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The *Velásquez Rodríguez* Case: The Development of the Inter-American Human Rights System

Angel Manfredo Velásquez Rodríguez disappeared on September 12, 1981, in broad daylight in downtown Tegucigalpa, Honduras. His friends and family never saw him again. The Honduran government denied any knowledge or involvement in his disappearance, and the Honduran courts would not hear the family's case.

For Manfredo Velásquez's family, along with the families of many other victims, disappearances were a grim political and legal reality in Latin America during the 1970s and 1980s. Disappearances constitute one of the most fundamental violations of human rights because state authorities either perpetrate or acquiesce in the systematic extermination of individuals, which typically includes torture and killing, while the state denies any knowledge of the situation. The authorities often mock and ignore the families' pleas to find their loved ones. This state policy of extermination seeks to terrorize the population at large, in a context where the courts do not offer any relief to the victims or their families. The practice of disappearances also rejects the value of a legal system, as individuals are not considered legal subjects entitled to the protection of the law.

The desire for the justice denied by the Honduran government, and the need to tell Angel Manfredo Velásquez Rodríguez's story, motivated his family to bring the case to the Inter-American Commission on Human Rights. Later, *Velásquez Rodríguez v. Honduras* became the first contested case to reach the Inter-American Court of Human Rights,

giving the case great symbolic significance.¹

Since the *Velásquez Rodríguez* decision approximately two decades ago, drastic political changes have taken place in Latin America. Thirty-four of the thirty-five countries now have democratically elected governments. On September 11, 2001, the member states of the Organization of American States (OAS) adopted the Democratic Charter, allowing collective state action in cases of human rights violations. Democracy, however, consists of more than periodic elections and charters; democracy requires a strong, independent judiciary, a political system with checks and balances, a generalized respect for human rights, and a vibrant civil society.

The evolution of the inter-American human rights system both reflects and has influenced the changing reality of the region. The Inter-American Commission and the Court contribute to the development of democracy by administering justice when domestic remedies fail to bring relief to the victims of human rights violations, and by serving as an early warning system. A rich body of jurisprudence has emerged since the *Velásquez Rodríguez* case, and twenty-one states have recognized the contentious jurisdiction of the Court.² The Inter-American Court has since issued 139 judgments, 19 advisory opinions, and 62 provisional measures, while states have acknowledged their international responsibility for violating human rights in twenty-eight percent of the cases.³ The inter-American system serves as an early warning mechanism because it addresses individual cases before human rights abuses become systematic. The Commission and Court bring human rights violations to the attention of the political organs of the OAS (the General Assembly, the Permanent Council, and the Secretary General) for possible action, assuming these organs can muster the necessary political will.

The *Velásquez Rodríguez* case presented the Commission and the Court with many novel legal issues. The Inter-American Court had to determine the type of court it would be, the level and type of proof required, the role of the petitioners in the proceedings, the nature of state responsibility, and reparations, among other issues. As a new Court, the judges had to establish the Court's legitimacy and satisfy the petitioners' claim for justice, while also depriving Honduras of any

¹ *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) [hereinafter *Velásquez Rodríguez Judgment*].

² The countries that have accepted the contentious jurisdiction of the Court are Costa Rica, Peru, Venezuela, Honduras, Ecuador, Argentina, Uruguay, Colombia, Guatemala, Panama, Chile, Nicaragua, Paraguay, Bolivia, El Salvador, Suriname, Haiti, Brazil, Mexico, the Dominican Republic, and Barbados.

³ See Inter-Am. Ct. H.R., Annual Report 2005, OEA/Ser.L/V/III.69, doc. 1 at 57, 63 (Dec. 2, 2005) [hereinafter *Court's Annual Report 2005*].

excuse to withdraw from the proceedings. The Court's choices would greatly influence the inter-American system, and the case of Manfredo Velásquez became a departure point for much of the Court's future jurisprudence. This essay explores the history of *Velásquez Rodríguez* and its impact on the inter-American system and international human rights law.

The Social and Legal Background

The term "desaparecidos" (disappeared persons) emerged during the 1960s to describe the government practice of eliminating political dissidents while denying any responsibility for the crime.⁴ The policy became systematic in the Chilean and Argentinean military dictatorships of the 1970s, and in El Salvador and Honduras in the 1980s.⁵ The practice of disappearances flourished in regimes where the military existed independently from any civilian control. A special branch of the military usually carried out the forced disappearances, without any effective protection accorded to the victims by the judiciary.⁶

For Honduras, a society with weak institutional constraints, the practice of disappearances began as the conflict in Nicaragua escalated in the 1980s and spilled over into Honduras. In response to the growing social tension and the government's concern for national security, General Gustavo Alvarez Martinez, head of the armed forces and de facto ruler of Honduras, resorted to the systematic use of disappearances to purge "the insurgency" from the country. It was part of a strategy to contain the Nicaraguan Sandinistas regime and a means to annihilate those opposing the presence of the anti-Sandinista Contra troops in Honduras. Death squads from the armed forces captured suspects, and then interrogated, tortured, and executed those believed to be political opponents before dumping their bodies into unidentified graves. Between 1980 and 1992, 150 people disappeared in Honduras.⁷ The victims were typically teachers, students, labor organizers, peasant leaders, and human rights defenders.⁸

⁴ See Juan E. Mendez & Jose Miguel Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 507, 510 (1990) (noting that the label of disappearances is really a euphemism for a practice that includes arbitrary arrest, kidnapping, torture, and murder).

⁵ *Id.* at 509-10; see *id.* at 511 (observing that democratically elected governments in Peru and Colombia also practiced disappearances).

⁶ See *id.* at 511 (reporting that the secretive nature of disappearances meant that habeas corpus petitions were ineffective).

⁷ See Velásquez Rodríguez Judgment, *supra* note 1, ¶ 147(a) (finding that the number of disappeared in Honduras between 1981 and 1984 was between 100 and 150).

⁸ Mendez & Vivanco, *supra* note 4, at 511.

Angel Manfredo Velásquez Rodríguez was one of those 150 victims. According to eyewitness accounts, unidentified men forced him into a small van and took him to the Public Security Forces station, where he was interrogated and tortured.⁹ The abduction occurred in the parking lot of the Palace and Lido Theatres in Tegucigalpa.¹⁰ At the time of his disappearance, Manfredo taught at a local high school, attended graduate school in economics, and served as the Secretary General of the Student Union at the National Autonomous University of Honduras. He was thirty-five years old, with a wife and three children.¹¹

In response to the widespread practice of disappearances in Latin America, and in the context of weak political parties, families of the disappeared, churches, and non-governmental organizations became the primary defenders of human rights victims. They faced great obstacles. Honduras's repressive regime at that time wanted to silence every voice that opposed its policies. The newspapers denied that the disappearances were taking place by blaming "family conflicts" or stating that people ran away to join political movements abroad. The President of the Supreme Court of Honduras characterized claims of disappearances as conspiracies to destroy the good name of Honduras. In the face of these state denials, non-governmental organizations and human rights defenders faced significant dangers and challenges in gathering evidence, developing campaigns to affect public opinion, and identifying fora in which to present the cases. Despite these obstacles, the families presented writs of habeas corpus, brought criminal complaints, contacted embassies and international organizations, and pressured internal and external political parties, in an effort to prosecute those responsible and learn the location of those who had disappeared.¹² Zenaida Velásquez, Manfredo's sister, filed two habeas corpus petitions in Tegucigalpa in 1981 and 1982, which the courts simply ignored. A third habeas petition, naming Manfredo as well as other victims, was filed on July 4, 1983, and was denied on September 11, 1984. Zenaida and other family members also filed criminal complaints in 1982 and 1984.¹³

The cases and the complaints achieved few, if any, results in the domestic setting. Little information was gained about the fate of the disappeared, and those responsible for the violations were not brought to justice because, in most situations, the disappearances resulted from a state policy and occurred with the judiciary's active collusion or tacit

⁹ See *id.* at 517; Velásquez Rodríguez Judgment, *supra* note 1, ¶ 3.

¹⁰ See Velásquez Rodríguez Judgment, *supra* note 1, ¶ 147(e).

¹¹ See *id.* ¶ 147(g)(i).

¹² See Mendez & Vivanco, *supra* note 4, at 508-09.

¹³ See *infra* note 67.

acceptance. While there were a few instances of courageous judges, they were the absolute exception. Although the efforts of the national human rights organizers helped bring attention to the issue, the victims still had no effective domestic legal remedy for the disappearances. With no avenues to pursue internally, the victims turned to the international community, seeking both to learn the fate of their loved ones, as well as justice. The inter-American system offered a venue whose importance had yet to be tested.

The Inter-American System. Partly in response to the human rights atrocities committed during World War II, the nations of the Western hemisphere established the Organization of American States (OAS) in 1948 and adopted the American Declaration of the Rights and Duties of Man of 1948 (American Declaration).¹⁴ The OAS Charter mentions human rights as one of its foundational principles.¹⁵ In 1959, the Inter-American Commission on Human Rights was created and charged with a limited diplomatic and political mandate to study the human rights delineated in the American Declaration.¹⁶ The revised OAS Charter transformed the Commission into a treaty-based organ.¹⁷

The American Declaration was one of the first human rights documents in the world, but it did not have the impact or weight of a binding treaty.¹⁸ Consequently, in 1969, the members of the OAS held a specialized Conference on Human Rights in Costa Rica and adopted the American Convention on Human Rights.¹⁹ The American Convention expanded the mechanisms available to the Commission to protect human rights, while preserving the Commission's status as a principal organ of

¹⁴ American Declaration of the Rights and Duties of Man, Org. Am. States [OAS] Res. XXX, International Conference of American States, 9th Conf., OAS Doc. OEA/Ser.L/V/I. 4 Rev. XX (1948); see generally THOMAS BUERGENTHAL & DINAH SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS* 37 (4th ed. 1995) (noting that the inter-American system predates the OAS Charter and can be traced to the 1826 Congress of Panama).

¹⁵ See Charter of the OAS art. 3(l).

¹⁶ See *id.* art. 52; OAS Res. VIII, 5th Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser.L/V/1.4, at 35-36 (1960) (establishing the Commission, composed of seven members elected in their individual capacity, ten years after the Declaration); Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 440, 441 (1990).

¹⁷ See OAS Res. XXII, Inter-Am. Conference, OEA/Ser.E./XIII.I, doc. 150 rev. (1965).

¹⁸ See BUERGENTHAL & SHELTON, *supra* note 14, at 39 (noting that the Declaration predated the Universal Declaration of Human Rights by seven months).

¹⁹ American Convention on Human Rights art. 3, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978, after ratification by its eleventh member state) [hereinafter American Convention or Convention].

the OAS. The Convention also created the Inter-American Court of Human Rights.

The American Convention provided a treaty justification for activities the Commission had already developed, such as preparing country reports (with or without visits *in loco*) and advising the OAS or the member states on human rights matters.²⁰ Under the Convention, the Commission may request information from member states and submit an annual report to the General Assembly of the OAS.²¹

The American Convention also authorizes the Commission to process individual complaints alleging violations of the Convention.²² For states that have not yet ratified the American Convention, the Commission uses the American Declaration for individual petitions.²³ When a petition is brought to the Commission against a state, the Commission decides on admissibility and only opens a case if it decides that the petition is admissible.²⁴ The Commission can place itself at the disposal of the parties to reach a friendly settlement.²⁵ The Commission may also request that a state adopt precautionary measures even before a case has been opened.²⁶ When parties do not reach a friendly settlement, the Commission proceeds to consider the substance of the allegations.²⁷ If the Commission's determination is affirmative, it adopts recommendations to be implemented by the state.²⁸ If the state fails to implement the Commission's recommendations, the Commission can use its discretion

²⁰ See *id.* art. 48.

²¹ *Id.* arts. 41(c), (g), 42.

²² *Id.* art. 41(f).

²³ See Mendez & Vivanco, *supra* note 4, at 519 (noting that the legal elements of the Convention and the Declaration are similar).

²⁴ See American Convention, *supra* note 19, art. 46 (listing the admissibility requirements, namely, that remedies under domestic law have been pursued and exhausted, that the petition was lodged within six months of the final judgment, that the subject of the petition is not pending in another international proceeding, and that the petition contains the name, nationality, profession, domicile, and signature of the person filing the petition).

²⁵ See *id.* art. 48(f); Rules of Procedure of the Inter-Am. Comm'n on Human Rights art. 41 [hereinafter Commission's Rules of Procedure] ("On its own initiative or at the request of any of the parties, the Commission shall place itself at the disposal of the parties concerned, at any stage of the examination of a petition or case, with a view to reaching a friendly settlement of the matter.").

²⁶ See Commission's Rules of Procedure, *supra* note 25, art. 25(1) ("In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons.").

²⁷ See *id.* art. 41(6).

²⁸ See American Convention, *supra* note 19, art. 50.

to either publish a report to bring the situation to the public's knowledge or refer the case to the Court, if the country has accepted the Court's compulsory jurisdiction.²⁹ Only the Commission and states parties have the authority to bring cases to the Court.³⁰

The Court, established in 1979 in San Jose, Costa Rica, is an autonomous judicial institution of the inter-American system.³¹ The Court has both advisory and contentious jurisdiction.³² Under its advisory jurisdiction, the Convention authorizes the Court to interpret the American Convention as well as any other human rights treaty in the American states.³³ The Court may also issue provisional measures.³⁴ The Convention also permits the Court to assess the compatibility of domestic law with other human rights treaties ratified by the member states.³⁵ Both OAS member states and organs of the OAS may request advisory opinions from the Court.³⁶

The Court's contentious jurisdiction is limited to applying and interpreting the American Convention.³⁷ In interpreting the scope of the American Convention, the Court has resorted to other human rights treaties.³⁸ A state party may generally accept the contentious jurisdiction of the Court, or agree to be bound by the Court's decision for a specific

²⁹ See *id.* art. 51; see also Claudio Grossman, *Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation*, 15 HASTINGS INT'L & COMP. L. REV. 363 (1992).

³⁰ See American Convention, *supra* note 19, arts. 61, 64 (elaborating that "[w]ithin their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court").

³¹ In accordance with Article 74(2), the American Convention entered into force on July 18, 1978, after the eleventh state party ratified it.

³² See Court's Annual Report 2005, *supra* note 3. As of 2005, the Inter-American Court had issued 19 advisory opinions and 139 judgments.

³³ See American Convention, *supra* note 19, art. 64.

³⁴ See *id.* art. 63(2) ("In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration.").

³⁵ See *id.*; see also *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999). Mexico requested an advisory opinion on the rights, under the International Covenant of Civil and Political Rights and the Vienna Convention on Consular Relations, of Mexican nationals condemned to death by courts in the United States.

³⁶ See American Convention, *supra* note 19, art. 64(2).

³⁷ See *id.* arts. 61-63.

³⁸ See, e.g., *Pueblo Bello*, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 124 (Jan. 31, 2006).

case or a limited period of time.³⁹ The Court's judgments in contentious cases are binding on the parties and cannot be appealed.⁴⁰ The Court also retains jurisdiction over the cases to monitor compliance.⁴¹

Proceedings before the Inter-American Commission on Human Rights. In the case of Manfredo Velásquez, with no legal remedy available in Honduras and no effective diplomatic means to obtain information and redress, the victim's family, supported by Honduran human rights organizations, filed a petition with the Inter-American Commission on Human Rights in October of 1981.⁴² The petition alleged that the Honduran government was responsible for Manfredo's disappearance.⁴³ That same month, the Commission began investigating the *Velásquez Rodríguez* case.

The government of Honduras, however, failed to provide the Commission with evidence and information about the disappearance.⁴⁴ While the credibility of the Commission's findings increase when all parties participate in the proceedings and the Commissioners decide the case on its merits, if the defendant refuses to participate in the proceedings, the Commission, in accordance with its regulations, can presume the validity of the facts as alleged by the petitioner.⁴⁵ Honduras's lack of cooperation left the Commission with no option but to apply this presumption. The Commission issued its Recommendation finding that Manfredo Velásquez had been detained and most likely disappeared in Honduras, and that his disappearance violated the right to life (Article 4) and the right to personal liberty (Article 7) of the American Convention.⁴⁶ The Com-

³⁹ See American Convention, *supra* note 19, art. 61(2).

⁴⁰ *Id.* art. 67.

⁴¹ See *id.* art. 65 ("[s]hall specify, in particular, the cases in which a State has not complied with its judgments").

⁴² See *Velásquez Rodríguez v. Honduras*, Case No. 7920, Inter-Am. C.H.R., Res. No. 22/86, OEA/Ser.L./III.15, doc. 13 (Apr. 18, 1986) (reporting that the Commission received the petition on Oct. 7, 1981, and noting that the petition maintained that Manfredo Velásquez and other missing political prisoners were being held by the First Battalion of Infantry in Tegucigalpa).

⁴³ See *id.* ¶ 1 (reporting that the petition stated that "[w]e assign responsibility for that action to Colonels Leonidas Torres Arias (G-2), Gustavo Alvarez (FUSEP), Juan Lopez Grijalba (National Investigation Department) and Hubbert Bodden (Commander, First Battalion of Infantry, Tegucigalpa)").

⁴⁴ See *id.* ¶¶ 4-6 (noting that the Commission did not receive the requested information from the Honduran government despite the requests sent on Oct. 14, 1981, Nov. 24, 1981, Oct. 6, 1982, Mar. 23, 1983, and Aug. 9, 1983).

⁴⁵ See Commission's Rules of Procedure, *supra* note 25, art. 39.

⁴⁶ See *Velásquez Rodríguez v. Honduras*, Case No. 7920, Inter-Am. C.H.R., Res. No. 22/86, OEA/Ser.L./V/II.61, doc. 44 (Apr. 18, 1986).

mission recommended that the government undertake a complete and impartial investigation, punish those responsible for the disappearance, and then inform the Commission about the measures enacted to comply with the Commission's recommendations.⁴⁷

In response, the government requested that the Commission reconsider its decision, objecting that the petitioners had not exhausted all domestic remedies, and that no official information corroborated the allegations concerning new cases of disappearances.⁴⁸ The government claimed that it was making efforts to establish the whereabouts of Manfredo Velásquez.⁴⁹ The Commission agreed to postpone the final decision.⁵⁰

After General Alvarez was ousted from power in 1985, the new government of Honduras requested additional time to conduct an internal investigation.⁵¹ A special national commission, composed of six Honduran colonels, issued a report consisting of four sentences, concluding that no evidence existed connecting anyone in the military to the disappearances.⁵² The report claimed that those who had disappeared had never been in government custody.⁵³

In April of 1986, the Commission ruled that the government's investigation was insufficient to warrant a reconsideration of its former Recommendation, partly because of the "unjustifiable delay in the ad-

⁴⁷ See *id.* (allowing the Honduran government sixty days to inform the Commission of its compliance measures).

⁴⁸ See Velásquez Rodríguez v. Honduras, Case No. 7920, Inter-Am. C.H.R., Res. 22/86, OEA/Ser.L./III.15, doc. 13 (Apr. 18, 1986) (summarizing the government's observations on Resolution 30/83, from the note of Nov. 18, 1983, Official Letter No. 1504, and stating that the government did not know the location of Manfredo, but was making every effort to locate the other people who had been the subjects of petitions despite the difficulties that entailed because of their involvement with communist countries).

⁴⁹ See *id.* (noting that the government claimed that Manfredo Velásquez was hiding and that he had been seen with groups of guerrillas from El Salvador).

⁵⁰ See *id.* ¶ 12 (deciding to continue studying the case at its 62nd Session in May 1984, and requesting that the government provide information concerning the status of the case under domestic law, including the habeas corpus petition). The Commission continued studying the case for two-and-one-half years. *Id.*

⁵¹ See *id.* ¶ 16 (reporting that Honduras requested postponement of consideration of the case in its cablegram of Mar. 1, 1985, and informed that it had set up an Investigating Commission to examine the complaints and identify those responsible so they could be punished).

⁵² See Grossman, *supra* note 29.

⁵³ See Velásquez Rodríguez v. Honduras, Case No. 7920, Inter-Am. C.H.R., Res. 22/86, OEA/Ser.L./III.15, doc. 13 (Apr. 18, 1986).

ministration of justice."⁵⁴ Consequently, the Commission resolved to confirm its earlier Recommendation in its entirety.⁵⁵ At the request of the family's lawyers, the Commission referred the case to the Inter-American Court of Human Rights on April 24, 1986, almost five years after it received the initial petition.⁵⁶ In addition to the Commission's lawyers, four lawyers, including the author of this essay, represented Manfredo's family in the Court's proceedings.⁵⁷

Proceedings before the Inter-American Court of Human Rights. The Court accepted jurisdiction of the *Velásquez Rodríguez* case under Articles 61 and 62 of the Convention. At the time, Honduras was one of eight countries that had accepted the contentious jurisdiction of the Court.⁵⁸ Honduras's 1981 decision to accept the Court's contentious jurisdiction had been influenced by the policy of the United States, a close Honduran ally. Under the Carter administration the United States had actively promoted human rights initiatives, such as the American Convention on Human Rights, and had publicly condemned disappearances. In Honduras, domestic pressure had also grown in an effort to stop the most outrageous violations of human rights. The Honduran government considered acceptance of the Court's contentious jurisdiction to be an important symbolic gesture.

Litigation of the case before the Court lasted for more than two years. The Court issued four separate decisions, one on Honduras's preliminary objections, one on the merits, and two decisions on the issue of compensation.⁵⁹ Even though the government raised preliminary objections and initially resisted full compliance with the Court's judgment, Honduras actively participated throughout the process. The victim's

⁵⁴ *Id.* at 5.

⁵⁵ *See id.* at 6.

⁵⁶ *See* Commission's Rules of Procedure, *supra* note 25, art. 50; American Convention, *supra* note 19, art. 63(1).

⁵⁷ In addition to the author, Juan Mendez, Hugo Munoz and Jose Miguel Vivanco represented the victims. Dr. Roman Custodio Lopez, director of the Committee for the Defense of Human Rights in Honduras, and relatives of the victims approached these lawyers because of their reputation and their engagement in the inter-American human rights system. At the time of the *Velásquez Rodríguez* case, the author was a professor at American University Washington College of Law and had provided assistance to the Commission in cases involving Suriname. The attorneys performed their services pro bono.

⁵⁸ Honduras accepted the contentious jurisdiction of the Court on September 9, 1981.

⁵⁹ *Velásquez Rodríguez* Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 1 (June 26, 1987); *Velásquez Rodríguez* Judgment, *supra* note 1; *Velásquez Rodríguez* Case, Compensatory Damages Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7 (July 21, 1989); *Velásquez Rodríguez* Case, Interpretation of the Compensatory Damages Judgment, Inter-Am. Ct. H.R. (ser. C) No. 9 (Aug. 17, 1990).

lawyers and the Commission were concerned that Honduran military or government officials might attempt to withdraw Honduras from the Convention or the Court's jurisdiction, and, accordingly, they took steps to minimize that possibility. For example, the lawyers avoided focusing on politics and instead relied on technical legal arguments, playing on a formalistic legal tradition.

Preliminary Objections of the Government of Honduras. On October 31, 1986, the Honduran government presented the Court with several preliminary objections, arguing that the Commission's handling of the case violated the American Convention and seeking to avoid a hearing on the merits.⁶⁰ The government argued that the Commission: failed to follow the procedure established for issuing a formal declaration of admissibility; did not sufficiently explore a friendly settlement; did not conduct a preliminary hearing or an investigation in Honduras; did not issue a final report in a timely manner; and did not demand that the petitioners exhaust the available domestic remedies. The Court unanimously rejected all but one of Honduras's objections.⁶¹ The Court decided, however, that one of Honduras's preliminary objections—its claim concerning failure to exhaust available domestic remedies—should be joined with the merits of the case.⁶²

The Court's Decisions on the Merits. On July 29, 1988, the Inter-American Court of Human Rights held the government of Honduras responsible for the disappearance of Angel Manfredo Velásquez Rodríguez. In its decision on the merits, the Court defined the petitioners' obligation to exhaust domestic remedies by articulating what constituted a domestic remedy. The Court established the type and level of evidence admissible to prove a case of disappearance, and defined the crime of disappearances. The judgment identified the articles of the Convention that had been violated by the practice of disappearances. The Court mandated that the state had a duty to prevent, investigate, and punish those responsible for the disappearances. The decision also inter-

⁶⁰ See Velásquez Rodríguez Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 1, ¶ 25 (June 26, 1987).

⁶¹ *Id.* Interpreting the friendly settlement provisions of Article 48(1)(f) of the American Convention and Article 45(2) of the Commission's Regulations, the Court concluded that the Commission has discretion to decide whether the circumstances would be conducive to a friendly settlement negotiation. See *id.* ¶¶ 44–46 (concluding that friendly settlement would not be possible in these circumstances because state authorities had been involved in Manfredo Velásquez's disappearance and denied that it had occurred). The Court also found that the Commission has discretion to conduct on-site investigations or hearings, as well as declarations of admissibility and issuance of reports. See *id.* ¶¶ 49–50, 77–78.

⁶² See *id.* ¶¶ 91–96 (concluding that a decision on the issue of domestic remedies would be a prejudgment on the merits and prejudicial to one side).

preted the obligation to provide a remedy and offer fair compensation as required by the Convention.⁶³

Article 46 of the Convention, in accordance with international legal doctrine, requires that the petitioners exhaust domestic remedies before availing themselves of international tribunals.⁶⁴ The government of Honduras argued that the victims still had various remedies available, such as appeals, cassations, extraordinary writs of amparo, civil remedies of a presumptive finding of death, and criminal proceedings.⁶⁵ Honduras claimed that the courts granted writs of habeas corpus during that period, but had not reached a final decision on either the habeas petition or the criminal cases in Manfredo Velásquez's case because the perpetrators had not been identified.⁶⁶ The Commission claimed that the Honduran courts never processed the three habeas corpus petitions filed by the family.⁶⁷ The Commission argued that the courts dismissed the two criminal complaints against military officers for lack of evidence. The Commission concluded that the petitioners had effectively exhausted domestic remedies because the internal situation in Honduras during that time meant that there was no hope that the cases would be favorably resolved.⁶⁸

The Court agreed with the Commission, holding that the government of Honduras had the burden to prove that the petitioners had not exhausted domestic remedies.⁶⁹ The Court found that a remedy must be effective, adequate, and at least capable of producing the intended result.⁷⁰ States cannot avoid liability by demonstrating the mere exis-

⁶³ See American Convention, *supra* note 19, art. 63.

⁶⁴ See *id.* art. 46(1)(a) (requiring that admission by the Commission of a petition must demonstrate "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law").

⁶⁵ See Velásquez Rodríguez Judgment, *supra* note 1, ¶ 53.

⁶⁶ See *id.* ¶¶ 68-70, 75.

⁶⁷ See *id.* ¶ 74 (noting that Zenaida Velásquez brought habeas corpus petitions against the Public Security Forces on Sept. 17, 1981, and on Feb. 6, 1982, without result). On July 4, 1983, relatives of the disappeared brought a habeas petition, which was denied that September. Zenaida and other family members filed the criminal complaints in 1982 and 1984 without result. *Id.*

⁶⁸ See *id.* ¶ 55.

⁶⁹ See Velásquez Rodríguez Judgment, *supra* note 1, at 59; Velásquez Rodríguez Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 1, ¶ 88 (June 26, 1987) (stating that a country expressly or implicitly waives its right to object that domestic remedies have not been exhausted, if it fails to raise the objection early on in the proceedings).

⁷⁰ Velásquez Rodríguez Judgment, *supra* note 1, ¶¶ 63, 66; see *id.* ¶ 67 (disagreeing with the Commission's argument that a domestic remedy is ineffective if it does not find in favor of the petitioner).

tence of a formal legal system. Instead, the Court required that the domestic legal system must be effective at ensuring "the free and full enjoyment of human rights."⁷¹ In light of this standard, the Court determined that the government's argument that the petitioners seek a presumptive finding of death from the courts could not be considered a legitimate remedy because a presumptive finding of death is a civil remedy allowing disposition of the estate and permitting a spouse to remarry, and could never involve punishment of the perpetrators or disclosure to the families of what had actually happened.⁷² Although legal remedies technically existed in Honduras, the Court found that the habeas corpus petitions and criminal complaints were ineffective in cases of disappearances because the imprisonment occurred in secret, the formal procedural requirements precluded effective relief, and officials ignored the petitions.⁷³ The Court also pointed to the threats and intimidation received by judicial officials if they pursued these types of cases.⁷⁴ Therefore, the Court found that the petitioners had exhausted the available domestic remedies, satisfying that admissibility requirement,⁷⁵ and turned to the proof of disappearances.

The lack of forensic evidence makes it difficult to prove a disappearance case. In response to this problem of a lack of physical evidence, the Court held that an individual case of disappearance can be proven by circumstantial evidence and logical inference.⁷⁶ Before the Court will allow circumstantial evidence, however, the Commission must demonstrate a pattern of disappearances.⁷⁷ This pattern of disappearances must be established by a high standard of proof and cannot be simply satisfied with reasonable inferences or hearsay. In such cases, when the petitioners establish the pattern of disappearances and then link the individual case to the pattern through circumstantial evidence, the petitioners have satisfied their burden of proof. The burden then shifts to the state to disprove the pattern or the individual case. The Court allowed circumstantial evidence in disappearance cases because "this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim."⁷⁸ It would be

⁷¹ *Id.*

⁷² *Id.* ¶ 64.

⁷³ *Id.* ¶¶ 80-81.

⁷⁴ *Id.* ¶¶ 80, 118(b).

⁷⁵ *Id.* ¶ 81.

⁷⁶ *See id.* ¶¶ 124-26.

⁷⁷ *Id.*

⁷⁸ *Id.* ¶ 131.

impossible to prove that a disappearance had occurred without circumstantial evidence when a state itself is responsible for such a crime. A functional legal system presumes that the state and its organs will investigate crimes and punish those responsible. On the contrary, if a state and its organs are responsible for committing the crimes, state officials will refuse to cooperate, and they will actively engage in a cover-up with all the resources at their disposal.⁷⁹ Additionally, the Court's judgment reflected that different evidentiary standards apply in international human rights tribunals than in criminal proceedings, because the purpose is not to determine guilt, but rather to protect victims and grant reparations where violations have occurred.⁸⁰

Reliance on witnesses to prove disappearances also poses challenges. Thirteen days before testifying at trial, José Isaías Vilorio, a former Honduran Army sergeant, was killed on a public street in Honduras.⁸¹ Although a group of armed men draped his body with the banner of a leftist guerilla organization, human rights groups claimed that the organization was not active.⁸² The human rights groups argued that the military carried out this assassination in order to silence Vilorio because he intended to testify about his activities as a former member of a Honduran death squad. Another trial witness, Miguel Angel Pavón Salazar, Vice Chairman of the Honduran Human Rights Committee and alternate Deputy to Congress, who testified before the Inter-American Court against the government of Honduras in September of 1987, was assassinated while sitting in a parked car.⁸³ The Honduran government has never investigated either case, and those responsible have never been punished.

Relying on the witness testimony that was presented at trial, and on press clippings that confirmed the facts available to the Court, the Court concluded that between 1981 and 1984 the Honduran government carried out or tolerated a systematic practice of disappearances.⁸⁴ The evidence also tended to show that the perpetrators of the disappearances in Honduras had a particular *modus operandi*.⁸⁵ The Court found that Battalion 316, the alleged perpetrators of the disappearances, used vehicles with tinted glass and with no license plates, guns unique to

⁷⁹ *Id.* ¶¶ 135–36.

⁸⁰ *See id.* ¶¶ 129–34.

⁸¹ *See id.* ¶ 40.

⁸² *See id.*

⁸³ *See id.* ¶ 41.

⁸⁴ *Id.* ¶ 119.

⁸⁵ *See id.* ¶ 99.

government agents, and disguises.⁸⁶ Military agents initiated surveillance of victims considered dangerous to state security, before taking the victims into custody and transporting them to unofficial detention centers.⁸⁷ After hearing the testimony of disappearance victims who later regained their liberty and of former members of the armed forces, the Court held that many disappearance victims were also subjected to torture and other cruel, inhuman, and degrading treatment while in prison.⁸⁸ The Court held that the disappearances often involved clandestine executions without trial, followed by the disposal of all material evidence, including the body.⁸⁹ The Court also found that government officials denied any knowledge of the victims and pursued no investigations.⁹⁰

The Court then concluded that Manfredo Velásquez's disappearance followed this same pattern, occurred in this context, and thus created the reasonable presumption that he was dead.⁹¹ The Court also found that members of the armed forces or those operating by their orders carried out the disappearance of Manfredo Velásquez.⁹² By allowing circumstantial evidence in Manfredo's case, in the context of a practice of disappearances, the Court overcame one of the evidentiary bars that could have prevented attributing responsibility to states in cases of disappearances.⁹³

Although the Convention does not list disappearance as a separate crime, the Court ruled that forced disappearances constitute multiple and continuous violations of the rights enshrined in the American Convention.⁹⁴ The Court concluded that the practice of disappearances violated four articles of the American Convention, specifically Articles 1, 4, 5, and 7.⁹⁵ "The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which

⁸⁶ *Id.* ¶ 147.

⁸⁷ *Id.* ¶¶ 103, 147.

⁸⁸ *See id.* ¶ 147(d)(iii).

⁸⁹ *See id.*

⁹⁰ *See id.* ¶ 147(d)(iv)-(v).

⁹¹ *Id.* ¶ 147(e), (g).

⁹² *Id.* ¶ 147(f).

⁹³ *See id.* ¶ 148.

⁹⁴ *See id.* ¶ 155.

⁹⁵ *See infra* text accompanying notes 182-205.

recognizes the right to personal liberty.”⁹⁶ The Court broadly interpreted Article 5’s provisions against cruel and inhuman treatment by concluding that it prohibits incommunicado detention.⁹⁷ The Court found that prolonged and isolated imprisonment harms the “psychological and moral integrity of the person.”⁹⁸ Finally, the Court acknowledged that disappearances involving clandestine executions and burials without trials violated the right to life under Article 4.⁹⁹ The Court characterized the practice of disappearances as violating even more than the specific provisions of the Convention. The Court concluded by stating that “[t]he practice of disappearances . . . constitutes a radical breach of the treaty in that it shows 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.”¹⁰⁰ Once the Court established that Manfredo Velásquez’s disappearance conformed to the widespread pattern of disappearances in Honduras with the government’s involvement or knowledge, and that the practice of disappearances in general violated the American Convention, the Court concluded that Honduras had violated the American Convention in the case of Manfredo Velásquez.

Although the Commission did not argue that the Honduran government violated Article 1(1), the Court used Article 1(1) to impute liability of the violations to the state.¹⁰¹ Article 1(1) of the Convention obligates Honduras to “respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.”¹⁰² The Court in *Velásquez Rodríguez* held that the duty to “respect” applies to violations committed by state officials acting in their official capacity that can be directly attributed to the state.¹⁰³ The duty to “ensure” obligates the state “to organize the government in such a way as to guarantee rights recognized in the Convention”¹⁰⁴ and to protect individuals against violations of the Con-

⁹⁶ Velásquez Rodríguez Judgment, *supra* note 1, ¶ 155.

⁹⁷ *Id.* ¶ 156 (stating that “prolonged isolation and deprivation of communication are in themselves cruel and inhumane treatment, harmful to the psychological and moral integrity of the person”).

⁹⁸ *Id.*; American Convention, *supra* note 19, art. 5.

⁹⁹ Velásquez Rodríguez Judgment, *supra* note 1, ¶ 157.

¹⁰⁰ *Id.* ¶ 158.

¹⁰¹ See *id.* ¶¶ 163–64. The Court has the power and the duty to apply legal provisions relevant to the proceeding even when parties do not expressly invoke them. *Id.*

¹⁰² American Convention, *supra* note 19, art. 1(1).

¹⁰³ Velásquez Rodríguez Judgment, *supra* note 1, ¶¶ 166, 169–71.

¹⁰⁴ *Id.* ¶¶ 166, 169.

vention committed by non-state actors with the acquiescence of the state.¹⁰⁵ If the human rights are violated by non-state actors, and the state does not take measures to prevent or punish the perpetrators, then responsibility for the violations can be imputed to the state, even if the identity of the actor is unknown.¹⁰⁶ The Court applied a due diligence standard requiring states to affirmatively prevent, investigate, and punish human rights abuses, as well as compensate the victims.¹⁰⁷ The Court defined the due diligence duty as including political, legal, administrative, and cultural measures.¹⁰⁸

The Court concluded that the Honduran government did not respect or ensure Manfredo Velásquez's human rights because the government had not investigated, punished, or paid compensation as required by Article 1(1).¹⁰⁹ The clandestine abductions violated Manfredo's right to personal liberty and legal recourse, and the Court concluded that Manfredo was probably detained and tortured.¹¹⁰ Therefore, the Court held that Honduras failed to guarantee Manfredo's right to life under Article 4, to liberty under Article 7, and to freedom from torture and other degrading or inhuman treatment under Article 5.¹¹¹ The Court concluded by holding the government of Honduras liable for the disappearances and deaths of Manfredo Velásquez and the victims represented in three other cases,¹¹² and ordered the government to pay fair compensation to the next of kin.¹¹³

Reparations. The Court gave the Honduran government and the Commission an opportunity to agree on the amount and form of compensation to be paid. After six months, the parties only reached an agreement on the identity of the beneficiaries, but not the scope or content of compensation.¹¹⁴ The Court retained jurisdiction to hear the case and

¹⁰⁵ See *id.* ¶ 166.

¹⁰⁶ *Id.* ¶¶ 172-73.

¹⁰⁷ *Id.* ¶ 174.

¹⁰⁸ *Id.* ¶ 175.

¹⁰⁹ *Id.* ¶¶ 178-81.

¹¹⁰ *Id.* ¶ 187.

¹¹¹ *Id.* ¶¶ 185-88.

¹¹² See *Godinez Cruz Case*, Inter-Am. Ct. H.R. (ser. C) No. 5 (Jan. 20, 1989) (finding that Honduras was also responsible for the disappearance of Saul Godinez Cruz, and ordering Honduras to pay an amount totaling 1,300,000 lempiras (approximately \$232,000) to the Godinez Cruz family as compensation).

¹¹³ *Id.*; Velásquez Rodríguez Judgment, *supra* note 1, ¶ 189.

¹¹⁴ See *Velásquez Rodríguez Case*, Compensatory Damages Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶¶ 20-21 (July 21, 1989) (noting that the parties agreed that the next of kin would include Manfredo's wife and three children).

ordered a public hearing on the issue of compensation.

The Commission submitted a request for payment that included a pension, title to "an adequate house," and compensation for the pain and suffering of Manfredo Velásquez's wife and children.¹¹⁵ The victims' lawyers argued for moral reparations, loss of earnings, emotional damages, and punitive damages.¹¹⁶ The lawyers, under the technical supervision of the Commission, requested an end to forced disappearances and a disbanding of the organizations that carried out the torture and disappearances.¹¹⁷ They applied for a public condemnation of the disappearances, and exhaustive investigations, prosecutions, and punishments.¹¹⁸ The lawyers requested that the work of the family and humanitarian organizations be respected, and that an educational fund be created for the children of the disappeared.¹¹⁹

The government of Honduras argued that the Court's order of just compensation did not require any explanation.¹²⁰ It asserted that victim's family was entitled to 41,200 lempiras (approximately \$7,360), as provided by the Law of the National Institute of Social Security for Teachers in the case of accidental death, but offered to pay an additional 108,800 lempiras (total of approximately \$26,800).¹²¹

The Court did not adopt all of the requests of the petitioners. It held that full restitution should be understood broadly to encompass both material and moral damages. Material damages include "daño emergente," direct or immediate damages suffered by the victims and the costs incurred by the victims as a result of the violations, including their pursuit of justice, and "lucro cesante," the earnings he would have made over his lifetime. Moral damages include monetary compensation for the pain and suffering caused by the violation. The Court held that Honduras had an obligation under international law to make adequate restitution to the victims, including reparation and indemnification.¹²² The Court stated that "fair compensation" under Article 63(1) of the Con-

¹¹⁵ *Id.* ¶ 8. The Commission did not specify an amount, but argued that the monetary compensation should correspond to the benefits offered by the Institute of Military Pensions, as well as a cash amount. *Id.* ¶ 44.

¹¹⁶ *Id.*

¹¹⁷ *Id.* ¶ 7(7).

¹¹⁸ *Id.* ¶¶ 7(2), 9.

¹¹⁹ *Id.* ¶ 7.

¹²⁰ *Id.* ¶ 14.

¹²¹ *Id.* ¶ 43.

¹²² See Velásquez Rodríguez Case, Compensatory Damages Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶¶ 25-26 (July 21, 1989).

vention required that Honduras provide full restitution to victims or their families for the injuries suffered as a result of the violations of the Convention.¹²³ The Court rejected the lawyers' request for punitive damages because it fell outside of the scope of Article 63(1) and international law.¹²⁴ Similarly, it denied the request for legal fees and costs because the lawyers had not argued for those expenses. The Court also rejected the government's assertion that compensation should be based on an insurance calculation for accidental death. The Court noted that Manfredo Velásquez did not die accidentally.¹²⁵

The Court set the damages at 750,000 lempiras (approximately \$134,000).¹²⁶ The Court found that 250,000 lempiras should be paid for moral damages for the pain and suffering of the family, and set the loss of earnings at 500,000 lempiras. The Court ordered the government to pay one-fourth of the payments directly to the victim's widow. The Court directed the government to place the remaining three-fourths of the funds in a trust fund in the Central Bank for the victim's three children.¹²⁷

The Court gave Honduras ninety days to comply with the judgment, but eight months later Honduras still had not paid the compensation. As a result of this delay, the lempira declined in value, reducing the value of the children's trust fund by fifty percent.¹²⁸ Due to the hyperinflation of the Honduran currency, the Commission requested a clarification of the Court's July 21, 1989, judgment.¹²⁹ The Commission urged the Court to protect the award against devaluation by tying the amount to an index that would maintain its purchasing power.¹³⁰ The Commission emphasized that if the government did not compensate for the decrease in value caused by the government's delay, the money would lose all real

¹²³ See *id.* ¶ 29; American Convention, *supra* note 19, art. 63 (stating that if there has been a violation, then the Court shall order that the breach is remedied).

¹²⁴ Velásquez Rodríguez Case, Compensatory Damages Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶¶ 38-39 (July 21, 1989).

¹²⁵ *Id.* ¶ 46.

¹²⁶ *Id.* ¶¶ 49, 52, 57.

¹²⁷ *Id.* ¶ 58. The trust fund would be administered under the most favorable conditions permitted by Honduran banking practice. Under the decision, the children would receive monthly interest payments until the age of twenty-five, when they would receive their proportionate part. Honduras could either pay one lump sum, or pay the amount in six consecutive monthly installments. *Id.* ¶ 57.

¹²⁸ Velásquez Rodríguez Case, Interpretation of Compensatory Damages Judgment, Inter-Am. Ct. H.R. (ser. C) No. 9, ¶ 18 (Aug. 17, 1990).

¹²⁹ *Id.* ¶ 1.

¹³⁰ *Id.* ¶ 19.

value and become merely symbolic.¹³¹ The government argued that the July 21st judgment required no clarification, and that the Court had not implemented any other monetary guidelines.¹³²

In a judgment issued on August 17, 1990, the Court responded to the Commission's request. The Court found that it retained jurisdiction to hear the case under Article 67 because a contentious case remains open until the parties fully comply with the judgment.¹³³ The Court also found that the government, not the beneficiaries, should bear the consequences caused by Honduras's delay in making the payments. Therefore, the Court ordered Honduras to compensate the family for the losses caused by the government's delay in making payment.¹³⁴ The Court ordered the government to pay the family the 750,000 lempiras as of October 21, 1989, as well as interest on the entire amount of the capital.¹³⁵

In response to the Court's decision, the government of Honduras initially agreed to pay the victims only the amount specified in the original compensation judgment, refusing to pay the interest or compensate for the loss caused by inflation. Full compliance with the Court's decision occurred only after an international campaign was mounted to pressure the government, and after Roberto Reina, a former member of the Inter-American Court, became president of Honduras. The Honduran government ultimately paid the full compensation in 1995.¹³⁶

Immediate Impact of the Case

As the first contested case before the Inter-American Court of Human Rights, *Velásquez Rodríguez* received extensive media attention.¹³⁷ The case brought the inhumanity of the practice of disappear-

¹³¹ *Id.*

¹³² *Id.* ¶ 21.

¹³³ See American Convention, *supra* note 19, art. 67 (stating that "[i]n the case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment").

¹³⁴ Velásquez Rodríguez Case, Interpretation of Compensatory Damages Judgment, Inter-Am. Ct. H.R. (ser. C) No. 9, ¶ 23 (Aug. 17, 1990).

¹³⁵ *Id.* ¶ 39. The Court held that the phrase "under the most favorable conditions" obligated the trustee of the trust fund to maintain and increase the value of the funds by selecting a diverse investment portfolio, such as U.S. dollars, real estate, and securities. *Id.* ¶¶ 30-31; see *supra* note 127.

¹³⁶ See David Harris, *Regional Protection of Human Rights*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 21, 25 (David Harris & Stephen Livingstone eds., 1998).

¹³⁷ See, e.g., Stephen Kinzer, *O.A.S. Tribunal Finds Honduras Responsible for a Political Killing*, N.Y. TIMES, July 30, 1988, at A1; WASH. POST, Jan. 21, 1988, at A28; *Rights Court Faults Honduras*, *id.* July 30, 1988, at A19.

ances to the attention of the international community. Journalists, local human rights organizations, and the OAS had denounced the practice of disappearances for years, but Manfredo Velásquez had the sad honor of being the first person recognized by a judicial body in the Americas as an "officially" disappeared person. The Court, since then, has noted that family members of the disappeared are often direct victims of cruel, inhuman and degrading treatment because they have been denied access to justice and lived with the uncertainty of not knowing the whereabouts of their loved ones.¹³⁸

The Court's ruling had several immediate effects. The *Velásquez Rodríguez* decision contributed to the end of the practice of disappearances in the region. The case helped shape a new Court as it started to develop its contentious jurisdiction. The decision strengthened the rights and role of the individual and expanded the Convention's legitimacy within civil society. The Court's procedural rulings affected later decisions and prompted changes in the Commission's and Court's Rules of Procedure.

An End to Disappearances. The *Velásquez Rodríguez* decision, in the context of other domestic and international factors, such as the end of the Cold War and the easing of tensions in the region, contributed to the end of disappearances. It is impossible to quantify the precise impact of the decision in eradicating this practice, but the decision did play a role in ending the practice of disappearances as a widespread tool of state repression. For example, the procedure and the decision were widely publicized, and Honduras accepted the Court's ruling.¹³⁹ The case also challenged the culture of impunity and deniability that pervaded the countries in the region. By exposing the state's responsibility in this inhuman practice and confronting a status quo characterized by repression and authoritarianism, the case helped further the goals of human rights and democracy in the region.¹⁴⁰

The Role of the Court. For the first time, the Court in *Velásquez Rodríguez* exercised its compulsory jurisdiction in a contested case. Although Article 62 of the Convention empowers the Court with this jurisdiction, prior to this case the Court had only exercised its compulsory jurisdiction once, and then in an uncontested case.¹⁴¹

¹³⁸ See 19 Merchants v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 229 (July 5, 2004); Juan Humberto Sánchez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 101 (June 7, 2003); Blake v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 48, ¶ 38 (Jan. 22, 1999); Bámaca-Velásquez v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 160 (Nov. 25, 2000).

¹³⁹ See *supra* note 137.

¹⁴⁰ See *infra* text accompanying notes 175–205.

¹⁴¹ See *In re Viviana Gallardo*, Case G 101/81, Inter-Am. C.H.R. 12, OEA/Ser.L./III.7, doc. 13 (1982). Costa Rica submitted the case against itself and agreed to be bound by the ruling, but the case was dismissed before a final ruling was reached.

The Convention, however, did not indicate whether the Court was a trial court, which would determine factual questions *de novo*, or a superior court, which would limit its jurisdiction to questions of legal interpretation as they pertain to a case. The Court in this case established itself as if it were a court of first instance with jurisdiction over all relevant issues in the case, practically trying the case anew and considering all factual evidence.¹⁴²

The Commission and the victim's lawyers had both political and legal reasons for urging the Court to establish itself as a court of first instance, rather than an appeals chamber. The Commission based its finding of Honduras's responsibility on a procedural presumption because the government refused to participate in the proceedings.¹⁴³ If the Court simply certified the Commission's finding, based on a norm included in the Commission's Rules of Procedure but not found in the Convention, its decision would have been vulnerable to criticism that it lacked any grounding in a treaty.

Additionally, the lawyers wanted the government's responsibility for the disappearances established unequivocally by a court of law. A judicial decision would lend legitimacy to the findings and to the inter-American system. The lawyers also recognized that particularly in the developing area of international law, no procedure is purely legal. If the Court operated as an appeals chamber, then the dry legal proceeding would not attract media or public attention to the horrible crime of disappearances. The lawyers knew that the witnesses' testimony about Manfredo Velásquez's story would be powerful evidence to focus attention on the larger human rights abuses occurring in Honduras. Mobilizing public shame was a critical tool available to the lawyers to guarantee compliance. The Convention required that Honduras comply with the Court's decision, but the Court did not yet have the legitimacy earned by an institution through the successful adjudication of cases over time. Without the publicity, the lawyers were concerned that Honduras might withdraw on a technicality. Increasing the publicity escalated the political stakes if Honduras attempted to withdraw. To its credit, the Honduran government appeared and actively participated throughout the proceedings. The extra media attention gained by treating the Court as a trial court, as well as Honduras's participation, increased the Court's profile and further strengthened the Court's credibility.

¹⁴² See Velásquez Rodríguez Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 1, ¶ 29 (June 26, 1987) (stating, "[i]n exercising these powers, the Court is not bound by what the Commission may have previously decided; rather its authority to render judgment is in no way restricted. The Court does not act as a court of review, of appeal or other similar court in its dealings with the Commission.").

¹⁴³ See Inter-Am. Ct. H.R., 2001 Rules of Procedure art. 42 [hereinafter Court's Rules of Procedure].

Subsequently, however, the treatment of the Court as a "trial court" meant that every case must be proven twice: once before the Commission, and then again before the Court. This increased the expense of the proceedings because witnesses had to be brought before both tribunals. It also made the process less accurate because opportunities were lost as time elapsed and witnesses could not always clearly remember the events. Additionally, if every case had to be tried anew by the Court, then member states might conclude that they need not cooperate with the proceedings before the Commission, and the role of the Commission would be greatly weakened.

These concerns led the Court to adopt new Rules of Procedure in November of 2000. Under these Rules the Court, while retaining its right to "retry" a case, may give probative value to the Commission's proceedings if, in the Court's judgment, those proceedings satisfy the necessary standards.¹⁴⁴ The Court has applied these new regulations in a number of cases.¹⁴⁵

The Role of the Individual. In the *Velásquez Rodríguez* decision, the Court applied and enforced the rights laid down in the Convention, helping to develop a new role for the individual in the inter-American system. According to late nineteenth and early twentieth-century conceptions, international law governed relationships and conflicts between states, and only states were considered proper subjects of international law.¹⁴⁶ These conceptions of international law generally ignored the individual, as well as other subjects such as international organizations, nations, minority groups, other collective groups, and humankind.¹⁴⁷

Human rights law generally, and the American Convention specifically, departed from state-centric conceptions of international law by according both substantive and procedural rights to the individual. The assigning of rights to the individual reflected the profound change taking place in international relations, where new actors asserted their presence on the global stage. From the human rights perspective, this process was fueled by the atrocities committed during the Second World War. In the aftermath of World War II, human rights defenders argued that the lack of internationally defined rights that individuals could assert against their own governments contributed to genocide and other mass and gross violations of human rights.¹⁴⁸

¹⁴⁴ See *id.*

¹⁴⁵ See Dinah Shelton, *Judicial Review of State Action by International Courts*, 12 FORDHAM INT'L L.J. 361 (1989).

¹⁴⁶ See LOUIS HENKIN, *HOW NATIONS BEHAVE* 15 (2d ed. 1979).

¹⁴⁷ See BUERGENTHAL & SHELTON, *supra* note 14, at 6.

¹⁴⁸ See HENKIN, *supra* note 146, at 229.

The Inter-American Commission began processing individual petitions in the Western hemisphere in 1965 based on the American Declaration, an instrument that was viewed as establishing only ethical standards and not legal obligations. Most of the Commission's actions, however, were visits *in loco* and country reports designed to assess the overall human rights situation in the country, and not individual cases, designed to establish truth and state responsibility in an individual case.¹⁴⁹ When mass and gross human rights violations prevailed in the region, the Commission believed that visits *in loco* and a collective approach offered the most effective way to mobilize public opinion and shame the governments into change, rather than painstakingly having to prove each individual case in accordance with legal requirements. Undoubtedly, the public exposure of the violations served a useful purpose, but the examination of disappearances or other violations of a group's rights could not offer justice to each victim.¹⁵⁰ As the sheer number of violations began to decrease, better conditions arose to handle those violations through a personalized system. In this new environment individual petitions could finally prove effective.¹⁵¹

The Court issued the *Velásquez Rodríguez* decision as countries in the region began the transition process from authoritarian regimes to democratically elected governments. In this new environment, the inter-American system gradually shifted from visits *in loco* to individual petitions. An individual petition system requires examination of evidence and provides legally reasoned decisions in accordance with the legal tradition, ideas of justice, and standards of reparations. The *Velásquez Rodríguez* decision, based on a binding treaty, helped fuel the development of individuals as subjects of international law in the inter-American system.¹⁵²

These developments at the normative level were seized by non-governmental organizations (representing thousands of individuals), lawyers, and human rights activists, whose appreciation for the system's value increased greatly as a result of the *Velásquez Rodríguez* decision. The case also increased the legitimacy of this state-created system in the eyes of civil society. In fact, the OAS human rights system is widely

¹⁴⁹ See Harris, *supra* note 136, at 21.

¹⁵⁰ The Commission also encountered limitations because it only visited countries with the government's permission, and it did not have the same legitimacy as a court.

¹⁵¹ See Claudio Grossman, *El Fortalecimiento de la democracia: el sistema interamericano de derechos humanos*, 1 FOREIGN AFFAIRS EN ESPAÑOL No. 3, at 115 (2001).

¹⁵² See generally Grossman, *supra* note 29 (expanding on the role of the individual under international law).

perceived as the most successful and participatory endeavor of an otherwise weak organization.¹⁵³

The dramatic increase in decisions adopted by the inter-American organs attests to the growing relevance of the inter-American human rights system. The workload of the Commission has grown dramatically, and states parties have participated in all of the Commission's cases.¹⁵⁴ The Court's workload has increased as well. In 1986 the Court had three contentious cases in process, but by 2005 the number of contentious cases before the Court and in various stages of supervision had climbed to seventy-four.¹⁵⁵ In 1987 the Court issued one judgment and no pronouncements on preliminary objections, merits, or reparations. The 2005 Court issued judgments in fourteen cases and pronouncements on preliminary objections, merits, or reparations in twenty-nine cases.¹⁵⁶ The number of provisional measures ordered by the Court has dramatically increased.¹⁵⁷ In 1980, the Court held thirty-eight days of sessions; by 2005 that number had almost doubled.¹⁵⁸ In 27.9 percent of the cases the states have also acknowledged their international responsibility, either completely or in part.¹⁵⁹ During the 1990s the average case before the Court lasted thirty-nine months; since the 2000 Rules of Procedure, the processing time for cases has decreased to an average of twenty-one

¹⁵³ See Inter-American Dialogue Task Force on the Organization of American States, *Responding to the Hemisphere's Political Challenges* 18 (June 2006), available at http://www.thedialogue.org/publications/2006/summer/OAS_2006.pdf.

¹⁵⁴ For example, in 1998 the Commission received 571 petitions, while in 2005 the Commission received 1330. See Inter-Am. C.H.R., Annual Report, OEA/Ser.L/V/II.124, doc. 5, ch. 3, ¶ 8 (Feb. 27, 2006) [hereinafter Commission's Annual Report 2005].

¹⁵⁵ See *id.* at 64.

¹⁵⁶ *Id.* at 66.

¹⁵⁷ *Id.* at 76–77. In 1988 the Court ordered the state to adopt provisional measures in three cases. In 2004 the Court ordered provisional measures in thirty-four cases, increasing to thirty-six cases in 2005. Provisional measures may include providing cell phones and bodyguards to protect the lives and personal integrity of individuals receiving death threats.

¹⁵⁸ See Court's Annual Report 2005, *supra* note 3, at 59. Recently, the Court has held special sessions in other countries, such as Brazil, Argentina, and El Salvador.

¹⁵⁹ *Id.* at 63 (listing the cases that have accepted responsibility); see, e.g., *Aloeboetoe v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 11 (Dec. 4, 1991); *Barrios Altos v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001); *Bulacio v. Argentina*, Inter-Am. Ct. H.R. (ser. C) No. 100 (Sept. 18, 2003); *Gutierrez Soler v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 132 (Sept. 12, 2005); *Huilca Tecse v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 121 (Mar. 3, 2005); *Maritza Urrutia v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 103 (Nov. 27, 2003); *Mapiripan Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005); *Plan de Sanchez Massacre v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 105 (Apr. 29, 2004); *Myrna Mack Chang v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 101 (Nov. 25, 2003).

months,¹⁶⁰ a change that in contentious cases allows victims to experience justice faster.

Procedural Developments. Changes in the Rules of Procedure of the Commission and the Court further strengthened the individual's position within the system.¹⁶¹ The victim's lawyers participated in the *Velásquez Rodríguez* case unopposed by the Honduran government. The participation of the victim's lawyers in the case greatly benefited the Commission, the Court, and the process as a whole, but the lawyers' participation was theoretically under the supervision of the Commission.¹⁶² After the *Velásquez Rodríguez* decision, the Court embarked on a process of change that culminated in allowing direct representation of the victims before the Court in more than just the reparations stage.¹⁶³

The Court in *Velásquez Rodríguez* also defined what constituted the proper local remedies that victims were required to exhaust before bringing their case to an international tribunal.¹⁶⁴ Although the failure to

¹⁶⁰ See Court's Annual Report 2005, *supra* note 3, at 72; see also Antonio Augusto Cancado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. INT'L & COMP. L. 5, 21 (2000).

¹⁶¹ See Commission's Rules of Procedure, *supra* note 25 (approved by the Commission at its 109th special session held from Dec. 4 to 8, 2000, and amended at its 116th regular period of sessions, held from Oct. 7 to 25, 2002, and at its 118th regular sessions, held from Oct. 7 to 24, 2003); Court's Rules of Procedure, *supra* note 143 (modified in 1991, 1996, 2000, and 2003). See generally JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 18–22 (2003).

¹⁶² The four lawyers for the victim's family joined the two lawyers from the Commission and expanded the expertise, resources, and time that could be brought to bear on the case. Through their lawyers, the families of the victims, and the non-governmental organizations supporting them, felt represented in a procedure that otherwise would have involved only the Honduran government and the Commission. See generally Grossman, *supra* note 29. Although the Convention does not allow the victim's lawyers to directly present cases to the Court, the Commission in *Velásquez Rodríguez* appointed them as legal advisors. See Commission's Rules of Procedure, *supra* note 25, art. 69(4). The Commission later modified its Rules of Procedure to allow the petitioner to be included as a delegate. See *id.* art. 69(2). The Commission's discretionary power to appoint delegates, however, did not guarantee adequate participation by the victims or the victims' lawyers. In some cases, the Commission's political goals and its protection of the integrity of the system might diverge from the interest of the victims for justice in their case.

¹⁶³ See Court's Rules of Procedure, *supra* note 143, art. 23; SERGIO GARCÍA RAMÍREZ, *LA JURISDICCIÓN INTERAMERICANA DE DERECHOS HUMANOS* 188 (2006). Despite these changes, the victims are not permitted to allege new facts. They are, however, permitted to clarify and allege new violations of articles based on the Commission's statement of fact. See Commission's Rules of Procedure, *supra* note 25, art. 71. The Commission also changed its Rules of Procedure to facilitate victims' access to the Court by reducing the number of votes required to send the case to the Court. Most cases are now referred to the Court. See *id.* art. 44.

¹⁶⁴ See *supra* text accompanying notes 64–75.

exhaust domestic remedies is a preliminary, procedural objection, the Court's later jurisprudence concerning this issue relied on the substantive right to judicial protection under Article 25 of the American Convention and the general obligation to respect and ensure rights under Article 1.¹⁶⁵ The Court held that these articles obligate member states to offer their citizens an effective domestic judicial remedy.¹⁶⁶ It is not enough for states to claim that they have available domestic procedures on the books; domestic remedies must be more than just formal mechanisms.

The Court's rulings concerning the burden of proof and lawyer's fees also affected later procedural developments in the inter-American system. By articulating a reasonableness standard for the evidence required to prove a case of disappearances, the Court provided valuable guidance for petitioners and governments.¹⁶⁷ The Court did not award lawyer's fees to the plaintiffs' lawyers, claiming that the issue of lawyer's fees had never been argued,¹⁶⁸ a disposition that created the space for future lawyers to argue that the state should pay such fees. The Court currently awards legal fees and court costs based on issues of equity, the circumstances surrounding the case, the international jurisdiction, and the reasonable expenses incurred by the parties.¹⁶⁹

The *Velásquez Rodríguez* Court's treatment of witnesses raised controversial issues. The Court allowed the questioning of three Honduran military personnel to occur in private, rather than in a public proceeding before the Court.¹⁷⁰ Perhaps the Court acceded to the govern-

¹⁶⁵ See *infra* text accompanying notes 182–203.

¹⁶⁶ See *Castillo Páez v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 34, ¶ 90 (Nov. 3, 1997); *Blake v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 36 (Jan. 24, 1998). Judge Cancado Trindade has written that "Article 25 constitutes one of the basic pillars not only of the American Convention but of the rule of law itself in a democratic society ... and is intimately linked to the general obligations of Art. 1(1)." Antonio Augusto Cancado Trindade, *The Inter-American Court of Human Rights at a Crossroads: Current Challenges and its Emerging Case Law on the Eve of the New Century*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE* 179 (Carl Heymanns ed., 2000).

¹⁶⁷ See *supra* text accompanying notes 76–93.

¹⁶⁸ See *Velásquez Rodríguez Case*, Compensatory Damages Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7 (July 21, 1989).

¹⁶⁹ See, e.g., *The "Street Children" (Villagrán-Morales) v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 9 (May 26, 2001) (ordering the state to reimburse expenses and costs of both the representatives of the victims' next of kin, in the domestic and international jurisdictions); *19 Merchants v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 284 (July 5, 2004) (noting that legal assistance to the victim does not begin at the reparations stage, but starts in the cases before the domestic judicial bodies and continues through the proceedings before the Commission and before the Court); *Ximenes-Lopes v. Brazil*, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 252 (July 4, 2006).

¹⁷⁰ See Inter-Am. Ct. H.R. Statute art. 24 (Oct. 1979) (permitting hearings to be held in private under exceptional circumstances); Court's Rules of Procedure, *supra* note 143,

ment's demands to ensure the government's continued involvement and cooperation in the case. In subsequent cases, however, the Court has not held private proceedings; these could compromise the integrity and accuracy of the Court as a place of law and justice. A second controversy arose because of the Court's response to the protection of the plaintiffs' witnesses. Although the Court condemned the killings of two witnesses¹⁷¹ and made orders directed at Honduran authorities,¹⁷² the Court did not adopt more assertive measures, such as a Commission recommendation that the Court send one of its judges to Honduras to investigate the killings.¹⁷³ In later years, the Court's and the Commission's reports to the OAS General Assembly, about precautionary and provisional measures and the state of compliance with judgments in contentious cases,¹⁷⁴ have allowed more public scrutiny of the process of protecting witnesses.

Lasting Impact of the Case

Through the *Velásquez Rodríguez* decision, the Inter-American Court has had a lasting impact on normative developments in international law. The decision also paved the way for an ambitious jurisprudence on the reparations available to victims in cases of human rights violations. Finally, the decision contributed to the depolitization of the human rights discourse.

Normative Developments in International Law. Prior to the Court's decision in *Velásquez Rodríguez*, international and regional bodies responded to disappearances by issuing resolutions and establishing working groups to address the state practice of disappearances.¹⁷⁵ For

art. 14. At the time, the Honduran government argued that security concerns and the active duty status of the officers warranted the closed hearing examination of the three witnesses. See *Velásquez Rodríguez Judgment*, *supra* note 1, ¶ 31. The Court did, however, permit the lawyers for the Commission and the victims to cross-examine the officers. See *id.* ¶ 33.

¹⁷¹ See *supra* text accompanying notes 81–83.

¹⁷² The Court ordered Honduras to adopt measures to protect the safety of other witnesses involved in the case and required Honduras to investigate and punish the perpetrators. See *Velásquez Rodríguez Case*, Order of the Court, Inter-Am. Ct. H. R. (ser. E) (Jan. 15, 1988); *Velásquez Rodríguez Case*, Order of the Court, Inter-Am. Ct. H. R. (ser. E) (Jan. 19, 1988).

¹⁷³ See *Velásquez Rodríguez Judgment*, *supra* note 1, ¶ 43.

¹⁷⁴ See Court's Annual Report 2005, *supra* note 3, at 33–34; Commission's Annual Report 2005, *supra* note 154, ch. 3, § D; see also American Convention, *supra* note 19, art. 65 (establishing the obligation to inform the General Assembly of the OAS of state's compliance).

¹⁷⁵ See *Velásquez Rodríguez Judgment*, *supra* note 1, ¶¶ 151–53.

example, the United Nations General Assembly adopted resolutions to condemn disappearances, and the United Nations Commission of Human Rights of the Economic and Social Council created the Working Group on Enforced and Involuntary Disappearances to assist families in determining the fate of their relatives and to establish channels of communication between the families and the governments.¹⁷⁶ The Inter-American Commission condemned the practice and urged that it be investigated and stopped.¹⁷⁷ The OAS General Assembly characterized the crime of disappearances as "an affront to the consciousness of the hemisphere" and a crime against humanity.¹⁷⁸ Most human rights instruments created before the decision, however, did not address disappearances as a specific violation.

Since the *Velásquez Rodríguez* decision, the crime of disappearances has been codified in the hemisphere in 1996 with the entry into force of the Inter-American Convention on the Forced Disappearance of Persons, which incorporated the definition of disappearances used in the *Velásquez Rodríguez* case, and encompasses the crimes of kidnapping, torture, and murder.¹⁷⁹ The *Velásquez Rodríguez* decision was the impetus for drafting and presenting the Convention. Sixteen countries in the hemisphere have currently accepted the Inter-American Convention on the Forced Disappearance of Persons.¹⁸⁰

The *Velásquez Rodríguez* decision was also one of the developments that led to the inclusion of disappearances in the Rome Statute of the International Criminal Court and the International Convention against Disappearances. In the Rome Statute, the forced disappearance of persons constitutes a crime against humanity (a grave violation of human rights and fundamental liberties) and is subject to the jurisdiction of the International Criminal Court. The crime is defined as the

arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of

¹⁷⁶ See Mendez & Vivanco, *supra* note 4, at 515.

¹⁷⁷ See, e.g., Inter-Am. C.H.R. Report on Argentina, OEA/Ser.L/V/II/49, doc. 19 rev.1 (1980); Inter-Am. C.H.R. Report on Chile, OEA/Ser.L/V/II.66, doc. 17 (1985).

¹⁷⁸ OAS G.A. Res. 666 (XIII-0/83) (Nov. 18, 1983); OAS G.A. Res. 742 (XIV-0/84) (Nov. 17, 1984).

¹⁷⁹ See Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529 (1994) (entered into force Mar. 28, 1996).

¹⁸⁰ Those countries are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

those persons, with the intention of removing them from the protection of the law for a prolonged period of time.¹⁸¹

Reparations. It is a well-established principle of international law that a violation of a right creates an obligation to adequately remedy that violation.¹⁸² Article 63 of the American Convention states that “[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that an injured party be ensured the enjoyment of his right or freedom that was violated.”¹⁸³ The Convention continues by stating that the breach should be “remedied and fair compensation be paid to the injured party.”¹⁸⁴

The Court in *Velásquez Rodríguez*, for the first time in the inter-American system, elaborated on what measures constituted reparations for a human rights violation, and what might be a definition of fair compensation. Significantly, the Court did not refer to Honduran domestic law for issues of reparations, but applied classic notions of reparations under international law.¹⁸⁵ The judgments provided a precedent for granting the victims damages for both material and non-material harm.

Even though the Commission and the victim’s lawyers were seeking symbolic measures of redress, the Court did not require that Honduras adopt any symbolic measures.¹⁸⁶ In numerous cases since *Velásquez Rodríguez*, however, the Court has ordered states to make reparations through symbolic measures, such as building monuments, publishing the Court’s decision in the newspaper, or providing the resources for a proper burial.¹⁸⁷ The Court has also required that states make repara-

¹⁸¹ Rome Statute of the International Criminal Court art. 7(2)(i), July 17, 1998, 2187 U.N.T.S. 90.

¹⁸² See, e.g., *López-Álvarez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 141, ¶ 190 (Feb. 1, 2006); *Pueblo Bello Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 227 (Jan. 31, 2006).

¹⁸³ American Convention, *supra* note 19, art. 63

¹⁸⁴ *Id.*

¹⁸⁵ See *Mendez & Vivanco*, *supra* note 4, at 568. In contrast, the European Court of Human Rights regularly looks to domestic law for issues of reparations under Article 50 of the European Convention on Human Rights. However, the Inter-American Court does have flexibility to refer the case to domestic procedures for reparations due to the nature of the issue before it, such as the complex economic issues it faced in *Five Pensioners v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 98, ¶ 178 (Feb. 28, 2003). See RAMÍREZ, *supra* note 163, at 203 n.42.

¹⁸⁶ See *Velásquez Rodríguez Judgment*, *supra* note 1, ¶ 194; *Velásquez Rodríguez Case, Compensatory Damages Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 7 (July 21, 1989).

¹⁸⁷ See *Barrios-Altos v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001) (ordering the state to provide the beneficiaries with educational benefits, including scholarships, classroom materials, and uniforms, and to erect a monument commemorating the

tions to a particular community to which the victim belongs by providing services lacking as a way to prevent future violations.¹⁸⁸

To have more flexibility in providing reparations for material damages, the Court in subsequent cases created the concept of damage to the life project.¹⁸⁹ The classical calculation of material damages only included factors such as age, occupation, yearly salary, and probable increase in salary. Reparations to redress the disruption in a victim's aspirations, aptitudes, and circumstances recognize that the victim's potential was severely interrupted or permanently altered by the violation. For example, an individual's life project of studying may have resulted in dramatically altering the conditions of his or her existence. In such a case, the Court may order the state to create a scholarship for a victim to continue his interrupted studies.

The Court has used Articles 1(1) and 2 to find that domestic legislation violated the American Convention, and ordered states to change their legislation to protect human rights as part of the reparations.¹⁹⁰ In later cases, it has linked the duty to respect and ensure

victims within sixty days of the signing of an agreement between the Commission and the state); *The "Street Children" (Villagrán-Morales) v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 77, at 6, 7 (May 26, 2001) (requiring that Guatemala provide the resources for a proper burial for one of the victims, and designate an educational center with a plaque dedicated to the victims).

¹⁸⁸ See *Aloeboetoe v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 116.5 (Sept. 10, 1993) (ordering the opening of a school and pharmacy for the community as part of the reparations); *Fermin Ramirez v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 126, ¶ 138.12 (June 20, 2005) (ordering Guatemala to improve detention conditions to conform with international standards); *Yakye Axa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 221 (June 17, 2005) (ordering the state to provide clean water and medical care for an indigenous community while the community is without their own land); see also CENTER FOR JUSTICE & INT'L LAW, *GACETA: LAS REPARACIONES EN EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS* No. 22 (2004), available at <http://www.cejil.org/gacetitas/22GacetaRepfinal.pdf>.

¹⁸⁹ See *Loayza Tamayo v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 42, ¶¶ 147–48 (Nov. 27, 1998); *RAMIREZ, supra* note 163, at 218–19 nn.73–77.

¹⁹⁰ See *Loayza Tamayo v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997) (holding that the "traición a la patria" terrorism laws violated Article 8 of the Convention, and ordering the prisoner, Maria Elena Loayza Tamayo, freed, and the laws changed); see generally *Trindade, supra* note 166, at 182 (noting that Peru released the victim and ended the practice of using military tribunals with faceless judges); see also *Suarez Rosero v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 35 (Nov. 12, 1997) (finding that Article 114 of the Ecuadorian Penal Code depriving detainees held under the Anti-Drug Law of some judicial guarantees was a per se violation of Articles 2 and 7(5) of the Convention); *The "Street Children" (Villagrán-Morales) v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 77, at 8 (May 26, 2001) (requiring Guatemala to investigate the facts of this case, identify and punish those responsible, and adopt, in its domestic law, the provisions needed to ensure compliance with this obligation).

human rights under Article 1(1) with the duty under Article 2 to adopt legislative measures to "give effect" to the Convention's rights or freedoms.¹⁹¹ According to the Court's later jurisprudence, failure to incorporate a right in the domestic legal order constitutes a violation of Article 2 in connection with Article 1. For example, the Court has said that domestic amnesty laws that prevent investigation would be illegal in an individual case and a per se violation because states have a duty to prevent human rights violations.¹⁹²

In its decision on reparations the Court ordered only monetary redress for the victims; it did not order Honduras to investigate and punish the perpetrators of the human rights violations. In its decision on the merits, however, the Court mentioned that Honduras had violated Article 1(1) and the other articles of the Convention.¹⁹³ The Court's interpretation of Article 1(1) in the decision on the merits, which included an obligation to investigate and punish, set the stage for the later development of what could be considered the most ambitious system of reparations adopted by an international human rights system.¹⁹⁴

Investigation and punishment are important developments for the victims because the victims of human rights violations do not accept that "money cures all wrongs." For them it is fundamental that the truth be told, and that those who are responsible be held accountable, in order to ensure that these types of events are not repeated in the future.¹⁹⁵ Relying on the *Velásquez Rodríguez* precedent and its interpretation of Article 1(1), the Court, in later cases, explicitly ordered the state to investigate and punish those who appear responsible for violating provisions of the Convention as a part of the required reparations.¹⁹⁶

¹⁹¹ See Trindade, *supra* note 166.

¹⁹² See *Barrios Alto (Chumbipuma Aguirre) v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 41, 43 (Mar. 14, 2001).

¹⁹³ See *supra* text accompanying notes 114–36.

¹⁹⁴ See Douglass Cassel, Book Review, 100 AM. J. INT'L L. 503, 504 (2006) (reviewing Jo M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (2003)).

¹⁹⁵ See INT'L COMM'N OF JURISTS, *JUSTICE NOT IMPUNITY: INTERNATIONAL MEETING ON IMPUNITY OF PERPETRATORS OF GROSS HUMAN RIGHTS VIOLATIONS* (1992).

¹⁹⁶ See *Castillo Páez v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 34, ¶ 90 (Nov. 3, 1997) (ordering the state to identify those responsible for the crimes, and to punish the perpetrators as part of the compensation); *Garrido & Baigorria v. Argentina*, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 39, at 4 (Aug. 27, 1998) (deciding that "the Argentine State shall investigate the facts leading to the disappearance of Adolfo Garrido and Raúl Baigorria and prosecute and punish their authors, accomplices, accessories after the fact and all those who may have had some part in these events").

The interpretation of Article 1(1) has also been extremely valuable because it has provided a valid legal basis to fight impunity and seek justice in the region.¹⁹⁷ During the transition to democracy in many Latin American countries, the outgoing authoritarian regimes often passed amnesty laws protecting themselves and blocking later investigations or prosecutions.¹⁹⁸ Court cases building on the *Velásquez Rodríguez* decision, however, required that states actively investigate and punish human rights abuses, and this interpretation provided a tool to attack the amnesty laws that pervaded the whole region. When amnesty laws could not be challenged directly, human rights defenders adopted the idea that gross violations, like disappearances, were continuous and ongoing crimes, and argued that neither the amnesty laws nor statutes of limitations applied.¹⁹⁹ The Court's broad interpretation of Article 1(1) further strengthened the rule of law and accountability.

Full compliance with the duty to investigate and punish has been problematic.²⁰⁰ In numerous occasions, those who were responsible or tolerated violations continued to wield considerable power within their society during the transition to democracy.²⁰¹ While there could be claims that noncompliance with the obligations to investigate and punish could ultimately affect the Court's legitimacy, this has not been the case. Even when there has not been an immediate application of the Court's decisions, investigation and punishment have taken place years later.²⁰² When criminal liability has not been established, the duty of the state to

¹⁹⁷ For example, in *Barrios Altos*, the Court stated that "all amnesty provisions . . . are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance" and that amnesty laws "are manifestly incompatible with the aims and spirits of the Convention." *Barrios Alto* (Chumbipuma Aguirre) v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 41, 43 (Mar. 14, 2001).

¹⁹⁸ See, e.g., Decreto Ley 2191, Apr. 19, 1978, Diario Oficial No. 20,042 (providing blanket amnesty for "all persons who committed, as perpetrators, accomplices or conspirators criminal offences . . . between 11 September 1973 and 10 March 1978").

¹⁹⁹ See, e.g., Corte de Apelaciones de Santiago, No. 11.821-03 (Jan. 5, 2004); *Hermosilla v. Chile*, Case 10.843, Inter-Am. C.H.R., Rep. No. 36/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 73 (1996); see also *Espinoza v. Chile*, Case 11.725, Inter-Am. C.H.R., Rep. No. 133/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶¶ 102-07.

²⁰⁰ See, e.g., *Neira-Alegría v. Peru*, Inter-Am. Ct. H.R., Compliance with Judgment, at 6 (Nov. 28, 2002) (noting that the state paid the monetary compensation, but had not located and returned the remains of the victim to the family).

²⁰¹ See, e.g., Alan Angell, *The Pinochet Factor in Chilean Politics*, in *THE PINOCHET CASE: ORIGINS, PROGRESS AND IMPLICATIONS* 63, 64 (Madeline Davis ed., 2003).

²⁰² See, e.g., Thomas Catan, *The Sins of Montesinos*, FIN. TIMES (London), July 26, 2003, at 15 (describing the trial of a Vladimir Montesino, the head of the secret police under the former Peruvian President Alberto Fujimori).

investigate and punish those responsible has meant the end of careers or untenable political consequences for those involved in violating human rights.²⁰³ Full compliance, however, is required to ensure respect for the rule of law. Until that situation has been achieved, we are not fully realizing the promise of *Velásquez Rodríguez*.

Depolitization of the Human Rights Discourse. The *Velásquez Rodríguez* decision contributed to the depolitization of the human rights discourse in the hemisphere. Historically, Latin American countries, fearful of the U.S.'s power, adopted an absolute view of the principle of nonintervention, rejecting intervention for whatever purpose and by whatever means.²⁰⁴ In addition, criticisms against a state for human rights violations were identified with either the right or the left, depending on the victims of human rights abuses and the affiliation of the government being exposed. The Commission, for its part, made a strenuous effort to avoid putting *Velásquez Rodríguez* in the political struggles in Latin America. By framing it in terms of the human rights abuses and not politics, the case reinforced the idea that human rights apply regardless of the political context or the regime in power. By following a judicial process, based on a treaty, and issuing an impartial decision grounded in the rule of law, the Court circumvented sovereignty concerns and the politics that generally accompanied human rights discussions. The decision is perceived as a success because it added legitimacy to the human rights discourse in a nonpolitical context, and regulated matters that needed clarification without reference to political ideology. The process also supported the idea that the inter-American system is a vehicle for the participation of civil society. As a result, the decision has been both influential and widely cited.²⁰⁵

Conclusion

The *Velásquez Rodríguez* case contributed greatly to the legitimacy of the Inter-American Court of Human Rights and the inter-American system because it helped build a solid jurisprudence and strengthened the rule of law. The judgment contributed to the evolution of human

²⁰³ See *supra* text accompanying note 136; Larry Rohter & Pascale Bonnefoy, *Peru Asks Chile to Extradite Fujimori to Face a Range of Charges*, N.Y. TIMES, Jan. 4, 2006, at A5 (noting that Fujimori was on his way to Peru to campaign for the presidential election when he was detained on charges of corruption and human rights violations).

²⁰⁴ See generally EXPORTING DEMOCRACY: THE UNITED STATES AND LATIN AMERICA (Abraham F. Lowenthal ed., 1991).

²⁰⁵ See, e.g., *Kurt v. Turkey*, App. No. 24276/94, 27 Eur. H.R. Rep. 373 (1998); *Ertak v. Turkey*, 2000-V Eur. Ct. H.R. 24; Leila N. Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 1021 n.320 (2006); Catharine A. MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 37 HARV. INT'L L.J. 1, 17 n.67 (2006).

rights norms by exposing and delegitimizing the inhumane practice of disappearances. It demonstrated that individuals unwilling to accept disappearances should be entitled to bring their claims to international bodies. In most cases today the states actively participate in the proceedings and abide by the Court's rulings. Despite these developments, problems of resources, absence of universal ratification, and issues of noncompliance persist in the system. In addition, there could be serious challenges to the system's future by populism, corruption, and renewed forms of authoritarianism.

The inter-American human rights system still experiences serious material constraints. The budget allocation assigned to the human rights bodies does not even reach five percent of the OAS's overall budget, and the organs could not survive without voluntary donations.²⁰⁶ The exponential increase in the number of cases in recent years has increased the need for more resources. The Court continues to meet only four or five times a year for a few weeks at a time,²⁰⁷ and the Commission meets two or three times a year for a couple of weeks. The inter-American system has achieved some impressive results despite serious limitations, but ensuring the viability of the system would require adequately funding the Court and the Commission so that they can properly handle their workload.

Canada and the United States have neither ratified the American Convention nor accepted the compulsory jurisdiction of the Court. Additionally, Trinidad and Tobago withdrew from the American Convention in 1998, citing a conflict between the Commission and Court's handling of death penalty cases and its internal death penalty laws.²⁰⁸ The ratification of the Convention by Canada and the United States would bring additional resources and strengthen the hemispheric legitimacy. Moreover, the failure of Canada and the United States to ratify the Convention, and the denunciation by Trinidad and Tobago, could strengthen the view that the system is mostly for Spanish and Portuguese-speaking Latin American countries, thereby limiting the benefits of a regional system (e.g., greater resources and application). Realistically, it seems difficult to imagine that the United States in particular will ratify the Convention any time soon.

²⁰⁶ See Clare K. Roberts, President, Inter-Am. C.H.R., Inauguration of 122nd Regular Session (Feb. 24, 2005), available at <http://www.cidh.org/annualrep/2005eng/Annex3.htm> (stating that the Commission's budget for 2005 was 3.8 percent of the total OAS budget).

²⁰⁷ See Trindade, *supra* note 160, at 36 (noting that prior to 1996, the Court only met three times a year).

²⁰⁸ See OAS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 72-74 (2003) (listing Trinidad and Tobago's formal letter denouncing the American Convention).

Without conceding the valuable goal of wider ratification, it is important not to see ratification and participation as a zero-sum game. The Commission also supervises compliance of state behavior on the basis of the American Declaration. Although that instrument is of a lesser normative quality than a treaty, the Commission applies it in individual cases and visits *in loco*, so that to a certain extent, the Declaration contributes to the development of a uniform hemispheric jurisprudence. In addition, the United States and Canada have provided resources and political backing to the inter-American system.²⁰⁹ Supporting the system is a persuasive way to strengthen democratic institutions, the rule of law, and human rights in the region.

The problem of noncompliance, particularly regarding investigation and punishment, persists in the inter-American system. Currently, the Commission and the Court submit annual reports to the General Assembly of the OAS concerning the status of compliance of each member state. In recent years, it has become more politically costly for a country to ignore a ruling by the Court, but the OAS has not yet fully ensured timely compliance with the decisions of its human rights bodies. Although most countries eventually pay monetary reparations and adopt symbolic measures, there is not full compliance with the Court's judgments concerning prosecution and punishment. The Democratic Charter, adopted by the inter-American system in 2001, gives the possibility of collective state action when there are human rights violations.²¹⁰ Arguably, a failure to comply with a Court decision could be considered a violation of the Democratic Charter, requiring state action. State action might include the suspension of a country from the OAS, as is the case in the Council of Europe.

In the Western hemisphere the development of institutions is essential to expanding and ensuring full compliance with human rights so that the realization of those rights does not rest on the will of a single individual. The dictatorships that existed until recently in the region brought not only mass and gross violations of human rights, but also very serious impediments to institutional development. Hence, priority must be placed on the development of a system of checks and balances with independent judiciaries and strong legislatures in the framework of a rich civil society. The political scientist Guillermo O'Donnell has described the governments that have emerged in some countries with histories of authoritarianism as "delegative democracies" because they

²⁰⁹ See Commission's Annual Report 2005, *supra* note 154, ¶ 108.

²¹⁰ See Inter-American Democratic Charter, OAS Doc. OEA/Ser.P/AG/Res.1 (2001); 28th Spec. Sess., OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01) (OAS General Assembly) (Sept. 11, 2001), 40 I.L.M. 1289 (2001).

entrust one individual with a sweeping delegation of power.²¹¹ In an "undelegative democracy," the civil society ensures broad participation by the population as a whole and constrains the actions of the executive. In response to the failure of executives in delegative democracies to deliver on promises they made to the public, the population equates democracy mostly with elections, and loses faith in democracy.

The *Velásquez Rodríguez* decision has the potential to challenge this pattern. It provides an active role for the individual by making certain that rights include more than simply voting. It offers a layer of legitimacy to human rights and the rule of the law above the national level. However, full exploration of this potential requires a stronger political commitment to provide the resources and the political backing that will ensure compliance with the decisions of the Court. Political will and resources will guarantee that the lessons of *Velásquez Rodríguez* are fully realized.

²¹¹ See Guillermo O'Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55 (1994).