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PRESENTATION



Sur – International Journal on Human Rights is a biannual publication that presents an analytical and balanced standpoint on human rights in Southern Hemisphere countries. With the aim to strengthen the South-South and the South-North dialogue among human rights activists, scholars and UN officials, this journal promotes a critical debate on several issues related to the theme. It breaks away from a pseudo-consensus and opens up spaces to improve the quality of this discussion. It therefore invites dissent, since we believe that a consistent human rights doctrine will only be put into place after a wide-ranging exchange of ideas.

We firmly believe that the information that is being produced must be widely publicized and, for this reason, this journal is issued in three languages (English, Portuguese and Spanish). Approximately 6,000 copies of the first two issues have been distributed free of charge in over 100 countries and, to ensure an extended readership, we have made an unabridged version available at <www.surjournal.org>, in the three languages.

For this edition, papers have been submitted from thirteen countries (Argentina, Brazil, Cameroon, Chile, India, Ireland, Namibia, Nigeria, Switzerland, Tanzania, Uganda, United Kingdom, and United States). After a selection by an International Editorial Board, whose members are human rights scholars, specialists and UN officials, we are publishing eight contributions, one of which reports on a research project. The subject matters dealt with are: security and human rights; trade and human rights; access to justice on domestic and international levels; and land reform.

Two papers contributed by participants of the Knowledge Development Group, organized by **Sur** in April 2005, focus on the subject of **trade and human rights**. Caroline Dommen discusses mechanisms that, by protecting human rights, actually favor the trade practices in which they are inserted. Carlos Correa depicts the progresses made in the

process to lend more flexibility to the TRIPS Agreement for medical drugs, and shows how the Doha Declaration and the 2003 Decision of the TRIPS Board are insufficient to ensure a reduction in prices and the negotiation of voluntary licenses.

Tracing a bridge between **security and human rights**, the article of Bernardo Sorj deals with the concept of human security applied to Latin American problems.

Four articles – contributed by Alberto Bovino, Nlerum S. Okogbule, Maria José Guembe and José Roberto Cunha – discuss different aspects concerning **access to justice**, on domestic and international planes. From an international perspective, Bovino dwells on the peculiarities of evidence evaluation conducted by the Inter-American Court of Human Rights, underlining the flexibility shown by this jurisdictional body in dealing with grievous infringements of rights. Okogbule weighs the specific obstacles hampering access to justice in the Nigerian context. Guembe discusses the decision of the Supreme Court of Argentina, which deemed unconstitutional the amnesty laws that benefited military personnel involved in violations of human rights during the dictatorship. Cunha presents the results of his survey among magistrates in the state of Rio de Janeiro, Brazil, as to the extent of their familiarity with and their actual use of international law in issues involving human rights.

Land reform in Namibia is the theme of the text by Nico Horn, who considers the implications of the colonizing process and custom-law.

Although very varied in their themes and approaches, all these papers share a common point of departure – the contextualization of human rights – attempting to contribute to the reconstruction of these rights, with a view at their implementation, and to ensure a better coverage of local and regional demands.

We are wrapping up this issue with a summary of the plan of action submitted by the High Commissary for Human Rights, Louise Arbour, who proposes mechanisms to increase the effectiveness of human rights protection in the several UN member countries.

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ABSTRACT

In a litigation before the Inter-American Court of Human Rights, when the Inter-American Commission petitions a state to the Convention, evidence becomes a core issue. The Convention itself, as well as the Rules of Procedure of the Court, do not contain any regulations concerning the treatment of evidential activity, and, as a consequence, the particularities adopted by the Court have in fact resulted from its case law. The following aspects are essential to the understanding of the role of evidence: (a) particularities of the evidential activity within the Inter-American system; (b) constitution of the evidence of the case; (c) burden of proof; (d) evidence assessment system; and (e) standards to identify infringements to the Convention. This issue is of crucial importance, given the particularities presented by serious infringements to human rights. Such peculiarities have been taken into special account in the Court precedents. [Original article in Spanish.]

KEYWORDS

Evidence – Assessment of evidence – Sound criticism – Burden of proof – Evidence standards

EVIDENTIAL ISSUES BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Alberto Bovino

In a litigation conducted before the Inter-American Court of Human Rights, when the Inter-American Commission on Human Rights brings suit against a state party to the American Convention on Human Rights, evidential activity is a core issue.¹

The relevance of the means evidence is clear if we focus on the chapters of facts and proof of any sentence issued by the Inter-American Court.² In its jurisprudence, the Court has defined principles and standards regarding evidential activity. The peculiarities of the system developed by the IAHR Court, mainly jurisprudentially, are such as to warrant a thorough review.

In the jurisprudence of the Court, the following aspects are referred to concerning the evidential activity: (a) particularities of evidential activity in proceedings conducted before the IAHR Court; (b) constitution of the body of evidence for a specific case; (c) burden of proof; (d) evidence assessment system; and (e) evidence standards to identify violation of rights protected under the American Convention.

1. As from this point, the Inter-American Court of Human Rights is referred to as the use the Inter-American Court or the IAHR Court; the Inter-American Commission, as the Commission or the IACHR; and the American Convention on Human Rights, as the American Convention, the Convention or the ACHR.

2. In the Canese case, for example, of the 229 paragraphs in the sentence, 23 were devoted to the evidence (item V, The Evidence, paragraphs 46-68), and 69 to the facts (item VI, Proven Facts, paragraphs 1-69), summing up to a total of 92 paragraphs devoted to the issues of facts and evidence (40%). See IAHR Court, Ricardo Canese v. Paraguay case, judgment of 31 August 2004.

This issue is of critical importance, especially if we take into account the peculiarities of cases representing serious infringements to human rights.

Singularities

The specificities of the international law on human rights can be appreciated in the development of the jurisprudence of the Inter-American Court concerning evidence. As we will see further on, these specificities structure a very specific evidential system. Indeed, it has been pointed out that:³

135. 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 (emphasis added).

This quotation points to the fact that the intrinsic gravity of any violation of human rights is taken into account as a determining variable in the evidential system. On the other hand, on the same occasion the IAHR Court pointed out:⁴

138. Since the Court is an international tribunal, it has its own specialized procedures. All the elements of domestic legal procedures are therefore not automatically applicable.

139. The above principle is generally valid in international proceedings, but is particularly applicable in human rights cases.

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. The 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.

Summing up, what is set out is the singularity of international law in general, and of international human rights legislation specifically; a distinction is made between criminal law and international responsibility; the effective goal of the international law on human rights is defined.

These are the circumstances that must be taken into consideration if we are to comprehend and regulate evidential activity in proceedings conducted before the Inter-American Court:

3. IAHR Court, case of Godínez Cruz. Judgment of 20 January 1989.

4. Id.

70. *In an international tribunal such as the Court, whose aim is the protection of human rights, the proceeding possesses its own characteristics that differentiate it from the domestic process. The former is less formal and more flexible than the latter, which does not imply that it fails to ensure the parties' legal security and procedural balance.*⁵

89. *With the aim of obtaining the largest possible evidence, this Court has been very flexible in the admission and evaluation of the proof, in accordance to the rules of logic and based on experience. The procedure set forth for litigious cases before the Inter-American Court boasts its own characteristics, which sets it aside from domestic law procedures, the former not being subject to the inherent formalities of the latter.*⁶

On the other hand, one must take into consideration that:

75. *Lastly, the Court has maintained that [u]nlike domestic criminal law, it is not necessary to determine the perpetrators' culpability or intentionality in order to establish that the rights enshrined in the Convention have been violated, nor is it essential to identify individually the agents to whom the acts of violation are attributed. The sole requirement is to demonstrate that the state authorities supported or tolerated infringement of the rights recognized in the Convention. Moreover, the state's international responsibility is also at issue when it does not take the necessary steps under its domestic law to identify and, where appropriate, punish the author of such violations.*⁷

For this reason, it is possible to read in the above-mentioned case of Paniagua-Morales:

87. *Moreover, with respect to Mr. González-Rivera and Mr. Corado-Barrientos, the Court considers that state agents were involved in their detentions and murders, whether or not they were "G-2" (Military Intelligence) or from the Treasury Police itself. This case was also included in the investigations on record in the National Police report which attributed responsibility to the agents of the state.*

So far the peculiarities of evidential activity before the Inter-American Court. We are here dealing with serious infringements to international obligations, under a

5. IAHR Court, case of Paniagua-Morales and Others. Judgment of 8 March 1998.

6. IAHR Court, case of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Judgment of 31 August 2001.

7. IAHR Court, case of Villagrán Morales and Others ("Street Children" case). Judgment of 19 November 1999.

unique procedure which is characterized by its informality and alleged differences compared to domestic law, and which does not aim to impute criminal responsibility, but rather to compensate victims of human rights violations.

This protective human rights proceeding is regulated so as to make it possible to allow the greatest number possible of elements of evidence, with the aim of establishing the truth of what has happened. In this sense, the only relevant issue which needs to be proven is that the violation reported can be attributed to a government agent, without the need to identify a concrete author.

Evidence of the case

Although one of the principles of evidential activity is that of the adversary system, and the procedure conducted before the IAHR Court, regulated by its Rules of Procedure, is a procedure involving parties, the evidence that is valued in each concrete case is incorporated in a very specific fashion.

Firstly, the set of elements of conviction that will be incorporated in a concrete case are put together with the evidence offered by the claimant and defendant:⁸

84. Article 43 of the Rules of Procedure indicates the appropriate procedural moment to submit items of evidence and their admissibility, as follows

1. Items of evidence tendered by the parties shall be admissible only if previous notification thereof is contained in the application and in the reply thereto and, when appropriate, in the document setting out the preliminary objections and in the answer thereto.

[...]

3. Should any of the parties allege force majeure, serious impediment or the emergence of supervening events as grounds for producing an item of evidence, the Court may, in that particular instance, admit such evidence at a time other than those indicated above, provided that the opposing parties are guaranteed the right of defense.

[...]

86. It is important to point out that the principle of presence of both parties to an action rules matters pertaining to evidence. This principle is one of the foundations for Article 43 of the Rules of Procedure, as regards the time at which evidence must be submitted for there to be equality among the parties.

Thus, the parties offer their evidence within a contradictory framework. Nonetheless, given the special nature of international law on human rights, the Inter-American Court has broad powers in terms of evidential activity, as it can

8. Mayagna Community case, op. cit.

exercise its authority to produce and incorporate elements of evidence *sua sponte*, that is to say, without the request of the party.⁹ In this sense, Article 45 of the Court Rules of Procedure provides:

The Court may, at any stage of the proceedings:

1. *Obtain, on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant.*
2. *Request the parties to provide any evidence within their reach or any explanation or statement that, in its opinion, may be useful.*
3. *Request any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point. The documents may not be published without the authorization of the Court.*
4. *Commission one or more of its members to hold hearings, including preliminary hearings, either at the seat of the Court or elsewhere, for the purpose of gathering evidence.*

This, for example, is how the Court dealt with the untimely incorporation of certain documents on behalf of the state:¹⁰

112. ... Although the state did not make any statement about the reasons for the time-barred presentation of these elements of evidence and, therefore, did not explain the exceptional circumstances that would justify their admission by the Court, the latter considers that they constitute useful evidence inasmuch as they contain information about the facts examined, and accordingly incorporates them into the probative evidence based on Article 44.1 of the Rules of Procedure and deems them to be circumstantial evidence within the probative evidence, in accordance with the principle of “sound criticism”.

In the same way, it was decided that:¹¹

71. The documents provided by the Commission during the public hearing were presented after the statutory time limit had elapsed. The Court has maintained that the exception established in Article 43 of the Rules of Procedure is applicable only in the case when the proponent alleges force majeure, grave impediment or supervening events. However, although the Commission did not demonstrate such circumstances in this case, the Court

9. On occasions, the Court uses these faculties to produce the evidence requested by parties who have missed the opportunity of having access to it.

10. IAHR Court, case of Bámaca Velásquez. Judgment of 25 November 2000.

11. IAHR Court, case of Ivcher Bronstein. Judgment of 6 February 2001.

admits them, in application of the provisions of Article 44(1) of the Rules of Procedure, as it considers that they are useful for the evaluation of the facts.

In an identical way, regarding the evidence requested by the Court, it was sustained that:¹²

58. ... the documents supplied during the public hearing held in the instant case – both the copies of the national identification documents and the birth certificates and provisional custody certificates of Matías Emanuel and Tamara Florencia Bulacio – in the body of evidence, to facilitate adjudication of the case.

Furthermore, it is worthwhile pointing out that additional evidential material can also be evaluated when issuing the sentence:

98. The body of evidence of a case is indivisible and is formed by the evidence tendered throughout all stages of the proceedings. For this reason, the documentary evidence tendered by the state and by the Commission during the preliminary objections stage is admitted into evidence in the present case.¹³

68. The Court will assess the probatory value of the documents, testimony, and expert opinions submitted in writing or rendered before the Court. Evidence submitted at all stages of the proceedings has been included in the same body of evidence, which is considered a whole.¹⁴

This principle is evident. It refers to the evidence incorporated in the contradictory stage of the oral hearings before the Inter-American Court, and it is natural that the elements of conviction should be incorporated into the set of elements of evidence that are to be taken into account when proffering the sentence. The same would happen if we were dealing with evidence presented requesting provisional remedies.¹⁵

Finally, in a somewhat questionable decision that contributes to dilute the political principle of immediacy – a principle that typically applies to oral and contradictory proceeding –, Article 44.2 of the Court's Rules of Procedure allows the incorporation of the following to the records of the case being dealt with before the Court: "Evidence rendered to the Commission shall

12. IAHR Court, case of Bulacio v. Argentina. Judgment of 18 September 2003.

13. Mayagna Community case, op. cit.

14. Bulacio case, op. cit.

15. See IAHR Court, case of Herrera Ulloa v. Costa Rica. Judgment of 2 July 2004, paragraph 68.

form part of the file, provided that it has been received in a procedure with the presence of both parties, unless the Court considers it essential that such evidence should be repeated”.

This is a risky rule, since it could play against the immediacy of the proceedings before the Inter-American Court. If we bear in mind that ever since the new Rules of Procedure came into effect, the Court has had to deal with many more cases than before, and that this entity pressures the parties to obtain written statements from the witnesses and from the experts and do not present their statements in court, this rule could increase the trend to convert into writing a proceeding that should be completely oral.¹⁶

So far, we have reviewed the set of evidential elements that are part of the material to be used to establish the facts under dispute in a concrete case. Let us move on to take a look at the specificities of the evidential activity within the framework of this procedure.

The burden of proof

The burden of proof of the facts contained in the trial lies on the Inter-American Commission,¹⁷ since it undertakes the role of plaintiff:

128. Before weighing the evidence, the Court must address some questions regarding the burden of proof and the general criteria considered in its evaluation and finding of the facts in the instant proceeding.

129. Because the Commission is accusing the Government of the disappearance of Saúl Godínez, it, in principle, should bear the burden of proving the facts underlying its petition.¹⁸

Nevertheless, several circumstances reduce the weight of responsibility for the burden of proof. Firstly, the possible defenses of the defendant state are limited.

16. See A. Bovino, *The Victim before the Inter-American Court of Human Rights*, (“Interights’ Bulletin”, London: The International Centre for the Legal Protection of Human Rights, v. 14, 2002). It should be remembered that with the long terms or periods extending between the different stages of a proceeding, the growing importance of documents, allegations and witness statements and expert opinions presented in writing, all operate against immediation.

17. Since the Court’s new Rules of Procedure came into effect on 1 June 2001, the victim, the family members and his/her representatives have the autonomous legitimacy to intervene and share in the evidential burden with the Commission. See Article 23.1 of the Court’s Rules of Procedure. Here we refer to the evidential burden of the Commission only.

18. Godínez Cruz case, *op. cit.*

In a Peruvian case several inmates disappeared from a prison during a mutiny, and the Court said:¹⁹

65 The Court feels that it is not up to the Inter-American Commission to determine the whereabouts of the three persons to whom these proceedings refer, but instead, because of the circumstances at the time, the prisons and then the investigations were under the exclusive control of the Government, the burden of proof therefore corresponds to the defendant state. This evidence was or should have been at the disposal of the Government had it acted with the diligence required. In previous cases, the Court has said:

[i]n contrast to domestic criminal law, in proceedings to determine human rights violations the state cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the state's cooperation. The state controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a state's jurisdiction unless it has the cooperation of that state. (Velásquez Rodríguez case, supra 63, paras. 135-136; Godínez Cruz case, supra 63, paras. 141-142).

By the same token, in the Aloeboetoe case, the Court exempted the Commission from having to demonstrate the filiation and identity of several people based on documentary evidence, since the absence of such documents was due to negligence by the state: "Suriname cannot, therefore, demand proof of the relationship and identity of persons through means that are not available to all of its inhabitants in that region. In addition, Suriname has not here offered to make up for its inaction by providing additional proof as to the identity and relationship of the victims and their successors".²⁰

On the other hand, it is not always necessary to comply with the burden of proof for all of the facts invoked in the petition, as according to the Rules of Procedure of the Commission, Article 39: "The facts alleged in the petition, the pertinent parts of which have been transmitted to the state in question, shall be presumed to be true if the state has not provided responsive information during the maximum period set by the Commission under the provisions of Article 38 of these Rules of Procedure, as long as other evidence does not lead to a different conclusion".

Article 38.2 of the Court's Rules of Procedure adds: "In its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have

19. IAHR Court, case of Neira Alegría and Others. Judgment of 19 January 1995.

20. IAHR Court, case of Aloeboetoe and Others v. Suriname. Judgment of 10 September 1993, paragraph 64.

not been expressly denied and the claims that have not been expressly contested”.

Because of this, the Court, for example, was able to come up with the following considerations:²¹

67. In the instant case, the state did not directly contest the facts alleged by the Commission or the charges of violation of Articles 7, 4 and 5 of the American Convention and Articles 1, 6 and 8 of the Convention against Torture. In answering the application and in its final arguments, Guatemala concentrated its defense on the contention that the facts of the case had been investigated by the courts, which had issued a series of decisions on them – including a judgment of the Supreme Court – that may not be discussed by other public bodies, under the principle of the independence of the Judiciary.

68. In this respect, the Court considers, as it has done in other cases, that when the state does not specifically contest the application, the facts on which it remains silent are presumed to be true, provided that the existing evidence leads to conclusions that are consistent with such facts. ...

In short, although in principle the burden of proof falls upon the plaintiffs, there are situations in which this burden becomes the responsibility of the state, and others in which the burden of proof can be simply dismissed, the claims being presumed correct in the absence of opposition by the state.

Assessment of evidence

Systems to assess evidence

The evidence assessment process is the method whereby the different elements of conviction validly incorporated into the records to take a decision on the facts are assessed. It is a rational analysis of the elements of conviction, subject to certain rules that organize the process. There are three traditional evidence assessment systems:

- Intimate conviction: this system is based on the non-existence of rules established *a priori* that attribute evidential value to the elements of proof and furthermore, on the non-existence of the duty to justify the motives of the decision and the assessment process. What is required is that the person delivering judging informs the factual conclusion that has been reached, without explaining how this was done. This is the classical jury system used proceeding.
- Legal proof: “The law carefully regulates the conditions, whether positive

21. Villagrán Morales and Others case, op. cit.

or negative, that should exist before reaching a certain conviction (number of witnesses, amount of proof, confessions, etc.), whereby the reconstruction of the fact is converted into a juridical operation”.²²

- Sound criticism: The system is characterized by an absence of abstract rules for the assessment of evidence. It requires that the decision be explained, through an explanation of the motives on which it is based, with reference the elements of conviction that were taken into account and how these have been appraised. The basis of the assessment must be rational, respect the rules of logic, of psychology, of experience and proper human understanding. “This method allows the magistrate the freedom to admit any evidence deemed to be useful to clarify the truth, and to weigh it according to the rules of logic, of psychology and common experience”.²³

Among these three systems, sound criticism is, beyond doubt, the best when it comes to court decisions to be made by jurists. This is the most reliable method to carry out evidential activity and to assess the value of conviction of the results of this activity, using rational mechanisms and the analytical faculties of the person who judges. Furthermore, in the domestic sphere, this system allows for control through appeals.

It is not, as happens in the system of legal proof or appraised proof – inherent to the inquisitorial system –, a rigid method, used to attribute a legally determined value to each class of evidential means. On the contrary, it is a method that does not pre-determine the value of the conviction of the different items of evidence, but establishes general guidelines, inherent to human reasoning itself, applicable to all evidential elements.

This is the method which with some inconsistencies is used by the Court, according to what is stated in its own decisions. Furthermore, the Court, with certain exceptions, makes a clear distinction between the assessment system adopted in its proceedings as compared to that generally used in domestic law.

The system adopted by the Court

Regarding evidence assessment, the Court has adopted a unique system that it consistently enforces in litigations. According to the explicit manifestations of the Court, it has adopted a broader and less formal evidence assessment system, as compared to domestic law. The underlying principle is that of sound criticism.

22. Martín Abregú, *La sentencia*, in AA.VV., *El nuevo Código procesal penal de la Nación. Análisis crítico* (Buenos Aires: Del Puerto, 1993, p. 207).

23. Abregú, *op. cit.*, p. 209.

The Court has stated this circumstance in its own decisions:²⁴

76. In conclusion, any domestic or international tribunal must be aware that proper evaluation of evidence according to the rule of “sound criticism” will allow judges to arrive at a decision as to the truth of the alleged acts.

...

81. The Court grants circumstantial status to the numerous previous police reports used as a basis for the final report. These reports contain interrogations, declarations, descriptions of places and facts, legal practices such as those relating to the removal of the victims’ corpses and other information. These previous police reports are useful in the instant Case because, by the rules of sound criticism, they help form an opinion on the facts; all the more so in these situations of kidnappings and violent death, in which attempts are made to erase any trace that would betray their perpetrators.

As we will see, one thing is what the Court says and another is what the Court actually does when assessing elements of conviction on which it bases its premises and facts for its resolutions. The system applied by the Court resorts, in fact, to **two different methods** of assessing evidence.

When dealing with elements of proof that have not been opposed, objected to or attacked by the other parties, the Court will, as a rule: (a) consider them as valid; (b) incorporate them into the evidential body; and (c) consider as proven the fact the element of proof tends to demonstrate. Thus, in the Suárez Rosero case, the Court established that:²⁵

30. No objections were made either to the statement of witness Ms. Carmen Aguirre or the expert report by Dr. Ernesto Albán-Gómez. The Court therefore deems the facts stated by the former and the expert’s observations on Ecuadorian law to have been proven.

In this sense, the Inter-American Court resorts to a conclusive principle, ascribing evidential value to those elements of certainty or conviction not contested by the parties, without being overly concerned with the value of the conviction in the evidential situation.

Such elements of conviction are granted an evidential value, not as a result of an analysis of their intrinsic value, and neither because of their consistency with the overall evidential situation. In fact, their value of conviction is not dependent upon the rules of sound criticism, but, rather, on the absence of opposition or objection by the counterpart. Thus, the elements of proof not

24. Paniagua Morales case, op. cit.

25. IAHRC Court, Suárez Rosero case. Judgment of 12 November 1997.

objected to by the parties has evidential value as a result of the simple consent of the counterpart in recognizing its value of conviction.

By making these assumptions, the Inter-American Court leaves aside the regime of sound criticism and limits itself to taking into account the possibility of the contenders contesting the element of proof.

Sound criticism as applied by the Inter-American Court

On other occasions, the Court will strictly apply the sound criticism system. But the application of this assessment method, which should be applied to all elements of conviction that are part of the evidential situation, is limited to a pair of specific cases.

In effect, the Court resorts to the specific sound criticism evaluation criteria when faced with the opposition or objection from the parties, or when the element of conviction contains intrinsic problems that render it unreliable or not very credible.

Thus, for instance, the Court adopts a consistent approach when assessing the statements of witnesses who could have some interest in the cause:

32. It is the well-settled jurisprudence of this Court that any interest which a witness may have in the outcome of a case, is not enough, per se, to disqualify such witness. This principle is eminently applicable to the evidence given by Margarita Ramón de Suárez and Carlos Ramón. Moreover, their statements were not contested by the state and referred to facts of which the witnesses had direct knowledge. Consequently, those statements must be admitted as suitable evidence in this Case.

33. With regard to the statement of Mr. Rafael Iván Suárez-Rosero, the Court considers that, since he is the alleged victim in this case and has a possible direct interest in it, his testimony should be assessed in the context of all the evidence in the Case.²⁶

...

75. As for Mr. Ivcher Bronstein's declaration, since he is the alleged victim and has a direct interest in this case, the Court believes that his statements cannot be evaluated on their own, but rather in the context of all the evidence in the proceeding. However, Mr. Ivcher's declarations should be considered to have a special value, to the extent that they may provide greater information on certain facts and alleged violations committed against him. Therefore, the statement referred to is incorporated into the pool of evidence with the above-mentioned considerations.²⁷

In fact, if these depositions were not treated in this fashion, it would make no

26. Suárez Rosero case, op. cit.

27. Ivcher Bronstein case, op. cit.

sense to take them in the first place. What is necessary is to be aware of the possible interests the deponent may have in the resolution of the case, and take this variable into account when assessing the statements submitted by the witness.

At this point, it is interesting to point out that the Inter-American Court applies the rules of sound criticism in the same way it they are applied in domestic law.²⁸ Beyond the manifestations of international jurisprudence, the substantial distinction the Court alleges exists between international law and domestic law when referring to the assessment of evidence cannot be perceived.

It is, however, possible to acknowledge a peculiarity of international law in this respect: the practice of granting high evidential value to certain elements of conviction, when faced with the absence of additional or corroborating proof regarding a specific fact or circumstance. This practice, accepted in international law, is inadequate under a sound criticism approach in criminal law – given the high evidential standard that has to be met before imposing a guilty verdict –, but it is totally appropriate for international law, especially in the sphere of the international law on human rights.

Object of the process

The uniqueness in the treatment of evidential activity by the Court is confirmed by the practice that makes it possible to alter the factual object to be proven in the suit to establish the international responsibility of the state.

In this sense, the Court has taken decisions regarding the practice of forced disappearances whereby it has become possible to prove the charges in a unique manner. Thus, the Court has accepted as follows:²⁹

130. The Commission's argument relies upon the proposition that the policy of disappearances, supported or tolerated by the Government, is designed to conceal and destroy evidence of disappearances. When the existence of such a policy or practice has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence or by logical inference. Otherwise, it would be impossible to prove that an individual has been disappeared.

...

132. The Court finds no reason to consider the Commission's argument inadmissible. 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

28. It is the facts generating personal penal responsibility and international responsibility that are profoundly different. This does not hinder the evidence evaluation system from being applied in almost identical ways in both judicial contexts.

29. Godínez Cruz case, op. cit.

Saúl Godínez 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.

In the case in point, the normal requirement would have been for the plaintiff to be under the obligation to demonstrate the actual disappearance of the victim.

Given the approach accepted by the Court, on the contrary, the object to be demonstrated has been shifted to two circumstances: (a) the systematic practice of disappearances; and (b) a certain relationship between the disappearance reported and such systematic practices.

Regardless of which means of proof used to consider these facts as proven – witness deposition, expert opinions, documentary evidence – what is certain is that the actual facts to be proven have been modified.

Content of sound criticism

In those cases in which the Court applies the regime of sound criticism, it resorts to all types of elements of conviction. Thus, already in its initial sentences, the Court maintained that:³⁰

135. 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.

136. The practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only type of evidence that may be legitimately considered in reaching a decision. Circumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts.

137. Circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim.

As can be observed, all these categories of proofs are also used in the domestic sphere. What is not made clear is what the Court refers to with the term “presumptions”. In a generic sense, a presumption is understood as an uncertain fact that has not been demonstrated as being true based on the clear evidence of an autonomous fact.

According to Palacio, there are legal presumptions and judicial presumptions. Legal presumptions (*iuris tantum* and *iuris et de iure*) are defined normatively, whilst

30. Godínez Cruz case, op. cit.

simple or judicial presumptions, on the other hand “are subject to the criteria of the magistrate, whose conclusions are not subject to pre-established rules, but must be established in conformity with the principles of sound criticism”.³¹

In the latter assumption, not only are these simple presumptions or inferences, when carried out rationally, absolutely valid; they also form a natural component of the sound criticism approach.

In any domestic criminal proceedings, for instance, and save if an admission of guilt is made, it can be difficult, not to impossible, to demonstrate directly each and every element of the charges.³² For this reason, several elements are inferred in the evidential situation, through an overall analysis of the case. Circumstances such as fraud, the motivations for the crime, etc., do not tend to be the object of direct evidence, but of inferences made based on other issues that have been effectively proven.

As for the rest, the elements of conviction mentioned by the Court, in the paragraphs transcribed, are also used generally when the sound criticism approach is applied.

Conclusions

As stated by the Court in its awards, the general evidence assessment system inherent to its proceedings is unique, and differs from that commonly adopted in the domestic sphere.

The most notorious difference is probably the practice of the Inter-American Court that ascribes full evidential value to the elements of proof not challenged by the parties. In this respect, the principle used will be dependant on the will of the parties regarding the value of conviction of the elements of proof. If the parties do not challenge it, the analysis that is the essence of the sound criticism approach is eluded.

When dealing with elements of conviction that are either unreliable, or have been challenged, the Court applies the sound criticism approach, heeding the intrinsic value of conviction of the evidential element, and its degree of consistency with the remainder of the evidential situation. In this process, the Court will occasionally attribute value of conviction to certain elements of proof which could have been questioned or are scarce in the absence of other elements of conviction.

Furthermore, it should be pointed out that the evidence assessment method

31. Lino E. Palacio, *Manual de derecho procesal civil* (6. ed., Buenos Aires: Abeledo-Perrot, 1986), pp. 598 and following.

32. Consider, on the other hand, the fact that, if exceptions, incidents and challenges have been submitted, each evidence item will encompass a countless number of factual issues that are irrelevant to the charge.

applied by the Court included direct evidence, circumstantial evidence, indications, indirect evidence and inferences. In this aspect, the sound criticism approach used by the Court does not differ from the usage current on the domestic sphere.

Finally, it should be stressed that the factual object to be proven is determined by the peculiarities of international law on human rights and by the requirements of international responsibility. One should also bear in mind that evidence standards required to establish international liability of a state differ to those prevailing in domestic law.

Evidence standards

As we have seen, the sound criticism approach adopted by the Inter-American Court is indistinguishable from that prevailing domestically within each member state. What can be distinguished is the evidence standard for international law on human rights. “Evidence standard” is here understood as the degree of conviction that must be attained in order to deem a given fact proven at a specific point in time in the proceedings. Thus, for example, Article 294 of the National Code of Criminal Procedure (Argentina) requires “sufficient motive” to summon someone for a formal interrogation or deposition.³³

However, these evidence standards are independent of the regime to assess the means of conviction. The standard of a semi-complete evidence – or preponderance of the evidence – can be established, and get to it through other systems of evidence assessment.

On the other hand, it is not true that the international system is less formal regarding evidence appraisal as compared to domestic law. In fact, when it comes to assessing evidence, the sound criticism approach, seems to function in an identical manner in both judicial spheres. In other words, sound criticism is just as informal at the Inter-American Court as it is at the courts of the respective states parties.

What is inherent to international law on human rights, because of its peculiarities, are certain more lax evidence standards. Nevertheless, the Court has insisted on informality in the **process of assessing the evidence**.³⁴

96. With regard to the formalities required in relation to tendering evidence, the Court has stated that “the procedural system is a means of attaining justice and ... cannot be

33. Article 306, Argentine National Code of Criminal Procedure, requires “sufficient elements of conviction to deem there exists a criminal fact and that the former can be accused as an accomplice of the latter” in order to pursue the proceedings.

34. *Bámaca Velásquez case*, op. cit.

sacrificed for the sake of mere formalities. Keeping within certain timely and reasonable limits, some omissions or delays in complying with procedure may be excused, provided that a suitable balance between justice and legal certainty is preserved”.

97. In an international tribunal such as the Court, whose aim is the protection of human rights, the proceeding has its own characteristics that differentiate it from the domestic process. The former is less formal and more flexible than the latter, which does not imply that it fails to ensure legal certainty and procedural balance to the parties. This grants the Court a greater latitude to use logic and experience in evaluating the evidence rendered to it on the pertinent facts.

Although some precedents only make reference to the assessment, others place matters in a more correct perspective and refer to informality in the process of **admission** and assessment:³⁵

89. With the aim of obtaining the greatest possible number of proofs, this Tribunal has been very flexible in the admission and assessment of evidence, according to the rules of logic and based on experience. A criterion, which has been pointed out and applied formerly by the Court, is that of the absence of formalism in the assessment of evidence. The procedure set forth for the litigious cases before the Inter-American Court boasts its own characteristics, that differentiate it from those applicable in the processes of domestic law, the former not being subject to the formalities inherent to the latter.

90. That is why “sound criticism” and the non-requirement for formalities in the admission and assessment of evidence are fundamental criteria to assess this one, which is appraised as a whole and rationally.

Quite frankly, we do not believe it can be upheld that a decrease in evidence acquisition formalities will result in a less formal process of assessment. The assessment process will continue to be the same. The only variation will be the body of evidence, not the assessment system.

In the cases of disappearance, the Court has developed a specific standard. As we have seen, due to the lack of direct proof, it is sufficient to prove the existence of regular pattern of disappearance, or other violations to human rights, and, additionally, of the link between the disappearance reported and the pattern itself.³⁶

The evidence standard is lax, but not as a consequence of any difficulty in obtaining more conclusive evidence, but, rather, due to the peculiarities of international law on human rights. Its aim consists in protecting human beings

35. See, for instance, the Mayagna Community case, op. cit.

36. Godínez Cruz case, op. cit.

from the actions of the state. Attributing responsibility to the state requires less than attributing personal criminal responsibility.

This is the reason for laxer evidence standards; it stems not from the informality of the evidence assessment valuation method, but from the object and aim of this branch of law. As we have already seen, it is not even necessary to individualize the state agent responsible for the harmful act, it is sufficient to find that whoever the agent might be, he/she was an agent of a state party.

Inquisitorial remains

Confusion between the means of proof and evidential value

Regardless of the manifestations of the Inter-American Court, and given that one of the methods used to assess evidence is that of sound criticism, it is possible to detect some remains of the inquisitive culture in the Court precedents.

As we have already seen, the system of sound criticism disunites the rules to incorporate a means of evidence in the proceedings from the rules on how to appraise its evidential weight.

In the *Bámaca Velásquez* case, the claimants wanted to include in the records the verbal statements of a person that had been originally recorded on videotape. The Court's opinion:

103. To this respect, the Court considers that the videotape that contains the testimony of Nery Ángel Urizar García, contributed by the Commission as documentary proof, lacks autonomous value and the testimony, which is the content, cannot be admitted for not complying with the requirements of validity, such as the appearance of the witness before the Tribunal, his/her identification, taking of the oath, control on behalf of the state and the possibility of questioning by the judge.

Here the Court made two mistakes. Firstly, it considered as a testimony what was clearly a piece of **documentary evidence**. In effect, this is not, by any means, a testimonial statement, as the affirmations of a person about a fact or circumstance that only he knows about is a testimonial statement, when it is rendered within the framework of judicial proceedings, in the presence of a public agent duly authorized to receive it, and only if the statement is given under oath. None of these requirements exist in this assumption. Finally, it is evident that these interviews were not carried out within the framework of court proceedings. The doctrine points out, in this sense, another essential difference between a testimonial statement and documentary proof: "Emilio

Betti ... correctly observes that ‘the chronological distance between the act and the representative effect, differentiates the documentary proof from the testimonial one’, given that a document is presented to the judge after it has been composed and, contrariwise, the representative effect of the testimony is perceived by the judge at the moment of receiving it”.³⁷

The document is the result of a human act, but is in itself a thing or an object. It is not an act that is representative in itself, as the statement of a witness – or a confession – that is received directly by the tribunal, but, rather, a thing or an object used to represent a fact.

The cassettes and the video are documentary evidence, in the same way that an interview published in a newspaper, an interview broadcast on television, a letter in which a person states a fact which makes it possible to incriminate another person – or even him/herself. In this sense it has been stated:³⁸

A document is a means of indirect evidence, real, objective, historical and representative ... equally, it may at times contain an extra-judicial confession and other types of witness statements from third parties ... strictly speaking, however, it will always be an extra-procedural act.

... A document ... has evidential content, which, in the course of judicial proceedings, in case it is presented, can constitute a confession (if its author is part of the process and the documented fact either injures or benefits the opposing party) or testimonial (in the other cases); but this document is a means of autonomous proof and not a simple testimony nor a confession. For this reason there are significant differences among the former and the latter.

When one or more persons decide to document an act, they are not rendering “an extra-judicial testimony with a confessional content, but are creating a document and are documenting this act, with its autonomous evidential nature, notwithstanding its representative, declarative character and the testimonial or confessional meaning of its content. If such document is invoked in any future case, by a party foreign to the original parties to the document, in its benefit, it becomes even clearer that we are not dealing with the testimony of a third party, because a true testimony is only given in a proceeding”.

But the most serious mistake committed by the Court was to reject the admissibility of the document, on the basis that it was not a statement of testimony. What a person says can become part of a proceeding in a myriad of

37. Hernando Devis Echandía, *Teoría general de la prueba judicial* (6. ed., Buenos Aires: Zavallia, 1988), t. 2, p. 494.

38. *Id. ibid.*, t. 2, pp. 501, 502 and 503.

ways. Although the most common one is through the testimony of that person him/herself, there are many ways whereby such information can be included in the records. Thus, for instance: (a) statement of another witness; (b) audio or video tape; (c) written reports.

However, the Court not only made a mistake when it considered that an interview recorded on videotape is a testimonial statement; the conclusion it reached based on this misconception was even more incorrect, since it effectively hindered the inclusion in the records of this means of evidence as documentary proof, which was what it truly stood for.

The worst of all was the automatic connection the Court established between the lack of conformity with the requirements for an incorrect means of evidence – testimonial –, and the absolute impossibility of this evidence being declared admissible and, as a consequence, assessed.

This ruling draws attention because is the reiterated jurisprudence of the Court, to the effect that press releases, although not documentary evidence – which they also are, over and above their evidential value –, can be entered in the case and be assessed according to the criteria of sound criticism.³⁹

Clues

Within the framework of the sound criticism approach, the different **means of evidence**⁴⁰ – expert witness opinions, documentary, testimonial, identifications, witness confrontation – are only differentiated from the remainder regarding the rules that organize their incorporation into the proceedings. As to their evidential weight, however, the different means of evidence have, in principle, an identical value.

In the sound criticism approach, each and every one of the means and elements of evidence⁴¹ validly introduced into the proceedings are “clues”, in the sense that they “indicate” a certain degree of probability that the fact is true

39. Ricardo Canese case, op. cit.: “65. Regarding the press documents presented by the parties, this Tribunal has considered that even though they cannot be characterized as having documental proof per se, they could be assessed as they recompile public and notorious facts, declarations of state officials and corroborate aspects relating to the present case”.

40. “Means of evidence is, in the proceedings, the procedural act regulated by law whereby an element of proof is introduced into the proceeding and its contents, if any (a testimonial declaration, an expert opinion, a document)”. Julio B. J. Maier, *Derecho procesal penal argentino*. (Buenos Aires: Hammurabi, 1989), t. 1b, pp. 579 and following.

41. The “element of evidence which directly or indirectly leads to a certain or probable knowledge of an object of the proceeding”. Id., *ibid.*, p. 579.

or untrue. No means or element of evidence has a predetermined value, nor the ability to “fully” prove the fact, nor a greater value than the others. Its value of conviction will depend on the evidential value of the means of the proof and not on the circumstance that certain means of evidence would carry a greater value of conviction than others.

The tribunal is free to appreciate each evidential element and establish its value of conviction, as long as it offers the rational motives on which it based its assessment, and as long as such reasons respect the rules of sound criticism.

Within the framework of the sound criticism approach, each and every one of the means and elements of evidence are, in truth, clues. On very few occasions will an element of proof, taken in isolation, have the ability to provide a direct and reliable demonstration of the different factual elements that make up the procedural object.

In some cases, it is possible, of course, for a single piece of evidence to provide a direct and reliable demonstration of an element of the procedural object – for instance, an autopsy will inexorably prove that the victim is dead. Nevertheless, it should be admitted that even in those cases in which there are witnesses who have actually seen the crime, the need to provide additional elements of proof will continue to exist, so as verify all of the assumptions of international responsibility.

If, on the other hand, we put aside the technical means of registration or investigation, and focus on the relevance that testimonial proof has in most of the cases, we can understand more fully the rationality of the system. Empirical investigations and experience unequivocally point to the fact that testimonial statements are not very reliable pieces of evidence.

At the same time, it is also a fact that there are good and bad witnesses. For this reason, only the rules of sound criticism will allow for an individualized consideration of each specific statement of testimony – the element of proof – so that the magistrate can issue judgment on the credibility, reliability and evidential value of each statement, based on its specific characteristics.

In this individualized consideration, the magistrate ought to focus on the content of the element of proof as such, and also confront it with the rest of the evidential body. In the jurisprudence of the Court, when the element of conviction, for some reason, is found to be not completely credible – for instance, when dealing with the victim’s testimony, it resorts to confrontation. Therefore, it is said that the Court resorts to the formula “it must be assessed within the body of evidence for this process”⁴² when faced with a problem that could affect the credibility of the witness. But this confrontation, according to the rules of sound criticism, should be carried out with each piece of evidence and not merely with the problematic ones.

42. See IAHR Court, case of Blake v. Guatemala. Judgment of 24 January 1998, paragraph 46.

In short, the Court has developed a jurisprudence which, when it enunciates its principles, sounds reasonable, but which in practice, when concretely appraising the elements of proof, would seem to resort to certain elements of the legal proof system.⁴³

Conclusions

Evidential activity constitutes a core activity in litigations conducted before the Inter-American Court of Human Rights, in which a state party is sued for the violation of one or more rights guaranteed under the American Convention.

Such an activity, on the other hand, presents certain specific features that are inherent to international law on human rights, due to the object and purpose of this branch of law.

Respecting the principle of contradiction, the elements of proof that are admitted in the records of a case are: those offered by the parties in their petition and in their counterplea, respectively; the relevant elements of conviction entered at other procedural stages; and any proof that the Court may find fit to incorporate on its own initiative.

The means to incorporate evidence are more informal than the procedures used in domestic law. The guiding criteria that informs the evidential activity is the discovery of truth about a probable violation of one or more of the rights guaranteed under the American Convention.

Evidential activity presents some singularities that are specific to international law in the field of human rights. Criteria such as the gravity of the violation, the need to repair the damage caused by the violation, the procedural object which consists in attributing international responsibility, all distinguish the procedure before the Court from other procedures inherent to domestic law.

This procedure, which protects human rights, is regulated in a manner that makes it possible to enter the greatest amount possible of elements of proof, with the aim of determining the truth of what actually happened. In this sense, the only relevant issue that needs to be proven is that the violation reported can be attributed to a public power, without the need of having to identify a concrete author.

The treatment of the burden of proof also presents a certain uniqueness.

43. The Court has stated: "62. The Tribunal verifies that the opinions of expert witnesses Máximo Emiliano Sozzo and Emilio García Méndez have been contributed to the process through the brief that recompiles them... As has been done on other occasions, the Court will not allocate the characteristic of complete evidence, but will assess its content as part of the evidential body and by applying the rules of rational judgment" (emphasis added). IAHR Court, case of Bulacio v. Argentina, op. cit.

In principle, the burden of proving the facts object of the petition falls upon the Commission.

Nonetheless, this burden is moderated in two different manners. Firstly, on certain occasions, the plaintiff is exempted from the burden of evidence if the means of proof are inaccessible to him, e.g., by being in possession of the state. In such cases, the plaintiff will be exempted from proving one or more facts or circumstances.

Secondly, if the state does not object to the facts of the petition, these will be considered as true, based on the application of a statutory presumption.

There exists a normative vacuum in everything that relates to the assessment of evidence, as neither the Convention nor the Rules of Procedure mention the issue. Because of this, it is the case law established by the Court itself that has shaped the system currently in effect.

The evidence assessment approach adopted by the Court is that of sound criticism. Although its jurisprudence has pointed out that the appraisal system adopted by the IAHR Court differs from that current in domestic law, being more informal, they actually operate exactly like each other.

The Court considers that it has complete freedom regarding the appraisal of evidence. Nonetheless, in all material issues, it adopts the sound criticism approach, and assesses direct evidence, circumstantial evidence and the proof of clues, including the necessary inferences to provide the foundation on facts as required to issue a sentence. When it appraises evidence, however, the Court resorts to certain internal practices that pertain to the legal proof system.

The 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.

The laxity in the evidence standard bears no relationship whatsoever to the proof assessment system, and arises from the object and the purpose of international law on human rights.

In the case of disappearances, the Court has developed a specific standard that requires proof of a systematic practice of disappearances, and a certain relationship between the fact reported and the aforementioned practice.

In short, it is possible to point out that the Inter-American Court of Human Rights has undergone a consistent jurisprudential development in terms of evidential activity. In this respect, it should be mentioned that the adoption of a sound criticism approach under which to appraise the elements of conviction still draws some practices from a legal proof system.