I. INTRODUCTION

Prohibitions against torture and other forms of ill-treatment are well-recognized as basic human rights in international law. However, despite their basic nature, they are by no means simple for the judicial bodies called upon to establish their existence and to condemn the States that commit them.1

The Inter-American Court of Human Rights has interpreted the personal integrity provisions of Article 5 of the American Convention on Human Rights in several cases, and has touched on many of the important issues with regard to respecting human dignity, torture and cruel, inhuman,
and degrading treatment.\textsuperscript{2} In interpreting Article 5, the Court is faced with the inter-relation between its six provisions, creating a threshold which must be passed to find a violation, distinctions between differing levels of violations, as well as many other issues relating to how far the Court is willing to go in interpreting this broadly written article.

II. STRUCTURE OF ARTICLE 5 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

The American Convention on Human Rights protects the integrity of persons in very broad terms, and explicitly includes not only the physical integrity but also the psychological and moral integrity of persons. Article 5(1) establishes that "[e]very person has the right to have his physical, mental, and moral integrity respected."\textsuperscript{3}

Other treaties, such as the International Covenant on Civil and Political Rights (ICCPR), do not specifically list psychological and moral integrity in their texts. However, in the case of the ICCPR, the related United Nations Human Rights Committee stated in its General Comments on the Convention that the prohibition against torture or cruel, inhuman and degrading treatment "[r]elates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim."\textsuperscript{4} Therefore, although the text of the American Convention is more explicit than other conventions in its inclusion of non-physical integrity, this conception of personal integrity is recognized in other systems.

Although the European Convention on Human Rights does not explicitly include psychological and moral suffering, the European Court of Human Rights has also interpreted its personal integrity provisions to include protection against moral suffering and degrading treatment that creates a sense of fear, anxiety and inferiority in order to humiliate, degrade and break the victim’s resistance.\textsuperscript{5} This European standard including psychological trauma has been cited and adopted by the Inter-American Court of Human Rights in a recent case.\textsuperscript{6}

The American Convention also prohibits torture and cruel, inhuman and degrading treatment, in the common terms of other human rights

\begin{itemize}
\item[3.] Id. art. 5(1).
\end{itemize}
documents, and goes on in the same provision to prohibit treatment of detained persons that does not show full respect for human dignity.

The remaining provisions of Article 5 deal with the further rights of detainees to be separated based on conviction or pre-trial status and age, and lays out reform and rehabilitation as the only proper goal of imprisonment. These provisions, and the right for detainees to be treated with the respect due human dignity in Article 5(2) are rights usually thought of separately from the right to be free of torture and cruel, inhuman and degrading treatment.

For example, the ICCPR lists torture and cruel, inhuman and degrading treatment in Article 7 and the rights of detained persons in Article 10. However, the practice of the Human Rights Committee, which hears complaints based on that treaty, has been to find violations of both of these two provisions when detainees have been found to have been tortured or suffered cruel, inhuman and degrading treatment. The Committee also has found that treatment due detainees under Article 10(1) goes further than just a prohibition of torture and cruel, inhuman and degrading treatment. It also includes ensuring conditions that are not detrimental to their health.

This sort of consideration is important in the evaluation of the treatment that the Inter-American Court gives to Article 5, since it also includes provisions on the rights of prisoner and is therefore quite broad. The Inter-American Court, to this date, has only ruled on violations relating to torture, cruel, inhuman and degrading treatment and conditions and treatment that are not respectful of human dignity. The other provisions of Article 5 have not been directly interpreted. Therefore, this paper will focus on these provisions, which, as already noted, include conditions of confinement cases. However, in the Court's jurisprudence,

7. For example, the Universal Declaration of Human Rights, the 1984 Convention on Torture, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights.

8. The Convention, supra note 2, art. 5(2).

9. Id. art. 5(2).

10. International Covenant on Civil and Political Rights, art 7 and 10. [hereinafter ICCPR].


13. Id.

14. Id.
as discussed further below, distinctions between the different types of violations of these provisions are not always clear. This lack of clarity may lead to difficulty when the further provisions of Article 5 are reached, since these provisions would naturally include violations that do not reach the level of cruel, inhuman and degrading treatment or torture.

III. Creating a Threshold for Violations of Articles 5(1) and 5(2)

With respect to violations of Article 5(1) and (2), it is important to initially address separately the first two provisions and to establish a minimum threshold which must be crossed in the treatment of the victims in order to show their personal integrity has been violated or that they have suffered torture or cruel, inhuman and degrading treatment. Some punishment is necessary in criminal systems, but the Convention establishes that certain types of punishments, conditions, and treatments of any person are restricted in order to preserve the sacredness of the human person. This right is so fundamental that, unlike other important rights, no exceptions to the right to humane treatment are allowed, even under a state of emergency or war. Ironically, even the right to life can be excepted, particularly in the American Convention, which provides for the death penalty.

Therefore, an important task is the creation of a threshold, which can incorporate even the most minor violations of these two provisions of the article and which can never be crossed without condemnation. The creation of a substantive, legal threshold which must be reached in order to hold a State responsible is a task which sometimes becomes blurred in the jurisprudence of the Inter-American Court with the level of proof necessary to prove the facts underlying these violations.

The extensive protections provided in Article 5 leave an interpretation of this article available that could be quite broad in its protection of the individual rights it enshrines. With its definition of the integrity to be

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15. See The Convention, supra note 2.


17. Despite its abolitionist provisions which do not allow expansion or reinstitution of the death penalty, the Convention provides for the continuance of the death penalty in countries that establish it prior to signing on to the Convention. See The Convention, supra note 2.

protected as that of the whole being rather than physical torture alone, modern psychological and other tortures can easily be covered\(^{19}\) as well as physical mistreatments. Further, though the provisions cover the more egregious "tortures," which call to the mind a special degree of disgust, it also covers any treatment which is cruel, inhuman or degrading to the physical, mental or moral integrity of the person.

Yet the threshold of what can constitute a violation of personal integrity under this article does not stop with this type of treatment, but further restricts the treatment that can be forced on a detainee to that which is respectful of human dignity. Since the provision already includes "degrading treatment," in order to read this provision to have some purpose, it would appear that the meaning would be of a treatment that might or might not reach the level covered by "degrading treatment." Thus, it could be found that the article restricts more treatments than just those that reach the level of cruel, inhuman and degrading treatment.

A further interpretation of Article 5(1) and (2) could also incorporate Article 5(6), with regard to prisoners, and could find further protections in the mandate that the deprivation of their liberty can have no other purpose than rehabilitation and reform. A violation of Article 5 could be held to be inherent in any incarceration that does not live up to this standard, including possibly any *incommunicado* holding, disappearance, or other illegal detention since no arbitrary detention could truly have reform or rehabilitation as its goal. With regard to disappearances, in the Velásquez Rodríguez and Godínez Cruz cases, the Court found a presumed violation of Article 5. Also, the Court has previously ruled that the condition of *incommunicado* alone is enough to violate the prohibition against cruel, inhuman and degrading treatment.\(^{20}\) However, the Court has not always followed these decisions.

### IV. THRESHOLD FOR PRESUMPTIONS OF ARTICLE 5 VIOLATIONS AND ISSUES OF PROOF

The Court has not yet articulated a presumption based on Article 5(6). However, it has found in several cases that a presumption that the threshold for Article 5(1) and 5(2) violations exists with regard to certain types of detention.

Clearly from its first treatment of forced disappearances in Velásquez Rodríguez and Godínez Cruz, the Court found, without any direct evidence

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of a violation to physical well-being, that a violation of Article 5 could be presumed in disappearance cases given the psychological and moral effects of being held *incommunicado* and the prolonged isolations which are inherently part of a disappearance. The Court noted that these violations constituted cruel and inhuman treatment and injured the personal integrity of the victim and the right of detained persons to be treated in a way respectful of human dignity. From this case it is clear that mental and emotional forms of ill-treatment are clearly being accepted by the Court, in line with the Convention's protection of a broadly defined personal integrity, which includes the psychological and moral aspects in addition to the physical.

The threshold for the Court's finding of a violation in disappearances, it would have appeared from this case, was therefore the isolation which is inherent in a disappearance. This inherent violation passed the legal threshold to include both disrespect for human dignity and cruel, inhuman and degrading treatment. However, in a similar case where disappearance was once again proven, the Court found only that human dignity had been disrespected and did not find cruel, inhuman and degrading treatment.

The Court did not refer in that case to the isolation inherent in a disappearance but rather to the fact, which had been proven by eyewitness accounts, that the victim had been put into the trunk of a vehicle.

Similarly in the Paniagua Morales case, although the Court declared the existence of the practice of forced disappearance and illegal detention accompanied by mistreatment and torture, it would not presume the existence of violations of Article 5 with regard to these violations, despite its previous decision in the Velásquez Rodríguez and Godínez Cruz cases. Therefore, some of the victims were not found to have had their Article 5 rights violated despite the *incommunicado* nature of their detention.

This is especially confusing in light of the Court's emphasis on this type of isolation in the Suárez Rosero and Loayza Tamayo cases which both concerned *incommunicado* detentions. These cases tend to follow, and in the case of the Suárez Rosero case, explicitly states, ideas similar to

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22. *Id.*
24. *Id.*
that of the Velásquez Rodríguez and Godínez Cruz cases: That isolation alone constitutes a treatment disrespectful of human dignity and cruel, inhuman and degrading treatment.\(^{27}\) Further, the Court has cited the European Court’s decision that stated that illegal detention is an aggravating factor given the vulnerability of the victim in these circumstances.\(^{28}\)

These cases seemingly rejected a prior case that had possibly limited the presumption that arbitrary detention and isolation inherently violate Article 5. In the Gangaram Panday case, the Court found that in the absence of definitive proof of mistreatment of the victim, who committed suicide during his detention which the Court determined was arbitrary and illegal based on inference of fact did not permit it to presume violations of Articles 5(1) and 5(2) based purely on the arbitrary nature of the detention.\(^{29}\)

Moreover, given the lack of proof of torture or mistreatment of others by government officials, the Court found that the applicants had not demonstrated a governmental practice from which the Court could presume the victim was tortured or mistreated.\(^{30}\) The refusal to use a similar presumption in this case was based on the fact that no pattern of mistreatment was shown nor specifically any mistreatment of the victim.

With regard to cases where the Court has not used its presumption despite the existence of a proven pattern or practice of isolated detentions and mistreatment of detainees, the Court instead weighed the medical evidence of torture and cruel, inhuman and degrading treatment it had available.\(^{31}\) The victims who did not present medical reports showing physical signs of ill-treatment were found to have not suffered it. Given the difficulty of obtaining medical evidence, especially if one is held for some time or tortured using techniques that do not leave easily identified signs,\(^{32}\) the Court’s failure to use presumptions may have an impact on future cases. This may be especially true, since the Court has sometimes

\(^{27}\) See generally, Suárez Rosero, supra note 20 and Loayza Tamayo, supra note 6.


\(^{30}\) Id. para. 64.

\(^{31}\) See Paniagua Morales, supra note 26.

been unwilling to find contested facts to be proven based solely on the testimony of the victim.\footnote{33}

In cases where specific mistreatment of the victims was shown, the Court has still been willing to find that this was the responsibility of the State. However, the Paniagua Morales case tends to set up a standard that a pattern and specific medical evidence of the mistreatment should be shown rather than just showing a connection to the pattern of disappearances or illegal detentions which included such mistreatment.

In Suárez Rosero, the Court was faced with a living victim whose testimony and that of his family included claims of beatings, incommunicado detention, and poor conditions of confinement.\footnote{34} The Court could not specifically use the European standard that an injury proven to have occurred while in the sole custody of the State is presumed to be caused by the State. However, absent a sufficient rebuttal,\footnote{35} the Court did find that given the \textit{incommunicado} nature of the first part of his detention, only the victim and the State could have evidence.\footnote{36} Therefore, without evidence to the contrary offered by the State, the Court would give weight to the testimony and claims of the victim.\footnote{37}

In other words, after proving isolated detention and making initial Article 5 claims the burden shifted to the State to show the claims were untrue. Such a shift of the burden of proof is in line with the nature of these detentions recognized in the prior cases that established the presumption of Article 5 violations in disappearance cases. Thus, not only has the Court on occasion found cruel, inhuman and degrading treatment and disrespect to human dignity based solely on isolation, but it also has used isolation to shift the burden of proof in attempting to prove other, more egregious, violations.

\footnote{33}{See Paniagua Morales, \textit{supra} note 26 (despite the fact that the Court found the victims had been detained in a pattern that included beatings and mistreatment and that the Commission had argued any injury claimed in custody should be found to be the responsibility of the State absent a rebuttal, the Court denies claims of those who do not present actual medical evidence of their allegations); Loayza Tamayo, \textit{supra} note 6, para. 58 on the issue of rape; \textit{But see}, Suárez Rosero, \textit{supra} note 20 para. 33 (Court discusses in a case where the State did not rebut the victim's allegations that the State is the party that has access to the facts).}

\footnote{34}{Suárez Rosero, \textit{supra} note 20, para. 23.}

\footnote{35}{The European Court found that in a case where it was undisputed that injuries were sustained during detention by the police that the government was \textit{“under an obligation to provide a plausible explanation of how the applicant’s injuries were caused.”} Ribitsch v. Austria, 336 Eur. Ct. H. R (Ser.A) (1995), para. 34.}

\footnote{36}{Suárez Rosero, \textit{supra} note 20, para. 33.}

\footnote{37}{Id.}
The United Nations Human Rights Committee has addressed this issue by stating the following:

With regard to the burden of proof, the Committee has already established in other cases (for example, Nos. 30/1978 and 85/1981) that this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. In those circumstances, due weight must be given to the author's allegations.38

This decision was based on the obligation of the State to investigate such allegations fully, presumably because if the State had fulfilled this obligation it would have had the information necessary to rebut or explain the allegations. Since this obligation exists in the Inter-American System as well, this conception of the burden of proof should be equally relevant in the Court's analysis. The Court's first decision is evidence of this, given its statement that the States "[c]annot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation."39 A combination of this flexibility in the burden of proof and the presumptions can go a long way in remedying the problems facing victims in establishing their claims of mistreatment.

V. DISTINCTIONS BETWEEN TORTURE AND CRUEL, INHUMANE AND DEGRADING TREATMENT

Once the threshold or presumption has been met, which is perhaps the most important step in the interpretation, it also becomes important to determine the various levels of violation possible under Article 5. This is important for many reasons. First, the State must not only be condemned for a "violation of Article 5" but should also be stigmatized by the labels

38. Supra note 4.
39. Velásquez Rodríguez v. Honduras, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988). In this and the other Honduras Case of Godínez Cruz, the Court defined the standard of proof necessary to prove violations of the rights contained in the American Convention in a way that allowed the applicant to show a governmental practice of violations and a link between the individual case brought and the practice through circumstantial evidence and presumptions consistent with the facts. The Court noted that, given that "[s]tates do not appear before the Court as defendants in a criminal action," and further that the purpose of the proceedings was "[t]o protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible" for violations of their rights the Court has more flexibility than domestic criminal courts in determining the criteria for weighing evidence. Id. paras. 127, 128 and 134.
which truly mark the atrocities it has committed. If a state has allowed, condoned, or participated actively in "torture," it should be condemned for this practice by name by the international community and not allowed to escape with a less stigmatizing label. While all violations are to be condemned and cruel, inhuman and degrading treatment is as violatory of the Convention as torture, the severity of the violation must not be overlooked.

Not only should the Court look to condemn violations generally but, because the Inter-American system is based on individual complaints, the horrors committed against each victim should be discovered, where possible, and condemned, even if it is easier to stop at a simple crossing of the threshold and a general denunciation. Through this recognition, the State can be asked to compensate the victim for the extent of their suffering and also so that the judgment can serve as what the Court often sees as the *per se* international recognition of the responsibility of the State for the atrocities committed.

One major distinction that can be drawn is between torture and cruel, inhuman and degrading treatment. The European Court has distinguished succinctly between these two types of violations in its groundbreaking, although criticized, case of Ireland v. United Kingdom. In that case, the European Court found that the various forms of ill-treatment should be separated and defined individually. The writers of the European Convention, that Court noted, meant to give meaning to all the parts of the prohibition and therefore each must be seen as adding something to the provisions. The term "torture", they found, carried a special "stigma" which should be applied to "deliberate inhuman treatment causing very serious and cruel suffering." As noted above, it is because of this stigma that it is important for the determination of which form of violation has occurred in each case, even though all violations should be condemned.

This idea that torture is a more grave form of cruel, inhuman and degrading treatment is supported by the United Nation's definition of torture, which the European Court cites, that calls torture "an aggravated and deliberate form of cruel, inhuman and degrading treatment or

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40. Even Amnesty International, whose report calls for all violations to be condemned regardless of distinctions, recognizes the special stigma inherent in the term "torture." *TORTURE IN THE EIGHTIES, supra* note 1, at 15.

41. The Court has often denied requests by the Commission and victims for an apology or public announcement by the State, stating that its judgment by itself constitutes international recognition of responsibility.


punishment." However, as the Ireland case shows, the European Court used this criteria to determine that the infamous "five techniques" complained of in that case were not of the "intensity" that the word torture implies, and instead deemed them cruel, inhuman and degrading treatment. Such an approach, which is followed by the Inter-American Court in its cases, has been criticized for making the lower threshold of what constitutes cruel, inhuman and degrading treatment severe enough to be called "torture."

This approach also requires the use of a case-by-case analysis which leaves the Courts open to criticisms of subjectiveness and a lack of objective factors. However, as the comments of the United Nations Human Rights Committee regarding the torture and cruel, inhuman and degrading treatment article of the ICCPR states:

"That Covenant does not contain any definition of the concepts covered by Article 7 [the torture and cruel, inhuman and degrading treatment article], nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied."

This is similar to the approach of the European Court and leaves the judging body discretion to make distinctions based on any criteria it deems relevant to its determination.

The Inter-American Court has followed a similar path, although at times its distinctions and interpretations of what fits within the terms of the Convention have been inconsistent and confusing. The Court, based on the structure of Article 5(1) and (2) discussed above, has used different distinctions: torture, cruel, inhuman and degrading treatment, and treatment disrespectful of human dignity.

With Loayza Tamayo, the Court found that the victim had some medical evidence and witnesses that testified to abuses similar to those she

44. Id.
45. Id.
46. Id. para. 168.
47. Loayza Tamayo, supra note 6, para. 57.
49. La Integridad Personal en el Derecho Internacional (A propósito de la Convención de las Naciones Uniones contra la tortura), Miguel Villavicencio C., Boletín Comisión Andina de Juristas, marzo 1990, No. 24, 28-29.
50. Supra note 4.
complained of suffering in the same prison. The victim complained in this case of traditional torture techniques such as "submarine torture," beatings and sexual torture, yet the Court found only cruel, inhuman and degrading treatment based on the facts it considered proven. However, the Court did find the State responsible for cruel, inhuman and degrading treatment based on the other claims including conditions of confinement, the incommunicado nature of her detention, beatings and other mistreatments.

The Court did include in this case recognition that different grades of violations from torture to other lesser types. The Court also noted the European Court's definitions of inhumane treatment and degrading treatment as including psychological suffering, but did not make a point of distinguishing strictly between "inhuman" and "degrading" treatment as the European Court has. While recognizing as well that illegal detention aggravates the vulnerability of the detained person, the Court does not use this aggravating factor to find torture rather than cruel, inhuman and degrading treatment.

In determining the distinction between the three different types of violations used by the Court, several other cases are also illustrative. In the Paniagua Morales case, the Court had three different types of victims with regard to Article 5. All victims had been arbitrarily kidnapped and held prisoner, although as previously mentioned, the presumption that this isolation constituted ill-treatment of any kind was not mentioned by the Court. The first set of victims had been held and had not, in the Court's criteria, proven any violence against them or poor conditions of confinement despite claims by some of them that they were beaten. The Court rejected their allegations of Article 5 violations. For those victims who had survived the detention and had shown the Court medical proof of beatings, the Court determined they had been subjected to cruel, inhuman and degrading treatment.

51. Loayza Tamayo, supra note 6.
52. Id. paras. 58 and 46.
53. Id. para. 58.
54. Id.
56. Id. para. 57.
58. Id. para. 66.
59. Id. para. 135.
60. Id.
The victims who had been murdered by their captors, for whom the Court had the autopsy reports which showed the treatment of the victims before their deaths, and given the gravity of the suffering obviously caused by the treatment shown in these reports, were deemed to have been tortured.\(^6\) Given that the particular violations in the case of the deceased victims were especially gruesome,\(^6\) this decision was not a difficult one with regard to whether it was "intense" enough to qualify under the test for "torture."

This intensity test, which is similar to the European Court's, was adopted by the Inter-American Court to distinguish between "torture" and cruel, inhuman and degrading treatment,\(^6\) although the Court does not distinguish between cruel, inhuman and degrading as the European Court has done.\(^6\) The intensity standard, as mentioned previously, can be criticized based on its subjectivity. However, the Court seemed to prefer not to list a more specific definition.

As with any subjective standard, the facts of each case must be weighed in order to determine if a violation has occurred, and if so, what level it reaches. This raises another serious issue in physical integrity cases: what is necessary to prove the facts involved? As noted above, torture and its various techniques are not always easy to demonstrate medically, and this can be especially true in cases involving long detentions where access to a doctor can be restricted or where the victim is too afraid to seek medical attention immediately. Therefore, in any discussion of torture and the various levels of violations to physical integrity rights, the related standard of proof issues must be addressed both in terms of the Court's general standard of proof and that concerning Article 5 specifically.

VI. OTHER ARTICLE 5 ISSUES TREATED BY THE COURT

A greater number of cases coming before the Court each year include more varied violations (other than disappearances and right to life). Therefore, the Court should begin to reach those issues which it may have found easier to dismiss in earlier cases where the more "obvious" or "egregious" violations made it possible to dismiss the lesser or more complicated claims while still finding the State responsible. Some issues

\(^{61}\) Id. para. 134.

\(^{62}\) The autopsy reports showed that the victims' injuries included near-decapitation, removal of fingernails, bruises, non-fatal cuts (including one in the shape of a cross), etc. Id. para. 66.

\(^{63}\) Loayza Tamayo, supra note 6, para. 57.

\(^{64}\) Ireland v. United Kingdom, supra note 18.
dealing with Article 5 outside of the Court’s standard disappearance and detention cases have been raised in past cases, though many more exist and will eventually need to be confronted by the Court.

In a case where the more egregious violations were not under the Court’s jurisdiction, the Court was confronted with claims concerning the Article 5 rights of the family of a disappearance victim whose disappearance was covered-up by the State. These rights, creatively, were found to be violated since the disappearance and burning of the body of their family member directly caused suffering and gravely affected their lives.65

The Inter-American Court has not adequately addressed the distinction between direct and indirect victims, and this becomes apparent in this expansion of Article 5 rights to psychological and moral integrity of relatives of the primary victim, which the Blake case finds to be directly affected by violations to another person. However, this finding has not been used in other cases to find family members to be direct victims where the primary crime was under the Court’s jurisdiction, which gives the unfortunate impression that the Court was simply extending this interpretation in the Blake case because of its finding that the victim’s disappearance could not be adjudicated because it occurred before the violating State became a Party to the jurisdiction of the Court.66

In another important area that might be covered under Article 5, the Court has not yet directly addressed the death row phenomenon which is said to cause mental anguish to prisoners awaiting death sentences. This issue, faced by the European Court in the famous Soering case, has been raised before the Court in its decision on provisional measures in a matter involving death row prisoners in Trinidad and Tobago.67 While the State argued that the Court should not ask it to delay their executions further because of internal time limits established to avoid the “cruel and unusual punishment” of extended death row stays, the Court did not reach this issue and ordered the stay of execution without any discussion of this substantive issue raised by the State.68

With regard to whether violations of Article 5 can be found in a case where death is presumed to have occurred and whether a violent death might be considered to violate Article 5 represented two issues that were

66. Id. paras. 2 and 3.
68. Id.
addressed by the Court in the Neira Alegria case. In that case, involving
the disappearance of prisoners during a prison riot, the Court decided to
reject the argument of the Inter-American Commission that the right to not
be subjected to cruel, inhuman or degrading treatment was violated,
without evidence that such treatment occurred during the alleged detention
of the victim. Further, the Court concluded that "[w]hile the deprivation
of a person's life could also be understood as an injury to his or her
personal integrity, this is not the meaning of [Article 5] of the
Convention." This concept, that Article 5 does not refer to all injuries to
the victim's body even in the case of a disappearance implies that an
element of prolonged suffering is part of the Court's definition of the
treatments included in the prohibitions of Article 5.

The Court has been reluctant also in issues that affect women. For
example, in the Loayza Tamayo case, the Court did not find for the victim
on her claims of sexual tortures, thereby dodging an important and well-
recognized type of torture. The Court, which has only had one female
member since its creation, must overcome whatever timidity it has to
dealing with women's issues. This will be especially true not only given
the use of sexual tortures against women and men, but also for other
Article 5 issues which may arise later. For example, whether a state could
be found responsible for domestic violence (an assault to personal integrity
rights) in its jurisdiction if the State condones it or does not attempt to.

VII. CONCLUSION

In conclusion, the Court must continue to clarify its interpretation of
Article 5(1) and 5(2). A threshold for violating these first two provisions
should be clearly established, and presumptions should be used to allow
victims to meet this threshold based on the nature of their detentions which
can make them especially vulnerable to physical violence as well as
inherently causing them mental and moral anguish. At least, a shift in the
burden of proof as in the Suárez Rosero case should occur in these
situations. The burden of proof should be clearly established but should
not overburden the victim, since, as the Court has noted, it is often only
the State that holds access to proof other than the victim's testimony.

Deciding where the threshold of a violation lies and the distinctions
between the different levels of violations (lack of respect for human

70. Id. para. 86.
71. Id.
72. Torture Survivors, supra note 19.
dignity, cruel, inhuman and degrading treatment, or torture) are subjective, evolving along with society's conceptions, and will always, therefore, be open to criticism. However, the stigma inherent in the terms themselves should be used to vindicate the victim and recognize the extent of the State's responsibility. More complicated situations and types of violations must be addressed fully. The Court should not stop at simply crossing the threshold without condemning all of the violations it can find in any given case.

The Court will surely be faced with various types of violations of Article 5. Cases involving detainees' rights will surely also follow and the Court must be clear on its interpretation of the first two provisions of Article 5 in order to prepare itself to deal with the overlapping remaining provisions which will have their own, presumably lower, threshold of mistreatment.