INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF SUÁREZ PERALTA *v.* ECUADOR

JUDGMENT OF MAY 21, 2013
(Preliminary objections, merits, reparations and costs)

In the case of *Suárez Peralta*,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:

Diego García-Sayán, President
Manuel E. Ventura Robles, Vice President
Alberto Pérez Pérez, Judge
Eduardo Vio Grossi, Judge
Roberto de Figueiredo Caldas, Judge
Humberto Sierra Porto, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

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

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention") and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court[1] (hereinafter "the Rules of Procedure"), delivers this Judgment, structured as follows:

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[1] Rules of Procedure of the Court approved at its eighty-fifth regular session held from November 16 to 28, 2009.

CASE OF SUÁREZ PERALTA *V.* ECUADOR

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On January 25, 2012, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Court (hereinafter "submission brief") the case of "Melba del Carmen Suárez Peralta" against the Republic of Ecuador (hereinafter "the State" or "Ecuador"), indicating that: (a) in July 2000, Melba del Carmen Suárez Peralta was operated on for appendicitis in the Minchala private clinic, and this caused her severe and permanent ailments; (b) the criminal proceedings opened in relation to these facts concluded inconclusively, owing to the lack of due diligence in the execution of the proceedings, which resulted in the declaration of the statute of limitations in 2005, more than five years after the court order to investigate the offense had been issued; (c) no real investigation was conducted into the main person accused, or into those possibly implicated with different degrees of responsibility; (d) the criminal proceedings were characterized by a lack of procedural activity *ex officio* and by minimum guarantees of due diligence for the presumed victim; (e) the absence of a response and the delay in expediting and processing the proceedings gave those eventually responsible the benefit of impunity, and (f) the decision on the request to fine the administrator of justice who intervened in the proceedings was not motivated.

2. *Proceedings before the Commission.* The proceedings before the Commission were as follows:

a) *Petition.* On February 23, 2006, Melba del Carmen Suárez Peralta and her representative, Jorge Sosa Meza, lodged the initial petition before the Commission;

b) *Admissibility Report.* On October 30, 2008, the Commission approved Admissibility Report No. 85/08;[2]

c) *Merits Report.* On July 20, 2011, the Commission approved Merits Report 75/11,[3] pursuant to Article 50 of the Convention (hereinafter also "the Merits Report" or "Report No. 75/11"), in which it reached a series of conclusions and made several recommendations to the State.

   a. *Conclusions.* – The Commission concluded that the State was responsible for violating the following rights recognized in the American Convention:

      i. "The right to a fair trial and to judicial protection, established in Articles 8(1) and 25(1) of the American Convention in relation to the general obligation to respect and ensure the rights established in Article 1(1) thereof, with respect to Melba del Carmen Suárez Peralta and her mother, Melba Peralta Mendoza."

   b. *Recommendations.* The Commission therefore made a series of recommendations to the State; namely that it:

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[2] In this report, the Commission declared the petition admissible with regard to the presumed violation of Articles 5(1), 8(1) and 25(1) of the Convention, in relation to Article 1(1) of this instrument. *Cf.* Admissibility Report No. 85/08, Case 12,683, Melba del Carmen Suárez Peralta, Ecuador, October 30, 2008 (file of proceedings before the Commission, folios 432 to 444). In this regard, on February 26, 2009, the Commission forwarded to the parties a *fe de errata* with regard to Report No. 85/08, which excluded the mention of the admissibility of Article 5(1) of the Convention.

[3] Merits Report No 75/11, Case 12,683, Melba del Carmen Suárez Peralta, Ecuador, July 20, 2011 (merits file, folios 8 to 38).

i. "Adopt the measures necessary for an effective investigation of the facts of the case at hand and to punish, within a reasonable time, the judicial officials whose actions led to the excessive delays in the pursuit of the criminal proceedings and the resultant denial of the victims' access to justice;

ii. Adopt the measures necessary to provide appropriate redress to Melba del Carmen Suárez Peralta and to her mother, Melba Peralta Mendoza, for the human rights violations identified in this report, including both pecuniary and non-pecuniary damages. Given the particular nature of the facts in this case, this redress must include payment of the expenses incurred by the victims in their pursuit of justice and an acknowledgement of international responsibility and public apology by the State;

iii. Adopt the measures necessary to provide the required medical care immediately and without charge, through its specialized health agencies, and at the place of residence of Ms. Suárez Peralta, including the medicines she requires based on her ailments;

iv. Adopt the measures necessary to ensure that the laws relating to the exercise of the medical profession are regulated and effectively implemented, in accordance with the relevant national and international standards, and

v. Adopt all the measures necessary to prevent similar incidents from occurring in the future, in compliance with the duties of prevention and of guaranteeing the rights enshrined in the American Convention."

d) *Notification to the State.* On July 26, 2011, the Merits Report was notified to the State, which was granted two months to provide information on compliance with the recommendations;

e) *Compliance Agreement.* On September 8, 2011, Johana Pesantez Benítez, Minister of Justice, Human Rights and Worship, and Melba del Carmen Suárez Peralta, signed a document entitled "Compliance Agreement," in order to ensure compliance with "the recommendations ordered by the Commission in Merits Report No. 75/11, Case 12,683, Melba del Carmen Suárez Peralta – Ecuador";

f) *Extension.* On October 24, 2011, the Commission granted the State a three-month extension to comply with the recommendations made in Report No. 75/11. On January 25, 2012, the State provided the Commission with information on compliance with some of the said recommendations (*infra* para. 79 to 81), and

g) *Submission to the Court.* On January 26, 2012, based on "the need to obtain justice for the victims, owing to the failure by the State of Ecuador to comply with the recommendations, as well as the serious health problems suffered by Melba del Carmen Suárez Peralta," the Commission submitted the case to the Court. The Commission appointed Commissioner Dinah Shelton and the Executive Secretary at the time, Santiago A. Canton, as its delegates before the Court, and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Tatiana Gos and Karin Mansel, Executive Secretariat lawyers, as legal advisers.

3. *Requests of the Inter-American Commission.* Based on the above, the Commission asked the Court to declare the international responsibility of the State for the violation of Articles 8(1) and 25(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Melba del Carmen Suárez Peralta, and her mother, Melba Peralta Mendoza. In addition, the Commission asked the Court to order the State to undertake certain measures of reparation, which will be described and analyzed in Chapter X of this Judgment.

II
PROCEEDINGS BEFORE THE COURT

4. *Notification to the State and to the representative.* The Court notified the Commission's submission of the case to the State and the representative on March 1, 2012.

5. *Brief with pleadings, motions and evidence.* On April 28, 2012 the representative of the presumed victims filed his brief with pleadings, motions and evidence before the Court (hereinafter "pleadings and motions brief"). Overall, the representative agreed with the allegations made by the Commission and asked the Court to declare the international responsibility of the State for the violation of the same articles alleged by the Commission; he also asked that the Court declare the violation of Article 5 (Right to Humane Treatment) of the Convention, with regard to Melba Suárez Peralta and her next of kin. In addition, the representative asked for access to the Victims' Legal Assistance Fund of the Inter-American Court (hereinafter "the Court's Assistance Fund" or "the Fund"). Lastly, he asked the Court to order the State to adopt different measures of reparation and to reimburse certain costs and expenses.

6. *Answering brief.* On August 22, 2012, the State submitted to the Court its brief with its preliminary objections, answer to the brief submitting the case, and observations on the pleadings and motions brief (hereinafter "answering brief"). In this brief it presented a series of preliminary objections and "prior questions" (*infra* para. 12). The State appointed Erick Roberts as its Principal Agent, and Carlos Espín and Daniela Ulloa as Deputy Agents.

7. *Access to the Victims' Legal Assistance Fund.* The request to access the Court's Assistance Fund filed by the presumed victims, through their representative, was admitted in an Order of the President of the Court (hereinafter "the President") of September 14, 2012.[4]

8. *Observations on the preliminary objections.* On October 11 and 13, 2012, the Commission and the representative of the presumed victims, respectively, presented their observations on the preliminary objections filed by the State.

9. *Public hearing and additional evidence.* In an Order of the President of December 20, 2012,[5] the parties were summoned to a public hearing so that the Court could receive their final oral arguments and observations on the preliminary objections and eventual merits, reparations and costs, as well as the testimony of Dennis Cerezo Cervantes and the expert opinion of Laura Cecilia Pautassi. Subsequently, in an Order of January 24, 2013,[6] the Court decided to receive, at a public hearing, the statement of the presumed victim, Melba del Carmen Suárez Peralta, instead of the testimony of Dennis Cerezo Cervantes, which it was requested should be provided by affidavit. The public hearing took place on February 11, 2013, during the Court's ninety-eighth regular session held at its seat.[7] During the hearing, the testimony of one presumed victim and one expert witness was received, together with

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[4] *Cf. Case of Suárez Peralta v. Ecuador.* Order of the President of the Inter-American Court of Human Rights of September 14, 2012. Available at: http://www.corteidh.or.cr/docs/asuntos/suarez_fv_12.pdf.

[5] *Cf. Case of Suárez Peralta v. Ecuador.* Order of the President of the Inter-American Court of December 20, 2012, *supra*.

[6] *Cf. Case of Suárez Peralta v. Ecuador.* Order of the President of the Inter-American Court of Human Rights of January 24, 2013. Available at: http://www.corteidh.or.cr/docs/asuntos/suarez_24_01_13.pdf.

[7] There appeared at this hearing: (a) for the Inter-American Commission: Elizabeth Abi-Mershed, Jorge H. Meza Flores, and Silvia Serrano Guzmán; (b) for the representatives of the presumed victims: Jorge Sosa Meza and José Peralta, and (c) for the State of Ecuador: Carlos Espín and Daniela Ulloa.

the final oral observations and arguments of the Commission, the representative of the presumed victims, and the State, respectively. During this hearing, the Court asked the parties to submit specific useful information and documentation. In addition, several statements were received that had been requested by affidavit in the Order of the President of December 20, 2012 (*infra* para. 31).

10. *Final written arguments and observations.* On March 11, 2013, the State and the representative forwarded their final written arguments and the Commission presented its final written observations. The representative and the State responded partially to the Court's request for useful information and documentation.

11. *Observations of the representative and the State.* The briefs with final written arguments and observations were forwarded to the parties and to the Commission on March 14, 2013. The President granted the representative and the State a specific time frame for presenting any observations they deemed pertinent on the useful evidence requested by the Court, as well as on the information and annexes forwarded by the representative and the State. On March 22 and April 4, 2013, the State and the representative, respectively, forwarded the observations that had been requested.

III
PRELIMINARY OBJECTIONS

12. The State presented a series of preliminary objections and "prior questions" arguing that the Court was incompetent as regards the following: (a) the representative's argument concerning the presumed violation of Article 5(1) of the Convention to the detriment of Melba Suárez Peralta and her next of kin; (b) the inclusion of presumed victims who had not been established in the Commission's Merits Report; (c) the Commission's request concerning the offer of the expert opinion of Laura Pautassi, and (d) the Commission's request concerning the incorporation into the body of evidence of the expert opinions of Raúl Moscoso Álvarez and Ernesto Albán Gómez, both provided in the Case of *Albán Cornejo et al. v. Ecuador*.

13. In this regard, the Court has indicated that preliminary objections are objections of a preliminary nature designed to prevent the analysis of the merits of a matter in question, by objecting to the admissibility of a case, or to the Court's competence to hear a specific case or any aspect of it based on either the person, the subject matter, the time or the place, provided that these objections are preliminary in nature.[8]

14. Regarding objections (c) and (d), the Court indicates that, the Order of the President of December 20, 2012, decided the challenges concerning the offer of an expert opinion and the incorporation of expert opinions that had been provided previously before the Court.[9] In this Order, it was found pertinent to receive and incorporate the said evidence and, since it was considered documentary evidence, the parties were accorded the possibility of referring to the said opinions in their final arguments. Consequently, the Court finds that it is not appropriate to make an additional ruling in this Judgment.

15. In relation to objections (a) and b), in the following sections, the Court will refer to:

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[8] *Cf. Case of Las Palmeras v. Colombia. Preliminary objections*. Judgment of February 4, 2000. Series C No. 67, para. 34*, and 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, para. 40.

[9] *Cf. Case of Suárez Peralta v. Ecuador*. Order of the President of the Court of December 20, 2012, *supra*.

A. The inclusion of the presumed violation of the right to personal integrity

1. Arguments of the Commission and of the parties

16. The State indicated that the presumed victim had violated the principle of procedural good faith by not having argued the violation of Article 5(1) of the Convention during the processing of the case before the Commission and by introducing the presumed violation of this right in the proceedings before the Court. The State considered that this situation represented an evident change in the original position of the representative and that this had a direct effect on the inter-American proceedings, the State's right to defense, and legal certainty. Thus, it indicated that "the right that they are now seeking be declared was not discussed or presented by the [Commission] before the [...] Court and it should be recalled that more than [five] years have passed during which the presumed victims never invoked the supposed violation of Article 5(1) before the Commission."

17. The representative indicated that the pleadings and motions brief is an "autonomous document where the victims or the beneficiaries present, independently, their arguments related to the case and this allows the victims to present new arguments in relation to the facts described in the application." Thus, he argued that "[a]lthough it is true [that] the Inter-American Commission omitted to analyze [Article 5 of the Convention] in light of the facts it submitted, the examination of the facts described in the application clearly reveals a failure of the Ecuadorian State to prevent the incident denounced."

18. For its part, the Commission argued that the representative may present facts that explain, clarify or reject the facts mentioned in the Merits Report, and may invoke the violation of rights other than those included in that report, because the presumed victims are the possessors of all the rights recognized in the Convention.

2. Considerations of the Court

19. The Court has established that the presumed victims and their representatives may invoke the violation of rights other than those included in the Merits Report, provided that they abide by the facts contained in that document, because the presumed victims are the possessors of all the rights recognized the Convention.[10] Thus, it is not admissible to allege new facts, without prejudice to describing those that explain, clarify or reject the facts mentioned in the Merits Report, or that relate to the plaintiff's claims.[11] The application of these criteria to the instant case requires the Court to verify whether the alleged violation of Article 5(1) of the Convention relates to facts contained in the factual framework described by the Commission in the Merits Report.[12]

20. The Court observes that the representative argued the violation of Article 5(1) of the Convention based on the failure to control the professional activities of the doctor who performed the operation on the presumed victim, Melba Suárez Peralta, and the investigations conducted during the criminal proceedings. Thus, he explained that operations performed in the Minchala Clinic "formed part of an agreement signed with a State entity called the Guayas Traffic Commission, where the husband of the [presumed]

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[10] *Cf. Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 155, and *Case of Artavia Murillo et al. ("In vitro fertilization"), supra,* para. 42.

[11] *Cf. Case of the "Five Pensioners", supra*, para. 153, and *Case of Fornerón and daughter v. Argentina. Merits, reparations and costs.* Judgment of April 27, 2012. Series C No. 242, para. 17.

[12] *Cf. Case of Mohamed v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2012. Series C No. 255, para. 25.

victim worked, under which operations were provided at a reduced cost to family members of its employees and officers."

21. The Court notes that, in the Merits Report, the Commission referred to the operation that presumed victim Melba Suárez Peralta underwent in the Minchala Clinic, the ailments suffered as a result of this, and the criminal action filed by presumed victim Melba Peralta Mendoza based on the supposed "dirty operation" that had been performed on her daughter, Melba Suárez Peralta.[13] During those criminal proceedings, *inter alia*, the site of the facts was inspected and Dr. Emilio Guerrero's employment status was verified (*infra* paras. 41, 42, 47, 53, 55 and 58).

22. Based on the above, the Court considered that, when alleging the supposed violation of Article 5(1) of the Convention, the representative referred to the factual framework set out by the Commission in the Merits Report and expanded contextual elements to include those described. Therefore, the Court decided to rule in its analysis of the merits on the presumed violation of Article 5(1) of the Convention submitted by the representative.

B. Request to include other presumed victims in the case

1. Arguments of the Commission and of the parties

23. The State argued that "the Court should declare itself incompetent to examine the reparations claimed in favor of Dennis Cerezo Cervantes, Gandy Alberto Cerezo Suárez, Katherine Madeleine Cerezo Suárez and Marilyn Melba Cerezo Suárez, because [...] the right of action to submit a case before the Court corresponds to the [Commission, and] not to the presumed victim; consequently, the determination of those who would be the victims and beneficiaries of an eventual reparation can only be those persons that the Commission determines in its Merits Report, a document that defines the limits of the case."

24. The representative argued that the pleadings and motions brief constitutes a brief that is autonomous and independent from the allegations contained in the Commission's Merits Report, and can incorporate other beneficiaries or victims who were involved in the context of the facts denounced. Consequently, he considered that the members of the Cerezo Suárez family, understanding these to be Dennis Cerezo Cervantes, Mrs. Suárez Peralta's husband, and their children, namely Gandy Alberto, Katherine Madeleine and Marilyn Melba, all with the surnames Cerezo Suárez, were also victims of the presumed violations to the detriment of Melba del Carmen Suárez Peralta.

25. For its part, the Commission considered that the determination of victims in this case is an issue that should be analyzed during the merits stage.

2. Considerations of the Court

26. Pursuant to the provisions of Article 35(1) of the Court's Rules of Procedure, in its brief submitting the case, the Commission noted that the presumed victims in this case were Melba del Carmen Suárez Peralta and Melba Peralta Mendoza. However, the representative identified Dennis Cerezo Cervantes, and Gandy Alberto, Katherine Madeleine and Marilyn Melba, all with the surnames Cerezo Suárez, as additional victims.

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[13] *Cf.* Merits Report No 75/11, Case 12,683, Melba del Carmen Suárez Peralta, Ecuador, July 20, 2011 (merits file, folios 16, 17 and 23).

27. In this regard, the Court recalls its consistent case law to the effect that the presumed victims must be indicated in the Commission's Merits Report issued under Article 50 of the Convention and in the submission of the case to the Court pursuant to Article 35(1) of the Rules of Procedure.[14] According to this article, it is for the Commission, and not the Court, to identify the presumed victims in a case before it precisely and at the appropriate procedural opportunity.[15] Legal certainty requires, as a general rule, that all the presumed victims are duly identified in both briefs, and it is not possible to add new presumed victims following the Merits Report, except in the exceptional circumstances contemplated in Article 35(2) of the Court's Rules of Procedure.[16] The Court notes that this case does not involve one of the presumptions under the said Article 35(2) that could justify the identification of presumed victims following the Merits Report or the submission of the case.

28. Therefore, in application of Article 35(1) of its Rules of Procedure and its consistent case law, the Court declares that it can only consider as presumed victims those persons who were identified in the Merits Report; in other words Melba del Carmen Suárez Peralta and Melba Peralta Mendoza.

IV
COMPETENCE

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

V
EVIDENCE

30. Based on the provisions of Articles 46, 47, 50, 57 and 58 of the Rules of Procedure, as well as on its case law concerning evidence and its assessment,[17] the Court will examine and assess the documentary probative elements forwarded by the parties at different procedural moments, the statements and testimony provided by affidavit and during the public hearing, and also the helpful evidence requested by the Court. To this end, it will abide by the principles of sound judicial discretion, within the corresponding legal framework.[18]

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[14] *Cf. Case of the Ituango Massacres v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs.* Judgment of October 24, 2012. Series C No. 251, para. 29..

[15] *Cf. Case of the Ituango Massacres, supra*, para. 98, and *Case of García and family members v. Guatemala. Merits, reparations and costs*. Judgment of November 29, 2012. Series C No. 258, para. 34.

[16] *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 29, and *Case of García and family members, supra,* para. 34.

[17] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, paras. 69 al 76, and *Case of the Massacre of Santo Domingo v. Colombia. Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, para. 41.

[18] *Cf. Case of the "White Van" (Paniagua Morales et al.), supra*, para. 76, and *Case of the Massacre of Santo Domingo, supra*, para. 41.

A. Documentary, testimonial and expert evidence

31. The Court received various documents presented as evidence by the Commission, the representative, and the State, attached to their main briefs (*supra* paras. 4 to 11). The Court also received the affidavits prepared by the witnesses Dennis Cerezo Cervantes, Rodolfo Sánchez Jiménez and Luis Humberto Córdova Ramos, and the expert witnesses Hugo Miguel Morán Sánchez, Verónica Valencia and Jaysoon Abarca. As for the evidence provided during the public hearing, the Court listened to the statement of the presumed victim Melba Suárez Peralta and the expert opinion of Laura Pautassi (*supra* para. 9).

B. Admission of the evidence

1. Admission of the documentary evidence

32. In this case, as in others, the Court admits those documents forwarded by the parties at the appropriate procedural opportunity (*supra* paras. 4 to 11), which were not contested or opposed and the authenticity of which was not questioned.[19] The documents requested by the Court at the public hearing, which were subsequently provided by the parties, are incorporated into the body of evidence in application of Article 58 of the Rules of Procedure.

33. With regard to the newspaper articles and videos presented by the parties and the Commission together with their different briefs, the Court has considered that these may be assessed when they refer to well-known public facts or declarations by State officials, or when they corroborate aspects related to the case. Consequently, it decides to admit the documents that are complete or that, at least, allow their source and date of publication to be verified, and will assess them taking into account the entire body of evidence, the observations of the parties, and the rules of sound judicial discretion.[20]

34. In addition, the Court observes that the representative did not provide the affidavits of the witness Eduardo Tigua Castro or the expert witnesses Ignacio Hanna Musse and Iván Castro Patiño, which were offered by the representative of the presumed victims and requested in the Order of the President of December 20, 2012.[21]

35. In relation to the documents provided with the final written arguments, the State requested the exclusion of evidence provided by the representative because it was not presented at the proper procedural moment. In this regard, the Court observes that, in particular, the representative forwarded a sworn statement by Moisés Daniel Arguello Bermeo, which had not been requested as useful evidence by a judge or the Court during the public hearing of the case. Therefore, pursuant to Article 57 of its Rules of Procedure, the Court declares inadmissible the presentation of this evidence by the representative, because it was not provided at the appropriate procedural moment.

2. Admission of the statements of the presumed victim and of an expert witness

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[19] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of the Massacre of Santo Domingo*, *supra*, para. 43.

[20] *Cf. Case of Velásquez Rodríguez, Merits, supra*, para. 146, and *Case of the Massacre of Santo Domingo, supra*, para. 44.

[21] *Cf. Case of Suárez Peralta v. Ecuador.* Order of the President of the Court of December 20, 2012, *supra*.

36. Regarding the State's objection to the Commission's offer of the expert opinion of Laura Pautassi, the Court reiterates that this objection was decided in the Order of the President of December 20, 2012,[22] in which it was found pertinent to receive and incorporate the said evidence. Consequently, it is found in order to admit the opinion of Ms. Pautassi, which was provided during the public hearing before the Court.

37. Lastly, regarding the statement of presumed victim Melba del Carmen Suárez Peralta and the content of the expert opinion of Laura Pautassi, provided during the public hearing, the Court finds them pertinent only insofar as they are in keeping with the purpose defined by the President in the Orders requiring them (*supra* para. 9). In addition, in accordance with the Court's case law case, the statement made by the presumed victim cannot be assessed in isolation, but rather within the whole body of evidence of the proceedings, because it is useful to the extent that it can provide further information on the presumed violations and their consequences.[23]

VI
PROVEN FACTS

A. Background information and surgical operation

38. Melba del Carmen Suárez Peralta (hereinafter "Melba Suárez Peralta"), an Ecuadorian national, 22 years of age at the time of the facts, is the mother of three children. She is the companion of Dennis Edgar Cerezo Cervantes (hereinafter "Edgar Cerezo"), who, at the time of the facts, worked for the Guayas Traffic Commission as a traffic supervisor.[24]

39. On June 1, 2000, the Guayas Traffic Commission issued General Order No. 1977, in which it offered medical services to its employees and their family members, provided by two Cuban doctors in the Polyclinic of the said Traffic Commission,[25] as follows:

> This is to inform the personnel of the Surveillance Unit that the Cuban doctors will be providing their services in the Institution's Polyclinic until Friday, June 30, 2000, [...] Dr. Emilio Guerrero Gutiérrez in General Surgery [and] Dr. Rafael Amador in Trauma and Orthopedic Surgery. [...] The medical services will also be provided to family members.

40. On June 28, 2000, Melba Suárez Peralta consulted Emilio Guerrero Gutiérrez, in the Polyclinic of the Guayas Traffic Commission, for symptoms of abdominal pain, vomits and

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[22] *Case of Suárez Peralta v. Ecuador.* Order of the President of the Court of December 20, 2012, *supra*, tenth and fourteenth considering paragraphs.

[23] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of García and family members*, *supra*, para. 46.

[24] *Cf.* Sworn statement provided by Dennis Edgar Cerezo Cervantes of February 8, 2013 (merits file, folio 734); statement made by Melba Suárez Peralta at the public hearing held in this case on February 11, 2013, and identity card of Melba del Carmen Suarez Peralta (file of annexes to the pleadings and motions brief, folio 1164).

[25] *Cf.* Documentation added to the sworn statement of Luis Humberto Córdova Ramos (merits file, folio 592). Article 1 of the Law on the Rights and Protection of the Patient indicates that "Polyclinics" are considered to be health centers that belong to the public or private health services system established by law to provide comprehensive health care on an outpatient and hospitalized basis (file of annexes to the answering brief, folios 2388 to 2391). Also, according to Article 98 of the Law on personnel of the Surveillance Unit of the Traffic Commission of the province of Guayas, "The members of the Surveillance Unit in active service, as well as their family members, shall enjoy medical assistance, laboratory and X-ray services, in the establishments of the Guayas Traffic Commission, under the pertinent regulations."

fever.[26] During this consultation, Emilio Guerrero diagnosed chronic appendicitis and informed her that se required an urgent operation.[27] According to the testimony of Jenny Bohórquez, Emilio Guerrero told Melba Suárez Peralta that she should undergo some laboratory tests;[28] however, Mrs. Suárez Peralta indicated that these tests were not performed.[29]

41. On July 1, 2000, Melba Suárez Peralta consulted the same doctor again, this time in the Minchala Clinic (a private clinic located in Guayaquil, Ecuador). During this consultation, Emilio Guerrero decided that she should undergo surgery, under the diagnosis of acute appendicitis.[30] According to her medical record in this institution, the operation took place on July 1, performed by Dr. Jenny Bohórquez, first assistant Emilio Guerrero Gutiérrez, anesthetist César García, and the nurse Olga, whose last name was not mentioned.[31]

B. Facts subsequent to the operation

42. After the operation, Melba Suárez Peralta suffered intense abdominal pain, vomits and other complications.[32] On July 11 she went to the Luis Vernaza Hospital, and was seen by Dr. Héctor Luis Taranto, who indicated that she was pale, with abdominal swelling, anorexia and diffuse abdominal pain.[33] The doctor also diagnosed acute post-surgical abdomen and, classified her as a patient in an extremely serious condition, so that she had to undergo surgery again on July 12. During the operation, the doctor performed a re-exploratory laparotomy, in the course of which he found "dehiscence of the appendicular stump, localized peritonitis, and fibrin clumps." The abdominal cavity was also cleaned and drained, with the aspiration of purulent matter, and part of her colon was removed.[34]

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[26] *Cf.* Medical record of Melba Suárez Peralta issued by the Polyclinic of the Guayas Traffic Commission No. 11794 (file of annexes to the final arguments, folios 2995); Medical record of Melba del Carmen Suárez Peralta issued by the Minchala Clinic, No. 975 (file of annexes to the Merits Report, folio 112), testimonial statement provided by Wilson Benjamín Minchala Pichu on October 19, 2001 (file of annexes to the Merits Report, folios 105 and 106), and testimony provided by Jenny Bohórquez on November 13, 2001 (file of annexes to the Merits Report, folios 130 a 134).

[27] *Cf.* Medical records of Melba Suárez Peralta issued by the Polyclinic of the Guayas Traffic Commission No. 11794 (file of annexes to the final arguments, folio 2995).

[28] *Cf.* Testimony provided by Jenny Bohórquez on November 13, 2001 (file of annexes to the Merits Report, folio 130).

[29] *Cf.* Testimony provided by Melba Suárez Peralta on September 6, 2000 (file of annexes to the Merits Report, folio 16).

[30] *Cf.* Medical records of María del Carmen Suárez Peralta issued by the Minchala Clinic (file of annexes to the Merits Report, folios 109 a 120)

[31] The reason for the operation was "pain in the right iliac fossa accompanied by hyperthermia, vomits and difficulty in walking"; while she was described as a "patient who states that, yesterday, she consulted a doctor about pain in the epigastric region that, in the afternoon, extended to the right iliac fossa, accompanied by hyperthermia, vomits and difficulty in walking, [...] this became more intense today, so that it was decided to intern her in order to operate on her." *Cf.* Medical records of María del Carmen Suárez Peralta issued by Minchala Clinic, No. 975 (file of annexes to the Merits Report, folio 112); Testimony provided by Jenny Bohórquez on November 13, 2001 (file of annexes to the Merits Report, folio 130), and statement made by Melba Suárez Peralta during the public hearing held in this case on February 11, 2013.

[32] *Cf.* Statement made by Melba Suárez Peralta during the public hearing held in this case on February 11, 2013.

[33] *Cf.* Testimony by Héctor Luis Taranto on November 12, 2001 (file of annexes to the Merits Report, folio 21).

[34] *Cf.* Operation protocol of the Luis Vernaza Hospital (file of annexes to the Merits Report, folio 19), and Testimony by Héctor Luis Taranto on November 12, 2001 (file of annexes to the Merits Report, folio 21).

43. Melba Suárez Peralta indicated that, in June 2006, she underwent abdominoplasty and liposculpture at the Houston Memorial Clinic (Medihouston), in Guayaquil, Ecuador.[35]

44. Subsequently, between July 2006 and April 2012, Mrs. Suárez Peralta underwent the following medical procedures, among others:

a) On July 18, 2006, she had an echography in the *Clínica de Especialidades Moreno* following which "it was recommended that she undergo a pelvic tomography for a complementary examination";[36]

b) On September 11 and 16, 2006, she went to the Guayaquil Family Medicine Center (CE.ME.FA), with general discomfort and vomits, and was prescribed different medicines. On October 4, she consulted a doctor in this Center for pain in the lumbar region;[37]

c) On August 17 and 23[38] and September 24, 2007,[39] and on November 29[40] and December 11, 2007,[41] she consulted doctors in different health centers. The reasons for these appointments included hypertensive crisis, headaches and fever, and she was prescribed different types of medication;

d) On January 30, 2008, she went to the Punto Family Medicine Clinic where she was diagnosed with colitis and non-infectious gastroenterocolitis, and dyspepsia.[42] The next day she underwent abdominal tomography in this Clinic during which the "gallbladder with the presence of thick fluid and micro-gallstones" was found;[43]

e) On May 19, 2008, she was interned in the San Francisco Hospital, owing to abdominal pain.[44] On that occasion, it was indicated that Melba Suárez Peralta had "colic abdominal pain of moderate intensity that increases gradually until it is very intense, accompanied by nausea." She was released from the hospital on May 22.[45] On August 7, she was again interned in this hospital for precordial pain, and had a doctor's appointment there on November 6;[46]

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35 *Cf.* Certification from the Houston Memorial Clinic (Medihouston) dated February 5, 2009, (file of annexes to the Merits Report, folio 214), and sworn statement by Melba del Carmen Suárez Peralta on April 5,2012 (file of annexes to the pleadings and motions brief, folio 1723).

36 Certifications from the *Clínica de Especialidades Moreno* (file of annexes to the Merits Report, folios 225 and 226).

37 *Cf.* Medical certificates from the Family Medicine Center (CE.ME.FA) (file of annexes to the Merits Report, folios 216 to 219).

38 *Cf.* Prescriptions from the Kennedy Clinic (file of annexes to the Merits Report, folios 221 and 222).

39 *Cf.* Certifications from the *Clínica de Especialidades Moreno* (file of annexes to the Merits Report, folios 225 and 226).

40 *Cf.* Medical certificates from the Family Medicine Center (CE.ME.FA) (file of annexes to the Merits Report, folios 216 to 219).

41 *Cf.* Medical certificates from the Punto Family Medicine Center (file of annexes to the Merits Report, folio 241).

42 *Cf.* Documentation from the Punto Family Medicine Center (file of annexes to the Merits Report, folio 231).

43 Documentation from the Punto Family Medicine Center (file of annexes to the Merits Report, folio 230).

44 *Cf.* Documentation, San Francisco Hospital (file of annexes to the Merits Report, folio 250).

45 *Cf.* Documentation, San Francisco Hospital (file of annexes to the Merits Report, folio 249).

46 *Cf.* Documentation attached to the sworn statement by Melba del Carmen Suárez Peralta of April 5, 2012 (file of annexes to the pleadings and motions brief, folios 1794 and 1802).

f) From January 18 to 20, 2009, she was interned in the "Alcívar Clinic" in Guayaquil, with symptoms of "lithiastic cholecystitis," and underwent different tests.[47] Also, from October 20 to 24, she was hospitalized again in this clinic, where she underwent "laparoscopic resolution, which was complicated [...] by the adhesions present as a result of the previous operations." She was diagnosed with "Empyema in the gallbladder," and prescribed antibiotics;[48]

g) In November 2010, in the same clinic she underwent the removal of adhesions,[49] and

h) From April 22 to 24, 2012, Melba Suárez Peralta was interned in the Alcívar Clinic with symptoms of colic, nausea and fever.[50]

45. According to Melba Suárez Peralta, these ailments had diverse financial, work-related and personal consequences. Regarding the financial consequences, she had to request several loans in order to cover the costs of the medical treatment she received.[51] She also stated that she had to dispose of three vehicles and a property she owned.[52] Without providing the final date, she also ended her commercial activities dedicated to the rental and sale of vehicles, which she had been carrying out since 1998, although she was registered in the Taxpayers Register as a company dedicated to hiring out cars with drivers as of August 17, 2005.[53] Also, as she stated during the hearing, owing to her physical ailments, she is now "unable to perform any type of economic activity."[54]

C. The judicial proceedings regarding the facts of the case

46. On August 2, 2000, Melba Peralta Mendoza, Melba Suárez Peralta's mother, filed a complaint before the First Criminal Court of Guayas, against Dr. Emilio Guerrero, "and any possible perpetrators, accomplices and accessories."[55] In response, on August 16, the First Criminal Judge of Guayas (hereinafter "Criminal Judge") issued a court order to investigate the offense, thus opening the preliminary criminal proceedings.[56]

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47 *Cf.* Epicrisis form. Alcívar Clinic (file of annexes to the Merits Report, folio 276).

48 Documentation attached to the sworn statement made by Melba del Carmen Suárez Peralta on April 5, 2012 (file of annexes to the pleadings and motions brief, folio 1763).

49 *Cf.* Sworn statement made by Melba del Carmen Suárez Peralta on April 5, 2012 (file of annexes to the pleadings and motions brief, folio 1811).

50 *Cf.* Medical certificate of April 22, 2012 (file of annexes to the pleadings and motions brief, folio 1653), and answer to the Note by the Guayas Health Ministry (file of annexes to the answering brief, folio 2258).

51 *Cf.* Sworn statement made by Melba del Carmen Suárez Peralta on April 20, 2012 (file of annexes to the pleadings and motions brief, folios 1711 to 1720); Sworn statement made by Luis Azanza Azanza on April 5, 2012 (file of annexes to the pleadings and motions brief, folios 1813 to 1820); sworn statement made by Stalin Xavier Intriago Burgos on April 5, 2012 (file of annexes to the pleadings and motions brief, folios 1821 to 1826), and sworn statement made by Melba del Carmen Suárez Peralta on April 5, 2012 (file of annexes to the pleadings and motions brief, folios 1865 to 1874).

52 *Cf.* Sworn statement made by Melba del Carmen Suárez Peralta on April 5, 2012 (file of annexes to the pleadings and motions brief, folios 1833 a 1849).

53 *Cf.* Sworn statement made by Melba del Carmen Suárez Peralta on March 30, 2012 (file of annexes to the pleadings and motions brief, folio 1892).

54 *Cf.* Statement made by Melba del Carmen Suárez Peralta in the public hearing held in this case on February 11, 2013.

55 Private accusation filed by Melba Peralta Mendoza on August 2, 2000 (file of annexes to the Merits Report, folios 6 and 7).

56 *Cf.* Court order to investigate the alleged offense of August 16, 2000 (file of annexes to the Merits Report, folios 26 to 28). The order required the following actions: "FIRST. Receive the preliminary testimony of the

47. On August 7, 14 and 28, 2000, Melba Peralta Mendoza filed briefs before the said judge requesting that the proceedings be expedited by implementation of the pertinent probative actions.[57] The Criminal Judge issued notes requesting the following evidence: the patient's medical records; the inspection of the site of the facts; the verification of the employment situation of Dr. Emilio Guerrero and of the Minchala Clinic, and a medical examination of Melba Suárez Peralta.[58]

48. In response to these notes, on September 1, 2000, the Employment and Human Resources Sub-secretariat for the Coast and Galápagos reported that there was no record that Emilio Guerrero had completed the formal requirements for the approval of his employment activities or to obtain a work permit.[59] Similarly, according to the testimony of Jenny Bohorquez, "[Dr.] Emilio Guerrero was hired by [a] lawyer [...] to perform medical procedures, either consultations or surgery, for a Foundation named 'Genovanny Francisco,' and, in order to legalize his stay in the country and his surgical operations, [she] assumed them, so that when he performed an operation, he was named [her] assistant and, during this time, Dr. Emilio Guerrero was accrediting his qualifications."[60] Similar information was provided by the Coordinator of the Provincial Health Control and Supervision Process of the Guayas Provincial Health Directorate, Ministry of Public Health, who certified, on August 9, 2012, that [t]here was no document registered for Drs. Emilio Guerrero Gutiérrez and Jenny Bohórquez that accredited them as medical professionals."[61]

49. On September 6, 2000, Melba Suárez Peralta provided her preliminary testimony before the Criminal Judge, describing what happened during the operation in the Minchala Clinic and the subsequent medical treatment that she received in the Luis Vernaza

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aggrieved person [...]; SECOND. Receive the statement of the accused [...]; THIRD. Inspect the site of the facts [...] on August 23, 2000, starting at 11 a.m.; FOURTH. [Request] copies [...] of Medical Record No. 891938 of the patient Melba Suárez Peralta; FIFTH. [Request] the immigration documentation with which Dr. Emilio Guerrero Gutiérrez entered the country; SIXTH. [Request from the] Minchala Clinic [...] the medical records of the patient Melba del Carmen Peralta (*sic*); SEVENTH. [Contact the] Immigration Department of the National Police to inform them about the case; EIGHTH. [Request] the Deputy Director for Employment [...] to provide a copy of the work permit and the employment permit that authorized him to work legally in the country; NINTH. [Communicate with] the Guayas Judicial Police, so that [...] they conduct the pertinent investigations, [and the] Director for Health and the Health Inspector to find out whether the clinic has the respective operating permits and whether it has all the necessary guarantees to operate; TENTH. Take statements from all those who are aware of the illegal act that is being investigated."

[57] *Cf.* Briefs submitted by Melba Peralta Mendoza on August 7, 14 and 28, 2000 (file of annexes to the Merits Report, folios 30 to 34). On August 28, 2000, Melba Peralta Mendoza requested the following actions: (a) forensic medical examination of Melba Suárez Peralta; (b) that the Guayas Traffic Commission advise whether Emilio Guerrero "had a contract with the Commission," and (c) that a new date be set for the inspection of the site of the facts.

[58] *Cf.* Notes issued by the Guayas First Criminal Judge (file of annexes to the Merits Report, folios 36 to 41).

[59] *Cf.* Answer to Note No. 075-SERH-MIG-2000 of September 1, 2000 (file of annexes to the Merits Report, folio 51).

[60] *Cf.* Testimony provided by Jenny Bohórquez on November 13, 2001 (file of annexes to the Merits Report, folio 130).

[61] Certification issued on August 9, 2012, by the Coordinator of the Provincial Health Control and Supervision Process (file of annexes to the final arguments, folios 2967 and 2968). Meanwhile, regarding this fact, during the hearing before the Court, the State provided a certification issued by the National Sub-secretariat for Public Health Oversight dated February 8, 2013, indicating that, at that date, Emilio Guerrero was registered in the former Coastal and Island Health Sub-secretariat. *Cf.* Response issued by the Ministry of Public Health, dated February 8, 2013 (merits file, folio 759).

Hospital.[62] Also, on September 7, Melba Suárez Peralta underwent a forensic medicine examination.[63]

50. On September 18 and 20, October 16 and November 14, 2000, Melba Peralta Mendoza filed successive briefs before the Criminal Judge asking that an arrest warrant be issued against the accused, the inspection of the site of the facts, and the conclusion of the preliminary proceedings.[64]

51. On March 22, 2001, the Judge of the Second Criminal Court of Guayas concluded the preliminary proceedings, "finding that [the respective] time frame had expired."[65]

52. On May 29, 2001, Melba Peralta Mendoza and the First Criminal Prosecutor of Guayas (hereinafter "the Criminal Prosecutor") filed formal charges against Emilio Guerrero before the Criminal Judge.[66] Moreover, in the indictment, Melba Peralta Mendoza added Dr. Wilson Minchala Pinchu, for acting with negligence and lack of judgment, and "for [having] authorized a doctor who was not accredited to work in a clinic."[67]

53. On June 7, 2001, Melba Peralta Mendoza asked the Criminal Judge to "extend the preliminary proceedings to Dr. Wilson Minchala Pichú as an accomplice and accessory."[68] She also requested the closure of the Minchala Clinic and the issue of a "constitutional arrest warrant [and an order of capture be issued] against [Drs.] Wilson Minchala Pinchu and Emilio Guerrero Gutiérrez."[69] On August 14, the Criminal Judge ordered the expansion of the preliminary proceedings and that a statement be taken from Wilson Minchala, as well as the inspection of the site of the facts on August 23[70] (*infra* para. 96).

54. On August 23 and 29, 2001, Wilson Minchala contested the grounds for his inclusion in the proceedings, requesting a declaration of the annulment of the proceedings and that he be summoned to provide testimony.[71] Meanwhile, on August 29, Emilio Guerrero requested the annulment of the proceedings based on the absence of notifications and failure to comply with procedural formalities.[72]

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[62] *Cf.* Testimony provided by Melba del Carmen Suárez Peralta on September 6, 2000 (file of annexes to the Merits Report, folios 16 and 17).

[63] *Cf.* Report No. 5783 of the Provincial Head of the Guayas Judicial Police, Forensic Medicine Service, September 7, 2000 (file of annexes to the Merits Report, folio 24).

[64] *Cf.* Briefs submitted by Melba Peralta on September 18 and 20, October 16 and November 14, 2000 (file of annexes to the Merits Report, folios 53 to 59).

[65] Decision of the Second Criminal Court of Guayas dated March 22, 2001 (file of annexes to the Merits Report, folio 61).

[66] *Cf.* Formal accusation filed by Melba Peralta on May 29, 2001 (file of annexes to the Merits Report, folios 65 and 66), and Indictment filed by the First Criminal Prosecutor of Guayas on May 29, 2001 (file of annexes to the Merits Report, folios 68 and 69).

[67] Formal accusation filed by Melba Peralta on May 29, 2001 (file of annexes to the Merits Report, folio 66).

[68] Brief submitted by Melba Peralta on June 7, 2001 (file of annexes to the Merits Report, folio 71).

[69] Brief submitted by Melba Peralta on June 7, 2001 (file of annexes to the Merits Report, folio 71).

[70] *Cf.* Decision of the First Criminal Judge of Guayas on August 14, 2001 (file of annexes to the Merits Report, folio 73).

[71] *Cf.* Briefs submitted by Wilson Minchala on August 23 and 29, 2001 (file of annexes to the Merits Report, folios 76 to 81).

[72] *Cf.* Brief submitted by Emilio Guerrero on August 29, 2001 (file of annexes to the Merits Report, folios 85 and 86).

55. On September 13, 2001, Wilson Minchala failed to appear to provide the testimony required by the Criminal Judge, for health reasons.[73] The same day, Melba Peralta Mendoza requested the closure of the preliminary proceedings, "because the site of the facts had been inspected and the preliminary proceedings had been extended to Wilson Minchala."[74] The preliminary proceedings were concluded on September 19.[75]

56. On September 25, 2001, Melba Peralta Mendoza ratified her accusation against Emilio Guerrero and Wilson Minchala before the Criminal Judge.[76] However, the Criminal Prosecutor asked the Criminal Judge to re-open the preliminary proceedings in order to receive the statements of Emilio Guerrero and Wilson Minchala.[77] The preliminary proceedings were re-opened by a decision of the Criminal Judge of October 11, establishing that the accused should appear to give their statements on October 19,[78] date on which the testimony was received of Wilson Minchala, who declared that he "hired out the operating theater of the Minchala Clinic of which [he is] the owner/manager to Dr. Jenny Bohórquez, for an emergency operation (appendicitis), as can be seen in Medical Record No. 975; thus, he never examined or met the said patient, so that she [was] not [his] patient and, as revealed in this case, the said patient was examined in the outpatients department of the Polyclinic of the Guayas Traffic Commission." Moreover, he also stated that he was "unaware of whether [Emilio Guerrero was] authorized to exercise the medical profession in our country, but in [his] clinic, [Emilio Guerrero was] not registered as a principal surgeon to perform operations."[79]

57. On October 18, 2001, Melba Peralta Mendoza filed a request before the Criminal Judge to receive the testimony of Héctor Luis Taranto Ortiz, Melba Suárez Peralta's physician in the Luis Vernaza Hospital.[80] On October 24, 2001, Emilio Guerrero asked the Criminal Judge to receive the testimony of Jenny Bohórquez.[81] On October 31, the Criminal Judge summoned Emilio Guerrero, Héctor Luis Taranto and Jenny Bohórquez to provide their testimony.[82]

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[73] *Cf.* Brief submitted by Wilson Minchala on September 19, 2001 (file of annexes to the Merits Report, folio 99).

[74] Brief submitted by Melba Peralta on September 13, 2001 (file of annexes to the Merits Report, folio 90).

[75] *Cf.* Decision taken by the First Criminal Judge on September 19, 2001 (file of annexes to the Merits Report, folio 92).

[76] *Cf.* Private accusation filed by Melba Peralta on September 25, 2001 (file of annexes to the Merits Report, folios 94 and 95).

[77] *Cf.* Request of the First Criminal Prosecutor of Guayas filed in October 2001 (file of annexes to the Merits Report, folio 101).

[78] *Cf.* Decision of the First Criminal Judge of Guayas of October 11, 2001 (file of annexes to the Merits Report, folio 97).

[79] Testimony by Wilson Benjamín Minchala Pichu on October 19, 2001 (file of annexes to the Merits Report, folio 106).

[80] *Cf.* Brief submitted by Melba Peralta on October 18, 2001 (file of annexes to the Merits Report, folio 103).

[81] *Cf.* Brief submitted by Emilio Guerrero el on October 24, 2001 (file of annexes to the Merits Report, folio 122).

[82] *Cf.* Summons issued the First Criminal Judge of Guayas on October 31, 2001 (file of annexes to the Merits Report, folio 126).

58. On November 12, 2001, Emilio Guerrero excused himself from appearing to give the said testimony.[83] The same day, the testimony was received of Héctor Luis Taranto, who testified on the operation performed in the Luis Vernaza Hospital on July 12, 2000, explaining that Melba Suárez Peralta "had been diagnosed [...] with post-surgery acute abdomen, re-operating on her and finding traces of intestinal liquid, purulent material, fecal content, abdominal viscera, covered with fibrin clumps, all this in the pelvic abdominal cavity."[84]

59. On November 13, 2001, the Criminal Judge received the testimony of Jenny Bohórquez.[85] In her statement, she indicated that, "on July 1 2000, [she] was at the Minchala Clinic with Dr. Emilio Guerrero, when [...] Melba Suárez arrived with abdominal pain, vomits, fever and also showed [them] laboratory tests. [In view of] the laboratory tests, [she] proceeded, together with Dr. Guerrero, to conduct a detailed physical examination, reaching the conclusion that Ms. Suárez had symptoms of acute appendicitis, so that [they] decided to operate on her, and [she] was the main surgeon for this operation and Dr. Guerrero participated as [her] assistant."

60. That same day, Melba Peralta Mendoza asked the Criminal Judge to conclude the preliminary proceedings,[86] and they were again concluded by a decision of November 27, "because the time frame for the re-opened preliminary proceedings had expired some time previously."[87]

61. In briefs of November 28 and 30, 2001, Emilio Guerrero asked the Criminal Judge to summon him to give another preliminary statement.[88] On November 29, that year, Melba Peralta Mendoza ratified and formalized her private accusation against Emilio Guerrero, Wilson Minchala and Jenny Bohórquez before the Criminal Judge.[89] Subsequently, on May 13, 2002, the Criminal Prosecutor filed a brief before the Criminal Judge requesting that he "declare the annulment of the proceedings following [the decision issued on August 14, 2001, in which the Criminal Judge ordered the re-opening of the preliminary proceedings in order to include Wilson Minchala] and, instead, issue a final decision, taking into consideration that the prosecutor had already provided his report."[90]

62. On June 3, 2002, Melba Peralta Mendoza filed a brief before the Criminal Judge asking him to reject the Prosecutor's request, and to issue a final decision convening a plenary hearing "for the perpetrators, accomplices and accessories with their respective

[83] *Cf.* Brief submitted by Emilio Guerrero on November 12, 2001 (file of annexes to the Merits Report, folio 128).

[84] *Cf.* Testimony provided by Héctor Luis Tarando on November 12, 2001 (file of annexes to the Merits Report, folio 21).

[85] Testimony provided by Jenny Bohórquez on November 13, 2001 (file of annexes to the Merits Report, folio 130).

[86] *Cf.* Brief submitted by Melba Peralta on November 13, 2001 (file of annexes to the Merits Report, folios 136 to 138).

[87] Decision of the First Criminal Judge of Guayas of November 27, 2001 (file of annexes to the Merits Report, folio 142).

[88] *Cf.* Briefs submitted by Emilio Guerrero on November 28 and 30, 2001 (file of annexes to the Merits Report, folios 148 and 154).

[89] *Cf.* Private accusation filed by Melba Peralta Mendoza on November 29, 2001 (file of annexes to the Merits Report, folio 150).

[90] Brief of the First Criminal Prosecutor of Guayas of May 13, 2002 (file of annexes to the Merits Report, folios 156 and 157).

constitutional arrest warrant against [Drs.] Wilson Minchala and Emilio Guerrero, [together with] perpetrators, accomplices and accessories."[91] On June 6, Emilio Guerrero asked the Criminal Judge to re-open the preliminary proceedings in order to receive his statement.[92]

63. On February 17, 2003, the Criminal Judge issued a final decision convening a plenary hearing[93] against Emilio Guerrero, as perpetrator, ordering pre-trial detention for the accused, finding him responsible for the offense established in article 466 of the Penal Code.[94] However, since he was in hiding, the proceedings against him were suspended, until he appeared at a trial or was arrested, in application of article 254 of the Code of Criminal Procedure.[95] To this end, the Criminal Judge ordered "notification of the police authorities so that they may proceed to find and capture him." Also, since the criminal responsibility of Wilson Minchala had not been proved, the provisional dismissal of the case against him was declared, pursuant to article 242 of the Code of Criminal Procedure.[96]

64. On February 24, 2003, Emilio Guerrero filed an appeal before the Criminal Judge against the final decision convening a plenary hearing;[97] this was granted two days later, ordering the referral to a higher court.[98] When deciding the appeal, by a decision notified on June 29, 2004, the Third Plenary Chamber of the Superior Court of Justice of Guayaquil confirmed all aspects of the decision to convene a plenary hearing.[99]

65. On September 17, 2004, Emilio Guerrero submitted successive briefs to the Criminal Judge, requesting the substitution of the pre-trial detention that had been ordered and the establishment of bail.[100] By a decision of September 21, the Criminal Judge accepted bail

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[91] Brief submitted by Melba Peralta on June 3, 2002 (file of annexes to the Merits Report, folios 159 and 160).

[92] Brief submitted by Emilio Guerrero on June 6, 2002 (file of annexes to the Merits Report, folio 162).

[93] Decision of the First Criminal Judge of Guayas of February 17, 2003 (file of annexes to the Merits Report, folios 164 to 166).

[94] Article 466 of the Penal Code of January 22, 1971, in force at the time of the facts, established that: "If the blows or injuries have caused an ailment or incapacity for personal employment that exceeds 90 days, or a permanent incapacity to the regular employment of the aggrieved party, or a serious illness, or the loss of a non-principal organ, the penalty will be one to three years' imprisonment and a fine of sixteen to seventy-seven United States dollars. If any of the circumstances established in art. 450 co-exist, the penalty shall be two to five years' imprisonment and one to one hundred and twenty United States dollars."

[95] 1983 Code of Criminal Procedure (file of annexes to the answering brief, folio 2722). This article establishes that: "If, at the time the decision to open the plenary session is issued, the accused is fugitive from justice, the Judge, after issuing the said decision, shall order the suspension of the plenary stage until the accused has been captured or comes forward voluntarily. While the accused is at large, the decision to open the plenary session shall not be made final, and the decision shall be notified personally, when he or she comes forward or is captured."

[96] 1983 Code of Criminal Procedure (file of annexes to the answering brief, folio 2720). This article stipulated that: "If the judge shall consider that the existence of the offense has not be proved sufficiently, or having proved its existence, if the guilty parties have not been identified, or if there is insufficient evidence of the participation of the accused, he shall order the provisional dismissal of the proceedings and of the case against the accused, declaring that, at that time, the substantiation of the case cannot continue."

[97] *Cf.* Brief submitted by Emilio Guerrero on February 24, 2003 (file of annexes to the Merits Report, folio 168).

[98] *Cf.* Decision of the First Criminal Judge of Guayas of February 26, 2003 (file of annexes to the Merits Report, folio 170).

[99] *Cf.* Decision of the Third Plenary Chamber of the Superior Court of Justice (file of annexes to the Merits Report, folios 172 to 174).

[100] *Cf.* Briefs submitted by Emilio Guerrero on September 17, 2004 (file of annexes to the Merits Report, folios 176 and 177).

and set this at eight hundred and thirty-seven United States dollars.[101] On September 22, Emilio Guerrero deposited the amount of the bail before the Criminal Judge.[102] On September 23, Melba Suárez Peralta asked the Criminal Judge to reconsider the amount and increase this, because "it would not be sufficient to cover the damages and the procedural costs, even though the private accusation had been duly filed and its processing admitted."[103] Then, on September 24, Emilio Guerrero asked the Criminal Judge to reduce the bail.[104]

66. On June 28, 2005, Melba Peralta Mendoza submitted a brief to the Criminal Judge requesting action in the proceedings, arguing that the said judge could be civilly and criminally responsible "for procedural delay and not dealing promptly with the illegal act that had been committed." In addition, she asked the Criminal Judge "to rule without further delays."[105]

67. On June 30 that year, the Criminal Judge issued a note to the Head of the Case Assignment Chamber of the Superior Court of Guayaquil, requesting that competence for processing the plenary hearing be assigned to one of the criminal courts of the district of Guayas.[106] On July 5, the First Criminal Court of Guayas ordered the proceedings to be returned to the original court so that it could complete the procedures that had not been implemented, including the decision on the request to substitute pre-trial detention presented by Emilio Guerrero and the definition of his legal situation.[107]

68. On July 28, the Criminal Judge suspended the order of pre-trial detention, because Emilio Guerrero had deposited the bail amount, and returned the case file to the First Criminal Court of Guayas[108].

69. On August 23 and September 5 and 17 that year, Melba Peralta Mendoza submitted briefs to the First Criminal Court of Guayas requesting that it set a date for the public hearing of the case.[109]

70. On September 8 that year, based on article 101 of the Penal Code, Emilio Guerrero asked the First Criminal Court of Guayas to declare that the criminal action had prescribed, because five years had elapsed since the issue of the court order to investigate the facts.[110]

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[101] *Cf.* Decision of the First Criminal Judge of Guayas (file of annexes to the Merits Report, folio 179).

[102] *Cf.* Brief submitted by Emilio Guerrero on September 22, 2004 (file of annexes to the Merits Report, folio 181).

[103] Brief submitted by Melba Peralta on September 23, 2004 (file of annexes to the Merits Report, folio 186).

[104] *Cf.* Brief submitted by Emilio Guerrero on September 24, 2004 (file of annexes to the Merits Report, folio 188).

[105] Brief submitted by Melba Peralta on June 28, 2005 (file of annexes to the Merits Report, folio 190).

[106] *Cf.* Note issued by the First Criminal Judge of Guayas on June 30, 2005 (file of annexes to the Merits Report, folio 192).

[107] *Cf.* Decision of the First Criminal Court of Guayas of July 5, 2005 (file of annexes to the Merits Report, folio 194).

[108] *Cf.* Decision of the First Criminal Judge of Guayas of July 28, 2005 (file of annexes to the Merits Report, folio 196).

[109] *Cf.* Briefs submitted by Melba Peralta on August 23 and September 5 and 17, 2005 (file of annexes to the Merits Report, folios 198 to 202).

[110] *Cf.* Brief submitted by Emilio Guerrero on September 8, 2005 (file of annexes to the Merits Report, folio 204).

71. On September 20 that year, the First Criminal Court of Guayas declared that the action had prescribed.[111] Consequently, on September 22, Melba Peralta Mendoza asked the said Court to fine the judge of the case.[112] On November 10, the First Criminal Court of Guayas denied Melba Peralta Mendoza's petition, merely indicated that "the request was not admissible [...]."[113]

72. Furthermore, the evidence provided by the State reveals that, owing to the administrative proceedings conducted by the Ecuadorian Council of the Judicature, the acting Criminal Judge in the proceedings was suspended from exercising his functions and subsequently dismissed.[114]

D. The Minchala Clinic

73. The evidence in the case file reveals that, on May 8, 2002, the Ecuadorian press announced that the Minchala Clinic had been closed following an inspection made by the Guayas Health Control Unit, on verifying that "[the clinic] had between four and five patients in each ward, owing to lack of space for recovery. In the laboratory area, [forty] reactive agents were seized that had expired more than a year before."[115] Furthermore, on October 14, 2007, the Ecuadorian press announced that the Minchala Clinic "had been closed by the Provincial Health Department because its operating permit was out of date and owing to poor conditions of hygiene. It would remain closed until the necessary requirements and adjustments were made; [...] [nevertheless,] this measure [was] not applied owing to supposed medical malpractice." In both situations, there was no information on the dates for re-opening.[116]

Article 101 of the Penal Code in force at the time of the facts stipulates: "Every criminal action prescribes in the time and under the conditions established by law. In exercising the right established by prescription, the following rules shall be observed:

In the case of offenses for which a public action is in order, and offenses subject to private action, above all, it shall be observed whether or not, once the offense has been committed, the prosecution has been initiated. If there is no prosecution, in the case of offenses punished by imprisonment (*reclusion*), which are subject to pubic action, the action to prosecute them shall prescribe in 10 years; in the case of offenses punished with special imprisonment of more than 10 years, the action to prosecute them shall prescribe in 15 years. In the case of offenses punished with imprisonment (*prisión*), the action to prosecute them shall prescribe in five years. The time shall be calculated as of the date the offense was perpetrated.

In the case of offenses subject to public action, if prosecution is started before these time frames expire, the action to continue the case shall prescribe within the same time frames, calculated from the date of the court order to open the investigation of the offense [...]".

[111] *Cf.* Decision of the First Criminal Court of Guayas of September 20, 2005 (file of annexes to the Merits Report, folios 206 and 207).

[112] *Cf.* Brief submitted by Melba Peralta on September 22, 2005 (file of annexes to the Merits Report, folio 209).

[113] Decision of the First Criminal Court of Guayas (Decision 136/2005) of November 10, 2005 (file of annexes to the Merits Report, folio 211).

[114] On April 30, 2007, the acting Criminal Judge in the proceedings was suspended from the exercise of his functions for 30 days, and on September 18, 2007, and July 29, 2008, he was sanctioned with a fine. On September 4, 2011, he was reprimanded, and on February 7, 2012, his dismissal was decided; a decision which became final on May 16 that year. *Cf.* Executive summary of memorandum No. DNA J-2012-1761 (file of annexes to the State's answering brief, folio 2243).

[115] Article in the newspaper "*El Universo*" of May 8, 2002, entitled "*Dos clínicas clausuradas por el Ministerio de Salud*" [Two clinics closed by the Health Ministry] (file of annexes to the Merits Report, folio 9).

[116] Article in the newspaper "*El Universo*" of October 14, 2007, entitled "*Más muertes por atención médica fallida*" [More deaths from deficient medical care] (file of annexes to the Merits Report, folio 12).

VII
SCOPE OF THE "COMPLIANCE AGREEMENT"

74. Now that the facts have been determined, this must be complemented by indicating the effects of the State's acts of acknowledgement of responsibility in the agreement on compliance with and implementation of the recommendations contained in the Commission's Merits Report, signed by the State and Melba Suárez Peralta on September 8, 2011.

A. Agreement on compliance with the recommendations contained in the Commission's Merits Report

75. Following the Commission's adoption of its Merits Report, the State and Melba Suárez Peralta and her representative met to negotiate an agreement on compliance with the recommendations contained in this report (*supra* para. 2.e). On September 8, 2011, the Ministry of Justice, Human Rights and Worship, represented by the Minister of Justice, Johana Pesántez Benítez, and Melba del Carmen Suárez Peralta signed a "Compliance Agreement"; its purpose was:

> To comply with the recommendations made by the Inter-American Commission on Human Rights in Merits Report No 75/11, Case 12,683 [...]. To this end, the Ministry and the beneficiaries agreed on a timetable for execution of the measures of reparation.[117]

76. The parties agreed on measures with regard to each of the five recommendations made by the Commission, to be complied with between October 2011 and October 2012, according to an "implementation timetable,"[118] as follows:

> [1. The] Ministry of Justice, Human Rights and Worship undertakes: to inform the Prosecutor General's Office [and the Council of the Judicature] of the facts and the Merits Report, so that an investigation is conducted and the respective criminal [and administrative] sanction imposed on the agents of justice whose conduct has resulted in the excessive delay in the processing of the criminal proceedings and the consequent lack of access to justice for the victims" [October 2011].
>
> [...]
>
> [2. The State will pay] compensation for judicial costs, pecuniary damage and non-pecuniary damage in the amount of US$250,000 to Melba del Carmen Peralta, US$30,000 to Melba Peralta Mendoza, and US$20,000 for the medical care provided to the beneficiary,[119] [...] for a total of US$300,000 [November 2011].
>
> [3.] In addition [...], it will coordinate the placement of a plaque with a public apology in the building of the Provincial Court of Justice of Guayaquil [and] the publication of part of the text of the recommendations in the Guayaquil daily newspaper *El Universo*, to be agreed with the beneficiary" [November 2011].
>
> [4.] Adopt the necessary measures to provide immediately and free of charge, through its specialized health care institutions and in the place of residence of Mrs. Suárez Peralta, the required medical treatment, including any medicines that she may require and based on her ailments [...]. Given that, in the previous meetings, Mr. Cerezo and the beneficiary have stated that they will not accept the medical health care in public hospitals, health centers and clinics, it was agreed that the State will pay the sum of US$20,000 for medical care [Time frame: November 2011].

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[117] Compliance Agreement of September 8, 2011 (file of annexes to the answering brief, folio 2946).

[118] Implementation timetable. Friendly settlement agreement (file of proceedings before the Commission, folio 849).

[119] It should be noted that the Agreement did not define any way of proving that the said payment had been made.

> [...]
>
> [5.] The State [...] must enact or amend laws concerning health care professionals, which must include the relevant national and international standards, emphasizing and according full validity to patients' rights. [Also ...], it undertakes to present a bill that includes the pertinent reforms concerning medical malpractice and patients' rights [October 2012].
>
> [6.] The State [will provide] training to health care professionals about patients' rights in both the public and the private sphere in a planned and sustainable manner [October 2012].

77. On September 14 and 15, 2011, the representatives and the State, respectively, advised the Commission about the signature of the agreement. In addition, in its brief, the State asked the Commission to endorse the said document.[120] The Commission did not comment on this aspect. Then, on October 10, 2011, the State asked the Commission for an additional period of three months in order to report on the progress achieved in compliance with its recommendations.[121] In this regard, on October 24, 2011, the Commission advised that it had granted the requested extension; that the new time frame for complying with the recommendations would expire on January 26, 2012, and that, on January 5, 2012, the State should provide information on progress in this regard.[122]

78. Subsequently, on December 28, 2011, Melba Suárez Peralta and her mother, Melba Peralta Mendoza, together with the State, prepared a second Compliance Agreement, which explicitly replaced the first document signed on September 8, 2011. This document would also have established a new timetable for execution of the provisions that had previously been agreed on, but it was never formalized. In this regard, on January 18, 2012, the representatives informed the Commission that they had signed this second agreement and indicated that the State had not yet complied with it. For its part, the State advised the Court that the second Compliance Agreement had not been signed on behalf of the State, because the payment vouchers did not cover the amount claimed.

79. On January 26, 2012, the State provided information to the Commission on the status of compliance with the agreement of September 8, 2011.[123] In this regard, it advised that it had not complied with the payment of the agreed compensation because it had asked the husband of the "victim for supporting documentation to justify the pecuniary damage suffered"; his supporting documents "justif[ied] expenses of nineteen thousand six hundred and twenty nine dollars and thirty seven cents ($19,629.37)." The difference with the amounts agreed on "limited the State's actions when complying with the payment of three hundred thousand dollars." Thus, the State advised the Commission that, "for the second time, [it would] request additional documentation that would justify, objectively and absolutely, the expenses incurred since 2001." In this regard, the Court observes that the Agreement did not establish that the expenses had to be authenticated, and that the payment was not subject to any conditions. Also, with regard to the recommendation concerning medical services, the State indicated that officials from "the health sector would ensure the logistics necessary to attend Melba Suárez Peralta," but, according to the State, following a visit to the victim at her home she rejected the services of the public health system.

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[120] Briefs of the representatives (file of proceedings before the Commission, folios 856 to 865, and 837 to 849) and note No. 06982 of the Attorney General's Office of September 25, 2011 (file of proceedings before the Commission, folio 841).

[121] Note No. 04124 of the Attorney General's Office of October 10, 2011 (file of proceedings before the Commission, folios 837 to 849).

[122] Communication of the Inter-American Commission of October 24, 2011 (file of proceedings before the Commission, folios 826 to 828).

[123] Note 4-2-91/12 of the Ministry of Foreign Affairs, Trade and Integration of Ecuador of January 25, 2012 (file of proceedings before the Commission, folios 1624 to 1637).

80. Furthermore, in the same communication to the Commission, the State indicated that, regarding compliance with providing a public apology to the victims, it had made a publication in the Ecuadorian daily newspaper *El Universo* on January 25, 2012, the pertinent part of which read:

> "Ministry of Justice, Human Rights and Worship
> PUBLICATION OF A PUBLIC APOLOGY
> The Ecuadorian State profoundly regrets that State officials involved in the administration of justice unduly delayed the proceedings to the detriment of the victims and that it was not possible to clarify, within the framework of the guarantees of due process, those responsible for this fact.
>
> The Ecuadorian State, based on the Compliance Agreement signed by this Ministry and Melba Suárez Peralta on September 8, 2011, [...] extends this public apology to Melba del Carmen Suárez Peralta and to her mother, Melba Peralta Mendoza, for having violated their human rights, specifically for not having guaranteed Articles 8(1) and 25(1) of the American Convention on Human Rights."[124]

81. Finally, on the same date, the State advised the Commission that it would install a plaque with a public apology in the building of the Provincial Court of Justice of the province of Guayas, to read as follows:[125]

> "REPUBLIC OF ECUADOR
> Ministry of Justice, Human Rights and Worship
> The Ecuadorian State, by this plaque, extends its public apology to Melba del Carmen Suárez Peralta and her mother, Melba Peralta Mendoza, for having violated their human rights, specifically for not having guaranteed Articles 8(1) and 25(1) of the American Convention on Human Rights, which refer to judicial guarantees and judicial protection.
>
> This plaque constitutes a form of reparation under the Compliance Agreement signed [...] on September 8, 2011. [...] Guayaquil, January 23, 2012."

82. The plaque was installed in the Provincial Court of Justice of Guayas eon August 3, 2012.[126]

B. Arguments of the Commission and of the parties

83. The representative indicated that: (a) the State signed the Compliance Agreement completely voluntarily; (b) the plaque installed on August 3, 2012, in the Provincial Court of Justice of Guayas textually acknowledges responsibility for the violation of Articles 8, 25 and 1(1) of the American Convention; (c) this represents an "act of express acknowledgement [...] in the context of the proceedings before [...] the Court [...] after the State had been notified [of the submission of the case, and [of the [pleadings and motions] brief." In addition, "the plaque was placed in the absence of the victim, [who was unaware of this act] until the State brought it up when the litigation was underway."

84. The State indicated that: (a) *estoppel* had never arisen, because, given the nature of the proceedings before the Commission, a State may reach an agreement and undertake to implement certain measures without this signifying that the State is accepting as true the facts that it is accused of, or acknowledging that it is responsible for their legal

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124 File of proceedings before the Commission, *supra*, folio 1632.

125 File of proceedings before the Commission, *supra*, folio 1630, and photograph of the plaque with the public apology (file of annexes to the answering brief, folio 2439 and 2341).

126 Photographs of the unveiling of the plaque (file of annexes to the answering brief, folios 2338 to 2341).

consequences; (b) in particular, only a specific unilateral act of acknowledgement of facts or a clear declaration of responsibility in the context of the said proceedings, regarding which the Commission or the representatives have taken action and that, consequently, have given rise to legal consequences, implicates the State in this regard and, consequently, can be contested in the proceedings before the Court; (c) the State had never changed its position with regard to the case, so that the fact of complying with obligations acquired in the international sphere and that are based on the Ecuadorian Constitution, does not give rise to *estoppel*, because the arguments used by the State concerning the failure to exhaust domestic remedies had never been contested. On these grounds, the State disputed the existence of a supposed violation of Articles 8 and 25 of the Convention.

85. The Commission did not refer to this matter.

C. Considerations of the Court

86. The Court takes note that the State and the presumed victims signed an Agreement in order to comply with the Commission's recommendations. Also, it should be pointed out that the State, pursuant to the provisions of this Agreement, subsequently indicated that it acknowledged its international responsibility on two occasions: (a) when publishing a public apology in a newspaper with widespread circulation on January 25, 2012, after the issue of the Merits Report (*supra* para. 80), and (b) when installing a plaque in the Provincial Court of Justice of Guayas on August 3, 2012 (*supra* para. 82). These acts clearly reveal the State's intention to accept its responsibility publicly for the violations of Articles 8 and 25 of the Convention. Furthermore, the Court finds it particularly relevant that the plaque was installed in the Provincial Court of Justice of Guayas after the case had been notified to the State, and even after the representatives' brief with pleadings, motions and evidence had been forwarded to it *(supra* para. 4 and 5) and when the State was aware that the Court was examining the case.

87. In this regard, the Court considers that the said acceptance of responsibility by the State is not the same as the acknowledgement established in Article 62 of the Rules of Procedure;[127] in other words, it did not take place during the proceedings before the Court, the State has not directly communicated it to the Court or advised the Court about it, and it does not consist in an explicit acknowledgement by the State of the facts of the case, or a unilateral acquiescence to the claims made in the proceedings.

88. Based on the foregoing, this Court takes note of the partial public acceptance of responsibility made by the State. However, in its answering brief, the State contested the violations that it had previously accepted publicly and its international responsibility in this regard. Consequently, based on its contentious jurisdiction, the Court finds it necessary to rule on the dispute and set out its considerations on the violations of the American Convention that have been alleged by the Commission and by the representative of the presumed victims.

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[127] "If the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or the brief submitted by the alleged victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its legal effects."

VIII
RIGHT TO JUDICIAL GUARANTEES AND TO JUDICIAL PROTECTION

A. Arguments of the parties and of the Commission

89. The Commission indicated that, under Ecuadorian law, the effective remedy to resolve the situation of the presumed victim was a criminal proceeding; however, "[t]he criminal proceeding initiated [...] concluded with the prescription of the criminal action," and "it f[ell] to the State, in its capacity as the entity responsible for punitive measures, to initiate and pursue proceedings to identify and, eventually, prosecute and punish the guilty parties, carrying out each step of the proceedings until their conclusion." In this regard, the Commission underscored "the passive role of the prosecution service and the lack of diligence of the judge in the case," as well as the "failure to pursue matters on an *ex officio* basis, and the absence of minimal guarantees of due diligence." Lastly, in its final observations, the Commission indicted that in cases of medical malpractice, the State has a special obligation of care owing to the effects on the victim's health and physical integrity, and must therefore ensure the reasonable promptness and speed of the proceedings in such cases, which did not occur in the instant case.

90. The representative agreed with the Commission's arguments and that the administration of justice could have rectified the final result of the criminal proceedings [...], because the promptness in the substantiation of the case depended [on it], and the result could have been other if the procedural time frames under Ecuadorian criminal law had been respected"; also, that "[a]n analysis of the proceedings [...] reveals that the First Criminal Judge and the President of the First Criminal Appeals Court contributed to the unjustified delay in justice." Also, in his final arguments, he concluded that the "absence of procedural activity by the authorities resulted in the delay in the substantiation of the proceedings." Consequently, the "investigation was partial, fragmented and random, which had a notable impact on the slowness of the proceedings."

91. The State, for its part, indicated that the presumed victims could have recused the judge who was hearing the case, which was a "legitimate option that the parties to a proceeding may exercise, since it is a guarantee [...] that allows justice to be obtained, [...] if a judicial official does not perform his or her functions appropriately," and that "the State cannot be attributed with the fact that the right to judicial guarantees was not exercised as appropriate, [because] the recusal was and is a guarantee of constitutional rights." Lastly, in its final arguments, the State described the procedure to obtain financial reparation from members of the administration of justice who, in the exercise of their functions, cause financial prejudice to the parties or to interested third parties, such as the procedural delay caused in the instant case.

B. Considerations of the Court

92. In this chapter, the Court will analyze the respective domestic proceedings in light of the rights to judicial guarantees and to judicial protection established in Articles 8(1) and 25(1) of the Convention, in relation to Article 1(1) of this instrument, in order to determine whether or not the State failed to comply with its international obligations owing to the actions of its judicial organs.

93. The Court has indicated that "[t]he right to effective judicial protection requires judges to guide the proceedings in a way that avoids undue delays and obstructions

resulting in impunity, thus thwarting the due judicial protection of human rights,"[128] and that "judges, in their capacity to guide the proceedings, have the obligation to manage and prosecute judicial proceedings in a way that does not sacrifice justice and due process of law to formalism and impunity"; otherwise, this "leads to the violation of the State's international obligation of prevention and to protect human rights, and violates the right of the victim and his or her next of kin to know the truth of what happened, that those responsible are identified and punished, and to obtain the corresponding reparations."[129]

1. Due diligence and a reasonable time in the investigation and the criminal proceedings

94. Within the factual framework of this case, it has been proved that the investigation was initiated on August 2, 2000, based on a complaint filed before the Guayas First Criminal Court by Melba Peralta Mendoza, Melba Suárez Peralta's mother (*supra* para. 46). Regarding the said investigation, the Court will proceed to formulate considerations on the delays, errors and omissions observed throughout the criminal proceedings that concluded with the declaration of the prescription of the action by the Guayas First Criminal Court on September 20, 2005 (*supra* para. 71).

95. In this regard, the Court notes that the preliminary proceedings were opened on August 16, 2000, by means of the "court order to investigate the alleged offense" issued by the Criminal Judge and requiring different measures to be taken (*supra* para. 46). However, up until the first closure of the preliminary proceedings, on March 22, 2001, the case file only contains the statement and the forensic examination of the presumed victim, and the information on the employment situation of the accused.

96. The Court also observes the presence of various errors and omissions in the implementation of essential actions to investigate and resolve the case, such as: (a) the statement of the accused Emilio Guerrero was never taken; (b) the inspection of the site of the facts was carried out a year after the proceedings started; (c) the statement of the accused, Wilson Minchala was taken 14 months after the proceedings started, on October 19, 2001, and (d) the testimonial statements of individuals who were alleged to have taken part in the medical procedures performed on the victim, Héctor Taranto and Jenny Bohórquez, were taken almost 15 months after the proceedings started, on November 12 and 13, 2001, respectively (*supra* paras. 55 to 59).

97. The foregoing also reveals that the State's actions were not effective, because article 231 of the Code of Criminal Procedure in force at the time of the facts established that "the preliminary proceedings shall never take more than sixty days." These actions took from August 16, 2000, to November 27, 2001 (*supra* paras. 46 and 60).

98. Similarly, the Court observes that, even though it corresponds to the Public Prosecution Service to advance proceedings in cases of public criminal actions, the first action of this Service only occurred on May 29, 2001; in other words, nine months after the issue of the court order to investigate the alleged offense. Furthermore, extensive gaps between certain actions can be noted, such as:

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[128] *Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 115, and *Case of Myrna Mack Chang v. Guatemala. Merits, reparations and costs.* Judgment of November 25, 2003. Series C No. 101, para. 210.

[129] *Case of Myrna Mack Chang,* supra, para. 211, and *Case of the Las Dos Erres Massacre, supra*, para. 120 and 255.

a) Almost nine months between the first re-opening of the preliminary proceedings ordered on August 14, 2001, and the Public Prosecution Service's petition to annul this action on May 13, 2002 (*supra* paras. 53 and 61);

b) Almost 15 months between the order to close the preliminary proceedings of November 27, 2001, and the final decision convening a plenary hearing on February 17, 2003[130] (*supra* paras. 60 and 63);

c) Sixteen months between the admission of the appeal against the final decision convening a plenary hearing, on February 26, 2003, and the decision of the Superior Court of Justice on June 29, 2004 (*supra* para. 64),[131] and

d) More than one year between the decision of the Superior Court of Justice confirming the convening of a plenary hearing on June 29, 2004, and the forwarding of the case file so that the court with competence at the plenary stage would continue processing it on June 30, 2005 (*supra* paras. 64 and 67).[132]

99. In addition, it can be seen that most of the judicial actions were taken on the initiative of Melba Peralta Mendoza,[133] who filed numerous briefs before the Criminal Judge and the Criminal Court on August 7, 14 and 28, September 18 and 20, October 16 and November 14, 2000; October 18 and November 13, 2001; June 3, 2002; and August 23 and September 5, 12 and 22, 2005. In these petitions, she requested, among other matters, that the proceedings be continued and decided diligently, without obtaining any clear answer or action in response to her petitions.

100. Furthermore, even though the case related to a medical matter, which meant that it was rather complex, the slowness of the proceedings did not stem from this, above all, bearing in mind that the judicial agents failed to request technical or expert measures or specialized studies in order to investigate the facts, which might have justified the delay. In addition, in this case, the victim, the persons who performed the operation, the results of this intervention, the place and the circumstances of the facts were clearly identified.

101. The foregoing reveals the lack of diligence and effectiveness of the agents of justice in expediting the investigation proceedings in the case, which, added to the different gaps of time in the processing of the case, culminated in the prescription of the criminal proceedings. In other words, the responsibility for the errors and the delay in the proceedings and their consequent prescription was due, exclusively, to the way in which the Ecuadorian judicial authorities acted, who bore the responsibility for taking all the necessary measures to investigate, prosecute and punish, as appropriate, those responsible, irrespective of the measures taken by the parties.[134]

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[130] In this regard, article 239 of the Code of Criminal Procedure established that, once the defendant's answer was received, the judge would proceed to declare a nonsuit or the opening of the plenary hearing, as appropriate.

[131] In this regard, article 350 of the Code of Criminal Procedure established that this appeal must be heard within 15 days.

[132] In this regard, article 359 the Code of Criminal Procedure established that, once the decision was final, the proceedings would be forwarded to the lower court for immediate execution.

[133] The Court notes that Melba Peralta Mendoza filed various briefs to expedite the proceedings, in which she requested, successively, the processing of the pertinent measures, the conclusion of the preliminary proceedings and the convening of a plenary hearing, as applicable (file of annexes to the Merits Report, folios 209 to 212).

[134] *Cf.* Code of Criminal Procedure of Ecuador (1983), articles 21, 23 and 169 (file of annexes to the answering brief, folios 2687 to 2751). *Case of Ximenes Lópes v. Brazil.* Judgment of July 4, 2006. Series C No. 149, para. 199, and *Case of Albán Cornejo. Merits, reparations and costs*. Judgment of November 22, 2007. Series C No. 171, para. 108.

102. In addition, the Court takes note of the expert opinion of Laura Pautassi who, in light of the case law of the European Court of Human Rights,[135] stated that, in situations such as those of the instant case, in which civil compensation is subject to the completion of the criminal proceedings, the obligation to investigate within a reasonable time, "is increased, depending on the health of the person concerned," since the latter "requires special care [and the duration of the proceedings] violates [...] his or her possibility of leading a full life; [...] especially when the person cannot work owing to malpractice, [and] is limited in other regards from earning her own income."

103. The Court also underscores that, since the integrity of an individual is at stake, with the consequence importance of the proceedings for the victims,[136] these proceedings must respect due guarantees and be completed within a reasonable time. This obligation is even more important "in those cases where there is evident harm to the person's integrity, such as when there is medical malpractice [and, therefore,] the political, administrative and, especially, the judicial authorities must ensure and implement reasonable and timely promptness in deciding the case."[137] In the present matter, the judicial authority was not effective in guaranteeing the due diligence of the criminal proceedings in light of the State's positive obligation to ensure that it progressed without delay and within a reasonable time, taking into consideration, also, the violation of the victim's personal integrity and the fact that obtaining reparation by means of a civil action was subject to the completion of the criminal proceedings (infra para. 120).

104. In a similar situation this Court considered that:

> The failure to complete the criminal proceedings ha[d] specific repercussions [...], because, under the laws of the State, the award of civil reparations for the damage resulting from the illegal criminal act c[ould] be subject to the determination of the offense in criminal proceeding; thus, a first instance judgment had not be delivered in the civil action for redress either. In other words, the absence of justice in the criminal proceedings ha[d] prevented [obtaining] civil compensation for the facts of the [...] case."[138]

105. In this regard, the Court considers that the prescription of the criminal proceedings against the doctor who was accused prevented Melba Suárez Peralta from filing actions on civil responsibility for damages, given that, under the Ecuadorian laws in force at the time of the facts, the action to obtain civil reparation was dependent on the corresponding criminal action[139] (*infra* para. 120).

106. Accordingly, during the hearing, the Court asked the State to provide information on the existence of remedies in relation to extra-contractual responsibility that Melba Suárez

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[135] *Cf. Laudon v. Germany.* No. 14635/03. Fifth section. Judgment of 26 April 2007, para. 72; *Orzel v. Poland.* No. 74816/01. Fourth section. Judgment of 25 June 2003, para. 55, and *Inversen v. Denmark.* No. 5989/03. Fifth section. Judgment of 28 December 2006, para. 70.

[136] *Cf. Laudon v. Germany*, *supra*, para. 72.

[137] Expert opinion provided by Laura Pautassi during the public hearing.

[138] *Case of Ximenes Lopes, supra,* para. 204.

[139] Code of Criminal Procedure de Ecuador (1983), *supra*, article 17: Executed judgments in civil proceedings do not produce the effect of *res judicata* in the criminal jurisdiction, except for those that decide the offense indicated in the preceding article. Executed judgments in criminal proceedings produce the effect of *res judicata* as regards the exercise of a civil action, only when they declare that no offense has occurred; or when, if there has been an offense, they declare that the accused is not the guilty party. Therefore, no civil compensation may be claimed until a final guilty verdict in the criminal jurisdiction has been delivered declaring an individual criminally responsible for the offense.

could have used to obtain reparation. However, the State did not forward evidence of any available remedy or explain how the civil action could have proceeded despite the failure to decide criminal responsibility.

2. The alleged available remedies

107. In this section, the Court will refer to the victim's request that the Criminal Judge be fined. Then, the Court will analyze the State's arguments concerning the remedies that the victim should have filed, namely: (a) the appeal against the decision declaring the prescription of the criminal action; (b) the recusal of the Criminal Judge, and (c) the civil action for damages against the judge of the case.

a) The request to fine the Criminal Judge

108. Melba Peralta Mendoza asked the Guayas First Criminal Court to impose a fine on the First Criminal Judge of the province, considering that the prescription of the criminal action came into effect owing to his lack of diligence. In this regard, the decision was that "[t]he request is not admissible [...]."

109. In this regard, the Court considers that this decision was not founded, contrary to article 24.13 of the Ecuadorian Constitutions in force at the time of the facts.[140] Thus, the Court has indicated that "the founding of a decision is the reasoned justification that allows a conclusion to be reached." Accordingly, "the obligation to found a decision is one of the "due guarantees" included in Article 8(1) of the Convention to safeguard the right to due process."[141]

b) The appeal against prescription, civil action for reparation, and recusal

110. In its answering brief, the State indicated that the victim could have appealed the decision declaring that the criminal action against Emilio Guerrero had prescribed.[142] It also indicated that the victim could have recused the First Criminal Judge of Guayas based on articles 453 of the Code of Criminal Procedure and 871.1.0 of the Code of Civil Procedure,[143] so that the proceedings could have continued without delays. In its final arguments, it argued that, following the decision that declared that the criminal action had prescribed, the

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[140] Constitution of the Republic of Ecuador (1998). Article 24 "The following basic guarantees must be observed in order to ensure due process of law, without prejudice to others established in the Constitution, international instruments, laws or jurisprudence: [...] 13. The grounds shall be provided for the decisions of the public authorities that affect the individual. These grounds do not exist if the decision does not set out the legal norms or principles on which it was based, and if the pertinence of its application to the facts is not explained. When decided a challenge of a punishment, the situation of the applicant may not be made worse" (file of annexes to the answering brief, folios del 2180 to 2240).

[141] *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 López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2011. Series C No. 233, para. 141.

[142] Code of Criminal Procedure, 1983. Article 348 established that: "The remedy of appeal is admissible when one of the parties files it in relation to the following decisions: [...] 3. Decisions on disqualification and prescription that end the proceedings" (file of annexes to the answering brief, folios 2687 to 2751).

[143] Code of Criminal Procedure, 1983, *supra*. Article 453 established that: "All criminal proceedings shall be substantiated pursuant to the procedure established in this Code, except for the legal exceptions. In any case not determined specifically in this Code, the provisions of the Code of Civil Procedure, as a supplementary law, shall be observed." Code of Civil Procedure, 1987 (Available at: http://www.ceda.org.ec). Article 871 of the Code of Civil Procedure in force at the time of the facts established that: "A judge, of a court or tribunal, may be recused by any of the parties, and must withdraw from hearing the case, for any of the following reasons: [...] 10. Failure to conclude the proceedings in three times the duration indicated by the law."

victim could have filed a civil action for damages against the judge responsible for the failure to hear the proceedings promptly.

111. In this regard, the representatives and the Commission argued that these remedies were not appropriate (*supra* paras. 89 and 90).

i. Remedy of appeal

112. Regarding the appeal against the declaration of prescription, the Court observes that this remedy was provided by law and, under article 114 of the Penal Code, prescription is declared when the legal requirements are present.[144] Article 348(3) of the Code of Criminal Procedure[145] stipulated that the remedy of appeal was admissible to contest the declaration of prescription. Moreover, article 108 of the Penal Code indicates that "the prescription of the action, and also that of the punishment are interrupted if the individual convicted commits another offense that warrants the same or a greater punishment, before the time frame for prescription shall have expired."[146] In addition, Article 398 of the said Code establishes that the proceedings in which prescription of the public criminal action is declared shall be referred to a higher instance for consultation, by both criminal courts and criminal judges.[147]

113. The evidence in the case file reveals that, in Ecuador, the declaration of prescription was applicable *ipso jure*; in other words, it was sufficient for the judicial agent to verify that the time frame for prescription established by law had expired to declare its application. Furthermore, the case law of the National Court of Justice of Ecuador provided to the case file indicates that the declaration of prescription corresponds to the judge or court where the action prescribed, who has the obligation "to declare it *ex officio* or at the request of a party, when the legal requirements have been met, and not to refer the proceedings so that a higher court hears the appeal."[148] In addition, if an appeal is filed, this will be rejected if "the case file shows that [the prescription] has not been interrupted."[149]

114. In this regard, the State did not explain how the said remedy could re-open the investigation or the criminal proceedings that had prescribed, and did not contest the decisions of the National Court of Justice. To the contrary, the State itself, in its final written arguments, indicated that "the former Supreme Court of Justice has developed extensive case law on the prescription of the criminal action, [in which it has] been emphatic in

[144] *Cf.* Penal Code of Ecuador (1971), article 114. Prescription can be declared at the request of a party, *or ex officio* necessarily when the conditions required by this Code exist (unreferenced).

[145] *Cf.* Code of Criminal Procedure (1983), *supra*, article 348.

[146] Penal Code of Ecuador (1971). Article 108. Both the prescription of the action and that of the punishment are interrupted by the fact that the individual convicted commits another offense that warrants the same or a greater punishment, before the time frame for prescription has expired.

[147] Code of Criminal Procedure, (1983), *supra.* Article 398: "Criminal judges shall obligatorily refer decisions on dismissal to the respective higher court for consultation. In cases where the prescription of the public criminal actions is declared, this shall also be referred to the higher court for consultation by both criminal courts and criminal judges. [...]."

[148] *Cf.* National Court of Justice of Ecuador. Rulings Nos. 06-2009 of January 13, 2009, and 20-2009 of January 21, 2009, available at http://www.cortenacional.gob.ec (final observations brief of the Commission, folio 796).

[149] *Cf.* National Court of Justice of Ecuador. Ruling No. 19-2009 of January 15, 2009, available at: http://www.cortenacional.gob.ec (final observations brief of the Commission, folio 796).

establishing that "[i]t is an obligation of judges to declare the prescription of the action to prosecute offenses when the conditions established by [law] exist."[150]

115. Based on the above, during the public hearing, the Court asked the State to provide, as helpful evidence, among other documents, "copy of the decision on the consultation with regard to the criminal prescription in this case pursuant to the provisions of article 398 of the Ecuadorian Code of Criminal Procedure," because, if the remedy of appeal had not been filed against the decision declaring the prescription of the action, the higher court should still have reviewed, by means of the consultation procedure, the legality of this decision. However, the State did not respond to this request, not even by describing the result of this action.

116. Accordingly, the Court considers that, according to the evidence provided in the instant case, this remedy was evidently inadmissible, because the presumptions that allow the prescription decision to be revoked are unrelated to the delay in the processing of the criminal proceedings. In this regard, in this case, the remedy would have neither legal nor factual effects because it did not comply with the legal requirements for its admissibility established in Article 108 of the Penal Code;[151] in other words, that the convicted man had committed another offense that warranted the same or a greater punishment, or a difference with regard to the calculation of the time frame for prescription. Therefore, the unsatisfactory handling of the proceedings did not exist as a cause of admissibility of the appeal. Consequently, even though article 348(3) of the Code of Criminal Procedure establishes the remedy of appeal to oppose the declaration of prescription, it would not be considered admissible to try and reverse the declaration of prescription that had already taken effect *ipso jure*, as revealed by the evidence in the case file.

117. Pursuant to articles 14, 23, 24, 428 and 460 of the Code of Criminal Procedure,[152] the Prosecution, as the entity responsible for the criminal action, could have filed the necessary remedies in order to activate and expedite the proceedings by the recusal or appeal, as appropriate.[153] Even though the victim and her next of kin could file a private accusation, in a supplementary or complementary way, this did not substitute for the prosecution's role and its obligation to take action. In this regard, the State also failed to justify why the prosecution did not undertake these actions.

ii. Recusal

[150] *Cf.* Former Supreme Court of Justice. *Gaceta Judicial*, Prescription of the Criminal Action, August 26, 1949 (brief with final arguments of the State, folio 880).

[151] *Cf.* Penal Code of Ecuador (1971), article 108.

[152] Code of Criminal Procedure (1983). Article 14 established that: "The criminal action is public in nature. In general, it is exercised, *ex officio*, and the private accusation is admissible." Article 23 stipulated that "[t]he intervention of the Public Prosecution Service shall be required in all criminal proceedings that, owing to the perpetration of an offense, are initiated in the corresponding tribunals and courts, even when a private accuser acts in such proceedings, provided that the said offense must be prosecuted *ex officio*." Article 24 established that: "The Public Prosecution Service may not renounce the obligation to file the criminal action, unless there are reasons that justify its renunciation." Article 428 established that: "[u]nder a private accusation, the criminal judges shall hear only" some offenses, which do not include any offense related to injuries or to medical malpractice. Article 460 stipulated that: "When the proceedings are referred to a higher court, by an appeal or for consultation, the Public Prosecution Service shall be advised so that it issues its opinion on the principle and rules, if appropriate, on the fines that must be imposed for omissions or delays in the substantiation of the proceedings. The omission of this obligation shall make the Head of the Public Prosecution Service liable to the fines that are not collected."

[153] *Cf. Case of Albán Cornejo et al.*, *supra*, para. 92.

118. Regarding the recusal, as the Court has indicated, this was "a procedural instrument aimed at protecting the right to be tried by an impartial court and not [necessarily] an element that constituted or defined that right,"[154] particularly, as regards to the speediness of the proceedings. In this regard, the Court notes that this remedy was not designed to protect the legal situation that had been infringed and that was in dispute, because it would have been in admissible if obvious elements had been verified that might inhibit the objectivity of the judge in charge of the proceedings, but not to rectify a procedural delay that had already occurred. Based on the foregoing, this remedy was not appropriate.[155]

iii. Civil action for compensation

119. With regard to the filing of civil actions for compensation against the doctors, the Court reiterates that, based on article 17 the Code of Criminal Procedure in force at the time of the facts (*supra* para. 106), such actions could not be filed, because the criminal proceedings had not been completed. Furthermore, regarding the action described extemporaneously by the State, in relation to filing a civil action against a judge (*supra* para. 111), it would not be designed to determine the damage suffered as a result of medical malpractice, but rather would be limited to debating an eventual damage caused by the procedural delay for which the judge was responsible.

120. Thus, although the State indicated the probable consequences if the recusal, appeal or civil action against the judge for damages had been filed (*supra* para. 111), it did not provide any practical examples that would prove the effectiveness of filing the said remedies as a measure to achieve the goal of the criminal investigation.

121. Based on all the above, the remedies indicated by the State should have been filed by the Prosecution. Moreover, the State failed to prove that they were admissible, appropriate or effective to clarify the facts, to determine responsibilities, and to achieve reparation for the adverse effects on the personal integrity and health of Melba Suárez Peralta.

3. Conclusion

122. In conclusion, the Court considers that, in this case, the errors, delays and omissions in the criminal investigation reveal that the State authorities did not act with due diligence or in keeping with the obligations to investigate and to ensure effective judicial protection within a reasonable time, in order to guarantee to Melba Suárez Peralta a reparation enabling her to have access to the medical treatment required by her health problems. Consequently, the State violated the rights established in Articles 8(1) and 25(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of Melba Suárez Peralta and Melba Peralta Mendoza.

IX
RIGHT TO PERSONAL INTEGRITY

A. Arguments of the Commission and of the parties

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[154] *Case of Apitz Barbera et al. ("First Contentious-Administrative Court") v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 64.

[155] *Cf. Case of Velásquez Rodríguez, supra,* para. 64, and *Case of García and family members v. Guatemala, supra*, para. 142.

123. The Commission did not rule on the presumed violation of Article 5(1) of the Convention in its Merits Report.[156]

124. In the pleadings and motions brief, the representative asked the Court to declare the violation of Article 5(1) of the Convention,[157] to the detriment of Melba del Carmen Suárez Peralta, Melba Peralta Mendoza and their next of kin, given that "the deficient medical operation that was performed resulted in the extraction of part of her intestine," and because "the State was ineffective in controlling the exercise of the medical profession by Emilio Gutiérrez, since it allowed him to perform the operation without the proper work permit." The representative emphasized that "the operations performed in the Minchala Clinic were part of an agreement made by a State entity called the Guayas Traffic Commission, where the victim's husband worked, offering low-cost operations to the family members of its employees and officials." Therefore, he considered that the State was an "accomplice in the execution of the unlawful act, because the illegal action of the said health care professional [...] was promoted and encouraged by a State entity." Furthermore, in his final oral arguments, the representative added that "the origin of the medical malpractice in the operation was [...] general order No. 19177 dated Thursday, June 1, 2000, in which the State traffic entity in Ecuador [...] advise[d] [...] that the doctors of the fellow country of Cuba were providing their services in the institution's Polyclinic, [and] mentioned Dr. Emilio Guerrero[.] [T]he State entity itself promoted the consultation [and] even the surgical operation by a professional who was not authorized in the State, [...] which concluded evidently and subsequently, with the operation on [...] Melba del Carmen Suárez Peralta[. Thus,] the State assumed a negative, instead of positive, inverse burden, by having knowingly promoted rather than impeded [or] prevented an [unqualified] professional from exercising medicine, and had even sponsored this.

125. For its part, the State argued that the representative had "trie[d] to show that offenses similar to torture or cruel and degrading treatment exist by simple derivation from an eventual attribution of responsibility under Articles 1(1), 8 and 25 [of the Convention] and not because the facts constitute any trace of violation of the right to personal integrity." In addition, it indicated that "the presentation of the facts [...] reveals that [in] the circumstances in which the operation on Mrs. Suárez Peralta took place, not only [...] the State did not intervene, but, furthermore, it is erroneous to affirm that the State was in a position of virtual guarantor." Thus, it indicated that "a State cannot be held responsible for a human rights violation committed between private individuals under its jurisdiction." In its final oral arguments, the State concluded that "the acts that may have caused the supposed medical malpractice, and even the supposed delay in the processing of justice, do not fall within the definition of physical and mental torture, so that it would not be in order for the Court to rule on the merits of this article."

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[156] Nevertheless, when issuing Admissibility Report No. 85/08 of October 30, 2008, in a note of its Secretariat dated January 7, 2009, the Commission notified the Admissibility Report in which it included the possible responsibility for "the presumed violation of its obligation to prevent the violation of personal integrity arising from its obligation to regulate and supervise medical health care as special duties derived from its obligation to ensure the rights established in Article 5(1) of the American Convention in relation to Article 1(1) of this instrument." Subsequently, in a note of its Secretariat dated February 26, 2009, the Commission advised that it was necessary "to refer to an involuntary material error in Admissibility Report No. 85/09 forwarded on January 8, 2009. The errata were in paragraphs 3, 48, 49 and decision 1 of the report sent out, and ha[d] been duly corrected in Report No. 85/08 attached to this note." Consequently, the said report excluded any reference to a possible violation of Article 5 of the Convention.

[157] The violation of the right to humane treatment (Article 5 of the Convention) was not alleged in the proceedings before the Commission.

B. General considerations of the Court

126. The Court reiterates what it has already indicated to the effect that the presumed victims and their representatives may invoke the violation of rights other than those included in the application, provided these relate to facts contained in the said document, because the presumed victims are the holders of all the rights recognized in the Convention (*supra* para. 19). Therefore, this Court finds it pertinent to analyze certain aspects relating to the application of Article 5(1) of the Convention to this case, in order to determine whether the State's responsibility is constituted in relation to this right.

127. In this regard, the Court has stated that, in application of Article 1(1) of the Convention, States have the obligation *erga omnes* to respect and to guarantee the norms of protection, as well as to ensure the effectiveness of human rights.[158] Consequently, States undertake not only to respect the rights and freedoms recognized in the Convention (negative obligation), but also to adopt all appropriate measures to guarantee them (positive obligation).[159] Thus, the Court has established that "it is not sufficient that States abstain from violating rights; rather it is imperative that they adopt positive measures, determined based on the particular needs for protection of the subjects of law, owing to either their personal situation, or on the specific situation in which they find themselves."[160]

128. In addition, the Court considers that Article 1(1) of the Convention also includes the State's obligation to guarantee the existence of legal mechanisms to deal with threats to the physical integrity of the individual,[161] and that permit a serious investigation of any violation that may be committed in order to punish those responsible and ensure that the victim receives reparation.[162] In the instant case, the obligations corresponding to investigation and punishment have been analyzed in the considerations with regard to Articles 8 and 25 of the Convention (*supra* para. 123).

129. The obligation of guarantee goes beyond the relationship between the State agents and the persons subject to it jurisdiction, also encompassing the obligation to prevent, in the private sphere, third parties from violating the protected rights.[163] Nevertheless, the Court has considered that the State cannot be held responsible for a human rights violation committed between private individuals under its jurisdiction. The nature *erga omnes* of the treaty-based obligations of guarantee for which the States are responsible does not entail their unlimited responsibility for any action or incident involving private individuals; because, even though an act, omission or incident of a private individual has the legal consequence of violating certain human rights of another private individual, this cannot automatically be attributed to the State, but rather the specific circumstances of the case

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[158] *Cf. Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 111, and *Case of Ximenes Lopes*, *supra*, paras. 85 and 86. Similarly, *Juridical Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 140.

[159] *Cf. Case of Velásquez Rodríguez, Merits, supra*, paras. 165 and 166, and *Case of the Massacre of Santo Domingo, supra*, para. 188.

[160] *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 243.

[161] *Cf. Case of Ximenes Lopes, supra*, para. 99.

[162] *Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary objections, merits, reparations and costs.* Judgment of June 7, 2003. Series C No. 99, para. 127 and 132, and *Case of Ximenes Lopes, supra*, para. 148.

[163] *Case of the "Mapiripán Massacre," supra*, para. 111, and *Case of Ximenes Lopes*, *supra*, paras. 85 and 86; Similarly, *Juridical Status and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03, *supra,* para. 140.

must be examined together with the implementation of the said obligations of guarantee.[164] Thus, the Court must verify whether the State is responsible in this specific case.

130. Regarding the relationship between the obligation of guarantee (Article 1(1)) and Article 5(1) of the Convention, the Court has established that the right to personal integrity is directly and immediately linked to attention to human health,[165] and that the absence of adequate medical care can lead to the violation of Article 5(1) of the Convention.[166] In this regard, the Court has indicated that the protection of the right to personal integrity supposes the regulation of the health care services in the domestic sphere, as well as the implementation of a series of mechanisms designed to ensure the effectiveness of this regulation.[167] Accordingly, the Court must determine whether, in this case, the right to personal integrity recognized in Article 5(1) of the Convention, in relation to Article 1(1) thereof, was guaranteed.

131. The Court also finds it pertinent to recall the interdependence and indivisibility of civil and political rights, and economic, social and cultural rights, because they must be understood integrally as human rights without any specific ranking between them, and as rights that can be required in all cases before those authorities with the relevant competence.[168] In this regard, Article XI of the American Declaration on the Rights and Duties of Man establishes that every person has the right "to the preservation of his health through sanitary and social measures relating to [...] medical care, to the extent permitted by public and community resources." Meanwhile, Article 45 of the OAS Charter requires all Members States "to dedicate every effort [... to] [d]evelop [...] an efficient social security policy."[169] In this regard, Article 10[170] of the Additional Protocol to the American Convention

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[164] *Cf. Case of the Pueblo Bello Massacre v. Colombia.* Judgment of January 31, 2006. Series C No. 140, para. 123, and *Case of González et al. ("Cotton Field"), supra*, para. 280.

[165] *Cf. Case of Albán Cornejo et al., supra*, para. 117*, and Case of Vera Vera et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 19, 2011. Series C No. 226, para. 43.

[166] *Cf. Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 157, and *Case of Vera Vera et al., supra*, para. 44.

[167] *Cf. Case of Ximenes Lopes, supra*, paras. 89 and 90, and *Case of Albán Cornejo et al., supra*, para. 121; See also: *Case of Lazar v. Romania,* No. 32146/05. Third Section. Judgment of 16 May 2010, para. 66; *Case of Z v. Poland*, No. 46132/08. Fourth Section. Judgment of 13 November 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, 11 August 2000, paras. 12, 33, 35, 36 and 51.

[168] *Case of Acevedo Buendía et al. ("Dismissed and Retired Employees of the Comptroller General's Office) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of July 1, 2009 Series C No. 198, para. 101. Similarly: *Cf.* United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 9, *supra,* para. 10. See also: *Case of Airey v. Ireland*, No. 6289/73. Judgment of 9 October 1979, para. 26, and *Case of Sidabras and Dziautas v. Lithuania*, Nos. 55480/00 and 59330/00. Second Section. Judgment of 27 July 2004, para. 47. In the Case of *Airey v. Ireland,* the European Court indicated: "Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention."

[169] Article 26 of the American Convention (Pact of San José) refers to the progressive development, "by legislation or other appropriate means, and in keeping with the available resources [...] of the rights implicit in the economic [and] social, standards set forth in the Charter of the [OAS]." The right to health is included in this reference. *Cf.* General Comment No. 3. The nature of States parties' obligations. Paragraph 2: "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant." Paragraph 5: "Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without

on Human Rights in the Area of Economic, Social and Cultural Rights, ratified by Ecuador on March 25, 1993, stipulates that everyone has the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being, and indicates that health is a public good.[171] In addition, in July 2012, the General Assembly of the Organization of American States emphasized the need for high quality health facilities, goods and services, which required the presence of trained medical personnel, as well as satisfactory conditions of hygiene.[172]

132. Therefore, this Court has indicated that, in order to comply with the obligation to guarantee the right to personal integrity and in the context of health, States must establish an adequate normative framework that regulates the provision of health care services, establishing quality standards for public and private institutions that allow any risk of the violation of personal integrity during the provision of these services to be avoided. In addition, the State must create official supervision and control mechanisms for health care facilities, as well as procedures for the administrative and judicial protection of victims, the effectiveness of which will evidently depend on the way these are implemented by the competent administration.[173]

133. Consequently, the Court finds it necessary to analyze, in the context of the obligations of guarantee, prevention and protection of the right to personal integrity, whether the State has complied diligently with its obligation to regulate, supervise and control the entities that, in this case, provided health care services to Melba Suárez Peralta. To this end, first, the Court will refer to the Ecuadorian laws that regulated the health care services at the time of the facts of the case. It will then rule on the supervision and control carried out by State entities in relation to the services provided to Melba Suárez Peralta. Lastly, the Court will refer to the eventual effects on the personal integrity of Melba Peralta Mendoza.

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discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies."

[170] 1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. 2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right:

(a) Primary health care, that is, essential health care made available to all individuals and families in the community, [and] (b) Extension of the benefits of health services to all individuals subject to the State's jurisdiction.

[171] *Cf. Case of Albán Cornejo et al., supra,* para. 117, and *Case of Vera Vera et al., supra*, para. 43.

[172] *Cf.* OAS, Progress indicators in respect of rights contemplated in the Protocol of San Salvador, OEA/Ser.L/XXV.2.1, Doc 2/11 rev.2, December 16, 2011, paras. 72 and 73. This document establishes that: "The Protocol refers to observance of the right in the framework of a health system that, however basic it may be, should ensure access to primary health care and the progressive development of a system that provides coverage to the country's entire population. [...] 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." In addition, the said indicators include: "Existence of administrative instances to submit complaints in matters of non-compliance with obligations related to the right to health. Competences of Ministries or of Superindences to receive complaints from the health system users. Policies for training judges and lawyers on the right to health." Similarly, *Cf.* United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 9, E/C.12/1998/24, 3 December 1998, para. 10. See also OAS., Social Charter of the Americas, approved by the OAS General Assembly on June 4, 2012, , AG/doc.5242/12 rev. 2.

[173] *Cf. Case of Ximenes Lopes, supra*, paras. 89 and 99.

1. The State's obligation to regulate health services in order to protect personal integrity

134. As this Court indicated in another case, "States are responsible for the permanent regulation [...] of the provision of the services and the execution of the national programs for provision of high-quality public health services, in order to avoid any risk to the right to life and to physical integrity of those subject to health care. They must, *inter alia*, create satisfactory mechanisms for the inspection of institutions, [...] submit, investigate and decide complaints, and establish suitable disciplinary or judicial procedures for cases of inappropriate professional conduct or the violation of patients' rights."[174]

135. The United Nations Committee on Economic, Social and Cultural Rights[175] and the European Court of Human Rights[176] have ruled similarly, considering that the State must take positive steps to protect the life of the persons subject to their jurisdiction and to ensure the quality of health care services, and that health care professional meet the necessary standards for providing these services, by means of a regulatory framework for public or private entities, as well as with regard to the activities of private individuals, groups or corporations, in order to protect the life of their patients.

136. In this regard, the Court observes that, in the instant case, the State referred to various laws and regulations designed to regulate health care facilities, which were adopted before and after the facts. On July 1, 2000, the relevant Ecuadorian regulations were constituted by the following norms:[177]

a. The Constitution of June 5, 1998, which entered into force on August 11 that year, and established that "[t]he State shall formulate the national health policy and shall supervise its application; [and] shall monitor the functioning of the entities in this sector"[178] (article 44);

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[174] *Case of Ximenes Lopes, supra*, para. 99.

[175] United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 14, E/C.12/2000/4, 11 August 2000, paras. 35 and 51. This document establishes that: "[o]bligations to protect include [...] to adopt legislation or to take other measures ensuring [...] the quality of health facilities, [...] and to ensure that medical practitioners and other health care professionals meet appropriate standards of education, skill and ethical codes of conduct." "Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties." These include "such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others."

[176] The European Court of Human Rights has indicated that: "[among] the basic provisions of the Convention [the States have] the obligation [... to adopt] the necessary measures to protect the life of the persons subject to their jurisdiction [...]. These principles also apply in the public health sector, where the positive obligations [...] entail the establishment by the State of a framework of public or private regulated entities, adopting the measures required to protect the life of their patients." See also *Case of Lazar, supra*, para. 66; *Case of Z v. Poland*, *supra*, para. 76, *Case of Calvelli and Ciglio* v. Italy. No. 32967/96. Judgment of 17 January 2002, para. 49, Case of *Byrzykowski v. Poland.* No 11562/05. Fourth Section. Judgment of June 27, 2006, para. 104, and *Case of Silih v. Slovenia.* No. 71463/014. Judgment of 9 April 2009, para. 192.

[176] *Cf. Case of Z v. Poland*, *supra*, para. 76, ECHR. *Case of Calvelli and Ciglio* v. Italy, *supra,* para. 49, and Case of *Byrzykowski v. Poland, supra,* para. 104. *Cf., mutatis mutandi, Case of Erikson v. Italy.* No 37900/97. First Section. Judgment of 26 October 1999; *Case of Powell v. United Kingdom.* No 45305/99. Third Section. Judgment of 4 March 2000, and *Case of Silih v. Slovenia.* No. 71463/014. Judgment of 9 April 2009, para. 192

[177] The Court examined this normative relating to guaranteeing and supervising the health services in the *Case of Albán Cornejo et al., supra*, paras. 123 and 132.

[178] Constitution of the Republic of Ecuador, 1998 (file of annexes to the answering brief, folio 2190).

b. The Health Code approved by Supreme Decree No. 188 on February 8, 1971, articles 168 and 169 of which indicated that: "[t]he health authority shall establish the norms and the requirements that health care facilities must meet, and shall inspect and evaluate such facilities periodically [...]. Health care facilities shall submit their annual programs and their regulations to the health authority for approval";[179]

c. Regarding the exercise of the medical professions, article 174 of this Code determined the requisites for providing such services, and also established that professionals must be registered in various public registers.[180] In addition, its article 179 stipulated that: "[t]he health authority must investigate and punish the illegal exercise of medicine and related branches of science, without prejudice to the action of ordinary justice, when appropriate" and, to this end, established a procedure for imposing fines on offenders;[181]

d. The Law of the Ecuadorian Medical Federation, approved on July 17, 1979, which created the Ecuadorian Medical Federation as a "private legal entity" with competence "to defend the professional rights of its members and to monitor compliance with their obligations" (article 3). The same law also envisaged the existence of a disciplinary tribunal to examine the conduct of doctors and to apply sanctions when appropriate (articles 22 and 25).[182]

e. Other legal provisions regulated patients' rights in relation to health care centers and health care services provided by doctors; they included the Medical Deontology Code of August 17, 1992,[183] and the Patients' Rights and Protection Act of February 3, 1995, later amended by Law No. 77 published on December 22, 2006.[184] In addition, the Organic Law of the Ombudsman's Office approved on February 20, 1997, created this public entity, the functions of which included "[t]o defend and to promote, *ex officio* or at the request of a party, when necessary, the observance of fundamental individual and collective rights."[185]

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179 Health Code, 1971 (file of annexes to the answering brief, folio 2411).

180 Article 174 of the 1971 Health Code established that: "[e]xercise of the profession of doctor or surgeon [...] requires having obtained academic qualifications granted or revalidated by universities, specialized technical institutes, or other duly authorized training centers; these qualifications must be registered with the National Higher Education Council (CONESUP), with the National Register of Medical Professionals of the Ministry of Public Health, and with the Provincial Health Directorate of the geographical district where the profession will be exercised," *supra,* folio 2411).

181 Health Code, 1971, *supra,* folios 2412, 2415 and 2416. The sanction procedure was established in articles 213 to 230; it was initiated by a complaint and conducted before the Health Commissioner, who issued a decision that could be appealed before the Ministry of Public Health.

182 Law of the Ecuadorian Medical Federation (file of annexes to the final arguments, folios 3032 to 3043).

183 Article 15 of the Medical Deontology Code stipulated that: "The doctor shall never perform surgery without the prior authorization of the patient, and if the latter is unable to give this, the doctor shall seek the authorization of his or her representative or a member of the family, unless the patient's life is in imminent danger. In all cases the authorization shall include the type of intervention, the risks and the possible complications" (file of annexes to the final arguments, folios 3019 to 3030)

184 Article 1 of the Patients' Rights and Protection Act indicates that "Polyclinics" are considered to be legally established health care centers that, therefore, belong to the public or private health care system (file of annexes to the answering brief, folios 2388 to 2391).

185 *Cf.* Arguments of the State (merits file, folios 877 and 878), and Information provided by the Ombudsman's Office (file of annexes to the final arguments, folios 3207 to 3216).

137. This Court also takes note of the Ecuadorian regulations in this area that have been approved subsequently, such as the Ecuadorian Constitution of October 20, 2008;[186] its article 32 establishes the guarantees of the right to health pursuant to the principles of universality, solidarity, interculturalism, quality, efficiency and effectiveness, and its article 363 envisions the formulation of public policies that guarantee integral health care and prevention, as well as the Organic Health Act of December 22, 2006, amended on January 24, 2012.[187] In addition, the Court also takes note of the recent efforts of public entities such as the Ombudsman in this area.[188]

138. Therefore, this Court observes that, at the time of the facts, the above-mentioned norms established a regulatory framework for the provision of medical services, granting the corresponding State authorities the necessary competence to control these, with regard to both the supervision and control of the functioning of public and private facilities, and the supervision of the exercise of the medical profession. Consequently, the Court finds that the national health authority was endowed with certain administrative attributes, through the Health Code, to inspect the provision of services and, if necessary, sanction any adverse effects of the irregular practice of medicine, which will be verified below.

2. *The State's obligation to supervise and control as regards health services and the protection of the personal integrity of Melba Suárez Peralta*

139. In order to determine whether, in this case, there have been any violations of the right to personal integrity and, consequently, the international responsibility of the State as regards its obligation to guarantee rights, the Court finds it necessary to distinguish between two separate moments in the medical care provided to Melba Suárez Peralta: on

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[186] Article 32 of the 2008 Constitution of the Republic of Ecuador establishes that: "Health is a right guaranteed by the State [...]. The State shall ensure this right by economic, social, cultural, educational and environmental policies, and permanent, timely and inclusive access to programs, actions and services for integral health care and promotion [...]. The provision of health services shall be governed by the principles of equity, universality, solidarity, interculturalism, quality, efficiency [and] efficacy, [...]." In addition, article 363 establishes that "[t]he State [is] responsible for formulating public policies that ensure promotion, prevention, treatment, rehabilitation and integral care for health" (file of annexes to the answering brief, folios 2060 and 2154).

[187] Organic Health Act (file of annexes to the answering brief, folio 2342). The act establishes the following, among other matters:

i. Regarding the control of medical services, in its article 4: "[t]he national health authority is the Ministry of Public Health, entity responsible for exercising leadership functions in the area of health, together with the responsibility of the application, control and monitoring of compliance with [this] act." In addition, article 6 stipulates that: "[i]t is the responsibility of the Ministry of Public Health: [...] to regulate, to supervise, to control and to authorize the functioning of the public and private, profit and non-profit, health care establishments, and others subject to health inspection"; these obligations are also established in articles 180 and 181;

iii. Regarding users' rights, article 7 recognizes and regulates different patients' rights. In addition, article 9 establishes that: "[t]he State must guarantee the right to health of the individual and, to this end, it has the following responsibilities: [... t]o encourage the participation of society in the care of individual and collective health, and to establish oversight and accountability mechanisms in the public and private institutions concerned";

vi. Regarding the regulation of the exercise of the medical profession, article 194 establishes that: "[i]n order to practice as a health professional, it is necessary to have obtained a postgraduate university degree from one of the universities legally established and recognized in the country, or a degree from a foreign university that has been authenticated and revalidated. In either case, registration is necessary with the National Council of Higher Education (CONESUP) and with the national health authority. In addition, article 199 grants the national health authority competence to investigate and sanction the illegal practice of medicine.

[188] *Cf.* 2009 Annual Report of the Ombudsman's Office, and the First report on the situation of the area of neonatology in public hospitals of Ecuador, March 22, 2011. Likewise, *Cf.* Information provided by the Ombudsman's Office (file of annexes to the final arguments, folios 3207 to 3216); and final arguments of the representatives (merits file, folios 800 to 810).

the one hand, in the Polyclinic of the Guayas Traffic Commission and, on the other, in the Minchala Clinic in Guayaquil.

a) The medical services provided in the Polyclinic of the Guayas Traffic Commission

140. The Court observes that the Guayas Traffic Commission, a State entity, provided medical care to Melba Suárez Peralta as part of a benefit granted to the family members of its employees, one of whom was Melba Suárez Peralta's husband. Thus, the Court understands that this State entity offered and provided health care services through Emilio Guerrero, and this was announced by its authorities on June 1, 2000 (*supra* para. 39). In the course of providing this care, Emilio Guerrero diagnosed appendicitis and indicated that it was urgent that Melba Suárez Peralta undergo an operation (*supra* para. 40); this was performed on July 1, 2000, in the Minchala Clinic, a private institution (*supra* para. 41).

141. According to the facts of this case, it has been proved that Emilio Guerrero had not carried out the official procedure to obtain approval for his employment activities from the Assistant Secretary for Employment of the coastal sector (*supra* para. 48); furthermore, he had not complied with the registration procedure ordered by the applicable law with the National Higher Education Council, the Ministry of Public Health, and the Guayas Provincial Health Directorate,[189] necessary requisites for exercising his profession in Ecuador (*supra* paras. 136 and 137). In this regard, the Court observes that the State has not contested the fact that it failed to verify whether Emilio Guerrero had complied with the procedures and registrations that domestic law established as a requisite for the exercise of the profession of doctor and surgeon.

142. The Court takes note that the State provided an unsigned certification issued by the National Sub-secretariat for the Supervision of Public Health on February 8, 2013, which indicates that, on that date (2013), Emilio Guerrero was registered with the former Coastal and Insular Regional Health Sub-secretariat.[190] However, the Court observes that this certification contains no information relating to the era of the facts, or when the registration was carried out, contrary to the evidence that can be inferred from the judicial case file (*supra* para. 48) In this regard, the Court required the State to clarify whether, at the time of the facts, Emilio Guerrero was authorized to practice as a doctor and surgeon, and to submit evidence on the supervision that the State's competent authority may have exercised over the Polyclinic of the Guayas Traffic Commission and/or Dr. Emilio Guerrero;[191] however, this was not provided to these proceedings.

143. Consequently, the information disseminated by the Guayas Traffic Commission regarding the medical care that Emilio Guerrero provided in the Polyclinic of this State entity, as a benefit for its employees and also for their family members (*supra* para. 39),[192]

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[189] Article 174 of the Health Code stipulates that: "[e]xercise of the profession of doctor or surgeon [...] requires having obtained academic qualifications granted or revalidated by universities, specialized technical institutes, or other duly authorized training centers; these qualifications must be registered with the National Higher Education Council (CONESUP), in the National Register of Medical Professionals of the Ministry of Public Health, and with the Provincial Health Directorate of the geographical district where the profession will be exercised" (file of annexes to the answering brief, folio 2411)

[190] Response issued by the Ministry of Public Health on February 8, 2013 (merits file, folio 759). The Court notes that this certification only includes an electronic signature.

[191] Question by Judges Roberto Figueiredo Caldas and Manuel Ventura Robles during the public hearing held in this case; and request for helpful evidence (merits file, folios 771 to 775).

[192] In addition, the Court observes that, at the time of the facts, the Scientific and Technical Cooperation Agreement in the area of Health was in force between the Ministry of Public Health of the Republic of Ecuador and

conferred on the State a special obligation of care pursuant to its obligation to guarantee rights, in view of the responsibility involved in its actions to promote health care.[193] This announcement resulted in the first medical care that Melba Suárez Peralta received, during which her apparent ailment was diagnosed, and which channeled her towards the following medical intervention. In this regard, the Court finds that the formal delegation to another health entity, by the doctor provided by the State, of the provision of a service for which the State had assumed responsibility, did not disengage the State from this responsibility, because the relationship between the delegating State and the beneficiary of the service regarding protection of the right to personal integrity remained.

144. In this regard, the Court has established that "when health care is public, it is the State that provides the service directly to the population [...]. The public health care service [...] is primarily offered by public hospitals; however, private initiative, in a complementary manner, and through the signature of agreement or contracts, [...] also provides health care services under the aegis of the [State]. In both situations, whether the patient is interned in a public hospital, or a private hospital under an agreement or contract [...], the person is in the care of the [...] State."[194] "Even though the State may delegate the provision of services, by means of the so-called outsourcing, it retains the ownership of the obligation to provide public services and to protect the respective public rights."[195]

145. Thus, the supervision and control of the medical services provided by the State in the Polyclinic that, in this case, should have been carried out by the corresponding authorities (Guayas Polyclinic and Ministry of Public Health), were not proved (*supra* para. 137). The Court finds that the announcement made by the State, in General Order No. 1977, in which it promoted medical services, created a situation of risk of which the State itself should have been aware. Regarding this situation, it has been proved that medical care was provided in a public health center by someone who had not accredited that he was qualified to exercise his profession (*supra* para. 48) and that, despite this, the State not only permitted this, but also promoted it. This situation of risk subsequently materialized in the prejudice to the health of Melba Suárez Peralta. Therefore, this Court concludes that the State failed to comply with its obligation to safeguard and to guarantee the right to personal integrity of Melba Suárez Peralta, in relation to the medical care provided in the Polyclinic of the Guayas Traffic Commission.

b) The medical services carried out in the Minchala Clinic

146. The Court takes not of the contextual conditions of the operation performed in the Minchala Clinic, alleged by Melba Suárez Peralta during the hearing, in which she described the deficient conditions of hygiene in the Clinic and the lack of expertise of the acting physicians. In this regard, she indicated that "the place was dirty, devastating, because [she] only received local anesthesia, as if they were only apprentices; it appeared that they were not providing adequate attention because they were conversing, 'you close it here,' 'this is how you sew it up; this is how you suture'; in other words, everything they said made it seem that they were learning." The Court also takes into consideration the

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the Ministry of Public Health of the Republic of Cuba, of September 22, 1999 (file of annexes to the final arguments, folio 3162).

[193] *Cf. Case of Ximenes Lopes, supra*, paras. 95 and 96, 138 and 139, and 141.

[194] *Case of Ximenes Lopes, supra*, para. 95.

[195] *Case of Ximenes Lopes, supra*, para. 96.

testimony of Wilson Minchala[196] and Jenny Bohórquez[197] during the domestic criminal proceedings (*supra* paras. 48 and 56), in which it stands out that, when the doctor under contract was Emilio Guerrero, and "in order to legalize his presence," the surgical procedures were assumed by Jenny Bohórquez and "he became her assistant, because, at that time, he was accrediting his qualifications."

147. In addition, the Court takes into account that, although, during the domestic criminal proceedings, in the court order to investigate the alleged offense issued on August 16, 2000, the Criminal Judge ordered that: "a note be sent to the Director of Health and the Commissioner for Health asking that [they indicate] whether the Minchala Clinic had the necessary operating permits and whether it offered the guarantees necessary for this,"[198] these proceedings were not provided with any response to this request for information, even though it would appear that an answer existed, based on the observations of the Public Prosecution Service in its report of May 29, 2001 (*supra* para. 52). However, there is no evidence that the said health authority opened an administrative investigation into this fact under the provisions of article 213 of the Health Code.[199] Furthermore the Court observes that, in a brief submitted on June 7, 2001, Melba Peralta Mendoza asked the Criminal Judge to "proceed to close the Minchala Clinic."[200] The case file does not contain an answer to this request. Lastly, in August 2001, the site of the facts was inspected. However, the criminal case file provided to the proceedings before this Court does not contain the results of this inspection.

148. In this regard, it should be added that the Court asked the State, as helpful evidence, to provide the documentation proving that, at the time of the facts, the Minchala Clinic was authorized by the competent authority, and also that the Clinic had been subject to some form of supervision.[201] In this regard, the State provided information relating to the procedures implemented in Ecuador to monitor health care facilities, and also with regard to other cases of medical malpractice; however, it did not provide the information that had been requested.[202] In addition, the Court observes that the State's monitoring and control of the Minchala Clinic was only carried out by the competent authorities years after the facts of this case had been verified, owing to other specific cases, resulting in the closure of the said clinic in May 2002 and October 2007 (*supra* para. 73). Nevertheless, the evidence provided reveals that these inspections and subsequent sanctions were not related to the facts that occurred in this case.

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[196] Wilson Minchala testified that he: "hired out the operating theater of the Minchala Clinic, of which [he is] the owner manager, to Jenny Bohórquez, for an emergency operation (appendicitis), as can be seen in Medical Record No. 975; thus, he never examined or met the said patient, so that she [was] not [his] patient and, as revealed in this case, the patient was examined in the outpatients department of the Polyclinic of the Guayas Traffic Commission." In addition, he also testified that Drs. Emilio Guerrero and Jenny Bohórquez lived together at the same address and that he did "not know whether [Emilio Guerrero was] authorized to exercise the medical profession in our country; however, in [his] clinic, [Guerrero was] not registered as a principal surgeon to perform operations." Testimony of Wilson Minchala of October 19, 2001, *supra.*

[197] Testimony of Jenny Bohórquez on November 13, 2001, *supra.*

[198] Court order to investigate the alleged offense of August 13, 2000 (file of annexes to the Merits Report, folios 26 to 28).

[199] Article 213 of the 1971 Health Code establishes that: When a claim, report or complaint has been received from which it can be inferred that any violation penalized by this Code has been committed, the Health Commissioner shall issue an initial decision containing [...]" (file of annexes to the answering brief, folio 2415).

[200] Brief submitted by Melba Peralta on June 7, 2001 (file of annexes to the Merits Report, folio 71).

[201] *Cf.* Request for helpful evidence, *supra,* folios 771 to 776.

[202] *Cf.* Note MSP-DGS-2013-00418, Information provided by the Health Ministry (file of annexes to the final arguments, folios 3182 to 3205).

149. As the Court has established, the State's supervisory obligation encompasses both the services provide by the State directly or indirectly, and also those offered by private individuals.[203] Hence, it covers the situations in which the services have been delegated, in which private individuals provide them on behalf of the State, and also the supervision of private services relating to rights of the greatest social interest, which must also be monitored by the public authorities.[204] The eventual provision of medical care in institutions without the proper authorization, the infrastructure and hygiene of which are inadequate for the provision of medical services, or by professionals who do not have the appropriate qualifications for such activities, could have a significant impact on the rights to life and to integrity of the patient.[205]

150. With regard to the supervision of services provided in private institutions, the Court has stated that:

> In the case of essential competences related to the supervision and control of the provisions of services of public interest, such as health care, by either public or private entities (as in the case of a private hospital), responsibility stems from the failure to comply with the obligation to supervise the provision of the services in order to protect the respective right.[206]

151. Similarly, the European Court of Human Rights has emphasized that the State has the obligation to grant licenses and to exercise the supervision and control of private institutions.[207]

152. In addition, the Court finds that the State's supervision and inspection should be designed to ensure the principles of availability, accessibility, acceptability, and quality of the medical services.[208] Regarding the quality of the service, the State has the obligation to

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203 *Cf. Case of Ximenes Lopes, supra*, para. 141.

204 *Cf. Case of Albán Cornejo et al., supra*, para. 119.

205 *Cf.* United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 14, *supra*, paras. 12 and 35.

206 *Case of Albán Cornejo et al., supra*, para. 119.

207 *Cf.* ECHR. *Case of Storck v. Germany*, No. 61603/00. Third Section. Judgment of 16 June 2005, para. 103. In this case, the European Court established that: ""the State is under an obligation to secure to its citizens their right to physical integrity under Article 8 of the [European] Convention [on Human Rights]. For this purpose, there are hospitals run by the State which coexist with private hospitals. The State cannot completely absolve itself of its responsibility by delegating its obligations in this sphere to private bodies or individuals. [… T]he State remain[s] under a duty to exercise supervision and control over private […] institutions. Such institutions […] need not only a licence, but also competent supervision on a regular basis of whether the confinement and medical treatment is justified."

208 *Cf.* United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 14, *supra*, para. 12. In this regard, the Committee stated that:

> The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:
>
> (a) *Availability.* Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The[se services] will include, however, 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 […];
>
> (b) *Accessibility.* Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. […];

regulate, supervise and control the health care offered, ensuring, above other aspects, that the conditions of hygiene and the personnel are adequate, that the latter are duly qualified, and remain apt to exercise their profession.[209] In this regard, the Committee on Economic, Social and Cultural Rights has established the standards for these principles concerning the guarantee of the right to health, recognized in Article 12 of the International Covenant on Economic, Social and Cultural Rights. The Committee has underscored, with regard to quality, that health facilities must have satisfactory conditions of hygiene and trained medical personnel.[210]

153. Lastly, the Court notes that the supervision and control of the private clinic was not carried out prior to the facts by the competent State authorities (Ministry of Public Health), which signified the State's failure to comply with the obligation to prevent the violation of the right to personal integrity of Melba Suárez Peralta. The medical care received from an unauthorized professional and a clinic that was not being supervised by the State had an adverse impact on the health of the presumed victim. In addition, the State failed to prove that it had exercised control of this private institution after the facts, when it became aware of the facts or as a result of the corresponding criminal proceedings that were initiated and the constant requests made by Melba Peralta Mendoza that the clinic be inspected and closed.

c) Conclusion

154. The Court concludes that, although the relevant Ecuadorian regulations established mechanisms of control and supervision of medical care, this supervision and control was not carried out in the instant case, as regards both control of the services provided in the State facility, the Polyclinic of the Guayas Traffic Commission, and those provided in the private institution, the Minchala Clinic. The Court finds that this resulted in a situation of risk, which the State was aware of, that materialized in adverse effects on the health of Melba Suárez Peralta. Therefore, the State of Ecuador incurred international responsibility for the absence of prevention and the failure to guarantee the right to personal integrity of Melba Suárez Peralta, in violation of Article 5(1) of the American Convention, in relation to Article 1(1) of this instrument.

3. Violation of the personal integrity of Melba Peralta Mendoza

155. Melba Suárez Peralta described the sufferings of her family as a result of the physical ailments she suffered.[211] In addition, the psychologist, Eduardo Tigua Castro, indicated in

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c) *Acceptability.* All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, [...] 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.

[209] *Cf. Case of Ximenes Lopes, supra*, para. 99. See also; United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 14, *supra*, paras. 12, 33, 35, 36 and 51.

[210] United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 14, *supra*, para. 12.

[211] In her testimony during the public hearing on February 11, 2013, Melba Suárez Peralta stated that her "children were very young; [...] from the time [she] first started to suffer until now [... she has] been unable to look after them; [...her] children have suffered greatly [...]. [Her] husband [...] has often suffered with [her]."

his report that "[t]his whole situation and its immediate and mediate context have greatly affected the [whole] family, because it was eclipsed by dedicating the greatest physical, material, financial and spiritual efforts to ensure the survival of doña Melba."[212]

156. Regarding the violation of the right to personal integrity of Melba Peralta Mendoza, Melba Suárez Peralta's mother, the Court recalls its previous considerations concerning the determination of the beneficiaries of this case (*supra* para. 28). Furthermore, the Court has stated, on repeated occasions, that the next of kin of the victims of human rights violations may, in turn, be victims. On this point, the Court has considered that the right to mental and moral integrity of some family members of victims has been violated owing to the additional suffering that they have undergone as a result of the specific circumstances of the violations perpetrated against their loved ones, and because of the subsequent acts or omissions of the State authorities in relation to the facts.[213]

157. The Court has understood that, in certain cases of grave human rights violations, it is possible to presume the damage caused to certain family members, following the suffering and anguish that the facts of the said cases suppose.[214] Thus, it has established that, in certain cases of grave violations, it is not necessary to prove the non-pecuniary damage to the parents of the victim, for example, arising from "the cruel death of their children, because it is inherent in human nature that anyone experiences anguish in the face of the suffering of his or her child."[215]

158. The Court has assessed the circumstances of this case. However, it understands that, since this is not a case that involves a grave violation of human rights in the terms of its case law, the violation of the personal integrity of the victim's mother, as regards her suffering, must be proved.[216]

159. In this regard, the Court observes that the only evidence concerning this fact describes the psychological harm to Melba Suárez Peralta and her family, in which her husband and children are specifically included. Regarding Melba Peralta Mendoza, it is indicated that she was "the person who was always attentive to what was happening to her daughter's health, and she has also collaborated with her grandchildren's schooling expenses and, in general, with the medication."[217]

160. Therefore, the Court understand that, even though Melba Peralta Mendoza was accredited as a victim of the denial of justice in violation of Articles 8 and 25 of the Convention (*supra* para. 123), in this case, the State's violation of her right to personal integrity has not been proved.

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[212] Report of Eduardo Tigua Castro (file of annexes to the pleadings and motions brief, folios 1964 to 1966). The Court observes that the testimony of the witness Eduardo Tigua Castro provided by affidavit, which was offered by the representative of the presumed victims and requested in the Order of the President of December 20, 2012, *supra* was not submitted.

[213] *Cf. Case of the "Mapiripan Massacre", supra,* paras. 144 and 146, and *Case of the Pueblo Bello Massacre*, *supra*, para. 154.

[214] *Cf. Case of Blake v. Guatemala. Merits.* Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of García and family members*, *supra*, para. 161.

[215] *Case of Aloeboetoe et al. v. Suriname.* Reparations and costs. Judgment of September 10, 1993. Series C No. 15, para. 76.

[216] *Cf. Case of Ximenes Lópes, supra*, paras. 156 to 163, and *Case of Vera Vera et al., supra*, paras. 100 to 105.

[217] Report of Eduardo Tigua Castro (file of annexes to the pleadings and motions brief, folios 1964 to 1966).

X
REPARATIONS
(APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)

161. Under the provisions of Article 63(1) of the American Convention,[218] the Court has indicated that any violation of an international obligation that may have resulted in damage entails the obligation to make adequate reparation, and that this article reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[219]

162. Based on the violations of the Convention declared in the preceding chapters, the Court will proceed to analyze the claims submitted by the Commission and the representative, in light of the criteria established in its case law in relation to the nature and scope of the obligation to make reparation, in order to decide measures designed to redress the damage caused to the victims.[220]

163. Given that the Court has established that the reparations should have a causal nexus with the facts of the case, the violations declared, the damage proved, and the measures requested to redress the respective damage, it must observe that these factors co-exist in order to rule appropriately and pursuant to law.[221]

164. The Court has considered that it is necessary to grant different measures of reparation in order to repair the damage integrally; thus, in this case, in addition to pecuniary compensation, measures of rehabilitation and satisfaction, and guarantees of non-repetition may be particularly relevant to the harm and suffering caused.[222]

A. Injured party

165. The Court reiterates that, under Article 63(1) of the Convention, anyone who has been declared a victim of the violation of any rights established in the Convention shall be considered an injured party.[223] Furthermore, the Court reiterates what it indicated in its preceding considerations as regards the victims named in the Merits Report (*supra* para. 28). Consequently, this Court considers that Melba del Carmen Suárez Peralta and Melba Peralta Mendoza are the "injured party" and, as victims of the violations declared in this Judgment, they will be considered beneficiaries of the reparations ordered by the Court.

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[218] Article 63(1) of the Convention stipulates that "[i]f 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."

[219] *Cf. Case of Velásquez Rodríguez. Reparations and costs.* Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of the Massacre of Santo Domingo, supra*, para. 290.

[220] *Cf. Case of Velásquez Rodríguez. Reparations and costs, supra,* paras. 25 to 27, and *Case of García and family members, supra,* para. 191.

[221] *Case of Ticona Estrada v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of the Massacre of Santo Domingo, supra*, para. 291.

[222] *Cf. Case of the "Mapiripán Massacre," supra,* para. 294, and *Case of the Massacre of Santo Domingo, supra,* para. 292.

[223] Cf. *Case of Bayarri v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of October 30, 2008. Series C No. 187, para. 126, and *Case of Nadege Dorzema, supra,* para. 244.

B. Obligation to investigate the facts and to identify, prosecute and punish, as appropriate, those responsible

1. Request for investigations and the determination of administrative and criminal responsibilities

166. Both the Commission and the representative asked the Court to order the State to adopt the necessary measures to conduct an effective investigation into the facts of this case, and to sanction, within a reasonable time, the agents of justice whose conduct resulted in the excessive delay in the processing of the criminal proceedings and the consequent lack of access to justice for the victims.

167. In addition, the representative indicated that the Court should "require the Ecuadorian State to comply with the obligations imposed by Articles 8 and 25 of the Convention, by proceeding to conduct an exhaustive investigation and a prompt and impartial trial of all the persons who participated as masterminds and perpetrators, as well as accessories after the fact."

168. For its part, the State indicated that "if the Court should find [it] guilty of the presumed violation of the rights of Melba del Carmen Suárez Peralta, it would be pertinent to impose on the State the obligation to clarify the facts that occurred, but not for the Court to establish the sanction of those responsible as a measure of reparation, because the criteria that allow the principle of legal certainty offered by prescription to be breached are not met." Regarding the agent of justice who processed the proceedings in the criminal jurisdiction, the State advised that he had been removed from his functions as a judge.

169. The Court observes that, in the Compliance Agreement signed by the State and Mrs. Suárez Peralta, the State undertook "[t]o inform the Prosecutor General's Office of the facts and the Merits Report so that it would proceed with the investigation and the respective criminal sanction of the agents of justice owing to [their] conduct [and] to inform the Council of the Judicature of the facts and the Merits Report so that it could conduct an investigation and establish administrative sanctions."

170. In Chapter VIII of this Judgment, the Court declared that the State had violated the rights established in Articles 8(1) and 25(1) of the Convention, because the State authorities failed to act with due diligence and based on their obligations concerning the duty to investigate and to exercise effective judicial protection. In addition, it indicated that the criminal proceedings had exceeded a reasonable time.

171. Consequently, the Court will refer to the following matters: (a) the administrative and disciplinary investigations, and (b) the criminal proceedings.

a) The administrative and disciplinary investigations

172. In previous cases, when referring to certain violations, the Court has decided that the State must initiate disciplinary, administrative or criminal actions, as appropriate, under domestic law, in relation to those responsible for the different investigative and procedural irregularities.[224] In this case, it has been proved that, despite Mrs. Peralta Mendoza's

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[224] *Cf. Case of the Las Dos Erres Massacre*, *supra*, para. 233, and *Case of the Massacres of El Mozote and nearby places v. El Salvador. Merits, reparations and costs.* Judgment of October 25, 2012 Series C No. 252, para. 325.

different requests to expedite the proceedings, on September 20, 2005, the prescription was declared of the criminal action underway with regard to the facts of the case and, consequently, it was requested that the judge of the case be fined; but this request was rejected.

173. In this regard, the Court has been advised that the judge who processed the criminal proceedings was removed from his judicial functions; nevertheless, the evidence provided does not reveal that the said removal was related to the facts of the instant case.[225] However, and in particular bearing in mind this removal, the Court does not consider it appropriate to order a reparation regarding the opening of administrative and disciplinary investigations in relation to the facts of this case.

b) The criminal proceedings

174. The Court reiterates that any human rights violation involves a certain degree of severity by its very nature, because it involves the State's failure to comply with specific obligations of respect for and guarantee of the rights and freedoms of the individual. However, this should not be confused with what, throughout its case law, the Court has considered "grave human rights violations," which have their own connotation and consequences. The Court has also indicated that it is inappropriate to claim that the statute of limitations is not applicable, since all the cases submitted to it relate to human rights violations.[226]

175. The Court has already indicated that, in the criminal jurisdiction prescription eliminates the possibility of punishment, owing to the passage of time and, in general, it limits the State's punitive authority to prosecute the illegal conduct and sanction the authors.[227] According to the Court's consistent and uniform case law, in certain circumstances, international law considers prescription inadmissible and inapplicable in order to maintain the State's punitive authority in effect over conducts such as forced disappearance of persons, extrajudicial execution, and torture, the severity of which makes their punishment necessary in order to avoid their repetition.[228]

176. In this regard, in this case, the Court considers that the necessary presumptions do not exist to use any of the exceptions to the application of the statute of limitations. Consequently, the Court finds that it is not appropriate to order the State to re-open the criminal investigations into the facts related to the operation performed on Melba Suárez Peralta in July 2000.

C. Measures of rehabilitation and satisfaction and guarantees of non-repetition

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[225] Report on the administrative proceeding against the former judge (file of annexes to the answering brief, folios 2241 to 2251).

[226] *Cf. Case of Vera Vera et al., supra*, paras. 117 and 118, and *Case of Vélez Restrepo and family members v. Colombia.* Preliminary objections, merits, reparations and costs. Judgment of September 3, 2012. Series C No. 248, para. 282.

[227] *Cf. Case of Albán Cornejo et al., supra*, para. 111, and *Case of Vélez Restrepo and family members, supra*, para. 283.

[228] *Cf. Case of Barrios Altos v. Peru. Merits.* Judgment of March 14, 2001. Series C No. 75, para. 41, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 283.

177. International case law and, in particular, that of the Court, has established that the Judgment may constitute *per se* a form of reparation.[229] Nevertheless, considering the circumstances of the case and the effects on the victims arising from the violations of the American Convention declared against them, the Court finds it pertinent to determine the following measures of reparation.

1. Rehabilitation

a) Request for medical assistance

178. Both the Commission and the representative asked the Court to order the State "[t]o take the necessary measures to provide immediately and free of charge, through its specialized health institutions and in the place of residence of Mrs. Suárez Peralta, the medical care that she requires, including any medicines she needs, based on her ailments."

179. The representative also indicated that "[t]he State's obligation to provide medical services supposes that it must assume the cost of the doctors that the victim chooses or of those doctors who usually attend the victim." In addition, he indicated that this reparation should include the "cost of the clinical examinations and the appropriate treatments prescribed by the specialized doctors."

180. For its part, the State indicated that it "can provide the necessary services to attend not only Melba Suárez, but also any individual who needs health care services; according to the State the problem is the complainant's unwillingness [...] to be treated by the Health Ministry's trained personnel."

181. The Court observes that, the Compliance Agreement signed by the State and Mrs. Suárez Peralta, indicated that "[t]aking into account that, in previous meetings, Mr. Cerezo and the beneficiary had stated that they [would] not accept medical attention in public hospitals, health centers and clinics, it was agreed that the State will pay the sum of US$20,000 for medical attention."

182. In Chapter IX of this Judgment, the Court declared the violation of the obligation to guarantee the right to personal integrity of Melba Suárez Peralta owing to the failure to carry out an effective supervision and control of the medical attention provided (*supra* para. 155).

183. The Court finds that, in this case, the delivery of a pecuniary reparation for medical attention, in the terms agreed by the parties in the Compliance Agreement, represents an adequate measure to guarantee the State's treaty-based obligations in favor of the victim.

184. Based on the foregoing, the Court establishes the State's obligation to deliver to Melba del Carmen Suárez Peralta the said sum of US$20,000.00 (twenty thousand United States dollars) for any future medical attention and treatment she may require.

2. Satisfaction

a) Request for the publication and dissemination of the Judgment, acknowledgement of international responsibility, and a public apology

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[229] *Cf. Case of El Amparo v. Venezuela. Reparations and costs*. Judgment of September 14, 1996. Series C No. 28, para. 35, and *Case of the Massacre of Santo Domingo, supra*, para. 323.

185. The representative asked the Court to order the State to "publish the judgment in two national newspapers with widespread circulation, and also to order the State to publish the judgment in the Ecuadorian official gazette, and to prepare and publish a leaflet summarizing the Court's decisions."

186. The Commission asked the Court to order the State to make an acknowledgement of international responsibility and a public apology as part of the measures required to make adequate reparation to Melba del Carmen Suárez Peralta and to her mother, Melba Peralta Mendoza, for the human rights violations determined in Report No. 75/11.

187. The State asked the Court "not [to admit] the measures requested by the representative of the presumed victim because the measures of satisfaction had been complied with fully." This was because, under the Compliance Agreement signed by the State and Mrs. Suárez Peralta on January 25, 2012, the State had published a "Public apology" in the Ecuadorian newspaper *El Universo* and, on August 3, 2012, it had placed a "Plaque with a public apology" in the Provincial Court of Justice of Guayas.

188. The Court observes that, under the Compliance Agreement signed by the State and Mrs. Suárez Peralta, the State published a "Public apology" in the Ecuadorian newspaper *El Universo*, which refers to the recommendations made in Report 75/11 based on the violation of Articles 8(1) and 25(1) of the Convention. The State also placed a "Plaque with a public apology" in the Provincial Court of Justice of Guayas.

189. In this regard, the Court finds that these acts of public apology constitute sufficient and adequate measures of reparation to redress, in part, the violations caused to the victims and to achieve the objective indicated by the representative.[230] However, they did not take into account the considerations set out in this Judgment. Therefore, as it has in other cases,[231] the Court finds it necessary that, within six months of notification of this Judgment, the State publish, once, in the Ecuadorian official gazette, the official summary of the Judgment prepared by the Court and, also, that the entire Judgment remain available for one year on an official website of Ecuador.

b) Request for reparation for damage to the life project

190. The representative asked the Court to order the State "to cover the cost of the years that remain for Melba del Carmen Suárez Peralta to complete her law studies at the Universidad Laica Vicente Rocafuerte." He also asked the Court to order the State "to guarantee the intermediate and higher education of the children Gandy Alberto Cerezo Suárez, Katherine Madeline Cerezo Suárez and Marilyn Melba Cerezo Suárez by providing them with scholarships. The provisions of scholarships would constitute a form of reparation, because in restitution of what they could not have, it would give them the opportunity to realize the life project that was affected when [their] financial situation deteriorated.

191. The State advised the Court that, "the life project of Mrs. Suárez was never limited, [because she] withdrew and lost a year, [whereas] during her first years at university, [...] she passed the courses without any problem." It also indicated that "in Ecuador, education

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230 *Cf. Case of Fontevecchia and D'Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238, para. 110.

231 *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 Massacres of Río Negro v. Guatemala*. Preliminary objections, merits, reparations and costs. Judgment of September 4, 2012. Series C No. 250, para. 287.

is free up to university level; in other words, the petitioner and her children have a right to free education guaranteed by the State, and this is recognized in article 28 of the Constitution."

192. The Court recalls that, for the effects of this Judgment, it only considers Melba del Carmen Suárez Peralta and Melba Peralta Mendoza as the "injured party" and they, as victims of the violations declared in this Judgment, will be considered beneficiaries of the reparations ordered by the Court (*supra* para. 28). Thus, it finds that the representative's request that scholarships be awarded to the children Gandy Alberto, Katherine Madeline and Marilyn Melba, all with the surnames Cerezo Suárez, is inadmissible.

193. Furthermore, as it has established in other cases,[232] the Court considers that the "damage to the life project" involves the loss or the serious impairment of opportunities for personal development, irreparably or in a way that it would be difficult to repair. This damage results from the limitations suffered by a person to relate to and enjoy his or her personal, family or social surroundings, owing to serious physical, mental, psychological or emotional injuries.[233]

194. In this regard, the Court has indicated that in order to rule appropriately and in keeping with law, reparations must have a causal nexus with the facts of the case, the violations declared, the damage proved, and the measures requested to repair the respective damage.[234] In this regard, it underlines, with regard to the payment of the university studies of Mrs. Suárez Peralta, that neither the factual framework nor the analysis of the rights that were declared to have been violated reveal any situation that permits the Court to establish a proven causal nexus between Mrs. Suárez Peralta's failure to complete her studies and the violations declared in this Judgment. Taking this into account, the Court finds it inappropriate to establish a measure of reparation in this regard.

3. Guarantees of non-repetition

195. The Court recalls that the State must prevent the repetition of human rights violations such as those described in this case and, therefore, adopt all the legal, administrative and other measures that are necessary to ensure that the exercise of the rights is effective,[235] pursuant to the obligation to avoid similar events occurring in the future, in compliance with the obligations of prevention, and guarantee of the human rights recognized by the American Convention.[236]

a) Request to adopt measures under domestic law

196. The Commission asked the Court to order the State to "adopt the measures necessary to ensure that the laws related to the exercise of the medical profession are

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[232] *Cf. Case of Loayza Tamayo v. Peru. Reparations and costs.* Judgment of November 27, 1998. Series C No. 42, para. 150, and *Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012 Series C No. 246, para. 285.

[233] *Cf. Case of Furlan and family members*, supra, para. 285.

[234] *Cf. Case of Ticona Estrada et al., supra*, and *Case of Fontevecchia and D'Amico, supra*, para. 99.

[235] *Cf. Case of Velásquez Rodríguez, Reparations and costs, supra*, para. 166, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245*, para. 221.

[236] *Cf. Case of Velásquez Rodríguez, Reparations and costs, supra*, para. 166, and *Case of Artavia Murillo et al. (In vitro fertilization)*, para. 334.

regulated and implemented effectively, in accordance with the relevant national and international standards."

197. The representative agreed with the Commission's request and added that the Ecuadorian State should "adopt legislative and any other measures to strengthen the civil and criminal liability of doctors and health workers in Ecuador."

198. For its part, the State affirmed that the Ecuadorian Organic Health Act, amended on January 24, 2012, regulated, among other matters, the exercise of the medical profession and the civil liability of health care professionals and health care services.[237] Consequently, it asked the Court "not to rule on these requests, because, as has been proved, currently structural changes are being put in place that benefit not only the family of the complainant, but all of society; in other words, the State is seeking to gradually achieve positive changes that lead to what is known as the good life or *sumak kawsay*."

199. The Court observes that, in the Compliance Agreement, the State undertook "to enact or reform laws addressed at health care professionals [and] to present a bill that includes the pertinent reforms concerning medical malpractice and patients' rights."

200. In Chapter IX of this Judgment, the Court declared the violation of the obligation to guarantee the right to personal integrity of Melba Suárez Peralta by the effective supervision and control of the medical attention provided, in relation to Article 1(1) of the American Convention. However, it also indicated that the laws of the State of Ecuador at the time of the facts granted the corresponding State authorities the necessary powers to carry out this control, either as regards supervising the functioning of the public and private establishments, or supervising the exercise of the medical profession (*supra* para. 139). On this basis, the Court finds it unnecessary to order a measure of reparation in this regard.

b) Request to provide health care professionals with training on the responsibilities involved in the exercise of their profession

201. The representative asked the Court to order the State "to adopt urgent measures to provide training to doctors and health personnel from public hospitals and private clinics, in human rights, criminal law, patients' rights, and the case law of the Inter-American Court, so that the actions of these professionals are adapted to the international human rights obligations to which the Ecuadorian State is subject."

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[237] The State indicated the following norms: Art. 191. The national health authority shall implement regulation and control procedures to avoid the practice of traditional medicine harming the health of the individual; Art. 192. The members of the National Health System shall respect and promote the development of alternative medicines within the framework of comprehensive health care. Alternative medicines must be exercised by health care professionals with recognized qualifications and certifications from CONESUP who are registered with the national health authority. The practice of alternative therapies shall require a license issued by the national health authority; Art. 196. The national health authority shall analyze all aspects of the training of human resources in the area of health care, taking into account local and national needs, in order to promote reforms in the education and training plans and programs of the institutions that train human resources in the area of health care; Art 201. It is the responsibility of the health care professionals to provide attention of quality, with warmth and efficacy, within their sphere of competence, seek the highest level of health of their patients and of the general population, respecting human rights and bioethical principles. It is their duty to demand the basic conditions to comply with the provisions of the preceding paragraph. Art. 202. A violation in the exercise of the health care professions is constituted by any individual and non-transferable, unjustified act that harms the patient and that results from: (a) failure to comply with the norms; (b) malpractice in the actions of the health care professional with partial or total absence of technical knowledge or experience; (c) recklessness in the actions of the health care professional, failing to provide the required care and diligence, and (d) negligence in the actions of the health care professional by the omission or an unjustified delay in his or her professional obligations; Art 203. The health care services shall bear civil co-responsibility for the actions of the health care professionals that it employs.

202. The Commission asked the Court to order the State to "adopt all necessary measures to avoid similar incidents occurring in future, in compliance with the obligations of prevention and guaranteeing rights recognized by the American Convention."

203. The State did not refer specifically to this measure of reparation.

204. The Court observes that, in the Compliance Agreement, the State undertook "to conduct planned permanent training sessions for health care professionals on patients' rights in both the public and the private sphere."

205. In Chapter IX of this Judgment, the Court declared the violation of the obligation to guarantee the right to personal integrity of Melba Suárez Peralta in relation to the medical attention provided to her and considered that no supervision and control were exercised in this case, both as regards the control of the services provided in the State entity, and as regards the private institution (*supra* para. 155).

206. The Court recalls that, in the Judgment in the case of *Albán Cornejo v. Ecuador,*[238] it had already ordered as a measure of reparation that "[t]he State must, within a reasonable time, offer an education and training program for agents of justice and health care professionals on the laws and regulations that Ecuador has implemented on patients' rights, and the penalty for failing to comply with them."

207. Nevertheless, the Court observes that, as revealed by the corresponding proceeding of monitoring compliance with judgment, more than five years after this measure was decided, it has not yet been executed completely. Owing to this, in an Order of this Court of February 5, 2013, it was considered necessary to reiterate the State's obligation to comply with the education and training programs ordered in the said Judgment.[239] Consequently, this Court reiterates this obligation of the State and does not find it appropriate to order an additional measure to the one decided in the said case, added to the absence of the respective causal nexus.

D. Compensation

1. Arguments of the Commission and of the parties

208. The representative asked the Court to order the State to "pay pecuniary compensation to the victims and their families for the damages to the family's capital assets suffered as a result of the medical malpractice, and the search for justice, truth and reparation over the subsequent years," in the amount of US$750,426.57 (seven hundred and fifty thousand, four hundred and twenty six United States dollars and fifty-seven cents).[240] In addition, the representative requested the payment of US$432,000.00 (four hundred and thirty-two thousand United States dollars) for loss of earnings.

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[238] *Case of Albán Cornejo et al., supra,* para. 7.

[239] *Case of Albán Cornejo et al. v. Ecuador. Monitoring compliance with judgment.* Order of the Inter-American Court of Human Rights of February 5, 2013, para. 19.

[240] The representative detailed the expenses for pecuniary damage as follows: "(1) Hospitalization for appendicitis: Minchala Clinic $2,000.00; (2) Hospitalization for medical malpractice: Luis Vernaza Hospital $50,000.00; (3) Operation to correct injuries: Medi-Houston Medical Center $20,000.00; (4) Treatment: CEMEFA $300.00; (5) Continuing treatment: Cemefa $80.00; (6) Emergency hospitalization: Kennedy Clinic $150.00; 7) Emergency attention: Moreno Clinic $120.00; (8) Emergency hospitalization: Punto Médico Familiar $586.19; (9) Emergency attention: Punto Médico Familiar $118.48; (10) Hospitalization: San Francisco Clinic $630.89; (11) Hospitalization in the San Francisco Clinic $527.27; (12) Emergency hospitalization in the San Francisco Clinic

209. In addition, the representative asked the Court to order the State to pay, as non-pecuniary damage,[241] the sum of US$150,000.00 (one hundred and fifty thousand United States dollars) to Mrs. Suárez Peralta, US$100,000.00 ((one hundred thousand United States dollars) to Melba Peralta Mendoza, US$50,000 (fifty thousand United States dollars) to Dennis Cerezo Cervantes and US$20,000 (twenty thousand United States dollars) to each of their children: Gandy, Katherine and Marilyn, all with the surnames Cerezo Suárez.

210. The State indicated, with regard to incidental damage, that the Court should "stipulate that there are possibly grounds for incidental damage calculated at $38,654.22 (thirty-eight thousand six hundred and fifty-four United States dollars and twenty-two cents), a sum equal to 12% of the amount requested by the representative." Consequently, the State asked the Court to rule, in equity, with regard to the pecuniary damage. However, in its final written arguments, the State asked the Court "[t]o declare inadmissible to claims for the supposed pecuniary damage, because the amounts claimed had not been validly [substantiated ...]. Therefore, if the Court should decide pecuniary reparation, this should not be more than twenty thousand dollars for loss of earnings and incidental damage." The State also contested everything requested for loss of earnings.[242]

211. Regarding non-pecuniary damage, the State indicated that the amounts stipulated by the representative were extremely high, because the Compliance Agreement between the presumed victims and the Ministry of Justice included an amount corresponding to pecuniary damage, non-pecuniary damage, costs and expenses of $300,000.00 (three hundred thousand dollars). In addition, in its final written arguments, the State asked the Court to declare that the non-pecuniary damage should be calculated, based on the equity principle, in accordance with the standards and principles contained in inter-American case law, which could never be more than a total of $10,000.00 (ten thousand dollars) for the two victims.

November 2008 $180.00; (13) Emergency hospitalization twice: Alcívar Clinic $8,045.08; (14) Operation on adhesions in the Alcívar Clinic: $7,345.50; (15) Cleaning adhesions in the Alcívar Clinic: $1,500.00; (16) Loan from Luis Azanza Azanza $11,800.00; (17) Loan from Stalin Intriago Burgos $8,000.00; (18) Loan from Luis Humberto Córdova Ramos $8,500.00; (19) Sale of house of Melba Suárez Peralta $28,000.00; (20) Sale of 2005 Jeep Hyundai Tucson: $20,990.00; 21) Sale of vehicle, license plate GNX-577: $12,810.00; (22) Sale of vehicle, license plate GPB-969: $12,810.00; (23) Loan from the Retirement Fund of the CTE Supervisory Units: $20,902.04; (24) Loans from the *Banco Cooperativa Nacional*: $18,340.00; (25) Loans from *COOPCCP Cooperativa Financiera*: $14,000.00; (26) Loans from the *Banco Solidario*: $4,005.61; (27) Loans from the CTE Credit and Loan Cooperative: $6,540.00; (28) Annual property rental 2009/2010/2011: $12,040,00; (29) MasterCard Debt: $1,413.14; (30) Diners Club of Ecuador debt: $6,086.09; (31) Debt with the *Banco de Pichincha* financial institutions: $923.12; (32) Debt with the *Banco de Guayaquil* financial institutions: $2,410.16; (33) Debt with the Alcívar Hospital Clinic financial institutions: $273.00, and (34) General expenditure for treatment of keratoconus for the child Gandy Cerezo: $20,000.00."

[241] The representative indicated that, in this case, the non-pecuniary damage should be analyzed based on the following circumstances: (a) the operation perform on Mrs. Suárez Peralta in July 2000; (b) the permanent post-operative complications due to the adhesions that continually formed in Mrs. Suárez Peralta's intestine; (c) the physical pain and the suffering resulting from the subsequent operations and the rehabilitation; (d) the pain and anguish resulting from the termination of Mrs. Suárez Peralta's employment, and (e) the effects suffered by her family members.

[242] In this regard, the State indicated that "the company that Melba Suárez supposedly owned, dedicated to the rental of vehicles and known as "Melba Suárez," [...] is not registered as a company in the Company Registry of Duran canton, or in that of Guayaquil; moreover, it does not exist as a company registered with the Superintendence of Companies; in other words this company does not exist and has never existed." It also indicated that "the taxpayers, Melba del Carmen Suárez Peralta and Dennis Edgar Cerezo Cervantes have never presented a tax return; in other words, the supposed income of Mrs. Suárez was never recorded by the Ecuadorian tax authorities [and], consequently, is unsubstantiated. Consequently, the State "contest[ed] everything requested for loss of earnings."

2. Considerations of the Court

212. In its case law, the Court has developed the concept of pecuniary damage and has established that this supposes "the loss or detriment to the income of the victims, the expenditure incurred as a result of the facts, and the pecuniary consequences that have a causal nexus with the facts of the case."[243] The Court has indicated that "[n]on-pecuniary damage may include both the suffering and difficulties caused by the violations, and also the impairment of values that are very significant for the individual, as well as any change, of a non-pecuniary nature, in the living conditions of the victims."[244]

213. In this regard, the Court observes that, in the Compliance Agreement, the State undertook "to pay compensation for the judicial proceeding, pecuniary damage and non-pecuniary damage" to Melba Suárez Peralta and Melba Peralta Mendoza, as beneficiaries. This compensation was agreed as follows: (a) US$250,000.00 (two hundred and fifty thousand United States dollars) to Melba Suárez Peralta, and (b) US$30,000.00 (thirty thousand United States dollars) to Melba Peralta Mendoza.

214. The Court finds that the undertaking to compensate the victims, which includes the pecuniary reparation agreed by the parties to the Compliance Agreement for pecuniary and non-pecuniary damage, represents a positive step taken by Ecuador in compliance with its international treaty-based obligations. Consequently, the Court considers that the amount previously agreed by the State and the victims, under which the State of Ecuador must pay compensation to Melba Suárez Peralta in the amount of US$250,000.00 (two hundred and fifty thousand United States dollars) and to Melba Peralta Mendoza in the amount of US$30,000.00 (thirty thousand United States dollars) is appropriate. This corresponds to compensation for both the violation of the rights to judicial guarantees and to judicial protection (Articles 8 and 25 of the Convention) of Mrs. Suárez Peralta and Mrs. Peralta Mendoza, and for the violation of the obligation to guarantee the right to personal integrity (Article 5 of the Convention) of Mrs. Suárez Peralta declared in this Judgment. In addition, it is indicated that the payment of this compensation is not subject to the presentation of any type of voucher for the respective expenses.

E. Costs and expenses

215. The representative asked the Court to order the State to "reimburse all the costs and expenses incurred by the legal representatives in the litigations before the Ecuadorian domestic courts and by submitting and litigating the case before the organs of the inter-American system." For the litigation in the Ecuadorian State, the representative requested the sum of US$30,000.00 (thirty thousand United States dollars) for the lawyer José Peralta Rendón. For the litigation before the inter-American system, the representative requested the sum of US$40,000 (forty thousand United States dollars) for the lawyer Jorge Sosa Meza.

216. Meanwhile, the State indicated that, since the tax declaration before the Internal Income Tax Service does not reflect the amounts declared and does not provide appropriate evidence in this regard, it asked the Court to establish, in equity, the amounts corresponding to costs and expenses, which should not exceed the $10,000.00 (ten thousand dollars) that the State paid in the case of *Vera Vera et al. v. Ecuador*.

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[243] *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Artavia Murillo et al. ("In vitro fertilization"), supra*, para. 349.

[244] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of García and family members, supra,* para. 224.

217. The Court reiterates that, in keeping with its case law,[245] costs and expenses are part of the concept of reparation, because the actions taken by the victims in order to obtain justice, at both the national and the international level, entail expenditure that must be compensated when the international responsibility of the State is declared in a guilty verdict.

218. Regarding the reimbursement of expenses, it is incumbent on the Court to assess their scope prudently, and this includes the expenses incurred before the authorities of the domestic jurisdiction, as well as those incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the principle of equity and taking into account the expenses indicated by the parties, provided that their *quantum* is reasonable.

219. In this regard, the Court observes that there are no probative documents in the case file to justify the amounts requested by the representatives for professional fees and services. In addition, the amounts requested for fees were not accompanied by arguments with specific evidence relating to their reasonableness and scope.[246]

220. Consequently, in addition to the amount relating to the part corresponding to the judicial proceedings established previously in the compensation and based on the Compliance Agreement, the Court establishes, in equity, the sum of US$10,000.00 (ten thousand United States dollars) for costs and expenses during the processing of the case before the inter-American human rights system in favor of the representative Jorge Sosa Meza.

F. Reimbursement of expenses to the Victims' Legal Assistance Fund

221. The representative requested the support of the Court's Assistance Fund to cover the expenses represented by the participation in the public hearing held in this case of two presumed victims, five family members, four expert witnesses, four witnesses and two representatives.

222. In Orders of the President of the Court of December 20, 2012, and January 24, 2013, authorization was given for the Fund to cover the travel and accommodation costs required for Mrs. Suárez Peralta to appear before the Court and give her testimony at the public hearing, and to cover the costs of preparing and sending the affidavit of Dennis Cerezo Cervantes and of two other deponents chosen by the representative.

223. The State was given the opportunity to present its observations on the disbursements made in this case, which amounted to US$1,436.00 (one thousand four hundred and thirty-six United States dollars). Ecuador did not present observations in this regard. In application of article 5 of the Rules of the Fund, the Court must evaluate the admissibility of ordering the defendant State to reimburse the disbursements made to the Legal Assistance Fund.

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[245] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 39, and *Case of the Massacre of Santo Domingo, supra*, para. 342.

[246] *Cf. Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of May 25, 2010. Series C No. 212, para. 287, and *Case of Artavia Murillo et al. ("In vitro fertilization"), supra*, para. 372.

224. Owing to the violations declared in this Judgment, the Court orders the State to reimburse this Fund the sum of US$1,436.00 (one thousand four hundred and thirty-six United States dollars) for the expenses incurred. This amount must be reimbursed to the Inter-American Court within ninety days of notification of this Judgment.

G. Means of complying with the payments ordered

225. The State must make the payment established 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, in the terms of the following paragraphs.

226. The State must comply with its pecuniary obligations by payment in United States dollars. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs it is not possible to pay the amounts established within the time frame indicated, the State must deposit the amounts in their favor in an account or a certificate of deposit in a solvent Ecuadorian financial institution, in United States dollars, and in the most favorable financial conditions allowed by law and banking practice. If the corresponding compensation is not claimed within 10 years, the amounts shall be returned to the State with the accrued interest.

227. The amounts allocated in this Judgment as compensation and to reimburse costs and expenses must be delivered to the persons indicated integrally, as established in this Judgment, without any reductions owing to eventual taxes or charges

228. If the State should fall in arrears, it must pay interest on the amount owed, corresponding to bank interest on arrears in the Republic of Ecuador.

XI
OPERATIVE PARAGRAPHS

229. Therefore,

THE COURT

DECIDES,

unanimously,

1. To reject the preliminary objection filed by the State concerning the lack of competence of the Court to examine situations related to the right to personal integrity established in Article 5(1) of the American Convention, in the terms of paragraphs 19 to 22 of this Judgment.

2. To admit the preliminary objection filed by the State concerning the inclusion of presumed victims who were not indicated in the Merits Report, in the terms of paragraphs 26 to 28 of this Judgment.

DECLARES,

unanimously, that:

3. The State is responsible for the violation of the right to judicial guarantees and judicial protection recognized in Articles 8(1) and 25(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Melba del Carmen Suárez Peralta and Melba Peralta Mendoza, in the terms of paragraphs 94 to 122 of this Judgment.

4. The State is responsible for the violation of the obligation to guarantee the right to personal integrity, recognized in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Melba del Carmen Suárez Peralta, in the terms of paragraphs 134 to 154 of this Judgment.

5. The State is not responsible for the violation of the obligation to guarantee the right to personal integrity recognized in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Melba Peralta Mendoza, in the terms of paragraphs 155 to 160 of this Judgment.

AND DECIDES,

unanimously, that:

6. This Judgment constitutes *per se* a form of reparation.

7. The State must make the publications indicated in paragraph 189 of this Judgment within six months of its notification.

8. The State must pay the amounts established in paragraphs 184, 214 and 220 of this Judgment for the future medical treatment of Mrs. Suarez Peralta, compensation for pecuniary and non-pecuniary damage, and reimbursement of costs and expenses, within one year of its notification. The State must also pay the amount established in paragraph 224 of this Judgment to reimburse the Victims' Legal Assistance Fund, within 90 days.

9. The State must, within one year of notification of this Judgment, provide the Court with a report on the measures adopted to comply with it.

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 Alberto Pérez Pérez advised the Court of his Separate Opinion and Judge Eduardo Ferrer Mac-Gregor Poisot advised the Court of his Concurring Opinion, both of which accompany this Judgment.

Done, at San José, Costa Rica, on May 21, 2013, in the Spanish and English languages, the Spanish text being authentic.

Diego García-Sayán

President

Manuel E. Ventura Robles | Alberto Pérez Pérez

Eduardo Vio Grossi | Roberto de Figueiredo Caldas

Humberto Sierra Porto | Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

SEPARATE OPINION OF JUDGE ALBERTO PÉREZ PÉREZ
IN THE CASE OF SUÁREZ PERALTA *v.* ECUADOR

1. The purpose of this separate opinion is exclusively to make it clear that the references to the right to health contained in the judgment do not mean that the Court is assuming competence with regard to this right in particular, or to the economic, social and cultural rights in general. The contentious competence of the Court is established in Article 62 of the American Convention, and in paragraph 6 of Article 19 of the Protocol of San Salvador, without prejudice to the pertinent provisions in other inter-American human rights conventions.

2. In this regard, it is worth recalling what Judge Sergio García Ramírez indicated in his separate opinion in the case of Albán Cornejo *v*. Ecuador, when he stated that:

> "[t]he protection of health does not constitute, at the present time, a right that is currently justiciable under the Protocol of San Salvador. However, it is possible – and appropriate – to examine the issue, as the Court has in this case, from the perspective of the preservation of the rights to life and to integrity, and even from the standpoint of access to justice when the violations of those juridical rights – the core of the corresponding rights – gives rise to a claim for justice,"

and that:

> "In such cases, as in others, the State obligation is not limited to the hypothesis in which the State itself, through its own entities, organs or officials, provides health care services" – in other words, provides immediate attention to the protection of life and personal integrity,"

but also includes

> "both the situations in which it has delegated a service, which private individuals provide on the orders of and on behalf of the State, and also the essential supervision of private services related to rights of the greatest social interest, such as health, the control of which must of necessity be exercised by the public authorities. When deciding on a violation of human rights and on State responsibility, the private nature of the institution and of the employees, officials or professional who work in it should not be forgotten; but neither should the public and/or social relevance of the function that they and it have assumed, which cannot fall outside the interest, duty and supervision of the State."

3. This is what has been done in this Judgment in which it was concluded that "a situation of risk [resulted], which the State was aware of, that materialized in adverse effects on the health of Melba Suárez Peralta" and that, "[t]herefore, the State of Ecuador incurred international responsibility for the absence of prevention and the failure to guarantee the right to personal integrity of Melba Suárez Peralta, in violation of Article 5(1) of the American Convention in relation to Article 1(1) of this instrument" (para. 154). Concordantly, in the operative paragraphs, it was determined that "[t]he State is responsible for the violation of the obligation to guarantee the right to personal integrity, recognized in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Melba del Carmen Suárez Peralta, in the terms of paragraphs 134 to 154 of this Judgment" (declarative paragraph 4).

Alberto Pérez Pérez
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE EDUARDO FERRER MAC-GREGOR POISOT

TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE *CASE OF SUÁREZ PERALTA v. ECUADOR*, OF MAY 21, 2013

I. INITIAL PREMISE: THE POSSIILITY OF HAVING APPROACHED THE RIGHT TO HEALTH DIRECTLY AND AUTONOMOUSLY (ARTICLES 26 AND 1(1) OF THE AMERICAN CONVENTION)

1. In this case, the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court") declared the defendant State internationally responsible for the violation of the rights to judicial guarantees and to judicial protection established in Articles 8(1) and 25(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Pact of San José"), as well as of the obligation to guarantee the right to personal integrity contained in Article 5(1), all in relation to Article 1(1) of the Pact of San José.

2. Although I agree with the sense of the judgment delivered unanimously, 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, its jurisdictional instance, which was the implications for the "right to health," owing to medical malpractice with State responsibility that had a serious impact on the health of a woman of 22 years of age, mother of three children, leading to several operations and ailments that affected her human dignity.

3. From my perspective, this situation could have been considered explicitly, so that the considerations of the Judgment on preliminary objections merits, reparations and costs (hereinafter "the Judgment")[1] could have dealt with the question fully, and the implications in the case for the right to health could have been examined autonomously. The foregoing, based on recognizing the competence granted to the Inter-American Court by Article 26 of the Pact of San José to rule on the right to health, and understanding the direct justiciability of this social right – not only tangentially and in connection with other civil rights – which could, perhaps, have led to declaring that this treaty-based provision had been violated autonomously, in relation to the obligations of respect and guarantee established in Article 1(1) of the Pact of San José.

4. Indeed, the general obligations of "respect" and "guarantee" that are established in this article of the Convention – together with the obligation to "adapt domestic legislation" of Article 2 of the American Convention – apply to *all rights*, whether civil, political, economic, social or cultural, in light of the interdependence and indivisibility that exists among *all the human rights* recognized in the Pact of San José; this "interdependence and

[1] *Case of Suárez Peralta v. Ecuador. Preliminary objections merits, reparations and costs.* Judgment of May 21, 2013.

indivisibility" was expressly acknowledged with particular emphasis in relation to the right to health in the Judgment that gives rise to this separate opinion,[2] and this entails a series of significant consequences, including that of accepting that human rights do not have a hierarchy, and civil and political rights are justiciable directly, as are economic, social and cultural rights.

5. Based on the premise that the Inter-American Court has full competence to analyze violations of *all the rights* recognized in the American Convention, including those relating to Article 26,[3] which include the right to the progressive development of economic, social and cultural rights, which includes the right to health – as recognized in the Judgment that gives rise to this separate opinion[4] — I consider that, in this case, this social right should have been analyzed directly, based on the competence that I understand this Inter-American Court to have to rule on a possible violation of the guarantee of economic, social and cultural rights, especially the right to health.

6. Indeed, the competence of the Inter-American Court to examine the right to health is found directly in Article 26 (Progressive Development)[5] of the Pact of San José (using different interpretative mechanisms (*infra* paras. 33 to 72), in relation to Articles 1(1) (Obligation to Respect Rights)[6] and 2 (Domestic Legal Effects),[7] as well as to Article 29 (Restrictions regarding Interpretation)[8] of the American Convention itself. In addition,

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[2] See paragraph 131 of the Judgment, which indicates textually that: "The Court also finds it pertinent to recall the interdependence and indivisibility of civil and political rights, and economic, social and cultural rights, because they must be understood integrally as human rights without any specific ranking between them, and as rights that can be required in all cases before those authorities with the relevant competence"; the foregoing following the precedent of the Inter-American Court in the *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009 Series C No. 198, para. 101.

[3] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra,* para. 16: "the Court has asserted on other occasions, that the broad terms in which the Convention is written indicate that the Court has full jurisdiction over all matters pertaining to its articles and provisions," and thus it decided to examine the merits of the matter by rejecting the first preliminary objection filed by the State, precisely with regard to the Inter-American Court's supposed lack of competence with regard to Article 26 of the American Convention.

[4] *Cf.* para. 131 of the Judgment, which refers to the OAS Charter and in footnote 169 establishes: "Article 26 of the American Convention (Pact of San José) refers to the progressive development, "by legislation or other appropriate means, and in keeping with the available resources [...] of the rights implicit in the economic [and] social, standards set forth in the Charter of the [OAS]." <u>The right to health is included in this reference</u> (underlining added).

[5] "Article 26. Progressive Development. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

[6] "Article 1. *Obligation to Respect Rights.* 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."

[7] "Article 2. *Domestic Legal Effects.* Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

[8] American Convention: "Article 29. *Restrictions regarding Interpretation.* No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government, or (d)

considering Articles 34(i)[9] and 45(h)[10] of the Charter of the Organization of American States, Article XI[11] of the American Declaration on the Rights and Duties of Man, and Article 25(1)[12] of the Universal Declaration of Human Rights (the last two instruments pursuant to the provisions of Article 29(d)[13] of the Pact of San José), as well as other international instruments and sources that accord content, definition and scope to the right to health – as the Court has done in relation to the civil and political rights[14] - such as Articles 10[15] of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, 17 and 33(2) of the Social Charter of the Americas,[16] 12(1) and 12(2)(d)[17]

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excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

9 Article 34(i) of the OAS Charter establishes among the "basic objectives of integral development," the "protection of man's potential through the extension and application of modern medical science" (underlining added).

10 Article 45 of the OAS Charter indicates: "The Member States [...] agree to dedicate every effort to the application of the following principles and mechanisms: (h) Development of an efficient social security policy." In the Judgment this precept is used in relation to Article 26 to arrive at the right to health, see para. 131 and footnote 176 of the Judgment to which this separate opinion refers; although it appears to bear a greater relationship to the issue of Article 34(i) of the OAS Charter.

11 American Declaration: "Article XI. Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources" (underlining added).

12 Universal Declaration: "Article 25(1): Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services… ."

13 This expressly states that that the effect that the "American Declaration" and "other international acts of the same nature" may have cannot be limited.

14 For example, the *Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 153, establishes: "The content and scope of Article 19 of the American Convention must defined, in cases such as this, taking into consideration the pertinent provisions of the Convention on the Rights of the Child, in particular its articles 6, 37, 38 and 39, and of Protocol II Additional to the Geneva Conventions, because these instruments and the American Convention form part of a very comprehensive international *corpus juris* for the protection of children that States must respect."

Another example is the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs*. Judgment of August 31, 2001, Series C No. 79, paras. 147 and 148; the latter states that: "By using an evolutive interpretation of the international instruments for the protection of human rights, taking into account the applicable rules of interpretation and, pursuant to Article 29(b) of the Convention – which prohibits a restrictive interpretation of rights – this Court considers that Article 21 of the Convention protects the right to property in a sense that includes, among other matters, the rights of the members of the indigenous communities relating to communal property, which is also recognized in the Nicaraguan Constitution."

Similarly, in the *Case of Gelman v. Uruguay*. *Merits and reparations*. Judgment of February 24, 2011, Series C No.221, para. 121, the Inter-American Court established that: "María Macarena Gelman had a right to special measures of protection [...] [so that] the alleged violations of the rights recognized in Articles 3, 17, 18 and 20 of the Convention must be interpreted in light of the *corpus juris* concerning the rights of the child and, in particular, according to the special circumstances of the case, in harmony with the other relevant norms, especially Articles 7, 8, 9, 11, 16 and 18 of the Convention on the Rights of the Child."

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

16 Social Charter of the Americas, approved by the OAS General Assembly on June 4, 2012, in Cochabamba, Bolivia.

of the International Covenant on Economic, Social and Cultural Rights, 12(1)[18] of the Convention on the Elimination of all Forms of Discrimination against Women, 24[19] and 25[20] of the Convention on the Rights of the Child, among other international instruments[21] and sources[22] — and even national ones by way of Article 29(b)[23] of the American Convention.[24]

"Chapter III, Article 6. The Member States reaffirm that *the enjoyment of the highest attainable standard of health is a fundamental right of all persons without discrimination and recognize that health is an essential condition for social inclusion and cohesion, integral development and economic growth with equity.* In that context, the States reaffirm their responsibility and commitment to improve the availability of, access to, and quality of health care services. The States are committed to these country efforts in the health area in accordance with the principles promoted by the Health Agenda for the Americas 2008-2017: human rights, universality, comprehensiveness, accessibility and inclusion, Pan American solidarity, equity in health, and social participation.

Member states affirm their commitment to promote healthy lifestyles and to strengthen their capacity to prevent, detect, and respond to chronic non-communicable diseases, current and emerging infectious diseases, and environmental health concerns. Member states also commit to promote our peoples' well-being through prevention and care strategies and, in partnership with public or private organizations, to improve *access to health care*."

"Chapter V, Article 1: "Integral development encompasses among others, the economic, social, educational, cultural, scientific, technological, labor health, and environmental fields through which the goals that each country sets for accomplishing it should be achieved."

[17] International Covenant on Economic, Social and Cultural Rights: "Article 12(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: ... (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

[18] Convention on the Elimination of all Forms of Discrimination against Women: "Article 12. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

[19] Convention on the Rights of the Child: "Article 24. 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures [...]."

[20] Convention on the Rights of the Child: "Article 25. States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement."

[21] For example, the Convention on the Protection of Migrant Workers and Members of their Families: "Article 28. Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment." In general, see the instruments that are mentioned in General Comment No. 14 of the Committee on Economic, Social and Cultural Rights on "The right to the highest attainable standard of health (Article 12)," para. 2.

[22] Such as the general recommendations and comments of different Committees. Particularly relevant to the right to health is General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, which interprets Article 12 of the International Covenant on Economic, Social and Cultural Rights, on "The right to enjoy the highest attainable standard of health." Also, the Liburg Principles on the Implementation of the International. Covenant on Economic, Social and Cultural Right, paragraph 25 of which indicates: "States parties are obligated regardless of the level of economic development, to ensure respect for minimum subsistence rights for all."

In addition, the *Progress Indicators in Respect of Rights Contemplated in the Protocol of San Salvador*, OEA/Ser.L/XXV.2.1, Doc 2/11 rev.2, 16 December 2012, are of interest.

[23] American Convention: "Article 29(b) No provision of this Convention shall be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."

[24] Most of the national Constitutions of the countries that have signed the Pact of San José explicitly regulate, implicit with other precepts or by means of the incorporation of international treaties, the protection of the right to health. See *infra* paras. 74 and 75. In addition, it should be recalled that the Inter-American Court has

And this, without being limited by Article 19(6)[25] of the Protocol of San Salvador, which merely refers to the justiciability of certain trade union rights and the right to education, whereas it is Article 26 of the American Convention itself that accords this possibility, as we shall see below.

7. Evidently, this position requires further scrutiny of the interpretation of the inter-American normative as a whole and, particularly, of Article 26 of the Pact of San José, which establishes "the full effectiveness" of economic, social and cultural rights, without the elements of "progressiveness" and of "available resources" to which this article refers constituting conditioning normative elements for the justiciability of the said rights; rather, in any case, they constitute aspects relating to their implementation in keeping with the specific circumstances of each State. Indeed, as indicated in the case of *Acevedo Buendía*, cases may arise in which judicial control is focused on alleged regressive measures or on inadequate management of the available resources (in other words, judicial control in relation to progressive development).

8. Furthermore, this line of argument requires a progressive vision and interpretation, in keeping with the times, which requires considering the progress made in comparative law – especially that of the highest national jurisdictions of the States Parties, and even the tendencies in other parts of the world – as well as an interpretation that analyzes the inter-American *corpus juris* as a whole, especially the relationship between the American Convention and the Protocol of San Salvador.

9. This is why, under Article 66(2) of the American Convention,[26] and based on the elements deliberated on and discussed with my esteemed colleagues, I feel the need to add to the Judgment my concurring individual opinion on some of the important implications that this matter has in direct and autonomous relationship to the right to health in cases of medical malpractice. This was the central issue of the facts of the case, which, ultimately, focused on the merits of the matter to declare the international responsibility of the State concerned with regard to other civil rights recognized in the Pact of San José.

10. The intention of this separate opinion is to encourage further thought on the necessary evolution that, in my opinion, should take place in inter-American case law towards the full normative effectiveness of Article 26 of the Pact of San José, thereby granting transparency and real protection to economic, social and cultural rights, which requires accepting their direct justiciability and, if appropriate — as in the case of civil and political rights — eventually being able to declare the autonomous violation of those rights, in relation to the general obligations established in Articles 1 and 2 of the American Convention when the circumstances of a specific case require this.

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used the contents of the national Constitutions to grant certain contents to civil rights; for example "in application of Article 29 of the Convention, the provisions of article 44 of the Constitution of the Republic of Colombia should be considered" (fundamental rights of the child). *Case of the "Mapiripán Massacre," supra*, para. 153.

[25] Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights: "Article 19. *Measures of protection.* 6. Any instance in which the rights established in paragraph (a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights."

[26] Article 66(2) of the American Convention establishes: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment. Also, see Articles 24(3) of the Statute of the Inter-American Court and 32(1)(a), 65(2) and 67(4) of its Rules of Procedure.

11. Indeed, without denying the progress achieved indirectly in the protection of economic, social and cultural rights and in connection with other civil and political rights — which has been the well-known practice of this Inter-American Court – in my opinion, this approach does not accord full efficacy and effectiveness to those rights, denaturing their essence. Moreover, it does not contribute to clarifying the State's obligations in this regard and, ultimately, results in an overlap among rights, which leads to unnecessary confusion in these times when there is a clear tendency towards the recognition and normative efficacy of *all the rights* in keeping with the evident progress that can be noted in the domestic sphere and in international human rights law.

12. Bearing in mind these initial premises, I now find it appropriate to examine: (i) the justiciability of economic, social and cultural rights, including the right to health, based on their interdependence and indivisibility with civil and political rights (paragraphs 13 to 32); (ii) the interpretative mechanisms of Article 26 for the direct justiciability of economic, social and cultural rights (paragraphs 33 to 87); (iii) the *iura novit curia* principle and the direct justiciability of the right to health in this case (paragraphs 88 to 96), and (iv) some concluding considerations (paragraphs 97 to 108).

II. THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO HEALTH, BASED ON THEIR INTERDEPENDENCE AND INDIVISIBILITY WITH CIVIL AND POLITICAL RIGHTS

A) Precedents and current state of the debate

13. The Inter-American Court has had the occasion to rule previously on some of the implications of the protection of the right to health. In some cases in relation to the rights to life or to personal integrity,[27] in others in the context of the concept of a "decent life,"[28] and in others based on the medical care provided in detention centers or similar institutions;[29] even, in yet other cases, in relation to sexual or reproductive rights.[30]

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[27] Irrespective of specific references in provisional measures and in advisory opinions, the following judgments are relevant: *Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012, Series C No. 246; *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 the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010, Series C No. 214; *Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs.* Judgment of November 22, 2007, Series C No. 171, and *Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006, Series C No. 149.

[28] *Cf. Case of the Xákmok Kásek Indigenous Community*, *supra*; *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of June 17, 2005, Series C No. 125; *Case of the "Children's Rehabilitation Institute" v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004, Series C No. 112, and *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63.

[29] *Cf. Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of May 19, 2011. Series C No. 226; *Case of Vera Vera et al., supra*; *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218; *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2006. Series C No. 160, and *Case of the "Children's Rehabilitation Institute," supra.*

[30] *Cf. 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; *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010. Series C No. 216; *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 30, 2010, Series C No. 215; *Case of the Xákmok Kásek Indigenous Community, supra*; *Case of the Miguel Castro Castro Prison, supra*, and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006, Series C No. 146.

14. In very few cases has it analyzed the implications of Article 26 of the American Convention, generally limiting itself to interpreting certain normative parts of this treaty-based provision in relation to economic, social and cultural rights. It has never declared, directly and autonomously, the violation of the said provision.[31]

B) The interdependence and indivisibility of all the rights as an essential element to grant direct justiciability to economic, social and cultural rights

15. The possibility for this Inter-American Court to rule on the right to health arises, first, from the "interdependence and indivisibility" that exists between civil and political rights and economic, social and cultural rights.[32] Indeed, the Judgment that underlies this separate opinion, expressly recognizes this nature, because all rights should be understood integrally as human rights, without any specific hierarchy, that may be required at all times before those authorities who have the respective competence.[33]

16. We consider that the above is of the greatest importance for the progressive development and justiciability of economic, social and cultural rights. The Inter-American Court bases itself on a 2009 precedent – decided by the former composition of the Court – in which it had already recognized the "interdependence" of human rights. Indeed, on that occasion, the Court stated:[34]

> 101. In this regard, the Court finds it pertinent to recall the interdependence that exists between civil and political rights and economic, social and cultural rights, because they should be understood integrally as human rights, without any specific hierarchy, and may be required at all times before those authorities who have the respective competence.

17. In addition to establishing "the interdependence" of human rights in that case, the Inter-American Court endorsed the ruling of the European Court of Human Rights on interpretative extensions towards the protection of social and economic rights. On that occasion, it stated:[35]

> In this regard, the case law of the European Court of Human Rights should be quoted, which, in the case of Airey, indicated that:
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>> The Court is aware that the further realisation of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the [European] Convention must be interpreted in the light of present-day conditions [...] and it is designed to

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[31] The Inter-American Court has referred to Article 26 of the American Convention and analyzed it specifically on very few occasions. However, it did so in the following cases: *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, paras. 99 a 103; *Case of the Yean and Bosico Girls v. Dominican Republic.* Judgment of September 8, 2005. Series C No. 130, para. 158, and *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003, Series C No. 98, paras. 147 and 148; and *Case of the Yakye Axa Indigenous Community*, *supra*, para. 163. In this last case, the State acquiesced to its responsibility for the violation of Article 26, but the Court only referred to this article in its narrative on the violation of the right to life.

[32] Paragraph 5 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on June 25, 1993, states categorically that: "[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

[33] *Cf.* para. 131 of the Judgment.

[34] *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, para. 101.

[35] *Idem.* Similarly, see United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 9, E/C.12/1998/24, 3 December 1998, para. 10, and ECHR. *Sidabras and Dziautas v. Lithuania.* Nos. 55480/00 and 59330/0. Second Section. Judgment of 27 July 2004, para. 47.

> safeguard the individual in a real and practical way as regards those areas with which it deals [...]. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.[36]

18. The important point of this consideration on the interdependence of civil and political rights with economic, social and cultural rights, made by the Inter-American Court in the *Case of Acevedo Buendía et al. v. Peru*, stems from the fact that this ruling was made when examining the interpretative scope of Article 26 of the American Convention, with regard to a right (social security), that is not expressly recognized to be justiciable in Article 19(6) of the Protocol of San Salvador.[37] Prior to its analysis of the merits, the Inter-American Court had expressly rejected the preliminary objection of lack of competence *ratione materiae* filed by the defendant State:[38]

> [...] the State argued that the right to social security fell outside the sphere of competence of the Court owing to the subject-matter, because it is not included in the American Convention, and is not one of the two rights (trade union rights and the right to education) that, exceptionally, are justiciable before the inter-American system, as indicated in Article 19(6) of the Protocol of San Salvador.

19. The Inter-American Court, without mentioning the Protocol of San Salvador to determine whether it had competence in this regard,[39] finding that this was not necessary because the direct violation of that international instrument had not been alleged, rejected the State's preliminary objection, considering, on the one hand, that as any organ with jurisdictional functions, the Inter-American Court had the authority inherent in its attributes to determine the scope of its own competence (*compétence de la compétence*); and, on the other hand, that "the Court must take into account that the instruments accepting the optional clause on binding jurisdiction (Article 62(1) of the Convention) supposes the acceptance of the Court's right to decide *any dispute relating to its jurisdiction* by the States that present this instrument.[40] In addition, the Court has indicated previously that the broad terms in which the Convention was drafted indicate that the Court exercises *full jurisdiction over all its articles and provisions."*[41]

20. In this important precedent, the Inter-American Court rejected the preliminary objection of the defendant State that expressly argued that this jurisdictional organ lacked competence to rule on a non-justiciable right under Article 19(6)[42] of the Protocol of San Salvador. In other words, by rejecting this preliminary objection and examining the merits

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[36] ECHR. *Airey v. Ireland*. No. 6289/73. Judgment of 9 October 1979, para. 26.

[37] See the content of this provision, *supra*, nota 25.

[38] *Case of Acevedo Buendía et al. v. Peru ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, para. 12.

[39] In this regard, see the criticisms of Ruiz-Chiriboga, Oswaldo, The American Convention and the Protocol of San Salvador: Two Intertwined Treaties. Non-enforceability of Economic, Social and Cultural Rights in the Inter-American System. *Netherlands Quarterly of Human Rights*. Vol. 31/2, 2013, pp. 156 to 183, on p. 167.

[40] *Cf. Case of Ivcher Bronstein v. Peru. Competence.* Judgment of September 24, 1999. Series C No. 54, paras. 32 and 34; *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of August 12, 2008. Series C No. 186, para. 23, and *Case of García Prieto et al. v. El Salvador. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2007. Series C No. 168, para. 38.

[41] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 29, and *Case of the 19 Tradesmen v. Colombia. Preliminary objection*. Judgment of June 12, 2002. Series C No. 93, para. 27.

[42] See the content of this article, *supra* nota 25.

of the matter, the Inter-American Court considered that it had competence to hear and to decide (even to be able to declare violated) Article 26 of the Pact of San José. However, in that particular case, it found that there had not been a violation of this treaty-based provision.[43] When examining the merits of the matter, the Inter-American Court considered that the economic, social and cultural rights referred to in Article 26 are subject to the general obligations contained in Articles 1(1) and 2 of the American Convention, as are the civil and political rights established in Articles 3 to 25.[44]

21. The competence of the Inter-American Court to rule on economic, social and cultural rights, under the normative content of Article 26 of the Pact of San José, can also be seen in the considerations expressed in the 2009 concurring opinion of the former president of the Inter-American Court, Sergio García Ramírez, in the *Case of Acevedo Buendía et al. v. Peru*, which, to some extent, explains the decision of the said jurisdictional organ.[45]

22. Thus, in his concurring opinion, the former inter-American judge recognized that, up until that time, the treatment of economic, social and cultural rights "has been very limited" and that, in that case, the Inter-American Court "had made progress" on the issue of those rights when "reaffirming its competence – which should now be well-established" – to rule on possible failures to comply with Article 26" of the American Convention. Accordingly, the Inter-American Court "understands that the observance of Article 26 may be claimed and required."

23. In this sense, in the *Case of Acevedo Buendía et al.,* the Inter-American Court made express reference to the "interdependence" of rights in order to examine the economic, social and cultural rights referred to in Article 26 of the Pact of San José.[46] However, it found that, together with the interdependence, it was necessary to emphasize the "indivisible" nature of human rights, as it explicitly established in the judgment to which this separate opinion refers, when considering the two concepts: "interdependence and indivisibility"[47].

24. Based on their interdependence (reciprocal dependence), the enjoyment of some rights depends on the realization of others, while their indivisibility denies any separation, categorization or hierarchy among rights for the effects of their respect, protection and guarantee. Moreover, some judges of previous compositions of the Inter-American Court have referred to the "independence and indivisibility" of human rights.[48]

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[43] *Cf. Case of Acevedo Buendía et al. v. Peru ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, third operative paragraph.

[44] *Cf. Case of Acevedo Buendía et al. v. Peru ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, para. 100. It should not be forgotten that, in this matter, the Commission in its Merits Report did not find that the content of Article 26 had been violated, but the representatives of the victims did allege this when expressly stating that "the State is responsible for non-compliance with Article 26 (Progressive development of economic, social and cultural rights) of the Convention, in relation to Article 1(1) (Obligation to Respect Rights) thereof," para. 4 of the judgment in the *Case of Acevedo Buendía.*

[45] Concurring opinion of Judge Sergio García Ramírez with regard to the Judgment of the Inter-American Court of Human Rights in the *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller")* of July 1, 2009, paras. 15 to 21.

[46] *Cf. Case of Acevedo Buendía et al. v. Peru ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, para. 101.

[47] Para. 131 of the Judgment.

[48] See, for example, the partially concurrent and partially dissenting opinion of Judge *ad hoc* Ramon Fogel, paras. 23 and 30, in the *Case of the Yakye Axa Indigenous Community v. Paraguay, supra*, and the opinion of Judge Antonio Cançado Trindade, para. 7, in the *Case of the Dismissed Congressional Employees (Aguado Alfaro et*

25. In this sense, I consider that the "interdependence and indivisibility" should be dealt with as an inseparable duo, as indicated in the main human rights instruments.[49] This is in order to assume the challenge of their interpretation and implementation as a holistic task that obliges us not to lose sight of the implications of the respect, protection and guarantee of civil and political rights in relation to economic, social and cultural rights, and *vice versa*. The application, promotion and protection of economic, social and cultural rights call for the same attention and urgent consideration as that of the civil and political rights.[50]

26. In the case that underlies this separate opinion, the Inter-American Court had an opportunity to develop in its case law the implications of the concepts of the interdependence and indivisibility of human rights, which are very useful tools for achieving the "direct" justiciability of economic, social and cultural rights, particularly "the right to health," and to achieve its full realization and effectiveness.

27. From my perspective, these implications involve: (a) establishing a strong relationship, based on their equal importance, between civil and political rights, and economic, social and cultural rights; (b) making it obligatory to interpret all rights together – which, at times, results in overlapping contents – and to assess the implications of the respect, protection and guarantee of some rights for other rights, as regards their effective implementation; (c) considering economic, social and cultural rights autonomously, based on their intrinsic essence and characteristics; (d) recognizing that they can be violated autonomously, which could lead – as happens in the case of civil and political rights — to declaring the obligation to guarantee rights arising from Article 26 of the Pact of San José, in relation to the general obligations established in Articles 1 and 2 of the American Convention; (e) defining the obligations that the State must fulfill in the area of economic, social and cultural rights; (f) allowing a progressive and systematic interpretation of the inter-American *corpus juris,* especially to emphasize the implications of Article 26 of the Convention with regard to the Protocol of San Salvador, and (g) providing a further justification for using other instruments and interpretations of international organizations with regard to economic, social and cultural rights in order to endow them with content.

C) The implications of the interdependence and indivisibility of the right to health in this case

28. Now, in the Judgment to which this separate opinion refers, the Inter-American Court made specific reference to the concepts of interdependence and indivisibility in order to define the scope of the right to health, when examining the violation of the obligation to guarantee the right to personal integrity (Articles 5(1) in relation to 1(1) of the Pact of San José),[51] and concluding "that although the relevant Ecuadorian regulations established mechanisms of control and supervision of medical care, this supervision and control was not carried out in the instant case, as regards control of both the services provided in the State

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al.) v. Peru. Preliminary objections, merits, reparations and costs. Judgment of November 24, 2006. Series C No. 158.

[49] See the Preamble to the American Convention on Human Rights, to the International Covenant on Civil and Political Rights, and to the International Covenant on Economic, Social and Cultural Rights. Proclamation of Teheran 1948, para. 13.

[50] *Cf.* Resolution 32/130 of the General Assembly of the United Nations, of 16 September 1977, paragraph 1, subparagraph (a); Declaration on the Right to Development made by the General Assembly in its resolution 41/128 of 4 December 1986, para. 10 of the preamble and art. 6; the 1986 Limburg Principles, especially No. 3, and the 1997 Maastritch Guidelines on Violations of Economic, Social and Cultural rights, particularly No. 3.

[51] The analysis of the right to personal integrity is made in paras. 123 to 160 of the Judgment, although many passages are related to the right to health.

facility, the Polyclinic of the Guayas Traffic Commission, and those provided in the private institution, the Minchala Clinic. The Court finds that this resulted in a situation of risk, which the State was aware of, that materialized in adverse effects on the health of Melba Suárez Peralta."[52] In addition, the Inter-American Court affirmed that "the State's supervision and inspection should be designed to ensure the principles of availability, accessibility, acceptability, and quality of the medical services" and, to this end, it emphasized that "regarding the quality of the service, [...] health facilities must have satisfactory conditions of hygiene and trained medical personnel."[53]

29. In this analysis, the Inter-American Court referred expressly to different international instruments, resolutions and sources that regulate or have direct implications for the protection of the right to health:

(i) Article 26 of the American Convention on Human Rights;[54]

(ii) Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, ratified by Ecuador on March 25, 1993, which establishes that everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being, and indicates that health is a public good.[55]

(iii) Article XI of the American Declaration on the Rights and Duties of Man, which indicates that every person has the right "to the preservation of his health through sanitary and social measures relating to [...] medical care, to the extent permitted by public and community resources";[56]

(iv) Article 45 of the Charter of the Organization of American States, when stating that the Member States are required "[t]o dedicate every effort to the [... d]evelopment of an efficient social security policy";[57]

(v) Article 12 del International Covenant on Economic, Social and Cultural Rights.[58]

(vi) The Social Charter of the Americas of June 2012, adopted by the General Assembly of the Organization of American States, which emphasizes the quality of the health establishments, goods and services, which require the presence of qualified medical personnel, as well as satisfactory conditions of hygiene;[59]

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52 Para. 154 of the Judgment.

53 Para. 152 of the Judgment.

54 Footnote 176 [Nota: not 176] of the Judgment. This note refers to the mention made to the OAS Charter in para. 131, from which the Inter-American Court derives the right to health; although I consider that it should have considered article 34(i) of the OAS Charter.

55 *Cf.* para. 131 of the Judgment. The *Case of Vera Vera et al., supra*, para. 43, is cited.

56 *Cf.* para. 131 of the Judgment.

57 *Cf.* para. 131 of the Judgment.

58 Cf. para. 152 of the Judgment.

59 *Cf.* para. 131, *in fine*, of the Judgment.

(vii) The Progress Indicators in Respect of Rights Contemplated in the Protocol of San Salvador.[60] ~~o~~

(viii) General comment No. 14 of the United Nations Committee on Economic, Social and Cultural Rights, on “The right to the highest attainable standard of health (Article 12)”;[61] ~~Article~~

(ix) General comment No. 9 of the United Nations Committee on Economic, Social and Cultural Rights, on “The domestic application of the Covenant.”[62]

(x) General comment No. 3 of the United Nations Committee on Economic, Social and Cultural Rights, on “The nature of States parties' obligations (paragraph 1 of Article 2 of the Covenant).”[63]

30. Similarly, when the Judgment examines the violation of the right to judicial guarantees and to judicial protection established in Articles 8(1) and 25(1) of the American Convention, in relation to the obligations of respect and guarantee of Article 1(1) of this instrument, the Inter-American Court determined that there had been errors, delays and omissions in the criminal investigation proceedings, and that therefore “the State authorities did not act with due diligence or in keeping with the obligations to investigate and to ensure effective judicial protection within a reasonable time, in order to guarantee to Melba Suárez Peralta a reparation <u>enabling her to have access to the medical treatment required by her health problems</u>”[64] (underlining added).

31. I consider that, with all these precedents in the *corpus juris* with regard to protection of the right to health — in the sphere of the inter-American and the universal system — mentioned and used in the Judgment that prompts this separate opinion, even having recourse to very relevant decisions of the United Nations Committee on Economic, Social and Cultural Rights, as well as other recent international sources, such as the Social Charter of the Americas, adopted in June 2012 by the OAS General Assembly, the Inter-American Court could have approached this social rights Article autonomously, in relation to the obligation of guarantee referred t in 1(1) of the Pact of San José.

32. This is so, because, on the one hand, the interdependence and indivisibility of rights and the absence of a hierarchy among them is expressly recognized in the Judgment and, on the other hand, the OAS Charter and the American Declaration on the Rights and Duties of Man are used, even deriving the right to health from that instrument in relation to the

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[60] *Cf.* Footnote 172 of the Judgment: Organization of American States, Progress Indicators in Respect of Rights Contemplated in the Protocol of San Salvador, adopted by the General Assembly, Resolution 2713 (XLII-0/12), forty-second regular session, Cochabamba, Bolivia, June 2012, paras. 66 and 67. In footnote 172 of the Judgment, the Inter-American Court transcribes part of this document: “The Protocol refers to observance of the right in the framework of a health system that, however basic it may be, should ensure access to primary health care and the progressive development of a system that provides coverage to the country’s entire population. [...] 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.” In addition, the said indicators include: “Existence of administrative instances to submit complaints in matters of non-compliance with obligations related to the right to health. Competences of Ministries or of Superindences to receive complaints from the health system users. Policies for training judges and lawyers on the right to health.”

[61] *Cf.* footnotes 175, 182, 217, 220, 221 and 222 of the Judgment.

[62] *Cf.* footnotes 175 and 179 of the Judgment.

[63] Footnote 176 of the Judgment.

[64] Para. 122 of the Judgment.

provisions of Article 26 of the American Convention.[65] In addition, reference is made to Article 10 of the Protocol of San Salvador, which I consider would have provided an opportunity to make an evolutive and systematic interpretation of this precept and of Article 26 of the American Convention, in light of other treaty-based provisions, such as Article 29 of the Pact of San José and Articles 4 and 19(6) of the Protocol of San Salvador.

III. THE WAY TO INTERPRET ARTICLE 26 OF THE AMERICAN CONVENTION FOR THE DIRECT JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

33. In addition to the interdependence and indivisibility of rights, explicitly recognized in the Judgment, the implications of which were demonstrated in the preceding section, the direct justiciability of economic, social and cultural rights, derives from the American Convention itself, the instrument at the core of the inter-American system that constitutes the main object of "application and interpretation"[66] of the Inter-American Court, which has "competence with respect to matters relating to the fulfillment of the commitments made by the States Parties"[67] to the Pact of San José.

34. When considering the scope of the right to health, it is necessary to make an interpretative re-evaluation of Article 26 of the American Convention, the only article of this treaty that refers to "the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires," based on the fact that the Inter-American Court exercises full jurisdiction over all the articles and provisions, which include this provision of the Convention.

35. Furthermore, Article 26 forms part of Part I (State Obligations and Rights Protected) of the American Convention and, therefore, the general obligations of the States established in Articles 1(1) and 2 of the Convention are applicable to it, as recognized by the Inter-American Court itself in the *Case of Acevedo Buendía v. Peru.*[68] Nevertheless, there is an apparent interpretative conflict between the scope that should be given to Article 26 of the Pact of San José, and Article 19(6) of the Protocol of San Salvador, which limits the justiciability of the economic, social and cultural rights to certain rights only.

A) The apparent conflict between the Pact of San José and the Protocol of San Salvador

36. From my perspective, an interpretative development of Article 26 of the Pact of San José is required in the case law of the Inter-American Court, and this could open new possibilities for making economic, social and cultural rights effective, in both their individual and collective dimensions. Moreover, in the future new content could be established through evolutive interpretations that enhance the interdependent and indivisible nature of human rights.

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[65] The reference is found in footnote 176 to para. 131 of the Judgment, from which the Inter-American Court considers that the right to health is derived.

[66] *Cf.* Article 1 of the Statute of the Inter-American Court of Human Rights, approved by the OAS General Assembly in October 1979.

[67] *Cf.* Article 33 of the American Convention on Human Rights.

[68] *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, paras. 16, 17 and 100.

37. In this regard, I consider opportune the call made some months ago by the very distinguished judge Margarette May Macaulay — from the Inter-American Court's previous composition — in her concurring opinion in the *Case of Furlan and family members v. Argentina,*[69] regarding the updating of the normative meaning of this treaty-based precept. The former judge indicated that the Protocol of San Salvador "does not establish any provision intended to restrict the scope of the American Convention."[70] In addition, she stated that:[71]

> [...] when interpreting the Convention [and the Protocol of San Salvador], a systematic interpretation of the two treaties should be made, taking their purpose into account. In addition, the Vienna Convention requires an interpretation in good faith of the terms of Article 26, as made previously to determine the scope of the textual reference to the said article in relation to the OAS Charter and its relationship to Articles 1(1) and 2 of the Convention. This interpretation in good faith requires recognizing that the American Convention does not establish distinctions when indicating that its jurisdiction covers all the rights established from Article 3 to Article 26 of the Convention. Furthermore, Article 4 of the Protocol of San Salvador establishes that no right recognized or in force in a State may be restricted or infringed by international instruments, under the pretext that the said Protocol does not recognize it or recognizes it to a lesser degree. Lastly, the Vienna Convention declares that an interpretation should not lead to a manifestly absurd or unreasonable result. In this regard, the conclusion that the Protocol of San Salvador limits the scope of the Convention would lead to the absurd consideration that the American Convention could have certain effects for the States Parties to the Protocol of San Salvador while having a different effect for the States that are not a party to this Protocol.[72]

38. Judge Macaulay specified that it was incumbent on the Inter-American Court to update the normative meaning of Article 26 as follows:[73]

> [...] what matters is not the subjective intention of the delegates of the States at the time of the Conference of San José or during the discussion of the Protocol of San Salvador, but the objective intention of the text of the American Convention, taking into account that the interpreter's obligation is to update the normative meaning of the international instrument. Moreover, it is not possible to discredit the explicit content of the American Convention using a historical interpretation, based on the hypothetical intention that the delegates who adopted the Protocol of San Salvador would have had with regard to the Convention.

39. Besides the above, some arguments additional to this interpretation of the relationship between the American Convention and the Protocol of San Salvador can be considered concerning the Court's competence to examine direct violations of economic, social and cultural rights in light of Article 26 of the Pact of San José.

40. First, it is essential to establish the importance of taking into account the literal interpretation of Article 26 with regard to the competence established to protect *all the rights* established in the Pact of San José, which include the rights established in Articles 3 through 26 (Chapter II: "Civil and political rights, and Chapter III: "Economic, social and cultural rights"). As I have already mentioned, the Inter-American Court recognized this expressly in the judgment en el case of *Acevedo Buendía et al. v. Peru:*[74]

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[69] *Case of Furlan and family members, supra.*

[70] Concurring opinion of Judge Margarette May Macaulay in the *Case of Furlan vs. Argentina*, *supra,* para. 8.

[71] *Idem.*

[72] Only 15 States have ratified the Protocol of El Salvador. Source: http://www.cidh.oas.org/Basicos/basicos4.htm.

[73] Concurring opinion of Judge Margarette May Macaulay in the *Case of Furlan v. Argentina, supra*, para. 9.

[74] *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, para. 100.

> 100. Furthermore, it is pertinent to note that even though Article 26 is contained in Chapter III of the Convention, entitled "Economic, Social and Cultural Rights," it is also located in Part I of the said instrument, entitled "State Obligations and Rights Protected" and, therefore, is subject to the general obligations contained in Articles 1(1) and 2 mentioned in Chapter I (entitled "General Obligations"), as well as Articles 3 to 25 indicated in Chapter II (entitled "Civil and Political Rights").

41. This interpretation by the Inter-American Court, adopted unanimously,[75] constitutes a fundamental precedent for the direct justiciability of economic, social and cultural rights, by stating that, when dealing with the rights that can be derived from Article 26, it is possible to apply the general obligations of respect, guarantee, and adaptation contained in Articles 1(1) and 2 of the American Convention. Given that, in this case, the Inter-American Court did not rule on these interpretative implications in relation to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, I consider that the Judgment to which this separate opinion refers would have provided a significant opportunity to allude to this, because the Protocol of San Salvador, the OAS Charter, the American Declaration, and even Article 26 of the American Convention were used expressly to give content to the right to health (see *supra* para. 29).[76]

42. Now, none of the articles of the Protocol of San Salvador make any reference to the scope of the general obligations referred to in Articles 1(1) and 2 of the American Convention. If the Pact of San José is not being amended expressly, the corresponding interpretation should be the least restrictive as regards its scope. In this regard, it is important to stress that the American Convention itself establishes a specific procedure for its amendment.[77] If the Protocol of Salvador had been intended to annul or amend the scope of Article 26, this should have been established explicitly and unequivocally. The clear wording of Article 19(6) of the Protocol does not permit inferring any conclusion with regard to the literal meaning of the relationship between Article 26 and Articles 1(1) and 2 of the American Convention, as the Inter-American Court has recognized.[78]

43. Differing positions have arisen with regard to the interpretation of Article 26 and its relationship with the Protocol of San Salvador.[79] In my opinion, the principle of the most

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[75] With separate opinions of Judge Sergio García Ramírez and Judge *ad hoc* Víctor Oscar Shiyin García Toma.

[76] Also, see para. 131 and footnote 176 of the Judgment.

[77] American Convention: "Article 76(1) Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General."

[78] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, para. 100.

[79] *Cf.,* in alphabetical order, among others, Abramovich, Víctor and Rossi, Julieta, "La tutela de los derechos económicos, sociales y culturales en el artículo 26 de la Convención Americana sobre Derechos Humanos," in *Revista Estudios Socio-Jurídicos,* year/vol. 9, Special No., Universidad del Rosario, Bogotá, 34-53; Burgorgue-Larsen, Laurence, and Úbeda de Torres, Amaya, in particular Chapter 24 written by the first author: "Economic and social rights," *The Inter-American Court of Human Rights. Case Law and Commentary,* New York, Oxford University Press, 2011, pp. 613-639; Cavallaro, James L. and Brewer, Stephanie Erin "La función del litigio interamericano en la promoción de la justicia social," in *Sur. Revista Internacional de Derechos Humanos*, No. 8, 2008, pp. 85- 99; Cavallaro, James L. and Schaffer, Emily, "Less as More: rethinking Supranational Litigation of Economic and Social Rights in the Americas," in Hastings Law Journal, No. 56, No. 2, 2004, pp. 217-281; Cavallaro, James and Schaffer, Emily, "Rejoinder: Finding Common Ground to Promote Social Justice and Economic, Social and Cultural Rights in the Americas," in *New York University Journal of International Law and Politics*, No. 39, 2006, pp. 345-383; Courtis, Christian, "La protección de los derechos económicos, sociales y culturales a través del artículo 26 de la Convención Americana sobre Derechos Humanos" in Eduardo Ferrer Mac-Gregor and Arturo Zaldívar Lelo de Larrea (coords.), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho,* Mexico, UNAM-Marcial Pons-IMDPC, 2008, volume IX: "Derechos humanos y tribunales internacionales," pp. 361-438; Melish, Tara J., *La Protección de los Derechos Económicos, Sociales y Culturales en el Sistema Interamericano de Derechos Humanos*, Quito, CDES, Yale Law School, 2003, pp. 379-392; by the same author: "Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the

favorable interpretation must be applied not only with regard to the substantive aspects of the Convention, but also as regards procedural aspects related to the attribution of competence, provided that a real and specific conflict in interpretation exists. If the Protocol of San Salvador had expressly indicated that it should be understood that Article 26 was no longer in force, the interpreter could not reach the opposite conclusion. However, no article of the Protocol refers to the reduction or limitation of the scope of the American Convention.

44. To the contrary, one of the articles of the Protocol indicates that this instrument should not be interpreted in order to disregard other rights in force in the States Parties, which include the rights derived from Article 26 within the framework of the American Convention.[80] Moreover, in the terms of Article 29(b) of the American Convention, a restrictive interpretation of the rights is not permitted.[81]

45. Thus, this – apparent – problem must be resolved based on a systematic, teleological and evolutive interpretation that takes into account the most favorable interpretation to ensure the best protection of the individual and the object and purpose of Article 26 of the American Convention regarding the need to truly guarantee economic, social and cultural rights. In the presence of a conflict in interpretation, prevalence should be given to a systematic interpretation of the relevant norms.

46. In this regard, the Inter-American Court has indicated on previous occasions[82] that human rights treaties are living instruments, the interpretation of which must keep up with the times and current living conditions. Furthermore, it has also affirmed that this evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention, and also in the Vienna Convention on the Law of Treaties.[83] When making an evolutive interpretation, the Court has given special relevance to comparative law, and has therefore used domestic laws[84] or the case law of domestic courts[85] when analyzing specific disputes in contentious cases.

Americas," in *New York University Journal of International Law and Politics*, No. 39, 2006, pp. 171-343; by the same autor: "Counter-Rejoinder. Justice vs. justiciability?: Normative Neutrality and Technical Precision, The Role of the Lawyer in Supranational Social Rights Litigation," in *New York University Journal of International Law and Politics*, No. 39, 2006, pp. 385-415; Parra Vera, Oscar, *Justiciabilidad de los derechos económicos, sociales y culturales ante el Sistema Interamericano,* Mexico, CNDH, 2011; Pelayo Moller, Carlos María. El "mínimo vital" como estándar para la justiciabilidad de los derechos económicos, sociales y culturales. *Revista Metodhos*, Federal District Human Rights Commission, No. 3, 2012, pp. 31-51; Ruiz-Chiriboga, Oswaldo, *The American Convention and the Protocol of San Salvador: Two Intertwined Treaties. Non-enforceability of Economic, Social and Cultural Rights in the Inter-American System, op. cit. supra* 39; Uprimny, Rodrigo, and Diana Guarnizo, "¿Es posible una dogmática adecuada sobre la prohibición de regresividad? Un enfoque desde la jurisprudencia constitucional colombiana," in Eduardo Ferrer Mac-Gregor and Arturo Zaldívar Lelo de Larrea (coords.), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho,* Mexico, UNAM-Marcial Pons-IMDPC, 2008, volume IV: "Derechos fundamentales y tutela constitucional," pp. 361-438; and Urquilla, Carlos, *La justiciabilidad directa de los derechos económicos, sociales y culturales,* San José, IIDH, 2009.

[80] Protocol of San Salvador: "Article 4. *Inadmissibility of Restrictions.* A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree."

[81] *Cf. Case of the "Mapiripán Massacre," supra*, para. 188;

[82] *Cf. The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 83.

[83] *Cf. The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law.* Advisory Opinion OC-16/99, *supra*, para. 114, and *Case of Atala Riffo and daughters, supra*, para. 83.

[84] In the *Case of Kawas Fernández v. Honduras. Merits, reparations and costs.* Judgment of April 3, 2009. Series C No. 196, para. 148, the Court took into account for its analysis that it noted: "that a significant number of

47. It is clear that the Inter-American Court cannot declare the violation of the right to health under the Protocol of San Salvador, because this can be observed from the literal meaning of its Article 19(6). However, it is possible to understand the Protocol of San Salvador as one of the interpretative references concerning the scope of the right to health protected by Article 26 of the American Convention. In light of the human rights *corpus juris*, the Additional Protocol throws light on the content that the obligations of respect and guarantee should have in relation to this right. In other words, the Protocol of San Salvador *provides guidance* on the application corresponding to Article 26 together with the obligations established in Articles 1(1) and 2 of the Pact of San José.

48. The possibility of using the Protocol of San Salvador in order to define the scope of the protection of the right to health contained in Article 26 of the American Convention is not unfamiliar to the case law of the Inter-American Court; neither is the use of other international sources or the OAS Progress Indicators in Respect of Rights Contemplated in that Protocol, in order to define different State obligations in this regard. Indeed, the Inter-American Court performed this exercise in the *Case of the "Children's Rehabilitation Institute" v. Paraguay*, in which it expressly stated that, in order to establish the content and scope of Article 19 of the Pact of San José, it would take into consideration the Convention on the Rights of the Child and the Protocol of San Salvador, because these international instruments formed part of a very comprehensive international *corpus juris* for the protection of the child.[86]

49. In the same way, in the *Case of the Yakye Axa Indigenous Community v. Paraguay*, when analyzing whether the State had created the conditions that increased the difficulties of access to a decent life of the members of the Community and whether, in that context, it had adopted the appropriate positive measures, the Court chose to interpret Article 4 of the American Convention in light of the international *corpus juris* on the special protection required by members of indigenous communities. Among other provisions, it mentioned Article 26 of the Pact de San José, and Articles 10 (Right to Health), 11 (Right to a Healthy Environment), 12 (Right to Food), 13 (Right to Education) and 14 (Right to the Benefits of Culture) of the Protocol of San Salvador (on Economic, Social and Cultural Rights), and the pertinent provisions of ILO Convention No. 169. The Court also noted the observations of the United Nations Committee on Economic, Social and Cultural Rights in its General Comment No. 14.[87]

States Parties to the American Convention have adopted constitutional provisions expressly recognizing the right to a healthy environment."

[85] In the *Case of Heliodoro Portugal v. Panama, supra*, and the *Case of Tiu Tojín v. Guatemala. Merits, reparations and costs.* Judgment of November 26, 2008. Series C No. 190, the Inter-American Court took into account judgments of the domestic courts of Bolivia, Colombia, Mexico, Panama, Peru and Venezuela on the non-prescription of permanent offenses such as forced disappearance. In addition, in the Case of *Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202, the Inter-American Court used the rulings of constitutional courts of the countries of the Americas to support its definition of the concept of forced disappearance. Other examples are the *Case of Atala Riffo and daughters, supra, and* the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations.* Judgment of June 27, 2012. Series C No. 245.

[86] *Case of the "Children's Rehabilitation Institute," supra*, para. 148. Similarly, the *Case of the Yean and Bosico Girls, supra*, para. 185. In my opinion, implicit in the concept of the *corpus juris* is the interdependence and indivisibility of the rights of which it is composed. Regarding the indicators, see Abramovich, Víctor and Pautassi, Laura (comps.), *La medición de derechos en las políticas sociales*, Buenos Aires, Editores del Puerto, 2010.

[87] *Cf. Case of the Yakye Axa Indigenous Community, supra*, para. 163; *mutatis mutandi*, Case of the Sawhoyamaxa Indigenous Community*, supra*, para. 155, and *Case of the Xákmok Kásek Indigenous Community, supra*, paras. 215 and 216.

50. The *Case of the Xákmok Kásek Indigenous Community v. Paraguay* is another example of a matter in which the Inter-American Court made an even more thorough analysis in order to determine that the assistance provided by the State with regard to the access to and quality of water, food, and health and education services had been insufficient to overcome the situation of special vulnerability of the Community. When determining this, the Inter-American Court evaluated the provision of each of these services in a separate section, in light of the main relevant international standards and the measures adopted by the State, using the General Comments of the United Nations Committee on Economic, Social and Cultural Rights.[88]

51. Furthermore, in the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador,* the Court interpreted the right to prior, free and informed consultation of the indigenous and tribal peoples and communities within the rights to their own culture and cultural identity recognized in ILO Convention No. 169. Thus, the absence of consultation in this specific case gave rise to the violation "of the right to the communal property of the Sarayaku People, recognized in Article 21 of the Convention, in relation to the right to cultural identity, in the terms of Articles 1(1) and 2 of this instrument."[89]

52. In the *Case of Chitay Nech v. Guatemala*, the Inter-American Court established that the general obligation of States to promote and protect the cultural diversity of the indigenous peoples gives rise to the special obligation to guarantee the *right to cultural life of indigenous children* and, to this end, it interpreted Article 30 of the Convention on the Rights of the Child and comments of its Committee, which provide content to Article 19 of the American Convention, and determined that, to ensure the full and harmonious development of their personality in keeping with their world view, indigenous children preferably need to develop and grow up in their own natural and cultural surroundings, because they possess a distinctive identity that connects them to their land, culture, religion and language.[90]

53. In the *Case of the Las Dos Erres Massacre v. Guatemala*, in order to analyze State responsibility in relation to the rights to a name (Article 18), of the family (Article 17) and of the child (Article 19) of the American Convention, the Court considered that the right of everyone to receive protection against arbitrary and illegal interference in their family is an implicit part of the rights to the protection of the family and of the child. This is based on the express recognition in Articles 12(1) of the Universal Declaration of Human Rights, V of the American Declaration of the Rights and Duties of Man, 17 of the International Covenant on Civil and Political Rights, 11(2) of the American Convention on Human Rights, 8 of the European Convention on Human Rights, 4(3) of Protocol (II) Additional to the Geneva

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[88] *Cf.* Case of the Xákmok Kásek Indigenous Community, supra, *paras. 215 and 216, paras. 194 to 217. Citing the following: U.N. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15. The right to water (arts. 11 and 12 of the Covenant), (twenty-ninth session, 2002), U.N. Doc. HRI/GEN/1/Rev.7 at 117 (2002); CESCR, General Comment No. 12, 12 May 1999, E/C.12/1999/5, paras. 6 to 8; CESCR, General Comment No. 13, 8 December 1999, E/C.12/1999/10, para. 50; CESCR, General Comment No. 21, 21 December 2009, E/C.12/GC/21, para. 38; ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Article 27.1; Paul Hunt. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, A/HRC/14/20/Add.2, 15 April 2010.*

[89] *Case of the Kichwa Indigenous People of Sarayaku, supra*, para. 232.

[90] *Cf. Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of May 25, 2010. Series C No. 212, paras. 164 to 170. See also, UN. Committee on the Rights of the Child. General Comment No. 11 (2009). *Indigenous children and their rights under the Convention*, 12 February 2009, para. 82.

Conventions of 12 August 1949 (hereinafter "Protocol II") and the Convention on the Rights of the Child.[91]

54. Similarly, in the *Case of Gelman v. Uruguay*, the Court developed the so-called right to identity (which is not expressly established in the American Convention) on the basis of the provisions of article 8 of the Convention on the Rights of the Child, which establishes that this right includes, among other elements, the right to nationality, to a name, and to family relationships. Thus, the alleged violations of the rights recognized in Articles 3, 17, 18, 19 and 20 of the Convention were interpreted pursuant to the *corpus juris* of the law concerning children, especially articles 7, 8, 9, 11, 16 and 18 of the Convention on the Rights of the Child.[92]

55. Meanwhile, in the *Case of the Massacres of El Mozote and nearby places v. El Salvador*, the Court complemented its case law with regard to the right to private property established in Article 21 of the Convention when referring to Articles 13 and 14 of Protocol (II) Additional to the 1949 Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977.[93] Subsequently, in the *Case of the Massacre of Santo Domingo v. Colombia*, the Court interpreted the scope of the same Article 21 using treaties other than the American Convention. Thus, it referred to Rule 7 of Customary International Humanitarian Law regarding the distinction between civilian objects and military objectives and Article 4.2.g of Protocol II, concerning pillage,[94] to provide content to the right to property established in Article 21 of the American Convention.

56. As can be observed from these examples of inter-American case law, it has been the reiterated practice of the Inter-American Court to use international instruments and sources other than the Pact of San José to define the content and even to expand the scope of the rights established in the American Convention and to stipulate the obligations of the States,[95] since the said international instruments and sources form part of a very comprehensive international *corpus juris* on the matter; also using the Protocol of San Salvador. The possibility of using the Protocol of San Salvador to give content and scope to the economic, social and cultural rights derived from Article 26 of the American Convention, in relation to the general obligations established in Articles 1 and 2 of this instrument, is viable in the way in which the Inter-American Court has been using them to provide content to many treaty-based rights using treaties and sources other than the Pact of San José. Thus, it could also use the Protocol of San Salvador, together with other international instruments, to establish the content and scope of the right to health protected by Article 26 of the American Convention.

B) Articles 26 and 29 of the American Convention in light of the *pro persona* principle

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[91] *Cf. Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, paras. 188, 190 and 191.

[92] *Cf. Case of Gelman, supra*, paras. 121 and 122.

[93] *Cf. Case of the Massacres of El Mozote and nearby places v. El Salvador. Merits, reparations and costs.* Judgment of October 25, 2012 Series C No. 252, para. 179.

[94] *Cf. Case of the Massacre of Santo Domingo v. Colombia. Preliminary objections, Merits and reparations.* Judgment of November 30, 2012. Series C No. 259, paras. 270 to 272.

[95] For example, *The Progress Indicators in Respect of Rights Contemplated in the Protocol of San Salvador*, OEA/Ser.L/XXV.2.1, Doc 2/11 rev.2, December 16, 2012, could also be used.

57. Up until now, the Inter-American Court has used different aspects of the *corpus juris* on the right to health in order to found its arguments on the scope of the right to life or personal integrity, using the concept of decent life or another type of analysis based on the relationship between health and these civil rights (see *supra* para. 13). This argumentation strategy is valid and has permitted significant progress in inter-American case law. However, the main problems of this argumentation technique is that it prevents an in-depth analysis of the scope of the obligations of respect and guarantee in relation to the right to health, as in the Judgment that give rise to this separate opinion. In addition, there are some components of social rights that cannot be extended to standards of civil and political rights.[96] As I have underlined, "the specificity could be lost of both civil and political rights (that begin to cover everything) and of social rights (that are unable to project their specificities)."[97]

58. Considering that, in its evolutive case law, the Inter-American Court has already explicitly accepted the justiciability of Article 26 (see *supra* paras. 18 to 22),[98] in my opinion, the Inter-American Court now needs to resolve several aspects of this article, which poses the difficult future task of deciding three distinct questions relating to: (i) what rights does it protect; (ii) what type of obligations arise from those rights, and (iii) what are the implications of the principle of progressiveness. Evidently, my intention is not to try and decide these questions in this individual opinion. My desire is merely to establish a basis that could serve as a reflection for future developments of the case law of this Inter-American Court.

59. Different positions exist with regard to the rights protected by Article 26 of the American Convention. Some people consider that this article constitutes a mere programmatic norm, without any type of effectiveness in itself. We do not find this conception adequate in view of the spirit of the Convention, which is inspired by the absence of hierarchy among the rights, as revealed by its Preamble, and by the need for all its provisions to have practical effects.

60. In addition, the said argument would be an evident step backward from the progressiveness that Article 26 itself expressly establishes for the States and that, of necessity, also applies to the Inter-American Court itself, because inter-American case law has already recognized the possibility of ruling on the contents of this article as indicated in the preceding paragraph, and has also recognized the full validity of all the provisions of the Pact of San Jose, precisely when deciding on the State's argument concerning its lack of competence *ratione materiae* in relation to Article 26 of the Pact of San José:[99]

> [...] the Court must take into account that the instruments accepting the optional clause concerning obligatory jurisdiction (Article 62(1) of the Convention) suppose the acknowledgement by the States that

[96] On this aspect, see Melish, Tara J. "The Inter-American Court of Human Rights: Beyond Progressivity," in Langford, Malcolm (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law*, Cambridge University Press, 2008, chapter 19.

[97] Parra Vera, Oscar, *Justiciabilidad de los derechos económicos, sociales y culturales ante el Sistema Interamericano,* Mexico, CNDH, 2011, p. 60.

[98] *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, paras. 92 to 106, particularly paras. 99 to 103; the last paragraph, *in fine*, indicates: "it should be stated that regressiveness is justiciable when economic, social and cultural right are at issue."

[99] *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, para. 16.

> submit them of the Court's right to decide any dispute relating to its jurisdiction.[100] In addition, the Court has indicated previously that the broad terms used in the wording of the Convention indicate that the Court exercises full jurisdiction over all its articles and provisions.[101] (Underlining added)

61. Another interpretative position in relation to Article 26 is addressed at granting full effectiveness to economic, social and cultural rights. This school of thought is the one that, for some time, has been defended by an important sector of legal doctrine in order to accord this treaty-based article normative nature, as the Inter-American Court did in the *Case of Acevedo Buendía v. Peru* in 2009, constituting a firm step in that direction, and abandoning the precedent of the 2005 *Case of the Five Pensioners v. Peru*.[102]

62. For some, the rights protected by Article 26 of the American Convention are those derived from the economic, social, educational, scientific and cultural norms contained in the OAS Charter, without any possibility of referral to the American Declaration.[103] Once it has been determined that a rights is implicit in the Charter and, therefore, included in Article 26, it can then be interpreted with the aid of the American Declaration or of other human rights treaties in force in the respective State.[104] On the other hand, it is also affirmed that, in addition to the *pro persona* principle, in order to know which rights are derived from the goals established in the OAS Charter, it is necessary to resort to other international instruments, such as the American Declaration, constitutional texts, and the work of international monitoring mechanisms.[105]

63. Regarding the possible integration of the OAS Charter with the American Declaration on the Rights and Duties of Man, it is pertinent to take into account Advisory Opinion OC-10/89 "Interpretation of the American Declaration on the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights", of July 14, 1989, especially paragraphs 43 and 45:

> 43. Hence it may be said that by means of an authoritative interpretation, the Member States of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.

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[100] *Cf. Case of Ivcher Bronstein, supra,* paras. 32 and 34; *Case of Heliodoro Portugal, supra*, para. 23, and *Case of García Prieto et al. v. El Salvador. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2007. Series C No. 168, para. 38.

[101] *Cf. Case of Velásquez Rodríguez, Preliminary objections, supra*, para. 29, and *Case of the 19 Tradesmen v. Colombia. Preliminary objection.* Judgment of June 12, 2002. Series C No. 93, para. 27.

[102] Regarding the critiques of this judgment, see, for example, Courtis, Christian, "Luces and sombras. La exigibilidad de los derechos económicos, sociales y culturales en la sentencia de los "Cinco Pensionistas" de la Corte Interamericana de Derechos Humanos," in *Revista Mexicana de Derecho Público*, No. 6, ITAM, Law Departament, Mexico, 2004.

[103] Abramovich, Víctor, and Rossi, Julieta, "La tutela de los derechos económicos, sociales y culturales en el artículo 26 de la Convención Americana sobre Derechos Humanos", *Estudios Socios Jurídicos*, Bogotá, Special No. 9, April 2007, pp. 46 and 47.

[104] *Ibidem*, p. 48.

[105] With certain variations, see Courtis, Christian, "La protección de los derechos económicos, sociales y culturales a través del artículo 26 de la Convención Americana sobre Derechos Humanos," *op. cit. supra* note 79; and Melish, Tara J., "El litigio supranacional de los derechos económicos, sociales y culturales: avances y retrocesos en el Sistema Interamericano," in *Memorias del seminario internacional sobre derechos económicos, sociales y culturales,* Mexico, Foreign Affairs Secretariat, pp. 173 to 219; by the same author, *La Protección de los Derechos Económicos, Sociales y Culturales en el Sistema Interamericano de Derechos Humanos, op. cit. supra* note 79.

[...]

> 45. For the Member States of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that, to this extent, the American Declaration is for these States a source of international obligations related to the Charter of the Organization.

64. I consider that another possible means of interpretation, in keeping with the latter position, would be to consider the relationship of Articles 26 and 29 of the Pact of San José with the *pro persona* principle. Indeed, based on the norms established in Article 29 of the American Convention, none of the provisions of the Convention may be interpreted in the sense of limiting the enjoyment and exercise of any right or freedom that may be recognized under the laws of any of the States Parties, or under any other convention to which one of the said States is a party, or to exclude or limit the potential effects of the American Declaration of the Rights and Duties of Man and other international acts of the same nature (such as the Universal Declaration of Human Rights) that, in the same way as the American Declaration, establish social rights without distinction from civil and political rights.

65. These rules of interpretation established in Article 29 of the American Convention should also be interpreted. If we read these criteria pursuant to the *pro persona* principle, the interpretation of Article 26 should not only not limit the enjoyment and exercise of the rights established in the laws of the States Parties, which include the Constitution of these States, or the rights established in other conventions, but these laws and conventions must be used to ensure *the highest degree of protection.* Hence, in order to know what rights are derived from the economic, social, educational, scientific and cultural norms contained in the OAS Charter (in the terms set out in Article 26 of the American Convention), in addition to abiding by its text, recourse could be had to domestic laws and to other international instruments, including the American Declaration.[106] Likewise, Article 25 of the American Convention establishes the right of the individual to an effective recourse "for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention [...]."[107]

66. In other words, a possible way to interpret Article 26 of the American Convention would lead to finding that a literal interpretation of this article is not sufficient, and neither are the criteria established in Article 29 of the Pact of San José, but rather, first, the latter article must be interpreted in accordance with the *pro persona* principle. Once this has been done, it is possible to understand that, according to the said Article 29, the economic, social and cultural rights established in other laws, including the Constitutions of the States Parties and the American Declaration,[108] are incorporated into Article 26 in order to interpret and develop it.

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[106] *Cf.* OC-10/89 "Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights," of July 14, 1989, paras. 43 and 45.

[107] *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment February 2, 2001. Series C No. 72, para. 141 (dismissal of employees); *Case of the "Five Pensioners," supra,* paras. 116 to 121 (pensions), and *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 163 (electoral laws).

[108] Even the Universal Declaration of Human Rights, because Article 29(d) of the American Convention establishes that no provision of the Convention shall be interpreted as: "excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other *international acts of the same nature* may have"; and the Universal Declaration, owing to its essence, has the same nature as the American Convention.

67. On some occasions, the Inter-American Court itself has used the basic national laws and different international instruments to give increased content and context to civil rights by means of the interpretation of Article 29(b) of the American Convention. Thus, for example, article 44 of the Constitution of the Republic of Colombia (fundamental rights of the child), together with different international instruments and the American Convention, were used in the *Case of the "Mapiripán Massacre" v. Colombia:*[109]

> 153. The content and scope of Article 19 of the American Convention must be defined, in cases such as this, taking into consideration the pertinent provisions of the Convention on the Rights of the Child,[110] in particular articles 6, 37, 38 and 39, and of Protocol II Additional to the Geneva Conventions, because these instruments and the American Convention form part of a very comprehensive international *corpus juris* for the protection of children that States must respect.[111] Added to this, in application of Article 29 of the Convention, the provisions of article 44 of the Constitution of the Republic of Colombia must be taken into consideration.[112]

68. As we have indicated previously, the *pro persona* principle implies, *inter alia,* making the most favorable interpretation for the effective enjoyment and exercise of the fundamental rights and freedoms, which, also, prevents using other international instruments to restrict the rights of the American Convention.[113] The Inter-American Court has indicated:[114]

> 51. With respect to the comparison between the American Convention and the other treaties already mentioned, the Court cannot avoid a comment concerning an interpretation suggested by Costa Rica in the hearing of November 8, 1985. According to this argument, if a right recognized by the American Convention were regulated in a more restrictive way in another international human rights instrument, the interpretation of the American Convention would have to take those additional restrictions into account for the following reasons:
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>> "If it were not so, we would have to accept that what is legal and permissible on the universal plane would constitute a violation in this hemisphere, which cannot obviously be correct. We think rather that with respect to the interpretation of treaties, the criterion can be established that the rules of a treaty or a convention must be interpreted in relation to the provisions that appear in other treaties that cover the same subject. It can also be contended that the provisions of a regional treaty must be interpreted in the light of the concepts and provisions of instruments of a universal character. (Underlining in original text)

109 *Case of the "Mapiripán Massacre," supra,* para. 153, and *Case of the Mayagna (Sumo) Awas Tingni Community, supra*, para. 148.

110 Ratified by Colombia on January 28, 1991, and entering into force on February 27, 1991.

111 *Cf. Case of the "Children's Rehabilitation Institute," supra,* para. 148; *Case of the Gómez Paquiyauri Brothers. Merits, reparations and costs.* Judgment of July 8, 2004. Series C No. 110, para. 166; *Case of the "Street Children" (Villagrán Morales et al.), supra,* para. 194, and *Legal Status and Human Rights of the Child, Advisory Opinion OC- 17/02*, para. 24.

112 *Cf.* Article 44 of the Constitution of the Republic of Colombia: "The fundamental rights of the child are: life, physical integrity, health and social security, a balanced diet, name and nationality, to have a family and not be separated from it, love and care, education and culture, recreation and freedom of expression. They shall be protected against any form of abandon, physical or moral violence, kidnapping, sale, sexual abuse, economic or labor exploitation, and hazardous work. They shall also enjoy the other rights embodied in the Constitution, in the laws and in the international treaties ratified by Colombia. The family, society and the State have the obligation to assist and protect the child in order to ensure his or her comprehensive and harmonious development and the full exercise of his or her rights. Anyone may require the competent authority to ensure compliance with the foregoing and to punish offenders.

113 See the separate opinion in the *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, para. 38.

114 Advisory Opinion OC-5/85. November 13, 1985. Series A No. 5, concerning *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)* paras. 51 and 52.

> It is true, of course, that it is frequently useful – and the Court has just done this – to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the manner in which a certain right has been formulated, but that approach should never be used to read into the Convention restrictions that are not grounded in its text. This is true even if these restrictions exist in another international treaty.[115]
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> 52. The foregoing conclusion clearly follows from the language of Article 29 which sets out the relevant rules for the interpretation of the Convention. Paragraph (b) of Article 29 indicates that no provision of the Convention may be interpreted as "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."
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> Hence, if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.

69. In any case, whatever the interpretation we accord to Article 26 of the American Convention, there are, as we have seen, several valid and reasonable lines of interpretation and argument that lead us to grant direct justiciability to economic, social and cultural rights, and that the Inter-American Court could eventually admit on future occasions. Based on the presumption, let me reiterate, that the Inter-American Court already took this step of accepting the justiciability of the rights derived from Article 26 of the Pact of San José in the important precedent of the *Case of Acevedo Buendía v. Peru*.

70. The second question is the type of obligations that States have under Article 26 of the Convention. According to this article, States "undertake to adopt measures" to achieve progressively the full realization of the economic, social and cultural rights "subject to available resources." Here, the question is to clarify what this measures consists of.

71. Once again, we refer to the precedent of the *Case of Acevedo Buendía et al. v. Peru,* which considered the nature of the obligations derived from Article 26 of the Pact of San José, and which dealt with the failure to comply with the payment of pension equalizations, which, according to the Inter-American Court — with its preceding composition – violated the rights to property and to judicial protection established in Articles 21 and 25 of the American Convention, although not Article 26, because, in the Inter-American Court's opinion, that article requires economic and technical measures subject to available resources, which was not the case. Thus, the Court considered that this was a different type of obligation and, therefore, found that the said provision of the Convention had not been violated.[116] Nevertheless, the Inter-American Court established clearly that "regression is justiciable when economic, social and cultural rights are involved,"[117] which left open the possibility of further development of its case law in the future.

72. Furthermore, it should not be forgotten that the Inter-American Court has indicated that, in addition to regulating the progressive development of social rights, in light of Article 26 of the American Convention, a systematic interpretation of this article includes applying

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[115] *Cf.* Inter-American Court. "*Other Treaties" subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human rights*). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1. Other treaties used.

[116] *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, Series C No. 198, paras. 105 and 106.

[117] *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, para. 103.

to economic, social and cultural rights the obligations of respect and guarantee[118] derived from Articles 1(1) and 2 of the Pact of San José.

C) The evolutive interpretation of Article 26 of the American Convention in light of the constitutional norms and the practice of the high national jurisdictions, for the justiciability of the right to health

73. In order to examine further the direct justiciability of the right to health, it is particularly useful to make an evolutive interpretation of the scope of the rights recognized in Article 26 of the American Convention. In this regard, the practice of different domestic courts offers important examples of analyses based on the obligation of respect and guarantee with regard to the right to health and the use of the *corpus juris* on international obligations in relation to the right to health in order to promote direct judicial protection of this right.

74. It is important to indicate, however, that the high national jurisdictions use their own constitutional provisions – in addition to international instruments and sources. Today, the normative progress made in the States in the area of social rights cannot be denied, particularly as regards the constitutional scope of the protection of the right to health (either expressly, derived from other rights, or owing to its recognition by the incorporation of international treaties into the Constitution).

75. The following are among the constitutional provisions of the States Parties to the American Convention that refer in some way to the protection of the right to health: Argentina (art. 42),[119] Bolivia (art. 35),[120] Brazil (art. 196),[121] Colombia (art. 49),[122] Costa Rica (art. 46),[123] Chile (art. 19, paragraph 9),[124] Ecuador (art. 32),[125] El Salvador (art.

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118 *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, para. 100: "even though Article 26 is found in chapter III of the Convention, entitled "Economic, Social and Cultural Rights," it is also located in Part I of the said instrument, entitled "State Obligations and Rights Protected" and, therefore, is subject to the general obligations contained in Articles 1(1) and 2."

119 "Article 42. Consumers and users of goods and services have the right, in relation to consumption, to *the protection of their health*, safety and financial interests; to adequate and truthful information; to freedom of choice and to conditions of equal and dignified treatment [...]."

120 "Article 35. I. The State, at all levels, shall protect the right to health, promoting public policies designed to improve the quality of life, the collective well-being, and the access of the population to free health care services. II. There is just one health system and it includes the traditional medicine of the original indigenous peasant peoples and nations."

121 "Article 196. *Health is a right for every person and an obligation of the State*, guaranteed by social and economic policies designed to reduce the risk of disease and other risks, and to provide universal and equal access to actions and services that its promotion, protection and recovery."

122 "Article 49. Health care and environmental sanitation are public services under the responsibility of the State. *Everyone is guaranteed access to the services of health promotion, protection and recovery*. It is incumbent on the State to organize, direct and regulate the provisions of health care services for the inhabitants, as well as of environmental sanitation, based on the principles of efficiency, universality and solidarity. Also, to establish policies for the provision of health care services by private entities, and to supervise and control these. In addition, to establish the competences of the Nation, and territorial and private entities, and to determine their contributions pursuant to the legal terms and conditions. Health care services shall be decentralized, by levels of attention, and with the participation of the community. The law shall indicate the terms in which basic health care for all the inhabitants shall be free and obligatory. Everyone has the obligation to ensure the comprehensive care of his or her health and that of their community."

123 "Article 46. [...] Consumers and users have the right to the protection of their health, environment, safety and financial interests; to receive adequate and truthful information; freedom of choice and fair treatment. The State shall support the mechanisms that they establish for the defense of their rights. The law shall regulate these matters."

65),[126] Guatemala (arts. 93 and 94),[127] Haiti (art. 19),[128] Honduras (art. 145),[129] Mexico (art. 4),[130] Nicaragua (art. 59),[131] Panama (art. 109),[132] Paraguay (art. 68),[133] Peru (art. 7),[134] Dominican Republic (art. 61),[135] Suriname (art. 36),[136] Uruguay (art. 44)[137] and Venezuela (art. 83).[138]

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[124] "Article 19. The Constitution ensures to all persons: … 9. The right to *protection of health*. The State protects free and equal access to the actions for health promotion, protection and recovery, and for the rehabilitation of the individual. The State shall also coordinate and control actions related to health, whether these are provided by public or private institutions, in the way and under the conditions determined by law, which may establish obligatory contributions. Everyone shall have the right to choose the health care system that he or she wishes to use, either public or private …."

[125] "Article 32. *Health* is a right guaranteed by the State, and its realization is related to the exercise of other rights, including the right to water, food, education, physical culture, work, social security, a healthy environment and others that support well-being. The State shall guarantee this right by economic, social, cultural, educational and environmental policies, and the permanent, opportune and inclusive access to programs, actions and services for the promotion of and integral attention to health care, sexual health and reproductive health. The provision of health care services shall be governed by the principles of equity, universality, solidarity, interculturalism, quality, efficiency, efficacy, care and bioethics, with a gender-based and generational approach."

[126] "Article 65. The health of the inhabitants of the Republic is a right. The State and the individual are obliged to ensure its conservations and restoration."

[127] "Article 93. The right to health. The enjoyment of health is a fundamental right of the human being, without any discrimination whatsoever."

"Article 94. Obligation of the State concerning health and social assistance. *The State shall ensure the health and the social assistance of all the inhabitants.* It shall develop through its institutions, actions of prevention, promotion, recovery, rehabilitation, coordination and any pertinent complementary measures in order to ensure the most complete physical, mental and social well-being."

[128] "Article 19. The State has the absolute obligation to guarantee the right to life, health and respect for the persona of all citizens without any distinction, pursuant to the Universal Declaration of Human Rights."

[129] "Article 145. The right to protection of health is recognized. It is the obligation of everyone to participate in the promotion and preservation of his or her personal health and that of the community. The State shall conserve an adequate environment to protect the health of the individual."

[130] "Article 4. Every person has the *right to the protection of his or her health.* The law shall define the bases and methods of access to health care services and shall establish the contribution of the Federation and of the federative entities as regards general health care, pursuant to paragraph XVI of article 73 of this Constitution." See the recent study by Carbonell, José, and Carbonell, Miguel, *El derecho a la salud: una propuesta para México,* Mexico, UNAM-IIJ, 2013.

[131] "Article 59. All Nicaraguans have an equal right to health. The State shall establish the basic conditions for its promotion, protection, recovery and rehabilitation. The State is responsible for heading and organizing health care programs, services and actions and promoting the participation of the population in its defense. The citizens have the obligation to obey the public health measures that are determined."

[132] "Article 109. It is an essential function of the State to ensure the health of the population of the Republic. The individual, as a member of the community has a right to the promotion, protection, conservations, restoration, and rehabilitation of health and the obligation to conserve his or her health, understood as complete physical, mental and social well-being."

[133] "Article 68. *On the right to health.* The State shall protect and promote health as a fundamental right of the individual and in the interest of the community. No one shall be deprived of public assistance to prevent or to treat diseases, pests or plagues, and of aid in cases of catastrophes and accidents. Everyone is obliged to submit to the public health measures established by law, within the respect for human dignity."

[134] "Article 7. *Everyone has the right to the protection of his or her health,* that of the family, and that of the community, *as well as the obligation to contribute to its promotion and defense.* All those who are incapable of protecting themselves owing to a physical or mental disability have the right to respect for their dignity and a legal regime of protection, attention, rehabilitation and safety."

[135] "Article 61. *The right to health.* Everyone has the right to integral health. Consequently: (1) The State must ensure protection of the health of everyone, access to potable water, and improvement of the diet, public health services, conditions of hygiene, and environmental health, and also procure the means to prevent and treat all diseases, ensuring access to high-quality medicines and providing medical and hospitalized assistance free of

76. These norms have been used on many occasions by the high national jurisdictions, even to ensure "direct" protection, and citing different international sources and treaties.

77. In this regard, the experience of the Constitutional Court of Colombia is relevant. The argument "by connectivity" was used, particularly to delimit the content of the right requiring judicial protection by means of the action for constitutional protection.[139] In Judgment T-016 of 2007, that Court indicated that it was possible to go beyond a dogma based on connectivity and initiate an analysis of the right to health as a direct fundamental right:[140]

> … Nowadays, it is specious to advocate the requirement of connectivity with regard to fundamental rights, which all have – some more than others – an undeniable connotation of social benefits. That requirement should be understood in other terms; in other words, as a close connection between a series of circumstances that occur in the specific case and the need to have recourse to the action for *amparo* as a way to make a fundamental right effective. Thus, with regard to the fundamental right to health, it can be said that, regarding the social benefits excluded from legal and regulatory categories, it is only possible to have recourse to protection by means of the action for *amparo* in those cases in which it can be proved that the failure to recognize the fundamental right to health: (i) also signifies harming, seriously and directly, the human dignity of the person affected by the violation of the right; (ii) it is argued with regard to a subject of special constitutional protection, and/or (iii) it implies placing the person affected in a situation of defenselessness owing to the inability to pay to claim this right.
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> The foregoing, precisely because the State – in application of the principles of equity, solidarity, subsidiarity and efficiency – must rationalize the satisfactory provision of the health care services for which it is responsible or for which private individuals who function as public authorities are responsible, giving priority to those who are in any of the above-mentioned circumstances. In this regard, the Constitutional Court has indicated in its reiterated case law that, under these circumstances, even in the case of social benefits excluded from the POS, the POSS, the PAB, the PAC and from those obligations established in General Comment 14, the *amparo* is in order as a mechanism to obtain the protection of the fundamental constitutional right to health.

78. Furthermore, it is important to stress that all the rights have some aspects that relate to social benefits and some aspects that do not. In other words, establishing the characteristic of rights requiring social services only for the social rights does not appear to

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charge to those who require this; (2) the State shall guarantee, by legislation and public policies, the exercise of the economic and social rights of the lower-income population and, consequently, shall provide its protection and assistance to vulnerable groups and sectors; and combat social evils with appropriate means and with the assistance of international organizations and agreements."

[136] "Article 36. *Everyone has the right to good health.* The State shall promote general health care by the systematic improvement of living conditions and conditions in the workplace, and shall provide information on health protection."

[137] "Article 44. The State shall legislate all matters related to health and public hygiene, in order to ensure the physical, moral and social improvement of all the inhabitants of the country. *All the inhabitants have the obligation to take care of their health, as well as that of seeking assistance in case of illness.* The State shall provide, free of charge, the means of prevention and assistance only to the poor and those without sufficient resources." (Italics added)

[138] "Article 83. Health is a fundamental social right, an obligation of the State, which shall guarantee it as part of the right to life. The State shall promote and implement policies designed to increase the quality of life, the collective well-being, and access to services. Everyone has a right to the protection of his or her health, as well as the obligation to play an active role in its promotion and defense, and to comply with the public health and hygiene measures established by law pursuant to the international conventions and treaties signed and ratified by the Republic."

[139] The Colombian action for constitutional protection corresponds to the application, appeal or trial for *amparo* in most countries of Latin America. In Chile it is called the "remedy of protection" (*recurso de protección*), and in Brazil an "injunction" (*mandado de segurança)*.

[140] Constitutional Court of Colombia, Judgment T-016 of 2007 (Judge Rapporteur: Humberto Sierra Porto), para. 12.

be a viable answer in our times and would seem to be an equivocation or a "categorical error," as the Constitutional Court of Colombia itself indicated in Judgment T-760 of 2008.[141] The Colombian Court has also specified the different implications of the judicial protection of the social benefit dimension of the fundamental rights, clarifying those obligations with immediate effect and those obligations to be complied with gradually.

79. In the above-mentioned Judgment T-760 of 2008 of the Constitutional Court of Colombia, it is indicated that some obligation associated with these social benefit aspects must be complied with immediately, "either because this requires a simple action by the State that does not involve significant resources – for example, the obligation to provide information on their rights to patients before they are subject to a medical treatment" – or "because, despite the mobilization of resources that the task entails, the gravity and urgency of the matter call for an immediate action by the State (for example, the obligation to adopt the adequate and necessary measures to guarantee health care to every infant during its first year of life)."[142]

80. Other obligations of a social benefit nature derived from a fundamental right require *progressive* compliance, owing to the complex nature of the actions and resources that are needed to guarantee the real enjoyment of these aspects of protection of a right. However, the Colombian Court reiterated the precedent established in Judgment T-595 of 2002, according to which "the fact that a social benefit protected by a right is of a programmatic nature does not mean that it may not be claimed or that it may be omitted eternally."[143]

81. Several examples taken from comparative law illustrate the direct justiciability of the right to health. For example, in the *Case of Viceconte*, decided by an Argentine Federal National Contentious-Administrative Chamber,[144] the courts were asked to order the Government to produce a vaccine in order to provide protection against Argentine hemorrhagic fever for a significant number of Argentines. In light of the incorporation into the Constitution of the international treaties that recognize the right to health, the Chamber determined that, by omission, the Government had failed to comply with is obligation to provide the vaccine. As the private sector considered that the production of the vaccine was not profitable, the Chamber ordered the State to produce it. The Chamber ordered the investment in the production of the vaccine, and required compliance with an investment timetable already established by the Government itself.

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[141] *Cf.* Constitutional Court of Colombia, Judgment T-760 de 2008 (Judge Rapporteur: Manuel José Cepeda Espinosa), para. 3.3.5.

[142] Constitutional Court of Colombia, Judgment T-760 de 2008 (Judge Rapporteur: Manuel José Cepeda Espinosa), para. 3.3.6.

[143] In this regard, following this judgment delivered in 2002, it was indicated that the social benefit and progressive aspect of a constitutional right allows its holder to claim judicially, at the very least: (a) the existence of a public policy; (b) that it is not symbolic or merely formal, which means it is clearly designed to guarantee the effective enjoyment of the right. This point is important because "the Constitution is violated when a plan or program exists, but it is verified that: (i) "*it only exists in writing* and its implementation has not started," or (ii) "that even if it is being implement, this is evidently *pointless*, either because it does not respond to the real problems and needs of the holders of the right in question, or because its implementation has been delayed indefinitely, or for an unreasonable time," and (c) that includes mechanisms for the participation of the interested parties that encourages the greatest accountability possible. *Cf.* Constitutional Court of Colombia, Judgment T-760 of 2008 (Judge Rapporteur: Manuel José Cepeda Espinosa).

[144] Federal National Contentious-Administrative Appeals Chamber of Argentina, Chamber IV, *Case of Viceconte, Mariela Cecilia v/National State – Ministry of Health and Social Action: ref/protection law 16,986. Case No. 31,777/96*, Judgment of June 2, 1998. An analysis of this case can be seen in Abramovich, Víctor and Courtis, Christian, Los derechos sociales como derechos exigibles, Madrid, Trotta, 2002, pp. 146 to 154.

82. In addition, the Constitutional Chamber of the Supreme Court of Costa Rica, in the recent Judgment 3691 of March 2013,[145] examined the serious obstacles in access to health care owing to the "waiting lists" that were delaying the provision of medical attention to many Costa Ricans. The Constitutional Chamber ordered that gradual, but genuine, steps be taken to eradicate unreasonable waiting lists for the provision of health care services. It requested that technical studies be undertaken that would allow a plan to be drawn up within the 12 months following the judgment. According to the Constitutional Chamber, this plan should define reasonable waiting times for pathology or urgent cases, as well as objective criteria for defining the inclusion and placement of a patient on the waiting lists. The Chamber also indicated that it was necessary to establish a timetable showing progress, and the administrative or technical measures to comply with the goals of the plan, so that, once the plan had been approved, in these first 12 months, within the following 12 months at the most, the waiting lists establish reasonable waiting times, according to the respective medical specialty and diagnosis.

83. Meanwhile, the Constitutional Court of Guatemala[146] has ordered the necessary medical services that people with HIV/AIDS may require, "understanding that this obligation entails the necessary medical assistance (consultation and hospitalization as applicable), medical treatment (provisions of the necessary medicines required by the said patients, once their situation has been verified based on studies performed by professionals with the relevant expertise), and the other services designed to preserve the health and life of these individuals, with the appropriate speed called for by the circumstances."

84. Similarly, the Mexican Supreme Court of Justice of the Nation has established that the right to protection of health "includes the reception of the basic medicines for the treatment of an illness, as an integral part of the basic health care services consisting in the medical care, the curative activities of which signify providing opportune treatment to the person who is ill, which evidently includes the application of the respective basic medicines, in keeping with a basic table of health sector inputs. The foregoing, notwithstanding medicines that have been discovered recently and that there are other ailments that warrant the same or greater attention from the health care sector, because these are matters that go beyond the right of the individual to receive the basic medicines for the treatment of his illness, as an integral part of the right to the protection of health that is recognized as an individual guarantee, and of the obligation to provide them of the entities and departments that offer the respective services."[147] In addition, the Supreme Court has recognized the normative nature of the right to health established as a fundamental right.[148]

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[145] Supreme Court of Costa Rica, Constitutional Chamber, *Judgment 3691,* March 13, 2013.

[146] Constitutional Court of Guatemala, *Case file 1055*, June 25, 2008.

[147] Ruling of the Court in plenary XIX/2000, entitled: "Health. The right to its protection, which, as an individual guarantee, is recognized in article 4 of the Constitution, includes the reception of basic medicines for the treatment of illnesses and their provision by the entities and departments that offer the respective services" (*Semanario Judicial de la Federación y su Gaceta,* Ninth period, Volume XI, March 2000, p. 112). *Amparo* under review 2231/97. José Luis Castro Ramírez. October 25, 1999. Rapporteur: Justice Mariano Azuela Güitrón; Justice Sergio Salvador Aguirre Anguiano who was absent endorsed the text. Secretary: Lourdes Ferrer Mac-Gregor Poisot.

[148] See ruling of the Court in plenary XV/2011, entitled: "The right to health. Its normative nature"; the text of which reads: "Our country is experiencing a stage of intense changes in the way in which the normative substance of the Constitution of the United Mexican States is identified and its consequences for how the *amparo* proceeding functions. A specific example of this phenomenon is the change in the understanding, which to date has been traditional, of rights such as the right to health or to education. In other words, despite their embodiment in the text of the Constitution, these rights have traditionally be understood as mere declarations of intent, without much real binding power over the action of citizens and public authorities. It has been understood that their effective realization was subordinated to specific legislative and administrative actions, in the absence of which the constitutional justices could not do very much. Now, to the contrary, the basic premise is that, even though in a

85. At the international level, many States that are not members of the OAS or that have not signed the American Convention have also established the right to health by constitutional, legislative or judicial mechanisms; for example, the Constitutions of South Africa (art. 27),[149] Cuba (art. 50),[150] Spain (art. 43),[151] Philippines (art. 13)[152] and Puerto Rico (art. 2).[153] In addition, the Supreme Court of Canada has established that certain constitutional provisions include the right to health.[154] England, on the other hand, is an example of a State that has enacted progressive legislation based on the right to health as a fundamental right for social well-being."[155]

86. For its part in the *Case of the Treatment Action Campaign,*[156] the Constitutional Court of South Africa analyzed a complaint against the public policy for the distribution of Nevirapine, an antiretroviral medicine used to avoid the transmission of HIV from mothers to babies during birth. The court determined that the Ministry of Health was not doing everything that it reasonably could to promote the accessibility of the medicine, and ordered that the restrictions to the use of Nevirapine in public clinics and hospitals be removed in cases where it had been recommended by a doctor, and it also ordered the promotion of a global and coordinated program to recognize gradually the right of pregnant women and their newborns to access medical services to avoid mother-to-child transmission of HIV. It is possible to find many other cases similar to these examples of judicial protection of the right to health.[157] Some of these matters involve understanding the right to health autonomously, without ignoring its interactions with the rights to life and to personal integrity.

87. It is important to underscore that this understanding of the right to health as directly fundamental in the national States, or of the direct justiciability of the right to health within the framework of the American Convention, does not imply understanding the right to health as an absolute right, as a right that has no limits, or that must be protected every time it is invoked. The absolute protection of a civil or social right in any litigation is not

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democratic constitutional State, the ordinary legislator and the government and administrative authorities have a broad margin to articulate their vision of the Constitution and, in particular, to deploy the public policies and regulations that must substantiate the effective guarantee of the rights in one direction or another, the constitutional judge is able to compare his work with the standards contained in the Constitution itself and in the human rights treaties that form part of the laws and that are binding on all the State authorities" (*Semanario Judicial de la Federación y su Gaceta,* Ninth period, Volume XXXIV, August 2011, p. 31). *Amparo* under review 315/2010. Jorge Francisco Balderas Woolrich. March 28, 2011. Rapporteur: Justice José Ramón Cossío Díaz. Secretaries: Francisca María Pou Giménez, Fabiana Estrada Tena and Paula María García Villegas Sánchez Cordero.

[149] "Article 27. Everyone has the *right to have access to health care services*, even reproductive health care."

[150] "Article 50. Everyone has the *right to his or health being cared for and protected*. The State guarantees this right."

[151] "Article 43. The *right to the protection of health* is recognized. The public authorities must organize and protect public health by preventive measures and the necessary services and social benefits. The law shall establish the rights and obligations of everyone in this regard."

[152] "Article 13. The State shall adopt an integrated and comprehensive approach to health development."

[153] "Article 2. The right of every person to a standard of living adequate for the *health* and well-being of himself and of his family, and especially to food, clothing, housing and medical care and necessary social services."

[154] *Chaoulli v. Quebec (Prosecutor General)* [2005] 1 S.C.R. 791, 2005.

[155] *Cf.* National Health Service Act 2006, and the Health and Social Care Act. 2012 No. 1319 (C. 47) (2012).

[156] Constitutional Court of South Africa, *Minister of Health et al. v. Treatment Action Campaign (TAC) et al.* Case CCT 8/02, 5 July 2002.

[157] For an analysis of cases in Colombia, Costa Rica, Argentina, India, Brazil and South Africa, see the documents assembled in Yamin, Alicia Ely and Gloppen, Siri (coords.) *La lucha por los derechos de la salud. ¿Puede la justicia ser una herramienta de cambio?* Buenos Aires, Siglo XXI, 2013.

derived from its justiciability. Every case, whether it relates to a civil or social right, must be decided making an analysis of imputation and to verify how the obligations of respect and guarantee function in relation to each situation that is alleged to have violated a specific right.

IV. THE *IURA NOVIT CURIA* PRINCIPLE AND THE DIRECT JUSTICIABILITY OF THE RIGHT TO HEALTH IN THIS CASE

88. In the instant case, the Inter-American Court declared the international responsibility of the State owing to: (a) the errors, delays and omissions in the criminal investigation, which led to the declaration of the prescription of the case in the proceedings; in other words, owing to violation of effective judicial protection (Articles 8(1) and 25(1), in relation to Article 1(1) of the American Convention), and (b) the failure to guarantee and prevent a violation of the right to personal integrity (Article 5, in relation to Article 1(1) of the Pact of San José), owing to the absence of State supervision and control of the clinics (public and private) where one of the victims was attended. In both analyses, especially in the second, the right to health was discussed, without considering this right to be an essential aspect of this case, and without considering its full justiciability, despite the citation of numerous international instruments and sources on this social right.

89. In the Judgment an analysis was made of different aspects of the protection of the right to health in connection with the civil rights that were declared to have been violated:

A) Regarding the violation of the rights established in Articles 8(1) and 25(1) of the Convention, in relation to Article 1(1) thereof, owing to the "errors, delays and omissions in the criminal investigation" that "reveal that the State authorities did not act with due diligence or in keeping with the obligations to investigate and to ensure effective judicial protection within a reasonable time, in order to guarantee to Melba Suárez Peralta a reparation <u>enabling her to have access to the medical treatment required by her health problems</u>"[158] (underlining added); and

B) <u>Regarding the failure to guarantee and to prevent the violation of the right to personal integrity (Article 5(1) in relation to Article 1(1) of the American Convention)</u> of one of the victims, owing to the absence of supervision and control, "as regards both control of the services provided in the State facility, the Polyclinic of the Guayas Traffic Commission, and those provided in the private institution, the Minchala Clinic," so that the Inter-American Court "considered that "<u>this resulted in a situation of risk, which the State was aware of, that materialized in adverse effects on the health</u> of Melba Suárez Peralta"[159] (underlining added).

90. In the Judgment, the analysis of the adverse effects on the right to health of Melba del Carmen Suárez Peralta based on certain precedents of the Inter-American Court by means of the connectivity of rights is particularly relevant. The examination of the right to health was immersed in the effects on the right to personal integrity established in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of the Pact of San José. Thus, the Judgment states that "the right to personal integrity is directly and

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[158] Para. 122 of the Judgment. In addition, the expert opinion of Dr. Laura Pautassi is useful concerning the case law of the European Court of Human Rights, that in cases such as this one, where civil compensation is subject to the conclusion of the criminal proceedings, the obligation to investigate within a reasonable time is increased depending on the health situation of the person concerned; see para. 102, and footnote 135 of the Judgment.

[159] Para. 154 of the Judgment.

immediately linked to attention to human health."[160] It then indicates that "the absence of adequate medical care can lead to the violation of Article 5(1) of the Convention."[161] And, subsequently, it stipulates "that the protection of the right to personal integrity supposes the regulation of the health care services in the domestic sphere, as well as the implementation of a series of mechanisms designed to ensure the effectiveness of this regulation."[162]

91. However, I consider that the right to health should be approached autonomously owing to the proven facts and the effects suffered by one of the victims owing to the medical malpractice with State responsibility. In this regard, since, from my perspective, the right to health of one of the victims is directly involved, the Court could have approached the implications of these effects, which could even have led to declaring a violation of the obligation to guarantee the right to health under Article 26 of the American Convention.

92. 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) the Pact of San José.[163] 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."[164]

93. Indeed, the citing of this principle has been a practice of the international courts,[165] as it has also been the practice of the Inter-American Court starting with its first judgment on merits,[166] to examine violations of rights that were not expressly cited by the parties. The Inter-American Court has done this on many occasions in relation to different civil rights; for example, regarding the general obligations and rights contained in en Articles 1(1) (respect and guarantee),[167] 2 (domestic legal provisions),[168] 3 (recognition of juridical personality),[169] 4 (right to life),[170] 5 (personal integrity),[171] 7 (personal liberty),[172] 9

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160 *Case of Suárez Peralta, supra,* para. 130.

161 *Idem.*

162 *Idem.*

163 Even though the Merits Report of the Inter-American Commission, the brief with pleadings, motions and evidence of the representatives of the victims, and the State's answering brief all refer to the right to health, see *infra* footnotes 174, 175 and 176.

164 *Cf. Case of Cantos v. Argentina. Merits, reparations and costs.* Judgment of November 28, 2002, Series C No. 97, para. 58; *Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs.* Judgment of May 30, 1999. Series C No. 52, para. 166, and *Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008, Series C No. 177, para. 61.

165 *Cf.* PCIJ. *Case of S.S. "Lotus."* Series A No. 10. Judgment of 27 September 1927, p. 31, and ECHR. *Handyside v. United Kingdom.* No. 5493/72. Judgment of 7 December 1976, para. 41. *Cf. Case of Godínez Cruz v. Honduras. Merits.* Judgment of January 20, 1989, Series C No. 5, para. 172.

166 *Cf. Case of Velásquez Rodríguez v. Honduras, Preliminary objections, supra*, para. 163.

167 *Cf. Case of Godínez Cruz, supra*, para. 172.

168 *Cf. Case of Cantos v. Argentina, supra*, para. 58

169 *Cf. Case of the Sawhoyamaxa Indigenous Community,* paras. 186 and 187.

(freedom from *ex post facto* laws),[173] 8 (judicial guarantees),[174] 11 (protection of honor and dignity)[175] and 22 (movement and residence),[176] among others.

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. In addition, it can be seen that the Merits Report of the Inter-American Commission cites this social right,[177] as does the brief with pleadings, motions and evidence of the representatives of the victims,[178] and there are also precise references to the right to health in the State's answering brief,[179] while the parties have had ample opportunity to refer to the facts in the instant case.

95. In any case, the implications for the right to health are revealed, also, by the citing and use in the Judgment of numerous international instruments and sources relating to this social right, such as Articles XI of the American Declaration on the Rights and Duties of Man, 10 of the Protocol of San Salvador, 12 of the International Covenant on Economic, Social and Cultural Rights. The Social Charter of the Americas of June 2012, and General Comments 3, 9 and 14 of the Committee on Economic, Social and Cultural Rights are even cited, as well as the OAS Charter and, expressly, the derivation of the "right to health" from Article 26 of the American Convention (see *supra* paras. 28 to 32).[180]

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 connected

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170 *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of June 21, 2002. Series C No. 94, para. 107.

171 *Cf. Case of Vera Vera et al., supra*, paras. 100 and 101, and *Case of Ximenes Lopes, supra*, para. 155.

172 *Cf. Case of Acosta Calderón v. Ecuador. Merits, reparations and costs*. Judgment of June 24, 2005. Series C No. 129, para. 85.

173 *Cf. Case of Vélez Loor, supra*, para. 184, and *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, paras. 53 and 54.

174 *Cf. Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 137.

175 *Cf. Case of Contreras et al. v. El Salvador. Merits, reparations and costs*. Judgment of August 31, 2011. Series C No. 232, para. 109.

176 *Cf. Case of Gudiel Álvarez (Diario Militar) v. Guatemala. Merits, reparations and costs.* Judgment of November 20, 2012. Series C No. 253, para. 308.

177 Merits Report 75/2011, of July 20, 2011, p. 22, para. 83: "[…] when the actions of the State's authorities lead to a failure in the guarantees protected at the domestic and inter-American levels – hindering the right of access to justice <u>associated with a claim related to the right to health, a public service protected by the States</u> (underlining added).

178 Also, brief with pleadings, motions and evidence of the representatives of the victims dated April 28, 2012, p. 42: "the laws of Ecuador establish the right to health as a fundamental human right and establish the obligation of the State to regulate the health care of the persons subject to its jurisdiction, either directly or through third parties."

179 *Cf.* the State's answering brief, pp. 221 to 226.

180 Also, see in particular para. 131, and footnote 176 of the Judgment.

to the civil rights that it declared violated – in the understanding that the right to health is one of the 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, as analyzed above.

V. IN CONCLUSION: TOWARDS THE FULL JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTER-AMERICAN SYSTEM

97. More than three decades after the entry into force of the American Convention, discussions continue on the nature and scope of the economic, social and cultural rights referred to in the only article included in its Chapter III: Article 26. It is my understanding that this article of the Convention needs to be interpreted in light of our times and in accordance with the relevant advances in international human rights law, and in constitutional law. Indeed, regarding the former, it is sufficient to indicate that a few days before the Judgment to which this separate opinion refers was handed down, the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights entered into force,[181] and this represents a real potential opening towards the justiciability of these rights under the universal system.

98. Furthermore, the progress made in the area of social rights within the States Parties to the Pact of San José is undeniable. The necessary evolutive interpretation of Article 26 of the American Convention must also be derived from the full recognition in many Constitutions of the protection of the right to health as a social right, which represents a regional trend. And this trend can also be appreciated in the evolution of the case law of the highest national jurisdictions granting effectiveness to this social right; at times even directly and not only in connection with civil and political rights.

99. In this individual opinion, I have tried to defend an interpretation that attempts to grant primacy to the normative value of Article 26 of the American Convention. It has been said – with some reason – that the Inter-American Court should not ignore the Protocol of San Salvador;[182] neither should it ignore Article 26 of the Pact of San José; it should interpret it in light of both instruments. In this understanding, the Additional Protocol is not able to reduce the normative value of the American Convention if this objective is not expressly stated in that instrument in relation to the obligations *erga omnes* established in Articles 1 and 2 of the American Convention, general obligations that apply to all rights, even economic, social and cultural rights, as the Inter-American Court has explicitly recognized.[183]

100. The evolutive interpretation referred to seeks to grant real efficacy to inter-American protection in this area, the effectiveness of which is minimal 25 years after the adoption of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, and almost 15 years after its entry into force. And this calls for an interpretation addressed at establishing the greatest practical effects possible for

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[181] Resolution A/RES/63/117 adopted on 10 December 2008 by the UN General Assembly, which entered into force on May 5, 2013. Ecuador is one of the 10 countries that have ratified it. The signatories undertake to recognize the competence of the Committee on Economic, Social and Cultural Rights to examine communications from individuals or groups who affirm that there has been a violation of the International Covenant on Economic, Social and Cultural Rights.

[182] Ruiz-Chiriboga, Oswaldo, *op. cit. supra,* note 39, p. 160.

[183] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra,* para. 100.

the inter-American norms as a whole, as the Inter-American Court has been doing with regard to civil and political rights.

101. The essence of the right to health is its interdependence with the right to life and the right to personal integrity. However, this does not justify denying autonomy to the scope of that social right based on Article 26 of the American Convention in relation to the obligations of respect and guarantee contained in Article 1(1) of the Pact, and this requires interpreting the Pact of San José in light of the *corpus juris* on the right to health — as is done in the *Case of Suárez Peralta* that prompts this separate opinion, even though it is called personal integrity, limiting significantly by way of connectivity the real scope of the right to health.

102. This vision of direct justiciability means that the methodology to attribute international responsibility is circumscribed to the obligations regarding the right to health. This signifies the need for more specific arguments on the reasonableness and proportionality of a certain type of public policy measures. In view of the sensitive nature of an assessment in this sense, the Inter-American Court's decisions acquire greater transparency and strength if the analysis is made *directly* in this way with regard to the obligations surrounding the right to health, instead of with regard to the sphere more closely related to the consequences of certain effects on personal integrity; that is, indirectly or by connectivity with the civil rights. Similarly, the reparations that the Court traditionally grants, and that in many cases have an impact on services related to the right to health, such as measures of rehabilitation and satisfaction, may acquire a real causal nexus between the right violated and the measure decided with all its implications.[184] Furthermore, when we speak of direct justiciability, this implies changing the methodology based on which compliance with the obligations of respect and guarantee (Article 1(1) of the Pact of San José) is assessed, which is evidently different with regard to the right to life and the right to personal integrity, than it is with regard to the right to health and other social, economic and cultural rights.

103. Social citizenship has made significant progress throughout the world and, *evidently, in the countries of the American continent. The "direct" justiciability of economic, social and cultural rights* constitutes not only a viable interpretative and argumentative option in light of the actual inter-American *corpus juris;* the Inter-American Court, as the jurisdictional organ of the inter-American system, has the obligation to move in this direction of social justice, because it has competence with regard to *all the provisions* of the Pact of San José. The effective guarantee of economic, social and cultural rights is an alternative that would open up new possibilities in order to achieve transparency and the full realization of rights, without artifices and directly, and thus acknowledge what the Inter-American Court has been doing indirectly or in connection with the civil and political rights.

104. Ultimately, the objective is to recognize what the Inter-American Court and the highest national jurisdictions are, in fact, doing, taking into account the *corpus juris* on national, inter-American and universal social rights, which would also constitute a greater and more effective protection of the fundamental social rights, with clearer obligations for the States Parties. All this is in keeping with current signs of the full effectiveness of human rights (in the national and international spheres), without any categorization or distinction between them, which is particularly important in the Latin American region where, regrettably, high rates of inequality persist, significant percentages of the population live in

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[184] *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008, Series C No. 191, para. 110.

poverty and even in extreme poverty, and there are still numerous forms of discrimination against the most vulnerable.

105. The Inter-American Court cannot remain on the sidelines of the contemporary debate on the fundamental social rights[185] — which has a long history in the reflection on human rights – and which are the motive for continuing change in order to achieve their full realization and effectiveness in the constitutional democracies of our times.

106. Given the dynamic scenario in this regard at the domestic level and within the universal system, it can be anticipated that, in the future, the Inter-American Commission, or the presumed victims or their representatives may cite more forcefully eventual violations of the guarantees of economic, social and cultural rights derived from Article 26 of the American Convention in relation to the general obligations established in Articles 1 and 2 of the Pact of San José. In particular, the presumed victims may cite the said violations owing to their new faculties of direct access to the Inter-American Court, based on the new Rules of Procedure of this jurisdictional organ, in force since 2010.

107. As a new member of the Inter-American Court, it is not my desire to introduce sterile discussions within the inter-American system and, particularly, within its jurisdictional organ of protection. I merely wish to invite reflection on the legitimate interpretative and argumentative possibility of granting direct effectiveness to economic, social and cultural rights, especially in the specific case of the right to health, by means of Article 26 of the Pact of San José – because I am absolutely convinced of this. It represents a latent possibility of advancing towards a new stage in inter-American case law, which is no novelty if we recall that, on the one hand, the Inter-American Commission has understood this to be so on several occasions and, moreover, the Inter-American Court itself explicitly recognized the justiciability of Article 26 of the American Convention in 2009.[186]

108. In conclusion, after more than 25 years of continuing evolution of inter-American case law, it is legitimate – and reasonable using hermeneutics and treaty-based arguments – to grant full normative content to Article 26 of the Pact of San José, coherently and congruently with the whole inter-American *corpus juris.* This course of action would permit dynamic interpretations in keeping with the times that could lead towards a full, real, direct and transparent effectiveness of all rights, whether civil, political, economic, social or cultural, without hierarchy and categorizations that impede their realization, as revealed by the Preamble to the American Convention, the spirit and ideals of which permeate the whole inter-American system.

Eduardo Ferrer Mac-Gregor Poisot
Judge

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[185] In this regard, see: von Bogdandy, Armin, Fix-Fierro, Héctor, Morales Antoniazzi, Mariela and Ferrer Mac-Gregor, Eduardo (coords.), *Construcción y papel de los derechos sociales fundamentales. Hacia* un Ius Constitutionale Commune *en América Latina*, Mexico, UNAM-IIJ-Instituto Iberoamericano de Derecho Constitucional-Max-Planck-Institut für ausländisches öffentiliches Recht und Völkerrecht, 2011.

[186] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra*, paras. 99-103.

Pablo Saavedra Alessandri
Secretary