]The term is in quotation marks to emphasise that the victim has not simply vanished. The victim's whereabouts and fate, concealed from the outside world, are known by someone. ('Disappearances' and Political Killings: Human Rights Crisis of the 1990's: A Manual for Action (AI Index: ACT 33/01/94, p. 84).

[2]M. Nowak has highlighted as one of the gaps in the protection against 'disappearance' that it is not automatically treated as an act of torture or other illtreatment. (Report by the independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of the Commission Resolution 2001/46, E/CN.4/2002/71, 8 January 2002, par. 76).

[3]*Blake v. Guatemala* (Merits), Inter-Am. Ct HR, 24 January 1998, Series C, No. 36, par. 49.

[4]*Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No. 4 (1988), par. 125.

[5]E.g. *Juan Humberto Sánchez vs. Honduras*, Judgment of 7 June 2003, Inter-Am. Ct. H.R. (2003).

[6]E.g. *Castillo Páez Case*, Judgment of November 3, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 34 (1997).

[7]E.g. *Villagrán Morales et al.*, Judgment of November 19, 1999, Inter-Am. Ct. H. R. (Ser. C) No. 63 (1999)..

[8]*Velásquez Rodríguez Case* (*supra* 4), par. 175.

[9]*Çiçek v. Turkey*, European Ct. of H.R, Judgment of 27 February 2001, Application No. 25704/94, par. 155.

[10]*Çakici v. Turkey*, European Ct. of H.R , Judgment of 8 July 1999. Application No. 3657/94, par. 91.

[11]This has only been the case in *Çakici v. Turkey* (ibid) and *Akdeniz and Others v. Turkey*, European Ct. of H.R, Judgement of 31 May 2001, Application No. 23954/94.

[12]E.g. *Kurt v. Turkey*, European Ct. of H.R, Judgment of 25 May 1998, Application No. 24276/94, par. 112 and *Çiçek v. Turkey* (supra note 9), par. 152 and 155.

[13]*Ireland v. United Kingdom*, European Ct. of H.R, Series A 25 (1978), p. 64 and *Greek Case*, 12 YB (1969), p. 195-196.

[14] *Timurtas v. Turkey* (Application No. 23531/94), Verbatim Record of the hearing held on 23 November 1999 and Written Comments of the Centre of Justice and International Law, *Timurtas v. Turkey* (Application No. 23531/94), p. 3.

[15]E.g. *Aksoy v. Turkey*, European Ct. of H.R, Judgment of 18 December 1996, Application No. 21987/93 and *Aydin v. Turkey*, European Ct. of H.R, Judgment of 25 September 1997. Application No. 23178/94.

[16] *Timurtas v. Turkey*, European Ct. of H.R, Judgment of 13 June 2000. Application No. 23531/94, par. 85 and *Nachova and Others v. Bulgaria*, European Ct. of H.R, Judgment of 26 February 2004, Applications nos. 43577/98 and 43579/98, paras 166-175.