

**INTER-AMERICAN COURT OF HUMAN RIGHTS**  
**CASE OF GUACHALÁ CHIMBO *ET AL.* V. ECUADOR**  
**JUDGMENT OF MARCH 26, 2021**  
***(Merits, reparations and costs)***

In the case of *Guachalá Chimbo et al. v. Ecuador*,

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) composed of the following judges:\*

Elizabeth Odio Benito, President  
Eduardo Vio Grossi, Judge  
Humberto Antonio Sierra Porto, Judge  
Eduardo Ferrer Mac-Gregor Poisot, Judge  
Eugenio Raúl Zaffaroni, Judge, and  
Ricardo Pérez Manrique, Judge,

also present,

Pablo Saavedra Alessandri, Secretary, and  
Romina I. Sijniensky, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure” or “the Court’s Rules of Procedure”), delivers this judgment structured as follows:

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\* Judge L. Patricio Pazmiño Freire, Vice President of the Court, an Ecuadorian national, did not take part in either the processing of the case, or the deliberation and signature of this judgment, in accordance with the provisions of Articles 19(1) and 19(2) of the Court’s Rules of Procedure.

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**I**  
**INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE**

1. *The case submitted to the Court.* On July 11, 2019, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the jurisdiction of the Court the case of *Luis Eduardo Guachalá Chimbo and next of kin with regard to the Republic of Ecuador* (hereinafter “the State” or “Ecuador”). The Commission indicated that the case related to the “disappearance of Luis Eduardo Guachalá Chimbo, a person with mental disabilities, in January 2004, while he was in a public psychiatric hospital in Quito,” as well as the absence of informed consent for the hospitalization and the treatment received. The Commission concluded that the State was responsible for the violation of Mr. Guachalá Chimbo’s rights to recognition of juridical personality, life, personal integrity, personal liberty, judicial guarantees, access to information to provide informed consent on health-related matters, equality and non-discrimination, judicial protection, and health. The Commission also concluded that Ecuador had violated the right to personal integrity of Mr. Guachalá’s mother and his immediate family because they had “suffered greatly due to the disappearance of their loved one, which had been further aggravated by the failure to clarify the facts and the lack of justice with regard to what happened.”

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

- a) *Petition.* On March 1, 2007, the Human Rights Clinic of the Pontificia Universidad Católica del Ecuador, the Fundación Regional de Asesoría en Derechos Humanos and the Comisión Ecuménica de Derechos Humanos lodged the initial petition in representation of the presumed victims.
- b) *Admissibility Report.* On November 1, 2010, the Commission adopted Admissibility Report No. 141/10, in which it concluded that the petition was admissible.
- c) *Merits Report.* On October 5, 2018, the Commission adopted Merits Report No. 111/18, in which it reached a series of conclusions<sup>1</sup> and made several recommendations to the State.

3. *Notification to the State.* The Merits Report was notified to the State on January 11, 2019, granting it two months to report on compliance with the recommendations. After granting the State a three-month extension of the time frame, the Commission indicated that the State had “failed to provide detailed and updated information on specific progress in complying with all the recommendations, particularly those relating to integral reparation, the search for the [presumed] victim, and with regard to investigation and justice.”

4. *Submission to the Court.* On July 11, 2019, the Commission submitted the case to the Court owing to “the need to obtain justice for the [presumed] victims.”<sup>2</sup> The Court notes with concern that more than 12 years elapsed between the lodging of the initial petition before the Commission and the submission of the case to the Court.

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<sup>1</sup> The Commission concluded that the State was responsible for the violation of the rights established in Articles 3, 4(1), 5(1), 7(1), 7(3), 8(1), 13(1), 24, 25(1) and 26 of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of this instrument, to the detriment of Luis Eduardo Guachalá Chimbo and his family.

<sup>2</sup> The Commission appointed Commissioner Esmeralda Arosemena de Troitiño, the Executive Secretary at the time, Paulo Abrão, and the Special Rapporteur on Economic, Social and Cultural Rights, Soledad García, as its delegates, and Silvia Serrano Guzmán, Erick Acuna Pereda and Luis Carlos Buob Concha, Executive Secretariat lawyers, as legal advisers.

5. *The Commission's requests.* Based on the above, the Inter-American Commission asked the Court to find and declare the State's international responsibility for the violations contained in its Merits Report and to order the State, as measures of reparation, to comply with the recommendations included in the said report, which will be described and examined in Chapter VIII of this judgment.

## II PROCEEDINGS BEFORE THE COURT

6. *Notification to the State and the representatives.* The submission of the case was notified to the State and the representatives of the presumed victims on September 25, 2019.

7. *Brief with pleadings, motions and evidence.* On November 26, 2019, the Fundación Regional de Asesoría en Derechos Humanos (INREDH) and the Human Rights Clinic of the Pontificia Universidad Católica del Ecuador (hereinafter "the representatives") presented their brief with pleadings, motions and evidence (hereinafter "the pleadings and motions brief"), under Articles 25 and 40 of the Court's Rules of Procedure. The representatives agreed with the allegations made by the Commission, but categorized what had occurred to Mr. Guachalá Chimbo as forced disappearance. They also asked that the Court order the State to adopt various measures of reparation and to reimburse certain costs and expenses.

8. *Answering brief.* On February 6, 2020, the State submitted to the Court its brief answering the Commission's submission of the case, and with its observations on the pleadings and motions brief (hereinafter "the answering brief"). In this brief, the State contested the alleged violations and the requests for measures of reparation presented by the Commission and the representatives.

9. *Public hearing.* On October 9, 2020, the President of the Court issued an order calling the parties and the Commission to a public hearing on the merits, and possible reparations and costs.<sup>3</sup> In addition, in this order, one presumed victim, one expert witness proposed by the State and one expert witness proposed by the Commission were called to testify before the public hearing, and one presumed victim, two witnesses and five expert witnesses were required to present their statements by affidavit; the latter were presented on November 1, 2, 19 and 20, 2020. Owing to the exceptional circumstances resulting from the COVID-19 pandemic, the public hearing was held by videoconference, as established in the Court's Rules of Procedure, on November 25 and 26, 2020, during its 138<sup>th</sup> regular session.<sup>4</sup> During this hearing, the Court's judges requested certain information and explanations from the parties and the Commission.

10. *Amici Curiae.* The Court received seven *amicus curiae* briefs<sup>5</sup> presented by: (1) the Action Program for Equality and Social Inclusion of the Law Faculty of the Universidad de los

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<sup>3</sup> Cf. *Case of Guachalá Chimbo et al. v. Ecuador*. Order of the President of the Inter-American Court of Human Rights of October 9, 2020. Available at: [http://www.corteidh.or.cr/docs/asuntos/quachala\\_09\\_10\\_20.pdf](http://www.corteidh.or.cr/docs/asuntos/quachala_09_10_20.pdf)

<sup>4</sup> There appeared at this hearing: (a) for the Inter-American Commission: Antonia Urrejola Noguera, Commissioner; Marisol Blanchard, IACHR Deputy Executive Secretary; Jorge Meza Flores, Adviser, and Erick Acuña Pereda, Adviser; (b) for the representatives of the presumed victims: Mario Melo Cevallos and David Cordero Heredia, lawyers of the Human Rights Center of the Pontificia Universidad Católica del Ecuador (CDH-PUCE), and Pamela Chiriboga Arroyo, lawyer of the Fundación Regional de Asesoría en Derechos Humanos (INREDH), and (c) for the State of Ecuador: María Fernanda Álvarez, National Director for Human Rights of the Attorney General's Office and Principal Agent for the case; Carlos Espín Arias, Assistant National Director for Human Rights of the Attorney General's Office and Deputy Agent for the case, and Alonso Fonseca Garcés, lawyer from the Nation Human Rights Directorate of the Attorney General's Office and Deputy Agent for the case.

<sup>5</sup> The State alleged that the *amicus curiae* briefs submitted by the Human Rights Clinic of the Universidad de Santa Clara, the International Human Rights Practicum of Boston College Law School Practicum, the Legal Clinic on Disabilities and Human Rights of the Law Faculty of the Pontificia Universidad Católica del Perú, and Dan Israel García Gutiérrez "contain assertions that ignore the evidence provided by one of the parties; therefore, owing to their bias,

Andes;<sup>6</sup> (2) the Redesfera Latinoamericana de la Diversidad Psicosocial;<sup>7</sup> (3) the Human Rights Clinic of the Universidad de Santa Clara;<sup>8</sup> (4) the International Human Rights Practicum of Boston College Law School;<sup>9</sup> (5) the Legal Clinic on Disabilities and Human Rights of the Law Faculty of the Pontificia Universidad Católica del Perú;<sup>10</sup> (6) Dan Israel García Gutiérrez,<sup>11</sup> and (7) the Asociación Civil por la Igualdad y la Justicia, the Centro de Estudios Legales y Sociales, the Comisión Colombiana de Juristas, the Centro de Estudios de Derecho, Justicia y Sociedad, the Harvard Law School Project on Disabilities, the Instituto de Estudios Legales y Sociales de Uruguay, and Justiça Global, coordinated by the Secretariat of the International Network for Economic, Social and Cultural Rights.<sup>12</sup>

11. *Alleged supervening evidence.* On November 23, 2020, the representatives forwarded information on the number of persons presumably disappeared from public hospitals in Ecuador.

12. *Final written arguments and observations.* On January 5, 2021, the State, the representatives and the Commission forwarded, respectively, their final written arguments and final written observations, with annexes. In its final written arguments, the State presented its observations on the alleged supervening evidence presented by the representatives.

13. *Observations on the annexes to the final written arguments.* On January 25 and 26, 2021, the representatives and the Commission, respectively, presented their observations on the annexes remitted by the State with its final written arguments.

14. *Helpful information and evidence.* On January 27, 2021, the President of the Court asked the State to present helpful documentation. Ecuador presented this information on February

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they no longer constitute valid opinions to be taken into consideration by the Court.” In this regard, the Court recalls that, according to the Rules of Procedure, the term *amicus curiae* “refer to the person or institution who is unrelated to the case and to the proceeding and submits to the Court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding by means of a document or an argument presented at a hearing.” Given that it is not incumbent on the Court to rule on the accuracy of such briefs or on any requests or petitions they may contain, the State’s observations do not affect the admissibility of the *amici curiae*; without prejudice to the eventual relevance of such observations when assessing the information they contain. Cf. *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 282, para. 15, and *Case of V.R.P., V.P.C. et al. v. Nicaragua. Preliminary objections, merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 350, footnote 12.

<sup>6</sup> The brief was signed by Juliana Bustamante Reyes, Federico Isaza Piedrahita, Luis Enrique Penagos and Sofía Forero Alba. The brief contains legal considerations concerning the right to recognition of juridical personality and legal capacity.

<sup>7</sup> The brief was signed by Cecilia Guillén Lugo. It contains legal considerations concerning the rights of persons with disabilities and the “deinstitutionalization program” in Ecuador.

<sup>8</sup> The brief was signed by Francisco J. Rivera Juaristi. It contains legal considerations concerning informed consent, forced disappearance and the right to personal integrity.

<sup>9</sup> The brief was signed by Daniela Urosa, Nadia Bouquet and Marija Tesla. It contains legal considerations concerning the right to health of persons with disabilities and forced disappearance.

<sup>10</sup> The brief was signed by Renata Anahí Bregaglio Lazarte, Astrid Flores Huamani, Renato Antonio Constantino Caycho and Paula Camino Morgado. It contains legal considerations concerning involuntary institutionalization and the informed consent of persons with mental disabilities.

<sup>11</sup> The brief was signed by Dan Israel García Gutiérrez. It contains legal considerations concerning forced disappearance.

<sup>12</sup> The brief was signed by Constanza Argentieri, Paula Litvachky, Javier A. Galindo, Sebastian Bojacá, Mauricio Ariel Albarracín Caballero, Michael Ashley Stein, Lucía Giudice, Raphaela Lopes, and Fernando Ribeiro Delgado. It contains legal considerations concerning the right to health of persons with disabilities, the lack of justification for the segregation of mental health services, and the duty to prioritize “deinstitutionalization.”

5, 2021. In addition, on February 16, 2021, the representatives were asked for a clarification with regard to the next of kin of Luis Eduardo Guachalá Chimbo.

15. *Deliberation of the case.* The Court began to deliberate this judgment in a virtual session on March 16, 2021.<sup>13</sup>

### **III JURISDICTION**

16. The Court has jurisdiction to hear this case, pursuant to Article 62(3) of the Convention, because Ecuador has been a State Party to this instrument since December 28, 1977, and accepted the contentious jurisdiction of the Court on July 24, 1984.

### **IV EVIDENCE**

#### **A. Admissibility of the documentary evidence**

17. The Court received diverse documents presented as evidence by the Commission, the representatives and the State, as well as those requested by the Court or its President as helpful evidence and, as in other cases, it admits these in the understanding that they were submitted at the proper procedural moment (Article 57 of the Rules of Procedure)<sup>14</sup> and that their admissibility was not contested or challenged.

18. The **representatives** alleged that annexes 7,<sup>15</sup> 8<sup>16</sup> and 9<sup>17</sup> to the State's final written arguments had been "in its hands previously so that their extemporaneous presentation is not justified." According to the representatives, this conduct constituted "an act of procedural disloyalty that violates the adversarial principle and result[ed] in [their] being unable to exercise fully [their] legitimate right of defense." The Court notes that annexes 7, 8 and 9 to the State's final written arguments responded to a request made by the Court, under Article 58(b) of the Rules of Procedure, during the public hearing and, therefore, finds it appropriate to admit them.

19. The **State** contested the admissibility of the facts and evidence presented by the representatives as supervening evidence on November 23, 2020 (*supra* para. 11), regarding persons disappeared from public hospitals in Ecuador. In this regard, the State argued that the proper procedural moment for its presentation was in the pleadings and motions brief, and that, moreover, the representatives had not justified its presentation based on *force majeure* or grave impediment. Meanwhile, the **representatives** alleged that they "did not have this information, when presenting the brief with pleadings, motions and evidence." In

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<sup>13</sup> Owing to the exceptional circumstances caused by the COVID-19 pandemic, this judgment was deliberated and adopted during the 140th regular session, which was held virtually using technological means in keeping with the provisions of the Court's Rules of Procedure.

<sup>14</sup> In general, and pursuant to Article 57(2) of the Rules of Procedure, documentary evidence may be presented together with the briefs submitting the case or with pleadings and motions, or with the answering brief, as applicable, and evidence remitted at other times is not admissible, subject to the exceptions established in the said Article 57(2) of the Rules of Procedure (namely, *force majeure*, or grave impediment) or unless it relates to a supervening fact; in other words, one that occurred following the said procedural moments.

<sup>15</sup> Annex 7 corresponds to the following document: "National Sub-Secretariat for the Provision of Health Services: Minutes of a meeting, Monitoring progress in the proposal to modernize the Julio Endara Specialized Hospital [HEJE]."

<sup>16</sup> Annex 8 corresponds to the following document: "Ministry of Public Health: document – Implementation of the Model of Community Mental Health Care in the HEJE 2017-2025."

<sup>17</sup> Annex 9 corresponds to the following document: "Ministry of Public Health: Zonal Coordinator No. 9 – Julio Endara Specialized Hospital – Report on the amendments made to the HEJE internal Rules and Regulations."

this regard, the Court notes that the representatives requested this information from the Communications Directorate of the Prosecutor General's Office in a request to access public information presented on November 4, 2020. The representatives have not explained the reasons why they requested this information after the presentation of their pleadings and motions brief. Therefore, this Court considers that the said supervening evidence is time-barred.

### **B. Admissibility of the statements offered**

20. The Court finds it pertinent to admit the statements made by affidavit<sup>18</sup> and during the public hearing,<sup>19</sup> insofar as they are in keeping with the purpose defined by the President in the order requiring them and that of the instant case.

21. The Court notes that, even though its admissibility was not contested, the expert opinion of Carlos Ríos Espinosa offered by the Inter-American Commission was not provided by affidavit. When submitting it, the expert witness indicated that he had not been able "to notarize the document owing to the health emergency in Mexico." The Court considers that this justification is reasonable and is supported by reasons of *force majeure*.<sup>20</sup> Consequently, the expert opinion of Mr. Ríos Espinosa is admitted insofar as it is in keeping with the purpose defined by the President in the order of October 9, 2020.

## **V**

### **PRELIMINARY CONSIDERATION**

22. The **Commission**, in its Merits Report, concluded that the violations of the Convention had been to the detriment of Luis Eduardo Guachalá Chimbo and his family members. The section of the report on "Proven facts" reveals that the Luis Eduardo's family included his mother, Zoila Chimbo Jarro, his sisters, Martha, Nancy, Alexandra, and his brother, Ángel. However, the **representatives** indicated that Luis Eduardo's siblings were Carmen, Nancy, Ángel, Martha, Medardo (deceased in 2019) and Leonardo. Also, they clarified that Jessica Alexandra Guangaje Farinango is not Mr. Guachalá's sister, as the Commission had indicated, but rather his niece. Lastly, they asked that compensation be granted to Luis Eduardo Guachalá's niece, Diana Farinango, "who has provided significant support to doña Zoila in the struggle to find her son." The **State** stressed that, in this case, it was necessary to identify the possible beneficiaries of measures of reparation.

23. The Court recalls that Article 35(1) of the Rules of Procedure establishes that the case must be presented to it by the submission of the Merits Report which should contain the identification of the presumed victims. Consequently, it corresponds to the Commission to identify the presumed victims in each case before the Court precisely and at the proper

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<sup>18</sup> Cf. Affidavit made by Nancy Guachalá Chimbo on October 30, 2020 (evidence file, folios 2241 to 2247); Affidavit made by Aida Beatriz Villareal Tobar on October 30, 2020 (evidence file, folios 2254 to 2276); Affidavit made by Pablo Bermúdez Aguinaga on October 31, 2020 (evidence file, folios 2285 to 2291); expert opinion provided by affidavit by Francisco Hurtado Caicedo on October 31, 2020 (evidence file, folios 2301 to 2351); expert opinion provided by affidavit by Elena Palacio van Isschot on November 2, 2020 (evidence file, folios 2353 to 2376); expert opinion provided by affidavit by Edison Javier Cárdenas Ortega on October 29, 2020 (evidence file, folios 2215 to 2239); expert opinion provided by affidavit by Andrés González Serrano on October 30, 2020 (evidence file, folios 2168 to 2210), and expert opinion provided by Carlos Ríos Espinosa on November 19, 2020 (evidence file, folios 2378 to 2391).

<sup>19</sup> Cf. Statements made by Zoila Chimbo Jarro, Claudia Estefanía Chávez Ledesma, and Christian Courtis during the public hearing held in this case.

<sup>20</sup> See, Statement of the Inter-American Court of April 9, 2020, "Covid-19 and Human Rights: The problems and challenges that must be addressed from the perspective of human rights and respect for international obligations." Available at: <https://www.corteidh.or.cr/tablas/alerta/comunicado/cp-27-2020.html>



procedural moment,<sup>21</sup> unless the exceptional circumstances established in Article 35(2) of the Court's Rules of Procedure are involved, according to which, when it has been justified that it was not possible to identify them in cases of massive or collective violations, the Court will decide at the appropriate time who to consider victims according to the nature of the violation.<sup>22</sup>

24. This Court has verified that, in the Merits Report, the Commission did not determine that Carmen Guachalá Chimbo, Luis Medardo Farinango Chimbo, Leonardo Farinango Chimbo and Diana Farinango were presumed victims. Also, it notes that, in this case, the exception established in Article 35(2) of the Rules of Procedure is not applicable.

25. Therefore, the Court considers that, pursuant to Article 35(1) of the Rules of Procedure, to safeguard procedural balance between the parties and the State's right of defense, the representatives' request to include other members of Luis Eduardo Guachalá Chimbo's family as presumed victims is not appropriate.<sup>23</sup> Consequently, it is only able to consider as presumed victims the persons identified as such in the Merits Report, namely: Luis Eduardo Guachalá Chimbo, his mother, Zoila Chimbo Jarro, his sisters, Martha Cecilia Farinango Chimbo, Nancy Guachalá Chimbo, his brother, Ángel Segundo Guachalá Chimbo, and his niece, Jessica Alexandra Guangaje Farinango.

## **VI FACTS**

### **A. Luis Eduardo Guachalá Chimbo and his immediate family**

26. Luis Eduardo Guachalá Chimbo was born on February 27, 1980, and was 23 years of age when he disappeared.<sup>24</sup> His family consisted of his mother, Zoila Rosario Chimbo Jarro, his sisters, Martha, Nancy and Carmen, and his brothers Ángel, Luis Medardo and Leonardo.<sup>25</sup> As a child, Mr. Guachalá Chimbo began to suffer epileptic seizures, and was diagnosed with "mental illness and conduct due to brain dysfunction, epilepsy" on January 21, 2004.<sup>26</sup>

27. According to the expert opinion of Elena Palacio van Isschot, "an epileptic seizure has been defined as a transient occurrence of signs and/or symptoms due to abnormal excessive or synchronous neuronal activity in the brain, predisposed by a series of neurobiological, cognitive, psychological and social factors."<sup>27</sup> Epilepsy is "a neurological disease that may be

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<sup>21</sup> Cf. *Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of Spoltore v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of June 9, 2020. Series C No. 404, para. 50.

<sup>22</sup> Cf. *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012. Series C No. 250, para. 48, and *Case of Spoltore v. Argentina, supra*, para. 50.

<sup>23</sup> Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 29, and *Case of Spoltore v. Argentina, supra*, para. 52.

<sup>24</sup> Cf. Medical report of the Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2), and Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 20).

<sup>25</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 20), and Medical record of Luis Eduardo Guachalá Chimbo from the Julio Endara Psychiatric Hospital of June 11, 2003 (evidence file, folio 2552).

<sup>26</sup> Cf. Medical record of the Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 3), and Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 20).

<sup>27</sup> Cf. Affidavit made by Elena Palacio van Isschot on November 2, 2020 (evidence file, folio 2355).

linked to mental disorders.”<sup>28</sup> Mr. Guachalá Chimbo also had “psychotic symptoms,” which could be related to the epilepsy.<sup>29</sup>

28. According to his mother’s statement, Mr. Guachalá Chimbo completed primary education but could not continue his studies because his epileptic seizures did not allow him to concentrate and his mother was unable to pay for his schoolbooks and other equipment.<sup>30</sup> Mr. Guachalá Chimbo worked as a bricklayer and, occasionally, suffered epileptic seizures at his worksite.<sup>31</sup>

29. Zoila Rosario Chimbo Jarro did laundry work in private homes during the day and sold roses on the street during the evening.<sup>32</sup> A social environment assessment prepared by the Pichincha Prosecutor determined that Mr. Guachalá Chimbo’s family “has insufficient income to cover its basic needs, such as subsistence, health, housing [and] recreation.”<sup>33</sup> Owing to her son’s illness, Mrs. Chimbo Jarro took him to various hospitals where he was given medication to treat his epileptic seizures.<sup>34</sup> Mrs. Chimbo stated that, at times, she was unable to buy these medicines because they were so expensive.<sup>35</sup> The State did not present information on the accessibility of such medicines.

### **B. Luis Eduardo Guachalá Chimbo’s first admission to the Julio Endara Psychiatric Hospital**

30. The Julio Endara Psychiatric Hospital is attached to Ecuador’s Ministry of Public Health, and its mandate is to care for patients with mental disorders.<sup>36</sup> On June 4, 2003, Mrs. Chimbo took her son to the Julio Endara Psychiatric Hospital for the first time, because his health had deteriorated and he was behaving aggressively.<sup>37</sup> Mr. Guachalá Chimbo was admitted to the hospital for the whole of the month of June, receiving visits from his mother every other day, and without her having “any problem to enter and to talk to her son.”<sup>38</sup> According to the Julio Endara Hospital’s records, Mr. Guachalá Chimbo was discharged on July 2, 2003, in a stable condition,<sup>39</sup> with the indication that he should return for a check-up.<sup>40</sup> However, due to a lack of financial resources, Mr. Guachalá could not attend subsequent medical check-ups.<sup>41</sup>

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<sup>28</sup> Cf. Affidavit made by Elena Palacio van Isschot on November 2, 2020 (evidence file, folio 2355).

<sup>29</sup> Cf. Affidavit made by Elena Palacio van Isschot on November 2, 2020 (evidence file, folio 2358).

<sup>30</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 20).

<sup>31</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 21).

<sup>32</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 21).

<sup>33</sup> Cf. Pichincha Prosecution Service. Service for the Investigation of Disappeared Persons. Social Environmental Assessment of November 10, 2014 (evidence file, folio 4333).

<sup>34</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 21).

<sup>35</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folios 20, 21 and 22).

<sup>36</sup> Cf. Ruling of the Constitutional Court of Ecuador of June 6, 2006 (evidence file, folio 60), and Communication of the Management of the Julio Endara Psychiatric Hospital of March 21, 2016 (evidence file, folio 916).

<sup>37</sup> Cf. Ministry of Public Health, Julio Endara Hospital. Medical record of Luis Eduardo Guachalá Chimbo (evidence file, folio 1697), and Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 22).

<sup>38</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 22).

<sup>39</sup> Cf. Discharge record of July 2, 2003 (evidence file, folio 1710), and Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 23).

<sup>40</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 23), and Statement made by E.Q. before the Provincial Headquarters of the Judicial Police of Pichincha on February 19, 2004 (evidence file, folio 2695).

<sup>41</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 23).

### **C. Luis Eduardo Guachalá Chimbo's second admission to the Julio Endara Psychiatric Hospital**

31. At the end of December 2003 and during January 2004, Luis Guachalá Chimbo's health deteriorated, reaching the point where he had epileptic seizures every half hour.<sup>42</sup> Consequently, on January 10, 2004, Mrs. Chimbo Jarro again took her son to the Julio Endara Psychiatric Hospital.<sup>43</sup> One week before this, Mr. Guachalá had stopped taking the prescribed medication, and this had resulted in the "reappearance of the psychopathological problems."<sup>44</sup> According to the hospital, his admission was due to physical and verbal "aggressivity, impulsiveness, disorderly conduct, soliloquies, inappropriate laughter, insomnia, mutism, hallucinations [and] generalized seizures."<sup>45</sup>

32. According to Mrs. Chimbo's statement, during his transfer to the hospital, her son was aware of what was happening; she explained to him that he was going to the hospital and Mr. Guachalá Chimbo told her that he agreed to this.<sup>46</sup> The record of his admission to the hospital indicates that Mr. Guachalá was "mute, and uncooperative during the interview and physical examination."<sup>47</sup> Zoila Chimbo signed the form authorizing his admission to the hospital, which indicated that she undertook "to collaborate with any necessary medication, and would also check on the patient while he was in the hospital, visiting him with the frequency advised by the doctors treating him and providing him with essential clothing and articles of personal hygiene." It also indicated that "the hospital takes precautions against any possibility of escape or accident, but if this should happen it accepts no responsibility for the consequences."<sup>48</sup>

33. Mrs. Chimbo Jarro stated that she accompanied her son to a ward where a doctor ordered a nurse to inject Mr. Guachalá with a sedative.<sup>49</sup> According to Mrs. Chimbo Jarro, a nurse, whose breath smelt of alcohol, inserted the needle in her son's arm more than six times, and when he had given him the injection, it left her son "as if he was dead."<sup>50</sup>

34. On January 12, 2004, Dr. E.Q. was assigned to Mr. Guachalá and she reported that she found the patient sedated, performed a physical examination, and prescribed medication.<sup>51</sup> The following day, Dr. E.Q. again examined Mr. Guachalá, finding that he was "uncommunicative, with hypoprosia,<sup>52</sup> bradypsychia,<sup>53</sup> poor retention, [...] memory, power of analysis, judgment and reasoning deteriorated." She added that Mr. Guachalá had not suffered epileptic seizures and that he was eating and sleeping satisfactorily. Based on his

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<sup>42</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 23).

<sup>43</sup> Cf. Medical record of Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2), and Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 24).

<sup>44</sup> Cf. Ministry of Public Health, Julio Endara Psychiatric Hospital. Admittance form of January 10, 2004 (evidence file, folio 1727).

<sup>45</sup> Cf. Medical record of Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2), and Admittance form of Mr. Guachalá Chimbo (evidence file, folio 1705).

<sup>46</sup> Cf. Statement of Zoila Chimbo Jarro on April 4, 2016, before the Inter-American Commission on Human Rights. Available at: <http://www.oas.org/es/cidh/multimedia/sesiones/157/default.asp>

<sup>47</sup> Cf. Admittance form of Mr. Guachalá Chimbo (evidence file, folio 1706).

<sup>48</sup> Cf. Hospitalization authorization form (evidence file, folio 145).

<sup>49</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folios 24 and 25).

<sup>50</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 25).

<sup>51</sup> Cf. Medical record of Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2).

<sup>52</sup> Hypoprosia refers to reduced ability to focus attention, revealed by the incapacity of the individual to concentrate of an object or task.

<sup>53</sup> Bradypsychia is a neurological symptom characterized by slowness of thought or mental activity.

improvement, she decided to change the prescribed medication.<sup>54</sup> On Thursday, January 15, 2004, when Dr. E.Q. arrived at the hospital, she was informed that Mr. Guachalá had suffered a fall the previous day and she therefore proceeded to suture the wound in the left ciliary area and to prescribe an anti-inflammatory medicine.<sup>55</sup> On January 16, 2004, Dr. E.Q. again examined Mr. Guachalá, indicating that "he was walking around, with hypoprosopia, bradypsichia, poor retention, without sensory-perceptual alterations, [...] memory, power of analysis, judgment and reasoning deteriorated. He was eating and sleeping satisfactorily. He has not had epileptic seizures."<sup>56</sup>

35. Mrs. Chimbo Jarro stated that, when Luis Eduardo was admitted to the hospital, she asked the doctor if it would be possible to visit her son the following day and the doctor responded that it would be "better if she returned on Monday because her son would be sleeping on Saturday and Sunday."<sup>57</sup> On Monday January 12, 2004, Mr. Guachalá Chimbo's mother went to the hospital; she indicated that she did not find her son in his room and therefore asked the doctor where he could be. The doctor "advised [her] that [her] son was sedated"<sup>58</sup> and that she considered that, "from a therapeutic perspective, it would better if [she] did not see him because when patients receive visits from their family members, they often become agitated and want to leave with them."<sup>59</sup>

36. After she had looked for her son in the hospital unsuccessfully, Mrs. Chimbo again asked Dr. E.Q. where he was, and she responded that "he could be at the barbers or in occupational therapy with other patients."<sup>60</sup> However, the medical record indicates that "at that time [she] did not know exactly where he was because [she did not have] direct responsibility for taking care of patients."<sup>61</sup> Mrs. Chimbo Jarro did not find her son in the places mentioned, and could not get any answers in this regard from the hospital staff.<sup>62</sup> The doctor told her that she should communicate "by telephone to obtain daily information on her son's health and the day that [she could] visit him."<sup>63</sup> Mrs. Chimbo telephoned the hospital staff on January 11, 13, 15 and 16, 2004, and received information on her son's condition.<sup>64</sup>

#### ***D. The disappearance of Mr. Guachalá Chimbo and the first efforts to discover his whereabouts***

37. The last time that his family saw Luis Eduardo Guachalá Chimbo was on January 10, 2004, when he was admitted to the Julio Endara Hospital.<sup>65</sup> According to this hospital's records, Mr. Guachalá Chimbo was hospitalized until January 17, 2004, the day on which the

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<sup>54</sup> Cf. Medical record of Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2).

<sup>55</sup> Cf. Medical record of Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2).

<sup>56</sup> Cf. Medical record of Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2).

<sup>57</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 25).

<sup>58</sup> Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 26).

<sup>59</sup> Cf. Medical record of Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2).

<sup>60</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 26), and Medical record of Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2).

<sup>61</sup> Cf. Medical record of Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2).

<sup>62</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 26).

<sup>63</sup> Cf. Medical record of Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2).

<sup>64</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folios 25 to 27); Medical record of Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folios 2 and 3), and Complaint of February 2, 2004 (evidence file, folio 33).

<sup>65</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 27).

change of shift report indicated at 3.30 p.m. that "the patient Luis Guachalá has left the hospital; a search was made, but he was not found."<sup>66</sup>

38. The male nurse responsible for Mr. Guachalá's care stated that, on the afternoon of January 17, 2004, Mr. Guachalá was in the hospital grounds together with other patients. Later, he took him to the television room where Mr. Guachalá sat down, while he "went to see another patient who was threatening to leave the hospital." The nurse stated that he was absent for "more or less 15 or 20 minutes, while the other patients were under the control of his colleagues on the shift." When he returned to the television room, he noted that Mr. Guachalá was not there and immediately proceeded "to look for him in all the hospital wards and bathrooms; then [they] went out to the grounds and the areas around the hospital and the Autopsy Department [...] without finding him." He indicated that he had informed "his colleagues so that they would help in the search." When "the search was completed, [he] immediately proceeded to record the problem on the change of shift report, having previously telephoned [...] the family." He explained that "owing to the hectic nature of the search, [he] forgot to inform the hospital guards."<sup>67</sup> According to the representatives, the family did not receive the telephone call allegedly made by the hospital on January 17.<sup>68</sup>

39. Mrs. Chimbo stated that, on Sunday, January 18, 2004, she went to the hospital to see her son and spoke to the nurse who had given her son the injection on the day he was admitted. The nurse told her that her son "had escaped from the hospital on Saturday, January 17"; that "this was [her] problem; [...] that they had searched the whole sector and had not found him." The nurse indicated that they had informed the police and asked Mrs. Chimbo to go to the police.<sup>69</sup> Mr. Guachalá's mother indicated that she did not find the doctor who was treating her son that day and that a nurse on the shift recommended that she look for her son "in the homes of other members of the family."<sup>70</sup> Zoila Chimbo also stated that, once, one of the hospital patients had told her that Luis was dead, that "he had had a heart attack during mass."<sup>71</sup>

#### ***E. Measures undertaken owing to the disappearance of Luis Eduardo Guachalá Chimbo***

40. Dr. E.Q. stated that, on arriving at the hospital on Monday, January 19, 2004, she was informed that Mr. Guachalá "had abandoned the institution during the weekend"; she therefore ordered the social worker to take the necessary steps to locate the patient."<sup>72</sup> The social worker telephoned the family to ask whether he had arrived home.<sup>73</sup>

41. That same day, Mrs. Chimbo went to the hospital and spoke to the Hospital Director and the social worker. The Hospital Director advised Mrs. Chimbo Jarro that:

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<sup>66</sup> Cf. Change of shift report of January 17, 2004 (evidence file, folios 35 and 36).

<sup>67</sup> Communication of the nurse to the Director of the Julio Endara Psychiatric Hospital of September 27, 2004 (evidence file, folio 40).

<sup>68</sup> Cf. Statement made by Zoila Chimbo during the public hearing held in this case.

<sup>69</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 27).

<sup>70</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 27).

<sup>71</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 28).

<sup>72</sup> Cf. Medical record of Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 3), and Luis Eduardo Guachalá Chimbo's medical record at the Julio Endara Psychiatric Hospital from January 10 to January 21, 2004 (evidence file, folio 12).

<sup>73</sup> Cf. Record of the social worker's search actions (evidence file, folio 7), and Luis Eduardo Guachalá Chimbo's medical record at the Julio Endara Psychiatric Hospital from January 10 to January 21, 2004 (evidence file, folio 12).

Patients become unsettled when family members don't visit them and, unfortunately, the hospital does not have high walls so that it is very easy for them to leave; the staff looks after them, but there are not enough staff to be checking on the patients who wish to run away.<sup>74</sup>

42. According to the hospital report, on January 19, 2004, phone calls were made to hospitals and to the morgue, without obtaining any answers regarding Mr. Guachalá's whereabouts and his disappearance was reported to the police at 11 a.m. that day.<sup>75</sup> The same day, a police sergeant went to the hospital "to obtain routine data."<sup>76</sup> Meanwhile, Mrs. Chimbo searched the whole sector without any authority coming to help her.<sup>77</sup>

43. Mrs. Chimbo stated that, the following day, she went to the police checkpoint located in Guangopolo, where the person in charge told her that "it was not the first time that a patient from that hospital was lost," and recommended that she file a complaint with the Judicial Police.<sup>78</sup> On January 20, 2004, at 6.22 p.m. Mrs. Chimbo Jarro went to the headquarters of the National Judicial Police Directorate of Pichincha to file a complaint on her son's disappearance.<sup>79</sup>

44. On January 21, 2004, the hospital issued a discharge sheet for Luis Guachalá indicating that he had abandoned the hospital.<sup>80</sup> The same day, the Pichincha District Prosecutor open a preliminary inquiry and ordered the following measures: (i) reception of the complainant's statement and of all those who had any knowledge of the fact investigated; (ii) collection of evidence, fingerprints and traces; (iii) communication with the different departments to gather evidence of the perpetration of the offense and the participants; (iv) communication to the Judicial Police delegating to them the measures established in article 216(2) and (3) of the Code of Criminal Procedure; (v) examination of the site of the facts, and (vi) implementation of "all necessary measures to clarified the facts reported."<sup>81</sup>

45. On January 26, 2004, the social worker went to the morgue, without obtaining any answers regarding Luis Guachalá's whereabouts.<sup>82</sup> On January 27, the hospital agreed to "create a search group."<sup>83</sup> That same day, it contacted a television station, asking it to publicize the loss of the patient.<sup>84</sup> On January 29, posters were put up concerning the disappearance.<sup>85</sup>

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<sup>74</sup> Record of the social worker's search actions from January 19 to February 12, 2004 (evidence file, folio 7).

<sup>75</sup> Record of the social worker's search actions from January 19 to February 12, 2004 (evidence file, folio 7); Record of distress calls reported by the National Police on January 19, 2004 (evidence file, folio 42), and National Police phone call management system of January 19, 2004 (evidence file, folio 43).

<sup>76</sup> Record of the social worker's search actions from January 19 to February 12, 2004 (evidence file, folio 7), and Record of arrival time of members of the National Police of January 19, 2004 (evidence file, folio 44).

<sup>77</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 28), and Affidavit made by Nancy Guachalá on October 30, 2020 (evidence file, folio 2243).

<sup>78</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 28).

<sup>79</sup> Cf. Complaint of January 20, 2004 (evidence file, folio 48).

<sup>80</sup> Cf. Discharge sheet dated January 21, 2004 (evidence file, folio 38).

<sup>81</sup> Cf. Public Prosecution Service of Ecuador, district of Pichincha, Crimes against Life Unit. Official communication of January 21, 2004 (evidence file, folio 7030).

<sup>82</sup> Record of the social worker's search actions from January 19 to February 12, 2004 (evidence file, folio 7), and Certification of the Pichincha Forensic Medicine Department of the National Police of Ecuador of September 4, 2004 (evidence file, folio 2530).

<sup>83</sup> Record of the social worker's search actions from January 19 to February 12, 2004 (evidence file, folio 7).

<sup>84</sup> Record of the social worker's search actions from January 19 to February 12, 2004 (evidence file, folio 7).

<sup>85</sup> Record of the social worker's search actions from January 19 to February 12, 2004 (evidence file, folio 7).

46. On February 10, 2004, Mrs. Chimbo Jarro went to the hospital to find out about the steps taken in the search and was informed that a doctor had contacted the La Rivera garrison, which had offered to provide a patrol to search for Mr. Guachalá.<sup>86</sup> Then, during the afternoon, a group of officers came to the hospital and, after talking to Mrs. Chimbo and receiving a photograph, went off to look for her son.<sup>87</sup> The following day, the sergeant from the garrison told her that "two brigades were alternating" in the search, but had been unable to find him and that "it would be preferable to put pressure [on the Judicial Police] to intervene and carry out preliminary investigations in the hospital."<sup>88</sup> The Fire Department of the Metropolitan District of Quito indicated that on February 12, 13, 14 and 15, 2004, it conducted a search without obtaining any results.<sup>89</sup> It also indicated that "the said search was carried out at the request of one of the hospital's social workers."<sup>90</sup>

47. On February 16, 2004, the National Police conducted a search of the hospital where Mr. Guachalá Chimbo was seen for the last time.<sup>91</sup>

48. Between February 3, 2004, and July 13, 2005, various investigation procedures were conducted, including obtaining: (i) Mrs. Chimbo Jarro's sworn statement;<sup>92</sup> (ii) statements by hospital officials;<sup>93</sup> (iii) the report of the expert examination of the site of the facts;<sup>94</sup> (iv) the sworn statement of the director of the hospital,<sup>95</sup> and (v) the forensic dental report indicating that an examination of the dental work of Mr. Guachalá and two unidentified corpses had been performed with negative results.<sup>96</sup>

49. On November 26, 2004, and also on January 28, March 3 and July 4, 2005, Mrs. Chimbo filed briefs with the Prosecutor asking for various procedures to be conducted.<sup>97</sup> The Prosecutor

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<sup>86</sup> Record of the social worker's search actions from January 19 to February 12, 2004 (evidence file, folio 7).

<sup>87</sup> Record of the social worker's search actions from January 19 to February 12, 2004 (evidence file, folio 7).

<sup>88</sup> Record of the social worker's search actions from January 19 to February 12, 2004 (evidence file, folio 10).

<sup>89</sup> Cf. Certification of the Fire Department of the Metropolitan District of Quito of October 4, 2004 (evidence file, folio 113).

<sup>90</sup> Cf. Certification of the Fire Department of the Metropolitan District of Quito of October 4, 2004 (evidence file, folio 113).

<sup>91</sup> Cf. Record of search of the site of the facts of February 17, 2004 (evidence file, folios 7035 and 7036) and Expert report on search of the site of the facts of October 18, 2004 (evidence file, folios 7123 to 7126).

<sup>92</sup> Cf. Statement made by Zoila Chimbo Jarro before the Provincial Headquarters of the Judicial Police of Pichincha on February 3, 2004 (evidence file, folio 2423).

<sup>93</sup> Cf. Statement made by E.Q. before the Provincial Headquarters of the Judicial Police of Pichincha on February 19, 2004 (evidence file, folios 2695 and 2696); Statement made by Jenny Sandra Beltrán Bautista before the Provincial Headquarters of the Judicial Police of Pichincha on February 19, 2004 (evidence file, folios 2697 and 2698); Statement made by José Luis Borja Quishpe before the Provincial Headquarters of the Judicial Police of Pichincha on February 19, 2004 (evidence file, folios 2699 and 2700); Statement made by Luis Alfonso Veloz Amuguimba before the Provincial Headquarters of the Judicial Police of Pichincha on February 19, 2004 (evidence file, folios 2701 and 2702), and Statement made by Richard Gonzálo Ganchozo Mendoza before the Provincial Headquarters of the Judicial Police of Pichincha on February 17, 2004 (evidence file, folio 2434).

<sup>94</sup> Cf. Record of search of the site of the facts of February 17, 2004 (evidence file, folio 2421), and Expert report on search of the site of the facts of October 18, 2004 (evidence file, folios 7123 to 7126).

<sup>95</sup> Cf. Statement made by Rommel Petronio Artieda Maruri before the Provincial Headquarters of the Judicial Police of Pichincha on February 17, 2004 (evidence file, folios 2693 and 2694);

<sup>96</sup> Cf. Forensic dental report of July 13, 2005 (evidence file, folios 7231 and 7232).

<sup>97</sup> Cf. Brief filed by Zoila Chimbo Jarro before the Pichincha District Prosecutor on November 26, 2004 (evidence file, folios 7128 and 7129); Undated brief filed by Zoila Chimbo Jarro before the Pichincha District Prosecutor (evidence file, folios 7130 and 7131); Undated brief filed by Zoila Chimbo Jarro before the Pichincha District Prosecutor (evidence file, folios 7214 and 7215); Brief filed by Zoila Chimbo Jarro before the Pichincha District Prosecutor on July 4, 2005 (evidence file, folios 7218 to 7221);

indicated that he had taken several of the measures requested and that others would be taken at the appropriate time.<sup>98</sup>

50. On August 29, 2005, the Pichincha Prosecutor asked the 18th Criminal Court of Pichincha to dismiss the complaint and to close it based on article 38 of the Code of Criminal Procedure.<sup>99</sup> The Prosecutor indicated that “at the present time it is impossible to discover the whereabouts of the disappeared person.”<sup>100</sup> On September 12, 2005, the 18th Criminal Judge of Pichincha granted the complainant 72 hours to respond to this request.<sup>101</sup> Mrs. Chimbo Jarro asked the judge not to dismiss the complaint; accordingly, on September 27, 2005, the judge ordered that the file be forwarded to the senior prosecutor, for consultation, and so that the latter could revoke or ratify the dismissal.<sup>102</sup> On July 13, 2006, the Pichincha Provincial Prosecutor ratified the request to close the investigation because, “after analyzing the documentation in the case file, [...] it has not been possible to determine the existence of an offense of any kind.”<sup>103</sup> Consequently, on July 19, 2006, the Pichincha 18th Criminal Court ordered that the case be closed.<sup>104</sup>

#### **F. Complaint filed before the Ombudsman**

51. In parallel, on April 2, 2004, the Fundación Regional de Asesoría en Derechos Humanos (hereinafter “INREDH”) filed a complaint before the Ombudsman based on the disappearance of Mr. Guachalá, addressed to the National Directorate for Defense of the Rights of Elderly Persons and Persons with Disabilities (DINATED).<sup>105</sup> Following various measures, on June 10, 2004, in a communication to the hospital, DINATED expressed its concern owing to the failure to communicate the disappearance that had occurred between January 17 and 18, 2004.<sup>106</sup>

52. On September 27, 2004, DINATED called a hearing, and this was held on October 5, 2004, with the participation of Mrs. Chimbo and officials of the Julio Endara Hospital.<sup>107</sup> On October 7, 2004, the director of DINATED issued a decision indicating that it would examine the complaint insofar as it met the legal requirements.<sup>108</sup>

53. On November 26, 2004, the director of the Hospital sent DINATED a folder with documents related to the disappearance of Mr. Guachalá.<sup>109</sup> On February 17, 2005, the

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<sup>98</sup> Cf. Pichincha District Prosecutor. Decision of the Unit for Crimes against Life of July 7, 2005 (evidence file, folios 7222 and 7223).

<sup>99</sup> Cf. Pichincha District Prosecutor. Decision of August 29, 2005 (evidence file, folios 7247 and 7248).

<sup>100</sup> Pichincha District Prosecutor. Decision of August 29, 2005 (evidence file, folio 7248).

<sup>101</sup> Pichincha 18th Criminal Court. Decision of September 12, 2005 (evidence file, folio 7251).

<sup>102</sup> Cf. Brief filed by Zoila Chimbo Jarro with the Pichincha 18th Criminal Court on September 14, 2005 (evidence file, folios 7252 to 7255), and Decision of the Pichincha 18th Criminal Court of September 27, 2005 (evidence file, folio 7256).

<sup>103</sup> Decision of the Pichincha District Prosecutor of July 13, 2006 (evidence file, folio 7260).

<sup>104</sup> Cf. Pichincha 18th Criminal Court. Decision of July 19, 2006 (evidence file, folio 7261).

<sup>105</sup> Cf. Decision of the Third Chamber of the Constitutional Court of July 6, 2006 (evidence file, folio 51), and DINATED communication of February 17, 2005 (evidence file, folio 7216).

<sup>106</sup> Cf. Communication of the social worker addressed to the Director of DINATED on June 30, 2004 (evidence file, folio 5).

<sup>107</sup> Cf. Order of September 27, 2004 (evidence file, folio 2915) and Brief filed by INREDH on October 6, 2004 (evidence file, folios 2918 to 2920).

<sup>108</sup> Cf. DINATED, decision of October 7, 2004 (evidence file, folio 2917).

<sup>109</sup> Cf. Communication of the Director of the Julio Endara Hospital of November 26, 2004 (evidence file, folios 2923 to 2927).



director of DINATED sent a communication to the Health Minister advising him that it would take the pertinent steps to perform DNA testing on a corpse in the Police morgue, the cost to be assumed by the Julio Endara Hospital. In this communication, the DINATED director indicated the "total responsibility of [the hospital] for this unfortunate incident; as a year has passed and it is still unresolved because Zoila Chimbo Jarro [...] has very limited financial resources." He also asked that "the pertinent orders be given to investigate this case appropriately."<sup>110</sup> On April 7, 2005, a forensic dental examination was performed on the corpse with negative results.<sup>111</sup>

### **G. Habeas corpus application**

54. On November 29, 2004, the Fundación Regional de Asesoría en Derechos Humanos, where Mrs. Chimbo had reported her son's disappearance, filed an application for *habeas corpus* in favor of Mr. Guachalá before the Mayor of Quito, indicating that "[t]he disappearance occurred without either the patients, the doctors, or the security guards noticing the incident, which constitutes inadmissible negligence by the health care personnel of a unit of the Ministry of Public Health of Ecuador."<sup>112</sup> On December 14, 2004, the Mayor of Quito ordered that Mr. Guachalá be "brought before him on December 15, 2004, with the corresponding detention order."<sup>113</sup> On December 15, 2004, the director of the Hospital indicated that Mr. Guachalá had escaped on January 17 and that they had been unable to find him. The applicants explained that the hospital was unable to present Mr. Guachalá and asked that the application for *habeas corpus* be granted, because it was the appropriate guarantee to find a disappeared person.<sup>114</sup>

55. On April 27, 2005, INREDH filed a brief before the Constitutional Court in which it indicated that, since five months had passed without obtaining a response from the Mayor, it appealed "to obtain a ruling by the system for the administration of justice."<sup>115</sup> The Constitutional Court decided the appeal favorably on July 6, 2006.<sup>116</sup> It indicated that "the mayor, in his capacity as constitutional judge to examine the guarantee of *habeas corpus* was obliged to ensure compliance with the said provision and, since he had not issued a decision in the case filed before him, he had left the party in a situation of defenselessness, a situation that must be rectified by the Constitutional Court."<sup>117</sup> The Constitutional Court also indicated that "[t]he position taken by this Chamber, which is to leave valid alternatives open to the disappeared person's family, also extends to the Ombudsman, the Public Prosecution Service, and any other state institution that is legally bound to contribute its efforts to coordinate actions in order to discover the whereabouts of Luis Guachalá Chimbo, and none of them may close its investigation and execution procedures until the case has finally been resolved."<sup>118</sup>

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<sup>110</sup> Cf. DINATED, Order of February 17, 2005 (evidence file, folios 2931 and 2932).

<sup>111</sup> Cf. Report of the Head of Stomatology, "Julio Endara" Psychiatric Hospital of April 7, 2005 (evidence file, folio 2936).

<sup>112</sup> Cf. Application for *habeas corpus* filed by INREDH before the Mayor of the Metropolitan District of Quito (evidence file, folios 3214).

<sup>113</sup> Cf. Decision of the Metropolitan Mayor of Quito of December 14, 2004 (evidence file, folio 3217).

<sup>114</sup> Cf. Decision of the Third Chamber of the Constitutional Court of July 6, 2006 (evidence file, folio 1810).

<sup>115</sup> Cf. Decision of the Third Chamber of the Constitutional Court of July 6, 2006 (evidence file, folio 1810).

<sup>116</sup> Cf. Decision of the Third Chamber of the Constitutional Court of July 6, 2006 (evidence file, folio 1815).

<sup>117</sup> Cf. Decision of the Third Chamber of the Constitutional Court of July 6, 2006 (evidence file, folio 1811).

<sup>118</sup> Cf. Decision of the Third Chamber of the Constitutional Court of July 6, 2006 (evidence file, folio 1815).

The Constitutional Court ordered that the case file be returned to the Mayor for the pertinent effects.<sup>119</sup>

#### **H. Second investigation of the facts**

56. According to the case file, no measures were taken between July 2006 and November 2009. On November 4, 2009, the Prosecutor opened an investigation and initiated the preliminary inquiry into the disappearance of a person, ordering that statements be taken from those who were aware of the incident, and the inspection of the site of the facts.<sup>120</sup> According to the State, the investigation was re-opened in compliance with the Constitutional Court's ruling of July 6, 2006.

57. On November 27, 2009, the Homicide Brigade of the Pichincha Judicial Police required the director of the Hospital to forward a list of all the personnel who were working there in 2004.<sup>121</sup>

58. On May 16, 2013, the Judicial Police of the Metropolitan District of Quito advised that a working meeting had been held to coordinate activities in the investigations into the whereabouts of Mr. Guachalá attended by Mrs. Chimbo, the Legal Adviser of the Ministry of Internal Affairs, and delegates of the National Directorate of the Judicial Police. During this meeting, the Legal Adviser of the Ministry of Internal Affairs stipulated that the investigations should continue and asked Mr. Guachalá's mother to go to the Office of Forensic Anthropology to provide her son's biometric data.<sup>122</sup>

59. Between October 16, 2013, and August 25, 2020, the Prosecutor ordered that information regarding Mr. Guachalá Chimbo's whereabouts be gathered from numerous public and private institutions and conducted several investigation procedures. These included, in particular: a request to INTERPOL to issue a yellow notice and to ask Peru, Colombia and Venezuela to report Mr. Guachalá's migratory activity;<sup>123</sup> the DNA testing of the skeletons and osseous remains of three unidentified male corpses recorded as NN [unidentified] with similar characteristics to the presumed victim for comparison with samples provided by the presumed victim's mother;<sup>124</sup> search of the Julio Endara Psychiatric Hospital and seizure of documents and evidence;<sup>125</sup> expert appraisals of documents to determine whether alterations had been made to Mr. Guachalá's handwritten medical records, shift change reports of January 10 [sic], 2004, and work schedule records;<sup>126</sup> comparison of the presumed victim's fingerprints in the

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<sup>119</sup> Cf. Decision of the Third Chamber of the Constitutional Court of July 6, 2006 (evidence file, folio 1815).

<sup>120</sup> Cf. Decision of the Prosecutor General of November 4, 2009 (evidence file, folio 1776).

<sup>121</sup> Cf. Communication of the Homicide Brigade of the Pichincha Judicial Police of November 27, 2009 (evidence file, folio 1778).

<sup>122</sup> Cf. Report forwarded to the Head of the Judicial Police of the Metropolitan District of Quito of May 16, 2013 (evidence file, folio 1780 and 1781).

<sup>123</sup> Cf. Decision of the Pichincha Provincial Prosecutor of October 16, 2013 (evidence file, folio 2437).

<sup>124</sup> Cf. Forensic Anthropology Report No. 005-SOAF-2014 of January 31, 2014 (evidence file, folios 2718 to 2722), and DNA Report of the Pichincha Department of Forensic Medicine of April 21, 2014 (evidence file, folios 3060 to 3064).

<sup>125</sup> Cf. Ruling of the judge of the Criminal Guarantees Judicial Unit with Competence for Flagrant Offenses of the Metropolitan District of Quito, province of Pichincha, of June 13, 2014 (evidence file, folio 3089); Search record of June 18, 2014 (evidence file, folios 3205 and 3206), and Report on Investigation No. 945 of the National Directorate for crimes against life, violent deaths, disappearances, extortion and kidnapping of the National Police of Ecuador, June 25, 2014 (evidence file, folios 3169 to 3179).

<sup>126</sup> Cf. Forensic Documentation Report No. 396 of the Pichincha Criminalistics Department of July 17, 2014 (evidence file, folios 3283 to 3297), and Forensic Documentation Report No. 840 of the Pichincha Criminalistics Department of August 12, 2015 (evidence file, folios 6545 to 6569).

AFIS system with the prints of unidentified male corpses since January 2004;<sup>127</sup> search and evidence gathering activities in numerous places,<sup>128</sup> and reception of diverse statements.<sup>129</sup>

60. In addition, on January 31, 2019, a search was made with ground penetrating radar in areas surrounding the hospital by police officers from the Special Operations Group and the Dog Training Center, with three handlers and two dogs trained in finding skeletal remains,<sup>130</sup> with negative results. The State reported that “the investigation is still open.”

## **VII MERITS**

61. The instant case relates to the alleged forced hospitalization of Mr. Guachalá Chimbo, and the medical treatment he received in a public psychiatric hospital, as well as the presumed victim’s subsequent disappearance one week after his admittance to that hospital. The case also relates to the investigation of Mr. Guachalá Chimbo’s disappearance and the problems faced by the presumed victim’s family following his disappearance.

62. Based on the allegations of the parties and the Commission in the instant case, the Court will now set out: (1) general considerations on the right to equality and non-discrimination, and will examine (2) the rights to recognition of juridical personality, life, integrity, personal liberty, dignity, privacy, access to information and health; (3) the rights to judicial guarantees and judicial protection, and (4) the right to personal integrity of the members of Mr. Guachalá Chimbo’s family.

### **VII-1 GENERAL CONSIDERATIONS ON THE RIGHT TO EQUALITY<sup>131</sup> AND NON- DISCRIMINATION<sup>132</sup>**

#### ***A. Arguments of the parties and of the Commission***

63. The ***Commission*** underlined that Mr. Guachalá Chimbo had a mental disability. It argued that the medical center was influenced by “stereotypes regarding the ability of persons with mental disability to make autonomous decision about their health; hospitalization and medication without their consent are clear expressions of the predominance of discriminatory treatment in the mental health services that deprive those with some type of mental disability of the ability to take decisions regarding their own body and health.” In this way, “Ecuador restricted Mr. Guachalá’s right to decide on his hospitalization based exclusively on his disability, which is a form of discrimination.” According to the Commission, the case of Mr. Guachalá is consistent with the “problems identified by the [Committee on the Rights of Persons with Disabilities] relating to the existence of the model of substitute decision-making, and the institutionalization of persons with disabilities without their consent in mental health facilities and without giving them the support needed so that they are able to give this consent.” The said Committee noted that the Organic Act on Disabilities “retains a definition

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<sup>127</sup> Cf. Human Identity Report (Fingerprints) No. 442-2014 of the Technical and Scientific Subdirectorate of the Judicial Police of July 22, 2014 (evidence file, folios 3301 to 3306).

<sup>128</sup> Cf. Investigation reports of the National Directorate for crimes against life, violent deaths, disappearances, extortion and kidnapping of the National Police of Ecuador (evidence file, folios 3053 to 8453).

<sup>129</sup> Cf. Internal investigation file (evidence file, folios 3188 to 7933).

<sup>130</sup> Cf. DINASED Investigation Report of February 13, 2019 (evidence file, folios 8266 to 8272), and Report of the Ecuadorian Space Institute of February 12, 2019 (evidence file, folios 8278 to 8286).

<sup>131</sup> Article 24 of the Convention.

<sup>132</sup> Article 1(1) of the Convention.

and understanding of disability that are based on a medical approach [...] [which] emphasizes their limited abilities and neglects the social and relational dimension of disability” and that the civil legislation “provides for a substitute decision-making model through the use of roles such as guardians and wards, and that there is no immediate plan to reform [it ...] to include a supported decision-making model.” Regarding the medical treatment that Mr. Guachalá Chimbo received without his consent, the Commission argued that the State’s omission in this regard was “absolute and reflects a conception of mental disorders that automatically equates them with disability and, in turn, a conception of persons with mental disability that assumes they have no autonomy to make decisions regarding their own health and treatment, which constitutes a form of discrimination.” It also underscored that “Luis Eduardo’s situation of poverty [...] constituted an additional factor of vulnerability, and exemplified a situation of discrimination.”

64. The **representatives** argued that “the structural discrimination revealed against the person of Luis Guachalá is based [...] on a biological and medical paradigm,” under which persons with disabilities are considered “an object for protection rather than a subject of law,” which, “in the case of Luis Eduardo, resulted in the loss of his juridical capacity.” They advised that the Organic Act on Disabilities “distinguishes persons with disabilities based on the permanent or temporary nature of their disability. In addition, it identifies four types of disability: (a) physical; (b) mental and psychological; (c) intellectual, and (d) sensorial.” They indicated that, in 2014 and 2019, the Committee on the Rights of Persons with Disabilities had “expressed its concern that Ecuador had not defined disability in accordance with the principles of Convention on the Rights of Persons with Disabilities.” They argued that “the discrimination suffered by Mr. Guachalá, as a systematic process that violated human rights, constitutes, *per se*, an action of violence linked to socio-economic inequalities.”

65. The **State** argued that the Organic Act on Disabilities is adapted to the United Nations Convention on the Rights of Persons with Disabilities, so that the allegation of the existence of a structural discriminatory pattern was inappropriate and lacked practical support. In addition, it explained that “the Ecuadorian Civil Code establishes, directly, that persons with intellectual disability are absolutely incapable. In addition, persons with disability may, based on their condition, be subject to processes of interdiction and curatorship.” Regarding this specific case, it indicated that “there has been no violation of Mr. Guachalá’s right to juridical personality and, in particular, discriminatory treatment against him on the grounds argued by the Commission.” The State also indicated that “the treatment given to Mr. Guachalá was aimed at ensuring his well-being and right to health, so that it is absurd to affirm that this could have been discriminatory.” On this point, Ecuador stressed that “no document in the case file reveals discriminatory treatment or the violation of rights.”

## **B. Considerations of the Court**

66. In the instant case, the Court notes that Mr. Guachalá Chimbo suffered from epilepsy, did not have continuous access to the necessary treatment for this illness, and displayed psychotic symptom that could be related to epilepsy (*supra* paras. 26 and 29). There is no dispute between the parties that, at the time of his confinement in the Julio Endara Hospital, Mr. Guachalá Chimbo was a person with a disability.<sup>133</sup> For this reasons, the Court finds it pertinent to begin the examination of the merits of this case based on the scope of the principle of equality and non-discrimination in relation to persons with disabilities.

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<sup>133</sup> Mr. Guachalá Chimbo suffered from epilepsy. In 2004, he was diagnosed with “mental and behavioral disorder owing to brain dysfunction,” and he faced different barriers in his environment that prevented his full and effective participation in society. Cf. Medical record of the Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 3), and Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 20).

67. Article 1(1) of the Convention establishes that “[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

68. The Court has established that Article 1(1) of the Convention is a general provision the content of which extends to all the provisions of the treaty and establishes the obligation of the States Parties to respect and to ensure the free and full exercise of the rights and freedoms recognized therein “without any discrimination.” In other words, whatever its origin or the form it takes, any treatment that may be considered discriminatory in relation to the exercise of any of the rights guaranteed in the Convention is *per se* incompatible with this instrument.<sup>134</sup>

69. Bearing this in mind, the Court will now examine: (1) whether disability can be considered a category protected by Article 1(1) of the American Convention, and (2) what general obligations do the States have with regard to persons with disabilities.

### **B.1 Disability as a category protected by Article 1(1) of the Convention**

70. The Court has established that human rights treaties are living instruments, the interpretation of which must evolve with the times and current circumstances.<sup>135</sup> This evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention, as well as those established by the Vienna Convention on the Law of Treaties.<sup>136</sup>

71. The specific criteria based on which discrimination is prohibited according to Article 1(1) of the American Convention does not represent an exhaustive or restrictive list, but merely an illustrative one. The wording of this article leaves the criteria open by including the phrase “any other social condition” for the incorporation of other categories that were not explicitly indicated.<sup>137</sup>

72. Therefore, when interpreting the phrase “any other social condition” of Article 1(1) of the Convention, the most favorable alternative to protect the rights recognized by this treaty should be chosen based on the principle of the norm most favorable to those concerned.<sup>138</sup>

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<sup>134</sup> Cf. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 53, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 78.

<sup>135</sup> Cf. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, October 1, 1999. Series A No. 16, para. 114, and *Case of Atala Riffo and daughters v. Chile, supra*, para. 83.

<sup>136</sup> Cf. Advisory Opinion OC-16/99, *supra*, para. 114 and *Case of Atala Riffo and daughters v. Chile, supra*, para. 83.

<sup>137</sup> Cf. Advisory Opinion OC-16/99, *supra*, para. 115, and *Case of Atala Riffo and daughters v. Chile, supra*, para. 85.

<sup>138</sup> Cf. Advisory Opinion OC-16/99, *supra*, para. 115, and *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples. State Obligations in relation to Change of Name, Gender Identity, and Rights deriving from a relationship between Same-Sex Couples (Interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 67.

73. Under the inter-American system, since its inception with the American Declaration of the Rights and Duties of Man adopted in 1948, the rights of persons with disabilities have been defended.<sup>139</sup>

74. Subsequently, the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"<sup>140</sup>), in its Article 18, indicated that "[e]veryone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality."

75. Then, in 1999, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities<sup>141</sup> (hereinafter "IACDIS") indicated in its Preamble that the States Parties reaffirm "that persons with disabilities have the same human rights and fundamental freedoms as other persons; and that these rights, which include freedom from discrimination based on disability, flow from the inherent dignity and equality of each person."

76. Under the universal human rights system, on different occasions the United Nations General Assembly has stressed that a person may not be discriminated against due to a disability.<sup>142</sup> The Committee on Economic, Social and Cultural Rights has classified disability as one of the prohibited categories of discrimination contemplated in Article 2(2)<sup>143</sup> of the International Covenant on Economic, Social and Cultural Rights, including it under "or other status."<sup>144</sup>

77. The Convention on the Rights of the Child, which entered into force on September 2, 1990, was the first treaty of the universal system to explicitly include disability as one of the protected categories within its article that prohibits discrimination.<sup>145</sup> Subsequently, on May 3, 2008, the Convention on the Rights of Persons with Disabilities (hereinafter "CRPD") entered

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<sup>139</sup> Article XVI of the American Declaration of the Rights and Duties of Man establishes: Every person has the right social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.

<sup>140</sup> Article 18 (Protection of the Handicapped) of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," establishes: "[e]veryone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality. The States Parties agree to adopt such measures as may be necessary for this purpose and, especially, to: (a) Undertake programs specifically aimed at providing the handicapped with the resources and environment needed for attaining this goal, including work programs consistent with their possibilities and freely accepted by them or their legal representatives, as the case may be; (b) Provide special training to the families of the handicapped in order to help them solve the problems of coexistence and convert them into active agents in the physical, mental and emotional development of the latter; (c) Include the consideration of solutions to specific requirements arising from needs of this group as a priority component of their urban development plans; (d) Encourage the establishment of social groups in which the handicapped can be helped to enjoy a fuller life.

<sup>141</sup> Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, AG/RES. 1608 (XXIX-O/99).

<sup>142</sup> Cf. Standard Rules on the Equalization of Opportunities for Persons with Disabilities adopted by the United Nations General Assembly, 48th session, annex to Resolution 48/96 of December 17, 1991.

<sup>143</sup> Article 2(1) of the International Covenant on Economic, Social and Cultural Rights: The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>144</sup> Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with Disabilities, E/1995/22, December 9, 1994, para. 5, and Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights, E/C.12/GC/20, July 2, 2009, para. 28.

<sup>145</sup> Article 2 of the Convention on the Rights of the Child, and Committee on the Rights of the Child, General Comment No. 9: The rights of children with disabilities, CRC/C/GC/9, February 27, 2007, para. 2.

into force, establishing non-discrimination as one of its general principles and prohibiting all disability-based discrimination.<sup>146</sup>

78. Specifically in Ecuador, article 23 of the 1998 Constitution, in force at the time of the events, established that:

Equality before the law. Everyone shall be considered equal and shall enjoy the same rights, freedoms and opportunities, without discrimination due to birth, age, sex, ethnicity, color, social origin, language, religion, political affiliation, economic status, sexual orientation, health, disabilities or differences of any other type [underlining added].<sup>147</sup>

79. Taking into account the general obligations to respect and to ensure rights established in Article 1(1) of the American Convention, the interpretation criteria stipulated in Article 29 of this Convention, and the provisions of the Vienna Convention on the Law of Treaties, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, the Convention on the Rights of Persons with Disabilities and other international instruments (*supra* paras. 70 to 77), the Inter-American Court affirms that disability is a category protected by the American Convention. Accordingly, the Convention prohibits any law, act or practice that discriminates based on an individual's real or perceived disability. Consequently, no domestic legal norm, decision or practice, either by state authorities or by private individuals, may reduce or restrict in a discriminating way the rights of a person based on his or her disabilities.

## **B.2 General obligations with regard to persons with disabilities**

80. Persons with disabilities are entitled to the rights established in the American Convention. The obligation to respect human rights recognized in the Convention concerns all those who act in the name of the State, especially if they act in the capacity of state organs, so that any possible violations committed by the latter are directly attributable to the State. The obligation to ensure the free and full exercise of the said rights means that the State is responsible for their violation by third parties if it has not adopted the essential measures to prevent their infringement or to make this cease, redressing the harm caused. And the foregoing with regard to any person who, for any reason or circumstance, is subject to its jurisdiction.<sup>148</sup>

81. In light of the obligation not to discriminate, States are also obliged to adopt positive measures to reverse or change any discriminatory situations that exist in their societies which affect a determined group of individuals. This entails the special duty of protection that the State must exercise as regards actions and practices of third parties who, with its tolerance or acquiescence, create, maintain or encourage discriminatory situations.<sup>149</sup>

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<sup>146</sup> CRPD, Articles 3 and 5.

<sup>147</sup> Constitution of the Republic of Ecuador, 1998, article 23.3 (evidence file, folios 8793 and 8794). Similarly, see Constitution of the Republic of Ecuador, 2008, article 11.2 (evidence file, folio 8863). Also, Disabilities Act 2001, article 3 (evidence file, folio 9100).

<sup>148</sup> *Case of Azul Rojas Marín et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 12, 2020. Series C No. 402, para. 87.

<sup>149</sup> *Cf. Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 104, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020. Series C No. 407, para. 186.

82. The IACDIS establishes a list of obligations that States must meet in order “to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society.”<sup>150</sup> Ecuador ratified this convention on March 18, 2004.<sup>151</sup>

83. Meanwhile, the CRPD establishes the following general principles in this regard: (i) respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; (ii) non-discrimination; (iii) full and effective participation and inclusion in society; (iv) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (v) equality of opportunity; (vi) accessibility; (vii) equality between men and women, and (viii) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.<sup>152</sup> Ecuador ratified this convention on April 3, 2008.<sup>153</sup>

84. The IACDIS defines the term “disabilities” as “a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.”<sup>154</sup> While the CRPD establishes that persons with disabilities “include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>155</sup>

85. In this regard, the Court observes that, these conventions take the social model into account to address disabilities, and this means that disability is not defined exclusively by the presence of a physical, mental, intellectual or sensorial impairment, but interrelates this with the barriers or limitations that exist in the social environment that prevent the individual from being able to exercise his or her rights effectively.<sup>156</sup> Persons with functional diversity regularly face physical, architectural, communicative, attitudinal or socio-economic limitations or barriers in society.<sup>157</sup>

86. To comply with the special obligations of protection for all those who are in a vulnerable situation, it is essential that States adopt positive measures, to be determined based on the particular needs for protection of the subject of law, due to his or her personal condition or specific situation, such as being a person with disabilities.<sup>158</sup> Therefore, States have the obligation to encourage the inclusion of persons with disabilities by ensuring equal conditions,

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<sup>150</sup> Article II of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities.

<sup>151</sup> Information available on the webpage of the Department of International Law of the Organization of American States at: <https://www.oas.org/juridico/spanish/firmas/a-65.html> (last consulted on November 20, 2020).

<sup>152</sup> Article 3 of the CRPD.

<sup>153</sup> Information available on the United Nations webpage at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en), (last consulted on November 20, 2020).

<sup>154</sup> Article I of the IACDIS.

<sup>155</sup> Article 1 of the CRPD.

<sup>156</sup> *Case of Furlán and family v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 133, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 207.

<sup>157</sup> *Cf. Case of Furlán and family v. Argentina, supra*, para. 133, and *Case of Chinchilla Sandoval et al. v. Guatemala, supra*, para. 207.

<sup>158</sup> *Cf. Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149, para. 103, and *Case of Chinchilla Sandoval et al. v. Guatemala, supra*, para. 208.



opportunities and participation in all spheres of society,<sup>159</sup> to ensure that any legal or *de facto* limitations are dismantled. Consequently, States must promote social inclusion practices and adopt positive differentiation measures to remove such barriers.<sup>160</sup>

87. The Court holds that persons with disabilities are often subject to discrimination based on their condition. Therefore, State must adopt the necessary legislative, social, educational, labor or any other measures to eliminate all disability-based discrimination and to promote the full integration of persons with disabilities into society.<sup>161</sup> In this regard, the Committee on Economic, Social and Cultural Rights has emphasized that States have the obligation “to take appropriate measures, to the maximum extent of their available resources, to enable [persons with disabilities] to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability.”<sup>162</sup>

88. On this point, the CRPD establishes that disability-based discrimination also occurs when reasonable accommodation is denied. The Convention defines reasonable accommodation as:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>163</sup>

89. The Court notes that these standards are also established in the 1998 Constitution of Ecuador, in force at the time of the facts, which indicates that “priority, preferential and special attention” will be given to persons with disabilities as they are considered a vulnerable group,<sup>164</sup> and also that:

Article 53. The State shall ensure the prevention of disabilities and also guarantee comprehensive care and rehabilitation for persons with disabilities; particularly in cases of poverty. Together with society and the family, it shall assume responsibility for their social integration and equality of opportunities.

The State shall establish measures that guarantee persons with disabilities the use of goods and services, especially in the areas of health, education, training, work and recreation, as well as measures that eliminate barriers to communication, and architectural, urban and transport accessibility barriers, that hinder their mobilization. Municipalities shall be obliged to adopt these measures within the sphere of their responsibilities and constituencies. Persons with disabilities shall receive preferential treatment to obtain credits, and for tax reductions and exemptions pursuant to the law. The right of persons with disabilities is recognized to alternative means of communication, such as the Ecuadorian sign language for the deaf, oralism, Braille, and others.<sup>165</sup>

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<sup>159</sup> Cf. *Case of Furlán and family v. Argentina*, *supra*, para. 134, and *Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 208. See also, Article 5 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.

<sup>160</sup> Cf. *Case of Furlán and family v. Argentina*, *supra*, para. 134, and *Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 208. See also, Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with disabilities, E/1995/22, December 9, 1994, para. 13.

<sup>161</sup> Cf. *Case of Ximenes Lopes v. Brazil*, *supra*, para. 105, and *Case of Chinchilla Sandoval et al. v. Guatemala*, *supra*, para. 44.

<sup>162</sup> Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with disabilities, E/1995/22, December 9, 1994, para. 5.

<sup>163</sup> Article 2 of the CRPD.

<sup>164</sup> Constitution of the Republic of Ecuador, 1998, article 47 (evidence file, folio 8800).

<sup>165</sup> Constitution of the Republic of Ecuador, 1998, article 53 (evidence file, folio 8801), and Constitution of the Republic of Ecuador, 2008, article 47 (evidence file, folio 8876).

90. The Court also notes that the facts of the instant case occurred while Mr. Guachalá Chimbo was institutionalized in a psychiatric hospital. In this regard, the Court underscores that, in institutional environments, whether in public or private hospitals, the medical staff responsible for the care of the patients exercise strong control or authority over the persons in their custody. This intrinsic power imbalance between a person interned and those who are in authority is exponentially greater in psychiatric institutions.<sup>166</sup> This means that, in the case of psychiatric hospitals, States must exercise strict oversight of such establishments. States have the duty to ensure and to monitor that the right of the patients to receive decent, humane and professional treatment and to be protected against exploitation, abuse and humiliation is respected in all public or private psychiatric institutions.<sup>167</sup>

91. Additionally, the Court notes that a social environmental assessment made by the Pichincha Prosecutor determined that Mr. Guachalá Chimbo's family "has insufficient income to cover its basic needs, such as subsistence, health, housing [and] recreation."<sup>168</sup> Also, the lack of financial resources prevented the presumed victim from having access to the medication he needed to treat his epilepsy. The Court considers that, in the case of Luis Eduardo Guachalá Chimbo, if the diverse grounds for discrimination alleged in this case are verified, different factors of vulnerability or sources of discrimination associated with his condition as a person with disabilities and his financial situation – owing to the situation of extreme poverty in which he lived – had coalesced intersectionally. Thus, the Court stresses that the lack of financial resources may hinder or preclude access to the medical care required to prevent possible disabilities or to prevent or reduce the appearance of new disabilities. Based on the foregoing, the Court has indicated that the positive measures that States must take for persons with disabilities living in poverty include those necessary to prevent all forms of avoidable disabilities and to accord persons with disabilities preferential treatment appropriate to their condition.<sup>169</sup>

## VII-2

### **RIGHTS TO RECOGNITION OF JURIDICAL PERSONALITY,<sup>170</sup> LIFE,<sup>171</sup> INTEGRITY,<sup>172</sup> PERSONAL LIBERTY,<sup>173</sup> DIGNITY AND PRIVACY,<sup>174</sup> ACCESS TO INFORMATION,<sup>175</sup> AND HEALTH,<sup>176</sup> IN RELATION TO THE OBLIGATION TO RESPECT AND TO ENSURE RIGHTS<sup>177</sup> AND THE OBLIGATION TO ADOPT DOMESTIC LEGAL PROVISIONS<sup>178</sup>**

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<sup>166</sup> Cf. *Case of Ximenes Lopes v. Brazil*, *supra*, para. 107.

<sup>167</sup> Cf. *Case of Ximenes Lopes v. Brazil*, *supra*, para. 108.

<sup>168</sup> Cf. Social Environmental Assessment of November 10, 2014 (evidence file, folio 4333).

<sup>169</sup> Cf. *Case of Ximenes Lopes v. Brazil*, *supra*, para. 104.

<sup>170</sup> Article 3 of the Convention.

<sup>171</sup> Article 4 of the Convention.

<sup>172</sup> Article 5 of the Convention.

<sup>173</sup> Article 7 of the Convention.

<sup>174</sup> Article 11 of the Convention.

<sup>175</sup> Article 13 of the Convention.

<sup>176</sup> Article 26 of the Convention.

<sup>177</sup> Article 1(1) of the Convention.

<sup>178</sup> Article 2 of the Convention.

## **A. Arguments of the parties and the Commission**

92. The **Commission** pointed out that Mr. Guachalá was a person with a mental disability. Regarding Mr. Guachalá's hospitalization, the Commission emphasized that this was carried out with his mother's authorization and based on the evaluation made by the hospital authorities of the possible consequences of his cognitive or psychosocial disabilities." Therefore, Mr. Guachalá never gave his consent to be hospitalized and there is no record that the State made any assessment to determine that this was not possible, or provided the necessary support to enable Mr. Guachalá to give his consent. In addition, the Commission emphasized that the actions of the medical center were influenced by a stereotype according to which persons with mental disabilities are unable to take autonomous decisions regarding their health. It added that the State had not offered any type of evidence to justify an emergency situation and to rule out that the hospitalization occurred owing to his disability. Furthermore, there is no record that his mother was advised about the different treatment alternatives and their consequences, or given any information in order to obtain her informed consent. On this basis, the Commission concluded that the State had violated the rights to recognition of juridical personality, personal liberty, non-discrimination, access to information to give consent in health-related matters, and health.

93. Regarding the treatment that Mr. Guachalá received, the Commission alleged that "the medical center performed an unjustified paternalistic intervention because, by limiting his legal capacity without seeking to obtain his prior, free, full and informed consent, it restricted Mr. Guachalá's health and integrity and his autonomy to take a decision about his mental health through the medical treatment provided." Likewise, Mr. Guachalá Chimbo was not advised about and his consent was not sought as regards the treatment he received, and he was not provided with support so that he could give this consent. Moreover, the State failed to provide treatments other than non-consensual medication and institutionalization. Additionally, the Commission indicated that "the Ecuadorian State has been unable to clarify Mr. Guachalá's disappearance, or discover his fate or whereabouts." It also stressed that there was evidence indicating "that his fate could be that he died in the context of the treatment received from the State and that this was subsequently concealed." Given that Mr. Guachalá Chimbo was in the State's custody, the Commission presumed that the State was responsible for what occurred, because Ecuador has not provided a satisfactory and convincing explanation to support its version that the presumed victim escaped from the hospital.

94. The **representatives** argued that the Ecuadorian State had not ensured Mr. Guachalá's right to health by providing the necessary and urgent services required by his special situation of vulnerability as a person with disabilities. Regarding the quality of the health services, they indicated that: (i) Luis Guachalá never had access to care appropriate to his situation; (ii) one of the hospital employees indicated that Luis was "shelling corn" with the other interns; (iii) Mrs. Chimbo was informed that she should buy the medicines and articles of hygiene for Luis, and (iv) the patients were dressed in second-hand clothing. Regarding the acceptability, they mentioned: (i) the delays in providing Mrs. Chimbo with information on the condition, treatment and evolution of her son's health; (ii) the mistreatment suffered by Luis when he was given an injection at the start of his hospitalization, and (iii) at one time, Luis Guachalá fell and his mother was informed *a posteriori*. The representatives also indicated that: (i) after his fall on January 15, 2004, Mr. Guachalá Chimbo did not undergo a basic examination to determine his health status; (ii) he received high doses of medication, and (iii) the Julio Endara Psychiatric Hospital did not have protocols to follow in case of escapes. Based on the foregoing, the representatives argued that the State had violated Mr. Guachalá Chimbo's right to health, pursuant to Article 26 of the American Convention in relation to Article 1(1) of this instrument. They also indicated that the State had violated the right to juridical personality in relation to Article 1(1) of the Convention because: (i) Luis Guachalá ceased to be a subject of law who took decisions about his life and

became an object of protection by the State which had the power to take decisions on all aspects of his life, and (ii) the actions of the Ecuadorian State condemned Luis Eduardo to a "civil death," manifested by the impossibility of taking extremely personal legal actions. The representatives characterized the disappearance of Mr. Guachalá as a forced disappearance, and indicated that it is possible to presume that "he died at the hands of the State agents in whose care he was, and that they hid his remains."

95. The **State** indicated that it "ratifies its position concurring" with the partially dissenting opinions of Judges Vio Grossi and Sierra Porto in the case of *Lagos del Campo v. Peru*. Despite this, the State argued that "the international obligations in the area of social, economic and cultural rights are of a progressive nature" so that "the hospitalization and treatment to which Mr. Guachalá was submitted at the request of his mother were the measures that could best ensure his health based on the country's circumstances and the scientific standards at that time." It added that Mr. Guachalá's hospitalization had not violated his autonomy or liberty because "his admittance to the hospital was requested and authorized by Mrs. Chimbo Jarro [...] who consciously and voluntarily hospitalized her son so that he could receive psychiatric treatment that would cure the problems resulting from his illness." This constituted "a prior, free, full and informed consent that, necessarily, had to be provided owing to Guachalá's critical and serious situation, which Mrs. Chimbo Jarro herself described and ratified in her sworn statement." The State argued that Mr. Guachalá's medical record "reveals that the patient was suffering from psychotic symptoms" and this constituted a case of medical emergency, which justified the consent being given by his mother. Ecuador argued that the hospitalization and the treatment applied to Mr. Guachalá constituted "essential, appropriate, necessary and proportionate measures to ensure his health and integrity." Mr. Guachalá "was always properly fed and kept clean and received his medication opportunely." Lastly, the State stressed that "there is no indication whatsoever that Mr. Guachalá was deprived of his life within the hospital," and "the three requirements for the constitution of a forced disappearance have not been proved."

### **B. Considerations of the Court**

96. The central dispute in the instant case relates to what happened to Mr. Guachalá Chimbo owing to his illness and, in particular, when receiving medical treatment in a public hospital in 2004. Therefore, the Court finds it pertinent to examine the hospitalization and the treatment received by Luis Eduardo Guachalá in the Julio Endara Hospital in the context of the right to health. The events regarding Mr. Guachalá Chimbo's alleged disappearance from the hospital will be examined taking into account, also, the State's obligations to ensure the rights to life and to integrity of those persons admitted to a public hospital.

97. Regarding the right to health, the Court recalls that, taking into account that, pursuant to Articles 34(i),<sup>179</sup> 34(l)<sup>180</sup> and 45(h)<sup>181</sup> of the OAS Charter, it is derived that the right to

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<sup>179</sup> Article 34(i) of the OAS Charter establishes: "Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: [...] (i) Protection of man's potential through the extension and application of modern medical science."

<sup>180</sup> Article 34(l) of the OAS Charter establishes: "Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: [...] (l) Urban conditions that offer the opportunity for a healthful, productive, and full life;

<sup>181</sup> Article 45(h) of the OAS Charter establishes: "[t]he Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace,

health is included in this Charter, this Court in various precedents has recognized the right to health as a right protected by Article 26 of the Convention.<sup>182</sup> In addition, Article XI of the American Declaration allows the right to health to be identified when stating that “[e]veryone has the right to the preservation of his health through sanitary and social measures relating to [...] medical care, to the extent permitted by public and community resources.”<sup>183</sup>

98. Similarly, Article 10 of the Protocol of San Salvador establishes that everyone has the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being, and indicates that health is a public good.<sup>184</sup> The same article establishes that, among the measures to ensure the right to health, States must promote “[u]niversal immunization against the principal infectious diseases,” “[p]revention and treatment of endemic, occupational and other diseases” and “[s]atisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.”

99. The Court also notes a broad regional consensus in relation to consolidation of the right to health, which is explicitly recognized in various Constitutions and internal laws of the States of the region.<sup>185</sup> In this regard, it underscores that the right to health is recognized at the constitutional level in Ecuador, both in the Constitution currently in force and in the Constitution in force when Mr. Guachalá Chimbo was hospitalized.<sup>186</sup>

100. Health is a fundamental human right, essential for the satisfactory exercise of the other human rights and everyone has the right to enjoy the highest attainable standard of health that allows them to live with dignity, understanding health not only as the absence of disease or infirmity, but also as a state of complete physical, mental and social well-being derived

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agree to dedicate every effort to the application of the following principles and mechanisms: [...] (h) Development of an efficient social security policy.”

<sup>182</sup> Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 106 and 110; *Case of Cuscul Pivaral et al. v. Guatemala, supra*, para. 99, and *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of November 22, 2019. Series C No. 395, para. 64.

<sup>183</sup> American Declaration of the Rights and Duties of Man, Article XI.

<sup>184</sup> Article 10 of the Protocol of San Salvador establishes: “1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. 2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right: (a) Primary health care, that is, essential health care made available to all individuals and families in the community; (b) Extension of the benefits of health services to all individuals subject to the State's jurisdiction; (c) Universal immunization against the principal infectious diseases; (d) Prevention and treatment of endemic, occupational and other diseases; (e) Education of the population on the prevention and treatment of health problems, and (f) Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.”

<sup>185</sup> The constitutional provisions of the States Parties to the American Convention include: Barbados (art. 17.2.A); Bolivia (art. 35); Brazil (art. 196); Chile (art. 19) Colombia (art. 49); Costa Rica (art. 46); Dominican Republic (art. 61); Ecuador (art. 32); El Salvador (art. 65); Guatemala (arts. 93 and 94); Haiti (art. 19); Honduras (art. 145); Mexico (art. 4); Nicaragua (art. 59); Panama (art. 109); Paraguay (art. 68); Peru (art. 70); Suriname (art. 36); Uruguay (art. 44), and Venezuela (art. 83).

<sup>186</sup> Article 32 of the Constitution of the Republic of Ecuador currently in force establishes that: “Health is a right guaranteed by the State and its realization is linked to the exercise of other rights, including the rights to water, food, education, physical culture, work, social security, healthy environments and others that support a decent life. The State shall ensure this right by economic, social, cultural, educational and environmental policies, and the permanent, timely and inclusive access to programs, actions and services for the promotion and comprehensive care of health, sexual health and reproductive health. The provision of health care services shall be governed by the principles of equity, universality, solidarity, interculturality, quality, efficiency, efficacy, prevention and bioethics, with a gender and generational perspective” (evidence file, folios 8869 and 8870). Article 42 of the 1998 Constitution of the Republic of Ecuador established that: “The State shall ensure the right to health, its promotion and protection by implementing food safety, the provision of potable water and basic sanitation, promotion of healthy family, workplace and community environments, and the possibility of permanent and uninterrupted access to health care services based on the principles of equity, universality, solidarity, quality and efficiency” (evidence file, folios 8799 and 8800).

from a lifestyle that allows the individual to achieve total balance.<sup>187</sup> Thus, the right to health refers to the right of everyone to enjoy the highest level of physical, mental and social well-being.<sup>188</sup>

101. The general obligation to protect health translates into the state obligation to ensure access to essential health services, ensuring effective and quality medical services, and to promote the improvement of the population's health.<sup>189</sup> This right encompasses timely and appropriate health care in keeping with the principles of availability, accessibility, acceptability and quality, the application of which will depend on the prevailing circumstances in each State.<sup>190</sup> Compliance with the State obligation to respect and to ensure this right must pay special attention to vulnerable and marginalized groups, and must be realized progressively in line with available resources and the applicable domestic laws.<sup>191</sup>

102. The Court notes that specific obligations arise for the provision of health care in the case of persons with disabilities. According to the 1998 Ecuadorian Constitution, in force when Mr. Guachalá Chimbo was hospitalized, the State had to guarantee priority, preferential and specialized access to integral health care and rehabilitation services to persons with disabilities.<sup>192</sup>

103. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the United Nations General Assembly in 1993, establish that:

Rule 2: Medical care

States should ensure the provision of effective medical care to persons with disabilities.

Rule 3: Rehabilitation

States should ensure the provision of rehabilitation services to persons with disabilities in order for them to reach and sustain their optimum level of independence and functioning.<sup>193</sup>

104. The Convention on the Rights of Persons with Disabilities establishes that:

Article 25 - Health

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to

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<sup>187</sup> Cf. *Case of Poblete Vilches et al. v. Chile, supra*, para. 118, and *Case of Hernández v. Argentina, supra*, para. 76.

<sup>188</sup> Cf. *Case of Poblete Vilches et al. v. Chile, supra*, para. 118. See, *inter alia*, Preamble to the Constitution of the World Health Organization (WHO), adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946, by the representatives of 61 States (Off. Rec. WHO, 2, 100), and entered into force on 7 April 1948. Amendments adopted by the Twenty-sixth, Twenty-ninth, Thirty-ninth and Fifty-first World Health Assemblies (resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23) came into force on 3 February 1977, 20 January 1984, 11 July 1994 and 15 September 2005 respectively and are incorporated into the present text. Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, August 11, 2000, UN Doc. E/C.12/2000/4, para. 12.

<sup>189</sup> Cf. *Case of Poblete Vilches et al. v. Chile, supra*, para. 118, and *Case of Hernández v. Argentina, supra*, para. 76.

<sup>190</sup> Cf. *Case of Poblete Vilches et al. v. Chile, supra*, paras. 120 and 121, and Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, August 11, 2000, UN Doc. E/C.12/2000/4, para. 12.

<sup>191</sup> Cf. *Case of Cuscul Pivaral et al. v. Guatemala, supra*, para. 39, and *Case of Hernández v. Argentina, supra*, para. 78.

<sup>192</sup> Cf. Constitution of the Republic of Ecuador, 1998, article 23(3) and (20) and articles 42, 47 and 53 (evidence file, folios 8793, 8794, 8799, 8800 and 8801).

<sup>193</sup> Cf. Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the United Nations General Assembly, 48th session, annex to Resolution 48/96, Articles 2 and 3.

health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

- a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;
- b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;
- c) Provide these health services as close as possible to people's own communities, including in rural areas;
- d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, *inter alia*, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;
- e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;
- f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.<sup>194</sup>

105. Furthermore, the Committee on Economic, Social and Cultural Rights has underlined that persons with disabilities should have access, without discrimination, to medical and social services, and have rehabilitation services available to them so that they may "reach and sustain their optimum level of independence and functioning."<sup>195</sup> Also, in its General Comment on the right to sexual and reproductive health, it indicated that:

[...] reasonable accommodation must be made to enable persons with disabilities to fully access sexual and reproductive health services on an equal basis, such as physically accessible facilities, information in accessible formats and decision-making support, and States should ensure that care is provided in a respectful and dignified manner that does not exacerbate marginalization.<sup>196</sup>

106. As it has reiterated in its recent case law, the Court considers that the nature and scope of the obligations derived from the protection of the right to health include aspects that may be required immediately and those that are of a progressive nature.<sup>197</sup> In this regard, the Court recalls that, regarding the former (obligations that may be required immediately), States must adopt effective measures to ensure access without discrimination to the services recognized by the right to health, ensure equality of rights between men and women and, in general, advance towards the full effectiveness of the economic, social, cultural and environmental rights (ESCER). Regarding the latter (obligations of a progressive nature),

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<sup>194</sup> Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on December 13, 2006, and entered into force on May 3, 2008, Article 25.

<sup>195</sup> Cf. United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with disabilities, E/1995/22, December 9, 1994, para. 34, and Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, August 11, 2000, UN Doc. E/C.12/2000/4, para. 26. See also, Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the United Nations General Assembly, 48th session, annex to Resolution 48/96, Articles 2 and 3.

<sup>196</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 22: The right to sexual and reproductive health, May 2, 2016, UN Doc. E/C.12/GC/22, para. 24.

<sup>197</sup> Cf. *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 104, and *Case of Hernández v. Argentina*, *supra*, para. 81.

progressive realization means that States Parties have the concrete and constant obligation to advance as expeditiously and efficiently as possible towards the full effectiveness of the said right, to the extent of their available resources, by legislation or other appropriate means. In addition, there is an obligation of non-retrogressivity in relation to the rights realized. In light of the above, the treaty-based obligations to respect and to ensure rights, as well as to adopt domestic legal provisions (Articles 1(1) and 2), are essential to achieve their effectiveness.<sup>198</sup>

107. In the instant case the Court must examine the State's conduct regarding compliance with its obligations to ensure respect for Mr. Guachalá Chimbo's right to health, in relation to the medical treatment he received while in the Julio Endara Hospital.

108. The Court notes that, at the time of the facts, regulations existed with regard to the right to health that guaranteed this right to everyone without distinction,<sup>199</sup> and established the obligation to ensure persons with disabilities access to health service according them "priority, preferential and special attention" (*supra* para. 102).

109. Based on the facts of the case and the arguments of the parties and the Commission, the Court will examine: (1) the right to informed consent; (2) whether the medical treatment that Mr. Guachalá Chimbo received was appropriate according to standards concerning the right to health; (3) the Mr. Guachalá Chimbo's disappearance, and (4) the scope of discrimination in this case.

### **B.1. The right to informed consent**

110. Informed consent is a basic element of the right to health;<sup>200</sup> and the obligation to comply with this is an obligation of an immediate nature.<sup>201</sup> This Court has indicated that the violation of the right to informed consent entails not only a violation of the right to health, but also of the right to personal liberty, the right to dignity and privacy, and the right of access to information.<sup>202</sup> The Court notes that, in the instant case, neither the Commission nor the representatives explicitly alleged the violation of Article 11 of the Convention. However, by virtue of the *iura novit curia* principle,<sup>203</sup> the Court will rule on the right to privacy as an essential component of informed consent.<sup>204</sup>

111. Additionally, in this case, the representatives and the Commission have argued that the alleged absence of informed consent violated Mr. Guachalá Chimbo's right to recognition of

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<sup>198</sup> Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 190, and *Case of Hernández v. Argentina, supra*, para. 81.

<sup>199</sup> Cf. Constitution of the Republic of Ecuador, 1998, article 23.20 (evidence file, folio 8794), and Organic Law of the National Health System, articles 3 and 4 (evidence file, folio 9078).

<sup>200</sup> Cf. Report of the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, August 10, 2009, UN Doc. A/64/272, para. 18, and Report of the United Nations Special Rapporteur on the rights of persons with disabilities, March 28, 2017, UN Doc. A/HRC/35/21, para. 63. See also, *Case of Poblete Vilches et al. v. Chile, supra*, para. 160.

<sup>201</sup> Cf. Committee on the Rights of Persons with Disabilities, General Comment No. 6: Equality and non-discrimination, April 26, 2018, UN Doc. CRPD/C/GC/6, para. 48, and Written version of the expert opinion of Christian Courtis (evidence file, folio 8499).

<sup>202</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, paras. 163 and 165, and *Case of Poblete Vilches et al. v. Chile, supra*, paras. 172 and 173.

<sup>203</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 163, and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs*. Judgment of February 6, 2020. Series C No. 400, para. 200.

<sup>204</sup> Cf. *Case of I.V. v. Bolivia, supra*, paras. 163 and 165, and *Case of Poblete Vilches et al. v. Chile, supra*, paras. 172 and 173.



juridical personality. The content of the right to recognition of juridical personality is that everyone “has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights[, which] implies the capacity to be the holder of rights (capacity of exercise) and obligations; the violation of this recognition presumes an absolute disavowal of the possibility of being a holder of [basic civil] rights and obligations.”<sup>205</sup> Thus, legal capacity is an essential component of juridical personality.

112. This right represents a parameter to determine whether or not a person is a holder of the rights in question and whether he or she can exercise them,<sup>206</sup> so that failing to grant this recognition makes the individual vulnerable *vis-à-vis* the State or other individuals.<sup>207</sup> In this way, the content of the right to recognition of juridical personality refers to the State’s correlative general obligation to provide the legal conditions and means to ensure that this right may be exercised freely and fully by its holders.<sup>208</sup>

113. In application of the principle of the “practical effect” and of the needs for protection in cases of vulnerable individuals and groups, the Court has observed the broadest legal content of this right by considering that the State is especially “obliged to ensure to those persons in a situation of vulnerability, marginalization and discrimination, the administrative and legal conditions that ensure them the exercise of this right, based on the principle of equality before the law.”<sup>209</sup>

114. In the case of persons with disabilities, this Court notes that the right to recognition of juridical personality acquires a specific content. The Convention on the Rights of Persons with Disabilities establishes the following:

Article 12 - Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a

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<sup>205</sup> *Case of Bámaca Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, para. 179, and *Case of Vásquez Durand et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of February 15, 2017. Series C No. 332, para. 138.

<sup>206</sup> *Cf. Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 188, and *Case of González Medina and family v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of February 27, 2012. Series C No. 240, para. 188.

<sup>207</sup> *Cf. Case of the Yean and Bosico Girls v. Dominican Republic.* Judgment of September 8, 2005. Series C No. 130, para. 179, and *Case of González Medina and family v. Dominican Republic, supra*, para. 188.

<sup>208</sup> *Cf. Case of the Sawhoyamaya Indigenous Community v. Paraguay, supra*, para. 189 and *Case of González Medina and family v. Dominican Republic, supra*, para. 188.

<sup>209</sup> For example, in the case of the Sawhoyamaya Indigenous Community, the Court considered that its members had “remained in a legal limbo in which, although they were born and died in Paraguay, their very existence and identity were never legally recognized; in other words, they did not have juridical personality.” *Case of the Sawhoyamaya Indigenous Community v. Paraguay, supra*, para. 189, and *Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202, para. 89.

competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

[...]

115. On this point, the Committee on the Rights of Persons with Disabilities has indicated that "[t]he denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem," which constitutes a violation of the right to juridical personality, personal liberty and the right to health.<sup>210</sup>

116. Thus, the recognition of the juridical personality of persons with disabilities signifies not denying their legal capacity and providing access to the support they may need to take decisions with legal effects.<sup>211</sup> The "human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making."<sup>212</sup>

117. Legal capacity acquires particular importance for persons with disabilities when they have to take important decisions with regard to their health.<sup>213</sup> Moreover, subjecting a person with disabilities to a health-related treatment without their informed consent may constitute a denial of their juridical personality.<sup>214</sup>

118. The patient's informed consent is a condition *sine qua non* for medical practice, and is based on respect for the patient's autonomy and liberty to take his or her own decisions in keeping with the life project. In other words, informed consent ensures the practical effect of the norm that recognizes autonomy as an essential element of the dignity of the individual.<sup>215</sup>

119. States have the international obligation to ensure that informed consent is obtained before any medical act is performed because this is founded, above all, on the self-determination and autonomy of the individual as part of the respect and guarantee of the dignity of every human being, as well as their right to liberty.<sup>216</sup> Informed consent consists "in a prior decision to accept, or to submit to, a medical act in the broadest sense, obtained freely – that is, without threats or coercion, undue incentives or inducement – and after having obtained adequate, complete, reliable, comprehensible and accessible information, provided that this information has truly been understood, which will permit the individual to give full consent." This rule not only consists in an act of acceptance, but also in the result of a process in which the following elements must be complied with in order that it be considered valid; namely, that the consent is prior, free, full and informed.<sup>217</sup> Therefore, at the very least, health care providers should offer the following information: (i) an evaluation of the diagnosis; (ii) the purpose, method, probable duration, and expected benefits and risks of the proposed treatment; (iii) the possible adverse effects of the proposed treatment; (iv) treatment

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<sup>210</sup> Cf. Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal recognition before the law, May 19, 2014, UN Doc. CRPD/C/GC/1, para. 40.

<sup>211</sup> Cf. Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal recognition before the law, May 19, 2014, UN Doc. CRPD/C/GC/1, paras. 14 and 15.

<sup>212</sup> Cf. Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal recognition before the law, May 19, 2014, UN Doc. CRPD/C/GC/1, para. 3.

<sup>213</sup> Cf. Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal recognition before the law, May 19, 2014, UN Doc. CRPD/C/GC/1, para. 8.

<sup>214</sup> Cf. Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal recognition before the law, May 19, 2014, UN Doc. CRPD/C/GC/1, para. 37.

<sup>215</sup> Cf. *Case of I.V. v. Bolivia*, *supra*, para. 159.

<sup>216</sup> Cf. *Case of I.V. v. Bolivia*, *supra*, para. 165.

<sup>217</sup> Cf. *Case of I.V. v. Bolivia*, *supra*, para. 166, and *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 161.

alternatives, including those that are less invasive, together with the possible pain or discomfort, risks, benefits and secondary effects of the alternative treatments proposed; (v) the consequences of the treatment, and (vi) what may occur before, during and after the treatment.<sup>218</sup>

120. As a general rule, consent is personal because it must be provided by the person who will submit to the procedure.<sup>219</sup> The Court emphasizes that real or perceived disability should not be understood as the incapacity to take decisions and it should be presumed that persons with disabilities are capable of expressing their will, which should be respected by medical personnel and authorities.<sup>220</sup> Indeed, a patient's disability should not be used as a justification for not requesting their consent and resorting to substitute-based consent.

121. When treating persons with disabilities, medical personnel must examine their actual condition and provide the necessary support for them to take their own informed decision.<sup>221</sup> This obligation is expressly included in the CRPD,<sup>222</sup> but also emanates from the obligations contained in the American Convention, including the obligation not to discriminate against anyone owing to their disability, established in Article 1(1) of the Convention (*supra* para. 79),<sup>223</sup> as well as in the 1998 Ecuadorian Constitution itself.<sup>224</sup> In this regard, the United Nations Special Rapporteur on the rights of persons with disabilities has indicated that:

The universal nature of human rights provides an obligation on States to promote the full realization of rights for all people. Persons with disabilities should enjoy all human rights and fundamental freedoms on an equal basis with others. Access to adequate support is indeed a precondition for persons with disabilities to effectively exercise their human rights on an equal basis with others and, therefore, to live with dignity and autonomy in the community.<sup>225</sup>

122. The Committee on the Rights of Persons with Disabilities has indicated that the support that should be afforded to persons with disabilities "must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making."<sup>226</sup> It explained that:

'Support' is a broad term that encompasses both informal and formal support arrangements, of varying types and intensity. For example, persons with disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of

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<sup>218</sup> Cf. *Case of I.V. v. Bolivia*, *supra*, para. 189, and *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 162.

<sup>219</sup> Cf. *Case of I.V. v. Bolivia*, *supra*, para. 182, and *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 161. Likewise, see: Declaration of Helsinki. Ethical principles for medical research involving human subjects, adopted by the World Medical Association (59<sup>th</sup> General Assembly Seoul, Korea, October 2008), Principle 25, and Declaration of Lisbon on the rights of the patient, adopted by the World Medical Association (34<sup>th</sup> General Assembly, Lisbon, Portugal, September/October 1981; amended by the 47<sup>th</sup> General Assembly, Bali, Indonesia, September 1995, and edited at the 171<sup>st</sup> session of the Council, Santiago, Chile, October 2005, Principle 3.

<sup>220</sup> Cf. *Case of Ximenes Lopes v. Brazil*, *supra*, para. 130.

<sup>221</sup> Cf. Report of the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, August 10, 2009, UN Doc. A/64/272, para. 12; Report of the United Nations Special Rapporteur on the rights of persons with disabilities, December 20, 2016, UN Doc. A/HRC/34/58, para. 32.

<sup>222</sup> CRPD, Article 12(3).

<sup>223</sup> Cf. *Mutatis mutandis*, Report of the United Nations Special Rapporteur on the rights of persons with disabilities, December 20, 2016, UN Doc. A/HRC/34/58, paras. 31 and 32, and Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with disabilities, E/1995/22, December 9, 1994, para. 5.

<sup>224</sup> Cf. Constitution of the Republic of Ecuador, 1998, article 53 (evidence file, folio 8801).

<sup>225</sup> Report of the United Nations Special Rapporteur on the rights of persons with disabilities, December 20, 2016, UN Doc. A/HRC/34/58, para. 32.

<sup>226</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal recognition before the law, May 19, 2014, UN Doc. CRPD/C/GC/1, para. 17.

decisions, or may call on other forms of support, such as peer support, advocacy (including self-advocacy support), or assistance with communication.<sup>227</sup>

123. If another person is responsible for providing the support, "all health and medical personnel should ensure appropriate consultation that directly engages the person with disabilities. They should also ensure, to the best of their ability, that assistants or support persons do not substitute or have undue influence over the decisions of persons with disabilities."<sup>228</sup>

124. In addition, States should provide persons with disabilities with the possibility of planning their own support in advance, specifying who will provide this support and how it will operate. This planning should be respected when the person with disabilities "finds himself unable to communicate his wishes to others."<sup>229</sup>

125. The Court takes note of domestic law at the time of the facts concerning the consent required for the practice of procedures such as those performed in this case, namely:

Law No. 77 on Patients' Rights:

Article 5. RIGHT TO INFORMATION. Every patient has the right, before and during the different stages of treatment, to receive from the health center, through its corresponding staff, information concerning the diagnosis of their health status, the prognosis, the treatment, the medical risks to which they are exposed, the probable length of incapacitation, and the existing care and treatment alternatives, in terms that the patient may reasonably understand and be enabled to take a decision on the procedure to be performed. Emergency situations are excepted from this process. The patient has the right to the health center advising him of the identity of the doctor in charge of his treatment.

Article 6. RIGHT TO DECIDE. Every patient has the right to choose whether he accepts or declines the medical treatment. In both cases, the health center must inform him of the consequences of his decision.

Article 7. EMERGENCY SITUATION. This is any serious contingency that affects the health of the human being with imminent danger for the physical integrity or life of the individual as a result of unforeseen or inevitable circumstances, such as: a crash, collision, overturning or other form of land, air or water transportation accident; general accidents or mishaps, such as those that occur in the workplace, educational establishments, home, room, sporting venues, or that are the effect of crimes against persons such as those that result in injuries caused by blunt and sharp weapons, firearms or any other form of physical aggression.<sup>230</sup>

Likewise, the Medical Code of Ethics, established:

Article 15. The doctor shall not perform any surgical intervention without the patient's prior authorization and, if the patient is unable to provide this, the doctor shall resort to the patient's representative or to a member of the family, unless the patient's life is in imminent danger. In all cases, the authorization shall include the type of intervention, the risks and the possible complications.

Article 16. Also, cases subject to diagnostic or therapeutic procedures that, in the opinion of the treating physician, involve a risk must be authorized by the patient, his representative or

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<sup>227</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal recognition before the law, May 19, 2014, UN Doc. CRPD/C/GC/1, para. 17. *See also*, Report of the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, August 10, 2009, UN Doc. A/64/272, para. 23.

<sup>228</sup> Report of the Committee on the Rights of Persons with Disabilities, A/72/55, Guidelines on the right to liberty and security of persons with disabilities, para. 11

<sup>229</sup> *Cf.* Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal recognition before the law, May 19, 2014, UN Doc. CRPD/C/GC/1, paras. 17 and 18, and Written version of the expert opinion of Christian Courtis (evidence file, folio 8495).

<sup>230</sup> Patients' Rights Act of February 3, 1995, articles 5 to 7 (evidence file, folio 9073).

his family. This is also necessary in cases of the use, in the absence of other fully proven resources, of new techniques or drugs as therapeutic measures in order to safeguard the life and integrity of the patient.<sup>231</sup>

126. Furthermore, according to information provided by expert witness Claudia Chávez Ledesma, proposed by the State, when Mr. Guachalá was hospitalized, the Rules and Regulations of the Julio Endara Psychiatric Hospital were in force that established:

Article 10. The family member or representative who accompanies the patient when he is admitted to the hospital shall be informed of the patient's diagnosis, the treatment and the possible secondary effects of this. In addition, their collaboration shall be requested during the treatment and rehabilitation process. When these requirements have been met, this person shall sign the authorization form included in the medical record.

Article 11. The patient has the right to be informed by the treating physician of the treatment and the prognosis, in terms that reasonably ensure his complete comprehension, when the treating physician considers this prudent and always before he is discharged.<sup>232</sup>

127. This Court notes that the Patients' Rights Act established the right of all patients to receive information and to decide whether they accepted or declined the medical treatment. However, the rules and regulations of the Julio Endara Hospital, in force when Mr. Guachalá Chimbo was hospitalized, did not recognize this right, but used a substitute decision-making model requiring the consent of the patient's family member or representative, rather than that of the patient himself. Indeed, the rules and regulations did not include the obligation to obtain the patient's informed consent; rather they established that he had the right to be informed "in terms that reasonably ensure his complete comprehension, when the treating physician considers this prudent." Thus, the hospital's regulations included a substitute decision-making model, giving priority to informing the family members and not the patient himself.

128. This paternalistic rationale for the treatment of the patient was also reflected on the hospitalization authorization form used by the Julio Endara Hospital, which is written assuming that it will be a third party who authorizes the hospitalization of the patient and stipulates "we authorize the hospital doctors to use the treatments they consider appropriate,"<sup>233</sup> without even specifying the nature of the treatments to which the person will be submitted.

129. Additionally, in its answering brief, the State itself indicated that:

The State has officially recognized that informed consent is a process of communication and deliberation that forms part of a health-based relationship between medical professionals and patients and in which a person voluntarily accepts, refuses or cancels a health-based intervention or treatment. It is evident that, in the case of children and adolescents, and persons with disabilities, it is the family who provides this consent.<sup>234</sup>

130. In the instant case, when Mr. Guachalá Chimbo was admitted to the hospital, he had not given his consent; the consent was given by his mother. There is no record in the case file of whether Mr. Guachalá Chimbo was provided with any type of information on, *inter alia*, his diagnosis, the treatment he would receive, possible secondary effects, alternative treatments, and the probable length of his hospitalization and treatment, or that an attempt was made to obtain his consent for the hospitalization and the treatments that he would receive. Furthermore, there is no record that the hospital tried to use any support mechanism to respect Mr. Guachalá Chimbo's wishes. And, after obtaining his mother's consent, the

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<sup>231</sup> Medical Code of Ethics of August 17, 1992, articles 15 and 16 (evidence file, folio 9088).

<sup>232</sup> Rules and Regulations of the Julio Endara Psychiatric Hospital, article 9 (evidence file, folio 8540).

<sup>233</sup> Ministry of Public Health, Julio Endara Hospital. Hospitalization authorization form of January 10, 2004 (evidence file, folio 145).

<sup>234</sup> Answering brief of February 6, 2020 (merits file, folio 338).

presumed victim was immediately sedated and there is no record that, subsequently, any measure was taken to obtain his consent.

131. The State excused this failure by arguing that, at the time of his hospitalization, Mr. Guachalá was in an “acute and critical condition.”

132. This Court has established that exceptions do exist where health care personnel may act without requiring consent in cases in which this cannot be given by the person concerned and an immediate urgent or emergency medical or surgical intervention is necessary, given a serious risk to the patient’s health or life.<sup>235</sup> The Court has considered that urgency or emergency refers to the imminence of a risk and, consequently, of a situation in which the intervention is necessary and cannot be postponed, excluding those cases in which it is possible to wait to obtain consent.<sup>236</sup>

133. In the instant case, Mr. Guachalá Chimbo was unable to access the medication he needed to control his illness. Before his hospitalization, he was having epileptic seizures every half hour. According to Mrs. Chimbo’s statement, her son was awake during his transfer to the hospital; she explained to him that he was being taken to the hospital and Mr. Guachalá Chimbo told her that he was in agreement.<sup>237</sup> According to the hospital records, at the time of the physical examination performed on admittance, he was “mute, and uncooperative during the interview and physical examination.”<sup>238</sup> In this regard, one of the expert witnesses indicated that, when he was taken to the Julio Endara Hospital, Mr. Guachalá Chimbo’s condition was a psychiatric emergency.<sup>239</sup>

134. On this point, the Committee on the Rights of Persons with Disabilities has indicated that, even in crisis situations, persons with disabilities should be given support, providing them with accurate and accessible information about available service options and offering them non-medical alternatives.<sup>240</sup> Only in cases of the absence of advance planning measures (*supra* para. 124), and that, after “significant efforts” have been made to obtain consent, it has not been possible to determine a person’s will and preference, is it permissible to apply the “best interpretation of will and preference” standard.<sup>241</sup> This standard “implies ascertaining what the person would have wanted” taking into account “the previously manifested preferences, values, attitudes, narratives and actions, inclusive of verbal or non-verbal communication, of the person concerned.”<sup>242</sup> It does not constitute a determination based on his “best interest” because this is not a safeguard that complies with respect for the right to legal capacity in relation to adults.<sup>243</sup> Also, according to the expert opinion of Christian

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<sup>235</sup> *Case of I.V. v. Bolivia, supra*, para. 177, and *Case of Poblete Vilches et al. v. Chile, supra*, para. 166.

<sup>236</sup> *Case of I.V. v. Bolivia, supra*, 177.

<sup>237</sup> *Cf.* Statement made by Zoila Chimbo Jarro on April 4, 2016, before the Inter-American Commission on Human Rights. Available at: <http://www.oas.org/es/cidh/multimedia/sesiones/157/default.asp>

<sup>238</sup> *Cf.* Admittance form of Mr. Guachalá Chimbo (evidence file, folio 1706).

<sup>239</sup> *Cf.* Statement made by Claudia Chávez Ledezma during the public hearing held in this case.

<sup>240</sup> *Cf.* Report of the Committee on the Rights of Persons with Disabilities, A/72/55, Guidelines on the right to liberty and security of persons with disabilities, para. 22. See also, Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal recognition before the law, May 19, 2014, UN Doc. CRPD/C/GC/1, para. 42.

<sup>241</sup> *Cf.* Report of the United Nations Special Rapporteur on the rights of persons with disabilities, December 12, 2017, UN Doc. A/HRC/37/56, para. 31.

<sup>242</sup> *Cf.* Report of the United Nations Special Rapporteur on the rights of persons with disabilities, December 12, 2017, UN Doc. A/HRC/37/56, para. 31.

<sup>243</sup> *Cf.* Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal recognition before the law, May 19, 2014, UN Doc. CRPD/C/GC/1, para. 21.

Courtis, in such cases, “the authorities have the obligation to address their actions at re-establishing the capacity to consent; this may also be considered a measure of support.”<sup>244</sup>

135. Taking into account the rules and regulations applied by the Julio Endara Hospital at the time of the facts, the wording of the authorization form, and other evidence concerning the moment the presumed victim was hospitalized, the Court finds it clear that, in this case, the State failed to take any measures to support Mr. Guachalá Chimbo so that he could provide his informed consent for his hospitalization and the treatment to which he was subjected in the Julio Endara Hospital, either at the time he was admitted or subsequently. This absence of consent constituted a denial of his autonomy as a person, and of his capacity to take decisions concerning his rights.

136. Furthermore, the Court cannot fail to note that no one provided Mrs. Chimbo with an explanation about her son’s diagnosis, what the treatment would be, its purpose, method and possible risks; nor were other treatment alternatives proposed. To the contrary, the authorization form merely indicated that she authorized “the hospital’s doctors to provide the treatments they considered appropriate.”<sup>245</sup> Consequently, Mr. Guachalá Chimbo’s mother did not give informed consent for the treatment he received.

137. Additionally, the Court recalls that Article 2 of the Convention obliges the States Parties to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to the rights and freedoms protected by the Convention.<sup>246</sup> This duty requires the adoption of two types of measures. On the one hand, the elimination of norms and practices of any nature that entail a violation of the guarantees established in the Convention,<sup>247</sup> because they either disregard those rights and freedoms or obstruct their exercise.<sup>248</sup> On the other hand, the enactment of laws and the implementation of practices leading to the effective observance of such guarantees.<sup>249</sup>

138. In the instant case, the applicable laws did not include the obligation to provide the necessary support to persons with disabilities when taking decision concerning their health. The Court notes that, under Article 2 of the Convention, the State was obliged to enact the laws and implement the practices required to comply with this guarantee. Therefore, this represented an omission by the State which resulted in a violation of Article 2 of the Convention.

139. Mr. Guachalá Chimbo did not give his informed consent to his hospitalization and the medical treatment he received in the Julio Endara Hospital and, consequently, the State violated Mr. Guachalá’s rights to health, recognition of juridical personality, dignity, privacy, personal liberty and access to information, in relation to the right to non-discrimination and the obligation to adopt domestic legal provisions.

## **B.2 Medical treatment received by Mr. Guachalá Chimbo**

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<sup>244</sup> Cf. Written version of the expert opinion of Christian Courtis (evidence file, folio 8495).

<sup>245</sup> Cf. Hospitalization authorization form of January 10, 2004 (evidence file, folio 145).

<sup>246</sup> Cf. *Case of Gangaram Panday v. Suriname. Preliminary objections*. Judgment of December 4, 1991. Series C No. 12, para. 50, and *Case of Casa Nina v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 24, 2020. Series C No. 419, para. 100.

<sup>247</sup> Cf. *Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs*. Judgment of May 30, 1999. Series C No. 52, para. 207, and *Case of Casa Nina v. Peru, supra*, para. 100.

<sup>248</sup> Cf. *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs*. Judgment of June 21, 2002. Series C No. 94, para. 113, and *Case of Casa Nina v. Peru, supra*, para. 100.

<sup>249</sup> Cf. *Case of Castillo Petruzzi et al. v. Peru, supra*, para. 207, and *Case of Casa Nina v. Peru, supra*, para. 100.

140. The Court recalls that the right to health refers to the right of everyone to enjoy the highest attainable level of physical, mental and social well-being. This right includes timely and appropriate health care in keeping with the principles of availability, accessibility, acceptability and quality. In this case, based on the arguments of the parties and the Commission, the Court will examine the alleged lack of accessibility of the health care, as well as its alleged lack of acceptability and quality.

B.2.a The accessibility of the health care received by Luis Eduardo Guachalá Chimbo

141. The accessibility of health care means that “[h]ealth facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party,” and this includes that they must be affordable. In this regard, the Committee on Economic, Social and Cultural Rights has indicated that:

Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.<sup>250</sup>

142. Therefore, compliance with the State obligation to respect and to ensure this right must pay special attention to vulnerable and marginalized groups, and health care must be provided progressively, based on available resources and the applicable domestic laws.<sup>251</sup>

143. The Court emphasizes that States must provide the necessary health services to prevent possible disabilities, and also to prevent and reduce further disabilities.<sup>252</sup> This obligation is also found in article 53 of the Ecuadorian Constitution in force at the time of the facts.<sup>253</sup> Furthermore, the Committee on Economic, Social and Cultural Rights has established that, regarding persons with disabilities:

Insofar as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability.<sup>254</sup>

144. Additionally, the Convention on the Rights of Persons with Disabilities establishes, among the obligations included in the right to health, that States shall “[p]rovide those health services needed by persons with disabilities specifically because of their disabilities, including early

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<sup>250</sup> Cf. *Case of Poblete Vilches et al. v. Chile, supra*, paras. 120 and 121, and Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, August 11, 2000, UN Doc. E/C.12/2000/4, para. 12.

<sup>251</sup> Cf. *Case of Cuscul Pivaral et al. v. Guatemala, supra*, para. 107, and *Case of Hernández v. Argentina, supra*, para. 93.

<sup>252</sup> Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with disabilities, E/1995/22, December 9, 1994, para. 34; Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the United Nations General Assembly, 48th session, annex to Resolution 48/96 of December 17, 1991, Article 3; United Nations Declaration on the Rights of Disabled Persons, adopted by the United Nations General Assembly Resolution 3447 (XXX) of December 9, 1975, para. 6; World Programme of Action concerning Disabled Persons, adopted by UN General Assembly Resolution 37/52 of December 3, 1982, para. 98, and CRPD, Article 25(b).

<sup>253</sup> Constitution of the Republic of Ecuador, 1998, article 53 (evidence file, folio 8801), and Constitution of the Republic of Ecuador, 2008, article 47 (evidence file, folio 8875 and 8876).

<sup>254</sup> Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with disabilities, E/1995/22, December 9, 1994, para. 5.



identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons.”<sup>255</sup>

145. The foregoing relates to the right of persons with disabilities to live independently and to be included in the community.<sup>256</sup> In this regard, States must take measures “to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.”<sup>257</sup>

146. According to the World Health Organization, it is estimated that up to 70% of people living with epilepsy could live seizure-free if properly diagnosed and treated.<sup>258</sup> In addition, expert witness Claudia Chávez Ledesma indicated that poor therapeutic adherence or numerous changes in medication result in a greater possibility of neurobehavioral disorders associated with epilepsy.<sup>259</sup> She explained that, “if one seeks to avoid cognitive deterioration in the patient it is necessary to prescribe comprehensive initial and ongoing treatment with anticonvulsant medication.”<sup>260</sup> Therefore, the medication of persons with epilepsy is essential to prevent or reduce seizures, as well as the neurobehavioral disorders associated with epilepsy. Moreover, the adequate treatment of epilepsy reduces the possibility that the person suffering from this ailment will develop disabilities.

147. In the instant case, Mr. Guachalá Chimbo had to suspend his treatment frequently because he did not have sufficient resources to pay for it.<sup>261</sup> Following the first hospitalization in 2003, he was prescribed a series of medicines and told that he should return in June 2003 for a medical check-up. However, due to lack of money, Mr. Guachalá could not attend the appointment and had to suspend the treatment, which made a second hospitalization necessary. When he was hospitalized for the second time in the Julio Endara Hospital, Mrs. Chimbo had to sign a form undertaking “to collaborate with any medicines that were necessary,”<sup>262</sup> which was established in the hospital’s regulations.<sup>263</sup> In this regard, Mrs. Chimbo stated that the doctors gave her the prescription and she bought the medicines in the pharmacy and took them to the hospital.<sup>264</sup>

148. This Court recalls that compliance with the State obligation to respect and to ensure the right to health must pay special attention to persons living in poverty. Therefore, States must take measures to ensure that the treatment required to prevent disabilities does not represent a disproportionate burden for the poorest households.

149. In the instant case, the Court notes that: (1) the laws of Ecuador establish the State’s obligation to give preferential treatment to persons with disabilities, and the obligation to

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<sup>255</sup> CRPD, Article 25(b).

<sup>256</sup> Cf. CRPD, Article 19.

<sup>257</sup> CRPD, Article 26.

<sup>258</sup> Cf. World Health Organization, Epilepsy: Key Facts, June 20, 2019. Available at: <https://www.who.int/news-room/fact-sheets/detail/epilepsy>; World Health Organization, Epilepsy. A public health imperative, 2019, p. XVII. Available at: <https://www.who.int/publications/i/item/epilepsy-a-public-health-imperative>.

<sup>259</sup> Cf. Statement made by Claudia Chávez Ledesma during the public hearing held in this case.

<sup>260</sup> Cf. Statement made by Claudia Chávez Ledesma during the public hearing held in this case.

<sup>261</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folios 20, 21 and 22), and Pichincha Prosecution Service. Service for the Investigation of Disappeared Persons. Social environment assessment of November 10, 2014 (evidence file, folio 4333).

<sup>262</sup> Ministry of Public Health, Julio Endara Hospital. Hospitalization authorization form of January 10, 2004 (evidence file, folio 145).

<sup>263</sup> Rules and Regulations of the Julio Endara Psychiatric Hospital, article 10 (evidence file, folio 8540).

<sup>264</sup> Cf. Statement made by Zoila Chimbo Jarro during the public hearing held in this case.

ensure the prevention of disabilities; (2) Mr. Guachalá Chimbo was in a situation of extreme vulnerability owing to the illness he suffered and his family's situation of extreme poverty; (3) lack of access to epilepsy treatment increases the possibility of those suffering from this illness developing disabilities and reduces their autonomy and possibility of choosing and controlling their way of life, and (4) epilepsy treatments are not expensive because, according to the World Health Organization, "[l]ow-cost treatment is available, with daily medication that costs as little as US\$5 per year."<sup>265</sup> Therefore, the Court considers that, owing to the circumstances of this case, the enhanced guarantee of the right to health of Mr. Guachalá Chimbo called for the free provision of the medicines prescribed for his medical treatment and appropriate medical supervision. The absence of supervision and opportune access to such medicines led to the deterioration of Mr. Guachalá Chimbo's health and required his admittance to the Julio Endara Hospital. Consequently, it gave rise to the circumstances in which the facts of this case occurred.

150. Based on the above, the Court considers that the lack of access to the medicines that Mr. Guachalá Chimbo required constituted non-compliance with the obligation to ensure accessible health services and, consequently, a violation of the right to health.

#### B.2.b The acceptability and quality of the health care received by Luis Eduardo Guachalá Chimbo and his subsequent disappearance

151. The right to health requires that the services provided be acceptable; that is, designed to "improve the health status of those concerned," and "must also be scientifically and medically appropriate and of good quality."<sup>266</sup> The Court has indicated that the State, in its capacity as guarantor of the rights recognized in the Convention, is responsible for observance of the right to personal integrity of every person in its custody.<sup>267</sup> This applies especially to those who are receiving medical care because the ultimate purpose of the provision of health services is the improvement of the physical or mental health of the patient, and this significantly increases the State's obligations and requires it to adopt the necessary and available measures to prevent a deterioration in the patient's condition and to optimize his or her health.<sup>268</sup> In addition, the Court underscores that the care to which everyone who is receiving medical treatment is entitled must be amplified in the case of patients with disabilities in psychiatric institutions,<sup>269</sup> without this signifying supplanting the legal capacity of the person institutionalized. The duty of care is related to the elements of the acceptability and quality of the right to health.

152. The Court notes that Mr. Guachalá's medical record reveals various shortcomings that demonstrate that the care provided was neither acceptable nor of quality. First, there is no record that the type of epilepsy suffered by Mr. Guachalá Chimbo was identified.<sup>270</sup> This

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<sup>265</sup> Cf. World Health Organization, *Epilepsy: Key Facts*, June 20, 2019. Available at: <https://www.who.int/news-room/fact-sheets/detail/epilepsy>; World Health Organization, *Epilepsy. A public health imperative*, 2019, p. XVII. Available at: <https://www.who.int/publications/i/item/epilepsy-a-public-health-imperative>.

<sup>266</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health*, August 11, 2000, UN Doc. E/C.12/2000/4, para. 12.

<sup>267</sup> Cf. *Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of June 7, 2003. Series C No. 99, para. 99, and *Case of Munárriz Escobar et al. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of August 20, 2018. Series C No. 355, para. 73.

<sup>268</sup> Cf. *Case of Ximenes Lopes v. Brazil, supra*, para. 139.

<sup>269</sup> Cf. *Case of Ximenes Lopes v. Brazil, supra*, para. 140.

<sup>270</sup> Affidavit made by Elena Palacio van Isschot on November 2, 2020 (evidence file, folio 2355).

determination is essential to ensure that the appropriate treatment is provided and, consequently, care that is acceptable and of quality.<sup>271</sup>

153. Second, the medical record does not show that, on January 11, 2004, any prescription was written for medication or that the patient's condition and evolution were assessed on January 14, 17 and 18.<sup>272</sup> Also, there is no record that any tests other than the measurement of his vital signs were performed.<sup>273</sup>

154. Third, in light of the possible effects of the medication that Mr. Guachalá Chimbo was taking, on January 12, 13 and 16, the doctor in charge of his case noted on the medical chart "please monitor closely."<sup>274</sup> However, on January 12, when Zoila Chimbo went to the hospital to visit her son, she was unable to see him because he was not in his room and none of the staff that she questioned knew where he was or else they gave her contradictory information.<sup>275</sup> Initially, Dr. E.Q. "told me that my son was sedated,"<sup>276</sup> which is what the same doctor indicated in the medical record that day.<sup>277</sup> However, subsequently, Mrs. Chimbo was told that "he could be at the barbers or in occupational therapy with the other patients."<sup>278</sup> The Court finds it necessary to emphasize that the care needed to ensure that medication does not have adverse effects required that, when it was noted that the patient was not in his room, efforts should have been made to find him and confirm the state of his health.

155. Fourth, on January 14, Mr. Guachalá Chimbo had an accident in the bathroom; an injury to his head had to be sutured and this was done the following day.<sup>279</sup> The medical record and the medical report make no mention of the indications given by the doctor on January 14. Therefore, the Court assumes that the request to keep a close watch on him made the previous day continued in effect. Even though it is not possible to determine the reason for this accident, there is a possibility that Mr. Guachalá was not receiving sufficient assistance from the nursing staff, considering his sedation.

156. Based on the above, the Court concludes that the State failed to comply with its obligation to provide the presumed victim with acceptable and quality medical care and, consequently, violated the right to health.

### **B.3 The disappearance of Mr. Guachalá**

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<sup>271</sup> Cf. World Health Organization, Epilepsy. A public health imperative, 2019, p. XVII. Available at: <https://www.who.int/publications/i/item/epilepsy-a-public-health-imperative>, and Affidavit made by Elena Palacio van Isschot on November 2, 2020 (evidence file, folio 2358).

<sup>272</sup> Affidavit made by Elena Palacio van Isschot on November 2, 2020 (evidence file, folios 2359 and 2360), and Medical record of Luis Eduardo Guachalá Chimbo from the Julio Endara Psychiatric Hospital from January 10 to January 21, 2004 (evidence file, folio 12).

<sup>273</sup> Affidavit made by Elena Palacio van Isschot on November 2, 2020 (evidence file, folio 2361), and Medical record of Luis Eduardo Guachalá Chimbo from the Julio Endara Psychiatric Hospital from January 10 to January 21, 2004 (evidence file, folio 12).

<sup>274</sup> Medical record of Luis Eduardo Guachalá Chimbo from the Julio Endara Psychiatric Hospital from January 10 to January 21, 2004 (evidence file, folios 12 and 13).

<sup>275</sup> Cf. Statement made by Zoila Chimbo during the public hearing held in this case; Medical record of the Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2), and Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 26).

<sup>276</sup> Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folios 25 and 26).

<sup>277</sup> Medical record of Luis Eduardo Guachalá Chimbo from the Julio Endara Psychiatric Hospital from January 10 to January 21, 2004 (evidence file, folio 12)

<sup>278</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 26), and Medical record of the Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2).

<sup>279</sup> Cf. Medical record of the Julio Endara Psychiatric Hospital of April 21, 2004 (evidence file, folio 2).

157. According to the medical record, on January 17, 2004, it appears that Mr. Guachalá Chimbo left the hospital and, since then, his whereabouts are unknown.<sup>280</sup>

158. In the instant case, there is no direct evidence that Mr. Guachalá Chimbo escaped from the hospital. The State supported its position on the statements of the nurse responsible for taking care of Mr. Guachalá, who saw him for the last time in the television room and indicated that, while he was absent, Mr. Guachalá had escaped from the hospital. The case file contains no statements by anyone who saw Mr. Guachalá abandon the hospital.

159. On the other hand, there is evidence that Mr. Guachalá was in no condition to leave the hospital on his own. In this regard, expert witness Palacio van Isschot concluded that “[t]he medication prescribed (Carbamazepina, Diazepam (Valium) and Haloperidol), in the doses indicated in the medical record, have an extremely sedative effect and have secondary effects that incapacitate communication, cognition and motility.” Consequently, the medication administered to Mr. Guachalá “would limit his ability [...] to move around independently, as well as to maintain his balance and take decisions.”<sup>281</sup>

160. In addition, this Court underlines that Zoila Chimbo stated that one of the hospital inmates told her that Luis was dead, that “he had a heart attack during mass.”<sup>282</sup> Regarding this possibility, expert witness Palacio van Isschot indicated that “[i]t has been found that Diazepam (Valium) causes cardio-respiratory failure in doses of between 10 and 30 mg/day in patients with neurological disorders.”<sup>283</sup>

161. This Court does not have the necessary evidence to determine what happened to the presumed victim. However, the Court underscores that the last instructions given by Dr. E.Q. for Mr. Guachalá included an explicit request to monitor him closely. The Court considers that unawareness of the whereabouts of a patient who was in the State’s custody, under medication and with an explicit request to monitor him, reveals that the authorities were, at the very least, negligent. In this regard, the Court reiterates that the ultimate purpose of health care is to improve the physical and mental health of the patient (*supra* para. 151). Even though a patient is able to take an informed decision not to continue his treatment, hospitals should take measures to prevent those who are in its care from abandoning the health center suddenly, and without knowing the risks involved if they fail to continue with the treatment they were receiving. On this point, the Court stresses that, according to the Director of the Julio Endara Hospital, owing to the number of patients and the scarcity of hospital guards, surveillance, “unfortunately, is always inadequate.”<sup>284</sup>

162. The Court has indicated that it is not sufficient that States refrain from violating rights; rather, it is essential that they adopt positive measures, determined in function of the particular needs for protection of the subject of law, due to either his personal conditions or

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<sup>280</sup> Cf. Medical record of Luis Eduardo Guachalá Chimbo from the Julio Endara Psychiatric Hospital of from January 10 to January 21, 2004 (evidence file, folio 13).

<sup>281</sup> Affidavit made by Elena Palacio van Isschot on November 2, 2020 (evidence file, folio 2372).

<sup>282</sup> Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 27).

<sup>283</sup> In addition, bearing in mind that, on January 14, Mr. Guachalá Chimbo had suffered a fall that required a suture in the left ciliary area, during the public hearing in this case, expert witness Claudia Chávez Ledesma was asked whether or not, “in the case of head injury and subsequent seizures, it was appropriate to administer haloperidol or any other psychotropic medication?” In response, the expert indicated that: “Depending on the injury, depending on the patient’s level of consciousness. In other words, it will depend on numerous factors. In reality, these falls, falls with tears in [...] subcutaneous cellular tissue, skin, normally do not indicate changes in consciousness and one merely sutures them and, evidently, assesses the person. If it is a serious injury with loss of consciousness, yes [it is contraindicated].” The expert explained that, although Mr. Guachalá had suffered a fall on January 14, on January 16 he was walking around without difficulty. Cf. Statement made by Claudia Chávez Ledesma during the public hearing held in this case.

<sup>284</sup> Statement by the Director of the Julio Endara Hospital of October 17, 2013 (evidence file, folio 2664).

the specific situation in which he finds himself.<sup>285</sup> Therefore, States have the obligation to ensure the creation of the conditions required to ensure that the rights to personal and integrity and life of persons in its custody are not violated.<sup>286</sup>

163. In light of the State's position of guarantor of persons in its custody (*supra* para. 151), it is presumed that the State is responsible for any injuries suffered by a person who has been in the custody of state agents.<sup>287</sup> This same principle is applicable in cases in which a person is in State custody and his subsequent whereabouts is unknown.<sup>288</sup> The State has the obligation to provide a satisfactory and convincing explanation of what happened and to disprove the arguments concerning its responsibility, with satisfactory evidence.<sup>289</sup>

164. In the instant case, the State was in a position of guarantor in relation to Luis Eduardo Guachalá and, therefore, bore the burden of providing a satisfactory and convincing explanation of what happened and disproving its presumed responsibility. However, the investigation conducted by the State was unable to offer a definitive and official version of what happened to the presumed victim and this obligation subsists while uncertainty remains about the final fate of the disappeared person.

165. Based on the above, the Court concludes that the State failed to comply with the obligation to ensure the rights to life and to personal integrity, in relation to the right to health, of Luis Eduardo Guachalá.

### **B.3 The scope of the discrimination that occurred in this case**

166. The Court recalls that, as a crosscutting condition of the accessibility of health services,<sup>290</sup> the State is obliged to ensure that everyone receives equal treatment. Accordingly, pursuant to Article 1(1) of the American Convention, discriminatory treatment based on disabilities is not permitted (*supra* para. 79).

167. In addition, the Court has indicated that the right to equality guaranteed by Article 24 of the Convention has two dimensions. The first, a formal dimension, that establishes equality before the law and the second, a material or substantive dimension, that requires the adoption of positive measures in favor of groups that have historically been discriminated or marginalized owing to the factors mentioned in Article 1(1) of the American Convention. This means that the right to equality entails the obligation to adopt measures to ensure that equality is real and effective; in other words, to correct existing inequalities, to promote the inclusion and participation of historically marginalized groups, to guarantee to disadvantaged persons or

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<sup>285</sup> Cf. *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 111, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, *supra*, para. 115.

<sup>286</sup> Cf. *Mutatis mutandis*, *Case of Ximenes Lopes v. Brazil*, *supra*, para. 138.

<sup>287</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of on November 19, 1999. Series C No. 63, para. 95 and 170, and *Case of Olivares Muñoz et al. v. Venezuela. Merits, reparations and costs*. Judgment of November 10, 2020. Series C No. 415, para. 89.

<sup>288</sup> Cf. *Case of Munárriz Escobar et al. v. Peru*, *supra*, para. 73, and *Case of Isaza Uribe et al. v. Colombia. Merits, reparations and costs*. Judgment of November 20, 2018. Series C No. 363, para. 89.

<sup>289</sup> Cf. *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of July 5, 2006. Series C No. 150, para. 80, and *Case of Olivares Muñoz et al. v. Venezuela*, *supra*, para. 89.

<sup>290</sup> Cf. *Case of Poblete Vilches et al. v. Chile*, *supra*, para. 122, and *Case of Cuscul Pivaral et al. v. Guatemala*, *supra*, para. 129. See also, General Comment No. 14: "The right to the highest attainable standard of health", August 11, 2000, UN Doc. E/C.12/2000/4, para. 12. In this regard, the General Comment indicates that accessibility has four overlapping dimensions, one of which is non-discrimination, which means that health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.

groups the effective enjoyment of their rights and, in sum, to offer everyone real possibilities of achieving material equality. To this end, States must actively tackle situations of exclusion and marginalization.<sup>291</sup>

168. This obligation to ensure material equality concurs with Article 5 of the CRPD, which stipulates that:

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

169. The CRPD refers back to this obligation in its article on the right to health by establishing that: "States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability."<sup>292</sup>

170. The IACDIS also establishes that the States Parties undertake "[t]o adopt the legislative, social, educational, labor-related, or any other measures needed to eliminate discrimination against persons with disabilities and to promote their full integration into society."<sup>293</sup> Similarly, the CRPD establishes that disability-based discrimination also occurs when reasonable accommodation is denied. In this regard, the Committee on the Rights of Persons with Disabilities has indicated that "[r]easonable accommodation is an intrinsic part of the immediately applicable duty of non-discrimination in the context of disability."<sup>294</sup> In this regard, it explained that "[a]n accommodation is reasonable, therefore, if it achieves the purpose (or purposes) for which it is being made, and is tailored to meet the requirements of the person with a disability."<sup>295</sup>

171. Specifically, in the case of medical decision-making, States have the obligation to provide the necessary support to enable the person concerned to take his or her own informed decision. The Court reiterates that, according to the United Nations Special Rapporteur on the rights of persons with disabilities, "[a]ccess to adequate support is indeed a precondition for persons with disabilities to effectively exercise their human rights on an equal basis with others and, therefore, to live with dignity and autonomy in the community."<sup>296</sup>

172. In the instant case, the Court underscores that the State did not take measures to help Mr. Guachalá take a decision on his hospitalization and treatment. To the contrary, the State

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<sup>291</sup> Cf. *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, *supra*, para. 199.

<sup>292</sup> CRPD, Article 25.

<sup>293</sup> IACDIS, Article III.1.

<sup>294</sup> United Nations Committee on the Rights of Persons with Disabilities, General Comment No. 6: Equality and non-discrimination, April 26, 2018, UN Doc. CRPD/C/GC/6, para. 23.

<sup>295</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 6: Equality and non-discrimination, April 26, 2018, UN Doc. CRPD/C/GC/6, para. 25.a.

<sup>296</sup> Report of the United Nations Special Rapporteur on the rights of persons with disabilities, December 20, 2016, UN Doc. A/HRC/34/58, para. 32.

substituted Mr. Guachalá's will by directly asked his mother for the consent. In his expert opinion, Christian Courtis indicated that:

The *de facto* denial of the presumed victim's capacity to act during his hospitalization in a psychiatric institution, even though he was an adult and with no record in the case file that he had been formally declared incapable – regardless of the incompatibility of that measure with the Convention on the Rights of Persons with Disabilities – constitutes a case of direct disability-based discrimination because it represents a clear situation of unequal treatment based on capacity, that has the effect of obstructing or annulling the exercise, in equal conditions, of the rights to recognition of juridical personality, personal liberty, personal integrity and health, among others.<sup>297</sup>

173. Accordingly, the State used the presumed victim's disability to justify that his informed consent was not necessary for his hospitalization and the forced administration of medical treatments and this not only increased the barriers that prevented him from exercising his rights effectively, but also constituted disability-based discrimination.<sup>298</sup>

174. Furthermore, the Court notes that the State has failed to take steps to deal with or seek to change the substitute decision-making model used in this case, which precludes the material equality of persons with disabilities, such as the presumed victim. On this point, the laws on informed consent applicable at the time of the facts do not mention the need to provide measures of support to persons with disabilities. Also, the rules of the Julio Endara Hospital assumed that it would always be the family members who would authorize the hospitalization and that the patients only had a right to receive information when the treating physician considered it pertinent. In this regard, the Court notes that, in its 2014 Concluding Observations on Ecuador, the Committee on the Rights of Persons with Disabilities stressed that:

The Committee is concerned that the State party's civil legislation provides for a substitute decision-making model through the use of roles such as guardians and wards, and that there is no immediate plan to reform the Civil Code and the Code of Civil Procedure to include a supported decision-making model, as recommended in general comment No. 1 (2014) on equal recognition before the law.<sup>299</sup>

175. Similarly, in its 2019 Concluding Observations on Ecuador, the Committee recommended to the State, *inter alia*:

Replace substitute decision-making systems, including guardianships and wardships, with supported decision-making systems, take all appropriate measures for the provision of individualized support, properly inform persons with disabilities about such alternatives and train the relevant personnel in accordance with article 12 of the Convention.<sup>300</sup>

176. Furthermore, the Disabilities Act established that: "[t]he State through its organs and entities guarantees the full exercise of the rights recognized by the Constitution and the law to all persons with disabilities, by [... the] elimination of physical, psychological, social and communicational barriers," among other actions.<sup>301</sup> However, it is unclear whether the elimination of such barriers would include the need to provide support when requesting informed consent.

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<sup>297</sup> Written version of the expert opinion of Christian Courtis (evidence file, folio 8485).

<sup>298</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 6: Equality and non-discrimination, April 26, 2018, UN Doc. CRPD/C/GC/6, paras. 30 and 47.

<sup>299</sup> Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Ecuador, October 27, 2014, UN Doc. CRPD/C/EU/CO/1, para. 24.

<sup>300</sup> Committee on the Rights of Persons with Disabilities, Concluding observations on the combined second and third periodic reports of Ecuador, October 21, 2019, UN Doc. CRPD/C/EU/CO/2-3, para. 26(b).

<sup>301</sup> Disabilities Act of April 6, 2001, article 4 (evidence file, folios 9100 and 9101).

177. The Court also notes that, taking into account the particular circumstances of this case (*supra* para. 149), the reasonable accommodations required to achieve material equality would require preferential treatment for Mr. Guachalá by the provision of the medicines prescribed for his treatment and appropriate medical supervision, free of charge. By failing to provide him with these medicines the necessary measures were not taken to prevent the appearance of disabilities or to reduce the possibilities of their increase.

178. In summary, the Court finds that the use of the presumed victim's disability to justify that his informed consent was not necessary for his hospitalization and medication, and the lack of access to the necessary medicines, constituted disability-based discrimination. Consequently, the State failed to take measures to ensure the material equality of the right to health with regard to persons with disabilities and, in particular, with regard to Luis Eduardo Guachalá Chimbo. This situation signifies that, in the instant case, the State did not ensure the right to health without discrimination, or the right to equality established in Articles 24 and 26 in relation to Article 1(1) of the Convention.

### **B.5 General conclusion on this chapter**

179. In the instant case, the Court considers that: (i) Mr. Guachalá Chimbo did not give his informed consent to the hospitalization and medical treatment received in the Julio Endara Psychiatric Hospital; (ii) the treatment received by Mr. Guachalá was not accessible because, taking his circumstances into account, the State had the obligation to provide him, free of charge, with the medicines to treat his epilepsy and monitor the situation of his health, so that the failure to comply with this obligation resulted in the deterioration of Mr. Guachalá Chimbo's health and increased the barriers that prevented him from exercising his rights effectively; (iii) the treatment received by Mr. Guachalá was not acceptable or of quality because the type of epilepsy he suffered from was not diagnosed, during his hospitalization his health was not monitored on a daily basis, and the necessary supervisory measures were not taken to ensure his well-being; (iv) the necessary measures were not taken to ensure Mr. Guachalá's rights to life and to person integrity because the State has not provided a satisfactory and convincing explanation regarding the whereabouts of the victim, who was in the State's custody in a public psychiatric hospital, and (v) Mr. Guachalá Chimbo's right to health without discrimination, and his right to equality were not ensured.

180. Therefore, the Court concludes that the State is internationally responsible for the violation of the rights to recognition of juridical personality, life, personal integrity, personal liberty, dignity and privacy, access to information, equality before the law and health, in accordance with Articles 3, 4, 5, 7, 11, 13, 24 and 26 of the American Convention, in relation to the obligation to respect and to ensure the rights without discrimination and the duty to adopt domestic legal provisions established in Articles 1(1) and 2 of this instrument, to the detriment of Luis Eduardo Guachalá Chimbo.

## **VII-3**

### **RIGHTS TO JUDICIAL GUARANTEES<sup>302</sup> AND TO JUDICIAL PROTECTION<sup>303</sup>**

#### **A. Arguments of the Commission and of the parties**

181. The **Commission** indicated that neither the administrative and criminal investigations, nor the remedies of *habeas corpus* and complaint before the Ombudsman were conducted with the due diligence that was required of the authorities in charge of the internal

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<sup>302</sup> Article 8 of the Convention.

<sup>303</sup> Article 25 of the Convention.



proceedings. Specifically, the Commission indicated that: (i) from the time she filed her complaint until mid-2005, Mrs. Chimbo had to pay for the police officers' transport to look for her son; (ii) the State did not undertake any line of investigation concerning the possibility that something had happened to Mr. Guachalá within the hospital; (iii) during the investigation, the taking of statements was focused on the hospital staff and not on the patients who were institutionalized at the time of the facts; (iv) from mid-2005 to July 2006, the date on which the case was closed, no investigation procedures were recorded; (v) although the case was closed because it had been impossible to determine the existence of an offense, "the evidence recorded prior to that decision does not suggest the planning and exhaustion of a line of investigation based on the possible death of Mr. Guachalá in the hospital and the possible concealment of his death by the staff of that center"; (vi) in 2013, following seven years without any procedural activity and during the public hearing of the case before the Commission, the State conducted a reconstruction of the events and an administrative procedure without results, and (vii) "in recent years, the only line followed is the presumed identification of a person living on the street." The Commission also argued that the application for *habeas corpus* was "not an effective remedy to address the situation of deprivation of liberty and disappearance of Luis Eduardo Guachalá" because, "initially, the mayor's office of the Metropolitan District of Quito merely issued a summons for Mr. Guachalá, even though it had already been indicated that he had gone missing from the hospital" and despite the favorable ruling of the Constitutional Court in the case "the Commission has no information on the measures take in the context of the application for *habeas corpus*".

182. The **representatives** indicated that, following Mr. Guachalá's disappearance, there was a lack of effective judicial protection and due diligence in the search to find the whereabouts of Luis revealed by: (i) the lack of due diligence in the initial search for Luis Eduardo; (ii) the absence of effective judicial protection in the *habeas corpus* proceeding, and (iii) the lack of due diligence owing to the absence of an effective search for Luis Eduardo Guachalá. They also argued that the remedy that existed under the laws of Ecuador was ineffective, which meant that "the remedy turned out to be useless and inapplicable." They also concluded that "based on what has been revealed in the case *sub judice*, neither the criminal nor the administrative investigation were conducted with due diligence, at the appropriate procedural moment, and within a reasonable time." Lastly, they indicated that the authorities had not conducted an exhaustive and diligent investigation and that this had far exceeded a reasonable time, which resulted in "a systematic violation of the right to the truth, justice and reparation of victims of human rights violations."

183. The **State** argued that "no verifiable violation had existed [...] of the obligations of due diligence in the investigation and of a reasonable time." It indicated that "it has been verified that Mrs. Chimbo Jarro was able to file her complaint before the Judicial Police and the Prosecutor General," and to take part in several procedures ordered by the latter. Regarding the reasonable time and the elements established by the Court to determine this, it considered that "clearly, the disappearance of a person, and especially in the circumstances in which Mr. Guachalá's departure from the hospital occurred, is an immensely complex matter." Regarding the procedural activity of the interested person, it recognized that "the criminal investigation was, and is, a legal and constitutional obligation of its authorities," concluding that "there is no doubt about this." It also indicated that the said institutions opened the investigation immediately after his mother had filed her complaint, acting "*ex officio* and without delay." It also stressed that "the authorities and officials who intervened in the investigation of the Guachalá case acted in keeping with the legal and constitutional principles of impartiality and independence."

## **B. Considerations of the Court**

184. The obligation to investigate human rights violations is one of the positive measures that States must adopt to ensure the rights recognized in the Convention. Therefore, since is first judgment, this Court has emphasized the importance of the state obligation to investigate and, as appropriate, punish human rights violations.<sup>304</sup>

185. In the instant case, the last known whereabouts of Mr. Guachalá Chimbo was a public hospital. Therefore, since he was in the State's custody at the time of his disappearance, the State's position of guarantor requires that it investigate what happened with due diligence (*supra* para. 151).

186. Based on the arguments made by the parties and the Commission, this Court will examine: (1) the obligation to open an investigation *ex officio*; (2) the omission in the efforts to search for Mr. Guachalá Chimbo; (3) due diligence in the investigation; (4) the effectiveness of the application for *habeas corpus*, and (5) the reasonable time.

### **B.1 Obligation to open an investigation *ex officio***

187. The Court recalls that the Julio Endara Hospital is an Ecuadorian public hospital. Therefore, once the staff of that hospital noted the absence of a patient they were obliged to notify the competent authorities in order to open the investigation. According to information given to Mrs. Chimbo by the nurse in charge of caring for Mr. Guachalá, the day of his disappearance the police were advised.<sup>305</sup> However, there is no record in the case file that any investigation was initiated following this report. The first police procedure was conducted on January 19, 2004, two days after the disappearance.<sup>306</sup>

188. Instead of undertaking the investigation *ex officio*, both the hospital staff and the police informed Mrs. Chimbo Jarro that she should file a complaint.<sup>307</sup> The Court considers that the obligation to investigate the disappearance of a person who was in the State's custody should be assumed *ex officio*; that is to say, its initiation cannot be contingent upon the procedural initiative of the victims' next of kin.

189. Consequently, the Court considers that the State failed to comply with its obligation to initiate the investigation *ex officio* and immediately.

### **B.2 Omission in the efforts to search for Mr. Guachalá Chimbo**

190. The investigation into what happened to Mr. Guachalá Chimbo included the obligation to determine the victim's fate or destiny and to discover his whereabouts. In this case, the search also had to take into account Mr. Guachalá Chimbo's special vulnerability at the time of his disappearance.

191. First, the Court underlines that the state authorities' assumption is that Mr. Guachalá Chimbo escaped from the hospital. However, this line of investigation required that, at the very least, the authorities had been informed of his disappearance straight away and that they had immediately carried out searches in the areas surrounding the Julio Endara Hospital or in possible places where Mr. Guachalá could have gone.

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<sup>304</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 166, and *Case of Vásquez Durand et al. v. Ecuador, supra*, para. 141.

<sup>305</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 27).

<sup>306</sup> Record of the social worker's search actions (evidence file, folio 7), and record of the arrival time of the emergency service (evidence file, folio 44).

<sup>307</sup> Cf. Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folios 27 and 28).

192. To the contrary, the Rules and Regulations of the Julio Endara Hospital established that, if a patient “abandoned the institution,” “the person in charge would advise the hospital security staff in order to locate him.”<sup>308</sup> These rules were not sufficiently comprehensive to ensure that actions were taken with due diligence when a patient disappeared because, for example, they did not require the staff to report the disappearance to the police immediately or to contact the patient’s family.

193. In addition, the Court notes that, in this case, even the hospital’s rules and regulations were not complied with because the nurse in charge of Mr. Guachalá Chimbo’s care stated that he forgot to advise the security guards.<sup>309</sup> Furthermore, the hospital authorities failed to communicate with the family on the day of the disappearance because although, according to the records, a telephone call was made, Zoila Chimbo has stated that this call was never received.<sup>310</sup>

194. According to the nurse in charge of the care of Mr. Guachalá, on the day of his disappearance, they searched for Mr. Guachalá “in all the hospital wards and bathrooms; then [they] went out into the grounds and the areas around the hospital and the Autopsy Department [...] without finding him.”<sup>311</sup> The first efforts to search for Mr. Guachalá beyond the immediate surroundings of the hospital took place on January 19, two days after his disappearance, when the hospital telephoned other hospitals and the morgue.<sup>312</sup> That same day, the first police procedure was conducted when a police sergeant went to the hospital “to obtain the routine information.”<sup>313</sup> There is no record in the case file that any type of search for the disappeared patient was carried out on that occasion.

195. Although various searches were conducted between January 26 and February 15, 2004, there is no record that a coordinated, serious and systematic effort was made to find Luis Eduardo Guachalá Chimbo. To the contrary, it would appear that the authorities assumed that the search was, above all, the family’s responsibility. In this regard, the Court notes that the hospitalization authorization signed by Mrs. Chimbo established that “the hospital takes precautions against any possibility of escape or accident, but if this should happen it accepts no responsibility for the consequences.”<sup>314</sup> Moreover, Mrs. Chimbo was told to look for him in the homes of her family members.<sup>315</sup>

196. The Court considers that this omission is particularly serious in the case of the disappearance of a person with a disability. In this regard, expert witness Christian Courtis indicated that “[t]he alleged disappearance of a person with a disability in the custody of the State requires the authorities to exercise maximum diligence in the search, using all available means and, in particular, by a coordinated effort of the different departments and relevant

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<sup>308</sup> Rules and Regulations of the Julio Endara Hospital adopted in March 2004, article 25 (evidence file, folio 8542).

<sup>309</sup> Communication of the nursing auxiliary to the Director of the “Julio Endara” Psychiatric Hospital (evidence file, folio 40).

<sup>310</sup> *Cf.* Statement made by Zoila Chimbo during the public hearing held in this case.

<sup>311</sup> Communication of the nursing auxiliary to the Director of the “Julio Endara” Psychiatric Hospital (evidence file, folio 40).

<sup>312</sup> Record of the social worker’s search actions (evidence file, folio 7); Record of distress calls reported by the National Police (evidence file, folio 42), and National Police phone call management system(evidence file, folio 43).

<sup>313</sup> Record of the social worker’s search actions (evidence file, folio 7), and Record of the arrival time of the emergency service (evidence file, folio 44).

<sup>314</sup> *Cf.* Hospitalization authorization form (evidence file, folio 145).

<sup>315</sup> *Cf.* Sworn statement of Zoila Chimbo Jarro on September 27, 2005 (evidence file, folio 27).

institutions of the civil authority – for example, the police, social services, civil defense, local authorities, and media.”<sup>316</sup>

197. The Court appreciates that, since 2009, the State has conducted various search procedures. However, these have not been exhaustive; for example, it has never contacted other individuals who could have witnessed the events, such as the patients who were interned in the hospital at the time of Mr. Guachalá Chimbo’s disappearance.

198. All the above reveals that the State did not undertake a search effort for the presumed victim using a differentiated, serious, coordinated and systematic approach, which constituted a violation of access to justice.

### **B.3 Due diligence in the investigation**

199. The Court emphasizes that, to ensure that an investigation of human rights violations is conducted efficiently and with due diligence, all necessary measures must be taken to carry out promptly the essential and appropriate actions and inquiries to clarify the fate of the victims and to identify those responsible for the facts.<sup>317</sup> To this end, the State should provide the corresponding authorities with the logistic and scientific resources required to collect and process evidence and, in particular, the authority to access documentation and information that is relevant for the investigation of the reported facts and to obtain indications or evidence of the victims’ whereabouts.<sup>318</sup>

200. The Court has indicated that the authorities must expedite the investigation as an intrinsic legal obligation, and not shift the burden of the initiative to the family members.<sup>319</sup> This is a fundamental and conditioning element for the protection of the rights affected by such situations.<sup>320</sup> Consequently, the investigation should be conducted using all available legal means and addressed at determining the truth and the pursuit, capture, prosecution and eventual punishment of all the masterminds and perpetrators of the facts, especially when state agents are or could be involved.<sup>321</sup> Likewise, impunity must be eradicated by the determination of both the general responsibility of the State and the individual responsibilities, of a criminal or other nature, of its agents or of private individuals.<sup>322</sup>

201. In order to ensure the effectiveness of the investigation of human rights violations, omissions in gathering evidence should be avoided and logical lines of investigation followed.<sup>323</sup> The Court has stipulated that in criminal investigations concerning human rights

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<sup>316</sup> Written version of the expert opinion of Christian Curtis provided during the public hearing in this case (evidence file, folio 8506).

<sup>317</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 174, and *Case of Terrones Silva et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2018. Series C No. 360, para. 203.

<sup>318</sup> Cf. *Case of Tiu Tojin v. Guatemala. Merits, reparations and costs*. Judgment of November 26, 2008. Series C No. 253, para. 327, and *Case of Munárriz Escobar et al. v. Peru, supra*, para. 97.

<sup>319</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 177, and *Case of Munárriz Escobar et al. v. Peru, supra*, para. 98.

<sup>320</sup> Cf. *Case of the Pueblo Bello Massacre v. Colombia, supra*, para. 145, and *Case of Munárriz Escobar et al. v. Peru, supra*, para. 98.

<sup>321</sup> Cf. *Case of Myrna Mack Chang v. Guatemala. Merits, reparations and costs*. Judgment of November 25, 2003. Series C No. 101, para. 156, and *Case of Munárriz Escobar et al. v. Peru, supra*, para. 98.

<sup>322</sup> Cf. *Case of Goiburú et al. v. Paraguay. Merits, reparations and costs*. Judgment of September 22, 2006. Series C No. 153, para. 131, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 220.

<sup>323</sup> Cf. *Case of the Serrano Cruz Sisters v. El Salvador. Merits, reparations and costs*. Judgment of March 1, 2005. Series C No. 120, paras. 88 and 105, and *Case of Azul Rojas Marín et al. v. Peru, supra*, para. 194.

violations, it is necessary, *inter alia*: to gather and preserve evidence in order to help in any potential criminal investigation of those responsible; to identify possible witnesses and obtain their statements, and to determine the cause, manner, place and time of the act investigated. It is also necessary to conduct an exhaustive investigation of the scene of the crime, and ensure that rigorous tests are performed by competent professionals using the most appropriate procedures.<sup>324</sup>

202. In the instant case, the Court notes that there were flaws in the initial investigations that could not be rectified. For example, it underlines that the examination of the site of the events was carried out on February 16, 2004, approximately one month after Luis Eduardo Guachalá Chimbo's disappearance.<sup>325</sup> Since the Julio Endara Hospital was the last known location of Mr. Guachalá Chimbo it was essential to inspect this establishment immediately to obtain evidence as to what could have occurred to the presumed victim. Also, the procedure only included a general inspection of the hospital premises. There is no record that an exhaustive inspection was conducted, for example, of the room where Mr. Guachalá slept, his belongings, or the television room where he was presumably seen for the last time. The passage of time prevented this shortcoming from being rectified.

203. Moreover, the Court notes that, during the investigation, at no time did the State request the statements of other possible witnesses of what happened to Mr. Guachalá Chimbo, particularly of those who were interned in the hospital at the time of his disappearance. Nor did it adequately investigate the possibility that Mr. Guachalá had died in the hospital.

204. The foregoing reveals that the investigation conducted was not serious, effective or exhaustive. Therefore, the Court considers that the investigation was not conducted with due diligence.

#### **B.4 Effectiveness of the application for *habeas corpus***

205. The Court recalls that Articles 7(6) and 25 of the Convention refer to different spheres of protection. Article 7(6) of the Convention<sup>326</sup> has its own legal content which consists in directly protecting physical or personal liberty by a court order addressed to the corresponding authorities requiring them to bring a detainee before a judge so that the latter may examine the lawfulness of the detention and, order his release, if appropriate.<sup>327</sup> This Court has considered that the remedy of *habeas corpus* is the appropriate means to ensure liberty, control respect for the life and integrity of the individual, and prevent his disappearance or the indetermination of his place of detention.<sup>328</sup> In this regard, in its case law, the Court has already indicated that such remedies should not only exist formally in the laws, but must also

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<sup>324</sup> Cf. *Case of Juan Humberto Sánchez v. Honduras*, *supra*, para. 128, and *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 194.

<sup>325</sup> Cf. Record of search of the site of the facts, of February 17, 2004 (evidence file, folio 2421).

<sup>326</sup> Article 7(6) of the Convention establishes that: "[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies."

<sup>327</sup> Cf. *Habeas corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)*, Advisory Opinion OC-8/87, January 30, 1987. Series A No. 8, paras. 33 and 34, and *Case of Galindo Cárdenas et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of October 2, 2015. Series C No. 301, para. 44.

<sup>328</sup> Cf. Advisory Opinion OC-8/87, *supra*, para. 35, and *Case of Gutiérrez Hernández et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of August 24, 2017. Series C No. 339, para. 187.

be effective.<sup>329</sup> In light of the fact that the principle of effectiveness (*effet utile*) crosscuts the protection due to all the rights recognized in the said instrument, the Court considers, as it has on other occasions,<sup>330</sup> that – in application of the *iura novit curia* principle, to which international case law has resorted repeatedly, in the sense that the judge has the authority, and even the duty, to apply the pertinent legal provisions in a case, even when the parties have not cited them explicitly<sup>331</sup> – it must examine the arguments related to the effectiveness of the applications for *habeas corpus* in relation to the said provision. In addition, the Court has indicated that Article 25 of the Convention signifies that judicial decisions, including *habeas corpus*, must be executed appropriately.<sup>332</sup>

206. The effectiveness of a remedy supposes that, in addition to the formal existence of remedies, they provide results or answers to the violation of rights,<sup>333</sup> which means that the remedy must be appropriate to combat the violation, and that its application by the competent authority is effective.<sup>334</sup> In particular, the Court has considered the remedy of *habeas corpus* to be the appropriate means to guarantee liberty, control respect for the life and integrity of the individual, and prevent his disappearance or the indetermination of his place of detention.<sup>335</sup>

207. In the instant case, on November 29, 2004, INREDH filed an application for *habeas corpus* before the Mayor of Quito in favor of Mr. Guachalá, providing information on his disappearance in the Julio Endara Hospital.<sup>336</sup> On December 14, 2004, the Mayor of Quito ordered that Mr. Guachalá be “brought before him [...] with the corresponding detention order.”<sup>337</sup> The applicants explained that Mr. Guachalá could not be presented by the hospital and asked that the application for *habeas corpus* be granted because it was the appropriate guarantee to find a disappeared person.<sup>338</sup>

208. On April 27, 2005, INREDH filed a brief with the Constitutional Court in which it indicated that, since five months had passed without obtaining a response from the mayor, it appealed “to obtain a decision by the system for the administration of justice.”<sup>339</sup> The Constitutional Court ruled in favor of the appeal on July 6, 2006.<sup>340</sup> It stated that “the mayor, in his capacity

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<sup>329</sup> Cf. *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 129, and *Case of Gutiérrez Hernández et al. v. Guatemala, supra*, para. 187.

<sup>330</sup> Cf. *Case of Anzualdo Castro v. Peru, supra*, para. 77; *Case of Vélez Loor v. Panama, supra*, para. 123, and *Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 14, 2019. Series C No. 387, para. 135.

<sup>331</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 163, and *Case of Hernández v. Argentina, supra*, para. 54.

<sup>332</sup> Cf. *Case of Cesti Hurtado v. Peru. Merits*. Judgment of September 29, 1999. Series C No. 56, para. 133, and *Case of Acevedo Jaramillo et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of February 7, 2006. Series C No. 144, para. 218.

<sup>333</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, paras. 63, 64 and 66, and *Case of Hernández v. Argentina, supra*, para. 121.

<sup>334</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 64, and *Case of Hernández v. Argentina, supra*, para. 121.

<sup>335</sup> Cf. Advisory Opinion OC-8/87, *supra*, para. 35, and *Case of Gutiérrez Hernández et al. v. Guatemala, supra*, para. 187.

<sup>336</sup> Cf. Application for *habeas corpus* filed by INREDH before the Mayor of the Metropolitan District of Quito (evidence file, folios 3214).

<sup>337</sup> Cf. Decision of the metropolitan Mayor of Quito of December 14, 2004 (evidence file, folio 3217).

<sup>338</sup> Cf. Decision of the Third Chamber of the Constitutional Court of July 6, 2006 (evidence file, folio 1810).

<sup>339</sup> Cf. Decision of the Third Chamber of the Constitutional Court of July 6, 2006 (evidence file, folio 1810).

<sup>340</sup> Cf. Decision of the Third Chamber of the Constitutional Court of July 6, 2006 (evidence file, folio 1815).

of constitutional judge to hear the guarantee of *habeas corpus*, was obliged to ensure compliance with the said provision and, by not issuing a decision in the case submitted to him, he had left the party defenseless, a situation that must be rectified by the Constitutional Court."<sup>341</sup> The Constitutional Court also indicated that "[t]he position adopted by this Chamber, which is to leave valid alternatives open to the next of kin of the disappeared person, is extended to the Ombudsman, the Public Prosecution Service, and any other state institution that has the legal obligation to contribute its efforts to coordinate actions in order to discover the whereabouts of Luis Guachalá Chimbo; and none of them may close their investigation and execution procedures until the case has been definitively resolved."<sup>342</sup>

209. Although the Court considers that the decision of the Constitutional Court represented an adequate control of conventionality,<sup>343</sup> from the information provided to this Court, it notes that the authorities did not take any measure to comply with it immediately. To the contrary, the closure of the case was ordered 13 days after the Constitutional Court's judgment.<sup>344</sup> The State argued that the re-opening of the investigation in November 2009 was in compliance with the judgment of the Constitutional Court. However, the Court notes that, even if this were true, this re-opening was carried out more than three years after the judgment granting the *habeas corpus* and that, in 2009, only one investigation procedure was conducted.<sup>345</sup> The next procedures that appear in the case file were conducted in 2013.

210. The Court stresses that both compliance with and execution of judgments constitute components of the right of access to justice and effective judicial protection. Similarly, the effectiveness of a judgment depends on its execution because the right to judicial protection would be illusory if the State's legal system allowed a final and mandatory judicial decision to remain ineffective to the detriment of one of the parties.<sup>346</sup> Thus, the Court notes that, since no investigation actions were conducted immediately after the Constitutional Court's decision, in practice, the remedy of *habeas corpus* was ineffective. Therefore, the Court concludes that the State violated its obligation to provide an effective remedy in relation to the right to judicial protection.

## **B.5 Reasonable time and right to know the truth**

211. The Court has established that the right of access to justice requires that the events investigated are determined within a reasonable time.<sup>347</sup> The Court has indicated that the "reasonable time" to which Article 8(1) of the Convention refers should be assessed in relation to the total duration of the proceedings until the final judgment is delivered.<sup>348</sup> In addition, it

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<sup>341</sup> Cf. Decision of the Third Chamber of the Constitutional Court of July 6, 2006 (evidence file, folio 1812).

<sup>342</sup> Cf. Decision of the Third Chamber of the Constitutional Court of July 6, 2006 (evidence file, folio 1812).

<sup>343</sup> Cf. *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 239, and *Case of Fernández Prieto and Tumbeiro v. Argentina. Merits and reparations*. Judgment of September 1, 2020. Series C No. 411, para. 185.

<sup>344</sup> Cf. Pichincha 18th Criminal Court. Decision of July 19, 2006 (evidence file, folio 7261).

<sup>345</sup> Cf. Communication of the Homicide Brigade of the Pichincha Judicial Police of November 27, 2009 (evidence file, folio 1778).

<sup>346</sup> Cf. *Case of Acevedo Jaramillo et al. v. Peru, supra*, para. 219.

<sup>347</sup> Cf. *Case of Case of Radilla Pacheco v. México. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 191, and *Case of Guzmán Albarracín et al. v. Ecuador. Merits, reparations and costs*. Judgment of June 24, 2020. Series C No. 405, para. 180.

<sup>348</sup> Cf. *Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, para. 71, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 222.

has considered that, in principle, a prolonged delay constitutes, *per se*, a violation of judicial guarantees<sup>349</sup>.

212. The Court notes that there were three stages in the activities of the authorities in charge of the investigation in this case: a first stage (from 2004 to 2006) during which the initial investigation of the events was conducted and that concluded with the closure of the case, indicating that "it has not been possible to determine the existence of an offense of any kind";<sup>350</sup> a second stage, in November 2009, when the investigation was re-opened, and a third stage between 2013 and 2020. No actions whatsoever were undertaken from 2006 to 2009, when a single procedure was conducted, or from 2009 to 2013. This absence of activity can be attributed to the conduct of the authorities because the State has not justified these periods of lack of investigation actions. Therefore, the Court concludes that the State failed to comply with its obligation to conduct the investigation in a reasonable time.

213. The Court also recalls that everyone, including the next of kin of victims of human rights violations, has the right to know the truth. Consequently, the victims' next of kin and society as a whole should be informed of what happened in relation to such violations.<sup>351</sup> Even though the right to know the truth has been considered, above all, in relation to the right of access to justice,<sup>352</sup> it is comprehensive in nature and its violation may affect various rights recognized in the American Convention<sup>353</sup> depending on the context and particular circumstances of the case.

214. In the instant case, 17 years have passed and the whereabouts of Mr. Guachalá Chimbo remain unknown. Consequently, taking into account the flaws in the investigations, the Court declares the violation of the right to know the truth of the members of Luis Eduardo Guachalá Chimbo's family. In this case, as in others, this violation is included in the right of access to justice.

## B.6 Conclusion

215. In light of the fact that: (i) the State failed to initiate an investigation *ex officio* and immediately; (ii) the State failed to conduct a serious, coordinated and systematic search for the presumed victim; (iii) the State failed to investigate what happened with due diligence,

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<sup>349</sup> Cf. *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, *supra*, para. 145, and *Case of Colindres Schonenberg v. El Salvador. Merits, reparations and costs*. Judgment of February 4, 2019. Series C No. 373, para. 115.

<sup>350</sup> Decision of the Pichincha District Prosecutor of July 13, 2006 (evidence file, folio 7260).

<sup>351</sup> Cf. *Case of Trujillo Oroza v. Bolivia. Reparations and costs*. Judgment of February 27, 2002. Series C No. 92, para. 100, and *Case of Isaza Uribe et al. v. Colombia*, *supra*, para. 159.

<sup>352</sup> Cf. *Inter alia*, *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 181; *Case of Bámaca Velásquez v. Guatemala*, *supra*, para. 201; *Case of Barrios Altos v. Peru. Merits*. Judgment of March 14, 2001. Series C No. 75, para. 48; *Case of Almonacid Arellano et al. v. Chile, Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 154, para. 148; *Case of La Cantuta v. Peru. Merits, reparations and costs*. Judgment of November 29, 2006. Series C No. 162, para. 222; *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of August 12, 2008. Series C No. 186, paras. 243 and 244; *Case of the Members of the village of Chichupac and neighboring communities of the municipality of Rabinal v. Guatemala*, *supra*, para. 260, and *Case of Vásquez Durand et al. v. Ecuador*, *supra*, para. 165.

<sup>353</sup> In his study on the right to know the truth, the United Nations High Commissioner for Human Rights indicated that several declarations and international instruments had linked the right to know the truth to the right to request and obtain information, the right to justice, the obligation to combat impunity for human rights violations, the right to an effective remedy and the right to respect for private and family life. Furthermore, with regard to the families of victims, the right to the truth had been connected to the right to the integrity (mental health) of the families of victims, the right to obtain reparation in cases of gross human rights violations, the right to be free from torture and ill-treatment and, in certain circumstances, the right of children to receive special protection. Cf. Report of the Office of the United Nations High Commissioner for Human Rights: Study on the right to the truth, UN Doc. E/CN.4/2006/91 of February 8, 2006.



because there were flaws in the initial investigations that were impossible to rectify and the State has never requested the statements of other possible witnesses of what happened to Mr. Guachalá Chimbo; (iv) the remedy of *habeas corpus* was ineffective to respond to the disappearance of Mr. Guachalá, and (v) the State failed to comply with its obligation to investigate the facts in a reasonable time, the Court concludes that the State is responsible for the violation of Articles 7(6), 8(1) and 25(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Luis Eduardo Guachalá Chimbo and the members of his family, Zoila Chimbo Jarro and Nancy Guachalá Chimbo. In addition, the State violated the right to know the truth of the members of Luis Eduardo Guachalá Chimbo's family.

## **VII-5 RIGHT TO PERSONAL INTEGRITY OF THE FAMILY MEMBERS<sup>354</sup>**

### **A. Arguments of the parties and the Commission**

216. The **Commission** considered that it had been sufficiently demonstrated that, in the instant case, Mr. Guachalá's mother and his immediate family had suffered profoundly due to the disappearance of their loved one, which had been further aggravated by the failure to clarify the facts and the lack of any justice with regard to what happened. The **representatives** indicated that "Mrs. Chimbo, since she was Luis Guachalá's mother and the person who had the main responsibility for taking care of him, had been the driving force for the continuation of the search for her son," and together with "the State's permanent refusal to determine the truth of the events," this constituted a violation of her personal integrity." The **State** argued that "no evidence had been presented regarding any violation of [Article] 5 of the [Convention] in the case of Mrs. Chimbo Jarro, or Mr. Guachalá's immediate family." It indicated that "the said presumption *iuris tantum* is only constituted when the violation of the human rights of a specific person has been proved previously," and this "had not been verified" in the instant case, so that the violation of Mrs. Chimbo's mental and moral integrity could not be concluded. Nevertheless, the State stressed that it understood the "enormous concern" that the situation had caused Mrs. Chimbo and, therefore, alleged that it had "conducted numerous investigation procedures in order to clarify the circumstances of Mr. Guachalá's disappearance" and "tried to assist Mrs. Chimbo insofar as possible" by actions such as: (i) providing her with "frequent medical, psychological and dental treatment"; (ii) negotiating "financial aid so that she [could] generate her own enterprise," and (iii) ensuring that she was constantly monitored by a social worker.

### **B. Considerations of the Court**

217. The Court has asserted on numerous occasions that the family members of the victims of human rights violations may, in turn, be victims.<sup>355</sup> The Court has considered that it is possible to declare the violation of the right to mental and moral integrity of the victims' "immediate family members" and other persons with close ties to the victims due to the additional suffering they have undergone as a result of the particular circumstances of the violations perpetrated against their loved ones, and owing to the subsequent acts or omissions

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<sup>354</sup> Article 5 of the Convention.

<sup>355</sup> Cf. *Case of Castillo Páez v. Peru. Merits*. Judgment of November 3, 1997. Series C No. 34, fourth operative paragraph, and *Case of Mota Abarullo et al. v. Venezuela. Merits, reparations and costs*. Judgment of November 18, 2020. Series C No. 417, para. 130.

of the state authorities in relation to those facts,<sup>356</sup> taking into account, among other matters, the steps taken to obtain justice and the existence of close family ties.<sup>357</sup>

218. The evidence in the case file allows the Court to conclude that Zoila Chimbo Jarro and Nancy Guachalá Chimbo have experienced profound suffering and anguish affecting their mental and moral integrity owing to what happened to Luis Eduardo Guachalá Chimbo and to the actions of the state authorities in relation to the investigation of what occurred. In this regard, Zoila Chimbo Jarro, Mr. Guachalá Chimbo's mother, stated that:

We are all devastated. My daughter, she went to look for him with me and she almost died. She lost her baby because she was helping me in these efforts; she suddenly had a tummy ache because she was pregnant, and she lost her baby.<sup>358</sup>

219. On this point, Nancy Guachalá Chimbo, Luis Guachalá Chimbo's sister, stated that "during one of the searches I began to feel ill, I became dizzy. I was admitted to the emergency department of the Enrique Garcés Hospital and they told me that I was possibly one month pregnant and had lost the baby. They hospitalized me in the afternoon and then they sent me to the 'Isidro Ayora' Maternity Hospital for an ultrasound scan. The next day I went to the Maternity Hospital; they did an ultrasound scan, which confirmed an ectopic pregnancy and, later they did a D and C. The doctors told me that the tension and stress of my brother's situation was the main cause of this accident. My mother's life has ended. She gets angry and cries over everything. I admire her strength and don't know how she endures all this. [...] This situation has caused so much tension. I don't let my children go out without a telephone and I try to talk to them all the time. Owing to my brother's disappearance I am very afraid that something will happen to my children. Once, one of my children [...] broke his leg and I was with him all the time during his hospitalization because I was afraid to lose him. What happened to Luis has marked my life and I have become overprotective because I am afraid."<sup>359</sup> Also, witness Pablo Bermúdez stated that "Zoila Chimbo's suffering, the absence of her son, Luis Eduardo, this is the most significant mental suffering because, even though he disappeared many years ago, she continues to experience the suffering which is renewed every day."<sup>360</sup>

220. In relation to Martha Guachalá Chimbo, Ángel Guachalá Chimbo and Jessica Alexandra Guangaje Farinango, the Court notes that the representatives presented no evidence concerning the alleged violation of their right to personal integrity.

221. Based on the above, the Court concludes that the State violated the right to personal integrity recognized in Article 5(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Zoila Chimbo Jarro and Nancy Guachalá Chimbo.

## **VIII REPARATIONS**

222. Pursuant to the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has caused harm entails the duty to redress it adequately and that this provision reflects a customary norm that constitutes

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<sup>356</sup> Cf. *Case of Blake v. Guatemala. Merits*. Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Roche Azaña et al. v. Nicaragua. Merits and reparations*. Judgment of June 3, 2020. Series C No. 403, para. 100.

<sup>357</sup> Cf. *Case of Bámaca Velásquez v. Guatemala, supra*, para. 163, and *Case of Roche Azaña et al. v. Nicaragua, supra*, para. 100.

<sup>358</sup> Statement made by Zoila Chimbo during the public hearing held in this case.

<sup>359</sup> Affidavit made by Nancy Guachalá Chimbo on October 30, 2020 (evidence file, folios 2243 to 2245).

<sup>360</sup> Affidavit made by Pablo Bermúdez Aguinaga on October 30, 2020 (evidence file, folios 2287).

one of the fundamental principles of contemporary international law on State responsibility.<sup>361</sup> The Court has also established that the reparations must have a causal nexus to the facts of the case, the violations that have been declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must analyze the concurrence of these factors to rule appropriately and in keeping with law.<sup>362</sup>

223. Consequently, and based on the considerations on the merits and the violations of the Convention declared in this judgment, the Court will now examine the claims presented by the Commission and the victims' representatives, as well as the corresponding observations of the State in light of the criteria established in its case law on the nature and scope of the obligation to make reparation, in order to establish measures aimed at redressing the harm caused.<sup>363</sup>

#### **A. Injured party**

224. This Court considers that, pursuant to Article 63(1) of the Convention, the injured party is anyone who has been declared a victim of the violation of any right recognized in this instrument. Therefore, the Court considers that Luis Eduardo Guachalá Chimbo, Zoila Chimbo Jarro and Nancy Guachalá Chimbo are the "injured party" and, in their capacity as victims of the violations declared in Chapter VII, they will be considered beneficiaries of the reparations ordered by the Court.

#### **B. Obligation to investigate the facts and identify, prosecute and punish, as appropriate, those responsible, as well as to determine the whereabouts of the victim**

##### **B.1 Investigation, determination, prosecution and punishment, as appropriate, of those responsible**

225. The **Commission** indicated that the State should continue the investigation impartially, effectively and within a reasonable time in order to clarify the facts completely, identifying the perpetrators and imposing the corresponding sanctions. The **representatives** asked that the State initiate "the investigation, prosecution and punishment of the public officials responsible for the forced disappearance of Luis Eduardo Guachalá. Moreover, this investigation and punishment should be extended to the prosecutors, investigation agents and others who failed to act diligently, promptly and competently, and who were responsible by act or omission for violating human rights." The **State** indicated that "the investigation continues open to date; a series of measures have been take to clarify the facts and Mrs. Chimbo Jarro is legally authorized to have access to and be informed of them."

226. The Court appreciates the progress made to date by the State in order to clarify the facts. However, bearing in mind the conclusions of Chapter VII-4 of this judgment, the Court establishes that the State should continue and conduct, within a reasonable time and with the greatest diligence, all necessary investigations to determine what happened to Luis Eduardo Guachalá Chimbo in order to identify, prosecute and punish, as appropriate, those responsible pursuant to domestic law. This obligation must be complied with in keeping with the standards

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<sup>361</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, paras. 24 and 25, and *Case of Casa Nina v. Peru, supra*, para. 126.

<sup>362</sup> Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Casa Nina v. Peru, supra*, para. 126.

<sup>363</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, paras. 25 and 26, and *Case of Almeida v. Argentina. Merits, reparations and costs*. Judgment of November 17, 2020. Series C No. 416, para. 57.

established by this Court's case law,<sup>364</sup> taking into account that the victim's whereabouts have been unknown for 17 years.

## B.2 Determination of the victim's whereabouts

227. The **Commission** indicated that the State should undertake a search, using all available means, to discover the fate or whereabouts of Luis Eduardo Guachalá Chimbo or his mortal remains. If applicable, the Commission asked that the State provide adequate means of identification and proceed to return the remains to the family. The **representatives** asked that the State continue the search for Luis Eduardo Guachalá Chimbo "so that he may be given a Christian burial if his mortal remains are found." The **State** did not comment on this request.

228. In this case, it has been established that the whereabouts of Luis Eduardo Guachalá Chimbo are still unknown. The Court emphasizes that more than 17 years have passed since he disappeared. The discovery of his whereabouts is a just expectation of his family and constitutes a measure of reparation that gives rise to the correlative duty of the State to satisfy it.<sup>365</sup> The remains of a person who has died and the place where they are found may provide valuable information about what happened.<sup>366</sup> Additionally, for the families of victims of disappearance, receiving the bodies of their loved ones is extremely important because it allows them to bury their loved ones in keeping with their beliefs, and to bring closure to the mourning process that they have been experiencing over the years.<sup>367</sup>

229. Consequently, the State must continue the search for Luis Eduardo Guachalá Chimbo using all pertinent means, and make every effort to determine his whereabouts as soon as possible. This search must be conducted systematically and be assigned adequate human, technical and financial resources. A strategy for communicating with the family should be established in relation to these efforts together with a coordinated action plan to ensure their participation, awareness and presence, in keeping with the relevant guidelines and protocols.<sup>368</sup> The Court recalls that, in addition to constituting a measure of reparation, the effective search for the victim's whereabouts is an expectation that the State must meet so that the families may know the truth of what happened. This duty subsists while the uncertainty about the fate of the disappeared person continues.

230. The Court also notes that, in the instant case, it has been Zoila Chimbo who has conducted most of the searches for her son. Although the obligation to search is a state obligation that does not depend on the participation of the family members, if they are involved, the State must take measures to provide material and logistic support to the members of Mr. Guachalá Chimbo's family who participate in the search. Also, and notwithstanding the provisions of paragraph 233, if, during the search, a risk is identified to

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<sup>364</sup> See, for example,, *Case of the Human Right Defender et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 283, para. 252; *Case of the members of the Village of Chichupac and neighboring communities of the municipality of Rabinal v. Guatemala, supra*, para. 285; *Case of Vásquez Durand et al. v. Ecuador, supra*, para. 203; *Case of Favela Nova Brasília v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of 1February 6, 2017. Series C No. 333, para. 292, and *Case of Pacheco León et al. v. Honduras. Merits, reparations and costs.* Judgment of November 15, 2017. Series C No. 342, para. 194.

<sup>365</sup> Cf. *Case of Neira Alegría et al. v. Peru. Reparations and costs.* Judgment of September 19, 1996. Series C No. 29, para. 69, and *Case of Munárriz Escobar et al. v. Peru, supra*, para. 124.

<sup>366</sup> Cf. *Case of the Los Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 245, and *Case of Munárriz Escobar et al. v. Peru, supra*, para. 124.

<sup>367</sup> Cf. *Case of the Los Dos Erres Massacre v. Guatemala, supra*, para. 245, and *Case of Munárriz Escobar et al. v. Peru, supra*, para. 124.

<sup>368</sup> Cf. *Case of Contreras et al. v. El Salvador. Merits. Reparations and costs.* Judgment of August 31, 2011. Series C No. 232, para. 191, and *Case of Munárriz Escobar et al. v. Peru, supra*, para. 125.

the physical or mental health of the members of Mr. Guachalá Chimbo's family who take part in it, the State must offer comprehensive support to the victims. All protection measures should respect the beneficiaries' right to privacy. Such measures require the prior consent of beneficiaries and are subject to review at their request.<sup>369</sup>

231. If, in the course of the measures taken by the State, the victim is found deceased, the mortal remains must be delivered to his family, following reliable confirmation of his identity, as soon as possible and without any cost to them. In addition, if applicable, the State must cover the funeral costs in agreement with the family and according to their beliefs.<sup>370</sup>

### **C. Measures of rehabilitation**

232. The **Commission** indicated that, if Luis Guachalá was found alive, the State should "provide him with the mental health treatment he requires, in coordination with him, free of charge and for the time necessary [...]." The **representatives** asked the Court to order the State to provide medical and psychological care to the family members and, specifically in the case of Zoila Chimbo, they asked that she be provided with private health insurance for the rest of her life. They also indicated that, if Mr. Guachalá was found alive, he should be granted the same measure. The **State** argued that the Constitution recognized and guaranteed the right to health and to a decent life, and the existence of "state public health services [...]" universal and free of charge at all levels of care [...]." Therefore, it concluded that "Mrs. Chimbo and her family are able to request comprehensive medical care from the providers of public health care services [...] so that it is neither necessary nor pertinent that the Inter-American Court rule" on this measure.

233. Based on the arguments of the parties, the Court, in the instant case, finds it pertinent that the State grant Zoila Chimbo Jarro and Nancy Guachalá Chimbo, once, the sum of US\$7,000.00 (seven thousand United States dollars) each for the expenses of psychological and/or psychiatric treatment, as well as for medicines and other related expenses that they may require.

234. If Mr. Guachalá Chimbo is found alive, the State must provide appropriate treatments for his physical, psychological and/or psychiatric ailments that respond to his specific needs and medical record, as well as ensuring that it has his informed consent for each treatment. The treatment must be provided free of charge, immediately, opportunely, adequately and effectively, through the State's specialized health care institutions, following the victim's indication of his wishes. This means that the victim must receive a differentiated treatment as regards the procedures that have to be followed to be treated in public hospitals.<sup>371</sup> Also, the respective treatments must be provided, insofar as possible, in the centers nearest to his place of residence for as long as necessary.<sup>372</sup>

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<sup>369</sup> Cf. United Nations Committee on Enforced Disappearance, Guiding principles for the search for disappeared persons, adopted by the Committee at its 16th session (April 8 to 18, 2019), Principles 4, 5 and 14.

<sup>370</sup> Cf. *Case of Anzualdo Castro v. Peru*, *supra*, para. 185, and *Case of Isaza Uribe et al. v. Colombia*, *supra*, para. 182.

<sup>371</sup> Cf. *Case of Heliodoro Portugal v. Panama. Monitoring compliance with judgment*. Order issued by the Inter-American Court on May 28, 2010, *considerandum* 28, and *Case of Coc Max et al. (Xamán Massacre) v. Guatemala. Merits, reparations and costs*. Judgment of August 22, 2018. Series C No. 356, para. 155.

<sup>372</sup> Cf. *Case of the Las Dos Erres Massacre v. Guatemala*, *supra*, para. 270, and *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 236.

## **D. Measures of satisfaction**

### **D.1 Publication of the judgment**

235. The **representatives** asked the Court to order the Ecuadorian State to publish a summary of the judgment containing a description of the facts, the operative paragraphs and a description of the life of the victims in this case in "newspapers, websites of different state entities, and by radio and television." The **State** did not comment on this request.

236. The Court establishes, as it has in other cases,<sup>373</sup> that the State must publish, within six months of notification of the judgment: (a) the official summary of this judgment prepared by the Court, once, in the Official Gazette and in another national newspaper with widespread circulation, in an appropriate and legible font, and (b) this judgment in its entirety, available for at least one year on an official website of the State, and accessible to the public from the main webpage. The State must inform the Court immediately when it has made each of the publications ordered, irrespective of the one-year time frame to present its first report established in the operative paragraphs of the judgment.

### **D.2 Public act to acknowledge international responsibility**

237. The **representatives** asked that the State organize a public act to acknowledge international responsibility "in a solemn public ceremony, [...] presided by the President of the Republic and in the presence of the Prosecutor General, the details of which must be agreed with the victims, their family members and representatives, and for which the State must assume the expenses." They asked that, during this act, reference be made to the human rights violations committed to the detriment of Luis Eduardo Guachalá and his family and that, the State explicitly declare that "the violations found in this case are serious human rights violations, inadmissible from any perspective and in any circumstance." Also, during the act "the authorities present must issue a public apology, and we ask that the apology addressed to the family members of the direct victims in this case be disseminated by the media." This act should be held in the Julio Endara Psychiatric Hospital.

238. The **State** argued that "since the publication of the judgment is, in itself, a measure of satisfaction, the public act to acknowledge international responsibility and additional dissemination activities such as those requested, are not necessary." It therefore concluded that the Court "should refrain from ordering them."

239. The Court finds it necessary to establish, in order to redress the harm caused to the victims and to avoid facts such as those of this case being repeated, that the State must conduct a public act to acknowledge international responsibility in relation to the facts of this case. During the act, reference must be made to the human rights violations declared in this judgment. In addition, it must be held in a public ceremony in the presence of senior State officials and of Mr. Guachalá Chimbo's next of kin or their representatives.<sup>374</sup>

240. The State and the victims and/or their representatives must coordinate the way in which the public act will be held, as well as details such as the date and place.<sup>375</sup>

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<sup>373</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Casa Nina v. Peru, supra*, 133.

<sup>374</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs, supra*, para. 81, and *Case of Guzmán Albarracín et al. v. Ecuador, supra*, para. 232.

<sup>375</sup> Cf. *Case of Radilla Pacheco v. México, supra*, para. 353, and *Case of Guzmán Albarracín et al. v. Ecuador, supra*, para. 233.

## **E. Guarantees of non-repetition**

### **E.1 Adaptation of existing laws**

241. The **Commission** asked the Court to order Ecuador to take measures that include: “a review of domestic legislation and deep-rooted practices in relation to decision-making procedures for persons with disabilities, to ensure that [...] the legal framework is compatible with international standards.”

242. The **State** indicated that “the Ecuadorian authorities are already implementing the laws in force and all the measures required to ensure the effective enjoyment of rights as has been described, so that the measures of non-repetition requested are unnecessary in light of domestic law and the corresponding implementation measures already in force in Ecuador.”

243. The Court notes that, in its answering brief, the State underscored various legislative measures that it had taken with regard to the protection of persons with disabilities, including in its Constitution, the Organic Health Act and the Organic Disabilities Act. The State also signed the Ministerial Decision that facilitated the National Strategic Plan on Mental Health, strategic guideline No. 2 of which establishes that the process of de-institutionalization should be undertaken, and is promoting the community mental health model. The Court considers that these measures reveal significant progress to adapt domestic law to the obligation to ensure the right to health of persons with disabilities without discrimination. However, the Court notes that the State should take measures to ensure complete application of the social model to address disabilities, based on the obligations that arise from the American Convention, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, and the Convention on the Rights of Persons with Disabilities.

244. Regarding informed consent, the State has not demonstrated that it has regulated the obligation to provide the necessary support for persons with disabilities to be able to take the pertinent decisions with regard to the medical treatments they wish to receive. To the contrary, during these international proceedings, the State indicated that “[i]t is evident that, in the case of children and adolescents, and persons with disabilities, it is the family who provides this consent.”

245. Based on the foregoing, the Court finds it desirable to order the State to regulate specifically, within two years of notification of this judgment, the international obligation to provide support to persons with disabilities so that they are able to give their informed consent to medical treatments, pursuant to paragraphs 110 to 139 of this judgment. The State must explicitly establish the obligation to provide support to persons with disabilities in order to ensure the right to health without discrimination.

### **E.2 Training**

246. The **Commission** asked that the State “adopt specific measures to eradicate coercion and forced psychiatric treatments, as well as to ensure informed consent in matters relating to mental health in keeping with the standards described in [its] report.”

247. The **representatives** requested implementation of “human rights training programs for personnel of the National Police (DINASED), the Prosecutor General’s Office, the Ombudsman’s Office, the Ministry of Public Health, the Human Rights Secretariat, and other competent public institutions related to this specific case, and especially for all the staff of public and private psychiatric hospitals in Ecuador.” They indicated that the “training programs should include, among other topics, those relating to the international standards on disappearance of persons and enforced disappearance and, in general, on human rights related to the relevant case law of the inter-American system. These programs or courses must be permanent and addressed at the aforementioned officials of the public system at all

hierarchical levels. In addition, information on the case and on enforced disappearances in the country must be included in the core curricula and study plans in order to expand and increase awareness of the Ecuadorian historical memory concerning serious human rights violations.

248. The **State** indicated that the Ministry of Health had a system of virtual training modules through which “it has designed and executed workshops on the rights of persons belonging to groups requiring priority attention, and health care for victims of serious human rights violations and crimes against humanity. Professionals in the fields of medicine, psychology, nursing and social work, who perform functions at different levels of health care, participate in these training modules and this allows care to be improved in keeping with standards of quality and friendliness, raises the awareness of the personnel concerning the needs of vulnerable groups and for priority care, and prevents human rights violations.”

249. This Court appreciates the efforts made by the State to train personnel in this way. However, it stresses that States have the obligation to guarantee that “[a]ll health and medical personnel should ensure appropriate consultation that directly engages the person with disabilities. They should also ensure, to the best of their ability, that assistants or support persons do not substitute or have undue influence over the decisions of persons with disabilities.”<sup>376</sup> Therefore, the State should adopt permanent education and training programs for medical students and medical professionals (including psychiatrists), as well as all the personnel who comprise the health care and social security systems, on issues of informed consent, the obligation to provide the necessary support for persons with disabilities to be able to decide in an informed manner whether or not they wish to receive a medical treatment, and the obligation to ensure that the appropriate consultation is carried out directly with the person with a disability.

250. To this end, the Court finds it pertinent to order the State to design and implement, within one year and once only, a training course on informed consent and the obligation to provide support to persons with disabilities for the medical staff and health workers of the Julio Endara Hospital.

251. Furthermore, the Court orders the State to design a publication or leaflet that outlines in a clear, accessible and reader-friendly way the right of persons with disabilities to receive medical care, as well as the obligations of the medical staff to provide care to persons with disabilities, which should specifically mention prior, free, full and informed consent and the obligation to provide the necessary support to persons with disabilities. This publication must be made available in all Ecuador’s public and private hospitals for both patients and medical personnel, as well on the website of the Ministry of Public Health. The State must also make an informational video on the right of persons with disabilities to receive medical care, as well as the obligations of the medical personnel to provide care to persons with disabilities, and in which specific mention is made of prior, free, full and informed consent and the obligation to provide the necessary support to persons with disabilities. This video must be available on the website of the Ministry of Public Health and, insofar as possible, must be shown in public hospitals. The State must inform the Court each year on the implementation of this measure for three years once this measure has been implemented.

### **E.3 Action protocol for public health officials when a disappearance occurs**

252. The **representatives** asked the Court to order “the issue of a specific legal instrument on investigation, search and localization in cases of disappearances from public institutions.” The **State** indicated that, in 2020, it had adopted the Organic Law on Actions in Cases of

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<sup>376</sup> Cf. Committee on the Rights of Persons with Disabilities, General Comment No. 1: Article 12: Equal recognition before the law, May 19, 2014, UN Doc. CRPD/C/GC/1, para. 41.



Disappeared or Missing Persons, which “includes the immediate search for individuals following a report, immediate attention, and that the search continues until the remains of the persons appear [and] stipulates the creation of a national list of disappeared persons.” Consequently, Ecuador considered that the measure of reparation requested by the representatives was unnecessary.

253. In the instant case, the Court has considered it proved that the public officials who worked in the Julio Endara Hospital did not act with due diligence by reporting the disappearance of Mr. Guachalá Chimbo to the competent authorities (*supra* paras. 187 to 198). The Court notes that, since the facts of this case occurred, the State has taken various measures, including the publication of the Organic Law on Actions in Cases of Disappeared or Missing Persons on January 28, 2020. The Court notes that this law, even though it constitutes an important step forward in the non-repetition of facts such as those that occurred in this case, lacks specific provisions regarding the disappearance of persons in public hospitals. Therefore, the Court considers it desirable that the State develop, within one year, an action protocol for cases of disappearances of persons hospitalized in public health centers that includes the standards developed in this judgment on the obligation to notify the competent authorities so that they open an investigation (*supra* paras. 187 to 198).

## **F. Compensation**

254. The **Commission** asked the Court to order Ecuador “to make integral reparation for the human rights violations declared in the report, for both the pecuniary and the non-pecuniary aspects,” and “to order measures of financial compensation and satisfaction.”

### **F.1 Pecuniary damage**

255. The **representatives** asked the Court to establish, in equity, consequential damage to cover “the actions undertaken by the family to find the victim from the day of his disappearance, which involved traveling to different parts of the country, as well as different legal procedures and measures.” They indicated that “it has not been possible to authenticate these expenses owing to the time that has passed and the impossibility of presenting documentation for all these expenses.”

256. The **State** emphasized that the representatives had not “justified their claim with any evidence.” However, it indicated that “if the Court should so decide, it should calculate this compensation based on the principle of equity.”

257. In its case law, this Court has developed that pecuniary damage supposes the loss of, or detriment to, the victims’ income, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case.<sup>377</sup>

258. The Court notes that, even though no expense vouchers were presented, it can be presumed that the members of Mr. Guachalá Chimbo’s family incurred different expenses due to his disappearance. Accordingly, the Court finds it reasonable to establish the sum of US\$15,000.00 (fifteen thousand United States dollars) as compensation for consequential damage, and this must be delivered to Zoila Chimbo Jarro.

### **F.2 Non-pecuniary damage**

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<sup>377</sup> Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Casa Nina v. Peru, supra*, para. 143.

259. The **representatives** asked the Court to order the payment of US\$150,000 to Zoila Chimbo and US\$5,000 to each of Luis Eduardo Guachalá Chimbo's siblings for non-pecuniary damage.

260. The **State** argued that the representatives "support this claim for compensation on sums decided in some precedents that are not applicable to this case." It indicated that "given the failure to substantiate the presumed specific effects on the members of Luis Eduardo Guachalá's family, [... it] asks the Court to reject the claim for non-pecuniary damage set for in the pleadings and motions brief. However, "if the Court should decide that the State should make pecuniary reparation for this concept, it asks that the Court establish this based on the principle of equity."

261. In its case law, the Court has developed the concept of non-pecuniary damage, and has established that this may include both the suffering and afflictions caused to the direct victim and his close family, and the impairment of a value of great significance for the individual, as well as alterations of a non-pecuniary nature in the living conditions of the victim or his family.<sup>378</sup>

262. Considering the circumstances of this case, the violations committed, the suffering caused and experienced to different degrees, the time that has passed, the denial of justice, and the change in the living conditions of some family members, the proven violations of the personal integrity of the members of the victim's family and the other non-pecuniary consequences they suffered, the Court will establish compensation for non-pecuniary damage in favor of the victims.

263. First, the Court considers that the circumstances that surrounded the hospitalization, treatment and disappearance of Luis Eduardo Guachalá Chimbo caused profound fear and suffering. In light of this criterion, the Court considers that Luis Eduardo Guachalá Chimbo should be compensated for non-pecuniary damage and finds reasonable the payment of US\$100,000.00 (one hundred thousand United States dollars). This amount to be delivered to Zoila Chimbo Jarro.

264. Second, the Court considers that the lives of Zoila Chimbo Jarro and Nancy Guachalá were affected as a result of the disappearance of Luis Eduardo Guachalá Chimbo and that they have experiences great suffering that has had an impact on their life projects. Consequently, the Court finds it reasonable to establish the sum of US\$80,000.00 (eighty thousand United States dollars) for Zoila Chimbo Jarro, Luis Eduardo Guachalá Chimbo's mother, and US\$5,000.00 (five thousand United States dollars) for Nancy Guachalá Chimbo, Luis Eduardo Guachalá Chimbo's sister, for non-pecuniary damage.

### **G. Other measures requested**

265. The **Commission** asked the Court to order Ecuador to "draw up a comprehensive plan to review the policy of hospitalizing persons in public mental health institutions and tailor it to de-institutionalization," and "to incorporate the components of the right to mental health in general health strategies and plans, prioritizing services of psychosocial and community care." The **representatives** asked that: (1) the name of the Julio Endara Psychiatric Hospital be changed to "Luis Eduardo Guachalá"; (2) the name of a street in the city be changed to "Zoila Chimbo"; (3) an audiovisual documentary be made of the facts of the case; (4) the State present, for at least the following five years, "reports to the Inter-American Court on investments and progress in the area of mental health and forced disappearance, with the possibility that the [Commission] and civil society may present information contrary to that

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<sup>378</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*, *supra*, para. 84, and *Case of Casa Nina v. Peru*, *supra*, para. 151.

presented by the State [...]”; (5) a business unit be built for Mrs. Chimbo so that she can start a business; (6) the State “amend the laws in force and develop the competences of the relevant institutions for the control and oversight of psychiatric clinics [...]”; (7) reparation be made for the non-pecuniary damage caused to Carmen Guachalá Chimbo, Luis Medardo Farinango Chimbo, Leonardo Farinango Chimbo and Diana Farinango, and (8) the State build a two-story house on Zoila Chimbo’s land.

266. The Court notes that, regarding the compensation requested for non-pecuniary damage to Carmen Guachalá Chimbo, Luis Medardo Farinango Chimbo, Leonardo Farinango Chimbo and Diana Farinango, these persons were not considered victims in this case (*supra* para. 25); consequently, it is inadmissible to order reparations in their favor. Regarding the other requests, the Court considers that the delivery of this judgment and the reparations ordered in this chapter are sufficient and adequate to redress the violations suffered by the victims, and therefore does not find it necessary to order those measures.

#### **H. Costs and expenses**

267. The **representatives** indicated that the PUCE Human Rights Center and the Fundación de Asesoría Regional en Derechos Humanos (INREDH) had defended Luis Eduardo Guachalá and his family before the domestic instances and before the inter-American system since 2004. They indicated that the “costs arising from their professional activities, as well as the costs relating to the collection of evidence and the notarization of documents had been covered by the organizations and, in the instant case, this has represented an average of US\$10,000 a year.” They also asked that the expenses incurred to attend the hearing on merits before the Inter-American Commission be taken into consideration; these included the issue of passports and United States visas for Mrs. Chimbo and two INREDH lawyers, the airfares, tickets, hotel accommodation, transport and food. They indicated that the participation of Mrs. Chimbo and the INREDH lawyers cost US\$5,862.44; while the participation of the PUCE Human Rights Center cost US\$3,222.07.

268. The **State** stressed that the representatives had not set forth “their arguments relating them to vouchers, as the Court requires.” It also indicated that “it is not for the State to assume the expenses corresponding to passport and visa procedures for persons who have a dependent relationship with INREDH and the PUCE Human Rights Center, and whose work supposedly carried out in relation to these inter-American proceedings has not been justified.” Lastly, it indicated that five persons attended the hearing before the Inter-American Commission to exercise the defense of the presumed victim, without any “evidence of the strict need for the presence of that number of representatives for that particular procedure.”

269. The Court reiterates that, pursuant to its case law,<sup>379</sup> costs and expenses form part of the concept of reparation, because the activities deployed by the victims in order to obtain justice at both the national and the international level entail disbursement that must be compensated when the international responsibility of the State has been declared in a judgment convicting it. Regarding the reimbursement of costs and expenses, it corresponds to the Court to make a prudent assessment of their scope, which includes the expenses generated before the authorities of the internal jurisdiction, as well as those incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human

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<sup>379</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Casa Nina v. Peru*, *supra*, para. 157.

rights. This assessment may be made based on the equity principle and taking into account the expenses indicated by the parties, provided their *quantum* is reasonable.<sup>380</sup>

270. The Court has indicated that “the claims of the victims or their representatives for costs and expenses, and the evidence that support these claims should be submitted to the Court at the first procedural moment granted to them – that is, in the pleadings and motions brief – without prejudice to those claims being updated subsequently, based on the new costs and expenses incurred as a result of the proceedings before this Court.”<sup>381</sup> In addition, the Court reiterates that it is not sufficient to merely forward evidentiary documents; rather, the parties are required to include arguments that relate the evidence to the fact that it is considered to represent and that, in the case of financial disbursements, the items and their justification is clearly established.<sup>382</sup>

271. Taking into the account the sum requested by the Fundación de Asesoría Regional en Derechos Humanos (INREDH) and the expense vouchers presented, the Court decides to establish, in equity, the payment of a total of US\$10,000.00 (ten thousand United States dollars) for costs and expenses in favor of the Fundación de Asesoría Regional en Derechos Humanos (INREDH). In addition, the Court notes that the PUCE Human Rights Center merely presented financial reports from the Budgets Department, without vouchers for the amounts established in the said financial reports. Nevertheless, it is reasonable to presume that the victims and their representatives also incurred expenses during the processing of the case before the Commission; therefore, the Court finds it pertinent to reimburse reasonable litigation expenses,<sup>383</sup> which it establishes, in equity, in the sum of US\$10,000.00 (ten thousand United States dollars) for costs and expenses in favor of the PUCE Human Rights Center. These sums must be delivered directly to the said organizations. At the stage of monitoring compliance with this judgment, the Court may order the State to reimburse the victims or their representatives any reasonable expenses they incur at that procedural stage.<sup>384</sup>

### **I. Reimbursement of expenses to the Victims’ Legal Assistance Fund**

272. In the instant case, in a note of March 3, 2020, the President of the Court declared admissible the request presented by the presumed victims’ family, through their representatives, to access the Legal Assistance Fund. The order of the President of October 9, 2020, granted the necessary financial assistance “to cover the expenses of the notarizing the written statements of Nancy Guachalá, Francisco Hurtado Caicedo and Elena Palacio van Isschot.”

273. On March 2, 2021, the disbursement report was sent to the State as established in Article 5 of the Rules for the Operation of the said Fund. In this way, the State had the opportunity to present its observations on the disbursements made in this case, which amounted to US\$60.74 (sixty United States dollars and seventy-four cents).

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<sup>380</sup> Cf. *Case of Garrido and Baigorria v. Argentina*, *supra*, para. 82, and *Case of Casa Nina v. Peru*, *supra*, para. 157.

<sup>381</sup> Cf. *Case of Garrido and Baigorria v. Argentina*, *supra*, para. 79, and *Case of Olivares Muñoz et al. v. Venezuela*, *supra*, para. 193.

<sup>382</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*, *supra*, para. 277, and *Case of Olivares Muñoz et al. v. Venezuela*, *supra*, para. 193.

<sup>383</sup> Cf. *Case of Órdenes Guerra et al. v. Chile. Merits, reparations and costs*. Judgment of November 29, 2018. Series C No. 372, para. 140, and *Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2020. Series C No. 409, para. 166.

<sup>384</sup> Cf. *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs*. Judgment of September 1, 2010. Series C No. 217, para. 29, and *Case of Casa Nina v. Peru*, *supra*, para. 158.

274. The State indicated that it had no comments to make in this regard.

275. Based on the violations declared in this judgment, the Court orders the State to reimburse the Fund the sum of US\$60.74 (sixty United States dollars and seventy-four cents). This sum must be reimbursed within six months of notification of this judgment.

**J. Method of compliance with the payments ordered**

276. The State shall make the payments of compensation for rehabilitation, pecuniary and non-pecuniary damage, and to reimburse costs and expenses established in this judgment directly to the persons and organizations indicated herein within one year of notification of this judgment, without prejudice to making the complete payment before this, pursuant to the following paragraphs.

277. If the beneficiaries are deceased or die before they receive the respective amount, this shall be delivered directly to their heirs, pursuant to the applicable domestic law.

278. The State shall comply with the monetary obligations by payment in United States dollars.

279. If, for causes that can be attributed to the beneficiaries it is not possible to pay the amount established within the indicated time frame, the State shall deposit the said amount in their favor in a deposit certificate or account in a solvent Ecuadorian financial institution, in United States dollars, and in the most favorable financial conditions permitted by banking law and practice. If the corresponding amount is not claimed, after ten years the amounts shall be returned to the State with the interest accrued.

280. The sums allocated in this judgment as measures of reparation for damage and to reimburse costs and expenses must be delivered in full, without any deductions arising from possible taxes or charges.

281. If the State should fall in arrears, including in the reimbursement of expenses to the Victims' Legal Assistance Fund, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Ecuador.

**IX  
OPERATIVE PARAGRAPHS**

282. Therefore,

**THE COURT**

**DECLARES,**

By five votes to one that:

1. The State is responsible for the violation of the rights to recognition of juridical personality, life, personal integrity, personal liberty, dignity and privacy, access to information, equality before the law and health, in accordance with Articles 3, 4, 5, 7, 11, 13, 24 and 26 of the American Convention on Human Rights, in relation to the obligation to respect and to ensure the rights without discrimination and the duty to adopt domestic legal provisions established in Articles 1(1) and 2 of this instrument, to the detriment of Luis Eduardo Guachalá Chimbo, pursuant to paragraphs 96 to 180 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

Unanimously, that:

2. The State is responsible for the violation of the rights to an effective remedy, judicial guarantees and judicial protection, recognized in Articles 7(6), 8(1) and 25(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Luis Eduardo Guachalá Chimbo and his next of kin, Zoila Chimbo Jarro and Nancy Guachalá Chimbo. In addition, the State violated the right to know the truth of these family members of the disappeared victim. All of this pursuant to paragraphs 184 to 215 of this judgment.

Unanimously, that:

3. The State is responsible for the violation of the right to personal integrity, recognized in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Zoila Chimbo Jarro and Nancy Guachalá Chimbo, pursuant to paragraphs 217 to 221 of this judgment.

**AND ESTABLISHES:**

Unanimously, that:

4. This judgment constitutes, *per se*, a form of reparation.

5. The State shall continue or conduct, within a reasonable time and with the greatest diligence, all necessary investigations to determine what happened to Luis Eduardo Guachalá Chimbo in order to identify, prosecute and punish, as appropriate, those responsible, pursuant to the provisions of paragraph 226.

6. The State shall conduct, as soon as possible, a rigorous and systematic search with adequate human, technical and financial resources, during which it makes every effort to determine the whereabouts of Luis Eduardo Guachalá Chimbo, all of this pursuant to paragraphs 228 to 231.

7. The State shall grant Zoila Chimbo Jarro and Nancy Guachalá Chimbo, once, the sum established in paragraph 233 of the judgment, for the expenses of psychological and/or psychiatric treatment.

8. The State, if Mr. Guachalá Chimbo is found alive, shall provide Luis Eduardo Guachalá Chimbo with medical and psychological and/or psychiatric treatment, free of charge and immediately, opportunely, adequately and effectively, pursuant to paragraph 234 of this judgment

9. The State shall make the publications indicated in paragraph 236 of this judgment.

10. The State shall hold a public act to acknowledge its international responsibility, as indicated in paragraphs 239 and 240 of this judgment.

11. The State shall regulate the international obligation to provide support to persons with disabilities so that they are able to give their informed consent to medical treatments, pursuant to paragraph 245 of this judgment.

12. The State shall design and implement a training course on informed consent and the obligation to provide support to persons with disabilities for the medical and nursing staff of the Julio Endara Hospital, pursuant to paragraph 250 of this judgment.

13. The State shall design a publication or leaflet that outlines in a clear, accessible and reader-friendly way the right of persons with disabilities to receive medical care, which should

specifically mention prior, free, full and informed consent and the obligation to provide the necessary support to persons with disabilities, pursuant to paragraph 251 of this judgment.

14. The State shall make an informational video on the rights of persons with disabilities to receive medical care, as well as the obligations of the medical professionals to provide care to persons with disabilities, and which specifically mentions prior, free, full and informed consent and the obligation to provide the necessary support to persons with disabilities, pursuant to paragraph 251 of this judgment.

15. The State shall develop an action protocol for cases of the disappearance of persons hospitalized in public health centers, pursuant to paragraph 253 of this judgment.

16. The State shall pay the sums established in paragraphs 258, 263, 264 and 271 of this judgment as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses, pursuant to paragraphs 276 to 281 of the judgment.

17. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the sum disbursed during the processing of this case, pursuant to paragraph 275 of this judgment.

18. The State, within one year of notification of this judgment, shall provide the Court with a report on the measures adopted to comply with it, without prejudice to the provisions of paragraph 236 of this judgment.

19. The Court will monitor full compliance with this judgment, in exercise of its authority and in fulfillment of its obligations under the American Convention on Human Rights, and will consider this case closed when the State has complied fully with its provisions.

Judges Eugenio Raúl Zaffaroni and Ricardo Pérez Manrique advised the Court of their concurring opinions. Judge Eduardo Vio Grossi advised the Court of his partially dissenting opinion and Judge Humberto Sierra Porto informed the Court of his concurring and partially dissenting opinion.

DONE, at San José, Costa Rica, in a virtual session, on March 26, 2021, in the Spanish language.

I/A Court HR. *Case of Guachalá Chimbo et al. v. Ecuador*. Merits, reparations and costs. Judgment of March 26, 2021. Judgment adopted virtually at San José, Costa Rica.

Elizabeth Odio Benito  
President

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri  
Secretary

So ordered,

Elizabeth Odio Benito  
President

Pablo Saavedra Alessandri  
Secretary



**PARTIALLY DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI**  
**INTER-AMERICAN COURT OF HUMAN RIGHTS**  
**CASE OF GUACHALÁ CHIMBO *ET AL.* V. ECUADOR**  
**JUDGMENT OF MARCH 26, 2021**  
***(Merits, reparations and costs)***

**I. INTRODUCTION**

1. This dissenting opinion concerning the above judgment<sup>1</sup> is issued to set out the reasons for my discrepancy with the mention made in the first operative paragraph of the judgment<sup>2</sup> to Article 26<sup>3</sup> of the American Convention on Human Rights<sup>4</sup> in relation to the judicialization of the right to health.

**II. PRELIMINARY OBSERVATION**

2. This discrepancy relates to the provisions of two articles of the Rules of Procedure of the Inter-American Court of Human Rights.<sup>5</sup> The first, Article 16(1), indicates that:

The President shall present, point by point, the matters to be voted upon. Each judge shall vote either in the affirmative or the negative; there shall be no abstentions.

3. This means that the different operative paragraphs of a judgment should be voted on separately, one by one, but also that the respective vote adopts or rejects each of them as a whole; in other words, it is not possible to vote affirmatively or adopt part of the operative paragraph in question and negatively or reject the other part of the said paragraph.

4. The other provision is the first phrase of Article 65(2) of these rules which indicates that:

Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting.

5. This provision follows the same rationale as the preceding one; namely, that the vote of the judge may concur with what is adopted in the respective operative paragraph or dissent from it; in other words, concur or dissent from it as a whole, because this is how it was adopted or rejected. And this is so because the concurring or dissenting opinion is only explained or understood in relation to what has been adopted or rejected, respectively.

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<sup>1</sup> Hereinafter, the judgment.

<sup>2</sup> "The State is responsible for the violation of the rights to recognition of juridical personality, life, personal integrity, personal liberty, dignity and privacy, access to information, equality before the law and health, in accordance with Articles 3, 4, 5, 7, 11, 13, 24 and 26 of the American Convention on Human Rights, in relation to the obligations to respect and to ensure the rights without discrimination and the obligation to adopt domestic legal provisions established in Articles 1(1) and 2 of this instrument, to the detriment of Luis Eduardo Guachalá Chimbo, pursuant to paragraphs 96 to 180 of this judgment."

<sup>3</sup> Hereinafter, Article 26.

<sup>4</sup> Hereinafter, the Convention.

<sup>5</sup> Hereinafter, the Court.

6. Therefore, the harmonious interpretation of the two articles transcribed above leads to the conclusion that, since the pertinent operative paragraph is adopted as a whole by the affirmative vote, it is neither admissible nor logical that the eventual corresponding concurring opinion also dissents from it, but only as regard one part of it. This is contrary to both the letter and the spirit of the provisions cited.

7. The dissenting opinion may be total because it dissents from what is established in all the operative paragraphs of the judgment or partial if the discrepancy only relates to the contents of one or more operative paragraphs, which usually should not be most of them.

8. Regarding the situation in this case, this would be different if the judgment had included a special operative paragraph to address the pertinent part of Article 26, as occurred on another occasion;<sup>6</sup> in other words, if the Court had dedicated one operative paragraph exclusively to the violation of that article. This would have allowed me to concur with the adoption of all the operative paragraphs except for the one relating to Article 26. However, the decision taken in the first operative paragraph of the judgment obliges anyone who disagrees with the inclusion of Article 26 with the other articles of the Convention violated by the State of Ecuador to vote negatively with regard to all of them. The judgment disregards the rules issued by the Court itself in relation to its functioning and this is regrettable.

### **III. GENERAL COMMENTS ON ARTICLE 26**

9. That said, regarding general reflections on Article 26, it should first be indicated that the considerations contained in the separate opinions issued by the undersigned are reiterated<sup>7</sup> concerning the reference made in the corresponding judgments to this article of the Convention.

10. Consequently, at this points, it is particularly relevant to indicate that this text does not refer to the existence of the right to health or to that of the other economic, social and cultural rights. The existence of such rights is not the purpose of this opinion. Rather, its purpose is merely to maintain that the Court lacks competence to examine violations of those rights, based on the provisions of Article 26; in other words, the presumed violations of those rights are not justiciable before the Court.

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<sup>6</sup> *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs.* Judgment of February 6, 2020. Series C No. 400. Third operative paragraph: "The State is responsible for the violation of the right to take part in cultural life as this relates to cultural identity, a healthy environment, adequate food and water, established in Article 26 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of the 132 indigenous communities indicated in Annex V to this judgment, pursuant to paragraphs 195 to 289."

<sup>7</sup> Dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Casa Nina v. Peru, preliminary objections, merits, reparations and costs.* Judgment of November 24, 2020; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of the Workers of the Fireworks Factory of Santo Antonio de Jesús and their families v. Brazil, preliminary objections, merits, reparations and costs.* Judgment of July 15, 2020; Dissenting opinion of Judge Eduardo Vio Grossi, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs.* Judgment of February 6, 2020; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights; *Case of Hernández v. Argentina, preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights; *Case of Muelle Flores v. Peru, preliminary objections, merits, reparations and costs,* Judgment of March 6, 2019; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of San Miguel Sosa et al. v. Venezuela, merits, reparations and costs.* Judgment of February 8, 2018; Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights; *Case of Lagos del Campo v. Peru, preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017, and Separate opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of the Dismissed Employees of PetroPeru et al. v. Peru, preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017.

11. This does not mean, however, that violations of those rights cannot be justiciable before the corresponding internal jurisdiction. This will depend on the provisions of the respective domestic laws, a matter that, in any event, falls outside the purpose of this opinion and that is part of the internal, domestic and exclusive jurisdiction of the States Parties to the Convention.<sup>8</sup>

12. What this opinion asserts is that it is necessary to distinguish between human rights in general, which, in all circumstances, must be respected owing to the provisions of international law, and those that, in addition, may be justiciable before an international jurisdiction. In this regard, it should be noted that there is no universal court of human rights. Moreover, not all the regions of the world have an international human rights jurisdiction. There are only three international human rights courts; namely, the Inter-American Court of Human Rights, the European Court of Human Rights and the African Court of Human and Peoples' Rights.

13. Thus, the fact that a State has not accepted to be subject to an international jurisdictional human rights instance does not mean that such rights do not exist and that they cannot eventually be violated. Besides, the State must respect them even though there is no international court that can be resorted to if they are violated and, especially, if they are established in a treaty of which that State is a party. In this eventuality, international society can use diplomatic or political means to achieve the restoration of respect for the said human rights. Thus, the international recognition of human rights is one matter and quite another the international instrument used to achieve the restoration of their exercise in situations in which they are violated.

#### **IV. THE INTERPRETATION OF ARTICLE 26**

14. Given that the Convention is a treaty between States and, consequently, governed by public international law,<sup>9</sup> the reasons that underlie this discrepancy lie, above all, in the interpretation that, according to the means for interpretation of treaties established in the Vienna Convention, should be made of Article 26. These means, that must be concordant or harmonious, without one prevailing over the others, relate to good faith, the ordinary meaning to be given to the terms of the treaty, their context, and its object and purpose.<sup>10</sup>

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<sup>8</sup> "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." Permanent Court of International Justice, *Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco*, Series B No. 4, p. 24. Protocol No. 15 amending the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1: "At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows:

"Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

<sup>9</sup> Art. 2 of the Vienna Convention: "Use of terms. 1. For the purposes of the present Convention: (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

<sup>10</sup> "General rule of interpretation. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the

15. Therefore, these means must be used to interpret Article 26, which establishes:

Progressive Development. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means and subject to available resources, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

**a. Good faith**

16. The method based on good faith means that what was agreed by the States Parties to the treaty in question should be understood on the basis of what they really had the intention of agreeing on, so that this would be applied faithfully and have practical effects. Thus, good faith is closely linked to the principle of "*pacta sunt servanda*" established in Article 26 of the Vienna Convention.<sup>11</sup>

17. From this perspective, it is particularly evident that the practical effects of that article are that the States Parties to the Convention really adopted the provisions in order to achieve progressively the full realization of the rights derived from the OAS standards that it indicates and all of this in keeping with the available resources. Therefore, the State obligation established in Article 26 is to adopt measures to make the said rights effective and not to ensure that those rights really are effective. The obligation is one of conduct and not of result.

18. In this regard, it is necessary to call attention to the fact that what Article 26 establishes is similar to the provisions of Article 2 of the Convention; that is, that the States commit, in the former, to adopt measures in order to achieve progressively the full realization of the rights derived from the OAS standards mentioned and, in the latter, to adopt measures if the exercise of the rights established in Article 1 of the Convention are not guaranteed,<sup>12</sup> although the two provisions differ in that the former conditions compliance with its contents to the availability of the corresponding resources.

19. On this basis, it is necessary to ask oneself why Article 26 was adopted and, therefore, why the rights it refers to were not addressed in the same way as the civil and political rights. The answer based on good faith can only be that the Convention established that, although both types of human rights are closely linked owing to the ideal to which they aspire which

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application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

32. Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

<sup>11</sup> "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

<sup>12</sup> Art. 2: "Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

is, according to its Preamble, that of creating the conditions to allow their “enjoyment,”<sup>13</sup> they are, however, different and, particularly, developed differently in the sphere of public international law, so that they should be treated differently, which is precisely what the Convention does since it also indicates this in its Preamble.<sup>14</sup>

20. Therefore, and in keeping with the principle of good faith, it should be underlined that the fact that the Preamble to the Convention asserts that everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights does not infer, as the judgment does, that the practical effects of Article 26 are that the violation of the rights to which it refers are justiciable before the Court, but rather that the State should adopt the pertinent measures to realize those rights progressively.

21. Additionally, it is essential to indicate that it is surprising that the judgment has not referred more extensively, in any part, to good faith as an element that is as essential as the other elements for the interpretation of treaties contemplated in Article 31(1) of the Vienna Convention. Likewise, it is also strange that it provides no explanation of the inclusion of Article 26 in a chapter separate from the civil and political rights and, in particular, the reason for this and its practical effects. The judgment provides no answers to the motive or reason for the existence of Article 26 as a provision that differs from those that relate to the civil and political rights.

22. In sum, good faith leads to considering Article 26 on its own merits, which means that it should be interpreted, not as recognizing rights that it does not name or develop as in the instant case, but rather as referring to criteria other than those of the Convention to distinguish them, such as those of the OAS Charter and that, consequently, their specific or particular practical effect is, let me repeat, that the States Parties to the Convention should take measures to realize progressively the rights derived from those provisions, and all of this subject to available resources.

23. In other words, interpreting the Convention in good faith entails starting from the presumption – and respecting it – that the States Parties adopted it in the understanding that only what they had agreed to is what could be required or claimed of them. Separating good faith from what was agreed could mean that the States Parties to the Convention are required to comply with something they never agreed to or had in mind. Therefore, by omitting any reference to good faith, the judgment markedly departs from the Vienna Convention’s provisions in this regard.

**b. Ordinary meaning**

24. When interpreting Article 26 in light of its literal or ordinary meaning, it can be concluded that this provision:

- i. Is the only article in Chapter III, entitled “Economic, Social and Cultural Rights,”<sup>15</sup> of Part I entitled “State Obligations and Rights Protected,” which also includes

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<sup>13</sup> Para. 4: “Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.”

<sup>14</sup> Para. 5: “... the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters.”

<sup>15</sup> Chapter IV of Part I is entitled “Suspension of Guarantees, Interpretation and Application” and Chapter V of Part I “Personal Responsibilities.”

Chapter I “General Obligations” and Chapter II “Civil and Political Rights”; consequently, it can be understood that it is this instrument itself that considers the civil and political rights separately from the economic, social and cultural rights, making a clear distinction between them by establishing a special and different consideration for each one;

- ii. Does not name or describe or specify the rights to which it alludes, but merely identifies them as those derived from<sup>16</sup> “the economic, social, educational, scientific, and cultural standards set forth in the [OAS] Charter”; that is, rights that emanate from or can be inferred<sup>17</sup> from the provisions of the latter;
- iii. Does not stipulate respect for the rights to which it refers or ensure their respect, neither does it embody or establish them;
- iv. Does not make those right effective or enforceable because if it had wanted to do so, it would have stated this expressly and without any ambiguity; in other words, it would have proceeded contrary to what is indicated by the Court’s case law;<sup>18</sup>
- v. To the contrary, establishes an obligation to act, not one of results, consisting in the duty of the States Parties to the Convention “to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively [...] the full realization of the rights” to which it alludes, a mandate to which, however, the judgment makes no reference;
- vi. Indicates that the obligation of conduct that it establishes should be complied with “by legislation or other appropriate means and subject to available resources,” which not only reinforces the lack of effectiveness of those rights, but conditions the possibility of compliance to the existence of the resources that the respective State has available to this end, and
- vii. Makes the adoption of the measures in question dependent not only on the unilateral will of the corresponding State, but also on the agreements that it may reach with the other States, also sovereign, and with international cooperation organisations and, also, it can be concluded that the rights in question are not, in

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<sup>16</sup> “*Derivar: Dicho de una cosa: Traer su origen de otra.*” Diccionario de la Lengua Española, Real Academia Española, 2018.

<sup>17</sup> “*Inferir: Deducir algo o sacarlo como conclusión de otra cosa,*” *idem*.

<sup>18</sup> Para. 97 of the judgment.

the terms used by the Convention, “*recognized*,”<sup>19</sup> “*set forth*,”<sup>20</sup> “*guaranteed*,”<sup>21</sup> “*protected*” [“*consagrado*” in the Spanish version]<sup>22</sup> or “*protected*,”<sup>23</sup> but are derived from “the economic, social, educational, scientific, and cultural standards set forth in the [OAS] Charter”; in other words, they originate from the latter and not from the Convention.

25. In summary, contrary to what the judgment asserts, the Convention has not “recognized the right to health as a right protected under Article 26 of the Convention.”<sup>24</sup> In order to maintain that it has been “recognized,” “established,” “guaranteed,” “set forth” or “protected” by the latter, it would be necessary to conduct a twofold intellectual exercise; in other words, derive that right from the provisions of the OAS Charter; and, on this basis, derive the corresponding rights and, consequently, consider it recognized – but not expressly, merely implicitly – by that treaty, an intellectual exercise far removed from the direct and clear terms of the Convention with regard to the rights to which it refers.

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<sup>19</sup> Art. 1(1): “Obligation to Respect Rights. 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

Art. 22(4): “Freedom of Movement and Residence. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.”

Art. 25(1): “Judicial Protection. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”

Art. 29(a): “Restrictions regarding Interpretation. No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein.”

Art. 30: “Scope of Restrictions. The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”

Art.31: “Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.”

Art.48(1)(f): “1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:...

The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.”

<sup>20</sup> 45(1): “Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.”

<sup>21</sup> Art. 47(b): “The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:... the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention.”

<sup>22</sup> *Supra*, art.48(1)(f), footnote 19.

<sup>23</sup> Art.4(1): “Right to Life. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

Art. 63(1): “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

<sup>24</sup> Para.97 of the judgment.

26. Furthermore, it is evident that the judgment disregards the literal meaning of Article 26 and, consequently, in this regard does not apply harmoniously the provisions of Article 31(1) of the Vienna Convention or even make an interpretation of this article. It appears that, for the judgment, the literal meaning of what was agreed has no relevance whatsoever and, consequently, it considers this a mere formality, which allows it to attribute to the said article a meaning and scope that is far removed from what the States explicitly signed on to, as if they really wanted to agree something else which, evidently, goes against all logic.

27. To the contrary, it can legitimately be asserted that, according to its literal meaning and the principle of good faith, Article 26 does not propose several possibilities of application – in other words, create doubts about its meaning and scope that, consequently, justify the interpretation that clearly differs from what was agreed – and does not establish any human right and, especially, one that can be required before the Court; rather it alludes to obligations assumed by the States Parties to the Convention concerning actions and not results.

28. In short, it may be concluded, contrary to what is maintained in this judgment, that “in accordance with the ordinary meaning to be given to the terms of the treaty,” Article 26 does not establish a sufficient reason for having recourse to the Court to safeguard the rights “derived” from the OAS Charter and that, consequently, are not “recognized,” “established,” “guaranteed,” “set forth” or “protected” in or by the Convention, unlike the rights that, when violated, are justiciable before the Court.

### **c. The means relating to the context**

29. When trying to fathom the intention of the States Parties to the Convention in relation to Article 26, it is necessary to refer – always in keeping with the provisions of the Vienna Convention – to the context of the terms; therefore, it is necessary to refer to the system established in the Convention in which Article 26 is inserted, which means that:

a) This system consists of the obligations and rights that it establishes, the organs responsible for ensuring respect for them and requiring compliance with them, and provisions concerning the Convention;<sup>25</sup>

b) Regarding the obligations, these are two: namely, “*Obligation to Respect Rights*”<sup>26</sup> and to ensure “*Domestic Legal Effects*”<sup>27</sup> and, as regards the rights, they are the “*Civil and Political Rights*”<sup>28</sup> and the “*Economic, Social and Cultural Rights*”;<sup>29</sup> and

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<sup>25</sup> “Part III, “General and Transitory Provisions.”

<sup>26</sup> *Supra*, footnote 19, Art. 1(1).

<sup>27</sup> *Supra*, footnote 12.

<sup>28</sup> <sup>28</sup> Part I, Chapter II, Arts. 3 to 25. Right to recognition of juridical personality (Art. 3), Right to life, (Art. 4), Right to personal integrity (Art. 5), Freedom from slavery (Art. 6), Right to personal liberty (Art. 7), Right to a fair trial (Art. 8), Freedom from *ex-post facto* laws (Art. 9), Right to compensation (Art. 10), Right to privacy (Art. 11), Freedom of conscience and religion (Art. 12), Freedom of thought and expression (Art. 13), Right of reply (Art. 14), Right of assembly (Art. 15), Freedom of association (Art. 16), Rights of the family (Art. 17), Right to a name (Art. 18), Rights of the child (Art. 19), Right to nationality (Art. 20), Right to property (Art. 21), Freedom of movement and residence (Art. 22), Right to participate in government (Art. 23), Right to equal protection (Art. 24) and Right to judicial protection (Art. 25).

<sup>29</sup> *Supra*, para. 15, Art. 26.



c) In relation to the organs, these are the Commission, the Court<sup>30</sup> and the OAS General Assembly. The first is responsible for the promotion and defense of human rights,<sup>31</sup> the second for the interpretation and application of the Convention<sup>32</sup> and the third for the adoption of the measures required to ensure compliance with the respective rulings.<sup>33</sup>

30. From the harmonious interpretation of the corresponding norms, it is possible to deduce that the States that have accepted the contentious jurisdiction of the Court can only be required, in a case that has been submitted to the Court, to duly respect the civil and political rights "recognized," "established," "guaranteed," "set forth" or "protected" by the Convention and, furthermore, provided that it is eventually necessary, to adopt, "in accordance with t[he] constitutional processes [of the corresponding State] and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

31. To the contrary, with regard to the rights derived from "the economic, social, educational, scientific, and cultural standards set forth in the [OAS] Charter," States can only be required to adopt "by legislation or other appropriate means," "measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively [...] the full realization of the rights," and this "subject to available resources."

32. That said, it is necessary to place on record for the purpose of the application of this means of interpretation that, according to the fifth paragraph of the Preamble to the Convention, the OAS Charter incorporates "broader standards with respect to economic, social, and educational rights" and the Convention determined "the structure, competence, and procedure of the organs responsible for these matters."

33. In compliance with this mandate and as already indicated, the Convention gave the civil and political rights a differentiated treatment from the economic, social and cultural rights, expressing, as already indicated, the former in Chapter II of Part I of the Convention and the latter in Chapter III of the same part and instrument. Thus, the indivisibility of the

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<sup>30</sup> Art. 33: "The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

a. the Inter-American Commission on Human Rights, referred to as "The Commission;" and  
b. the Inter-American Court of Human Rights, referred to as "The Court."

<sup>31</sup> Art.41: "The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers: (a) to develop an awareness of human rights among the peoples of America; (b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights; (c) to prepare such studies or reports as it considers advisable in the performance of its duties; (d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights; (e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request; (f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and (g) to submit an annual report to the General Assembly of the Organization of American States.

<sup>32</sup> Art. 62(3): "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

<sup>33</sup> Art. 65: "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."

civil and political rights and of the economic, social and cultural rights referred to in the Preamble to the Convention, is to the “*enjoyment*” of both types of human rights and not that they should be subject to the same rules for their exercise and international oversight.

34. It is also necessary to recall, with regard to what Article 31(2) of the Vienna Convention considers as context, that there is no “agreement relating to the [Convention] which was made between all the parties in connection with the conclusion of the treaty” nor “any instrument which was made by one or more parties in connection with the conclusion of the [Convention] and accepted by the other parties as an instrument related to the [it].”

35. Moreover, nor does there exist together with the context, as established by Article 31(3) of the Vienna Convention “any subsequent agreement between the parties regarding the interpretation of the [Convention] or the application of its provisions,” nor “any subsequent practice in the application of the [Convention] which establishes the agreement of the parties regarding its interpretation,” with the exception of the Protocol of San Salvador.

36. Consequently, it is unacceptable that, in the absence of the so-called “authentic interpretation”<sup>34</sup> of the Convention, its meaning and scope are determined by the Court over and above, and even in contradiction with, what its States Parties agreed. The Convention, as any treaty, does not exist beyond what the States Parties expressly agreed.

37. In addition, in an attempt to justify the judicialization of the right to health and hygiene in the workplace before the Court, and supporting itself on the provisions of Article 31(3)(c) of the Vienna Convention, the Court’s case law has had recourse, in order to support what it has decided in recent years in this regard, to treaties that are not only of a universal scope, but also do not establish the possibility of resorting to the Court or any other international court based on eventual violations of the right to health.

38. Moreover, the Court’s case law does not have recourse to other autonomous sources of international law in order to support its actual position; that is, those that create rights, such as custom, general principle of law or unilateral legal act, or to subsidiary sources of international law; in other words, those that help determine the applicable rules of law, such as jurisprudence, legal doctrine or the declarations of law by international organizations.<sup>35</sup> It merely refers to either its own case law, which is useful basically to demonstrate coherence in its actions, but not necessarily to determine the applicable legal rules, or to decisions of international organisations that are non-binding for the States – in other words, mere recommendations and that, also, do not interpret the Convention nor is that their purpose.

39. And, these instruments, rather than interpreting a provision of a convention and, in particular, of the Convention, constitute the expression of legitimate hopes for change or the development of international law in the matter to which each one refers. Furthermore, it should not be forgotten that they do not even emanate from an international organ or an official of the inter-American system of human rights.

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<sup>34</sup> So-called by legal doctrine.

<sup>35</sup> Article 38 of the Statute of the International Court of Justice: “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo* if the parties agree thereto.”

40. On several occasions, the said case law has alluded to the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man and, although it is true that they are declarations of law because they establish general principles of law applicable to the matter, it is also true that they do not establish or refer to any type of mechanism to control respect for those principles. It should be added that the American Declaration, since it preceded the Convention, does not interpret it; rather the latter was developed owing to what was proclaimed in the former, precisely to establish mechanisms of control.

41. In addition, in order to support its actual position, the Court's case law has referred to Article 29 of the Convention,<sup>36</sup> known as the "*pro personae*" principle. However, the Court does not take into account that this article relates to the interpretation of the rights recognized in this instrument and not to the mechanisms of control established therein. It also appears to forget that the said article relates to the interpretation of the Convention, mandating that, in this regard, the meaning and scope construed cannot signify a limitation of the human rights in question, as recognized by the Convention or by the other legal instruments it mentions. Consequently, the purpose of the said article is not to authorize the Court to rule on the judicialization of presumed human rights violations, but rather it establishes a condition for the interpretation of the Convention. Furthermore, it does not establish the Court's authority to interpret other international legal instruments or treaties, or only to the extent necessary to determine whether they establish a broader meaning and scope than the one that can be determined from the human rights ensured in the Convention.

42. It also appears necessary to make a few brief comments on the phrases frequently used in the Court's case law as regards that "human rights treaties are living instruments, the interpretation of which must evolve with the times and current circumstances." The first comment is that this is established in Article 31(3)(a) and (b) of the Vienna Convention, when it stipulates that, together with the context, there shall be taken into account any subsequent agreements or practices of the States regarding the interpretation of the treaty in question. Therefore, the evolutive factor should relate more to the applicable law than to the case law issued on it and, above all, should consist in how the States Parties to the Convention have interpreted the Convention, taking into account other treaties or agreements and practices.

43. The second comment is that, consequently, when making an interpretation it is necessary to recall that a general assertion by non-state entities, at times without any scientific support, is not sufficient to determine the evolution of the times and of current circumstances; rather, this view must be shared by international society and, in the case of the Convention, by inter-American society; both of which, still today, are mainly comprised by sovereign States. Otherwise, this would confer on the said private entities the power to determine the said evolution and current circumstances, which could not only lead to arbitrary assertions, but also infringe upon citizen participation in international affairs through democratic States. In addition, it would confer on those private institutions a certain intervention in the inter-American normative process that the Convention has reserved to the States Parties to the Convention.

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<sup>36</sup> No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

44. In sum, bearing in mind that the aforementioned phrases are cited by the Court's case law to substantiate its recent position that the Court has competence to examine and decide on eventual violations of the right to health, it can be categorically stated that the truth is that, in the best case, those instruments could be considered as recognizing the existence of that right, but not the said competence. Thus, it is irrefutable that none of them, let me repeat, none, indicate or establish that the presumed violations of the said right can be submitted to the Court for it to take a decision on them.

45. Furthermore, it should be added that nor do the references made in the Court's case law to the domestic law of the State in question justify the thesis that this would authorize recourse to the Court in the case of violations of the said rights. The Court's jurisdiction derives from the authority granted to it by the Convention and not by a provision of domestic law of the corresponding State even though, evidently, its legal system should be taken into account when interpreting the Convention, as indicated by the said Article 29, to ensure that it does not limit the enjoyment and exercise of a right recognized by the Convention.

46. In addition to all the above, it should be noted that the Court's judgments have achieved a similar result as the one sought in the instant case by applying only the articles of the Convention on the rights it recognizes and, logically, within their limits, without the need to resort to Article 26. Therefore, it is difficult to understand the reason for the insistence on indicating that article as grounds for the Court's competence to examine violations of the human rights derived from the OAS Charter when it is evident that this is superfluous. The reference to Article 26 is even unnecessary and can only create expectations regarding the judicialization of other rights derived from the OAS Charter.

47. From the foregoing, it can be concluded, therefore, that the application of the subjective means of interpretation of treaties leads to the same result as already indicated; namely, that at no time were the economic, social and cultural rights derived from the provisions of the OAS Charter, among them the right to health, included in the protection system established in the Convention.

#### **d. Function or teleological means**

48. When trying to define the object and purpose of the article of the Convention in question, it can be asserted that:

a) The purpose of the Convention's signatory States was "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man";<sup>37</sup>

b) To this end, as already indicated,<sup>38</sup> "the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization [of American States] itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters";

c) It is very clear then that what was decided at the said Conference was achieved, as regards the economic, social, and education rights, with the Protocol of Buenos

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<sup>37</sup> Para. 1 of the Preamble

<sup>38</sup> *Supra*, footnote 14.

Aires and with regard to the structure, competence and procedure of the organs responsible for these matters, with the Convention; and

d) Therefore, it was in compliance with that mandate that Article 26 was included in the Convention in a separate chapter from that of the political and civil rights and, also, establishing a special obligation of the States Parties to the Convention, which did not exist with regard to the latter rights; that is, "to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively [...] the full realization of the rights" to which it referred, and this, "by legislation or other appropriate means and subject to available resources."

49. In other words, the object and purpose of Article 26 is that the States Parties take the measures indicated to achieve the realization of the rights that it indicates and not that these are enforceable immediately and, in particular, that they are justiciable before the Court, as the judgment asserts.<sup>39</sup> In this regard, it should be recalled that the very title of the article is "Progressive Development" and that the title of Chapter III, of which it is the only article, is "Economic, Social and Cultural Rights," which indicates that what this article establishes – its object and purpose – is that measures are adopted to achieve, progressively, the realization of the rights to which it refers and not that these are in effect.

50. If it were accepted that, in order to interpret a specific provision of the Convention, it was sufficient to cite the general object and purpose of this treaty – which is fairly broad, vague and imprecise – this would infringe the legal certainty and security that should characterize any ruling by the Court, because it would leave to its discretion, with a significant margin of appreciation, determination of the rights derived from the said provisions of the OAS Charter. And, therefore, prior to the corresponding proceedings, the States Parties to the Convention would not know which those rights were.

51. This is why the undersigned is unable to share the approach adopted by the Court's case law that, based on the contents of Articles 1 and 2 of the Convention, Article 26 makes a distinction between "aspects that may be required immediately and those that are of a progressive nature,"<sup>40</sup> because this differs significantly from what is envisioned in the said articles which establish that the rights to which they refer are only those "recognized," "established," "guaranteed," "set forth" or "protected" in or by the Convention, which is not the case of those mentioned by Article 26. In addition, the said distinction made by the Court's case law would, in itself, be confusing and even contradictory because, on the one hand, it would not be possible to know with certainty and before the proceedings, which aspects or, more exactly, which rights alluded to in Article 26 were enforceable immediately and which would be enforceable progressively and, on the other hand, the former would not require the adoption of measures to be enforceable, while the other could not be enforceable until measures were adopted.

52. Moreover, an approach such as the one mentioned would lead the Court to assume the international normative function which, in the case of the Convention, corresponds only to its States Parties.<sup>41</sup> And this because, in the absence of the definition of the rights derived

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<sup>39</sup> Para. 106 of the judgment.

<sup>40</sup> *Idem*.

<sup>41</sup> Art.31: "Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention."

Art. 76: "1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General. 2.

from the criteria of the OAS Charter, the Court could establish rights that were not explicitly envisioned in the said criteria and establish that these were justiciable before it.

53. As a supplementary comment, it is necessary to indicate that the fact that Article 1 of the Convention establishes the obligation of its States Parties to respect and to ensure respect for the rights that it establishes<sup>42</sup> and that Article 2 of this instrument indicate that, if such rights are not already ensured, those State must adopt the necessary measure to give effect to them,<sup>43</sup> does not reveal that those articles establish that the violation of those rights or all of them may be submitted to the consideration and decision of the Court. They only establish the obligation to respect and to ensure respect for those rights.

54. Ultimately, therefore, it can be asserted that the application of the functional or teleological means for the interpretation of treaties to Article 26 of the Convention leads to the same conclusion as was reached by using the other means for the interpretation of treaties; in other words, that the purpose of this article is not to establish any human right but merely to establish the obligation of the States Parties to the Convention to adopt measures to realize the economic, social and cultural rights "derived" from the OAS Charter.

#### **e) Supplementary means**

55. With regard to the supplementary means of interpretation of treaties, it should be underscored that, during the 1969 Inter-American Specialized Conference on Human Rights at which the definitive text of the Convention was adopted, two articles on this matter were proposed. One was the number 26 in the terms that appear in the Convention. This article was adopted.<sup>44</sup>

56. The other proposed article stated: Article 27: "Monitoring Compliance with the Obligations. The States Parties shall transmit to the Inter-American Commission of Human Rights a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, in their respective fields, so that the Commission can verify their compliance with the obligations determined previously, which are the essential basis for the exercise of the other rights enshrined in this Convention."

57. It should be noted that the said draft article 27, which was not adopted,<sup>45</sup> referred to "reports and studies" for the Commission to verify compliance with the said obligations and therefore distinguished between "the obligations determined previously" – evidently in Article 26 – that is, those relating to the rights that derive from "the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States

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Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification."

Art. 77: "1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection. 2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it."

<sup>42</sup> *Supra*, footnote 19, Art.1.

<sup>43</sup> *Supra*, footnote 12, Art.2.

<sup>44</sup> Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 318.

<sup>45</sup> Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 448.

as amended by the Protocol of Buenos Aires” and, on the other hand, the “other rights enshrined in this Convention”; that is, the “civil and political rights.”

58. Therefore, the adoption of Article 26 was not intended to incorporate the economic, social, educational, scientific, and cultural rights into the protection system established in the Convention. The only suggestion in this regard was that compliance with the obligations relating to those rights should be verified by the organs of the OAS, considering that such compliance was the basis for the realization of the civil and political rights. And, as indicated, this proposal was not adopted. This confirms that the States Parties to the Convention had no intention of including the economic, social and cultural rights in the protection system that it does establish for the civil and political rights.<sup>46</sup>

## V. THE OAS CHARTER

59. That said, based on the fact that Article 26 refers to the “the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires,” it is essential, in order to know the scope of the latter, to refer to the content of the same standards and, in particular, those cited in the judgment.

60. Regarding the right to health, the judgment refers to Articles 34(i),<sup>47</sup> 34(l)<sup>48</sup> and 45(h)<sup>49</sup> of the OAS Charter,<sup>50</sup> adding that “the Court in various precedents has recognized the right to health as a right protected by Article 26 of the Convention” and that “[i]n addition, Article XI of the American Declaration allows the right to health to be identified when stating that “[e]veryone has the right to the preservation of his health through sanitary and social measures relating to [...] medical care, to the extent permitted by public and community resources.”<sup>51</sup> Similarly, the judgment cites Article 10 of the Protocol of San Salvador which establishes that “everyone has the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being, and indicates that health is a public good.”<sup>52</sup>

61. And, it is based on these provisions that the judgment asserts that: “[a]s it has reiterated in its recent case law, the Court considers that the nature and scope of the obligations derived from the protection of the right to health include aspects that may be required immediately and those that are of a progressive nature,” adding that, “[i]n this

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<sup>46</sup> Concurring opinion of Judge Alberto Pérez Pérez, *Case of Gonzales Lluy et al. v. Ecuador, preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015.

<sup>47</sup> “The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals:... (i) Protection of man's potential through the extension and application of modern medical science.”

<sup>48</sup> “The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals:... (l) Urban conditions that offer the opportunity for a healthful, productive, and full life.”

<sup>49</sup> “The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:...(h) Development of an efficient social security policy.”

<sup>50</sup> Para. 97 of the judgment.

<sup>51</sup> *Idem*.

<sup>52</sup> Para. 98 of the judgment.

regard, the Court recalls that, regarding the former (obligations that may be required immediately), States must adopt effective measures to ensure access without discrimination to the services recognized by the right to health, ensure equality of rights between men and women and, in general, make progress towards the full effectiveness of the ESCER," and that "[r]egarding the latter (obligations of a progressive nature), progressive realization means that the States Parties have the concrete and constant obligation to advance as expeditiously and efficiently as possible towards the full effectiveness of the said right, to the extent of their available resources, by legislation or other appropriate means." And concludes by asserting that "[i]n addition, there is an obligation of non-retrogressivity in relation to the rights achieved. In light of the above, the treaty-based obligations to respect and to ensure rights, as well as to adopt domestic legal provisions (Articles 1(1) and 2), are essential to achieve their effectiveness."<sup>53</sup>

62. The foregoing is transcribed in order to record, on the one hand, that the judgment does not indicate which obligations can be required immediately are which are of a progressive nature or the criterion for distinguishing between one and the other and, on the other hand, that, in reality, it is recognizing, at least undoubtedly in part, that the right to health is not judicially enforceable before the Court, insofar as this right depends on its realization which, in turn, depends on the availability of resources and on the adoption of other measures by the State concerned.

63. That said, it is based on the provisions of the said Articles 34(i), 34(l) and 45(h) of the OAS Charter, that Article 26 is said to have been violated, in circumstances in which, as in the case of Article 26, they very clearly establish obligations of conduct and action expressed as the "utmost efforts" that States must make in order to achieve the application of "principles" and "mechanisms." It should not be forgotten that all the articles cited are in Chapter VII of the Charter, entitled "Integral Development." Thus, these articles do not establish obligations of result; that is, they do not establish that the human rights derived from the said articles should be respected, but rather that the utmost efforts should be made to achieve the *principles, mechanisms and goals* that they indicate.

64. With this in mind, if the approach recently adopted by the Court's case law is continued, the range of possibilities from which the interpreter could derive human rights that are not explicitly contemplated in any international norm would be enormous, and even limitless. If the Court continues in this direction and takes it to its extreme, all the States Parties to the Convention that have accepted its jurisdiction could eventually be brought before it because they have not fully achieved the "principles," "goals" or "mechanisms" contemplated in the OAS Charter from which the judgment derives rights, which, plainly, would appear to be very far from what the States Parties intended when they signed the Convention or, at least, from the logic implicit in it, especially owing to the way in which the said Chapter VII of the OAS Charter is drafted.

65. Consequently, it is evident that it is not possible to determine the Court's competence to examine and decide eventual violations derived "from the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires" to which Article 26 refers.

## **VI. THE PROTOCOL OF SAN SALVADOR**

66. In addition to the foregoing, it is necessary to refer to the "Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,

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<sup>53</sup> Para. 106 of the judgment.



Protocol of San Salvador," which is also cited in the judgment to support its interpretation of Article 26,<sup>54</sup> but which, to the contrary, the undersigned considers that its signature and validity support his assertions in this opinion.

67. This instrument<sup>55</sup> was adopted on the basis of the provisions of Articles 31, 76 and 77<sup>56</sup> of the Convention, as indicated in its Preamble, which indicates that:

"Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources, and Considering that the American Convention on Human Rights provides that draft additional protocols to that Convention may be submitted for consideration to the States Parties, meeting together on the occasion of the General Assembly of the Organization of American States, for the purpose of gradually incorporating other rights and freedoms into the protective system thereof."

68. Consequently, the foregoing reveals that it is an agreement additional to the Convention, with the specific purpose of reaffirming, developing, perfecting and protecting the economic, social and cultural rights and of progressively incorporating them into its protection system and achieving their full realization.

69. In other words, the Protocol was adopted because, when it was signed, the economic, social and cultural rights had not been reaffirmed, developed, perfected and protected, or incorporated into the Convention's protection system. And this means that neither were they fully effective by virtue of Article 26. Otherwise, neither the purpose nor desirability of the Protocol could be understood.

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<sup>54</sup> Para. 161 of the judgment.

<sup>55</sup> Hereinafter, the Protocol.

<sup>56</sup> *Supra*, footnote 40.

70. Thus, the Protocol “recognizes,”<sup>57</sup> “establishes,”<sup>58</sup> “sets forth”<sup>59</sup> or “sets forth” [*consagra* in the original Spanish]<sup>60</sup> the following rights: Right to Work (Art. 6); Just, Equitable and Satisfactory Conditions of Work (Art. 7); Trade Union Rights (Art. 8); Right to Social Security (Art. 9); Right to Health (Art. 10); Right to a Healthy Environment (Art. 11); Right to Food (Art. 12); Right to Education (Art. 13); Right to the Benefits of Culture (Art. 14); Right to the Formation and the Protection of Families (Art. 15); Rights of Children (Art. 16); Protection of the Elderly (Art. 17), and Protection of the Handicapped (Art. 18). And remember that, to the contrary, Article 26 does not establish or recognize any rights, it merely refers to those derived from the OAS Charter.

71. Regarding the rights recognized by the Protocol, the States Parties undertook to adopt, progressively, measures to ensure their full realization (Arts. 6(2), 10(2), 11(2) and 12(2)). This is consistent with the provisions of Article 26; that is, both the Protocol and that article refer to rights that have not been realized or else not fully.

72. The Protocol also includes a provision, Article 19, concerning the means of protection of the above rights. These means consist in reports that the States Parties must submit to the OAS General Assembly “on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol,” the treatment to be given to these reports by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture, and the observations that eventually may be issued on this matter by the Commission.<sup>61</sup> It should be noted that this provision is similar to draft article 27 of the Convention, which was rejected by the corresponding Conference.

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<sup>57</sup> Art. 1: “Obligation to Adopt Measures. The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.”

Art. 4: “Inadmissibility of Restrictions. A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.”

<sup>58</sup> Art. 5: “Scope of Restrictions and Limitations. The State Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights.”

Art. 19(6): “Means of Protection. Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.”

<sup>59</sup> Art. 2: “Obligation to Enact Domestic Legislation. If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality.”

Art. 3: “Obligation of Nondiscrimination. The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.”

<sup>60</sup> Art. 19: “Means of Protection. 1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol.”

<sup>61</sup> Art. 19: “Means of Protection. 1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol.”

73. All of this means, first, that for the States Parties to the Protocol, the realization of the economic, social and cultural rights is of a progressive nature; thus, *a contrario sensu*, they are not in force or, at least not fully in force.

74. Second, consequently, this means that for the said States, Article 26 means that the said rights are not included among those to which the protection system established in the Convention applies, or that are in force, because, otherwise, the adoption of the Protocol would have been unnecessary.

75. It should be recalled that the OAS created the Working Group to Examine the Periodic Reports of the States Parties to the Protocol,<sup>62</sup> as a mechanism to oversee compliance with the commitments made on this matter in that instrument. This confirms that, undoubtedly, the intention of the said States was to create a non-jurisdictional mechanism for the international monitoring of compliance with the Protocol.

76. The only exception to this system is established in Article 19(6); namely that:

Any instance in which the rights established in paragraph a) of Article 8<sup>63</sup> and in Article 13<sup>64</sup> are violated by action directly attributable to a State Party to this Protocol may give rise,

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2. All reports shall be submitted to the Secretary General of the OAS, who shall transmit them to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture so that they may examine them in accordance with the provisions of this article. The Secretary General shall send a copy of such reports to the Inter-American Commission on Human Rights.

3. The Secretary General of the Organization of American States shall also transmit to the specialized organizations of the inter-American system of which the States Parties to the present Protocol are members, copies or pertinent portions of the reports submitted, insofar as they relate to matters within the purview of those organizations, as established by their constituent instruments.

4. The specialized organizations of the inter-American system may submit reports to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture relative to compliance with the provisions of the present Protocol in their fields of activity.

5. The annual reports submitted to the General Assembly by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture shall contain a summary of the information received from the States Parties to the present Protocol and the specialized organizations concerning the progressive measures adopted in order to ensure respect for the rights acknowledged in the Protocol itself and the general recommendations they consider to be appropriate in this respect.

6. Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

7. Without prejudice to the provisions of the preceding paragraph, the Inter-American Commission on Human Rights may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol in all or some of the States Parties, which it may include in its Annual Report to the General Assembly or in a special report, whichever it considers more appropriate.

8. The Councils and the Inter-American Commission on Human Rights, in discharging the functions conferred upon them in this article, shall take into account the progressive nature of the observance of the rights subject to protection by this Protocol."

<sup>62</sup> AG/RES. 2262 (XXXVII-O/07) of June 5, 2007.

<sup>63</sup> Art. 8: "Trade Union Rights. 1. The States Parties shall ensure: (a) The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely."

<sup>64</sup> Art. 13: "Right to Education. 1. Everyone has the right to education. 2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They

through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

77. This means that only in the event of violations of the rights relating to trade unions and to education are the pertinent cases justiciable before the Court. To the contrary, regarding the violation of the other rights, including the right to health, only the report system established in Article 19 of the Protocol is applicable.

78. Consequently, the Protocol is an amendment to the Convention. This is revealed by its text where it is considered a protocol, a device expressly established in the Convention.<sup>65</sup> It should be stressed that, in its Preamble, it places on record that it is adopted considering that the Convention provides for that possibility.<sup>66</sup> In other words, it is an "additional protocol" to the Convention, signed "for the purpose of gradually incorporating other rights and freedoms into the protective system thereof," which, therefore, the Convention itself did not include.

79. Thus, by establishing in its Article 19 the Court's competence to examine eventual violations of the rights of trade unions and to education, this instrument is not restricting the Court, but rather expanding its competence. If the Protocol did not exist, the Court would be unable to examine the eventual violation of those rights.

80. All the foregoing is, consequently, extremely clear evidence that, for the States Parties to the Protocol, the provisions of Article 26 of the Convention cannot be interpreted in order to establish or recognize economic, social or cultural rights or that it authorizes submitting a case of their violation to the consideration of the Court. It should be reiterated that, if that had been established, evidently there would have been no need to conclude the Protocol. And that was why it was necessary. Its adoption cannot be explained in any other way.

81. Based on the above, it is possible to conclude that the Protocol provides clear proof that the provisions of Article 26 do not establish any human right or, in particular, as maintained in this case, give *locus standi* before the Court for the violation of the economic, social and cultural rights to which it refers.

## VII. CONCLUSIONS

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further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.

3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education: (a) Primary education should be compulsory and accessible to all without cost; (b) Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education; (c) Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education; (d) Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction; (e) Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.

4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.

5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties."

<sup>65</sup> *Supra*, footnote 40

<sup>66</sup> *Supra*, para.73.

82. It is, therefore, based on all the above that I dissent partially from the judgment; that is, from the contents of its first operative paragraph.<sup>67</sup>

83. In this regard, it is necessary to insist, one more time, that this opinion is not related to the existence of the right to health. This falls outside its purpose. It merely states that the possible violation of this right cannot be submitted to the consideration and determination of the Court.

84. Furthermore, it is necessary to indicate that this opinion should not be understood to mean that the undersigned would not be in favor of submitting violations of the economic, social and cultural rights to the consideration of the Court eventually. If this occurs, it should be established by the entity that holds the responsibility for the international legislative function. It does not appear desirable that the organ entrusted with the inter-American judicial function should assume the international legislative function, especially when the States Parties to the Convention are democratic and are governed by the Inter-American Democratic Charter,<sup>68</sup> which establishes the separation of powers and citizen participation in public affairs, which the Court should evidently respect, particularly with regard to those norms that concern the intervention of the citizen most directly.

85. From this perspective, it is worth insisting that interpretation does not consist of determining the meaning and scope of a norm so that it expresses what the interpreter wishes, but rather what it objectively stipulates or establishes. In the case of the Convention, this means clarifying how what was agreed by its States Parties can be applied in the times and circumstances in which the respective dispute arises; in other words, how to apply the *pacta sunt servanda* principle in the times and circumstances in which the dispute occurs.

86. The issue is, therefore, how to ensure that human rights treaties are, *per se*, truly living instruments; that is, they are able to understand or be applied to the new realities that arise and not that it is their interpretation, as if it were a separate entity, that evolves with the times and the current circumstances, altering their provisions. The only way to achieve the said evolutive interpretation is to understand how the society regulated by the Convention, as an international treaty – that is, the international society formed basically by the States – has interpreted it and this is, precisely, the meaning of Article 31 of the Vienna Convention.<sup>69</sup>

87. Furthermore, it is essential to repeat that, if the Court persists in the course adopted by the judgment, the inter-American system of human rights as a whole could be seriously constricted. And this is because, very probably, on the one hand, the accession of new States to the Convention and the acceptance of the Court's contentious jurisdiction by those States that have not done so would not be encouraged, but rather quite the reverse and, on the other hand, the tendency among the States Parties to the Convention not to comply fully and promptly with its rulings could be increased or renewed. In sum, the principle of legal certainty or security would be weakened, which, in the case of human rights, also benefits the victims of their violation by ensuring compliance with the court's judgments because they are solidly supported by the commitments sovereignly assumed by the States.

88. In this regard, it should not be forgotten that, in practice and over and above any theoretical consideration, the Court's function is, ultimately, to deliver judgments that re-establish, as soon as possible, respect for the violated human rights. It is not so sure that

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<sup>67</sup> *Supra*, footnote 2.

<sup>68</sup> Adopted at the twenty-eighth special session of the OAS General Assembly, September 11, 2001, Lima, Peru.

<sup>69</sup> *Supra*, footnote 10

this is achieved with regard to human rights violations that the Convention did not consider justiciables before the Court.

89. Lastly, the undersigned cannot refrain from mentioning that he sincerely regrets having to partially dissent in this case. This is because it involves a person with disabilities whose situation merited very special and prompt attention by the State.

90. However, he has proceeded as indicated in this partially dissenting opinion because respect for human rights supposes strict compliance with the law – in this case, international law – and its component, inter-American human rights law, which assigns the Court the function of imparting justice in keeping with what the law establishes and not with what it would like. Respect for this premise allows the principle of legal certainty and security to function to the benefit of human rights, by guaranteeing to all the parties who appear before the Court, the due and prior knowledge of the applicable norms, with all their strengths and weaknesses.

Eduardo Vio Grossi  
Judge

**CONCURRING AND PARTIALLY DISSENTING OPINION OF  
JUDGE HUMBERTO ANTONIO SIERRA PORTO**

**INTER-AMERICAN COURT OF HUMAN RIGHTS  
CASE OF GUACHALÁ CHIMBO *ET AL.* V. ECUADOR  
JUDGMENT OF MARCH 26, 2021  
*(Merits, reparations and costs)***

1. With my usual respect for the majority decisions of the Inter-American Court of Human Rights (hereinafter “the Court”), the purpose of this opinion is to explain my partial dissent from the first operative paragraph in which the international responsibility of the State of Ecuador (hereinafter “the State” or “Ecuador”) is declared for the joint violation of the rights to recognition of juridical personality, life, personal integrity, personal liberty, access to information, equality before the law and health of Luis Eduardo Guachalá. This opinion supplements the position already indicated in my partially dissenting opinions in the cases of *Lagos del Campo v. Peru*,<sup>1</sup> *Dismissed Employees of PetroPeru et al. v. Peru*,<sup>2</sup> *San Miguel Sosa et al. v. Venezuela*,<sup>3</sup> *Cuscul Pivaral et al. v. Guatemala*,<sup>4</sup> *Muelle Flores v. Peru*,<sup>5</sup> *the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*,<sup>6</sup> *Hernández v. Argentina*<sup>7</sup> and *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*,<sup>8</sup> as well as my concurring opinions in the cases of *Gonzales Lluy et al. v. Ecuador*<sup>9</sup> and *Poblete Vilches et al. v. Chile*<sup>10</sup> in relation to the justiciability of Article 26 of the American Convention on Human Rights (hereinafter “the Convention” or “the ACHR”).”

2. Therefore, first, I will reiterate my position concerning the problems of interpretation and legal substantiation of the theory of justiciability of Article 26 of the American Convention and the

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<sup>1</sup> Cf. *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

<sup>2</sup> Cf. *Case of Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

<sup>3</sup> Cf. *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

<sup>4</sup> Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

<sup>5</sup> Cf. *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

<sup>6</sup> Cf. *Case of Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

<sup>7</sup> Cf. *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of 20 November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

<sup>8</sup> Cf. *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs.* Judgment of February 6, 2020. Series C No. 400. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

<sup>9</sup> Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

<sup>10</sup> Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

practice assumed by the Court of addressing its alleged violations in the same operative paragraph. Second, I will present some consideration on the nature of the right to health and its effects on this case, particularly in relation to the model of access to health ordered by the majority of the Court.

## **I. THE PROBLEMS CONCERNING THE JUSTICIABILITY OF ARTICLE 26 OF THE AMERICAN CONVENTION**

3. In previous separate opinions, I have set out in detail numerous arguments that reveal the logical and legal contradictions and inconsistencies from which the theory of the direct and autonomous justiciability of economic, social, cultural and environmental rights (hereinafter "the ESCER") via Article 26 of the American Convention suffers. Indeed, this position assumed by the majority of the Court's judges since the case of *Lagos del Campo v. Peru* disregards the ordinary meaning of the American Convention as the treaty that grants competence to the Court; ignores the rules of interpretation of the Vienna Convention on the Law of Treaties;<sup>11</sup> alters the nature of the obligation of progressivity clearly established in Article 26;<sup>12</sup> ignores the intention of the States embodied in Article 19 of the Protocol of San Salvador<sup>13</sup> and undermines the Court's legitimacy in the regional sphere,<sup>14</sup> to mention only some of the arguments.

4. On this occasion, it is not my intention to pursue this line of thought further, but rather to focus attention on a practice related to this legal position that is revealed when declaring the violations in the operative paragraphs, and also when addressing the allegations in the one and the same chapter.

5. As I pointed out in the cases of *ANCEJUB-SUNAT v. Peru*,<sup>15</sup> *Hernández v. Argentina*<sup>16</sup> and *Casas Nina v. Peru*,<sup>17</sup> the Court has modified randomly and without justification its method of determining the conclusions that it expresses in the operative paragraphs of the judgments delivered in contentious cases. This is especially problematic because it seeks to render invisible the internal disagreements on the scope of Article 26 of the Convention.

6. This method that assembles in a single operative paragraph all the violations that substantiate the international responsibility of the State, also reduces the legitimacy provided by the unanimous position of the Court. I refer to the fact that although the main or original legitimacy of the Court's decisions is conferred by the majorities established in the Rules of Procedure, this is enhanced more effectively when all the judges agree on the final decision. In the instant case, by including in a single operative paragraph the violations of Articles 3, 4, 5, 7, 11, 13, 24 and 26 of

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<sup>11</sup> *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375.

<sup>12</sup> *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359.

<sup>13</sup> *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349.

<sup>14</sup> *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344.

<sup>15</sup> *Cf. Case of Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 6.

<sup>16</sup> *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 17.

<sup>17</sup> *Cf. Case of Casa Nina v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2020. Series C No. 419. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 7.



the American Convention, it was not possible to express the Court's unanimity in finding the State guilty, or the partial discrepancy in relation to Article 26.

7. This is the reasoning behind my separate opinion because, although I agree with the Court declaring the violation of Articles 3, 4, 5, 7, 11, 13 and 24 and, consequently, voted in favor of the first operative paragraph, the method used by the Court in this judgment did not allow me to express my legal position adequately in relation to the inadmissibility of the declaration of international responsibility for the violation of the right to health in light of Article 26 of the Convention based on the arguments that I will set forth in the following section.

## **II. THE RIGHT TO HEALTH AND THE CARE MODEL FOR PERSONS WITH DISABILITIES**

8. Following its precedents in the cases of *Poblete Vilches v. Chile*,<sup>18</sup> *Cuscul Pivaral v. Guatemala*<sup>19</sup> and *Hernández v. Argentina*,<sup>20</sup> in this judgment the Court recalled that it recognized health as "a fundamental human right, essential for the satisfactory exercise of the other human rights and that everyone has the right to enjoy the highest attainable standard of health that allows them to live with dignity, understanding health not only as the absence of disease or infirmity, but also as a state of complete physical, mental and social well-being derived from a lifestyle that allows the individual to achieve total balance."<sup>21</sup> Then, the Court clarified that "the general obligation to protect health translates into the state obligation to ensure access to essential health services, ensuring effective and quality medical services, and to promote the improvement of the population's health."<sup>22</sup> In addition, the Court recalled that the dual scope of the ESCER, and of the right to health, may result in obligations that can be required immediately, and in obligations of a progressive nature.

9. In the instant case, the Court addressed the scope of the obligation to respect and to ensure the right to health in relation to its aspects of accessibility and acceptability, referring exclusively to those that it considered were immediate obligations derived from Article 26 of the Convention, which it indicated have a special significance in relation to vulnerable and marginalized groups. Regarding the criterion of accessibility, the Court found it proved that an adequate treatment of epilepsy, the illness suffered by Mr. Guachalá Chimbo, reduced the possibility that this would result in disabilities.<sup>23</sup> It indicated that the victim frequently had to suspend his treatments as he had insufficient resources to pay for them and, consequently, declared that Ecuador had violated the right to health in its aspect of access, by failing to provide free treatment for his illness. Then, with regard to the acceptability and quality of health care, the Court identified as facts that constituted international responsibility that: (i) there was no record that the type of epilepsy suffered by Mr. Guachalá Chimbo had been identified; (ii) his medical record did not reveal that he had been

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<sup>18</sup> Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349., para. 103,

<sup>19</sup> Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 73,

<sup>20</sup> Cf. *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of 20 November 22, 2019. Series C No. 395, para. 64.

<sup>21</sup> Cf. *Case of Guachalá Chimbo et al. vs. Ecuador. Merits, reparations and costs*. Judgment of March 26, 2021. Series C No. 423, para. 100.

<sup>22</sup> Cf. *Case of Guachalá Chimbo et al. vs. Ecuador. Merits, reparations and costs*. Judgment of March 26, 2021. Series C No. 423, para. 101.

<sup>23</sup> Cf. *Case of Guachalá Chimbo et al. vs. Ecuador. Merits, reparations and costs*. Judgment of March 26, 2021. Series C No. 423, para. 149.

prescribed medication on January 11; (iii) there was no record that he had received the necessary care given the adverse effects of the medication ordered, and (iv) there was a possible absence of adequate assistance in relation to the accident he suffered on January 14.<sup>24</sup>

10. In addition to declaring the violation of Article 26 for the above-mentioned reasons, the Court also concluded that the State was responsible for having violated the rights to life and personal integrity contained in Articles 4 and 5 of the American Convention as they related to the right to health. On this occasion, unlike in other cases,<sup>25</sup> the Court examined the content of these provisions of the Convention exclusively with regard to their relationship to the State's obligation to offer a satisfactory and convincing explanation for the disappearance of Mr. Guachalá Chimbo who, since he was interned in a public hospital was in the State's custody.<sup>26</sup> In this way, it completely disconnected health care from the rights to life and to personal integrity, blurring the contents that the Court itself had granted this right and that, from my perspective, are those that legally substantiate the obligations that must be complied with immediately in relation to the right to health.

11. As I have indicated, the theory that the "individual" aspect of the right to health should be examined in relation to the connected fundamental rights that may be affected – in this case, the right to personal integrity or to life – and the "progressive" aspect in relation to the sufficiency of the health services provided by the State is the one that is most precisely in keeping with the content of the American Convention. The use of connectivity as an indirect mechanism for the protection of the ESCER is an effective mechanism for the protection and guarantee of the rights of the victims.<sup>27</sup> Indeed, this line of argument does not prevent the Court from making important progress in relation to the requirements of availability, accessibility, acceptability and quality in the provision of health services, as well as the obligation to regulate, monitor and oversee the provision of services in private health centers. And this is without the need to create a new right, but rather providing meaning and scope to rights such as to life and to integrity that are contained in the Convention and, therefore, have been accepted by the States Parties as grounds for the Court's jurisdiction.<sup>28</sup>

12. The judgment of the Inter-American Court in this case asserts that, based on the provisions of the American Convention and of its Article 26, the States that signed this international instrument are bound to comply with the right to health and this is reflected in the State's duty to ensure access to essential health services immediately. Even though it is possible to note that this interpretation by the Inter-American Court is phase with or corresponds to the most recent developments of some States of the region, such as Colombia,<sup>29</sup> it is unclear whether the same conclusion can be reached for the other States.

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<sup>24</sup> Cf. *Case of Guachalá Chimbo et al. vs. Ecuador. Merits, reparations and costs.* Judgment of March 26, 2021. Series C No. 423, paras. 152 to 155.

<sup>25</sup> Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 6.

<sup>26</sup> Cf. *Case of Guachalá Chimbo et al. vs. Ecuador. Merits, reparations and costs.* Judgment of March 26, 2021. Series C No. 423, para. 164.

<sup>27</sup> Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 30.

<sup>28</sup> Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 31.

<sup>29</sup> Cf. Colombian Constitutional Court. Judgments T-012 of 2020, T-508 of 2019, and T-001 of 2018, among others.

13. The Court establishes in the judgment that it “notes a broad regional consensus in relation to consolidation of the right to health, which is explicitly recognized in various Constitutions and internal laws of the States of the region.”<sup>30</sup> However, I find that this assertion is not reasonable because it is too general. Just to mention some of the references, neither article 19 of the Constitution of Chile, nor article 46 of the Constitution of Costa Rica establish the right to health in the way the Court indicates. In other words, this position does not take into consideration the different contexts, the range of the discussions in each State, the different designs of the domestic legal systems, or simply the real possibilities of implementing the declarations.

14. In this case, it is clear that the internationally wrongful act is founded on the absence of free treatment for Mr. Guachalá Chimbo, understood as an obligation that must be complied with immediately, as well as the lack of quality of the medical care at the time of his hospitalization. Even though the Court took the laws of Ecuador into account, in particular article 53 of the Constitution in force at the time of the facts, which ordered “priority, preferential and specialized care” for persons with disabilities; indirectly, it established a high regional standard in this regard, which has no basis in the Convention. As I have indicated, Article 26 merely refers to an objective to achieve progressively the full realization of the rights derived from the economic, social, educational, scientific and cultural provisions, subject to available resources, and does not refer to any obligation of an instantaneous nature to standardize or equalize the position of each of the States in order to comply fully and instantaneously with the ESCER.<sup>31</sup>

15. Although, on this occasion, the Court did not order measures of reparation or guarantees of non-repetition expressly addressed at the implementation of specific models of health care, its reasoning on Ecuador’s international responsibility for failing to provide free treatment in this case warrants some considerations on the object and purpose of the work of the San José Court in relation to the mechanisms to comply with the treaty-based obligations, especially as regards their social benefit aspects.

16. As I have been indicating since I was a judge of the Constitutional Court of Colombia, the aspect of the right to health as a social benefit obliges the State “to rationalize the allocation of investment to ensure that its guarantee has a comprehensive scope, given the need for sustainability that the guarantee of other rights also involves.”<sup>32</sup> Indeed, although this case refers to the right to health in relation to persons with disabilities, in a context of scarce resources, it is necessary to take into account that the guarantee of the right to health may affect the State’s capacity to respond to the needs of persons whose access to housing, food, water, employment and social security, among other matters, is also unsatisfied. This may lead to the conclusion that, in certain cases, it is necessary to adopt an approach that takes into account the needs of society as a whole, instead of focusing on the specific needs of a particular group.<sup>33</sup>

17. Furthermore, it is also necessary to take into account the effects of the judicial decision vis-à-vis the State model protected by the inter-American system for the protection of human rights. Although the judges can and should delineate some of the means by which the Convention’s rights

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<sup>30</sup> Cf. *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs*. Judgment of March 26, 2021. Series C No. 423, para. 99.

<sup>31</sup> Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 9.

<sup>32</sup> Colombian Constitutional Court, Case file T-1080/07. Judgment of December 13, 2007. Judge rapporteur, Humberto Antonio Sierra Porto, p. 10.

<sup>33</sup> Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, Partially dissenting opinion of Judge Humberto Antonio Sierra Porto, para. 14.

are ensured, it is essential that the meaning and scope that the Court gives to these obligations leaves the State an adequate room for maneuver through its different branches or public authorities. In this regard, it should be recalled that States must have a certain degree of flexibility that allows them to meet their international commitments within their material possibilities, and based on their particular context and social demand. Therefore, it is necessary to avoid promoting an extensive interpretation of the position assumed in this judgment in relation to free health treatments for persons with disabilities, because the context of the country, the available resources, and the effect that according priority to a certain right or group may have on the other economic, social and cultural rights of the population as a whole must always be taken into account. Within its sphere of competence, the Court should recognize that it is the States themselves, through their competent organs as established in domestic law, that are in the best position to take decisions on how to invest available resources in order to ensure both the right to health and other rights recognized in their domestic laws and in the American Convention. Thus, the failure to implement a specific model cannot, of itself, entail a violation of their international obligations in the area of the right to health.

Humberto Antonio Sierra Porto  
Judge

**CONCURRING OPINION OF  
JUDGE EUGENIO RAÚL ZAFFARONI**

**TO THE JUDGMENT OF MARCH 26, 2021  
OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

**IN THE CASE OF GUACHALÁ CHIMBO ET AL. V. ECUADOR**

I. The forced disappearance of persons requires the concurrence of three elements: (1) deprivation of liberty; (2) direct intervention of state agents or their acquiescence, and (3) refusal to acknowledge the detention or to reveal the victim's fate or whereabouts.

I present my opinion that the three elements are present in the instant case and, therefore, it should be considered a case of forced disappearance.

1. **Deprivation of liberty.** The victim was in a psychiatric establishment; in other words, a mental asylum. It is well known that psychiatry has had a murky past that, over the last 50 years, has led to a radical change in the theoretical and practical paradigm, based on the so-called deinstitutionalization movement, regarding which there is extensive literature (for example, Stroman, Duane, *The Disability Rights Movement: From Deinstitutionalization to Self-determination*, University Press of America, 2003; Basaglia, Franco, *La institución negada. Informe de un hospital psiquiátrico*, Barral Editores, Barcelona, 1970; Basaglia, F., Langer, M., Caruso I, et al., *Razón, locura y sociedad*, Siglo XXI, Buenos Aires, 1979; Basaglia, Franco, *La mayoría marginada*, Ed. Loia, Barcelona, 1973; Guattari, F., *La intervención institucional*, Folios, Mexico, 1967; Szasz, T., *Esquizofrenia*, Premiá, México, 1979).

This movement has resulted in numerous legal reforms in the different countries regulating the "so-called psychiatric law." Their general purpose is to prevent that, under the pretext of "protection," a control of behavior is practiced that is similar to punitive control and even includes undertones of greater cruelty, with invasive treatments, arbitrary deprivation of liberty, and even torture.

At the same time, in several of our countries the right of institutionalized psychiatric patients has been recognized to be protected by applications for *habeas corpus* or similar remedies that safeguard individual liberty. It cannot be ignored that institutionalized psychiatric patients are in a situation of much greater vulnerability and defenselessness than persons deprived of liberty in prisons, so that measures to protect them under domestic law should be reinforced.

This situation of the rationalization of abuses against liberty and health under the guise of therapy reached dangerous extremes even for political freedom, when psychiatry was manipulated to pathologize opponents and dissidents, as in the case of Soviet psychiatry, but also with the pathologization of non-binary sexuality and with the survival of Morel's degeneration theory, which was upheld in some countries even after the start of the last century. Although "anti-psychiatry" was an extreme movement, it served to call attention to the situation of persons deprived of liberty in mental asylums (for example, Szasz, T., *La fabricación de la locura. Estudio comparativo de la Inquisición y el movimiento en defensa de salud mental*, Kairós, Barcelona, 1981). In North American sociology, a turning point was marked by the well-known research of the interactionist of the Chicago School, Erving Goffman (*Asylums: Essays on the Social Situation of Mental Patients and Other Inmates*, 1961), and his subsequent development of the concept of "total institution."

The circumstance that the victim in this case was not in a "closed" establishment – in the sense that the patients were not prevented from leaving the mental asylum – does not mean that they were not deprived of liberty, and it is not significant in this respect that he had entered the establishment voluntarily or with the consent of his mother; the victim

in this specific case was effectively deprived of his liberty, even though it was an "open" establishment.

It is known that padded cells, straitjackets, and cold showers have not been used for several decades because those elements have become unnecessary with the use of psychotropic medication – revealed in psychiatric jargon when this is referred to as a "chemical straitjacket." Throughout the criminal doctrine and jurisprudence of our countries and even, explicitly, in some codes, the provision of incapacitating drugs is rightly equated to physical violence for coercive effects and other offenses against liberty.

It has been proved, and was made clear during the hearing, that the victim had been medicated with an exaggerated dose of sedatives; in other words, he was under the effects of incapacitating drugs or a "chemical straitjacket" that, according to the above-mentioned rational equivalence of laws, doctrine and jurisprudence, has the same factual and legal effects as if he had been handcuffed or tied to his bed.

Under the effects of such a dosage of psychotropic drugs the individual is – at the very least – severely limited in his movements, not to mention the presence of the psychological effects on his conscious activity and the correct functioning of his sensory activity, which is to say that he was deprived of his liberty, even though the establishment was not "closed."

An individual's liberty is restricted or eliminated by both physical and chemical means and, in the instant case, the victim was clearly deprived of liberty by chemical means, based on the high dose of medication prescribed by the treating physician, and nothing indicates that he had not taken this, especially when it is a known practice that psychiatric patients in mental asylums are frequently sedated generously to prevent them from "causing trouble."

**2) Direct intervention of state agents or their acquiescence.** The establishment in which the victim was deprived of liberty was public and the doctors and staff were public officials; that is beyond doubt in this case.

The legal concept of forced disappearance of persons does not require that the public officials deprived someone of their liberty with wilful intent of making that person disappear. It is known that, in many well-known cases, this wilful intent "*ab initio*" does not exist. There are numerous very clear instances of these human rights violations without any wilful intent "*ab initio*." In the case of the officials, the wilful intent is "*ex post factum*"; that is, after what happens to the victim and is not known.

In this case it is evident that a person was deprived of liberty; that this deprivation of liberty was by state officials, and that the person disappeared.

**3) Refusal to acknowledge the detention or to reveal the fate or whereabouts of the victim.** It has not been proved that the victim left the establishment and, furthermore, in the condition in which he was, under the effects of a strong dose of psychotropic drugs – in other words, deprived of liberty or, at least, to a great extent prevented from moving freely and with full conscious awareness – it is almost implausible that he abandoned the establishment and that, in addition, he did so without his clumsy movements attracting anyone's attention, and that no one observed that a person in those conditions was leaving. There were no witnesses to his purported departure or any written record of this; it is based merely on the statements of the same personnel who kept him deprived of liberty, and who say that they never saw him again.

It is even more implausible that, in the aforementioned conditions, he was able to go far away and hide up until the present; not only, due to his specific condition due to the effects of the psychotropic drugs, but also due to his previous deteriorated state and that he was dependent on the members of his family. Even more significant were the facts that his mother had been unable to see him and that he had suffered a fall that required a

suture, without its significance being specified, although it appears that the injury was to his brow.

It is known that it is impossible to obtain so-called "negative evidence," which, in the instant case, would be proof that he did not leave the mental asylum. If it were necessary to rule out the forced disappearance of anyone deprived of liberty based on the mere assertion by the public officials who were keeping him deprived of liberty that the disappeared person had "departed," without providing any details, it would never be possible to prove this human rights violation or the corresponding offense, because this is the allegation most commonly used in such cases.

Consequently, in each case it is necessary to evaluate the particular circumstances that make the version of the "departure" more or less plausible and, in this specific case, all the indications, which are especially serious, precise and concordant, converge on the scant probability of confirming that hypothesis, which is only a mere statement by those who supposedly would be the foremost suspects. In addition, the State did not question other patients or staff of the mental asylum to request more details about the supposed "departure."

In the instant case, everything indicates that the most probable explanation is that "he did not leave." Since there is no minimally reliable evidence regarding his alleged "departure" which is only remotely probable, a doubt arises that leads to the hypothesis that, among the officials, there must be one or several who know what occurred and could explain what happened to the victim. Those officials would be acting with wilful intent; precisely the wilful intent not to reveal the fate or whereabouts of the victim; this is why I indicated above that wilful intent "*ab initio*" is not required, because it is a wilful intent "*ex post factum*" as regards what really happened to the victim and that is unknown, because if it were known this offense would be excluded. The State has never questioned those officials because, based on the simple allegation of the "departure," the State merely searched outside the asylum for an epileptic patient, deteriorated by repeated seizures that had gone unmedicated, and under the effects of psychotropic drugs.

The offense of forced disappearance of persons does not presume any wilful intent prior to what happens to the victim or even with regard to any eventual harm that he may have suffered, which is precisely what is unknown. Rather the objective nature of the offense is completed, subjectively, with the wilful intent not to reveal the victim's fate or whereabouts; in other words, the intention to maintain the uncertainty about the person's fate or whereabouts over time.

In this case, there are real indications that some of the officials are aware of this and have wilfully failed to reveal what happened up until the present time. Therefore, the State should investigate this hypothesis which it failed to investigate demonstrating, at the very least, extreme negligence; and it should do so now despite the time that has passed with the inevitable dispersion of evidence.

II. Based on the foregoing, forced disappearance is not an instantaneous offense, but rather a permanent or continuing offense; that is, it has a certain duration while it is being committed that, in the case of an omission, begins at the time the obligation to act of the active subject arises – in other words, the obligation to reveal the fate or whereabouts of the person – and it extinguishes at the time when this is known. And, it is not until the latter occurs that the calculation of the statute of limitations on the criminal action for the offense of forced disappearance would begin. Accordingly, in the instant case, the State has the obligation to investigate and, as appropriate, prosecute and punish the perpetrators.

Even in cases in which, long after the disappearance commenced, information is found that allows the victim's death to be verified, the offense that would eventually prescribe would be the possible homicide – unless the provisions of domestic or international law established that this was imprescriptible – but not the forced

disappearance, because calculation of the statute of limitations on the criminal action would begin from the time that the victim's death was known.

III. I consider that, in the instant case, it is essential to classify the offense as forced disappearance of persons because, otherwise, in any other similar situation of disappeared persons following their deprivation of liberty in mental asylums, but committed in the context of a systematic practice, that could not be declared a crime against humanity, and this would be a cause for extreme concern.

This act, as it does not correspond to a systematic practice, cannot be considered a crime against humanity; however, the problem is that, if it is not classified as forced disappearance, if it had occurred in the context of a systematic practice, it would not be a crime against humanity either, disregarding the fact that the systematic practice does not conceptualize forced disappearance, but rather it endows it with the nature of a crime against humanity: if the species did not exist, the genus could not exist.

I understand that it is essential to avoid this consequence simply because, otherwise, the provisions of the 1994 Inter-American Convention on Forced Disappearance of Persons, the 2006 UN International Convention for the Protection of All Persons from Enforced Disappearances and all the other similar international norms would be ineffective in relation to forced disappearances in mental asylums.

IV. I submit this concurring opinion because a careful reading of the text of the judgment reveals that it recognizes all the elements of the forced disappearance of persons and also assigns all the legal consequences, but omits the explicit mention of this categorization.

I understand that when a thing has all the elements and consequences that correspond to it, based on the principle of identity supported by logic from the times of Parmenides and followed by Aristotle, it is the same thing ( $A = A$ ); therefore, I consider that it is necessary to clarify this, ratifying this Court's previous case law and to guarantee the effectiveness of the international law in force on forced disappearance of persons in cases of disappearances of psychiatric patients deprived of liberty in public establishments.

Based on the above, I submit this concurring opinion with the foregoing clarification.

Eugenio Raúl Zaffaroni  
Judge



**CONCURRING OPINION OF  
JUDGE RICARDO C. PÉREZ MANRIQUE  
CASE OF GUACHALÁ CHIMBO ET AL. V. ECUADOR  
JUDGMENT OF MARCH 26, 2021  
(*Merits, reparations and costs*)**

**I. INTRODUCTION**

1. The judgment declares the violation of the rights to recognition of juridical personality, life, personal integrity, personal liberty, dignity, access to information, equality and health, in accordance with Articles 3, 4, 5, 7, 11, 13, 24 and 26 of the American Convention on Human Rights (hereinafter "the Convention") in relation to the obligations to respect and to ensure rights without discrimination and the duty to adopt domestic legal provisions established in Articles 1(1) and 2 of the Convention, to the detriment of Luis Eduardo Guachalá. The judgment also declares that the State is responsible for the violation of the rights to an effective remedy, judicial guarantees and judicial protection recognized in Articles 7(6), 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Luis Eduardo Guachalá Chimbo and the members of his family, Zoila Chimbo Jarro and Nancy Guachalá Chimbo. In addition, the State violated the right of these family members of the disappeared victim to know the truth. Lastly, it declares that the State is responsible for the violation of the right to personal integrity, recognized in Article 5(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Zoila Chimbo Jarro and Nancy Guachalá Chimbo.

2. The case relates to a series of violations that occurred in relation to the disappearance of Luis Eduardo Guachalá Chimbo, a person with disabilities, in January 2004, while he was interned in a public psychiatric hospital in Quito, Ecuador, as well as the absence of his informed consent for the hospitalization and the treatment received.

3. In this opinion, I concur with the findings of the judgment and submit it in order to: (i) examine further the way in which I consider that the IACtHR should approach cases that involve violations of the economic, social, cultural and environmental rights (ESCER), based on the universality, indivisibility, interdependence and interrelationship of all the human rights as the grounds for their justiciability, in relation to the right to health in the case of the treatment of mental health; (ii) examine further the concept of intersectionality in relation to mental health and its possible consequences, and (iii) analyze the events related to the hospitalization of Mr. Guachalá and the relationship between the consent and his treatment as a person with disabilities, and (iv) the reasons why a situation of forced disappearance was not established.

**II. THE ISSUE OF THE RIGHT TO HEALTH AS AN ECONOMIC, SOCIAL AND CULTURAL RIGHT JUSTICIABLE *PER SE***

4. The justiciability of the economic, social, cultural and environmental rights has been a subject of discussion both in legal doctrine and within the IACtHR, and three positions exist in this regard, as I mentioned, *inter alia*, in my concurring opinion to the judgment of November 21, 2019, in the *case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*.<sup>1</sup> The first position proposes that the analysis of individual violations of the economic, social, cultural and

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<sup>1</sup> Cf. *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394.

environmental rights must be made exclusively in relation to the rights explicitly recognized by Articles 3 to 25 of the Convention and based on what is expressly permitted by the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "the Protocol of San Salvador") in its Article 19(6).<sup>2</sup> While the second viewpoint asserts that the Court has competence to examine autonomous violations of the economic, social, cultural and environmental rights based on Article 26 of the Convention, understanding that they would be justiciable individually.<sup>3</sup>

5. As I have mentioned in previous concurring opinions and reiterating the arguments presented in them,<sup>4</sup> I adhere to a different position based on the universality, indivisibility, interdependence and interrelationship of the human rights, to maintain that the Court has competence to examine violation of the economic, social, cultural and environmental rights. And this is due to the conviction that human rights are interdependent and indivisible so that the civil and political rights are interwoven with the economic, social, cultural and environmental rights and, in circumstances such as those of this case, they cannot be separated.

6. This is why I have asserted that their interdependence and indivisibility allow the human being to be observed integrally as the titleholder of all rights and this has an impact on the justiciability of each of his rights. A similar perspective is asserted in the Preamble to the Protocol of San Salvador: "Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified."

7. In this perspective, Article 26 of the Convention functions as a framework article, in the understanding that it makes a general reference to the economic, social, cultural and environmental rights, and refers us to the OAS Charter for the description and determination of them. The Protocol of San Salvador individualizes and provides content to the economic, social, cultural and environmental rights. The Protocol mentions that it is essential that those rights be reaffirmed, developed, perfected and protected (see

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<sup>2</sup> Cf. *Case of the "Juvenile Re-education Institute" v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, or the *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005. Series C No. 125, to mention just two examples. Also, the *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298.

<sup>3</sup> Cf. *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340, paras. 142 and 154; *Case of Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348, para. 220; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 100; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97; *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, paras. 34 to 37; *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394, paras. 33 and 34; *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 62, and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs.* Judgment of February 6, 2020. Series C No. 400, para. 195.

<sup>4</sup> Cf. Concurring opinions to the judgment of November 21, 2019, in the *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru*; to the judgment of November 22, 2019, in the case of *Hernández v. Argentina*; to the judgment of February 6, 2020, in the *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* and to the judgment of July 15, 2020, in the *Case of the Workers of the Fireworks Factory of Santo Antonio de Jesús and their families v. Brazil*.

Preamble). Finally, a series of instruments of the inter-American *corpus juris* also refer to the ESCER.

8. Accordingly, I consider that this judgment demonstrates the coexistence of several rights of the victim that are indivisible and justiciable before this Court *per se*. Therefore, Article 19(6) of the Protocol of San Salvador does not represent an impediment for the Court to consider their joint violation.

9. In the instant case, as indicated in the first operative paragraph, the Court has declared the violation of the rights to recognition of juridical personality, life, personal integrity, personal liberty, dignity, access to information, equality and health, in accordance with Articles 3, 4, 5, 7, 11, 13, 24 and 26 of the Convention, in relation to Articles 1(1) and 2 of this instrument. I understand that, based on the conception that I have asserted in relation to the interpretation and application of the American Convention, the right to health is justiciable in function of the coexistence of the violation of various rights of the Convention, without the need to resort to justifications based on an autonomous referral to Article 26 of the Convention. On this basis, the referral to Article 26 is, in my opinion, unnecessary or at least superfluous.

### **III. INTERSECTIONALITY IN THE ANALYSIS OF INEQUALITY AND DISCRIMINATION**

10. In this section, I will examine the concept of intersectionality, with special emphasis on mental health, and the consequences of the intersectional approach.

11. The point of departure in this case is that Mr. Guachalá Chimbo was born poor, suffered from epilepsy, an illness that requires special care and treatment, and the absence of treatment results in the need for psychiatric care.

12. Regarding the intersectionality of the factors of vulnerability, paragraph 91 of the judgment indicates that “in the case of Luis Eduardo Guachalá Chimbo, if the diverse grounds for discrimination alleged in this case are verified, different factors of vulnerability or sources of discrimination associated with his condition as a person with disabilities and his financial situation – owing to the situation of extreme poverty in which he lived – had coalesced intersectionally. Thus, the Court stresses that the lack of financial resources may hinder or preclude access to the medical care required to prevent possible disabilities or to prevent or reduce the appearance of new disabilities. Based on the foregoing, the Court has indicated that the positive measures that States must take for persons with disabilities living in poverty include those necessary to prevent all forms of avoidable disabilities and to accord persons with disabilities preferential treatment appropriate to their condition.”<sup>5</sup> From this we can see that the intersectional approach has an impact on the content and scope of the State’s obligations. To look further into this, I will now examine the concept of intersectionality and its consequences.

13. As I mentioned in my concurring opinion with regard to the judgment in the *case of the Workers of the Fireworks Factory of Santo Antonio de Jesús and their families v. Brazil*, I understand intersectionality as the confluence in a single person or group of persons, who are victims of discrimination, of the violation of different types of rights which makes them victims of augmented discrimination. In my opinion, the confluence of multiple discriminations increases the devastating effects on the human dignity of the persons who suffer from them and results in a greater and more diverse violation of rights than when these discriminations are constituted in relation to a single right. In this regard, intersectionality is constituted when numerous vulnerabilities coalesce in one person or group of persons, understood as a deprivation of rights that produces a more intense discrimination, aggravated by asymmetry in relation to the rest of society and due to the simultaneousness, which also allows a group

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<sup>5</sup> Cf. *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 108.

or typology with special conditions of vulnerability to be identified.

14. The theory of intersectionality has usually been applied to examine two structures of power and discrimination: racism and sexism. The first person to address the concept of intersectionality was Kimberle Crenshaw when indicating that “black women encounter combined race and sex discrimination.” Thus, compared to a white woman or an Afro-descendant man, their situation may be similar or different, but involves greater vulnerability.<sup>6</sup> She also developed its significance when designing and evaluating policies in order to avoid remedies focused on the acceptance of the predominant factor of discrimination that make the intersection of other factors of discrimination invisible.<sup>7</sup> This concept has evolved taking into account other factors of vulnerability, such as in the instant case in which Mr. Guachalá is a person with disabilities who is in a vulnerable financial situation. Also, Mr. Guachalá was a young man suffering from a neurological disorder that had not been treated promptly or effectively owing to his condition of poverty, and this culminated in his admittance to a psychiatric hospital and his disappearance up until the present time.

15. With regard to disabilities as a factor of intersectional discrimination, in its General Comment No. 3, the Committee on the Rights of Persons with Disabilities established that the “concept of intersectional discrimination recognizes that individuals do not experience discrimination as members of a homogenous group but, rather, as individuals with multidimensional layers of identities, statuses and life circumstances. It acknowledges the lived realities and experiences of heightened disadvantage of individuals caused by multiple and intersecting forms of discrimination, which requires targeted measures to be taken with respect to disaggregated data collection, consultation, policymaking, the enforceability of non-discrimination policies and the provision of effective remedies.”<sup>8</sup>

16. Regarding the vulnerable financial situation as an aspect to be taken into account,<sup>9</sup> the Inter-American Commission on Human Rights has referred to the differentiated impact of poverty as a factor of vulnerability that is enhanced and increased when it is added to the vulnerabilities of certain groups in the population, such as among women and among children and adolescents.

17. At the level of the universal system for the protection of human rights, added to what has been mentioned in the judgment, the United Nations High Commissioner for Human Rights, in his 2017 report to the Human Rights Council, referred to the impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance emphasizing women and girls.<sup>10</sup>

18. From a judicial perspective, the consequences of the intersectional approach include, above all: (i) the increased impact owing to the sum of vulnerabilities that is especially harmful in relation to persons or groups who are victims; (ii) the demand on the State for a complex action of prevention, in which each vulnerability must be considered individually, but jointly, together with specific actions to respond to the summation of vulnerabilities; (iii) the need for policies that include all the social, economic, health,

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<sup>6</sup> Cf. Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” *University of Chicago Legal Forum* 1, No. 8, 1989, p. 149. Available at: <https://chicagounbound.uchicago.edu/cqj/viewcontent.cqj?article=1052&context=ucf>.

<sup>7</sup> Cf. Kimberle Crenshaw, *supra*, p. 152.

<sup>8</sup> Committee on the Rights of Persons with Disabilities. General Comment No. 3 on women and girls with disabilities. CRPD/C/GC/3, November 25, 2016, para 16.

<sup>9</sup> Cf. IACHR, Report on poverty and human rights in the Americas, OEA/Ser.L/V/II.164, September 7, 2017.

<sup>10</sup> Cf. Human Rights Council, Impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls, Report of the United Nations High Commissioner for Human Rights, April 21, 2017, UN Doc. A/HRC/35/10.

educational and other aspects to act on the consequences of intersectionality on the persons and groups affected.

19. In the case of disabilities, policies must be developed based on the social model of disability. This model is based on the fact that the causes that originate disabilities are social and not individual and respond to the limitations of society to provide adequate services for the inclusion of persons with disabilities.<sup>11</sup> This social model of disability is revealed by the Convention on the Rights of Persons with Disabilities, because it does not create new rights, but rather its purpose is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity" (Article 1, CRPD). Therefore, the purpose of the CRPD is to ensure the non-discrimination of persons with disabilities. Also, article 11 of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities defines its objectives as "to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society."

#### **IV. THE CASE OF MR. GUACHALÁ CHIMBÓ AND EVENTS DURING HIS HOSPITALIZATION**

20. One of the particularities of this case relates to the absence of Mr. Guachalá's consent at the time of his last hospitalization. The absence of adequate records and of a thorough investigation give rise to well-founded doubts about his treatment as a person that the hospital considered to be suffering from a disability, and the consequences of the hospitalization that resulted in his disappearance.

21. In this regard, aspects that should be taken into account include: (1) epilepsy is not a psychiatric illness; (2) this was not a voluntary hospitalization because Mr. Guachalá's consent was not obtained, and (3) the reason for Mr. Guachalá's second hospitalization is unclear.

22. The medical record does not reveal any useful evidence or annotation with regard to a determination of his powers of discernment that would have made him unable to provide his consent in order to proceed to admit him. No type of cognitive assessment was carried out. He was considered to be a person with a disability and, consequently, his mother was asked to give the consent, and even she was not provided with the minimum necessary information. All the foregoing appears in the documentation provided by the State.

23. It is worth underlining that the irregularities in relation to the second hospitalization – the failure to request consent, the treatment as a person with a disability, and the intersectionality of his vulnerable financial situation – raise doubts about the need for the forced hospitalization of Mr. Guachalá. It was his mother who gave consent for his admittance without receiving the necessary information to form a judgment on the real condition of her son.

24. All the circumstances that occurred from the time of his admittance and during the hospitalization are questionable from the perspective of the right to health and the obligation of special care required by a patient interned in a psychiatric hospital. The documentation that recorded his hospital treatment and the expert evidence reveal inconsistencies and a total lack of care and of the treatment that Mr. Guachalá required. In this regard, in the *case of Ximenes Lopez v. Brazil*, the Court emphasized that "persons with disabilities are frequently subject to discrimination owing to their condition, so that States must adopt the necessary legislative, social, educational, work-related or any other

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<sup>11</sup> Palacios, Agustina. "Una introducción al modelo social de discapacidad y su reflejo en la Convención Internacional sobre Derechos de las Personas con Discapacidad" en "Nueve conceptos claves para entender la Convención sobre los Derechos de las Personas con Discapacidad," 2015, Lima. Available at: <https://www.corteidh.or.cr/tablas/32092.pdf>

measures to eliminate any discrimination associated with mental disabilities and to promote the full integration of persons suffering from such disabilities into society.” The Court emphasized the vulnerability of persons with disabilities who are institutionalized in psychiatric institutions because they are more “particularly vulnerable to torture or other forms of cruel, inhuman or degrading treatment. The intrinsic vulnerability of persons with mental disabilities is exacerbated by the high degree of intimacy that characterizes the treatments of psychiatric illnesses, which makes these persons more liable to suffer abusive treatment when they are institutionalized.”<sup>12</sup>

25. The consequence of this particular vulnerability is that establishments dedicated to institutionalization must comply with certain requirements and be especially monitored by the State. Given that “the medical personnel responsible for the care of the patients exercise a strong control or authority over those in their custody. This intrinsic imbalance of power between a person institutionalized and those who are in authority, is multiplied exponentially in psychiatric institutions. Torture and other forms of cruel, inhuman or degrading treatment, when inflicted on such persons violates their mental, physical and moral integrity, represents an insult to their dignity and severely restricts their autonomy, which could result in worsening the illness.”<sup>13</sup>

## **V. THE ELEMENTS OF FORCED DISAPPEARANCE WERE NOT PRESENT**

26. Paragraph 227 of the judgment establishes that “it has been established that the whereabouts of Luis Eduardo Guachalá Chimbo are still unknown. The Court emphasizes that more than 17 years have passed since he disappeared. The discovery of his whereabouts is a just expectation of his family and constitutes a measure of reparation that gives rise to the correlative duty of the State to satisfy it.<sup>14</sup> The remains of a person who has died and the place where they are found may provide valuable information about what happened. Additionally, for the families of victims of disappearance, receiving the bodies of their loved ones is extremely important because it allows them to bury their loved ones in keeping with their beliefs, and to bring closure to the mourning process that they have been experiencing over the years.” I will now reinforce the view that this is not a forced disappearance, as claimed by the representatives, because it does not involve a systematic and organic act by the State.

27. In this regard, the case law of the IACtHR in cases of forced disappearance has established the elements that should be present to constitute a violation of the American Convention. “It is necessary that the acts or omissions that resulted in this violation can be attributed to the defendant State. Those acts or omissions may have been committed by any power or organ of the State, regardless of its rank. Taking into account the dispute that exists, the Court will proceed to analyze whether the alleged facts can be attributed to the State and, then, if necessary, it will determine whether they constitute violations of the American Convention and the other international treaties cited.”<sup>15</sup> It has also established that it must occur within the context of a “systematic and generalized practice of forced disappearances, political persecution, or other human rights violations and therefore cannot be used to corroborate other probative elements.”<sup>16</sup>

28. The European Court of Human Rights took into account the element of systematicity when examining the case of Antonio Gutiérrez Dorado and Carmen Dorado Ortíz against Spain.

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<sup>12</sup> Cf. *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 106.

<sup>13</sup> Cf. *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 106.

<sup>14</sup> Cf. *Case of Neira Alegría et al. v. Peru. Reparations and costs*. Judgment of September 19, 1996. Series C No. 29, para. 69, and *Case of Munárriz Escobar et al. v. Peru, supra*, para. 124.

<sup>15</sup> Cf. *Case of Arrom Suhurt et al. v. Paraguay. Merits*. Judgment of May 13, 2019. Series C No. 377.

<sup>16</sup> Cf. *Case of Arrom Suhurt et al. v. Paraguay. Merits*. Judgment of May 13, 2019. Series C No. 377.

24. In this case, even though some elements of forced disappearance are present, the element of systematicity does not appear, because a systematic process by the State and its agents to disappear patients interned in psychiatric hospital has not been cited or noted. Since disappearance is a situation that subsists over time without interruption, this conclusion determines that the processes for the search and location of Mr. Guachalá, and the eventual holding responsible of the hypothetical perpetrators remain open.

Ricardo C. Pérez Manrique  
Judge