

**INTER-AMERICAN COURT OF HUMAN RIGHTS**  
**CASE OF CHINCHILLA SANDOVAL V. GUATEMALA**  
**JUDGMENT OF FEBRUARY 29, 2016**  
***(Preliminary objection, merits, reparations and costs)***

In the case of *Chinchilla Sandoval et al. v. Guatemala*,

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), composed of the following judges:<sup>1</sup>

Roberto F. Caldas, President  
Eduardo Ferrer Mac-Gregor Poisot, Vice President;  
Manuel E. Ventura Robles, Judge;  
Alberto Pérez, Judge;  
Eduardo Vio Grossi, Judge, and  
Humberto Antonio Sierra Porto, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and  
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 54(3), 62(3) and 63 (1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”), Article 5(3) of the Statute of the Inter-American Court and Articles 17(1), 31, 32, 42, 65 and 67 of its Rules of Procedure (hereinafter “the Rules”), delivers this judgment, structured as follows:

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<sup>1</sup> This Judgment was issued during the 113 Regular Session of the Court. Pursuant to Articles 54(3) of the American Convention on Human Rights, 5(3) of the Statute of the Court and 17(1) of its Rules of Procedure, “Judges whose term has expired shall continue to exercise their functions in the cases that they have begun to hear and that are still pending.” Therefore, Judges Manuel E. Ventura Robles and Alberto Pérez participated in the deliberation and signing of this Judgment. For reasons of *force majeure*, Judge Diego García-Sayán did not participate in the deliberation and signing of this Judgment.

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

1. *The case submitted to the Court.* – On August 19, 2014, pursuant to Articles 51 and 61 of the American Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court the case of *Chinchilla Sandoval and others against the Republic of Guatemala* (hereinafter "the State" or "Guatemala"). According to the Commission, the case concerns alleged human rights violations committed against María Inés Chinchilla Sandoval (hereinafter "Mrs. Chinchilla" or "Mrs. Chinchilla Sandoval") resulting from multiple actions and omissions that culminated with her death while she was deprived of liberty and serving a prison sentence at the Women's Orientation Center (*Centro de Orientación Femenina- COF*). The Commission determined that while Mrs. Chinchilla was in custody, the State had a special obligation to act as guarantor of her rights to life and personal integrity, yet it failed to conduct comprehensive diagnostic tests to assess her illnesses and to provide appropriate treatment based on her specific needs. The Commission affirmed that, given her diabetic condition, the State had failed in its obligation to ensure that Mrs. Chinchilla Sandoval received regular medical examinations, equipment and special medications, as well as constant monitoring of her diet and the required care. On the contrary, she had to supply her own medications and food, relying on her own means or on her family. As a result, her medical condition deteriorated resulting in the amputation of one of her legs, among other ailments. The Commission further argued that the State also had a special obligation to Mrs. Chinchilla as a disabled person, that it failed to provide her with adequate conditions of detention to ensure her rights – considering that she was confined to a wheelchair and had other special needs owing to her condition - and that on the day of her death, after falling from her wheelchair, she was not provided with appropriate medical care or emergency hospital treatment. It also alleged that, despite having received consistent and regular information regarding Mrs. Chinchilla's health condition and its impact on her life and integrity, through her repeated requests for permission to attend medical appointments and four motions for early release, the judge enforcing the sentence did not provide judicial protection in relation to the various ailments suffered by the alleged victim. Finally, the Commission argued that the State failed to conduct an effective investigation into her death, violating the rights to judicial guarantees and judicial protection of her four children, namely: Marta María Gantenbein Chinchilla, Luz de María Juárez Chinchilla, Luis Mariano Juárez Chinchilla and another unidentified daughter.

2. *Proceeding before the Commission.* The proceeding before the Commission was as follows:

- a) *Petition.* On March 23, 2005, the non-governmental organization "Institute of Comparative Studies in Criminal Sciences of Guatemala," through its legal representative Alejandro Rodríguez Barillas, filed the initial petition before the Commission (opened under No. 321/05).
- b) *Report on Admissibility.* – On November 13, 2009, the Commission approved Admissibility Report No. 136/09.<sup>2</sup>

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<sup>2</sup> In this report, the Commission "conclude[d] that the case is admissible and that it is competent to examine the claim submitted by the petitioners regarding the alleged violation of Articles 4, 5, 8 and 25 of the American Convention, in relation to Article 1(1) thereof". Cf. IACHR, Report No. 136/09 Petition 321/05, Admissibility, María Inés Chinchilla Sandoval, Guatemala, November 13, 2009. Available at: <http://www.cidh.oas.org/annualrep/2009sp/Guatemala321-05.sp.htm> .

c) *Report on the Merits.* – On April 2, 2014, the Commission approved the Report on Merits No. 7/14,<sup>3</sup> pursuant to Article 50 of the Convention (hereinafter also “the Merits Report” or “Report No. 7/14”), in which it reached a number of conclusions and made several recommendations to the State:

a. *Conclusions.* – The Commission concluded that the State was responsible for:

- the violation of the right to life enshrined in Article 4(1) of the American Convention in conjunction with Article 1(1) thereof, to the detriment of María Inés Chinchilla Sandoval.
- the violation of the right to personal integrity enshrined in Article 5(1) of the American Convention, in conjunction with Article 1(1) thereof, to the detriment of María Inés Chinchilla Sandoval.
- the violation of judicial guarantees and judicial protection enshrined in Articles 8(1) and 25 of the American Convention, in conjunction with Article 1(1) and 2 thereof, to the detriment of María Inés Chinchilla Sandoval and her next of kin.

b. *Recommendations.* The Commission made the following recommendations to the State:

1. Provide full reparation for the human rights violations declared in the report, including both material and moral dimensions.
2. Carry out and complete an impartial, thorough and effective investigation, as soon as possible, in order to establish criminal and other responsibilities for the violations established in the report.
3. Adopt non-repetition measures, including: i) a guarantee of timely access to adequate medical treatment at the Women’s Orientation Center; ii) a guarantee of adequate conditions of confinement for persons with disabilities at the Women’s Orientation Center, in accordance with the standards described in this report; iii) institutional strengthening and training for judicial authorities responsible for the enforcement of sentences, to ensure that they effectively perform their role as guarantors of the rights of persons deprived of their liberty; and iv) adoption of rules on a prompt and effective judicial remedy to protect the rights to life and humane treatment where the health needs of persons deprived of their liberty are concerned.

d) *Notification of the State.* – On May 19, 2014, the Merits Report was notified to the State, which was granted two months to provide information on compliance with the recommendations. The State forwarded a report indicating that it did not commit the violations of the American Convention declared in the Merits Report, and argued that it was therefore not appropriate to impose measures of reparation in favor of Mrs. Chinchilla.

3. *Submission to the Court.* – On August 19, 2014, the Commission submitted the instant case to the Court given “the need to obtain justice for the [presumed] victim.”<sup>4</sup>

4. *Requests of the Inter-American Commission.* Based on the above, the Commission asked this Court to declare the international responsibility of the State for the violation of the rights indicated in the conclusions of its Merits Report and to order the measures of reparation described in the report’s recommendations (*supra* para. 2).

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<sup>3</sup> Cf. IACHR, Merits Report No. 7/14, Case 12.739, María Inés Chinchilla Sandoval et al., Guatemala, April 2, 2014 (File before the Commission, volume III, folios 2144 to 2203). Available at: <http://www.oas.org/es/cidh/Decisiones/corte/12739MeritsEs.pdf>

<sup>4</sup> The Commission appointed Commissioner James Cavallaro and Executive Secretary Emilio Álvarez Icaza L. as its delegates before the Court, and appointed Elizabeth Abi-Mershed, Deputy Executive Secretary, Silvia Serrano Guzmán and Jorge Humberto Meza F., lawyers of the Executive Secretariat, as legal advisers.

## II PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and to the representatives.* The case submitted by the Commission was notified to the State and the representatives on September 11, 2014.

6. *Brief of pleadings, motions and evidence.* On November 11, 2014, the representatives of the presumed victims (hereinafter “the representatives”) filed their brief of pleadings, motions and evidence (hereinafter “pleadings and motions brief”),<sup>5</sup> in the terms of Articles 25 and 40 of the Rules of Procedure. The representatives agreed substantially with the arguments and conclusions reached by the Commission and, in addition, they requested access to the Victims’ Legal Assistance Fund of the Court (hereinafter “Legal Assistance Fund”).

7. *Answering brief.* On January 12, 2015, the State submitted a brief with its preliminary objection, answer to the application and with observations to the pleadings and motions brief (hereinafter “answering brief”), in the terms of Articles 41 and 42 of the Rules.<sup>6</sup>

8. *Victims’ Legal Assistance Fund.* In an Order of January 28, 2015, the President admitted the request filed by the representatives for an alleged victim to have access to the Victims’ Legal Assistance Fund and approved the financial assistance necessary for the presentation of a statement by Mrs. Marta María Gantenbein Chinchilla de Aguilar, as appropriate, either at a hearing or by affidavit.<sup>7</sup> Subsequently, in a decision of May 12, 2015, the President ordered financial assistance to cover the travel and accommodation expenses necessary for the alleged victim to testify at the hearing (*infra* para.10).

9. *Observations on the preliminary objection.* On February 13 and 14, 2015, the Commission and the representatives, respectively, presented their observations on the preliminary objection filed by the State.

10. *Public hearing and expert and testimonial evidence.* In an Order of May 12, 2015, the parties and the Commission were summoned to a public hearing so that the Court could receive the statements of a presumed victim (offered by the representatives) and of an expert witness (proposed by the Commission), as well as the final oral arguments of the representatives and the State and the final oral observations of the Commission on the preliminary objection and possible merits and reparations. The President also required the statements rendered by affidavit, of a witness (proposed by the State) and two expert witnesses (proposed by the Commission).<sup>8</sup> On June 15, 2015, the Court received these statements, having granted the parties an opportunity to formulate questions to the deponents<sup>9</sup> and having announced that it was not appropriate to grant the Commission’s

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<sup>5</sup> The brief was signed by Luisa María Leiva Mazariegos and Mario Ernesto Archial Ortiz, of the “Institute for Comparative Studies in Criminal Sciences of Guatemala,” in representation of Marta María Gantenbein Chinchilla de Aguilar, Luz de María Juárez Chinchilla and Luis Mariano Juárez Chinchilla, children of the presumed victim, María Inés Chinchilla Sandoval.

<sup>6</sup> On September 26, 2014, the State designated Rodrigo José Villagrán Sandoval as Agent and Steffany Rebeca Vásquez Barillas as Alternate Agent.

<sup>7</sup> *Cf. Case of Chinchilla Sandoval et al. v. Guatemala.* Order of the President of the Inter-American Court of January 28, 2015. Available at: [http://www.corteidh.or.cr/docs/asuntos/chinchilla\\_fv\\_15.pdf](http://www.corteidh.or.cr/docs/asuntos/chinchilla_fv_15.pdf)

<sup>8</sup> *Cf. Case of Chinchilla Sandoval et al. v. Guatemala.* Order of the President of the Inter-American Court of May 12, 2015. Available at: [http://www.corteidh.or.cr/docs/asuntos/chinchilla\\_12\\_05\\_15.pdf](http://www.corteidh.or.cr/docs/asuntos/chinchilla_12_05_15.pdf)

<sup>9</sup> Only the State forwarded questions for the expert witnesses.

request to change the objects of the statements of the proposed expert witnesses.<sup>10</sup> The public hearing took place on June 22 and 23, 2015, during the Court's 109 Regular Session, held at its seat.<sup>11</sup> During the hearing, the Judges of the Court requested certain helpful information, explanations and documentation.

11. *Amici curiae*. The Court received *amicus curiae* briefs from the following individuals and organizations: 1) "The Criminal Policy Research Center" of *Universidad Externado de Colombia*; 2) professors and students of the New York University School of Law Clinic on Policy Advocacy in Latin America; 3) professors and students of the "Legal Clinic on Disability" of the Pontifical Catholic University of Peru; 4) professors and students of the "Law Clinic, Action Program for Equality and Social Inclusion (PAIIS)" of the Law Faculty of the University of Los Andes, Colombia; 5) the law firm *ELEMENTA Consultoría en Derechos*; 6) Harvard Law School Project on Disability, and the Center for Justice and International Law (CEJIL).

12. *Final written arguments and observations*. On July 23, 2015, the parties and the Commission, respectively, presented their final written arguments and observations. As annexes to their final written arguments, the parties presented certain documentation. The President granted a period of time to submit observations on those annexes, which were received on August 5 and 6, 2015. Given that the term granted to present observations to the aforementioned documentation did not constitute a new procedural opportunity to submit new arguments, on August 10, upon the instructions of the President, the Secretariat indicated that the Court would not consider the content of the briefs of the State and the representatives that did not refer strictly and specifically to those annexes.

13. *Expenses incurred in application of the Legal Assistance Fund*. Through a note of the Secretariat dated September 18, 2015, following the instructions of the President and pursuant to Article 5 of the Court's Rules of Procedure on the Operation of the Victims' Legal Assistance Fund, a report on disbursements made in application of said Fund was forwarded to the State, which was granted until October 5, 2015, to submit its observations. On that date, the State presented its observations and asked the Court not to require it to reimburse those expenses.

14. *Deliberation of the instant case*. The Court began its deliberation of this Judgment on February 26, 2015.

### **III JURISDICTION**

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<sup>10</sup> In a brief dated May 13, 2015, the Commission stated that, by involuntary error, it had changed the order and correspondence of the objects of the expert opinions proposed in its final list of deponents, and requested that the expert opinions ordered be rendered according to the objects defined in its brief of September 9, 2014. The parties were granted an opportunity to submit observations. The State opposed the request. In a note dated May 22, 2015, the Secretariat communicated the President's instructions not to change the provisions of the Order of May 12, 2015.

<sup>11</sup> This hearing was attended by the following: a) for the representatives: Luisa María Leiva Mazariegos and Mario Ernesto Archial Ortiz; b) for the Inter-American Commission: James Louis Cavallaro, Commissioner, Elizabeth Abi-Mershed, Deputy Executive Secretary, Silvia Serrano Guzmán and Jorge H. Meza F., lawyers of the Executive Secretariat; and c) for the State: Rodrigo José Villagrán Sandoval, Agent, and Steffany Rebecca Vásquez Barillas, Alternate Agent. Video available at <http://vimeopro.com/corteidh/hearing-publica-case-chinchilla-sandoval-y-other-vs-guatemala-22-y-23-de-junio-de-2015>

15. The Court is competent to hear this case under the terms of Article 62(3) of the American Convention, given that Guatemala is a State Party to the Convention since May 25, 1978, and accepted the Court's contentious jurisdiction on March 9, 1987.

#### IV PRELIMINARY OBJECTION (Alleged failure to exhaust domestic remedies)

##### *Arguments of the State and observations of the Commission and the representatives*

16. The **State** indicated that, although the Commission's Admissibility Report applied the exception to the exhaustion of domestic remedies included in Article 46(2)(b) of the Convention,<sup>12</sup> in its merits report the Commission changed its view, arguing that no remedies were available under domestic law to denounce the effects of the lack of appropriate treatment and the conditions of incarceration on the alleged victim's health. The State emphasized that the Commission and the representatives did not claim (in the merits report and in the pleadings and motions brief) that there was any criminal responsibility on the part of a State authority or of another person; rather there was possible negligence or a lack of medical care on the part of State authorities and, consequently, damage occurred. As to the existence of domestic remedies such as civil liability for compensation for damages, the State argued that, under domestic legislation, several procedures were available to the petitioners to claim possible negligence or lack of medical care, which were effective remedies that should have been exhausted:

- a) Ordinary lawsuit to claim damages, under the terms of Article 1645 of the Civil Code<sup>13</sup> and Article 96 of the Code of Civil and Commercial Procedure (Decree Law 107),<sup>14</sup> to determine if any damage or harm occurred and, if so, establish reparations to compensate the victim. The State argued that the petitioners (Mrs. Chinchilla's heirs) could have determined whether the alleged victim's treatment at the COF was deficient, whether it caused a deterioration in her health or any other claim related to the lack of medical care. By failing to exhaust this remedy, it was not possible to determine whether there was any individual or State responsibility<sup>15</sup> and, if so, to establish compensation. As to the effectiveness of that

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<sup>12</sup> "1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;

b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment; [...]

2. The provisions of paragraphs 1.a and 1.b of this Article shall not be applicable when: [...]

b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them."

<sup>13</sup> "Any person who causes damage or prejudice to another person, either intentionally, or through carelessness or negligence, is required to repair it, unless it is proven that the damage or prejudice are caused by inexcusable negligence or guilt on the part of the victim."

<sup>14</sup> "Disputes that are not subject to special procedure under this Code shall be settled in an ordinary trial."

<sup>15</sup> According to the State, such a trial would also have served to determine the State's responsibility, as established in Article 155 of the Constitution of the Republic of Guatemala ("When a dignitary, official or employee of the State, in the exercise of his duties, violates the law to the detriment of private individuals, the State or the State institution which he serves shall be jointly responsible for any damage or prejudice that may have been caused. The civil liability of public officials and employees may be surmised provided that the statute of limitations, which is twenty years, has not expired") and Article 1665 of the Civil Code ("The State and the municipalities are responsible for



remedy, the State referred to two cassation judgments delivered by the Supreme Court of Guatemala that confirm the rulings of two ordinary lawsuits for damages in which a private institution in one case, and a public sector institution in the other, were ordered to pay compensation for medical malpractice.

- b) Summary trial of public officials and employees for civil liability, pursuant to Article 246 of the Code of Civil and Commercial Procedure<sup>16</sup>, not to consider the damage, but to determine if there was any liability on the part of officials responsible for Mrs. Chinchilla's custody and, if so, establish compensation.

17. The State insisted that these remedies would have made it possible to prove whether Mrs. Chinchilla's death was caused by the lack of medical attention, which could not be proven through a criminal trial (which determines whether a person committed a criminal action). In that case, neither negligence nor lack of adequate medical attention would constitute a crime, but rather would entail civil liability, unless it was intentional, in which case, depending on the result, a person could be prosecuted for damages or for homicide. The State stressed that the Commission and the representatives did not claim criminal intent in Mrs. Chinchilla's death, and argued that if the petitioners did not agree with the outcome of the criminal investigation they should have persisted at the time and exercised the rights and guarantees recognized in the Constitution and the Code of Criminal Procedure,<sup>17</sup> but did not do so. The State also emphasized that Article 1647 of the Civil Code establishes that exemption from criminal liability does not imply exemption from civil liability; therefore, the Public Prosecution Service's decision to dismiss the case only made reference to the absence of a criminal act, but did not affect the possibility of administrative liability, for which it was necessary to file a civil claim. Based on the foregoing, and considering that the petitioners are directly using the protection of the Inter-American System, when it is complementary and coadjuvant, the State asked the Court to admit its objection of failure to exhaust domestic remedies.

18. Regarding the alleged failure to file an ordinary lawsuit to claim damages, the **Commission** indicated that, in its Admissibility Report, it had declared inappropriate the requirement to exhaust that remedy. It pointed out that because Mrs. Chinchilla was a person deprived of liberty who had died while in the State's custody, the State had a duty to investigate her death *ex officio* and it could not demand that the other party exhaust civil remedies. The Commission further noted that the State did not dispute the fact that Mrs. Chinchilla's next of kin had not been notified of the opening of the investigations by the Public Prosecution Service, or of their outcome and, therefore, the next of kin could not be required to have some form of participation in that proceeding, pursuant to Article 46(2) (b) of the Convention. It also pointed out that, during the admissibility stage, the State did not explain how said remedy would be appropriate and effective. As to the alleged failure to exhaust the remedy of a summary trial for civil liability of public officials and employees, the Commission indicated that the remedy indicated by the State was mentioned for the first time before the Court in the answering brief; therefore, this aspect of the objection was filed extemporaneously and, furthermore, the State did not specify the legal requirements for its application or demonstrate its effectiveness and appropriateness.

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damage or prejudice caused by its officials or employees in the exercise of their duties"). It argued that, as of this date, the civil liability, both of the officials and of the State, has not expired in the case of Mrs. Chinchilla.

<sup>16</sup> "The civil liability of public officials and employees is applicable in those cases expressly established by law; it shall be analyzed before the judge of First Instance by the injured party or his successors."

<sup>17</sup> Code of Criminal Procedure, Article 116. "Private Accuser. (...) the petitioner may always collaborate with the prosecutor and contribute to the investigation of the facts. (...) If the petitioner disagrees with the decision of the prosecutor, he may have recourse to the Judge of First Instance (...)"

19. The **representatives** argued that in this case, the exception to the rule for exhausting domestic remedies established in Article 46(2) of the Convention should operate, since the determination of criminal liability is a function of the State and its actions did not respect international standards for a criminal investigation into the death of a person deprived of liberty. They argued that the facts of this case concern not only the absence of a criminal investigation into the death of the alleged victim, but also her incarceration without adequate medical care, including the lack of adequate diagnosis, access to health services and medical treatment. Regarding the alleged lack of the remedy to claim damages, the representatives noted that, in the last 20 years, no public official has been convicted by that route, that pursuing these remedies involves very lengthy processes and that Guatemala does not have an appropriate and effective implementation mechanism to ensure a possible civil conviction. As to the need to file a civil claim for some form of liability, they argued that the fact that there is no criminal classification of matters such as negligence or lack of adequate medical care cannot be used to justify the failure to investigate and prosecute a person's death, especially when the facts fall within the legal definitions of domestic legislation.

#### *Considerations of the Court*

20. Article 46(1) (a) of the American Convention establishes that in order to determine the admissibility of a petition or communication presented before the Inter-American Commission, pursuant to Articles 44 or 45 of the Convention, it is necessary to have filed and exhausted domestic legal remedies, according to the generally accepted principles of International Law.<sup>18</sup> In this regard, the Court has held that any objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be submitted at the proper procedural moment, that is, during the procedure of admissibility before the Commission.<sup>19</sup>

21. Therefore, during the processing the case, the State must clearly specify before the Commission the remedies that, in its view, have not yet been exhausted. This is related to the need to safeguard the principle of procedural equality between the parties, which must govern any procedure before the Inter-American System. The Court has repeatedly established that it is not for this Court or for the Commission to identify *ex officio* which domestic remedies are pending exhaustion, since it is not the role of international bodies to remedy the lack of precision in the State's arguments. Likewise, the arguments that substantiate the preliminary objection filed by the State before the Commission during the admissibility stage must correspond to those presented before the Court.<sup>20</sup> Likewise, the State must not only specify which domestic remedies have not yet been exhausted, but it must also demonstrate that these were available and were adequate, appropriate and effective.<sup>21</sup>

22. In the first place, the Court points out that, during the stage of admissibility before the Commission, the State alleged that the next of kin had not attempted to file a complaint during

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<sup>18</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 85, and *Case of Quispiyalaya Vilcapoma v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2015. Series C No. 308, para. 20.

<sup>19</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, *supra*, para. 85, and *Case of Quispiyalaya Vilcapoma v. Peru*, *supra*, para. 21.

<sup>20</sup> Cf. *Case of Furlan and Family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 29; and *Case of Quispiyalaya Vilcapoma v. Peru*, *supra*, para. 21.

<sup>21</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, *supra*, paras. 88 and 91; and *Case of Velásquez Paiz et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of November 19, 2015. Series C No. 307, para. 24.

the criminal proceedings in relation to the decision to archive the case, or in the ordinary civil lawsuit to claim damages.<sup>22</sup>

23. Thus, for the purposes of determining whether the conventional requirement of prior exhaustion of domestic remedies has been met, and before analyzing the legal actions filed in the domestic courts regarding the situation described in Admissibility Report N° 136/09 of November 13, 2009, the Commission stated the object of the complaint in the following terms: 1) "the alleged lack of adequate and sufficient medical care provided to the alleged victim while in jail, especially during the time just prior to her death; and 2) the alleged absence of a proper investigation into the circumstances of her death." The Commission then considered the State's argument in its report, deeming it inadmissible to require the exhaustion of the two remedies mentioned by the State.<sup>23</sup>

24. However, in the preliminary objection filed before this Court it is not clear that the State maintains its argument regarding the failure to file a complaint. In this objection, the State focused on the fact that the petitioners did not exhaust the following remedies: 1) an ordinary civil lawsuit to claim damages, and 2) summary proceedings to establish the civil liability of public officials and employees. Therefore, with respect to the dispute, the Court considers that the State has tacitly renounced its previous argument before the Commission.

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<sup>22</sup> Cf. Briefs of the State forwarded to the Commission, dated June 9, 2006, September 25, 2006, January 8, 2007, November 17, 2008, April 21, 2009 and September 29, 2009. In this last brief, the State argued that the petitioners did not attempt to exhaust the domestic remedies in the civil and criminal courts, and therefore the petition should be declared inadmissible, owing to the failure to exhaust domestic remedies pursuant to Article 46(1) of the Convention. On the one hand, the State argued that domestic remedies did indeed exist, since a criminal investigation was carried out and concluded that the death of Mrs. Maria Inés Chinchilla Sandoval did not meet the criteria to configure a crime; therefore, the Public Prosecution Service, based on the principle of objectivity and legality, requested the withdrawal of the case. It added that the petitioner could have filed a complaint and used the power granted by the Code of Criminal Procedure to oppose the prosecutor's request to withdraw the claim, but did not do so. In addition, the State argued that another remedy of a civil nature was available, namely an ordinary lawsuit for damages, protected at the constitutional and legal level, which had not been used.

<sup>23</sup> In relation to the first, the Commission observed that, from 1997, Mrs. Chinchilla Sandoval filed several administrative petitions to the prison authorities regarding her health condition, namely, requests for authorization to attend medical appointments at the hospital and incidental motions for early release for remission of sentences before the Second Criminal Enforcement Court of Guatemala. Thus, it considered that the alleged victim made use of the means at her disposal, both legal and administrative, to obtain adequate and sufficient medical care while serving her sentence in prison and that she made the State aware of her health condition, which was deteriorating at an accelerated pace due to the various ailments that afflicted her. In that sense, the Commission considered that "the conventional requirement of prior exhaustion of domestic remedies has been met with regard to the object of the complaint pertaining to the alleged lack of medical care provided to Mrs. Chinchilla Sandoval at the Women's Orientation Center." In relation to the second point, the Commission observed that "the relatives of the alleged victim were not notified of the investigation opened by the Prosecutor's Office or of its outcome," and therefore "the lack of information and notification made it impossible for the relatives of Mrs. Chinchilla Sandoval to file a petition to change the decision to close the case, to present their allegations and evidence of the deficient medical care provided to the alleged victim after she fell, as they have done in their petition lodged with the IACHR" (para. 44). The Commission considered that "[i]n addition, [...] the alleged facts refer to the alleged violation of fundamental rights such as the right to life and to personal integrity, violations that in the domestic legislation are categorized as crimes that can be prosecuted by a court on its own, and whose investigation and prosecution should be pursued by the State;" given that she was in jail and under the custody of the State when she died, "it should [have been] first, the responsibility of the State to clarify the circumstances of her death and not the efforts of private interests, or for the investigation to depend on the initiative of those private interests" (para.45). Consequently, the Commission considered that in the second aspect of the complaint relating to the investigation into the death of Mrs. Chinchilla Sandoval, the exception to the requirement of prior exhaustion of domestic remedies established in Article 46(2)(b) of the Convention applies (para.46). Moreover, it pointed out that "compensation for loss and damages which, according to the State, the petitioners did not claim could not, in this case, be considered an efficient and sufficient remedy to investigate, clarify and, if warranted, prosecute the consequences of a death, allegedly caused by negligence and the failure on the part of government employees to provide adequate medical care to a person deprived of liberty." Cf. Admissibility Report, *supra*, para. 47.

25. With respect to the ordinary civil lawsuit to claim damages, which was not attempted by Mrs. Chinchilla Sandoval or by her relatives, as the presumed victims in this case, the Court reiterates that, on account of the possible liabilities associated with the alleged facts, namely, the lack of adequate health care and the death of a person while in the State's custody, it was up to the State to elucidate, *ex officio*, the circumstances in which these facts occurred, and should not depend on the efforts of private interests. Consequently, it could not require a party to exhaust legal actions in the civil courts as indicated by the State, the purpose of which was, according to the latter, to determine damages and, if applicable, set the corresponding compensation.<sup>24</sup> In other cases, the Court has considered that, "if national mechanisms exist to determine forms of reparation [that satisfy] the criteria of objectivity, reasonableness and effectiveness to make adequate reparation for declared violations of rights recognized in the Convention," such proceedings and their results "can be assessed."<sup>25</sup> Thus, certain proceedings activated by victims at the domestic level may be relevant to qualify and define certain aspects or implications of the State's responsibility, as well as to settle certain claims in the context of integral reparation. Accordingly, the decisions taken at the domestic level have been taken into account when assessing the requests for reparation in a case before the Inter-American System.<sup>26</sup> However, such proceedings have been relevant and have been used effectively by individuals harmed by violations of their rights, or by their next of kin. Thus, an assessment must be made having regard to the circumstances of each specific case, according to the nature of the right allegedly violated and the claims of the individual who has instituted the proceedings. Consequently, this analysis may correspond to the merits of the matter or, if appropriate, to the reparations stage.<sup>27</sup> Therefore, in this case it is not pertinent to assess *in abstracto* the appropriateness and effectiveness of an ordinary civil lawsuit to establish the State's responsibility for the facts of this case or to seek reparation for the consequences thereof, since it was not necessary for the presumed victim or her relatives to exhaust them.

<sup>24</sup> In the case *Salman v. Turkey* (No. 21986/93, Judgment of June 27, 2000), the European Court of Human Rights heard a case in which the State filed a preliminary objection arguing the failure to exhaust domestic remedies, for not filing administrative and civil actions for damages, following the suspicious death of a man in the State's custody. In this case the Court decided that, based on the autopsy, the person would have died naturally as a result of heart disease, but the relatives argued that the outcome had been provoked by the torture to which he had been subjected during his detention. The European Court considered the following:

83. [...]the Court recalls that a Contracting State's obligation under Articles 2 and 13 of the Convention to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of fatal assault might be rendered illusory if, in respect of complaints under those Articles, an applicant were to be required to exhaust an administrative-law action leading only to an award of damages (See the Judgment *Yaşa v. Turkey* of September 2, 1998, Reports 1998-VI, p. 2431, § 74). Consequently, the applicant was not required to bring the administrative proceedings in question and the preliminary objection is in this respect unfounded. (Translation of the Secretariat)

<sup>25</sup> Cf. *Case of Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of May 26, 2010. Series C No. 213 para. 246; and *Case of García Ibarra et al. v. Ecuador. Preliminary objections, Merits, Reparations and Costs*. Judgment of November 17, 2015. Series C No. 306, para. 186.

<sup>26</sup> Cf. *Case of the Mapiripán Massacre v. Colombia. Merits*. Judgment of September 15, 2005. Series C No. 134; and *Case of García Ibarra et al. v. Ecuador, supra*, para. 186. See also: *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 251; *Case of the Tango Massacres v. Colombia. Merits*. Judgment of July 1, 2006. Series C No. 148, paras. 91 and 340; *Case of La Rochela Massacre v. Colombia. Merits, reparations and costs*. Judgment of May 11, 2007. Series C No. 163, paras. 265 and 266; *Case of Cepeda Vargas v. Colombia, supra*, para. 246; *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of November 24, 2010, Series C No. 219, para. 303; *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations*. Judgment of November 30, 2012. Series C No. 259, paras. 38 and 334 to 338; *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2013. Series C No. 270, paras. 469 to 476; and *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 14, 2014. Series C No. 287, paras. 548 and 549.

<sup>27</sup> Cf. *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 37 and 38; and *Case of García Ibarra et al. v. Ecuador, supra*, para. 186.

26. Finally, when the case was submitted to the Court, the State also argued that the petitioners did not exhaust the remedy of summary trial for civil liability of public officials and employees. In this regard, the Court reiterates that the appropriate procedural moment to specify the remedies that, according to the State, were yet to be exhausted, was during the proceeding before the Commission. Therefore, the State's argument before this Court regarding that domestic remedy is time-barred.

27. Consequently, the Court dismisses the State's preliminary objection of failure to exhaust domestic remedies.

## **V EVIDENCE**

### **A. *Documentary, testimonial and expert evidence***

28. The Court received various documents presented as evidence by the Commission and the parties, attached to their main briefs. The Court also received the affidavits of the witness Vicenta Tzamal Navichoc, proposed by the State, together with the expert opinions of Oscar A. Cabrera and Alejandro Morlachetti, proposed by the Commission. As for the evidence provided during the public hearing, the Court heard the statement of Marta María Gantenbein Chinchilla de Aguilar, a presumed victim, proposed by the representatives, and the statement of the expert witness Carlos Ríos Espinosa, proposed by the Commission. Finally, the Court received documents presented by the State and the representatives attached to their respective final written arguments.

### **B. *Admission of the evidence***

#### **B. 1) *Admission of the documentary evidence***

29. In this case, as in others, the Court admits those documents presented by the parties and the Commission at the appropriate procedural moment (Article 57 of the Rules) that were not contested or opposed, and the authenticity of which was not challenged;<sup>28</sup> nevertheless, the Court will now rule on the disputes concerning the admissibility of certain documents.

30. In its answer brief, the State asked the Court not to admit the statements of Osiris Angélica Romano Villatoro and Claudia Fedora Quintana Mendoza, rendered before a notary and provided as evidence by the Commission, and to refrain from assessing the facts deemed proven in those statements, since they lack any veracity. The State argued that the notary who had allegedly taken the statements did not enter or attend the COF for those purposes on the day on which those statements were supposedly taken, as is evident from a certification of the log book for the entry lawyers to the COF for that day, and of a report of the person responsible for controlling prison visits of the SIAPEN program.

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<sup>28</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of the Kaliña and Lokono Peoples v. Suriname. Merits, reparations and costs*. Judgment of November 25, 2015. Series C No. 309, para. 21.

31. The Court notes that the representatives and the Commission did not specifically refer to these comments by the State, since the representatives only referred to the applicable regulations. According to the information provided, there are doubts as to whether such statements were indeed rendered before a notary at the prison in which the deponents were detained. These doubts have not been challenged. Consequently, the Court will not give probative value to those two pieces of documentary evidence.

32. At the same time, the State presented certain documentation with its final written arguments, including laws, rules of procedure, a work report of the Ministry of the Interior and a national prison reform plan, for the purpose of reporting on the legal reforms and current regulations of the prison system, as well as providing answers to questions asked by the Judges during the hearing. The representatives and the Commission had an opportunity to present their observations on said documents (*supra* para. 12). With respect to a statement rendered by an inmate and a photograph of the entrance to the maternal block of the COF, the Court agrees with the Commission's<sup>29</sup> observation that the State did not justify the presentation of those documents outside the procedural moment established in the Rules of Procedure; that is to say, it did not justify them for reasons of *force majeure* or grave impediment, and did not refer to any supervening facts, after the date on which the answer brief was submitted. Therefore, this documentation is inadmissible. As to the rest of the documents, the Court includes these in the file in application of Article 58 of the Rules of Procedure, solely as information on current prison regulations in Guatemala and insofar as they may contribute to explain the State's position in relation to the Judges' requests for information during the hearing.<sup>30</sup>

33. For their part, the representatives presented certain documents with their final written arguments and, in addition, forwarded receipts for expenses incurred in the proceeding before the Court. The State and the Commission had an opportunity to present their observations on said information and documentation. As to Annexes I<sup>31</sup>, III<sup>32</sup>, IV, V, VI<sup>33</sup> and IX,<sup>34</sup> the Court agrees with the State that the representatives did not justify their time-barred presentation for reasons of *force majeure* or serious impediment, and therefore these are not

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<sup>29</sup> Regarding the statement made by an inmate named Maria Isabel Funes Vincente and the photograph of the entrance to the maternal block of the COF, presented by the State, the Commission observed that "the State did not justify any reason of "force majeure" or "grave impediment, or, that these referred to "supervening facts" after the date on which it forwarded its answer brief", by which "such evidence is inadmissible." Regarding the photograph of the entrance to the maternal block of the COF, the Commission observed that the State did not prove the authenticity of the photograph and that it showed the existence of a step to the entrance of the maternal block, confirming that the COF still does not guarantee the necessary accessibility for a person confined to a wheelchair.

<sup>30</sup> Cf. *Case García Ibarra et al. v. Ecuador*, *supra*, para. 40.

<sup>31</sup> Annex I is a document prepared by the Center for Justice and International Law (CEJIL) and the Institute for Comparative Studies in Criminal Sciences of Guatemala (ICCPG) containing observations regarding compliance with the Judgments delivered by the Inter-American Court in the cases of *Fermín Ramírez v. Guatemala* and *Raxcacó Reyes v. Guatemala*, and the implementation of the provisional measures ordered in favor of Bernardino Rodríguez Lara.

<sup>32</sup> Annex III is *Cifras de Impunidad del Crimen Policial Contra Mujeres* (Rates of Impunity in Police Crimes against Women), a report published by the Guatemalan Institute for Comparative Studies in Criminal Sciences in 2005.

<sup>33</sup> Annex IV is a report published on the web site of the Guatemalan organization *Casa Artesana* on the situation of the COF in 2014, which concludes that the situation of women deprived of their liberty remains non-compliant with the Bangkok Rules. Annexes V and VI contain news reports published in the media mentioned on page 22 of the brief of final arguments.

<sup>34</sup> Annex IX is a certification of psychological and psychiatric treatment issued by a psychiatrist concerning the therapy that she gave Mrs. Chinchilla Sandoval at the COF and the treatment given to her children after her death.

admissible. Regarding Annexes II<sup>35</sup> and VII<sup>36</sup>, the Court will include these pursuant to Article 58 of the Rules of Procedure, solely as information on the State's current prison regulations. Finally, the Court admits Annexes X to XV,<sup>37</sup> related to vouchers for expenses and fees allegedly incurred by the representatives to attend the proceeding before the Court, for airline tickets and accommodation, without prejudice to the corresponding assessment made of their evidentiary weight in the section on costs and expenses. Regarding Annex VIII,<sup>38</sup> the Court points out that this document does not have evidentiary value, but is considered as part of the arguments regarding the "breakdown and details" of the amount requested as pecuniary compensation in the final written arguments of the representatives.

## **B. 2) Admission of the testimonial and expert evidence**

34. In relation to the statements rendered by affidavit and those provided during the public hearing, the Court admits these insofar as they relate to the object defined by the President of the Court in the Order that required them (*supra* para. 10) and to the purpose of this case.

35. Regarding the testimony of Mrs. Vicenta Tzamal Navichoc, rendered by affidavit and provided by the State, the representatives argued that it was irrelevant because she was not acting as director of the COF at the time of the facts. The Court considers that such observations refer to the evidentiary value or weight of that statement, but do not affect its admissibility.

## **C. Assessment of the evidence**

36. Based on Articles 46, 47, 48, 50, 51, 57 and 58 of the Rules of Procedure, as well as on its case law concerning evidence and its assessment,<sup>39</sup> the Court will examine and assess the documentary evidence forwarded by the parties at the proper procedural moments, together with the statements, opinions and testimonies rendered in a sworn statement before a notary public (affidavit) and during the public hearing. To this end, the Court will abide by the principles of sound judicial discretion, within the corresponding legal framework, taking into account the entire body of evidence in the case.<sup>40</sup> Likewise, the statements rendered by the alleged victims cannot be assessed in isolation, but must be considered within the context of

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<sup>35</sup> Annex II is the first report of the *Observatorio Guatemalteco de Cárceles* (Guatemalan Prisons Observatory) of the Human Rights Ombudsman of 2004, which "offers a systematic assessment of the Guatemalan prison system from a human rights perspective."

<sup>36</sup> Annex VII is the Preliminary Report on Monitoring Access to the Human Right to Health of Detainees in the Prisons of the Department of Guatemala prepared by the General Directorate of the Prison System in the Department of Guatemala, on May 22 and 25, 2015.

<sup>37</sup> Annex XV is a breakdown of the total amount disbursed for professional legal counseling services by the Association of the Institute for Comparative Studies in Criminal Sciences of Guatemala during the proceeding before the Inter-American System in the case of María Inés Chinchilla Sandoval et al. against Guatemala.

<sup>38</sup> Annex VIII is a report entitled "*Daño Emergente, Lucro Cesante y Reparación Digna*" prepared by Juan Diego Velásquez Vargas.

<sup>39</sup> Cf. *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 25, 2001. Series C No. 76, para. 51, and *Case of Velásquez Paiz et al. v. Guatemala, supra*, para. 39.

<sup>40</sup> Cf. *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Reparations and costs, supra*, para. 76; and *Case of Quispialaya Vilcapoma v. Peru, supra*, para. 24.

the evidence as a whole, insofar as they can provide greater information on the alleged violations and their consequences.<sup>41</sup>

#### **D. Admission and assessment of the *amicus curiae* briefs**

37. The State asked the Court to refrain from admitting the *amicus curiae* briefs, considering that have no legal basis since they ignore the real situation of inmates in the Guatemalan prison system, particularly in the instant case. The State argued that such briefs do not fulfill their objective providing the Court with arguments and appraisals that expand the elements of judgement currently available in this case and presented a series of arguments regarding each of the briefs. They argued, *inter alia*, that their authors are not familiar with the defense and counter arguments put forward by the State during the proceedings before the Court; that they introduce new situations or facts in breach of the State's right of defense; that they reveal a lack of knowledge of the case and of Guatemala's social, legal and political context; and, that they do not fulfill the purpose of an *amicus curiae* brief that the Court has accepted previously and, in general, that they lack "legitimacy *locus standi* to submit briefs in this case."

38. The Court points out that, according to Article 2(3) of the Rules of Procedure, an *amicus curiae* is a "person or institution who is unrelated to the case and to the proceeding" brought before the Court, in order to submit "reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding." In other words, such an individual or institution is not a procedural party in the litigation and the document submitted is intended to illustrate to the Court factual or legal matters related to the proceeding before it, without the Court having to rule on the correctness or otherwise of such briefs. Consequently, the State's observations do not affect the admissibility of the *amici curiae* briefs,<sup>42</sup> notwithstanding that the substance of such observations may be considered when assessing the information contained therein.

### **VII FACTS**

39. In this chapter the Court will set out the facts of this case, based on the factual framework established in the Report of the Commission, including those presented by the parties that may explain, clarify or dismiss said factual framework<sup>43</sup> and, where pertinent, the facts in dispute.

#### **A. Regarding the alleged victim**

40. It is an undisputed fact that, at the time when the alleged violations of the Convention took place, Mrs. María Inés Chinchilla Sandoval had been arrested on May 30, 1995 and that in the same year she was sentenced to 30 years in prison for the crimes of murder and

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<sup>41</sup> Cf. *Case of Loayza Tamayo v. Peru*. Merits. Judgment of September 17, 1997. Series C No. 22, para. 43, and *Case of Quispiyalaya Vilcapoma v. Peru*, *supra*, para. 25.

<sup>42</sup> Cf. *Case of Expelled Dominicans and Haitians v. the Dominican Republic*. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2014. Series C No. 282, para. 15.

<sup>43</sup> Cf. *Case of the "Five Pensioners" v. Peru*. Merits, reparations and costs. Judgment of February 28, 2003. Series C No. 98, para. 153; and *Case of García Ibarra et al. v. Ecuador*, *supra*, para. 49.



aggravated larceny,<sup>44</sup> and was ordered to serve her sentence at the *Centro de Orientación Femenino*, or Women's Orientation Center, (hereinafter COF), where she died on May 25, 2004, at the age of 51.

41. When Mrs. Chinchilla was deprived of her liberty, she had two minor children from her second marriage, Luz de María Juárez Chinchilla, born on April 11, 1987, and Luis Mariano Juárez Chinchilla, born on October 24, 1989. She also had two daughters from her first marriage:<sup>45</sup> one of them, Mrs. Marta María Gantenbein Chinchilla de Aguilar, who had established her own home, and another daughter, whose name was not known to the Commission at the time it issued its merits report and who was not included as a presumed victim in the pleadings and motions brief of the representatives. Mrs. Chinchilla owned two apartments, one of which was rented. The mother of Mrs. Chinchilla bought her the items that she needed and her two minor children were left in the care of their older sisters who, together with the maternal grandmother, covered their expenses.<sup>46</sup>

42. While confined in the COF, Mrs. Chinchilla worked on various tasks,<sup>47</sup> made handicrafts and paintings and sold coffee and tea. She was also allowed communication and visits with her family members and her eight year-old son, named Luis Mariano Juárez Chinchilla, who was granted permission to accompany his mother for up to four consecutive days in the prison.<sup>48</sup>

## ***B. Mrs. Chinchilla's health situation and death during her detention at the COF***

### ***B.1. Medical care within the COF and procedures for attending external medical appointments***

43. Mrs. Chinchilla suffered from multiple diseases and ailments for which, according to the procedure established, she was treated by nurses and by the duty doctor at the COF<sup>49</sup> or,

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<sup>44</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7, Decision of the Judge of the Second Criminal Enforcement Court of December 3, 1996 (evidence file, folios 6 and 7).

<sup>45</sup> Cf. Incidental Motions for Early Release. Public Criminal Defense Institute. Social Work Unit. Socioeconomic Report. April 6, 2004 (evidence file, folios 812-818).

<sup>46</sup> Cf. Incidental Motions for Early Release. Public Criminal Defense Institute. Social Work Unit. Socioeconomic Report. April 6, 2004 (evidence file, folios 812-818).

<sup>47</sup> General Directorate of the Prison System of Guatemala. Work Report No. 0002, submitted to the Judge of the Second Criminal Enforcement Court, by the Director of the Women's Orientation Center- COF on February 3, 2003, (evidence file, folio 2693)

<sup>48</sup> Certification issued by the Director of the Women's Orientation Center -COF- to the President of the Presidential Commission, Human Rights Policy Coordinator of the Executive Branch, dated September 14, 2009 (evidence file, folios 2698-2700)

<sup>49</sup> The State sent Official Letter No. 453-2014, dated December 16, 2014, from the General Directorate of the Prison System, attached to the Ministry of the Interior, indicating that this Department "by legal mandate, must comply with and respect the provisions established in the current legislation, specifically in matters that affect human beings, based on norms contained in the Constitution of the Republic of Guatemala, Human Rights Conventions and Treaties to which the State of Guatemala is a party, the Law of the Penitentiary System and its Regulations, and both national and international regulations that govern the protection afforded to persons deprived of their liberty. [... ]

Under the same parameters, this is applicable to [detained persons] and complies with the provisions of Article 14 of the Law of the Penitentiary System; accordingly, medical clinics must serve all inmates who require such assistance and provide medical prescriptions with the available medications; if these are not available, given the exorbitant number of inmates currently detained in prison, they coordinate their supply with the Medical Services

when necessary, she requested authorization from the Second Court of Criminal Enforcement to go to medical appointments at public hospitals.<sup>50</sup> According to the State, there was also a possibility of being transferred to hospital in the event of an emergency, which could be authorized without the need to request permission from the judge.

44. Regarding the procedure for obtaining such authorizations, from the file it is clear that three types of situations occurred:<sup>51</sup>

- a) If Mrs. María Inés Chinchilla had a particular need to receive specialized medical care in gynecology, for example, she would ask the medical staff at the COF for a medical examination, after which the COF doctor would send an official letter to the Director of the COF recommending that, based on her symptoms, she should be examined by a specialist.<sup>52</sup> The COF Director would then request permission from the appropriate enforcement judge who,<sup>53</sup> prior to deciding, would order a medical examiner to provide an opinion based on an evaluation.<sup>54</sup> The medical examiner had to provide an

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Department of the General Directorate of the Prison System or, in the event of urgency or extreme shortages, procedures are carried out to obtain supplies immediately. In addition, the national hospitals sometimes provide inmates with their own medications.

Likewise, the Medical Services Department forms part of the structure of this institution and is responsible for addressing any problem affecting the health of persons deprived of liberty, with medications or with the paramedic personnel assigned to prisons; therefore, there is supervision at all times to resolve any problem. [...] the Prison System provided medical assistance during Mrs. Maria Inés Chinchilla Sandoval's incarceration at the Women's Orientation Center -COF- (evidence file, folio 2689)

<sup>50</sup> In this regard, in response to questions from the Judges during the hearing as to whether there exists or existed a system of automatic affiliation to social security or to a doctor in the corresponding establishment, or some mixed or private regimen, the State explained that "medical care and the provision of medical treatment is, in the first instance, the responsibility of the prison doctor, who in turn must refer the inmate to the most suitable clinic within the public health system, if their recovery cannot be managed at the Center. This situation is regulated in Article 14 of the Law of the Penitentiary System [...] Bearing in mind the foregoing, if the person deprived of liberty is not satisfied with the manner in which his or her disease or convalescence is being treated, he or she has the right to file motions before the judge of enforcement under the Code of Criminal Procedure." Regarding the question of whether persons deprived of liberty could or can have a primary care doctor and under which circumstances, or if they must necessarily go through a public sector doctor, the State pointed out that, in cases in which the State acts *ex officio* to safeguard the right to health of prisoners, they are first assessed by the doctors in their own prison and, based on their recommendations, are referred for treatment to other doctors of the public health system. However, in the event of not having a specialist in the area required, the inmate is referred to a private doctor. This is regulated in Article 14 of the Law of the Penitentiary System."

<sup>51</sup> In its report, the Commission stated that the procedure applied was contemplated in Circular 16-02 of the Secretariat of the Supreme Court of Justice. It specified that this document had not been provided by the State and that in one of the responses to the requests, the judge required the social worker to verify the appointment at the hospital and "only then would he grant permission to treat the illness." Cf. Merits Report No. 7/14, case No. 12.739, para. 18 (evidence file, folios 2147 -2148). This document was cited but was not provided to the Court.

<sup>52</sup> Cf. Certification of Enforcement 429-96. Request for specialized medical care. Duty doctor of the COF. Official letter No. 006-97. February 8, 1997(evidence file, folio 108)

<sup>53</sup> In response to the Judges' question at the hearing concerning the authority responsible for approving, planning or scheduling medical appointments in cases of chronic disease, the State indicated that "persons deprived of liberty always attend the medical appointments ordered by the attending physicians, using vehicles of the national Prison System, coordinated and arranged by the director of each Center. As established by law, in the case of María Inés Chinchilla, the COF Director was always the person who coordinated her attendance at medical appointments, as confirmed in Annex 26 of the answering brief. Furthermore, the representation of the State reiterates that there is no record in the file showing that the inmate or her next of kin filed complaints, claims or legal remedies arguing that she had missed a scheduled medical appointment or that she had been refused permission to go whenever the COF doctor considered it necessary." Cf. Certification of Enforcement 429-96. Women's Orientation Center, Official letter No. 69-97, Ref. SRIA\_ACF, Request of the Director of the COF for authorization to obtain specialized medical assistance outside of the COF., February 11, 1997 (evidence file, folio 107)

<sup>54</sup> Cf. Certification of Enforcement 429-96. Judicial order. Judge of the Second Criminal Enforcement Court. February 12, 1997. (evidence file, folio 109)

expert opinion and, if this coincided with the recommendation made by the COF doctor, the judge proceeded to grant permission.<sup>55</sup>

- b) Based on preexisting medical appointments, the Director or Deputy Director of the COF would request permission from the judge for her to attend the San Juan de Dios General Hospital (hereinafter "HSJD"), attaching her medical appointments card.<sup>56</sup> The judge would then order the Social Information Service to confirm the appointment and, once this was done, the judge would grant permission for her to leave the prison.<sup>57</sup>
- c) If there were scheduled medical appointments, the Director of the COF would forward the request to the judge so that Mrs. Chinchilla could be treated, attaching her medical appointments card; based on that information the judge would grant her permission to leave the prison.<sup>58</sup>

## ***B.2 Mrs. Chinchilla's health between 1997 and 2004***

### ***i. 1997***

45. Mrs. Chinchilla's health records date from 1997, two years after her imprisonment, when she was 43 years old. She received treatment as an outpatient at the San Juan de Dios Hospital (hereinafter "the HSJD") on March 4, 1997, after being diagnosed with venous insufficiency of the lower limb, with a history of a previous varicose vein removal procedure on her left leg. In May 1997, Mrs. Chinchilla was "diagnosed with an ANTERIOR VAGINAL BULGE;" in June and July of that year she was seen for "a diagnosis of COMPENSATED DIABETES MELLITUS" and in July she was "examined again for a PARAURETHRAL MASS."<sup>59</sup> She also presented dysuria and the sensation of having a "mass" in the vaginal region and "a stage I-II uterine prolapse." In addition, she was reported to have "tooth decay, missing teeth, loose teeth and periodontitis."<sup>60</sup>

46. In 1997, the judge granted Mrs. Chinchilla permission to attend medical appointments on the following dates: March 25; May 8; May 20; and May 27 (an appointment that she did not attend);<sup>61</sup> June 5; June 25, June 17, and July 23 and 29; July 31; August 5; August 20;

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<sup>55</sup> Cf. Certification of Enforcement 429-96. Judicial order. Judge of the Second Criminal Enforcement Court. February 27, 1997. (evidence file, folio 121)

<sup>56</sup> Cf. Certification of Enforcement 429-96. Request for authorization to receive specialized medical assistance outside of the COF. Director of the COF. Official letter No. 111-97. March 4, 1997. (evidence file, folio 122)

<sup>57</sup> Cf. Certification of Enforcement 429-96. Judicial orders. Second Criminal Enforcement Court. March 5 and 18, 1997. (evidence file, folios 125 and 130)

<sup>58</sup> Cf. Certification of Enforcement 429-96. Request of authorization to receive specialized medical assistance outside of the COF, Director of the COF, Official letter No. 233-97 of May 14, 1997 and Judicial order, Second Criminal Enforcement Court, May 15, 1997 (evidence file, folios 137 and 138).

<sup>59</sup> Cf. Certification of Enforcement 429-96. "San Juan de Dios" General Hospital Official Letter No. 375, 22 September 1997 (evidence file, folio 210).

<sup>60</sup> Cf. Certification of Enforcement 429-96. Women's Orientation Center. Communication of the COF dentist of June 19, 1997 (evidence file, folio 159).

<sup>61</sup> Mrs. Chinchilla obtained permission from the Judge of the Second Criminal Enforcement Court; however, she did not go "to get the lung x-ray" because she was "not notified that she was authorized to have that examination." The Judge authorized a subsequent visit by Mrs. Chinchilla to the "San Juan de Dios" Hospital on June 5, 1997, to have a "lung X-ray". On May 27, two appointments appear, because one was at clinic No. 31 of the San Juan de Dios

October 7 and 14; November 3, 4 and 11; November 18, 19 and 20; November 27 and 28, and December 8, 11, 12, 15 and 23, 1997.<sup>62</sup> That year, 1997, the judge refused permission to attend medical appointments on the following dates: June 5, 1997, July 17, 1997,<sup>63</sup> September 11, 1997,<sup>64</sup> December 12, 1997,<sup>65</sup> December 15, 1997<sup>66</sup> and January 8, 22, and 27, 1998.<sup>67</sup> In a communication, Mrs. Chinchilla mentioned that the patrol car that was supposed to take her to hospital appointments had not turned up on three occasions.<sup>68</sup> In

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General Hospital and the other was to have an examination at the National League against Tuberculosis. *Cf.* Certification of Enforcement 429-96. Judiciary. Of. 7, Decision of the Second Criminal Enforcement Court of May 21, 1997 (evidence file, folio 141); Women's Orientation Center. Official letter No. 269-97 Classification SRIA\_EM. Communication of the Deputy Director of the Women's Orientation Center to the Judge of the Second Criminal Enforcement Court of May 28, 1997 (evidence file, folio 145); Women's Orientation Center. Official letter No. 276-97 Ref. SRIA\_AMDES. Communication of the Interim Director of the Women's Orientation Center to Judge of the Second Criminal Enforcement Court of May 30, 1997 (evidence file, folio 148); Judiciary. Of. 7, Decision of the Second Criminal Enforcement Court of June 2, 1997 (evidence file, folio 149).

<sup>62</sup> *Cf.* Certification of Enforcement 429-96. Judiciary. Of. 7 Decisions of the Second Criminal Enforcement Court issued between March 18 and December 2, 1997 (evidence file, folios 130 to 229).

<sup>63</sup> The Director of the COF reported that Mrs. Chinchilla did not attend her medical appointment because "at this Center we do not have sufficient guards and for that reason there was no custody for this inmate." *Cf.* Certification of Enforcement 429-96. Women's Orientation Center. Official letter Illegible Ref. SRIA\_ACF. Communication of the Director of the Women's Orientation Center to the Judge of the Second Criminal Enforcement Court of July 17, 1997 (evidence file, folio 170).

<sup>64</sup> On August 18, 1997, the Judge of the Second Criminal Enforcement Court ruled that "the request is WITHOUT MERIT" because it did not "meet the criteria established in Article 49 of the Criminal Code. Certification of Enforcement 429-96. Judiciary. Of. 7 Decision of the Second Criminal Enforcement Court of September 10, 1997 (evidence file, folio 199).

<sup>65</sup> On December 2, 1997, the Deputy Director of the COF asked the Judge of the Second Criminal Enforcement Court to allow Mrs. Chinchilla to attend the Roosevelt Hospital to have a laboratory test on December 12, 1997, since the "San Juan de Dios" Hospital does not have "appropriate equipment to perform that examination." On December 3, 1997, the Judge of the Second Criminal Enforcement Court decided that the request was "without merit" because Mrs. Chinchilla had an appointment authorized at the "San Juan de Dios" General Hospital and therefore it was necessary to apply for the new appointment in the Roosevelt Hospital. There is no information as to whether this appointment was re-scheduled soon after. *Cf.* Certification of Enforcement 429-96. Women's Orientation Center. Official letter 581-97, Ref. SRIA\_EM. Communication of the Deputy Director of the Women's Orientation Center to the Judge of the Second Criminal Enforcement Court of December 2, 1997; and *Cf.* Certification of Enforcement 429-96. Judiciary. Of. 7 Decision of the Second Criminal Enforcement Court of 3 December 3, 1997 (evidence file, folios 230 and 231).

<sup>66</sup> Mrs. Chinchilla was not permitted to leave the prison "because the patrol car did not arrive at the Center to take her to the San Juan de Dios General Hospital." *Cf.* Certification of Enforcement 429-96. Women's Orientation Center. Official letter No. 597-97 Ref. SRIA\_EM, Communication from the Deputy Director of the Women's Orientation Center to the Judge of the Second Criminal Enforcement Court of December 16, 1997 (evidence file, folio 239).

<sup>67</sup> On December 1, 1997, the Deputy Director of the COF asked the Judge of the Second Criminal Enforcement Court to grant Mrs. Chinchilla permission to attend appointments on January 5, 8, 22 and 27, 1998. The Judge of the Second Criminal Court of Enforcement authorized attendance at appointments on January 5 and 20, 1998, at the "Dr. Guerrero" clinic and two at the "San Juan de Dios" General Hospital. The same Judge did not grant permission to attend appointments on January 8, 22 and 27, 1998, considering that "these must be verified prior to their authorization because they were not noted down on the appointment card." *Cf.* Certification of Enforcement 429-96. Women's Orientation Center. Official letter No. 578-97 Ref. SRIA\_AMDS. Communication from the Director of the Women's Orientation Center to the Judge of the Second Criminal Enforcement Court of December 1, 1997; and Certification of Enforcement 429-96. Judiciary. Of- 7<sup>o</sup> Decision of the Second Criminal Enforcement Court of December 2, 1997 (evidence file, folios 228 and 229).

<sup>68</sup> *Cf.* Certification of Enforcement 429-96. Women's Orientation Center. Official letter No. 301-97 Ref. SRIA\_AMDS/acf. Communication from the Deputy Director of the Women's Orientation Center to the Judge of the Second Criminal Enforcement Court of December 16, 1997 (evidence file, folio 241) and Communication from María Inés Chinchilla Sandoval to the Judge of the Second Criminal Enforcement Court, dated December 16, 1997 (evidence file, folios 242-244).

response to this situation, the judge ruled that if the patrol car did not arrive, then a telephone call could be made to the Director of the National Police in order to request one.<sup>69</sup>

47. On November 4, 1997, Mrs. Chinchilla fainted on arrival at the hospital, and the guards took her to the emergency room. Although the doctor “wanted to keep her in for observation,” she refused and asked to be returned to the prison, saying that she would ask “to be brought back at another time.”<sup>70</sup> On November 6, 1997, Mrs. Chinchilla was taken to hospital “in an emergency” for a “blood transfusion.”<sup>71</sup>

## **ii. 1998**

48. On January 2, 1998, the judge asked the Judiciary’s Forensic Medicine Service to re-examine Mrs. Chinchilla in order to “verify the illness that she claims to suffer” and to “know if she needs to go to a hospital.” The medical examiner replied that the request could not be met, “because there was no vehicle in good condition.”<sup>72</sup>

49. Mrs. Chinchilla was again rushed to the HSJD in an emergency on January 12, 1998, and remained in hospital until January 21, 1998, with an abscess on her right gluteus.<sup>73</sup>

50. On March 5, 1998, the judge again asked the medical examiner to assess Mrs. Chinchilla’s medical condition. The medical report indicated: “problems of leukemia, osteoporosis and diabetes. History of splenectomy (January 98)”, as well as being “generally unwell from being run down,” and it was suggested that she attend appointments at the HSJD.<sup>74</sup>

51. On July 13, 1998, the judge received a letter from Mrs. Chinchilla requesting a “private hearing in his chambers” on matters concerning her situation. On July 14, 1998, the judge said that the Inspector General of the court would be visiting the COF “soon, so you can explain your problem to him.”<sup>75</sup>

52. On August 28, 1998, the judge asked the Judiciary’s medical examiner to re-examine Mrs. Chinchilla in order to determine “if the excessive requests for hospital visits that

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<sup>69</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7, Decision of the Second Criminal Enforcement Court of December 18, 1997 (evidence file, folio 245).

<sup>70</sup> Cf. Certification of Enforcement 429-96. Women’s Orientation Center. Communication from the guards to the Deputy Director of the Women’s Orientation Center of November 4, 1997 (evidence file, folio 217).

<sup>71</sup> Cf. Certification of Enforcement 429-96. Women’s Orientation Center. Official letter No. 553-97 Ref. SRIA\_AMDES/acf. Communication from the Director of the Women’s Orientation Center to the Judge of the Second Criminal Enforcement Court of November 7, 1997 (evidence file, folio 222).

<sup>72</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7 Decision of the Second Criminal Enforcement Court of 2 January 1998 and Forensic Medicine Department, Communication of January 7, 1998 (evidence file, folio 250 and 256).

<sup>73</sup> Cf. Certification of Enforcement 429-96. Women’s Orientation Center. Official letter No. 008-98 Ref. SRIA\_AMDS/acf. Communications from the Deputy Director of the Women’s Orientation Center to the Judge of the Second Criminal Enforcement Court of January 13 and 22, 1998 (evidence file, folio 259 and 263); Incidental Motions for Early Release. San Juan de Dios General Hospital. Medical Records Department. Certification 447/04. March 2, 2004 (evidence file, folio 764).

<sup>74</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7 Decision of the Second Criminal Enforcement Court of March 5, 1998, and Forensic Medicine Department, letter of March 24, 1998 (evidence file, folio 266 and 268).

<sup>75</sup> Cf. Certification of Enforcement 429-96. Judiciary. Communication from Mrs. María Inés Chinchilla Sandoval to the Judge of the Second Criminal Enforcement Court of June 13, 1998; and Of. 7 Decision of the Second Criminal Enforcement Court of July 14, 1998 (evidence file, folios 303 and 304).

this inmate is making are necessary.”<sup>76</sup> The medical examiner reported that “she has a urethral cyst” as well as “gynecological problems, diabetes and urethral problems” and suggested that she could attend her appointments at the HSJD.<sup>77</sup>

53. In 1998, the judge granted Mrs. Chinchilla permission to attend medical appointments on the following dates: January 5 and 20; January 6; May 12; June 11, 18 and 23; July 1, 2, 13, 21, 22, 23 and 30; August 4, 12, 24 and 25; September 14, 17 and 18; October 12, 27 and 29, 1998.<sup>78</sup> However, the judge did not grant Mrs. Chinchilla permission to attend medical appointments on the following dates: March 12, 1998,<sup>79</sup> November 2, 9 and 12, 1998.<sup>80</sup>

54. On December 29, 1998, the COF doctor asked the prison’s Deputy Director to arrange for Mrs. Chinchilla to be assessed by the medical examiner, as she was a patient with a history of diabetes, was “refusing to be examined by the prison doctors” and was reportedly not taking her medicine or following her diet; therefore she was “requesting the intervention of the [examiner], to avoid complications.” In another official letter on the same date, the same COF doctor reported that Mrs. Chinchilla “is refusing treatment offered by the medical staff at this Center and is asking to go to hospital, making threats and holding us responsible if anything happens.” She reported that “according to officials and fellow inmates,” Mrs. Chinchilla “has not taken her medicine (hypoglycemic agents) and is off her diet, consuming sugars, soft drinks, etc., purely for the sake of getting to the [General] Hospital.”<sup>81</sup> She also mentioned that “a request [was] made to the hospital’s Medical Records [department] for a report on her medical file, on the 17th of the month, but they replied that no medical file appears in that record.”<sup>82</sup>

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<sup>76</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7 Decision of the Second Criminal Enforcement Court of August 28, 1998 (evidence file, folio 319).

<sup>77</sup> Cf. Certification of Enforcement 429-96. Judiciary Forensic Medicine Department. Communication of September 3, 1998 (evidence file, folio 338).

<sup>78</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7 Decisions of the Second Criminal Enforcement Court issued between December 2, 1997 and October 14, 1998 (evidence file, folios 229 to 352).

<sup>79</sup> On March 4, 1998, the Deputy Director of the COF asked the Judge of the Second Criminal Enforcement Court for authorization so that Mrs. Chinchilla could attend the “San Juan de Dios” hospital on March 12, 1998. On March 5, 1998, the Judge asked the Forensic Medicine Service to conduct a medical re-examination of Mrs. Chinchilla “to confirm the disease she claims to suffer and thereby ascertain if she needs to go to a hospital or if she can be treated at the Center.” On March 25, 1998, the Judge sent Mrs. Chinchilla’s carnet of appointments to the Director of the COF, pointing out that “the appointments she had for March 12 of this year are time-barred.” On March 26, 1998, the Judge asked the COF to inform Mrs. Chinchilla that she could “apply for an appointment at the San Juan de Dios General Hospital.” Cf. Certification of Enforcement 429-96. Women’s Orientation Center. Official letter No. 020-98 Ref. SRIA\_EM/acf. Communication from the Deputy Director of the Women’s Orientation Center to the Judge of the Second Criminal Enforcement Court of March 4, 1998 (evidence file, folio 265); Certification of Enforcement 429-96. Judiciary Of. 7 Decisions of the Second Criminal Enforcement Court of March 5-26, 1998 (evidence file, folios 266 to 271).

<sup>80</sup> On October 29, 1998, the Deputy Director of the COF asked the Judge of the Second Criminal Enforcement Court to grant Mrs. Chinchilla permission to attend medical appointments on November 2, 9 and 12, 1998, at the “San Juan de Dios” General Hospital. On October 30, 1998, the Judge of the Second Criminal Enforcement Court returned the appointments book so that the social worker of the Women’s Orientation Center could apply for a “new medical appointment.” Cf. Certification of Enforcement 429-96. Women’s Orientation Center. Official letter No. 112-98 Ref. SRIA\_JDM. Communication from the Deputy Director of the Women’s Orientation Center to the Judge of the Second Criminal Enforcement Court of October 29, 1998; Cf. Certification of Enforcement 429-96. Judiciary. Of. 7 Decision of the Second Criminal Enforcement Court of October 30, 1998 (evidence file, folios 353 and 354)

<sup>81</sup> Cf. Certification of Enforcement 429-96. Women’s Orientation Center. Official letter 0124-98, Communication from the doctor to the Deputy Director of the COF of December 29, 1998 (evidence file, folio 356)

<sup>82</sup> Cf. Certification of Enforcement 429-96. Women’s Orientation Center. Official letter 0125-98, Communication of Dr. Magdalena Recinos de Barrios to the Deputy Director of the COF of December 29, 1998 (evidence file, folio 357).

### **iii. 1999**

55. On January 15, 1999, at the request of the judge, the Judiciary's Forensic Medicine Service performed the examination and reported that Mrs. Chinchilla showed "awareness in terms of time, her physical surroundings and herself as a person, and has a history of diabetes, going back several years, which is being treated with oral hypoglycemic drugs." The report indicated that Mrs. Chinchilla could be treated at the COF.<sup>83</sup>

56. On January 6, 1999, the Director of the COF reported that the inmates' cells had been searched and a bag had been found containing two wigs, a necklace, a bracelet, a girdle with padded buttocks, a black dress, a white dress, a jacket with a printed design, a pair of black shoes, a white camisole and makeup "belonging to the [inmate]: MARIA INES CHINCHILLA." The Center's authorities had reportedly "heard rumors that this inmate is planning to escape during one of her visits to the hospital, and it is presumed, from the things that were found, that she planned this in advance. To achieve her goal, lately she has refused to take her medication and has not followed her diet, in order to provoke high sugar levels as she is a diabetic, and has insisted that she should be taken to hospital in an emergency, holding us and the authorities responsible if anything happens to her."<sup>84</sup>

57. On January 20, 1999, the judge decided that the permission requested by Mrs. Chinchilla was "without merit" because the "medical examiner's report says that she can receive medical treatment for her diabetes at the Center where she is currently confined." The judge was asked to permit "the entry of the appropriate medications" into the prison, which he authorized. The record also shows that on January 27, 1999,<sup>85</sup> and February 3, 1999,<sup>86</sup> Mrs. Chinchilla went to the HSJD for an appointment.

58. On August 20, 1999, the prison doctor asked the Director of the COF to request an examination of Mrs. Chinchilla by the medical examiner, as she "presented general poor health and has a history of diabetes." She said that the glucose urine test produced four crosses, and "therefore, her blood glucose must be high." On August 24, 1999, the judge requested that a medical examiner be appointed. On September 9, the medical examiner suggested that she be evaluated at the HSJD. The judge granted Mrs. Chinchilla permission to go to the hospital on September 16, 1999.<sup>87</sup>

### **iv. 2000**

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<sup>83</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7 Decision of the Second Criminal Enforcement Court of January 4, 1998 (evidence file, folio 361) and Forensic Medicine Department. Communication of January 15, 1998 (evidence file, folio 365).

<sup>84</sup> Cf. Certification of Enforcement 429-96. Women's Orientation Center. Official letter No. 01-99-OEO. Communication from the Director of the Women's Orientation Center to the Director General of the Prison System of January 6, 1999 (evidence file, folio 364).

<sup>85</sup> Cf. Certification of Enforcement 429-96. San Juan de Dios General Hospital. Communication of January 27, 1999 (evidence file, folio 367).

<sup>86</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7 Decision of the Second Criminal Enforcement Court of January 20 and 4 February 1999 (evidence file, folios 366 and 370).

<sup>87</sup> Cf. Certification of Enforcement 429-96. Judiciary. Women's Orientation Center. Official Letter 074-99. Communication from Dr. Magdalena Recinos de Barrios to the Director of the COF dated August 20, 1999; Judiciary Of. 7 Decision of the Second Criminal Enforcement Court of August 24, 1999; Forensic Medicine Service. Communication of September 9, 1999; and Of. 7 Decision of the Second Criminal Enforcement Court of September 13, 1999 (evidence file, folios 373 to 377).

59. On February 9, 2000, the Director of the COF requested an evaluation of Mrs. Chinchilla who had "decompensated diabetes, which has caused foot ulcers. She also has a hard and painful mass in her abdomen that measures more than 8x10 cm and is growing." Following authorization from the judge, on March 4, 2000, the doctor reported that Mrs. Chinchilla presented a "firm, mobile mass above the pubic hairline, tender upon superficial and deep palpation; she also presents arterial pressure problems and a trophic ulcer on her left foot." The doctor suggested an endocrinological evaluation at the HSJD. On April 6, 2000, the judge granted permission for Mrs. Chinchilla to attend the endocrinology clinic.<sup>88</sup>

60. The judge gave approval for Mrs. Chinchilla to attend medical appointments on April 12, 17 and 26; October 30; and November 29, 2000.<sup>89</sup> That year, the judge refused permission for Mrs. Chinchilla to attend an appointment on June 5, 2000, given that after permission was requested on May 24, on the following day the judge asked the social worker to confirm the appointment; however, that confirmation was not submitted until June 2, 2000, and therefore the judge decided that it was "inadmissible" because "the social worker's report was received late."<sup>90</sup>

61. Mrs. Chinchilla was hospitalized from August 29, to September 14, 2000, with an abscess on the big toe of her left foot. She was hospitalized again from December 29, 2000, to February 26, 2001, with an "abscess on the big and second toes of her right foot," as a result of which "the affected area was washed and surgically debrided."<sup>91</sup>

#### **v. 2001**

62. Mrs. Chinchilla left hospital on February 26, 2001. After returning to the COF, the judge gave authorization for her to attend medical appointments on the following dates: March 6, 7, 8, 23 and 30; April 4, 10, 20 and 27; May 8, 15, 16, 22, 24, and 31, 2001. With regard to the appointment requested for March 1, 2001, the judge refused it because the request was submitted late. On March 2, 2001, the Deputy Director of the COF asked the judge to authorize a medical appointment, since the appointment of March 1 "was not possible" and "the lady has a graft on her foot and it needs to be checked." On March 5, the judge ruled that she must "abide by the decision of March 1 of this year."<sup>92</sup>

63. On March 5, 2001, Mrs. Chinchilla informed the judge that her foot was "giving off a bad smell", and she was "afraid that if it [was] not treated in time [she] might lose it."

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<sup>88</sup> Cf. Certification of Enforcement 429-96. Judiciary. Communication from the Director of the COF of February 9, 2000; Of. 7 Decision of the Second Criminal Enforcement Court of February 10, 2000; Forensic Medicine Service. Communication of March 4, 2000; and Of. 7 Decision of the Second Criminal Enforcement Court of April 6, 2000 (evidence file, folios 381 to 384).

<sup>89</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Decisions of the Second Criminal Enforcement Court of April 6 - November 21, 2000 (evidence file, folios 384 to 399).

<sup>90</sup> Cf. Certification of Enforcement 429-96. Judiciary. Women's Orientation Center. Official letter 0039/2000. Request of the Deputy Director of the COF of May 24, 2000; Communication from the social worker to the Judge of the Second Criminal Enforcement Court of June 2, 2000; and Of. 7. Decisions of the Second Criminal Enforcement Court of May 25 and June 5, 2000 (evidence file, folios 387 to 390).

<sup>91</sup> Cf. Incidental Motions for Early Release. San Juan de Dios General Hospital. Medical Records Department. Certification 447/04. March 2, 2004, (evidence file, folio 764).

<sup>92</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7 Decision of the Second Criminal Enforcement Court from March 1 to May 4, 2001 (evidence file, folios 412 to 438).



That same day the judge gave permission for Mrs. Chinchilla to leave the prison to attend the Service Clinic "*Uno cm.*"<sup>93</sup>

64. On May 25, 2001, the HSJD certified that Mrs. Chinchilla had been "receiving treatment [at this] institution since March 1997 for type II diabetes mellitus" and that she had been readmitted that year with "decompensated diabetes and an abscess on the big toe of her left foot." She was diagnosed with "type II diabetes mellitus" and "urethrocele."<sup>94</sup>

65. On May 28, 2001, Mrs. Chinchilla was taken to the HSJD in an emergency. The doctor in charge reported that "a cleansing and debriding procedure had to be performed on her right foot," that she had an "infection with three types of bacteria," and that "progress has been very slow."<sup>95</sup> Mrs. Chinchilla remained in hospital until August 8, 2001."<sup>96</sup>

66. Subsequently, the judge gave approval for Mrs. Chinchilla to attend medical appointments on August 15, 23 and 29; September 3, 6, 10, 17, 24, 25, and 28, 2001; October 4, 24, 15 and 31; November 13 and 26; and December 11, 2001.<sup>97</sup> However, the judge refused permission for her to attend an appointment on October 29, because her appointment card was not enclosed.<sup>98</sup>

67. On November 14, 2001, Mrs. Chinchilla asked the judge for authorization to attend medical appointments on November 20, 25 and 26, 2001. On November 19, 2001, the judge asked the social worker to confirm the veracity of the appointments. On November 20, 2001, having failed to elicit a response from the judge, the Director of the COF wrote to the judge saying, "We beg your authorization for [her] to go to the hospital emergency room, as she has a cancerous sore on her foot that needs to be cleaned constantly." On November 20, 2001, the judge authorized the visit. That same day, the social worker submitted the report requested of her, stating that Mrs. Chinchilla "may be taken to laboratory on the 26<sup>th</sup> of this month [...]" and there is no record of the appointment on the 25<sup>th</sup>"; she has another appointment on December 11. Accordingly, the judge gave permission for Mrs. Chinchilla to attend the verified appointments. On November 29, 2001, the judge asked the social worker to confirm Mrs. Chinchilla's appointment for December 20. In response, on December 4, the social worker indicated that there was no record of it.<sup>99</sup>

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<sup>93</sup> Cf. Certification of Enforcement 429-96. Brief on behalf of Mrs. María Inés Chinchilla to the Judge of the Second Criminal Enforcement Court, dated March 5, 2001; and Judiciary. Of. 7 Decision of the Second Criminal Enforcement Court of March 5, 2001 (evidence file, folios 416 to 418).

<sup>94</sup> Cf. Incidental Motions for Early Release. Republic of Guatemala Judiciary. Second Criminal Enforcement Court. Of. 7°. San Juan de Dios General Hospital. Certification No. 878/01 of May 25, 2001 (evidence file, folio 957).

<sup>95</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7 Decision of the Second Criminal Enforcement Court of May 28, 2001; and Official letter No. 304-2, 001 DR, REF/MEDICAL SERVICES, Communication of the Medical Services Coordinator of the Prison System of July 19, 2001 (evidence file, folios 444 and 449).

<sup>96</sup> Cf. Incidental Motions for Early Release. San Juan de Dios General Hospital. Medical Records Department. Certification 447/04. March 2, 2004, (evidence file, folio 764).

<sup>97</sup> Cf. Certification of Enforcement 429-96. Judiciary. Communication from the Second Criminal Enforcement Court to the Director General of the National Civil Police of September 17, 2001; and Of. 7. Decisions of the Second Criminal Enforcement Court of August 13 to November 21, 2001 (evidence file, folios 453 a 506).

<sup>98</sup> Cf. Certification of Enforcement 429-96. Judiciary. Communication of the Director of the COF of October 23, 2001; and Of. 7. Decision of the Second Criminal Enforcement Court of October 24, 2001 (evidence file, folios 486 and 487).

<sup>99</sup> Cf. Certification of Enforcement 429-96. Judiciary. Communication of the Director of the COF of November 14, 2001; Of. 7. Decision of the Second Criminal Enforcement Court of November 19, 2001; Communication from the COF Director dated November 20, 2001; Of. 7. Decision of the Second Criminal Enforcement Court of November 20, 2001; Communication of the social worker to the Second Criminal Enforcement Court of November 20, 2001; Of. 7. Decision of the Second Criminal Enforcement Court of November 21, 2001; Communication from the Second Criminal

68. On December 7, 2001, Mrs. Chinchilla was taken to the emergency room of the HSJD and "hospitalized because of the seriousness of her condition."<sup>100</sup> She remained there until February 15, 2002, with "necrosis on the sole and second and fifth toes of her right foot as well as a subcapital fracture of the right humerus." "The affected area was cleaned and surgically debrided on two occasions." She also presented necrosis on the fifth toe of her right foot, which was amputated, while the sole of the foot was cleaned and debrided. The "fracture was treated by simply immobilizing it."<sup>101</sup>

**vi. 2002**

69. On February 19, 2002, the judge gave approval for Mrs. Chinchilla to attend a medical appointment on February 22. On February 25, Mrs. Chinchilla requested authorization to go to a medical appointment at the HSJD on March 1, saying that, "because of her very severe illness she has to attend that clinic weekly on Fridays." The social worker reported that Mrs. Chinchilla "is not registered in the appointments book for Friday of every week." On March 1, 2002, the judge refused permission and on March 4 wrote to the COF advising that "in future all requests [...] must be submitted with sufficient notice so that the social worker can verify the request."<sup>102</sup>

70. On March 15, 2002, Mrs. Chinchilla was taken to hospital in an emergency after the Center's doctor examined her and found that she "presented a change of color in her left foot and fibrin accumulation with a very bad odor, leading to the amputation of her little toe."<sup>103</sup>

71. On March 18, 2002, the judge was asked to authorize medical appointments for Mrs. Chinchilla on March 22 and 27, and April 5, 12, 19 and 26. The judge stated that before deciding he required a report from the social worker to verify the request. On March 22, 2002, the social worker reported that Mrs. Chinchilla could be taken on March 27. Her report also stated that on the doctor's indication the wounds needed constant cleaning. On March 25, the judge gave approval for Mrs. Chinchilla to attend the verified appointments.<sup>104</sup>

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Enforcement Court to the social worker, dated November 29, 2001; Communication from the social worker to the Second Criminal Enforcement Court of December 4, 2001 (evidence file, folios 493 to 512).

<sup>100</sup> Cf. Certification of Enforcement 429-96. Judiciary. Official letter 257-2001, Communication of the Director of the COF of December 10, 2001 (evidence file, folio 514).

<sup>101</sup> Cf. Incidental Motions for Early Release. San Juan de Dios General Hospital. Medical Records Department. Certification 447/04. March 2, 2004 (evidence file, folio 764).

<sup>102</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Decision of the Second Criminal Enforcement Court of February 19, 2002; Communication of the Deputy Director of the COF of February 25, 2002; Communication from the social worker to the Second Criminal Enforcement Court of February 28, 2002; Decision of the Second Criminal Enforcement Court of March 1, 2002; Communication from the Second Criminal Enforcement Court to the Deputy Director of the COF of March 4, 2002 (evidence file, folios 522 to 531).

<sup>103</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Official letter 054-2002. Communication of the Deputy Director of the COF of March 15, 2002 (evidence file, folio 536).

<sup>104</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Communication of the Director of the COF of March 18, 2002; Communication from the social worker to the Second Criminal Enforcement Court of March 19 and 22, 2002; Decisions of the Second Criminal Enforcement Court of March 19 and 25, 2002 (evidence file, folios 539 to 545).

72. Mrs. Chinchilla was hospitalized from April 12 until June 9, 2002.<sup>105</sup> She was found to have an "ulcer on her right foot, osteomyelitis and a fractured humerus." In addition, "partial thickness skin grafts were taken and placed on the sole of her right foot" and "she was enrolled in a physical medicine and rehabilitation program." It was mentioned that "the treatment could not be completed because the patient asked to be discharged against medical advice." In addition, "she was diagnosed with diabetic retinopathy and it was suggested that she have laser surgery at the Roosevelt Hospital. Onychomycosis was also identified on the nails of her feet and hands."<sup>106</sup>

73. On June 11, 2002, the Director of the COF asked for authorization so that Mrs. Chinchilla could attend all her medical appointments for "physical medicine and rehabilitation" every Friday. Following a report from the social worker, on June 13, 2002, the judge of the Second Criminal Enforcement Court granted permission for Mrs. Chinchilla to leave the prison on Monday June 17, and every Friday in June. Subsequently, the judge authorized a further appointment on August 14, 2002.<sup>107</sup> The judge also gave approval for Mrs. Chinchilla to attend medical appointments on July 23, August 7 and 21, 2002.<sup>108</sup>

74. Mrs. Chinchilla was admitted to hospital on August 20, 2002, with an "abscess on the right foot, wet gangrene on the right foot, decompensated diabetes mellitus and arterial hypertension." That same day, or on the following day, doctors performed "supracondylar amputation of the right foot" and she "developed an infection of the stump, which was treated with local cleaning and antibiotics."<sup>109</sup> She also presented "obstructive arterial disease in the lower left leg" and "mild dilation of the left ventricle, without hypertrophy of the walls and preserved systolic function."<sup>110</sup> Mrs. Chinchilla was discharged on November 26, 2002.<sup>111</sup> That same day, she requested authorization to attend medical appointments on December 11, 2002. On December 30, 2002, authorization was requested for January 8 and 29, 2003. On January 2, 2003, the judge gave approval for her to leave the prison on January 8 and 29, 2003.<sup>112</sup>

## **vii. 2003**

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<sup>105</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Communications from the Director of the COF dated April 15, 2002 and June 11, 2002 (evidence file, folios 555 and 560).

<sup>106</sup> Cf. Incidental Motions for Early Release. San Juan de Dios General Hospital. Medical Records Department. Certification 447/04. March 2, 2004 (evidence file, folio 764)

<sup>107</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Exec. No. 429-96 OF- 7º, Communication of the Director of the COF of June 11, 2002; Communication from the social worker to the Second Criminal Enforcement Court of June 13, 2002; Decision of the Second Criminal Enforcement Court of June 13 and August 13, 2002 (evidence file, folio 559 to 590).

<sup>108</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Decisions of the Judge of the Second Criminal Enforcement Court of July 8, August 1 and August 16, 2002 (evidence file, folios 576-595).

<sup>109</sup> Cf. Incidental Motions for Early Release. San Juan de Dios General Hospital. Medical Records Department. Certification 447/04. March 2, 2004 (evidence file, folio 764).

<sup>110</sup> Cf. Incidental Motions for Early Release. San Juan de Dios General Hospital. Medical Records Department. Certification 447/04. March 2, 2004 (evidence file, folio 764).

<sup>111</sup> Cf. Certification of Enforcement 429-96. Women's Orientation Center. Communication from the Director of the COF to the Judge of the Second Criminal Enforcement Court, of November 26, 2002 (evidence file, folio 604); Incidental Motions for Early Release. San Juan de Dios General Hospital. Medical Records Department. Certification 447/04. March 2, 2004 (evidence file, folio 764).

<sup>112</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Women's Orientation Center, Brief of the Director of the COF of November 26, 2002; brief of the Deputy Director of the COF of December 30, 2002; and Decision of the Judge of the Second Criminal Enforcement Court of January 2, 2003 (evidence file, folio 606 to 608).

75. On January 2, 2003, the duty nurse informed the Medical Coordinator of the Prison System that Mrs. Chinchilla "refuses to have her wounds cleaned by [her], as she says that the inmate Gina Samayoa is cleaning them and that she can continue doing her the favor." The nurse reported that "the lady is very negative" and explained that "on December 31, Marlene Lavagnino visited the Center and was informed of the problem, and went down to block "C" to talk to the inmate, but she continued with her negative attitude." She said that "the lady is very difficult and [she did] not know how to prevent the infection in those wounds because of the bad practice employed by the inmate who cleans them."<sup>113</sup>

76. According to the information available, Mrs. Chinchilla was granted permission to attend medical appointments on January 8, 15, 29 and 31; March 28; and April 4, 14 and 23, 2003.<sup>114</sup>

77. On March 14, 2003, the duty nurse at the COF reported that Mrs. Chinchilla's wounds were not cleaned because "she refused, [saying] that the inmate Gina Samayoa, housed in the same block, was doing it." She said that she "spoke to her to make her aware of the need for a nurse to do the cleaning of the wound." She said that "this inmate will not see reason", and that she became negative, "telling her that she wanted to be left in peace." She said that "for the moment, she does not need cleaning because the stump has already dried and the area is clean."<sup>115</sup>

78. According to official letters dated April 4 and June 19, 2003, the COF doctor stated that, given her physical impediment and state of health, there was no objection to Mrs. Chinchilla receiving her visit in the maternal wing where she lived within the prison.

79. Mrs. Chinchilla was taken to the HSJD in an emergency on May 4, 2003, after falling and breaking her left hip,<sup>116</sup> which required her to have surgery to perform a "hip osteosynthesis." She remained in hospital until May 15, 2003.<sup>117</sup>

80. The judge authorized her attendance at medical appointments on May 29; June 12, 19, 26 and 27; and August 1, 14 and 17.<sup>118</sup> A petition was presented on August 4, 2003, requesting permission to attend a medical appointment on August 8; however, the social worker only presented her report on August 11,<sup>119</sup> after the date of Mrs. Chinchilla's appointment.

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<sup>113</sup> Cf. Women's Orientation Center. Communication from the duty nurse to the Medical Coordinator of the Prison System, of January 2, 2003 (evidence file, folio 723).

<sup>114</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Decisions of the Second Criminal Enforcement Court of January 2-April 22, 2003; and Communication from the Judge of the Second Criminal Enforcement Court to the Director of the COF of January 30, 2003 (evidence file, folios 608 to 664).

<sup>115</sup> Cf. Women's Orientation Center. Communication from the duty nurse to the Coordinator of Medical Services. March 14, 2003 (evidence file, folio 725).

<sup>116</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Brief of the Deputy Director of the COF of May 5, 2003 (evidence file, folio 668).

<sup>117</sup> Cf. Incidental Motions for Early Release. San Juan de Dios General Hospital. Medical Records Department. Certification 447/04. March 2, 2004 (evidence file, folio 767).

<sup>118</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Decisions of the Second Criminal Enforcement Court of May 27 to August 13, 2003 (evidence file, folios 678 to 710).

<sup>119</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Women's Orientation Center. Brief of the Director of the COF of August 4, 2003; and Communication from the social worker to the Second Criminal Enforcement Court, August 11, 2003 (evidence file, folios 705 and 709).

81. On August 7, 2003, the medical examiner of the Judiciary reported that he had visited the COF to perform a medical-legal examination of Mrs. Chinchilla and found that the "inmate [was] well known for her problems of: a) diabetes mellitus, b) arterial hypertension, c) fracture of the right femur, d) occlusive disease of the lower left limb, e) cervical cancer and f) diabetic retinopathy." The report said that the inmate "is in a wheelchair, with sequelae from her diabetes and her health is in marked decline."<sup>120</sup>

82. Subsequently, appointments were authorized for September 11, 17 and 30; October 8, 13 and 31, 2003. As for a request for appointments on September 2 and 17, the social worker's report was not submitted until September 3, 2003. The judge advised that in future all requests "must be submitted at least eight days in advance [...] otherwise they will be refused."<sup>121</sup>

83. On July 26 and September 20, 2003, the COF doctor asked the Director of the COF to use her good offices to have Mrs. Chinchilla transferred to the Jurisdictional Hospital to assess her loss of sight and to the Roosevelt Hospital for an examination and treatment of her diabetes, metabolic ailments and post-diabetic blindness, adding that "this patient is currently being treated with insulin."<sup>122</sup>

84. On September 23 and October 2, 2003, the judge requested a medical examination to be performed on Mrs. Chinchilla.<sup>123</sup> The report indicated that she was known to "suffer from long-term diabetes mellitus associated with arterial hypertension, diabetic retinopathy, occlusive disease of the lower left limb, fracture of the lower right femur, and cancer of the cervix," and that in the evaluation "she presents a gradual loss of sight" and "she moves around in a wheelchair." The doctor suggested medical treatment in the prison's clinic. On October 16, 2003, the judge ordered that the appropriate person or persons "provide medical treatment consistent with her diabetic condition."<sup>124</sup>

85. On October 9, 2003, the duty nurse at the COF informed the prison Director and Deputy Director that on that day she had gone down to the maternal block to administer a dose of insulin to Mrs. Chinchilla but that "she did not open the door" and said "that she [was] not to be given insulin," and that she "would send for the medication." The nurse said that the Deputy Director of the COF ordered her to accompany her downstairs to administer the inmate's medication and that "she only allowed the director to enter her room" and that she gave her "the syringe with insulin" from outside "so that [the director] could administer the medication," as well as other pills, "since she does not want [the duty nurse] to give her anything." The nurse explained that she was fulfilling her "duties as a nurse" and that if the

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<sup>120</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7 Report No. 30-2003 from the medical examiner to the Judge of the Second Criminal Enforcement Court of August 7, 2003 (evidence file, folio 708).

<sup>121</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Letter of the Director of the COF of August 28, 2003; Of. 7 Report of the social worker of September 3, 2003; and Communication of the Second Criminal Enforcement Court a María Inés Chinchilla Sandoval of September 11, 2003 (evidence file, folios 714, 718 and 1228).

<sup>122</sup> Cf. Women's Orientation Center. Official letter 63/2003. Communications from the doctor to the acting Director of the COF of July 26, 2003, and September 20, 2003 (evidence file, folios 698 and 1221).

<sup>123</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Communications from the Judge of the Second Criminal Enforcement Court to the Head of the Forensic Medicine Service of September 23 and October 2, 2003 (evidence file, folios 1235 and 1243);

<sup>124</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Communication from the medical examiner to the Judge of the Second Criminal Enforcement Court of October 14, 2003; and Decision of the Judge of the Second Criminal Enforcement Court of October 16, 2003 (evidence file, folios 1245 and 1246).

patient were to suffer “a relapse, she [could not] blame her” saying that “the she does not pay her any attention.”<sup>125</sup>

86. On October 28, 2003, the duty doctor at the COF informed the Medical Services Coordinator of the Prison System that Mrs. Chinchilla Sandoval “is administered 40 units of INSULIN every 24 hours, at 7:00 am daily.”<sup>126</sup>

87. On November 28, 2003, Mrs. Chinchilla requested authorization to attend a medical appointment on December 12. On December 1, the judge ruled that the inmate in question should receive the medical treatment for her diabetes at the prison.<sup>127</sup>

#### **viii. 2004**

88. On January 7, 2004, the duty nurse informed the Deputy Director of the COF that the duty doctor had examined Mrs. Chinchilla Sandoval and had indicated the following: “hyperglycemia, arterial hypertension, liquid retention, rule out renal failure; rule out anemia.” In addition, she contacted the Medical Services Coordinator by telephone to inform him about Mrs. Chinchilla’s health condition, and he authorized her emergency transfer to the Roosevelt Hospital, in coordination with the prison’s Deputy Director.

89. On January 8, 2004, the judge granted permission for Mrs. Chinchilla to attend an appointment on January 12, 2004.<sup>128</sup> On January 29, 2004, Mrs. Chinchilla requested authorization from the judge to attend the Park Center Welfare Unit (*Unidad Asistencial Centro del Parque*) in San Juan Sacatepequez, where an orthopedic clinic would be held for people with limited resources. It was explained that the request was made because “she had had x-rays of her hip and femur and the bones had not knitted because of her illness; they said it would be necessary to use a prosthetic device that cost 13,000 quetzales.”<sup>129</sup>

90. On February 6, 2004, the judge sent a communication to the President of the Criminal Division of the Supreme Court of Justice with reference to his “verbal request regarding the convict Chinchilla.” He explained that “requests by inmates for transfer to national hospitals are processed as follows: once the application is received, a report is requested from the medical examiner of this institution, who determines whether the inmate needs to be treated outside the prison.” He added that “she has been granted the permissions requested for transfers to hospital, with a prior report from the medical examiner” and that “only on two occasions has she been denied permission to go to hospital, given that the report of the medical examiner, Eduardo Alejandro Estrada Paredes, dated 14-10-2003, stated that the inmate CHINCHILLA SANDOVAL could be treated at the prison clinic.”<sup>130</sup>

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<sup>125</sup> Cf. Women’s Orientation Center. Communication from the duty nurse to the Director and Deputy Director of the COF of October 9, 2003 (evidence file, folio 729).

<sup>126</sup> Cf. Women’s Orientation Center. Communication from the doctor of the COF to the Medical Services Coordinator of the Prison System of October 28, 2003 (evidence file, folio 2673).

<sup>127</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Communication from the Director of the COF to the Judge of the Second Criminal Enforcement Court of November 28, 2003; and Decision of the Judge of the Second Criminal Enforcement Court of December 1, 2003 (evidence file, folios 1248 and 1249).

<sup>128</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Decision of the Judge of the Second Criminal Enforcement Court of January 8, 2004 (evidence file, folio 1253).

<sup>129</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Communication from the Director of the COF to the Judge of the Second Criminal Enforcement Court of January 29, 2004 (evidence file, folio 1258).

<sup>130</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Communication from the Judge of the Second Criminal Enforcement Court to the President of the Criminal Division of the Supreme Court of February 6, 2004 (evidence file, folio 1262).

91. On February 12, 2004, the Public Criminal Defense Institute submitted two briefs to the judge, the first requesting the replacement of Mrs. Zoila América Ordóñez González de Samayoa, who had been in charge of Mrs. Chinchilla's defense. In the second communication, Mrs. Chinchilla requested her transfer to the San Juan de Dios General Hospital, stating that: "I have now given up hope of recovering and the condition in which I find myself is a torture." On February 13, 2004, the judge turned down the request to replace her defense counsel, saying that "the name of the lawyer Zoila América Ordóñez de Samayoa does not appear" in the report, and therefore it is not possible to replace her as requested.<sup>131</sup>

92. On February 26, 2004, Mrs. Chinchilla wrote a letter to the judge requesting that "Edgardo Enrique Enríquez Cabrera of the Public Criminal Defense Institute be appointed as her defense counsel, to replace the private defender that she had had previously." On March 2, 2004, the judge appointed the aforementioned person as Mrs. Chinchilla's new defense counsel.<sup>132</sup>

93. On February 27, 2004, the Director of the COF informed the judge that Mrs. Chinchilla had an authorized medical appointment but had refused to attend "because the Court had arranged for a patrol car to take her."<sup>133</sup>

94. On March 1 to 3,<sup>134</sup> Mrs. Chinchilla was rushed to hospital in an emergency after the duty doctor recommended her assessment at the HSJD and the Medical Services Coordinator of the Prison Service authorized an emergency visit by telephone.

95. On March 15, 2004, the COF duty doctor asked the Director of the COF to issue instructions for the medical examiner to evaluate Mrs. Chinchilla, who presented sequelae from her diabetes and was "presenting a [general] deterioration of her symptoms and needs to be re-evaluated by medical examiner."<sup>135</sup>

96. On March 20, 2004, the duty nurse informed the Prison Service's Deputy Coordinator of Medical Services that the inmate presented arterial hypertension, respiratory difficulties, low sugar, dilated pupils and generalized edema, which she reported to the Deputy Director of the COF and the Coordinator, who authorized via telephone her emergency transfer to the Roosevelt Hospital, where she was hospitalized, under guard.<sup>136</sup>

97. On April 7, 2004, the duty nurse at the COF reported that the Medical Services Coordinator and the Health Care Coordinator had ordered Mrs. Chinchilla's transfer to the

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<sup>131</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Communication from the Departmental Coordinator of the Public Criminal Defense Institute to the Judge of the Second Criminal Enforcement Court of February 12, 2004; Communication from Mrs. María Inés Chinchilla Sandoval of February 12, 2004; and Decision of the Judge of the Second Criminal Enforcement Court of February 13, 2004 (evidence file, folios 1265 to 1268).

<sup>132</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Communication from Mrs. María Inés Chinchilla Sandoval to the Judge of the Second Criminal Enforcement Court of February 26, 2004; and Decision of the Judge of the Second Criminal Enforcement Court of March 2, 2004 (evidence file, folios 1279 and 1280).

<sup>133</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Communication of the Director of the COF of February 27, 2004 (evidence file, folio 1277).

<sup>134</sup> Cf. Certification of Enforcement 429-96. Women's Orientation Center. Communications of the Director of the COF of March 3 and 4, 2004 (evidence file, folios 1281-1282).

<sup>135</sup> Cf. Certification of Enforcement 429-96. Women's Orientation Center. Communication from the duty doctor to the Director of the COF of March 15, 2004 (evidence file, folio 2671).

<sup>136</sup> Cf. Certification of Enforcement 429-96. Women's Orientation Center. Communication from the duty doctor to the Director of the COF of March 20, 2004 (evidence file, folio 2670).

"Infirmery (*Hospitalito*) where she could be better monitored and could be administered her medications at the times ordered by the doctors." However, Mrs. Chinchilla said "that she [did] not want to go up to the infirmary and that she would be better off in her block with her fellow inmates, and that they were with her if she needed anything."<sup>137</sup> On April 9, 2004, the duty nurse at the COF reported the following regarding Mrs. Chinchilla's particular needs:

The inmate needs someone very special to be with her 24 hours a day and attend to her personally, because if she is taken up to the Infirmary she would have to be helped with all her personal and hygiene needs and the care that a special patient requires, as well as with administering her medication and everything else that she needs, in addition to giving her NPH insulin injections in the morning and the afternoon, as indicated by the doctor. She also needs a special diet and help with her aggressive mood swings and behavior, as well as special care when her condition becomes critical because of her generalized edema and breathing difficulties. It is impossible for us to provide the special care that this inmate needs because we have to tend to the other 146 inmates, [...] this inmate needs to be in stable surroundings where she can receive emotional support and physical therapy that they prescribe for her. Also, [...] she refuses to sign any paper with the treatment and instructions given to us in writing [...] in order to attest to the fact that we are carrying out our written instructions.<sup>138</sup>

98. On April 17, 2004, the COF doctor informed the Medical Services Coordinator that "[t]he patient in question presents an epigastric induration that causes her a lot of pain and restricts her movement, especially "deflexion movements (bending) and flexion movements (putting her head back). Therefore, I consider it necessary to do an ultrasound to screen for any significant pathology." He said that he was requesting "his intervention in order to perform the suggested procedure on the inmate."<sup>139</sup>

### ***B.3 Mrs. Chinchilla's death on May 25, 2004***

99. It is an undisputed fact that, between 6:00 and 08:30 on the morning of May 25, 2004, Mrs. Chinchilla Sandoval was sitting in her wheelchair at the entrance to the maternal block of the COF, and that she moved herself toward another area of the Center, where she fell on some steps; after her fall, other inmates helped her, returned her to her cell and called the duty nurse, who came immediately.

100. The duty nurse reported that at 9:20 am she was informed that Mrs. Chinchilla had fallen "between blocks c and d" and that when she [was] examined, her "blood pressure was 170/100, pulse 72x, breathing 16 x." In addition, "she had a scraped knee, which was painful and hot on palpation" so she "administered two tablets of diclofenac and one tablet of captopril. Dr. Renato Estrada Chinchilla, the Medical Services Coordinator, was also informed of the inmate's fall and the medications administered to her."<sup>140</sup>

101. In a second report, the duty nurse said that around 11:05 a.m. the inmates informed her that Mrs. Chinchilla could not breathe and "upon examining her she presented

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<sup>137</sup> Cf. Women's Orientation Center. Communication from the duty nurse to the Director and Deputy Director of the COF of April 7, 2004 (evidence file, folio 737).

<sup>138</sup> Cf. Women's Orientation Center COF. Note from the duty nurse of the COF to the prison's Health Director, dated April 9, 2004 (evidence file, folios 1321 and 1322).

<sup>139</sup> Cf. Women's Orientation Center. Official letter No. 120/CM Dr. RJQ. Communication from the COF doctor to the Medical Services Coordinator, April 17, 2004 (evidence file, folio 741).

<sup>140</sup> Cf. Women's Orientation Center. Communication from the duty nurse to the Deputy Director of the COF of May 25, 2004 (evidence file, folio 2330)



bp: 0/0; pulse: undetectable; breathing: undetectable; pupils dilated and not reflecting light; CPR was given, but she did not respond, so she was not put on an I.V. drip of Hartmann's solution." The nurse said the "actual time of death was declared at 11:25 a.m." and that they called the fire brigade, who made efforts to resuscitate her, but without success.<sup>141</sup>

102. The Deputy Coordinator of Medical Services reported that he was called at 11:15 a.m. and that upon arriving he noted that her face showed "facies cadaverica." He said that the patient could have presented "a- acute myocardial infarction; b-type II diabetes mellitus (insulin dependent)."<sup>142</sup>

103. In a letter of January 8, 2007, sent by the State to the Commission, it was noted that, "according to the Prison System report, there is no record of the reasons why Mrs. María Isabel Chinchilla Sandoval was not taken to the hospital."<sup>143</sup>

104. The medical examiner and officials of the Public Prosecution Service arrived at the scene at 12:50 p.m. on the day of her death and examined the corpse at 13:00 hours, estimating that the time of her death was two hours earlier.<sup>144</sup> The Deputy Director of the COF reported that the body was taken to the Judiciary morgue at 14:10 hours for the legal autopsy.<sup>145</sup>

105. On May 25, 2004, the Office of the Defender of Due Process and Prisoners of the Office of the Human Rights Ombudsman informed the Second Judge of Criminal Enforcement that it had received a report on the death of Mrs. Chinchilla Sandoval, as a result of a fall from her wheelchair. It requested that the judge provide a detailed report of the dates on which the deceased had been granted permission to go to hospital for medical treatment and if the Court had knowledge from the prison authorities that the deceased inmate's disease had worsened.<sup>146</sup> On May 28, 2004, the Judge of the Second Criminal Enforcement Court reported on the authorization of appointments and stated that "he was not advised by the prison authorities that the inmate's illness had worsened."<sup>147</sup>

106. During the public hearing, Marta María Gantenbein Chinchilla, daughter of Mrs. Chinchilla Sandoval, declared that on that day she received a call around 10.30 a.m. informing her of her mother's death, and that, when she went to the COF, "...some inmates were at the railings talking to me, but I didn't pay any attention to them, because of my pain at seeing my mother lying on the floor covered with a sheet by the door of the Director's Office and her

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<sup>141</sup> Cf. Women's Orientation Center. Communication from the duty nurse to the Deputy Director of the COF, May 25, 2004 (evidence file, folio 1301)

<sup>142</sup> Cf. General Directorate of the Prison System. Women's Orientation Center. Report of the Deputy Coordinator of Medical Services of the Prison System of May 25, 2004 (evidence file, folio 1302).

<sup>143</sup> Cf. Report of the Government of Guatemala to the Inter-American Commission of Human Rights of January 8, 2007 (evidence file, folios 1888-1891).

<sup>144</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Office of Forensic Sciences Unit of the Forensic Medicine Department. Death scene survey. Report of the medical examiner. May 25, 2004 (evidence file, folios 1297-1300).

<sup>145</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Women's Orientation Center. Official letter No. 99/2004. Communication of the Deputy Director of the COF of May 25, 2004, (evidence file, folio 1303).

<sup>146</sup> Cf. Human Rights Ombudsman. Office of the Defender of Due Process and Prisoners. Communication from the lawyer Jorge Mario Castillo Díaz of May 25, 2004 (evidence file, folio 1305).

<sup>147</sup> Cf. Certification of Enforcement 429-96. Judiciary. Of. 7. Communication of the Judge of the Second Criminal Enforcement Court of May 28, 2004 (evidence file, folio 1309).

fellow inmates told me that they had brought my mother upstairs because there was no one to attend to her.”<sup>148</sup>

### **C. Incidental motions for early release filed by Mrs. Chinchilla**

107. During the time she was deprived of her liberty, between November 2002 and March 2004, Mrs. Chinchilla Sandoval, through her assigned public defender, filed four incidental motions for “early release”: the first and last for “extraordinary remission of sentences” and the second and third “for terminal illness,” as described below. These incidental motions were filed under Articles 492 of the Code of Criminal Procedure,<sup>149</sup> 139 of the Judiciary Law<sup>150</sup> and 30 of Decree 56-69 “Remission of Sentences Law.”<sup>151</sup> The judge also found that Article 7 (c) of the aforementioned decree was applicable for ruling on the last incidental motion.<sup>152</sup>

#### **C.1 First incidental motion for “early release under extraordinary remission of sentences.”**

108. On November 26, 2002, Mrs. Chinchilla filed an incidental motion for early release before the Second Criminal Enforcement Court.<sup>153</sup> The attached certification from the HSJD states that “[...] the patient suffers from a terminal occlusive arteriosclerotic disease of which there is currently clinical evidence in the lower left limb, which will very likely (80% probability) end up being amputated.”<sup>154</sup> On November 27, 2002, the judge began to process the incidental motion.<sup>155</sup>

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<sup>148</sup> Cf. Statement by Mrs. Marta María Gantenbein Chinchilla during the public hearing before the Court.

<sup>149</sup> “While serving his sentence, the convicted person shall be entitled to exercise all the rights and powers granted by the criminal and correctional laws, and their implementing regulations, and may present to the enforcement judge such observations as he deems appropriate.” Available at: [http://www.oas.org/juridico/MLA/sp/gtm/sp\\_gtm-int-text-cpp.pdf](http://www.oas.org/juridico/MLA/sp/gtm/sp_gtm-int-text-cpp.pdf).

<sup>150</sup> “If the motion concerns matters of law, once the time limit for the hearing has passed, the judge shall order the hearing of such evidence offered by the parties upon presenting the motion or upon holding the hearing, which shall be examined in no more than two hearings held within the following ten working days”. Available at: [https://www.oas.org/juridico/mla/sp/gtm/sp\\_gtm-int-text-oj.doc](https://www.oas.org/juridico/mla/sp/gtm/sp_gtm-int-text-oj.doc).

<sup>151</sup> “All convicted inmates may benefit from this law, provided that they meet the requirements stipulated therein, and in order to begin redeeming the sentence it is necessary for the Central Prisons Board or the Regional Prisons Board to grant prior approval following classification in accordance with the law.” Available at: <http://www.foroderechoguatemala.org/wp-content/uploads/2011/07/penal011.pdf>.

<sup>152</sup> In addition to the powers vested in him by the Constitution, other laws, and regulations, the President of the Judiciary shall have the authority to: [...] c) Agree upon and establish special remissions for acts of altruism, heroism, or any other humanitarian act, at the recommendation of the Central Prisons Board, setting out the reasons justifying such remissions [...]. Article 7 of Decree No. 56-69 “Remission of Sentences Law”, October 18, 1969. Available at: <http://www.foroderechoguatemala.org/wp-content/uploads/2011/07/penal011.pdf>.

<sup>153</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Public Criminal Defense Institute. Request for Special Early Release under Remission of Sentences, November 26, 2002 (evidence file, folios 1013-1015).

<sup>154</sup> Cf. Incidental Motions for Early Release. Judiciary Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. San Juan de Dios General Hospital. Medical Records Department. Certification 2070-02 of November 18, 2002 (evidence file, folio 1016).

<sup>155</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Decision of the Judge Second of Enforcement Pena of 27 November 2002 (evidence file, folio 1017).

109. At the request of the judge, the medical examiner offered an opinion stating that Mrs. Chinchilla presented "[...] symptoms of terminal illness, with problems in her lower limbs."<sup>156</sup> For his part, the duty doctor at the COF said that she was a patient who was "depressive, rebellious and in poor general health" and that "her physical condition [was] in marked decline as a result of her diabetes mellitus, and she had limited mobility because of the amputation of her lower right limb."<sup>157</sup> For its part, the report of the Public Prosecution Service Medical Examiner stated that she was in "a stable and controlled condition" and "[...] she can continue her current treatment" at the COF, "provided that she is supplied with her medications and is regularly assessed by the institution's doctor and the external consultant."<sup>158</sup>

110. Attached to the file was a report from the COF's Multidisciplinary Team,<sup>159</sup> which stated that Mrs. Chinchilla "gets around in a wheelchair" and since "this facility lacks the necessary resources for her care [...] she should be granted early release [...]."<sup>160</sup> Also included was a report by the Director of the COF, which stated that Mrs. Chinchilla's conduct was rated as "good,"<sup>161</sup> and a socioeconomic study by the social worker that suggested "that she could be granted parole [...]" and that the COF "does not have specialized staff to provide her with better care."<sup>162</sup>

111. The judge scheduled an evidence hearing for February 12, 2003.<sup>163</sup> The hearing was suspended as the Judiciary's medical examiner did not attend. The judge scheduled a new hearing on February 14 of the same year,<sup>164</sup> which took place.<sup>165</sup> At the hearing, both the

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<sup>156</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Forensic Medicine Service. Inf. # 30-2003 Of. 2°. Report of the Medical examiner of January 16, 2003 (evidence file, folio 1020).

<sup>157</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Women's Orientation Center. Official letter. 005-2003. Report of the COF duty doctor, January 23, 2003 (evidence file, folio 1032).

<sup>158</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Order No. 429-96 Of. 7. Remission of Sentences File. Public Prosecution Service. DFM 023. Official letter 138-03 "c". Report of the Medical examiner of the Public Prosecution Service of January 30, 2003 (evidence file, folio 1061 and 1062).

<sup>159</sup> Comprised of the Deputy Director of the COF, and representatives of the Legal Department, Labor Department, Psychology Department, the Social worker and the Director of the COF. Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Women's Orientation Center. Letter from the Multidisciplinary Team. January 21, 2003 (evidence file, folio 1022).

<sup>160</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Women's Orientation Center. Report of the Multidisciplinary Team of January 21, 2003 (evidence file, folio 1022).

<sup>161</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Women's Orientation Center. Conduct Report of January 21, 2003 (evidence file, folio 1024).

<sup>162</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Women's Orientation Center. Official letter. 005-2003. Report of the social worker, January 27, 2003 (evidence file, folio 1035).

<sup>163</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Decision of the Judge of the Second Criminal Enforcement Court of February 4, 2003 (evidence file, folio 1056).

<sup>164</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Decision of the Judge of the Second Criminal Enforcement Court of February 12, 2003 (evidence file, folio 1064 and 1065).

<sup>165</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Judiciary. Record of Evidence Hearing. February 14, 2003 (evidence file, folios 1067 to 1079).

HSJD doctor and the doctors from the COF and the Public Prosecution Service agreed that Mrs. Chinchilla's illness was not terminal.<sup>166</sup> However, the Judiciary's medical examiner said, "the diabetic symptoms that Mrs. Chinchilla Sandoval presents are those of a terminal illness," where terminal illness is defined as one which "at a given moment could ultimately result in death."

112. The doctors also agreed that the illness could be treated in an ambulatory manner; however: i) the doctor of the San Juan de Dios General Hospital added that he did "not know if [her treatment] could [be provided at the COF] or not, since [he was] not familiar with the Center and the medical care offered there [...]"; ii) the Judiciary doctor mentioned that "the Center [...] has the capacity to deliver the treatment, provided that it is [allowed] in or it is provided to her and also as long as there are no complications of any kind", but he "[did] not know who provides medication to Mrs. Chinchilla as [he was] not a staff doctor" at the COF; iii) the COF doctor said that "she has her own treatment, as the correctional system does not provide it; if the family continues to bring her treatment, and she receives psychological support and rehabilitation therapy, she could continue her treatment at the Center; that is, she could receive at home the same treatment that she receives at the Center"; and, iv) the medical examiner of the Public Prosecution Service stated that at some point the patient could suffer a decompensation "which would require hospital treatment" and that "her life could be in danger if she does not receive the right medical treatment or if she is not properly medicated."

113. The COF doctor added that "the inmate [...] does not allow the nursing staff to clean her wounds, only her cellmates." He specified that "normally, the patient medicates herself" and that "to die, [Mrs. Chinchilla] would have to develop ketoacidosis and blood sugar levels above 600; someone whose blood sugar reaches 500 or 600 could still be taken to a hospital emergency room in time." Finally, he explained that "the Center has a vehicle for transport, but before doing so a blood sugar level test is done, and if it is high, permission to leave is granted."

114. On February 14, 2003, the judge dismissed the motion based on the following:

a) That the inmate was convicted and sentenced to a prison term of thirty years for the crime of MURDER and so far has served SEVEN YEARS, SEVEN MONTHS and THREE DAYS of her total prison sentence; b) Reports have been provided by experts and administrative authorities in the exercise of their duties, for which reason the Judge considers these reports to be appropriate and therefore grants to each and every one full evidentiary value in accordance with Article 186 of the Code of Criminal Procedure; c) In that order of ideas, based on the statements and reports of said experts, [the Judge] decides that although the inmate suffers from diabetes mellitus, at this time the illness cannot be considered terminal since according to the experts and their reports, this person can receive ambulatory treatment at the Women's Orientation Center, with adequate supervision, in the same way that her family outside the prison could eventually do it. Thus, the aforementioned inmate could die from another cause and not necessarily from the disease in question. For all the foregoing reasons, the Judge concludes that the petitioner's claim must be denied. [...] THEREFORE, based on its considerations and the laws cited, this Court

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<sup>166</sup> The physician at the "San Juan de Dios" General Hospital explained that "[...] diabetes cannot be considered as a terminal illness but it may be incurable." The COF doctor indicated that "[i]f [Mrs. Chinchilla] has adequate treatment her disease can NOT [be considered terminal]." Finally, the medical examiner of the Public Prosecution Service indicated that "[t]he diseases suffered by Mrs. Chinchilla Sandoval, diabetes mellitus and arterial hypertension, are not considered terminal; however, the arteriosclerosis in her lower left limb is at an advanced stage."

DECLARES I) WITHOUT MERIT the motion for Extraordinary Early Release for Remission of Sentences filed by the inmate MARÍA INÉS CHINCHILLA SANDOVAL.<sup>167</sup>

115. On February 27, 2003, Mrs. Chinchilla filed an “appeal and statement of grievances” with the First Criminal Court. She argued that “the prison has inadequate infrastructure to allow [her] to communicate freely with [her] relatives and others; that the Center does not have the infrastructure to store medication that requires refrigeration, such as insulin, which is indispensable for [her] to stay alive, and without refrigeration it goes bad.” She added that she did not “have access to other medicines.” She also said that she “[did] not know if the cancer detected [in her vagina was] benign or malignant.” That same day, the Court forwarded the brief to the Fourth Division of the Court of Appeals, which in turn forwarded it to the Second Court the following day.<sup>168</sup>

116. On March 3, 2003, the Judge of the Second Criminal Enforcement Court concluded that “the challenge [was] out of order”, because it was not filed within the three-day period prescribed by law and, “in any case, the appellant should not have appealed to a court other than the one with jurisdiction under the law.”<sup>169</sup>

## **C.2 Second incidental motion for “early release due to terminal illness”**

117. On May 5, 2003, Mrs. Chinchilla filed a petition for early release “due to terminal illness,”<sup>170</sup> before the Second Criminal Enforcement Court. The motion stated that, among other diseases, she suffered from “occlusive arteriosclerosis of the lower limbs, a terminal illness that obstructs blood circulation,” that in a short period of time this could cause “a brain embolism.”<sup>171</sup> Attached to the petition were medical certifications from the Chief of the Medical Records Department,<sup>172</sup> a COF conduct report<sup>173</sup> and a communication from the COF Multidisciplinary Team stating that “this Center lacks the specialized staff and infrastructure to provide her with better health care” and that “she should be granted early release.”<sup>174</sup>

118. In a certification dated May 30, 2003, the Judiciary’s medical examiner stated that Mrs. Chinchilla “presents symptoms of a terminal illness, with problems in her lower

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<sup>167</sup> Cf. Incidental Motions for Early Release. Republic of Guatemala Judiciary. Enforcement No. 429-96 Of. 7. Remission of Sentences file. Decision of the Judge of the Second Criminal Enforcement Court of February 14, 2003 (evidence file, folios 1080-1082).

<sup>168</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Brief of appeal and statement of grievances of Mrs. María Inés Chinchilla Sandoval of February 27, 2003 (evidence file, folios 1087 to 1092).

<sup>169</sup> Cf. Incidental Motions for Early Release. Judiciary. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Decision of Judge of the Second Criminal Enforcement Court of March 3, 2003 (evidence file, folios 1094-1095).

<sup>170</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Request for extraordinary release due to terminal illness of May 5, 2003 (evidence file, folios 950-954).

<sup>171</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Application for liberty extraordinary by terminal illness of May 5, 2003 (evidence file, folios 950- 954).

<sup>172</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. San Juan de Dios General Hospital. Medical Certificates 1268-02, 878-01. 2076-02, 1802-02 of November 6, 2002, May 25, 2001, November 18, 2002, and October 7, 2002, respectively (evidence file, folios 955-959).

<sup>173</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Women’s Orientation Center. Conduct Report. April 14, 2002 (evidence file, folio 960).

<sup>174</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Brief of the Multidisciplinary Team of the COF. May 26, 2003 (evidence file, folio 970).

limbs.”<sup>175</sup> Certifications were enclosed from the HSJD<sup>176</sup> and the medical examiner of the Public Prosecution Service. The latter stated that Mrs. Chinchilla “can remain at the Center [...] provided she takes her medications regularly” and receives care from the medical and paramedic staff.<sup>177</sup>

119. The judge scheduled a hearing for July 9, 2003,<sup>178</sup> where he ruled on the motion, declaring it “without merit.”<sup>179</sup> It was mentioned that the attending physician (proposed by Mrs. Chinchilla) did not appear at the hearing because he was out of the country, that the petitioner did not propose another doctor in replacement, and that the Public Prosecution Service medical examiner offered excuses for not being able to attend. Thus, “[...] it was not established whether the petitioner’s clinical condition is terminal or not” and “the failure of the [doctors] to appear is an obstacle to a favorable ruling.”<sup>180</sup>

### **C.3 Third incidental motion for “special release due to terminal illness”**

120. On August 6, 2003, Mrs. Chinchilla Sandoval filed a motion for special release due to terminal illness<sup>181</sup> with the Second Criminal Enforcement Court. The petition reiterated that she suffered, among other illnesses, from “occlusive arteriosclerosis of the lower limbs, a terminal illness that obstructs blood circulation” and that in a short period this could produce “a brain embolism,” for which reason she was requesting early release. Attached to the petition was a certification from the Judiciary’s medical examiner, stating that Mrs. Chinchilla “presents symptoms of terminal illness with problems in her lower limbs.”<sup>182</sup> Mrs. Chinchilla Sandoval then requested that the medical reports enclosed in the previous motion, which had been dismissed,<sup>183</sup> be included and certified, namely, a statement from the COF’s Multidisciplinary Team, saying that “this Center lacks the specialized staff and infrastructure to provide her

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<sup>175</sup> Cf. Judiciary, Republic of Guatemala. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Brief of the Medical Examiner of the Judiciary. May 30, 2003 (evidence file, folio 972).

<sup>176</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. “San Juan de Dios” General Hospital. Letter from the Chief of the First Women’s Surgery Unit. June 2, 2003 (evidence file, folios 973-975).

<sup>177</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Brief of the Medical Examiner of the Public Prosecution Service of June 6, 2003 (evidence file, folios 979-980).

<sup>178</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Decision of the Judge of the Second Criminal Enforcement Court of June 26, 2003 (evidence file, folio 992).

<sup>179</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Decision of the Judge of the Second Criminal Enforcement Court of July 9, 2003 (evidence file, folios 1006-1009).

<sup>180</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Decision of the Judge of the Second Criminal Enforcement Court of July 9, 2003 (evidence file, folios 1006-1009).

<sup>181</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File No. 169-03. Brief to file a motion for extraordinary release due to terminal illness (evidence file, folios 863-866).

<sup>182</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File No. 169-03. Judiciary. Forensic Medicine Service. Communication of the Medical Examiner of May 30, 2003 (evidence file, folio 867).

<sup>183</sup> Cf. Brief of Mrs. Maria Inés Chinchilla Sandoval to the Judge of the Second Criminal Enforcement Court of August 6, 2003 (evidence file, folios 869-871).

with better health care" and that "[she should be] granted early release;"<sup>184</sup> and certificates issued by the Chief of the First Women's Surgery Unit<sup>185</sup> and the doctor of the Public Prosecution Service.<sup>186</sup> The judge scheduled an evidence hearing on August 27, 2003,<sup>187</sup> which did not take place "because of the excuses submitted by fax by the Public Prosecution Service's medical examiner."<sup>188</sup> The hearing was held on August 29.<sup>189</sup>

121. The first to be questioned was the Judiciary's medical examiner, who said that he "[had] noted a marked deterioration in [Mrs. Chinchilla's] health, since she [suffers from] "DIABETES MELLITUS, and [...] all the complications associated with this disease, [which are] arterial hypertension, [...] occlusive arteriosclerotic disease of the lower left limb, [...] diabetic retinopathy, in addition to which she had already had her lower right limb amputated [...] and, she has cancer of the cervix that is not connected with the diabetes." The doctor indicated that "[her] treatment is with insulin taken via intramuscular injection [...]" and he "[did] not know if it was administered to her in the clinic." As to whether she had a terminal illness, he said "No, but given the complications associated with her [...] illness [...] her life is in danger [...] the most serious one is a diabetic coma." He added that "if she [did] not have her [medicine] the complications would become more accentuated."

122. The attending physician at the HSJD stated that "at this moment, just by looking at her [Mrs. Chinchilla is not at risk of dying]." He said that he "[was] not familiar with the conditions in which she lived to be able to answer [...] correctly [if she could receive ambulatory treatment]." He said he "[did] not know if she injected herself with insulin or if someone else did." The doctor answered "yes" when asked if there was a possibility of sudden death, and replied "probably" when asked whether or not an interval of 15 days between her medical visits could result in her death if she did not receive care. As to the "cervical cancer" he said that "[he did] not know." Finally, he said that internal occlusive arteriosclerosis is a terminal illness.

123. The medical examiner of the Public Prosecution Service replied "no" when asked if Mrs. Chinchilla had a terminal illness. He said that he "[was] unable to say [if she received treatment], because to do so [he] would need information on what resources the institution

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<sup>184</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File No. 169-03. Brief of the Multidisciplinary Team of the Women's Orientation Center of May 26, 2003 (evidence file, folio 872).

<sup>185</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File No. 169-03. Hospital San Juan de Dios. Brief of the Chief of the First Women's Surgery Unit of June 2, 2003 (evidence file, folios 873-874).

<sup>186</sup> The latter certification indicated that the patient "has systemic diseases that have no cure but can be controlled with regularly administered medications;" these systemic diseases "will cause a gradual deterioration in the patient's health and therefore, unless that patient suffers an accidental death, he or she will die of a complication from one of these diseases." It is impossible to predict when that will happen since "she is controlled." It also stated that "the patient could remain in prison provided she takes her medication regularly and receives conscientious care from the medical and paramedic staff assigned to this institution." Cf. Incidental Motions for Early Release. Republic of Guatemala Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Communication of the Public Prosecution Service Medical Examiner, June 6, 2003. (evidence file, folios 875 -876).

<sup>187</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File No. 169-03. Decision of the Second Criminal Enforcement Court of August 18, 2003 (evidence file, folio 892).

<sup>188</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File No. 169-03. Brief of the Secretary of the Second Criminal Enforcement Court of August 27, 2003 (evidence file, folio 899).

<sup>189</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File No. 169-03. Record of Evidence Hearing on August 29, 2003 (evidence file, folios 913-928).

has." He mentioned that "the care that the patient needs is as follows [:] regular monitoring of blood sugar levels, for someone to keep track of when she takes her medication, someone to move her around and, depending on the complications that she might suffer, to verify if the Center has equipment or access to examinations by a consultant." He added that "when she was examined her condition was under control" and that he had not "stated that the patient ha[d] what [was] needed for her illnesses to be properly controlled." He said that terminal occlusive arteriosclerosis was not a terminal disease but "a complication from diabetes which, in this case, has not been adequately controlled." He said that gangrene "...is an infectious pathology that can kill a patient if the right treatment is not given." As to the cervical cancer, he said that on the day she went to the hospital, the clinical file was handed over but "it contained no record of that pathology."

124. The COF doctor said that "[Mrs. Chinchilla] buys her own insulin" and "presumably [it was administered] by the nurses." He said that he examined Mrs. Chinchilla whenever she required it and that periodicity "can be constant." As to whether the COF had the necessary equipment to provide treatment, he replied, "no", and said it would be necessary "to have special equipment for ketoacidosis, in order to revive her from a diabetic coma that she could go into at any moment." He added that her diabetes was not controlled and that "it is subject to external factors at any time." He said that at that moment Mrs. Chinchilla's life was not in danger; however, when asked if she was in danger of dying from her disease if she was imprisoned, he said that "it [was] possible, given all the complications that she has" and that "it [was] impossible to predict when." When asked if the lack of adequate means to treat diabetic coma or a complication could be fatal, he answered "yes." He said that Mrs. Chinchilla needed 40 units of insulin in the morning and 15 in the afternoon and that internal occlusive arteriosclerosis "[was] indeed [a terminal disease]." He added that he was aware of the cervical cancer but "NOT [...] OF ITS DEGREE" and that he could not say definitively "IF IT [WAS] TERMINAL OR NOT." Regarding the hypertension, he said the Center "only [had] CAPTOPRIL" and "WHEN IT WAS IN STOCK, YES [the COF provided it]."

125. Next, Mrs. Chinchilla spoke and said:

[...] being an amputee, I have to prepare my own food, because I cannot eat what the Center offers me; I cannot eat sugar, fats or condiments; sometimes I have some and sometimes I don't; sometimes I can rely on my family and sometimes not. [...] How can I contact my family if the telephone to which I could have access is too high for me to reach and the transportation is so limited ... I don't have anyone to do things for me. I don't have warders or a friend to help me do it and, as regards my health, as has been made clear, the Center does not have the necessary equipment, nor does it provide me with medicines, not even insulin, which I have to obtain by my own means [...] I've already nearly lost my sight in my right eye and half in the left eye, so I appeal to your sense of humanity [...], my health is deteriorating daily and I ask you to take into account that because of my advanced age I am not going to be able to recover.<sup>190</sup>

126. On August 29, 2003 the judge decided that the motion was "without merit", considering that Mrs. Chinchilla "can receive adequate treatment at the prison [...] and not necessarily outside it [...]",<sup>191</sup> based on the following:

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<sup>190</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File No. 169-03. Record of Evidence Hearing of August 29, 2003 (evidence file, folios 913-928).

<sup>191</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File No. 169-03. Decision of the Judge of the Second Criminal Enforcement Court of August 29, 2003 (evidence file, folios 929-931).



The [expert] reports must be given full evidentiary value since they were signed and reviewed by experts in the exercise of their duties. 2.- Moreover, during the hearing, the Court also heard the opinions provided, in order, by the Attorney of the Public Prosecution Service, the Technical Legal Counsel and the inmate María Inés Chinchilla Sandoval; 3.-Accordingly, the Judge infers that while it is true that the diseases currently suffered by the inmate, including (DIABETES MELLITUS), require rigorous control by the authorities of the Women's Orientation Center, and specifically by the Center's medical staff, it is no less true that at present those illnesses do not constitute a terminal illness according to the experts present at today's hearing; thus, it is clear that they do not conclude that the aforementioned inmate is in danger of dying at present [...]

127. On September 11, 2003, Mrs. Chinchilla lodged an appeal against that decision.<sup>192</sup> On September 25, 2003, the Fourth Division of the Court of Appeals dismissed the appeal because "all three [doctors] were categorical in saying that it was impossible to determine when death could occur", and therefore "at the moment she is not in imminent danger."<sup>193</sup>

#### **C.4 Fourth incidental motion for "extraordinary early release through Remission of Sentences"**

128. On March 3, 2004, Mrs. Chinchilla filed a motion for "extraordinary early release" through Remission of Sentences<sup>194</sup> before the Second Criminal Enforcement Court, based on Article 495 of the Code of Criminal Procedure and Article 7(c) of the Remission of Sentences Law, concerning special remission on humanitarian grounds. In the motion, Mrs. Chinchilla reiterated the illnesses and ailments mentioned previously and pointed out that she had "been classified as a TERMINAL CASE." Attached were two certifications from the Head of the Medical Records Department of the San Juan de Dios Hospital, stating that she had "terminal occlusive arteriosclerotic disease" with 80% probability that her left limb would eventually be amputated.<sup>195</sup>

129. On March 17, 2004, the Deputy Director of the COF sent the judge "a photocopy of the medical certificate issued by the Chief of the First Women's Surgery Unit, San Juan de Dios Hospital" <sup>196</sup> and an "Opinion of the Multidisciplinary Team", according to which Mrs. Chinchilla "[...] should be granted special release because she is unable to fend for herself and the Center does not have specialized staff to provide her with a personal service."<sup>197</sup>

130. At the request of the Judge, on March 15, 2004, the Public Prosecution Service conducted a medical examination of Mrs. Chinchilla and said that "she presents [...] pain in her left hip when she moves, and also has a tumor." The report added that "she is not taking

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<sup>192</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File No. 169-03. Appeal filed on behalf of Mrs. María Inés Chinchilla Sandoval of September 11, 2003 (evidence file, folios 935-940).

<sup>193</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File No. 169-03. Appeal No, 243-2003. Of. 2. Decision of the Fourth Division of the Court of Appeals. September 25, 2003 (evidence file, folios 945-947).

<sup>194</sup> Cf. Incidental Motions for Early Release. Letter from f Mrs. María Inés Chinchilla Sandoval to the Judge of the Second Criminal Enforcement Court of March 3, 2004 (evidence file, folios 762-763).

<sup>195</sup> Cf. Incidental Motions for Early Release. San Juan de Dios General Hospital. Medical Records Department. Certifications No. 2076/02 and No. 447/04, of November 18, 2002 and March 2, 2004 respectively (evidence file, folios 764 and 766).

<sup>196</sup> Cf. Incidental Motions for Early Release. Communication from the Deputy Director of the COF of March 17, 2004, Official letter No. 019-2004 (evidence file, folio 768).

<sup>197</sup> Cf. Incidental Motions for Early Release. Communication of the Multidisciplinary Team of March 17, 2004 (evidence file, folio 769).

her medication;" however, "she does not have [...] any terminal illness."<sup>198</sup> For his part, the Judiciary doctor said that Mrs. Chinchilla was an "inmate who merited medical treatment to address the symptoms of her diabetes and sequelae (terminal illness) at the prison clinic and/or the San Juan de Dios General Hospital."<sup>199</sup>

131. On March 30, 2004, Mrs. Chinchilla submitted various items of evidence, including a psychological report stating that she "presents symptoms of depression", "feels frustration and stress that affects her mental and physical health" and that her "physical health [has] deteriorated markedly."<sup>200</sup> A report from the Head Medical Records Department of the HSJD was also included,<sup>201</sup> as was a written communication offering a guarantor to cover her medicines and ensure that she went to all her appointments in future.<sup>202</sup> There was also a certificate from the medical surgeon Dr. María de los Ángeles López, who said that Mrs. Chinchilla was in a "poor general state of health and nutrition," entertained "thoughts of suicide (desire to die)" and had been diagnosed with "decompensated arterial hypertension, decompensated type II diabetes mellitus, chronic adult malnutrition and severe depression with risk of suicide."<sup>203</sup> On April 2, 2004, in response to a request for a medical examiner's report on Mrs. Chinchilla, the Chief of the HSJD's Surgery Department reported that "there is no medical examiner to prepare the report."<sup>204</sup>

132. On April 6, 2004, the COF duty doctor submitted a medical report to the Director of the COF, stating that 51 year-old Mrs. Chinchilla suffered from several illnesses, including: i) decompensated type II diabetes mellitus; ii) arterial hypertension; iii) blindness caused by diabetes; iv) anasarca; [...] vi) chronic adult malnutrition and vii) aggressive behavior. The report said that she was currently taking "10 units of insulin T.X. in the A.M. and P.M. and Enalapril every 24 hrs."<sup>205</sup>

133. On April 14, 2004, a socioeconomic report by the Social Work Unit of the Public Criminal Defense Institute was submitted stating that Mrs. Chinchilla had been suffering from diabetes for approximately fourteen years and that the "disease had been kept under control at the Guatemalan Social Security Institute until the time of the legal proceedings in which she is currently involved." The report said that "when she was convicted, the complications of her disease began, since she was not treated in time at the prison where she was held, and did not receive immediate medical assistance. As a result she entered into a coma and had to be taken in an emergency to the San Juan de Dios General Hospital on August 19, 2002, where she underwent surgery on her right leg." The report stated that Mrs. Chinchilla moves

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<sup>198</sup> Cf. Incidental Motions for Early Release. Communication of the Public Prosecution Service of March 24, 2004, DMF-0-652-2004 RERG/zqp (evidence file, folios 772 and 773).

<sup>199</sup> Cf. Incidental Motions for Early Release. Communication of the Medical Examiner of March 24, 2004 (evidence file, folio 776).

<sup>200</sup> Cf. Incidental Motions for Early Release. Women's Unit. Institute of the Public Defense. Psychological Report. February 17, 2004 (evidence file, folios 785-787).

<sup>201</sup> Cf. Incidental Motions for Early Release. San Juan de Dios General Hospital. Medical Records Department. February 5 and March 16, 2004 (evidence file, folios 789-791).

<sup>202</sup> Cf. Incidental Motions for Early Release. Letter from Mrs. Ana María Sandoval de Valdes of March 18, 2004 (evidence file, folio 792).

<sup>203</sup> Cf. Incidental Motions for Early Release. Report of Dr. María de los Ángeles López of March 18, 2004 (evidence file, folio 803).

<sup>204</sup> Cf. Incidental Motions for Early Release. San Juan de Dios General Hospital. Letter from Dr. Sergio Ralon. First Women's Surgery Unit. April 2, 2004 (evidence file, folio 808).

<sup>205</sup> Cf. Incidental Motions for Early Release. Communication of Amelia Moran, COF duty doctor of April 6, 2004 (evidence file, folio 861).

around in a “wheelchair,” which was a problem for her “because of the very confined spaces” in the prison and that “the patient’s state of mind and depression are of grave concern.”<sup>206</sup>

134. On April 20, 2004, the judge asked the Central Prisons Board to issue an early release report.<sup>207</sup>

135. The hearing was scheduled for April 21, 2004.<sup>208</sup> On April 16, 2004, Mrs. Chinchilla requested that Dr. Luisa Amelia Morán García, the COF duty doctor,<sup>209</sup> be summoned to give evidence at the hearing. The judge confirmed receipt of the brief on April 19, 2004, and instructed that a summons be sent to the doctor so that she could submit a medical report.<sup>210</sup> The evidence hearing was held on April 21, 2004.<sup>211</sup>

136. The first to be questioned was the medical examiner of the Judiciary, who said that Mrs. Chinchilla had told him “that she does not receive treatment.” However, he answered “no” when asked if she was in danger of dying in the short term, but added that if she did not follow “an adequate diet and [did not] receive her treatment [Mrs. Chinchilla was] in imminent danger of death.” He said that “the endocrinologist is the person who would have to decide the type of treatment, and the quantities or doses, and the people to administer it would be the prison’s nursing staff”, but he did “not [know] whether or not the Center ha[d] the necessary medicines” and that “prisons do not have teams of specialists.” He added that “if [the patient] were to enter into a state of diabetic ketoacidosis and a secondary coma she would have the chance to receive help, but the time taken to transfer her to a facility that provides specialized care would be critical.” He specified that “...there is nothing with respect to cancer, only mention of a [tumor] or cervical lesion and it is Mrs. Chinchilla who claims to have cancer of the cervix.” Finally, when asked what sort of life prospects Mrs. Chinchilla could have “as a prisoner if the Women’s Orientation Center at Fraijanes did not have an endocrinologist”, he answered, “her quality of life will be poor.”<sup>212</sup>

137. The Public Prosecution Service medical examiner stated that Mrs. Chinchilla’s ailments “...are not considered a terminal illness” and “...she could be prescribed ambulatory medical treatment.” He said that “if the patient is not treated with drugs, she tends to suffer complications that at some point [could be] life-threatening” and that if she were to have a ketoacidosis crisis “she must receive medical treatment as soon as possible.” He said that he was not “familiar with the facilities [at the COF] in terms of health care and professional staff [...] in the event of a complication” and that he was “not familiar with the specific medical care that the patient [illegible] at the prison... [and] the written records on the care that the patient

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<sup>206</sup> Cf. Incidental Motions for Early Release. Public Criminal Defense Institute. Social Work Unit. Socioeconomic Report of November 14, 2002 (evidence file, folios 812-818).

<sup>207</sup> Cf. Incidental Motions for Early Release. Decision of the Judge of the Second Criminal Enforcement Court of April 20, 2004 (evidence file, folio 858).

<sup>208</sup> Cf. Incidental Motions for Early Release. Decision of the Judge of the Second Criminal Enforcement Court, April 16, 2004 (evidence file, folio 827).

<sup>209</sup> Cf. Incidental Motions for Early Release. Public Criminal Defense Institute. Brief on behalf of Mrs. María Inés Chinchilla Sandoval of April 16, 2004 (evidence file, folio 828).

<sup>210</sup> Cf. Incidental Motions for Early Release. Decision of the Judge of the Second Criminal Enforcement Court of April 19, 2004 (evidence file, folio 829).

<sup>211</sup> Cf. Incidental Motions for Early Release. Judiciary. Enforcement No. 429-96; Of. 7. Record of Evidence Hearing of April 21, 2004 (evidence file, folios 846-858).

<sup>212</sup> Cf. Incidental Motions for Early Release. Judiciary. Enforcement No. 429-96; Of. 7. Record of Evidence Hearing of April 21, 2004 (evidence file, folios 846-858).

has received or is receiving at the prison.”<sup>213</sup> He mentioned that “[the] clinical file from the San Juan de Dios Hospital describes a tumor in the vagina in March 1997, but there are no other medical notes on the progress of the disease.”

138. When asked if Mrs. Chinchilla had been brought to hospital in adequate time, the attending physician from the HSJD replied, “so far, yes.” As to whether or not Mrs. Chinchilla had mentioned the medication prescribed to her, he said “no.” When asked who administered the insulin, he said “I do not know” and added that “at the moment and in the short-term it is difficult [to know if her life is in danger]; however, without adequate treatment she could suffer a fatal diabetic complication.” He said that “[Mrs. Chinchilla] has an illness that is not properly treated and controlled” and that “if she does not receive her insulin treatment [...] she could go into a hyperosmolar or ketoacidotic coma [...].” He indicated that he had “no medical knowledge ... that... she has cervical or vaginal cancer.” He said that given her illnesses, Mrs. Chinchilla needed “glycemia control, pre- and post- [illegible], ophthalmological monitoring, nephrological monitoring, control of irrigation in the lower limb and cardiovascular checkups.” When asked if Mrs. Chinchilla was “consistently receiving such treatment daily in prison,” he replied, “not to my knowledge.”

139. On April 22, 2004, Mrs. Chinchilla presented the judge with “illustrative background information on the motion for early release under special remission of sentences,” consisting of a report from the Director General of the Prison System about conditions at the COF, a newspaper report on her situation, as well as expert opinions and reports contained in the record.<sup>214</sup>

140. The Prison System’s Medical Services Coordinator reported that “the prison has medicine for treating infectious problems as well as oral medications for treating diabetes, osteomyelitis and arterial hypertension. However, the inmate Chinchilla Sandoval requires subcutaneous insulin for her diabetic problem that is causing all the metabolic ailments from which she suffers, including chronic kidney failure, for which the prison lacks the necessary equipment to provide care.” The report added that “[t]he Center does not have specialized hospital medical equipment to deal with crises of that magnitude” ... It does have adequate facilities for the internment of this inmate, which are managed by the prison’s hospital area” but that it “does not have adequate orthopedic equipment.” Finally, the report stated that “Mrs. Chinchilla Sandoval’s condition has forced us to refer her regularly to hospitals because at certain times she requires specialized care.”<sup>215</sup>

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<sup>213</sup> Cf. Incidental Motions for Early Release. Judiciary. Enforcement No. 429-96; Of. 7. Record of Evidence Hearing of April 21, 2004 (evidence file, folios 846- 858).

<sup>214</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Public Criminal Defense Institute. Communication from Mrs. María Inés Chinchilla Sandoval through her representative (evidence file, folios 1100 -1101)

<sup>215</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Order No. 429-96 Of. 7. Remission of Sentences File. General Directorate of the Prison System. Medical Services Coordinator. Official Letter No. 0546-2004- DR-RECH of April 2, 2004 (evidence file, folios 1103-1104).

141. On April 28, 2004, “psychological and work reports” were forwarded from Santa Teresa Women’s Prison.<sup>216</sup> On April 29, 2004, the COF’s medical surgeon advised that she would be unable to attend the hearing on that day and forwarded a medical certificate.<sup>217</sup>

142. The evidence hearing was held on April 29, 2004.<sup>218</sup> The Public Prosecution Service announced, *inter alia*, that “it was not possible to hear the testimony of Dr. Luisa Amelia Morán, which was of the utmost importance for establishing at the hearing everything connected with the inmate’s illness and conditions at the Women’s Orientation Center (COF).” It also mentioned that the statement of the Central Prisons Board was not included, “which is of great importance to establish the admissibility of the inmate’s request for early release, since it is an essential requirement for granting it, as established in Article 7(c) of the Sentence Remission Law.”<sup>219</sup>

143. On April 29, 2004, the COF doctor sent a report to the physician of the Second Court containing a “clinical impression” of Mrs. Chinchilla as follows: “\* arterial hypertension.\* diabetes mellitus. \* pleural effusion\* ascites \* chronic adult malnutrition \* fracture of the femur (operated, however the bone has not knitted) \* renal insufficiency (tests to be completed) \* depression.” The doctor also mentioned other symptoms and concluded that “the patient suffers from various pathologies and needs specific permanent treatment; however, given its complexity and chronicity, its resolution is difficult.”

144. On April 29, 2004, the Second Criminal Enforcement Judge declared the incidental motion “without merit”, stating the following:

“[...] although it is true that the inmate currently suffers from the disease [...] diabetes mellitus as well as other illnesses, it is no less true that to date Mrs. Chinchilla Sandoval has been granted permission whenever she has asked to receive medical attention; therefore, this inmate cannot be released, as her defense counsel requests, because of the mere fact that she is ill, as a humanitarian act, since it would be the Judiciary taking this action through this jurisdictional body and not as envisaged by the lawmakers [...] Similarly, based on an analysis of the reports and statements of the doctors summoned, we conclude that, while it is true that the disease suffered by the convict is irreversible and complex, all the doctors have made it clear that if she receives adequate treatment her life is not in imminent danger. Therefore, the convict must continue serving her sentence and, whenever she needs to receive medical attention, she should make it known and this will be authorized with prior justification. This [decision] also takes into account the fact that the convict Chinchilla Sandoval is serving a thirty-year prison sentence and that so far she has served only eight years, ten months and twenty-nine days, not even half of the penalty imposed. Considering that the law in this aspect must be obeyed and enforced, in this case, the aforementioned convict must remain in prison even though she has a disease that makes it more complicated for her to stay and serve the sentence imposed. Also, it is the view of this Judge that, in order to grant the benefit sought, it is not a requirement for the convict to be suffering from a particular illness; on the contrary, as established by Article 7 (c) of the Remission of Sentences Law it is essential for the convict to have performed acts of altruism,

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<sup>216</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Women’s Orientation Center. Letter from the Deputy Director of the COF and Psychological and Work Reports of the Santa Teresa Women’s Prison, Zone 18, of April 28, 2004 (evidence file, folios 1112-1114).

<sup>217</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Communications of Dr. Luisa Amelia Moran of April 28 and 29, 2004 (evidence file, folios 1116-1117).

<sup>218</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Record of Evidence Hearing of April 29, 2004 (evidence file, folios 1119-1128).

<sup>219</sup> Cf. Incidental Motions for Early Release. Judiciary. Enforcement No. 429-96 Of. 7. Record of Evidence Hearing of April 29, 2004 (evidence file, folios 1119-1128).

heroism, or any other humanitarian act, something that has not been accredited at any time. In addition, the same law provides that such benefits must be decided upon and set on the recommendation of the Central Prisons Board, stating the reasons that justify such remissions. That has not occurred in this incidental motion, despite the fact that that an opinion on that matter was requested from the [Board], which also constitutes an obstacle to granting the benefit sought. Coupled with the foregoing, Judge Aquo concludes that the benefit requested was not designed to enable a convicted person to die with dignity, but to encourage or reward a convicted person who has performed a solemn act of solidarity and compassion for another individual or individuals who have suffered misfortune. Therefore, the Judge decides that this motion must be declared without merit."<sup>220</sup>

145. In addition, on April 29, 2004, the Judge of the First Criminal Enforcement Court forwarded a communication to the Second Judge informing him that "the Central Prisons Board has been disbanded since 2002, on account of the duplication of functions between the Judge of the First Criminal Enforcement Court and the President of the Board." In light of the foregoing, "it [was] not possible to rule on the motion filed for early release under remission of sentence."<sup>221</sup>

146. On May 17, 2004, Mrs. Chinchilla's attorney filed an appeal on her behalf arguing that the interpretation of Article 7 of the Sentence Remission Law was "outmoded, simplistic and obsolete" and that the Central Prisons Board had not convened. Finally, it argued that the incidental motion should be interpreted in a manner consistent with international treaties on the observance of human rights.<sup>222</sup> On May 18, 2004, the judge confirmed receipt of the appeal and forwarded it the Fourth Division of the Court of Appeals for a ruling.<sup>223</sup> After being notified on May 25, 2004, of Mrs. Chinchilla's death,<sup>224</sup> on June 3, 2004, the said Appeals Court decided not to hear the appeal on the grounds that the appellant had died.<sup>225</sup>

#### ***D. The investigation into Mrs. Chinchilla's death***

147. The Prosecution Unit for Crimes against Life and the Person of the Public Prosecution Service was notified of Mrs. Chinchilla's death on May 25, 2004.<sup>226</sup> The prosecutor of Agency No. 22 of the Metropolitan Prosecutor's Office conducted the official removal of the body that same day. A photograph album of the official removal of the body was included in a report of June 9, 2004.<sup>227</sup>

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<sup>220</sup> Cf. Incidental Motions for Early Release. Judiciary. Enforcement No. 429-96 Of. 7. Decision of the Judge of the Second Criminal Enforcement Court of April 29, 2004 (evidence file, folios 1139-1144).

<sup>221</sup> Cf. Incidental Motions for Early Release. Judiciary. Enforcement No. 429-96 Of. 7. Communication of the First Criminal Enforcement Judge of April 29, 2004 (evidence file, folio 1145).

<sup>222</sup> Cf. Incidental Motions for Early Release. Judiciary. Enforcement No. 429-96 Of. 7. Legal Defense Institute. Appeal filed on May 17, 2004 (evidence file, folios 1150-1193).

<sup>223</sup> Cf. Incidental Motions for Early Release. Judiciary. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Decision of the Judge of the Second Criminal Enforcement Court of May 18, 2004 (evidence file, folio 1195).

<sup>224</sup> Cf. Incidental Motions for Early Release. Judiciary. Enforcement No. 429-96 Of. 7. Remission of Sentences File. Women's Orientation Center. Official letter No. 99-2004. Communication of the Deputy Director of the COF, May 25, 2004 (evidence file, folio 1199).

<sup>225</sup> Cf. Incidental Motions for Early Release. Judiciary. Enforcement No. 429-96 Of. 7. Decision of the Fourth Division of the Court of Appeals of June 3, 2004 (evidence file, folios 1200-1201).

<sup>226</sup> Cf. Public Prosecution Service. Prosecutor for Crimes against Life and Personal Integrity. "Vida" Office 04, MP001/2004/105950, January 11, 2005 (evidence file, folios 1330 and 1331).

<sup>227</sup> Cf. Public Prosecution Service. Form for removal of corpses, dated May 25, 2004 (evidence file, folio 1297)

148. That same day, May 25, 2004, the Judiciary's Forensic Medicine Service of the Department of Guatemala conducted an autopsy on Mrs. Chinchilla's body and, on June 3, 2004, informed the Public Prosecution Service of the conclusions: "A) pulmonary edema, B) hemorrhagic pancreatitis, C) left pleural effusion and D) congestive heart failure."<sup>228</sup>

149. On June 21, 2004, the Technical Scientific Department (toxicology section) of the Public Prosecution Service's Office of Criminal Investigations informed the prosecutor that tests were carried out on samples of blood, liver and gastric contents taken from Mrs. Chinchilla Sandoval's body, in autopsy No. 1499/04 of May 25, 2004. This determined, *inter alia*, that there was no presence of ethyl alcohol, methyl alcohol or other volatile substances, isopropanol, acetone, or other therapeutic and/or "abuse" drugs, pesticides, herbicides, phosphides and other harmful substances.<sup>229</sup>

150. Based on that information, the Prosecutor's Office requested, under the terms of Article 310 of the Code of Criminal Procedure, that the Court of First Instance for Criminal Matters, Drug Trafficking and Environmental Crimes of the Department of Guatemala dismiss the case and archive the file. The Prosecutor's Office considered that, as evidenced in the autopsy protocol, the cause of death was pulmonary edema and hemorrhagic pancreatitis, and therefore "there [were] no grounds to proceed because the cause of death [did] not constitute a criminal offense, and therefore, [was] not punishable."<sup>230</sup>

151. On January 18, 2005, the Seventh Court of First Instance on Criminal Matters, Drug Trafficking and Environmental Crimes of the Department of Guatemala ordered the case to be archived.<sup>231</sup> The decision was based on the fact that, "prior study and analysis of the actions contained in the merits file, suggests there are not sufficient elements of conviction and legal certainty to order the opening of criminal proceedings, considering that according to the forensic report, the cause of death of María Inés Chinchilla Sandoval was pulmonary edema and hemorrhagic pancreatitis; consequently, this Court has no option other than to rule according to law. [...] Thus, based on these considerations and on the laws cited, this Court DECIDES: 1) As requested by the Public Prosecution Service, to DISMISS the case and orders it to be archived."

## **VII MERITS**

152. Having regard to the alleged violations of the rights recognized in the Convention in the instant case, the Court will conduct an analysis in the following order: 1) the rights to life and to personal integrity of Mrs. Chinchilla Sandoval; and 2) the right of Mrs. Chinchilla and her next of kin to judicial guarantees and judicial protection.

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<sup>228</sup> Cf. Judiciary. Forensic Medicine Service, Autopsy No. 1499-2004-Mald., June 3, 2004 (evidence file, folio 1333).

<sup>229</sup> Cf. Public Prosecution Service. Communication from the Pharmaceutical Chemist of the Chemical Analysis Department to the Prosecutor, June 21, 2004 (evidence file, folios 1335-1336).

<sup>230</sup> Cf. Public Prosecution Service. Prosecution Unit for Crimes against Life and the Person. "Vida" Office 04, MP001/2004/105950 of January 11, 2005 (evidence file, folios 1338-1339).

<sup>231</sup> Cf. Certification of Enforcement No. 429-96. Judiciary. Of. 7. C-394-2005. Decision of the Seventh Court of First Instance on Criminal Matters, Drug Trafficking and Environmental Crimes of the Department of Guatemala, January 18, 2005 (evidence file, folios 1341-1342).

**VII-1**  
**RIGHTS TO PERSONAL INTEGRITY AND TO LIFE**  
**(Articles 5(1) and 4(1) of the Convention)**

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

153.       The **Commission** considered that the State's duty to protect persons deprived of liberty extends to their health, as part of the rights to life and personal integrity, and specifically to the obligation to provide adequate, timely, and specialized medical treatment, in accordance with the special health care needs of persons detained in its custody, when required. It indicated that the lack of adequate medical care does not meet the basic requirements of treatment with dignity established in Article 5 of the Convention and, in the case of a person deprived of liberty in the custody of the State, could be considered a violation of that right, depending of the specific circumstances of the particular individual.

154.       In particular, the Commission concluded that there was no proper diagnosis or record of Mrs. Chinchilla's health condition and treatment while in detention and that the State's response to her health condition was limited, since "there are no certifications attesting to a comprehensive diagnosis or follow-up on all Mrs. Chinchilla's ailments." It added that the enforcement judge requested medical certifications only for two reasons: first, to verify whether or not it was necessary to grant the alleged victim permission to leave the prison to attend her medical appointments; and secondly, to determine if the illnesses were "terminal" when deciding on the motions for early release and whether or not she could receive care at the detention center. Thus, there were numerous contradictory and isolated references to certain physical and mental ailments, which had not been treated. In other words, no steps were taken to understand Mrs. Chinchilla's overall health condition and thereby determine the required treatment and provide adequate monitoring.

155.       As to the treatment of Mrs. Chinchilla's diabetes and related ailments, the Commission concluded that: i) the prison system did not provide Mrs. Chinchilla with the medication that she needed and she obtained it by her own means, contingent on her financial circumstances or those of her next of kin; ii) the COF lacked adequate facilities and specialized staff, either to offer her medical treatment or provide care in an emergency; iii) the COF did not provide her with the diet that she needed to control her illness and she obtained her food either through her own means, according to her possibilities, or through other COF inmates; iv) the COF had no defined strategy to provide her with conditions to prevent her disease from growing worse; and v) the above situation had an impact on the evolution and deterioration of Mrs. Chinchilla's diseases, leading to, *inter alia*, the amputation of one of her legs, diabetic retinopathy and occlusive arteriosclerosis, with 80% probability of losing her other leg.

156.       Regarding the State's response to Mrs. Chinchilla's disability after the amputation of one of her legs and the progressive loss of her sight, the Commission argued that no reasonable accommodation was made to help her move around in a wheelchair within the prison and to transport her to medical appointments. As a result, she suffered two falls, among other difficulties. Although the State reported that it had installed a special toilet and washbasin and provided Mrs. Chinchilla with her own cell, the Commission considered that those measures did not demonstrate the special care required to guarantee the conditions appropriate to her special needs. Therefore, the State did not fulfill its special obligations to ensure her dignity and her personal integrity, in light of her disability. In its final written observations, the Commission argued that the fact that she had to be carried by male staff to attend her appointments constitutes "a multiple form of discrimination given her condition as a disabled woman."



157. As for the State's response on the day of Mrs. Chinchilla's death, according to the Commission, no prior health tests were carried out on her various symptoms. That day she suffered a fall because of a step that prevented her from getting by in her wheelchair, due to the fact that she had no one to help her move around, a situation attributed to the State's failure to implement reasonable modifications at the COF. The nurse who attended her did not perform a glucose test, which was essential to determine whether she was facing an emergency, and to obtain permission for her to go to hospital for treatment. After a superficial check by the nurse, she did not receive any monitoring *ex officio* or any kind of health care for almost one hour. Thus, she died alone and without any type of medical assistance or supervision, since there was no doctor that day; and she was denied hospital care and treatment.

158. The **representatives** did not present specific arguments on the alleged violation of her rights to life and personal integrity and, in general, reiterated part of what was stated by the Commission. They emphasized that the procedure for authorizing medical appointments was bureaucratic, slow and ineffective, which had a negative impact on her medical care, causing her to miss appointments and making it necessary to reschedule them, a situation that worsened in 2002. They also noted that a refrigerator was placed in her room to keep the insulin, because otherwise it would be stolen at the COF, and therefore she had to pay each month for the use of electricity.

159. The **State** insisted that Mrs. Chinchilla was detained at the COF because she was serving a 30-year sentence after being found guilty in criminal proceedings for the crimes of murder and aggravated larceny. It emphasized that the Commission and the petitioners had not claimed that any official was responsible for Mrs. Chinchilla's death or had caused her injuries, and the Public Prosecution Service did not find that State agents had participated in the facts or that these had resulted from a criminal act, since the autopsy determined death from natural causes.

160. In relation to Mrs. Chinchilla's disability, the State indicated that she was housed in the COF's maternal area, in an individual cell, adapted and modified to her special health needs, that is, separated from the rest of the inmate population and not in overcrowded conditions. She enjoyed hygiene and personal care facilities free of charge and a toilet and washbasin were installed for her, taking into account that she was in a wheelchair. Her room did meet the relevant requirements and she made no complaint about the ventilation or the lighting in her cell. In addition, she mentioned that she was allowed to bring in electrical appliances (television and refrigerator).

161. As for the obligation to provide regular medical attention by qualified staff, the State emphasized that during her detention at the COF she was provided with medical attention free of charge according to her needs, in the COF's own clinic. Here she received regular care by qualified medical and nursing staff, and was allowed to leave the prison to receive treatment in public hospitals; however, being incarcerated and serving her sentence, she first had to request permission from a judge. In this regard, the State noted that, out of a total of seven years of incarceration, during one year, five months and six days (622 days) the inmate received health care services at a public hospital, in addition to all the other occasions on which she was attended to in the COF's own clinic. Thus, she received medical treatment during almost one-quarter of the time that she was incarcerated (24.34%) and only missed appointments on 11 days, because she had not carried out the established legal procedures. The State argued that Mrs. Chinchilla Sandoval's daughter, who testified at the hearing, only visited her mother on five occasions between 2000 and 2004, and therefore could not attest to the treatment received by her mother.

162. The State argued that Mrs. Chinchilla herself aggravated many of her ailments, since she refused to obey the orders issued by the COF doctors and nurses regarding her care, treatment and control of her disease. Moreover, she refused to be attended by the doctors and to sign the record sheets and certificates confirming the treatment, care and medication administered by them in fulfillment of their professional duties. This was reported by the medical staff in charge of her care on various occasions, as noted in the report of the Commission. The State also indicated that, contrary to what was stated by the Commission, the COF did provide her with the type of diet prescribed by the doctors who treated her, but she gave herself a free diet, contrary to medical advice, consuming products that were harmful for her health, and seeking to hold those professionals, and therefore the State, responsible for her negligence.

163. Regarding the alleged violation of Article 5 of the Convention, the State rejected any suggestion that torture was committed against the presumed victim. It indicated that she was indeed in prison and not in a hospital because she was serving a sentence and the medical reports did not indicate that she should remain interned in a hospital, since her ailments were inherent to her illness. It argued that at no time was it proven that Mrs. Chinchilla Sandoval made a complaint about mistreatment, physical or mental torture or threats on the part of the COF staff, the medical professionals or any other persons, or that she faced a real and immediate risk that could endanger her life and personal integrity.

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

164. The instant case concerns a woman deprived of her liberty in a women's prison in Guatemala, where she was serving a sentence for a criminal conviction, and whose state of health progressively deteriorated due to her diabetes and other ailments. This situation led to a disability stemming from a number of complications, particularly when one of her legs was amputated, forcing her to move around in a wheelchair; as a result, modifications were required in the prison, which allegedly were not carried out. Her condition worsened and, after suffering a fall, she died in that center. It is alleged that the prison and the judicial authorities did not properly attend to her situation and that the facts were not investigated.

165. Having regard to the disputes presented, the Court will consider whether the State fulfilled its obligations to guarantee<sup>232</sup> the alleged victim's rights to personal integrity<sup>233</sup> and to life,<sup>234</sup> in the following order: 1) the State's obligation to provide health care and medical treatment to persons deprived of their liberty; 2) the duty of the State to provide adequate treatment to the alleged victim for her diabetes and related ailments after she was deprived of liberty; 3) the State's response to Mrs. Chinchilla's disability; and 4) the response of the administrative authorities on the day of Mrs. Chinchilla's death.

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<sup>232</sup> Article 1(1) of the American Convention establishes "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."

<sup>233</sup> Article 5 Right to Humane Treatment (Right to Personal Integrity) of the Convention establishes that:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

<sup>234</sup> Article 4(1) of the American Convention establishes that "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."

### **B.1 The State's obligation to provide medical care and treatment to persons deprived of liberty**

166. The Court has repeatedly stated that the right to life is a fundamental human right in the American Convention, and therefore its protection is essential for the exercise of all other rights.<sup>235</sup> Accordingly, States have the obligation to create the conditions required for their full enjoyment and exercise.<sup>236</sup>

167. Moreover, the right to personal integrity is of such importance that the American Convention protects it specifically upon establishing, *inter alia*, the prohibition on torture, cruel, and inhumane treatment, and the impossibility of suspending this right under any circumstances.<sup>237</sup>

168. The Court has indicated that from the general obligations to respect and guarantee the rights established in Article 1(1) of the American Convention are derived special obligations that are determined according to the particular needs for protection of the subject of law, either owing to his personal situation or to the specific situation in which he finds himself.<sup>238</sup> In that regard, the State has a special role as guarantor in respect of persons deprived of their liberty, given that the prison authorities exert control over the persons held in custody.<sup>239</sup> This results from the special interaction of subjection between the person deprived of liberty and the State, characterized by the particular intensity with which the State can regulate their rights and obligations and by the circumstances characteristic of confinement, in which the person deprived of liberty is prevented from satisfying, on his own account, a series of essential basic needs required to lead a dignified life,<sup>240</sup> in the terms that are possible in those circumstances.

169. Consequently, pursuant to Article 5(1) and 5(2) of the Convention, every person deprived of liberty has right to live in conditions of detention that are compatible with their personal dignity. This implies that the State has a duty to safeguard the health and wellbeing of those deprived of liberty and to ensure that the manner and method of deprivation of liberty does not exceed the inevitable level of suffering inherent in detention.<sup>241</sup>

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<sup>235</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 144, and *Case of Vera Vera et al. v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of May 19, 2011. Series C no. 226, para. 39.

<sup>236</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, supra*, para. 144, and *Case of Vera Vera et al. v. Ecuador, supra*, para. 39.

<sup>237</sup> Articles 5 and 27 of the American Convention. See also, *Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary objections, merits, reparations and costs*. Judgment of September 2, 2004. Series C No. 112, para. 157, and *Case of Vera Vera et al. v. Ecuador, supra*, para. 40.

<sup>238</sup> Cf. *Case of the Pueblo Bello Massacre v. Colombia, supra*, para. 111; and *Case of the Pacheco Tineo Family v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2013. Series C No. 272, para. 128.

<sup>239</sup> Cf. *Case of Neira Alegría et al. v. Peru. Merits*. Judgment of January 19, 1995. Series C No. 20, para. 60, and *Case of Quispialaya Vilcapoma v. Peru, supra*, para. 117.

<sup>240</sup> Cf. *Case of the "Juvenile Reeducation Institute" v. Paraguay, supra*, para. 152, and *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations*. Judgment of May 14, 2013 Series C No. 260, para. 188. See IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OAS/ Ser. L/V/II Doc. 64, December 31, 2011, paras. 49 and ss.

<sup>241</sup> Cf. *Case of the "Juvenile Reeducation Institute" v. Paraguay, supra*, para. 159, and *Case of Quispialaya Vilcapoma v. Peru, supra*, para. 117. Basic Principles 1, 5 and 9 for the Treatment of Prisoners approved by the United Nations General Assembly in Resolution 45/111, of December 14, 1990, state that all inmates shall be treated with

170. The Court has considered that the rights to life and personal integrity are directly and immediately linked to human health care.<sup>242</sup> In this sense, the protection of the right to personal integrity supposes the regulation of domestic health services, together with the implementation of a number of mechanisms aimed at protecting the effectiveness of that regulation.<sup>243</sup>

171. Accordingly, based on the principle of non-discrimination, the right to life of persons deprived of liberty also requires the State to ensure their physical and mental health, specifically through the provision of regular medical examinations<sup>244</sup> and, when required, of

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the respect due to their inherent dignity and value as human beings, except for those limitations that are demonstrably necessitated by the fact of incarceration. Likewise, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, their human rights and fundamental freedoms enshrined in the Universal Declaration of Human Rights and, where the State in question is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants. And, prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation. The European Court of Human Rights has stated that: Article 3 of the European Convention requires the State to "ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the enforcement of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance." *Cf. ECHR, Kudla v. Poland*, No. 30210/96, Judgment of October 26, 2000, Reports 2000 XI, para. 94.

<sup>242</sup> *Cf. Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs.* Judgment of November 22, 2007. Series C No. 171, para. 117, and, *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 171.

<sup>243</sup> *Cf. Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261, para. 130, and *Case of Gonzales Lluy et al. V. Ecuador, supra*, para. 171. Furthermore, the Court has considered that "States have the duty to regulate and oversee all health care services provided to persons under their jurisdiction, as a special duty of protection to life and personal integrity, regardless of whether the entity that provides such services is of a public or private nature" (*Cf. Case of Ximenes Lopes v. Brazil. Merits.* Judgment of July 4, 2006. Series C No. 149, para. 89). See also: ECHR, *Lazar v. Romania*, No. 32146/05. Section Three. Judgment of May 16, 2010, para. 66; *Z v. Poland*, No. 46132/08. Section Four. Judgment of November 13, 2012, para. 76, and United Nations, Economic and Social Council, Committee of Economic, Social and Cultural Rights. General Comment No. 14, E/C.12/2000/4, August 11, 2000, paras. 12, 33, 35, 36 and 51.

<sup>244</sup> *Cf. Case Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 156 and 157; and *Case of Mendoza et al. v. Argentina, supra*, para. 189. Principle X of Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas of the IACHR establishes that "Persons deprived of liberty shall have the right to health, understood to mean the enjoyment of the highest possible level of physical, mental, and social well-being." See also: UN Special Rapporteur on Torture et al. Cruel, Inhuman or Degrading Treatment, Annual Report submitted to the Commission of Human Rights (now Council), E/CN.4/2004/56, adopted on December 23, 2003, para. 56.

medical treatment,<sup>245</sup> that is adequate, timely<sup>246</sup> and, where appropriate, specialized to meet the special care needs of the detained persons in question.<sup>247</sup>

172. The European Court of Human Rights has also recognized the obligation of States to ensure medical care for prisoners and to provide special care in situations of emergency or special care in cases of serious or terminal illness.<sup>248</sup> Likewise, the UN Human Rights Committee has established that when States detain a person they assume a special responsibility for their life, and must therefore ensure the protection of this right, including adequate medical care, which should be offered *ex officio*, without the need for the detained person to make a special request.<sup>249</sup>

173. This Court has indicated that lack of adequate medical assistance for a person deprived of liberty and in the State's custody could be considered *per se* a violation of Article 5(1) and 5(2) of the Convention, depending on the specific circumstances of the individual in question, his state of health, the type of disease or ailment, the time spent without treatment, the cumulative physical and mental effects,<sup>250</sup> and, in some cases, the individual's sex and age.<sup>251</sup> It is clear that, since the State exerts control over detainees and as well as over the evidence concerning their physical state, conditions of detention and possible medical attention, the onus is on the State to verify that it has properly respected and ensured the

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<sup>245</sup> See ECHR, *Tarariyeva v. Russia*, No. 4353/03, Judgment of December 14, 2006, para. 76, and *Slawomir Musial v. Poland*, No. 28300/06, Judgment of January 20, 2009, paras. 85-88. See also United Nations Committee on Human Rights: *Pinto v. Trinidad and Tobago*, Communication No. 232/1987) UN Doc. CCPR/C/39/D/232/1987, of August 21, 1990, para. 12.7; *Kelly v. Jamaica*, Communication No. 253/1987, UN Doc CCPR/C/41/D/253/1987, of 10 April 1991, para. 5.7; *Lantsova v. Russian Federation*, Communication No. 763/1997, U.N. Doc. CCPR/C/74/763/1997, of March 26, 2002, para. 9.2. See also: African Commission on Human Rights, *Free Legal Assistance Group and others v. Zaire*, Communications No. 25/89, 47/90, 56/91, 100/93, of April 4, 1994, para. 47; *International PEN and Others v. Nigeria*, Communications No. 137/94, 139/94, 154/86, 161/97, October 31, 1998, para. 112; *Malawi African Association and Others v. Mauritania*, Communications Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98, May 11, 2000, paras. 111 and 112.

<sup>246</sup> In this regard see, *inter alia*, Art. 25 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council in Resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977; and Principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted through Resolution 43/173 of the UN General Assembly of December 9, 1988.

<sup>247</sup> For example, the UN Human Rights Committee has established the obligation of prison authorities to provide adequate medical care, in cases such as *Pinto v. Trinidad and Tobago*, Communication No. 232/1987, U. N. Doc. CCPR/C/39/D/232/1987, of August 21, 1990, para. 12.7; *Lewis v. Jamaica*, Communication No. 527/1993, U.N. Doc. CCPR/C/57/D/527/1993, of July 18, 1996) para. 10.4; *Whyte v. Jamaica*, Communication No. 732/1997, U.N. Doc. CCPR/C/63/D/732/1997 of July 27, 1998, para. 9.4; *Leslie v. Jamaica*, Communication No. 564/1993, U.N. Doc. CCPR/C/63/D/564/1993, August 7, 1998, para. 3.2. See also, African Commission of Human Rights, *Free Legal Assistance Group and others v. Zaire*, Communications No. 25/89, 47/90, 56/91, 100/93, April 4, 1994. Para. 47.

<sup>248</sup> In cases where persons deprived of liberty have received negligent or deficient medical treatment, States are considered to have violated Article 3 of the European Convention on Human Rights, which prohibits cruel, inhuman or degrading treatment, see *Case of Sarban v. Moldova*, No. 3456/05, Judgment of October 4, 2005. In the *Case of Kudhobin v. Russia* (No. 59696/00, Judgment of October 26, 2006, para. 83), the Court determined that when the authorities have knowledge of diseases that require supervision and adequate treatment, a record must be kept of the prisoner's state of health and treatment during detention.

<sup>249</sup> See: United Nations Human Rights Committee. *Lantsova v. Russian Federation*, Communication No. 763/1997, U.N. Doc. CCPR/C/74/763/1997, of March 26, 2002, para. 9.2; *Fabrikant v. Canada*, Communication No. 970/2001, U.N. Doc. CCPR/C/79/D/970/2001, of November 11, 2003, para. 9.3.

<sup>250</sup> Cf. *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, Preliminary objection, merits, reparations and costs*. Judgment of July 5, 2006. Series C No. 150, para. 103, and *Case of Mendoza et al. v. Argentina, supra*, para. 190.

<sup>251</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, supra*, para. 74; and *Case of Mendoza et al. v. Argentina, supra*, para. 190.

rights of a person deprived of liberty in the event of a health problem requiring adequate and efficient medical attention.

174. The Court recalls that many decisions adopted by international bodies invoke the United Nations Standard Minimum Rules for the Treatment of Prisoners in order to interpret the content of the right of persons deprived of liberty to dignified and humane treatment, and basic standards regarding their lodging, hygiene, medical treatment and physical exercise, etc.<sup>252</sup>

175. As to the medical services to be provided, the Minimum Rules state, *inter alia*, that “the doctor must examine each inmate as soon as possible after his admission and subsequently as often as necessary, in particular to determine the presence of a physical or mental disease, [and] take the necessary steps.”<sup>253</sup>

176. Similarly, the European Court of Human Rights has considered that when individuals are deprived of their liberty and the authorities are aware of prisoners suffering illnesses that require supervision and adequate treatment, a full record must be kept of their state of health and treatment during incarceration.<sup>254</sup>

177. Health services must maintain standards of quality equivalent to those offered to those not deprived of their liberty.<sup>255</sup> Health should be understood as a fundamental and indispensable guarantee for the exercise of the rights to life and personal integrity. This implies

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<sup>252</sup> Cf. *Case of Raxcacó Reyes v. Guatemala. Merits, reparations and costs*. Judgment of September 15, 2005. Series C No. 133, para. 99; and *Case of Mendoza et al. v. Argentina, supra*, para. 189. United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First Congress of the United Nations on the Prevention of Crime and Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council in Resolutions 663C (XXIV) of July 31, 1957, and 2076 (LXVII) of May 13, 1977. See also Rules 49 and 50 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. Adopted by the General Assembly in Resolution 45/113, of December 14, 1990.

<sup>253</sup> Rule 24 of the United Nations Standard Minimum Rules for the Treatment of Prisoners. It is also pertinent to recall that Principle 24 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Adopted by General Assembly resolution 43/173, of December 9, 1988) establishes that: “A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.” The Inter-American Commission’s *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle IX.3) states that “All persons deprived of liberty shall be entitled to an impartial and confidential medical or psychological examination, carried out by appropriate medical personnel immediately following their admission to the place of imprisonment or confinement, in order to verify their state of physical or mental health, and the existence of and the existence of any mental or physical injury or damage; to ensure the diagnosis and treatment of any relevant health problem; or to investigate complaints of possible ill-treatment or torture.”

<sup>254</sup> Cf. ECHR, *Kudhobin v. Russia*, No. 59696/00, Judgment of October 6, 2006, para. 83. See also, *Tarariyeva v. Russia*, No. 4353/03, Judgment of December 14, 2006, para. 76; *Case of Iacov Stanciu v. Romania*, No. 35972/05, Judgment of 24 July 2012, para. 170. The *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* has established that “A medical file should be compiled for each patient, containing diagnostic information as well as an ongoing record of the patient’s evolution and of any special examinations he has undergone. In the event of a transfer, the file should be forwarded to the doctors in the receiving establishment” (Translation of the Secretariat). Cf. *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment, Third Report General of Activities during the period January 1 to December 1992*. Ref.: CPT/Inf (93) 12 [EN] – Published June 4, 1993, para. 39. Available in English at: <http://www.cpt.coe.int/en/annual/rep-03.htm#III>

<sup>255</sup> The Principles of Medical Ethics Applicable to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, state that: “Health personnel, particularly physicians, ... charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained” (Principle 1). See <http://www.ohchr.org/SP/ProfessionalInterest/Pages/MedicalEthics.aspx>

that States have an obligation to adopt provisions of domestic law, including adequate practices, to ensure equal access to health care services for persons deprived of liberty, and to ensure the availability, accessibility, acceptability and quality of such services.

178. In particular, having regard to the provisions of the United Nations Standard Minimum Rules for the Treatment of Prisoners, States must provide professional medical care, including psychiatric care, to persons deprived of liberty, both in emergency situations and for the purposes of regular care, either within the place of detention or prison or, if this is not available, in hospitals or health care centers where that service is provided. Health care services should prepare and maintain accurate, up-to-date and confidential medical files on all prisoners, who must be granted access to those files upon request. Health care services should be organized and coordinated with the general public health administration, which implies establishing effective and prompt procedures for the diagnosis and treatment of sick prisoners and, when they require special care for their health condition, their transfer to specialized penal establishments or civil hospitals. To fulfil these obligations, health care protocols and prompt and effective mechanisms for transporting prisoners are required, particularly in cases of emergency or serious illness.<sup>256</sup>

179. In addition, States should, *inter alia*, create appropriate mechanisms to inspect institutions, present, investigate and resolve complaints and establish appropriate disciplinary or judicial procedures for cases of improper professional conduct or any violation of the rights of persons deprived of liberty.<sup>257</sup>

180. Several Member States of the Organization of American States have incorporated into their domestic laws specific standards to protect the health of prisoners; measures or procedures for their regular and emergency treatment; alternative measures to imprisonment in specific circumstances; and administrative and judicial control with respect to those

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<sup>256</sup> Article 22 of the United Nations Standard Minimum Rules for the Treatment of Prisoners. See also Articles 25 and 26. More recently, the revised United Nations Standard Minimum Rules for the Treatment of Prisoners, also known as the "Nelson Mandela Rules", as a manifestation of the global consensus on certain minimum standards for the medical care of the persons deprived of liberty, had established that every prison must have a health care service tasked with evaluating, promoting, protecting and improving the physical and mental health of prisoners, paying particular attention to those with special health care needs or with health issues that hamper their rehabilitation (Rule 25); the need to prepare and maintain appropriate individual medical records (Rule 26); prisons must ensure that prisoners have prompt access to medical attention in urgent cases; prisoners who require specialized treatment or surgery must be transferred to specialized institutions or to civil hospitals; and where the prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide prisoners referred to them with appropriate treatment and care (Rule 27). This amendment of the United Nations Standard Minimum Rules for the Treatment of Prisoners was approved by the United Nations General Assembly on December 17, 2015. See: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/70/175&referer=http://www.unodc.org/unodc/en/justice-and-prison-reform/tools.html?ref=menu&Lang=S](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/175&referer=http://www.unodc.org/unodc/en/justice-and-prison-reform/tools.html?ref=menu&Lang=S)

<sup>257</sup> Cf., *mutatis mutandi*, *Case of Suarez Peralta v. Ecuador*, *supra*, para. 134; and *Case of Ximenes Lopes v. Brazil*, *supra*, paras. 89 and 99.

persons,<sup>258</sup> for example in: Argentina,<sup>259</sup> Bolivia,<sup>260</sup> Canada,<sup>261</sup> Chile,<sup>262</sup> Colombia,<sup>263</sup> Costa Rica,<sup>264</sup> Ecuador,<sup>265</sup> El Salvador,<sup>266</sup> Guatemala,<sup>267</sup> Honduras,<sup>268</sup> Mexico,<sup>269</sup> Nicaragua,<sup>270</sup> Panama,<sup>271</sup> Paraguay,<sup>272</sup> Peru<sup>273</sup> and Venezuela.<sup>274</sup>

181. Furthermore, although there are substantial variations in the case law of each State in the region, the domestic courts have addressed the issue of protection of prisoners'

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<sup>258</sup> Those rules establish specific obligations of the administrative or judicial authorities, for example: a) the obligation to treat prisoners with the respect warranted by the dignity inherent to every human being; b) right to regular and timely medical care, free of charge; c) the duty of prison authorities to carry out a medical, psychological and social assessment of the convict upon admission to prison, preparing diagnoses and the criminological study to determine his physical and mental condition and, where appropriate, adopt the corresponding measures, all of which is entered in the clinical history of the convict; d) all remand and detention centers must provide permanent general medicine services, dentistry, psychology and psychiatry, each with the respective team; e) in cases of serious illness, or upon request, detainees have the right to be assisted by private doctors or to receive treatment in public and/or private institutions, after a favorable report by the medical examiner and other authorities, with authorization from the corresponding judge or other authorities; f) every sentence shall be served under the strict control of the enforcement judge, who will implement the rulings of the Judgment, and ensure adequate compliance by the prison system; g) the control of general conditions in prisons shall be under the responsibility of the administrative authorities, with the proper supervision of the competent judge; h) the transfer of prisoners from one facility to another or to a medical center may only be authorized by a competent judge in serious cases requiring urgent attention or specialized medical care that cannot be provided by the prison's medical unit; i) in emergency situations, the prison authorities may order the pertinent transfers.

<sup>259</sup> See: *Law for the Enforcement Custodial Sentences* of Argentina, and Art. 10 of the Criminal Code, replaced by Art. 4 of Law N° 26.472, B.O. 20/01/2009). Available at <http://www.infoleg.gov.ar/infolegInternet/annexs/15000-19999/16546/texact.htm#3>

<sup>260</sup> *Law No. 2298, on Criminal Enforcement and Supervision*, of December 20, 2001, Articles 90-97 and 196.

<sup>261</sup> *Federal Corrections and Conditional Release Act*, approved on June 18, 1992 and amended on July 23, 2015, Sections 86-87.

<sup>262</sup> *Regulations for Prison Establishments* of August 21, 1998, Articles 6, 34 and 35. Available at <http://pdba.georgetown.edu/Security/citizenssecurity/chile/laws/Dec518.pdf>

<sup>263</sup> *Law No. 1709* of 20 January 2014, arts. 65, 66, 67, 85, 87 that modify Articles 104 (Access to Health Care), 105 (Prison medical services), 106 (Medical assistance for inmates with special health conditions), 139 (Special Release), and 145 (Council for Evaluation and Treatment) of Law 65 of 1993; Law 1122 of January 9, 2007, Art. 14 m). See also the Technical Manual for the Provision of Health Services CAPRECOM-INPEC 2011 on the "Prison Medical Services."

<sup>264</sup> *Code of Criminal Procedure of Costa Rica*, Art. 461 (Sickness in convicts); and *Technical Regulations of the Penitentiary System*, Art. 13 (Admission phase).

<sup>265</sup> *Organic Law of the Criminal Code* of Ecuador, Arts. 4, 12.1 and 12.12.

<sup>266</sup> *General Regulations of the Prison Law*, El Salvador, November 16, 2000, Arts. 275 to 285.

<sup>267</sup> *Law of the Penitentiary System* of Guatemala, of 5 October 2006, Art. 14, and the *Regulations of the Prison System* of Guatemala of December 31, 2011, Arts. 12 and 13.

<sup>268</sup> *Law for the Rehabilitation of Offenders* of Honduras, of March 13, 1985, Arts. 29 to 34.

<sup>269</sup> See, for example, *Law of Enforcement of Custodial and Restrictive Penalties of the State of Mexico*, of December 26, 1985, Arts. 30, 32, 36 and 37.

<sup>270</sup> *Law No. 473 of the Prison System and Enforcement of Sentences* of Nicaragua, arts. 38, 43, and 91-94.

<sup>271</sup> *Criminal Code of the Republic of Panama*, Articles 108 and 110.

<sup>272</sup> *Penitentiary Law* of Paraguay, of October 2, 1970, Arts. 19 and 73 - 78.

<sup>273</sup> *Code of Criminal Enforcement* of Peru, Arts. 6 and 76 - 82.

<sup>274</sup> *Law of the Penitentiary System* of the Bolivarian Republic of Venezuela, of June 19, 2000, Arts. 35-42 and 77-80.



health and medical attention, for example in Bolivia,<sup>275</sup> Canada,<sup>276</sup> Colombia,<sup>277</sup> Costa Rica,<sup>278</sup> Mexico,<sup>279</sup> Panama,<sup>280</sup> and Peru.<sup>281</sup>

182. In the following section, the Court will examine the violations alleged in this case.

### ***B.2 The State's obligation to provide adequate treatment to the alleged victim for her diabetes and related ailments after her incarceration***

183. In the instant case, after Mrs. Chinchilla Sandoval's admission to the COF in May 1995, it is clear that from 1997 she underwent various medical examinations, partial diagnoses and referrals, based on which a number of illnesses, symptoms or ailments were detected.<sup>282</sup> This confirms that she was admitted to the COF in a poor state of health, though without certainty of the illnesses she suffered. There is no clinical record of her diagnosis or of the treatment she received when she was deprived of her liberty.<sup>283</sup> Furthermore, subsequently,

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<sup>275</sup> Plurinational Constitutional Court, Plurinational Constitutional Judgments 0561/2015-S3 of May 14, 2015 and 0017/2015-S1 of February 2, 2015.

<sup>276</sup> Supreme Court of British Columbia, Canada, *British Columbia (Attorney General) v Astaforoff*, 1983 510 (BC SC), of July 14, 1983. See also, *Canadian HIV/AIDS Legal Network, Clean Switch: The Case for Prison Needle and Syringe Programs in Canada*, 2009.

<sup>277</sup> Constitutional Court of Colombia, Judgment T-1326/05 of December 15, 2005, and Judgment T-714/96 of December 16, 1996.

<sup>278</sup> Constitutional Court of the Supreme Court of Justice of Costa Rica. Judgment 13266, File: 03-010418-0007-CO of November 18, 2003; and Judgment 04918, File: 05-002087-0007-CO of 29/04/2005.

<sup>279</sup> First Collegiate Circuit Court of the Auxiliary Center of the Eighth Region, Direct Amparo 798/2011, of November 30, 2011, record 2000769.

<sup>280</sup> Supreme Court of Justice of Panama: Habeas Corpus 194-10, March 30, 2010; and Second Criminal Chamber, Special Request for Medical Evaluation, File 768-G, January 14, 2011.

<sup>281</sup> Constitutional Court of Peru, file 1429-2002-HC/TC, November 19, 2002.

<sup>282</sup> A report of the Medical Records Department of the HSJD (where she was treated several times) indicates that "the patient in question is known in this institution since March 4, 1997, the date on which she was evaluated at the outpatient clinic for problems of venous insufficiency in her lower limbs and a tumor in her vagina" (adding that she had "a medical history of diabetes mellitus and arterial hypertension"). Although finally two of the doctors indicated that the supposed cervical cancer was never confirmed, the file contains references to that possibility. Thus, at the hearing on August 29, 2003, the Judiciary's medical examiner referred to "something regarding cervical cancer," whereas the doctor at the HSJD indicated that he "[had] no knowledge" of that disease, while the doctor of the Public Prosecution Service said that there was "no record of that pathology" and the COF doctor said he was aware of her cervical cancer but "not of its degree" or "whether or not if it [was] non-terminal." Subsequently, at the hearing on April 21, 2004, the Judiciary's medical examiner stated that "there [was] nothing about cancer, only mention of a [tumor] or cervical lesion;" for his part, the attending doctor at the HSJD said that he had "no medical knowledge [...] that she ha[d] cervical or vaginal cancer" and the medical examiner of the Public Prosecution Service stated that the file "describe[d] a tumor in the vagina in March 1997, but there [were] no other medical notes on the progress of the disease." Furthermore, the disease "cancer of the cervix" is recorded in the certifications of the Judiciary's medical examiner of August 7 and October 14, 2003, after an "anterior vaginal mass" was identified; and in 2000 "a firm, mobile mass above the pubic hairline" was detected. In 2003, Mrs. Chinchilla herself stated that she "[did] not know if the cancer detected [in the vagina] is benign or malignant." Similarly, there was evidence of other symptoms or possible ailments, both physical and mental, identified separately in Mrs. Chinchilla, for which there are no subsequent certifications as to their progress or treatment, for example references to "problems of leukemia" and "osteoporosis" in 1998; "urethrocele" in 2001; "chronic adult malnutrition" in 2003; and "severe depression with risk of suicide" and "anasarca" in 2004.

<sup>283</sup> In this regard, the State argued that prior to being convicted and sent to the COF to serve her sentence, the alleged victim already suffered from diabetes mellitus and arterial hypertension, which was being treated and controlled by the Guatemalan Social Security Institute (a State institution); therefore, a diagnosis of her physical and emotional health did exist. It noted that a socioeconomic report by the Social Work Unit of the Public Criminal Defense Institute of Guatemala of 2004, records that her diabetes was being treated and controlled by the Guatemalan Social

and as a consequence of her deteriorating health, she suffered the amputation of one of her legs and loss of sight, which resulted in her physical and sensory disabilities.

184. According to the standards described in the previous section and specified further on, persons deprived of liberty who suffer serious, chronic or terminal illnesses should not remain in prison establishments, unless States can ensure that they have adequate medical facilities to provide adequate specialized care and treatment, including areas, equipment and qualified staff (medical and nursing). In such cases, the State must also supply adequate food and the specific diets prescribed for persons who suffer certain types of diseases. Prison system staff must monitor nutrition processes, based on the diets prescribed by the medical personnel and on the minimum requirements for their supply. In all cases, but especially where an individual is clearly ill, the States have an obligation to ensure that a record or file is kept on the state of health and treatment of every person who enters prison, either in the prison itself or at the hospitals or health centers where they will receive treatment.

185. In this case it is pertinent to determine whether or not the State provided the alleged victim with the necessary treatment in an effective, adequate, continuous manner, by qualified medical staff, and supplied the required medicines and food, either within or outside the prison, for her various illnesses or ailments and throughout the time that she was incarcerated. Similarly, it is pertinent to determine whether the State adopted adequate measures when her health deteriorated.

186. The alleged victim suffered from diabetes mellitus, a disease that required a specific treatment and diet. Likewise, Mrs. Chinchilla suffered various other illnesses or ailments related to the progression of that disease, particularly arterial hypertension, occlusive arteriosclerotic disease and diabetic retinopathy,<sup>284</sup> which is consistent with the World Health Organization's (WHO) description of the effects of "diabetes."<sup>285</sup> The WHO has indicated that "hypertension and diabetes are closely linked, and one cannot adequately control one of these afflictions without treating the other."<sup>286</sup>

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Security Institute before she was admitted to the COF. However, the State did not explain how such treatment was provided within the prison system (or specifically in COF) to give continuity to the treatment supposedly provided by another State institution until then. In other words, the State did not provide specific information about the procedures or practices used to transfer medical files or information (of a public or private nature) about an individual who is to be admitted to the detention center, to the prison's clinic or, if appropriate, to the hospital responsible for his care, so as to follow up on a previous diagnosis or to continue with a certain treatment, as appropriate. Therefore, the information was not relevant if another State institution had diagnosed or treated her prior to her incarceration.

<sup>284</sup> The statement of the Judiciary's medical examiner of August 29, 2003, noted that the deterioration in her state of health was fundamentally due to the fact that "[she suffers] [...] DIABETES MELLITUS" and "presented all the complications of this disease, [which are] arterial hypertension, [...] occlusive arteriosclerotic disease of the lower left limb, [...] diabetic retinopathy, also the fact that she had already suffered the amputation of her lower right leg [...]". Likewise, the Prison Service's Coordinator of Medical Services explained that Mrs. Chinchilla required sub-cutaneous insulin for her diabetes "which is the cause of all the metabolic problems she suffers."

<sup>285</sup> It states that the evolution of uncontrolled diabetes results in hyperglycemia "that seriously damages many organs and systems over time, especially the nerves and blood vessels." These effects may include: "foot ulcers that can lead to gangrene and amputation"; "diabetic retinopathy [...], a major cause of blindness"; "renal insufficiency"; "diabetic neuropathy"; risk of death "at least twice as great as people without diabetes". See: World Health Organization, *Diabetes. Fact Sheet No. 312*. January 2015. Available at:

<http://www.who.int/mediacentre/factsheets/fs312/es/index.html>

<sup>286</sup> World Health Organization, *General Information on Hypertension in the World*, World Health Day 2013, Page 24. Available at:

[http://apps.who.int/iris/bitstream/10665/87679/1/WHO\\_DCO\\_WHD\\_2013.2\\_spa.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/87679/1/WHO_DCO_WHD_2013.2_spa.pdf?ua=1)

187. The WHO has established that the treatment of diabetes “consists of the reduction of glycaemia and other known risk factors that damage the blood vessels. [...]” Among the interventions that “are feasible and economical in developing countries” the WHO mentions the following: i) moderate control of glycaemia; ii) blood pressure control; iii) foot care; iv) screening for retinopathy (cause of blindness); v) blood lipid control (to regulate cholesterol levels); and, screening for early signs of diabetes-related kidney disease.<sup>287</sup> Specific recommendations for the treatment of this disease include physical activity and an appropriate diet.<sup>288</sup>

188. The Court considers that the need to protect health, as part of the State’s obligation to ensure the rights to personal integrity and to life, increases in respect of a person who suffers serious or chronic illnesses, where their health can deteriorate progressively. Under the principle of non-discrimination (Article 1(1) of the Convention), this obligation acquires particular importance in relation to persons deprived of liberty. This obligation may also be conditioned, accentuated or specified, according to the type of disease, particularly if it is of a terminal nature or, even if it is not terminal *per se*, if it can be complicated or aggravated either by the individual’s own circumstances, by the conditions of incarceration or by the capacity of the prison establishment or of the prison authorities to provide health care. This obligation rests with the prison authorities and, ultimately and indirectly, with the judicial authorities who, *ex officio* or at request of the interested party, must exercise judicial control over the guarantees due to persons deprived of liberty.

189. The authorities must ensure that detainees receive regular and systematic monitoring of their medical condition, as required, and that treatment is aimed at curing their diseases or preventing their aggravation, rather than merely treating them on a symptomatic basis.<sup>289</sup> The European Court has incorporated the principle of equivalence of health care established by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment, according to which health care services in prisons must be able to provide medical treatment and nursing care, as well as appropriate diets, physiotherapy, rehabilitation and any other necessary special facilities, in conditions comparable to those enjoyed by patients in the outside community.<sup>290</sup> A lack and/or deficiency in the provision of medical attention, or negligent or deficient medical treatment, is not consistent with the obligation to protect the right to life of persons deprived of liberty.<sup>291</sup>

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<sup>287</sup> World Health Organization, Diabetes. Fact Sheet No. 312. January 2015. Available at: <http://www.who.int/mediacentre/factsheets/fs312/es/index.html>.

<sup>288</sup> The WHO recommendations for people who suffer from diabetes include: i) practicing an endurance activity at a moderate or higher level of intensity (e.g. brisk walking) at least one hour daily most days of the week; ii) ensuring that saturated fat intake does not exceed 10% of total energy and for high risk groups, fat intake should be less than 7% of total energy; iii) achieving adequate intake of NSP–non-starch polysaccharides through regular consumption of wholegrain cereals, legumes, fruits and vegetables. World Health Organization, *Diet, nutrition and the prevention of chronic diseases. Report of the joint WHO/FAO expert consultation*. WHO, Technical Report Series No. 916. Geneva 2003, page 77. Available at: [http://www.who.int/nutrition/publications/obesity/WHO\\_TRS\\_916\\_spa.pdf](http://www.who.int/nutrition/publications/obesity/WHO_TRS_916_spa.pdf)

<sup>289</sup> The European Court ruled on the medical treatment that a person with diabetes should receive, finding that “the mere fact that a detainee was seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate”. ECHR, *Barilo v. Ukraine*, No. 9607/06, Judgment of May 16, 2013, para. 68.

<sup>290</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment, Third General Report of Activities for the period January 1-December, 1992. Ref.: CPT/Inf (93) 12 [EN], published on June 4, 1993, para. 38. Available at: <http://www.cpt.coe.int/en/annual/rep-03.htm#III> cited in: ECHR, *Kudhobin v. Russia*, No. 59696/00, Judgment of October 26, 2006, para. 56.

<sup>291</sup> ECHR, *Tarariyeva v. Russia*, No. 4353/03, Judgment of December 14, 2006, para. 87. In its analysis of these types of violations the European Court has held that: “ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level is, in the nature of things, relative; it depends

190. In this case, the record shows that Mrs. Chinchilla's diabetes and related ailments were known to the prison authorities and to the doctors who treated her free of charge, both at the COF clinic and in the public hospitals. This situation was also reported by the doctors who assessed her and was brought to the attention of the enforcement court.

191. As for the treatment required by Mrs. Chinchilla, particularly after her ailments worsened or became complicated, the doctors referred to this between January 2003 and April 2004, in the context of the incidental motions for early release. They indicated that the treatment involved the following: i) regular monitoring of sugar levels, ophthalmological evolution, kidney disease monitoring, control of irrigation of lower left limb and cardiovascular checkups; ii) verification of the times she took her medicines, help in moving her, access to medical equipment at the COF for laboratory tests in the event of complications; iii) intramuscular insulin injections; iv) special equipment for ketoacidosis in the event of diabetic coma; and v) examination by an endocrinologist.<sup>292</sup> For her part, one of the COF nurses noted that Mrs. Chinchilla needed someone "very special to accompany her 24 hours a day and attend to her personally, which they could not do because they had to see to the rest of the prison population." Another medical report from 2006, provided to the Commission by the petitioners and not challenged by the State, also refers to the treatment that Mrs. Chinchilla should have received.<sup>293</sup>

192. In the first place, there are contradictory versions regarding the provision of necessary medications and an adequate diet for Mrs. Chinchilla Sandoval. On the one hand, the representatives argued that Mrs. Chinchilla's family paid for her insulin and provided food appropriate for her health condition, based mainly on the testimony of Mrs. Chinchilla's daughter, who mentioned the expenses incurred in purchasing her mother's insulin and the need to buy her a small refrigerator for her cell, claiming that the insulin would get lost in the COF's medical center.<sup>294</sup> For its part, the State insisted that the prison's medical center

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on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and state of health of the victim [...]. Although the purpose of such treatment is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 [...] ECHR, *Case of Sarban v. Moldova*, No. 3456/05, Judgment of October 4, 2005. Final, January 4, 2006, paras. 75 and 76. Thus, the European Court has taken into account factors such as the lack of emergency and appropriate specialized medical assistance, excessive deterioration of the physical and mental health of the person deprived of liberty and exposure to severe or prolonged pain as a result of a lack of prompt and diligent medical care, the excessive security conditions to which the person has been submitted in spite of their evident grave state of health and without the existence of grounds or evidence to make them necessary, among others, in order to assess if the person deprived of liberty has been subjected to inhuman or degrading treatment. ECHR, *Paladi v. Moldova*, No. 39806/05, Judgment of March 10, 2009.

<sup>292</sup> See the statements of the doctors given at the hearings of August 29, 2003 and April 21, 2004.

<sup>293</sup> According to this report, [...] a person suffering from diabetes must be assessed clinically, with regular lab tests (pre and postprandial glycaemia i.e. before and after eating), preferably fortnightly or monthly, as well as laboratory tests on urine, blood chemistry, renal, pancreatic, hepatic function, etc., since diabetes is a disease that progresses rapidly and has effects on various systems of the human body [...] hypertension [...] should be monitored constantly given the problem of terminal occlusive arteriosclerosis that she suffered in her lower limbs, since this increases the risk of venous thrombosis that could cause cardiac or pulmonary thrombosis. Monthly electrocardiograms and taking her pressure every 48 hours is the preventive treatment indicated [...] Report of Dr. Edna Karina Vaquerano Martínez, physician and surgeon, and specialist in Psychiatry (evidence file, folios 1520-1532).

<sup>294</sup> The representatives stated that Mrs. Chinchilla's relatives were the ones who provided her food and medications. In fact, her daughter Marta María Gantenbein Chinchilla de Aguilar stated at the hearing that she was responsible for taking the medicines to the COF, so that the medical department could hand them over to her, but that sometimes "the medicine would be lost." For this reason, they allowed her to have "a small refrigerator to keep the insulin" inside her cell, a privilege that generated expenses that "one had to pay to have it inside, and she had a television, and also had to pay for the electricity and for the right to keep it there." For its part, the Commission

provided Mrs. Chinchilla with all the medications, together with adequate food for her special needs, but that she had not taken care of her health, which had triggered a series of ailments prior to her admission to the COF. Nevertheless, the State admitted that “on certain occasions there may have been a lack of some type of medicine, which could have prompted Mrs. Chinchilla to buy her own medicine on certain occasions,” regarding which she could have presented an action of *amparo*.

193. However, the State did not dispute the assertion by Mrs. Chinchilla’s daughter that she had supplied her mother’s insulin on several occasions; this is consistent with the fact that she bought her a small refrigerator to keep her medicines inside her cell, which was allowed into the Center by the prison authorities, but was not provided to her. In addition to the statement of the presumed victim’s daughter, several statements by the COF’s own health personnel indicate that the prison system did not provide the insulin she needed or that she provided it by her own means through her family.<sup>295</sup> Therefore, the State did not provide evidentiary elements to demonstrate that the medication required by the alleged victim was adequately and regularly supplied by the State authorities.

194. As to an appropriate diet, the State did not provide evidence to show that the COF provided adequate food for Mrs. Chinchilla’s special dietary requirements. The only specific evidence mentioned by the State in claiming that she self-prescribed a free diet, against medical advice (“consuming sugars and other products harmful to her health”), was an official letter from the COF doctor from 1998. Other than this specific circumstance, the State did not prove that the COF’s health or security staff provided her with adequate food during her time in prison. Mrs. Chinchilla reiterated to the court of enforcement the statement made in August 2003: “I have to prepare my own food, because I cannot eat what the Center gives me, I cannot eat sugar, fats or condiments; sometimes I can provide them myself and sometimes not, sometimes I rely on my family and sometimes not.”<sup>296</sup>

195. In second place, it is necessary to determine whether Mrs. Chinchilla received adequate treatment when her health deteriorated markedly, after the onset of her disability and in the last two years of her life. In this regard, given that the enforcement judge decided not to grant Mrs. Chinchilla’s petitions for early release, and did not adopt other corrective or alternative measures to incarceration (*infra* paras. 246 to 252), it is pertinent to determine whether the COF had sufficient resources, facilities, qualified staff, equipment and supplies to provide her with adequate treatment, or, whether such treatment could be provided to her in public hospitals in a flexible and efficient manner.

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mentioned two statements by the COF doctor, dated February 14, and August 29, 2003, indicating that the Prison System did not provide Mrs. Chinchilla’s treatment and that she purchased her own insulin. Regarding Mrs. Chinchilla’s food, her daughter said that the prison did not provide her mother with the diet prescribed by the specialists for her disease and that she was given “exactly the same food as all the rest of the inmates, same breakfast, same lunch, and the dinner was usually sweet corn meal, lard bread, sweet breads, *incaparina* (vegetable protein flour) or things like that, a bit lighter but filled with lots of sugar.” Therefore, on Sundays she would bring her mother food that she could eat.

<sup>295</sup> In statements dated February 14 and August 29, 2003, the COF’s duty doctor said that the Prison System did not provide her with the insulin she needed and that she provided it herself using her own means, through her family; that Mrs. Chinchilla normally applied her own treatment, that she “buys her own insulin” which is “supposedly [administered by] the nurses.” At the beginning of 2003, the COF doctor noted that “she supplies her own treatment since the prison system does not provide it, [and] if the family continues delivering her treatment, and she receives psychological support and rehabilitation therapy, she continue being treated at that Center [...]” (*supra* paras. 112 and 124). In August 2003, Mrs. Chinchilla herself mentioned that “the Center does not provide my medications, I do not even receive insulin, which I have to provide for myself by my own means” (*supra* para. 125).

<sup>296</sup> Cf. Incidental Motions for Early Release. Judiciary. Second Criminal Enforcement Court. Enforcement No. 429-96 Of. 7. Remission of Sentences File No. 169-03. Record of Evidence Hearing of August 29, 2003 (evidence file, folios 913-928).

196. In this regard, the State pointed out that Mrs. Chinchilla received many of her treatments at public hospitals and that the COF was primarily an institution for serving a sentence and for the rehabilitation of prisoners; therefore, it was logical that a hospital would be better adapted to deal with medical emergencies, although the COF did have its own hospital area (infirmary). The Court notes that, given the progressive deterioration of her health, and based on several reports from the COF duty doctors, medical examiners and members of the COF's "multidisciplinary team" (comprised of officials of the legal department, the labor department, the psychology department, the social worker, and the prison's deputy director and director), it was clear that the prison did not have sufficient capacity (necessary resources, specialized staff, equipment and infrastructure) to adequately respond to her deteriorating health or, that its capacity had not been proven, particularly in relation to the provision of the required medicines or treatment. However, Mrs. Chinchilla could certainly have been examined and treated as an outpatient in public hospitals. Moreover, it was evident that at any time she could suffer a decompensation that would require hospital treatment and that her life could be at risk if that treatment was not adequate and consistent, or if her medicines were not administered regularly and appropriately. Given that the COF did not have the necessary equipment to provide emergency treatment in the event of ketoacidosis or diabetic coma, complications that could be fatal depending on the time taken to transport her to a specialized health care facility, the alleged victim had a latent risk of dying from her disease while incarcerated. Furthermore, the final reports indicate that, in addition to her disability, her mental and physical health was deteriorating rapidly, that she had general poor health, chronic adult malnutrition and severe depression with risk of suicide, with no evidence that these symptoms or ailments were being treated at any time.

197. Certainly, the judge granted permission for the alleged victim to receive treatment in hospital, on the great majority of occasions when she submitted requests. In this regard, it has not been demonstrated that the State incurred any liability in relation to the application of this procedure *per se*, or specifically in relation to the actual hospital care she received. However, it is clear that the procedures established for outpatient appointments at public hospitals were not sufficiently flexible to ensure effective, timely medical treatment, particularly in the event of an emergency. Nor is there any record of external mechanisms for the monitoring and supervision of the health services offered within the COF. In other words, given the nature of her health condition, there is no record to show that the authorities ensured regular and systematic medical supervision aimed at treating her illnesses and her disability and preventing their deterioration, instead of treating them symptomatically, and providing appropriate diets, rehabilitation and other specialized facilities in conditions comparable with those provided to patients not deprived of their liberty.

198. The State alleged that the presumed victim was negligent in adhering to her treatment and diet and risked her life because of her "rebellious attitude, negligence and disobedience;" her refusal to be treated by the prison's medical staff and entrusting her treatment to her fellow inmates; and by intentionally allowing herself a free diet and eating foods that were forbidden and harmful to her health. In this regard, the Court takes note of certain comments made by the prison's nurses or doctors during her seven years of incarceration, describing the difficulties faced in providing her treatment or her inappropriate behavior toward health workers. However, in addition to the fact that the situations alleged by the State were only confirmed on some occasions, it was not demonstrated that this would have impeded or in some way conditioned the fulfilment of its obligation to ensure adequate treatment during her incarceration. In particular, the State did not prove any causal link between the situations propitiated by the alleged victim and the deterioration of her disease or ultimately her death.

199. In conclusion, it was not proven that the State kept a record or file on the health condition and treatment provided to the alleged victim since her admission to the COF, either at the prison or at the hospitals or health centers where she was treated. Nor was it proven that the State provided adequate food and medications on a regular basis. Faced with the progressive deterioration of her health, the doctors who examined her noted that there was a latent risk to her life and personal integrity, given that she suffered from a serious, chronic and ultimately fatal disease. However, in spite of her health condition, there is no record that the authorities ensured regular, adequate and systematic medical supervision aimed at treating her illnesses and her disability and preventing their deterioration, in particular through the provision of appropriate diets, rehabilitation and other necessary facilities. If the State could not guarantee such care and treatment within the prison, it was obliged to establish a prompt and effective mechanism or protocol to ensure that the medical supervision was timely and systematic, particularly in the event of an emergency. In this case, the procedures established for outpatient appointments at hospitals were not sufficiently flexible to allow for effective and timely medical treatment.

200. For the foregoing reasons, the Court considers that the State did not fulfill its international obligations to guarantee Mrs. Chinchilla's rights to personal integrity and to life during her confinement at the COF.

### ***B.3 The State's response to Mrs. Chinchilla's disability***

201. As stated previously, as consequence of the progression of her diabetes, from 2002 Mrs. Chinchilla progressively developed motor and visual disabilities, along with a number of health complications that significantly reduced her quality of life. These were associated with a number of social barriers existing in the prison, which made her increasingly dependent on other people as she required more specialized medical care. Thus, after several diagnoses of "decompensated diabetes," the detection of ulcers on her feet and a foot wound that required constant cleaning, there was a progressive deterioration in her health. She developed physical and sensory disabilities caused by the progressive loss of her sight and the amputation of one of her legs,<sup>297</sup> as a result of which she had to move around in a wheelchair.

202. It is not disputed that, as indicated by the State, after being confined to a wheelchair she was transferred to a cell in the prison's maternal block, which had sufficient natural and artificial light and adequate ventilation, as well as a toilet and washbasin that were adapted to her needs. The dispute persists regarding the alleged lack of reasonable modifications to her cell and to facilitate her movement within the prison or her transfer to hospital for medical appointments, among other difficulties. Therefore, it is pertinent to determine whether the State is responsible for failing to respond adequately and effectively to the needs of the alleged victim, and thus, it is necessary to consider, more specifically, the State's obligations toward persons with disabilities when they are deprived of liberty.

203. The Inter-American Court has emphasized that, from its beginnings and throughout its development, the Inter-American System has advocated for the rights of persons with disabilities.<sup>298</sup> This issue was addressed in 1948 in the American Declaration of

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<sup>297</sup> According to the World Health Organization, both blindness and the amputation of a limb are consequences of uncontrolled diabetes. See: World Health Organization, *Diabetes. Fact Sheet No. 312*. January 2015. Available at: <http://www.who.int/mediacentre/factsheets/fs312/es/index.html>

<sup>298</sup> Cf. *Case of Furlan and Family v. Argentina*, *supra*, para. 128.

the Rights and Duties of Man.<sup>299</sup> The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), in Article 18, states that "Everyone 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."<sup>300</sup>

204. The Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities (hereinafter "CIADDIS") is the first international human rights instrument that specifically focuses on persons with disabilities and represents an invaluable commitment by the American States to guarantee their enjoyment of the same rights enjoyed by others. In the Preamble, 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." The Convention also establishes a series of obligations that States must fulfill with the aim of "eliminating all forms of discrimination against persons with disabilities and promoting their full integration into society."<sup>301</sup> Guatemala ratified this Convention on August 8, 2002.<sup>302</sup> More recently, the OAS General Assembly approved the "Declaration on the Decade of the Americas for the Rights and Dignity of Persons with Disabilities (2006-2016)."<sup>303</sup>

205. Furthermore, on May 3, 2008, the Convention on the Rights of Persons with Disabilities (hereinafter "CRPD") entered into force in the universal system, with the following guiding principles: 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 their right to preserve their identities. Guatemala ratified this Convention on April 7, 2009.<sup>304</sup>

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<sup>299</sup> Article XVI of the American Declaration on the Rights and Duties of Man establishes: Every person has the right to 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>300</sup> Article 18 (Protection of the Handicapped) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", establishes: Everyone 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; and d. encourage the establishment of social groups in which the handicapped can be helped to enjoy a fuller life.

<sup>301</sup> Cf. *Case of Furlan and Family v. Argentina*, *supra*, para. 130.

<sup>302</sup> Information available on the web page of the Department of International Law of the Organization of American States, at the link: <http://www.oas.org/juridico/spanish/firmas/a-65.html>.

<sup>303</sup> Declaration on the Decade of the Americas for the Rights and Dignity of Persons with Disabilities (2006-2016) adopted at the fourth plenary session, held on June 6, 2006, in Santo Domingo, Dominican Republic, with the theme: "Equality, Dignity and Participation", AG/DEC. 50 (XXXVI-O/06), with the objectives of achieving the recognition and the full exercise of the rights and dignity of persons with disabilities and their right to participate fully in the economic, social, cultural and political life and development of their societies, without discrimination and on an equal footing with others.

<sup>304</sup> Information available the United Nations web page at: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en).



206. The CIADDIS defines the term “disability” 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>305</sup> For its part, 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>306</sup>

207. In this regard, the Court notes that the aforementioned Conventions take into account the social model to address disability, which implies that disability is not exclusively defined by the presence of a physical, mental, intellectual or sensory impairment, but is interrelated with the barriers and limitations that exist socially and prevent persons from exercising their rights effectively.<sup>307</sup> The types of limitations or barriers commonly encountered by people with disabilities in society are, among others,<sup>308</sup> physical or architectural barriers,<sup>309</sup> communication,<sup>310</sup> attitudinal<sup>311</sup> or socioeconomic barriers.<sup>312</sup>

208. In compliance with the State’s special duties of protection toward any person in a vulnerable situation, it is imperative to adopt affirmative measures, to be determined according to the particular protection needs of the subject of rights, whether on account of that individual’s personal situation or his specific circumstances, such as disability.<sup>313</sup> In this sense, States have the obligation to promote the inclusion of persons with disabilities through

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<sup>305</sup> Article I of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities.

<sup>306</sup> Article 1 of the CRPD.

<sup>307</sup> Cf. *Case of Furlan and Family v. Argentina*, *supra*, para. 133, and *Case of Gonzales Lluy et al. v. Ecuador*, *supra*, para. 237.

<sup>308</sup> Cf. *Case of Furlan and Family v. Argentina*, *supra*, para. 133. See also: 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.5 (“The Committee emphasizes that the barrier is not the disability itself but rather a combination of social, cultural, attitudinal and physical obstacles which children with disabilities encounter in their daily lives”).

<sup>309</sup> Cf. *Case of Furlan and Family v. Argentina*, *supra*, para. 133. See also: Committee on the Rights of the Child, General Comment No. 9, para. 39 (“The physical inaccessibility of public transportation and other facilities, including governmental buildings, shopping areas, recreational facilities among others, is a major factor in the marginalization and exclusion of children with disabilities and markedly compromises their access to services, including health and education”).

<sup>310</sup> Cf. *Case of Furlan and Family v. Argentina*, *supra*, para. 133. See also: Committee on the Rights of the Child, General Comment No. 9, para. 37 (“Access to information and means of communication, including information and communication technologies and systems, enables children with disabilities to live independently and participate fully in all aspects of life”).

<sup>311</sup> Cf. *Case of Furlan and Family v. Argentina*, *supra*, para. 133, and *Case of Artavia Murillo et al. (In vitro Fertilization) v. Costa Rica*, *supra*, para. 291. See also: U.N. General Assembly, Standard Rules on the Equalization of Opportunities for Persons with Disabilities, GA/RES/48/96, March 4, 1994, Forty-eighth Session, para. 3: “In the disability field, there are also many specific circumstances that have influenced the living conditions of persons with disabilities: ignorance, neglect, superstition and fear are social factors that throughout the history of disability have isolated persons with disabilities and delayed their development.”

<sup>312</sup> Cf. *Case of Ximenes Lopes v. Brazil*, *supra*, para. 104, and *Case Artavia Murillo et al. (In vitro Fertilization) v. Costa Rica*, *supra*, para. 291. See also: Article III.2 of the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities, and Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with Disabilities, U.N. Doc. E/C.12/1994/13 (1994), 12 September 1994, para. 9.

<sup>313</sup> Cf. *Case of Ximenes López v. Brazil*, *supra*, para. 103, and *Case Artavia Murillo et al. (In vitro Fertilization) v. Costa Rica*, *supra*, para. 292.

equality of conditions, opportunities and participation in all spheres of society<sup>314</sup> and to ensure that regulatory or *de facto* limitations are dismantled. Therefore, States must promote social inclusion practices and adopt affirmative measures to remove such barriers.<sup>315</sup>

209. Regarding the specific situation of persons with disabilities deprived of their liberty, Article 14(2) of the CRPD establishes that States must ensure that “they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.”

210. As to the health of persons with disabilities, Article 25 of the CRPD recognizes that “persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability,” and that “States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.”<sup>316</sup> Likewise, Article 26 of the CRPD requires States to “take effective and appropriate measures, including through peer support, 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.”

211. In the case of *Mircea Dumitrescu v. Romania*, the European Court of Human Rights found that since the alleged victim was diabetic and disabled, he “belong[ed] to a particularly vulnerable group given his severe disability.” Considering his health and disability, the European Court held that when the authorities decide to place or keep disabled people in detention, they should demonstrate special care in guaranteeing conditions that correspond to their special needs resulting from their disability.<sup>317</sup>

212. In that case, the European Court noted that the victim continually complained that he had not been provided with his own wheelchair, that there were insufficient access ramps in the prison and that the toilet facilities and the vehicle in which he was transported had not been adapted. The Court considered that the conditions of detention endured by the victim, overall, for more than two years, would have caused him unnecessary and avoidable physical and mental suffering, diminishing his human dignity and amounting to inhuman treatment.<sup>318</sup> Furthermore, in the case of *Price v. the United Kingdom*, which concerned a disabled person in detention, the European Court found that although there was no intention to humiliate or debase the victim, to detain a severely disabled person in conditions where

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<sup>314</sup> Cf. *Case of Furlan and Family v. Argentina*, *supra*, para. 134, and *Case Artavia Murillo et al. (In vitro Fertilization) v. Costa Rica*, *supra*, para. 292. See also: Article 5 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.

<sup>315</sup> Cf. *Case of Furlan and Family v. Argentina*, *supra*, para. 134, and *Case of Artavia Murillo et al. (In vitro Fertilization) v. Costa Rica*, *supra*, para. 292. See also: Committee on Economic, Social and Cultural Rights, General Comment No. 5, para. 13.

<sup>316</sup> In particular, States must 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; require health professionals to provide care of the same quality to persons with disabilities as to others, 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.

<sup>317</sup> ECHR: *Mircea Dumitrescu v. Romania*, No. 14609/10, Judgment of July 30, 2013, para. 59; *ZH v. Hungary*, No. 28973/11, Judgment of November 8, 2012, para. 29; *Jasinskis v. Lithuania*, No. 45744/08, Judgment of December 21, 2010, para. 59; *Farbtuhs v. Latvia*, No. 4672/02, Judgment of December 2, 2004, para. 56, and *Price v. United Kingdom*, No. 33394/96, Judgment of July 10, 2001, para. 30.

<sup>318</sup> ECHR, *Mircea Dumitrescu v. Romania*, No. 14609/10, Judgment of July 30, 2013, para. 64.

she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and she is unable to go to the toilet or keep clean without greatest difficulty, constituted degrading treatment contrary to Article 3 of the European Convention.<sup>319</sup>

213. For its part, the United Nations Committee on the Rights of Persons with Disabilities considered the case of a disabled person who alleged that his cell was inadequate for a person with a disability and that the adjustments made by the prison authorities were insufficient, since the size of the bathroom was not adapted for someone using a wheelchair, with essential safety features and he could not move around by himself to reach the toilet and the shower, so that he had to rely on assistance from a nurse or some other person, among other reasons.<sup>320</sup> The Committee took into account the fact that the State had carried out necessary work and modifications to eliminate the step that prevented independent access to the toilet and shower and that the authorities verified *in situ* the existence and operation of elevators, an access door to the recreation yard, specially modified for that person, and the existence and operation of a button to call the nurse, who provided assistance 24 hours a day. The Committee, in turn, offered the following considerations:

8.5 The Committee recalls that, under Article 14, paragraph 2, of the Convention, persons with disabilities deprived of their liberty have the right to be treated in compliance with the objectives and principles of the Convention, including by provision of reasonable accommodation. It further recalls that accessibility is a general principle of the Convention and, as such, also applies to situations in which persons with disabilities are deprived of their liberty. The State party is under an obligation to ensure that prisons afford accessibility to all persons with disabilities who are deprived of their liberty. Accordingly, States parties must adopt all relevant measures, including the identification and removal of obstacles and barriers to access, so that persons with disabilities who are deprived of their liberty may live independently and participate fully in all aspects of daily life in their place of detention; such measures include ensuring their access, on an equal basis with others, to the various areas and services, such as bathrooms, yards, libraries, study areas, workshops and medical, psychological, social and legal services. In the case under review, the Committee acknowledges the accommodations made by the State party in order to remove the barriers that impeded the author's access to areas within the physical environment of the prison. However, the Committee considers that the State party has not irrefutably demonstrated that the accommodations made in the prison complex are sufficient to ensure the author's independent (insofar as possible) access to the bathroom and shower, recreation yard and nursing service. The Committee observes in this connection that the State party has not asserted that there are any obstacles that would prevent it from taking the necessary measures to facilitate the author's mobility or denied the author's allegations that architectural barriers to accessibility persist. Consequently, the Committee considers that, in the absence of sufficient explanations, the State party has failed to fulfil its obligations under Article 9, paragraphs 1 (a) and (b), and Article 14, paragraph 2, of the Convention.

8.6 Having reached the above conclusion, and given the circumstances of the case, the Committee considers that, in light of the lack of accessibility and a sufficient degree of reasonable accommodation, the author has been placed in substandard conditions of detention that are incompatible with the right set forth in Article 17 of the Convention.

8.7 The Committee recalls that the failure to adopt relevant measures and to provide sufficient reasonable accommodation when they are required by persons with disabilities who have been deprived of their liberty may constitute a breach of Article 15, paragraph 2, of the Convention. In the present case, however, the Committee does not consider that it has sufficient evidence before it to conclude that there has been a violation of Article 15, paragraph 2, of the Convention.<sup>321</sup>

214. The right to accessibility from the perspective of disability includes the obligation to adapt the environment so that a person with any impairment can function and enjoy the

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<sup>319</sup> ECHR, *Price v. United Kingdom*, No. 33394/96, Judgment of July 10, 2001, para. 30.

<sup>320</sup> It indicated that "he has developed scabs on a number of occasions owing to the lack of a special mattress to prevent bedsores and his movements are extremely limited. In practice he can only perform his basic needs through the use of instruments that are placed in his bed and the lack of assistance of third parties does not enable him to take daily care of his hygiene."

<sup>321</sup> Committee on the Rights of Persons with Disabilities, *X v. Argentina*, Communication No 8/2012 (Argentina) of June 18, 2014.

greatest independence possible, thereby ensuring that he or she can participate fully in all aspects of life on an equal basis with others. In the case of individuals who have difficulties with physical mobility,<sup>322</sup> the content of the right to freedom of movement implies that States are required to identify the obstacles and barriers to access and, consequently, proceed to eliminate or adapt them, thereby ensuring that persons with disabilities have access to facilities or services and can enjoy personal mobility with the greatest independence possible.

215. Having regard to the foregoing criteria, the Court considers that the State had the obligation to ensure accessibility to persons with disabilities deprived of their liberty, in this case to the alleged victim, in accordance with the principle of non-discrimination and the interrelated elements for the protection of health, namely, availability, accessibility, acceptability and quality, including the provision of reasonable accommodation<sup>323</sup> in the prison, to enable her to live with the greatest independence possible and in equality of conditions with other persons deprived of their liberty.

216. Likewise, in accordance with the principle of equivalence, the State should have facilitated her access to means that could reasonably support her rehabilitation had she not been in the State's custody, and to prevent the development of new disabilities. In this regard, the expert Carlos Ríos Espinosa, a member of the United Nations Committee on the Rights of Persons with Disabilities, emphasized the importance of certain measures that the State should have taken, such as providing her with a prosthesis or ensuring that she had the support of professionals to help her understand and accept her new situation. Furthermore, he indicated that States have a duty to ensure that the necessary steps are taken to remove the barriers faced by disabled persons and guarantee them equal conditions for the enjoyment of their rights.<sup>324</sup>

217. In this case, Mrs. Chinchilla moved around in a wheelchair but, according to the socioeconomic report, experienced problems "because of the place's very confined spaces", that is, the prison's physical limitations or architectural barriers. Thus, it was reasonable that the State should have adapted, at least minimally, the prison facilities to her condition of disability. As to the measures to facilitate her personal hygiene, the Court appreciates that the State installed a toilet and washbasin inside the individual cell allocated to her within the maternal wing. However, Mrs. Chinchilla's daughter, Marta Maria Gantenbein Chinchilla, explained that the wheelchair did not fit in the shower, so she and her husband had to place handrails in the shower to prevent her from falling. They also had to pay a monthly "contribution" of three hundred quetzales so that she could stay in the maternal wing, plus one hundred quetzales to use the television, refrigerator and electric lighting. The State did not challenge this assertion; therefore, most of the accommodations made cannot be attributed to the State and were not sufficient to alleviate her conditions in detention as a

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<sup>322</sup> Article 20 of the CRPD (Personal Mobility): States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by: a) Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost; b) Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost; c) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities; d) Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.

<sup>323</sup> According to the European Court, among the reasonable accommodations that should be made to adapt the environment to the needs of disabled people deprived of liberty, are the following: assistance for communication; personal support to aid the mobility of persons with disabilities, and modifications to the physical facilities of the prison. Cf. *ZH v Hungary*, No. 28973/11, Judgment of November 8, 2012, para. 43; *Grimailovs v. Latvia*, No. 6087/03, Judgment of June 25, 2013, para. 162, and *Vincent v. France*, No. 6253/03, Judgment of October 24, 2006, para. 112.

<sup>324</sup> Cf. Expert opinion of Carlos Ríos Espinosa rendered during the public hearing before the Court.

disabled person. In this case, the prison lacked adequate infrastructure, since the maternal area was small (although it did allow her to move around in a wheelchair) and she relied on other inmates and prison staff to be able to move to the common areas. Her fall took place on the steps that linked blocks “C” and “D” of the COF, while trying to “get down” from where she was and not having anyone to push her wheelchair (the cell was at the top of several steps, so she relied on other inmates to move around inside the maternal wing).

218. At the same time, regarding the practices and procedures required to allow Mrs. Chinchilla to leave the COF to attend her medical appointments in hospitals, she faced many difficulties in terms of physical access to transport, availability of vehicles and the limited time of the police who guarded her. For example, it was necessary for the guards to carry her and lift her into a “pick up” truck that was not suitable for transporting a person in a wheelchair.<sup>325</sup> She also alleged that she could not reach the telephones to communicate with her family. These situations show that Mrs. Chinchilla was limited in her environment and there were no staff assigned to help her move around. In this situation, it was reasonable for the State to take the necessary steps to guarantee her access to services, for example to have staff available to assist Mrs. Chinchilla and to mobilize her. However, in spite of the measures adopted, it is possible to conclude that no other steps were taken to alleviate her situation of disability, particularly by ensuring reasonable access to means for her rehabilitation when her health had deteriorated.

219. For the foregoing reasons, it is possible to conclude that the lack of accessibility and reasonable accommodation, placed the alleged victim in a situation of discrimination and conditions of detention incompatible with the right of all persons with disabilities to have their right to physical and mental integrity respected, on an equal basis with others, pursuant to Articles 5(1) and 1(1) of the Convention, to the detriment of Mrs. Chinchilla Sandoval.

#### ***B.4 Response of the administrative authorities on the day of Mrs. Chinchilla’s death***

220. Finally, it is pertinent to determine whether the care provided by the prison authorities, the medical staff of the COF and other State officials complied with the State’s obligation to provide the alleged victim with proper medical attention in an emergency, given the circumstances and the facts, and considering her health condition and the accident she had suffered.

221. The COF did not have the necessary equipment to provide emergency treatment to Mrs. Chinchilla in the event of a serious health complication, which could even be fatal

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<sup>325</sup> Mrs. Gantenbein Chinchilla stated that her mother could not always attend medical appointments outside of the COF, because the hospital did not have sufficient guards and it was necessary pay for the gas of the vehicles that transported her, and provide food for the guards that accompanied her to hospital. She said that the police “... asked her[...] if [she] could help out with the gasoline;” that she was transported in a “police pick-up truck because the COF “... did not have ambulances or patrol cars;” that being in a wheelchair, her mother relied on other inmates to go out, as she needed to be carried because there were “too many steps to go up, both to the patio for visits and to the main entrance, where she would be collected by the pick-up truck.” In this regard, the State argued that whenever she required specialized care, this was provided through the appropriate legal procedure, meeting all the requirements, and it sought to prove this fact with a sworn statement of Mrs. Vincenta Tzamol Navichoc, the current Director of the Santa Teresa Detention Center for Women (Cf. Evidence file, folio 3623). However, as the representatives argued, the State’s witness was not acting as Director of the COF at the time of the facts, and therefore her statement does not have sufficient evidentiary value to support their the State’s argument. With respect to hospital care, Mrs. Chinchilla’s daughter said, “...my mother would be last because she was an inmate”, and so when it was lunch time, in order to make the guards wait for her she had to “...invite them to eat or to have a soft drink, or a little snack, or something like that, and they would agree to stay until the last minute so that my mother could be treated.”

depending on the time taken to transfer her to a specialized care center. According to the doctors, the alleged victim had a latent risk of dying from her disease because she was incarcerated and because of the complications she suffered, since the COF did not have the capacity to deal with a crisis of that magnitude (*supra* para. 196). In relation to her specific illnesses, her arterial hypertension had already been diagnosed as “decompensated” and the COF “only [had] captopril”, [sic] which was provided to her “when [it was] in stock.” Moreover, the COF did not have capacity to regularly provide insulin for intramuscular injection, which was the type of insulin required for her diabetes problem. Considering her health condition and her ailments, the State had the obligation to establish a protocol for urgent and priority medical care, with the required security arrangements, to guarantee her rights to life and personal integrity in the event of an emergency.

222. Following her accident, Mrs. Chinchilla was treated by the COF’s duty nurse, and not by the doctor, who administered an analgesic and medication for hypertension and informed the Medical Services Coordinator of the Prison Service about the incident and the treatment given. However, she did not perform a glucose test, which was essential to determine if this was an emergency situation (as advised by the doctors) and to authorize her eventual transfer from prison to receive hospital treatment. Thus, after a superficial checkup by the nurse, Mrs. Chinchilla did not receive any follow-up care or any other type of medical attention. It was not until nearly an hour later that the nurse was again informed that she could not breathe and who noticed, upon examining her, that she no longer had vital signs, and reported that the fire brigade unsuccessfully tried to resuscitate her.<sup>326</sup> In other words, the process of Mrs. Chinchilla’s death occurred without any form of attention or supervision by medical staff. In a brief of January 8, 2007, forwarded to the Commission, the State indicated that, “according to the report of the Prison System, there is no record of the reasons why Mrs. María Isabel Chinchilla Sandoval was not transferred to a hospital.”

223. In conclusion, given the situation of risk in which she found herself, of which the doctors who examined her on different occasions had clearly warned, it is possible to consider that the State did not diligently guarantee Mrs. Chinchilla appropriate emergency medical assistance on the day of her death, neither within the COF nor at a hospital. Considering her health condition and the ailments she suffered, the time elapsed from the moment of the accident and the type of care received, it may be concluded that the State did not ensure her right to life in that circumstance.

## **B.5 Conclusion**

224. The Court considers that the State failed to fulfill its obligation to guarantee the alleged victim’s right to personal integrity and to life, since no record or file was kept on her health condition and the treatments provided upon her admission to the COF. Furthermore, it was not demonstrated that the State provided her with adequate food and medications on a regular basis. Then, faced with the progressive decline of her health and the latent risk to her life and personal integrity mentioned by the doctors, and given her serious, chronic and ultimately fatal disease and her disability, there is no record that the authorities ensured regular, adequate and systematic medical supervision of the treatment of her illnesses and her disability to prevent her deterioration. If the State could not guarantee such care and

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<sup>326</sup> The State argued that the situation was considered as an emergency and therefore the prison staff called the fire brigade, who arrived as soon as possible, to give her first aid and subsequently transfer her to a public hospital; that in Guatemala, firefighters attend as paramedics to perform first aid, provide assistance and transfer patients to the hospital emergency room; and that when the firefighters reached the COF, they found the inmate without vital signs and immediately proceeded to perform resuscitation efforts, which were unsuccessful.

treatment within the prison, it should have established a mechanism or protocol to ensure prompt and effective medical care, particularly in the event of an emergency, which was not demonstrated in this case, particularly regarding the procedures established for outpatient hospital appointments (*supra* para. 199). In addition, Mrs. Chinchilla encountered a number of difficulties in accessing health care for her disability; she was limited in her environment and no staff members were assigned to assist her or help her move around the COF. Finally, the State did not adopt sufficient measures of accessibility or make reasonable accommodation to guarantee her the exercise of that right, particularly reasonable access to a means of rehabilitation when her health deteriorated. Consequently, she was placed in precarious conditions of detention incompatible with the right of every person with a disability to have his right to physical and mental integrity respected, on an equal basis with other persons, without discrimination (*supra* paras. 218 and 219). Furthermore, on the day of her death the State did not diligently ensure proper medical attention in an emergency, given the risk implied by her health condition (*supra* paras. 222 and 223).

225. For the foregoing reasons, the Court finds that the State is responsible for failing to fulfil its international obligations to guarantee the rights to personal integrity and to life, recognized in Articles 5(1) and 4(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mrs. María Inés Chinchilla Sandoval.

## VII-2 RIGHTS TO JUDICIAL GUARANTEES AND JUDICIAL PROTECTION (Articles 8(1) and 25(1) of the Convention)

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

226. Regarding the actions of the enforcement judges in granting authorization to leave the prison in relation to ensuring the right to health, ***the Commission*** considered that the judge of the Second Enforcement Court received consistent and regular information about Mrs. Chinchilla's health condition, and its impact on her life and personal integrity, through the certifications, communications and information contained in the files of requests for permission to attend medical appointments and those related to the incidental motions for early release. Therefore, the judge was obliged to offer judicial protection in relation to her various ailments and the medical treatment provided to her at the COF; however, the judge's actions were limited to granting or denying Mrs. Chinchilla permission to leave prison to attend appointments.

227. With regard to the action of the judges in the incidental motions for early release *vis à vis* ensuring her right to health, the Commission noted that their role was limited to deciding whether or not Mrs. Chinchilla suffered from a terminal illness in order to rule on the motion and, in the last of these motions, the judge strayed completely from the issue of her health, stating that the main point of this remedy was not to afford a person the possibility of dying with dignity but rather to reward heroic acts. The Commission concluded that, aside from the communications that Mrs. Chinchilla could send to the judge, there was no formal remedy available for her to denounce the harm to her health resulting from the lack of adequate treatment, or to satisfy her need to be provided with conditions compatible with her dignity. Thus, the State did not ensure effective judicial protection of her rights to a life with dignity and personal integrity, in violation of Articles 8 and 25 of the Convention in relation to Articles 1 and 2 of the Convention.

228. With regard to the investigation conducted after Mrs. Chinchilla's death, the Commission noted that there was no inquiry into the possible responsibility of State officials, including prison staff, doctors or the courts, for their alleged failure to fulfil their duty to guarantee Mrs. Chinchilla's rights to life and integrity, for the omissions related to her prison conditions, the lack of adequate medical treatment and the factors that could have contributed to her death. On this point, the Commission emphasized that the responsibility of agents of the State for facts such as those of the instant case, can include investigations of different types. It added that in this case, the failure to conduct an official investigation also meant a failure to disclose the truth, with the result that, to date, there is still no judicial determination as to whether or not Mrs. Chinchilla's death was caused by her illnesses or by the lack of adequate medical attention.<sup>327</sup> This situation of uncertainty has been allowed linger unreasonably to this day. Although the State has suggested that there was a "lack of interest" in the matter on the part of the family, since they did not file a criminal complaint, the Commission argued that, because this matter concerned violations of the right to life or well-being of a person in State custody, it was not necessary to examine the steps that the victim's relatives may or may not have taken with a view to investigating the facts, since that was an *ex officio* obligation of the State.

229. As to the actions of the enforcement courts in granting the alleged victim permission to leave the prison, **the State** argued that, as demonstrated in her numerous requests, these were solely aimed at obtaining judicial approval so that she could leave the COF to attend previously scheduled medical appointments at public hospitals, each of which was considered and decided by the Second Enforcement Judge in the exercise of this duties. The State stressed that most requests were granted in response to the alleged victim's special health needs, but at the same time complying with the basic verification procedures required in cases of persons convicted for crimes of social significance; at no time could it have considered or granted other privileges to the presumed victim, different to those afforded for such requests, given her legal status as a person with a criminal conviction.

230. Regarding the actions of the enforcement judge in the incidental motions for early release, the State pointed out that the Commission's arguments are merely a subjective view, since they depart completely from the manner and legality with which the judge decided each and every one of the motions filed. At no time were the judges' decisions to dismiss said motions capricious; these actions should be seen as a whole, based on the merits of the records containing an extensive analysis of the case and clearly explaining their decision. Furthermore, the State argued that an alternative measure to incarceration was not warranted, much less house arrest, given the seriousness of the crime committed by Mrs. Chinchilla Sandoval, with the aggravating factor that the body of the person that she killed was found in her home, and therefore it was not possible for her to remain without the State's custody, endangering the lives of other citizens.

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<sup>327</sup> Specifically, the Commission noted that there is no record that the State investigated certain facts or conduct, for example: i) there was no detailed analysis of Mrs. Chinchilla's health condition to link her death with the lack of adequate medical treatment for her diabetes; ii) there was no analysis as to whether her death was related to the "epigastric hardness" or the failure to diagnose and treat that condition; however a doctor had determined the need to perform an ultrasound in the days prior to the victim's death in order to "rule out significant pathology" and iii) there was no investigation to determine whether her death was the result of not having been properly treated by the nurse or not having been taken immediately to see a doctor after the fall she suffered. Moreover, the Public Prosecution Service did not establish contact at any time with the victim's family and, therefore, did not investigate aspects such as her mother's state of health up to the time of her death, or the affirmation of Mrs. Chinchilla's daughter, that on the day of her death she had received informal information that her mother would be released from prison as a result of the motion filed and that several inmates reported that her mother was in a good state after her fall.



231. The State described as false the Commission's assertion that, other than the motions mentioned, Mrs. Chinchilla did not have access to any other formal remedy to denounce the harm caused to her health. It indicated that, based on the claims made by the alleged victim, the most appropriate and effective remedy would have been to file a *habeas corpus* action, pursuant to Article 82 of Guatemala's Law of Amparo, Personal Exhibition and Constitutionality. However, there is no record that Mrs. Chinchilla or her family members used that mechanism. In that sense, the State stressed that the failure on the part of the alleged victim and her next of kin to make proper use of available domestic remedies while she was alive is noteworthy, even though these remedies were at their disposal, yet they insisted at all times on filing incidental motions for early release, incorrectly employing domestic remedies.

232. Regarding the investigation into Mrs. Chinchilla's death, the State reiterated that at no time was there any mention of criminal responsibility or liability on the part of any authority at the COF regarding her death. The outcome of the investigation process established that her death did not constitute a crime, since the order for the removal of the body was signed by an agent of the Public Prosecution Service, with assistance from the medical examiner, and the record showed that Mrs. Chinchilla's body had no indicia or signs of violence. Moreover, laboratory tests were ordered to rule out the possible presence of drugs of abuse in her blood, as well as the tests carried out on the samples of blood, liver and gastric contents taken from the body in order to detect or rule out the presence of substances and drugs, etc. Thus, the State affirmed that, in its initial actions after her death, the Public Prosecution Service had investigated the matter with due diligence. It argued that the effectiveness of an investigation is not measured by its outcome. With regard to the fact that Mrs. Chinchilla's family and representatives were dissatisfied with the decisions taken at the domestic level, it noted that the investigation file shows that at no time did they file a complaint or request the support of the Public Prosecution Service, as established in Article 539 of the Code of Criminal Procedure; nor did they file an appeal (motion of inconformity) under Article 116 thereof. The State argued that in this case it is impossible to violate a right that was not exercised, and that a remedy was always available to Mrs. Chinchilla's next of kin.

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

233. The Court has indicated that, pursuant to Article 8(1) of the American Convention,<sup>328</sup> victims of human rights violations, or their next of kin, must have ample opportunities to be heard and to act in the respective proceedings, both to clarify the facts and to punish those responsible, and to seek appropriate reparation. Likewise, the Court has considered that States have the obligation to provide effective judicial remedies for persons claiming to be victims of human rights violations (Article 25).<sup>329</sup> These remedies must be substantiated pursuant to the rules of due legal process (Article 8(1)), all within the general

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<sup>328</sup> Article 8(1) of the Convention establishes that: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

<sup>329</sup> Article 25(1) of the Convention establishes that: "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."

obligation of the States to ensure to all persons subject to their jurisdiction the free and full exercise of the rights recognized by the Convention (Article 1(1)).<sup>330</sup>

234. In this chapter the Court will analyze the judicial response of the State in light of the rights to judicial guarantees and judicial protection enshrined in Articles 8(1) and 25(1) of the Convention, in relation to Articles 1(1) and 2 thereof, in order to determine if the State fulfilled its international obligations in relation to: a) the actions of the Sentence Enforcement Court in relation to the health condition and disability of the presumed victim; and b) the obligation to investigate her death.

### ***B.1) Actions of the Sentence Enforcement Court regarding the health condition of the alleged victim***

235. Based on the arguments put forward, it is pertinent to determine whether the actions of the Second Criminal Enforcement Court, which was involved in the facts of the case, adequately ensured the alleged victim's rights to personal integrity and to life, by affording her judicial guarantees and effective judicial remedies to which she also had a right, in relation to: a) the requests for permission to leave the COF to receive medical treatment in public hospitals; b) adequate follow-up of her health condition when ruling on the incidental motions for early release.

236. Control of the legality of acts of the public administration that affect, or could affect the rights, guarantees or benefits to which persons deprived of liberty are entitled, as well as the periodic control of conditions of deprivation of liberty and supervision of the execution of, or compliance with, punishments, must be under the responsibility of competent, independent and impartial judges and tribunals. Member States of the Organization of American States shall ensure the necessary resources for the establishment and effectiveness of judicial bodies of control and supervision of punishments, and shall provide the necessary resources for them to function adequately.<sup>331</sup> As to the fundamental role of the sentence enforcement judges in protecting the rights of seriously ill persons, such "judicial officials must act with diligence, independence and humanity in cases where it is duly established that there is an imminent risk to the life of the individual owing to their deteriorated health or a fatal illness."<sup>332</sup>

237. At the same time, Article 13 of the CRPD establishes the scope of the right of access to justice of persons with disabilities and consequently, the obligations that the States must assume. Specifically, it states that: i) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. ii) In order to help ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

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<sup>330</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 91, and *Case of the Kaliña and Lokono Peoples v. Suriname, supra*, para. 237.

<sup>331</sup> Principle VI (Judicial Control and Enforcement of Sentences) of the Principles and Best Practices for the Protection of Persons Deprived of Liberty in the Americas of the Inter-American Commission on Human Rights.

<sup>332</sup> IACHR, Report on the Human Rights of Persons Deprived of Liberty in the Americas, December 31, 2011, para. 300.

238. Various States of the region, such as Argentina,<sup>333</sup> Costa Rica,<sup>334</sup> Dominican Republic,<sup>335</sup> El Salvador,<sup>336</sup> Honduras,<sup>337</sup> and Nicaragua,<sup>338</sup> have recognized that, arising from the control of legality or constitutionality of the enforcement of sentences, such judges have the obligation to ensure the observance of respect for and the guarantee of the human rights of persons deprived of liberty.

239. According to the State, the criminal enforcement courts of Guatemala are special courts whose role is to monitor compliance and enforcement of prison sentences and decide on matters that arise during enforcement of the sentence. These courts also supervise security measures, principal and accessory penalties and all of the regimes to which convicted persons are subject, including cases of conditional suspension of criminal proceedings. According to the State, the enforcement courts were established under the Code of Criminal Procedure of 1992, as institutions of an eminently judicial nature responsible for "the enforcement of

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<sup>333</sup> Cf. Code of Criminal Procedure of Buenos Aires Province. "Article 25- Enforcement Judge- the Enforcement Judge shall examine: [...] 3. Matters concerning the observance of all guarantees including those in the national and provincial Constitutions and in International Treaties concerning the treatment to be given to persons deprived of their liberty who are convicted."

<sup>334</sup> Judgment of the Constitutional Chamber of the Supreme Court of Costa Rica, Judgment N° 10543, File: 00-010539-0007-CO of October 17, 2001, states: "(...) it has been recognized that the treatment or enforcement of sentences must be inspired by the principle of humanity, inasmuch as the person deprived of liberty retains all the basic rights that have not been limited as a logical consequence of the sentence imposed (...) The foregoing is consistent with the most qualified doctrine and constitutional case law, which indicates that in the enforcement of sentences, that the administration may only impose certain limitations on the human rights of inmates, in accordance with the legal system (Principle of Legality). In this regard, Article 40 of the Constitution, which prohibits cruel or degrading treatment acquires major importance, and may be interpreted in many ways, as the result of deliberate intent, weaknesses in the organization of prison services or lack of resources."

<sup>335</sup> Cf. *Dominican Code of Criminal Procedure*, Articles 74 and 437:

"Article 74: Criminal enforcement judges are responsible for supervising the enforcement of Judgments, the conditional suspension of proceedings, and the substantiation and settlement of all matters concerning the enforcement of the sentence."

"Article 437: The enforcement judge will monitor full compliance with condemnatory sentences and will decide on all matters arising during enforcement. The petitions submitted will be decided according to the procedure for incidental motions under this heading. The enforcement judge may order any necessary inspections and visits to prison establishments, and may summon the inmates or the authorities of those establishments to appear before him, for the purposes of monitoring and control. He will issue, *ex officio*, the measures deemed appropriate to correct and prevent any failings observed in the operation of the system, and will order the competent authority to implement these as required. The enforcement judge will also monitor compliance with the terms imposed in the conditional suspension of the proceeding, based on the reports received and, as appropriate, will transmit these to the competent judge for their revocation or for the declaration of extinction of the criminal action."

<sup>336</sup> Cf. *Code of Criminal Procedure of El Salvador*, Article 340: "The enforcement judge will be responsible for overseeing the treatment of the detainee (...)"

<sup>337</sup> Cf. *Code of Criminal Procedure of Honduras*, Article 382, subparagraphs 5 and 6.

"Article 382: (...) 5) Based on studies by the technical teams of prison establishments, settle the claims of inmates against decisions concerning their initial classification and the progression and regression of the treatment period; and,

6) Reach appropriate agreement on complaints formulated by inmates in penal institutions, in relation to the system and its operation, or regarding the treatment that they receive, when their fundamental rights or their prison rights and benefits are affected."

<sup>338</sup> Cf. Code of Criminal Procedure of the Republic of Nicaragua, Art. 411: "Illness of prisoners. If during the enforcement of the prison sentence, the convicted person suffers an illness that cannot be treated adequately in the prison and poses a serious risk to their health or life, the Enforcement Judge shall order, based on medical reports, the internment of the sick inmate in an appropriate establishment and shall order the measures necessary to prevent his escape (...)"

Similarly, see Article 23 of the *Ley de Ejecución, beneficios y control jurisdiccional de la sanción penal*. Law No. 745, of December 1, 2010 that establishes that the Judge of Criminal Enforcement and Prison Monitoring must visit prisons or remand centers at least twice a month.

sentences and all matters relating thereto" (Articles 43 and 51 of the Code). The judges are responsible for "maintaining the legality of the enforcement of sentences and safeguarding the rights of those sentenced to a prison term against abuses of the administration" and, among other functions, may "decide, after hearing the interested parties, on incidental motions related to enforcement, the extinction of sentences, early release and any other important actions deemed necessary by the judge." These motions "shall be decided at an oral public hearing, summoning the required witnesses and experts to testify during that hearing." Furthermore, such judges are competent to rule on matters such as conditional release, "monitoring compliance with the conditions imposed," and "supervising proper compliance by the prison system." The State also indicated that, when ruling on motions and petitions, said judges must issue their decisions in full observance of the relevant legal and regulatory provisions according to the requests or motions filed, in order to uphold the legality of the enforcement of prison sentences, always bearing in mind the rights of convicted persons.

240. As to first aspect, it is clear that the Second Criminal Enforcement Court had the power to grant the alleged victim, as a person deprived of liberty for committing a crime, authorization to leave the COF, at her request or at the request of the prison authorities, whenever she needed medical care at public hospitals. In response to such requests, and before granting permission, the judge could require a medical examiner to issue an opinion based on an evaluation, or require the social information service to verify the existence of programmed appointments (*supra* para. 44). As emphasized by the State, the great majority of these requests were granted (*supra* para. 197), even though the judge, unaware that the nature of Mrs. Chinchilla's illnesses meant she might require immediate attention, warned on one occasion that in future any request must be submitted "at least eight days in advance" otherwise, it would be denied; or even though on one occasion (in 2003) the judge ordered that Mrs. Chinchilla be given "symptomatic" treatment, without ensuring proper follow-up. Thus, while it is possible to consider that the enforcement judge was aware of the alleged victim's health condition when he ruled on her petitions, the Court considers that there are not sufficient elements to conclude that the State was responsible, under Articles 8 and 25 of the Convention, in relation to the specific judicial actions or procedures for granting permission to leave the COF.

241. As to the second aspect, the record shows that the Second Criminal Enforcement Court considered and ruled on four incidental motions for early release for "extraordinary remission of sentences" or "for terminal illness," filed by Mrs. Chinchilla between November 2002 and May 2004. In the context of those incidental motions, the judge received consistent and regular information on Mrs. Chinchilla's health condition and its impact on her life and wellbeing through the certifications, communications and technical-medical information that were provided to him. In particular, it was demonstrated that the judge received clear and repeated information regarding the lack of capacity at the COF (in terms of qualified staff, sufficient equipment and supplies) to provide adequate treatment to the alleged victim, through a series of reports submitted by the COF duty doctors, the prison's "multidisciplinary team" and the medical examiners designated as expert witnesses, which revealed a clear and progressive deterioration in her health during the last two years of her life.

242. The Court has reiterated that when a State has ratified an international treaty such as the American Convention, all its bodies, including its judges, are bound by it. This requires them to ensure that the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws that are contrary to its purpose. Therefore, the judges and all bodies associated with the administration of justice at all levels must exercise "conventionality control" *ex officio*, between domestic legal provisions and those of the American Convention, obviously in the context of their respective competences and of the

corresponding procedural rules. In doing so, the Judiciary should not only take into account the treaty, but also its interpretation by the Inter-American Court, which is the ultimate interpreter of the American Convention.<sup>339</sup>

243. With regard to this case, and in relation to the powers of the enforcement judges, it is clear that they were required to rule on any motions filed during the enforcement of the sentence, being responsible for monitoring its implementation, overseeing its legality “and everything related thereto,” as well as protecting the rights of prisoners “from abuses by the administration” and “monitoring appropriate compliance by the prison system.” In particular, among other tasks, they ruled on motions concerning execution of the sentence, early release and “any other important actions deemed necessary by the judge,” “always taking into account the rights of prisoners.” Thus, there is no doubt that, in the exercise of conventionality control, and in the absence of mechanisms for external supervision and monitoring of the health services specifically in the COF,<sup>340</sup> within the context of their powers (*supra* para. 239) and given the information received through the aforementioned motions for early release, the judge of enforcement was in a position - and had the obligation - to ensure judicial protection with due guarantees to the alleged victim, in relation to the deterioration of her health and her disability, and particularly the failings in the medical treatment that was and could be provided at the COF.

244. Having regard to the aforementioned criteria for the protection of the rights to life and personal integrity of persons deprived of liberty, the Court considers that in response to such petitions, judges must weigh up the interest of the State in ensuring the enforcement of a validly imposed criminal penalty, with the need to assess the viability of continuing to incarcerate convicted persons who suffer from certain serious illnesses. In other words, when the health pathology is incompatible with deprivation of liberty, or when incarceration cannot provide an appropriate mechanism for the exercise of basic human rights, it is necessary to try to ensure that prison reduces and mitigates the harm caused to the person and provides the most humane treatment possible according to international standards. Thus, if there is any danger to life or personal integrity and incarceration does not permit an individual to exercise his basic rights, according to the circumstances of the case, the judges must consider what other alternative or substitute measures for imprisonment are available,<sup>341</sup> without this

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<sup>339</sup> Cf. *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 154, para. 124; *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, *supra*, para. 176, and *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 26, 2010. Series C No. 220, para. 225. Also see *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011 Series C No. 221, para. 193; *Case of the Santo Domingo Massacre v. Colombia*, *supra*, para. 144; and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, *supra*, para. 311.

<sup>340</sup> In response to a question of the Judges, the State explained that “a specific external mechanism for the supervision or monitoring of the health service did not exist. However, at the time of the facts, the body charged with supervising prison services was the Central Prisons Board, as established in the Remission of Sentences Law in force at the time.” With regard to the last incidental motion filed, in April 2004, the Court notes that the judge of the First Criminal Enforcement Court sent a communication to the Second Enforcement Judge informing him that “the Central Prison Board ha[d] been disbanded since 2002 on account of the duplication of functions between the Judge of the First Criminal Enforcement Court and the President of the Board,” for which reason “it [was] not possible to issue a ruling on the motion filed for early release through remission of sentences.”

<sup>341</sup> See the United Nations Standard Minimum Rules for the Treatment of Prisoners, (Nelson Mandela Rules) approved by the United Nations General Assembly on December 17, 2015. Explanatory note: “Recalling resolution 69/172, of December 18, 2014, entitled “Human Rights in the Administration of Justice,” which recognized the importance of the principle that, except for those lawful limitations that are demonstrably necessitated by the fact of incarceration, persons deprived of their liberty shall retain their non-derogable human rights and all other human rights and fundamental freedoms, and recalled that the social rehabilitation and reintegration of persons deprived of their liberty shall be among the essential aims of the criminal justice system, ensuring, as far as possible, that offenders are able to lead a law-abiding and self-supporting life upon their return to society, and took notes of, *inter alia*, General Comment No. 21, on the humane treatment of persons deprived of their liberty, adopted by the Human

implying the termination of the sentence or non-compliance with the obligation to ensure its implementation. Furthermore, it is necessary to consider whether keeping a person in prison would affect not only that individual's health, but also the health of the other inmates whose opportunities to receive medical attention could be indirectly curtailed by the need to provide more resources to attend to a particular sick individual.

245. Therefore, the foregoing is conditional upon certain specific aspects of the case, such as the conditions in the prison or module where the sick inmate is confined; the practical possibilities of receiving adequate treatment for their illness; the prospects of being transferred to another place within or outside the prison system to receive care (either within the prison itself or by modifying the security regime); and, finally, the medical prognosis regarding any complications that could arise, assuming that the confinement is prolonged. In this sense, there are various ailments which, while not requiring the patient to stay in a hospital, make it necessary for them to remain in a place where they can be assisted with their daily activities, with special care that cannot be assured in prison, for example, in cases of chronic, neurodegenerative, terminal diseases or, in general, those requiring a level of attention that can only be provided by a specialized carer.

246. Moreover, when there are elements to indicate that a prisoner has suffered or could suffer serious consequences due to his precarious state of health, and when the punishment gravely endangers his life and integrity or is physically impossible to fulfil in the absence of physical and human resources within the prison center to address that situation, then the application of an alternative to a custodial sentence (for example, house arrest, change of security measures, early release, deferred sentence) can be justified as an exceptional measure. Such a decision, in addition to being justified for reasons of dignity and humanity, would eliminate institutional risks stemming from the deterioration of a person's health or risk of death due to conditions within the prison. In any case, if the court does not adopt another alternative measure, it must exercise control over the administrative activities carried out previously and, if errors are found, order their immediate correction or reparation.

247. Certainly, in this case the purpose of the aforementioned incidental motions was to request early release, in which the alleged victim claimed the existence of a terminal illness or an exceptional situation. In other words, based on the reported situation, the judge had to decide whether or not to grant her the benefit of the remission of her sentence and consequently early release. It is necessary to stress that the foregoing considerations do not imply that enforcement judges are obliged in all cases to release persons deprived of liberty. The important point is that enforcement judges must act with great vigilance and due diligence based on the particular needs for protection of the person deprived of liberty and the rights in question, particularly if the disease can be complicated or aggravated, either by the person's own circumstances, the lack of institutional capacity to address the situation or through negligence on the part of the prison authorities. Thus, in order to exercise adequate judicial control over the guarantees of persons deprived of liberty, the enforcement judges must base their decisions on a comprehensive assessment of evidentiary elements, particularly expert opinions and those of a technical nature, including prison visits or inspections to verify the situation described. Thus, whatever the final decision may be, it must be reflected in an adequate reasoning and a full justification.

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Rights Committee." (...) 12. Recommends that Member States continue to endeavor to reduce prison overcrowding and, where appropriate, resort to non-custodial measures as alternatives to pretrial detention, to promote increased access to justice and legal defense mechanisms, to reinforce alternatives to imprisonment and to support rehabilitation and social reintegration programs, in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)."

248. For this Court, a clear explanation of a decision constitutes an essential part of a correct justification of a judicial decision, understood as “a reasoned justification that allows a conclusion to be reached.”<sup>342</sup> In this sense, the Court has stated that the obligation to justify decisions is a guarantee linked to the proper administration of justice, which gives credibility to judicial decisions adopted within the framework of a democratic society.<sup>343</sup> Therefore, the decisions adopted by national bodies that could affect human rights must be duly justified, because otherwise they would be arbitrary decisions.<sup>344</sup> In that sense, the reasons given for a judgment and for certain administrative acts must disclose the facts, reasons and norms upon which the authority based its decision.<sup>345</sup> Moreover, it must show that the arguments of the parties have been duly weighed and that the body of evidence has been analyzed. Therefore, the duty to state grounds is one of the “due guarantees” included in Article 8(1) to safeguard the right to due process,<sup>346</sup> not only of the defendant but also, in the instant case, of the person deprived of liberty in relation to the right to access justice.

249. In this case, the Court does not rule on the decision, *per se*, not to grant the early release as requested in the incidental motions filed, which were decided after analyzing a series of evidentiary elements of a technical-professional nature and medical opinions. However, in considering the actual grounds for the decision, the Court finds that the actions of the enforcement judge were limited to establishing whether or not Mrs. Chinchilla suffered from a terminal illness to determine if early release was appropriate or not. In this sense, the rulings do not reflect adequate grounds for the decisions, particularly in assessing or weighing elements such as the nature and risks of her disease or disability and the proper treatment due. This, in spite of the fact that several conflicting opinions of a technical and medical nature, and of other disciplines, were provided regarding the terminal nature of her disease and of the COF’s real capacity to provide her with proper treatment, both on a regular basis and in an emergency. The judge also had access to the opinions of the prison doctor and the Multidisciplinary Team of the COF, which expressly mentioned the institution’s inability to ensure her treatment and the need to grant her early release.

250. Thus, the technical criteria indicated, on the one hand, that Mrs. Chinchilla’s disease could be treated in an ambulatory manner (that is, within the COF) as long as proper treatment was assured and, on the other, that it was a terminal illness or that was not clear whether the COF could provide such treatment. For example, in the first incidental motion, the medical examiner referred to “symptoms of terminal illness” and, although the doctors of the HSJD, the COF and the Public Prosecution Service all agreed that diabetes *per se* is not a

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<sup>342</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 107; and *Case of García Ibarra et al. v. Ecuador, supra*, para. 151.

<sup>343</sup> Cf. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 77; and *Case of García Ibarra et al. v. Ecuador, supra*, para. 151. This was also established by the European Court in the case *Suominen v. Finland*: “Cf. ECHR, *Suominen v. Finland*, No. 37801/97, of July 1, 2003, para. 34 [the European Court] then reiterates that, according to its established case law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based.” Cf. ECHR, *Suominen v. Finland*, No. 37801/97, of July 1, 2003, para. 34.

<sup>344</sup> Cf. *Case of Yatama v. Nicaragua, Preliminary objections, merits, reparations and costs*. Judgment of June 23, 2005. Series C No. 127, paras. 152 and 153; and *Case of García Ibarra et al. v. Ecuador, supra*, para. 151. Likewise, the European Court has indicated that judges must clearly indicate the reasons for which they take their decisions. Cf. ECHR, *Hadjianastassiou v. Greece*, No. 12945/87, Judgment of December 16, 1992, para. 23.

<sup>345</sup> Cf. *Case of Claude Reyes et al. v. Chile. Merits, reparations and costs*. Judgment of September 19, 2006. Series C No. 151, para. 122; and *Case of García Ibarra et al. v. Ecuador, supra*, para. 151.

<sup>346</sup> Cf. *Case of López Mendoza v. Venezuela, supra*, para. 141, and *Case of García Ibarra et al. v. Ecuador, supra*, para. 151.

terminal illness, the latter indicated that “arteriosclerotic disease of the lower left limb [was] at an advanced stage” and, for his part, the Judiciary’s doctor gave an opinion to the contrary saying that the diabetes was a terminal illness, this being defined as one which “at a given moment could ultimately result in death.” However, in his decision the judge merely stated that “at this time, the illness cannot be considered terminal,” without taking into account the diagnosis of the associated ailments and without weighing up the medical criteria or explaining why he disagreed with the doctor’s opinion, which assessed the disease and its possible fatal consequences in other terms. In addition, the judge did not refer to the COF’s institutional capacity to address the situation described. Furthermore, in several reports, the doctors stated that they did not know whether the COF could provide treatment, since they were not familiar with the prison, the medical assistance provided there, or with the medication provided to Mrs. Chinchilla.<sup>347</sup> In spite of this, the enforcement judge did not visit the COF to verify these statements, nor did he adopt other measures so that the medical experts could discuss their concerns *in situ*. The judge did not refer to the difficulties expressed by the presumed victim in maintaining reasonable conditions of detention in the COF, owing to her disability.

251. In the last of the incidental motions, the judge dismissed the motion, considering that to grant early release under extraordinary remission of sentence, “it is not a requirement for the convict to be suffering from a particular illness; on the contrary, as Article 7 (c) of the Sentence Remission Law provides, it is essential for the convict to have performed acts of altruism, heroism or any other humanitarian act, something that has not been accredited at any time.” Furthermore, he considered that “the benefit requested was not created to enable a convicted person to die with dignity.” (*supra* para. 144).

252. Finally, beyond the formal opportunities afforded by the incidental motions filed by Mrs. Chinchilla before the Second Criminal Enforcement Court, which were decided without due justification, three of them by the same judge, the fact is that the remedy attempted before that judicial body was not effective in addressing her complaints regarding the obvious and proven progressive deterioration in her health and the need to provide conditions of detention compatible with her dignity. Thus, in addition to deciding not to release her from prison, the court did not order any other corrective measures to seek a comprehensive solution to her situation, for example by requiring the COF to ensure stricter supervision of her guarantees, through some form of inter-institutional coordination, or by urging the prison authorities to offer solutions or guarantees that she would receive adequate treatment regularly or in the event of an emergency. In other words, the judge should also have exercised his role as guarantor in relation to the prison conditions of a gravely ill person with a disability, ensuring that her lack of accessibility and reasonable accommodation within the prison did not translate into even harsher conditions, with greater physical or psychological suffering, which could harm her personal integrity and could even constitute a form of cruel, inhuman or degrading treatment. In this regard, it is difficult to understand that, after receiving a request for a report from the Defender of Due Process and Prisoners, the Second

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<sup>347</sup> For example, the attending physician at the HSJD stated that he “[was] not familiar with the conditions where [she] live[d] to be able to answer [...] correctly [if she could receive ambulatory treatment]”; he said he did “not know if she injected herself with insulin or someone else” and that there was a possibility of sudden death. The medical examiner of the Public Prosecution Service stated that he “[was] unable to say [if she received treatment], because to do so, he would need [...] information on what resources the institution has;” in the fourth incidental motion, the medical examiner of the Public Prosecution Service stated that he “[was] not familiar with the facilities [in the COF] as regards professional health care staff [...] if a complication were to arise” and that he was “not familiar with the specific medical care received by the patient [...] at the prison Center [...] [and] the written records on the care she has received or is receiving in prison.” The attending physician at the HSJD replied “So far, yes” in response to whether Mrs. Chinchilla was taken to hospital in good time, and reported that she mentioned that she was not given the medication prescribed to her; he said he did “not know” who administered her insulin and indicated that did “not know” if Mrs. Chinchilla “[was] consistently receiving such treatment daily in prison.”



Criminal Enforcement Judge stated that he “was not advised by the prison authorities that the inmate’s illness had deteriorated.” Therefore, the actions of the enforcement judge failed to comply with the State’s obligations to ensure adequate access to justice in order to effectively protect Mrs. Chinchilla’s rights to personal integrity and life, by not having secured the best solution possible for her health condition in the context of the proceedings, regardless of the outcome of his decisions therein.

253. In relation to the foregoing, the State argued that, to avoid the alleged situations of lack of medications or adequate medical treatment or to denounce the effects on her health, Mrs. Chinchilla could have filed an action of *amparo* or *habeas corpus*, but did not do so. It added that, “the failure to make proper use of available domestic remedies on the part of the alleged victim and her next of kin while she was alive is noteworthy.” The Court considers that in this merits stage it is not pertinent to consider arguments regarding the supposed failure to exhaust domestic remedies, nor is it pertinent to evaluate, *in abstracto*, the domestic judicial remedies that were not attempted by the alleged victim or her next of kin in this case. Furthermore, given the particular relationship of subjection and control between the State and persons deprived of liberty, it is for the prison authorities themselves to guarantee those persons adequate access to and supply of the medications and diet prescribed by the doctors. Therefore, it is not appropriate that they should constantly have to resort to judicial proceedings to seek protection of their rights, owing to the failings or problems of the prison administration. In this case such situations were indeed known to a judicial authority, namely, the enforcement court, as was analyzed.

254. Finally, the Commission pointed out that there was no formal remedy to which Mrs. Chinchilla had access to denounce the harm caused to her health as a consequence of the lack of adequate treatment or the lack of conditions compatible with her dignity; therefore, the only remedy available was the incidental motion for remission of sentences. Thus, the Commission considered that the violation of Articles 8 and 25 of the Convention occurred “in connection with Articles 1 and 2 of the Convention.” Pursuant to Article 2 of the Convention, the States Parties are under the obligation to adapt their domestic laws to the provisions of the Convention, in order to guarantee the rights enshrined therein.<sup>348</sup> Certainly, Article 2 of the Convention fails to define which measures are appropriate to adjust domestic legislation to it; obviously, this is so because it depends on the nature of the rule requiring adjustment and the circumstances of each specific case.<sup>349</sup> Therefore, the Court has interpreted that such adjustment implies adopting two sets of measures, namely: i) repealing rules and practices of any nature involving violations of the guarantees provided for in the Convention or disregarding the rights enshrined therein or impeding the exercise of such rights, and (ii) adopting rules and developing practices aimed at effectively ensuring the observance of said guarantees.<sup>350</sup> However, the Commission did not specify which types of rules were not adopted, or which practices were not developed, which resulted in the State’s failure to comply with such obligations. Therefore, the Court considers that it does not have sufficient elements to analyze the alleged failure to comply with the obligation to adapt domestic law to the

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<sup>348</sup> Cf. *Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 142, and *Case of Omar Humberto Maldonado Vargas et al. v. Chile. Merits, reparations and costs.* Judgment of September 2, 2015. Series C No. 300, para. 124.

<sup>349</sup> Cf. *Case of La Cantuta v. Peru, Merits, reparations and costs.* Judgment of November 29, 2006. Series C No. 162, para. 172, and *Case of Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 166, para. 57.

<sup>350</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; *Case of Almonacid Arrellano et al. v. Chile, supra*, para. 118; *Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 57, and *Case of Omar Humberto Maldonado Vargas et al. v. Chile. Merits, reparations and costs.* Judgment of September 2, 2015. Series C No. 300, para. 124.

American Convention, contained in Article 2 thereof, and therefore it is not pertinent to rule on this matter.

255. In conclusion, the decisions taken by the enforcement court do not appear to have been duly justified, particularly in terms of assessing or weighing the elements related to the nature and risks posed by the disease or disability of the alleged victim, and the proper treatment due. The enforcement judge did not adopt other measures to verify the information presented to him, or enable the medical experts to discuss their concerns *in situ*, and did not refer to the difficulties faced by the alleged victim as a result of her disability. Thus, beyond the formal opportunities afforded by the incidental motions filed by Mrs. Chinchilla before the Second Criminal Enforcement Court, the remedies attempted before that judicial body were not effective to address her complaints regarding the obvious and proven progressive deterioration in her health and the need to ensure that her conditions of detention were compatible with her dignity, since the judge did not order any corrective measures for a comprehensive solution to her situation, or ensure that these did not translate into even harsher conditions, with greater physical or psychological suffering, which could endanger her life or personal integrity.

256. For the foregoing reasons, the Court considers that the State failed in its obligation to guarantee adequate access to justice in relation to the rights to personal integrity and to life, in terms of the rights to judicial guarantees and judicial protection, recognized in Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mrs. María Inés Chinchilla Sandoval.

## **B.2) The State's obligation to investigate the facts**

257. The Court has reiterated that the State has a legal duty to take "reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, [as applicable] to impose the appropriate punishment and to ensure the victim adequate reparation."<sup>351</sup> In particular, as an obligation that is a fundamental and determining element for the protection of the right to life,<sup>352</sup> the Court has established that, when investigating the death of a person who was in the State's custody, the relevant authorities have the duty to initiate *ex officio* and without delay, a thorough, independent, impartial and effective investigation.<sup>353</sup> This must be carried out with due diligence,<sup>354</sup> using "all available legal means and be aimed at determining the truth."<sup>355</sup> The investigation should be conducted by the State as a legal duty, in a serious manner, and not as a mere formality preordained to be ineffective, or as an action undertaken by private interests that depends upon the initiative of the victims

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<sup>351</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 174, and *Case García Ibarra et al. v. Ecuador, supra*, para. 98.

<sup>352</sup> Cf. *Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 88 and *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs. Judgment of April 17, 2015. Series C No. 292, para. 348.*

<sup>353</sup> Cf. *Case of Vera Vera et al. v. Ecuador, supra*, para. 87; and *Case of Quispialaya Vilcapoma v. Peru, supra*, para. 162.

<sup>354</sup> Cf. *Case of the Serrano Cruz Sisters v. El Salvador. Merits, reparations and costs. Judgment of March 1, 2005. Series C No. 120, para. 83, and Case of the Landaeta Mejías Brothers et al. v. Venezuela. Preliminary objections, merits, reparations and costs. Judgment of August 27, 2014. Series C No. 281, para. 217.*

<sup>355</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 177, and *Case of Quispialaya Vilcapoma v. Peru, supra*, para. 162.

or their relatives or their offer of proof.<sup>356</sup> Finally, the State has the obligation to provide an immediate, satisfactory and convincing explanation of what happened to a person who was under State custody.<sup>357</sup>

258. In the instant case, the Court notes that there were no indications of violence in the death of the victim (nor was it alleged); however, this does not affect the State's duty to investigate *ex officio*, given that she was deprived of her liberty. In this case, reasonable steps were taken to investigate the matter<sup>358</sup> which, in addition to ruling out the presence of various substances in her body, indicated "pulmonary edema" and "hemorrhagic pancreatitis" as the biological causes of death. Based on this, the Prosecutor's Office concluded that she died of "natural causes" and that no crime had been committed, and asked the Court of First Instance on Criminal Matters, Drug Trafficking and Environmental Crimes to dismiss the case and archive the complaint, a decision accepted by the latter.

259. The Court notes that the investigative efforts carried out were effective in establishing the biological cause of death and, based on those results, the Public Prosecution Service concluded that this event was not the result of any act considered punishable under Guatemalan law. In this regard, it has not been established that the State bears responsibility for the manner in which these inquiries were conducted, or for the decision not to initiate criminal proceedings against a specific person. Moreover, given that the State must provide, *ex officio*, a sufficient and effective explanation to establish the circumstances surrounding the non-violent death of a person in prison, the failure to determine criminal responsibility should not necessarily prevent the continuation of the investigation into other types of responsibilities, such as administrative responsibilities,<sup>359</sup> if appropriate, according to the circumstances of each case. However, the Court points out that the Commission and the representatives have not provided sufficient information or arguments to determine the appropriate channels (or, in this case, the absence of such channels) that should have been used to investigate other possible actions by public officials, doctors or third parties and to establish if these could have been related to Mrs. Chinchilla's death, regardless of the criminal, disciplinary or other implications that these could have.

260. For the foregoing reasons, the Court considers that it has not been demonstrated that the State is responsible for the alleged failure to guarantee access to justice, in the terms

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<sup>356</sup> Cf. *Case of Velásquez Rodríguez v. Honduras*. Merits, *supra*, para. 177, and *Case of Quispiyalaya Vilcapoma v. Peru*, *supra*, para. 131 and 161.

<sup>357</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. 111, and *Case of Vera Vera et al. v. Ecuador*, *supra*, para. 88. See also, *mutatis mutandi*, *Case of García Ibarra et al. v. Ecuador*, *supra*, paras. 151 and 152. It is worth mentioning the case law of the European Court of Human Rights on this matter, which has held that, under Article 3 of the European Convention, which recognizes the right to personal integrity, the State has the obligation to give a "convincing explanation" of any injury sustained by someone deprived of their liberty. Likewise, based on Article 3 of the European Convention in relation to Article 1 thereof, the ECHR has held that an effective official investigation is required when an individual makes a "credible assertion" that any of his rights stipulated in Article 3 have been infringed by an agent of the State. The investigation should be capable of identifying and punishing those responsible, because otherwise the general prohibition of cruel, inhuman and degrading treatment, *inter alia*, would be "ineffective in practice", since it would be possible for agents of the State to abuse the rights of those in their custody with total impunity. Cf. ECHR. *Elci et al. v. Turkey*, No. 23141 and 25091/94, Judgment of November 13, 2003, paras. 648 and 649, and *Assenov et al. v. Bulgaria*, No. 24760/94, Judgment of October 28, 1999, para. 102.

<sup>358</sup> Namely, official removal of the body; autopsy on Mrs. Chinchilla's body by the Judiciary's Forensic Medicine Service of the Department of Guatemala; analysis of samples of blood, liver and gastric contents taken from the corpse to rule out the presence of ethyl alcohol, methyl alcohol, isopropanol, acetone, other drugs or pesticides by the Technical Scientific Department (toxicology section) of the Directorate of Criminal Investigations of the Public Prosecution Service.

<sup>359</sup> Cf. *Case of Mendoza et al. v. Argentina*, *supra*, para. 224.

of the rights to judicial guarantees and judicial protection recognized in Articles 8(1) and 25 of the American Convention, to the detriment of the next of kin of Mrs. María Inés Chinchilla Sandoval, namely, Marta María Gantenbein Chinchilla, Luz de María Juárez Chinchilla and Luis Mariano Juárez Chinchilla.

## **VIII REPARATIONS (Application of Article 63 (1) of the American Convention)**

261. Based on the provisions of Article 63 (1) of the American Convention,<sup>360</sup> the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to make adequate reparation<sup>361</sup> and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.<sup>362</sup>

262. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of the re-establishment of the previous situation. If this is not feasible, the Court will determine measures to guarantee the rights that have been violated and to redress the consequences of those violations.<sup>363</sup> The reparations must have a causal nexus with the facts of the case, the violations declared, the damages proven and the measures requested to repair the resulting harm.<sup>364</sup>

263. Considering the violations of the Convention declared in the foregoing chapters, the Court will proceed to examine the claims presented by the Commission and the representatives, and the arguments of the State, in light of the criteria established in its case law regarding the nature and scope of the obligation to make reparation, so as to establish measures aimed at redressing the harm caused to the victims.<sup>365</sup>

### **A. Injured party**

264. Under the terms of Article 63(1) of the Convention, the Court considers as injured party anyone who has been declared a victim of the violation of any right recognized therein.

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<sup>360</sup> Article 63(1) of the American Convention establishes that “[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>361</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 269.

<sup>362</sup> Cf. *Case Velásquez Rodríguez v. Honduras. Reparations and Costs*, *supra*, para. 25, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 269.

<sup>363</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, *supra*, para. 26, and *Case of Quispialaya Vilcapoma v. Peru*, *supra*, para. 252.

<sup>364</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 the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 270.

<sup>365</sup> Cf. *Case of Velásquez Rodríguez. Reparations and costs*, *supra*, paras. 25 to 27, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 271.

265. The Commission considered María Inés Chinchilla Sandoval and “her next of kin” as victims of the violations declared in its merits report. In particular, it indicated as victims of the violation of the rights to judicial guarantees and judicial protection, her children Luz de María Juárez Chinchilla, Luis Mariano Juárez Chinchilla, Marta María Gantenbein Chinchilla de Aguilar, another daughter whose name was not provided, and “the mother of Mrs. Chinchilla.” For their part, the representatives forwarded a power of representation signed by the three named children, who were identified as victims and injured party in their brief, without making any reference to a fourth daughter or to the mother of Mrs. Chinchilla.

266. The State argued that, in the event that the Court should order it to pay compensation, said amount should be paid to the next of kin of Mr. Balsells Conde – who was the victim of the homicide committed by Mrs. Chinchilla—, and to “whom she never offered reparation in the civil courts.” The representatives and the Commission did not refer to this argument by the State.

267. The Court points out that reparation for damages derives from the State’s failure to fulfill its international obligations mentioned previously, and that this has no causal nexus whatsoever with the homicide mentioned by the State; therefore, the latter’s request in that regard is manifestly inadmissible.

268. The Court considers Mrs. María Inés Chinchilla Sandoval as the “injured party” and, as the victim of the violations declared in the merits, she will be considered as the beneficiary of the reparations ordered by the Court, without prejudice to those that may correspond to her children, as her heirs.

269. The provisions of this Judgment do not apply to those relatives of Mrs. Chinchilla who were not petitioners, who were not represented in the proceedings before the Commission and the Court, or who have not been included as victims or injured party in this Judgment. However, this does not preclude any actions that they might initiate at the domestic level in relation to the facts of this case, if appropriate. On that assumption, the Court will not issue any ruling in this regard and will not consider their situation in the context of monitoring compliance with this Judgment.

## **B. Measures of satisfaction and guarantees of non-repetition**

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

270. International case law has repeatedly established that the Judgment constitutes *per se* a form of reparation.<sup>366</sup> However, as it has done in other cases,<sup>367</sup> the Court deems it pertinent to order the State to publish, within six months of notification of this Judgment: a) the official summary of this Judgment prepared by the Court, once, in the Official Gazette and in a national newspaper with widespread circulation, and b) this Judgment in its entirety, available for one year, on an official web site of the State.

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<sup>366</sup> Cf. *Case of Neira Alegría et al. v. Peru. Reparations and costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Quispialaya Vilcapoma v. Peru, supra*, para. 311.

<sup>367</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 the Kaliña and Lokono Peoples v. Suriname, supra*, para. 312.

***B.2 Institutional strengthening and training of judicial and administrative officials on the rights of persons deprived of liberty***

271. In its merits report, the Commission recommended that the State ensure the institutional strengthening and training of the judicial authorities responsible for the enforcement of sentences, so that they can effectively perform their role as guarantors of the rights of persons deprived of liberty.

272. The State argued that it has implemented a number of training programs for the judicial authorities responsible for the enforcement of sentences.<sup>368</sup> In its brief of final arguments, it indicated that, in addition to this effort, "in 2006, the Law of the Penitentiary System was decreed, which regulates the guarantees of persons deprived of liberty as well as the administrative organization of prisons and the training of staff in their role as guarantors of the rights of persons confined in those facilities." The State considered that it has "optimal mechanisms and programs for institutional strengthening that guarantee respect for the rights of persons deprived of liberty."

273. With regard to the foregoing, the Court appreciates the information provided by the State and urges it to give continuity to the training programs for the judicial authorities responsible for the enforcement of sentences, and to promote institutional strengthening mechanisms and programs in order to guarantee respect for the rights of persons deprived of liberty.

274. Nevertheless, in order to avoid a repetition of the facts of this case, the Court orders the State to implement training measures for the judicial authorities in charge of the enforcement of sentences, prison authorities, medical and health care staff and other competent authorities involved with persons deprived of their liberty, so that they can effectively fulfill their roles as guarantors of their rights, particularly of the rights to personal integrity and life, the protection of health in situations requiring medical treatment, as well as their obligations to exercise adequate conventionality control when ruling on different types of requests from persons deprived of liberty.

275. Likewise, the Court considers it pertinent to require the State to implement a series of information and orientation sessions on human rights to persons deprived of liberty at the Women's Orientation Center. These sessions should present information concerning the nature of those rights, their content and how such rights can be exercised by persons who are incarcerated, in accordance with international standards, with special emphasis on the protection of health and the rights to personal integrity, life and non-discrimination, together with expeditious judicial or administrative mechanisms that are appropriate and effective for processing their claims when they consider that their rights have been infringed. During these sessions, reference should also be made to this judgment and to the international human rights obligations derived from the treaties to which Guatemala is a party.

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<sup>368</sup> The State referred to the training programs implemented by the Judiciary's Criminal Division to train the judicial authorities responsible for the enforcement of sentences; in addition, since February 2014, "the Specialization Program was coordinated for the Courts of that branch." This program includes training modules in the following topics: a) Adversarial reconversion plan for the enforcement of sentences, b) International standards for the enforcement of sentences, c) Re-socialization tools, d) Control of conditions of detention, e) Hearings based on the adversarial model and f) Workshops to develop skills for conducting hearings. The State pointed out that during the last four years different training programs have been implemented with judges and magistrates of the Jurisdictional Body for Criminal Enforcement.

### **C. Other measures of reparation requested**

#### *C.1 Obligation to investigate*

276. In its Report, the Commission recommended that the State “carry out and complete an impartial, thorough and effective investigation as soon as possible, in order to establish criminal and other responsibilities for the violations established.” For their part, the representatives, without further analysis, made the same request.

277. In this regard, the State argued that “all the steps taken were aimed at identifying the person or persons responsible for the death of the presumed victim; therefore the State complied with the requirements to conduct an effective investigation.” It also held that the investigation was carried out in a thorough, timely, prompt, serious and impartial manner from the moment of the processing of the scene of the facts, in accordance with the actions cited in the Report [on the Merits]” and that “the investigation in question was conducted in accordance with the State’s resources and in the measure of the State’s possibilities.”

278. The Court has considered that any human rights violation involves a level of severity by its own nature, because it implies a breach of certain State obligations to respect and guarantee the rights and freedoms of people. However, this should not be confused with what the Court throughout its jurisprudence has deemed to be “serious violations of human rights,” which have their own connotation and consequences.<sup>369</sup> Furthermore, it is not appropriate to expect that the Court, in any case submitted to it concerning human rights violations, should automatically order the State to investigate, and where appropriate, prosecute and punish those responsible for specific facts. In each case, the Court must assess the particular circumstances and the facts, the scope of the State’s responsibility and the effects that such an order by the Court would have at the domestic level, particularly if this implies reopening domestic proceedings in which final decisions or *res judicata* rulings have already been reached and there is no evidence or indication that these outcomes are the result of deception, fraud or of a desire to perpetuate a situation of impunity.

279. In the instant case, the Court points out that the representatives and the Commission did not provide grounds for asking the Court to order the State to conduct an “impartial, complete and effective investigation” of the facts “in order to establish criminal responsibilities.” In particular, they did not specify that a situation of impunity existed regarding certain facts or behavior of a possible criminal nature; they did not indicate the procedural means or measures that the State would supposedly need to adopt in order to eventually comply with an order in that regard; nor did they specify the scope of the “full and effective” investigation that, in their opinion, the State should carry out.

280. Certainly, in this case, there was no inquiry to determine whether Mrs. Chinchilla’s death could have been caused by possible negligence on the part of the administrative authorities with respect to her prison conditions, lack of adequate medical treatment or other factors that could have contributed to her death. In other words, there was no investigation to determine if other facts or conduct could have propitiated, permitted or caused the violations of the rights to life and personal integrity declared in this case, which could have been determined by ascertaining whether there were other types of responsibilities, such as administrative ones. However, in the absence specific arguments on the part of the Commission and the representatives, and without prejudice to any other lines of investigation that the State could have initiated and pursued, if applicable under its domestic legislation,

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<sup>369</sup> Cf. *Case of Vera Vera et al. v. Ecuador*, *supra*, paras. 117 and 118 and *Case of García Ibarra et al. v. Ecuador*, *supra*, para. 204.

the Court considers that the assumptions required to order the State to conduct a new criminal investigation of the facts, or to reopen the investigation already conducted, are not present in this case.

### *C.2 Construction of a hospital for persons deprived of liberty*

281. As a measure of reparation, the representatives requested the “construction of [a] Hospital for Persons Deprived of Liberty, in Fraijanes, Guatemala, in honor of Mrs. María Inés Chinchilla; this hospital would provide treatment for persons deprived of their liberty in any medical situation.” Also, in their brief of final arguments the representatives held that “[one] of the main difficulties faced by María Inés Chinchilla and her family was the impossibility of receiving medical care in the prison, which ultimately caused her death. This situation made it enormously complicated for her to obtain authorizations and transfers to health care centers, and also led to discrimination and mistreatment by the medical staff, which is not trained and sensitized to deal with persons deprived of liberty.”

282. In this regard, the State argued that “it already has public hospitals, [...] that inmates can attend, so there is no need to create a hospital specifically to treat persons deprived of liberty.” It also reported that in 2015 the first clinic was opened to treat inmates at the Pavoncito Prison Center in the Fraijanes complex.

283. As mentioned previously, the Court has considered that reparations must have a causal nexus with the facts of the case, the violations declared, the damages proven, and the measures requested to repair the resulting harm (*supra* para. 262). From the facts of this case, it does not appear that the lack of medical care or adequate treatment for Mrs. Chinchilla Sandoval was due to the absence of a medical area in the COF or of public hospitals exclusively for persons deprived of their liberty. Thus, the Court considers that the measure of reparation requested by the representatives, involving the construction of a hospital to honor the memory of Mrs. Chinchilla, has no causal nexus with the facts of this case and that their request has not been duly justified, for which reason there is no need to order it.

### *C.3 Adoption of rules on an effective remedy to protect the health of persons deprived of liberty*

284. In its merits report, the Commission recommended “the adoption of rules on a prompt and effective judicial remedy to protect the rights to life and personal integrity where the health needs of persons deprived of liberty are concerned,” as a measure of non-repetition.

285. The State argued that it already has “adequate and timely mechanisms or procedures to guarantee the rights of persons deprived of liberty; for this purpose, certain rules exist within the current legal system, specifically created to protect the human rights of prisoners who are serving their sentences.” It cited the example of the Penitentiary System Law of 2006 and its implementing regulations of 2011, and added that it “has adapted and modified the protocols for institutional strengthening used in all judicial actions [...], in observance of the State’s commitments, by ratifying different international instruments.” Likewise, in its brief of final arguments it indicated that “the State considers that the measure of reparation under discussion is already part of the legal and political framework and has been put into effect and is fully implemented.”

286. In this case, the Commission did not specifically indicate which rules or practices should have been regulated by the State so that the alleged victim could have access to a remedy to denounce the harm caused to her health, or the lack of conditions compatible with her dignity. Therefore, the Court considers that it does not have sufficient elements to analyze



the State's alleged failure to comply with the obligation to adapt domestic law to the American Convention, contained in Article 2 thereof (*supra* para. 254). It also points out that the Commission's recommendation relates to the violation of judicial guarantees and judicial protection declared in relation to the actions of the enforcement judge. Consequently, the Court considers that the Commission has not justified its request, particularly in terms of the characteristics that such a remedy should have.

#### *C.4 Access to medical care in the COF and in other prisons*

287. In its merits report, the Commission recommended guarantees of timely access to adequate medical treatment at the Women's Orientation Center.

288. For their part, the representatives requested that the State "establish health services in prisons, in accordance with international standards on the rights of persons deprived of liberty. In particular, they requested:

- a) The provision, throughout the prison, of medical and paramedic staff duly trained to treat sick persons and, in particular, to attend to medical emergencies, with health care protocols and adequate equipment;
- b) That prisons be provided with medicines and adequate medical facilities to attend emergencies, as well as chronic illnesses, such as diabetes, acquired immunodeficiency syndrome -AIDS-, chronic kidney disease; it is considered important that women's prisons be provided with special facilities to treat illnesses specific to women, gynecologists and specialized staff in these areas of health;
- c) The establishment of effective medical record systems for each person deprived of liberty, available to doctors and prison staff, so that they have accurate knowledge of the inmates' health condition, their treatments, medical history and all pertinent information to ensure adequate treatment; [and]
- d) Guarantee that persons deprived of liberty are taken punctually to their ambulatory appointments at specialized health centers, when necessary, and ensure adequate mechanisms for transport and attendance at those appointments".

289. Furthermore, in "matters of protection and monitoring of the rights of persons deprived of liberty," the representatives asked the Court to order the State to:

- a) "Establish prison monitoring and control systems that are effective for the protection of individual rights and, in particular, order the State to adopt appropriate mechanisms so that judges and other agents of the State comply with international quality standards of medical care and protect the right to health of detainees.
- b) Strengthen the system for the protection of the rights of persons deprived of liberty, through the appointment of enforcement judges, in sufficient number and with adequate training for the defense of the human rights of persons deprived of liberty in all places where prisons exist.
- c) Order the State of Guatemala to reduce prison overcrowding, given that in women's prisons the current rate overcrowding is 300%, and take all necessary steps in that regard, including the use of non-custodial measures for less serious crimes and, where applicable, the effective adaptation of prisons with special facilities for disabled persons.
- d) Strengthen the Justice system in matters of implementation, with additional human and technological resources to guarantee a prompt and effective response to the needs of persons deprived of liberty.
  - Increase the number of doctors that treat the prison population, considering that the conditions of those deprived of liberty increase the risk of epidemics, contagion, etc.
  - Provide specialized gynecological care to all women deprived of liberty.

290. The State argued that persons deprived of liberty in the COF are guaranteed access to regular, timely medical attention, free of charge, and that it "has mechanisms and procedures to guarantee medical access for persons deprived of liberty at the Women's Orientation Center. It specified that inmates are examined upon admission to the COF, and during the time they serve their sentence in the COF; this includes the required assistance

and monitoring of the health of each person deprived of liberty, with the aim of providing comprehensive medical care to all inmates.” The State therefore considered it “inappropriate to follow the recommendation made by the Commission,” and indicated the following:

“[...] the Women’s Orientation Center has a health clinic that provides medical assistance and treatment, with the medications needed by the inmates. In addition, it receives support from the Medical Services Department of the General Directorate of the Prison System for the supply of medications; the national hospitals also supply medications to the inmates. [...] In addition, the Prison System’s Medical Services Department has a control mechanism for addressing any problem affecting the health of persons deprived of liberty, that is, if some type of medication is needed, it is requested from the appropriate source so that it can be provided to the inmate, or if the presence of paramedics assigned to prisons is required (Annex 7).

Therefore, in this case, the State does not consider that there is a lack of medical attention in the COF, since it has medical services, and also monitors the needs of the inmates as regards medical assistance for their ailments and illnesses.

Finally, the State indicated that the General Directorate of the Prison System complies with the provisions of Article 14 of the Law of the Penitentiary System [...] since it provides adequate medications and medical consultations to the inmates. In addition, they are provided with medical treatment and are allowed to leave the prison to attend medical checkups that require the intervention of specialist doctors.

291. The Court points out that the State recognizes its international obligation to guarantee adequate and timely access to medical care to persons deprived of liberty in the Women’s Orientation Center, as well as in other detention centers and prisons, including access to medical examinations and the corresponding records of each person deprived of liberty, available to the doctors and prison staff, stating the inmates’ health condition upon admission to prison and during their detention, their treatment, medical history and other pertinent matters, to ensure their adequate treatment and monitoring. In particular, the State has reiterated its commitment to provide duly qualified medical staff to treat those with serious illnesses, and to attend to medical emergencies. On the understanding that the State will observe the standards mentioned in this judgment, and considering that the Commission and the representatives have not provided clear, specific and up-to-date information to determine the current health care needs of persons deprived of liberty in the Women’s Orientation Center, or in other prison facilities, the Court considers that it is not pertinent to order the requested measures of reparation.

*C.5 Guarantees of adequate conditions for persons with disabilities deprived of their liberty*

292. In its merits report, the Commission recommended that the State ensure adequate prison conditions for persons with disabilities at the Women’s Orientation Center, in accordance with the standards described in its report.

293. For their part, the representatives requested “that [the State] adopt all necessary measures to ensure that prisons provide conditions with dignity for persons that suffer physical disability, such as accessible toilets, dining rooms and other services, according to the requirements of persons with special needs.” In their brief of final arguments the representatives also requested: (i) that the State adopt the measures necessary to ensure that all new prisons are accessible to persons with disabilities, in accordance with international standards and the requirements of accessibility, since they are public buildings; (ii) implementation of a national plan to adapt existing prisons; (iii) implementation of a general policy in the Prison System’s Rules of Procedure, establishing the obligation to make reasonable accommodation to ensure accessibility for persons with disabilities; and (iv) that disabled persons be excluded from prison centers that are inaccessible to them.

294. The State argued that “to guarantee that persons deprived of liberty have optimal conditions so that they can carry out their activities without limitations due to their physical impairments, the Women’s Orientation Center has “mechanisms or procedures to ensure that disabled women detained at the Women’s Orientation Center -COF- Fraijanes, have access to adequate conditions for serving their sentences.”<sup>370</sup> The State considered that the reparation measures under discussion “already [exist] in [its] legal and political framework” as a result of the obligations assumed in compliance with international provisions; and that “all persons with a physical disability are treated according to their needs and in compliance with international standards.” Furthermore, it indicated that it has implemented a new public policy entitled “the National Policy of Prison Reform 2014-2024.”

295. The Court notes that the State recognizes its international obligations to adopt pertinent measures and provide reasonable accommodation to ensure adequate conditions and full accessibility to persons with disabilities who are currently deprived of their liberty or who will be admitted to the Women’s Orientation Center in future, and to other prisons. On the understanding that the State will observe the standards mentioned in this judgment, and considering that the Commission and the representatives have not provided clear, specific and up-to-date information to determine the current needs of persons with disabilities detained at the Women’s Orientation Center, or in other prisons, the Court considers that it is not appropriate to order the measures of reparation requested in this regard.

#### **D. Compensation**

296. The Commission asked the Court to order the State “to provide comprehensive reparation for the human rights violations declared in the report [on merits] both in the material and the moral aspects.”

297. The representatives argued that the State must pay fair compensation to the next-of-kin for the death of Mrs. Chinchilla Sandoval and reimburse them for the expenses incurred in their actions before the authorities in relation to this proceeding.

298. In its answer, the State argued that it “is not responsible for any of the violations alleged” and, “consequently, the State of Guatemala should not have to compensate the presumed victims.” Likewise, in its final arguments the State indicated that “within the framework of Guatemala’s legislation, if the petitioners suspected any supposed negligence or lack of medical attention, they had the right to take legal action for the harm and damage caused.”

299. The Court has considered that comprehensive and adequate reparation cannot be limited to the payment of compensation to victims or their next of kin;<sup>371</sup> depending on the case, measures of rehabilitation, satisfaction and guarantees of non-repetition are also necessary. Nevertheless, this Court reiterates that, where national mechanisms exist to define

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<sup>370</sup> Based on an official letter dated June 24, 2014, from the General Directorate of the Prison System, of the Ministry of the Interior, the State added that such persons “are examined by the doctor assigned to that detention center when they require such assistance; also, a request is made to the jurisdictional body to order the National Institute of Forensic Sciences of Guatemala to send a specialist of that Institute to the prison to evaluate the inmates, so that they can receive specialized care at the national hospitals. In addition, the inmates with mental disabilities are referred as outpatients to the “Federico Mora” National Mental Health Hospital, in Zone 18, for ambulatory treatment and, if necessary, they are interned in that hospital during a crisis, for as long as the psychiatrists consider appropriate.”

<sup>371</sup> Cf. *Case of the “Mapiripán Massacre” v. Colombia*, *supra*, para. 219; *Case of the Ituango Massacres v. Colombia*, *supra*, para. 339; *Case of the Pueblo Bello Massacre v. Colombia*, *supra*, para. 206, and *Case of García Ibarra et al. v. Ecuador*, *supra*, para. 186.

forms of reparation that satisfy the criteria of objectivity, reasonability and effectiveness to properly repair the violations of rights declared, such procedures and their results can be assessed. If those mechanisms do not meet such criteria, it is up to the Court, in exercise of its subsidiary and complementary competence, to order the pertinent reparations, since the victims or their families must have ample opportunities to obtain fair compensation. However, such proceedings would be relevant and valuable only in cases where they have been effectively attempted by the persons affected by violations of their rights or by their relatives (*supra* para. 25).

300. In the instant case, Mrs. Chinchilla's next of kin did not attempt the remedy of an ordinary lawsuit to claim damages, mentioned by the State, and therefore did not obtain any appreciable result. Thus, the State's argument has already been settled in relation to the preliminary objection (*supra* paras. 25 to 27). Consequently, the Court will proceed to analyze the requests for compensation for pecuniary and non-pecuniary damage and will rule appropriately. Likewise, the Court reiterates the compensatory nature of the indemnities; their nature and amount depend on the damage caused, and are not supposed to enrich or impoverish the victim or her heirs.<sup>372</sup>

### **D.1 Pecuniary damage**

301. The representatives indicated that "to calculate pecuniary damage it is necessary to take into account the situation of the person deprived of liberty and the income that she earned in that condition, which in no case can be lower than the current minimum living wage in Guatemala at that time, indexed to the current rate, for the years of life expectancy." Subsequently, based on the calculations contained in their final written arguments,<sup>373</sup> the representatives estimated that it would be appropriate to order the State to pay the sum of Q. 3,947,889.15 (Guatemalan quetzales) for pecuniary damage.

302. The State argued that, on previous occasions, the Court "has refrained from ordering measures of reparation for pecuniary damage when there is no legitimate reason on the part of the petitioners to claim compensation [,] a situation that applies to this case, since there was no criminal act to prosecute, and the petitioners have not claimed or presented any

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<sup>372</sup> Cf. *Case of the "White Van" (Paniagua Morales et al.)*, *supra*, para. 79, and *Case García Ibarra et al. v. Ecuador*, *supra*, para. 189.

<sup>373</sup> The following items together, described in Annex 8 to the representatives' brief of final arguments, make up the total amount of Q.2,791,219.52 for pecuniary damage, as follows:

1. Loss of profits: Q.2,093,212.21. The amount was calculated based on an estimated annual salary of Q.\$25,500.00 (including bonus 14 and Christmas bonus) over 26 years—Mrs. Chinchilla's life expectancy, had she been granted the benefit an alternative custodial measure from 2002 and until 2028—, plus the corresponding inflation rate and the active bank interest rate.
2. Loss of education: Q.7,669. 62 (refers to the fact that "during the time that she was serving her sentence for the crimes committed, the victim was prevented from attending university and obtaining the relevant academic diplomas. Also, to resume her life project, she should at least have continued her studies until graduating with a diploma in business administration which, considering that she studied at the Universidad Galileo, implies the sum of approximately [the amount indicated]").
3. Food expenses: Q.180, 354.67 (refers to expenses incurred for food during Mrs. Chinchilla's incarceration).
4. Expenses for moving into "protective" housing: Q.7, 986.91 (expenses incurred "to avoid having to live in the precarious conditions offered in Guatemalan prisons").
5. Medical Expenses: Q.227, 374.01 ("Medical Expenses for treating the victim's illness").
6. Psychological damage (Diagnosis of parents, children, mother and grandson): Q.62,400.00 (refers to expenses for psychological diagnosis and treatment of Mrs. Chinchilla's parents, children and grandchildren).
7. Psychiatric and/or psychological effects (therapy for siblings): Q.35, 700.00 (indicated as expenses incurred "for treatment with medicines").
8. Expenses related to "child support and education costs" of Mrs. Chinchilla's daughter. Child support for Flor de María Juárez Chinchilla (14 years – 18 years): Q. 81,480.75 and Luis Mariano Juárez Chinchilla (12 years – 18 years): Q. 102,710.97 (expenses related to "child support and education expenses" of Mrs. Chinchilla's son).

document to prove the damage to which they refer.” Also, “regarding the expenses incurred by the victim’s family during the proceeding, the petitioners do not indicate the total amount, since they do not provide any receipt or invoice that would account for that amount.” Furthermore, in its brief of final arguments, the State argued that “the next of kin of the presumed victim have not been able to provide documentary evidence to confirm the expenses incurred during Mrs. Chinchilla Sandoval’s stay in the COF.”

303. In its case law the Court has developed the concept of pecuniary damage and the hypotheses under which such compensation must be made.<sup>374</sup> Pecuniary damage encompasses “the loss of or detriment to the victims’ income, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the case.”<sup>375</sup>

304. In relation to the claims for compensation for consequential damages, this Court observes that the representatives did not provide timely evidence to prove the expenses allegedly incurred by the next of kin; moreover, the next of kin are not an injured party in this case, and therefore it is not pertinent to consider requests for compensation for their personal expenses. However, it has been proven that Mrs. Chinchilla Sandoval’s next of kin supplied her medications during her confinement in the COF and also contributed to certain modifications in her cell. Therefore, this Court decides to set in equity the sum of US\$ 3,000.00 (three thousand dollars of the United States) in compensation for those expenses, which shall be paid to Mrs. Marta María Gantenbein Chinchilla within the term established for that purpose (*infra* para. 321).

305. In relation to the alleged loss of income of Mrs. Chinchilla Sandoval, the Court considers that the facts accredited do not establish her real capacity to undertake remunerative activities, based on a possible outcome, not proven, according to which she would have received a benefit of an alternative penalty to imprisonment from 2002. In other words, these claims by the representatives, in addition to being time-barred, do not provide sufficient arguments or information regarding the supposed loss of profits, and therefore the Court does not consider it pertinent to order reparations in relation to this item.

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

306. The representatives argued that “to calculate moral damage it is necessary to consider the suffering and ailments suffered by Mrs. Maria Inés Chinchilla Sandoval during her final years of incarceration, the severe deterioration of her health, and particularly her physical disability, which severely restricted her mobility and caused her unnecessary suffering. That suffering, provoked during the time she was deprived of her liberty, persists through the psychological sequelae endured by her next of kin, who were directly harmed by the humiliations she suffered and by the conditions to which was subjected while alive.” Subsequently, based on the calculations contained in their final written arguments, the representatives considered it “equitable to request compensation of US\$50,000.00 for moral damage for each of the victims,” equivalent to Q. 1,149,000.00 (Guatemalan quetzales) approximately.

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<sup>374</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 García Ibarra et al. v. Ecuador, supra*, para. 194.

<sup>375</sup> Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs, supra*, para. 43, and *Case of García Ibarra et al. v. Ecuador, supra*, para. 194.

307. The State argued that “no form of pecuniary reparation for moral damage is owed to any of the alleged victims in the present case, since the State did not [...] violate any right to the detriment of Mrs. Chinchilla;” and that, “at no time did Mrs. Chinchilla’s next of kin engage with the investigation process conducted by the Public Prosecution Service, with no record of any type of intervention or interest shown by the presumed victim’s next of kin to investigate the facts.”

308. As indicated previously in this Judgment, international case law has repeatedly established that the Judgment constitutes *per se* a form of reparation (*supra* para. 270). However, in its case law this Court has developed the concept of non-pecuniary damage and has established that this “may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as suffering of a non-pecuniary nature that affects the living conditions of the victims or their families.”<sup>376</sup> Since it is not possible to assign a precise monetary equivalent to non-pecuniary damage, for the purposes of making integral reparation to the victims, they may only obtain compensation through the payment of a sum of money or through the delivery of goods and services that can be assessed monetarily, as prudently determined by the Court, applying judicial discretion and the principle of equity.<sup>377</sup>

309. The Court considers that, as a result of the facts of this case, Mrs. Chinchilla Sandoval suffered physical and psychological effects during her confinement in the COF, particularly when the State authorities failed to adopt effective measures to mitigate the evident deterioration of her health. For the foregoing reasons, having regard to its case law and considering the circumstances of the instant case and the violations declared, the Court finds it pertinent to establish, in equity and as compensation for non-pecuniary damage, the sum of US\$ 40,000.00 (forty thousand United States dollars) in favor of Mrs. María Inés Chinchilla Sandoval.

310. The compensation established in the above paragraph in favor of the injured party shall be paid directly to her children, namely: Marta María Gantenbein Chinchilla, Luz de María Juárez Chinchilla and Luis Mariano Juárez Chinchilla, in equal parts, within the period established for that purpose (*infra* para. 321).

## **E. Costs and expenses**

311. The representatives requested that the Court order the State to make “reparation to the victims and their representative[s] for all the expenses incurred in bringing the case before the Inter-American Human Rights System.” In their brief of final arguments, they noted that the total expenses amounted to Q. \$919,011.10<sup>378</sup> (equivalent to approximately US\$120,000.00 United States dollars).

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<sup>376</sup> Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Reparations and costs*, *supra*, para. 84, and *Case of Quispialaya Vilcapoma v. Peru*, *supra*, para. 309.

<sup>377</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*, *supra*, para. 53, and *Case of Velásquez Paiz et al. v. Guatemala*, *supra*, para. 273.

<sup>378</sup> The following items, described in Annex 8 of the representatives’ brief of final arguments, correspond to the total amount for costs and expenses (Q. \$919,011.10):

1. Expenses for legal fees and actuarial study: Q. \$804,011.10 (refers to “expenses for payment of professional fees to lawyers and the actuarial expert, who provided assistance and advice during the proceeding against the State of Guatemala.”)
2. Legal costs: Q.\$115,000.00 (specified as “legal costs and travel expenses in the proceeding before the Commission and before the Inter-American Court of Human Rights.” As justification, various receipts were submitted

312. For its part, the State indicated that the representatives did not submit documents proving the expenses supposedly incurred for processing the case.

313. The Court has indicated that “the claims of the victims or their representatives for costs and expenses, and the evidence that supports them, must be presented to the Court on the first procedural occasion granted to them; that is, in the pleadings and motions brief, without prejudice to such claims being subsequently updated, in keeping with the new costs and expenses incurred owing to the proceedings before this Court.”<sup>379</sup> The Court reiterates that, pursuant to its case law,<sup>380</sup> the costs and expenses form part of the concept of reparation, because the actions taken by victims to obtain justice, in both the domestic and the international sphere, entail disbursements that should be compensated when the international responsibility of the State has been declared in a judgment against it. In addition, the Court reiterates that it is not sufficient merely to forward probative documents; rather the parties must include arguments that relate the evidence to the fact it is meant to represent and, in the case of alleged financial disbursements, the items and their justification must be clearly established.<sup>381</sup>

314. Regarding the reimbursement of expenses, it is for the Court to prudently assess their scope, and this includes the expenses generated 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 rights. This assessment may be based on the principle of equity, taking into account the expenses mentioned by the parties, provided that their *quantum* is reasonable.<sup>382</sup>

315. In the instant case, the Court finds that, in relation to costs and expenses, although the representatives provided some evidence to accredit various expenses incurred during the litigation at international level, the fact is that these were attached to their brief of final arguments and were not related to different aspects and stages of their representation. Taking into account all the foregoing considerations, the Court sets in equity a proportional amount for the sum of US\$10,000.00 (ten thousand United States dollars) for the expenses incurred in processing this case before the Inter-American Human Rights System. These monies shall be delivered to the representatives within one year of notification of this Judgment. In the stage of monitoring compliance with the Judgment, the Court may order the State to reimburse the next of kin or their representatives for subsequent expenses that are reasonable and duly proven.<sup>383</sup>

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for accommodation, food and travel as Annexes 10, 11, 12, 13 and 14 of the representatives’ brief of final arguments. Also, Annex 15 of that brief included a certification from the Association of the Institute of Comparative Studies in Criminal Sciences of Guatemala, establishing that the total amount for professional services paid for processing the case within the Inter-American Human Rights System was Q. \$99,000.00).

<sup>379</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, para. 275, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 320.

<sup>380</sup> Cf. *Case of Velásquez Rodríguez. Reparations and costs*, *supra*, para. 42; *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*, *supra*, para. 79, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 319.

<sup>381</sup> Cf. *Case Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, para. 277, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 320.

<sup>382</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*, *supra*, para. 82, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 319.

<sup>383</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. 291 and *Case of Quispialaya Vilcapoma v. Peru*, *supra*, para. 323.

**F)      *Reimbursement of expenses to the Victims' Legal Assistance Fund***

316.            The presumed victims, through their representatives, requested the support of the Victims' Legal Assistance Fund of the Court to cover the expenses of the litigation before the Court, particularly those incurred during their participation at the public hearing in this case.

317.            In the Order of January 28, 2015, the President authorized the Fund to cover the costs of presenting the statement Mrs. Marta María Gantenbein Chinchilla de Aguilar and, in the Order of May 12, 2015, he required that assistance be granted to cover the travel and accommodation expenses necessary to receive her statement at the hearing.

318.            The State had the opportunity to present its observations on the disbursements made in this case, which totaled US\$ 993.35 (nine hundred and ninety-three United States dollars and thirty-five cents). The State argued that it should not have to pay this sum since it was demonstrated that the alleged victim did not tell the truth in her statement during the hearing.

319.            In this regard, the Court considers that the State's comment refers to the evidentiary value of the statement of the presumed victim, but does not affect the purpose of the Victims' Fund, which is to support those who lack the financial resources necessary to cover the cost of litigation before the Court.

320.            Consequently, in application of Article 5 of the Fund's Rules of Procedure, the Court will assess if it is appropriate to order the State to reimburse the Legal Assistance Fund for the disbursements made. Considering the violations declared in this Judgment, the Court orders the State to reimburse the Fund in the amount of US\$ 993.35 (nine hundred and ninety-three United States dollars and thirty-five cents) for the expenses incurred. This sum shall be reimbursed to the Inter-American Court within ninety days of notification of this judgment.

**G)      *Method of compliance with the payments ordered***

321.            The State shall make the payment ordered in this Judgment as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses directly to the persons indicated herein, within one year of notification of this Judgment; however, it may also advance the full payment within a shorter period, in the terms of the following paragraphs.

322.            The sums allocated in this Judgment as compensation and to reimburse costs and expenses shall be delivered to the representatives as established in this Judgment, without any deductions arising from possible taxes or charges.

323.            The State shall comply with its monetary obligations through payment in United States dollars or the equivalent in Guatemalan quetzales.

324.            If the State should fall into arrears, it shall pay interest on the amount owed corresponding to bank interest on arrears in Guatemala.

325.            In the event that a beneficiary has died or dies before the corresponding compensation has been received, payment shall be made directly to his or her heirs, in accordance with applicable domestic law.



326. If, for reasons that can be attributed to the beneficiaries of the compensation for costs and expenses, or their heirs, it is not possible to pay the amounts established within the time frame indicated, the State shall deposit said amount in an account or certificate of deposit in a solvent Guatemalan institution, in United States dollars, and on the most favorable financial terms permitted by law and banking practice. If, after ten years, the amount assigned has not been claimed, the amounts shall be returned to the State with the interest accrued.

## **IX OPERATIVE PARAGRAPHS**

327. Therefore,

### **THE COURT**

#### **DECIDES,**

Unanimously,

1. To dismiss the preliminary objection filed by the State, in the terms of paragraphs 20 to 27 of this Judgment.

#### **DECLARES,**

unanimously, that:

2. The State is responsible for the violation of the obligation to guarantee the rights to personal integrity and to life, recognized in Articles 5(1) and 4(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of María Inés Chinchilla Sandoval, in the terms of paragraphs 183 to 225 of this Judgment.

3. The State is responsible for the violation of the obligation to ensure the rights to judicial guarantees and judicial protection, recognized in Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of María Inés Chinchilla Sandoval, in the terms of paragraphs 241 to 256 of this Judgment.

4. The State is not responsible for the alleged violation of the right to judicial guarantees and judicial protection, recognized in Articles 8(1) and 25 of the American Convention, to the detriment of the next of kin of María Inés Chinchilla, for the reasons stated in paragraphs 240 and 257 to 260 of this Judgment. The Court will not rule on the alleged violation of the obligations contained in Article 2 of the Convention, for the reasons stated in paragraph 254 of this Judgment.

### **AND DECIDES**

unanimously, that:

5. This Judgment constitutes *per se* a form of reparation.

6. The State must adopt measures for the training of judicial authorities responsible for the enforcement of sentences, prison authorities, medical and health care staff and other competent authorities involved with persons deprived of liberty, so that they can effectively fulfill their roles as guarantors of their rights, particularly the rights to personal integrity and to life, as well as the protection of their health in situations that require medical attention. The State must organize a series of information and orientation sessions on human rights for persons deprived of their liberty in the Women's Orientation Center, in the terms of paragraphs 274 and 275 of this Judgment.

7. The State must issue the publications indicated in paragraph 270 of this Judgment, within one year of notification.

8. The State must pay the amounts established in paragraphs 304, 309, 315 and 320 of this Judgment as compensation for pecuniary and non-pecuniary damage and reimbursement of costs and expenses to the Legal Assistance Fund, in the terms of the aforesaid paragraphs and of paragraphs 310 and 321 to 326 of this Judgment.

9. The State must submit to the Court, within one year of notification of this Judgment, a report on the measures it has adopted in compliance therewith.

10. The Court will monitor full compliance with this Judgment, in exercise of its authority and in compliance with its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with its provisions.

Judge Roberto F. Caldas and Judge Eduardo Ferrer Mac-Gregor-Poisot advised the Court of their Separate and Concurring Opinions, respectively.

Done in Spanish at San José, Costa Rica, on February 29, 2016.

Judgment of the Inter-American Court of Human Rights. Case of Chinchilla Sandoval and others v. Guatemala. Preliminary objection, merits, reparations and costs.

Roberto F. Caldas  
President

Eduardo Ferrer Mac-Gregor Poisot

Manuel E. Ventura Robles

Alberto Pérez Pérez

Eduardo Vio Grossi

Humberto A. Sierra Porto

Pablo Saavedra Alessandri  
Secretary

So ordered,

Roberto F. Caldas  
President

Pablo Saavedra Alessandri  
Secretary

**SEPARATE OPINION OF JUDGE ROBERTO F. CALDAS**

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**CASE OF CHINCHILLA SANDOVAL V. GUATEMALA**

**JUDGMENT OF FEBRUARY 29, 2016**

***(Preliminary objection, merits, reparations and costs)***

**I. Introduction**

First, I emphasize my adherence to the Judgment, to the conclusions reached by this Court and to the reparations resulting therefrom. I only differ with regard to its justification, because I understand that there is a configuration of a breach of the right enshrined in Article 26 of the American Convention, on the point concerning the right to health, and, therefore, of Article 10(1) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).

Accordingly, this opinion expresses my view that the direct violation of the aforementioned Articles should be added to the grounds set forth in the judgment, without withdrawing or relativizing my position with respect to what was expressed in the Judgment, adopted unanimously by the honorable judges of this Inter-American Court.

I offer my separate opinion because I consider that the progressive evolution of the protection of human rights in our region allows us to recognize that the right to health, in addition to being a necessary precursor to guaranteeing the rights to physical integrity and to life, is also an autonomous right of the victim and verifiable by this Court.

**II. Right to health (Article 10(1) of the Protocol of San Salvador and Article 26 of the Convention)**

It was wholly proven that the victim was deprived of her liberty and was serving her sentence in a women's prison in Guatemala, where her state of health deteriorated progressively, producing complications that resulted in her disability and, finally, in her death, preceded by medical and emergency care that was insufficient to prevent such harm.

Clearly, the main content of the debate refers to the victim's health, which was harmed, and consequently, to her right to health, contemplated in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, which constitutes the legal patrimony of all the citizens of our Continent. It is important to clarify that Guatemala is a party to the Protocol of San Salvador and to the International Covenant on Economic, Social and Cultural Rights (ICESCR) since May 19, 1988,<sup>1</sup> and therefore, these rights of the victim were recognized thanks, in great measure, to the diplomatic and legislative efforts of the State declared responsible in this Judgment.

It so happens that the Judgment, in its conclusions and operative paragraphs, specifically in relation to the deterioration of the victim's health, declares that the State is responsible for its failure to comply with the obligation to guarantee the rights to personal integrity and to life, recognized in Articles 5(1) and 4(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof. Furthermore, the victim's incarceration and her disabilities led to the conclusion that the State is also responsible for the violation of the right to non-discrimination.

Unlike what appears to be the case at first glance, the Judgement's silence on the right to health in the conclusions and in the operative paragraphs is barely apparent.

Paragraph 165 of the Judgment announces that the Court will determine whether the State fulfilled its obligations to guarantee the alleged victim's rights to personal integrity and to life, offering a careful analysis of: 1) the State's obligation to provide health care and medical treatment to persons deprived of liberty; 2) the duty to provide adequate treatment for Mrs. Chinchilla's diabetes and related ailments; 3) the duty to ensure the accessibility of the conditions of detention in response to Mrs. Chinchilla's disability; and 4) the response of the administrative authorities on the day of Mrs. Chinchilla's death.

The right to health appears, therefore, in the justification of the Judgment, as a necessary precursor for full compliance with the obligations related to the right to life and personal integrity. The conviction for the violation of Articles 4(1) and 5(1) of the Convention depends, ultimately, on the prior analysis and confirmation of the failure to comply with the right to health, established in Article 26 of the Convention and Article 10(1) of the Additional Protocol.

In that sense, the right to health is present in the conclusions and operative paragraphs, but in a weakened form. It loses its status as a right and is converted into factual grounds for the application to the case of the rights established in Articles 4(1) and 5(1) of the American Convention. Therefore, the violation of the right to health provides the grounds for condemning the State's actions, although not in an autonomous manner, but as a necessary step or stage to conclude with the direct violation of the Convention.

The assessment of the right to health, albeit only at its interface with the right to personal integrity and to life, is not new in the case law of this Court,<sup>2</sup> which understands that such

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<sup>1</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq\\_no=IV-3&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-3&chapter=4&clang=en)

<sup>2</sup> Cf. *Case of Albán Cornejo et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of November 22, 2007. Series C No. 171, para. 117. See also, Article 25(1) of the Universal Declaration of Human Rights, Article XI of the American Declaration of the Rights and Duties of Man, Article 10(1) of the International Covenant on Civil and Political Rights, Article 12(1) and 2 of the International Covenant on Economic, Social and Cultural Rights. Also, see General Comment 14 of the Committee on Economic, Social and Cultural Rights. "The right to the highest attainable standard

rights are directly and immediately associated with human health care.<sup>3</sup> Furthermore, as stated in paragraph 170, the protection of the right to personal integrity supposes the regulation of health services in the national sphere, as well as the implementation of various mechanisms aimed at safeguarding the effectiveness of that regulation.<sup>4</sup>

Therefore, more than an indication of respect for the rights to life and personal integrity, the right to health is an autonomous right.

The confirmation, during the proceedings before the Court, that this right was violated, recommends a specific jurisdictional action, as provided in Articles 10(1) of the San Salvador Protocol and 26 of the Convention. I consider that those articles, which contain clear commitments related to economic, social and cultural rights (ESCR), enable the Court to examine the compatibility of the State's conduct in relation to these obligations.

The Court and America are ready to take this important step forward in the system for the protection of human rights in our continent - especially in this case, in which it has already been established that the State's failure to ensure the health of a detained person is conduct that has concrete repercussions in the Inter-American System. A direct conviction, under Article 26 of the Convention, falls within the framework of the evolution of human rights without producing any ruptures, or even altering the amount of the compensation, for example. But it is important that potential victims understand that the Inter-American System is, indeed, a route open to persons who seek to make those rights effective.

More than simply reiterating the protection of health indirectly through the rights to life and personal integrity, the jurisdictional protection of this right can and must be more explicit and direct.

The debate on the direct justiciability of economic, social and cultural rights (ESCR) is not new, and for many years the Court has gradually moved toward comprehensive justiciability. Since the end of the 1990s, with the emblematic case of *Baena Ricardo et al. v. Panama*, we have been developing mechanisms for the protection of ESCR, albeit initially via an indirect route,<sup>5</sup> thanks to the notable step taken by the judges at that time, who assumed the most difficult task: explaining those rights in the context of other broader and more generic rights.

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of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)." Twenty-second Session, 2000, U.N. Doc. E/C.12/2000/4 (2000), para. 34.

<sup>3</sup> Cf. *Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs*. Judgment of November 22, 2007. Series C No. 171, para. 117, and *Case of Suárez Peralta v. Ecuador, supra*, para. 130.

<sup>4</sup> Cf. *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261, para. 130. The Court has also considered that "States must regulate and supervise all activities related to the health care given to individuals under its jurisdiction, as a special duty to protect life and personal integrity, regardless of the public or private nature of the entity providing such health care." (Cf. *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 89. See also: ECHR, *Case of Lazar v. Romania*, No. 32146/05. Third Section. Judgment of May 16, 2010, para. 66; *Case Z v. Poland*, No. 46132/08. Fourth Section. Judgment of November 13, 2012, para. 76; and United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 14, E/C.12/2000/4, August 11, 2000, paras. 12, 33, 35, 36 and 51.

<sup>5</sup> See: *Case of "Five Pensioners" v. Peru*, Judgment of February 28, 2003; *Case of Ximenes Lopes v. Brazil*, Judgment of July 4, 2006; *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru*, Judgment of July 1, 2009; *Case of González et al. ("Cotton field") v. Mexico*, Judgment of November 16, 2009; *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of August 24, 2010; *Case of Atala Rizzo and Daughters v. Chile*, Judgment of February 24, 2012; *Case of Artavia Murillo et al. ("In vitro Fertilization") v. Costa Rica*, Judgment of November 28, 2012.

With the consolidation of that line of jurisprudence and effective compliance by the States, the challenge currently facing the judges is much simpler and more natural.

The present Judgment reproduces this concept, integrating it without moving beyond that tradition. The right to health is effectively protected, albeit as an integral element of Articles 4(1) and 5(1) of the Convention; however, the Judgment does not hold the State accountable for its violation, even though this is contemplated in Article 26.

It is important to carry out a historical review to pinpoint the reasons that led to the division of human rights into Civil and Political Rights and Economic, Social and Cultural Rights, and determined that the former are directly judiciable, whereas the latter would not be.

In 1966, when the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights were signed, we were in the middle of the Cold War and it was politically appropriate to adopt a more western and individualistic view of human rights. These two treaties were signed in a climate of ideological division, breaking with the logic of the indivisibility of human rights to allow States to adhere to one or both. The priority given to civil and political rights was made evident by the option to declare their direct justiciability. At that historic moment, the focus was on individuals and not on the socioeconomic structure in which they are inserted.

We must bear in mind that this division is not echoed in all the instruments that followed. In its preamble, the Additional Protocol to the American Convention on Human Rights in the area of ESCR, adopted in San Salvador on November 17, 1988, reaffirms that human rights comprise an indivisible whole,<sup>6</sup> thereby beginning the slow process of deconstructing the doctrinal basis that allowed for a radically different treatment of the two categories of human rights. Since then, the Court has progressively sought to guarantee ESCR, more firmly and more frequently, though always at the point where these converge with traditionally justiciable rights.<sup>7</sup>

The legal and doctrinal opportunity to protect health, though linked to Articles 4(1) and 5(1) of the Convention, speaks very eloquently of the real interdependence and indivisibility of human rights. The delay in taking this next step - of directly recognizing the violation of the right to health - weakens the discourse that this is a comprehensive system for the protection of human rights, given that the inter-American System's jurisdictional protection is only provided to certain human rights and denied to others, which are recognized equally in the international instruments ratified by Guatemala.

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<sup>6</sup> The Preamble states: "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, the violation of some rights in favor of the realization of others can never be justified;"

<sup>7</sup> In some cases, the Court has analyzed the scope of Article 26 of the American Convention, generally limiting itself to interpreting certain regulatory aspects of that conventional instrument: *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller")*. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009, Series C No. 198, paras. 99 to 103; *Case of the Girls Yean and Bosico v. Dominican Republic*. Judgment of September 8, 2005. Series C no. 130, para. 158; *Case of "Five Pensioners" v. Peru*. Merits, reparations and costs. Judgment of February 28, 2003. Series C No. 98, paras. 147 and 148; *Case of the Yakye Axa Indigenous Community, supra*, para. 163 (in this last case, the State accepted its responsibility for the violation of Article 26, but the Court only included that Article in its narrative on the violation of the right to life).

Based on everything I have stated here so far, I add that the State, as well as being responsible for violating the obligation to guarantee the rights to personal integrity and to life (Articles 5(1) and 4(1) of the American Convention on Human Rights), in relation to Article 1(1) thereof, to the detriment of the victim, failed to comply with Article 26, and that the conduct of the State impaired the right to health of María Inés Chinchilla Sandoval.

### **III. Final Considerations**

In spite of my concordant position with everything ordered in the Judgment and my personal conviction that when possible one should avoid purely conceptual divergences, which does not occur in this case, I issue this opinion in the hope that the System for the Protection of Human Rights in the Americas can advance further in the direction toward full protection of all human rights, interdependent and indivisible, that will come to be recognized in existing and future international instruments, notwithstanding the artificially imposed separation.

Roberto F. Caldas  
Judge

Pablo Saavedra Alessandri  
Secretary



**CONCURRING OPINION OF  
JUDGE EDUARDO FERRER MAC-GREGOR POISOT**

**CASE OF CHINCHILLA SANDOVAL V. GUATEMALA**

**JUDGMENT OF FEBRUARY 29, 2016  
(*Preliminary objections, merits, reparations and costs*)**

**INTRODUCTION: THE "RIGHT TO HEALTH" OF PERSONS WITH DISABILITIES  
DEPRIVED OF LIBERTY**

1. I issue this opinion to justify the reasons why I consider that the decision of the Inter-American Court of Human Rights (hereinafter "ICHR" or "Inter-American Court") should have included a direct and explicit analysis of the violation of the "right to health" in the context of Article 26 of the American Convention on Human Rights (hereinafter "the American Convention" or "Pact of San José"). This would have afforded the Inter-American Court an opportunity to contribute additional elements to the Inter-American standards on *accessibility, reasonable accommodation and protection of the "right to health" of persons with disabilities deprived of liberty*.

2. It is not the intention of this concurring opinion to put forward arguments on the manner in which the "right to health" should be interpreted, based on the application of Article 26 of the American Convention; I have discussed these elements on other occasions;<sup>1</sup> on the contrary, my arguments focus on showing how, in the case *sub judice*, the right to health is related to each of the facts that gave rise to the violations during Mrs. Chinchilla Sandoval's confinement in the Women's Orientation Center (hereinafter "the COF").

3. Unlike other cases examined by the Inter-American Court of Human Rights, in which converging matters have been addressed, that is, the failure to guarantee the right to

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<sup>1</sup> On the justiciability of the right to health, see: *Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013, Series C No. 262; and *Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot in the Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C. No. 298. Similarly, though in relation to the justiciability of the right to work, see: *Joint Concurring Opinion of Judges Roberto F. Caldas and Eduardo Ferrer Mac-Gregor Poisot in the Case of Canales Huapaya et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of June 24, 2015. Series C No. 296.

health,<sup>2</sup> the conditions of detention of persons deprived of liberty<sup>3</sup> and the rights of persons with disabilities,<sup>4</sup> in the specific case of Mrs. Chinchilla all the aforementioned elements converged which, in an interrelated manner, were decisive in the deterioration of her health within the COF.

4. Although I agree with the sense of the Judgment, I consider that the Inter-American Court could have approached the problem taking into account what really caused this case to reach the Inter-American System and, in particular, this jurisdictional body, namely: the implications for the “right to health” owing to a lack of adequate medical care when Mrs. Chinchilla Sandoval was admitted to the COF, from the time she presented a condition of disability at the detention center, until her death in 2004. In this case, it is necessary to address and analyze the violations from the perspective of the “right to health” in two phases or moments that are distinct, but connected by the situations of fact that arose: a) from the moment when Mrs. Chinchilla Sandoval was admitted to the COF, until the time when her leg was amputated and, b) from the time when the victim had to live with physical and sensory limitations in the COF, until the time of her death.

5. In this context, the “right to health” is of special importance for persons deprived of liberty, who cannot satisfy this right on their own account.<sup>5</sup> If we consider the fact that from

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<sup>2</sup> *Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs.* Judgment of November 22, 2007. Series C No. 171; *Case of Suárez Peralta v. Ecuador. Preliminary objections, Merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261 and *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> Among others: *Case of Neira Alegría et al. v. Peru. Merits.* Judgment of January 19, 1995. Series C No. 20; *Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33; *Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary objections, Merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112; *Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114; *Case of Caesar v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of March 11, 2005. Series C No. 123; *Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141; *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 5, 2006. Series C No. 150; *Case of the Miguel Castro-Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2006. Series C No. 160; *Case of Servellón García et al. v. Honduras. Merits, reparations and costs.* Judgment of September 21, 2006. Series C No. 152; *Case of Boyce et al. v. Barbados. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2007. Series C No. 169; *Case of Yvon Neptune v. Haiti. Merits, reparations and costs.* Judgment of May 6, 2008. Series C No. 180; *Case of Vélez Looor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218; *Case of Vera Vera et al. v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of May 19, 2011. Series C No. 226; *Case of Fleury et al. v. Haiti. Merits and reparations.* Judgment of November 23, 2011. Series C No. 236; *Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs.* Judgment of April 27, 2012 Series C No. 241; *Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 26, 2012. Series C No. 244; and *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations.* Judgment of May 14, 2013 Series C No. 260.

<sup>4</sup> *Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149; *Case of Furlan and Family v. Argentina. Preliminary objections, Merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246; *Case of Artavia Murillo et al. (In vitro Fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2012. Series C No. 257; and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298.

<sup>5</sup> In the *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, the Inter-American Commission on Human Rights stated that “the right to humane treatment of prisoners may also be violated by the severe conditions of confinement in which they are kept. In this sense, overcrowding generates a series of conditions that [...] hinder access to basic services and health services of the prisons [...]. This problem, common to all the countries of the region, is in turn the result of other serious structural deficiencies [...]” It also established

November 2002 until her death, Mrs. Chinchilla Sandoval had to serve part of her sentence at the COF with a physical impairment; this implies that the State had a reinforced obligation to guarantee her right to health. In her particular case, it is clear that her vulnerability as a person deprived of liberty, subject to the power of the State, intersected with the vulnerability derived from her condition of disability. This caused, to her detriment, very different problems in relation to those deprived of liberty without disabilities and without adequate health care services. In other words, *guaranteeing the right to health of a person with disabilities deprived of liberty involves specific and differentiated obligations, including reasonable accommodation, which must be applied to the particular case in order to guarantee the enjoyment of a specific right in equality of conditions.*

6. I consider that the traditional analysis carried out by the Inter-American Court of Human Rights, in light of the right to life and personal integrity, is limited in this case, given that these two rights do not fully incorporate certain obligations associated specifically with the “right to health,” namely: accessibility, availability, quality and acceptability, or, the provision of reasonable accommodation to guarantee to persons with disabilities the enjoyment of their right to health. In understanding the relationship between the right to health and health care systems in prisons, it is essential to properly apply a rights-centered approach to these issues of special importance and sensitivity to the most disadvantaged groups in our region, including persons deprived of liberty and particularly those with some type of disability.

7. The Judgment recognizes that *“health should be understood as a fundamental and indispensable guarantee for the exercise of the rights to life and personal integrity.”*<sup>6</sup> However, the Inter-American Court of Human Rights omits to expressly mention the “right to health,” linking both medical care and the health services directly to the effects on the right to life and personal integrity. The majority view considers that the effects are related to the *protection of health* (an expression used throughout the Judgment instead of the “right to health”). On this point, we should understand that the expression “protection of health” is one of the facets of the “right to health.”<sup>7</sup> Furthermore, it should be recalled that regardless of the denomination given to the right to health, this literal interpretation does not annul its content.

8. For that reason I issue this separate opinion, considering the need to emphasize, analyze and explore some elements of this case in relation to the “right to health” of persons deprived of liberty, and particularly of those with disabilities, which are fundamental for the development of the Inter-American System of Human Rights and for the persons who have recourse to it in search of justice. Accordingly, I will address: *I) Mrs. Chinchilla Sandoval’s*

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that “the State’s duty to provide health services to persons in its custody is an obligation which derives [...] from its duty to guarantee the rights to life and humane treatment of prisoners, and that this international responsibility is maintained even in the event that such services are provided in prisons by private contractors.” Cf. IACHR. *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, Inter-American Commission of Human Rights, OEA/ Ser. L/V/II Doc. 64, December 31, 2011, paras. 21 and 22.

<sup>6</sup> Cf. *Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, para. 177.

<sup>7</sup> Committee on Economic, Social and Cultural Rights, *General Comment 14, The Right to the Highest Attainable Standard of Health* (Article 12 of the International Covenant on Economic, Social and Cultural Rights), (Twenty-second Session, 2000), U.N. Doc. E/C.12/2000/4 (2000), paras. 7-9.

physical disability: advances in the case law of the Inter-American Court of Human Rights on the matter (*paras. 9-24*); II) the lack of medical care within the Women's Orientation Center as a violation of the right to health: the duty of prevention in prison conditions (*paras. 25-40*); III) the right to health of persons with disabilities deprived of liberty: accessibility and reasonable accommodation in prison contexts (*paras. 41-64*); IV) the *iura novit curia* principle and the direct justiciability of the right to health in this case (*paras. 65-68*); and V) Conclusions (*paras. 69-78*).

## **I. MRS. CHINCHILLA SANDOVAL'S PHYSICAL DISABILITY: ADVANCES IN THE CASE LAW OF THE INTER-AMERICAN COURT IN THIS MATTER**

9. Before addressing the central theme that elicits this opinion, I believe it is opportune to mention some of the advances achieved by the Inter-American Court in the case *sub judice*. In this sense, it is very important to emphasize that, unlike other cases heard by the Inter-American Court of Human Rights, concerning alleged violations of several rights of the American Convention and of the international *corpus juris* for the protection of the human rights of persons with disabilities, the present judgment demonstrates, more convincingly, how the Inter-American System conceives disability, not from the standpoint of the *assistentialist approach—or clinical model—* that had prevailed in international law; but, in the case of Mrs. Chinchilla Sandoval, the Inter-American Court embraces, to a large extent, the *social model to address disability*, which is developed and espoused in the Convention on the Rights of Persons with Disabilities (hereinafter "the CRPD").

10. In the instant case, Mrs. Chinchilla acquired a physical disability after having her leg amputated as a consequence of deficient medical care in the treatment of her diabetes within the COF. Thus, from 2002 Mrs. Chinchilla Sandoval suffered physical limitations stemming both from her motor disability and the physical barriers in her environment. On this point, it is appropriate to emphasize that in the Judgment it was considered proven that there were numerous steps within the COF building that made it impossible for Mrs. Chinchilla to access all the prison areas independently, and that therefore she required assistance from her fellow inmates. Thus, in the present case, the victim faced physical difficulties in accessing basic services or recreational or medical facilities.<sup>8</sup> Although Mrs. Chinchilla was transferred to the maternal area of the COF, and some modifications were made to her cell, she continued to encounter difficulties with the bathroom, which should have been adapted to the victim's needs.<sup>9</sup>

11. Accordingly, following certain statements made by different organizations that have highlighted the need to move beyond the clinical model, the Court emphasized that:

*207. In this regard, the Court notes that [the Conventions] take into account the social model for addressing disability, which implies that disability is not exclusively defined by the presence of a physical, mental, intellectual or sensory impairment, but is interrelated with the barriers and limitations that exist socially, and that prevent persons from exercising their rights effectively. The*

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<sup>8</sup> Cf. *Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, para. 217 and footnote 325.

<sup>9</sup> Cf. *Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, para. 217.

types of limitations or barriers commonly encountered by people with disabilities in society, are, among others, physical or architectural barriers, and communication, attitudinal or socioeconomic barriers.<sup>10</sup>

12. This vision, now embraced by the Inter-American Court in its case law, is of vital importance for all persons with some form of physical, mental, intellectual, sensory or social impairment in the inter-American region, as it constitutes a means through which the Inter-American Court of Human Rights delivers justice on a topic that had been little explored in its almost thirty-seven years of existence.

13. Another point of the utmost importance in the present decision is that the Inter-American Court of Human Rights refers, for the first time, to several values established in Article 3 of the CRPD as guiding principles of that international treaty. Thus, the Judgment refers to the principles of *i) inherent dignity, individual autonomy and independence of persons (Art. 3. a), ii) equality of opportunity and non-discrimination (Art. 3. b and e), iii) full and effective participation and inclusion in society (Art. 3. c) and iv) accessibility (Art. 3. f)*. In this regard, the Inter-American Court of Human Rights stated:

208. [...] In this sense, States have the obligation to promote the inclusion of persons with disabilities through equality of conditions, opportunities and participation in all spheres of society and to ensure that regulatory or de facto limitations are dismantled. Consequently, States must promote social inclusion practices and adopt affirmative measures to remove such barriers. [...]

214. The right to accessibility from the perspective of disability includes the obligation to adapt the environment in which a person with any impairment can function and enjoy the greatest independence possible, in order to participate fully in all aspects of life on an equal basis with others. In the case of individuals who have difficulties with physical mobility, the content of the right to freedom of movement implies that States are required to identify the obstacles and the barriers to access and, consequently, proceed to eliminate or adapt them, thereby ensuring that persons with disabilities have access to facilities or services and can enjoy personal mobility with the greatest independence possible.

215. Having regard to the foregoing criteria, the Court considers that the State had the obligation to ensure accessibility to persons with disabilities who are deprived of their liberty, in this case to the alleged victim, in accordance with the principle of non-discrimination and the interrelated elements for the protection of health, namely, availability, accessibility, acceptability and quality, including the implementation of reasonable and necessary accommodation in the prison, to enable her to live with the greatest independence possible and in equality of conditions with other persons deprived of their liberty.<sup>11</sup> (Underlining added)

14. The Committee on the Rights of Persons with Disabilities (hereinafter “CRPD”) has asserted that States have an obligation to promote the *inclusion of persons with disabilities* through equal conditions for their enjoyment and exercise of all rights, in all spheres and levels within society. Furthermore, the Committee, in its analysis of the Convention on the Rights of Persons with Disabilities, has noted that in order to configure these conditions throughout society it is necessary to take into consideration *universal design* - of products, environments, programs and services - to be used by all people, whether disabled or not.<sup>12</sup>

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<sup>10</sup> Case of *Chinchilla Sandoval v. Guatemala*. Preliminary objection, merits, reparations and costs. Judgment of February 29, 2016, Series C No. 312, para. 207.

<sup>11</sup> Cf. Case of *Chinchilla Sandoval v. Guatemala*. Preliminary objection, merits, reparations and costs. Judgment of February 29, 2016, Series C No. 312, paras. 208, 214 and 215.

<sup>12</sup> In this regard, the CRPD considers that universal design does not exclude technical support for specific groups of persons with disabilities, when needed. Under this perspective, the concept of universal design adopted by the CRPD constitutes an element of vital importance for the States that form part of the international *corpus juris* for the protection of human rights of persons with disabilities. In this sense, General Comment No. 2 of the CRPD has stated that the strict application of universal design to all new goods, products, facilities, etc., should

However, although persons with some limitation have special protection, this “special protection” must not be confused with an “assistentialist” view of persons with disabilities.<sup>13</sup>

15. It should be emphasized that the Inter-American Court concluded that given the situations suffered by Mrs. Chinchilla at the COF, “[...] it was *reasonable that the State should adapt, at least minimally, the prison facilities to her condition of disability [through the adoption of measures of accessibility and reasonable accommodation]*” or, otherwise “*have staff available to assist Mrs. Chinchilla and to mobilize her.*”<sup>14</sup> This assertion could convey the idea that the Inter-American Court adopts the option of the previous model — the clinical model— over the social model of disability. However, from my perspective, I consider it necessary to clarify this point.

16. In the first place, the conclusion reached by the Inter-American Court in the instant case should not be interpreted in the sense of excluding one option for another, that is, exempting the State from its obligation to create an accessible environment for persons with disabilities and to adopt measures of reasonable accommodation for the specific case (and future cases), by simply providing assistance to the disabled person. On the contrary, the above conclusion must be interpreted to mean that both measures, according to the specific case, complement each other; that is, in some situations it will be necessary - even within the human rights model for persons with disabilities - to provide assistance that complements the measures of accessibility and reasonable accommodation, as long as this assistance does not compromise the independence and autonomy of the disabled person to whom it is provided. In second place, international law does not prohibit, in some cases, the provision of assistance by third parties, without this breaching the principle of independence. The foregoing has been consistent with the social model of disability espoused at the international level.

17. The European Court of Human Rights has conceived the principle of independence from the standpoint of three “jurisprudential moments” or phases regarding the assistance provided to persons with disabilities. In the first phase, prior to the adoption of the CRPD in 2007, from the perspective of the clinical model, the Strasbourg Court considered that when a person with some form of impairment was deprived of liberty, it was essential to provide assistance within the detention center. In the second phase, there was a period of transition in case law, which referred to the independence of disabled persons but without mentioning the adoption of measures of accessibility and reasonable accommodation within prisons. And, thirdly, after reinforcing the social model of disability in 2007 with the CRPD, the ECHR modified its concept and conceded that failure to provide assistance—and well as measures

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ensure full, equal and unrestricted access for all potential consumers, including persons with disabilities, in a way that takes full account of their inherent dignity and diversity. Universal design should contribute to the creation of an unrestricted chain of movement for an individual from one space to another, including movement inside particular spaces, with no barriers. Although ideally, universal design should be applied to a building from the outset, thereby helping to make its construction much less costly, the cost of subsequent adaptations to remove barriers cannot be used as an excuse for avoiding the obligation to gradually eliminate the obstacles to accessibility. Clearly, the elimination of barriers to accessibility for persons with disabilities also applies to prisons, so as to allow them to move around within the facility. Convention on the Rights of Persons with Disabilities, Article 2 and Cf. Committee on the Rights of Persons with Disabilities, General Comment No. 2, Article 9: Accessibility, CRPD/C/GC/2, May 22, 2014, para. 15.

<sup>13</sup> Cf. Committee on the Rights of Persons with Disabilities, *Communication Nº 2/2010, Liliane Gröninger v. Germany*, CRPD/C/D/2/2010, of July 7, 2014, para. 6.2.

<sup>14</sup> *Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, Merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, para. 218.

of accessibility and reasonable accommodation— constitutes a violation of the rights of persons with disabilities under the social model.

18. For example, in relation to the first phase of the ECHR's jurisprudence, in the case *Farbtuhs v. Latvia*, of 2004, the Court considered that a person with a category 1 disability, with various impairments, which prevented him from moving around the prison independently, constituted a violation of Article 3 of the European Convention because the petitioner's continued detention was not appropriate given his age, his ailments and his health. Regarding the monitoring and daily care due to the petitioner, the Court considered, in the first place, that although he received family visits for prolonged periods of 24 hours and regularly exercised this right, the visit was not daily. In second place, it was also proven that although the victim was supervised and assisted by medical staff during the infirmary's working hours, outside of those hours assistance was provided by fellow inmates, acting as volunteers or as part of the prison service.<sup>15</sup> In this situation, and in this case, the ECHR concluded that *it was unlikely that such a solution was adequate as, for at least part of the time, it left most of the responsibility [for helping a disabled person] to unqualified prisoners; although the victim did not report any incident or specific disadvantage of this form of assistance and only mentioned that on some occasions the inmates had refused, the fact is that this was not sufficient to counteract the anxiety and distress felt by an infirm person, conscious that he would not receive any qualified help in the event of an emergency.*<sup>16</sup>

19. Regarding the second moment—the transition phase — in the ECHR's case law, the autonomy of persons with disabilities originated with the case *Vincent v. France* of 2006, where the court considered that to detain a disabled person in a prison where he could not move about and, in particular, could not leave his cell *independently*, amounted to degrading treatment.<sup>17</sup> In this case the European Court ruled that the violation arose from the failure to ensure that the person could leave his cell independently, and move around within the prison; however, it makes no reference to the failure to adopt measures of accessibility or, in his case, any reasonable accommodation that might have been necessary. It should also be emphasized that this case concerns a person with a physical limitation consisting of paraplegia, where the individual retained mobility in his upper body in a normal and autonomous manner.<sup>18</sup>

20. Finally, and in third place, the development of the ECHR's case law on independence occurs within the framework of the social model of disability. In this regard, in the case of *Grimailovs v. Latvia*, of 2013, the victim had become a paraplegic and, after considering the physical conditions of his detention, and the failure to adapt the facilities to allow for the movement of a person in wheelchair,<sup>19</sup> the European Court found that: *In the light of the*

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<sup>15</sup> Cf. ECHR, *Case of Farbtuhs v. Latvia*, No. 4672/02, of December 2, 2004, paras. 11, 39, 40, 41 and 45.

<sup>16</sup> Cf. ECHR, *Case of Farbtuhs v. Latvia*, No. 4672/02, of December 2, 2004, para. 60

<sup>17</sup> Cf. ECHR, *Case of Vincent v. France*, No. 6253/03, Judgment of October 24, 2006, para. 113.

<sup>18</sup> Cf. ECHR, *Case of Vincent v. France*, No. 6253/03, Judgment of October 24, 2006, para. 9.

<sup>19</sup> Cf. ECHR, *Case of Grimailovs v. Latvia*, No. 6087/03, Judgment of September 25, 2013, paras.70, 157 and 158.

*foregoing considerations and their cumulative effects, the Court holds that the conditions of the applicant's detention in view of his physical disability and, in particular, his inability to have access to various prison facilities independently, including the sanitation facilities, and that in such a situation the lack of any organized assistance with his mobility around the prison or his daily routine, reached the threshold of severity required to constitute degrading treatment contrary to Article 3 of the Convention. There has, accordingly, been a violation of that provision.*<sup>20</sup>

21. In addition to the foregoing, in the *Case of X v. Argentina*, the author suffered a stroke which resulted in left homonymous hemianopia, a sensory balance disorder, a cognitive disorder and impaired visuospatial orientation,<sup>21</sup> a serious neurological disease that meant he required assistance to perform the most basic daily tasks. Notwithstanding the pronouncements on accessibility and reasonable accommodation<sup>22</sup> in relation to the services provided to the victim by the nurse, the RPD Committee took note of the observations made *in situ* by the State authorities and confirmed the existence and operation of a call button to summon the nurse, who provided assistance 24 hours a day. In response, the Committee indicated that there was no doubt that the author required health care<sup>23</sup> and, although a call button was installed, the author said that in practice, it took some time before someone responded,<sup>24</sup> yet the Committee did not comment on the failure to comply with this obligation. It took a different view regarding the obligation to provide reasonable accommodation in other conditions of detention, since it concluded that the State of Argentina "[had] not irrefutably demonstrated that the accommodations made in the prison complex [were] sufficient to ensure the author's independent (insofar as possible) access to the bathroom and shower, recreation yard and nursing service."<sup>25</sup> In other words, the RPD Committee has not denied that, in certain cases, States must provide assistance to persons with severe disabilities when they are deprived of their liberty and, therefore, that this violates the principle of independence. On the contrary, in the case of *X*, the fact that the Committee pointed out that the State should have adapted the complex to ensure access to the nursing service not only entailed the provision and operation of the call button, but also ensuring timely assistance and attention within the detention center.

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<sup>20</sup> Cf. ECHR, *Case of Grimailovs v. Latvia*, No. 6087/03, Judgment of June 25, 2013, para. 162.

<sup>21</sup> Committee on the Rights of Persons with Disabilities, *Communication No. 8/2012, X v. Argentina*, CRPD/C/11/D/8/2012, April 11, 2014, para. 2.1.

<sup>22</sup> Committee on the Rights of Persons with Disabilities, *Communication No. 8/2012, X v. Argentina*, CRPD/C/11/D/8/2012, April 11, 2014, para. 9 a) and b).

<sup>23</sup> Cf. Committee on the Rights of Persons with Disabilities, *Communication No. 8/2012, X v. Argentina*, CRPD/C/11/D/8/2012, April 11, 2014, para. 8.10.

<sup>24</sup> Cf. Committee on the Rights of Persons with Disabilities, *Communication No. 8/2012, X v. Argentina*, CRPD/C/11/D/8/2012, April 11, 2014, paras. 8.4, 8.5 and 8.6.

<sup>25</sup> Committee on the Rights of Persons with Disabilities, *Communication No. 8/2012, X v. Argentina*, CRPD/C/11/D/8/2012, April 11, 2014, para. 8.5.



22. In the instant case, given Mrs. Chinchilla's circumstances and her serious degenerative health condition, specialized assistance would certainly have been essential to support the victim in her daily activities. As we can confirm, under the new model of disability assistance does not necessarily violate the principle of independence of disabled persons, especially those with severe disabilities.

23. However, it should be emphasized that such assistance will not be necessary in all cases, since the social model of disability ultimately aims to ensure the full inclusion of persons with disabilities, at all times encouraging their independence and autonomy. For this reason, this Court must assess the particular circumstances of each specific case, to determine if, in addition to measures of accessibility and reasonable accommodation currently emanating from international law on the rights of persons with disabilities, it would be necessary to provide assistance from specialized staff,<sup>26</sup> if required. To complement this, the granting of specialized assistance within the human rights model of disability cannot, and should not, materialize as a rule that operates in all cases; on the contrary, the offer of such assistance should be something exceptional that will depend solely on the nature of the circumstances surrounding future cases that this Court has the opportunity to hear, especially if we bear in mind that nowadays a wide range of physical, mental, intellectual, sensory and social limitations exist, each of these affecting individuals with a different intensity.

24. This prospective interpretative exercise by the Inter-American Court will be crucial in subsequent cases, because in some circumstances assistance is not only important, but indispensable, for certain types of physical, mental or sensory limitations or impairments;<sup>27</sup> for many other cases, providing assistance instead of implementing measures of accessibility and reasonable accommodation, could be regarded as a perpetuation of the clinical model of disability. By virtue of the foregoing, the advances achieved in the instant Judgment provide a starting point and a reference for envisaging situations and conditions in which specialized assistance will be necessary.

## **II. LACK OF MEDICAL CARE WITHIN THE WOMEN'S ORIENTATION CENTER AS A VIOLATION OF THE RIGHT TO HEALTH: THE DUTY OF PREVENTION IN RELATION TO PRISON CONDITIONS**

25. Although the American Convention does not expressly mention all the conditions of detention that affect persons deprived of liberty, since it only establishes that *everyone has the right to have his life and personal integrity respected* and that *all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person*, the Inter-American Court of Human Rights has gradually incorporated, through Articles 4 and 5 of the Pact of San José, the principal standards on prison conditions and the duty of prevention that States must guarantee to persons deprived of liberty. For example, pursuant

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<sup>26</sup> In this regard, the ECHR's case law has been very emphatic in determining that assistance must be provided by qualified persons and not depend on the availability and willingness of the victim's fellow prison inmates. See: *Cf. ECHR, Case of Farbtuhs v. Latvia*, No. 4672/02, of December 2, 2004, and *Case of Topekhn v. Russia*, No. 78774/13, Judgment of May 10, 2016.

<sup>27</sup> *Cf. World Health Organization and World Bank, World Report on Disability*, published in 2011, p. 41 and 42.

to Articles 5(1) and 5(2) of the American Convention, everyone has right to live in conditions of detention compatible with their personal dignity; furthermore, since the State is responsible for prisoners, and exercises total control over them, it must guarantee the right to life and personal integrity of persons deprived of liberty.<sup>28</sup>

26. The Court has constantly held that, under the general obligations to respect and guarantee human rights established in Article 1(1) of the American Convention, there are special duties that derive from these obligations, which are determined on the basis of the particular needs for protection of the subject of law, either owing to his personal situation or to the specific situation in which he finds himself.<sup>29</sup> In this same line of ideas, regarding persons who have been deprived of liberty, the State has a special role as guarantor in respect of prisoners, given that the prison authorities exert strong command and control over the persons in their custody.<sup>30</sup> This results from the special relationship and interaction of subordination between the person deprived of liberty and the State, where the State can be rigorous in regulating a prisoner's rights and obligations, and determining the circumstances of his internment; the inmate is thereby prevented from satisfying, on his own account, certain basic needs that are essential for living with dignity.<sup>31</sup>

27. In addition, the Inter-American Court has gradually incorporated into its vast case law various standards on prison conditions and on the State's obligation to observe these in favor of persons deprived of liberty.<sup>32</sup> In this sense, the Inter-American Court has

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<sup>28</sup> Cf. *Case of Neira Alegría et al. v. Peru. Merits*. Judgment of January 19, 1995. Series C No. 20, para. 60 and *Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs*. Judgment of April 27, 2012 Series C No. 241, para. 63.

<sup>29</sup> *Case of the Pueblo Bello Massacre v. Colombia. Merits, reparations and costs*. Judgment of January 31, 2006. Series C No. 140, para. 111; and *Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 26, 2012. Series C No. 244, para. 137.

<sup>30</sup> Cf. *Case of Neira Alegría et al. v. Peru. Merits*. Judgment of January 19, 1995. Series C No. 20 and *Case of Vélez Looor v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010 Series C No. 218, para. 198.

<sup>31</sup> Cf. *Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary objections, merits, reparations and costs*. Judgment of September 2, 2004. Series C No. 112, para. 152 and *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations*. Judgment of May 14, 2013 Series C No. 260, para. 188.

<sup>32</sup> *Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs*. Judgment of April 27, 2012 Series C No. 241, para. 67. Among other matters, the Inter-American Court has stated that a) Overcrowding is, in itself, a violation of personal integrity, since it hinders the normal execution of essential functions in prisons (Cf. *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of July 5, 2006. Series C No. 150, para. 20, and *Case of Vélez Looor v. Panama. Preliminary objection, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 204); b) Those who are being processed must be separated from those who have been convicted; and children must be held separately from adults, so that those deprived of liberty receive treatment appropriate to their situation. (*Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 7, 2004. Series C No. 114, para. 263 and *Case of Servellón García et al. v. Honduras. Merits, reparations and costs*. Judgment of September 21, 2006. Series C No. 152, para. 200); c) All those deprived of liberty must have access to potable water for personal consumption and to water for personal hygiene; lack of drinking water constitutes grave negligence by the State with regard to its obligation of guarantee to those in its custody (*Case of Vélez Looor v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010 Series C No. 218, para. 216); d) All cells must have sufficient natural or artificial light, ventilation and adequate conditions of hygiene; latrines must be hygienic and offer privacy (*Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of July 5, 2006. Series C No. 150, paras. 94, 95 and 146; and *Case of the Miguel Castro-Castro Prison v. Peru. Merits, reparations and costs*. Judgment of November 25, 2006. Series C No. 160, para. 315); e) Disciplinary measures that constitute cruel, inhuman or degrading treatment, including corporal punishment, prolonged solitary confinement, and any

established that the State, in its role as guarantor, must design and implement a prison policy to prevent any critical situations that could endanger the fundamental rights of the inmates in its custody.<sup>33</sup>

28. It is based on this vision that the Inter-American Court has considered that, as part of Article 5, the State also has a duty to safeguard the health and wellbeing of persons deprived of their liberty and to guarantee that the manner and method of their detention does not exceed the inevitable level of suffering inherent to imprisonment.<sup>34</sup> The State must also provide regular medical attention, with the necessary and appropriate treatment by qualified medical personnel, as required.<sup>35</sup> In addition, the food provided in prisons must be of good quality and of sufficient nutritional value.<sup>36</sup>

29. According to this traditional view, the Inter-American Court of Human Rights has considered that, under Article 5 of the American Convention, the State has the duty to provide inmates with regular medical examinations and care and adequate treatment when required.<sup>37</sup> In this regard, the Inter-American Court's analysis is based on the understanding that any breach of the right to health constitutes a failure to comply with the obligation to prevent violations of the right to life or personal integrity. However, this concept is erroneous, since every right has a facet of prevention and protection that must be assured in an integral manner.

30. In the case of Mrs. Chinchilla Sandoval, the Inter-American Court took on the task of determining whether the State had provided proper treatment in an effective, adequate,

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other measure that may severely jeopardize the physical or mental health of the inmate is strictly prohibited ( *Cf. Case of Caesar v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of March 11, 2005. Series C No. 123, para. 70).

<sup>33</sup> *Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary objections, Merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, para. 178.

<sup>34</sup> *Cf. Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, para. 159; *Case of Yvon Neptune v. Haiti. Merits, reparations and costs.* Judgment of May 6, 2008. Series C No. 180, para. 130, and *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010 Series C No. 218, para. 198; and *Case of Vera Vera et al. v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of May 19, 2011. Series C no. 226, para. 42.

<sup>35</sup> *Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 156; *Case of the Miguel Castro-Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2006. Series C No. 160 para. 301; and *Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs.* Judgment of April 27, 2012. Series C No. 241, para. 67.

<sup>36</sup> *Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 209; and *Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs.* Judgment of April 27, 2012. Series C No. 241, para. 67.

<sup>37</sup> *Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 156; *Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 26, 2012. Series C No. 24, para. 137, and *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations.* Judgment of May 14, 2013 Series C No. 260, para. 189.

continuous manner, by qualified medical personnel, including the required food and medications, either within or outside the prison, for her illnesses or ailments throughout the time she was incarcerated.<sup>38</sup> In other words, although the Judgment insists on limiting the violations declared to Articles 4 and 5 of the American Convention, the truth is that we are faced with a situation in which the right to health is affected, which also has an impact on the right to life and to physical and emotional integrity within the detention center.

31. In the Judgment, the standards developed by the Inter-American Court focus on the right to health, more than on the rights to life and to personal integrity. Thus, the Inter-American Court considers that, in order to ensure that persons deprived of liberty receive a dignified and humane treatment, they should have access to medical treatment, which must include initial and regular checkups when necessary. Furthermore, when an inmate is known to suffer a disease that requires supervision and appropriate treatment, a complete record must be kept of his state of health and of the treatment he receives while in detention. In the case of prisons, the Inter-American Court, referring for the first time since its approval of the *United Nations Minimum Standard Rules for the Treatment of Prisoners*, or the “Mandela Rules”, indicated that to implement effective and qualified medical care for persons deprived of liberty, the State must provide this either within the place of detention or prison or, if this is not available, in hospitals or health care centers where that service is provided.<sup>39</sup>

32. The Inter-American Court reached the conclusion that the right to life and to personal integrity were violated by the fact that the prison in which the victim was confined lacked the necessary resources, specialized staff, equipment and infrastructure to be able to provide adequate care when faced with the deterioration of her health; that she also required regular examinations and care, both by the prison’s in-house doctor and by external consultants and that, although she could receive ambulatory treatment for her disease, the prison system did not provide the necessary treatment, or it was not clear if the COF could do so, or who administered the medication that she required. Moreover, it was evident that at any time she could suffer a decompensation that would require specialized hospital treatment and that her life could be at risk if that treatment was not adequate and consistent, or if she was left to administer her own medications, since the COF did not have the necessary equipment to provide emergency treatment for a diabetic coma, a complication that could be fatal.<sup>40</sup>

33. Although the Judgment does not expressly declare the violation of the right to health in developing the standards related to the State’s obligation to ensure the right to health through the provision of medical care to persons deprived of liberty, in this first phase the Court should have analyzed the essential and interrelated elements of availability, accessibility, acceptability and quality of the right to health with greater scrutiny. In this regard, the Judgment merely states that:

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<sup>38</sup> Cf. *Case Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, para. 185.

<sup>39</sup> Cf. *Case Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, para. 178.

<sup>40</sup> Cf. *Case Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, paras. 196, 197, 198 and 199.

177. [...] health should be understood as a fundamental and indispensable guarantee for the exercise of the rights to life and personal integrity. This implies that States have an obligation to adopt provisions of domestic law, including adequate practices, to ensure equal access to health care for persons deprived of liberty, and to ensure the availability, accessibility, acceptability and quality of such services.<sup>41</sup> (Underlining added)

34. The Committee on Economic, Social and Cultural Rights (hereinafter “the ESCR Committee”) has established the right to health as a fundamental guarantee, indispensable for the exercise of other human rights,<sup>42</sup> such as the right to life and personal integrity, and not the other way round as the Inter-American Court has established in its case law by association.<sup>43</sup> This right implies the existence of a health protection system that offers individuals equal opportunities to enjoy the highest attainable standard of health. According to the ESCR Committee, the notion of the *highest standard of health* must be understood as the right to enjoy a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.<sup>44</sup>

35. The ESCR Committee has stated that these elements, and their application, will depend on the conditions prevailing in a given State. These have been understood as:

**a) Availability.** Each State Party shall have a sufficient number of public health and health-care facilities, goods and services, as well as programs [...] however, these services will include the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the Action Program on Essential Drugs [of the World Health Organization].

**b) Accessibility.** Health facilities, goods and services must be accessible to everyone without discrimination, within the jurisdiction of the State Party. [... ] i) Non-discrimination: health facilities, goods and services must be accessible to all, de facto and de jure [... ] ii) Physical accessibility: health facilities, goods and services must be within safe physical reach for all

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<sup>41</sup> Cf. *Case Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, para. 177.

<sup>42</sup> Committee on Economic, Social and Cultural Rights, General Comment 14, *The Right to the Highest Attainable Standard of Health* (Article 12 of the International Covenant on Economic, Social and Cultural Rights), (Twenty-second Session, 2000), U.N. Doc. E/C.12/2000/4 (2000), paras. 1 and 3.

<sup>43</sup> In this regard, in Communication No. 2/2014, the Committee on Economic, Social and Cultural Rights, in a case concerning the lack of effective access to the courts to protect the right to adequate housing, used due process guarantees to protect the victim’s right to housing, even though the case originated in the domestic courts, for the lack of adequate notification to the victim. The Committee stated that: *Such an irregularity in the notice procedure might not imply a violation of the right to housing if it had no significant impact on the author’s right to defend her full enjoyment of her home [...]. The Committee therefore considers that the inadequate notice constituted at that moment a violation of the right to housing, one that was not subsequently remedied by the State as the author was denied both reconsideration of the decision to order an auction and amparo as sought in the Constitutional Court.* The Committee [on Economic, Social and Cultural Rights], acting pursuant to Article 9, paragraph 1, of the Optional Protocol to the Covenant, is of the view that, by failing to fulfil its obligation to provide the author with an effective remedy, the State party violated her rights under Article 11, paragraph 1, of the Covenant, *read in conjunction with Article 2, paragraph 1. [...].* As we can see, in this example, the Committee highlights the fact that although all rights are interdependent, it is possible to determine an autonomous violation of a social right without subsuming it in the civil and political rights, such as the procedural guarantees of due process, ESCR. Cf. UN ESCR Committee, Communication No. 2/2014 in respect of Spain, E/C.12/55/D/2/2014, June 17, 2015, paras. 13.5, 13.7 and 15.

<sup>44</sup> Committee on Economic, Social and Cultural Rights, General Comment 14, *The Right to the Highest Attainable Standard of Health* (Article 12 of the International Covenant on Economic, Social and Cultural Rights), (22nd Session, 2000), U.N. Doc. E/C.12/2000/4 (2000), paras. 7-9.

sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities [...] *iii) 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; [...].

**c) Acceptability.** All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

**d) Quality.** As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.<sup>45</sup> *(Underlining added)*

36. If we analyze this case from the perspective of the right to health we find that, in the first place, the availability of the right to health was affected, since the prison lacked sufficient medical staff or essential drugs to treat the victim's frail health condition. In the second place, regarding accessibility, this principle was breached in two ways; on the one hand, by the problems stemming from the bureaucratic procedures - *de facto and de jure* accessibility - involved in obtaining permission to leave prison to receive medical attention and, on the other hand, by the lack of economic accessibility (affordability) of the right to health, since the lack of insulin at the COF made it necessary for the victim and her family to supply that medication; in third place, regarding the acceptability of the right to health, far from improving Mrs. Chinchilla's state of health, the lack of medical treatment aggravated her situation within the COF; and, finally, regarding the quality of the right to health, the COF did not have appropriate health facilities and services to treat Mrs. Chinchilla's diabetes.

37. It is undeniable that in the case of Mrs. Chinchilla Sandoval the right to health was involved in a manner that was palpable and autonomous, in the face of the deficient medical treatment provided at the COF. The lack of available, accessible, acceptable and quality medical attention, was decisive inasmuch as it resulted in the amputation of her leg, creating a situation of disability, since the failure to provide her with adequate medication or a diet suited to her needs led to a deterioration in her health over time. In this case, the State violated several aspects of the right to enjoy the highest attainable standard of health by not preventing the diabetes from further aggravating the conditions in which Mrs. Chinchilla served her sentence.

38. The right to health, as conceived in the San Salvador Protocol and in the International Covenant on Economic, Social and Cultural Rights, implies *prevention and treatment of*

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<sup>45</sup> Committee on Economic, Social and Cultural Rights, *General Comment 14, The Right to the Highest Attainable Standard of Health* (Article 12 of the International Covenant on Economic, Social and Cultural Rights), (Twenty-second Session, 2000), U.N. Doc. E/C.12/2000/4 (2000), para. 12.

*endemic, occupational and other illnesses.*<sup>46</sup> The prevention of illness, or preventing its aggravation during a term of imprisonment, is of special importance, because it helps in great measure to avoid situations such as the one encountered by the Inter-American Court in the instant case. That is, it guarantees the right to health as a public good, whether or not persons are deprived of liberty, together with adequate treatment of their illnesses. This is an essential component for those groups who, owing to their circumstances, are already in a situation of clear disadvantage. In this regard, the Inter-American Court stated the following in the case of Mrs. Chinchilla:

*188. The Court considers that the need to protect [the right to] health, as part of the State's obligation to ensure the rights to personal integrity and to life, increases in respect of a person who suffers serious or chronic illnesses, where their health can deteriorate progressively. [...] this obligation acquires particular importance in relation to persons deprived of liberty. This obligation may also be conditioned, accentuated or specified, according to the type of disease, particularly if it is of a terminal nature or, even if it is not terminal per se, if it can be complicated or aggravated either by the individual's own circumstances, by the conditions of incarceration or by the capacity of the prison establishment or of the authorities responsible to provide health care. This obligation rests with the prison authorities and, ultimately and indirectly, with the judicial authorities who, ex officio or at the request of the interested party, must exercise judicial control over the guarantees due to persons deprived of liberty.*<sup>47</sup>

39. On the topic of disability caused by illness, the Inter-American Court of Human Rights has been of the opinion that persons with certain illnesses may face social and attitudinal barriers to the enjoyment of equal access to all their rights.<sup>48</sup> The relationship between this type of barrier and a person's health status justifies the use of the social model of disability as a relevant approach to assess the scope of some of the rights involved in this case. Thus, this Court has considered that as part of the evolution of the concept of disability, the social model of disability understands disability as the result of the interaction between the functional characteristics of a person and the barriers in his or her surroundings. Therefore, disability is not defined exclusively by the presence of a physical, mental, intellectual or sensory impairment, but also interacts with social barriers or limitations that prevent persons from exercising their rights effectively.<sup>49</sup>

40. Thus, living with diabetes, as in the case of Mrs. Chinchilla at the COF, is not *per se* a situation of disability.<sup>50</sup> However, the absence of records on her health condition and on the treatment provided since her admission to the COF, the lack of guarantees to adequately

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<sup>46</sup> Additional Protocol to the American Convention on Economic, Social and Cultural Rights, Article 10.2.d and International Covenant on Economic, Social and Cultural Rights Article 12.2.c.

<sup>47</sup> *Cf. Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016, Series C No. 312, para. 188.

<sup>48</sup> *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 236.

<sup>49</sup> *Case Gonzales Lluy et al. V. Ecuador. Preliminary objections, Merits, Reparations and Costs.* Judgment of September 1, 2015. Series C No. 298, para. 237.

<sup>50</sup> Recently, in the *Case of Gonzales Lluy* the Court considered that a girl living with HIV does not *per se* constitute a situation of disability. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 238.

exercise her right to health through adequate and regular medical care, the lack of treatment for her ailments which aggravated her health condition, putting at her at risk of suffering a serious, chronic and ultimately fatal<sup>51</sup> disease, led to a physical impairment that translated into a disability. Thus, in some circumstances, the attitudinal and physical barriers faced by a person deprived of liberty can expose him or her to a situation of disability.

### **III. RIGHT TO HEALTH OF PERSONS WITH DISABILITIES DEPRIVED OF THEIR LIBERTY: ACCESSIBILITY AND REASONABLE ACCOMODATION IN PRISON CONTEXTS**

41. In the case of Mrs. Chinchilla, the Medical Services Coordinator of the General Directorate of the Prison System reported that the prison had medication to treat infectious problems, as well as oral medications to treat diabetes, osteomyelitis and arterial hypertension. However, the Coordinator added that Mrs. Chinchilla required subcutaneous insulin for her diabetes, which was the cause of all the metabolic problems that she suffered, including chronic renal insufficiency, for which the prison did not have adequate equipment to provide care. For example, on November 28, 2003, Mrs. Chinchilla requested permission to attend a medical appointment, but the judge decided on December 1, 2003, that she should receive medical treatment for her diabetes symptoms within the prison. Consequently, as a result of the evolution of her diabetic disease from 2002, Mrs. Chinchilla had to have a leg amputated, which impaired her mobility. This created a situation of disability resulting from various complications that considerably diminished her quality of life, since she faced a number of barriers in the prison, given that she had to move around in a wheelchair.<sup>52</sup> It should also be recalled that, as a result of the poor treatment of her diabetes, Mrs. Chinchilla gradually lost her sight.

42. Regarding the practical facilities and procedures that Mrs. Chinchilla had to follow to be allowed to leave the COF to attend medical appointments in hospitals, the Judgment noted numerous difficulties in terms of the accessibility and availability of the means of transportation and the time available to the policemen who guarded her. For example, it was necessary for the COF guards to carry her and lift her with some difficulty into a “pick up” truck, which did not have facilities to transport a person in a wheelchair. Moreover, after the amputation of her leg, instead of making this procedure more flexible, the judge insisted that in future all requests to attend appointments should be submitted at least eight days in advance, otherwise they would be denied. It is clear, then, that the procedures established for outpatient appointments in hospitals were not sufficiently flexible to permit effective and timely medical treatment, particularly in cases of emergency.<sup>53</sup>

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<sup>51</sup> Cf. *Case Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, para. 199.

<sup>52</sup> Cf. *Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, paras. 87, 140 and 201.

<sup>53</sup> Cf. *Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, paras. 82, 197, 199, 218 and 240.



43. The dispute in this second moment or phase related to the impairment of the victim's rights, is framed in two ways: on the one hand, poor accessibility within the COF in terms of movement inside her cell and around the prison area and, on the other, the lack of reasonable accommodation for her transfer to hospital to attend medical appointments, which was further exacerbated by Mrs. Chinchilla's diabetes.

44. This Court has considered in previous cases that persons with disabilities are often subject to discrimination because of their condition; therefore, States must adopt legal, social, labor and any other type of measures to eliminate all forms of discrimination associated with disabilities, and to promote the full integration of such persons into society.<sup>54</sup>

45. It is important to note that any person in a vulnerable situation is entitled to special protection, given that the State has a special duty to satisfy the general obligations to respect and guarantee human rights. Thus, it is not sufficient for States to refrain from violating rights; it is also imperative that they adopt affirmative measures, to be determined according to the particular protection needs of the subject of rights, whether on account of his personal condition or specific circumstances, such as disability. Moreover, States have an obligation to promote the inclusion of persons with disabilities through equality of conditions, opportunities and participation in all spheres of society to ensure that the limitations described are removed.<sup>55</sup>

46. In this sense, the Judgment issued by the Inter-American Court has determined that the obligation to adopt affirmative measures in favor of persons with disabilities is also applicable in the context of prisons and to persons with disabilities deprived of their liberty. Indeed, given the State's special role as guarantor of the rights of persons subject to its custody, this obligation to adopt affirmative measures is reinforced. In this regard, the social model based on human rights must also have an impact on persons who are physically confined within prisons; therefore, the facilities and their functionality within those detention centers should be designed and planned based on an approach to disability that ensures accessibility and the possibility of providing reasonable accommodation, as positive measures to guarantee the rights of persons with disabilities who are serving a custodial sentence.

47. In relation to the right to health of persons with disabilities, the CRPD requires States Parties to recognize that disabled persons have the right to the highest attainable standard of health without discrimination for reasons of disability. In this sense, the States must adopt the pertinent measures to ensure that persons with disabilities have access to health services, taking into account issues of gender, including health rehabilitation programs. Furthermore, they must 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.<sup>56</sup> As to the rights of persons with disabilities who are

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<sup>54</sup> *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 105 and *Case of Furlan and Family v. Argentina*. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2012. Series C No. 246, para. 135.

<sup>55</sup> *Case of Furlan and Family v. Argentina*. Preliminary objections, merits, reparations and costs. Judgment of August 31, 2012. Series C No. 246, para. 134

<sup>56</sup> Convention on the Rights of Persons with Disabilities, Article 25 and 25.b).

deprived of their liberty, Article 14(2) of the CRPD establishes that States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees [...] in compliance with the objectives and principles of the [...] Convention, including by provision of reasonable accommodation.<sup>57</sup>

48. Previously, in a case related to the confinement of a person with mental disabilities, the Inter-American Court ruled on the internment of Mr. Damião Ximenes Lopes for psychiatric treatment at the *Casa de Reposo Guararapes*, a private care center that operated within the Brazilian public health system. In this case, the Court considered that States must ensure the provision of effective health care services to persons with mental disabilities; this duty entails the obligation of the State to ensure access to basic health services to all persons.<sup>58</sup> As to basic care and dignified conditions of incarceration, the Court considered that the place and the physical conditions in which treatment is provided must respect a person's dignity, pursuant to Principle 13 of the *United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*. The Inter-American Court considered that the precarious operating conditions of *Casa de Reposo Guararapes*, both in terms of the general conditions of the place and the medical care provided therein, were far from being adequate to administer decent health treatment and were in and of themselves incompatible with the appropriate protection of personal integrity and life, particularly as they affected persons who were extremely vulnerable due to their mental illness.<sup>59</sup>

49. Mrs. Chinchilla Sandoval's situation is totally different from the cases heard until now by this Court involving persons with disabilities and persons deprived of liberty. Accordingly, in the instant case, the Inter-American Court concluded that:

*219. [...] it is possible to conclude that the lack of accessibility and reasonable accommodation, placed [Mrs. Chinchilla Sandoval] in a situation of discrimination and conditions of detention incompatible with the right of all persons with disabilities to have their right to physical and mental integrity respected, on an equal basis with others [...].*<sup>60</sup> (Underlining added)

50. It has been proven that the COF did not have adequate facilities to ensure that Mrs. Chinchilla could move around within the prison. For example, there was not enough space for the victim to get around in her wheelchair, or for the wheelchair itself to enter into the shower, so that the family needed to install handrails inside to prevent her from falling

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<sup>57</sup> Convention on the Rights of Persons with Disabilities, Article 14.2.

<sup>58</sup> *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 128.

<sup>59</sup> *Case Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, paras. 131 and 132. It should be noted that the situation contextualized in the case of Mr. Ximenes Lopes differs from the one examined in the instant case. However, based on the precedent in the case of Ximenes Lopes, the Court has been concerned about how and under what conditions medical services were being provided to persons with disabilities; thus, it considers that, in the case of prisons, the State must fulfill its obligations of regulation, supervision and inspection. Also, it should be emphasized that this case was decided prior to the adoption of the IACHR Principles and Best Practices (2008) and the CRPD (2006).

<sup>60</sup> Cf. *Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, para. 219.

down. In addition, her relatives said they had to pay a quota so that she could remain in the maternal area, where her movement was also restricted.<sup>61</sup>

51. In addition to the foregoing, the reasonable accommodation that should have been made to ensure the victim's rights, not only affected the limited physical space that constrained Mrs. Chinchilla's movement; it also had an impact on her enjoyment of the right to health, both within and outside the prison facilities.<sup>62</sup> Therefore it is important to draw a distinction between general accessibility from the perspective of disability, and reasonable accommodation to which a person with disability has the right to make effective their civil, political, economic, social and cultural rights, on an equal basis with others.

52. Accessibility has taken root so firmly in international human rights law that it may even be considered as a right *per se*.<sup>63</sup> In General Comment No. 2, of 2014, the RPD Committee considers that accessibility is a vital precondition for persons with disabilities to live independently and participate fully and equally in society.<sup>64</sup> Accessibility should be viewed as a disability-specific reaffirmation of the social aspect of the right of access,<sup>65</sup> given that persons with disabilities face technical and environmental—in most cases, human-built environmental - barriers related to social and cultural development as well as customs.<sup>66</sup>

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<sup>61</sup> Cf. *Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, para. 217.

<sup>62</sup> The relationship between persons with disabilities and access to the right to health is established in General Comment No. 5, concerning Persons with Disabilities, and in General Comment No. 14, on *the Right to the Highest Attainable Standard of Health*, both of the Committee on Economic, Social and Cultural Rights, which in combination state that the right to physical and mental health of persons with disabilities also implies the right to have access to medical and social services. However, at international level there are few precedents concerning reasonable accommodation, because it is a relatively new concept in relation to the right to health, or medical treatment, which must be adopted in prisons for people with disabilities. In general, the discussion on the right to health of persons with disabilities has focused on the health conditions of persons with mental disabilities. Cf. Committee on Economic, Social and Cultural Rights, *General Comment 14, The Right to the Highest Attainable Standard of Health* (Article 12 of the International Covenant on Economic, Social and Cultural Rights), (Twenty-second Session, 2000), U.N. Doc. E/C.12/2000/4 (2000), para. 26. Also Committee on Economic, Social and Cultural Rights, *General Comment 5, Persons with Disabilities* (Eleventh Session, 1994), U.N. Doc. E/C.12/1994/13 (1994), para. 34.

<sup>63</sup> Accessibility is one of the principles that underpins the Convention on the Rights of Persons with Disabilities (Art. 3 (f)). Historically, the movement in support of persons with disabilities has argued that access to the physical environment and public transport is a precondition for freedom of movement, as guaranteed under Article 13 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Civil and Political Rights. Similarly, access to information and communication is seen as a precondition for freedom of opinion and expression, as guaranteed under Article 19 of the Universal Declaration of Human Rights and Article 19, paragraph 2, of the International Covenant on Civil and Political Rights. Article 25 (c) of the International Covenant on Civil and Political Rights enshrines the right of every citizen to have access, on general terms of equality, to public service in his or her country. The International Convention on the Elimination of All Forms of Racial Discrimination, guarantees to everyone the right of access to any place or service intended for public use, such as transportation, hotels, restaurants, cafes, theaters and parks (Art. 5 f)). Thus, a precedent has been set in the international human rights legal framework. Cf. Committee on the Rights of Persons with Disabilities, *General Comment No. 2, Article 9: Accessibility*, CRPD/C/GC/2, May 22, 2014, paras. 1, 2 and 3.

<sup>64</sup> Cf. Committee on the Rights of Persons with Disabilities, *General Comment No. 2, Article 9: Accessibility*, CRPD/C/GC/2, May 22, 2014, para. 1.

<sup>65</sup> Cf. Committee on the Rights of Persons with Disabilities, *General Comment No. 2, Article 9: Accessibility*, CRPD/C/GC/2, May 22, 2014, para. 4.

However, accessibility of itself, is not always sufficient to ensure the rights of persons with disabilities; reasonable accommodation is also necessary.

53. According to the CRPD, reasonable accommodation means necessary and appropriate modifications and adjustments that do not impose 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>67</sup> Thus, whereas accessibility, in general terms, is aimed at ensuring access to the majority of persons with disabilities (an *ex ante* obligation), reasonable accommodation is required in those situations in which an environment, already accessible, must be adapted to the particular needs of a specific individual.<sup>68</sup> Accordingly, the duty to provide reasonable accommodation is configured as an *ex nunc* obligation, which means that it is enforceable from the moment that an individual with an impairment needs it in a given situation.<sup>69</sup>

54. While the CRPD includes accessibility as a fundamental principle and as a vital precondition for the effective and equal enjoyment of civil, political, economic, social and cultural rights by persons with disabilities,<sup>70</sup> by means of universal design, *reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is assured*, taking the dignity, autonomy and choices of the individual into account. Thus, a person with a rare impairment might ask for accommodation that falls outside the scope of any accessibility standard.<sup>71</sup>

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<sup>66</sup> Cf. Committee on the Rights of Persons with Disabilities, *General Comment No. 2, Article 9: Accessibility*, CRPD/C/GC/2, May 22, 2014, para. 3.

<sup>67</sup> Convention on the Rights of Persons with Disabilities, Article 2.

<sup>68</sup> Cf. Committee on the Rights of Persons with Disabilities, *General Comment No. 2, Article 9: Accessibility*, CRPD/C/GC/2, May 22, 2014, paras. 25 and 26.

<sup>69</sup> Cf. Committee on the Rights of Persons with Disabilities, *General Comment No. 2, Article 9: Accessibility*, CRPD/C/GC/2, May 22, 2014, para. 26.

<sup>70</sup> Cf. Committee on the Rights of Persons with Disabilities, *General Comment No. 2, Article 9: Accessibility*, CRPD/C/GC/2, May 22, 2014, para. 4.

<sup>71</sup> Cf. Committee on the Rights of Persons with Disabilities, *General Comment No. 2, Article 9: Accessibility*, CRPD/C/GC/2, May 22, 2014, para. 26.

55. In the context of prisons<sup>72</sup> in which persons with disabilities are deprived of their liberty, reasonable accommodation not only involves adapting the physical environment<sup>73</sup> as a general obligation (accessibility) for the entire prison population affected by physical constraints, as in the present case, but also addressing particular cases, with specific measures designed to make effective the rights of persons with disabilities enshrined in international human rights law, including all measures aimed at guaranteeing the right to health.

56. Regarding the reasonable accommodation required to ensure Mrs. Chinchilla's right to health, the Inter-American Court considered that the State had the obligation to ensure accessibility to persons with disabilities deprived of their liberty, in accordance with the principle of non-discrimination and the interrelated elements for the protection of health, namely, availability, accessibility, acceptability and quality, including reasonable accommodation in the prison, to enable her to live with the greatest independence possible and in equality of conditions with other persons deprived of their liberty.<sup>74</sup>

57. In this regard, I consider it very important to distinguish between *accessibility for persons with disabilities* (*supra*. paras. 52-54) and the *accessibility of the right to health to a person with disabilities*. While the first refers to a more general sense of adaptability in the terms of the CRPD,<sup>75</sup> the second implies, in specific cases, the implementation of reasonable accommodation that would enable a person affected by a physical, mental, intellectual or sensory impairment, to enjoy and make effective their right to health. This, in the terms of General Comment No. 14 of the ESCR Committee, is related to accessibility based on non-discrimination, since health care goods and services must be accessible *de facto* and *de iure* to the most vulnerable and marginalized sectors of the community, without

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<sup>72</sup> In its analysis of Article 9, paragraph 1, the Committee on the Rights of Persons with Disabilities, in General Comment No. 2, requires States Parties to identify and eliminate obstacles and barriers to accessibility to, *inter alia*: a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces and b) Information, communications and other services, including electronic services and emergency services. Other indoor and outdoor facilities mentioned above should include, *inter alia* ... [prisons]. *Cf.* Committee on the Rights of Persons with Disabilities, *General Comment No. 2, Article 9: Accessibility*, CRPD/C/GC/2, May 22, 2014, para. 17.

<sup>73</sup> On the physical aspects of accessibility, the Inter-American Convention for the Elimination of All Forms of Discrimination Against Persons with Disabilities establishes that to achieve the objectives of the Convention, the States Parties undertake to adopt measures to ensure that new buildings, vehicles and facilities constructed or manufactured within their respective territories facilitate transportation, communications, and access by persons with disabilities. And, in addition, all measures to eliminate, to the extent possible, architectural, transportation and communication obstacles to facilitate access and use by persons with disabilities (Article III .1 b and c). For its part the CRPD, recognizes the importance of ensuring accessibility to the physical environment by adopting measures to ensure access to buildings, public roads, transportation and other outside facilities such as schools, housing, medical facilities and workplaces. (Article. 9.1.a)

<sup>74</sup> *Cf. Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016, Series C No. 312, para. 215.

<sup>75</sup> The distinction between accessibility according to the CRPD, and the accessibility of the right to health according to the ESCR Committee, did not eliminate the State's obligation to create goods, buildings and services of an accessible nature in advance. In other words, in first instance, the States must provide accessible transportation even before a person with disabilities is deprived of liberty, as in this particular case. However, when this measure has not been adopted in advance, the adaptation of the means of transport for ambulatory treatment, constitutes a specific situation, since not all disabled persons deprived of liberty would need to travel outside the detention center to receive ambulatory treatment.

discrimination for any of the prohibited reasons and, in addition, must ensure physical accessibility through adequate access to buildings for persons with disabilities.<sup>76</sup> In the case of prisons, it also implies physical accessibility to the means of transport covering the route from the prison to the hospital or medical center where the health service is to be provided.<sup>77</sup>

58. With regard to the type of reasonable accommodation that should be provided to persons with disabilities in prisons to ensure their right to health, the European Court of Human Rights has indicated that part of a State's obligations as guarantor of the integrity of persons under its care, may include the provision of prosthetic devices,<sup>78</sup> appropriate orthopedic material<sup>79</sup> or special diets.<sup>80</sup> In the case of Mrs. Chinchilla, such reasonable accommodation should also have been observed by the State of Guatemala to ensure her right to health, beyond physical accessibility within the COF facilities.

59. Another of the adjustments to be made, considering the specific vulnerability of persons with disabilities, relates to the modification of procedural matters. In order to ensure the reasonableness of the waiting period in proceedings that involve vulnerable persons, the European Court of Human Rights has stated that the authorities must act with exceptional diligence.<sup>81</sup> In this regard, the judicial authorities have a duty to exercise exceptional diligence in a proceeding involving a person whose specific condition requires immediate attention, for example someone with HIV/AIDS, since what is at stake is of crucial importance (for their state of health).<sup>82</sup> Likewise, the European Court has also

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<sup>76</sup> Committee on Economic, Social and Cultural Rights, General Comment 14, *The Right to the Highest Attainable Standard of Health* (Article 12 of the International Covenant on Economic, Social and Cultural Rights), (Twenty-second Session, 2000), U.N. Doc. E/C.12/2000/4 (2000), para. 12.

<sup>77</sup> The Constitutional Court of Colombia protects the right to health of those subject to special constitutional protection, such as persons with disabilities, including persons deprived of liberty. Under the Principle of integrality of the right to health, the Constitutional Court has indicated that although transport *per se* is not a medical service, in certain circumstances, access to medical services depends upon the patient being transferred to a place where he can receive medical care. Thus, in the context of the right to health, everyone is entitled to have the barriers and obstacles removed that prevent a person from having access to health services they need. *Cf. T-760-08*, 31 July 2008. Magistrate José Manuel Cepeda Espinosa, Section 4.5.1 and 4.4.6.2. Assuming that reasonable adjustments are made to guarantee a person with disabilities deprived of liberty access to the right to health, the transportation provided to cover the route between the prison and the place that provides the medical service must be adapted to the needs of the person who will use that transport. For its part, the ECHR has also made reference to transportation as a means to ensure medical care for persons deprived of liberty. See: *Cf. ECHR, Case of Tarariyeva v. Russia*, No. 4353/03, Judgment of December 14, 2012, paras. 112-117 and, more recently, *Case of Thopekin v. Russia*, No. 78774/13, Judgment of May 10, 2016.

<sup>78</sup> See: ECHR, *Case of Zarzycki v. Poland*, No. 15351/03, Judgment of March 12, 2013, Fourth Section.

<sup>79</sup> See: ECHR, *Case of Vasilvey v. Russia*, No. 28370/5, Judgment of January 10, 2012, First Section.

<sup>80</sup> See: ECHR, *Case Fane Ciobanu v. Romania*, No. 27240/03, Judgment of October 11, 2011, Third Section.

<sup>81</sup> *Case of Furlan and Family v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 195; and ECHR *Case H. v. United Kingdom*, No. 9580/81, Judgment of July 8, 1987, para. 85.

<sup>82</sup> ECHR, *Case of H. v. the United Kingdom*, (No. 9580/81), Judgment of July 8, 1987, para. 85; *Case of X. v. France*, (No. 18020/91), Judgment of March 31, 1992, para. 47. Similarly, see *Case of A. et al. v. Denmark*, (No. 20826/92), Judgment of February 8, 1996), para. 78.

considered that the advanced age of the petitioners required the authorities to exercise special diligence for the resolution of their proceedings.<sup>83</sup> For its part, this Court has considered that when vulnerable persons are involved, as in the case of a person with disabilities, it is imperative to take the pertinent actions, such as ordering the authorities to give priority to addressing and settling such cases, in order to avoid delays in their processing so as to ensure a prompt decision and execution thereof.<sup>84</sup>

60. Thus, it is pertinent to recall that any procedure initiated by a vulnerable person, including requests for permission to receive medical treatment, implies a reinforced obligation to respect and ensure his or her rights. This reinforced obligation particularly affects all judicial authorities responsible for, or with knowledge of, procedures related to the health condition of a person with disabilities. Therefore, in cases such as those considered by the judges responsible for the enforcement of sentences, it is essential that, in consideration of the right to judicial protection, they bear in mind the specificities related to the vulnerability of persons who have recourse to them, in order to avoid perpetrating further human rights violations and addressing those that arise. It is clear that these standards should have been observed and could have served to prevent the health problems suffered by Mrs. Chinchilla, since, in addition to being a disabled woman, who could potentially reach an advanced age, she was a person deprived of liberty.

61. It is for this reason that, for example, to require a person to submit a request to attend a medical appointment eight days in advance or otherwise it would be denied, without taking into account that her advanced clinical symptoms showed a deterioration in her health, showed a failure to act with exceptional diligence. It is also important to stress that it was demonstrated that the COF did not have the infrastructure or the specialized medical care to provide Mrs. Chinchilla with adequate living conditions and appropriate rehabilitation. To the foregoing we should add that there is a direct and significant link between disability, on the one hand, and poverty and social exclusion, on the other, even within prisons.<sup>85</sup>

62. A total absence of accessibility or a deficient policy of accessibility to public spaces and services for persons with physical or mental impairments implies a violation of the principle of equality and non-discrimination. However, to assume that by adopting certain measures of accessibility without necessarily studying the specific situation of the disabled person, and their personal needs to ensure effective enjoyment of a right, exacerbates the situation of inequality and discrimination.

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<sup>83</sup> ECHR, *Case of Jablonská v. Poland*, (No.60225/00), Judgment of March 9, 2004. Final, June 9, 2004, para. 43 and *Case of Codarcea v. Romania*, (No. 31675/04), Judgment of June 2, 2009. Final, September 2, 2009, para. 89. Likewise, *Case of Styranowski v. Poland*, (No. 28616/95), Judgment of October 30, 1998, para. 57 and *Case of Krzak v. Poland*, (No. 51515/99), Judgment of April 6, 2004. Final, July 7, 2004, para. 42.

<sup>84</sup> *Case of Furlan and Family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 196.

<sup>85</sup> Cf. *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149 para. 104 and *Case of Furlan and Family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 196, para. 201.

63. In view of the fact that Mrs. Chinchilla suffered a progressive deterioration of her health due to her diabetes, the State should have taken stronger measures to ensure that her health did not deteriorate, bearing in mind that, after the amputation of her leg, she faced physical limitations. Thus, for example, the State had a duty to ensure that the procedure for authorizing medical appointments was not complex or lengthy. For this reason, the requirement to submit a request eight days in advance of each appointment was disproportionate, given her situation of vulnerability, especially in emergency situations. In addition, the vehicle that would have taken her to hospital to receive medical service should have been adapted to her needs.

64. The fact that a person is in the custody of the State serving a custodial sentence supposes a clear disadvantage for that person *vis à vis* the punitive power of the State; if to this is added the poor medical care that caused Mrs. Chinchilla disabilities, which worsened as the years passed, we observe the intersection of two or more categories protected by the American Convention in Article 1(1). In this case, the State's actions and omissions produced specific discriminatory impacts, effects that could clearly have been prevented by adapting its obligations to the notion of the right to health.

#### **IV. THE *IURA NOVIT CURIA* PRINCIPLE AND THE DIRECT JUSTICIABILITY OF THE RIGHT TO HEALTH IN THE INSTANT CASE**

65. I have previously expressed my opinion on the powers of this International Court to apply the *iura novit curia* principle in matters related to the right to health. In the case that concerns us, the Inter-American Court declared the State's international responsibility for: a) the lack of adequate medical care for Mrs. Chinchilla Sandoval's diabetes and other ailments, during the time she was deprived of her liberty; and b) the failure to make reasonable accommodation so that Mrs. Chinchilla could have adequate access the enjoyment of her right to health, and be able to move around within the COF's facilities. Accordingly, there are statements that directly address the right to health in the following terms:

a) in relation to the violation of Articles 4 and 5 of the Convention on the State's duty to provide adequate treatment to the victim for her diabetes and related ailments after she was deprived of her liberty, the Court considered that the State had not fulfilled its international obligations to guarantee the rights to personal integrity and to life given that the appropriate diet and medications were not provided regularly by the State and the procedures established for hospital outpatient appointments were not sufficiently flexible to allow for timely medical treatment.<sup>86</sup>

b) regarding the violation of Article 5 in relation to Article 1(1) on the State's response to Mrs. Chinchilla's disability, the Court considered that the rights of persons with disabilities were violated because the State did not ensure accessibility to persons with disabilities deprived of their liberty in accordance with the principle of non-discrimination and the interrelated elements for the protection of health (availability, accessibility, acceptability and quality), including the provision of reasonable accommodation.<sup>87</sup>

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<sup>86</sup> Cf. *Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, para. 199 and 200.



66. It is important to note the analysis made in the Judgment regarding the manner in which Mrs. Chinchilla Sandoval's right to health was affected by the medical attention she received, given that the Inter-American Court directly links the study of the right to health with Articles 4 and 5 of the American Convention. Thus, the Judgment affirmed that the rights to life and personal integrity are directly linked with human health care. It then specified that, "based on the principle of non-discrimination, the right to life of persons deprived of liberty also requires the State to ensure their physical and mental health, specifically through the provision of regular medical examinations and, when required, of medical treatment that is adequate, timely, and, where appropriate, specialized to meet the special care needs of the detained persons in question."<sup>88</sup>

67. However, as I have stated on numerous occasions, I consider that the right to health should have been addressed separately, based on the proven facts and the effects suffered by the victim owing to poor medical care, from the moment of her incarceration in the COF, until the time of her death. In this regard, from my perspective, since the victim's right to health is directly involved, the Court could have addressed the implications of these effects, which could even have led it to declare a violation of the obligation to guarantee the right to health under Article 26 of the American Convention.

68. The fact that the direct violation of this social right was not claimed by the Inter-American Commission, or by the representatives of the victims, does not represent an obstacle to the analysis of whether there was a violation of the obligation to guarantee the right to health derived from Article 26 of the American Convention, in relation to Article 1(1) of the Pact of San José. As I pointed out in the *Case of Suárez Peralta (2013)*:

92. [...]. The absence of the explicit citing of the violation of a right or freedom does not prevent the Inter-American Court from analyzing it based on the general principle of law *iura novit curia*, "which international case law has used repeatedly, (understanding it) in the sense that the judge has the power and even the obligation to apply the pertinent legal provisions in a litigation, even when the parties do not cite it expressly."

[...]

94. There is no reason not to examine the possible violation of the guarantee of a social right, derived from Article 26 in relation to Article 1(1) of the Pact of San José, even though it was not expressly cited by one of the parties. It is the obligation of the Inter-American Court to apply the *iura novit curia* principle — and the preceding paragraph reveals that it constitutes the Inter-American Court's practice with regard to civil rights — if, based on the factual framework of the case and the proven facts, clear implications can be observed for the right to health, as in this case, that arise from the impact of medical malpractice with the State's responsibility on the health of [one of the victims ...].

[...]

96. Accordingly, it is valid for the Inter-American Court, in application of the *iura novit curia* principle and based on the factual framework of the case, to be able to analyze, directly and autonomously, the guarantee of the right to health — and not only in connection with the civil rights that it declared violated — in the understanding that the right to health is one of the

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<sup>87</sup> Cf. *Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, para. 215.

<sup>88</sup> Cf. *Case of Chinchilla Sandoval v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016, Series C No. 312, paras. 170 and 171.

justiciable economic, social and cultural rights that are derived from Article 26 of the American Convention, in relation to the general obligations of Article 1(1) of the Pact of San José.

## V. CONCLUSIONS

69. The case of Mrs. María Inés Chinchilla is, in many aspects, important for the development of the case law of the Inter-American Court, being the first occasion on which this Court develops the concept of accessibility of a disabled person, alluding to *reasonable accommodation* for persons with disabilities.<sup>89</sup> Furthermore, notwithstanding its vast case law on prison conditions and the obligations of prevention, this is also the first time that the Inter-American Court has had to rule on such conditions in relation to a person with disabilities. However, as I have stated in the introduction to this opinion, the absent topic - and the one that is undoubtedly the source of the violations in this case - has been the issue related to the lack of adequate medical care provided to the victim, before and after she had her leg amputated, and until her death in 2004.

70. While I concur with the view held by the Inter-American Court in previous cases, that the right to life and to personal integrity are both directly and immediately associated with human health care, I consider that it is not appropriate to continue subsuming a right that is of vital importance in the region, such as the “right to health.” Although the Judgment does not explicitly use the expression *right to health*<sup>90</sup> (see *supra*. para. 7 of this opinion), health care is one of the facets of this right which, notwithstanding an express enunciation, constitutes an autonomous violation. This is particularly true, if we consider that this is not the first time that this Court examines a case directly related to the right to health and in which it has ruled—indirectly— on this right.<sup>91</sup> In the case at hand, the analysis of the “right to health” as an autonomous right would have allowed for a more in-depth exploration of issues related to the conditions in which medical services should be provided when a person is deprived of liberty, especially a person with disabilities.

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<sup>89</sup> It is not surprising, then, that the greatest development in case law on the accessibility of the right to health for persons with disabilities is based, in great measure, on the old medical model and not on the human rights model, as established by the CRPD. For example, in its case law, the European Court of Human Rights initially considered the *severity of the disability* and the negation of facilities adapted to the *special needs* of persons with disabilities deprived of their liberty, instead of the right to accessibility and the provision of reasonable accommodation to determine the existence of poor treatment. However, in a recent decision the European Court invoked the CRPD as an interpretative source and expressly found a violation of personal dignity based on the inaccessibility of the facilities and the negation of reasonable adjustments. The emergence of the CRPD in the universal sphere has, to a large extent, ensured that persons with disabilities go from being subjects of assistance to being subjects of internationally protected rights with a human rights focus. In this regard see: the clinical model based on the severity of the disability: ECHR, *Case Price v. United Kingdom*, No. 33394/94, Judgment of June 10, 2001, para. 7 and 8. On the new concept of the human rights model adopted by the ECHR see *Case of Semikhostov v. Russia*, No. 2689/12, Judgment of February 6, 2014, para. 83. On the application of the CRPD human rights model for persons with disabilities deprived of liberty: *Case X v. Argentina*, No. 8/2012, UN, Doc. CRPD/C/11/D/8/2012, April 11, 2014.

<sup>90</sup> As has occurred in other recent cases, such as *Suárez Peralta* (2013) and *González Lluy* (2015), I consider that the failure to mention the “right to health” in this Judgment is a backward step in its case law.

<sup>91</sup> In relation to economic, social, cultural and environmental rights, the specific case law on the “right to health” is the one that has had the strongest presence in nearly 37 years of jurisdictional action by the Inter-American Court. The fact that the “right to health” is not expressly mentioned in the present Judgment, contrasts with recent cases, such as *Suárez Peralta v. Ecuador* (2013) and *Gonzales Lluy v. Ecuador* (2015).

71. Without denying the progress achieved to date by the Inter-American Court in the indirect protection of economic, social, cultural and environmental rights and in connection with other civil and political rights—which has been the well-known practice of this Inter-American Court—as I have stated in several previous judgments,<sup>92</sup> in my view, this approach does not accord full efficacy and effectiveness to those rights, altering their essence. Moreover, it does not help to clarify the State's obligations in this regard and, ultimately, results in overlaps between different rights, which leads to regulatory confusion at a time when we can see evident progress in the domestic sphere and in international human rights law.

72. From that perspective, this Judgment is of the utmost importance. In the first place, persons deprived of liberty have the right to serve their sentence in conditions that ensure dignity in confinement; this applies not only to the physical conditions of the place, but also means that States are required to adopt affirmative measures to guarantee a wide range of economic, social and cultural rights that, unfortunately, have not been prioritized. Regarding the "*right to health*" of persons deprived of liberty, adequate and timely medical attention plays a vital role in preventing an even greater adverse impact on the conditions of detention. Despite the foregoing, the standards issued, as well as the limitations on the right to health, have a direct impact on persons deprived of their liberty who, owing to circumstances have suffered some form of physical impairment upon admission to prison, or who, owing to internal or external factors, develop a disability in the course of their confinement.

73. The situation of María Inés Chinchilla is one of many such cases that exist in our Latin American region and is a clear example of how disabled persons who are deprived of their liberty are often denied the most fundamental human rights. The adoption of measures of accessibility and reasonable accommodation alluded to in this Judgment by the Inter-American Court, is a way to claim and make visible the situation of individuals who are serving a sentence and are affected by some form of disability.

74. In international case law on health provisions for persons with disabilities detained in prison, the adoption of reasonable accommodation measures has been the focus of special attention in recent years. Nevertheless, in cases where, through failure to ensure a right as essential as the right to health, an individual finds himself facing a situation of physical limitation caused by a disease, this could result in a double violation: on the one hand, a violation of the obligation to ensure that the disabled person continues to enjoy the highest attainable standard of health and, on the other, the failure to guarantee the right to health which resulted in that disability.

75. For persons deprived of liberty with disabilities caused by diseases that can be treated and controlled, the right to health implies a reinforced obligation of protection; not only in terms of guaranteeing accessibility in buildings, as required by the CRPD, but also ensuring the design of reasonable accommodation to guarantee the enjoyment of the right to health in all its dimensions.

76. In this regard, guaranteeing the right to health has, in essence, a preventive role, ensuring that a person's living conditions do not deteriorate. For example, General Comment No. 14 of the ESCR Committee emphasizes that the right to health care includes the creation

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<sup>92</sup> See my Concurring Opinions in the *Cases of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013, Series C No. 262; and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C. No. 298.

of a system of urgent medical care in cases that endanger health,<sup>93</sup> even within detention centers. In these situations, the creation of protocols and actions for imparting justice are of vital importance, especially for vulnerable groups, such as persons with disabilities, whose cases require exceptional diligence on the part of the authorities.<sup>94</sup>

77. In sum, the right to health of persons deprived of liberty – with or without a disability – is a right that can (and should) be autonomously enforceable by this Court through a systematic and evolving interpretation of Article 26 of the American Convention,<sup>95</sup> in relation to Articles 1, 2 and 29 thereof,<sup>96</sup> also taking into account in this specific case that Guatemala recognizes that right in Articles 93 and 94 of its Constitution.<sup>97</sup> This vision would have afforded an opportunity to establish clearer standards regarding accessibility, reasonable accommodation and protection of the right to health of persons with disabilities deprived of their liberty.

78. I am firmly convinced that a step forward in that direction—which I trust will occur very soon—, would allow us to establish and configure specific obligations for the States, arising from the very nature of this right. By guaranteeing the right to health of persons deprived of liberty, the Court would prevent, in other similar cases, the progressive deterioration of health from illnesses that, ultimately, could result in the death of persons who are serving a custodial sentence in our region.

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<sup>93</sup> Committee on Economic, Social and Cultural Rights, *General Comment 14, The Right to the Highest Attainable Standard of Health* (Article 12 of the International Covenant on Economic, Social and Cultural Rights), (Twenty-second Session, 2000), U.N. Doc. E/C.12/2000/4 (2000), para. 16.

<sup>94</sup> For example, the Supreme Court of Justice of Mexico has promulgated Action Protocols for those who impart justice in cases involving the rights of persons with disabilities. Cf. SCJN, *Protocolo de Actuación para quienes imparten justicia en casos que involucren derechos de personas con discapacidad*, Mexico, 2014. Available at: <https://www.scjn.gob.mx/libreria/paginas/Protocols.aspx>

<sup>95</sup> As we have held on other occasions, the Inter-American Court has full jurisdiction to examine violations of *all rights* recognized in the American Convention, including those derived from Article 26, which would imply a systematic interpretation of particular importance with Article 19(6) of the San Salvador Protocol. See this possible interpretation in our concurring opinion in the *Case of Suárez Peralta v. Ecuador* (2013), especially in paras. 1-72.

<sup>96</sup> In this regard, the Court has indicated that human rights treaties are living instruments, whose interpretation must accompany the evolution of the times and current living conditions. It has also held that these evolving interpretations are consistent with the general rules of treaty interpretation established in Article 29 of the American Convention, and in the Vienna Convention on the Law of Treaties. Cf. *The right to information on consular assistance in the context of the guarantees of due process*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para.114. Also, see *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 188.

<sup>97</sup> “Article 93. Right to Health. The *enjoyment of health is a fundamental right of the human being, without discrimination.*”

“Article 94. Obligations of the State, regarding health and social assistance. The State shall safeguard the health and social assistance of all inhabitants. Through its institutions, it shall implement actions of prevention, promotion, recovery, rehabilitation, coordination and other pertinent complementary actions, in order to ensure the most complete physical, mental and social well-being.”

Eduardo Ferrer Mac-Gregor Poisot  
Judge

Pablo Saavedra Alessandri  
Secretary