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Índice

Recensión

Presentación

El Instituto Interamericano de Derechos Humanos (IIDH) se complace en presentar el número 55 de su Revista IIDH, correspondiente al primer semestre de 2012, que en esta ocasión ofrece artículos de variados temas en la materia. Con este número de su revista académica, el IIDH renueva el interés por fomentar la discusión de temas de relevancia para la comunidad internacional de derechos humanos, con miras a seguir encontrando formas novedosas para enfrentar los desafíos que en esta materia supone el actual contexto regional e internacional, apuntando a que se comprendan los factores históricos y se conozcan los nuevos elementos en el panorama de los derechos humanos de las Américas.

En ese sentido, la Revista IIDH ha recibido en esta ocasión los aportes de once autores y autoras que, desde diferentes ámbitos, se relacionan con el tema de los derechos humanos: algunos desde la academia, otros desde la práctica cotidiana de su quehacer profesional. Rescata así la importancia de dar voz y espacio a los distintos actores que construyen día a día el significado y alcances de los derechos humanos.

La presente edición de la Revista IIDH está dividida en dos secciones: *Doctrina* y *Temas en derechos humanos*. En la primera sección se han incluido tres artículos. El primero, de Norberto E. Garay Boza (Costa Rica), titulado *Los espacios invisibles en América Latina: análisis del hacinamiento penitenciario en Costa Rica para la inversión estructural de la pirámide kelsiana como modelo de tutela efectiva de los derechos humanos*, presenta un interesante y novedoso análisis, dirigido a propiciar una mejor garantía de los derechos humanos mediante la superación de las incompatibilidades de las legislaciones internas con el derecho internacional y constitucional. En el segundo, Álvaro Paúl (Chile), *In search of the Inter-American Court of Human Rights Standards of Proof*, revisa exhaustivamente la práctica de la Corte Interamericana de Derechos Humanos con respecto al aspecto probatorio o normas de la prueba en los casos

ante este tribunal. La sección se cierra con el artículo *Human Rights as an Essential Element of Contemporary International Community*, de Renato Zerbini Ribeiro Leão (Brasil).

La segunda sección contiene nueve artículos, presentados de acuerdo al orden alfabético. Björn Arp (Alemania) analiza la práctica del CAO (Compliance Advisor Ombudsman), de la CIF (Corporación Financiera Internacional, siglas en inglés) y de la MIGA (Agencia Multilateral de Garantía de Inversiones, siglas en inglés), cuando se producen violaciones a la normas internacionales de protección de los derechos humanos en el marco de las grandes inversiones del Banco Mundial (*El Banco Mundial entre el apoyo a grandes inversiones y la protección de los derechos humanos: estudio del Ombudsman y Asesor en materia de observancia de la corporación financiera internacional*). Paula S. Cuéllar (El Salvador), propone un repaso del proceso de desarme, desmovilización y reintegración en Colombia, a modo de argumentar a favor de la necesidad de una comisión de la verdad en ese país sudamericano (*The Necessity of a Truth Commission in Colombia within its Disarmament, Demobilization and Reintegration Process*). En su artículo *Efectos de la sentencias de la Corte Interamericana y del Tribunal Europeo de Derechos Humanos, con especial referencia a Uruguay y España*, Nils Helander Capalbo (Uruguay) presenta una reseña de los rasgos relevantes de las sentencias de estos tribunales internacionales con el objeto de responder a una pregunta central: ¿pueden aplicarse esas sentencias en los ordenamientos internos de dichos Estados? En su artículo *El derecho a satisfacción de las víctimas de violaciones de derechos humanos en la jurisprudencia de la Corte Interamericana de Derechos Humanos y su ejecución por parte del Estado colombiano*, Gina Kalach (Colombia) describe y analiza el alcance de cuatro tipos de órdenes de satisfacción efectuadas por la Corte Interamericana: las medidas tradicionalmente ordenadas en casi todas las sentencias de reparación de la Corte al Estado colombiano, las que tienen una importancia capital en materia de repercusión pública y del deber de memoria, las que ostentan un vínculo estrecho con los derechos a la justicia y la verdad, y aquellas que tienen particularidades en lo que

respecta a la ejecución efectuada por el Estado. Juan Manuel Medina Amador (Costa Rica), reflexiona acerca de la importancia de llevar a cabo una revisión del andamiaje jurídico sobre el que se sustenta la protección de las y los refugiados, con la intención de mejorar su implementación en el terreno (*Principales desafíos respecto a la protección internacional de los refugiados*). Aida Maria Monteiro Silva y Celma Tavares (Brasil) presentan en su artículo, titulado *Retos y avances de la educación en derechos humanos en la educación básica: el camino recorrido en Brasil*, los avances, limitaciones y retos de la educación en derechos humanos en ese país, en consideración que ésta es necesaria para el desarrollo de una formación humanista y el fortalecimiento de las estructuras democráticas de la sociedad. Paula Pelletier Quiñones (República Dominicana) propone propiciar un cambio en la forma de pensar de las personas profesionales en derecho en la República Dominicana, y en otros países y contextos similares, para honrar la profesión como un servicio social, mediante el diseño de estrategias propias de la naturaleza del litigio de interés público (*Estrategias de litigio de interés público en derechos humanos*). Adriano Sant'Ana Pedra (Brasil) se refiere al progreso que la medicina viene desarrollando, y que ha ampliado las oportunidades de éxito en la realización de trasplantes de órganos, tejidos y otras partes del cuerpo humano, lo que lleva inevitablemente a una serie de cuestiones ético-jurídicas respecto al tema. El autor analiza una de ellas, relativa a la posibilidad de que una persona anencefálica sea la donante (*El anencefálico como donante de órganos y el bioderecho constitucional*).

Por último, esta edición de la Revista IIDH presenta la recensión del libro *Contribuciones regionales para una Declaración Universal del Derecho Humano a la Paz*, editado por Carlos Villán Durán y Carmelo Faleh Pérez, a cargo de Juan Manuel de Faramiñán Gilbert (España).

Agradecemos a las autoras y autores por sus interesantes aportes y perspectivas; dejamos abierta la invitación a todas aquellas personas que deseen enviar sus trabajos a la consideración del Comité Editorial de la Revista IIDH, y aprovechamos la oportunidad para

agradecer, asimismo, a las agencias internacionales de cooperación, agencias del sistema de Naciones Unidas, agencias y organismos de la Organización de Estados Americanos, universidades y centros académicos.

Roberto Cuéllar M.
Director Ejecutivo, IIDH

Doctrina

In Search of the Standards of Proof Applied by the Inter-American Court of Human Rights

*Álvaro Paúl**

Domestic courts, especially in the common law system, explicitly use different standards of proof, which will guide them when determining whether some hypothesis of a case is proven. These standards also exist in international adjudication, even if not as clear-cut as in domestic jurisdictions. In the case of the inter-American tribunal, it has neither been given a standard of proof nor has it set one on its own accord. Nevertheless, the practice of the Court reveals some trends in this matter, despite not yet being very systematic. This paper will endeavor to analyze different cases of the inter-American tribunal and describe the way in which this court proceeds. When doing so it will also make reference to a misunderstanding caused by an incorrect translation of the Court's case law, and to a probabilistic reasoning for proving human rights violations. This paper will conclude that the Court applies different standards of proof for different matters, but that it generally utilizes a standard of preponderance of evidence.

Introduction

Standards of proof are important not only because of their practical effect, but also because of their symbolic meaning.[1] Indeed, a Court's explicit reference to standards of proof reveals its priorities when adjudicating. This is also true when it comes to international adjudication, where the symbolic meaning of a standard of proof may

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1 Addington v. Texas, 441 US 418 (1979), 60 L Ed. 2d 323, 99 S Ct 1804, pp. 424, 426.

reflect issues such as whether courts grant States a presumption of good faith. Some international courts explicitly assert the different standards of proof they use, but others do not. The latter describes the case of the Inter-American Court of Human Rights, whose practice in this regard is not particularly clear. This is unfortunate, since procedural rules of evidence are of paramount importance for the inter-American tribunal, a court which accepts and assesses evidence in most of the cases it analyzes. It does so not only for proving domestic laws and proceedings, but also for assessing directly the facts of a case. This approach is in contrast to that of the European Court, which tends to respect the fact-finding process undertaken by domestic courts, unless there are "cogent elements" for doing the opposite.[2]

The European Court assumes that ordinarily national adjudicators have a better chance to reach appropriate conclusions as a result of their investigatory activities. On the contrary, the Inter-American Court has no major issue with revising domestic fact-finding, despite the reality that national tribunals have higher compulsory powers for obliging the involved parties to cooperate with the procedures than the Inter-American Court, and that, in general, will be able to access evidence sooner after the facts occurred.[3] Different hypotheses may explain this stance towards domestic fact-finding, but it is not necessary to explain them in this paper. It is enough just to give, as an example of these reasons, the cases that often reach the Court due to an exception to the

2 Leach, P., C. Paraskeva and G. Uzelac, *International Human Rights & Fact-Finding. An Analysis of the Fact-Finding Missions Conducted by the European Commission and Court of Human Rights*. Human Rights & Social Justice Research Institute, London, 2009, p. 13. This latter tribunal has even stated that "it is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them." Edwards v. The United Kingdom (App. no. 13071/87) ECHR 16 December 1992, para. 34. According to Murray, the African Commission on Human and Peoples' Rights would adopt a stance similar to that of the European Court. Murray, R., "Evidence and Fact-finding by the African Commission", at *The African Charter on Human Rights and People's Rights*, 2. Cambridge University Press, Cambridge, 2008, pp. 163-164.

3 Certain types of evidence are potentially more accurate when gathered immediately after the facts, e.g. testimonial evidence or personal inspections undertaken by the judge.

rule of exhaustion of local remedies, in which the facts would not be settled by a domestic court.[4]

When assessing evidence, the European Court affirms that it "has generally applied the standard of proof 'beyond reasonable doubt'."[5] This international tribunal declares to apply this standard since Ireland v. the United Kingdom.[6] However, the European Court has made the caveat that this statement "should not be seen as referring to the Anglo-Saxon standard for criminal cases combined with the special rules of evidence prevailing there."[7] Indeed, this court states that "it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention."[8]

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4 This would be in contrast to what used to be the case in the European system, where "[o]nly rarely has the requirement of exhaustion of domestic remedies been waived on the grounds of futility or lack of availability." Fitzpatrick, J., "Human Rights Fact-Finding", at Anne F. Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century*. Kluwer Law International, The Hague-London-Boston, 2000, p. 69.

5 Enukidze and Girgvliani v. Georgia (App. No. 25091/07) Eur. Ct. H.R. (Apr. 26, 2011) para. 285.

6 Ireland v. The United Kingdom, 25 Eur. Ct. H.R. (Ser. A) para. 161 (1978). The use of this standard was originally stated by the European Commission in the Greek case (applications presented by the Governments of Denmark, Norway, Sweden, and The Netherlands against the Government of Greece). In it, the Commission defined that "[a] reasonable doubt means not a doubt based on a merely theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be given drawn from the facts presented." Greek case, 1969 Y.B. Eur. Convention on H.R. 196.

7 Frowein, J. A., "Fact-Finding by the European Commission of Human Rights", at Richard B. Lillich (ed.) *Fact-Finding Before International Tribunals*. Transnational Publishers, Inc., Ardsley-on-Hudson, New York, 1992 (Eleventh Sokol Colloquium), p. 248. See also Leach, P., C. Paraskeva and G. Uzelac, *International Human Rights & Fact-Finding...* p. 15.

8 Nachova and others v. Bulgaria (App. nos. 43577/98 & 43579/98) Eur. Ct. H.R. para. 147 (July 6, 2005). This judgment set an end to the criticisms arising from the use of a standard that in the Anglo-Saxon tradition is used for criminal proceedings, a fact which could have several readings. Kinsch, P., "On the Uncertainties Surrounding the Standard of Proof in Proceedings Before International Courts and Tribunals", at *Liber Fausto Pocar*, vol. I-Individual Rights and International Justice. Giuffrè Editore, Milan, 2009, pp. 435-436, last visited 19 July 2011, at http://ssrn.com/abstract=1777093. This approach of the Court was previously adopted by the late European Commission, despite its strict

In contrast to the European Court, the only explicit references of the inter-American tribunal to the standards of proof are due to a mistranslation in the English version of its jurisprudence.[9] This lack of reference to the standards of proof may occur because the Inter-American Court's case law is strongly influenced by the civil law tradition, where this notion is largely absent.[10] In fact, it is surprising that, despite the presence of an overwhelming majority of civil law judges, the European Court of Human Rights has a clearer standard of proof than that of the inter-American tribunal, where usually one of its seven permanent judges belongs to a common law country. However, it is probably no coincidence that the first case in which the European Court referred to its standard of proof was one in which two common law countries were involved.[11]

The object of this article will be to define whether the Inter-American Court implicitly utilizes any particular standard of proof. To do so, this paper will begin by clarifying this concept and explaining what is the general situation in civil law systems. However, before beginning this

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definition of the standard of beyond reasonable doubt. Indeed, the Commission "felt not bound by any formal standards of proof. It rather inferred from what had been stated by witnesses in the light of all the circumstances." Frowein, J. A., "Fact-Finding by the European Commission of Human Rights"... p. 247. The European Court stated in the case Jalloh v. Germany that it applied the standard of proof beyond reasonable doubt for proving violations of Article 3, but also asserted that it may use not only direct evidence for achieving this standard. It would also use evidence coming from the "coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact." Jalloh v. Germany, 2006-IX Eur. Ct. H.R. para. 67.

9 This issue will be analyzed in the next section of this paper. Not only do the founding documents of the Inter-American System state nothing regarding the standard of proof, but there are also no general principles of law recognized by civilized nations stating a particular rule in non-criminal standards of proof. Kinsch, P., "On the Uncertainties Surrounding the Standard of Proof in Proceedings Before International Courts and Tribunals"... pp. 428-432.

10 The relation between Civil Law systems and standards of proof will be dealt with in more detail later on this paper.

11 And therefore, in a court composed of seventeen judges there were two judges with a Common Law background - Mr. P. O'Donoghue and Sir Gerald Fitzmaurice. The first case in which this standard was set in the European system, the Greek case, there were also two judges of a Common Law background among the fifteen members of the Commission, Mr. P. O'Donoghue and J. E. S. Fawcett. Greek case, 1969 Y.B. Eur. Convention on H.R. 6.

analysis, it is important to give a brief overview of the Inter-American System of Human Rights, which was created within the context of the Organization of American States (OAS).[12] Its main human rights instruments are the 1948 American Declaration of the Rights and Duties of Man, and the 1969 American Convention on Human Rights.[13] The structure of the Inter-American System resembles to some extent the European System in its early years of existence, since there is a joint operation of a Commission and a Court of Human Rights.[14] The Inter-American Court was established by the American Convention as the competent organ for the protection of this treaty's wide catalogue of human rights. In its more than thirty year of existence it has issued around 140 final judgments dealing with an extensive range of matters. The fact that there is no direct individual access to the Court may explain this small number of final decisions.[15] People can only present their petitions to the Inter-American Commission, which after a quasi-judicial procedure will decide whether to present a case to the Court. Once a matter reaches the inter-American tribunal, the Commission will always "appear as a party before the Court."[16] Nevertheless, the alleged victim will have many powers in the presentation of pleadings, motions and evidence.[17]

12 For a description of this system see Faúndez Ledesma, H., *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects*, Charles Moyer trans. Instituto Interamericano de Derechos Humanos, San José, 2008, http://www.iidh.ed.cr/BibliotecaWeb/Varios/Documentos/BD_125911109/interamerican_protection_hr.pdf (last visited Feb 25, 2011).

13 American Declaration of the Rights and Duties of Man (1948), and American Convention of Human Rights [American Convention], 22 November, 1969, OAS T.S. No. 36, 1144 U.N.T.S. 123, both reprinted in Inter-American Court of Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System* (Updated to February 2011). Secretariat of the Inter-American Court of Human Rights, San José, 2011, pp. 19 and 29, respectively, last visited 30 Aug. 2001, at http://www.corteidh.or.cr/docs/libros/eng_docs2011.pdf. There are also other OAS documents and treaties referring to human rights. See *ibidem* at 77 ff.

14 The former is located in Washington D.C, and the latter in San José, Costa Rica.

15 Art. 44 of the American Convention.

16 Statute of the Inter-American Court of Human Rights, Art. 28.

17 Art. 24 of the Rules of Procedure of the Inter-American Court of Human Rights (San José, Costa Rica, approved Nov. 24, 2009, entered into force Jan. 1, 2010), reprinted in Inter-American Court of Human Rights, *Basic Documents*

1. Preliminary Issues

a. The Standard of Proof

i. The Standard of Proof in Common and Civil Law Systems

A standard of proof is a benchmark that specifies a minimum threshold of cogency that the evidence must reach in order to consider some hypothesis as proven.[18] Once this degree of cogency is reached, the – legal – burden of proof is discharged, and the party who bore this burden will be successful in his or her attempt to prove a particular fact.[19] "How much more cogent or convincing the evidence is required to be is determined by rules of law relating to the standard of proof."[20] These benchmarks will vary according to the nature of the dispute and to the jurisdiction in which they are applied.

The notion of a standard of proof is not frequently utilized by international adjudicators. This could be explained by this concept's common law origins, which is the reason why civil law systems do not, generally, make an explicit use of it either.[21] However, even though not explicitly stated, judges of both systems will apply a standard of proof. This is so because all judges will be faced at some point with evidence which is neither meagre nor conclusive, facing doubts when adjudicating. In this case judges will have to decide, according to the strength of their doubts, which party of the case they will favour. In other words, even if not explicitly announced, judges will always apply a standard of proof when addressing their doubts regarding the facts of

Pertaining to Human Rights in the Inter-American System... p. 196. Available at http://www.corteidh.or.cr/reglamento.cfm (last visited Feb. 25, 2011) [hereinafter IACtHR's Rules of Procedure].

18 Laudan, L., *Truth, Error, and Criminal Law: An Essay in Legal Epistemology*. Cambridge University Press, New York, 2006, p. 64, and Keane, A., *The Modern Law of Evidence*, fifth editioon. Butterworths, London-Edinburgh-Dublin, 2000, p. 90.

19 *Ibidem*, p. 73. When utilizing the expression "burden of proof", this work will refer to the obligation imposed on a party to prove a fact in issue.

20 *Ibidem*, p. 90.

21 Nevertheless, there are some exceptions to this rule, as it happens with some domestic statutes establishing a standard of proof, especially in criminal cases. E.g., a beyond reasonable doubt standard is established in *Código Procesal Penal* [Cód. Proc. Pen.] [Criminal Procedure Code] art. 9 (Costa Rica), and *Cód. Proc. Pen.* [Criminal Procedure Code] art. 340 (Chile).

a case (this assertion does not apply equally in cases where judges are not faced with a true-or-false case, such as in territorial disputes, where they may decide on a medium way).

Beyond reasonable doubt is the highest standard of proof in common law systems and is utilized in criminal cases.[22] This standard requires the evidence to be so strong against a party "as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable'."[23] In civil cases, courts will use a lower standard of proof called preponderance of evidence or proof in a balance of probabilities. This standard will just require evidence to show that it is more likely than not that a past event happened. In the United States there is also a standard between that of civil and of criminal cases. The name of this intermediate standard is not fixed, but it has been called the standard of clear and convincing evidence.[24]

The notion of the standard of proof is not equally developed in civil law systems.[25] Generally speaking, they have no clearly defined standard of proof. In these systems, "for criminal as well as civil cases, it is the conviction of the judge, based on the evidence submitted, which is decisive."[26] Some authors assert that this need for the inner conviction of the judge sets a uniquely high standard, closer to that of beyond

22 However, the civil law standard of preponderance of evidence will be used "where the accused bears a legal burden in criminal proceedings." McGrath, D., *Evidence*. Thomson Round Hall, Dublin, 2005, p. 16.

23 Keane, A., *The Modern Law of Evidence*... p. 92.

24 Addington v. Texas, 441 US 418 (1979), 60 L Ed. 2d 323, 99 S Ct 1804, p. 424, 431-433. This standard of proof was used in proceedings before the Eritrea-Ethiopia Claims Commission "where allegations of systematic and widespread violations of international law" were involved. Kinsch, P., "On the Uncertainties Surrounding the Standard of Proof in Proceedings Before International Courts and Tribunals"... p. 441.

25 At least in the law, since this issue has been addressed by continental legal scholarship. Taruffo, M., "Rethinking the Standards of Proof", *The American Journal of Comparative Law*, vol. 51, 2003, pp. 662-663.

26 Frowein, J. A., "Fact-Finding by the European Commission of Human Rights"... p. 248. Amerasinghe states that "[i]n civil law systems what matters in both civil and criminal cases seems to be the conviction of the judge, based on the evidence submitted." Amerasinghe, C. F., *Evidence in International Litigation*. Martinus Nijhoff Publishers, Leiden, The Netherlands, 2005, p. 233.

reasonable doubt.[27] However, Michele Taruffo contradicted this assertion and, assuming *gratia argumentandi* that civil law courts were to apply only one standard of proof, affirmed that their standard would be more similar to the lower standard of the preponderance of evidence.[28] If continental judges would expect to have a degree of conviction similar to that of beyond reasonable doubt when deciding civil matters, plaintiffs of complex matters would seldom dare to issue a lawsuit.

Ultimately, the main difference between Common and civil law judges regarding the standard of proof is that, while the former are given an explicit order to issue a judgment according to a previously determined standard of proof, the latter are allowed to set themselves the standard by which they will acquire an inner conviction. However, this leeway granted to civil law judges does not exist in criminal matters, where the principle *in dubio pro reo* ("when in doubt, favour the accused") has a similar effect as imposing the beyond reasonable doubt standard.[29] The existence of this principle also reflects that continental judges who are in reasonable doubt are allowed to decide civil cases in favour of the applicants, as long as the evidence shows that they are probably correct.[30] This counters the thesis that civil law judges adjudicate with a unique standard of beyond reasonable doubt.

ii. Provisional Measures and Lower Standards of Proof

Finally, it should be noted that the Inter-American Court's standard of proof may be different when considering provisional measures than when dealing with the merits of a case. This is so because the rationale that underlies both forms of adjudication are dissimilar. Preliminary measures are characterized by the requirement of immediacy. This

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27 See also Kokott, J., *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*. Kluwer Law International, The Hague-London-Boston, 1998, p. 201. She considers that Civil Law lawyers are "accustomed to a high standard of proof."

28 For the rebuttal see Taruffo, M., "Rethinking the Standards of Proof"... pp. 664-673. For Taruffo's assertion regarding the application of the lower standard of proof, *ibidem*, p. 666.

29 Damaška, M., "Evidentiary Barriers to Conviction", *University of Pennsylvania Law Review*, vol. 121, 1973, p. 541. An example of a Code where this principle is explicitly enshrined is in *Cód. Proc. Pen. de la Nación*, art. 3 (Argentina).

30 If they adjudicate against the evidence, their judgment could be arbitrary.

prevents the Court from analyzing in detail the merits of the issue presented before it, obliging it to adjudicate with a lower degree of certainty.[31] This is why the Inter-American Court asserts that the events which motivate the request for provisional measures "do not have to be fully proven," but that "a minimum degree of detail and information is necessary so as to allow the Court to assess *prima facie* a situation of extreme gravity and urgency."[32] This article will not deal with the Court's standard of proof when issuing provisional measures, even though it may incidentally refer to them as a way of illustrating some issue.

At this point it is important to note that there is no negative connotation whatsoever in asserting that a Court has a low standard of proof. Whether this is desirable depends on the nature of the decision at hand. For instance, it would be objectionable for a Court to have a low standard of proof when issuing a criminal conviction, but it would not be so if a Court is dealing with civil matters. Indeed, it should remembered that

> Raising a standard of proof will not reduce the number of erroneous decisions that fact finders will make, but it will allocate those erroneous decisions differently. For instance, if we believe that errors against the plaintiff are equal in societal cost to errors against the defendant, then we would set our standard of proof at 51 percent or a preponderance of evidence. [...] Thus, as Laudan and other scholars have observed, the only reason to set a legal standard of proof higher than a preponderance of the evidence is that we believe one sort of mistake is a worse, or more costly, mistake than another sort of mistake.[33]

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31 *Cf.*, Erdal, U., "Burden and Standard of Proof in Proceedings Under the European Convention", *European Law Review*, vol. 26 Supp. (Human Rights Survey 2001), 2001, p. 76. This author refers to the standard of proof applied by the European Court "to the establishment of future facts, such as the ones the Court has to establish within the context of interim measures under Rule 39 of the Rules of Court."

32 Matter of Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM regarding Brazil, Order of the Inter-Am. Ct. H. Rts. (July 4, 2006) para. 23, and also in Four Ngöbe Indigenous Communities and Their Members regarding the Republic of Panama, Order of the Inter-Am. Ct. H.R., (May 28, 2010) para. 11.

33 Combs, N. A., *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*. Cambridge University Press, New York, 2010, p. 345 (footnote omitted).

b. Misleading Translation

The Inter-American Court's first decision on the merits of a contentious case was that of Velásquez-Rodríguez v. Honduras. According to the official English version of this case, the tribunal of the Americas referred several times to the notion of the standard of proof.[34] This early statement has even been quoted in recent cases such as Vélez-Loor v. Panama,[35] and has influenced many authors who refer to the standards of proof of the Inter-American Court.[36] "However, the phraseology used in the English version should not be overevaluated."[37] Indeed, these references to the standard of proof in the Court's case law seem to be due to a mistranslation of the original Spanish version of the Velásquez-Rodríguez decision.[38] There are many reasons which could explain this inaccuracy, one of which is the inherent complexity

34 Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) paras.126-129.

35 Vélez-Loor v. Panama, Preliminary Objections, Merits, Reparations & Costs, Judgment, Inter-Am. Ct. H.R. (ser C) No. 218 (Nov. 23, 2010) para. 249.

36 E.g.: Shelton, D. L. "Judicial Review of State Actions by International Courts", *Fordham International Law Journal*, vol. 12, 1989, pp. 386-387.; Grossman,C., "Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation", *Hastings International & Comparative Law Review*, vol. 15, 1992, p. 372, note 47.; Erdal, U., "Burden and Standard of Proof in Proceedings Under the European Convention"... p. 74.; and Murray, R., "Evidence and Fact-finding by the African Commission"... p. 162.

37 Kokott, J., *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*... p. 201.

38 The following is a comparative table of both texts (emphases do not match the original):

Original Spanish Version (paras. 126-129)	Official English Version (paras. 126-129)
"126. [...] Si se puede demostrar que existió una práctica gubernamental de desapariciones en Honduras llevada a cabo por el Gobierno o al menos tolerada por él, y si la desaparición de Manfredo Velásquez se puede vincular con ella, las denuncias hechas por la Comisión habrían sido probadas ante la Corte, siempre y cuando los elementos de prueba aducidos en ambos puntos cumplan con los **criterios de valoración** requeridos en casos de este tipo.	"126. [...] If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of Manfredo Velásquez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the **standard of proof** required in cases such as this.

of translating legal concepts that have no clear and direct counterpart in a different judicial tradition.[39]

The official English version of the Velásquez-Rodríguez case uses the concept standard of proof for translating the Spanish phrase *criterios de valoración de la prueba*, which means criteria for evaluating evidence.[40]

"127. La Corte debe determinar cuáles han de ser los **criterios de valoración de las pruebas** aplicables en este caso. Ni la Convención ni el Estatuto de la Corte o su Reglamento tratan esta materia. Sin embargo, la jurisprudencia internacional ha sostenido la potestad de los tribunales para **evaluar libremente las pruebas**, aunque ha evitado siempre suministrar una rígida determinación del ***quantum*** **de prueba necesario para fundar el fallo** (cfr. Corfu Channel, Merits, Judgment I.C.J. Reports 1949; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, párrs. 29-30 y 59-60).	"127. The Court must determine what the **standards of proof** should be in the instant case. Neither the Convention, the Statute of the Court nor its Rules of Procedure speak to this matter. Nevertheless, international jurisprudence has recognized the power of the courts to **weigh the evidence freely**, although it has always avoided a rigid rule regarding the **amount of proof necessary to support the judgment** (Cfr. Corfu Channel, Merits, Judgment, I.C.J. Reports 1949; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, paras. 29-30 and 59-60).
"128. Para un tribunal internacional, los **criterios de valoración de la prueba** son menos formales que en los sistemas legales internos. En cuanto al **requerimiento de prueba**, esos mismos sistemas reconocen gradaciones diferentes que dependen de la naturaleza, carácter y gravedad del litigio.	"128. The **standards of proof** are less formal in an international legal proceeding that in a domestic one. The latter recognize different **burdens of proof**, depending upon the nature, character and seriousness of the case.
"129. La Corte no puede ignorar la gravedad especial que tiene la atribución a un Estado Parte en la Convención del cargo de haber ejecutado o tolerado en su territorio una práctica de desapariciones. Ello obliga a la Corte a aplicar una **valoración de la prueba** que tenga en cuenta este extremo y que, sin perjuicio de lo ya dicho, sea capaz de crear la **convicción de la verdad de los hechos alegados**."	"129. The Court cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court to apply a **standard of proof** which considers the seriousness of the charge and which, notwithstanding what has already been said, is capable of **establishing the truth of the allegations in a convincing manner**."

39 Another reason could be that twenty five years ago the comparative analyses of concepts such as the standard of proof were not as developed as they are now, so there may have been no widely accepted Spanish term for referring to this notion.

40 The three first paragraphs (126-128) use this exact expression, whereas the fourth (129) refers to *valoración de la prueba*, which means evaluation of evidence. The real meaning of this concept can be noticed in the translation of the separate opinion of Judges García-Ramírez and García-Sayán in the Kawas case, where the expression *"criterios de admisión y valoración de pruebas"* is translated as "criteria for the admission and assessing of evidence." Separate opinion of Judge García-Ramírez in the case Kawas Fernández v. Honduras, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 196 (Apr. 3, 2009) para. 5.

This latter expression seems to refer to the broader notion of evidence assessment, which would include concepts such as the "weight of the evidence,"[41] the "burdens of proof,"[42] and the "amount of proof necessary to support the judgment."[43] If the decision's reference to the "standard of proof" is read in this light, some of the Court's assertions are easier to understand or will be more accurate. For instance, it will be the criteria for evaluating evidence in general, not the standards of proof, which are "less formal in an international legal proceeding that [sic] in a domestic one."[44]

The paragraphs referring to the criteria for evaluating evidence are the Court's response to the Commission's proposal of using "circumstantial or indirect evidence" or "logical inference" for proving a case of forced disappearance.[45] The answer contained in these paragraphs is related with the standard of proof, since a broad understanding of the concept of evaluation of evidence would encompass several evidentiary notions, including the standard of proof. Thus, the expression criteria for evaluating evidence cannot be understood as referring straightforwardly to the standard of proof, but cannot be dismissed as unrelated to it.

The abovementioned paragraphs are relevant to the study of the standard of proof because they contain two other expressions that could be understood to refer to this concept, even though they are not translated as such. The first is "amount of proof necessary to support the judgment."[46] The second is "*requerimiento de prueba*," which is

41 This concept is referred to in Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) para. 127.

42 Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) para. 128. However, this also seems to be an improper translation, since the Spanish version refers to *requerimiento de prueba* (requirements of evidence), whereas the Spanish for burden of proof is *carga de la prueba* or *onus probandi*.

43 This latter concept is probably the most similar to the actual standard of proof. Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) para. 127.

44 *Ibidem*, para. 128.

45 *Ibidem*, para. 124.

46 *Ibidem*, para. 127. This expression seems to refer to the material quantity of evidence that is required for deciding a case, not to the judge's level of

mistranslated as "burdens of proof," but literally means "the evidence that is required."[47] If these two concepts are translated as "standards of proof," the resulting wording would seem very fitting, since the Court would be affirming that international tribunals have "always avoided a rigid rule regarding" the standard of proof, and that in domestic proceedings there are different standards of proof "depending upon the nature, character and seriousness of the case."

2. Absence of a Unique Standard in the Inter-American Court's Case Law

There are many issues related to the standard of proof, but this paper can only address those that appear to be particularly relevant, as the varying standards of proof applied by the Court; some practices of the Inter-American Court that may be confused with a low standard of proof; the standard for determining certain generalized violations; and the standard for proving irrelevant facts. Since the Inter-American Court of human rights has no general and explicit standard of proof, much of this analysis needs to be carried out on a case-by-case basis.

The Court's description of most of the evidence used for proving facts provides the reader with a very important tool for performing this case-by-case study.[48] Thus, this descriptive practice of the Inter-

conviction. However, it could be understood as an imperfect way of referring to the Anglo-Saxon concept of the standard of proof.

47 Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) para. 128. As was already said, Hispanic scholars use the expressions *carga de la prueba* or *onus probandi* to refer to the burden of proof. The Spanish expression *requerimiento de prueba* usually refers to a court's request to one of the parties to present a particular evidence (e.g., see the Spanish version of Miguel Castro-Castro Prison v. Peru (the), Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160 (Nov. 25, 2006) para. 81). However, this concept can also mean "evidence that is required," that is, the "amount of proof necessary to support the judgment." For an example of an author who uses this Spanish concept to refer to the standard of proof see: Borja Niño, M. A., *La prueba en el derecho colombiano*, second edition. Editorial UNAB, Bucaramanga, Colombia, 2003, p. 51. The fact that the "requirement of evidence" would allow different *gradaciones* (degrees) is another argument for showing that this concept refers of the standard of proof.

48 This is particularly the case when the webpage of the Inter-American Court provides the reader with copies of the relevant documents of the file. This

American tribunal is worthy of much praise. However, regardless of how exhaustive this account may be, it will never be possible to disclose all the subtleties of the evidence in a single judgment; but this does not prevent evidentiary analyses of the Court's proceedings from being accurate when recognizing general trends.

a. No Clear and Explicitly Stated Standard of Proof

As has been stated previously, the Inter-American Court makes no explicit statement about following a particular standard of proof. However, the Court implicitly rejects the beyond reasonable doubt standard[49] and understands that it can arrive at decisions which "would not hold under criminal law."[50] The reason for doing so is related to the ends of the procedures brought before the Inter-American System, since "[t]he objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible."[51] The foregoing does not mean that the

information appears in the majority of cases, but only until the year 2008. See: <http://corteidh.or.cr/casos.cfm>. Similarly, the Court's practice of uploading the videos of its public hearings is an important act of transparency.

49 Buergenthal, T., "Judicial Fact-finding: Inter-American Human Rights Court", at Lillich, Richard B. (ed.), *Fact-Finding Before International Tribunals*. Transnational Publishers, Inc., Ardsley-on-Hudson, New York, 1992 (Eleventh Sokol Colloquium), pp. 271-272. *Cf.* with Kokott, who considers that "the Inter-American Court's failure to expressly require 'evidence beyond reasonable doubt' may be caused by the influence of civil lawyers who are accustomed to a high standard of proof." Kokott, J., *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*... p. 201.

50 Godínez-Cruz v. Honduras (Merits) Inter-Am. Ct. H.R., (Ser. C) No. 5 (20 January 1989) para. 144.

51 Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988) para. 134. Godínez-Cruz v. Honduras (Merits) Inter-Am. Ct. H.R. (Ser. C) No. 5 (Jan. 20, 1989) para. 140. "The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action." *Ibidem*. "It is important to bear in mind that the standard of proof 'beyond reasonable doubt' has its origin in the context of common law criminal procedure. There the object is to punish an individual for a criminal offence, using an adversarial procedure in which the liberty of the accused must be protected by applying rigid standards of proof." Loucaides, L. G., *Essays on the Developing Law of Human Rights, Martinus Nijhoff Publishers*. Dordrecht / London / Boston, 1995,

inter-American tribunal has never applied the beyond reasonable doubt standard, as will be shown regarding the Gangaram-Panday case. The non-criminal nature of the Court also explains that the Court is not obliged to apply the principle *in dubio pro reo*.[52]

The Court asserts its freedom for determining the "amount" or "quantum" of evidence necessary for deciding an issue.[53] Apparently the Court makes this statement following international case law, which "has always avoided a rigid rule regarding the amount of proof necessary to support the judgment."[54] Indeed, international tribunals "have usually not discussed in detail the matter or the standard of proof to be applied to the evaluated evidence and have not clearly explained the underlying standard they have applied in their decisions."[55] The explicit statement made by the European Court of Human rights – besides being less straightforward than what it appears to be at a first glance – is an exception among international tribunals.

The lack of a clear, explicit and previously stated standard of proof does not mean that judges do not use one when adjudicating. First, this concept of standard of proof will be in the mindset of the judges who come from a common law background – in the Inter-American Court there is usually one of them. Secondly, even adjudicators from a civil law background will apply a standard of proof, at least tacitly. This is so because these judges will have to determine how to decide a case in which there is more evidence supporting one of the parties, but in

p. 160. Nevertheless, the standard of proof beyond reasonable doubt is not used only by criminal tribunals. See, for instance, Gattini, A., "Evidentiary Issues in the ICJ's Genocide Judgment", *Journal of International Criminal Justice*, vol. 5, 2007, p. 903.

52 Fix-Zamudio, H., "Orden y valoración de las pruebas en la función contenciosa de la Corte Interamericana de Derechos Humanos", at *Memoria del Seminario: El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI*, vol. I. Corte Interamericana de Derechos Humanos, San José, 2003, p. 211.

53 E.g.: Sawhoyamaxa Indigenous Community v. Paraguay (the), Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 146 (Mar. 29, 2006) para. 32.

54 Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988) para. 127.

55 Amerasinghe, C. F., *Evidence in International Litigation*... p. 232.

which there are nevertheless reasonable doubts about the veracity of its position. Judges will have to decide whether these reasonable doubts will make them adjudicate against the party who presents a probable case. Indeed, there are a few separate opinions referring to the standard of proof, even though not using this nomenclature.[56]

Likewise, it should be elucidated whether the Court of the Americas, a collegiate body, has a general requirement of persuasion or whether each judge operates according to his or her own mindset. Part of this issue can be grasped in Judge García-Ramirez's separate opinion in Kawas-Fernández v. Honduras, to which Judge García-Sayán adhered. They seem to state there – following the civil law tradition – that judges adjudicate according to their inner conviction, which is "a strictly personal matter."[57] These judges' opinion also addresses other issues related to the standard of proof. They affirm that adjudicators "find it necessary to address the doubts, which will naturally arise in the course of the examination,"[58] by analyzing the evidence.[59] When doing so it is enough for the evidence to be "sufficient," because the Court does not adjudicate on criminal matters.[60] When speaking about "sufficient" evidence, Judges García-Ramírez and García-Sayán seem to allude to a standard of proof, a threshold (an "– often imprecise and elusive

56 See, Dissenting opinion of Judge Montiel Argüello in Serrano-Cruz Sisters v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 120 (March 1, 2005) para. 7, and Dissenting opinion of Judge A. A. Cançado Trindade in "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 112 (Sept. 2, 2004) para. 20. Judge Nieto-Navia implicitly refers to the standard of proof utilized by the Court in a particular decision. Dissenting opinion of Judge Nieto Navia in Caballero-Delgado and Santana v. Colombia, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 22 (Dec. 8, 1995), paras. 1-3 (these paras. are not enumerated).

57 Separate opinion of Judge García-Ramírez in the case Kawas Fernández v. Honduras, Merits, Reparations & Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 196 (Apr. 3, 2009) para. 9.

58 *Ibidem*, para. 7.

59 *Ibidem*, para. 8.

60 *Ibidem*. The English version of this paragraph 8 is particularly difficult to understand. This is so because the Spanish words *convicción* (conviction or persuasion) and *condena* (conviction or guilty verdict) are translated by the word *conviction*.

– line") which evidence or data must reach.[61] However, this statement says nothing about the degree of cogency required for evidence to be "sufficient" for proving an issue, which seems to leave the whole matter in the realm of the judges' inner conviction, considered as a "strictly personal matter."

Since the Inter-American Court has no explicit standard of proof, each judge may adjudicate according to the personal standard of proof that he or she has set according to his or her conscience. Nevertheless, the individual standard of proof applied by each judge for reaching his or her conviction of the facts may be shared by the majority of judges, revealing some explicit or tacit agreement of the Court's members. Thus, it may be possible to find an implicit degree of certainty required by the inter-American tribunal as a whole for considering certain facts as proved. This article will try to find out whether the Court has or has had such a tacit or explicit agreement.

In the search for the Inter-American Court of Human Rights' standard of proof it is useful to quote Ramcharan, who considers that, in the absence of explicit rules in their constitutive instruments, fact-finding bodies usually use the balance of probability standard. He defines this standard as "an evaluation of the likelihood of a past event having happened, given the facts and assumptions expected or adopted for the purposes of the evaluation."[62] This standard is the same that common law courts apply for most of the civil matters, and it is considered to be a low standard of proof. Ramcharan also states that "in adversarial contexts, the standard 'beyond all reasonable doubt' may be applied."[63] This latter assertion is not applicable to the Inter-American System, since the Court rejects the use of such a strict standard.

Some scholars have dealt with the standard of proof of the Inter-American Court in particular. For example, referring to the Honduran

61 *Ibidem*.

62 Ramcharan, B. G., "Evidence", at *International Law and Fact Finding in the Field of Human Rights*. Martinus Nijhoff Publishers, The Hague-Boston-London, 1982, p. 80.

63 *Ibidem*.

Disappearance cases,[64] Buergenthal affirms that "[a]lthough stricter than a test that looks for a preponderance of evidence, the Court's test is weaker than one which requires that the evidence establish the facts beyond a reasonable doubt."[65] Amerasinghe points out that the Velásquez-Rodríguez case would reflect a standard of proof as that of the International Court of Justice (ICJ), in which "evidence need not point to absolute certainty as such but must be convincing."[66] He calls this standard "proof in a convincing manner."[67] Shelton considers that the standard utilized by the Court in the Velásquez-Rodríguez case is the "clear and convincing" standard, this middle ground utilized in some cases by courts of the United States.[68] Murray asserts that the inter-American bodies – the Commission and the Court – "have referred to standards of 'convincing proof', a 'tend[ency] to show', or even 'absolute certainty'."[69] Bovino considers that "[t]he litigious

64 That is: Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988) para. 134, Fairén-Garbi & Solís-Corrales v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 6 (15 March 1989), and Godínez-Cruz v. Honduras, Merits, Judgment, Inter-am. Ct. H.R. (Ser. C) No. 5 (Jan. 20, 1989).

65 T. Buergenthal, "Judicial Fact-finding: Inter-American Human Rights Court"... pp. 271-272.

66 Amerasinghe, C. F., *Evidence in International Litigation*... p. 241.

67 *Ibidem*, p. 239. This name is taken out of the mistranslation of the Velásquez-Rodríguez case. Kinsch also refers to a standard of "convincing evidence," but, following Kokott, considers that this standard is less clear if the Spanish version is taken into consideration. Kinsch, P., "On the Uncertainties Surrounding the Standard of Proof in Proceedings Before International Courts and Tribunals"... pp. 437-438.

68 Shelton, D. L., "Judicial Review of State Actions by International Courts"... p. 386. This is also stated by Gattini, A., "Evidentiary Issues in the ICJ's Genocide Judgment"... p. 895. Kokkot casts out doubts on the Inter-American Court's application of the clear and convincing evidence standard. Kokott, J., *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*... pp. 201-202.

69 Murray, R., "Evidence and Fact-finding by the African Commission"... p. 161. Murray quotes the following cases supporting each of the expressions quoted: Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988) para. 10, referring to the standard applied by the Commission; Godínez-Cruz v. Honduras, Merits, Judgment, Inter-am. Ct. H.R. (Ser. C) No. 5 (Jan. 20, 1989) para. 125; and *ibidem* para. 11. However, the latter is not really an assertion of the Court or the Commission, but of the Government involved in the case.

procedure before the Inter-American Court is characterized by an evidence standard that is not very demanding when it comes to showing the international responsibility of the state petitioned."[70] Some of these authors have concluded, based on the Velásquez-Rodríguez case, that the inter-American tribunal's standard may vary depending on the right allegedly violated, but it is not clear whether the Court really intended to assert this explicitly.[71]

This paper agrees with many of the foregoing assertions. However, since the Court has no explicit rules regarding a standard of proof, its decisions will probably depend on what the different judges consider an appropriate threshold. Therefore, what the Court decides in a given moment will depend not only on the issue being analyzed, but also on the specific conformation of the inter-American tribunal. This means that the Court will be almost bound to utilize different standards of proof – which may raise questions about the value of precedents in the Inter-American System. Thus, the best way of analyzing this matter will be on a case-by-case basis, which can lead to due identification of a general trend in the jurisprudence of the Inter-American Court.

b. First Approach to the Court's Standard of Proof

i. Factors that Blur the Standard of Proof

The inherent difference between cases is not the only factor which makes daunting the task of analyzing the inter-American tribunal's standard of proof in conditions of all-things-being-equal. The Court's high use of strong presumptions against the State and its differing understandings of the content of certain rights are other factors affecting this analysis. At times, these issues have the effect of making the standard of proof of the Court seem lower.

Presumptions are an evidentiary concept distinct from that of standards of proof. However, they can have similar effects on a case,

70 Bovino, A., "Evidential Issues Before the Inter-American Court of Human Rights", *Sur - International Journal on Human Rights*, vol. 2, 3, 2005, p. 79.

71 Shelton, D. L., "Judicial Review of State Actions by International Courts"... p. 386.; Buergenthal, T., "Judicial Fact-finding: Inter-American Human Rights Court"... p. 272.; and Murray, R., "Evidence and Fact-finding by the African Commission"... p. 162.

since they may relieve a party from having to prove an issue requiring a high standard of proof. This happens because the facts on which presumptions are based may be proven easily or with a low standard of proof, but they may, nevertheless, make the court presume the existence of a situation which otherwise would have required a high standard of proof. Consequently, it could be said that presumptions have the indirect effect of lowering the standard of proof or of circumventing in practice the standard of proof set by the judges themselves. Therefore, international courts should be wary when utilizing them, so as to avoid giving the impression of lack of impartiality.

The application of presumptions is justified when, in practice, only one of the parties can shed light on certain issues, but will improbably do so.[72] Presumptions in the Inter-American Court are almost always applied against the State, and are usually difficult to rebut. This use of strong presumptions against the State, which are often justified, may wrongly create in the reader the impression that the Court applies a standard of possibility for proving certain facts.[73] However, this impression would not be accurate, since the Court would be establishing presumptions, not setting a lower standard of proof, even though they may have a similar effect in practice.

Another fact that makes it difficult to analyze the standard of proof of the Court in an all-things-being-equal situation is the changing or unclear content of certain rights. At times this may be due to the Court's evolutive interpretation of the Convention, or to an expression of the Court's freedom to depart from what was established in previous decisions. An example of an unclear delimitation of the content of a right can be found in the early years of the Court with regard to the right to humane treatment. In the Velásquez-Rodríguez v. Honduras

72 There are also other reasons justifying the use of presumptions, e.g., concerns of public policy.

73 This could happen, for instance, if the Court asserts that a person who has been for one hour under the custody of his or her kidnappers has presumably been subject to cruel, inhuman and degrading treatment, holding the State responsible for that violation. Likewise, it could also happen when the Court applies Article 41(3) of the Rules of the Court, which establishes the presumption of the State's acceptance of the facts which have not been expressly denied or contested.

case, about the forced disappearance of a student, the Court asserted that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment," a violation of Article 5 of the Convention.[74] This statement reveals that the Court considered forced disappearances to entail a violation of the right to humane treatment. However, in Caballero-Delgado and Santana v. Colombia, a case in which the victims had been disappeared for more than six years, the inter-American tribunal considered that torture or inhuman or degrading treatment had not been proven.[75]

In these two cases it could seem that the Inter-American Court modified its standard of proof. However, this is not so, since no inhuman treatment was directly proven in the Velásquez case. Likewise, the wording of the final decision of this case does not reveal the application of presumptions either. It simply appears that the Inter-American Court considered in the first case that forced disappearances involved several violations of the Convention, among which were acts of inhuman treatment, but that it subsequently changed its understanding temporarily.

ii. Differing Standards of Proof

As a result of the Inter-American Court's lack of a defined standard of proof, this tribunal applies dissimilar thresholds in different cases. They range from low standards to what could be considered a beyond reasonable doubt standard in some isolated cases, despite the Court's explicit rejection of this latter threshold. The Court generally applies a standard of preponderance of evidence, as will be set forth later in this

74 Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988) para. 156. See also *ibidem* para. 187.

75 Caballero-Delgado and Santana v. Colombia, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 22 (Dec. 8, 1995) para. 53 f. Similarly, in the Castillo-Páez v. Peru case, also about forced disappearance, the Court found a violation of Article 5 only because, "even if no other physical or other maltreatment occurred, [the action of placing the victim in the trunk of an official vehicle] alone must be clearly considered to contravene the respect due to the inherent dignity of the human person." This reveals that the Court did not consider forced disappearance to constitute a cruel, inhuman or degrading treatment on its own. Castillo-Páez v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 44 (Nov. 3, 1997) para. 66.

article. Thus, this section will show the Court's changing standard of proof by referring only to a case where the Court departed from the standard of preponderance of evidence, applying a threshold of beyond reasonable doubt. This section will also refer to the Court's minimal standard for referring to facts which are accessory to the main issue, and irrelevant as a whole.

In Gangaram-Panday v. Suriname[76] the victim was a Surinamese national who was deported from Holland and sent back to his country of origin. At the airport he "was detained by members of the Military Police, on the grounds that the reasons for his expulsion from Holland warranted further investigation, and […] he was then placed in a cell within a shelter for deportees located in the Military Brigade at Zanderij."[77] Mr. Gangaram-Panday died in detention in uncertain circumstances, allegedly by hanging himself.

In this case the Commission alleged many violations, among which were State obligations regarding the rights to life, to humane treatment and personal freedom. The Court declared as proven the State's violation of the latter obligation, but not of the previous ones. The Inter-American Commission furnished the Court with different evidence regarding the alleged torture during the victim's detention.[78] Among this evidence was a forensic autopsy report referring to the existence of a simple contusion in the pre-pubic tissue and extravasations of the left and right parts of the scrotum of the victim, whose hemorrhage occurred shortly before death, and could have been occasioned by blows in the pubic area.[79] The Court was also presented with an analysis of photographical material showing a small flayed area in the scapular region, which could have been related with the process of committing suicide.[80]

The Inter-American Court explicitly accepts circumstantial evidence for proving human rights violations. However, despite this kind of

76 Gangaram-Panday v. Suriname, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 16 (Jan. 21, 1994).

77 *Ibidem*, para. 43 b.

78 *Ibidem*, para. 42 b.

79 *Ibidem*, paras. 53, 54 and 55.

80 *Ibidem*, para. 55 c.

evidence presented in the Gangaram case, the Court considered that "no conclusive or convincing indications result from the evaluation thereof that would enable it to establish the truth of the charge that Mr. Asok Gangaram Panday was subjected to torture during his detention by the Military Police of Suriname."[81] It also asserted that, contrary to what the Commission requested, in this case there was no presumption stating that the right to humane treatment was violated.[82]

This decision of the Court reflects a high standard of proof, probably of beyond reasonable doubt as applied in domestic forums. Indeed, the evidence suggested that a man under the custody of the State – and apparently in solitary confinement –[83] received blows to his testicles. This would seem enough for proving under a standard of probability, or even of clear and convincing evidence, that this detainee was subject to inhuman treatment of which the State should be held responsible. The high standard of proof used in Gangaram may be explained because this was a case of an isolated human rights violation, so the Court was not able to apply a form of probabilistic reasoning – which will be explained later in this paper. Interestingly enough, no judicial presumptions were used in order to evade this high standard of proof, and none of the three dissenting opinions say anything in relation to a violation of the right to humane treatment.

The Inter-American Court has also utilized a particularly low threshold for asserting some facts which are often irrelevant to the main dispute of a case. This minimal standard of proof could even be called a standard of possibility.[84] This standard was usually applied to

81 *Ibidem*, para. 56.

82 *Ibidem*.

83 The Court stated that one of the things that had to be proven was "[t]he alleged illegal and arbitrary detention of the victim by the Military Police of Suriname upon his arrival from Holland at the Zanderij Airport on Saturday, November 5, 1988, where he was reportedly held in **solitary** confinement in a special area reserved for deportees" (emphasis added). *Ibidem*, para. 56. However, when referring to the proven facts, the Court only stated that Mr. Gangaram Panday was placed in a cell, without mentioning whether he was alone in it. *Ibidem,* para. 43 b.

84 Amerasinghe asserts that when evidence shows that a claim is only possible, this would always result in a conclusion that "the actor has not discharged his burden of proof." Amerasinghe, C. F., *Evidence in International Litigation*... p. 245.

facts which were anecdotal or had only a slight relevance to the case. Therefore, the statement of these facts could have well been omitted in the judgment. This does not mean that the facts proved with this minimal standard were irrelevant in absolute terms, since they will be related to important issues – e.g., whether the alleged victim was involved in drug trafficking. However, they were not relevant for the determination of a violation.

The Court's use of a minimal standard could be explained by this tribunal's attempt to settle as many facts as possible – probably for giving a more colourful account of the facts. Indeed, a court cannot prove every one of a vast amount of facts with the same standard of proof as the main issue of a controversy. Often the facts asserted with this minimal standard were proven by unsuitable evidence,[85] or were due to giving excessive weight to the account of some witnesses or victims whose view of the facts may be distorted. The inaccuracy of these accounts may have been either voluntary, as would happen when the witness had an interest in the case or wishes to maintain his or her honour,[86] or involuntary, due to the frailty of human memory or because

85 E.g., in Palamara-Iribarne v. Chile the Court asserted under the heading "proven facts" that "there is a Navy member in most families living in Viña del Mar," one of the main cities in Chile. Palamara-Iribarne v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 135 (Nov. 22, 2005) para. 63(111). The author of this paper considers the Court's assertion to be doubtful. However, this article does not intend to analyze the accuracy of the Court's statement, but merely to assert that it was not proven by the adequate means. An assertion like this should be based on statistics or data, but in this case it was supported only by witness evidence – and most probably only on the declaration of the alleged victim (the whole paragraph where this assertion is stated is based on the testimonies of several witnesses, but the assertion about Viña del Mar appears to be solely in the declaration of Humberto Palamara). *Ibidem*, para. 54 a) 1.

86 E.g., in Tibi v. Ecuador the Court stated that the petitioner met a man called Eduardo García – who was involved in a drug dealing operation – because of a business of exporting leather jackets (Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 114 (Sept. 7, 2004) paras. 90.8 and 90.15). This paper only wishes to point out that there was not enough evidence for asserting that Tibi met García because of a leather jackets business, an issue which was not even relevant for deciding the case. In fact, were the Court to omit the manner in which the petitioner and García met, it could have still found the exact same violations it actually declared against the State. Even more so, the whole issue of evidence could have

of the effect that strong emotions may have in the witnesses' perception of reality.[87]

The main problem arising from the use of this minimal standard for proving irrelevant facts is that the Court may end up asserting inaccurate facts, undermining its own credibility. Every court is bound to make mistakes when deciding a case, even when dealing with important facts. However, if an adjudicator makes assertions based on weak evidence, about issues which do not need to be addressed, it would be this very court which freely and unnecessarily places itself in a position that threatens its own credibility. However, the Court has improved greatly in this matter, making less irrelevant statements based on a minimal standard of proof. Probably this progress is related with the Court's departure from the practice of devoting a separate chapter of its judgments for giving an account of the proven facts. Currently the relevant proven facts are referred to in the chapters where the Court analyzes the alleged violations to the Convention. This may help to focus on the facts which are relevant for proving a particular violation.

iii. The General Rule: A Standard of Preponderance of Evidence

As it was previously stated, there is nothing intrinsically wrong in a Court deciding to use a low standard of proof. This only reflects the adjudicator's beliefs regarding the cost of errors when judging. Thus,

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been circumvented by just saying that "according to the petitioner," Tibi and García met because of a business of exporting leather jackets.

87 E.g., in the Rochela Massacre case the Court stated that, after the members of a Colombian judicial commission were left by their captors in some vehicles, the paramilitaries "began to shoot indiscriminately and continuously at the members of the Judicial Commission for **several minutes**." Rochela Massacre v. Colombia (the), Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 163 (May 11, 2007) para. 112 (no emphasis in the original). The core of this sentence is undoubtedly true, but the accessory "proven fact" of the length of the shooting was neither necessary for the determination of the Convention's violation, nor conveniently proven. It was not necessary because what was relevant for the case was the existence of the massacre, not the length of the shooting. It was not adequately proven because – even though the shooting may have lasted for several minutes – the Court's assertion was based only on the declaration of a surviving victim, for whom the terrible anguish of being under fire could have seemed endless.

if a court considers that errors against either party are equally costly, it will set a low threshold, that is a "standard of proof at 51 percent or a preponderance of the evidence."[88] On the contrary, a high standard is set in criminal proceedings because it is usually considered that the societal cost of a wrong acquittal is lower than the cost of a wrong conviction for the accused. In the case of the Inter-American Court, there are important grounds for endorsing both a standard on a preponderance of evidence or a higher one.

On this point, there are two interesting separate opinions to the Court's judgments. They refer to the standard of proof beyond reasonable doubt. One is of Judge Alejandro Montiel Argüello, who stated in the Serrano case that

> [t]he Court has never ruled on the precise degree of certainty needed to declare that the State is responsible for a human rights violation. Nevertheless, in all the Court's case law there is not one single case in which it has made this declaration when there has been a reasonable doubt about such responsibility and, in my opinion, there is more than a reasonable doubt in the instant case.[89]

Another one is from Judge Antônio A. Cançado Trindade in the "Juvenile Reeducation Institute" v. Paraguay case, who considers that some points "were proven beyond any reasonable doubt," notwithstanding which the Court demanded more information from the petitioners.[90]

These opinions make it seem as if the Court usually requires a high standard of proof. However, this paper considers that the Inter-American Court generally adopts a low standard of proof, one of preponderance

88 Combs, N. A., *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*... p. 345.

89 Dissenting opinion of Judge Montiel Argüello in Serrano-Cruz Sisters v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 120 (Mar. 1, 2005) para. 7.

90 Dissenting opinion of Judge A. A. Cançado Trindade in "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 112 (Sept. 2, 2004) para. 20. In this paragraph Judge Cançado also refers to the burden of proof, which he considers that is incorrectly placed, constituting an obstacle too difficult to surpass.

of evidence.[91] This standard, when applied together with other juridical concepts utilized by the Court – e.g. presumptions, probabilistic reasoning, burden of proof –, may at times seem even lower. On occasions, the standard required will seem to be in the outer edges of the threshold required by the standard of preponderance of evidence.

The general rule regarding standard of proof of the Inter-American Court can be exemplified with that used for proving cruel, inhuman and degrading treatment in 19 Tradesmen v. Colombia. This case dealt with nineteen men who were intercepted and killed by the so-called paramilitaries. After the victims' deaths, their captors dismembered their bodies and threw them into a river.[92] When the Court analyzed the issue of cruel, inhuman or degrading treatment, it considered it

> […] reasonable to infer that the treatment the alleged victims received during the hours before their death was extremely violent, particularly if it is considered that the "paramilitary" group believed that the tradesmen collaborated with the guerrilla groups. The brutality with which the bodies of the tradesmen were treated after their execution permits us to infer that the way in which they were treated while they were alive was also extremely violent, so that they could fear and foresee that they would be deprived of their lives arbitrarily and violently, which constituted cruel, inhuman and degrading treatment.[93]

In this case the Court used the low standard of preponderance of evidence, since it infers from the particularly vicious way in which the bodies were disposed that the 19 tradesmen were treated in a similar way when they were alive. This inference is weak, since the motives for disposing of the bodies in such a brutal fashion could be due to the criminals attempt to conceal their heinous act, not necessarily as a reflection of the treatment they gave their victims while still alive. Probably the Court used a low standard of proof because this case was framed in the context of gross and systematic human rights violations,

91 Bovino asserts that "[t]he litigious procedure before the Inter-American Court is characterized by an evidence standard that is not very demanding when it comes to showing the international responsibility of the state petitioned." Bovino, A., "Evidential Issues Before the Inter-American Court of Human Rights"... p. 79.

92 19 Tradesmen v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 109 (July 5, 2004) paras. 85 f. and 85 h.

93 *Ibidem*, para. 150.

and perhaps these cruel, inhuman and degrading treatments were usual. The Court may have used its probabilistic reasoning based on presumptions. However, it makes no declaration in this regard.

3. Probabilistic Reasoning and Standards for Proving Widespread Violations

a. Probabilistic Reasoning for Proving Human Rights Violations

i. General Issues

In some cases of widespread human rights abuses the Inter-American Court utilizes what could be called a probabilistic reasoning for proving human rights violations. This method involves the use of presumptions for declaring individual violations of the Convention in cases where it is practically impossible to obtain evidence. Probabilistic reasoning is especially useful when there is an attempt of the State to cover or destroy the relevant evidence. This reasoning requires proving two basic facts: a) the existence of a widespread violation of human rights, which is proven through a process akin to induction,[94] and b) a link between this generalized practice and the case of an alleged victim of a human rights violation.[95] If these two evidentiary requirements are provided, the Court

94 When dealing with a violation that allegedly occurred within the context of widespread human rights abuses, the Court will first determine whether there was such a practice. For doing so, it will analyze some cases of human rights violations that occurred at a particular time and place. For instance, the Court may consider to be proven that many people who were politically active were made disappear by a given regime (finding, thus, a tendency). Hence, the Court may conclude that "most politically involved people who disappeared were abducted by the State." The Court cannot, however, reach a general conclusion of the kind of "all politically involved people who disappeared were abducted by the State," because there are other imaginable ways in which these persons could have disappeared. Ruiz Chiriboga considers that this reasoning involves a process of induction. He also gives the example of two cases where induction was apparently argued by the parties, one successfully (Velásquez-Rodríguez v. Honduras) and one unsuccessfully (Apitz-Barbiera et al. v. Venezuela). Ruiz Chiriboga, O., "La valoración de la prueba de la Corte Interamericana de Derechos Humanos. El caso Apitz Barbera y otros vs. Venezuela", *Anuario Mexicano de Derecho Internacional*, vol. X, 2010, pp. 157-159.

95 These two basic facts are implied in a statement of the Court in "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations

will engage in an analysis similar to deductive reasoning.[96] As a result, the Court will shift the *onus probandi*, requiring the State to prove that there was no human rights violation.[97] This procedure will only establish a rebuttable presumption regarding the alleged human rights violation.[98]

The Court's probabilistic reasoning has been useful in cases where the very nature of a violation reveals an intention to hide evidence, as happens in allegations of forced disappearances. This can be exemplified with the first decisions on the merits issued by the inter-American tribunal: the cases of Velásquez-Rodríguez v. Honduras, Godínez-Cruz v. Honduras, and Fairén-Garbi and Solís-Corrales v. Honduras. In these three cases the Commission provided evidence to convince the Court that there had been a systematic practice of forced disappearances in Honduras.[99] Thus, the first element was established. However, the

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and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 112 (Sept. 2, 2004) paras. 217 and 233. Buergenthal refers to this way of reasoning in the matter of forced disappearances. He states that "in the absence of direct evidence, the Commission or any other claimant would have to demonstrate (a) the existence of a governmental practice of disappearances and (b) that the disappearance of the specific individual was linked to that practice." Buergenthal makes this analysis under the heading "The Burden of Proof." Buergenthal, T., "Judicial Fact-finding: Inter-American Human Rights Court"... p. 269.

96 Probabilistic reasoning is not based on a universal statement. Thus, it is not, strictly speaking, deductive reasoning. A valid deductive reasoning would say something like "all 'politically involved persons who disappeared' were abducted by the State; John is a 'politically involved person who disappeared'; therefore, John was abducted by the State." In contrast, the Court's reasoning does not refer to everyone in the category "politically involved persons who disappeared," but only to a majority. Thus, the Court's reasoning has the following structure: "most 'politically involved persons who disappeared' were abducted by the State; John is a 'politically involved person who disappeared'; therefore, John was probably abducted by the State."

97 Bovino considers that in this kind of reasoning the object which had to be demonstrated (a violation of human rights against the claimant) is replaced by the need to prove two different circumstances. Bovino, A., "Evidential Issues Before the Inter-American Court of Human Rights"... pp. 69-70.

98 *Cf.*, Buergenthal, T., "Judicial Fact-finding: Inter-American Human Rights Court"... p. 269.

99 Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988) paras. 82-106 and 119, Godínez-Cruz v. Honduras, Merits, Judgment, Inter-am. Ct. H.R. (Ser. C) No. 5 (Jan. 20, 1989) paras. 89-113 and 125, and Fairén-Garbi & Solís-Corrales v. Honduras, Merits, Judgment, Inter-am. Ct. H.R. (Ser. C) No. 6 (Mar. 15, 1989) paras. 112 and 121.

second requirement – proving a link between the widespread situation and the particular case – was fulfilled only in the cases of Velásquez-Rodríguez and Godínez-Cruz, where the Commission established that the victims had been involved in the kind of activities persecuted by the Government, and that they had been detained by militaries.[100] In contrast, in Fairén-Garbi and Solís-Corrales the Commission only proved the disappearance of the alleged victims, but was unable to establish any political or other relevant activities of Fairén and Solís or their abduction by Government agents. Thus, the State was acquitted.

In some other cases the Court has refused to apply probabilistic reasoning.[101] This is appropriate, since it shows that there are cases where the probabilistic method for proving human rights violations should be applied when the evidence of a particular violation is extremely burdensome to obtain without the cooperation of the State. If a violation can be proved otherwise, the Commission or the representatives should have to do so, even if a widespread violation of human rights is proven. It is sensible to ask for this requirement, since the application of probabilistic reasoning is an extraordinary way of proving a human rights violation, and it is less reliable than the use of evidence pointing to the actual fact which has to be proven. The Court should avoid the use of these presumptions when the party is in the position of providing evidence, even if it is not easy to obtain it.

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100 Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988) paras. 107-116, and Godínez-Cruz v. Honduras, Merits, Judgment, Inter-am. Ct. H.R. (Ser. C) No. 5 (Jan. 20, 1989) paras. 114-122.

101 *Cf.*, "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 112 (Sept. 2, 2004) paras. 228-234. It is interesting to consider the following paragraph of the case: "189. In the case *sub judice* there is irrefutable evidence that the State failed to comply with the provisions of subparagraphs 4 and 5 of Article 5 of the Convention (supra para. 134.20 and 134.21). However, the Court is not in a position to find a violation in respect of the victims named, because the information in the body of evidence in the instant case is incomplete. Having said this, the Court is troubled by this noncompliance and urges the State to correct the situation immediately." *Ibidem*, para. 189. These decisions accord with the State's claim that "[t]here is sufficient documentary evidence from official sources detailing the inadequacies of the State prison system. What has to be proved, however, are the human rights allegedly violated in each individual case; the alleged victim must be identified clearly and conclusively, not in some general and ambiguous way." *Ibidem*, para. 143 (f).

ii. Standard of Proof Applied to Probabilistic Reasoning

The Court's probabilistic reasoning presents some interesting features in the matter of the standard of proof, since there are two separate issues that must be proven, each of them with a different threshold. The standard required for proving the existence of widespread human rights violations will be analyzed in the next section, but it is, generally speaking, relatively high. On the other hand, the standard of proof that has to be met for linking a particular person with that widespread pattern of human rights violations is lower. In the Honduran cases this standard was probably that of preponderance of evidence, even though the link was shown to be highly probable in the Velásquez-Rodríguez case.[102] In other cases it has been lower, as in the one which will be now analyzed regarding a particular act of inhuman treatment.

The Loayza-Tamayo v. Peru case[103] concerned a university professor who was arrested by the police as an alleged collaborator of the "Shining Path" terrorist organization. The Court stated that "during the period when Ms. María Elena Loayza-Tamayo was detained there was a widespread practice in Peru of cruel, inhuman and degrading treatment during criminal investigations into the crimes of treason and terrorism."[104] Among other human rights violations, María Elena Loayza-Tamayo claimed being forcefully immersed in the sea, a fact which the Court deemed to be proven.[105] The evidence for proving this

102 See Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988) paras. 107, 108, 113 and 115. In the Godínez-Cruz case the Commission presented mainly hearsay evidence for proving this link. See Godínez-Cruz v. Honduras, Merits, Judgment, Inter-am. Ct. H.R. (Ser. C) No. 5 (Jan. 20, 1989) paras. 114-118 and 120. It is not clear whether the newspaper clippings presented in the Godínez case referred to the disappearance of the victim. However, they are not decisive evidence, since the Court has stated that "they do not have the status of documentary evidence," but "are important in that they are the expression of public and well-known facts, and they corroborate the testimony received in the case with regard to the circumstances of the [illicit acts]." Paniagua-Morales et al. v. Guatemala (White Van), Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 37 (Mar. 8, 1998) para. 75.

103 Loayza-Tamayo v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 33 (Sept. 17, 1997).

104 *Ibidem*, para. 46(l).

105 *Ibidem*, para. 58.

particular act were four witnesses who referred to their own immersions in the sea, none of whom saw Loayza-Tamayo being subject to this treatment, and one witness's declaration of being taken with her to the beach, were prisoners were usually subject to different kinds of inhuman treatment. The four witnesses gave evidence that immersion was a widespread violation of human rights back then in Peru, and Loayza-Tamayo's link to that practice was her taking to the beach, proved by one direct witness.[106]

Proving a particular inhuman act through the declaration of a sole witness exemplifies the degree in which the existence of a generalized practice may lower down the ordinary standard required for proving a violation, especially if other inhuman treatments have been proved against the victim.[107] In general, the Court does not establish a high standard for proving a link between a particular case and a pattern of widespread human rights violations. Indeed, this connection between a particular case and a broader pattern of human rights violations may be deemed as proven based solely on a few witness statements. This practice ignores "that lies are easy to pull off at the international tribunals because basic facts that would serve to reveal those lies are difficult to conclusively establish."[108] A Court must be especially aware of this when witnesses are related to the victims. This also applies to the Inter-American Court, which has not been free from false declarations.[109]

106 Without taking into account Loayza-Tamayo's own declaration, the taking of the alleged victim to the beach was proven only by an eyewitness and a hearsay declaration. There was no direct evidence of her immersion in the sea. *Ibidem*, paras. 45(a) and (c).

107 In the Loayza-Tamayo case there are also examples of cruel, inhuman or degrading treatments proved with stronger evidence. For instance, some violations were proven via witness declarations. The victim's exhibition through the media wearing a degrading garment was proven by video tapes. Loayza-Tamayo v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 33 (Sept. 17, 1997) para. 46 d.

108 Combs, N. A., *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*... p. 149. This work has an interesting chapter about perjury in international criminal courts. *Ibidem*, pp. 130-166.

109 Some witnesses have rendered false declarations or statements before the Inter-American Court. False testimonies can be noticed once certain events come to light (e.g., in the recently revealed news of the case of the Mapiripán Massacre,

In cases where there is the risk of having insufficient evidence for proving a particular violation, it could be a better approach to use this lowered standard for proving a link between a particular case and a situation of generalized human rights violations. Thus, a claimant may prefer to prove a generalized violation and then, with a lower standard of proof, the link of this situation with a particular claim. This may be what the Commission and the victims tried to do in the Apitz-Barbera et al. v. Venezuela case, but the Court did not consider the widespread violation to be proven.[110]

Once the widespread practice of human rights violations and the link to a particular situation are established, the State will be asked to achieve a particularly high standard for proving that the alleged victim was not subject to such a violation. This will happen regardless of the standard required for proving the link between a particular case and a situation of widespread human rights violations. The high standard required for the State to prove that it committed no particular violation resembles a *probatio diabolica* – a requirement of evidence which would be impossible to satisfy. This is so because the State could only disprove this probabilistic reasoning by having anticipated this judgment, surrounding all of its activities with a protective process of video recording – which is, of course, quite impractical. For example, in a country where there is a widespread practice of abusive use of force when apprehending crime suspects, probably one of the few ways for a State to prove that there was no excessive use of force in a particular case would be through a video recording of the apprehension. This would

see "Mapiripán Massacre" v. Colombia, Order of the President, Inter-Am. Ct. H.R. (Oct. 31, 2011) (available only in Spanish)), and also when witnesses presented by opposing parties state opposite facts, since either one side or the other will be giving false statements. Some examples of this are found in: Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988), *cf.*, para. 103 with paras. 104 and 105; and in Serrano-Cruz Sisters v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 120 (Mar. 1, 2005), where there were declarations stating both that the victims had and had not existed (cf., paras. 35 Nos. 4, 5, 6 and 7, and 36 No. 6, with the declarations of some next of kin entitled to compensations). It also must be noted that the IACtHR's Rules of Procedure state in Article 51(5) that "alleged victims shall not take an oath."

110 *Cf.*, Ruiz Chiriboga, O., "La valoración de la prueba de la Corte Interamericana de Derechos Humanos. El caso Apitz Barbera y otros vs. Venezuela"... pp. 158-159.

require the State to have a much more elaborate police system, which may be difficult in countries with little economic resources. This almost-*probatio diabolica* is one of the reasons why the use of probabilistic reasoning should be restricted to exceptional cases, as when the very nature of the State's abuse reveals the intention of hiding evidence.

The inter-American tribunal is an organ created for adjudicating in particular cases – even though its rulings will have a much wider impact. Thus, its main aim should be to assert what actually happened in a particular case, not what is a common situation in a given country. Hence, to fulfill its task of reaching the truth of individual events, the Court should pay special attention in applying probabilistic reasoning only when strictly necessary. This will happen in those cases where the nature of the violation presupposes an intention of the current Government – not of a particular official – to hide the evidence and not to cooperate with the Court. Indeed, it seems that even when a widespread violation of human rights was a generalized practice in a given State, subsequent governments of different political tendencies will be willing to help the Court in its search for the truth, even by means of accepting international responsibility.[111] Furthermore, the Court may not require conclusive evidence when a case is given within a context of widespread human rights abuses, but it must always require compelling evidence of the violation in the particular case of the victim. The Court may use presumptions, but their conclusions must have a clear link with the facts on which they are based.

b. Standard for Proving Widespread Human Rights Violations

i. General Issues

In domestic proceedings the standard of proof "depend[s] upon the nature, character and seriousness of the case."[112] Thus, the graver the

111 E.g., compare paras. 25 and 32 with paras. 49 and 51 in Ivcher-Bronstein v. Peru, Merits, Reparations & Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 74 (Feb. 6, 2001), and para. 25 with paras. 28 and 31 in Chumbipuma-Aguirre et al. v. Peru (Barrios Altos Case), Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 75 (Mar. 14, 2001). However, in the immediately following cases against Peru the State did not keep this position of acknowledging responsibility.

112 Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988) para. 128.

consequences to the party, the higher will be the standard of proof. In international proceedings, "finding that a State Party to the convention has carried out or has tolerated" a practice of widespread and gross violations of human rights is an act of a "special seriousness."[113] Hence, the Court should utilize criteria for evaluating evidence which accord with this particular gravity.[114] Among these criteria, the standard of proof should accord the utmost seriousness of a charge of widespread violations of human rights against the State. Thus, the standard for proving it should be the highest one applied by the inter-American tribunal.[115]

In cases where the Court deals with governments of a different political tendency than those which committed or allowed widespread violations of human rights, it will probably find it easier to prove the existence of these violations. This may happen either because new governments will not conceal the evidence proving these violations, or because they will accept before the Court the responsibility of their predecessors. This can be exemplified with the case of Peru, where, once the government of Alberto Fujimori came to an abrupt end, the State took a starkly different approach to its cases before the Inter-American Court. In these situations the State will often acknowledge its responsibility because of a real commitment to human rights. Nevertheless, there may also be an element of game theory behind the recognition of gross violations, which the Court must bear in mind. Thus, the Court should also take into account the possibility of a political tactic against previous governments in these kinds of acknowledgments of responsibility. Since the inter-American tribunal never accept States'

113 *Ibidem*, para. 129.

114 *Ibidem*.

115 On the contrary, Kokott seems to consider that the tendency is the opposite, that is, that when deciding serious violations of human rights the Courts would be willing to use lower standards of proof. She states: "at least in cases concerning the most serious violations of human rights – such as disappearances and torture – international courts are willing to accept a standard of proof lower than the rule of 'conviction beyond a reasonable doubt'." Kokott, J., *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*... p. 202.

acknowledgement of responsibilities without determining by itself what actually happened, it should maintain a high standard for proving widespread human rights violations.

The Inter-American Court has asserted that "**in principle**, the confirmation of a single case of violation of human rights by the authorities of a State is not in itself sufficient ground to presume or infer the existence in that State of widespread, large-scale practices to the detriment of the rights of other citizens."[116] It may be wondered whether the Court's use of the expression "in principle" was appropriate. However, apparently the inter-American tribunal has never used a single case of human rights violations to consider as proven a situation of widespread abuses. The Court's standard for proving widespread human rights violations has not been uniform, and in recent years there seems to be a tendency to raise it.

ii. Example of a Probability Standard for Proving Widespread Violations

The Loayza-Tamayo was the first case against Peru dealing clearly with widespread human rights violations.[117] Subsequently the Court decided several other cases regarding these sorts of violations in Peru. In Loayza-Tamayo v. Peru the Inter-American Court gives an account of the evidence supporting the Court's determination of a "widespread practice in Peru of cruel, inhuman and degrading treatment during criminal investigations into the crimes of treason and terrorism."[118] The referred evidence is the following:

a. The statement of four witnesses who declared having been subject to cruel, inhuman and degrading treatment, none of whom appeared

116 Gangaram-Panday v. Suriname, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 16 (Jan. 21, 1994) para. 64.

117 The first case against Peru, Neira-Alegría et al., dealt with the particular action of quenching a mutiny. The alleged victims in this case were only three, even though the people who died after Peru's disproportionate use of force were more than a hundred. Neira-Alegría et al. v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 20 (Jan. 19, 1995).

118 Loayza-Tamayo v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 33 (Sept. 17, 1997) para. 46 (l).

before the Court,[119] and one of whom had a case pending before the inter-American tribunal;[120]

b. The declaration of the victim herself;[121]

c. The declaration of the defence attorneys of two of the previously referred witnesses, one of whom had a case pending before the Court;

d. The opinion of an expert witness who, according to the Court's description of his declaration, did not refer to cruel, inhuman or degrading treatments, but to the harassment, intimidation and threats used against the attorneys defending the human rights of persons accused of terrorism;[122]

e. A newspaper article;[123] and

f. A report of the National Coordinator of Human Rights on the Situation of Torture, whose accuracy was not explicitly assessed by the Court.[124]

Without taking into account the declaration of the victim, the expert opinion, which did not strictly refer to the widespread violation, or the newspaper articles, which the Court consider not to be documentary evidence, the existence of a widespread practice of cruel treatment would have been proven only by a report and six statements or declarations. The judgment of the Court did not analyze the conformation, independence or decision making process of the body which elaborated it, so it is difficult to know its evidentiary weight. Regarding the declarations,

119 *Ibidem*, paras. 13, 15 and 16.

120 *Ibidem*, para. 45 (a), (b), (c) and (d).

121 *Ibidem*, para. 45 (e). Regarding the weight of her declaration, the Court had previously stated: "The Court considers that the statement given by Ms. María Elena Loayza-Tamayo, as the alleged victim in this case with a possible direct interest, should be evaluated in the context of the evidence as a whole." *Ibidem,* para. 44.

122 *Ibidem*, para. 45 (j).

123 The Court has stated that newspaper clippings "do not have the status of documentary evidence. However, they are important in that they are the expression of public and well-known facts, and they corroborate the testimony received in the case with regard to the circumstances of the [illicit acts]." Paniagua-Morales et al. v. Guatemala (White Van), Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 37 (Mar. 8, 1998) para. 75.

124 Loayza-Tamayo v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 33 (Sept. 17, 1997) para. 46(l).

six do not seem enough for determining the existence of a general rule, especially considering that two witnesses had a vested interest in the case. It should also be remembered that witnesses usually face no actual danger of punishment for bearing false testimony before international tribunals, where perjury is more difficult to find out about than in the domestic forum.[125]

In any event, the standard for proving a widespread violation of human rights in the Loayza-Tamayo case was not high, reaching only a standard of probability. This assertion makes no evaluative judgment of the factual human rights situation in Peru under the Government of President Alberto Fujimori, which is not renowned for being human rights-friendly. The previously stated conclusion is only aimed at showing the threshold that the Inter-American Court required for proving a widespread violation of human rights. The Loayza-Tamayo case was particularly important, since its conclusion regarding the existence of a widespread use of cruel, inhuman and degrading treatment in Peru was adduced in a subsequent case.[126]

The Huilca-Tecse v. Peru case, of 2005, shows that the Court may not require a high standard of proof for declaring that there was a widespread violation of human rights in cases where the government itself recognizes this fact.[127] This practice would be easily understandable in a system

125 Art. 54 of the Rules of Procedure of the Court state that when, in the opinion of the Inter-American Court, a person summoned to declare "has violated his or her oath or solemn declaration, the Court shall inform the State with jurisdiction over that witness so that appropriate action may be taken under the relevant domestic legislation." However, the effectiveness of this rule is debatable. IACtHR's Rules of Procedure. See, Combs, N. A., *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*... pp. 130-166.

126 Cantoral-Benavides v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 69 (Aug. 18, 2000) para. 94.

127 Huilca-Tecse v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 121 (Mar. 3, 2005). In para. 60 the Court affirms: "Since the State has signified its acquiescence in this case, the Court considers that the facts described in the application filed by the Commission have been established; nothing in the case file before the Court contradicts the facts. They were accepted by the State in its acquiescence, so the Court considers they are 'proven facts.'" Based on this, the Court makes general statements of the situation of Peru in paras. 60(8), (9) and (10). Paragraph 60(8) will be later cited in Miguel Castro Prison, when stating that the Government "intervened the Judicial Power and the

where a Court accepts without question the State's acknowledgments of facts. However, in the Inter-American System of Human Rights the Court is used not to accept these acknowledgments without questioning them.[128] It rather tries to elucidate for itself the facts of a case, behavior which can be explained by different reasons, e.g., for having the chance to develop its case law, or to give publicity to its own findings.[129] Not all of these reasons are applicable to a State's recognition of widespread violations, but a requirement of consistency in the Court's behavior should dissuade it from accepting these acknowledgements without questioning them. Thus, the Court should require evidence of their existence, especially because it may use judgments of previous cases as proof of a widespread violation in future cases.

It could be argued that there would be no need for the Court to require a high standard of proof when there is a general perception of widespread human rights violations in a given country. However, common beliefs may be wrong. Thus, when determining the existence of a widespread violation of human rights, the Court should not be satisfied with the international community's general perception about the situation in a given country. An even stronger reason why the Inter-American Court should require evidence of a widespread violation of human rights is that the cases analyzed by the Court will seldom be settled in history, there being conflicting versions of the facts. Thus, the inter-American tribunal cannot take an *a priori* stance without the risk of being considered partial. Courts cannot take judicial notice of facts which could be reasonably disputed. Of course some historical facts are more easily proved than others, but they require evidence nevertheless, especially if they relate to widespread human rights

Public Prosecutors' Office." Miguel Castro-Castro Prison v. Peru (the), Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 160 (Nov. 25, 2006) para. 197(2).

128 E.g., see Kimel v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 177 (May 2, 2008). This practice of the Court may result in some practical difficulties when applying acknowledgments of facts.

129 For some reasons stating the pros and cons of State acknowledgments of responsibility see: Cavallaro, J. L., and S. E. Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court", *The American Journal of International Law*, vol. 102, 2008, pp. 808-816.

violations. The complexities involved in the exercise of judicial notice by some international tribunals may be exemplified by the extreme case of the International Criminal Tribunal for Rwanda, which had been in operation for eleven years before taking judicial notice of the fact that genocide occurred in Rwanda.[130]

iii. Example of a Higher Standard for Proving Widespread Violations

On the contrary, a much higher requirement of evidence can be seen in some other cases, where the standard is at least one of clear and convincing evidence. It is preferable to use a high rather than a low standard for proving widespread violations of human rights. This is so for two reasons. First, a declaration of this kind may establish the basis for a strong presumption against the State, having a paramount effect when proving human rights violations in particular cases. Secondly, declaring that a Government promoted a policy of widespread violations of human rights can stigmatize the relevant authorities of a State, constituting also a basis for future cases against them as individuals.

The first case that this paper will refer to is that of Apitz-Barbera et al. v. Venezuela,[131] whose evaluation of evidence was rigorously examined in an article by Ruiz-Chiriboga.[132] This case deals with a complex situation – which is probably the main reason why the standard set by the Court was a high one – so it requires this paper to give a brief account of the historical facts that occurred in Venezuela during the relevant years. This article will base this description on what was stated by the Inter-American Court.

In 1999 the "National Constitutional Assembly" of Venezuela was elected for proposing a new Constitution. After its appointment, this body declared that it was necessary to reorganize all governmental

130 For an analysis of the process by which the ICTR reached this decision see: Jørgensen, N. H. B., "Judicial Notice", at *Principles of Evidence in International Criminal Justice*. Oxford University Press, New York, 2010, pp. 710-715.

131 Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 182 (Aug. 5, 2008).

132 Ruiz Chiriboga, O., "La valoración de la prueba de la Corte Interamericana de Derechos Humanos. El caso Apitz Barbera y otros vs. Venezuela"...

bodies.[133] Subsequently, on December 15, 1999, the new Venezuelan Constitution was adopted, which stated that the necessary legislation regarding the judiciary should be enacted within a year. After two weeks of adopting the Constitution, a new body, the Commission for Operating and Restructuring the Judicial System (CORJS), was provisionally granted with the powers of "the judicial disciplinary jurisdiction" until the disciplinary tribunals were created.[134] At the moment when the Inter-American Court issued its judgment, in 2008, these tribunals still had not been created.[135]

In particular, the Apitz-Barbera case concerns three judges of the "First Court." This tribunal was in charge of, among other tasks, hearing "cases regarding the control of all administrative acts issued by all branches of government, except those issued by the President of the Republic and the Ministers thereof."[136] In 2000, the five members of the First Court were appointed to hold office "provisionally." Among these five judges were the three applicants of this case.[137] In June, 2002 this First Court issued a unanimous judgment against a public office.[138] Because of this, the person in charge of this public office filed a remedy before the relevant chamber of the Supreme Tribunal of Justice (STJ), which declared the judgment of the First Court to be null and void, and that the judges incurred in a "serious legal error of an inexcusable character."[139]

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133 Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 182 (Aug. 5, 2008) para. 26.

134 *Ibidem*, paras. 27 and 29.

135 *Ibidem,* para. 29. Even by the time when the Reverón-Trujillo case was issued, there was still no evidence of the creation of disciplinary tribunals (also called disciplinary courts). Reverón-Trujillo v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 197 (June 30, 2009) para. 99.

136 Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 182 (Aug. 5, 2008) para. 30.

137 *Ibidem*, para. 31.

138 The "Recording Office Junior Registrar." *Ibidem*, para. 32.

139 *Ibidem*, para. 33.

In this case, besides the individual violations of human rights, the applicants also claimed an "'ideological cleansing' of the courts of Venezuela." They asserted that this alleged purge sought to get rid of judges who "were not aligned with the political project devised by the President of Venezuela," interfering with the independence of the Judiciary as a whole.[140] If true, these acts would have constituted a widespread violation of human rights. In deciding this issue the Court was faced with evidence addressed partly to the issue of independence as a whole, and partly to specific cases which would reveal a lack of independence, as could happen with arbitrary dismissals. The account of this evidence is found in different parts of the judgment of the Apitz-Barbera et al. case, not only in the section where the Court specifically dealt with the independence of the judiciary as a whole. The relevant evidence – that is, not including that referring to an alleged lack of independence in the dismissal of the three applicants – was the following:

a. A statement in which President Chávez – besides criticizing strongly and in inappropriate terms a decision of the First Court, the Court itself, and in particular the three justices who delivered the Court's opinion – stated that "there is a lot of excess fabric to be trimmed in the judicial branch;"[141]

b. Two opinions stating that the increase from 20 to 32 members in the Supreme Tribunal was motivated by political reasons and aimed at obtaining an absolute control of the highest court;[142]

c. A speech in which a judge of the Constitutional Chamber of the Supreme Tribunal stated that some other issue was solved "in line with the **axiological project** of the Constitution of the Bolivarian Republic of Venezuela and with the rule of Law and Justice that enshrines such project;"[143]

d. The statement of a reporter who alleged that three justices belonging to the Electoral Chamber "were removed from their offices by the

140 *Ibidem*, para. 96.

141 *Ibidem*, para. 115. This statement was considered by the Court when analyzing some other violation, not when analyzing the independence of the judiciary.

142 *Ibidem*, para. 101.

143 *Ibidem*, para. 99 (emphasis added).

National Assembly" because of issuing a judgment against the interests of the President;[144]

e. The opinion of two experts who stated that the appointment of a judge of the Supreme Tribunal was annulled because he was the rapporteur of a judgment describing the "events of April 2002" as a "power vacuum;"[145]

f. An "informative statement" saying that there were judges who "voiced political remarks" before the President, apparently in favor of him;[146]

g. Evidence showing that the then Chief Justice of the Supreme Tribunal stated that 164 recently sworn judges were "Bolivarian." However, in this statement the Chief Justice also stated that they should be politically impartial and should "respect and guarantee the enforcement of the Constitution;"[147]

h. A statement of a former judge of the First Court, which the representatives considered to reflect the context of intervention of the Government in the judiciary, but which the Court considered to be ambiguous;[148]

i. An expert opinion referring "to a pattern of instances of dismissal or removal of judges for political reasons;"[149]

j. A statement of the rapporteur of the CORJS's decision ordering the applicants' removal, in which he stated: "we have achieved acceptable levels of cleansing [of the judiciary] over the past three years," and "[w]e currently need judges who are committed to the ethical and social values of the new reality rather than to legal concepts exclusively;"[150]

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144 *Ibidem*, para. 101 and note 108 of this judgment.

145 *Ibidem*, para. 101. In April, 2002 there was a *coup d'état* by which President Chávez was briefly deposed.

146 This statement did not specify what these expressions were or who made them. *Ibidem*, para. 102.

147 *Ibidem*, para. 103.

148 *Ibidem*, paras. 105 and 106. The representatives also claimed the existence of another statement showing an interference with the judiciary. However, the Court did not consider it to be proven.

149 *Ibidem*, para. 107.

150 *Ibidem*, para. 133. In para. 134 the Court focused on the rest of the decision, where this rapporteur stressed that the judges of the First Court "were removed

k. Statements of several public officials calling to disobey a ruling of the First Court;[151]

l. Several newspaper clippings.[152]

After analyzing this evidence, the Court considered that "the lack of independence of the Judiciary, in general, has not been proven."[153] Probably one of the reasons for not considering this claim as proven is that it is not easy to distinguish between changes in the judiciary for the sake of its own integrity, from modifications intended to gain some control over it. Hence, it may be much more difficult to prove interventions on the judiciary than to prove acts of torture.[154] In this case the Court is clearly using a higher standard than that of probability. This decision reveals either a standard of clear and convincing evidence or one of beyond reasonable doubt. A high standard seems to be appropriate for proving widespread violations of human rights, especially because of the consequences it may have for the relevant State. Probably the best standard would be one of clear and convincing evidence, since the standard of beyond reasonable doubt, at least in the way in which it is understood in domestic proceedings, is not necessarily suitable for international proceedings. When saying this, this paper is not referring to the standard of beyond reasonable doubt as it is understood by the European Court of Human Rights, since its standard seems to be, in practice, closer to that of clear and convincing evidence than to that of

due to the serious inexcusable judicial error that had been previously held to be such by the [CPAM] of the [STJ], […]. We did not act arbitrarily or in the spirit of political retaliation. We have no political affiliation and the operative section of our ruling is limited to the penalty of removal only." This statement was not considered by the Court when analyzing the independence of the judiciary, but when analyzing some other violation.

151 *Ibidem*, para. 117. This statement was not considered by the Court when analyzing the independence of the judiciary, but when analyzing some other violation.

152 E.g., *ibidem*, paras. 113 and 114, and footnotes 115 and 116.

153 *Ibidem*, para. 108.

154 The outcome of this case might have been different if the Court had also considered evidence like that received in the Reverón case, where it was proven that "the percentage of provisional judges in the country reached approximately 80%." Reverón-Trujillo v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 197 (June 30, 2009) para. 106.

beyond reasonable doubt, as they are understood domestically.[155] If the Court decided to use the standard of clear and convincing evidence, it would not be the first international tribunal in doing so, since the Eritrea-Ethiopia Claims Commission used this standard for proving systematic and widespread violations of international law.[156]

Conclusions

It has been asserted that "– all things being equal – higher standards of proof result in more erroneous acquittals and fewer erroneous convictions."[157] Thus, "[t]he more we wish to prevent wrongful acquittals, the lower the standards of proof should go."[158] This conveys the idea that the standard of proof set by a Court will depend on the ends that a Court is given, which may vary according to the object with which the Court is dealing. The inter-American tribunal has neither been given a standard of proof nor has it set one for itself. However, the practice of this court reveals some trends in this matter, despite not being yet very systematic. For instance, in cases of widespread human rights violations, the Court has used – especially in its recent case law – a high standard of proof, probably one of clear and convincing evidence. In the great majority of cases it seems that the Court has used a standard of probability, which, in principle, would distribute errors equally in judgments between the alleged victims and the State. However,

155 For the sake of clarity, this article will make use of the different kinds of standard of proof as they are understood domestically. It has been said that, in practice, "the difference between the approaches of both Courts [European and Inter-American] should perhaps not be overestimated. The European Court has developed a number of doctrines that allow it to find 'beyond reasonable doubt' a violation even in the absence of direct evidence of the events: shifting the burden of proof where injury or death occur in police custody; 'procedural violation' of Articles 2 and 3 that will be held to have existed where the direct State responsibility is not proven, but where the State has failed effectively to investigate the events; failure by the Government to submit a convincing explanation on the basis of information to which only it could have access. Similar techniques have been used by other international human rights bodies – without reference, it is true, to a definite standard of proof." Kinsch, P., "On the Uncertainties Surrounding the Standard of Proof in Proceedings Before International Courts and Tribunals"... p. 438 (footnotes omitted).

156 *Ibidem*, p. 441.

157 Combs, N. A., *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*... p. 346.

158 *Ibidem*.

the application of presumptions and other judicial devices, such as probabilistic reasoning, make this standard seem lower, increasing the chances of finding the State guilty.

The Inter-American Court makes no explicit reference to its standard of proof, and its practice in this regard is not consistent when faced with different evidence. In a concern for legal certainty it would be advisable for the Court to make some reference to the different standards it applies, because "[t]he standard of proof is, in last analysis, part of the institutional ethics of adjudicating bodies – and as such, it should be governed by predictable legal rules."[159] Thus, "[t]here may be, in order to do justice, a need to have a more concrete standard."[160] Indeed, it is desirable for an international tribunal to define as much as possible its own standards of proof. This may be the reason why the ICJ has, in recent years, tried to define its own more clearly.[161]

The inter-American tribunal's definition of its own standards of proof would make its system of adjudication more understandable to the practitioners of common law countries, which could be an interesting tool for attracting non-Latin State's under the Court's jurisdiction. Of course that the inter-American tribunal's jurisdiction over almost exclusively Latin American countries has deeper and more complex causes. However, incorporating concepts pertaining to the common law heritage would make the Inter-American System less of an outsider to the States pertaining to an Anglo-Saxon legal tradition. This is particularly relevant in the case of the Inter-American Court, where almost one third of the State members to the OAS belong to the common law tradition.

159 Kinsch, P., "On the Uncertainties Surrounding the Standard of Proof in Proceedings Before International Courts and Tribunals"... p. 428.

160 Amerasinghe, C. F., *Evidence in International Litigation*... p. 233.

161 Kinsch, P., "On the Uncertainties Surrounding the Standard of Proof in Proceedings Before International Courts and Tribunals"... p. 442.