2007 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION

ROSA LUNA V. AZAR

BENCH MEMORANDUM [*]

Index

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I. Introduction

The analysis of the case of Ms. Rosa Luna against the State of Azar raises a series of debates central to the protection of the fundamental rights of persons and the guarantees of democracy. The facts of this case have been drawn up to favor discussions on substantive issues—which might be key to practicing before the Inter-American system for the protection of human rights— over procedural issues.

The purpose of this document is to provide basic guidelines on some of the main legal topics likely to be raised in light of the facts of the case, as well as a general guide to the possible arguments that the teams representing the State and the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") or the victims might put forth. This should by no means exclude the possibility that a detailed and thorough study of the case might raise other interesting and relevant arguments not covered in this memorandum.

The legal points set forth in the description of the facts are summarized below. In the initial petition before the Inter-American Commission on Human Rights, Ms. Rosa Luna complained against the State of Azar for violations of her personal integrity, personal freedom, judicial protection and the general obligation to respect and guarantee rights— all rights protected under the American Convention on Human Rights (hereinafter "the American Convention" or "ACHR"). She also complained of violations of the Inter-American Convention to Prevent and Punish Torture (hereinafter "IACPPT"), the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará" and the Inter-American Convention against Corruption. The facts of the case did not unfold within the context of civil unrest or an internal armed conflict, which is relevant information for the correct identification of the rights violated and to rule out the application of article 27 of the American Convention.

During the proceedings before the Commission, the State of Azar did not raise any preliminary objections, nor did it dispute the facts reported. However, it seriously questioned the interpretation of the scope of the American Convention asserted by the victim. It maintained that the facts did not constitute violations of personal integrity, personal freedom, judicial protection or the obligation to respect and guarantee rights.

In accordance with article 50 of the American Convention, the Commission issued its Report concluding that the State of Azar had violated articles 1.1, 2, 5, 7, 8 and 25 of the American Convention on Human Rights; articles 3 and 6 of the Inter-American Convention to Prevent and Punish Torture and articles 2, 3 and 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, "Belem do Pará Convention". The State of Azar refused to follow the recommendations of the Commission, claiming that there were insurmountable legal obstacles that prevented it from following the instructions it was given.

In view of this situation, the Inter-American Commission filed the case before the Inter-American Court of Human Rights, denouncing the State of Azar for its international responsibility for the violation of Ms. Rosa Luna's aforementioned rights. Once the

procedures established in the Regulations had been followed, the Court initiated oral proceedings and set a hearing to hear the parties' arguments.

In developing their arguments, it is key for the teams to identify and put forth the central legal issues arising from the case hypothetical. They must take into account the state of the discussion in the Inter-American system —in terms of governing rules as well as case law— and in international human rights law in general. The teams must also pay attention to the doctrinal and jurisprudential developments regarding the protection of women's rights in the international sphere.

I. A. Applicability of international instruments in the Inter-American System

When examining the specific facts of the hypothetical case in light of international instruments that do not form part of the Inter-American system itself, the teams should take into account the practice and case law of the Inter-American Court that enables the use of standards from other human rights systems as a guideline for the interpretation and application of the American Convention.

The system for the promotion and protection of human rights is, as it states, a set of rules and principles linked together rationally, which must be seen in its totality in order for any part of it to be applied.[1] The authority of the Inter-American Court to interpret comprehensively the rules for the protection of human rights enshrined in the inter-American instruments is derived from article 29 of the ACHR. This rule demonstrates clearly that the system is a whole that surpasses the mere letter of the law, and that it requires the interpreter to consider the human being in his totality and to bear in mind all that the democratic system would require for the human right at issue to be effective.[2] The rule also reclaims the legal value of the resolutions of the treaty bodies, which the interpreters cannot ignore.[3] For its part, and specifically with regard to subsection b) of article 29, the Court has acknowledged that "this provision was designed specifically to ensure that it would in no case be interpreted to permit the denial or restriction of fundamental human rights and liberties, particularly those rights that have already been recognized by the State."[4]

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[1] *Cf.* Cecilia Medina Quiroga, *"La Convención Americana: teoría y jurisprudencia". Vida, integridad personal, libertad personal, debido proceso y recurso judicial.* Centro de Derechos Humanos de la Facultad de Derecho de la Universidad de Chile, December 2003, p.7.

[2] *Cf.* Cecilia Medina Quiroga, *"La Convención Americana: teoría y jurisprudencia". Vida, integridad personal, libertad personal, debido proceso y recurso judicial, op.cit.*, p.6.

[3] *Cf.* Cecilia Medina Quiroga, *"La Convención Americana: teoría y jurisprudencia". Vida, integridad personal, libertad personal, debido proceso y recurso judicial, op.cit.*, p.6.

[4] *Cf.* Inter-Am. Ct.H.R., *Advisory Opinion OC-4/84 "Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica",* of January 19, 1984, para. 20. As Judge Rodolfo E. Piza Escalante indicated in his separate opinion, the principles of interpretation enshrined in the Vienna Convention on the Law of Treaties, as well as those derived from article 29 of the American Convention, understood correctly, above all in the light of human rights law, "also point to the need to interpret and integrate each standard of the Convention by using the adjacent, underlying or overlying principles in other international instruments, in the country's own internal regulations and in the trends in effect in the matter of human rights, all of which are to some degree included in the Convention itself by virtue of the aforementioned article 29, whose innovating breadth is unmatched in any other international document." *Cf.* Inter-Am. Ct.H.R., *Advisory Opinion OC-4/84 "Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica", op.cit.,* separate opinion of Judge Rodolfo E. Piza Escalante, point I.2. "Criteria of Interpretation." On this point, the Inter-American Commission maintained that: "The purpose of this Article [29(b)] is to prevent States Parties from relying on the American Convention as a ground for limiting more favorable or less restrictive rights to which an

In Advisory Opinion OC-1 on "Other Treaties", the Inter-American Court maintained that it would be improper to make distinctions regarding the applicability of the human rights protection system based on whether the international obligations contracted by the State are derived from a regional source or not, as the nature of human beings and the universal character of the rights and liberties that merit guarantee are the basis for all international protection systems, and therefore certain minimal standards can be claimed. It further maintained that the American Convention tends to integrate the regional and universal systems for the protection of human rights, as stated in the Preamble, which recognizes that the principles that serve as the basis for the Convention were also enshrined in the Universal Declaration of Human Rights and that "they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope."[5]

Throughout its case law, the Inter-American Court has used all kinds of international instruments to interpret the rights enshrined in the American Convention, so as to provide the most complete protection of the rights established in the Convention and in the American Declaration. As such, in the case of *Villagrán Morales et al.*, the Court held that the ACHR forms part of an international *corpus juris* for the protection of human rights, which must be considered when establishing the content and the scope of some of the provisions of the Convention.[6] In the *Cantoral Benavides* case, the Court made reference to the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well to as the IACPPT, when it evaluated the possibility of mental suffering also constituting the offense of torture.[7] While noting its lack of jurisdiction to rule on whether a State is internationally responsible for the violation of international treaties that are outside its sphere of jurisdiction, the Court held in the *Bámaca Velásquez* case that certain acts or omissions that violate the rights enshrined in the American Convention also violate international instruments for the protection of human rights that are not Inter-American instruments.[8]

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individual is otherwise entitled under either national or international law. Thus, where there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question. If that higher standard is a rule of humanitarian law, the Commission should apply it." *Cf.* IACHR, *Report No. 55/97, Case 11.137, Juan Carlos Abella (Argentina),* in *Annual Report of the Inter-American Commission on Human Rights, 1997*, para. 165.

5 *Cf.* Inter-Am. Ct.H.R., *Advisory Opinion OC-1/82"Other Treaties"*, of September 24, 1982, paras. 40 and 41. In referring to the dynamic nature of interpreting international law, the International Court of Justice also held that "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation." *Cf.* Cecilia Medina Quiroga, *"La Convención Americana: teoría y jurisprudencia". Vida, integridad personal, libertad personal, debido proceso y recurso judicial, op.cit.*, p. 10, citing the International Court of Justice, *Legal Consequences for Status of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, ICJ Reports 1971, paras.16-31.

6 *Cf.* Inter-Am. Ct.H.R., *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*, Judgment of November 19, 1999, paras. 192 and 194.

7 *Cf.* Inter-Am. Ct.H.R., *Cantoral Benavides v. Peru*, Judgment of August 18, 2000, paras. 100 and 101.

8 *Cf.* Inter-Am. Ct.H.R., *Bámaca Velásquez v. Guatemala*, Judgment of November 25, 2000, para. 208.

As such, it indicated that it has jurisdiction "to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention."[9]

II. General considerations on torture and cruel, inhuman or degrading treatment or punishment

The prohibition against torture has been recognized as a norm of *jus cogens* and is therefore binding upon all States, whether or not they are parties to the treaties that contain such prohibition.[10] It has been so established by the General Assembly of the United Nations in the Declaration against Torture[11] and additionally deemed so by the United Nations Special Rapporteur on Torture.[12]

The Inter-American Court has also recognized the absolute prohibition against torture in all of its forms and that it belongs to international *jus cogens*.[13] Because it is a non-derogable right, it has been held that the prohibition against torture governs even under the circumstances most difficult for the State, such as the aggression of terrorism and large-scale organized crime.[14] This follows from article 27.2 of the American Convention, which establishes that the right of personal integrity cannot be suspended or derogated in cases of war, public danger or other threats to the independence or security of the State.[15]

On the other hand, the prohibition against cruel, inhuman or degrading treatment or punishment has not been recognized with the same consistency as the prohibition against torture.[16] Within the framework of this debate, the Inter-American Court has

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9 *Cf.* Inter-Am. Ct.H.R., *Las Palmeras v. Colombia*, Preliminary Objections, Judgment of February 4, 2000, para. 32.

10 *Cf.* U.N. Human Rights Committee, *General Comment No. 24 on issues relating to reservations*, adopted on November 2, 1994 at its 52nd session, paras. 8 and 10. Likewise, in the case of *Prosecutor v. Delalic et al.*, Judgment of November 16, 1998, the ICTY affirmed that the prohibition against torture constitutes a norm of *jus cogens* (para. 454) and that the prohibition against inhuman treatment is a norm of customary international law (para. 517); *Cf.* also ECHR, *Al-Adsani v. United Kingdom, Judgment of* November 21, 2001, para. 61.

11 Article 2 of the *Declaration against Torture* states: "Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights."

12 *Cf.* Economic and Social Council of the United Nations, *Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment*, para. 3. UN Doc. E/CN.4/1986/15 of February 19, 1986.

13 *Cf.* Inter-Am. Ct.H.R., *Maritza Urrutia v. Guatemala*, Judgment of November 27, 2003, para. 92.

14 *Cf.* Inter-Am. Ct.H.R., *Cantoral Benavides, op.cit.*, para. 95; *Cf.* also ECHR *Labita v. Italy*, Judgment of April 6, 2000, p. 119; *Selmouni v. France*, Judgment of July 28, 1999, para. 95.

15 *Cf.* Inter-Am. Ct.H.R., *Case of the "Juvenile Reeducation Institute" v. Paraguay*, Judgment of September 2, 2004, para. 157.

16 On this point, *Cf.* Ariela Peralta, "*Tortura y tratos crueles*", unpublished, citing Goldman, Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture, Vol. 12, Human Rights Brief, pp. 1-4, Center for Human Rights and Humanitarian Law, American University Washington College of Law (Fall 2004). However, in *Prosecutor v. Delalic et al., op.cit.*, the ICTY affirmed that the prohibition against inhuman treatment is a norm of customary international law (para. 517). On the same point, *Cf.* ECHR, *Al-Adsani v. United Kingdom, op.cit.*, para. 61.

adopted a position of broad protection, considering that the prohibition against this type of treatment also constitutes a norm of *jus cogens.*[17] In line with this idea, it has been established that States cannot allege economic difficulties to justify conditions of detention that violate article 5 of the American Convention.[18]

In the Inter-American system, the Inter-American Convention to Prevent and Punish Torture is the instrument designed specifically to eradicate torture and cruel, inhuman or degrading treatment or punishment. The Inter-American Court has said that this treaty forms part of the Inter-American *corpus iuris* that must serve the Court in determining the content and scope of the general provision contained in article 5.2 of the American Convention.[19] Nevertheless, neither the American Convention nor the Inter-American Convention to Prevent and Punish Torture, and not even the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[20] provides clear guidelines for establishing the distinction between torture and cruel, inhuman or degrading treatment or punishment. Therefore, the doctrine and case law have attempted to establish the distinction by means of examining the elements that comprise torture.[21]

Taking into account article 2.1 of the IACPPT, it has been established that torture is defined by a teleological element, a material element and by the subject who commits the act.[22] In relation to the teleological aspect, IACPPT article 2.1 itself prescribes that torture is imposed "for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose." As for the material element, the variable intensity or seriousness of pain —which may be psychological as well as physical— has been a determining factor for the distinction between torture and cruel, inhuman or degrading treatment. Finally, with regard to the active subject, article 3 of the IACPPT defines the actors who may be guilty of the

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17 *Cf.* Inter-Am. Ct.H.R., *De la Cruz Flores v. Peru*, Judgment of November 18, 2004, para. 125; *Cf.* also *Lori Berenson Mejía v. Peru*, Judgment of November 25, 2004, para. 100.

18 *Cf.* Inter-Am. Ct.H.R., *Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, Judgment of July 5, 2006, para. 85, citing ECHR, *I.I v. Bulgaria*, Judgment of June 9, 2005, para. 77; *Poltoratskiy v. Ukraine, Judgment of* April 29, 2003, para. 148.

19 *Cf.* Inter-Am. Ct.H.R., *Tibi v. Ecuador*, Judgment of September 7, 2004, para. 145.

20 Article 1.1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* provides that: "For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

21 Article 2.1 of the IACPPT states: "For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish."

22 *Cf.* Ariela Peralta, "*Tortura y tratos crueles*", *op.cit.*, citing authoritative doctrine on the subject.

crime of torture. In accordance with the consistent jurisprudence of the Inter-American system, a State may also be internationally responsible for the conduct of individuals who have acted with the acquiescence of the authorities or public officials.[23]

In any case, these guidelines are insufficient because making a distinction between torture and cruel, inhuman or degrading treatment or punishment requires an examination of the particular characteristics within the context of each case. As the Inter-American Court of Human Rights indicated in the case of *Cantoral Benavides*, the concept of torture is evolutionary. Certain acts that were labeled in the past as inhuman or degrading treatment might be labeled in the future as torture.[24] Within the particular characteristics of the case—as held recently in the *Miguel Castro Castro Prison* case[25]- one of the relevant factors for distinguishing between torture and cruel, inhuman or degrading treatment is the sex of the victim, according to which the international instruments granting specific protections to women must be considered. In this case, the Inter-American Court ruled that, in matters of violence against women, the scope of article 5 of the American Convention must be determined taking into consideration the pertinent provisions of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women and the Convention on the Elimination of All Forms of Discrimination against Women, insofar as these instruments complement the international *corpus juris* on the protection of the personal integrity of women.[26]

Indeed, in the Inter-American system, the main instrument for the protection of women's rights is the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, which defines and prohibits violence against women and reaffirms right of every woman to have her physical, mental and moral integrity respected, the right to personal liberty and security, and the right not to be subjected to torture.[27] Article 2 of this Convention states that violence against women includes physical, sexual and psychological violence, and paragraph c) establishes that violence "that is perpetrated or condoned by the state or its agents regardless of where it occurs" shall also be violence under the terms of the Convention. This formulation safeguards the obligation of the State to prevent violence against women and to act with due diligence in such cases.[28] Article 7 of this same instrument provides that States Parties must refrain from any action or practice of violence against women, and must ensure that its authorities and officials act in accordance with this prohibition.[29] This Convention also addresses specifically the situation of women deprived of their liberty,

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[23] *Cf.* Inter-Am. Ct.H.R., *Velásquez Rodríguez v. Honduras,* Judgment of July 29, 1988, para. 172. In effect, Inter-American case law would enable the State to incur international responsibility for torture at the hands of an individual, not for the act itself, but for the lack of due diligence to prevent the violation or respond to it in accordance with the standards established in the American Convention.

[24] *Cf.* Inter-Am. Ct.H.R., *Cantoral Benavides, op.cit*., para. 99; C*f.* also ECHR, *Selmouni Case, op.cit.*, para. 101.

[25] *Cf.* Inter-Am. Ct.H.R., *Case of the Miguel Castro Castro Prison v. Peru,* Judgment of November 26, 2006.

[26] *Cf.* Inter-Am. Ct.H.R., *Case of the Miguel Castro Castro Prison, op. cit.*, para. 276.

[27] *Cf.* IACHR, *Report on Terrorism and Human Rights,* Office of the Secretary General of the OAS, Washington, D.C. 2002, para. 175.

[28] *Cf.* Ariela Peralta, "*Tortura y tratos crueles*", *op.cit.*.

[29] *Cf.* Article 7 subsection a and b of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "*Belém do Pará Convention*".

telling the States (in article 9) to take this situation into particular account when implementing the duties imposed upon them by the text of the Convention.

It follows then, limiting ourselves to the topic of "torture and cruel, inhuman or degrading treatment", that the proper decision of the case before us must take into consideration on one hand the teleological element characterizing torture, that is, the purpose or aim of the acts described in the hypothetical case, as well as their intent; these aspects will be evaluated in points II.A and II.B of this document. On the other hand, the solution of the case requires an analysis of the material element constituting torture, that is, the severity of the suffering caused during the interrogations—whether they were physical or psychological—the conditions of detention and the cumulative effects of these practices. These aspects will be evaluated in points II.C, II.D and II.E of this document. Given the specific instruments referring to violence against women, a comprehensive analysis of the case requires that for the items addressed —in particular items II.C, II.D and II.E— special consideration be given to the variable of gender. Finally, the third definitional element of torture, the active subject, will be dealt with independently in section IV.B of this document.

II. A. Purpose or aim of the suffering

The word "torture" is generally used to describe inhuman treatment that was inflicted with a specific purpose,[30] such as obtaining information or a confession. The Inter-American Convention to Prevent and Punish Torture defines very broadly the scope of the purpose or aim of the act performed. Indeed, article 2 of the IACPPT establishes that an act that causes physical or psychological pain or suffering is torture if it is inflicted on a person for purposes of criminal investigation, as a means of intimidation or punishment or for any other purpose. Consequently, the sole existence of any such purpose constitutes the prohibited conduct.

In the Inter-American human rights system, the Court has stated that "[…] some of the acts of aggression [inflicted upon a person] can be classified as physical and psychological torture … [particularly those acts that have been] planned and inflicted deliberately upon [the victim] … to wear down his psychological resistance and force him to incriminate himself or to confess to certain illegal activities […] [or] to subject him to other types of punishment, in addition to imprisonment."[31] In the *Tibi* case, the Court held that "the purpose of the repeated performance of these violent acts was to diminish his physical and mental capacities and negate his personality so that he would plead guilty to a crime,"[32] an interpretation that enabled the acts to be evaluated as torture.

Interpreting the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in the *Greek* case, the European Commission on Human Rights established that torture has an aim or a purpose, such as obtaining information or a confession, or the infliction of suffering.[33] The European Court maintained this line of

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30 *Cf.* Aisling Reidy, "*The prohibition of torture": A guide to the implementation of Article 3 of the European Convention on Human Rights*, Human Rights handbooks, No. 6, Council of Europe 2002, p. 14.

31 *Cf.* Inter-Am. Ct.H.R., *Cantoral Benavides, op.cit.*, para. 104.

32 *Cf.* Inter-Am. Ct.H.R., *Tibi*, *op.cit.*, para. 148.

33 *Cf.* ECHR, *Greek case*, decision of November 18, 1969.

interpretation in other cases where it held that torture requires intentional action with a purpose, such as obtaining information, intimidating or punishing.[34] In other cases, where the suffering has been inflicted in the context of interrogations, the European Court has also found them to be cases of torture.[35]

II.A.1. Arguments of the Commission and the State

Based on these considerations, an examination of the facts presented in the hypothetical case in light of the international case law must take into account the purpose of the interrogations that Rosa Luna underwent, as well as that of the conditions of her detention. Taking into consideration the teleological element of torture in accordance with the IACPPT, the Commission could argue that the facts presented amount to a violation of article 5.2 of the ACHR. It could argue on this point that Ms. Luna was prosecuted for the alleged commission of a criminal offense and the interrogations were about her alleged involvement with the UNO group, about the personal activities of her and her relatives, as well as about her religious beliefs. As such, the Commission could argue that it would not be reasonable to analyze the treatment of the victim during the interrogations and her detention in a decontextualized fashion. A comprehensive evaluation of the events would take into account the direction of the interrogations and the environment in which they were conducted, including the conditions of detention.

On its behalf, the State could maintain that the acts Rosa Luna was subjected to constituted neither torture nor cruel, inhuman or degrading treatment in accordance with the characterization provided by the international system for the protection of human rights. Following this line of argument, the State could assert that the interrogations had the same purpose as those commonly used in other judicial proceedings and that its mere occurrence cannot amount to the crime of torture. As for the conditions of detention, the State could argue that Ms. Luna's dignity and personal integrity were maintained at all times —proof of which are the measures that the authorities took to comply with the international standards for the protection of persons deprived of their liberty— a fact that rules out any illegitimate aim or purpose.

II. B. The intentional nature of the suffering

Article 2 of the IACPPT establishes that one of the elements to be considered in the definition of torture is the intentional nature of the act by which suffering is inflicted upon a person. Article 2 of the IACPPT particularly establishes that the concept of torture does not include physical or mental suffering or punishment that is inherent in or solely the result of lawful measures, provided that they do not include the performance of acts or the use of methods referred to in that article.

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[34] *Cf.* ECHR, *Mahmut Kaya v. Turkey*, Judgment of March 28, 2000, para. 117. In the same vein, C*f. Salman v. Turkey*, Judgment of June 27, 2000.

[35] *Cf.* ECHR, *Aksoy v. Turkey*, Judgment of December 18, 1996; *Selmouni Case*, *op.cit.*.

According to these prescriptions it is important to reflect upon the meaning properly assigned to the concept of "intentional act" for purposes of differentiating it from "acts that are the inherent consequence of lawful measures adopted."

The concepts of intent and acts in international cases concerning state responsibility are different from those applicable in criminal proceedings. The Inter-American Court has thus established that when dealing with a human rights violation it is not necessary to prove, as it is in domestic criminal law, the guilt of the perpetrators or their intent; therefore, it is also not necessary to identify the agents who committed such violations.[36] As such, with regard to the intentional nature of the violations, the Court has held:

> "Violations of the Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability. For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant --the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible."[37]

Following this line of reasoning, in international human rights law, the "intent" is the failure to comply with a negative duty to refrain from torturing or engaging in acts that harm personal integrity, and the failure to comply with a positive duty of diligence and the guarantee of rights. The concept of "act" is formed by any action or omission imputable to the State.[38] Moreover, in the *Bulacio* case, the Court established that the State is the guarantor of the rights of detainees, which means that it must provide an explanation for what has happened to a person whose physical conditions were normal when custody began, and during it or at the end of it they worsened.[39] The Inter-American Court has implicitly recognized this distinction by including in its case law the presumption established the European Court, which considers that a State is responsible for the mistreatment exhibited by a person who has been under the custody of state agents, when the authorities are unable to demonstrate that such agents did not engage in the mistreatment.[40] Accordingly, what must be proven is that the violations alleged

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[36] *Cf.* Inter-Am. Ct.H.R., *Case of 19 Tradesmen v. Colombia*, Judgment of July 5, 2004, para. 141.

[37] *Cf.* Inter-Am. Ct.H.R., *Velásquez Rodríguez Case*, *op.cit.*, para. 173 and *Godínez Cruz v. Honduras*, Judgment of January 20, 1989, para. 183.

[38] The Inter-American Court has established that: "It is a basic principle of the law on the international responsibility of the State, embodied in international human rights law, that this responsibility may arise from any act or omission of any State agent, body or power, independent of its hierarchy, which violates internationally enshrined rights." *Cf.* Inter-Am. Ct.H.R., *Case of 19 Tradesmen*, *op.cit*., para. 140.

[39] *Cf.* Inter-Am. Ct.H.R., *Bulacio v. Argentina*, Judgment of September 18, 2003, para. 126.

[40] *Cf.* Inter-Am. Ct.H.R., *Case of the "Street Children" (Villagrán Morales et al.), op.cit.*, para. 170. Among the cases from the European system, see the *Salman Case*, *op.cit.*, para. 100, which states: "Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."

were committed by state agents or by private individuals at the request of or with the acquiescence of such agents.[41]

II. B. 1. Arguments of the Commission and the State

Based on these considerations, the Commission could argue that the facts presented in the hypothetical case constitute intentional acts imputable to the State of Azar. It could maintain that, under international human rights law, proof of the intentional nature of the state action does not require an examination of the culpability of the State's agents, and therefore, the State's inability to provide a reason for the aftereffects suffered by the victim is sufficient to constitute a violation of article 5.2 of the ACHR.

The State could argue on its behalf that the facts alleged in the complaint do not contain the elements necessary to be classified as torture or inhuman or degrading treatment pursuant to the Inter-American Convention to Prevent and Punish Torture. Under the standards of the Inter-American system, the detention of the victim, as well as the interrogation method and procedures, were conducted according to law and to the instructions given by the authorities in accordance with the international obligations of the State. As for the conditions in the jail, the State could maintain that, rather than being a deliberate action of subjecting the victim to torture, they were consistent with acts inherent in the application of a punishment of incarceration.

II. C. Distinction between torture and cruel, inhuman or degrading treatment or punishment. Severity of the physical or psychological harm

The most difficult parameter to define in distinguishing torture from cruel, inhuman or degrading treatment or punishment is the severity of the suffering inflicted. This is because the conceptualization of a specific physical or psychological harm as "severe" corresponds to a subjective scale; it depends on the sensitivity of each victim in particular. Therefore, this assessment will depend upon the evaluation, case by case, of all of the circumstances surrounding the event, including the victim's tolerance for suffering.[42]

No sharp division has been made within the framework of the Inter-American system between the concepts of torture and cruel, inhuman or degrading treatment or punishment. It follows from the case law of the Inter-American Court that the acts and the standard of protection of the right of personal integrity vary according to the particularity of each situation. In considering the severity of the suffering caused, the Court has related that severity to the intensity of the treatment inflicted, its duration, the aftereffects and the suffering caused. As a general criterion for establishing this distinction, the Court ruled in the *Tibi* case that the concept of inhuman treatment

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41 The Inter-American Court has established that "an illegal act that violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified), can lead to the international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention." Inter-Am. Ct.H.R., *Case of 19 Tradesmen*, *op.cit.*, para. 140; *Caballero Delgado and Santana v. Colombia*, Judgment of December 8, 1995, para. 56; *Godínez Cruz*, *op.cit.*, para. 182; *Velásquez Rodríguez*, *op.cit.*, para. 172.

42 *Cf.* Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, 2nd revised edition, N.P. Engel, Publisher, 2005, pp. 162 *et seq.*

included degrading treatment and that torture is an aggravated form of inhuman treatment, perpetrated with a purpose: obtaining information or confessions or inflicting punishment.[43] The Inter-American Commission considered that differentiating between torture and cruel, inhuman or degrading treatment requires a case by case analysis, taking into account its peculiarities, the duration of the suffering, the physical and mental effects on each specific victim and the personal circumstances of the affected person.[44] To specify the content of article 5 of the American Convention, the Commission has also established that inhuman treatment is that which deliberately causes mental or psychological suffering, which, given the particular situation, is unjustifiable; it has also established that degrading treatment or punishment exists if the person is seriously humiliated in front of others or is required to act against his wishes or his conscience.[45] Consistent with this differentiation, the Commission has established that the concept of inhuman treatment includes degrading treatment, and that torture is an aggravated form of inhuman treatment perpetrated with a purpose, namely to obtain information or confessions or to inflict punishment.[46] It is important to reaffirm that in its Report on Terrorism[47] —referring to the European case of *Ireland v. United Kingdom*[48]— the Inter-American Commission suggested that investigation techniques similar to those considered by the European Court are prohibited in all interrogations conducted by agents of the State.

In the individual cases brought before the United Nations Human Rights Committee, the classification of a specific practice as torture can be seen in the processing of complaints against Uruguay, Bolivia or Colombia. With respect to Uruguay, the facts alleged in the complaint were extremely serious, as they condemned the illegal and arbitrary detention of persons, interrogations conducted in solitary confinement and subjection to the most brutal forms of torture, including the use of systematic beatings, electric cattle prods, immersions in blood, urine and fecal matter and simulated executions and amputations, among other acts.[49] On a secondary level, the Committee considered that being forced to remain standing for 35 hours or to remain seated without moving for several days was inhuman and degrading treatment, and only in the case that these acts resulted in permanent injury would they rise to the classification of torture.[50] The same assessment was given in a case where it was proven that the victim had been detained incommunicado, deprived of food and subjected to threats and intimidation.[51] Finally, acts meant to humiliate detainees, such as isolation, subjection to inclement weather conditions and systematic relocation to different cells, were classified as degrading treatment.[52] In cases of female victims,

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43 *Cf.* Inter-Am. Ct.H.R., *Tibi Case*, *op.cit*., para.139.

44 *Cf.* IACHR, *Report No 35/96. Case No. 10.832, Luis Lizardo Cabrera (Dominican Republic),* April 7, 1998, para. 83.

45 *Cf.* IACHR, *Report on Terrorism and Human Rights, op.cit.*, para. 156.

46 *Cf.* IACHR, *Report No 35/96, Case No. 10.832*, *op.cit.*, para.79, citing the European Commission on Human Rights, *Greek Case, op.cit.*, Y.B.Eur.Conv.on.H.R. 12, p.186.

47 *Cf.* IACHR, *Report on Terrorism and Human Rights, op.cit.*, para. 164.

48 *Cf.* ECHR, *Ireland v. United Kingdom*, Judgment of January 18, 1978.

49 *Cf.* Manfred Nowak, *U.N. Covenant on Civil and Political Rights, op.cit.*, pp. 162 *et seq.*, citing HRC, *Rodríguez v. Uruguay*, No 322/1988, para. 2.1.

50 *Cf.* Manfred Nowak, *U.N. Covenant on Civil and Political Rights, op.cit.*, pp. 162 *et seq.*, citing HRC, *Soriano de Bouton v. Uruguay*, No 37/1978 and *Massera v. Uruguay*, No 5/1977.

51 *Cf.* Manfred Nowak, *U.N. Covenant on Civil and Political Rights, op.cit.*, pp. 162 *et seq.*, citing HRC, *Buffo Carballal v. Uruguay*, No 33/1978.

52 Cf. Manfred Nowak, *U.N. Covenant on Civil and Political Rights, op.cit.*, pp. 165 *et seq.*, citing HRC, *Conteris v. Uruguay*, No 139/1983.

the Committee determined that the treatment received had been degrading when such victims were forced to remain naked with their hands tied in a specific position for long periods of time.[53]

The criterion according to which it is the degree of suffering that distinguishes torture from inhuman treatment or punishment, and inhuman treatment or punishment from degrading treatment or punishment, was also accepted by the European Court of Human Rights. Nevertheless, that court has not established the limits of torture in precise terms; rather, it has evaluated the characteristics of the alleged acts on a case by case basis.[54] For the European Court of Human Rights, the variables to be taken into account are the duration, the physical and mental effects, the sex, age and health status of the victim, and the manner and method in which the conduct is carried out.[55] It likewise has established that for a specific act to rise to the level of inhuman or degrading treatment there must be a minimum level of severity, so that it is covered by the prohibition set forth in article 3 of the European Convention.[56] Nevertheless, it has held that the evaluation of this minimum level of severity is relative, and depends upon the aforementioned variables.[57] In the well-known case of *Ireland v. United Kingdom*[58] the Court judged in depth the compatibility with the European Convention of interrogation practices that involved the combined use of five techniques or methods, to wit: a) making the detainees remain in a "forced position" for periods of several hours; b) placing hoods over the detainees' heads, except during interrogations; c) submitting them to constant high-volume noise and whistles; d) depriving them of sleep while waiting for the interrogations; and e) submitting the detainees to a reduced diet during their time at the detention center. In its decision, the European Court considered that these interrogation techniques constituted inhuman treatment but not torture, since they did not cause suffering of particular cruelty and intensity.[59] However, in its most recent case, *Chitayev and Chitayev v. Russia,* the European Court considered that the interrogations to which two detainees had been subjected —among other acts, the victims had been interrogated in shackles, subjected to electroshocks, forced to remain with their feet and hands outstretched and beaten with rubber clubs and plastic bottles— constituted acts of torture. The court ruled that the petitioners had been kept in a state of constant mental and physical pain, due on one hand to the anxiety over their uncertain future, and on the other hand to the high degree of violence to which they were subjected. Consequently, the severity of their suffering enabled the Court to consider these acts to be torture.[60]

In general terms, the European Court has established that inhuman treatment includes, for example, suffering inflicted in a premeditated fashion, applied for hours, and that has caused some physical injury or some type of intense mental or physical suffering.[61] For

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53 *Cf.* Manfred Nowak, *U.N. Covenant on Civil and Political Rights, op.cit.*, pp. 165 *et seq.*, citing HRC, *Arzuaga Gilboa v. Uruguay,* No 147/1983.

54 *Cf.* among other cases, ECHR, *Dikme v. Turkey*, Judgment of July 11, 2000, para. 93. For a review of the European standards on the issue of torture, C*f.* Aisling Reidy, *op.cit.*, p. 11.

55 *Cf.* Aisling Reidy, *op.cit.*, p.12. On the same point, *Cf.* ECHR, *Ireland Case*, *op.cit.*.

56 *Cf.* Aisling Reidy, *op.cit.*, p.10.

57 *Cf.* ECHR, *Ireland Case*, *op.cit.*; *Soering v. United Kingdom*, Judgment of July 7, 1989.

58 *Cf.* ECHR, *Ireland Case*, *op.cit.*.

59 *Cf.* ECHR, *Ireland Case*, *op.cit.*.

60 *Cf.* ECHR, *Chitayev and Chitayev v. Russia*, Judgment of January 18, 2007.

61 *Cf.* ECHR, *Kudla v. Poland*, Judgment of October 26, 2000.

treatment to be defined as degrading, the European Court has taken into account whether its purpose was to humiliate a person and whether his personality was affected in a manner incompatible with article 3 of the European Convention.[62] In one specific case in which the guards insulted and ridiculed the detainee, the Court considered that, insofar as it caused feelings of humiliation and inferiority, the State was responsible for degrading treatment.[63]

II. C. 1. Specific considerations regarding psychological harm

International standards, doctrine and case law have recognized that the analysis of torture must take into account not only the physical consequences of a specific act but also its psychological effects. As such, international case law has developed the notion of psychological torture.

The Inter-American Court has also evaluated the characteristics of psychological torture. In the case of *Maritza Urrutia,* the Court had evidence proving that *Maritza Urrutia* had been threatened with physical torture, death, or the death of members of her family. Based on these facts, the Court considered that there had been mental torture, in that the victim had been intentionally subjected to anguish and suffering with the objective of negating her personality.[64] Although it is not a case dealing with threats, the *Tibi* case —in which it was proven that the victim had been punched in the body and the face, burned with cigarettes and subjected to electrical charges to the genitals— the court concluded that this physical violence caused the victim panic and fear for his life, thus suggesting that physical torture may amount to the suffering of psychological torture.[65] Nevertheless, the Inter-American decisions on the subject of psychological torture are not univocal. Indeed, in some cases it has been considered that the threat of receiving torture does not constitute torture. Under facts similar to those referred to previously in the *Maritza Urrutia* case, the Inter-American Court considered that they amounted to inhuman or degrading treatment, but not torture. Along these lines, in the case of the "*Juvenile Reeducation Institute,*" the Court ruled that "creating a threatening situation or threatening an individual with torture can constitute, at least in some circumstances, inhuman treatment […]."[66]

In its examination of individual communications, the Human Rights Committee of the United Nations has said that the threat of making a person suffer serious physical injury constitutes "psychological torture."[67] In similar terms, the United Nations Special Rapporteur on Torture maintained in the Report on a visit to Azerbaijan that psychological torture also arises from the fear of physical torture, which "may itself constitute mental torture." Mental suffering and anguish are not limited to the moment of physical torture; rather, they go beyond the torture chamber and stay with the victim

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62 *Cf.* ECHR, *Raninen v. Finland*, Judgment of December 16, 1997.

63 *Cf.* ECHR, *Iwańczuk v. Poland*, Judgment of November 15, 2001.

64 *Cf.* Inter-Am. Ct.H.R., *Maritza Urrutia*, *op.cit.*, paras. 93 and 94.

65 *Cf.* Inter-Am. Ct.H.R., *Tibi*, *op.cit.*, para. 149.

66 *Cf.* Inter-Am. Ct.H.R., *Case of the "Juvenile Reeducation Institute"*, *op.cit.*, para.167; *Case of 19 Tradesmen*, *op.cit.*, para. 149; also, *Case of the "Street Children" (Villagrán Morales et al.)*, *op.cit.*, para. 165. The European Court has ruled similarly, *Cf.* ECHR, *Campbell and Cosans v. United Kingdom*, Judgment of February 25, 1982.

67 *Cf.* Inter-Am. Ct.H.R., *Cantoral Benavides*, *op.cit.*, para. 102.

at all times.[68] In more general terms, the United Nations Commission of Human Rights affirmed that intimidation and coercion, including serious and credible threats to the physical integrity of the victim or a third party, as well as threats of death, may be equivalent to cruel, inhuman or degrading treatment or to torture.[69]

The European Court of Human Rights established that threatening a person with torture may constitute, in certain circumstances, at least "inhuman treatment", since the mere danger of some act occurring that is prohibited by article 3 of the European Convention on Human Rights is sufficient for that provision to have been considered violated, although the risk must be real and immediate.[70] Consistent with this, the Court also found that for purposes of determining whether article 3 of the European Convention on Human Rights has been violated, not only physical suffering must be evaluated but also emotional anguish.[71]

II. C. 2. Arguments of the Commission and the State

According to the above, the deciding of this case will require consideration of the severity of the suffering and the physical and psychological harm caused, as a parameter that will help distinguish between torture and cruel or inhuman treatment. As such, the Commission could argue that the victim was subjected to acts of physical and psychological torture that constitute—at the least—a violation of article 5.2 of the ACHR. To substantiate the existence of torture, the Commission could refer to the intimidation of the victim during the interrogations of June 21, when she was threatened with the possibility of suffering serious harm if she did not cooperate with the investigation. It could also point to the general method used in the interrogations, whereby the victim was forced to be in a particular position, deprived of light, subjected to an extremely reduced diet—all of which affected her physically (a back injury) as well as emotionally (the aftereffects that caused her to be in a constant state of alertness and to undergo changes in her character). It could be argued that these acts humiliated and degraded her, causing her to feel fear, anguish and inferiority, all of which are consistent with the cases decided internationally as cases of torture. With particular regard to the doctors, the Commission could argue that there were specialized personnel within the penitentiary service who could have evaluated the seriousness of the anguish that Rosa Luna experienced during her incarceration.

The State could argue from an opposing perspective that the facts of the case do not conform to the international guidelines on the subject of torture, and therefore, that the aftereffects exhibited by the alleged victim are not the product of physical or psychological torture. To support this argument, the State could cite the vagueness of the international standards currently in effect, which do not lend themselves to a clear characterization of torture and of cruel, inhuman or degrading treatment. The State could additionally invoke the existence of a domestic regulatory framework adapted to the definitions and boundaries provided by the Inter-American and universal system for

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68 *Cf. Report of the Special Rapporteur on Torture in reference to the visit to Azerbaijan, doc. E/CN.4/2001/66/Add.1, of November 11, 2000*, para. 115.

69 *Cf.* U.N. Commission of Human Rights, Resolution 2002/38 of April 22, 2002, para. 6.

70 *Cf.* ECHR, *Campbell and Cosans*, *op.cit.*, para.26.

71 *Cf.* ECHR, *Soering*, *op.cit.*, paras. 110 and 111.

the protection of human rights, and assert that the practices to which Rosa Luna was submitted were at all times consistent with the regulatory provisions. The State could place emphasis on the presence of doctors who verified that Ms. Rosa Luna was in good health before, during and after the interrogations.

II. D. Torture and cruel, inhuman or degrading treatment or punishment constituted by the conditions of detention

The deprivation of a person's liberty requires that attention be paid to the conditions in which he or she is detained. Detention gives rise to a state of vulnerability in which personal integrity is more apt to be affected.[72] Because every person retains the right to dignity and personal integrity, it is the State that must look out for his or her safety.

This is a basic obligation that arises from the duties to respect and guarantee rights in general. However, given the particular situation of fragility to which detainees are exposed, these duties acquire a special dimension. Following this criterion, in the case of the *"Juvenile Reeducation Institute"*, the Inter-American Court held that the State is in a special position of guarantor relative to persons deprived of their liberty, since it — through the penitentiary authorities— exercises control over the persons in its custody.[73]

The standards of protection regarding the conditions of detention of persons deprived of their liberty have evolved in such a way that, in certain circumstances, the supranational courts have determined that their situation amounts to torture or cruel, inhuman or degrading treatment. To make this distinction it is necessary to evaluate the general environment and the specifics of the detention system.[74] This evaluation must bear in mind the victim's age, sex and state of health, as well as the characteristics of the detention, such as whether it involves pretrial detention or the serving of a sentence.[75] In evaluating the conditions of detention, the Convention on the Prevention, Punishment and Eradication of Violence against Women warns of the need to take into special consideration the vulnerability of women to violence, especially those women who are deprived of their liberty.[76]

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72 *Cf.* Inter-Am. Ct.H.R., *Tibi, op.cit.*, paras. 146 and 147; see also *Lori Berenson Mejía*, *op.cit*., para. 101, where the Court established the possibility of examining the conditions of a person's detention insofar as they lead to a deterioration of physical, mental and emotional integrity.

73 *Cf.* Inter-Am. Ct.H.R., *Case of the "Juvenile Reeducation Institute", op.cit.,* para. 152. Similarly, the Inter-Am. Ct.H.R. has held that the State is the guarantor of the rights of detainees and must offer them living conditions compatible with their dignity. *Cf.* Inter-Am. Ct.H.R., *Montero Aranguren et al. (Detention Center of Catia), op.cit.*, para. 87. Similar arguments were advanced in decisions rendered within the universal system and the European system for the protection of human rights. *Cf.* U.N. Human Rights Committee, *General Comment No 21 on Article 10 of the ICCPR*, adopted April 10, 1992 during the 44th session, para. 3, which maintained that the States Parties have a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty. Consequently, may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.

74 *Cf.* Aisling Reidy, *op.cit.*, p.26.

75 *Cf.* Aisling Reidy, *op.cit.*, p.26.

76 *Cf.* Article 9, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Pará).*

The Commission and the Inter-American Court have considered the possibility of conditions of detention being classified as torture or cruel, inhuman or degrading treatment. For example, the Commission has referred specifically to the United Nations Standard Minimum Rules for the Treatment of Prisoners,[77] insofar as they establish variables for evaluating whether the treatment of prisoners satisfies humanitarian standards in areas such as housing, hygiene, clothing and bedding items, diet, recreation, exercise and medical treatment, discipline, punishment and the use of control or restraining devices, among other issues.[78] For its part, the Inter-American Court has made more general considerations that do not discern specific factors that it might consider to classify a particular detention as torture or cruel, inhuman or degrading treatment.

According to the particularities of the facts at issue, the solution of Rosa Luna's case requires an analysis of the characteristics of detention, the degree of solitary confinement to which the victim was subjected, the overcrowding and the conditions of diet and hygiene that prevailed during her detention, and the medical and psychological attention she received. Given the sex of the victim, all of these variables must be considered relative to each other, from a perspective that is sensitive to the social relationships of gender, as required under the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.[79]

II. D. 1. The characteristics of detention

To determine the existence of a violation of article 5 of the ACHR, the Inter-American Court has in the past evaluated the characteristics of detention. Thus, for example, in the *Bulacio* case, where state authorities had detained a minor child in a massive detention or *"razzia"*, the Court held that the vulnerability of the detainee is aggravated when the detention is illegal or arbitrary. For the Court, this single circumstance places the victim at certain risk for the violation of other rights, such as those relating to physical integrity and decent treatment.[80]

In the Inter-American system, the characteristics of detention—added to other considerations that will be addressed in the following sections—are variables relevant to the analysis of the violation of article 5 of the ACHR. The Inter-American Court understood it as such in the *Case of the Gómez Paquiyauri Brothers* (on the illegal detention of minor children), in which it ruled that an illegal detention that lasted a brief time is sufficient, under the standards of international law, to adversely affect emotional

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77 *Cf. United Nations Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and ratified by the Economic and Social Council in Resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

78 *Cf.* IACHR, *Report on Terrorism and Human Rights*, *op.cit.*, para. 167.

79 *Cf.* Preamble of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women stating that violence against women is "a manifestation of the historically unequal power relations between women and men."

80 *Cf.* Inter-Am. Ct.H.R., *Bulacio v. Argentina*, Judgment of September 18, 2003, para. 127. See also, *Juan Humberto Sánchez v. Honduras*, Judgment of June 7, 2003, para. 96; *Bámaca Velásquez*, *op.cit.*, para. 150; and *Cantoral Benavides*, *op.cit.*, para. 90.

and mental integrity, and that a detention of this type, even when there is no specific evidence with respect to the matter, may give rise to the inference that the treatment the person received during his incommunicado detention was inhuman and degrading.[81]

In contrast, although the European human rights system has given consideration to the increased vulnerability of a detained person,[82] it has also emphasized the fact that the deprivation of a person's liberty, including pretrial detention, cannot give rise on its own to the allegation of a violation of article 3 of the European Convention.[83] It has highlighted that, in addition to the material conditions of detention, a factor to take into account is the type of system to which a detainee is subjected, its duration, its purpose and the effects it had on the person deprived of his liberty.[84]

II. D. 2. Incommunicado detention

The international rules currently in effect on the subject of detainees make special reference to the need for limiting extreme incommunicado detention. As such, Principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[85] provides that avoiding incommunicado detention is one of the fundamental guarantees that tends to prevent torture and other mistreatment. The right of detainees to receive visitors is a fundamental right that must be exercised under any personal circumstance or circumstance arising from the detention itself. Rule 7 of the United Nations Standard Minimum Rules for the Treatment of Prisoners also urges States to abolish or restrict the use of incommunicado detention.

Beginning with its first judgments, the Inter-American Court established that the prolonged isolation and coercive incommunicado detention of a victim are, in themselves, forms of cruel and inhuman treatment, harmful to the emotional and mental integrity of the person and to the right of every detainee to have his dignity respected.[86] It similarly ruled that incommunicado detention causes pain and suffering and mental distress to the detainee and places him in a position of particular vulnerability.[87] In general terms, the Court's position is that incommunicado detention must be exceptional, as it causes emotional suffering and mental disturbances, places the

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81 *Cf.* Inter-Am. Ct.H.R., *Case of the Gómez Paquiyauri Brothers v. Peru, Judgment of* July 8, 2004, para. 108.

82 On this point, the European Court held: "The Court stresses that a person detained on remand, and whose criminal responsibility has not been established by a final judicial decision, enjoys a presumption of innocence. This assumption does not apply only to his or her procedural rights in the criminal proceedings, but also to the legal regime governing the rights of such persons in detention centers, including the manner in which a detainee should be treated by prison guards. It must be further emphasized that the authorities exercise full control over a person held in custody and their way of treating a detainee must, in view of his or her vulnerability, be subjected to strict scrutiny under the Convention." *Cf.* ECHR, *Iwańczuk, op.cit.*, para. 53.

83 *Cf.* ECHR, *Kalashnikov v. Russia*, Judgment of July 15, 2002.

84 *Cf.* ECHR, *Kehayov v. Bulgaria*, Judgment of January 18, 2005, para. 65.

85 *Cf. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by the U.N. General Assembly in its Resolution No. 43/173, of December 9, 1988.

86 *Cf.* Inter-Am. Ct.H.R., *Fairén Garbi and Solís Corrale v. Honduras*, Judgment of March 15, 1989, para. 149*; Godínez Cruz, op. cit.*, para. 164*; Velásquez Rodríguez, op.cit.*, para. 156; *Cantoral Benavides*, *op.cit.*, para. 83**;** *Bámaca Velásquez*, *op.cit.*, para. 150.

87 *Cf.* Inter-Am. Ct.H.R., *Maritza Urrutia*, *op.cit.*, para. 87; *Bámaca Velásquez*, *op.cit.*, para.150; *Cantoral Benavides*, *op.cit.*, para. 84 and *Castillo Petruzzi et al. v. Peru*, Judgment of May 30, 1999, para. 195.

detainee in position of particular vulnerability and increases his risk of being subjected to aggressive and arbitrary treatment in jail.[88]

In *Suárez Rosero*, a case in which it was proven that for 36 days the victim was deprived of all forms of communication with the outside world, and particularly with his family, the Inter-American Court held that the victim had been subjected to cruel, inhuman or degrading treatment.[89] Similarly, the Court ruled in the *Loayza Tamayo* case that incommunicado detention, isolation in a small cell without ventilation or natural light, and the restrictions placed on visitation forms of cruel, inhuman or degrading treatment.[90] In the case of *Cantoral Benavides*, in which it was proven that the victim was kept in solitary confinement for a year and that the visits he was allowed were extremely restricted —he could only have visits once a month with immediate relatives, and without any physical contact between him and the visitor[91]— the Court considered that these restrictions, together with other aggressive acts, were torture.[92] In the *Tibi* case, the Court also had the opportunity to evaluate the isolation to which the victim was subjected. In that case it ruled that the conditions in which the victim lived did not satisfy the minimum material requirements for humane treatment in accordance with article 5 of the Convention.[93] Affirming this holding in other cases, the Court ruled that "holding a detainee in conditions of overcrowding, absent ventilation and natural light, without a bed to lie on or adequate conditions of hygiene, in isolation and incommunicado, or with undue restrictions on visitation, constitutes a violation of his personal integrity."[94] Finally, in *De la Cruz Flores*, where it was proven that the victim was kept incommunicado during the first month of her detention, the Court ruled that this fact was sufficient to conclude that she had been subjected to cruel, inhuman or degrading treatment.[95]

The Inter-American Court has linked the right of all persons deprived of their liberty to establish communication with third parties to the right to be informed of such right; without knowledge of its existence, there would be no possibility of asserting it effectively.[96] This obligation to provide immediate notice is tied to the need to provide guarantees against the arbitrariness of the detention, as well as against possible adverse effects upon personal integrity.

In its General Comment No 20 on article 7 of the International Covenant on Civil and Political Rights (hereinafter "ICCPR"), the Human Rights Committee of the United

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88 *Cf.* Inter-Am. Ct.H.R., *Bulacio*, *op.cit.*, para. 127. *Cf.* also, *Bámaca Velásquez*, *op.cit.*, para. 150; *Cantoral Benavides, op.cit.*, para. 82 and *Case of the "Street Children" (Villagrán Morales et al.)*, *op.cit.*, para. 164.

89 *Cf.* Inter-Am. Ct.H.R., *Suárez Rosero v. Ecuador*, Judgment of November 12, 1997, para.91.

90 *Cf.* Inter-Am. Ct.H.R., *Loayza Tamayo v Peru*, Judgment of September 17, 1997, para. 58.

91 *Cf.* Inter-Am. Ct.H.R., *Cantoral Benavides*, *op.cit*, para. 63 k and 85.

92 *Cf.* Inter-Am. Ct.H.R., *Cantoral Benavides*, *op.cit.*, para. 104.

93 *Cf.* Inter-Am. Ct.H.R., *Tibi*, *op.cit.*, para. 151 and 152.

94 *Cf.* Inter-Am. Ct.H.R., *Tibi*, *op.cit.*, para. 150.

95 *Cf.* Inter-Am. Ct.H.R., *De La Cruz Flores*, *op.cit.*, para. 126.

96 *Cf.* Inter-Am. Ct.H.R., *Bulacio*, *op.cit.*, para. 130, referring to *Advisory Opinion OC-16/99"The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,"* October 1, 1999, para. 86.

Nations stated that "[...] the protection of the detainee also requires that prompt and regular access be given to […] lawyers and, under appropriate supervision when the investigation so requires, to family members."[97] Likewise, in *Polay Campos v. Peru*, in light of a situation in which the victim was denied the opportunity to have visits from relatives for one year following his conviction, the Committee found that such action constituted inhuman treatment in violation of article 7 of the ICCPR.[98] Similarly, recognizing the importance of the communication of detainees with their attorneys and relatives as a way of preventing torture, the United Nations Committee against Torture has recommended that States adopt provisions that ensure the right of detainees to "free access and communication with family members [and] legal advisors [..],[99]" and that "guarantee the free access of any person deprived of his liberty to an attorney […] and to his family members at all stages of the detention."[100]

II. D. 3. Overcrowding, hygiene conditions and diet

The individual cases denouncing conditions of overcrowding have been increasing. In this context, it has been emphasized that the overpopulation of jails and the constant increase in tension among inmates— generated by the lack of sufficient and adequate space for the development of persons[101]— facilitates the transmission of disease, diminishes the possibility of having an adequate diet or health services and reduces the already scarce spaces for privacy. Thus, prison overcrowding, conditions of hygiene and diet during incarceration also present a specter to be taken into account in evaluating whether article 5 of the ACHR has been violated.

Rules 10, 15, 16 and 20 of the United Nations Standard Minimum Rules for the Treatment of Prisoners set minimum standards on facilities for the housing of detainees and basic guidelines on hygiene and diet. Articles 17 and 18 of the European Prison Rules stipulate that detention centers must respect the privacy of detained persons and meet basic requirements of health and hygiene, lighting, heat and ventilation according to local climate conditions. Article 19 makes special reference to the need for detainees to have easy access to bathrooms and to the requirement that women receive the items necessary to ensure proper hygiene. The comments to the rules provide additional details on the needs of women. It has been stated that they must have access to sanitary products and the opportunity to bathe or shower more than twice a week.[102] As for diet, rule 22 of the European Prison Rules establish that the State must guarantee the proper

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97 *Cf.* Human Rights Committee, *General Comment No. 20 on article 7 of the CAT, doc. CCPR/ of April 10, 1992, replacing General Comment No 7*; *compare principles No 16.1, 17.1 and 18.3 of the Body of principles for the protection of all persons under any form of detention or imprisonment.*

98 *Cf.* Human Rights Committee, *Polay Campos v. Peru*, Communication No 577/1994 of November 6, 1997.

99 *Cf. Report of the Committee against Torture*, doc.A/50/44 of July 26, 1995, para. 60(a) of the English version, unnumbered paragraph in the Spanish version, recommendations with respect to the second periodic Report of Chile.

100 *Cf. Report of the Committee against Torture, op.cit.*, para. 101 of the English version, unnumbered paragraph in the Spanish version, recommendations to the second periodic Report of Libya.

101 *Cf.* Inter-Am. Ct.H.R., *Mendoza Prisons v. Argentina*, Order of March 30, 2006.

102 *Cf.* Council of Europe Committee of Ministries, *Recommendation Rec (2006) 2 on the European Prison Rules*, 2006, adopted by the Committee of Ministries on January 11, 2006, available at https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2006)2&Sector=secCM&Language=lanEnglish, last visited on December 13, 2006.

nutrition of the persons under its custody, and in order to do so must ensure that they are provided with at least three meals a day.[103]

The Inter-American Court specifically examined the matter of jail overcrowding in the *Montero Aranguren* case.[104] The judgment of the Inter-American Court reviewed the criteria of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter "CPT"), as well as those of the European Court, on the subject of overcrowding. According to the Inter-American Court, for the CPT, 7 m^2 per prisoner is an approximate and desirable guideline for a detention cell.[105] In the above-cited case, the Inter-American Court concluded that 30 cm^2 per inmate is unacceptable and constitutes cruel, inhuman or degrading treatment.[106] The European Court, also basing its position on the considerations of the CPT, established that 4 m^2 per detainee could be a reasonable standard to guarantee the integrity and dignity of the person.[107]

On the matter of diet and hygiene conditions, the Court in the *Lori Berenson* case had evidence proving that the detainee's diet was sparse, unhealthy and unvaried, and that the hygiene conditions were extremely deficient insofar as the water used for drinking and cooking was impure and very cold, scant and of poor quality. According to the Inter-American Court, these factors, together with the detainee's constant isolation in a small, unventilated cell with no sunlight —a condition that adversely affected her vision— constituted cruel, inhuman or degrading treatment in violation of article 5 of the ACHR.[108] In the *Caesar* case, the Inter-American Court also evaluated the conditions in a jail in Trinidad and Tobago. The victim was held together with other prisoners in small cells with no ventilation, equipped with a bucket instead of toilet facilities. In addition, the victim was forced to sleep on the floor. The Court again found this type of practice to be inhuman and degrading treatment in violation of art. 5.2 of the ACHR.[109] Similarly, in the case of *Hilaire, Constantine and Benjamín et al.*, the Inter-American Court held that the conditions of the victims' detention –both prior and subsequent to trial- constituted cruel, inhuman or degrading treatment. The Court found that Trinidad and Tobago violated the provisions of article 5.1 and 5.2 of the American

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103 *Cf.* Council of Europe Committee of Ministers, *Recommendation Rec (2006) 2 on the European Prison Rules*, 2006, adopted by the Committee of Ministries on January 11, 2006, available at https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2006)2&Sector=secCM&Language=lanEnglish, last visited on December 13, 2006.

104 *Cf.* Inter-Am. Ct.H.R., *Montero Aranguren et al. (Detention Center of Catia), op.cit.*, paras. 89 *et seq.*

105 *Cf.* Inter-Am. Ct.H.R., *Montero Aranguren et al. (Detention Center of Catia), op.cit.*, para. 90, citing CPT/Inf (92) 3 [EN], *2nd General Report*, April 13, 1992, para. 43. It is important to highlight that recent Reports of the CPT establish that the criterion of 7 m^2 per detainee is a desirable standard, but not a minimum standard, and that it only applies in holding cells at police stations, not to cells at detention centers. *Cf.* CPT, *The CPT standards - Substantive sections of the CPT´s General Reports*, doc.CPT/Inf./E (2002) 1, Rev. 2006, available at http://www.cpt.coe.int/en/docstandards htm, last visited on December 13, 2006.

106 *Cf.* Inter-Am. Ct.H.R., *Montero Aranguren et al. (Detention Center of Catia), op.cit.*, para. 91.

107 *Cf.* ECHR, *Ostrovar v. Moldova*, Judgment of September 13, 2005, para. 82. This case cites the CPT, *Report to the Azerbaijani Government on the visit to Azerbaijan from 24 November to 6 December 2002.*

108 *Cf.* Inter-Am. Ct.H.R., *Lori Berenson Mejía*, *op.cit.*, para. 88.74 iv, 106 and 108.

109 *Cf.* Inter-Am. Ct.H.R., *Caesar v. Trinidad and Tobago*, Judgment of March 11, 2005, para. 100.

Convention because of the overcrowding and the lack of hygiene, sufficient natural light and ventilation in the detention centers. It further held that the location of the showers near the execution chambers (gallows), the lack of an adequate diet, medical attention and recreation adversely affected the physical and mental integrity of the victims.[110] In the case of *De la Cruz Flores*, the Inter-American Court concluded that the conditions to which the victim was subjected constituted cruel, inhuman or degrading treatment due to the fact that she lived in unhealthy conditions and could not change her clothes for a month.[111] In the *Montero Aranguren* case, in which it was proven that the detainees were forced to live among excrement and even take meals under those circumstances, the Court ruled that this treatment was cruel, inhuman or degrading, and was therefore a categorical violation of article 5.1 and 5.2 of the American Convention.[112]

Finally, in the *Miguel Castro Castro Prison* case, the Inter-American Court noted with special attention the fact that the women detained at the facility were not allowed to wash; in some cases, in order to use the toilets, they were required to do so escorted by an armed guard who did not allow them to close the door and who aimed a weapon at them while they attended to their physiological needs. In this last case, the Court found that Peru was responsible for the violation of the right to personal integrity enshrined in article 5.2 of the American Convention with respect to the six female inmates who suffered this cruel treatment.[113] It is important to stress that in this case the Inter-American Court considered specially the specific needs of women detainees. On this point, it emphasized the "lack of attention to women's physiological needs when they were denied materials of personal hygiene, such as soap, toilet paper, feminine pads, and underwear in order to be able to change."[114] Citing the International Committee of the Red Cross, the Court held that the State must ensure that "'sanitary conditions [in the detention centers] are adequate to maintain the hygiene and the health [of the prisoners], allowing them regular access to toilets and allowing them to bathe and to wash their clothes regularly.' Likewise, said Committee also determined that special arrangements must be made for female detainees with their period, pregnant, or accompanied by their children. The commission of those excesses causes special and additional suffering to imprisoned women."[115]

The European Court has also issued decisions in which it addressed directly the matter of poor hygiene in prisons. In the case of *Peers v. Greece,*[116] it ruled that forcing a detainee to use the toilet facilities in front of another detainee was degrading treatment.[117] Nevertheless, in another case where the petitioner complained that he was not given any toilet paper inside the prison during the entire time of his detention, and that for one year he could only use the shower with a frequency of less than once a week, the Court held that these factors did not qualify as degrading treatment, but that they were adverse to article 3 of the Convention.[118]

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110 *Cf.* Inter-Am. Ct.H.R., *Hilaire, Constantine and Benjamín et al. v. Trinidad and Tobago,* Judgment of June 21, 2002, paras.84 m, n and 169.

111 *Cf.* Inter-Am. Ct.H.R., *De la Cruz Flores, op.cit.*, paras. 73.55 and 130.

112 *Cf.* Inter-Am. Ct.H.R., *Montero Aranguren et al. (Detention Center of Catia), op.cit.*, para. 99.

113 *Cf.* Inter-Am. Ct.H.R., *Miguel Castro Castro Prison, op. cit.*, para. 308.

114 *Cf.* Inter-Am. Ct.H.R., *Miguel Castro Castro Prison, op. cit.*, para. 319.

115 *Cf.* Inter-Am. Ct.H.R., *Miguel Castro Castro Prison, op. cit.*, para. 331.

116 *Cf.* ECHR, *Peers v. Greece,* Judgment of April 19, 2001.

117 *Cf.* ECHR, *Peers, op cit.*.

118 *Cf.* ECHR, *Karalevičius v. Lithuania,* Judgment of April 7, 2005.

The European Committee against Torture has issued some recommendations that are relevant to this issue. In one of its Reports it called attention to the different needs faced by incarcerated women. It maintained that women must have prompt access to toilets and wastebaskets for disposal of sanitary dressings. It also recommended that women be given sanitary napkins and tampons. With regard to the failure to provide these items, the Committee found that this deficiency could constitute degrading treatment.[119]

II. D. 4. Medical attention

The State also has the obligation to provide adequate medical attention to persons deprived of their liberty. Rules 22, 24, 25 and 52 of the United Nations Standard Minimum Rules for the Treatment of Prisoners [120] prescribe the minimum conditions of medical and psychiatric attention that all penitentiary establishments should have. Similarly, Principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment stipulates that all detained persons shall have access to an appropriate medical exam, with the least possible delay, and that such treatment shall be free of cost.[121]

In *Cantoral Benavides,* one of the first cases in which the conditions of detention of persons deprived of their liberty were evaluated in the Inter-American system, the Court concluded that the medical attention provided to the victim had been quite deficient — given that the examination had not been thorough, but rather had been a type of administrative procedure.[122] More recently, in the case of *García Asto*, the Inter-American Court held that "the lack of adequate medical attention fails to satisfy the minimum material requirements of treatment that respects the inherent dignity of the human person in accordance with article 5 of the American Convention."[123] The Court likewise ruled that, to comply with article 5 of the ACHR, the State must provide regular medical attention regular to detainees.[124] Previously however, in the *Bulacio* case, the Court had established one of the highest standards on the matter of medical attention to persons deprived of their liberty. Recognizing the importance of the prevention of torture and cruel, inhuman or degrading treatment, the Court established that the detainees "must be examined and given medical care, preferably by a physician chosen by themselves or by those who have their legal custody or representation."[125] To

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119 *Cf.* CPT, *The CPT standards - Substantive sections of the CPT´s General Reports,* doc.CPT/Inf./E (2002) 1, Rev. 2006.

120 Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and ratified by the Economic and Social Council in Resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

121 *Cf. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, op.cit.*.

122 *Cf.* Inter-Am. Ct.H.R., *Cantoral Benavides, op.cit.*, paras, 57, 63(g) and 85.

123 *Cf.* Inter-Am. Ct.H.R., *García Asto and Ramírez Rojas v. Peru***,** Judgment of November 25, 2005, para. 226.

124 *Cf.* Inter-Am. Ct.H.R., *De la Cruz Flores*, *op.cit.*, para. 122; *Tibi*, *op.cit.*, para. 157.

125 *Cf.* Inter-Am. Ct.H.R., *Bulacio*, *op.cit.*, para. 131.

guarantee the exercise of this right, it is important to recall what the Court has held on the issue of the duty to provide information.[126]

In its General Comment No 20 on article 7 of the ICCPR, the United Nations Human Rights Committee found that "[...] [t]he protection of the detainee also requires that prompt and regular access be given to doctors […]."[127] Likewise, on this subject, the United Nations Committee against Torture (UNCAT) has recommended that States adopt provisions that ensure the right of the detainee to "the free access to and communication with […] a physician whom he trusts,"[128] or that "guarantee the free access of any person deprived of his liberty to […] a doctor of his choosing […]."[129]

The European Court of Human Rights has affirmed that "the authorities have the obligation to protect the health of persons deprived of their liberty" and that "the lack of adequate medical treatment" may be considered mistreatment.[130] In the case of *Mathew v. The Netherlands*, which examines a petitioner's request to have medical attention of his own choosing, the European Court established that a medical examination performed by a specialist not connected to the detention center was a guarantee against the physical and psychological abuse of detainees and, therefore, that it should have been a rule to be respected.[131] However, it considered that article 3 of the ECHR had not been violated because the State had in fact allowed the complainant to be examined by a specialist of his own choosing, and the petition was based on the petitioner's desire to have a second professional opinion.

II. D. 5. Arguments of the Commission and the State

Based on these considerations, Rosa Luna's case should raise debates on the characterization of the facts as either the lawful actions of the State, or as inhuman or degrading treatment and torture, taking into account the definitions and interpretive guidelines provided by the Inter-American system and under international human rights law.

The Commission might assert –among other things- that the conditions of the victim's detention constituted a violation of article 5.2 of the ACHR. On this point in particular, the Commission might question the characteristics of detention —insofar as it was an arbitrary detention— and the lack of fluid and effective communication with her

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126 *Cf.* Inter-Am. Ct.H.R., *Bulacio*, *op.cit.*, para. 132.

127 *Cf.* Human Rights Committee, *General Comment No. 20 on article 7 of the CAT, doc. CCPR/ of April 10, 1992, replacing General Comment No 7*; *compare principles No 16.1, 17.1 and 18.3 of the Body of principles for the protection of all persons under any form of detention or imprisonment.*

128 *Cf.* UNCAT, *Annual Report 1995,* doc. A/50/44, § 60a of the English version, unnumbered paragraph in the Spanish version, *Recommendations with respect to the second periodic Report of Chile*.

129 *Cf.* UNCAT, *Annual Report 1995,* doc. A/50/44, § 101 of the English version, unnumbered paragraph in the Spanish version, *Recommendations with respect to the second periodic Report of Libya.*

130 *Cf.* ECHR, *Keenam v. United Kingdom, Judgment of* April 3, 2001, para. 110.

131 *Cf.* ECHR, *Mathew v. the Netherlands,* Judgment of September 29, 2005, para. 187. The European Court did not find a violation of article 3 because the detainee had had the opportunity to be examined by a doctor of his choice. The complaint was filed because the State failed to guarantee a second medical exam which, due to the characteristics of the case, had to be conducted by a doctor not registered in the place where the exam was to take place.

attorney and relatives. The Commission might also question the sparse diet —which did not amount to three meals a day— the failure to provide items for proper hygiene, and the fact that the victim did not undergo medical examination by a specialist not connected to the detention center.

On its behalf, the State could assert that the jail conditions did not constitute cruel, inhuman or degrading treatment. To support its position the State could argue that Rosa Luna was not subjected to arbitrary detention and that the State guaranteed her communication with her attorney. With respect to the period during which she was held incommunicado, the State could argue that it was a minimal length of time and that, consequently, it did not exceed the limits established by the international courts with regard to personal integrity. At the same time, the State could make a well-founded argument that Rosa Luna was not subjected to conditions of overcrowding, that– beyond the daily number of meals- the diet was adequate overall and that the State guaranteed sanitary conditions that, although minimal, did not rise to the level of adversely affecting the detainee. It could argue on this issue in particular that the detainee had a sufficiently large space in which to spend the night, cells that were ventilated and had access to sunlight, access to clean toilet and shower facilities, an adequate diet and health attention, and that therefore there was no violation of her personal integrity. It could further argue that the denial of some hygiene items was not arbitrary, but that their provision was conditioned upon compliance with certain prison schedules that were justifiable due to the security issues inherent in this type of detention center. As for medical attention, the State could demonstrate that Rosa Luna was seen by doctors whose mission it was to guarantee her physical and mental integrity.

II. E. The accumulation of acts that may constitute torture and cruel, inhuman or degrading treatment or punishment

In the classification of an act as torture, it may be important to conduct an overall analysis of the acts to which the victim was subjected; an isolated analysis will not always be sufficient to appreciate the suffering that such acts caused.

The Inter-American Court has referred implicitly to the cumulative effects of the conditions of detention. In the *Montero Aranguren* case, the Court ruled that "the poor physical and sanitary conditions of the detention facilities, as well as the absence of adequate light and ventilation, can in and of themselves be violations of article 5 of the American Convention," depending on their intensity and duration and the personal characteristics of the victim. According to the Court's ruling, this is because such conditions can cause suffering of an intensity that exceeds the inevitable limit of suffering and entail feelings of humiliation and inferiority.[132] The Court had already established in the *Loayza Tamayo* case that, "incommunicado detention, being exhibited through the media wearing a degrading garment, solitary confinement in a tiny cell with no natural light, blows and maltreatment, including total immersion in water, intimidation with threats of further violence, [and] a restrictive visiting schedule all constitute forms of cruel, inhuman or degrading treatment in the terms of Article 5(2) of the American Convention."[133] In *Lori Berenson*, the Court held that "the injuries,

132 *Cf.* Inter-Am. Ct.H.R., *Montero Aranguren et al. (Detention Center of Catia)*, *op.cit.*, para. 97.

133 *Cf.* Inter-Am. Ct.H.R., *Loayza Tamayo, op.cit.* para. 58.

suffering, damaged health or harm sustained by a person while deprived of his or her liberty may constitute a form of cruel punishment when, due to the conditions of detention, there is a deterioration of physical, mental and moral integrity, which is strictly prohibited by subsection 2 of article 5 of the Convention."[134]

The European Court of Human Rights has established that the duration of the treatment received is a point to bear in mind. In *Selmouni v. France*, the petitioner complained that he had received a significant number of blows all over his body, that he had been forced to run in a hallway while State agents tripped him and that he had been threatened with a syringe. The Court evaluated the duration of the proceedings, as well as the fact that they were repeated over a long period of time, and considered it to be a case of torture.[135]

Likewise, examining the conditions of detention independently, the European Court has held that evaluating the characteristics of the prison requires taking into account the cumulative effects of such conditions,[136] and that the duration of the detention is also a factor to be considered.[137]

II. E. 1. Arguments of the Commission and the State

According to the arguments put forward, the Commission could assert that the facts of the case, analyzed in their totality, constitute torture in accordance with the definitions provided by the universal system and the Inter-American system, as well as international human rights law. It could thus maintain that the State of Azar violated article 5.2 of the ACHR, emphasizing the totality of the effects and the manner in which this affects the severity of the treatment. On this point, it will be important to refer to the physical and psychological aftereffects that Rosa Luna sustained.

The State of Azar could assert on its behalf that the facts of the case do not constitute torture, even assuming a possible cumulative effect of the different facts alleged. It could minimize the aftereffects of Rosa Luna's treatment, arguing that during the period of her detention and while she was in the custody of the State authorities, at no time was she subjected to physical or psychological violence, nor to intentional acts that had the objective of causing her some harm. Along these lines of argument, the State could assert that the necessary precautions were taken at all times to meet the obligations contracted by the State for the protection of human rights, especially the prohibition against all types of acts that might constitute torture.

III. The protection of personal freedom

134 *Cf.* Inter-Am. Ct.H.R., *Lori Berenson Mejía, op.cit.*, para. 101.
135 *Cf.* ECHR, *Selmouni, op.cit.*, para. 105.
136 *Cf.* ECHR, *Dougoz v. Greece*, Judgment of March 6, 2001.
137 *Cf.* ECHR, *Khudoyorov v. Russia*, Judgment of November 8, 2005, para. 103.

The protection of personal safety and liberty —guarantees regulated by various international instruments[138]— imposes clear prohibitive limits on illegal and arbitrary detention. The illegality of a detention is determined by its imposition outside of the factual suppositions regulated by law. The arbitrariness of such detention is determined by its imposition outside the parameters of necessity and proportionality.

The guarantees of personal freedom regulated in article 7 of the ACHR protect not only physical liberty but also other fundamental rights. An arbitrary or illegal detention adversely affects article 7.2 or 7.3 of the American Convention, but also worsens the vulnerability of the detainee and places him at "certain risk for the violation of other rights, such as those relating to physical integrity and decent treatment.[139] In *Acosta Calderón*, the Inter-American Court held that the protection of liberty safeguards "both the physical liberty of the individual and his personal safety, in a context where the absence of guarantees may result in the subversion of the rule of law and deprive those detained of the minimum legal protection."[140]

Aside from that, due to the characteristics of the case at hand, it is necessary to conduct a more exhaustive analysis to characterize arbitrary detention in depth.

III. A. Arbitrary detention

States have the authority and even the obligation to guarantee their security and maintain law and order, but they cannot do so without limits; rather, the pursuit of such aim is conditioned upon respect for the fundamental rights of the persons subject to its jurisdiction. As such, the State must observe not only certain legal precepts but also certain variables against arbitrariness.

In defining the term "arbitrary" the United Nations Human Rights Committee has maintained that it is not synonymous with illegal, but rather denotes a broader concept. A lawful detention may be arbitrary when it is carried out for reasons or according to procedures other than those prescribed by law, or is based on a law whose fundamental purpose is incompatible with respect for individual rights to liberty and security.[141] As such, it indicated that detentions that are unjust, inadequate or conducted in violation of due process are arbitrary.[142]

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138 Article 7 of the *American Convention on Human Rights*; article 9 of the *International Protocol on Civil and Political Rights* and article 9 of the *Universal Declaration of Human Rights*.

139 *Cf.* Luis García, *La sentencia de la Corte Interamericana en el caso de Walter David Bulacio*, in Revista La Ley 2004-A, pp. 682 *et seq*. Also, *Cf.* Inter-Am. Ct.H.R., *Bulacio Case*, *op.cit.*

140 *Cf.* Inter-Am. Ct.H.R., *Acosta Calderón v. Ecuador***,** Judgment of June 24, 2005, para. 56; *Tibi*, *op.cit.*, para. 97; *Case of the Gómez Paquiyauri Brothers*, *op.cit.*, para. 82 and *Maritza Urrutia*, *op.cit.*, para. 64.

141 *Cf.* Human Rights Committee, *Pietroroia v. Uruguay*, paras. 2.2 and 2.5, cited by Daniel O'Donnel in "*La Protección Internacional de los Derechos Humanos*", Comisión Andina de Juristas, 1988.

142 *Cf.* Cassel, Douglass,"*El Derecho Internacional de los derechos humanos y la detención preventiva*", Journal of the Inter-American Institute of Human Rights, p.42.

The Inter-American Court has considered that the imposition of pretrial detention is arbitrary when it is "for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality."[143] It has also ruled that "the arrest may become arbitrary if in its course facts attributable to the State, considered incompatible with the respect to the detained person's human rights, occur."[144]

As it is regulated in the American Convention, personal liberty is not an absolute right, and certain restrictions are therefore permitted. The Convention authorizes interference in the liberty of persons provided that three requirements are met. First, it allows the restriction of liberty so long as there is a law that establishes previously, in a way that is understandable and accessible to the public, the reasons and procedures for carrying out an arrest. The second requirement is that the objectives pursued justify the limitations in accordance with the framework of the Convention. Finally, the third aspect to be evaluated is the necessity of the restrictions.

In terms of the objectives that justify pretrial detention, the Court held in *Suárez Rosero* that the legitimate reasons justifying the imposition of pretrial detention are limited to the need to guarantee the efficient conduct of investigations and ensure that the accused does not elude justice.[145] However, in the *Canese* case, the Court seems to have made the closed nature of its assertion relative, and allowed the imposition of pretrial detention in cases where there is a danger that the accused will commit another crime.[146] Nevertheless, in the case of *Tibi* the Court returned to its initial case law and reaffirmed that the only grounds that justified the imposition of pretrial detention were flight risk and the obstruction of investigations.[147]

In relation to the "necessity" of the imposition of pretrial detention, the Inter-American Court has held that "[...] 'necessity' and, hence, the legality of restrictions […], depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right [guaranteed] […]. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it."[148]

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143 *Cf.* Inter-Am. Ct.H.R., *Gangaram Panday v. Suriname***,** Judgment of January 21, 1994, para. 47. *Cf.* also Inter-Am. Ct.H.R., *Acosta Calderón*, *op.cit.*, para. 52, subsection d): "an arrest that was originally legal can become arbitrary, [...] without the initial legality being able to make up for the later arbitrariness. Likewise, an arrest with an arbitrary origin cannot be later corrected."

144 *Cf.* Inter-Am. Ct.H.R., *López Álvarez v. Honduras*, Judgment of February 1, 2006, para. 66.

145 *Cf.* Inter-Am. Ct.H.R., *Suarez Rosero*, *op.cit.*, para. 77.

146 *Cf.* Inter-Am. Ct.H.R., *Canese v. Paraguay*, Judgment of August 31, 2004, para. 129.

147 *Cf.* Inter-Am. Ct.H.R., *Tibi*, *op.cit.*, para. 180.

148 *Cf.* Inter-Am. Ct.H.R., *Advisory Opinion OC-5/85 "Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*", November 13, 1985, para. 46.

The Inter-American Commission has decided that "The purpose of preventive detention is to ensure that the accused will not abscond or otherwise interfere with the judicial investigation. […] [P]reventive detention is an exceptional measure and only applies in cases where there exists a reasonable suspicion that the accused will either evade justice or impede the preliminary investigation by intimidating witnesses or otherwise destroying evidence."[149] However, the Commission has also considered that a pretrial detention can be based on the dangerousness of the accused or even on the need to investigate the possibility of collusion. Thus, in Report 2/97, the Commission stated that: "[…] In order to justify preventive detention, however, the danger of a second offense must be real and it must take into account the personal history as well as the professional evaluation of the personality and character of the accused. To that end, it is particularly important to determine, among other elements, whether the subject has ever been convicted of offenses that are similar, both in nature and in seriousness."[150] It also added that: "The complexity of a case may justify preventive detention--in particular, when the case calls for investigation that is difficult to conduct and when the accused has prevented or delayed such action or conspired for this purpose with other persons who are being investigated during the normal course of a trial."[151]

The European Court of Human Rights has also validated the imposition of pretrial detention in cases where there was a risk of collusion, insofar as there was objective evidence to support this suspicion.[152] Without prejudice to this, the European Court continued to review pretrial detentions imposed for these reasons when, with the passing of time and the disappearance of the reasons that supported the presumption of collusion, such detention became arbitrary. In those cases the Court found a violation of article 5(3) of the European Convention on Human Rights[153] or of article 5(4) of the European Convention on Human Rights. [154]

III. A. 1. Arguments of the Commission and the State

Based on these considerations, the Commission could argue that the State of Azar violated article 7.3 of the ACHR. It could assert in support of this position that the pretrial detention of Rosa Luna was arbitrary in that, although it may have conformed to legal standards, the law was arbitrary because it authorized the imposition of pretrial detention outside the reasons validated as legitimate by the Inter-American Court. Ms. Rosa Luna presented no risk of flight or obstruction of the investigation and, in turn, the reasons and methods were incompatible with respect for fundamental rights by virtue of their being unreasonable and lacking in proportionality. It could further argue that the State of Azar failed to respect the international standards pertaining to the exceptional nature of the measures that allow for the restriction of personal liberty, as it did not meet the requirements that justify the deprivation of liberty.

On its behalf, the State could assert that to consider the facts of the case to be a violation of the victim's personal freedom would involve ignoring the domestic laws that are

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149 *Cf.* IACHR, *Report No 12/96, Case 11.245 Jorge A. Giménez (Argentina),* Decision of March 1, 1996, para. 84.

150 *Cf.* IACHR, *Report No 2/97, Case 11.205 et seq., Jorge Luis Bronstein et al. (Argentina),* Decision of March 11, 1997, para. 32.

151 *Cf.* IACHR, *Report No 2/97, op.cit.,* para. 33.

152 *Cf.* ECHR, *I.A. v. France*, Judgment of September 23, 1998, para. 109.

153 *Cf.* ECHR, *Trzaska v. Poland*, Judgment of July 11, 2000, paras. 63 and 69.

154 *Cf.* ECHR, *G.B. v. Switzerland*, Judgment of November 30, 2000, paras. 34 and 39.

supported by the Constitution and by international treaties. The State of Azar could argue that, in accordance with international standards, the deprivation of liberty was done in strict compliance with the procedures set forth under domestic law. The American Convention requires States to pass a law that determines the conditions for the restriction of liberty and establishes that the State shall incur international responsibility if it does not follow the procedures that it has established under its own laws, and the State did pass and follow such a law in the case at hand. Finally, with regard to the arbitrariness alleged by the Commission, the State could assert that the international standards also allow for the imposition of pretrial detention in cases where there is a danger of collusion; it could also assert that said assumption is also a form of obstructing the investigation, one of the assumptions broadly legitimized with respect to pretrial detention.

III. B. The right to appear without delay before a judge or other judicial authority as a detention control mechanism

The opportunity for a detainee to be brought without delay before a judge is directly related to the opportunity to obtain judicial review of the precautionary measure so as to prevent arbitrary and illegal detention. As such, the purposes of the appearance before a judge or other judicial authority are to evaluate whether there are sufficient legal grounds for the arrest and to safeguard the well-being of the detainee with a view to preventing violations of fundamental rights.

Although the international standards do not indicate specific time periods within which the detainee must appear *without delay* before a judge following arrest —periods that must be determined on a case by case basis— the United Nations Human Rights Committee has stated that the delays must not exceed a few days.[155] On this matter, members of the Committee questioned whether a period of forty-eight hours within which to bring the detainee before a judge was unreasonably long.[156] In a case involving capital punishment, the Committee concluded that a one-week delay in the detainee's appearance before a judge following the time of his arrest was incompatible with article 9.3 of the International Covenant on Civil and Political Rights. [157]

In the Inter-American system, the Inter-American Court highlighted the importance of the prompt judicial control of detentions in order to prevent arbitrariness. According to the case law of the Court, "[a]n individual who has been deprived of his freedom without any type of judicial supervision should be liberated or immediately brought before a judge, because the essential purpose of Article 7 of the Convention is to protect the liberty of the individual against interference by the State."[158] In *Tibi* and *Acosta Calderón*, the Court defined the terms of the guarantee in article 7.5 of the Convention. The Court held that "[t]he simple awareness of a judge that a person is detained does not satisfy this guarantee, since the detainee must appear personally and give his

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155 *Cf.* Human Rights Committee, *General Comment No 8 The right to liberty and security of persons*, June 30, 1982, para. 2.

156 *Cf.* Report of the Human Rights Committee, Vol. I, (A/45/40), 1990, para. 333, Federal Republic of Germany.

157 *Cf.* Human Rights Committee, *McLawrence v. Jamaica*, UN doc., CPR/C/60/D/702/1996, 29 de September de 1997, para. 5.6.

158 *Cf.* Inter-Am. Ct.H.R., *Bámaca Velásquez, op.cit.*, para. 140; *Juan Humberto Sánchez*, *op.cit.*, para. 84.

statement before the competent judge or authority."[159]

On this point, the European Court of Human Rights stressed the importance of prompt judicial control of detentions. In *Brogan et al. v. United Kingdom*, the Court held that any person deprived of his liberty without judicial control must be released or brought immediately before a judge.[160] The Court specifically ruled that a police detention that lasted for four days and six hours without judicial control did not meet the standards of the European Convention.[161] This Court held that although the word "immediate" must be interpreted in accordance with the special characteristics of each case, no situation, no matter how serious, grants the authorities the power to unduly prolong the period of detention, as this would violate article 5.3 of the European Convention.[162] The European Court acknowledged that some cases —such as those involving the investigation of terrorist acts— present significant challenges to States. The Court reiterated that it is the responsibility of States to determine when public safety is endangered, and if it is, what measures are necessary to overcome the emergency. The European Court considered that, given their constant and direct contact with the needs of the times, the national authorities are in a better position than the international courts to judge the merit of such necessities. Consequently, the Court conceded a broad margin of appreciation to the national authorities.[163] Following this line of reasoning, in *Brannigan and McBride v. United Kingdom*, the Court ruled that the United Kingdom had not exceeded its margin of appreciation when it established that persons accused of committing acts of terrorism were to be detained for seven days without judicial control.[164] Nevertheless, in *Askoy v. Turkey*, the Court ruled that, in the investigation of an act of this kind, in is unacceptable for a person to be held incommunicado for fourteen days without any judicial control. To the European Court, this period of time is extremely prolonged and leaves the detainee no only without protection against arbitrary detention but also more vulnerable to the possibility of being tortured.[165] Outside of terrorism investigations, the European Court has ruled that the detention of a person for four days and seven hours before being brought before a judge was not access without delay.[166]

III. B. 1. Arguments of the Commission and the State

Bearing in mind these considerations, the Commission could argue that the State of Azar violated article 7.5 of the American Convention. In asserting this, the Commission could argue that in the case of Rosa Luna there was no immediate judicial control in accordance with the guarantees regulated by international instruments for the protection

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159 *Cf.* Inter-Am. Ct.H.R., *Tibi*, *op.cit.*, para. 118; *Acosta Calderón*, *op.cit.*, para. 78.

160 *Cf.* ECHR, *Brogan et al. v. United Kingdom*, Judgment of November 29, 1988, paras. 58-59, 61-62. *Cf.* also, *Kurt v. Turkey*, Judgment of May 25, 1998, paras. 122, 123 and 124.

161 *Cf.* ECHR, *Brogan et al.*, *op.cit.*, para. 62.

162 *Cf.* ECHR, *Brogan et al.*, *op.cit.*, pars. 58-59, 61-62; see also Inter-Am. Ct.H.R., *Tibi*, *op.cit.*, para. 115; *Maritza Urrutia*, *op.cit.*, para. 73 and *Juan Humberto Sánchez*, *op.cit.*, para. 84, *Acosta Calderón*, *op.cit.*, para.77.

163 *Cf.* ECHR, *Tanrikulu et al. v. Turkey*, Judgment of October 6, 2005, para. 38.

164 *Cf.* ECHR, *Brannigan and McBride v. United Kingdom*, Judgment of May 26, 1993.

165 *Cf.* ECHR, *Aksoy*, *op.cit.*, paras. 77 and 78.

166 *Cf.* ECHR, *Brogan et al.*, *op.cit.*, para. 62.

of human rights. The victim was detained for thirteen days without having been brought before the judge, and during this period of time there was no judicial control of her detention.

The State could argue that there was indeed judicial control in this case, and that it was made effective when Rosa Luna requested her release, insofar as a judicial authority has the opportunity to review her detention. This control took place seven days after her arrest—a period of time which, according to international standards for the protection of human rights, does not seem excessive given the crime that was being investigated.

IV. The obligation to investigate, punish and make reparations for human rights violations

Although the American Convention does not contain a standard that expressly requires the State to investigate and criminally punish those responsible for human rights violations, this absence of enunciation cannot be used to limit the existence of that duty. To the contrary, the duty to investigate and punish these acts can be derived from the obligation to guarantee the effectiveness of rights, and from the duty to make reparations for harm suffered. Article 8.1 of the American Convention stipulates that every person has the right to a hearing with due guarantees and within a reasonable time by independent and impartial judicial authorities. Article 25 establishes the right to judicial protection and effective recourse, and article 1.1 of the American Convention sets forth that States must guarantee the effectiveness of rights. The criminal investigation and punishment of human rights violations is a means for attaining this objective. In addition, article 7.b of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women also includes a specific duty of the State when the affected party is a woman.

Based on these norms of the American Convention, and on the consistent case law on the issue,[167] the case at hand will raise the discussion of two types of problems relating to the possible international responsibility of the State of Azar. First, the discussion could be based on the absence of investigation and punishment of all of the acts that violated human rights. Following these lines of argument, the issue could be raised of why the Judiciary did not accept the standards of the Inter-American system on the subject of torture in its decisions, and how that led to certain human rights violations remaining unpunished, in clear violation of articles 8.1 and 25 of the ACHR. Second, the international responsibility of the State might be based on the fact that several of those responsible for the acts against Rosa Luna remained unpunished —specifically, the Ministers of the Interior, Defense and Justice and the latter's advisor, Professor Guerra, as well as the health professionals, Mr. Duche and Dr. Carnelutti— which would demonstrate partial non-compliance with the obligation to investigate and punish those persons responsible for human rights violations.

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[167] *Cf.* Inter-Am. Ct.H.R., *Velásquez Rodríguez, op.cit.,* para. 177. Within the framework of the United Nations Commission of Human Rights we can cite the "Study concerning the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms" prepared by Special Rapporteur Theo Van Boven. Doc. E/CN.4/Sub.2/1993/8 (1993/07/02).

For purposes of clarity, these two arguments, as well as the counter-arguments against this position, are developed separately below.

IV. A. The obligation to investigate all acts constituting human rights violations

Velásquez Rodríguez was the first case in which the Inter-American Court established that it is the State's duty to investigate human rights violations, and that to do so the State must conduct "an effective search for the truth" and the investigation "must be undertaken in a serious manner and not as a mere formality preordained to be ineffective."[168] In later decisions, the Court recognized that this duty to investigate is directly related to the prevention of future human rights violations.[169] In the case of *The Pueblo Bello Massacre*, the Court emphasized that the obligation to guarantee rights (established in article 1.1 of the Convention) gives rise to the duty to investigate acts that violate human rights.[170] The Court established that, in cases of torture, this duty is also derived specifically from articles 5 of the American Convention[171] and from articles 1, 6 and 8 of the Inter-American Convention against Torture.[172] Finally, in the *Miguel Castro Castro Prison* case, in which some of the victims were women, the Inter-American Court considered that article 7.b of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women was also an authoritative source of the duty to investigate and punish.[173]

Consistent with this case law, the Inter-American Court also reaffirmed the importance of eliminating impunity with respect to human rights violations.[174] The Court indicated

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168 *Cf.* Inter-Am. Ct.H.R., *Velásquez Rodríguez, op.cit.*, para. 177.

169 *Cf.* Inter-Am. Ct.H.R., *Bámaca Velásquez***,** Reparations (art. 63.1 American Convention on Human Rights), Judgment of February 22, 2002, paras. 77 and 78. In this decision the Court held: "Preventive measures and those against recidivism begin by revealing and recognizing the atrocities of the past, as was ordered by the Court in its judgment on the merits. Society has the right to know the truth regarding such crimes, so as to be capable of preventing them in the future. Therefore, the Court reiterates that the State has the obligation to investigate the facts that generated the violations of the American Convention in the instant case, as well as to publicly divulge the results of said investigation, and to punish those responsible."

170 *Cf.* Inter-Am. Ct.H.R., *Case of the "Mapiripán Massacre" v. Colombia*, Judgment of September 15, 2005, paras. 142 and 143.

171 *Cf.* Inter-Am. Ct.H.R., *Vargas Areco v. Paraguay*, Judgment of September 26, 2006, para. 78.

172 *Cf.* Inter-Am. Ct.H.R., *Tibi, op.cit.*, para.159. Along these same lines of argument, the European Court —referring to art. 3 of the European Convention— reiterated that it, together with art. 1 imposed "a number of positive obligations upon the States Parties, designed to prevent and provide protection from torture and other forms of inhuman and degrading treatment." The Court also noted that without these positive obligations —especially the duty to investigate— "the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity." *Cf.* ECHR, *Assenov v. Bulgaria*, Judgment of October 28, 1998, para. 102.

173 *Cf.* Inter-Am. Ct.H.R., *Miguel Castro Castro Prison, op.cit.*, para. 413.

174 The Inter-American Court has defined impunity as follows: "the overall lack of investigation, pursuit, capture, trial and conviction of those responsible for violations of rights protected under the American Convention, as the State has the obligation to combat said situation by all legal means within its power, as impunity fosters chronic recidivism of human rights violations and total defenselessness of the victims and of their next of kin." *Cf.* Inter-Am. Ct.H.R., *Bulacio, op.cit.*, para. 120; *Juan Humberto Sánchez, op.cit.*, 143 and 185; *Las Palmeras, op.cit.*, Reparations (art. 63.1 American Convention on Human Rights), Judgment of November 26, 2002, para. 53(a).

that in complying with the obligation to investigate and punish those responsible for human rights violations, States may not invoke judgments resulting from trials that did not meet the standards of the American Convention as an exemption to the obligation to investigate, prosecute and punish.[175] The Inter-American Court has established that when a State has ratified an international treaty such as the American Convention, its judges, as part of the State apparatus, are also subject to it, and that in this task the Judiciary must take into account not only the treaty but also its interpretation by the Inter-American Court.[176]

In any case, it would be possible to argue that the punitive authority of the State cannot exceed the limits set under domestic law. Article 9 of the American Convention prohibits the State from criminally punishing an individual if the act he is accused of has not been strictly defined by a law. On this point, in *García Asto and Ramírez Rojas v. Peru*, the Court found that "the drafting of criminal statutes entails a clear definition of the criminal conduct that establishes its elements and distinguishes it from conduct that is not punishable, or from conduct that is unlawful but punishable by civil penalties," and that "it is the responsibility of the criminal judge, when applying criminal law, to adhere strictly to its provisions, and to observe the greatest rigor in ensuring that the conduct of the accused fits the definition of the offense, so that the court does not penalize acts not punishable under the law."[177] In terms of the concept of "torture" under the domestic law reflecting the standards established by the treaty bodies, it is necessary to recognize that there is a difference between the superior regulatory force of human rights treaties and the value of the criteria of interpretation established by international bodies. The ratification of treaties does not mean that the case law developed by the treaty bodies has a particular force, as the interpretations of the treaties by the treaty bodies are not incorporated into the domestic legal system. As such, in the domestic legal system, the concept of torture may be independent of the concept of torture articulated in the system for the protection of human rights. Indeed, the Inter-American Commission has established that the mere disagreement of the petitioner with the legal interpretation rendered by a local judicial body is insufficient to constitute a violation of the American Convention.[178]

IV. A. 1. Arguments of the Commission and the State

Based on these considerations, the Commission could argue in the case at hand that the Judiciary failed to apply the international standards on the subject of torture and cruel, inhuman or degrading treatment or punishment –a fact made evident in the decision of the judge who ruled that the inhumane conditions of detention that Rosa Luna had been exposed to did not constitute the offense of torture. On this point, the Commission could

175 *Cf.* Inter-Am. Ct.H.R., *Carpio Nicolle et al. v. Guatemala,* Judgment of November 22, 2004, para.132.

176 *Cf.* Inter-Am. Ct.H.R., *Almonacid Arellano et al. v. Chile,* Judgment on Preliminary Objections, Merits, Reparations and Costs, September 26, 2006, para. 124.

177 Inter-Am. Ct.H.R., *García Asto and Ramírez Rojas, op.cit.,* para. 190.

178 *Cf.* IACHR, *Report N° 38/05, Petition 504/99, Inadmissibility, Beatriz E. Pinzas de Chung (Peru),* March 9, 2005, para. 51.

argue that this omission is already a violation of articles 1.1, 8.1 and 25 of the ACHR by virtue of the fact that certain acts remained unpunished.

The State could argue from a different perspective that States do not have the obligation to guarantee the criminal prosecution of any violation of human rights and that article 9 of the ACHR places a clear limitation on this possibility. To reinforce this argument the State could assert that not all of the situations affecting Rosa Luna were covered by the statutory definition of torture and that it is not possible to punish conduct that is not defined in the criminal law. In the specific case of the State of Azar, being a country with a civil law tradition, it would be contradictory for the Judiciary to have to be guided by casuist criteria established by supranational courts when, according to the domestic legal system, the laws – not the interpretive guidelines established in case law precedent— are what must guide the decisions of the judges. Moreover, the State could invoke the argument that States are required to comply with the human rights treaties incorporated into their legal system, but they do not have the duty to interpret the definitions of offenses contained in their Criminal Code according to the standards established under the international human rights system.

IV. B. The obligation to investigate and punish all parties responsible for human rights violations

Article 3 of the Inter-American Convention to Prevent and Punish Torture sets forth some criteria for directing criminal investigations toward certain persons. It establishes that public servants or employees who, acting in that capacity, order, instigate or induce the use of torture, commit it directly or, being able to prevent it, fail to do so shall be held guilty of the crime of torture; it also establishes that persons who, at the instigation of public servants or employees, order, instigate or induce its commission, commit it directly or are accomplices thereto, shall be guilty of torture.

Although the Court established in its judgment in the *Myrna Mack* case that the investigation of human rights violations must include "all those criminally responsible for the illegal acts that gave rise to the application (direct perpetrators, accessories, participants and accessories after the fact),"[179] it is no less true that, to date, it has not specified the degrees of criminal involvement to which States must exhaust the stages of investigation, for example, in the case of torture.

The case law of the Inter-American system is not opposed to examining domestic proceedings.[180] This shows that the treaty bodies of the Inter-American system are trained in the review of particular issues in local procedures, which narrows the margins

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[179] *Cf.* Inter-Am. Ct.H.R., *Myrna Mack Chang v. Guatemala*, Judgment of November 25, 2003, para. 217. In his reasoned concurring opinion, Judge García Ramírez correctly affirmed that in cases where there is evidence in the proceedings before the Court that more than one person is involved in the violation, the duty to investigate, prosecute and punish "is not satisfied by the prosecution and conviction of one of those responsible for the unlawful acts" and that it is necessary to examine other forms of criminal participation: "This criminal participation can include the forms of authorship included in one section of legal writings and is usually established in domestic legislation: immediate or mediate intellectual authorship or perpetration, and can also include forms of complicity, and even concealment by previous agreement between the participants." (paras. 36 and 37).

[180] *Cf.* Inter-Am. Ct.H.R., *Ximenes Lopes v. Brasil*, Judgment of July 4, 2006, para. 174; *Baldeón García v. Peru*, Judgment of April 6, 2006, para. 142.

of discretion granted to the States in terms of how they undertake to investigate serious human rights violations. In matters deemed complicated, the Inter-American Court has said that it is necessary to evaluate the performance and results of the investigations to establish whether the means used and the results obtained are sufficient to comply with the Convention, considering the magnitude of the events and the number of participants involved in them.[181] Thus, in the case of *The Pueblo Bello Massacre*, where some investigations resulted in the conviction of several defendants, the Court established that the violation of articles 8 and 25 of the ACHR persisted because many of the people involved remained unpunished. In the Court's view, an effective investigation is one that ensures the prosecution and punishment of all responsible parties.[182] In the case of *La Cantuta*, the Court even dared to identify the lines of investigation that led to the identification of high officials of the State as those responsible for the human rights violations under investigation. It found that: "the planning and execution of the detention and subsequent cruel, inhuman and degrading acts and the extrajudicial execution or forced disappearance of the victims […] could not have been perpetrated without the awareness of, and superior orders from, the highest spheres of the Executive Branch, military forces and intelligence at the time, specifically the intelligence headquarters and the President of the Republic himself."[183]

The Inter-American Court also established that, in interpreting provisions of the American Convention, it is important to bear in mind the decisions of the international criminal tribunals.[184] Judge Cançado Trinidade in particular has recognized that it is necessary "to promote greater closeness or convergence between international human rights law and international criminal law and, in particular, between the work of the international human rights courts and the international criminal tribunals."[185] These considerations are important because international criminal law, specifically the statutes of the International Criminal Tribunal for the Former Yugoslavia,[186] the International

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[181] *Cf.* Inter-Am. Ct.H.R., *Case of the Ituango Massacres v. Colombia*, Judgment of July 1, 2006, para. 293.

[182] *Cf.* Inter-Am. Ct.H.R., *Case of the Pueblo Bello Massacre v. Colombia***,** Interpretation of the Judgment on the Merits, Reparations and Costs (art. 67 American Convention on Human Rights), Judgment of November 25, 2006, para 143.

[183] *Cf.* Inter-Am. Ct.H.R., *La Cantuta v. Peru*, Judgment on the Merits, Reparations and Costs, Judgment of 29 de November de 2006, para. 96.

[184] *Cf.* Inter-Am. Ct.H.R., *Almonacid Arellano et al., op.cit.,* paras. 101 and 107; *Goiburú et al. v. Paraguay*, Judgment on the Merits, Reparations and Costs, September 22, 2006, para. 82.

[185] *Cf.* Inter-Am. Ct.H.R., *Goiburú et al., op.cit.*. Reasoned concurring opinion of Judge Antonio A. Cançado Trindade, paras. 18 and 29, respectively.

[186] Article 7 of the ICTY Statute states: "1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime. 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment. 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

Criminal Tribunal for Rwanda[187] and the International Criminal Court,[188] admit several forms of criminal participation. In their case law, the international criminal tribunals have interpreted the standards on participation and have developed the conventional concepts even further.[189] Specifically, the International Criminal Tribunal for the Former Yugoslavia has defined the following possible forms of participation in crimes that are punishable under the Statute: commission,[190] instigation,[191] aiding and abetting[192] and planning.[193] Likewise, in its decision in the case of *Kordic and Cerkez*, the court defined the characteristics of command responsibility.[194] It established that command responsibility is indirect, insofar as it arises as a consequence of the

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187 Article 6 of the ICTR Statute states: "1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime. 2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment. 3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to k now that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. 4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires."

188 Article 25 of this last instrument establishes the following: 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime; (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide; (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

189 *Cf. inter alia*, Antonio Cassese, *Internacional Criminal Law*, Oxford UP, New York, 2003.

190 *Commission* involves the carrying out of all of the material elements of the crime, through positive actions, omissions, or one or the other. Direct commission assumes the personal or physical participation of the defendant in the act or the culpable omission of an act he was legally required to perform. *Cf.* ICTY, *Kordic and Cerkez*, Judgment of February 26, 2001, paras. 375-6.

191 I*nstigation* involves encouraging someone to do something, by means of express or implied conduct. As such, it is not necessary for there to be evidence that the order was given in writing or otherwise. *Cf.* ICTY, *Blaskic*, Judgment of March 3, 2000, para. 280/1.

192 *Aiding and abetting* includes practical assistance as well as encouragement or moral support that has a material effect on the perpetration of the crime, even when no tangible act has been performed. Thus, in the *Furundzija* case, it was considered that the fact that the defendant witnessed another officer raping a woman, and did nothing, fit the definition of "aiding and abetting". *Cf.* ICTY, *Furundzija*, Judgment of December 10, 1998, para. 245 *et seq.*; *Blaskic*, *op.cit.*, para. 283.

193 *Planning* requires that "one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases." On this point, the Tribunal has established that circumstantial evidence of the existence of the plan is sufficient. *Cf.* ICTY, *Blaskic, op.cit.*, para. 279.

194 For a critical analysis of this concept, *Cf.* Mark Osiel, *Modes of participation in mass atrocity*, Cornell International Law Journal, 38, 2005, 793-822.

superior's failure to comply with the duty to prevent or punish a crime committed by his subordinate.[195] The defendant is responsible for the conduct of his subordinates when certain elements are present.[196] Another concept that has already become custom in international law on the subject of perpetration and participation is "joint criminal enterprise" or participation in a common criminal plan.[197]

Nevertheless, the standards with regard to the investigation and punishment of those responsible for human rights violations must be applied with caution. Indeed, an international court cannot rule without consideration that a State has omitted to investigate certain persons without pushing the limits of its jurisdiction to a crisis point, given that it is the national court system that examines the facts and issues its judgments in accordance with the law currently in effect.[198] Within the framework of the Inter-American system, its treaty bodies have established categorically that they are not courts of fourth instance. As such, a petitioner's dissatisfaction with the judgment handed down by a judge within the limits of his jurisdiction does not authorize the intervention of a supranational body to review the decision.[199] It has thus been established that the function of the Inter-American system is to guarantee the observance of the obligations assumed by the States Parties to the Convention, but its bodies cannot function as courts of appeal for the examination of alleged errors of law or fact committed by national courts.[200] Therefore, a supranational judge cannot replace a national judge and specify the people who should be investigated by the local justice system,[201] in that the international system does not encompass the notion of holding individuals criminally liable for their unlawful acts.

In the same way, the standards and forms of participation recognized under international criminal law cannot be applied just like that by the human rights courts or by national courts. In some cases, it could entail the decontextualized application of

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195 *Cf.* ICTY, *Kordic and Cerkez*, *op.cit.*, para. 104.

196 *Cf.* ICTY, *inter alia*, *Kordic and Cerkez*, *op.cit.*, para. 401. These elements are: the existence of a relationship of subordination; *mens rea*, that is, actual knowledge—by means of direct or circumstantial evidence—or the fact of having reason to believe that a criminal act was committed or was about to be committed; and noncompliance with the duty to take reasonable and necessary measures to prevent or punish the criminal conduct (*Cf.* ICTY, *Celebici Case*, Judgment of February 20, 2001, paras. 197, 232; *Blaskic*, Judgment of the chamber of appeals, July 29, 2004, paras. 62/4, 72).

197 Participation in a common criminal plan exists when: a) there is a plurality of persons. However, they need not be organized in a military, political or administrative structure; b) there is a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for it to have been previously arranged or formulated. The determining factor is that a plurality of persons act in unison to put it into effect; c) the accused participates in the common plan, design or purpose. It need not involve commission of a specific crime; rather, it is sufficient that the action contribute to the execution of the plan. *Cf.* ICTY, *Tadic*, Judgment of July 15, 1999, para. 227. On the difference between "participation in a common criminal plan" and "aiding and abetting", see para. 229. On the difference between "participation in a common criminal plan" and "co-perpetration", see *Stakic*, Judgment of March 22, 2006, para. 62.

198 *Cf.* Inter-Am. Ct.H.R., *Vargas Areco, op.cit.*, reasoned concurring opinion of Judge García Ramírez, paras. 6, 7 and 12.

199 *Cf.* IACHR, *Report No 87/98, Case 11.216, Oscar Vila-Mazot (Venezuela)*, Decision of October 12, 1998, para. 17.

200 *Cf.* IACHR, *Report No 39/96, Case No 11.673, Santiago Marzioni (Argentina)*, Decision of October 15, 1996, paras. 50 and 51.

201 *Cf.* Inter-Am. Ct.H.R., *Vargas Areco, op.cit.*, reasoned concurring opinion of Judge García Ramírez, paras. 6, 7 and 12.

concepts of international criminal law to cases that are not suited to its principles. Indeed, it would be feasible to apply the principles of international criminal law to crimes against humanity, but not to crimes which, although imputed to agents of the State, are common crimes.

Since the Nuremberg trials, a crime against humanity has been considered to be one that follows a large scale or systematic pattern that in some way reveals a State policy.[202] Since then, the jurisprudence has been without controversy in recognizing that crimes against humanity must necessarily be of a widespread or systematic nature. This was finally the definition set forth in the Rome Statute of the International Criminal Court, article 7 of which established that a number of acts shall be crimes against humanity if they are committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[203] These two conditions are alternatives, that is, either of the two requirements is sufficient for an act to constitute a crime against humanity.[204] "Widespread" is understood as the commission of massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.[205] The term "systematic" means organized action, following a regular pattern on the basis of a common policy and involving substantial public or private resources. It is not necessary for this policy to be adopted officially by the State; it is sufficient for there to be some type of preconceived plan or policy.[206] As such, isolated acts directed against a single victim are excluded from this concept.[207] The International Criminal Tribunal for the Former Yugoslavia has highlighted that an isolated crime does not fall within the notion of crimes against humanity because it is necessary to verify that a similar pattern was used in other places and times, that there is some type of government or group policy to commit these acts, *and that this methodical plan or pattern is evident.*[208]

The International Law Commission of the United Nations has already confirmed this interpretation, affirming that in order for inhuman acts to be classified as crimes against humanity they must be committed "systematically, that is, according to a preconceived plan or policy. The execution of this plan or policy could lead to the repeated or continuous commission of inhuman acts. What is important about this requirement is

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202 The first time that the term "crime against humanity" was codified in positive international law was with the promulgation of the Nuremberg Charter granting the International Military Tribunal of Nuremberg the jurisdiction to prosecute these types of crimes, which it defined as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds (…)". *Cf.* Charter of the International Military Tribunal of Nuremberg, article 6 (c). A/CN.4/22, 18/04/1950. Although the text did not contain any reference to the element of "systematization", the Tribunal emphasized that the inhuman acts considered to be crimes against humanity must have been committed as part of a policy of terror and were, in many cases, systematic and organized by the State. *Cf. Official Comments of the U.N. International Law Commission to the Draft Code of Crimes against the Peace and Security of Mankind*. Doc. Supplement No. 10 (A/51/10), 1996, para. 3.

203 *Cf.* Also article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and article 3 of the Statute of the International Criminal Tribunal for Rwanda.

204 *Cf. Official Comments of the U.N. International Law Commission to the Draft Code of Crimes against the Peace and Security of Mankind*, *op.cit.*, para. 4.

205 *Cf.* ICTR, *The Prosecutor v. Jean Paul Akayesu*, Judgment of October 02, 1998, para. 580.

206 *Cf.* ICTR, *The Prosecutor v. Jean Paul Akayesu*, *op.cit.*, para. 580.

207 *Cf.* ICTR, *The Prosecutor v. Jean Paul Akayesu*, *op.cit.*, para. 580.

208 *Cf.* ICTY, *Tadic*, *op.cit.*, para. 644.

that it excludes acts committed at random that are not part of a broader plan or policy."[209]

IV. B. 1. Arguments of the Commission and the State

Based on these considerations, the Inter-American Commission could argue that the interpretation of the obligation to investigate, prosecute and punish crimes such as the ones alleged in this case must include, as a minimum, the categories accepted in the previously cited Inter-American conventions, as well as the forms of participation accepted in the case law of the international criminal tribunals that now have the status of *jus cogens*. It could argue on this point that in the case of Rosa Luna there are multiple actors at different levels within a single hierarchically organized apparatus of authority. Specifically, with respect to the Minister of the Interior, the Minister of Defense and the Minister of Justice — all of whom approved the ministerial resolution supporting the practices to which Rosa Luna was subjected, but were also acquitted— the Commission could request that the concept of command responsibility be considered for its investigation. With respect to Professor Guerra, the Commission could argue that his release from the criminal trial also seems inappropriate in light of international law standards and jurisprudence. This is true, first of all, because article I of the Inter-American Convention against Corruption defines a "public official" as any employee of the State or its agencies, including those who have been designated to perform activities or functions in the name of the State, and "public function" means any temporary or permanent, paid or honorary activity, performed by a natural person in the name of the State or in the service of the State or its institutions. With this understanding, the prosecutor's interpretation leading him not to indict the Professor because he did not fall within the classification required under the criminal law—when the Convention against Corruption establishes a clear rule on the matter—would not be valid. Second, even assuming that Professor Guerra did not fall within the classification required by the definition of the offense under the criminal law, article 3 of the IACPPT also considers guilty of the crime of torture a person who, without being a public official, is prompted to act by someone who is. The facts of the case also fit this description because Professor Guerra was designated to draft the memorandum that legitimized the practices to which Rosa Luna was subjected. This last argument could also be developed with regard to the health professionals, Duche and Carnelutti. The Commission could call into question the prosecutor's assertion that their contributions were irrelevant, since they participated in key events during Rosa Luna's detention and had sensitive information about her state of mind and physical and psychological resistance to the practices to which she was subjected. As such, concepts of international criminal law, such as aiding and abetting, could also seem appropriate for holding the doctors criminally liable. In sum, in the case of Rosa Luna, the Commission could argue that, instead of "organiz[ing] the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights,"[210] the state authorities organized and exploited public authority in order to commit serious human rights violations and to ensure their impunity.

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209 *Cf. Official Comments of the U.N. International Law Commission to the Draft Code of Crimes against the Peace and Security of Mankind*, *op.cit.*, para. 3.

210 *Cf.* Inter-Am. Ct.H.R., *Velásquez Rodríguez*, *op.cit.*, para. 166.

On the other hand, the State could argue that a supranational tribunal is not in a position to issue a decision on the State's obligation to punish specific persons without it being a court of fourth instance. In addition, the State could argue that recognition of the forms of participation accepted under international criminal law would result in the broadening of the definitions of the criminal offenses regulated under domestic law—a practice which, in addition to undermining the concept of crimes against humanity, would violate the very principle of legality that the American Convention protects. Based on the facts of the case, it cannot be asserted that the inhuman treatment that Rosa Luna experienced would classify as a crime against humanity. The existence of a ministerial memorandum providing technical guidelines for conducting interrogations in cases where national security is at stake does not prove that there was a massive practice of interrogations according to those directives. Therefore, the State could defend its ministers by arguing that the domestic law does not accept the concept of command responsibility. With respect to Professor Guerra, the State could also note that the provisions of the Inter-American Convention against Corruption aim to "promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption," and that the facts at issue do not fall within the concept of *corruption* accepted by the Convention itself. Therefore, to extend the capacity of "public official" to a university professor not engaged in state activity, especially when his acts were not subject to accusations of corruption, would be contrary to the basic rules of interpretation.

V. The principles of *ne bis in idem* and *res judicata* as obstacles to the investigation and punishment of all parties responsible for human rights violations

One of the issues to be debated in the context of the case before us, and in relation to the arguments developed in point IV, is whether the supranational court is authorized to order the reopening of domestic cases that have concluded. To accept that an international body should order the revocation of judgments rendered in favor of defendants, which are already *res judicata*, must be done in light of two serious debates. The first is linked to the guarantee of *"ne bis in idem";* the second, to the principle of the immutability of final judgments.

The Court has consistently indicated in its case law that, in meeting the obligation to investigate and punish those persons responsible for the violation of human rights, amnesty provisions, statutes of limitation and the establishment of exclusions from liability are all unacceptable.[211] In *Castillo Páez*, the Court held that "In connection with the […] violations of the American Convention, the […] State is obliged to investigate the events that produced them, [even when] internal difficulties might prevent the identification of the individuals responsible for crimes of this kind [...]."[212] From this same perspective, the Court affirmed that [provisions limiting criminal liability] or any other domestic legal obstacle that attempts to impede the investigation and punishment of those responsible for human rights violations are

[211] *Cf.* Inter-Am. Ct.H.R., *Case of the Ituango Massacres*, *op.cit.*, para. 402; *Baldeón García*, *op.cit.*, para. 201.

[212] *Cf.* Inter-Am. Ct.H.R., *Castillo Páez v. Peru*, Judgment of November 3, 1997, para. 90.

inadmissible.[213] Here it is important to affirm that, to the extent to which a specific jurisprudential interpretation gives rise to impunity, the bodies for the international protection of human rights would have the authority to intervene so that there would be no obstacles in the domestic legal system to hinder criminal prosecution.[214]

The Inter-American Court has ordered the reopening of domestic cases in which there have been acquittals in cases of massive human rights violations,[215] as well as in cases where the conduct of the proceedings failed to satisfy the guarantees of independence and impartiality on the part of the judges.[216]

Without making a sharp distinction between the principle of *ne bis in idem* and the principle of *res judicata*, the Inter-American Court has held, with respect to the latter, that it is inapplicable when "it results from a trial in which the rules of due process were not respected, or when the judges were not independent and impartial."[217] With respect to *ne bis in idem*, in *Almonacid Arellano*, the Court established that "[…] it is inapplicable when […] the proceedings were not conducted independently and impartially…"[218] In more general terms, the Court has found that States cannot invoke, as a reason for exemption from their obligation to investigate, prosecute and punish, judgments rendered in trials that did not meet the standards of the American Convention.[219]

Nevertheless, these arguments are not without their dilemmas. The international standards on the punitive action of the State do not support the review of a judgment of acquittal or the reopening of proceedings that have concluded. Article 8.4 of the American Convention states that: "an accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause." The International Covenant on Civil and Political Rights grants a broader protection, and its article 14 provides that: "No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."[220] The standards set forth clearly that "the State, with all of its resources and power, should not be allowed to make repeated attempts at convicting an individual for an alleged crime, thus subjecting him to annoyance, expense and suffering, and forcing him to live in a constant state of anxiety and insecurity."[221] Moreover, it would be contrary to the rules of the American Convention to ignore the "*pro homine*" principle, according to which the greatest possible protection should be granted to a person who was acquitted by an enforceable judgment that has become *res judicata*.[222]

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213 *Cf.* Inter-Am. Ct.H.R., *Bulacio*, *op.cit.*, para. 116.

214 *Cf.* Inter-Am. Ct.H.R., *Bulacio*, *op.cit.*, para. 116.

215 *Cf.* Inter-Am. Ct.H.R., *Barrios Altos v. Peru*, Judgment of March 14, 2001, para. 51.5.

216 *Cf.* Inter-Am. Ct.H.R., *Almonacid Arellano et al.*, *op.cit.*, para. 154.

217 *Cf.* Inter-Am. Ct.H.R., *Carpio Nicolle et al. v. Guatemala*, Judgment of November 22, 2004, para. 131.

218 *Cf.* Inter-Am. Ct.H.R., *Almonacid Arellano et al.*, *op. cit.*, para. 154.

219 *Cf.* Inter-Am. Ct.H.R., *Carpio Nicolle et al.*, *op.cit.*, para. 132.

220 In accordance with the parameters established in the American Convention and in the International Covenant on Civil and Political Rights, the guarantee of "*non bis in idem*" does not refer only to the substantive criminal action, that is, the possibility of being convicted twice; rather, it also has the procedural objective of preventing a multiple trial. *Cf.* July B. J. Maier, "*Derecho Procesal Penal. Tomo I. Fundamentos*", Editores del Puerto, Buenos Aires, 1996, p. 598.

221 *Cf.* July Maier, *op. cit.*, p. 602.

222 *Cf.* article 29, ACHR.

V. A. Arguments of the Commission and the State

Along these lines of argument, in the case of Rosa Luna —in which the judge ruled that the conditions of detention to which the victim was exposed were the consequence of an unfortunate series of events, but not an action attributable to any person, and that they did not cause pain of the intensity required to fall within the category of torture— the Inter-American Commission could argue that the State of Azar violated articles 8.1 and 5 of the ACHR by failing to respect the international standards on torture and that, therefore, the Court should order the reopening of the domestic cases with respect to the state officials who were either acquitted or never formally charged by the Office of the Attorney General of the Republic of Azar.

To the contrary, the State could argue that this is not a case such as the *Barrios Altos* case that deals with the massive violation of human rights, and that the independence and impartiality of the judge who presided over the case were not called into question. As such, the argument relating to the tangibility of *res judicata* and the possibility of violating the principle of *ne bis in idem* should be rejected.

VI. The obligation to respect rights and the duty to adopt domestic law provisions

International law prescribes that a State that has entered into an international convention must make the necessary changes in its domestic law to ensure the execution of the obligations it has assumed. Referring to this general obligation, the Human Rights Committee of the United Nations found that:

> "…unless the rights recognized in article 2 of the [International Covenant on Civil and Political Rights] are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees."[223]

If a State fails to adapt its legal system to the international standards for the protection of human rights, it will incur international responsibility for the simple fact that a law that does not respect the international obligations is in effect. A State will likewise be internationally responsible for the absence of laws that duly accept international standards. The State has, on one hand, the negative obligation to not take legislative or other measures that violate human rights; on the other hand, it has the positive obligation to adopt all measures necessary to guarantee that internationally recognized rights and liberties are in full force and effect.

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[223] *Cf.* Human Rights Committee, *General Comment No 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* doc.CCPR/C/21/Rev.1/Add.13, May 26, 2004.

In the Inter-American system, these general duties arise from article 2 of the American Convention, which requires the issuance of norms and the development of practices conducive to the effective observance of such guarantees, as well as the suppression of norms and practices of any kind that violate the guarantees provided for in the Convention. [224] For these purposes, it does not matter whether the norms were adopted in accordance with the domestic legal system or not.[225] In all other respects, given the autonomous and automatic nature of these types of obligations, the duty to adopt laws does not come from a decision of one of the supervisory bodies.[226]

In its case law, the Inter-American Court has repeatedly ordered that the States Parties to the Convention adapt their domestic laws to the international standards on the subject.[227] It has indicated that, to prevent acts that violate human rights, it is crucial to adapt the laws to the standards of the Convention.[228] It has also prescribed that the domestic law measures adopted must be effective.[229] In the *Velásquez Rodríguez* case, the Inter-American Court held that the State is responsible for rights violations that have been caused by its failure to adopt efficient measures in the executive, legislative and judicial spheres.[230]

In referring to the correct statutory definition of conduct prohibited by international instruments, the Inter-American Court has held that criminal prosecution is a fundamental way to prevent future human rights violations, and that international law establishes the minimum standards for the proper identification of prohibited conduct. It has also held that the State may incur international responsibility for the removal of elements considered imperative to the prosecutorial standards established at the international level, as well as for the introduction of modalities that take away from the meaning or effectiveness of the prohibition in such a way that it leads to impunity.[231] It is within this framework that the legal definition of the offense of torture must be examined, furthermore taking into account the specific obligations derived from the Inter-American Convention to Prevent and Punish Torture.[232]

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224 *Cf.* Inter-Am. Ct.H.R., *Case of the "Five Pensioners" v. Peru*, Judgment of February 28, 2003, para. 165; *Baena Ricardo et al. v. Panamá*, Judgment of February 2, 2001, para. 180; *Cantoral Benavides, op.cit.*, para. 178 and *Castillo Petruzzi et al., op.cit.*, para. 207.

225 *Cf.* Inter-Am. Ct.H.R., *Advisory Opinion OC-13/93 "Certain Attributes of the Inter-American Commission on Human Rights (arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)"*, July 16, 1993, para. 26.

226 *Cf.* Inter-Am. Ct.H.R., *Caesar, op. cit.*, para. 93.

227 *Cf.* Inter-Am. Ct.H.R., *Trujillo Oroza v. Bolivia*, Reparations (art. 63.1 American Convention on Human Rights), Judgment of February 27, 2002, para. 98.

228 *Cf.* Inter-Am. Ct.H.R., *Case of the "Street Children" (Villagrán Morales et al.), op.cit.*, Reparations (art. 63.1 American Convention on Human Rights), Judgment of May 26, 2001, para. 98.

229 *Cf.* Inter-Am. Ct.H.R., *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, Judgment of February 5, 2001, para. 87.

230 *Cf.* Inter-Am. Ct.H.R., *Velásquez Rodríguez Case, op.cit.*, para. 166.

231 *Cf.* Inter-Am. Ct.H.R., *Goiburú et al., op.cit.*, para.92.

232 *Cf.* Art. 6 of the IACPPT: "In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction. The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature. […]."

VI. A. Arguments of the Commission and the State

Based on these considerations, the Commission could argue that the State of Azar violated article 2 of the ACHR with regard to the obligation to adopt the norms necessary to enforce the rights and liberties enshrined in the American Convention, the Inter-American Convention against Torture and the Belem do Pará Convention. With regard to the positive obligations, the Commission could assert that the State of Azar failed to define adequately the offense of torture in the Criminal Code, based on two arguments: First, because the definition of the offense, pursuant to jurisprudential standards, did not recognize all of the acts that constitute torture under international law. Second, because the Criminal Code of Azar does not distinguish among all the different possible levels of participation in the offense in question. In terms of the negative obligations, the Commission could argue that the State maintained a law that was contrary to the basic assumptions of the American Convention relative to the right of personal freedom, in that such law allowed for the imposition of pretrial detention in cases incompatible with the Convention.

For its part, the State of Azar could argue that it is not necessary to amend the Criminal Code with regard to the regulation of the crime of torture. The State could argue, first, that it is required to comply with the treaties, but not necessarily with the case law issued by the treaty bodies (which, moreover, is not univocal on the subject of torture); and second, because legislative procedure dictates that the different possible degrees of participation in a crime must be regulated in the general part of the Criminal Code and not with respect to each specific concept. With regard to the law that establishes limits on the release from jail for the type of offense that Rosa Luna was accused of, the State could maintain that it conforms to the international standards that permit the restriction of liberty as an exceptional measure when there is a danger of collusion with other members of the terrorist group under investigation.