INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF GONZALES LLUY *ET AL. v.* ECUADOR*

JUDGMENT OF SEPTEMBER 1, 2015

(*Preliminary objections, merits, reparations and costs*)

In the case of *Gonzales Lluy et al.,*

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

Humberto Antonio Sierra Porto, President
Roberto F. Caldas, Vice President
Manuel E. Ventura Robles, Judge
Diego García-Sayán, Judge
Alberto Pérez Pérez, Judge
Eduardo Vio Grossi, 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, "the American Convention" or "the Convention") and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure" or "the Court's Rules of Procedure"), delivers this Judgment structured as follows:

* The Inter-American Commission on Human Rights submitted this case to the Court under the name of "TGGL and family *v.* Ecuador." The Commission decided to keep the identity of the presumed victim confidential as she was a minor, and also to maintain the confidentiality of Talia's mother and the blood donors. When presenting their pleadings and arguments brief, the representatives advised that, since Talía Gabriela Gonzales Lluy was now of age, she had decided not to maintain the confidentiality of her identity. They also indicated that the name of Talía's mother was Teresa Lluy. Taking into account this decision by the presumed victims and the name of the case during the procedure before the Commission, the new title of this case is "Gonzales Lluy *et al. v.* Ecuador."

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On March 18, 2014, in accordance with Articles 51 and 61 of the American Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the Court the case of *TGGL and family against Ecuador* (hereinafter "the State" or "Ecuador"). The case relates to the presumed international responsibility of the State for the adverse effects on a decent life and the personal integrity of Talía Gabriela Gonzales Lluy (hereinafter "Talía"), "as a result of infection with HIV following a blood transfusion performed on her […] when she was three years of age." According to the Commission, the State had not complied adequately with its obligation to ensure rights, specifically, it had failed to perform "its role of supervision and control over private entities that provide health care services." The Commission also concluded that the State's failure to respond adequately, mainly by failing to provide specialized medical care, has continued to affect the exercise of the rights of the presumed victim, and it considered that the domestic investigation and criminal proceedings did not meet the basic standards of due diligence to provide an effective remedy for the presumed victim and her family, Teresa and Iván Lluy, and also failed to comply with the duty to provide special protection to Talía Gonzales Lluy owing to her status as a minor.

2. *Procedure before the Commission.* The case was processed before the Inter-American Commission as follows:

a) *Petition.* On June 26, 2006, the Inter-American Commission received the initial petition lodged by Iván Patricio Durazno Campoverde.

b) *Admissibility Report.* On August 7, 2009, the Commission approved Admissibility Report No. 89/09 (hereinafter "the Admissibility Report").

c) *Merits Report.* On November 5, 2013, the Commission issued Merits Report No. 102/13, pursuant to Article 50 of the American Convention (hereinafter "the Merits Report").

i) *Conclusions.* The Commission concluded that the State was responsible for the violation of the rights to a decent life, personal integrity, judicial guarantees, and judicial protection, recognized in Articles 4, 5, 8 and 25 of the American Convention, in relation to Article 1(1) of this international instrument, crosscut by the violation of Article 19 of the Convention. It also concluded that the State was responsible for the violation of the rights to mental and moral integrity, judicial guarantees, and judicial protection established in Articles 5, 8 and 25 of the American Convention in relation to the obligations established in Article 1(1) of this instrument to the detriment of Talía's mother and brother.

ii) *Recommendations.* Consequently, the Commission made a series of recommendations to the State:

1. Make full reparation to T[alia] and her mother for the human rights violations declared in the […] report, including both the pecuniary and non-pecuniary aspects.
2. Provide, in consultation with T[alia], immediately and permanently, the specialized medical treatment she requires.
3. Provide, in consultation with T[alia], free primary, high school and university education.
4. Conduct a complete and effective investigation into the human rights violations declared in the […] report.
5. Establish non-repetition mechanisms, including: (i) implementation of serious and effective mechanisms for periodic supervision and monitoring of the functioning and record systems of both the public and private blood banks operating in Ecuador; (ii) implementation of serious and effective mechanisms for periodic supervision and monitoring of public and private hospitals to ensure that they have the necessary safeguards in place to verify the safety of the blood products that are used for transfusions; (iii) implementation of training programs for employees of the blood banks that operate in Ecuador, in order to ensure that they carry out their tasks in a way that is compatible way with the basic internationally-recognized technical safety standards, and iv) provision of treatment and free health care to children with HIV who do not have the required financial resources.

d) *Notification of the State.* The Merits Report was notified to the State in a communication of November 18, 2013, in which it was granted two months to report on compliance with the recommendations. The State did not present observations on the Merits Report prior to the submission of the case to the Court.

3. *Submission to the Court.* On March 18, 2014, the Commission submitted all the facts and human rights violations described in the Merits Report to the Court "owing to the need to obtain justice."[1]

4. *Requests of the Inter-American Commission.* Based on the foregoing, the Inter-American Commission asked the Court to find and declare the international responsibility of Ecuador for the violations contained in the Merits Report and to order the State, as measures of reparation, to comply with the recommendations included in that report (*supra* para. 2).

II
PROCEEDINGS BEFORE THE COURT

5. *Notification of the State and the representatives.* The submission of the case by the Commission was notified to the State and to the presumed victims on April 17 and May 7, 2014, respectively.

6. *Brief with pleadings, motions and evidence.* On June 10, 2014, the representatives of the presumed victims[2] (hereinafter "the representatives") presented their brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief") pursuant to Articles 25 and 40 of the Court's Rules of Procedure. In addition, the presumed victims asked to access the Victims' Legal Assistance Fund of the Inter-American Court (hereinafter "the Assistance Fund").

[1] The Inter-American Commission appointed Commissioner Rose-Marie Belle Antoine and Executive Secretary Emilio Álvarez Icaza as delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, Executive Secretariat lawyer, as legal advisers.

[2] The representatives of the presumed victims during the processing of the case before the Court were Ramiro Ávila Santamaría and Gustavo Quito Mendieta.

7. *Answering brief.* On September 2, 2014, the State submitted to the Court its brief filing preliminary objections, answering the submission of the case, and with observations on the pleadings and motions brief (hereinafter "answering brief").[3] The State filed two preliminary objections and contested the violations that had been alleged.

8. *Assistance Fund.* In an order of October 7, 2014, the President of the Court declared the request filed by the presumed victims, through their representatives, to access the Assistance Fund admissible, and approved the necessary financial assistance for the presentation of a maximum of three statements and two expert opinions, and the appearance of one of the representatives at the public hearing.

9. *Observations on the preliminary objections.* In briefs received on October 2 and 11, 2014, the representatives and the Commission presented their observations on the preliminary objections filed by the State and asked the Court to reject them.

10. *Public hearing.* In an order of January 12, 2015,[4] the President summoned the parties to a public hearing to receive their final oral arguments and observations on the preliminary objections and on the eventual merits, reparations and costs, as well as to receive the testimony of one presumed victim proposed by the representatives and three expert witnesses proposed by the Commission, the representatives,[5] and the State, respectively. Also, in this order, the President required that affidavits be received from two presumed victims proposed by the representatives, two witnesses proposed by the representatives, two expert witnesses proposed by the Commission, eight expert witnesses proposed by the representatives, and sixteen expert witnesses proposed by the State. The public hearing[6] took place on April 20 and 21, 2015, during the Court's fifty-second special session held in Cartagena, Colombia. During the hearing, the judges of the Court requested specific additional information and documentation from the parties and the Commission, to be forwarded together with their final written arguments and observations, respectively.

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[3] The State appointed Erick Roberts Garcés, National Director of Human Rights of the Attorney General's Office, as its Agent, and Alonso Fonseca Garcés and Carlos Espín Arias as deputy agents.

[4] *Cf. Case of Gonzales Lluy (TGGL) and family v. Ecuador.* Order of the President of the Inter-American Court of Human Rights of January 12, 2015. Available at: http://www.corteidh.or.cr/docs/asuntos/gonzaleslluy_12_01_15.pdf

[5] On January 29, 2015, the representatives advised that expert witness Jorge Vicente Paladines, summoned to testify at the public hearing, had to excuse himself for reasons beyond his control. They therefore asked the Court to allow another of their proposed expert witnesses to appear at the hearing. After the President of the Court had asked the State and the Commission to comment on this request, in an order of February 11, 2015, he decided to summon expert witness Julio César Trujillo to the public hearing, owing to the similarity between the purpose of his expert opinion and that of expert witness Paladines. *Cf. Case of Gonzales Lluy (TGGL) and family v. Ecuador.* Order of the President of the Inter-American Court of Human Rights of February 11, 2015. Available at: http://www.corteidh.or.cr/docs/asuntos/gonzaleslluy_11_02_15.pdf

[6] The following persons attended the public hearing: (a) for the Inter-American Commission: Rose-Marie Belle Antoine, President; Silvia Serrano Guzmán, lawyer of the Executive Secretariat, and Jorge H. Meza Flores, Executive Secretariat lawyer; (b) for the representatives of the presumed victims: Ramiro Ávila Santamaría, representative, and (c) for the State of Ecuador: Erick Roberts Garcés, Agent; Alonso Fonseca Garcés, Deputy Agent; Juan Carlos Álvarez, lawyer; María Verónica Espinosa, National Assistant Secretary for Health Care Administration, and Nadia Ruiz, delegate of the Ministry of Foreign Affairs and Human Mobility.

11. *Amici curiae.* The Court received 17 *amicus curiae* briefs presented by: 1) José Paul Heraldo Gallardo Echeverría; 2) Ximena Casas Isaza, Viviana Bohórquez Monsalve, Ariadna Tovar Martínez, Ma. José Barajas de la Vega and Susana Chávez Alvarado, on behalf of the *Consorcio Latinoamericano Contra el Aborto Inseguro* (CLACAI);[7] 3) *Centro de Estudios de Derecho, Justicia and Sociedad* (Dejusticia);[8] 4) *Fundación Regional de Asesoría en Derechos Humanos* (INREDH);[9] 5) Judith Salgado Álvarez;[10] 6) *Programa de Acción por la Igualdad and la Inclusión Social*;[11] 7) María Dolores Miño Buitrón, Director of Legal Affairs of the Human Rights for All Lawyers' Association; 8) Natalía Torres Zuñiga; 9) Víctor Abramovich and Julieta Rossi;[12] 10) Mónica Arango Olaya, Director for Latin America and the Caribbean of the Center for Reproductive Rights, and Catalina Martínez Coral, Regional Manager of the Center; 11) Public Interest Legal Clinic of the Law School of the Universidad de Palermo;[13] 12) *ELEMENTA Consultoría en Derechos*;[14] 13) Laura Pautassi, Laura Elisa Pérez and Flavia Piovesan;[15] 14) *Asociación Civil por la Igualdad and la Justicia* (ACIJ), signed by Dalile Antunez, Co-Director of the Association; 15) Several professors of the Pontificia Universidad Católica de Ecuador, Ambato campus, School of Jurisprudence;[16] 16) the Office of the Ombudsman of Ecuador,[17] and 17) Siro L. De Martini, Director of the Center for Research on the Inter-American System for the Protection of Human Rights of the Law School of the Pontificia Universidad Católica de Argentina (UCA) and Ludovic Hennebel, Director of the International Human Rights Law Clinic of Aix-Marseille Université, France.[18]

12. *Final written arguments and observations.* On May 20 and 21, 2015, the parties and the Commission presented their final written arguments and observations, respectively. The

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[7] Ximena Casas Isaza is Coordinator of the CLACAI Legal Network, Viviana Bohórquez Monsalve, is a lawyer of the CLACAI Legal Network, Ariadna Tovar Martínez is Regional Director of Wome's Link Worldwide and member of the CLACAI Legal Network, Ma. José Barajas de la Vega is a lawyer and member of the CLACAI Legal Network, and Susana Chávez Alvarado is Executive Secretary of the CLACAI Legal Network

[8] Signed by César Rodríguez Garavito and Celeste Kauffman, Director and Researcher of Dejusticia.

[9] Brief presented by Beatriz Villarreal, President of INREDH.

[10] Professor of the Universidad Andina Simón Bolívar and of the Pontificia Universidad Católica of Ecuador.

[11] Signed by Andrea Parra, Director of the Equality and Social Inclusion Action Program Social (PAIIS) of the Law School of the Universidad de los Andes, Colombia; Juan David Camacho, the Program's Legal Adviser, and Lina Rocío Cala and Paula Lorena Mora, students attached to PAIIS.

[12] Professors of both the Universidad de Buenos Aires (UBA) and the Universidad Nacional de Lanús (UNLa).

[13] Signed by Ezequiel Nino and Agustina Ramón Michel, General Coordinator and Co-coordinator respectively of the Legal Clinic of the Universidad de Palermo, and also Karina G. Carpintero, Juan Ignacio Santos and Elma Mansilla, members of the Clinic.

[14] Signed by Adriana Muro Polo and Manuela Piza Caballero.

[15] Members of the Working Group to analyze national reports, established in the Protocol of San Salvador.

[16] Signed by Edgar Santiago Morales Morales, María Fernanda San Lucas Solórzano and Luis Fernando Suárez Probaño, as professors of that University, and also Carolina Romero Córdova.

[17] Signed by Ramiro Rivadeneira Silva, Ombudsman of Ecuador; Patricio Benaleázar, Assistant for Human Rights and Nature, and José Luis Guerra Mayorgan, Director General, all from the Ombudsman's Office. Also signed by Pablo Campa, as assistant to the Director of Rights pertaining to Well-being.

[18] Signed also by Rolando Gialdino as Coordinator of the *amicus curiae and* Karina G. Carpintero, Belen E. Donzelli and Magdalena I. García Rossi as members and reseachers of the UCA.

State and the representatives forwarded various documents with their briefs. On June 1 and 5, 2015, the parties and the Commission, respectively, presented their observations on the attachments to the final written arguments presented by the parties, as well as the answers to the questions posed by the judges of the Court during the public hearing.

13. *Supervening evidence and helpful evidence.* On July 14, 2015, the President of the Court asked the State to provide, as helpful evidence, the "Manual for Blood Banks and Storage Places, and Transfusion Services" mentioned in a report issued by the prosecutor who intervened in the criminal proceedings in this case. This document was forwarded on July 20, 2015.

14. *Request for provisional measures.* On July 16, 2015, the representatives asked the Court to order the State to adopt provisional measures to ensure immediate health care for Talía Gonzales Lluy, including the possibility of having recourse to private health services and being able to count on the appropriate medication for her health, because the state of her health had worsened. On July 23, 2015, the State and the Commission presented their observations. On July 28, and on August 5, 12, 27 and 31, 2015, the parties presented additional information in relation to this request for provisional measures.

15. *Deliberation of the case.* The Court initiated the deliberation of this Judgment on August 26, 2015.

III
JURISDICTION

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

IV
PRELIMINARY OBJECTION

17. In its answering brief, Ecuador presented two arguments, which it called preliminary objections, with regard to: (i) the alleged partial lack of competence of the Court to examine facts that exceeded the factual framework, and presumed violations of rights other than those established by the Commission in its reports, and (ii) the alleged failure to exhaust domestic remedies.

18. The Court will consider as preliminary objections only those arguments that are, or could be, of such a nature based on their content and purpose; that is, if they were decided favorably, they would prevent the proceedings from continuing or a ruling being made on the merits.[19] It has been the Court's consistent opinion that the purpose of a preliminary objection is to present objections related to the admissibility of a case, or to the competence of the Court to examine a specific case or any of its aspects due to either the person, the

[19] *Cf. Case of Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of May 26, 2010. Series C No. 213, para. 35.

matter, the time or the place.[20] Consequently, regardless of whether the State has defined an assertion as a "preliminary objection," if, when analyzing this, it becomes necessary, first, to consider the merits of a case, the assertion ceases to be preliminary and cannot be analyzed as a preliminary objection.[21]

19. Based on these criteria, the Court considers that the argument presented as a preliminary objection related to the Court's supposed partial lack of competence to examine rights outside the factual framework of the case and presumed violations of rights other than those established by the Commission in its reports, is not related to a matter of admissibility or the competence of this Court.[22] Therefore, these aspects will be examined in the following chapter on preliminary considerations,[23] when referring to the factual framework of the case.

20. Nevertheless, the Court will now decide the preliminary objection of failure to exhaust domestic remedies filed by the Ecuadorian State.

A. Alleged failure to exhaust domestic remedies

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

21. The State affirmed that the Commission, "in its Admissibility Report, accepted the State's position in relation to the petition presented by the presumed victims [as regards] the failure to file domestic remedies such as the recusal of judges, the action seeking compensation for non-pecuniary damage, and the remedy of criminal cassation." The State also emphasized that the petitioner had committed two errors during the domestic litigations that cannot be attributed to the State; namely, failing to appeal the action for constitutional protection, and failing to exercise the right to file an action herself as a private complainant.

22. Furthermore, the State argued that, although the need for a criminal conviction was required in order to file a civil action, this was not necessary in order to bring an action for non-pecuniary damage. In this regard, there was a remedy that was not attempted, the purpose of which was to provide reparation for non-pecuniary damage, as has now been argued before the Court. It also argued that the decision on proceeding No. 012-2000 with regard to constitutional protection, which was unfavorable to the presumed victims, was not appealed despite the rule of the right to a second hearing upheld by the Ecuadorian State, and due to this lack of procedural action the judgment became final. According to the State, the constitutional protection proceeding was designed to make it possible to cease, suspend or rectify immediately the violation of constitutional rights, and could be processed in either

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[20] *Cf. Case of Las Palmeras v. Colombia. Preliminary objections.* Judgment of February 4, 2000. Series C No. 67, para. 34, and *Case of the Human Rights Defender et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 283, para. 15.

[21] *Cf. Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 39, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 15.

[22] Similarly, *Case of Tarazona Arrieta et al. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of October 15, 2014. Series C No. 286, para. 18.

[23] *Cf. Case of Mendoza et al. v. Argentina. Preliminary objections, merit and reparations*. Judgment of May 14, 2013 Series C No. 260, para. 25, and *Case of the Human Rights Defender et al. v. Guatemala*, para. 15.

of the two instances; in other words, "the appeal was an appropriate remedy to prevent any presumed violation of the right, but it was not filed."

23. The State also argued that "the presumed victims were inactive during the processing of the criminal case, to the point of failing to present private charges within the pertinent time frame, and the procedural effect of this was that they were not considered a party to the case, [which] cannot be attributed to the State." Finally, it argued that "if [the Court] does not accept [the preliminary objection of failure to] exhaust domestic remedies, it should accept as a partial objection and not rule on presumed violations of Articles 2, 24 and 26 of the Convention or the norms of the Protocol [Additional to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador,")], because that would violate the State's right of defense, since those rights had not been examined during the admissibility and merits stages before the Commission."

24. In the Merits Report, the Commission asserted that, at the admissibility stage, the State had argued that the domestic remedies had not been exhausted, and this aspect was analyzed in the Admissibility Report. In its observations on the preliminary objections, the Commission indicated that "the arguments presented to the Commission are not fully consistent with the arguments presented to the Court." In particular, it pointed out that, at the admissibility stage, the State had not referred to the appeal in the context of the action for constitutional protection so that this component of the preliminary objection should be rejected as time-barred.

25. The Commission also recalled that, in Admissibility Report 89/09, it had ruled on the requirements for admissibility established in the American Convention. The Commission recapitulated that the petitioners had informed the State of Talía's infection with HIV by means of the criminal action and the civil action for damages, during which the State had the opportunity to remedy the situation, which had not occurred in this case. To the contrary, the statute of limitations took effect in the criminal proceedings without any responsibility being established, while the civil proceedings were declared null and void owing to the prescription of the criminal case. Thus, the Commission considered that both the civil and the criminal domestic remedies had been exhausted.

26. The representatives affirmed that the State "demands that remedies be exhausted that would have delayed the trials, or remedies that were not created to protect fundamental rights [and that] are inappropriate." According to the representatives "the appropriate action that was available to these persons was the application for constitutional protection and the criminal action which resulted in civil reparation if it had been effective, and both of these were exhausted." Lastly, they indicated that "the actions established by the Ecuadorian legal system are simply ineffective, and those suggested by the State are inappropriate."

Considerations of the Court

27. Article 46(1)(a) of the American Convention establishes that, in order to determine the admissibility of a petition or communication lodged before the Inter-American Commission in accordance with Articles 44 or 45 of the Convention, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of

international law. Thus, the Court has maintained that an objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be presented at the appropriate procedural moment; that is, during the admissibility procedure before the Commission.[24]

28. Therefore, during that stage of the processing of the case, the State must explain clearly to the Commission the remedies that, in its opinion, have not been exhausted. This is related to the need to safeguard the principle of procedural equality between the parties that should govern any proceeding before the inter-American system. As the Court has established repeatedly, it is not the task of this Court, or of the Commission, to identify *ex officio* the domestic remedies that remain to be exhausted, because it is not incumbent on the international organs to rectify the lack of precision in the State's arguments. Furthermore, the arguments that substantiate the preliminary objection filed by the State before the Commission during the admissibility stage should be the same as those submitted to the Court.[25]

29. In this regard, it can be observed that the objection raised was filed during the admissibility stage before the Commission. At that time, the State argued that the petitioners had brought the private charges in the criminal proceedings belatedly; they had not filed a remedy of cassation or another civil action with regard to the civil proceedings that had been annulled; they had not used the remedy of recusal against the judges who had heard the case, or the action for damages against them, or the action against the State seeking compensation for non-pecuniary damage, and they did not avail themselves of the remedy of cassation in the criminal proceedings.

30. Furthermore, during the proceedings before the Court the State also argued that the petitioners had not appealed the decision on the application for constitutional protection. In this regard, the Court reiterates that the appropriate procedural moment for describing the remedies that the State alleges were pending exhaustion was during the proceedings before the Commission. Therefore, the State's assertion before this Court with regard to the domestic remedies in the constitutional protection proceeding are time-barred.

31. Regarding the other remedies alleged by the State, this Court recalls that it is necessary that the State not only specify the domestic remedies that remain to be exhausted, but it must also prove that they were available and adequate, appropriate and effective.[26] In the case of the remedies of recusal of judges, and seeking damages against them, and the remedy of cassation, as these are regulated by the civil and criminal law of Ecuador, the Court finds that, owing to their nature, in the specific case, they were neither

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[24] *Cf. Case of Argüelles et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2014. Series C No. 288, para. 42.

[25] *Cf. Case of the Kuna Indigenous People of Madugandí and the Embera Indigenous People of Bayano and their members v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of October 14, 2014. Series C No. 284, para. 21.

[26] *Cf. Case of the Landaeta Mejías Brothers et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of August 27, 2014. Series C No. 281, para. 29.

adequate nor effective to determine responsibility for the facts surrounding the infection of Talía with HIV, or to determine adequate reparation.

32. Regarding the civil action seeking compensation for non-pecuniary damage, as indicated by the Commission in the Admissibility Report, this Court emphasizes that this was inadequate to obtain compensation for all the harm caused to Talía Gonzales Lluy. Lastly, regarding the private criminal charges, the Court notes that, in the instant case, the private charges were not a remedy that the presumed victims should have exhausted, because the conduct investigated in the criminal proceedings was defined in the Ecuadorian Criminal Code as an offense for which a public action was required which should be prosecuted *ex officio,* and, in this specific case, the petitioners had informed the State of the infection of Talía Gonzales Lluy by means of the criminal action.

33. Consequently, the Court rejects the preliminary objection of failure to exhaust domestic remedies filed by the State.

V
PRELIMINARY CONSIDERATIONS

A. The factual framework of this case and presumed violations of rights other than those established by the Commission in its reports

Arguments of the Commission and of the parties

34. The State argued that, Articles 40(2)(b) and 44(1) of the Court's Rules of Procedure infer that "the cases heard by the Court consist exclusively of the facts and rights discussed before the [Commission] and included in its reports." Hence, they argued that "nothing had been said about specific presumed violations of equality before the law, absence of domestic laws or […] about the progressive nature of economic, social and cultural rights"; rather, only situations that were presumably contextual had been mentioned. According to Ecuador, this is why the Commission did not declare the supposed violation of Articles 2, 24 and 26 of the American Convention in its Merits Report, and considered that it would not be appropriate to make an in-depth analysis of other related rights "which were not part of the factual framework at the start of the case." Consequently, it asked the Court not to examine the presumed violation of these articles, based on the impossibility of changing the factual framework and the rights discussed in the Merits Report.

35. The representatives considered that the right to education was clearly mentioned in paragraphs 43 and 188 of the Merits Report, as well as in the analysis of Article 19, which noted that the presumed victim was prevented from attending primary school owing to her illness. They also emphasized that the Commission's case file, which had been forwarded to the Court with the submission of case, included information on the application for constitutional protection that presumably denied the effective protection of the education of Talía Gonzales Lluy. In addition, they pointed out that the presumed victims have full autonomy to cite the violation of rights other than those included in the Merits Report, provided that they relate to facts contained in that report. Thus, the new allegation of rights

that were presumably violation, "falls within the requirements established by the Court […] and, therefore, should be admitted."

36. The Commission underscored that the State's arguments related to the fundamental dispute and, as such, did not constitute an objection to the admissibility of the case or to the competence of the Court to examine it, which is the purpose of a preliminary objection. It indicated that the facts relating to the right to education and the discrimination and denial of justice are included within the factual framework of the Merits Report, which refers explicitly to various aspects of the presumed discrimination suffered by Talía Gonzales Lluy. It also noted that the State "had not responded in any way during the merits stage" of the case before the Commission, which constituted "a limiting factor" for the establishment of the factual framework. Furthermore, it stressed that the Court had more detailed information with the necessary elements for ruling on the possible violation of the right to education.

Considerations of the Court

37. The Court reiterates that the factual framework of the proceedings before it is constituted by the facts contained in the Merits Report submitted to its consideration. Consequently, it is not admissible for the parties to allege new facts that differ from those contained in that report, without prejudice to describing facts that may explain, clarify or reject those mentioned in the report and submitted to the consideration of the Court.[27] The exception to this principle are facts classified as supervening, or when there is subsequent information, or access to evidence on the facts, provided, that are connected to the facts of the proceedings.[28] In addition, the presumed victims and their representatives may cite the violation of facts other than those included in the Merits Report, provided these relate to the facts contained in this document, because the presumed victims are holders of all the rights recognized in the Convention. In each case, it is for this Court to decide on the admissibility of arguments concerning the factual framework in order to safeguard the procedural equality of the parties.[29]

38. Although the facts in the Merits Report submitted to the Court's consideration constitute the factual framework of the proceedings before the Court,[30] the Court is not restricted by the probative assessment and the classification of the facts made by the Commission in the exercise of its functions.[31] In each case, it is for the Court to make its own determination of the facts of the case, assessing the evidence provided by the Commission and the parties and the helpful evidence requested, respecting the right of defense of the parties,

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[27] *Cf. Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of November 14, 2014. Series C No. 287, para. 47.

[28] *Cf. Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, para. 47.

[29] *Cf. Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, para. 47.

[30] *Cf. Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 26, 2012. Series C No. 244, para. 34, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, para. 48.

[31] *Cf. Inter alia, Case of Fairén Garbi and Solís Corrales v. Honduras. Merits.* Judgment of March 15, 1989. Series C No. 6, paras. 153 to 161, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, para. 48.

and the purpose of the *litis.*[32] Thus, the Court notes that, in the chapter on proven facts of the Merits Report, the Commission referred expressly to presumed discrimination and that Talía had been prevented from attending primary school owing to her illness; also, to the supposed discrimination that her immediate family had suffered.[33] In addition, in the Commission's considerations on Talía's right to personal integrity and to a decent life following her infection, the Commission stated that her situation "has had serious impacts that extend […] to the exercise of her right to education" and exposed her to "a situation of discrimination at various levels." Lastly, among the recommendations in the Merits Report, the Commission recommended that the State provide, in consultation with Talía, "primary, secondary and university education."[34]

39. Based on the above, the Court notes that the representatives' arguments in relation to Articles 2, 24 and 26 of the American Convention are based on facts that form part of the factual framework presented by the Commission, and relate to legal considerations and not to new facts; consequently, this is not a matter of admissibility of the competence of the Court that must be decided in a preliminary manner.[35]

B. The determination of the presumed victims in this case

Arguments of the Commission and of the parties

40. The State asserted that, in the recommendations made in its Admissibility and Merits Reports, the Commission had established that the State should make reparation only to Talía Gonzales Lluy and her mother. According to the State, this means that "it is not possible to incorporate persons who have not been named as beneficiaries of an eventual reparation." Accordingly, it asked the Court to reject "the inclusions made by the presumed victims" subsequently.

41. The representatives argued that Iván Lluy had been indicated as a presumed victim in paragraphs 3, 220 and 221 of the Merits Report, and "the spirit of the report" evidently included Iván Lluy as a presumed victim. They also argued that the Court has clearly indicated that family members can also be victims, because they suffer the consequences of the violation of the rights. Thus, they considered that Iván Lluy had to become a child worker to help his mother and obtain what was required for his sister's needs, and that he also suffered the consequences of the discrimination and emotional harm. Lastly, they indicated that the presumed victims have the right to present their pleadings, motions and evidence autonomously pursuant to Article 23 of the Court's Rules of Procedure and that, in exercise of this autonomy, they considered that all the members of the Lluy family were presumed victims in this case.

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[32] *Cf. Inter alia, Case of Yvon Neptune vs. Haiti. Merits, reparations and costs.* Judgment of May 6, 2008. Series C No. 180, para. 19, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, para. 48.

[33] *Cf.* Merits Report of the Inter-American Commission, paras. 43 and 44.

[34] *Cf.* Merits Report of the Inter-American Commission, paras. 188, 192 and 222.

[35] *Cf. Case of Tarazona Arrieta et al. v. Peru*, para. 17.

42. The Commission referred to paragraphs 196, 220 and 221 of the Merits Report, in which it was expressly stated that the presumed victims in this case are Talía Gonzales Lluy, Teresa Lluy and Iván Lluy. Also, during the public hearing, the Commission emphasized that the failure to include Iván Lluy within the recommendations of the Merits Report was due to a "factual error."

Considerations of the Court

43. Regarding the State's request to exclude Iván Lluy as a possible beneficiary of an eventual reparation, because he was not mentioned in the chapter of the Merits Report on recommendations, the Court notes that the Commission expressly mentioned him throughout the Merits Report and, in its conclusions on the alleged violation of Articles 5, 8 and 25 of the American Convention in relation to Article 1(1) of this instrument. Therefore, the Court finds that Iván Lluy was identified as a presumed victim in the Commission's Merits Report, in accordance with the provisions of Article 50 of the Convention and Article 35(1) of the Court's Rules of Procedure. Consequently, the Court must rule on the presumed violations of the human rights of this presumed victim and on the reparations claimed for him by the Commission and the representatives.

VI
ALLEGED ACKNOWLEDGEMENT OF ONE FACT

44. The State, during the public hearing, made an "acknowledgement […] of one specific fact": "that, at the time the regrettable facts that constitute the case took place, it should not have delegated to a private entity the function of administering the national blood system," and that "the State now has technical norms in keeping with international standards." It also indicated that this was the "acknowledgement of one very specific fact that had a very particular dimension" and asked the Court to interpret this acknowledgment with the help of the "hermeneutical tools of deliberation, precise context, and good faith," "appreciating the State's willingness and its commitment to the human rights justice promoted by the Court." In addition, it presented proposals for reparation in case the Court should declare the State responsible.[36]

45. During the public hearing, in answer to questions from the judges as to whether this declaration constituted an acknowledgement of international responsibility for the violation of rights, the State affirmed that "what the State has offered is an acknowledgement pursuant to Article 62 [of the Rules of Procedure] of a fact, and the specific fact is that it should not have delegated to a private entity the function of administering the national blood system." Accordingly, it was an "acknowledgement of that fact, and there is not, there is no

[36] The State affirmed that it "would officially provide decent housing in the province of Azuay to ensure the right to life" of Talía Gonzales, and indicated that, if the Court should declare the State's responsibility, the Ministry of Public Health would continue the Comprehensive Health Care Protocol and would implement outpatient care under the protocol, with access to the necessary antiretroviral treatment, and provide psychological support and social assistance to Talía and her mother under the public health network. Also, if the Court should declare its responsibility, the Minister of Health would make a public apology to Talía and her mother with regard to the specific fact acknowledged by the State. It also indicated that, owing to her academic performance, Talía could apply for a scholarship based on merits.

acquiescence to [specific] articles; it is an acquiescence to a fact that refers to acknowledgement of a specific situation." It added that, "based on this acknowledgement," the State was offering the presumed victim "a decent life, health, education, a public apology; it is an acknowledgement of a specific fact: having delegated the responsibility to a private institution, such as the Red Cross."

46. The Court asked the State to clarify the scope of its acknowledgement in its final arguments. The State responded to this request referring to what it had expressly indicated during the public hearing (*supra* para. 42).

47. The Commission pointed out that the State's affirmations "do not constitute an acquiescence to either facts or claims in the terms of Article 62 of the Court's Rules of Procedure." However, it assessed positively the offer of housing made to the presumed victim, although it observed that the other reparation proposals made by the State were made "conditional" on the Court declaring the State responsible. Consequently, it reaffirmed that the State's affirmations did not constitute an acknowledgement of responsibility.

48. The representatives argued that the State had not referred to the scope of the acknowledgement, or to the implications of the fact acknowledged on "the infection of a child with HIV, or on the rights [presumably] violated." Regarding the offer of reparations, they pointed out that these referred only to acknowledgement of that fact and not to other presumed violations of rights in this case.

Considerations of the Court

49. Pursuant to Articles 62[37] and 64[38] of the Rules of Procedure, and in exercise of its powers for the international judicial protection of human rights, a matter of international public order that transcends the will of the parties, it is incumbent on this Court to ensure that acts of acquiescence are acceptable for the objectives sought by the inter-American system. In this task, it is not restricted to merely confirming, recording or taking note of the acknowledgement made by the State, or to verifying the formal conditions of the said acts, but it must relate them to the nature and severity of the violations that have been alleged, the demands and interests of justice, the particular circumstances of the specific case, and the attitude and position of the parties,[39] in order to clarify, to the extent possible and in the

[37] Article 62. Acquiescence

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.

[38] Article 64. Continuation of a case

Bearing in mind its responsibility to protect human rights, the Court may decide to continue the consideration of a case notwithstanding the existence of the conditions indicated in the preceding articles

[39] *Cf. Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 24, and *Case of Gutiérrez and family v. Argentina. Merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 271, para. 21.

exercise of its jurisdiction, the truth of what happened.[40] Thus, an acknowledgement cannot limit, either directly or indirectly, the exercise of the Court's powers to hear the case that has been submitted to it,[41] and to decide whether there has been a violation of a right or freedom protected by the Convention.[42] The Court notes that the acknowledgement of specific isolated facts and violations may have effects and consequences on its analysis of the other facts and violations alleged in the case, insofar as they all form part of a same set of circumstances.[43]

50. In this case, the State's assertions reveal that it has not related its presumed responsibility to the violation of specific norms. The Court notes that Ecuador acknowledged an aspect of the case that was not being disputed, even though it could have implications on aspects associated with the determination of the facts and the merits of this case. Consequently, the Court will take the State's acknowledgement into account, as appropriate, when analyzing the substantive aspects or merits of the alleged human rights violations in the corresponding chapters,[44] in accordance with the American Convention and taking into account the observations of Ecuador during the public hearing and in its final written arguments.

VII
EVIDENCE

A. Documentary, testimonial and expert evidence

51. The Court received diverse documents presented as evidence by the Commission and the parties, attached to their main briefs (*supra* paras. 3, 6 and 7). The Court also received from the parties documents that it had requested as helpful evidence under Article 58 of the Rules of Procedure. In addition, the Court received the affidavits of the presumed victims Teresa Lluy and Ivan Mauricio Lluy, proposed by the representatives; the witnesses Clara Vinueza and María Soledad Salinas, proposed by the representatives, and the expert witnesses Sonia Nivelo Cabrera, Fernanda Solis, Farith Simon, Daniela Salazar, Diana Milena Murcia, Claudia Storini and Marcelo Pazmiño, proposed by the representatives; Paul Hunt and Alejandro Morlachetti, proposed by the Inter-American Commission, and John Antón, Gustavo Medinaceli, Antonio Salamanca Serrano, Roxana Arroyo, Stephanie León, Juan Montaña, Nilda Estela Villacrés, María Jerovi Naranjo, Diana Molina, Carmen Carrasco, Juan

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[40] *Cf. Case of Manuel Cepeda Vargas v. Colombia*, para. 17, and *Case of Gutiérrez and family v. Argentina*, para. 21.

[41] Article 62(3) of the Convention establishes: The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

[42] Article 63(1) of the Convention establece: If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

[43] *Cf. Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, para. 27.

[44] Similarly see what happened in the *Case of Veliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of May 19, 2014. Series C No. 277, para. 24.

Bernardo Sánchez, Aimée Dubois Sánchez, Jimmy Tandazo, Carolina Zevallos, Pablo Alarcón Peña, Pamela Juliana Aguirre and Carlos Delgado, proposed by the State.[45] Regarding the evidence provided during the public hearing, the Court received the testimony of the presumed victim Talía Gonzales Lluy, proposed by the representatives, and the expert witnesses Christian Courtis, Julio César Trujillo and Diego Zalamea proposed by the Commission, the representatives and the State, respectively.

B. Admission of the evidence

B.1) Admission of the documentary evidence

52. This Court admits those documents presented at the appropriate procedural opportunity by the parties and the Commission, the admissibility of which was neither contested nor opposed.[46] The documents requested by the Court that were provided by the parties following the public hearing are incorporated into the body of evidence in application of Article 58 of the Rules of Procedure.

53. Regarding some documents indicated by means of electronic links, the Court has established that, if a party or the Commission provides, at least, the direct electronic link to the document it cites as evidence and it is possible to access this, neither legal certainty nor procedural equality is harmed, because it can be found immediately by the Court and the other parties,[47] and is available up until the judgment is delivered.

54. Also, with regard to the document presented by the Commission on May 8, 2014, regarding a report that the State sent to the Inter-American Commission concerning the implementation of the Merits Report of April 14, 2014, the Court notes that it was issued after the case had been submitted to this Court. Therefore, this document is admitted under Article 57(2) of the Rules of Procedure and taking into account its usefulness to decide some aspects of this case.

55. In addition, the State and the representatives presented certain documentation as annexes to their final written arguments. Some of these annexes relate to answers to questions posed by the judges during the public hearing. The parties and the Commission were able to present their comments on this information and documentation. Pursuant to Article 58(a) of the Rules of Procedure, the Court finds it in order to admit the documents provide by the parties together with their final written arguments, insofar as they may be useful to decide this case.

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[45] The State withdrew the testimony of the expert witnesses Raúl Vallejo, Sebastián González, Blanca Susana Aguilar and María Elena Béjar.

[46] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 282, para. 113.

[47] *Cf. Case of Escué Zapata v. Colombia. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, para. 58.

56. In their comments on the final arguments, the representatives included certain observations on the evidence provided by the State. They argued that the evidence presented on the "[i]nternational accreditation of the Cuenca and Azogues hospitals, Ecuador, May 2015," was time-barred, and did not answer any question posed by the Court. Also, they indicated that it was neither opportune nor pertinent, and should therefore be rejected. Furthermore, they asked that the Court reject the evidence corresponding to the "[n]ational hospital network, Ministry of Public Health," the "2013-2014 priorities for health research," the "[p]ublic health network convention," "[d]ecision 3557, June 14, 2013, bioethics, creation CNBS" and the "2008-2013 annual budgets," because they were time-barred and were irrelevant to the case. Meanwhile, the State presented some observations on the comments made by the representatives on the evidence provided together with its final written arguments, and considered that they had "present[ed] new arguments that contain new assertions." Consequently, the State asked the Court not to take into account the document presented by the representatives on June 1, 2015.

57. In this regard, the Court notes that the documents corresponding to the international accreditation of the Cuenca and Azogues hospitals, and the Public Health Network Convention are dated after the presentation of the State's answering brief; it therefore finds it in order to admit them under Article 57(2) of the Rules of Procedure. However, regarding the documents concerning: (i) the national hospital network; (ii) the 2013-2014 health research priorities; (iii) decision 3557-14, and (iv) the 2008-2013 annual budgets, the Court observes that the State presented them without providing any justification for forwarding them after the answering brief and they are not directly related to the questions posed by the Court to help it decide this case. Consequently, based on the provisions of Article 57(2) of the Rules of Procedure, the Court finds that these documents are time-barred, because the State could have been aware of them before it submitted its answering brief. Therefore, the Court will not consider them in its decision.

58. Regarding the State's request that the Court exclude certain arguments of the representatives, the Court notes that, to a great extent, the latter's brief contains their comments on the answers to the questions posed by this Court, which referred to most of the existing disputes in this case. Consequently, the Court finds it in order to admit the brief presented by the representatives.

B.2) Admission of the testimonial and expert evidence

59. The Court finds it pertinent to admit the testimony of the presumed victims and the witnesses, as well as the expert opinions provided during the public hearing and by affidavit, insofar as they are in keeping with the purpose defined by the President in the order requiring them (*supra* para. 10) and the purpose of this case.

B.2.1) Observations on several affidavits presented by the State

60. The State presented various observations on the opinions provided by the expert witnesses proposed by the Commission and the representatives. Regarding the expert opinion of Paul Hunt, it asserted that he failed to refer to the level of legislative and public policy development that Ecuador had achieved with regard to the right to health, especially,

for persons with catastrophic illnesses. Regarding the opinion of expert witness Alejandro Morlachetti, it pointed out that he "appeared to be unaware of Ecuador's experience in the area of public policy with regard to […] health" and had only referred obliquely to Ecuador's Multi-sectoral Strategic Plan. In addition, it argued that the expert witness had refused to refer to the inclusion and safeguard of the recognition of children and adolescents under the legal category of protection of the citizenry. In the case of Farith Simon, the State indicated that his opinion included a reference to the Committee on the Rights of the Child in 2010 "that was nothing to do with the purpose of the expert opinion and should be rejected as it exceeded the mandate given by the Court," because the reference was the result of a context that did not correspond to the purpose of the expert opinion. With regard to the expert opinion of María Fernanda Solis, the State rejected the fact that it included value judgments on the situation of persons with HIV, and also her affirmation that "the fact that the State has used commercial criteria to administer the management of the blood banks deserves condemnation."

61. In the case of Diana Murcia, the State asserted that "she used political and media-related criteria, instead of technical and legal criteria" to defend a thesis that "was biased and removed from reality." Regarding Claudia Storini, it indicated that part of the opinion deviated from its main purpose, by referring to two specific proceedings that were unrelated to the case. With regard to the expert opinion of Marcelo Pazmiño, the State argued that the sample taken to analyze compensation for non-pecuniary damage was "insignificant" and "revealed a position that did not respect the criteria of objectivity and neutrality," exceeding the purpose of the expert appraisal. In the case of the expert opinion of Daniela Salazar, the State's objection was that this tried to expand the application framework and mandatory nature of some international human rights documents; it also affirmed that the content of the opinion, "starting at paragraph 28, violates the exercise of the role of an expert witness, by infringing […] the obligation of neutrality" and by determining the presumed obligations with which the State allegedly failed to comply. Consequently, it contested the entire document.

62. Regarding the State's observations, the Court considers that they relate to the probative value and implications of the opinions provided, but do not affect their admissibility.[48] Therefore, the Court will take these observations into account when assessing the evidence in the context of examining the merits of this case.[49]

C. Assessment of the evidence

63. Based on the provisions of Articles 46, 47, 48, 50, 51, 57 and 58 of the Rules of Procedure, and also on its consistent case law concerning evidence and its assessment,[50] the Court will examine and assess the documentary probative elements forwarded by the parties and the Commission, as well as the statements, testimony and expert opinions, and the helpful evidence requested and incorporated by this Court, when determining the facts of the

[48] *Case of the Human Rights Defender et al. v. Guatemala*, para. 69

[49] *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, para. 72

[50] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, paras. 69 to 76, and *Case of Tarazona Arrieta et al. v. Peru*, para. 28.

case and ruling on the merits. To this end, it will abide by the principles of sound judicial discretion, within the corresponding legal framework, taking into account the entire body of evidence and the arguments submitted in this case.[51] However, pursuant to the Court's case law, the statements made by the presumed victims cannot be assessed in isolation, but rather within all the evidence in the proceedings, insofar as they may provide further information on the presumed violations and their consequences.[52]

VIII
FACTS

64. This case refers to Talía Gabriela Gonzales Lluy and her family. Talía was born on January 8, 1995, in the canton of Cuenca, Azuay province, Ecuador. Her mother is Teresa Lluy, her father is SGO, and her brother is Iván Lluy. Neither her father, her mother nor her brother have HIV.[53] Talía was born and lives with her mother and her brother in the canton of Cuenca, Azuay province, Ecuador. When she was three years old, she was infected with HIV on receiving a transfusion of blood from a Red Cross blood bank in a private health clinic.

65. The World Health Organization (hereinafter "the WHO") has stated that "the human immunodeficiency virus (HIV) is a retrovirus that infects cells of the immune system, destroying or impairing their function. As the infection progresses, the immune system becomes weaker, and the person becomes more susceptible to infections." It is considered that "the immune system is considered deficient when it can no longer fulfill its role of fighting off infections and diseases. […] The term AIDS applies to the most advanced stages of HIV infection, defined by the occurrence of any of more than 20 opportunistic infections or HIV-related cancers."[54] The United Nations has recognized that "HIV and AIDS constitute a global emergency, pose one of the most formidable challenges to the development, progress and stability of our respective societies and the world at large and require an exceptional and comprehensive global response that takes into account the fact that the spread of HIV is often a consequence and a cause of poverty."[55]

66. The Court will now describe the facts that have been proved in the following order: (A) regulation of the Red Cross and the blood banks in Ecuador; (B) Talía's health, her

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[51] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*, para. 76, and *Case of Tarazona Arrieta et al. v. Peru*, para. 28.

[52] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of J. v. Peru. Preliminary objection, Merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275, para. 49.

[53] Results of HIV tests on the mother, brother and father of Talía Gonzales Lluy of October 23 and November 24, 1998, delivered to the Fourth Criminal Judge on December 14, 1998 (evidence file, folios 46 to 48).

[54] http://www.who.int/topics/hiv_aids/en/. UNAIDS has indicated that HIV is a "retrovirus that infects cells of the human immune system (mainly CD4 positive T cells and macrophages — key components of the cellular immune system), and destroys or impairs their function. Infection with this virus results in the progressive deterioration of the immune system, leading to 'immune deficiency'." http://data.unaids.org/pub/FactSheet/2008/20080519_fastfacts_hiv_en.pdf

[55] United Nations, General Assembly, "Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS, A/RES/65/277, 8 July 2011 (hereinafter UN Resolution HIV/AIDS 2011), at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/529/16/PDF/N1052916.pdf?OpenElement, para. 7.

hospitalization, and the blood transfusion of June 22, 1998; (C) the infection of Talía with HIV; (D) the criminal action; (E) the civil action, and (F) the impact of the infection on Talía's education.

A. Regulation of the Red Cross and the blood banks in Ecuador

67. On November 14, 1910, the Government of Ecuador accorded legal recognition to the installation of the Red Cross in that country by a legislative decree published in Official Gazette No. 1392, the first article of which indicates: "The Red Cross of Ecuador is declared to be a charitable institution for the public benefit, and is granted exoneration from paying any national or municipal taxes."[56]

68. In August 1922, the first statutes of the Ecuadorian Red Cross were drawn up, and this led to its international recognition by the League of Red Cross Societies (current International Federation of Red Cross and Red Crescent Societies) in 1923.[57] The statutes indicate:

> Art. 1. The Ecuadorian National Red Cross Society is founded on the following principles:
>
> FIRST.[58] The Ecuadorian Red Cross is recognized by the Government of Ecuador as a voluntary relief society, auxiliary to the public authorities in the humanitarian sphere, as stipulated in the 1906 Geneva Convention, and as the only Red Cross society in Ecuador.
>
> SECOND. The Ecuadorian National Red Cross Society is governed by the law that constituted it, by the international conventions and treaties legally approved by Ecuador, and by these statutes. It is a private non-profit institution, with its own legal status. The legal, judicial and extrajudicial representation, at the national level, is exercised by the President of the Nation and, at the provincial level, shall be exercised by the provincial governor. It will be governed by the provisions of Title XXX of the First Volume of the Civil Code.[59]

69. The Red Cross Blood Bank of Azuay has been in operation since 1951. The activities performed by the Blood Bank include blood typing, serological tests, separation of blood

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[56] See: *Reseña Histórica de la Cruz Roja en Ecuador*. Available at: http://www.cruzroja.org.ec/index.php/quienes-somos/resena-historica.

[57] Ver *Reseña Histórica de la Cruz Roja en Ecuador*. Formalization of the Ecuadorian Red Cross, Available at: http://www.cruzroja.org.ec/plantilla_texto.php?id_submenu1=2&id_menu=2.

[58] The Ecuadorian Red Cross is composed of national agencies and provincial, cantonal and parish committees, in accordance with the decisions of the 1863 International Conference of Geneva and the Principles of the 1906 Geneva Convention.

[59] The Inter-American Commission cited as a source to determine this fact the electronic link: http://www.cruzroja.org.ec/plantilla_texto.php?id_submenu1=2&id_menu=2. This fact has not been contested by the parties. Nevertheless, the Court notes that this webpage was not available when this Judgment was delivered. In this regard, the Court notes that it is possible to access an inter-institutional framework cooperation agreement which mentions the statutes of the Ecuadorian Red Cross and its nature as a private corporation governed by the Civil Code at: http://www.gazzettaamministrativa.it/opencms/export/sites/default/_gazzetta_amministrativa/amministrazione_trasparente/_agenzie_enti_stato/_croce_rossa_iTalíana/090_prov/010_pro_org_ind_pol/2013/Documenti_1383666871662/1383666873832_accordo_con_croce_rossa_ecuador.pdf.

components, collection of blood samples for DNA tests, and management of blood provided by donors.[60]

70. Ecuador's 1971 Health Code,[61] in force at the time of the facts of this case, did not include specific regulations for the operation of blood banks. In general, the 1971 Health Code established the following in relation to health entities:

> Art. 168. The health authorities shall establish the norms and requirements that the establishments providing medical services must comply with, and shall inspect and evaluate them periodically.
>
> Art. 169. Establishments providing medical services shall submit their annual programs and their rules of procedure to the health authorities for approval.

71. Ministerial Decision 8664 of 1987 established that "it is compulsory for all the country's blood banks to carry out HIV antibody tests in all blood units and blood products."[62] Subsequently, in 1992, the National Regulations for the Supply and Use of Blood and Blood Products were adopted.[63] These regulations established the National Blood Secretariat as an auxiliary agency of the Red Cross and established that the Secretariat's functions included: "to supervise the operation, distribution, and internal or external supply of human blood or blood products, when required." As regards sanctions, article 24 of the regulations stipulated that, in case of non-compliance or disregard for the regulatory provisions and the operating manuals, the National Blood Secretariat would issue a warning to the operational agency involved, or would refer the case to the National Blood Committee, which, in turn, could request the Health General Directorate of the Ministry of Public Health to "caution the respective operational agency."

72. In 1998, the Manual of Standards for Blood Banks and Deposits, and Transfusion Services was issued.[64] The Manual (article 5(1)(c)) stipulated that "prior to their use in allogeneic transfusion, all blood units and products must obligatorily undergo" HIV testing, among other tests. In the normative context in force in 1998, the State established the legal framework under which the blood banks should operate to collect blood, to carry out serological screening, and to distribute it for its final use in order to guarantee the safety of the blood and blood products so as to avoid the transmission of infections through transfusions.

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[60] See Ecuadorian Red Cross, Azuay Provincial Committee. Red Cross Blood Bank http://www.cruzrojazuay.org/#!banco-de-sangre/cyjt.

[61] Health Code of Ecuador (evidence file, folios 2643 to 2658).

[62] Official Gazette No. 794. Regulation 8001. Decison on the compulsory nature of performing HIV testing on all blood units and products of October 20, 1987 (evidence file, folios 2680 to 2704).

[63] Official Gazette No. 882. Regulations of the National System for the supply and use of blood and blood products of February 25, 1992 (evidence file, folios 2713 to 2716). According to these regulations, the Ecuadorian Red Cross, the entity that headed and regulated the National System for the supply and use of blood and blood, had the following auxiliary bodies: the National Blood Committee, the National Blood Secretariat, Blood Banks and Blood Deposits and, with regard to the blood banks, these were responsible for the registration, obtaining, donation, conservation, processing, distribution and supply of human blood and blood products.

[64] Manual of of Standards for Blood Banks and Deposits, and Transfusion Services of August 31, 1998 (evidence file, folios 2730 to 2759). Helpful evidence that was received on July 21, 2015.

73. Article 22.15 of the 1998 Constitution established that "the State shall formulate the national health policy and shall determine its application in both public and private health care services. The law shall ultimately determine the organ that will control and monitor the companies who provide private health care services."[65]

74. In 1998, the 1986 Law on the supply and use of blood and blood products, amended in 1992, was in force. This law determined that the Red Cross had the exclusive competence to manage the blood banks and even that the Ministry of Public Health, the Ecuadorian Social Security Institute, and the Armed Forces would manage blood banks and deposits "under the regulatory control and coordination of the Ecuadorian Red Cross."[66] The Law on voluntary blood donors adopted in 1984, was also in force.[67]

B. Talía's health, her hospitalization, and the blood transfusion of June 22, 1998[68]

75. On June 20, 1998, when she was three years old, Talía had a nose bleed that would not stop and her mother took her to the Catholic University Hospital, a private health care establishment in Cuenca, Azuay. Talía was hospitalized for two days in the University Hospital and, subsequently, her mother took her to the Pablo Jaramillo Foundation Humanitarian Clinic (hereinafter "Humanitarian Clinic"), another private health care establishment in Cuenca. At the Humanitarian Clinic, Talía was diagnosed with thrombocytopenic purpura[69] by Dr. PMT, a Red Cross doctor,[70] who informed Teresa Lluy that Talía urgently needed a transfusion of blood and platelets.

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65 Constitution of the Republic of Ecuador of August 11, 1998, Article 22.15.

66 "The supply and use of blood and blood products in Ecuador shall be the exclusive responsibility of the Ecuadorian Red Cross, the institutions that shall organize, to this end, a system of blood banks and storage facilities, in the cities and medical services that require them […]. The Ministry of Public Health, the Ecuadorian Social Security Institute, the Armed Forces and the Guayaquil Welfare Board, shall continue to manage the blood banks and storage facilities attached to their medical organizations, under the regulatory control and coordination of the Ecuadorian Red Cross. Official Gazette No. 559. Law on the supply and use of blood and blood products of November 7, 1986 (evidence file, folio 2661).

67 Official Gazette No. 774. Regulation 170. Law on voluntary blood donors of June 29, 1984.

68 The State did not contest the facts relating to Talía's hospitalization and blood transfusion. These facts were also established in the context of the domestic criminal proceedings.

69 "Immune thrombocytopenic purpura (ITP), also called idiopathic thrombocytopenic purpura (ITP) is a hemorrhagic disorder characaterized by the premature destruction of platelets owing to the union of an antibody, usually of the IgG type, to the glycoprotein platelets and the subsequent elimination through the mononuclear phagocyte system." *Guía de Práctica Clínica, Diagnóstico and Tratamiento de Púrpura Trombocitopénica Inmunológica*, Mexico, Health Secretariat, 2009. Available at http://www.cenetec.salud.gob.mx/descargas/gpc/CatalogoMaestro/143_GPC_PURPURA_TROMBOCITOP/Imss_ER.pdf. The Court considers that the said document is useful for the analysis of this case; it therefore incorporates it *ex officio* into the body of evidence under Article 58(a) of its Rules of Procedure.

70 Regarding Talía's medical condition when she was admitted to the Humanitarian Clinic, Dr. PMT indicated that "her clinical condition was characterized by hemorrhages in different places, both nasal and of the skin and mucous membranes; as a result of this, when she was examined she was extremely pale […] and her vital signs were on the point of failing, […] the general situation of the child was extremely precarious and she was at death's door […]." Testimony of PMT of November 30, 1998, before the Fourth Criminal Judge of Azuay (evidence file, folio 442).

76. In order to obtain the blood required for Talía's transfusion, Teresa Lluy went to the Azuay Red Cross Blood Bank (hereinafter "Red Cross Blood Bank") where they advised her that she should bring donors. Teresa Lluy then asked some acquaintances, including Mr. HSA, and they donated blood.

77. On June 22, 1998, Mr. HSA went to the Red Cross Blood Bank to donate blood. Ms. MRR, nursing assistant of the Red Cross Blood Bank, took blood samples from Mr. HSA and delivered the "pints of blood" to Talía's family and friends. That evening, Ms. BRR, an intern at the Red Cross Blood Bank, delivered the concentrates of the platelets to two friends of Teresa Lluy. Owing to the urgency, personnel of the Humanitarian Clinic gave the blood transfusions to Talía on June 22, 1998, and during the early morning hours of the following day.

78. On June 23, 1998, Ms. EOQ, biochemist of the Red Cross Blood Bank examined the blood sample of HSA for the first time, including testing for HIV.[71] Talía remained in the Humanitarian Clinic until June 29, 1998, when she was released.

C. Talia's infection with HIV[72]

79. "Approximately fifteen days" after having donated the blood to Talía, Mr. HSA received a call "from the Red Cross" asking him to come to the Red Cross Blood Bank in order to take other blood samples, because "the phials had spilled." Ms. MRR again took blood samples from HSA. Mr. HSA asked Ms. MRR why a new sample was required and if there was any problem with his blood, to which MRR replied that he should not be concerned; that "it was to keep the sample at the Red Cross."

80. One week later, Mr. HSA received a telephone call from the Red Cross to inform him that he was infected with HIV. On August 13, 1998, Mr. HSA underwent other tests that confirmed that he was infected with HIV.

81. Talía was released from the Humanitarian Clinic on June 29, 1998 (*supra* para. 78). However, she was told that she should continue with treatment at home for six months, with blood tests every month, and a monthly control visit with Dr. PMT. A few days after her release from the Clinic, Talía's mother took her to Dr. PMT's office and he ordered Talía to have a blood test "to control her illness." Following that test, Dr. PMT told Teresa Lluy that "everything was normal."

82. On July 22, 1998, Teresa Lluy again went to Dr. PMT's office, and he told her that Talía should have another blood test, "but including the test for [AIDS]." Consequently, Teresa Lluy went with Talía to the Humanitarian Clinic so that she could undergo another

[71] According to the expert opinion provided to the Fourth Criminal Judge of Azuay, PMT and MRR told the expert witnesses that tests performed on an emergency basis after 6 p.m. were not recorded in a ledger or log; but rather carried out by the staff on the evening shift and verified the following day. Expert opinion provided by JPR and NVI before the Fourth Criminal Judge of Azuay on August 17, 1999 (evidence file, folio 97).

[72] The State did not contest the facts relating to the infection.

blood test. The Humanitarian Clinic sent them to the Leopoldo Izquieta Pérez Laboratories and, there, she was informed that Talía "had the AIDS virus."

83. In a statement she made during the criminal proceedings in Ecuador (*infra* para. 90), Teresa Lluy indicated that:

> "[…] at the beginning of August, Dr. A[…] at the Humanitarian Clinic told [her] to go to the Izquieta Pérez Institute and speak to Dr. V[…], who asked [her] whether the child's parents or the donors had visited the United States, telling her that the child's blood was contaminated and that [she] should come back when the results were back from Guayaquil. [She] then visited Dr. [PMT] and in answer to [her] questions […], he replied: "you must get used to the idea that the girl has AIDS as a result of the blood transfusion, clarifying that it never appears initially, but rather months later.' […] She later returned to Dr. [PMT] and, at the Red Cross, this professional, after seeing the test, said that she was infected. Subsequently, [she] found out that [HSA] had AIDS; [she] therefore returned to Dr. [PMT] to ask him when he had found out about this and the doctor said that he, personally, had performed the test on the day after HSA donated blood – on June 23 – and he then knew that HSA had AIDS. Several days later, [she] returned because Dr. [PMT] had offered to continue treating the child and he then confessed that what had happened was due to involuntary human error and that he would continue treating her, giving her vaccines and the respective check-ups."

84. In this regard, Iván Lluy testified that Dr. PMT "told [them] that he was prepared to offer Talía the necessary care, but if [they] filed a complaint, she would lose this assistance and, without treatment, would not live more than two more years."

85. On July 28 and August 13, 1998, and January 15, 1999, blood tests were performed that confirmed that Talía had HIV. When she learned that HSA's blood had HIV and that Talía had been infected with the virus when she received a blood donation, Teresa Lluy filed various civil and criminal actions in Ecuador.

D. The criminal action

86. On September 29, 1998, Teresa Lluy filed a criminal complaint "to determine those responsible for the blood transfusion performed on Talía that had infected the child with HIV."[73]

87. On October 19, 1998, the Fourth Criminal Court of Azuay (hereinafter "the Fourth Court" or "the Fourth Criminal Court") issued "an order to investigate the alleged offense," opening the proceedings "to identify those responsible."[74] Consequently, the court ordered that the preliminary investigations be undertaken and, to this end, determined that testimony be received and the scene of the facts inspected,[75] as well as other necessary inquiries.

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[73] *Cf.* Complaint filed before the Criminal Judge on September 29, 1998, (evidence file, folio 382).

[74] Order to investigate the alleged offense issued by the Fourth Criminal Judge of Azuay on October 19, 1998 (evidence file, folio 385).

[75] In the context of the criminal case instituted by Teresa Lluy, three inspections were made of the Azuay Red Cross Blood Bank. The first one was made on December 11, 1998, when the experts, CCC and GCVR, accompanied by the Fourth Criminal Judge of Azuay and his secretary inspected the premises and the logbook. On May 18, 2000, a second visit was made to the Blood Bank. This time Ms. KA and Ms. MB were designated as experts, and they accompanied the Fourth Judge and his secretary, and inspected the Blood Bank's files. During the inspection of May 18, 2000, it was noted that each donor had a code that was entered into the computer database, and that Mr. HSA

88. On October 19, 1998, Dr. PMT, Director of the Red Cross Blood Bank, who had diagnosed Talía at the Humanitarian Clinic ordering the transfusion of two pints of blood and platelets (*supra* para. 75) came forward to testify.[76] The same day, EOQ, the Red Cross biochemist who had performed the HIV tests on HSA's blood on June 23, 1998 (*supra* para. 78), testified.[77]

89. On October 20, 1998, Mr. HSA testified about what happened on the day that he donated blood for Talía and how he later found out that he was a carrier of HIV.[78]

90. On November 15, 1998, Teresa Lluy appeared before the court to testify. She gave an account of what happened between June 20 and 22, 1998, as well as after Talía's blood transfusion and up until the time when she found out that Talía had HIV.[79] On November 18, 1998, Mr. HSA came forward once again to testify and added that, when he was advised of his illness, the Red Cross assured him that his blood had not been given to Talía.[80]

91. On December 14, 1998, MRR, nursing assistant of the Red Cross Blood Bank came forward to testify. She had taken the blood samples from the donors on June 22, 1998, and handed over the blood.[81]

92. On December 14, 1998, Teresa Lluy provided the Fourth Court with three negative results of the HIV tests performed on herself, and on Talía's brother and father, in order to

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and another five persons were identified with the numbers 43137, 43144, 43141, 43149, 43146 and 43142, respectively. In the record of the inspection it was noted that donor 43137 had tested positive for HIV; and it was recorded that "from the documents seen, it was verified that no tests on the donors in question were performed on June 22, 1998, but rather on June 23, 1999. In addition, the dates on which the tests were performed are smudged and other dates are also smudged." It was also recorded that EOQ had stated that, prior to December 1998, donations received after 6 p.m. and at weekends were not recorded. The last inspection took place on June 22, 2001, by the experts, RRC and GTS, and the Fourth Judge. During this inspection, it was concluded that the qualitative methods used were not reliable, because the tests should have been corroborated by reference methods such as the "Western Blot and Micro – ELISA" which the Red Cross did not have. Record of the inspection in the offices of the Red Cross in the presence of the Fourth Criminal Judge of Azuay on December 11, 1998 (evidence file, folios 42 and 13); record of the inspection in the offices of the Red Cross in the presence of the Fourth Criminal Judge of Azuay on May 18, 2000 (evidence file, folios 145 and 146), and record of the inspection in the offices of the Red Cross in the presence of the Fourth Criminal Judge of Azuay on June 22, 2001 (evidence file, folios 221 and 222).

[76] *Cf.* Testimony of PMT before Investigator No. 30 of the Ecuadorian National Police of October 19, 1998 (evidence file, folios 403 to 405).

[77] *Cf.* Testimony of EOQ before Investigator No. 30 of the Ecuadorian National Police of October 19, 1998 (evidence file, folio 407).

[78] *Cf.* Testimony of HSA before Investigator No. 30 of the Ecuadorian National Police of October 20, 1998 (evidence file, folio 409).

[79] *Cf.* Testimony of Teresa Lluy before Investigator No. 30 of the Ecuadorian National Police of November 15, 1998 (evidence file, folio 411).

[80] *Cf.* Testimony of HSA before the Fourth Criminal Judge of Azuay of November 18, 1998 (evidence file, folio 392).

[81] *Cf.* Testimony of MRR before the Fourth Criminal Judge of Azuay of December 14, 1998 (evidence file, folio 44).

prove that none of the members of the family was a carrier of HIV.[82] Teresa Lluy also provided a certificate, issued on October 27, 1998, of a gynecological examination carried out Talía, which indicated that there were no recent or previous traumatic lesions in Talía's external genitalia, and that "the characteristics of the hymen [were] normal."[83]

93. On July 5, 1999, two experts were appointed from this Medical Association's list: Drs. JPR and NVI, and they were asked to present their report within 10 days.[84] These experts assumed their functions on July 28, 1999[85] and delivered their report on August 17, 1999.[86]

94. In this report, Drs. JPR and NVI referred to: (i) the time and method used to obtain a concentrate of platelets in the Red Cross Blood Bank;[87] (ii) the codes assigned to each donor on June 22, 1998, including Mr. HSA;[88] (iii) the contradictions detected in the records available with regard to the donor from whom the platelets were obtained that were given to Talía;[89] (iv) the absence of a record of the time at which HSA's blood was received and of the

[82] Brief of Teresa Lluy submitted to the Fourth Criminal Prosecutor, presenting the results of the HIV tests performed on Teresa and Iván Lluy at the National Health Institute; and on SGO in the General Hospital of the Armed Forces No. 1, of December 14, 1998 (evidence file, folios 46 to 49).

[83] Gynecological certificate of Talía Gonzales Lluy, issued by the Ministry of Public Health, Cuenca, Pumapungo, on October 27, 1998 (evidence file, folio 45).

[84] Decision of the Fourth Criminal Court of June 5, 1999 (evidence file, folio 83).

[85] Record of assumption of functions of JPR and NVI before the Fourth Criminal Court of July 28, 1999 (evidence file, folio 84).

[86] *Cf.* Expert opinion provided to the Fourth Criminal Court by Drs. JPR and NVI dated August 16, 1999 (evidence file, folios 91 to 98).

[87] *Cf.* Expert opinion provided to the Fourth Criminal Court by Drs. JPR and NVI dated August 16, 1999 (evidence file, folios 91 to 98). On this point, the experts clarified that "recently extracted whole blood is used, or blood that has been extracted within six hours at most." Following procedures describd by the experts, the result is that "from one unit of fresh whole blood initially extracted from a donor we have obtain three fractions distributed in three different blood bags: one bag of red blood cells (concentrate of red blood cells), one of platelet-poor plasma, and one with the platelet concentrate." They added that "centrifuge time is exact, but the time required for the Blood Bank to deliver the platelets varies (but, in any case, this should be within six hours of the extraction of the blood from the donor), because it will depend on working conditions and, at least, the following situations should be taken into consideration: first, have available (as in the case that is being investigated) two donor with the same blood group as the receiver, because two concentrates of platelets had been requested […] [illegible], this time all the tests should be performed […] [illegible] of the donor (antibody for HIV/AIDS, antibody for Hepatitis C, Hepatitis B surface antigen, testing for syphilis, etc.), and all this in addition to the other work of the Blood Bank." The experts described this additional work, concluding that all the foregoing would depend on the staffl available at the Blood Bank.

[88] *Cf.* Expert opinion of Drs. JPR and NVI dated August 16 1999 (evidence file, folios 91 to 98). On this point, they indicated that this information was taken from the computer print-out of the Transfusion Records of the Azuay Red Cross and from photocopies of the forms completed by the donors, because, the Blood Bank told them that it "did not have a notebook."

[89] *Cf.* Expert opinion of Drs. JPR and NVI of August 16 1999 (evidence file, folios 91 to 98). On this point, they indicated that these contradictions are based on a situation described that was impossible in scientific terms, and on the name of the employee who had presumably taken one of the samples and who, according to the testimony, was not working there at the time indicated. They added that, "the Blood Bank does not have a record of the times at which the units were extracted from the donors."

tests performed on HSA's blood on June 22, 1998,[90] and (v) the failure to note in the medical record the "identification slips of the blood units."[91]

95. In the final part of their expert opinion, Drs. JPR and NVI indicated the need to perform a test of "comparison of viral genotype and sequential analysis of nucleotides," as follows: "from the scientific perspective, [the test] could help to establish or eliminate the possibility that the blood transfusion was the cause of the presence of the HIV antibody in the child [Talía], by the identification and comparison of the viral genotype and the sequential analysis of HIV nucleotides by hybridization techniques, in the blood of Mr. [HSA] and of the child [Talía]. This highly sophisticated technique (which corresponds to molecular biology) has not yet been fully implemented in the country, but the European Molecular Biology Bank (Heidelberg, Germany) could be contacted, if necessary, in order to send blood samples."[92]

96. On September 8, 1999, the Fourth Criminal Judge declared that the preliminary investigation had been concluded and asked the Fourth Prosecutor to issue his report.[93] On September 14, 1999, Teresa Lluy asked the Fourth Judge to re-open the preliminary investigation, indicating that fundamental evidence remained to be obtained, including the evidence suggested by the expert witnesses in relation to sending blood samples to the European Molecular Biology Bank.[94]

97. On October 19, 1999, the Fourth Prosecutor asked the Fourth Criminal Court to re-open the preliminary investigation in order to undertake the necessary procedures "to be able to identify the person responsible" for infecting Talía. On November 4, 1999, it was decided to re-open the preliminary investigation "for the maximum time established by law" Additional procedures were ordered, including those requested by the Fourth Prosecutor, and the experts, JPR and NVI, were required to submit their conclusions.[95]

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[90] *Cf.* Expert opinions of Drs. JPR and NVI of August 16 1999 (evidence file, folios 91 to 98). On this point, the experts indicated that, "according to information provided verbally by Dr. PMT and Ms. [MR], the tests performed urgently after 6 p.m. […] were not recorded in any ledger or log; rather, they state that the tests are performed by the staff on duty and are verified the following day."

[91] Similarly, regarding the time within which it is possible to detect the presece of HIV following a blood transfusion with contaminated platelets, the experts indicated that this can be done using "viral quantification techniques within a relatively short time (from 1 to 3 weeks following exposure) in the case of the so-called acute HIV infection. But seroconversion […] generally ranges from 6 to 12 weeks after transmission." They added that this varies from one person to another and that, in the case of a blood transfusion, the antibodies can be detected within a shorter period than in the case of sexual transmission. Expert opinion of Drs. JPR and NVI of August 16, 1999 (evidence file, folios 91 to 98).

[92] *Cf.* Expert opinion of Drs. JPR and NVI of August 16 1999 (evidence file, folios 91 to 98).

[93] Decision to conclude the preliminary investigation taken by the Fourth Criminal Court on September 8, 1999 (evidence file, folio 100).

[94] *Cf.* Request to re-open the preliminary investigation presented by Teresa Lluy to the Fourth Criminal Judge on September 14, 1999 (evidence file, folios 100 to 104).

[95] Decision of the Fourth Criminal Court of November 4, 1999, to re-open the preliminary investigation (evidence file, folio 111).

98. On November 26, 1999, the experts, JPR and NVI, once again addressed the Fourth Court indicating that the evidence that existed in the proceedings, "from a scientific perspective, did not determine unequivocally the cause of the propagation of HIV." The experts repeated the suggestion that a specialized test be performed, as follows: "at the end of [their] report, […they had] suggested the test that, scientifically, could be decisive: genetic sequencing to be performed in Europe. Based on the results of this test, [they] would be able to decide one way or the other."[96]

99. On December 22, 1999, Teresa Lluy filed "private charges" [*acusación particular*][97] against PMT, EOQ and MRR, seeking that they be declared responsible for infecting Talía.[98] On January 5, 2000, the Fourth Criminal Court decided not to accept for processing the "private charges" filed by Teresa Lluy, "because the re-opening of the preliminary investigation had been ordered in order to carry out the measures that had been ordered, [and] the private charges are not an essential procedural action, and should have been filed opportunely."[99]

100. On March 22, 2000, the Fourth Court declared the preliminary investigation concluded, for the second time, and ordered the prosecutor to issue his report within the legal time frame.[100] On May 5, 2000, Teresa Lluy again asked that the specialized test suggested by the experts be performed.[101] On May 15, 2000, at the request of the Fourth Prosecutor, the Fourth Court decided to re-open the preliminary investigation and ordered that several measures be taken.

101. On July 18, 2000, the Fourth Judge established that the experts, JPR and NVI, should obtain blood samples from Talía and HSA to be sent to the hospital of the *Université catholique de Louvain,* in Belgium, in order to perform the specialized test suggested by the experts.[102]

102. On August 31, 2000, for the third time, the court declared that the preliminary investigation had concluded and ordered the prosecutor to issue the corresponding report. At that time, the specialized test suggested by the experts had not yet been performed.[103]

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[96] *Cf.* Communication of November 26, 1999, sent by the experts, JPR and NVI, to the Fourth Criminal Judge (evidence file, folio 113).

[97] According to Art. 57 of the Code of Criminal Procedure of Ecuador, "private charges" are those filed in order to denounce offenses warranting either a public or private action. Available at: https://www.oas.org/juridico/mla/sp/ecu/sp_ecu-int-text-cpp.pdf.

[98] *Cf.* Private charges filed by Teresa Lluy against PMT, EOQ and MRR before the Fourth Criminal Judge of December 22, 1999 (evidence file, folios 116 and 117).

[99] Decision of the Fourth Criminal Court rejecting the private charges on January 5, 2000 (evidence file, folio 118).

[100] Decision of the Fourth Criminal Court deciding to conclude the preliminary investigation on March 22, 2000 (evidence file, folio 134).

[101] *Cf.* Request of Teresa Lluy to the Agente Fourth Criminal Prosecutor of May 5, 2000 (evidence file, folio 135).

[102] Decision of the Fourth Criminal Court of July 18, 2000 (evidence file, folio 156).

[103] Decision of the Fourth Criminal Judge declaring that the preliminary investigation had concluded, of August 31, 2000 (evidence file, folio 162).

103. On October 11, 2000, the Fourth Prosecutor issued a report in which he assessed the different testimonies and took into account the expert opinion, and the document inspection procedure, and other documents in the body of evidence. The prosecutor concluded that "the existence of the offense ha[d] been proved; it consisted in the negligent transmission of a mortal illness, such as AIDS, to the child [Talía], disregarding compulsory standards contained in the Manual for Blood Banks and Storage Places, and Transfusion Services."[104] Regarding the criminal responsibility, the prosecutor stated that "even though, following an appraisal by the prosecution, a request to continue the proceeding had been made with regard to this hypothesis considering that its existence could be presumed, from a procedural point of view it [was] not possible to bring charges, because no specific individual has been accused."[105]

104. The report of the hospital of the *Université catholique de Louvain* was prepared on January 8, 2001. It indicated that the test was performed with four blood samples: sample 1, corresponded to Talía; sample 2, corresponding to HSA; and samples 3 and 4 corresponding to two HIV-positive volunteers. The report indicated that the four samples were "clearly positive"; that sample 4 could not be expanded, that only samples 1, 2 and 3 had sufficient "viral RNA" to perform a "nucleotide sequence," and that "samples 1 and 2 were identical," while "sample 3 was genetically different from the first two."[106] On January 15, 2001, the Fourth Judge decided to re-open the preliminary investigation in order to incorporate the specialized evidence.[107]

105. On February 19, 2001, the translation of the report was forwarded to the experts, JPR and NVI[108] and, on March 9, 2001, they indicated that "the same virus had infected the blood samples of the two persons," referring to Talía and the person to whom blood sample No. 2 corresponded, which was HSA's blood. They added that "HIV can only have been transmitted to the child [Talía] from the person indicated as 170686285-9 [HSA] in two ways: by sexual transmission or by the transfusion of contaminated blood products from that person." The experts ended their report indicating that "if the investigations in the trial have excluded sexual transmission, necessarily it must be concluded from the point of view of medical logic, that the only way HIV was transmitted to the child [Talía] was through the blood transfusion."[109]

106. On March 26, 2001, for the fourth time, it was declared that the preliminary investigation had concluded.[110] On April 9, 2001, the Fourth Prosecutor asked the Fourth

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104 Report of the Fourth Criminal Prosecutor of October 11, 2000 (evidence file, folio 165).

105 Report of the Fourth Criminal Prosecutor of October 11, 2000 (evidence file, folios 163 to 165).

106 *Cf.* Report issued by the laboratory of the *Université catholique de Louvain,* Belgium, dated January 8, 2001 (evidence file, folios 177 and 178). Translated into Spanish by the Secretariat of the Court.

107 *Cf.* Decision of the Fourth Criminal Judge of January 15, 2001 (evidence file, folio 174).

108 *Cf.* Decision of the Fourth Criminal Judge to forward the report to the experts, of February 19, 2001 (evidence file, folio 191).

109 Report of the experts JPR and NVI of March 9, 2001 (evidence file, folio 194).

110 *Cf.* Decision of the Fourth Criminal Judge of March 26, 2001, declaring the preliminary investigation concluded (evidence file, folio 196).

Judge to re-open the preliminary investigation and extend it to MRR, BRR and PMT.[111] On April 10, 2001, the Fourth Judge extended the preliminary investigation to MRR, BRR and PMT.[112]

107. On May 16, 2001, Teresa Lluy filed "private charges," for the offense of "transmission of a contagious disease," against PMT, EOQ, MRR, BRR and Mr. CAA, in his capacity as President of the Azuay Provincial Committee of the Red Cross.[113] On the same date, the court agreed to process the "private charges" and the preliminary investigation was extended to include CAA and EOQ.[114]

108. On July 25, 2001, in answer to a request presented by PMT and BRR,[115] the Fourth Court declared that the "private charges had been abandoned, because they had ceased for 30 days" and decided to "separate the person bringing the charges from the […] case definitively, and that the case would continue to be heard with the intervention of the Public Prosecution Service."[116] On July 29, 2001, Teresa Lluy requested the annulment of this decision and, on July 31, 2001, the Fourth Court rejected her application indicated that it was "inadmissible."[117]

109. On August 9, 2001, the case file was given to the Azuay District Prosecutor (hereinafter "the District Prosecutor"), who had asked for it in order to examine it. On August 22, 2001, the District Prosecutor asked the Fourth Court to carry out some "procedural acts" that he considered "essential."[118]

110. On September 23, 2001, the District Prosecutor issued the prosecutor's report in which he analyzed the documentary, expert and testimonial evidence, and brought charges against MRR as author of the offense defined in article 436[119] of the Criminal Code. He also brought charges against PMT and EOQ for concealment of this offense. Among his conclusions, the Prosecutor indicated:

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111 *Cf.* Request of the Fourth Criminal Prosecutor to the Fourth Criminal Court of April 9, 2001 (evidence file, folio 197).

112 *Cf.* Decision of the Fourth Criminal Judge of April 10, 2001 (evidence file, folio 198).

113 Private charges filed by Teresa Lluy on May 16, 2001 (evidence file, folios 208 to 210).

114 *Cf.* Decision of the Fourth Criminal Judge of May 16, 2001 (evidence file, folio 211).

115 Request of PMT and BRR of July 16, 2001, addressed to the Fourth Criminal Court (evidence file, folio 263).

116 Decision of the Fourth Criminal Court declaring the private charges abandoned on July 25, 2001 (evidence file, folio 274).

117 *Cf.* Request of Teresa Lluy of July 29, 2001, and decision of the Fourth Criminal Court of July 31, 2001 (evidence file, folio 276).

118 Communication of the District Prosecutor to the Fourth Criminal Court of August 22, 2001 (evidence file, folio 284).

119 Criminal Code of Ecuador Article 436: Doctors, pharmacists, or anyone who, through lack of precaution or care, shall prescribe, dispense or provide medicines that seriously affect health shall be penalized with six months' to one year's imprisonment; if they have caused an illness that appears to be or is incurable, the prison term shall be from one to three years; and if it has resulted in death, the prison term shall be from three to five years. Available at: http://www.cepal.org/oig/doc/EcuArt5511Codigopenal.pdf.

> "That it has been proved conclusively that the minor [Talía] was infected by the blood of the donor [HSA] due to the handing over of this blood, admitted by the accused [MRR]. That, when making the donation, the donor [HSA] was unaware that he had HIV […].
>
> The nursing assistant of the Red Cross Blood Bank of Azuay, the accused [MRR], in her sole procedural statement, admit[ted] that it was she who handed over the blood and plasma on June 22, 1998. However, she lied when indicating that she had conducted the serological tests. The accused, owing to carelessness, negligence, imprudence or failure to respect the basic routine of the laboratory, omitted the HIV test before handing over the blood and plasma from a donor infected with HIV – an infection that was verified 24 hours after the transfusion – that was handed over for the use of the minor [Talía]. The offenses of negligence and imprudence that can be attributed to the accused are established in the definition in the last paragraph of art. 14 of the Criminal Code.
> […]
>
> The conduct of the accused [PMT] and [EOQ] identifies them, in the context of the evidence from the preliminary investigation, as accessories to the offense that has been proved. Their presumed guilt is proved unquestionably by their repeated lies.
> […]
>
> Against the accused [CAA] and [BRR] [he did] not find any procedural information related to any act or omission to classify their conduct at any level of criminal participation."[120]

111. On October 29, 2001, the Second Criminal Court of Azuay found that the following had been proved: (i) "the existence of the offense constituted by the infection of [Talia] with AIDS; (ii) that Talía had received a transfusion of platelets prepared with the fresh blood of donors, one of whom was Mr. HSA, who was infected with HIV; (iii) that the HIV virus that was present in the blood of HSA was genetically identical to that present in Talía's blood, and (iv) that [MRR] had prepared and supplied the platelets, revealing negligence, carelessness, lack of care, and causing an incurable disease in [Talía]."[121] Consequently, that court declared the "plenary stage" open against MRR "as presumed author of the offense defined and sanctioned in [article] 436 of the Criminal Code." That court also found that PMT and EOQ had "not perpetrated the acts expressly described in [the Criminal Code] as regards concealment, so that [it] issued a temporary stay of proceedings and dismissal of proceedings in favor [of these two persons]."[122]

112. On October 31, 2001, the prosecutor filed an appeal against the dismissal of proceedings, considering that PMT and EOQ should be prosecuted as accessories. On December 18, 2001, the First Chamber of the Superior Court decided the request forwarded by the Fourth Court with regard to the dismissals and the appeal filed by the prosecutor. The Chamber's decision was to confirm the dismissal of the proceedings in favor of CAA and BRR, and to amend the "dismissal of proceedings" against PMT and EOQ to a "temporary stay of proceedings."[123]

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120 *Cf.* Report of the Azuay District Prosecutor of September 23, 2001 (evidence file, folios 454 to 463).

121 Decision of the Second Criminal Court of October 29, 2001 (evidence file, folio 489).

122 Decision of the Second Criminal Court of October 29, 2001 (evidence file, folio 489).

123 Decision of the First Chamber of the Superior Court of December 18, 2001 (evidence file, folios 362 to 370).

113. On December 13, 2001, the Second Criminal Court of Azuay, ordered that the police authorities be notified to arrest MRR.[124] On October 23, 2002, June 26, 2003, and February 12, 2004, warrants were issued for the arrest of MRR, but it was not possible to arrest her.[125]

114. By a decision of February 22, 2005, the Second Criminal Court of Azuay, among other procedural actions, decided to determine the time that had elapsed since the order to investigate the alleged offense. On the same date, the court's secretary rapporteur certified that "6 years, 4 months and 3 days" had elapsed.[126]

115. On February 28 2005, the Second Criminal Chamber of the Superior Court of Justice of Azuay ruled that the action had prescribed, owing to the failure of the accused to appear at the trial hearing and because it had not been possible to arrest her; also, owing to the time that had passed since the order to investigate the alleged offense, a time that had not been interrupted by the perpetration of another offense.[127]

116. In a decision of April 22, 2005, the Second Criminal Chamber of the former Superior Court of Justice of Cuenca, confirmed the application of the statute of limitations.[128]

E. The civil action

117. In addition to the criminal action, Talía's family filed civil remedies that sought to obtain reparation for the damage resulting from the blood transfusion that infected Talia with HIV. In this regard, Teresa Lluy filed a claim for damages and, before that, an application for waiver of court costs ("*amparo de pobreza*") asking that the court declare that she was exempted from the compulsory payment of the "court fees" required in order to obtain legal standing to claim for damages.

E.1 Waiver of court costs

118. On September 26, 2001, Teresa Lluy applied for a waiver of court costs to the Civil Judge of Cuenca, in order to file a claim for damages against the Azuay Provincial Red Cross, without having to pay the "court fee" required in order to obtain legal standing. Teresa Lluy informed the Civil Judge that "owing to [her] financial situation, it was impossible to cover this expense."[129]

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[124] Order of the Second Criminal Court of December 13, 2001 (evidence file, folio 1860).

[125] *Cf.* Record of the Second Criminal Court of Azuay of February 22, 2005 (evidence file, folio 1861).

[126] *Cf.* Decision of the Second Criminal Court of Azuay of February 22, 2005 (evidence file, folio 1862).

[127] *Cf.* Final decision, Second Criminal Court of Azuay of February 25, 2005 (evidence file, folio 1876).

[128] *Cf.* Final decision, Second Criminal Chamber of the former Superior Court of Justice of Azuay on April 22, 2005 (evidence file, folio 1878).

[129] Application for waiver of court costs of September 26, 2001, before the Civil Judge of Cuenca (evidence file, folios 313 and 314).

119. On November 14, 2001, Ms. CS came forward to testify, and indicated that Talía's family "had a very precarious financial situation." The same day, Mr. JAB testified and stated that "it [was] true that [Teresa Lluy's] financial situation was precarious."

120. On December 5, 2001, Teresa Lluy was granted a waiver of court fees so that she could file the civil action for damages without having to pay the required "court fee."[130]

E.2 Claim for damages

121. On March 4, 2002, Teresa Lluy filed a claim for damages against PMT, in his capacity as Director of the Red Cross Blood Bank of Azuay; and against the institution of the Red Cross of Azuay, represented by Mr. CAA, in his capacity of President of the Azuay Provincial Red Cross.[131] Mr. CAA contested Teresa Lluy's claim arguing that it had not been proved that the infection of Talía had occurred owing to the blood obtained from the Red Cross, or that the samples sent to the *Université catholique de Louvain* had really been taken from HS and Talía.[132]

122. On May 6, 2002, the proceedings were opened for evidence "for the legal period of ten days."[133] Teresa Lluy incorporated as evidence into these proceedings to claim for damages, the whole criminal case file and requested additional evidence to prove the actions of the Red Cross.

123. On July 1, 2002, Teresa Lluy asked the Sixth Court to appoint an expert to translate the medical report prepared by the *Université catholique de Louvain.*[134] On July 3, 2002, Teresa Lluy asked the Sixth Court to name medical experts to examine Talía, and to set a day to carry out the inspection of the Azuay Provincial Red Cross Blood Bank. She also asked that the experts, JPR and NV, be summoned to give testimony, and that a date be set for a judicial inspection at the Humanitarian Clinic.[135]

124. On July 5, 2002, the Sixth Judge responded to Teresa Lluy's brief of June 3, 2002, and set the dates for the procedures.[136] On July 10, 2002, the Court decreed that the time frame for obtaining evidence had concluded.[137] On August 19, 2002, the medical report on

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130 *Cf.* Decision on waiver of court costs of the Third Civil Court of Cuenca of December 5, 2001 (evidence file, folio 328).

131 *Cf.* Claim for damages filed by Teresa Lluy before the Third Civil Judge of Cuenca on March 4, 2002 (evidence file, folios 331 to 334). The proceeding was assigned to the Sixth Civil Court of Cuenca on March 4, 2002 (evidence file, folio 335).

132 *Cf.* Answer to the claim presented by CAA to the Sixth Civil Judge of Cuenca on April 8, 2002 (evidence file, folio 338 to 340).

133 Decision of the Sixth Civil Court of Cuenca of May 6, 2002 (evidence file, folio 347).

134 *Cf.* Brief presented by Teresa Lluy to the Sixth Civil Judge of Azuay on July 1, 2002 (evidence file, folios 525 and 526).

135 *Cf.* Brief presented by Teresa Lluy to the Sixth Civil Judge of Azuay dated July 3, 2002 (evidence file, folios 530 to 532).

136 Decision of the Sixth Civil Court of Cuenca of July 5, 2002 (evidence file, folio 533).

137 Decision of the Sixth Civil Court of Cuenca of July 10, 2002 (evidence file, folio 535).

Talía's situation was provided[138] and, on August 20, 2002, the inspection of the Azuay Red Cross Blood Bank was conducted.[139]

125. On August 25, 2004, Teresa Lluy asked the Sixth Judge to declare that the time frame for obtaining evidence had concluded;[140] however, on September 5, 2004, Mr. CAA indicated that the procedure of translating the report of the *Université catholique de Louvain* remained pending and asked the judge to set a new date for the expert who had been appointed to assume this function.[141]

126. On October 27, 2004, Teresa Lluy asked the Sixth Court to annul her petition to appoint an expert to translate the report, because a translation of the document already existed. She also indicated that "owing to the existence of a very serious problem – the situation of [her] daughter – a judgment was required urgently."[142] On November 4, 2004, the Sixth Court decided that Teresa Lluy's request was not admissible because the pending procedure was necessary.[143] On November 24, 2004, the designated expert assumed the function,[144] and delivered the translation of the report on January 10, 2005.[145]

127. On January 19, 2005, Teresa Lluy asked the Sixth Judge, "in view of the fact that no procedures remained pending, […] to pronounce judgment."[146]

128. On July 12, 2005, the Sixth Civil Court of Cuenca delivered judgment and, taking into account the results of the criminal proceedings, rejected the claim presented by Teresa Lluy. The Sixth Court cited article 2241 of the Substantive Civil Code which established that: "anyone who has committed an offense or quasi-offense that has inflicted harm on another person is obliged to compensate them; without prejudice to the punishment imposed by law for the offense or quasi-offense." Based on this article, the Sixth Court indicated that it was necessary to determine whether the defendant had committed the offense before, then, obliging him or her to pay damages, and to this end it was necessary to hold a trial that concluded with a final condemnatory judgment. Taking into consideration the dismissals ordered in the criminal proceedings, the Sixth Court declared the civil action inadmissible.[147]

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138 Medical report of experts GT and GP dated August 20, 2002 (evidence file, folio 542).

139 *Cf.* Record of inspection of the Azuay Red Cross Blood Bank of August 20, 2002 (evidence file, folio 540).

140 *Cf.* Brief presented by Teresa Lluy to the Sixth Civil Judge of Azuay dated September 25, 2004 (evidence file, folio 550).

141 *Cf.* Brief presented by Claudio Arias to the Sixth Civil Judge of Azuay dated September 6, 2004 (evidence file, folio 552).

142 *Cf.* Brief presented by Teresa Lluy to the Sixth Civil Judge of Azuay dated October 27, 2004 (evidence file, folio 555).

143 Decision of the Sixth Civil Court of Cuenca of November 4, 2004. (evidence file, folio 556).

144 Record of assumption of functions by expert JS on November 24, 2004 (evidence file, folio 561).

145 *Cf.* Report of expert JS of January 10, 2005 (evidence file, folios 564 to 566).

146 Brief presented by Teresa Lluy to the Sixth Civil Judge of Azuay dated January 19, 2005 (evidence file, folio 568).

147 Judgment of the Sixth Civil Judge of Azuay of July 12, 2005. (evidence file, folios 593 to 595).

129. On July 14, 2005, Teresa Lluy filed a remedy of appeal against the decision of the Sixth Court,[148] which was heard on September 2, 2005. Mrs. Lluy indicated that the appeal referred to "the entire contents of the judgment [of the Sixth Court], both the reasoning and the decision." She added that the action for damages was independent of the criminal proceedings because it sought redress for the harm caused by a wrongful act, even though a conviction had not been handed down. In the appeal, Teresa Lluy also cited article 14 of the Children's and Adolescents' Code on the interpretation that should be applied in favor of the best interests of the child, and emphasized the discrimination that Talía had endured "in all aspects of education, housing, health, etc."[149]

130. On September 12, 2005, Mr. CAA presented his answering brief indicating that "it [was] not true that the action for damages [was] independent of the proceedings on criminal responsibility." In his brief, he added that, during the criminal proceedings, it had not been proved that the infection of Talía had been the result of the transfusion of the blood received from the Red Cross. Mr. CAA also indicated that the claim by Talía and her family had affected the prestige of the Red Cross.[150] On November 23, 2005, Teresa Lluy asked that a ruling be made on the appeal.[151]

131. On May 18, 2006, the First Chamber of the Superior Court of Justice of Cuenca declared the nullity of "all the proceedings following the decision that accepted the claim for processing" and returned the case file to the original court. This decision was based on article 41 of the Code of Criminal Procedure, which established that "civil compensation may not be claimed as a result of the criminal offense while no final condemnatory criminal judgment has been delivered." The First Chamber determined that, since there had been no such criminal judgment in Talía's case, the essential requirement for the admission of the civil action had not been met and, therefore, all the proceedings since it was admitted were null.[152]

132. The decision of the First Chamber of the Superior Court of Justice of Cuenca was not contested. Nevertheless, Talía and her family have testified that the infection of Talía and the different legal actions subsequently filed by her family had a series of consequences on their family life, finances, health and other areas of the life of Talía, Teresa Lluy and Iván Lluy that still affect them.

F. The impact on Talía's education of her situation as a person with HIV

133. In September 1999, when Talía was five years of age, she was enrolled at the first level of basic education in the Zoila Aurora Palacios Public School for basic education in Cuenca. Talía attended classes normally for two months; however, in November, the teacher, APA, food out that Talía had HIV and advised the school director. The director decided that

148 Appeal against Judgment No. 323-05 dated May 18, 2006 (evidence file, folio 597).

149 Grounds for the appeal against Judgment No. 323-05 dated September 2, 2005 (evidence file, folio 16).

150 *Cf.* Answer to the appeal by CA and his legal counsel JM of September 12, 2005 (evidence file, folios 18 and 19).

151 *Cf.* Brief presented by Teresa Lluy to the Chamber's judges on September 25, 2004 (evidence file, folio 21).

152 *Cf.* Appeal against Judgment No. 323-05 filed by Teresa Lluy on May 18, 2006. (evidence file, folio 599-605).

Talía should not attend classes "until he has seen what the educational authorities w[ould] say, or found a solution to the problem."[153]

134. Officials of the Subdirectorate for Health for the southern region gave talks in the school on HIV and the "impossibility of its transmission." However, on February 3, 2000, the Director of the school informed Teresa Lluy of the decision not to allow Talía to attend school any longer, and handed her the "dismissal" papers.[154]

135. On February 8, 2000, Teresa Lluy, with the help of the Ombudsman's Commissioner for Azuay, filed an application for constitutional protection before the Third District Contentious-Administrative Court of Cuenca against the Ministry of Education and Culture represented by the Deputy Secretary of Education for the southern region; the director of the Zoila Aurora Palacios School, and the teacher APA, based on a presumed deprivation of Talía's right to education. Teresa Lluy asserted that Talía's right to education had been violated and asked that she be reincorporated into the school, and also requested reparation for the harm caused.[155]

136. On February 9, 2000, a public hearing was held in the case. During this hearing, the Regional Deputy Secretary of Education for the southern region indicated that neither the Director of Education of Azuay, nor he himself, had ordered that Talía be taken out of school. However, the Deputy Secretary indicated that, "when there [was] an imminent danger to students, education legislation authorize[d] the directors of educational establishments to take measures to safeguard the other students."[156]

137. The Regional Deputy Secretary also added that: "the director of the school and the teacher ha[d] acted until the corresponding medical tests ha[d] been performed that would guarantee that [Talía would] not transmit her unfortunate illness to the other children and employees who [were] in contact with her, [because] although she [was] a beneficiary of constitutional guarantees, […] the majority of the children studying in that educational establishment should also enjoy those constitutional guarantees and rights."[157]

138. During the public hearing, the director of the Zoila Aurora Palacios School also testified and indicated that they had taken the decision to safeguard the health of the

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153 Application for constitutional protection, Third District Contentious-Administrative Court of Cuenca, of February 8, 2000 (evidence file, folio 1122). Talía testified that: "[w]hen I was three years old, I attended the Zoila Aurora Palacios Public School. I was happy becasue I made a lot of friends. When Christmas came, one day my teacher […] told my mother not to take me to school, to take me back home. My mother went to see the Director and came out crying and we never went back. […] The first day of classes they told my mother that my enrolment had been annulled without any explanation." Affidavit made by Talía Gonzales Lluy on April 22, 2014 (evidence file, folios 1097 and 1099).

154 *Cf.* Application for constitutional protection of February 8, 2000 (evidence file, folio 1122).

155 *Cf.* Application for constitutional protection of February 8, 2000 (evidence file, folio 1122).

156 Public hearing on the application for constitutional protection by the Third Contentious Administrative Court of Cuenca of February 9, 2000 (evidence file, folio 1132).

157 Public hearing on the application for constitutional protection by the Third Contentious Administrative Court of Cuenca of February 9, 2000 (evidence file, folio 1132).

children enrolled at the first level of basic education. The director also declared that he had based himself "on the requirements that [Talía] should have presented in order to enroll in the school, one of which [was] a medical certificate that the child [did] not suffer from any infectious or contagious disease." Lastly, the director indicated that, "while at school, [Talía] had several hemorrhages due to an illness called idiopathic thrombocytopenic purpura; this illness meant that the risk of transmission [was] greater, because [Talía] was enrolled in the first year of basic education where the children work with sharp objects."[158]

139. The teacher APA also gave testimony during the public hearing and stated that she had asked Talía's doctor, who had made a presentation on HIV "to all the teaching staff" of the Zoila Aurora Palacios School, whether there was any risk for Talia's companions, and that the doctor had answered that "yes, there [was] a risk, but a very small one." The teacher APA also stated that she "ha[d] witnesses to [Talía's] hemorrhages [and that] in view of those risks, [she had] followed the correct path; not to cause [Talía] moral and psychological harm, but rather because [she was] responsible for a group of 31 children."[159]

140. On February 10, 2000, the Ombudsman's Commissioner for Azuay asked that the certificate on Talía's condition prepared by the infectologist of the Vicente Corral Moscoso Regional Teaching Hospital be incorporated into the case file; also the certificate on Talía's hematological condition by the doctor of the Santa Ana Clinic, and the report of the Coordinator of the HIV/AIDS-STD Prevention Counselling Program of the Azuay Provincial Health Directorate on the visit of a technical health team to the Zoila Aurora Palacios School in relation to Talía's case.[160]

141. On February 11, 2000, the Third Contentious Administrative District Court declared the remedy of constitutional protection inadmissible, considering that "there [was] a conflict of interests between the individual rights and guarantees of [Talía] and the interests of a group of students, a conflict that mean[t] that the societal or collective interests, such as the right to life, outweighed the right to education."[161]

142. The District Court considered that "if the educational authorities and the establishment had not acted as they did, they ran the risk of infringing constitutional principles […] in relation to the other persons in the establishment by not preventing the threat to health of a real or supposed infection."[162]

143. Based on the foregoing, the court considered that "the educational authorities [had] proceeded in keeping with the law," taking into account that Talía's illness "entail[ed] a

[158] Public hearing on the application for constitutional protection by the Third Contentious Administrative Court of Cuenca of February 9, 2000 (evidence file, folio 1134).

[159] Public hearing on the application for constitutional protection by the Third Contentious Administrative Court of Cuenca of February 9, 2000 (evidence file, folio 1135).

[160] *Cf.* Note of the Azuay Ombudsman of February 10, 2000 (evidence file, folio 1145).

[161] Judgment of February 11, 2000, delivered by the Third Contentious Administrative District Court (evidence file, folio 1148).

[162] Judgment of February 11, 2000 (evidence file, folio 1148).

possible risk of infecting the other students at the school"; thus it affirmed that "in view of [that] conflict, it obviously had to point out that the right of the majority prevails over an individual case."[163]

144. Lastly, that court considered that Talía could exercise her right to education, "by individualized and distance education."[164] The judgment of the Third Contentious Administrative District Court was not contested.

G. Facts related to the health care and treatment received by Talía Gonzales Lluy

145. The State has provided the Court with information on the programs it has established on education and treatment with regard to HIV/AIDS in order to provide all its citizens with appropriate and unprejudiced information on HIV/AIDS. In this regard, at the time of the facts of this case, article 43 of the 1998 Constitution[165] established that public health programs and actions were free for everyone. Also, other relevant norms on access to health care and information are the 1995 Law on Patients' Rights and Protection;[166] the 2006 Organic Health Act;[167] the 1998 Law for Education on Sexuality and Love; Ministerial Decision 403 of 2006; Ministerial Decision 436 of 2008, and CONESUP Resolution 166 of 2009. Additionally, in 2000, the HIV Prevention and Comprehensive Assistance Law[168] was promulgated, complemented by the 2002 Regulations for the Treatment of Persons living with HIV/AIDS.[169] There is also a National Public Health Strategy for HIV/AIDS-STD.[170]

146. The Court also received expert opinions on the Definition of public policy on free treatment and the provisions of services to patients with HIV in Ecuador;[171] the 2007-2015 Multi-sectoral public policy of national response to HIV/AIDS, with special emphasis on the

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163 Judgment of February 11, 2000 (evidence file, folio 1149).

164 Judgment of February 11, 2000 (evidence file, folio 1149).

165 Constitution of the Republic of Ecuador of August 11, 1998, Article 43.

166 Article 5: "The right is recognized of every patient to information with regard to the diagnosis of his or her health, the prognosis, the treatment, and the risks to which he or she is exposed, in terms that the patient can understand so as to be able to take decisions on the procedure to follow," Law on Patients' Rights and Protection, Official Gazette Supplement 626 of February 3, 1995 (evidence file, folio 2764).

167 Article 27: "The Ministry of Education and Culture, in coordination with the national health authorities, with the State agency specialized in gender, and other competent agencies, shall formulate educational policies and programs, the implementation of which shall be mandatory in educational establishments throughout the nation to disseminate and provide guidance on sexual and reproductive health, in order to prevent adolescent pregnancies, HIV/AIDS, and other sexually transmitted diseases, to promote responsibility paternity and maternity, and to eliminate sexual exploitation; and shall allocate sufficient resources to this."

168 Law for the Prevention and Comprehensive Treatment of HIV/AIDS of April 14, 2000 (evidence file, folios 2119 to 2121).

169 Regulations for treatment of persons with AIDS of December 20, 2002, amended on December 22, 2006 (evidence file, folios 2113 to 2118).

170 National Public Health Strategy for HIV/AIDS-STD (evidence file, folios 3229 to 3233).

171 *Cf.* Expert opinion of Nilda Estela Villacrés and María Yerovi Naranjo of February 27, 2015 (evidence file, folios 3875 to 3895).

comprehensive and multi-sectoral management of this chronic infectious disease (including a detailed description of the multi-sectoral policies of several local governments and the plans for priority groups);[172] the Experience of public policy for the comprehensive treatment of adults and adolescents infected with HIV/AIDS, and the application of the Manual for the Prevention and Control of Mother to Child Transmission of HIV,[173] and on the mental health programs and the network of comprehensive services applied to the monitoring and treatment of catastrophic illnesses.[174]

147. In the case file before the Court, the evidence on the health care received by Talía is mostly contained in her statements and those of her family, certifications and documents related to her medical record and expert opinions. The proven facts include: that Talía's first blood tests were performed by the Cuenca Laboratory of the Leopoldo Izquieta Pérez Institute of Hygiene and Tropical Medicine where, on July 27, 1998, it was diagnosed that Talía had HIV,[175] this was followed by different specialized tests to confirm that diagnosis.[176] In addition, Talía was treated in the Vicente Corral Moscoso Hospital from 1999 until 2003[177] and, in 2003 and 2014, by the hematologist NV, as noted in the certification issued by the latter on April 22, 2014.[178] Also, since 2004, she has been treated in the General Hospital of the Armed Forces No. 1 by internists, allergologists and infectologists and was admitted to this institution on June 20, 2005,[179] when she began treatment with antiretroviral drugs.[180] On May 15, 2014, Talía visited the Cuenca Comprehensive Health Care Unit in the Vicente Corral Moscoso Hospital[181] in order to receive the treatment offered to her by the State in compliance with the recommendations of the Inter-American Commission.

148. Expert witness Diana Molina informed the Court that, since Talía was the daughter of a an affiliate of the Armed Forces Social Security Institute (ISSFA), she had received specialized medical care in the HG-1 Military Hospital in Quito for 10 years, including the

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172 *Cf.* Expert opinion of Diana Molina of February 26, 2015 (evidence file, folios 3901 to 3951).

173 *Cf.* Expert opinion of Carmen Carrasco and Juan Sánchez of February 26, 2015 (evidence file, folios 3952 to 4013).

174 *Cf.* Expert opinion of Aimée Dubois Sánchez of February 26, 2015 (evidence file, folios 4014 to 4027).

175 ELISA test on Talía Gonzales Lluy of July 27, 1998 (evidence file, folio 413).

176 Western Blot test on Talía Gonzales Lluy (evidence file, folio 414).

177 *Cf.* Expert opinion of Carmen Carrasco of February 13, 2015 (evidence file, folio 4976).

178 Certification of NV dated April 10, 2014 (evidence file, folio 1350).

179 Medical Record of Talía Gonzales Lluy of June 20, 2005 (evidence file, folios 1289 to 1334). Talía Gonzales Lluy visited the internist, according to the affidavits, on September 23, 2004 (evidence file, folio 1258), July 24, 2006 (evidence file, folio. 1294), May 20, 2008 (evidence file, folio. 1252), June 17, 2008 (evidence file, folio. 1253), June 15, 2011 (evidence file, folio. 1252) and January 26, 2012 (evidence file, folio. 1234). Visit made on June 20, 2005 (evidence file, folio. 1294). Last visit made on July 27, 2012 (evidence file, folio. 1234).

180 *Cf.* Expert opinion of Carmen Carrasco of February 13, 2015 (evidence file, folio 4978).

181 *Cf.* Note of Talía Gonzales Lluy to Ramiro Ávila of May 26, 2014 (evidence file, folio 1184 to 1186); Note of Talía Gonzales Lluy to the authorities of the Ministry of Public Health of Ecuador of May 26, 2014 (evidence file, folio 1187 and 1188).

antiretroviral drugs without having to make any payment to the hospital.[182] According to the expert witness, in view of the good condition of Talía's health from 1998 to 2004, it was not necessary to begin the antiretroviral therapy earlier. The expert witness explained that:

> "Continued access to antiretroviral drugs, free of charge, even though it was not an explicit public policy during that decade; however, it should be said that the [Public Health Ministry] had allocated a budget for specialized care and the purchase of antiretroviral drugs since 1990. In addition, among the public insurance systems, those affiliated to social security systems, such as the IESS and the ISSFA, had these services. In the HG-1 Military Hospital in Quito, treatment of HIV+ patients, including with antiretroviral drugs, began in 1996, and the "HIV/AIDS Clinic" was established in the hospital in October 1998; this is why, since [Talía] was the daughter of an affiliate of the ISSFA, she received specialized medical care for 10 years (2004-2013), including antiretroviral drugs, without having to make any payment to the hospital."

149. According to the expert witness, during those years, "it was even possible to change the institution providing services, and to continue receiving the benefits of free treatment." She added that, "if specialized laboratory tests were required that were only available in the private sector, these were paid for by the public insurance institute:

> In the Vicente Corral Moscoso Hospital, a Cuenca public hospital, the minor [Talía] began to receive specialized medical treatment in 1999 with a multi-disciplinary team composed of an infectologist, a dermatologist, a hematologist, and a clinical psychologist, as well as the services of the social work department.[183] From 1999 until 2003, the specialized treatment was controlling her health status. […] The minor was covered by the State during these years, as indicated in the 2015 HVCM Epidemiological Memorandum. In 2003, when she was told that [Talía] should commence antiretroviral treatment, her mother advised that she had decided to take the child to the Military Hospital in Quito for treatment.
>
> Since 1998, in the HG-1 Military Hospital in Quito, […] the financing of the costs of the medical services, which include treatment by the whole team of professionals, laboratory tests, special and regular medicines, has been from funds of the Armed Forces Social Security Institute (ISSFA). In the case of the minor [Talía], it [was] reported that she started treatment in January 2004 and, throughout that year, was monitored with specialized tests. The services of private laboratories were used for the laboratory tests." […]

150. The expert witness added that, up until 2004, Talía had not needed to begin antiretroviral therapy, as mentioned by the State's expert witness:

> Owing to her good health, she never had to begin the antiretroviral drugs during that year [2004], and started that treatment in June 2005; owing to the protocol at the time, this required hospitalization.[184]
> […]
>
> The reports of the amounts paid by ISSFA reveal that, from 2004 until January 10, 2013, Talía [was] a beneficiary of public insurance and, therefore, [she was] covered by the State. The sum

[182] *Cf.* Expert opinion of Diana Molina dated February 26, 2015 (evidence file, folio 3921). The expert witness cited Note No. ISSFA-DSS-2015-329-OF as proof of this.

[183] On this point, expert witness Diana Molina cited "HVCM Epidemiology Note, Cuenca, February 9, 2015" (evidence file, folio 3922). Meanwhile, expert witness Carrasco indicated that "since 1999, she has received comprehensive care from the Vicente Corral Moscoso Hospital, with professioals from the following areas who intervened at different times: infectology, dermatology, hematology, social work, psychology."

[184] The expert witness cited the untitled report of the Head of the Infectology Service, HG-February 1, 2015, on this point (evidence file, folio 3922).

> disbursed for the health of the patient [Talía] amounted to US$19,435.60, of which US$3,646.78 was for specialized laboratory tests, and US$15,788.91 for medicines.
> […]
>
> The Ecuadorian State, through ISSFA, covered the costs of the medical care of the minor [Talía] over the period 2004-2013, with a specialized team, specialized laboratory tests, and antiretroviral treatment, as detailed in the Report sent with Note No. ISSFA-DSS-2015-329-OF, and this amounted to the sum of US$19,435.69. Furthermore, over the period 1999-2003, and since 2014, the Ecuadorian State has also covered the cost of the treatment requested by [Talía], through the Vicente Corral Moscoso Public Hospital, attached to the Ministry of Public Health, as can be observed in 2015 HCVM Epidemiological Memorandum.
>
> […] it is worth noting that patients diagnosed with HIV received counselling support in order to cope with the disease. In the case of minors, the counselling service can also be provided to the minor's parents and/or legal representatives in order to provide the necessary support.

151. In answer to a question by the representatives regarding whether, as of 1998, from time to time the medicines required to treat HIV were unavailable in public hospitals, expert witness Molina stated that "the antiretroviral drugs have never been unavailable through the different subsystems that compose the complementary public health network."

152. Meanwhile, expert witness Carmen del Rocío Carrasco stated that, in Ecuador, the Ministry of Public Health began antiretroviral treatment for individuals with advanced HIV in 2004. Prior to this, other institutions, such as the Armed Forces, the Police, and the IESS began to provide comprehensive treatment to patients. The expert witness stated that, in the case of Talía, "the 2002, 2004, 2007, 2010 and 2012 Manuals" were used. Regarding some of the situations that occurred during the provision of health care, the expert witness advised that:

> "… Starting in 1999, the patient [Talía] received comprehensive treatment through the Vicente Corral Moscoso Hospital […]. In 2003, when she was told that the antiretroviral treatment should begin, her mother indicated that she had decided to take the girl to the Military Hospital in Quito for treatment.
>
> She then returned a second time, and was re-admitted to continue her treatment on March 6, 2009. She did not bring any documentation on previous treatments; the family was asked to obtain the documentation in order to coordinate the treatment, but this was never produced and, once again, the patient left without notifying the [Vicente Corral Moscoso] Hospital.
>
> It is important to note that the patient was never on time for the appointments that had been made by her mother; she revealed a low level of responsibility in complying with certain procedures: for example, she did not respect the date or the hour assigned to her, because, on several occasions, she wanted to be attended immediately on arrival.
>
> [Talía's] mother treated the members of the health team badly on several occasions, and failed to return. The hospital found out that the patient was receiving treatment at the Military Hospital in Quito and, once again, she abandoned the hospital on May 6, 2009. In 2014, she again returned, to be treated at the UAIPVVS-HVCM accompanied by human rights personnel and a family member; consequently, Dr. JO told her that she was welcome if that is what she wanted and asked her to please bring a report of the medication she had been receiving in order to follow-up on this.[185]

[185] Expert witness Carrasco substantiates these assertions on the basis of the HIV/AIDS record in the unsigned report of February 9, 2015, of the MSP-Vicente Corral Moscoso Hospital, Epidemiology-HVCM-2015, issued by the head of the UAIPVVS-HVCM.

153. Expert witness Carrasco also indicated the following with regard to the implementation of the counseling service:

> The proposal to set up a formal counseling system in the [Vicente Corral Moscoso Hospital] for persons living with HIV […] was put forward approximately two years ago [2013]. Before this, counselling was the responsibility of the Social Work Department of the [Vicente Corral Moscoso Hospital]. The Azuay Provincial Health Directorate (currently Area Coordination 6) established a counseling program for people living with HIV […].
>
> The patient's mother, Teresa Lluy, was part of the first self-help group for people living with HIV of the [Vicente Corral Moscoso Hospital]. The first meeting was held in the Azuay Medical Association in 2002, and Mrs. Lluy asked if she could be the coordinator of the group, which was composed of five patients, and then the number of patients gradually increased. The group was discontinued for various reasons."

154. After the treatment provided by the Vicente Corral Moscoso Hospital, Talía was treated in the Military Hospital in Quito. Regarding the treatment in this hospital, expert witness Carrasco stated the following:

> The patient [Talía] visited the HG1 for the first time in March 2004; she had been diagnosed with HIV when she was three years old; according to her mother and the note attached to her file, she had been monitored up until then by Dr. [JO] in Cuenca, and the patient had remained asymptomatic. At her first appointment, the patient was asymptomatic; all the initial tests for HIV were performed, including chest x-ray, DPP, IgM and IgG for toxoplasmosis, hematic biometry, blood chemistry and viral load and CD4 count.
>
> In her appointment with the results at September 23, 2004, the CD4 at 463 and the CD8 at 926, the patient continued to be asymptomatic. According to the protocol in force, she was not required to begin antiretroviral treatment. The patient did not appear for her next appointment in February 2005; her mother collected the requests for tests, and the viral load and CD4 were performed.
>
> She came to an appointment in June 2005, with symptoms of generalized macular and scaly lesions and diarrhea, with occasional abdominal pain; it was decided to hospitalize her to being antiretroviral treatment because the results of her last test had been CD4 at 236 and viral load at 38,946. While at the hospital, the dermatological diagnosis was simple acute prurigo due to HIV. Treatment was started with AZT, 3TC and Nelfinavir, first-line therapy, based on protease inhibitors, according to national and international guidelines; there was no indication of non-nucleosides because she had active skin lesions; since then the patient has been controlled every six months, in keeping with the protocol in force. During these controls, hematic biometry, blood chemistry, and EMO are performed. Following her next control, she remained with an undetectable viral load in 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012.
>
> In 2007 the antiretroviral therapy was changed to AZT, 3TC and Efavirenz, because the global distribution of Nefinavir had been suspended. Since then, the patient has not required any change in the antiretroviral therapy. She has not suffered from opportunistic infections so that she has not required further hospitalization; she has remained asymptomatic in most of the control visits (see Medical Record); her constant problem has been dermatological owing to the simple acute prurigo which, according to the literature, is always difficult to control. This has been treated with pentoxifilina and topical corticosteroids. According to the system, her last visit was in 2013, when she was evaluated and tests were requested. […] The patient's condition over these years has been that of an HIV-carrier, with an undetectable viral load, and as a complication she has suffered from simple acute prurigo, which leaves scars on the skin.[186]

[186] Expert witness Carrasco cited this information on the HIV/AIDS record textually from the unsigned report of February 9, 2015, of the Joint Command of the Armed Forces Hospital No. 1. Dr. Paulina Cell, Head of the Infectology Service (evidence file, folios 3978 and 3979).

H. Situation of poverty faced by the Lluy family

155. It has been mentioned previously that Teresa Lluy was granted a waiver of court costs so that she could file the civil action for damages (*supra* para. 120). Also, in addition to work-related difficulties, Teresa Lluy described how, on several occasions, her daughter and her family "ha[d] been victims of the most cruel discrimination, because they ha[d] been prevented from [having] their own home."[187] According to the testimony of Talía and her family, they were obliged to move on numerous occasions owing to the exclusion and rejection they suffered because of Talía's condition, and they were forced to live in unfavorable conditions and in isolated places, because they could not find anywhere where someone would lease them a place to live.[188]

IX
RIGHT TO LIFE AND RIGHT TO PERSONAL INTEGRITY

Arguments of the Commission and of the parties

156. The Commission analyzed the case in light of the relationship between human health and the rights to a decent life and to personal integrity. In this regard, it observed that, from the time the criminal complaint was filed with regard to the infection, "the State was aware of the child's situation and the need for treatment," despite which no response of any kind was received in order to prevent the progressive deterioration of her health and personal integrity. The Commission considered that "the State's obligations in relation to the right to personal integrity and the need to establish conditions to allow a decent life, read in conjunction with the duty to provide special protection to children and the principle of the best interests of the child, required the State to provide an effective response that should have resulted in [Talía's] access to the treatment she required." It added that the State's responsibility was not limited to the basic obligations of regulation, supervision and monitoring, "but also included the lack of response after becoming aware of the infection through numerous channels. To date, the State has disregarded the situation of a child under its jurisdiction in a situation of extreme vulnerability, thus causing additional harm to her personal integrity and her possibility of leading a decent life, and exposing her to a situation of discrimination." Furthermore, the Commission considered that the State was responsible for the violation of the mental and moral integrity of Talía's mother and brother. In addition, the Commission stressed that there was no evidence that, at the time of the facts, the private entities involved were subject to regulation, supervision and monitoring; that no

[187] Application for waiver of court costs to the Civil Judge of Cuenca of September 26, 2001 (evidence file, folio 314).

[188] According to the testimony of Talía and her family, when the owners of the places they rented found out about Talía's illness, "using any excuse, they threw [them] out." Application for waiver of court costs to the Civil Judge of Cuenca of September 26, 2001 (evidence file, folios 313 and 314). Similarly, Talía testified that they "had to leave the place where [they] were living" and that they "were always thrown out of the places where [they] lived." When they were unable to find a place that people were willing to lease them, "one day, [they] went out of town to live in a very ugly room; it was like a hole, it was dirty, the floor was just earth, it was very cold and, when it rained, the rain came in; [her] mother and brother covered [her] so that [she] would not get ill and fed [her]; they wer trembling with cold and did not eat." Affidavit made by Talía Gonzales Lluy on April 22, 2014 (evidence file, folio 1096).

hypothesis had been proposed other than the blood transfusion that could suggest any other route of infection; that several irregularities and contradictions existed in the few existing records, and that, "in this scenario, the State merely denied its responsibility, since private entities were involved, rather than the conduct of the State."

157. In addition, regarding the gynecological examination performed on Talía Gonzales Lluy at her mother's request, the Commission noted that, "if the State authorities had made any effort to obtain this evidence, the analysis should have focused on whether or not it was justified in the circumstances of the case." The Commission indicated that it had "not identified reasons or factors that could have justified performing an examination of this nature, with the effects that it could cause to a child of three years of age, and when the evidence pointed at the fact that the source of the transmission had been the blood transfusion, without the existence of any indicated of possible sexual transmission."

158. The representatives alleged that the rights to life and to personal integrity had been violated in relation to the right to health. They considered that "the negative obligation [with regard to the right to life, had been violated] by contaminating Talía's blood"; hence the State "was responsible because it did not have a monitoring system to prevent this violation in the private health sector." They also argued that the positive obligation had been violated, "because, without basic services, which entail the diagnosis, permanent treatment, and provision of medication on a daily and periodic basis, HIV-carriers would inevitably die." The representatives asserted that the State had violated Talía's personal integrity, because, "during all the years, starting when it became aware of the transfusion of contaminated blood to Talía, it failed to implement adequate mechanisms, or sanction those responsible by either administrative or judicial means." They also indicated that, since the Red Cross was the only entity that possessed blood banks when the facts occurred, and since it was not supervised or monitored, "this resulted in an unsafe situation that the State should have known about," so that its responsibility arose from the failure to comply with the duty to supervise the provision of its services. They added that the Lluy family had not received quality medical services, because "there were insufficient personnel, the laboratories were unable to perform all the tests required to examine the blood (to the point that it was necessary to ask Quito laboratories to verify the blood) [and] the Red Cross personnel and those of the hospital where Talía was interned did not know how to handle samples appropriately." The medical services were not acceptable either, because "they did not know how to proceed and, even now, cannot act responsibly in relation to a negligent act that violated fundamental rights; also the medical services were inadequate to treat a three-year old child who needed blood." In addition, they argued that the presumed victims "never received any information from the State that would have helped them deal with the problems they were facing."

159. The representatives also argued that the right to health had been violated in the context of Article 26 of the American Convention to the detriment of Talía Gonzales Lluy. Consequently, they asked the Court to make a contextual, evolutive and literal interpretation of the rights in light of contemporary developments in legal doctrine and the provisions of Article 29 of the Convention. In this regard, they pointed out that Article 26 should be fully enforceable and should not be interpreted restrictively, in the sense that economic, social and cultural rights not only have dimensions that should be complied with progressively, but also have immediate effects. According to the representatives, the content of those rights

must be read in keeping with the *corpus iuris,* in light of the Protocol of San Salvador, the doctrine of the Committee on Economic, Social and Cultural Rights of the United Nations (hereinafter, "the CESCR"), other international human rights instruments in force in Ecuador, and its Constitution. The representatives indicated that "the right that is best suited to deciding the case is the right to health and not the right to physical integrity"; that "each human right has its own specific content," and that the evolution of the enforceability of social rights by national courts, by the United Nations system, and by the inter-American system should be taken into account.

160. The representatives argued that the gynecological examination performed on Talía when she was three years old, "was one of the most traumatic experiences of her life." They also pointed out that informed consent is essential in order not to violate the right to privacy. In this regard, they indicated that the performance of this examination violated the right to privacy, health and personal integrity. The representatives also argued that Article 13 of the American Convention had been violated based on various problems in relation to access to information regarding the blood transfusion and the performance of the gynecological examination.

161. The State acknowledged during the public hearing that, "at the time the unfortunate events that constitute this case occurred, it should not have delegated the functions of administering the national blood system to a private entity." It also affirmed that, in this case, "fortunately, deprivation of the right to life [was] not being debated, but rather the supposed violation of this right under the standard of conditions for a decent life." The State argued that, "if the person is not interned in a public or private institution […], but rather under the protection of the family and their own discipline to follow treatments [… the State's] function of guarantor in the strict sense cannot be verified directly," or the obligation of special and enhanced care owed to the protection of patients, an obligation that is not applicable in the case of Talía. In addition, the State reported that Talía was "with her family, receiving medical care from the State and […] with the support of a public sector psychologist." Regarding the obligation to control and monitor private agencies, the State advised that it had "three systems for supervision, monitoring and planning," which met the obligation to protect physical integrity, namely: (i) the Epidemiological Surveillance System to implement second-generation surveillance with the introduction of sentinel studies among populations with the highest exposure; (ii) the Integrated Information System, which supports the monitoring and treatment of patients and the performance of service providers in the area of HIV/AIDS in the different Comprehensive Care Units, and (iii) the Integrated Monitoring and Evaluation System, which "plans and monitors programmatic and financial performance." Based on the foregoing, the State considered that it had not violated Talía's right to a decent life.

162. The State explained that "when the facts examined in this case occurred, the regulation of health services was established in the laws of Ecuador, starting with the Constitution and including legal and regulatory provisions for the operation of entities responsible for blood banks and transfusion services." In addition, it mentioned several domestic provisions that allegedly regulated aspects such as the provisions of health care services, the operation of blood banks, assistance to patients with HIV, and patients' rights.

163. Consequently, the State argued that it "had not failed to comply with its duty of regulation, because it had established an appropriate legal framework that regulated the provision of health care services, with quality standards for public and private institutions that would prevent any threat to a violation of personal integrity in the provision of these services." The State also argued that, in order to supervise and monitor the operation of the country's blood banks periodically, it had implemented various actions aimed at evaluating, improving, establishing quality standards for, and auditing the public and private blood banks.

164. Furthermore, the State argued that it had complied with its obligation to regulate, supervise and monitor the institutions that provide health care services, "because the national health authority had administrative powers, under the Health Code in force at the time, to monitor institutions that provided health care services, and to establish sanctions when appropriate." Similarly, it argued that "all the public sector health actions and services for her medical and psychological treatment were permanently available; however, the fact that, by her own decision, she did not use these public mechanisms, does not in any way mean that she has been prevented from using them, because free, immediate and permanent access to these state services was guaranteed." The State emphasized that the HIV/AIDS strategy had been given priority, and "it has its own investment plan in which more than 50 million dollars ha[d] been invested in recent years, focused exclusively on this pathology, including free access to international treatment schemes for all patients who require[d] this, as well as the provision of diagnostic, prevention, promotion, and comprehensive treatment services." It underscored that "it was under this level of health care service that Talía had been and continue[d] to be treated."

165. The State asserted that the representatives' point of view with regard to Article 26 did not meet the conditions of justiciability required to consider the case to be of a contentious nature, constituting "an 'abstract case' that, to the contrary, is situated within the advisory dimension relating to the promotion of human rights, that could equally well be dealt with in a technical or thematic report of the Inter-American Commission." It added that "it is not possible to accuse the State of inertia on public policies related to the social sector, or of backsliding in the area of social programs, circumstances that would reveal a pattern that could violate [economic, social and cultural rights]." The State stressed that it had "made notable progress in the provision of public services and the legal implementation of economic, social and cultural rights."[189]

[189] In this regard, "in the context of the presentation of the 2012 [Periodic Universal Review] before the Human Rights Council of the United Nations, in 94% of the interventions by 72 States, in addition to congratulating Ecuador for its social policy, they expressed their interest in having more detailed information on the methods and programs implemented by Ecuador, which had resulted in its greatest achievements with regard to the rights of the disabled, the elderly, children and adolescents, interculturality and plurinationality, and the right to health and the right to education." The State also underlined the notion of the *rights pertaining to a decent life* developed in the 2008 Constitution, which recognized the interdependence and integral nature of rights, such as the rights to education, health and work, among others. Regarding the right to health, the State indicated that "when the 2012 [Periodic Universal Review] was presented and evaluated, the current Government had invested 3,539 million dollars in health between 2007 and 2010; more than double the total investment in the three pre-2007 governments," and that Ecuador destined "184 million dollars a year for free medicines, under the concept that medicines are social rather than commercial commodities."

166. Lastly, the State argued that Teresa Lluy had requested the gynecological examination of her daughter voluntarily, and stressed that her request is recorded on the medical certificate issued following the examination. It also pointed out that, if the examination had been at the procedural initiative of the criminal judge, the latter would have had to appoint specialized medical experts to perform it. Therefore, it concluded that "no judicial or administrative authority requested or ordered Teresa Lluy to subject her daughter to a gynecological examination. This examination was performed on the initiative of Mrs. Lluy, who incorporated this document into the criminal proceedings on her own account."

Considerations of the Court

167. The Court will now examine: (A) the right to life, the right to personal integrity and the right to health in relation to the obligation to regulate, monitor and supervise the services provided by private health care centers; and (B) the availability, accessibility, acceptability and quality of health care in the context of the right to life and to personal integrity, both in relation to Talía González Lluy. Subsequently, it will examine: (C) the right to personal integrity of Teresa Lluy and Iván Lluy.

168. This Court has affirmed that, in application of Article 1(1) of the Convention, States have the obligation *erga omnes* to respect and ensure the norms of protection, and to ensure the effectiveness of human rights.[190] Consequently, States undertake not only to respect the rights and freedoms recognized in the Convention (passive obligation), but also to adopt all the appropriate measures to ensure them (active obligation).[191] In this regard, the Court has established that it is not sufficient that States abstain from violating rights; rather it is essential that they adopt positive measures, to be determined based on the specific needs for protection of the subjects of law, due either to their personal situation, or to the specific situation in which they find themselves.[192]

169. Article 4 of the Convention guarantees not only the right of every human being not to be arbitrarily deprived of life, but also the obligation of the State to take the necessary measures to establish an adequate legal framework to dissuade any threat to the right to life.[193]

170. The obligation to ensure rights extends beyond the relationship between the State agents and the persons subject to their jurisdiction, also including the obligation to prevent

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[190] *Cf. Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 111, and *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261, para. 127. Similarly, *Juridical Status and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 140.

[191] *Cf. Case of Velásquez Rodríguez v. Honduras*, paras. 165 and 166, and *Case of Suárez Peralta v. Ecuador*, para. 127.

[192] *Cf. Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 243, and *Case of Suárez Peralta v. Ecuador*, para. 127.

[193] *Cf. Case of Ximenes Lopes v. Brazil. Merits, reparations and costs.* Judgment of July 4, 2006. Series C No. 149, paras. 99 and 125, and *Case of Suárez Peralta v. Ecuador*, para. 134.

third parties, in the private sphere, from violating the protected legal rights.[194] However, the Court has considered that a State cannot be responsible for all human rights violations committed among private individuals under its jurisdiction. The nature *erga omnes* of the State's treaty-based obligations to ensure rights, does not entail its unlimited responsibility in relation to any act by private individuals; because, even though an act or omission by a private individual has the legal consequence of violating certain human rights of another private individual, this cannot automatically be attributed to the State; rather, the specific circumstances of the case and the implementation of the said obligation to ensure rights must be taken into consideration.[195] Thus, the Court must verify whether, in this specific case, international responsibility should be attributed to the State.

171. With regard to the relationship of the obligation to ensure rights (Article 1(1)) to Article 5(1) of the Convention, the Court has established that the right to personal integrity is directly and immediately linked to health care,[196] and that the lack of adequate medical treatment may result in a violation of Article 5(1) of the Convention.[197] Thus, the Court has affirmed 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 protect the effectiveness of this regulation.[198] Consequently, the Court must decide whether, in this case, the State ensured personal integrity as established in Article 5(1) of the Convention in relation to Article 1(1) of this instrument.

172. In addition, the Court also finds it pertinent to recall the interdependence and indivisibility that exists between civil and political rights and economic, social and cultural rights, because they should be understood as a whole as human rights, without any order of precedence, and enforceable in all cases before the competent authorities.[199] In this regard,

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[194] *Cf. Case of the "Mapiripán Massacre" v. Colombia*, para. 111, and *Case of Suárez Peralta v. Ecuador*, para. 129. Similarly, *Juridical Status and Rights of Undocumented Migrants*, para. 140.

[195] *Cf. Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 123, and *Case of Suárez Peralta v. Ecuador*, para. 129.

[196] *Cf. Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs*. Judgment of November 22, 2007. Series C No. 171, para. 117*, and Case of Suárez Peralta v. Ecuador*, para. 130.

[197] *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 Suárez Peralta v. Ecuador*, para. 130.

[198] *Cf. Case of Ximenes Lopes v. Brazil*, paras. 89 and 90, and *Case of Suárez Peralta v. Ecuador*, para. 130. See also: European Court of Human Rights (hereinafter "ECHR"), *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.

[199] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 101, and *Case of Suárez Peralta v. Ecuador*, para. 131. 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: ECHR, *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

Article XI of the American Declaration of the Rights and Duties of Man established 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 Member States to "dedicate every effort […] to [the] development of an efficient social security policy."[200] Similarly, 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 entered into force November 16, 1999, establishes that everyone has the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being, and indicates that health is a public right.[201] In addition, in July 2012, the General Assembly of the Organization of American States emphasized the quality of health care establishments, good and services, which require the presence of skilled medical personnel, and adequate sanitation.[202]

173. Also, the Committee on Economic, Social and Cultural Rights has indicated that all health services, goods and facilities must comply with the requirements of *availability,*

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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."

[200] Article 26 of the American Convention (Pact of San José) refers to the progressive achievement, "by legislation or other appropriate means, [of] the full realization of the rights implicit in the economic [and] social standards set forth in the Charter of the [OAS]." Contained in this reference is the right to health. Regarding the State's obligations in relation to economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights has indicated that: "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." It also indicated that "[a]mong 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 discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies." *Cf.* United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General comment No. 3, E/1991/23, 14 December 1990, paras. 2 and 5.

[201] This article establishes that: "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."

[202] *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. 66 and 67. 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." Also, the said indicators include: "Existence of administrative recourse to submit complaints concerning violation of obligations connected with the right to health. Competencies of ministries or oversight agencies in terms of receiving complaints from health system users. Training policies for 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.

accessibility, acceptability and *quality*. The Committee has defined the scope of these essential elements of the right to health as follows:

> (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 precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party's developmental level. They 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 receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs.
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> (b) *Accessibility.* Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:
> (i) Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.
> (ii) Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. […]
> (iii) Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.
> (iv) Information accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.
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> (c) *Acceptability.* All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.
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> (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.[203]

174. With regard to the condition of Talía Gonzales Lluy as a minor, Article 24 of the Convention on the Rights of the Child[204] establishes "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." According to Article 2(b) of this article, States Parties, "shall take appropriate measures: […] to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care."

[203] 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, para. 12.

[204] Ecuador ratified this Convention on March 23, 1990, and it entered into force on September 2, 1990.

A. Right to life, right to personal integrity and right to health in relation to the obligation to regulate, monitor and supervise the services provided by private health care centers

175. In view of the fact that, in this case, the interference with the right to life and to personal integrity (contamination with HIV-infected blood) originated from the conduct of private third parties (private health care institution and private blood bank), the Court finds it relevant to refer to its previous rulings on international responsibility for facts that result from the conduct of private health care providers. In the case of *Ximenes Lopes v. Brazil*, the Court stated that:

> 89. As to the persons who are under medical treatment, and since health is a public interest the protection of which is a State obligation, States must prevent third parties from unduly interfering with the enjoyment of the rights to life and to personal integrity, which are particularly vulnerable when a person is undergoing health treatment. The Court considers that States must regulate and supervise all activities relating to the health care provided to persons subject to their jurisdiction, as a special duty to protect life and personal integrity, regardless of the public or private nature of the entity providing such health care.
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> 90. The failure to regulate and supervise such activities gives rise to international responsibility, as States are responsible for the acts of both public and private entities that provide medical care, since under the American Convention international responsibility comprises the acts performed by private entities acting on behalf of the State, as well as the acts committed by third parties when the State fails to fulfill its obligation to regulate and supervise them.[205] Therefore, the obligation of the States to regulate these acts is not limited to public hospitals, but includes any and all health care institutions.[206]

176. The Court will now examine the facts of the case in light of the obligation to regulate and supervise the provision of services by the private blood bank that intervened in this case. It should be underlined that this examination will take into account the State obligation in relation to the *acceptability* of the health facilities, goods and services (which "must be respectful of medical ethics and culturally appropriate"), and their *quality* ("health facilities, goods and services must also be scientifically and medically appropriate and of good quality") (*supra* para. 173). Indeed, these notions of acceptability and quality entail a reference to the ethical and technical standards of the profession and those that have been established for blood donations and transfusions.

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[205] On this point, in the case of *Ximenes Lopes,* the Court indicated that the assumptions of State reponsibility for violation of rights established in the Convention may include the conduct described in the Resolution of the International Law Commission, "of a person or entity that, although not a State body, is authorized by the laws of the State to exercise powers entailing the authority of the State. Such conduct, by either a natural or legal person, must be deemed to be an act of the State, provided that the latter was acting in this capacity." *Cf. Case of Ximenes Lopes v. Brazil*, para. 86, and Responsibility of States for Internationally Wrongful Acts. International Law Commission, fifty-third session, 2001. UN Doc. A/56/10. Text annexed to UN General Assembly Resolution 56/83 of 28 January 2002.

[206] *Case of Ximenes Lopes v. Brazil*, paras. 89 and 90. Meanwhile, the Committee for the Elimination of Discrimination against Women (hereinafter "CEDAW") has noted "that the State is directly responsible for the action of private institutions when it outsources its medical services and that, furthermore, the State always maintains the duty to regulate and monitor private health-care institutions." Alyne da Silva Pimentel *v.* Brazil, CEDAW, 10 August, 2011. UN Doc. CEDAW/C/49/D/17/2008.

177. Regarding the content of the obligation of regulation, in previous cases, the Court has indicated the following:

> States are responsible for regulating […] at all times the provision of services and the implementation of the national programs relating to the provision of quality public health care services so that they may deter any threat to the right to the life and the physical integrity of persons undergoing medical treatment. They must, *inter alia,* establish the proper mechanisms to inspect […] institutions, submit, investigate, and resolve complaints, and establish appropriate disciplinary or judicial procedures for cases of professional misconduct or the violation of the rights of the patients.[207]

178. On this point, the Court considers that there are certain activities, such as the operation of blood banks, that entail significant risks for human health and, therefore, States have the obligation to regulate them specifically.[208] In this case, given that the Red Cross, a private entity, was the sole entity responsible for managing blood banks at the time of the facts, the supervision and monitoring of this institution should have been at the highest level possible, taking into account the necessary care that must be taken in activities associated with blood transfusion and in view of the fact that there were less controls than those to which State officials are subject in the provision of public services.[209]

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[207] *Case of Ximenes Lopes v. Brazil*, para. 99, and y *Case of Suárez Peralta v. Ecuador*, para. 134.

[208] In this regard, see the expert opinion of Christian Courtis during the public hearing held in this case. Also, the Colombian Constitutional Court has indicated that "blood banks are public or private institutions that have a responsibility towards public health, because they act as a filter to prevent the spread of infectious diseases by the donation and extraction of blood. In addition, they have the obligation to ensure that the blood and its products comply with the highest quality required by the institutions that provide health care and that have requested the blood supply in order to safeguard, above all, the rights to health and to life of those in their charge. […] The activity exercised by the blood banks is of public interest and, to this extent, it is strictly regulated by the State, because it entails matters as relevant as the preservation of public health and safety." *Cf.* Judgment T-248/12 of the Constitutional Court of Colombia of March 26, 2012.

[209] In a relatively similar case, the Contentious Administrative Court of the Council of State of Colombia examined the way a victim acquired HIV from blood transfusions he had received as a result of gunshot wounds caused by bullets fired by members of the Army. In the course of his treatment, the victim received transfusions of five bags of blood, three of which had not been subjected to the respective tests to control the blood quality for HIV/AIDS. Regarding the argument of the defendant entity, according to which, in view of the patient's critical condition it was not possible to make the respective prior analysis of the blood that would be transfused, the Chamber found it necessary to stipulate that: "this argument is extremely unfortunate, because it is an obligation of health institutions to have the appropriate reserves of blood units for possible cases of emergency or urgency when they are required. Thus, it is logical and natural that a medical institution should have the appropriate medical and clinical supplies to provide patients with proper care and they cannot shield themselves behind their own negligence and lack of foresight to exempt themselves from the corresponding reponsibility; especially, in the case of such an important and necessary product as blood units." In this regard, the Chamber's case law has established that "when the legal obligation has been imposed on the Public Administration to prevent a harmful result, the latter assumes the position of guarantor in relation to the victim; therefore, if such harm should arise, this can be attributed to the Administration owing to the failure to comply with the said obligation. […] Regarding the attribution of responsibility to the State for violating the obligations that arise from its position as guarantor, it should be noted that this cannot result from an abstrat or general analysis, because, although it has been established that the State is legally bound to protect and satisfy the human and/or fundamental rights, it is necessary to clarify that, according to a broad formulation of the position of guarantor, in order to bring charges, it is necessary also, that: (i) the obligor does not prevent the harmful result, provided that (ii) it is able to do so. […] Thus, it should also be noted that the State's obligations – and therefore the service-related omission that constitutes its wrongdoing – should be examined specifically in relation to the particular case that is being prosecuted, taking into consideration the circumstances that surround the production of the harm that is claimed, its greater or lesser predictability, and the means available to the authorities to counteract it. […] Consequently, it is not a case of an abstract attribution or of a general and imprecise obligation of monitoring and control, but that of egregious non-

179. The Court notes that, at the time of the facts, Ecuador had general rules on the right to health contained in the 1971 Health Code (*supra* para. 70). This Code indicated that the health authority would establish the norms and requirements that health care facilities must meet, and would carry out periodic inspections and evaluations. It also established that health care facilities would submit their annual programs and their regulations to the health authority for approval (*supra* para. 70). This Code did not stipulate or regulate the supply of blood or blood products, or establish any sanctions in this regard.[210]

180. The Court notes that, although the 1971 Health Code did not contain specific regulations on the operation of blood banks, since 1984 and 1986, there have been laws that regulated voluntary blood donations, and also the supply and use of blood and blood products (*supra* para. 74). Subsequently, in 1987, norms were established that regulated compulsory testing of all blood units and blood products for HIV, in all Ecuador's blood banks (*supra* para. 71). In addition, the norms specified that the health authorities were responsible for sanctioning failure to comply with these norms.[211]

181. Furthermore, norms established in 1992 and 1998, identified agencies such as the National Blood Secretariat, in charge of supervising compliance with the regulatory provisions and operating manuals, indicating the sanctions established in case of failure to abide by these provisions and manuals (*supra* para. 71). In addition, in 1998, the procedures to be used by the blood banks in order to collect blood and for its end use were established, in order to avoid the transmission of infections by transfusion (*supra* para. 72). Similarly, the 1998 Constitution established the national health policy and the supervision of entities providing private health care services (*supra* para. 73).

182. The delegation to the Red Cross of the management of the blood banks was maintained until 2006, when the Organic Health Act was enacted in which the State again assumed the administration of the blood banks.[212]

183. Although it is true that the laws in force at the time of the facts did not specify the frequency and the particular way in which the monitoring and supervision would be implemented, or the specific aspects that would be monitored and supervised, this Court considers that a regulation existed in this matter the purpose of which was to control the quality of the service so that, diseases such as HIV would not be transmitted through blood

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compliance by the Public Administration of such obligations, all of which resulted in the disastrous consequences seen in this matter, and in the case to which reference has been made. *Cf.* Council of State of Colombia, Contentious-Administrative Chamber, Third Section, Subsection A. Judgment of November 12, 2014, File. 25000-23-26-000-2003-01881-01(38738).

210 *Cf.* Expert opinion of Jimmy Tandazo and Carolina Zevallos of February 20, 2015 (evidence file, folio 4034).

211 In this regard, the norms indicate that: "[t]he control of compliance with the agreements shall be the responsibility of the Ecuadorian Red Cross," and also that "[t]he authorities or persons who do not obey [the said norms] shall be sanctioned by the health authorities, pursuant to the Health Code." Official Gazette No. 794. Regulation 8001. Agreement on the binding nature of performing HIV testing on all blood units and blood products, of October 20, 1987 (evidence file, folio 2691).

212 *Cf.* Organic Health Law (evidence file, folio 4243).

transfusions. In view of this conclusion on the issue of regulation, the Court will focus its analysis on the problems of supervision and monitoring.

184. In this regard, it should be stressed that it is the State that has the obligation to supervise and monitor. Even when the health service is provided by a private entity, the State maintains the obligation to provide public services and to protect the respective public right.[213] 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 service […] is, above all, provided by the public hospitals; however, private initiative, acting in a supplementary role, and by the signature of conventions and contracts, also provides health services under the auspices of the [State]. In both situations, whether the patient is interned in a public hospital, or a private hospital which has a convention or contract […], the individual is in the care of the […] State."[214] In addition, the Court has cited the European Court of Human Rights to point out that the State remains under a duty to grant licenses and exercise supervision and control over private institutions.[215] It has also indicated that the State's monitoring obligation covers the services provided both directly or indirectly by the State, and also those offered by private entities.[216] The Inter-American Court has specified the scope of the State's responsibility when it fails to comply with these obligations in the case of private entities as follows:

> Regarding essential competences related to the supervision and monitoring of the provision of services of public interest, such as health care, by either public or private entities (as is the case of a private hospital), the responsibility arises based on the omission to comply with the obligation to supervise the provision of the service in order to protect the respective right.[217]

185. In a similar case, the European Court examined the situation of a minor who required several transfusions of blood and plasma during the first months of his life. His parents acquired the necessary blood and plasma from the Turkish Red Cross. Four months after the hospital personnel had carried out the blood transfusions, the parents found out that their son had been infected with the HIV virus. Subsequently, the Government discovered that a person who had donated blood to the Turkish Red Cross was HIV positive and that this particular donor had previously donated blood and plasma. It was then discovered that a unit of plasma given to the baby had come from this HIV-positive donor. Following a series of proceedings, including a civil action against the Red Cross and an administrative action against the Ministry of Health, which lasted over nine years, the Administrative Court

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213 *Cf. Case of Suárez Peralta v. Ecuador*, para. 144.

214 *Case of Ximenes Lopes v. Brazil*, para. 95, and *Case of Suárez Peralta v. Ecuador*, para. 144.

215 *Cf. Case of Suárez Peralta v. Ecuador*, para. 151. In the case of *Case of Storck v. Germany,* the European Court established that: "The State is under an obligation to secure to it citizens their right to physical integriy under Article 8 of the Convention [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 […]. The State remains 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." *Cf.* ECHR. *Case of Storck v. Germany*, No. 61603/00. Third Section Judgment of 16 June 2005, para. 103.

216 *Cf. Case of Ximenes Lopes v. Brazil*, para. 141, and *Case of Suárez Peralta v. Ecuador*, para. 149.

217 *Cf. Case of Albán Cornejo et al. v. Ecuador*, para. 119, and *Case of Suárez Peralta v. Ecuador*, para. 150.

determined that the Ministry of Health personnel had been negligent in the performance of their duties. The compensation awarded only covered "one year's medical treatment expenses and did not suffice to pay the costs of medication." When examining the case, the European Court took into account the excessive duration of the administrative proceedings, general considerations on public health, and the prevention of similar errors, and declared a violation of the right to life.[218]

186. In the instant case, the laws and regulations provided by the State reveal that the National Blood Secretariat, an auxiliary body of the Red Cross, was the entity responsible for applying the sanctions for non-compliance with the regulations on how blood should be handled (*supra* para. 71). The Court observes that this implied a delegation of the functions of monitoring and supervision to the same private entity that had been delegated the task of managing the blood banks, which was especially problematic as regards due diligence in the institutional monitoring structure, because this task should have been performed by the State. On this point, the Court refers back to the State's acknowledgment that it should not have delegated the management of the blood banks to the Red Cross in that way; in other words, a delegation that did not establish adequate levels of supervision. It should be noted that the case file does not contain evidence of activities to monitor, control and supervise the blood bank prior to the facts.

187. In addition, in the instant case, the causal nexus between the blood transfusion and the infection with HIV related to these proven facts: (i) on June 22, 1998, Talía was diagnosed with thrombocytopenic purpura and her mother was told that she urgently needed a transfusion of blood and platelets; (ii) the same day, Talía's mother went to the Red Cross Blood Bank where they told her that she needed to bring donors; (iii) the Blood Bank received Mr. HSA's blood and the blood products derived from it were sent out by this Bank on the same June 22, 1998, for transfusion to Talía; (iv) the transfusion began the same day and continued the following day; (v) Mr. HSA's blood only underwent the respective tests, including the test for HIV, the following day; (vi) the results of that test were positive; (vii) there is no information to indicate that Talía had been infected with HIV before June 22, 1998, and (viii) both the medical experts and the genetic test performed by the *Université catholique de Louvain* in Belgium attributed to infection to the blood transfusion. As can be seen, the infection with HIV occurred as a result of the transfusion of blood that had not been tested previously and which came from the Red Cross Blood Bank.

188. Furthermore, during the criminal proceedings, the testimony of employees of the Red Cross and the hospital where Talía was interned reveals that the shifts were not well organized and that there were errors in the records. Thus, the Court underlines that the evidence in the criminal proceedings indicates that the Red Cross Blood Bank operated: (i)

[218] The European Court stressed that the family had to pay the high costs of the treatment and the medication and that the non-pecuniary damage awarded only covered one year of those expenses. Based on the facts of the case, that Court concluded that, in addition to the payment of non-pecuniary damage, the most appropriate remedy would have been to order the payment "of the treatment and medication expenses of the [victim] during his lifetime." ECHR, Oyal v. Turkey. No. 4864/05. Second Section. Judgment of 23 March 2010.

with limited resources;[219] (ii) without establishing and keeping records with complete and detailed information on the donors, the tests performed, and the delivery of blood products;[220] (iii) with irregularities and contradictions in the few existing records[221] (an example of this being the records on the delivery of the blood for Talía, which are smudged), and (iv) the personnel had the practice of not recording blood delivered after 6 p.m., which was precisely the situation of the blood products delivered for the victim in this case.[222]

189. In this case, the Court considers that the irregularities, and the precarious conditions under which the Blood Bank from which the blood for Talía came functioned, reveal the possible consequences of the State's failure to comply with its supervision and monitoring obligation. The inadequate supervision and inspection by Ecuador resulted in the Red Cross Blood Bank of the province of Azuay operating in irregular conditions that endangered the health, life and integrity of the community. In particular, this serious omission by the State allowed blood that had not undergone the most basic safety testing, such as for HIV, to be delivered to Talía's family for the blood transfusion, with the result that she became infected, with the consequent permanent impairment of her health.

190. This harm to her health, owing to the severity of the illness involved and the risks that the victim may face at different moments of her life, constitutes a violation of the right to life, in view of the danger of death that the victim has faced, and may face in the future, owing to her illness. Indeed, in this case the negative obligation to not harm life was violated when Talía Gonzales Lluy's blood was contaminated by a private entity. In addition, at times when her defenses have been weakened owing to the use of antiretroviral drugs, what happened with the blood transfusion in this case has resulted in a threat to her life and a possible risk of death that may happen again in the future.[223]

191. Based on the considerations in this section, and because the type of negligence that led to the infection of Talía Gonzales Lluy with HIV can be attributed to the State, Ecuador is responsible for the violation of the obligation to monitor and supervise the provision of health care services, within the framework of the right to personal integrity and of the obligation not to endanger life, which violates Articles 4 and 5 of the American Convention in relation to Article 1(1) of this instrument.

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219 *Cf.* Judicial inspection of the Azuay Red Cross Blood Bank of June 22, 2001 (evidence file, folio 222); Preliminary statement of EO of June 28, 2001 (evidence file, folio 233), and Report of the experts, NV and JP, of August 17, 1998 (evidence file, folios 91 to 98).

220 *Cf.* Report of the experts, NV and JP, of August 17, 1998 (evidence file, folio 97).

221 *Cf.* Inspection of the files on May 18, 2000 (evidence file, folio 145); Preliminary statement of EO of June 28, 2001 (evidence file, folio 233).

222 *Cf.* Preliminary statement of EO of June 28, 2001 (evidence file, folios 233 and 234), and Report of the experts, NV and JP, of August 17, 1998 (evidence file, folio 97).

223 In its case law, the European Court of Human Rights has also analyzed violations of the right to life related to harm to the life of individuals who, although they have not died, suffered aftereffects and harm owing to undue medical treatment. *Cf.* ECHR, Oyal *v.* Turkey. No. 4864/05. Second Section. Judgment of 23 March 2010, para. 55, and G.N. and Others *v.* Italy. No. 43134/05. Second Section. Judgment of 1 December 2009.

B. Availability, accessibility, acceptability and quality of health care within the framework of the right to life and to personal integrity

192. In this case, among other aspects related to health care, it is argued that, at different times, Talía did not received timely and appropriate care, or a pertinent treatment, and has faced obstacles to obtaining medication.

193. In this regard, the Court notes that the Protocol of San Salvador establishes that, among the measures to ensure the right to health, States must promote "universal immunization against the principal infectious diseases"; "prevention and treatment of endemic, occupational and other diseases," and "satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable."[224] Similar obligations are established in Article 12(2) of the International Covenant on Economic, Social and Cultural Rights. This framework of obligations includes different duties that relate to access to medication. According to General Comment No. 14, the right to the highest attainable standard of health gives rise to some minimum core obligations that include: "[t]o provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs."[225]

194. Access to medicines is an essential part of the enjoyment of the highest attainable standard of health.[226] In particular, the Human Rights Council and the former Human Rights Commission have issued resolutions that recognized that "access to medication in the context of pandemics such HIV/AIDS, tuberculosis and malaria, is one fundamental element for achieving progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[227]

195. In this regard, the Court considers that the *International Guidelines on HIV/AIDS and Human Rights* of the Office of the United Nations High Commissioner for Human Rights

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224 Article 10(2) of the Protocol of San Salvador.

225 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, para. 43(d).

226 *Cf.* Human Rights Council of the United Nations, Resolution on 'Access to medicines in the context of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (11 June 2013) UN Doc A/HRC/23/L.10/Rev.l para. 2; General Assembly of the United Nations, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt ' (13 September 2006) UN Doc A/61/338 para. 40, and Human Rights Council of the United Nations, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, on access to medicines' (1 May 2013) UN Doc A/HRC/23/42 para. 3.

227 For example, Resolutions of the United Nations Commission on Human Rights, 'Access to medication in the context of pandemics such HIV/AIDS, tuberculosis and malaria, Resolutions 2001/33, 2002/32, 2004/26 and 2005/23. The Human Rights Council has ruled similarly with regard to HIV/AIDS. *Cf.* Human Rights Council of the United Nations, Resolution on The protection of human rights in the context of the human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS)' (13 April 2011). UN Doc A/HRC/RES/16/28, para. 1. Meanwhile, the Peruvian Constitutional Court, in the context of recognizing that persons with HIV merit special protection, indicated that their life "depends on the specific actions undertaken by the State, togehter with the community and the direct family, both as regards health and as regards access to highly active antiretroviral treatment, and in other aspects related to prevention, comprehensive treatment, social security and the pension." *Cf.* Judgment of the Constitutional Court of August 9, 2011, file No. 0479-2009-PA/TC, para. 29.

(hereinafter "OHCHR") and the Joint United Nations Programme on HIV/AIDS (hereinafter "UNAIDS") are an authorized reference to clarify some State obligations in this matter. Guideline 6 (as revised in 2002), stipulates that:

> States should enact legislation to provide for the regulation of HIV-related goods, services and information, so as to ensure widespread availability of quality prevention measures and services, adequate HIV prevention and care information, and safe and effective medication at an affordable price. States should also take measures necessary to ensure for all persons, on a sustained and equal basis, the availability and accessibility of quality goods, services and information for HIV prevention, treatment, care and support, including antiretroviral and other safe and effective medicines, diagnostics and related technologies for preventive, curative and palliative care of HIV and related opportunistic infections and conditions. […][228]

196. Guideline 6 has been interpreted by OHCHR and UNAIDS in the sense that an effective response to HIV requires a comprehensive approach that includes a continuum of prevention, treatment, care and support:

> Prevention, treatment, care and support are mutually reinforcing elements and a continuum of an effective response to HIV. They must be integrated into a comprehensive approach, and a multifaceted response is needed. Comprehensive treatment, care and support include antiretroviral and other medicines, diagnostic and related technologies for the care of HIV and AIDS, related opportunistic infections and other conditions, good nutrition, and social, spiritual and psychological support, as well as family, community and home-based care. HIV-prevention technologies include condoms, lubricants, sterile injection equipment, antiretroviral medicines (e.g. to prevent mother-to-child transmission or as post-exposure prophylaxis) and, once developed, safe and effective microbicides and vaccines. Based on human rights principles, universal access requires that these goods, services and information not only be available, acceptable and of good quality, but also within physical reach and affordable for all.[229]

197. The Court observes that these standards emphasize that access to antiretroviral medicines is only one of the elements of an effective response for persons living with HIV. Thus, those living with HIV require a comprehensive approach that includes a continuum of prevention, treatment, care and support. A limited response as regards access to antiretroviral drugs and other medicines does not comply with the obligations of prevention, treatment, care and support arising from the right to the highest attainable standard of health.[230] These aspects of the quality of health[231] are related to the State obligation to

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[228] Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint Programme of the United Nations on HIV/AIDS (hereinafter "UNAIDS"), *International Guidelines on HIV/AIDS and Human Rights.* 2006 consolidated version, Guideline 6. Available at: http://www.ohchr.org/Documents/Publications/HIVAIDSGuidelinesen.pdf.

[229] OHCHR and UNAIDS, *International Guidelines on HIV/AIDS and Human Rights.* 2006 consolidated version, commentary on Guideline 6, para. 26 Available at: http://www.ohchr.org/Documents/Publications/HIVAIDSGuidelinesen.pdf.

[230] The Guidelines also indicate that "States should also ensure access to adequate treatment and drugs, within the overall context of their public health policies, so that people living with HIV can live as long and as successfully as possible. People living with HIV should also have access to clinical trials and should be free to choose amongst all available drugs and therapies, including alternative therapies." OHCHR and UNAIDS, *International Guidelines on HIV/AIDS and Human Rights.* 2006 consolidated version, para. 145. Available at: http://www.ohchr.org/Documents/Publications/HIVAIDSGuidelinesen.pdf. Meanwhile, referring to the protection of the right to health of persons with HIV/AIDS, the Colombian Constitutional Court has stated that: "in order to ensure that the equality and human dignity of such perons is effective, the protection that the State should provide in the area of health must be comprehensive, given the high expenditure that this disease requires, and in order not to give rise to discriminatory treatment." It has also affirmed that "this constitutional obligation [of protection] ensures that persons with HIV

ensure "safe and secure environments, especially for young girls, expanding good quality youth-friendly information and sexual health education and counselling services, strengthening reproductive and sexual health programmes, and involving families and young people in planning, implementing and evaluating HIV and AIDS prevention and care programmes, to the extent possible."[232]

198. Another relevant aspect of the right to health and to health care is access to information that can help the individual cope with the disease in the best way possible. In this regard, in General Comment No. 3 on HIV/AIDS and the Rights of the Child, the Committee on the Rights of the Child repeated the need to ensure that children:

> [do not suffer] discrimination in offering them access to HIV-related information, voluntary counselling and testing, knowledge of their HIV status, confidential sexual and reproductive health services, and free or low-cost contraceptive, methods and services, as well as HIV-related care and treatment if and when needed, including for the prevention and treatment of health problems related to HIV/AIDS.[233]

199. Lastly, regarding children with disabilities (*infra* paras. 236 to 240), the Committee on the Rights of the Child indicated that "[a]ttainment of the highest possible standard of health as well as access and affordability of quality healthcare is an inherent right for all children. Children with disabilities are often left out because of several challenges, including discrimination, inaccessibility due to the lack of information and/or financial resources, transportation, geographic distribution and physical access to health care facilities."[234]

200. The representatives of the presumed victims did not present observations, objections or any other type of argument to disprove explicitly the information provided by expert witnesses Diana Molina and Carmen del Rocío Carrasco with regard to the health care received by Talía Gonzales Lluy from the time the State became aware that she had been

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received free comprehensive care from the State so as to avoid the lack of financial resources preventing them from receving treatment for the illness and lessening the suffering, and exposing them to discrimination." *Cf.* Judgment T-843 of the Constitutional Court of Colombia of September 2, 2004. See also, Expert opinion of Paul Hunt of March 6, 2015 (evidence file, folios 3706 to 3734).

231 Regarding the quality of the health service, CEDAW, in the case of *Alyne da Silva Pimentel v. Brazil* declared the State responsible for failing to ensure adequate and timely maternal health care services for the victim, irrespective of her race and socio-economic situation, and that the failure to ensure the right to health had direct repercussions on the enjoyment of her rights to life and to be free of discrimination. The victim, who was 28 years old, was a Brazilian national of African descent, and she died from pregnancy-related complications after a private health clinic and then a public health center refused her quality obstetric health care. Her death, which was preventable, was due to the fact that the health clinic that treated her did not order the appropriate tests, took an unreasonable time to attend to the patient (including the delay in transferring her to another health institution), and did not have adequate in-house medical services, among other factors. These situations were exacerbated by the victim's racial and socio-economic situation. Committee for the Elimination of Discrimination against Women (CEDAW), *Alyne da Silva Pimentel v. Brazil* (27 September 2011) UN Doc. CEDAW/C/49/D/17/2008.

232 General Assembly of the United Nations, Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS (A/RES/65/277), 8 July 2011, para. 43.

233 United Nations, Committee on the Rights of the Child, General comment No. 3, CRC/GC/2003/3, 17 March 2003, para. 20.

234 United Nations, Committee on the Rights of the Child, General comment No. 9, CRC/C/GC/9, 27 February 2007, para. 51.

infected with HIV (*supra* paras. 148 to 153). In their statements, both the representatives and the presumed victims insisted on systematic problems in the comprehensive nature of the care. The Court notes that an initial problem of the quality of the health care arose when Talía was treated for the emergency that occurred in 1998. The Court observes that, at that time, there were insufficient personnel, the laboratories did not have all the necessary tests to examine blood, and therefore had to ask laboratories in Quito to verify the blood, and the personnel of the Red Cross and the hospital where Talía was interned did not know how to handle the samples appropriately (*supra* para. 77).

201. Other problems mentioned by the representatives related to the accessibility of health-related information in order to understand and to be able to cope, as well as possible, with the illness, particularly when the family first became aware of it. The representatives also indicated that the State had offered medicines, but at times failed to supply them, and mentioned other problems of access to diagnostic procedures and blood tests.[235] Regarding geographical accessibility, they mentioned that, on several occasions, it became necessary to travel outside Cuenca, which was especially difficult for a family living in poverty.[236]

202. The Lluy family have indicated that, since Talía became infected and up until 2015, all the tests for CD4 and viral load had been performed in private clinics and paid for by the Lluy family. However, the only receipts for payment presented by the victims in this regard is one for a medical examination in a private laboratory for US$489.44.[237] Consequently, the Court has no probative elements that would cause it to reject the information indicated in the case file to the effect that, between 2004 and 2012, Talía received antiretroviral drugs from a State entity; that is, the Military Hospital.[238]

203. Furthermore, the representatives have not described with sufficient clarity all the dates or characteristics of the interruptions in the supply of medicines and tests.[239]

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[235] Regarding the supply of antiretroviral drugs by the State prior to 2004, the Court observes that, in November 2002, Teresa Lluy sent a letter to a Ministry of Public Health official, indicating the following: "on the dates listed, [they] went […] to receive the medication that is essential for her life, but the antiretrovirals ha[d] not arrived in Cuenca and it was not possible to obtain them; the life of [her family] and of [her] daughter is in danger and [they] consider[ed] that the Ecuadorian State would be responsible for any calamity." Letter from Teresa Lluy of November 25, 2002, to the Director of the National AIDS Program of the Ministry of Public Health (evidence file, folio 4133). Regarding the tests for CD4, viral load, and others for opportunistic diseases, Talía's mother indicated that these were expensive and she had to pay for them. *Cf.* Letter from Teresa Lluy of May 18, 2015, to the Inter-American Court of Human Rights (evidence file, folio 4119). Also, Talía Gonzales Lluy mentioned problems with the viral load in May 2015. *Cf.* Letter of Talía Gonzales Lluy dated May 18, 2015, to the Inter-American Court of Human Rights (evidence file, folios 4111 and 4112).

[236] "Talía is now receiving the services for HIV patients in Azogues, province of Cañar; […] she has to travel to another province to receive treatment." Testimony of Ivan Mauricio Lluy of March 5, 2015 (evidence file, folio 3586).

[237] *Cf.* Received on April 3, 2014 (evidence file, folio 1214).

[238] Regarding the supply of tests on the viral load count and on CD4 and CD8, as well as other tests and medication in the context of the treatment in the hospital, see Expert opinion of Nilda Esthela Villacres Aviles of February 25, 2010 (evidence file, folios 3875 to 3894); Expert opinion of Carmen Carrasco of February 13, 2015 (evidence file, folios 3959 to 3997), and Expert opinion of Diana Molina Yépez of February 25, 2015 (evidence file, folios 3901 to 3950).

[239] The Court observes that a certificate exists from the Head of the Internal Medicine Unit of the Azogues hospital dated May 4, 2015, regarding a request to perform viral load and CD4 tests on November 5, 2014. The certificate indicates that only the result of the CD4s was availabale, "because there are no reagents to perform the

204. Another aspect of health care quality is revealed by the consistent statements of Talía, her mother and her brother that, under the public health system, specifically in the Cuenca hospital, the presumed victim was stigmatized and treated inappropriately by the hospital personnel on several occasions. The statements mention several problems relating to the confidentiality, quality and user-friendliness of the care.[240] Talía testified that she received treatment in the province of Cañar and not in the province of Azuay, which is where she lives with her family, because she had been mistreated by the person in charge of the HIV program in Cuenca. According to Talía's testimony, the doctor who treats her in Cuenca "does not know how to provide the confidential, quality and friendly treatment to be expected of a public servant."[241]

205. The Court concludes that, on some occasions, Talía Gonzales Lluy has not had access to a safe and friendly environment in relation to her health care and that, at times, she reacted negatively to the type of care received. This negative reaction was associated with tensions with the doctors who treated her at times when Talía and her family were asked to abide by the rules of the public health policies for HIV care. From time to time, there were also specific problems of availability of the viral load test and disputes on geographical accessibility because the presumed victim has had to travel to receive treatment. However, these aspects are related to particular elements of the health care that, at specific moments, caused problems, but without being sufficient to undermine the global scope of the health care over more than a decade. In addition, some of the specific claims and reports concerning the health care have not been denounced before the Ministry of Health authorities, which – following investigations at the domestic level – would have provided more documentary evidence on the type of restrictions generated by the State, and the extent of the problems that the presumed victims alleged that they have suffered in aspects relating to the accessibility and acceptability of health care. Taking into account that the information on the overall treatment continuum presented by expert witnesses Diana Molina and Carmen del Rocío Carrasco (*supra* paras. 148 to 153) has not been disproved, and based on an overall assessment of the health care over these 17 years that Talía has lived with the illness, without dwelling on isolated events at specific times, the Court considers that the evidence available is insufficient to attribute international responsibility to the State for a violation of the right to life and to personal integrity owing to the alleged lack of availability and quality of the services provided.

206. Lastly, the Court observes that, among the evidence provided to the case file, and in the context of the request for provisional measures in this case (*supra* para. 14), it has been reported that, over the last year, Talía has had a low CD4 cell count, which was 366 on

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viral load test." Nevertheless, although this information provides evidence on problems of availability in November 2014, it cannot be considered to have probative value with regard to the lack of availability at other times. *Cf.* Certification of May 4, 2015 (evidence file, folio 4131).

240 *Cf.* Testimony of Talía Gonzales Lluy during the public hearing held in this case; Note of Talía Gonzales Lluy to Ramiro Ávila regarding her visit to the Vicente Corral Moscoso Hospital dated May 26, 2014 (evidence file, folios 1184 to 1186); Note of Talía to the authorities of the Ministry of Public Health of Ecuador of May 26, 2014 (evidence file, folios 1188 and 1189); Testimony of Ivan Mauricio Lluy of March 5, 2015 (evidence file, folios 3585 and 3586), and *Cf.* Letter from Teresa Lluy dated May 18, 2015, to the Inter-American Court of Human Rights (evidence file, folios 4122 and 4123).

241 Testimony of Talía Gonzales Lluy during the public hearing held in this case.

November 5, 2014, while before she began to take the medication ordered at this recent stage of treatment the count was 518.[242] On this point, the State has indicated that "the standards used by the Ministry of Public Health are completely aligned with those recommended by the WHO, including the 2.0 which introduced a new combination with [a new] leading edge drug, despite the significant cost that this represents for the State." The State also pointed out that, "as with any pathology, HIV has its own natural course and evolution, during which there is a progressive decline in the CD4 count, [which] is not necessarily related to the drug treatment." The State indicated that this connection could only be proved by means of an expert medical appraisal.

207. This Court finds that these aspects related to the decrease in the CD4 count are extremely complex technical elements that it is not for the Court to assess in this chapter in terms of attributing responsibility to the State. The alleged problems in the medicines provided by the State in relation to the deterioration in defenses and antibodies, and the risk that this could imply to someone living with AIDS will be assessed in the section on reparations.

C. Right to personal integrity of Teresa Lluy and Iván Lluy

Arguments of the Commission and of the parties

208. The Commission, in its Merits Report, ruled on the violation of Article 5 of the American Convention with regard to Teresa Lluy and Iván Lluy, indicating that "the State is responsible for the violation of the right to mental and moral integrity of T[alía's] mother and brother." According to the Commission, this violation resulted from the deterioration in Talía's health and the lack of medical treatment, as well as from the discrimination arising from being a person with HIV. The Commission also asserted that Talía's situation as a person with HIV "has caused serious harm that extends to her immediate family" and "the basic conditions to lead a decent life." The Commission also argued that Talía's infection with HIV occurred owing to the error in the blood transfusion and had a significant impact on her immediate family. It also stressed that the violation of the right to personal integrity of Talía's mother and brother was exacerbated by factors of poverty and stigmatization because a member of their immediate family had HIV and lived with them.

209. The representatives reiterated the Commission's assertions, and added that Talía's family never had a stable environment and the atmosphere was always hostile, and this caused all the members of the family to feel fear and instability. In addition, Talía's mother and brother "never received any information from the State that [would have] helped them to understand the problem they were experiencing." According to the representatives, the State did not implement a program of care, treatment and education on HIV for Talía and her family. The representatives also argued that the Lluy family did not receive quality medical care; according to the representatives, Talía and the members of her family did not use the

[242] *Cf.* Certificate issued by the *Laboratorio Services Interlab S.A.* on April 3, 2014 (provisional measures file, folio 10), and Certificate issued by the National Public Health Research Institute on November 5, 2014 (provisional measures file, folio 12).

health care system provided by the State because, on repeated occasions, they were discriminated against and they were not given the necessary medicines; consequently, they resorted to a private health care system.

210. The State argued that the impact on Teresa and Iván Lluy was a matter that related to the private entities, because the State had duly complied with its obligation in relation to the regulation, supervision and monitoring of the private entities that provided health care services. In addition, the State argued that "it cannot be affirmed that there has been a violation of the personal integrity of Talía and her family as a direct result of the State's actions, because her illness and suffering […] were not increased in any way by acts or omissions of State agents."

Considerations of the Court

211. The Court has reiterated its case law that the next of kin of the victims of certain human rights violations may, in turn, be victims.[243] The Court has considered that the right to mental and moral integrity of some next of kin has been violated due to the suffering they have endured because of the acts and omissions of the State authorities,[244] taking into account, among other matters, the steps taken to obtain justice and the existence of close family ties.[245] It has also declared the violation of this right, based on the suffering arising from acts perpetrated against their loved ones.[246]

212. The Court has indicated that the part played by the State in creating or exacerbating the situation of vulnerability of a person has a significant impact on the integrity of those who surround him or her, especially the closest family members who are faced with the uncertainty and insecurity that results from the violation perpetrated against their close or immediate family member.[247]

213. In this case, the Court finds it pertinent to analyze aspects relating to the application of Article 5 of the Convention, in order to determine whether the State's responsibility has been constituted by the violation of the right to personal integrity of Teresa and Iván Lluy. To this end, the Court will now examine: (i) the stigma faced by Teresa and Iván Lluy because they were related to a person with HIV, and (ii) the specific impact on the personal integrity of Teresa and Iván Lluy.

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243 *Cf. Case of Vargas Areco v. Paraguay. Merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 155, para. 83, and *Case of Suárez Peralta v. Ecuador*, para. 156.

244 *Cf. Case of Vera Vera et al. v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of May 19, 2011. Series C No. 226, para. 104, and *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 249.

245 *Cf. Case of Bámaca Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, para. 163, and *Case of Furlan and family v. Argentina*, para. 249.

246 *Cf. Case of Baldeón García v. Peru. Merits, reparations and costs.* Judgment of April 6, 2006. Series C No. 147, para. 128, and *Case of Furlan and family v. Argentina*, para. 249.

247 *Cf. Case of the Yean and Bosico Girls v. Dominican Republic*. Judgment of September 8, 2005. Series C No 130, para. 204, and *Case of Furlan and family v. Argentina*, para. 250.

214. The Court notes that the whole Lluy family were stigmatized because Talía had HIV (*infra* para. 289). In this regard, it has been proved that the lives of Teresa and Iván were affected owing to the stigma attached to being the mother and brother of a person with HIV. For example, Teresa Lluy was dismissed from several jobs and, at school, Iván Lluy was subject to comments and finger-pointing (*infra* paras. 217 and 223).

215. Regarding all the difficulties in the areas of health, finance and housing that the members of her family have endured, Teresa Lluy has testified that:

> "The most difficult times have related to financial problems since the legal actions were filed, the loss of my job, the social rejection owing to the absence of opportunities, […] education, house rental expenses and frequent moves, [being discriminated against by] the home owners."[248]

216. The Court underlines the constant situation of vulnerability of Teresa and Iván Lluy, because they were discriminated against, isolated from society, and in a precarious financial situation. Added to this, Talía's infection had a significant effect on the whole family, because Teresa and Iván had to devote most of their physical, material and economic efforts to trying to ensure Talía's survival and a decent life for her. All of this, gave rise to a permanent situation of anguish, uncertainty and insecurity in the life of Talía, Teresa and Iván Lluy.

217. In the specific case of Teresa Lluy, she has testified that her life changed owing to Talía's infection with HIV; when Talía's illness became public, Mrs. Lluy lost her job in the company for which she had worked for 10 years. When she was dismissed, she was told that it was "because she gave a bad impression of the company, since her daughter had HIV." Following her dismissal, Mrs. Lluy did domestic work; however, "when [her employers] recognized [her], they told [her] that they no longer needed [her]" and, on some occasions, they reproached her that she "could put them at risk of infection."[249]

218. Teresa Lluy also testified that she "had to sell [her] household appliances, … she] lost everything, [she] was never able to recover anything." The discrimination and isolation suffered "caused emotional damage to [her] daughter, [herself] and [her] son." According to her testimony, in 2008, Teresa Lluy had health problems and "began to have headaches, loss of vision, weight loss; she was very thirsty and urinated a great deal." When she went to the clinic, the doctor who attended her told her that her sugar levels were very high and that she had "emotional diabetes," which occurred when "a person [was] the victim of great nervous tension and emotional conflict."[250] In addition to the distress owing to the "emotional diabetes," Teresa Lluy testified that she suffers from "neuralgic pain owing to the herpes zoster [she] developed because of the stress, which causes [her] intense pain in the chest."[251]

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248 Affidavit made by Teresa Gonzales Lluy on April 22, 2014 (evidence file, folios 1087 and 1088).

249 Affidavit made by Teresa Gonzales Lluy on April 22, 2014 (evidence file, folio 1078).

250 Affidavit made by Teresa Gonzales Lluy on April 22, 2014 (evidence file, folio 1086). Regarding his mother's health, Iván Lluy testified that he is also concerned about this situation, because "[t]he stress has taken its toll on them and affects them every day; at times [he had] to take [his mother] to the clinic urgently [because] her pressure increased excessively." Affidavit made by Iván Lluy on April 22, 2014 (evidence file, folio 1116).

251 *Cf.* Affidavit made by Teresa Gonzales Lluy on April 22, 2014 (evidence file, folios 1078, 1085 and 1086).

219. Owing to her difficult financial situation, Teresa Lluy "sought assistance from official entities, the Social Development Ministry, the courts of justice, the President of the Red Cross of Quito, but they did not respond to her."[252] As already mentioned, in order to cover the family's expenses and the costs of Talía's treatment, Teresa Lluy sold any items of value she possessed, and worked in the informal sector.[253]

220. According to the psychological appraisal made by the clinical psychologist, Sonia Nivelo Cabrera, in February 2015, "[Teresa] Lluy has been affected by the isolation, the social stigma, the loss of her employment, and feels what is known as "social death." She has the signs and symptoms of mixed anxiety-depressive disorder. The impact has been "somatized and she has the following ailments: emotional diabetes, hypertension, [and] chronic physical pains.[254]

221. In the case of Iván Lluy, he has testified that "[w]hen he was [15] years old his life was horribly affected on finding out that [his] sister had been infected with HIV due to human error." Owing to his sister's health problems and thinking that she could die at any time, he stopped attending university and began to work day and night to help his mother with the expenses.[255]

222. Iván Lluy was diagnosed with depression and received medication to treat this for 18 months. In this regard, Iván Lluy testified that he "could not live with all the problems that made [him] suffer" and, consequently, he went to see a psychiatrist he knew "one day that [he] was cleaning an office." This psychiatrist treated him "on several occasions, […] more or less 30 times; […the psychiatrist] only charged [him] for the first five appointments and diagnosed [Ivan] with major depression and prescribed two capsules every day of a medicine that was very expensive." According to Iván Lluy's testimony: "[w]hen [he] did not have money to buy them and did not take them, [he] suffered from nauseas, dizziness, palpitations [and] desperation."[256] He also indicated that, shortly after beginning to treat him, the psychiatrist died and he could not continue receiving treatment. According to his testimony, "the doctor helped him a great deal, but [he is] still afraid of not have [what is needed] in order to provide [his] sister with nutritious food and appropriate treatment."[257]

223. Teresa Lluy stated that her "son has had to take on responsibilities that did not correspond to him. […] He also lost out on many things in adolescence; he suffered a great deal of discrimination and social isolation, which was devastating, especially at that very complex stage of his personal development."[258] She added that, when she had to take Talía

252 Affidavit made by Teresa Gonzales Lluy on April 22, 2014 (evidence file, folio 1078).

253 Affidavit made by Teresa Gonzales Lluy on April 22, 2014 (evidence file, folio 1078).

254 Expert appraisal of Teresa Gonzales Lluy by Sonia Nivelo Cabrera of February 12, 2015 (evidence file, folio 3616).

255 *Cf.* Affidavit made by Iván Lluy Lluy on April 22, 2014 (evidence file, folios 3574 to 3576).

256 Affidavit made by Iván Lluy on April 22, 2014 (evidence file, folio 1115).

257 Affidavit made by Iván Lluy on April 22, 2014 (evidence file, folio 1115).

258 Affidavit made by Teresa Gonzales Lluy on April 22, 2014 (evidence file, folio 1079).

to Quito and stay there for some time while Talía was being treated, her "son was all alone in Cuenca; he sometimes slept in the parks or wherever he found a space, because [they] did not have money to rent a place."[259] Owing to the need to work, Iván Lluy "no longer went to school; he had no friends, and [they] often spend days without talking to each other." Lastly, Teresa Lluy testified that "the pain that a mother feels on seeing and feeling that her two children are suffering so unfairly, [was] enough to make anyone lose their sanity."[260]

224. The Court notes that the psychological appraisal made by Sonia Nivelo indicates how much "the mental health" of Iván Lluy has been affected "by thoughts and feelings such as: anger, frustration, despair, guilt […], which could be related to the stigma and discrimination that Iván [experienced …] in his social environment. […] And he has moderate depression, anxiety, and feelings of guilt."[261]

225. The Court considers that it can be concluded that the harm and suffering caused by the fact that Iván could not continue his studies and had to work during his adolescence, Teresa Lluy's loss of employment and the financial ability to support her family, and the constant discrimination to which they were subjected, resulted from the negligence in the procedures that led to the infection of Talía with HIV. Added to this, the Court notes that the Lluy family did not receive appropriate counseling and support in order to improve the family situation and overcome the precarious situation in which they found themselves. Furthermore, they did not receive support to overcome the discrimination they were subjected to in different areas of their life.

226. The Court observes that, although some of aspects regarding which Talía and her family suffered discrimination were not due to a direct action of the State authorities, the discrimination was the result of the stigma derived from Talía's condition as a carrier of HIV, and of the failure of the State to implement measures to protect Talía and her family, who were in a situation of vulnerability.

227. The discrimination suffered by Talía was the result of the stigma caused by her condition as a person living with HIV and it had consequences for Talía herself, her mother and her brother. The Court notes that, in this case, there were numerous differentiations in the treatment of Talía and her family arising from Talía's situation as a person with HIV; these differences in treatment constituted a discrimination that placed them in a vulnerable situation that was exacerbated by the passage of time. The discrimination suffered by the family was reflected in different areas, such as housing, work and education.

228. In this case, despite the situation of special vulnerability of Talía, Teresa and Iván Lluy, the State did not take the necessary measures to ensure them access to their rights without discrimination, so that the State's acts and omissions constituted treatment that discriminated against Talía, her mother and her brother.

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259 Affidavit made by Teresa Gonzales Lluy on April 22, 2014 (evidence file, folio 1080).

260 Affidavit made by Teresa Gonzales Lluy on April 22, 2014 (evidence file, folio 1081).

261 Expert appraisal of Teresa Gonzales Lluy by Sonia Nivelo Cabrera of February 12, 2015 (evidence file, folios 3618 and 3619).

229. Based on the above, the Court concludes that the State is responsible for the violation of the right to personal integrity, recognized in Article 5(1) of the American Convention, in relation to Article 1(1) thereof, of Teresa Lluy and Iván Lluy.

X
RIGHT TO EDUCATION

Arguments of the Commission and of the parties

230. The Commission stated that Talía "was expelled from a public education establishment and that the courts endorsed this action." This expulsion "took place when the school authorities […] became aware that Talía […] was infected with HIV. According to the Commission, even though Teresa Lluy filed an application for constitutional protection (*amparo)* to protect Talía's right to education, "[t]he District Court indicated that Talía Gabriela could exercise her right to education individually and by distance education." In the Commission's opinion, "[w]ith this decision, the courts endorsed [her expulsion], combining both a violation of her right to education and a discriminatory act based on her health status." In its Merits Report, the Commission established that "there is no information to indicate that any State entity responsible for the interests of children intervened in the judicial proceedings or collaborated in the search for medical services. This whole situation has had a serious impact […] on the exercise of her right to education and, in sum, to the basic conditions to lead a decent life." On this point, the Commission also argued that the obligation to ensure Talía's life project, which evidently included her education, was "enhanced in this case owing to the numerous factors of vulnerability of the [presumed] victim's situation, as an HIV-infected child with very limited resources."

231. The representatives indicated that, in Talía's case, the standards of the right to education had not been complied with, because a judicial decision existed that "annulled the right [of Talía] to access [any] public school"; this meant that Talía's family "had no other option, but to seek schools that were far away in order to avoid the unequal and denigrating treatment." Consequently, "[t]he education system did not adapt to Talía's needs," because it should "be flexible and respond to the needs of students in different social and cultural contexts." According to the representatives, "the State's obligation in relation to the right to education is violated when it creates conditions in which [the education system] becomes inaccessible or difficult to access, inadaptable and unacceptable." They added that Talía's education was never exempt from discrimination. Furthermore, they indicated that "Talía was only five years old when she was expelled from school because she was a carrier of HIV." Consequently, "Teresa [filed] an application for constitutional protection when Talía was expelled from the public school in September 1999." However, the judge decided to "reject [the application] and to order that Talía should receive distance education," which meant that Talía was besieged by Ministry of Education officials who, "instead of helping her, harassed her to ensure that she would not infect other children." In addition, the representatives argued that "Talía's higher education has not been without difficulties and consequences owing to the HIV-infected blood transfusion." Thus, they indicated that Talía could "not enroll in the university program she wanted; she c[ould] not live a life with the highest attainable well-being, because she [was] unable to choose the type of treatment most appropriate to her health."

232. The State indicated "that the educational policies implemented by State institutions were in keeping with international requirements for the protection and guarantee of rights," and affirmed that, "in Ecuador, education, even higher education, is free and universal, and provides, free of charge, social services and psychological support." The State emphasized that "the Constitution prohibits discrimination in the case of HIV carriers," and the prohibition has also existed "for the last 12 years in the Children's and Adolescents' Code as well as in the Law for the Prevention and Comprehensive Treatment of HIV/AIDS." The State asserted that it had always ensured Talia's "personal fulfillment [and] this c[ould] be corroborated by the fact that, even in the face of the numerous difficulties inherent in her health status, she was able to study and complete both basic and secondary education in public and private establishments regulated by the State and, by her own efforts, was an outstanding student." In this regard, it placed on record that, "in their brief, the representatives themselves recognize that Talía is enrolled in the university studying for a degree in design." In addition, with regard to the application for constitutional protection, the State argued that "the application was filed under the sponsorship of the Ombudsman"; it therefore considered that, even though "the sphere of action of the *amparo* as it was conceived in 1998 was restricted, compared to the constitutional scope established in 2008," it was clear that "Teresa Lluy had the institutional support of the State when filing the application to protect the rights of her daughter." On this point, it indicated that some of the testimonies did "not provide any information that would allow the State to conduct an investigation to determine the alleged discriminatory act." In addition, the State argued that, in this case, the discrimination was not caused by the intervention of decisions and practices of State agents, but rather at the social level in relation to a community that is still not prepared to understand persons with HIV/AIDS and assimilate them culturally. Lastly, the State argued that the efforts of the Ministry of Public Health and of the Ministry of Education in the area of information and promotion of a culture against discrimination is having a measurable impact in the country.

Considerations of the Court

233. In this case, there is a dispute about the possible violation of the right to education, taking into account that Talía was dismissed from a school owing to the assumption that she could endanger the integrity of her companions. In order to decide the dispute between the parties on these point, the Court will examine: (a) the relevant implications of the right to education in this case, and (b) the violation of the right to remain in the education system, the right not to be discriminated against, and adaptability in relation to the right to education.

A. The relevant implications of the right to education in this case: the right to education of persons with medical conditions such as HIV/AIDS that could result in disabilities

234. The right to education is contained in Article 13 of the Protocol of San Salvador.[262] The Court has competence to decide on contentious cases concerning this right based on Article

[262] As pertinent for this case, this article stipulates that: 1. Everyone has the right to education. 2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in

19(6) of the Protocol.[263] Also, this right is established in various international instruments.[264] Moreover, the Committee on Economic, Social and Cultural Rights has emphasized that the right to education is the epitome of the indivisibility and interdependence of all human rights, and that "Education is both a human right in itself and an indispensable means of realizing other human rights."[265]

235. Furthermore, the Committee on Economic, Social and Cultural Rights has asserted that, in order to guarantee the right to education, "education in all its forms and at all levels shall exhibit the following essential and interrelated features: (i) availability; (ii) accessibility; (iii) acceptability, and (iv) adaptability:[266]

> (a) Availability - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;
>
> (b) Accessibility - educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:
>
> (i) Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31-37 on non-discrimination);
>
> (ii) Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a "distance learning" programme);

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a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace. 3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education: (a) Primary education should be compulsory and accessible to all without cost; (b) Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education; (c) Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education […]."

263 Article 19(6) of the Protocol permits the application of the system of individual petitions regulated by Articles 44 to 51 and 61 to 69 of the American Convention on Human Rights if there is a violation of Articles 8(1) (Trade Union Rights) and 13 (Right to Education) of the Protocol.

264 The International Covenant on Economic, Social and Cultural Rights (Articles 13 and 14), the Charter of the Organization of American States (Article 49), the American Declaration of the Rights and Duties of Man (Article XII) and the Universal Declaration on Human Rights (Article 26) are some reference points that specify State obligations or duties in relation to the right to education.

265 *Cf.* United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General comment No. 13, E/C.12/1999/10, 8 December 1999, para. 1.

266 *Cf.* United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General comment No. 13, E/C.12/1999/10, 8 December 1999, para. 6.

(iii) Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available "free to all", States parties are required to progressively introduce free secondary and higher education;

(c) Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State (see art. 13 (3) and (4));

(d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

7. When considering the appropriate application of these "interrelated and essential features" the best interests of the student shall be a primary consideration.

236. Nevertheless, the Court notes that, historically, persons with HIV have been discriminated against owing to different social and cultural beliefs that have stigmatized the illness. Thus, the fact that a person is living with HIV/AIDS, or even the mere assumption that he or she has HIV/AIDS, may create social and attitudinal barriers to that person having equal access to all his or her rights. The relationship between this type of barrier and a person's health status justifies the use of the social model of disability as a relevant approach to assess the scope of some of the rights involved in this case.

237. As part of the evolution of the concept of disability, the social model of disability understands disability as the result of the interaction between the functional characteristics of a person and the barriers in his or her surroundings.[267] This Court has established that disability is not defined exclusively by the presence of physical, mental, intellectual or sensory impairments, but interacts with the barriers or limitations that exist in society for individuals to be able to exercise their rights effectively.[268]

238. Thus, living with HIV is not *per se* a situation of disability. However, in some circumstances, the attitudinal barriers faced by those living with HIV mean that the circumstances around them place them in a situation of disability. In other words, the medical condition of living with HIV may, potentially, result in disability owing to social and attitudinal barriers. Thus, the determination of whether someone can be considered a person with disability depends on their relationship with their surroundings, and does not respond solely to a list of diagnoses. Therefore, in some situations, persons living with HIV/AIDS may

[267] *Cf. Case of Furlan and family v. Argentina*, para. 133. In this regard, the Convention on the Rights of Persons with Disabilities recognizes that: "disability is an evolving concept" and that persons with disability "include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." Ecuador ratified this Convention on April 3, 2008.

[268] *Cf. Case of Furlan and family v. Argentina*, para. 133, 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, paras. 291 and 292. See also, article 1 of the the Convention on the Rights of Persons with Disabilities.

be considered persons with disabilities as conceived in the Convention on the Rights of Persons with Disabilities.[269]

239. The Court notes that various international agencies have spoken out about the close relationship that exists between HIV/AIDS and disability owing to the different physical ailments that may occur owing to the illness, as well as to the resulting social barriers. UNAIDS has affirmed that one of the erroneous perceptions of HIV/AIDS is considering that persons with HIV are a threat to public health.[270] In addition, the European Court of Human Rights, in the case of *Kiyutin v. Russia* considered that a distinction made based on the health status of a person, including HIV infection, should be covered by the term disability or, similarly, by the term "other situation" in the text of Article 14 of the European Convention on Human Rights.[271] Furthermore, the Court underscores that some States and constitutional courts have recognized the condition of living with HIV as a form of disability.[272]

240. Bearing in mind these characteristics, and based on the situation of vulnerability that Talía has faced, the Court finds it pertinent to clarify some elements of the right to education of persons living with medical conditions that could result in disability such as HIV/AIDS. In this regard, it will also refer to some elements associated with the right to education of persons with disabilities. On this point, the United Nations International Guidelines on

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269 Thus, the brief on disability and HIV policy of the World Health Organization, the United Nations High Commissioner for Human Rights and UNAIDS recognizes that when economic, political or social barriers are erected to the effective equal participation of a person with HIV/AIDS, it may be considered that the person has a disability. *Cf.* World Health Organization. Disability and HIV Policy Brief. 1 April 2009. Similarly, in 1996, the Joint Programme on HIV/AIDS of the United Nations (UNAIDS) recommended that HIV should be considered a disability, insofar as persons with the virus suffer constant discrimination owing to their condition. In this regard, it stated: "The consequences of the disability of the person who is HIV asymptomatic is that persons living with HIV are frequently discriminated against because it is erroneously considered that they do not function; there is an erroneous perception that they are a threat to public health. Therefore, although they are not disabled by the conditions relating to HIV, they are by the discriminatory treatment they received owing to their HIV status. The result is that they are denied the possibility of being productive, self-sufficient, and full and equal members of society." UNAIDS Statement on HIV/AIDS and Disability. United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-eighth session, August 1996.

270 *Cf.* Testimony of UNAIDS HIV/AIDS and Disability. United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-eighth session, August 1996, at which it was recommended that HIV be considered a disability.

271 *Cf. ECHR, Kiyutin v. Rusia,* (No. 2700/10), Judgment of March 10, 2011, para. 57.

272 See, *inter alia*, in the United States of America: the Americans with Disabilities Act of 1990. Based on this document, the United States Department of Justice has stated that persons with HIV are protected under The Americans with Disabilities Act. In the United Kingdom: the Disability Discrimination Act (DDA) of 2005. In New Zealand: Human Rights Act of 1993. In Hong Kong: the 1995 Disability Discrimination Ordinance. For its part, the Peruvian Constitutional Court has indicated that, "taking into account that the State has implemented, as suggested in STC 02945-2003-AA/TC, specific measures to satisfy the social rights of patients with HIV/AIDS, this Court considers that it is opportune to extend the special protection recognized in article 7 of the Constitution to persons who suffer from a physical disability as a result of infection with HIV or the development of AIDS, because it is clear that the situation of evident vulnerability of this sector of the population requires enhanced protection so that such persons may exercise their fundamental rights fully, without being subject to discriminatory measures or arbitrary actions based merely on the fact of suffering this pathology. With this affirmation, this court reiterates, as indicated in the said article 7, that this large sector of the population has a right to respect for their dignity, and also a legal protection regime, care, rehabilitation and safety." Constitutional Court of Peru. Judgment of August 9, 2011. File No. 04749-2009-PA/TC, para. 31.

HIV/AIDS and Human Rights[273] establish the following on the right to education of persons with HIV/AIDS:

> "Firstly, both children and adults have the right to receive HIV-related education, particularly regarding prevention and care. Access to education concerning HIV is an essential life-saving component of effective prevention and care programmes. It is the State's obligation to ensure, in every cultural and religious tradition, that appropriate means are found so that effective HIV information is included in educational programmes inside and outside schools. The provision of education and information to children should not be considered as promoting early sexual experimentation; rather, as studies indicate, it delays sexual activity."[274]
>
> "Secondly, States should ensure that both children and adults living with HIV are not discriminatorily denied access to education, including access to schools, universities, scholarships and international education or subject to restrictions because of their HIV status. There is no public health rationale for such measures since there is no risk of transmitting HIV casually in educational settings."[275]
>
> Thirdly, States should, through education, promote understanding, respect, tolerance and non-discrimination in relation to persons living with HIV.[276]

241. As can be seen, there are three obligations inherent in the right to education in the case of persons living with HIV/AIDS: (i) the right to have timely, prejudice-free information on HIV/AIDS; (ii) the prohibition to deny access to educational establishments to persons with HIV/AIDS, and (iii) the right that education should promote their inclusion and non-discrimination by their social milieu. The Court will now examine these obligations when assessing the dispute concerning the way in which Talía was expelled from the school she was attending owing to the presumed risk that she posed for her companions.

B. Right to remain within the education system, right not to be discriminated against, and adaptability in relation to the right to education

242. Based on the facts of this case, when establishing whether discrimination existed that violated Article 13 of the Protocol of San Salvador, the Court will begin by examining the expulsion of Talía from the school in which she was studying, in the context of a justification based on the "interests of all the other students." Then, the Court will examine some of the

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[273] Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint Programme of the United Nations on HIV/AIDS (UNAIDS), *International Guidelines on HIV/AIDS and Human Rights.* 2006 consolidated version.

[274] Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint Programme of the United Nations on HIV/AIDS (UNAIDS), *International Guidelines on HIV/AIDS and Human Rights.* 2006 consolidated version, para. 136.

[275] Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint Programme of the United Nations on HIV/AIDS (UNAIDS), *International Guidelines on HIV/AIDS and Human Rights.* 2006 consolidated version, para. 137. Meanwhile, article 24 of the Convention on the Rights of Persons with Disabilities, indicates that: "2. In realizing this right [to education], States Parties shall ensure that: (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability; (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live."

[276] Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint Programme of the United Nations on HIV/AIDS (UNAIDS), *International Guidelines on HIV/AIDS and Human Rights.* 2006 consolidated version, para. 137.

problems concerning stigmatization in Talía's access to education following her dismissal from that school.

243. However, first the Court observes that the representatives have argued the violation of Article 24 of the American Convention in relation to all the aspects related to the alleged discrimination in this case. In this regard, in relation to Articles 1(1) and 24 of the Convention, the Court has indicated that "the difference between the two articles is based on the fact that the general obligation under Article 1(1) refers to the State's obligation to respect and ensure the rights contained in the American Convention "without any discrimination." In other words, if a State discriminates with regard to the respect or guarantee of a right recognized in the Convention, it would violate Article 1(1) and the substantive right in question. If, to the contrary, the discrimination refers to an unequal protection of domestic law or its application, the fact should be examined in light of Article 24."[277] Given that, in this case, the facts do not constitute an unequal protection due to a domestic law or its application, it is not for the Court to analyze the presumed violation of the right to equal protection of the law contained in Article 24 of the Convention. Consequently, the Court will only examine the alleged violation of the obligation to respect and ensure the rights recognized in the American Convention without any discrimination, established in Article 1(1) of the Convention, in relation to Talía's right to education.

244. In order to determine whether, in this case, there has been a violation of the obligation to respect and ensure rights without discrimination, the Court will analyze: (a) whether there is a decisive or causal nexus or link between the health status and the differentiated treatment applied by the State authorities in the context of the education system, and (b) the alleged justification for the difference in treatment, in order to determine whether this justification constituted discriminatory treatment that violated the right to education in this specific case.

B.1. The difference in treatment based on Talía's medical condition when she was expelled from school

245. Teresa Lluy filed an application for constitutional protection in order to safeguard Talía's right to education owing to her dismissal from the Zoila Aurora Palacios School. This application for *amparo* was declared inadmissible by the Third Contentious Court of Cuenca, on the grounds that "there [was] a conflict of interests between the individual rights and guarantees of [Talía] and the interests of the rest of the students,"[278] and thus "the conflict [led to] the prevalence of the social and collective [rights] – in other words, the right to life prevailed over the right to education."[279]

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277 *Cf. Case of Apitz Barbera et al. v. Venezuela. Preliminary objection, Merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of June 22, 2015. Series C No. 293, paras. 216 to 218.

278 *Amparo* judgment of the Third Contentious Court of Cuenca of February 11, 2000 (evidence file, folio 1148).

279 *Amparo* judgment of the Third Contentious Court of Cuenca of February 11, 2000 (evidence file, folio 1148).

246. In order to reach the conclusion that Talía must continue her education "by means of individualized and distance education,"[280] the Contentious Court took into account the testimony of SA, the director of the Zoila Aurora Palacios School, and the teacher, APA, provided during the public hearing held on February 9, 2001. It also took into account the written statements provided by Teresa Lluy of Drs. JOM and NV, and of RG, the social worker from the Health Directorate, who coordinated the training on HIV/AIDS for the administrative and teaching staff of the Zoila Aurora Palacios School.

247. Similarly, during the public hearing, the Regional Deputy Secretary for Education of the southern region testified and stated that "no order had ever been given that [Talía] should be expelled from the school."[281] He indicated that, although she was temporarily suspended, this was authorized by law and was in place "until the corresponding medical examinations [had been] completed guaranteeing that the [child] would not infect the other children and personnel in contact with her with her unfortunate illness."[282] Therefore, he asked the Court "that the lesser right be sacrificed to the greater one, which is the educational community of the said school."[283]

248. The school director argued that what had been done was to proceed "to take decisions that involved precautionary measures for the health of the children at the basic primary level and that, also, would not violate the human rights of the children." Thus, in order to incorporate Talía into the school, she was required to provide "medical reports that guaranteed the health and well-being of the other children."[284] According to the director, these certificates were provide promptly, and they specified that Talía had HIV and that her hematological conditions were good. However, he indicated that Talía "had some hemorrhages at school due to an illness called [idiopathic thrombocytopenic purpura],"[285] an illness that, according to the director, meant that "the risks of infection [were] greater."[286] He also considered, as an additional risk, the fact that Talía was in the first year of basic education "where the children worked with sharp objects in the course of their different activities."[287]

249. Meanwhile, the teacher, APA, testified that Talía had "attended classes normally until November 26." She stated that, "as the class teacher, [she] found out about [Talía's] problem," and, therefore, asked Teresa Lluy to attend a meeting with the school director in order to discover whether or not Talía had HIV. At that meeting, Teresa told them that Talía's HIV "was due to a transfusion of blood from the Red Cross," because she had had a problem with her platelets. In addition, APA affirmed that, in the training session provided by the

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280 *Amparo* judgment of the Third Contentious Court of Cuenca of February 11, 2000 (evidence file, folio 1149).

281 Public hearing on the application for constitutional protection of February 9, 2000 (evidence file, folio 1132).

282 Public hearing on the application for constitutional protection of February 9, 2000 (evidence file, folio 1132).

283 Public hearing on the application for constitutional protection of February 9, 2000 (evidence file, folio 1133).

284 Public hearing on the application for constitutional protection of February 9, 2000 (evidence file, folio 1134).

285 Public hearing on the application for constitutional protection of February 9, 2000 (evidence file, folio 1134).

286 Public hearing on the application for constitutional protection of February 9, 2000 (evidence file, folio 1134).

287 Public hearing on the application for constitutional protection of February 9, 2000 (evidence file, folio 1134).

Health Directorate and the Education Directorate, Talía's doctor, Dr. JO told her that Talía's hematological illness was under control and, regarding the risk of infecting Talía's companions, the doctor had explained to her that "there [was] a very low percentage of risk; but the risk exist[ed]."[288] APA also stated that she had "witnesses of the hemorrhages suffered by [Talía]."[289]

250. In addition, the case file contains notes by Drs. JOM and NV, indicating that Talía was "a patient with the human immunodeficiency virus that was asymptomatic [up until that time],"[290] and also that "her hematological conditions were good."[291] It also includes the testimony of RG, a social worker from the Health Directorate, who coordinated the HIV/AIDS training of the administrative and teaching staff of the Zoila Aurora Palacios School, and who explained that the virus was a reality with which they should learn to live, and that "there [were] risks; however, these would be minimal if the biosafety regulations [were] respected."[292]

251. In the decision on the *amparo*, the Contentious Court established that it was "inevitable that the temporary suspension of [Talía] from attending the school to receive education was subject to medical examinations that reported fully on her health status."[293] Regarding the medical documents, the court stated that Talía "suffers from the HIV virus aggravated by the diagnosis of [idiopathic thrombocytopenic purpura],"[294] and that the latter illness "corresponds to a decrease in the platelets without apparent cause, and this produces bleeding."[295] In this regard, the court concluded that "the bleeding detected by the teacher […] signifie[d] a possible risk of contamination for the other students at the school."[296]

252. Taking these elements into account, the Court notes that the decision taken at the domestic level was based, above all, on the medical condition of Talía associated with both idiopathic thrombocytopenic purpura and HIV. Consequently, this Court concludes that a differentiated treatment was accorded based on Talía's health status. In order to decide whether this differentiated treatment constituted discrimination, the Court will now analyze the State's justification for this difference in treatment; that is, the alleged protection of the other children's safety.

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288 Public hearing on the application for constitutional protection of February 9, 2000 (evidence file, folio 1135).

289 Public hearing on the application for constitutional protection of February 9, 2000 (evidence file, folio 1135).

290 Note of JOM of December 21, 1999 (evidence file, folio 1138).

291 Note of NV of December 7, 1999 (evidence file, folio 1139).

292 Note of RG of February 10, 2000 (evidence file, folios 1140 and 1141).

293 *Amparo* judgment of the Third Contentious Court of Cuenca of February 11, 2000, (evidence file, folio 1148).

294 *Amparo* judgment of the Third Contentious Court of Cuenca of February 11, 2000, (evidence file, folio 1148).

295 *Amparo* judgment of the Third Contentious Court of Cuenca of February 11, 2000, (evidence file, folio 1148).

296 *Amparo* judgment of the Third Contentious Court of Cuenca of February 11, 2000, (evidence file, folio 1148).

B.2. The condition of being a person with HIV as a category protected by Article 1(1) of the American Convention

253. The American Convention does not contain an explicit definition of the concept of "discrimination"; however, based on different references in the respective *corpus iuris,* the Court has indicated that discrimination relates to:

> any distinction, exclusion, or restriction based on specific reasons, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other social condition, which has the intention or effect of nullifying or impairing the equal recognition, enjoyment, or exercise of the human rights and fundamental freedoms of all human beings.[297]

254. Some of the main international human rights treaties have been interpreted to include HIV as a reason for which discrimination is prohibited. For example, the International Covenant on Economic, Social and Cultural Rights prohibits discrimination for different reasons, including "any other social condition," and the Committee on Economic, Social and Cultural Rights of the United Nations has confirmed that the "health status (including HIV/AIDS)" is a prohibited reason for discrimination.[298] The Committee on the Rights of the Child has reached the same conclusion in relation to Article 2 of the Convention on the Rights of the Child[299] and also the former Commission on Human Rights indicated that discrimination, actual or presumed, against persons with HIV/AIDS or any other medical condition is protected among other social conditions present in non-discrimination provisions.[300] The United Nations Special Rapporteurs on the right to health have adopted this position.[301]

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[297] See *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 81, which cites the definition of the Human Rights Committee of the International Covenant on Civil and Political Rights. United Nations, Human Rights Committee, General comment No. 18, Non-discrimination, 10 November 1989, CCPR/C/37, para. 6. In the universal sphere, the Committee developed that definition, taking as a basis the definition of discrimination established in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 1(1) of the Convention on the Elimination of All Forms of Discrimination against Women. In the inter-American sphere, the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities has developed the following definition: "The term 'disability against persons with disabilities' means any distinction, exclusion, or restriction based on a disability, record of disability, conditions resulting form a previous disability, or perception of disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.

[298] Committee on Economic, Social and Cultural Rights, 'General comment No. 14: The right to enjoy the highest attainable standard of health' of 11 August 2000. UN Doc E/C.12/2000/4, para. 18.

[299] Committee on the Rights of the Child of the United Nations, 'General comment No. 3: HIV/AIDS and the rights of the child' of March 17 2003. UN Doc CRC/GC/2003/3, para. 9.

[300] In this regard, the former Commission indicated that: "discrimination on the basis of AIDS or HIV status, actual or presumed, is prohibited by existing international human rights standards, and that the term "or other status" in non-discrimination provisions in international human rights texts can be interpreted to cover health status, including HIV/AIDS" *Cf. The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)*, United Nations Commission on Human Rights, Resolution 1995/44, 3 March 1995, para. 1.

[301] United Nations Commission on Human Rights, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." (2003) UN Doc E/CN.4/2003/58 15, paras. 64 to 75; General Assembly of the United Nations, 'Report of the Special Rapporteur of the Commission

255. In the context of this *corpus iuris* on the matter, the Court considers that HIV is a condition based on which discrimination is prohibited under the term "any other social condition" established in Article 1(1) of the American Convention. This protection against discrimination under "any other social condition" also includes the situation of persons with HIV as an aspect that may lead to disability in those cases in which, in addition to the physical effects of HIV, economic, social and other barriers derived from HIV exist that affect their development and participation in society (*supra* para. 240).

256. The Court underscores that the direct legal effect of the fact that a condition or characteristic of a person falls within the categories included in Article 1(1) of the Convention is that judicial scrutiny should be stricter when assessing differences in treatment based on these categories. The authorities have a limited possibility of differentiating based on such questionable criteria, and only in those cases in which they prove that there are overriding needs and that using differentiation is the sole way of achieving those overriding needs, might it be possible to admit the use of that category. As an example of the strict assessment of equality, some of the decisions adopted by the United States Supreme Court of Justice,[302] the Court Constitutional of Colombia,[303] the Supreme Court of Argentina,[304] and

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on Human Rights on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.' (2010) UN Doc A/65/255, para. 8.

[302] "[…] Classifications based on race or national origin […] and classifications affecting fundamental rights, […] are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. […] To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Cf. Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) and *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

[303] In judgments C-093 and C-671 of 2001, the Constitutional Court explained the scope of this type of scrutiny, called the integrated equality test: "[i]n order to determine whether the discriminatory treatment violates the fundamental right to equality, the Court has elaborated a model of analysis that integrates the assessment of proportionality and the test of equality. What this model does, basically, is repeat and harmonize the elements of the European test or proportionality assessment with the contributions of the United States tendency. Thus, the methodological stages of the European test are used, which include the following stages of analysis: (i) the court examines whether the measures is suitable; in other words, whether it is an appropriate means to achieve a constitutionally-valid end; (ii) it analyzes whether the different treatment is necessary or essential, and (iii) it analyzes the proportionality in its strict sense in order to determine whether the unequal treatment sacrifices constitutional values and principles that have greater relevance than those achieved with the different measures. In addition, the court looks at the different levels of intensity when applying the equality scrutinies or tests. These levels may vary between (i) strict, in which the different treatment must constitute a necessary measure to achieve a constitutionally-essential objective; (ii) intermediate, in which the end must be constituionally important and the means must be highly conducive to achieve the proposed objective, and (iii) flexible or merely reasonable; in other words, that it is sufficient that the measure is potentially suitable to achieve the purpose that is not prohibited by law. This must be applied according to the nature of the disputed legislative provision or administrative measure." The integrated test was applied in a case of discrimination based on HIV in Judgment T-376 of 2013.

[304] "Presumption of the unconstitutionality of the local norm could only be eliminated by the defendant province by providing meticulous evidence on the objectives that it had tried to safeguard and on the means it had used to this end. Regarding the former, they must be substantial and it is not sufficient that they are merely convenient. Regarding the latter, a general "appropriateness" for those objectives shall be insufficient; rather it should be considered whether the means promote those objectives effectively and, also, whether there are other alternatives that are less restrictive of the rights in play than those imposed by the contested regulation." Supreme Court of Justice of the Nation of Argentina, Case of Hooft, Pedro Cornelio Federico *v.* Province of Buenos Aires, Ref. action to declare unconstitutionality, November 16, 2004, para. 6.

the Constitutional Chamber of the Supreme Court of Justice of Costa Rica can be mentioned.[305]

257. In this context, the Court stresses that, in the case of the prohibition of discrimination based on one of the protected categories established in Article 1(1) of the Convention, the possible restriction of a right requires rigorous and substantial justification, which means that the reasons used by the State to implement a differentiated treatment must be particularly serious and be substantiated by an exhaustive reasoning. In addition, the burden of proof is reversed, which means that it corresponds to the authority to prove that neither the purpose nor the effect of its decision was discriminatory.[306] In this case, having realized that the differentiated treatment of Talía was based on one of the prohibited categories, the State had the obligation to demonstrate that the decision to expel Talía did not have a discriminatory purpose or effect. In order to examine the justification put forward by the State, the Court will use, within the framework of the strict assessment of equality, the so-called rule of proportionality, which has been used previously to measure whether the limitation of a right is compatible with the American Convention.[307]

258. It is for the foregoing reasons that, if a difference in treatment is stipulated on the basis of a medical condition or illness, this difference in treatment must be made based on medical criteria and the real health status, taking into account each specific case, and evaluating the real and proved harm or risks, and not the speculative or imaginary ones. Therefore, speculations, presumptions, stereotypes or general consideration on persons with HIV/AIDS or any other type of illness cannot be admissible, even if these prejudices are

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[305] The Constitutional Chamber has emphasized that when unnecessary and unreasonable restrictions are imposed on persons with AIDS in the workplace, this constitutes discrimination. Any distinction of treatment or any normative differentiation requires a strong, reasonable and proportionate justification. Supreme Court of Justice of Costa Rica. Judgment No. 01874 of January 29, 2010.

[306] *Cf. Mutatis mutandi*, *Case of Atala Riffo and daughters v. Chile*, para. 124, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 228.

[307] This principle requires that a measure must have a legitimate purpose or objective and that it is a suitable, necessary proportionate measure to achieve the purpose. To this end, the Court will: (i) verify whether the differentiation in treatment is founded on a legitimate objective pursuant to the Convention; (ii) examine whether the differentiation was appropriate or suitable to achieve the objective sought; in other words, whether there is a logical relationship of the means to an end between the objective and the means *(cf. Case of Kimel v. Argentina*, para. 70); (iii) assess the need for this measure; this requires it to examine whether alternatives exist to achieve the legtimate end sought and to specify their greater or lesser harmfulness (*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. 93; *Case of Kimel v. Argentina*, para. 74; *Case of Castañeda Gutman v. Mexico*, para. 196; *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2009. Series C No. 207, para. 72), and (iv) analyze the strict proportionality of the measure; in other words, whether the differentiation of treatment guarantees, broadly, the objective sought, without nullifying the right to equality and the right to education. To make this weighing up, the Court must examine three elements: the degree to which one of the rights in play has been affected, determining whether the intensity of these effects was serious, intermediate or moderate; the importance of satisfying the contrary right, and whether the satisfaction of the latter right justifies the restriction of the other right (*Case of Kimel v. Argentina*, para. 84; *Case of Usón Ramírez v. Venezuela*, para. 80; *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, paras. 273 and 274, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 144).

shielded by reasons that appear to be legitimate, such as the protection of the right to life or public health.[308]

259. In this regard, in the case of *Kiyutin v. Russia*, the European Court considered that the inadequate justification of the restriction of the right to be a resident owing to the fact that the victim had HIV constituted discriminatory treatment. In addition, the European Court observed that the authorities never took the victim's real health status into account or the family ties that could connect him to Russia. Consequently, it established the vulnerable situation of persons with HIV/AIDS and the prejudices of which they have been victims over the last three decades.[309] This case is significant because it emphasized that the adoption of measures concerning persons with HIV/AIDS must be based on their real health status.[310]

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[308] *Cf. ECHR. Case of Kiyutin v. Russia* (Application No. 2700/10), 15 September 2011. For its part, the Colombian Constitutional Court, when examing the violation of the right to equality of a student with HIV who was prohibited from carrying out his practicum as a nursing auxiliary in a hospital during his studies owing to the alleged risk of infection, indicated that it was necessary to make a strict assessment of equality, because the differentiated treatment was based: (i) on a criterion of suspected discrimination (health status of the petitioner as an HIV carrier), and (ii) because the measure could be unlawfully restricting fundamental rights such as the right to education or the right to freedom to choose a profession or trade, among others, of a person who, owing to his health condition was in an evident situation of vulnerability. The Constitutional Court indicated that "[t] mere condition of HIV carrier cannot be argued to curtail the profession or career of a person even though he is an HIV carrier, because this condition does not constitute a sufficient reason to recommend other professional options. […] The factors that determine the health risk of a health professional infected with HIV relate to his immunological status, the type of occupational environment to which he is exposed and the correct use of protection barriers, because the careful practice of the procedures to control infections protect the patients and the health care providers against infectious-contagious diseases. Consequently, in principle, any restrictive measures adopted against this group that has been discriminated against in the past, cannot signify the limitation of the exercise of a profession, based merely on the condition, and also, in each specific case, its characteristics must be analyzed, observing whether or not the restrictive measure or the differentiated treatment is in keeping with the Constitution." See Judgment T-948 of 2008. Meanwhile, the Supreme Court of Justice of Mexico has indicated that discharging a person from the armed forces because they were HIV seropositive was illegal, because it violated the constitutional principle of non-discrimination based on health. Supreme Court of Justice of Mexico in plenary session 131/2007. *Amparo* under view 307/2007.

[309] *ECHR. Case of Kiyutin v. Russia* (Application No. 2700/10), 15 September 2011.

[310] Similarly, the Colombian Constitutional Court has analyzed discrimination against a person with HIV deprived of liberty who, because he was the victim of constant attacks owing to his condition, was transferred to a prison located in another city in which his family lived. However, following another decision, he was returned to the previous prison where he had been the victim of several attacks. To justify the transfer, the prison authorities alleged that this person had threatened to inject other prisoners with his blood. The Constitutional Court asserted that the medical condition and, in particular, having HIV/AIDS, is a protected category and a questionable criterion for differentiation. On making a strict assessment of equality, it indicated that: "although the safety of the prison population, and especially the importance of avoiding that a person injects prisoners with blood contaminated with the HIV virus, could be considered a legitimate and even essential reason, and that the transfer from the Barranquilla prison to Sincelejo appears suitable to achieve this, the Chamber does not consider that it is a *necessary* measure, because the prison authorities should be able to control the access to syringes and other elements of risk, especially if they have identified this kind of threat. In addition, they have the obligation to control acts of violence among persons deprived of liberty, and the duty to provide appropriate social and psychological treatment, if a person should be considered a threat to that entity. Similarly, the measure is evidently disproportionate because the effect on the rights of the petitioner, a person under special constitutional protection is particularly intense, while the supposed threat to the public safety of the prison has not been factually proved, because the Director of El Bosque merely indicated that "apparently" two inmates with HIV intended to attack the whole prison population. This clearly reveals the existence of discriminatory conduct against the petitioner by the Director of the El Bosque Prison, because the Chamber finds that, without any factual basis, this official attributes to Rubén a particularly censurable conduct, and this is an aspect in which this case differs from others in which a

B.3. Reversal of the burden of proof, suitability and strict necessity of the measure used to implement the differentiation of treatment

260. As can be seen, the analysis of whether or not a child with HIV, owing to a hematological condition, should be dismissed from an educational establishment should be made strictly and rigorously in order to ensure that this differentiation is not considered discrimination. It is the State's responsibility to determine whether there is, indeed, a reasonable and objective justification for making the distinction. In this regard, in order to establish whether a difference in treatment was based on a questionable category and to determine whether it constitutes discrimination, it is necessary to examine the arguments of the domestic authorities, their conduct, the language used, and the context in which the decision was taken.[311]

261. The Court notes that, in this case, initially, the restriction of Talía's right to education was based on the decision of the educational authorities to expel her from the Zoila Aurora Palacios School, a decision that was subsequently endorsed by the decision of the Third Contentious Court of Cuenca.

262. In this case, the Court observes that Talía attended the school normally until her teacher found out about her condition as a child with HIV. The educational authorities – her teacher, the director of the school, and the Deputy Secretary of Education – instead of providing her with specialized attention, in view of her vulnerable situation, assumed that she represented a risk for the other children and suspended her, before subsequently expelling her.[312] In this regard, the best interests of the children, both Talía and her class companions, required the *adaptability* of the educational environment to her condition as a child with HIV, As already mentioned (*supra* para. 235) according to the Committee on Economic, Social and

presumption of discrimination has been applied indicating the use of a rule of assessment of the evidence designed to fill the probative gaps derived from the difficulty of proving a discriminatory act." Judgment T-376 of 2013.

311 Cf. *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*. Merits, reparations and costs. Judgment of May 29, 2014. Series C No. 279, para.226 and *Case of Case of Atala Riffo and daughters v. Chile*, para. 95.

312 To the contrary, high courts such as the Constitutional Chamber of the Supreme Court of Justice of Costa Rica have indicated that, in certain cases, the best interests of the child prevail over other legitimate rights, as well as the State's obligation to ensure the right to education and to take steps to eliminate discrimination in matters concerning education. This was asserted in the case of a child with Asperger's Syndrome who was in the custody the Child Welfare Institute and who was not being taken to school because the Institute argued that it did not have the means to provide him with access to the right to education. The Constitutional Chamber of the Supreme Court determined that, based on the principle of the child's best interests, "the right of the child, depending on the specific case, prevails over other rights, even though these may be legitimate." In addition, it indicated that, with regard to education, adaptation of the curriculum also entailed adaptations in access in order to ensure the right to education under equal conditions. The Chamber considered that, "when a child requires special adjustments for his schooling, the right to education is not guaranteed by mere enrolment in an educational establishment, but it should be provided in accordance with his needs. If not, the minor would be studying under discriminatory conditions." It also emphasized that the State should take measures to eliminate discrimination progressively and to provide persons with disabilities with the required support services and technical assistance to ensure that they were able to exercise their rights and obligations. Judgment of the Supreme Court of Justice of Costa Rica, Constitutional Chamber. Ruling No. 2014-012897 of 2014. Available at: http://jurisprudencia.poderjudicial.go.cr/SCIJ_PJ/busqueda/jurisprudenciajur_Documento.aspx?param1=Ficha_Judgment&nValor1=1&nValor2=631082&strTipM=T&strDirSel=directo

Cultural Rights, "education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings."[313] Meanwhile, the Committee on the Rights of the Child, in its General Comment No. 1 on the Aims of Education, indicated that "teaching methods should be tailored to the different needs of different children."[314]

263. The Court observes that the educational authorities did not take measures to combat the prejudice concerning Talía's illness. Regarding the right to timely and prejudice-free information, the former United Nations Commission on Human Rights indicated that State must "take all the necessary steps, including appropriate education, training and media programmes, to combat any type of discrimination, prejudice and stigma" against persons suffering from HIV/AIDS.[315]

264. Also, the Court underlines that the protection of essential or important interests such as the personal integrity of the individual, owing to supposed risks to the health of others, should be implemented based on the specific evaluation of the said health status and the real and proven risks, and not the speculative or imaginary ones that it could give rise to. It has already been mentioned (*supra* para. 260) that speculations, presumptions and stereotypes concerning the risks of certain illnesses are inadmissible, particularly when they reproduce the stigma surrounding such illnesses.[316]

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[313] United Nations, Committee on Economic, Social and Cultural Rights. General comment 13*, The right to education* (Article 13 of the Covenant) UN Doc. E/C.12/1999/10, para. 6.

[314] Committee on the Rights of the Child. General comment No. 1, The Aims of Education. UN Doc. HRI/GEN/1/Rev.7 at 332, para. 9.

[315] The former Commission established that it: "further requests States to take all the necessary steps, including appropriate education, training and media programmes, to combat discrimination, prejudice and stigma, and to ensure the full enjoyment of civil, political, economic, social and cultural rights by people infected and affected by HIV/AIDS." *Cf.* United Nations, Commission on Human Rights. *The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS).* UN Doc. E/CN.4/RES/1999/49, 27 April 1999, para. 7.

[316] Thus, for example, the Colombian Constitutional Court had to examine the above-mentioned case on whether the right to equality of a student had been violated by the decision of a hospital to prevent him from carrying out the necessary professional practicum in its facilities to graduate as a nursing assistant, with the argument that he was a carrier of HIV/AIDS, because this represented a risk to both the patients and the student himself, owing to the nature of the activities involved in this type of medical practice. The Court indicated that, when weighing issues of the risks involved for individuals and the situation of a person who is an HIV carrier:

> "Returning to the application of the test to this case, and weighing what has been established by the concepts transcribed above, the decision taken by the manager of the defendant entity, which consisted in preventing the exercise of the professional practice in the Clinic's facilities arguing the protection of X-503 as an HIV carrier and that of the patients who might have contact with him, the Chamber concludes that the measures was not necessary, because a nursing assistant student is exposed to the same risks arising from a hospital environment in which activities inherent in this profession are performed, which, in the specific case of X-503, are not increased in a gynecological-obstetric practice or in the future exercise of his profession as a nursing assistant.
>
> In addition, the condition as a HIV seropositive carrier of X-503, according to the opinions and arguments of the defendant entities, does not represent any additional risk for the patients of any service in general and of the gynecological-obstetric service in particular who might come into contact with the petitioner, because this is the opinion of the experts in this area, concluding that tranmission by health professionals is improbable.

265. In conclusion, the Inter-American Court observes that since, in abstract, the "collective interest" and the "integrity and life" of children is a legitimate objective, merely referring to this without specifically proving the risks and harm that could be caused by the health status of a child who is in school with other children, cannot be an adequate reason to restrict a protected right, which is to be able to exercise all human rights without any discrimination owing to a medical condition.[317] The best interests of the child cannot be used to protect discrimination against a child owing to her health status.[318]

266. In this case, a decision made based on unfounded and stereotypical presumptions concerning the possible risks related to HIV is not appropriate to ensure the legitimate

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In sum, the measure is not necessary because there is an alternative to the decision to completely prevent him from carrying out the practice; that is, the entity, as an institution that provides health care services, is obliged to provide general measures of biosafety and to ensure the availability of methods of protection for all the personnel under the occupational health program. Likewise, protocols exist for the prevention of biological risks that, when publicized and applied, significantly reduce the risks of contagion on both sides." Judgment T-948 of 2008.

317 *Cf. Case of Atala Riffo and daughters v. Chile*, para. 110. Similarly, another relevant case is revealed by the content of Judgment T-816 of 2005 of the Constitutional Court of Colombia, in which a person tried to enter the executive level of the National Police of Colombia, having passed the different examinations required to join the institution. In this case, the Police considered that the petitioner was not suitable because he was a person "infected" with HIV. Consequently, based on the precedent in this matter and protecting the right to equality, the Court stated: "It should be emphasized that although the decision to declare that the HIV carrier was not suitable was based on legitimate objectives, it does not comply with them, because this Chamber finds it evident that the person's condition, in relation to the execution of the academic activities of the National Police School, and even the activities of the National Police, does not constitute a threat to his life, or to that of his colleagues and, especially, is contrary to the prevalence of the general interest. Consequently, the action of the defendant entity in the petitioner's selection and admission procedure for the institution's executive course, does not comply with the mandates of the Constitution […]. [There has been] evident discrimination against the petitioner, when he is considered "unsuitable" merely because of his condition as a healthy carrier of the virus. […] [B]eyond any doubt, as revealed by the evidence in the case file, the petitioner has been a direct victim of discrimination that, consequently, has violated his right to equality, to the free development of his personality, and thus, to choose freely his profession or trade, which inevitably poses a threat to his life project." Judgment T-816 2005.

318 On this point, the Constitutional Chamber of the Supreme Court of Justice of Costa Rica had to analyze the situation of a child with Asperger's syndrome who was in sixth grade at school. The child suffered a crisis, became angry, and insulted and kicked his teacher. As a result, the teacher refused to accept the child in his classes, and the child therefore stopped receiving lessons regularly. The Constitutional Chamber ordered the Director of the school immediately to take the necessary steps, within her terms of reference, to ensure that the protected child was provided with the classes of science, mathematics and agriculture that he had missed owing to the alleged situation, as well as to apply the recommendations made by the National Special Education Counselor to adapt the educational process of the protected child to his particular situation. The Court underscores that this case is exemplary because the result of weighing the rights required the protection of the child's right to education and orders were given that the necessary adjustments be made so that the child could continue receiving classes, even if he suffered a crisis that could affect third parties. Judgment of the Supreme Court of Justice of Costa Rica, Constitutional Chamber. Ruling No. 15334-08. In another case of a child with Asperger's syndrome, the same Constitutional Chamber had to examine the refusal to enrol a child in school on the excuse that the authorities were not prepared to accept him in the institution. The Constitutional Chamber ordered the Ministry of Public Education to take the necessary steps to ensure that, within five days, the Ministry's experts would analyze the case of the protected child – with the participation of his mother, the psychologist and the neurologist who treated him – and determine where it was best to place him, considering his personal circumstances, as well as the characteristics of the educational establishments in the area. It also ordered that the necessary support be provided if the decision entailed a change of school. As can be seen, this case reveals the way in which the Chamber, protecting the child's right to education, ordered the Ministry of Public Education to become involved and to decide which would be the best school to attend to the child's needs. Judgment of the Supreme Court of Justice of Costa Rica, Constitutional Chamber. Ruling No. 7784-05.

objective of protecting the best interests of the child. The Court considers inadmissible considerations based on stereotypes owing to the health status of an individual; that is, preconceptions of attributes, conducts or characteristics of those living with a certain illness or the risk that this illness may have for others.[319] In this case, the measure adopted was related to the prejudices and stigma to which those living with HIV are subjected.

267. The restriction of the right to education was established on the basis of three reasons given in the decision of the Third Contentious Court of Cuenca: (1) the diagnosis that Talía had HIV; (2) Talía's hemorrhages as possible sources of infection, and (3) the conflict of interests between the life and integrity of Talía's companions and the right to education of Talía.

268. In this regard, the Court emphasizes that the general objective of protecting the life and personal integrity of the children who attended school with Talía was a legitimate objective and was also essential. As regards the best interests of the child, the Court reiterates that this principle, which governs the norms on the rights of the child, is based on the dignity of the human being, on the characteristics of children, and on the need to foster their development, taking full advantage of their potential.[320] Similarly, it should be noted that, in order to ensure, insofar as possible, that the best interests of the child prevail, the preamble to the Convention on the Rights of the Child establishes that children require "special care," and Article 19 of the American Convention indicates that every child should receive special "measures of protection."[321]

269. The domestic court based its decision on a supposed conflict between rights – namely, the right to life of the students and the right to education of Talía – taking into consideration Talía's alleged hemorrhages. However, the determination of the risk and, on this basis, deciding that the right to life and integrity of the students was the right that should prevail, was an erroneous decision based on presumptions about the implications of Talía's hematological ailment, its symptoms, and its possibility of infecting the other children with the HIV virus.

270. The Court considers that when the evidence in the case was assessed in order to establish the imminence of the supposed risk, the medical evidence provided was not taken into account, and preference was accorded, based on prejudices concerning the illness, to the general testimony on the hemorrhages. Indeed, the Court observes that there was a doctor's report that gave assurances that Talía's hematological conditions were good.[322] In addition,

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319 Regarding the concept of stereotypes, *mutatis mutandi*, *Cf. Case of Atala Riffo and daughters v. Chile*, para. 111 *and Case of González et al. ("Cotton Field") v. Mexico*, para. 401.

320 *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 66 and *Juridical Status and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 56. Similarly, see: Preamble to the American Convention.

321 *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, para. 164 and *Juridical Status and Human Rights of the Child*, Advisory Opinion, para. 60. Similarly, see: Preamble to the American Convention.

322 *Cf.* Note of NV of December 7, 1999 (evidence file, folio 1139).

the school was aware of the diagnosis of idiopathic thrombocytopenic purpura following an interview with Teresa Lluy,[323] when she explained that Talía suffered from HIV, although at that time she was asymptomatic.[324]

271. In this regard, the decision of the domestic judge does not reveal a strict assessment of the need for the measure, inasmuch as he did not determine whether there were measures other than withdrawing her from the school and confining her to "individualized distance education." The arguments on the evidence provided were based on prejudices concerning the danger that HIV or idiopathic thrombocytopenic purpura might entail, but this was not apparent from any of the evidence provided to the proceedings, and that the domestic court found reliable when establishing that the testimony concerning the evidence had "not [been] contested or denounced as false."[325] This consideration did not take into account the infinitesimal percentage of risk of infection mentioned by both the medical experts and the teacher who gave testimony during the proceeding.

272. Considering that the criterion used to determine whether Talía represented a risk to the health of the other students at the school was her health status, it is evident that the judge should have provided weightier arguments determining rational and objective reasons that could lead to a restriction of Talía's right to education. These reasons, supported by the evidence obtained, should have been based on medical criteria in view of the specialized nature of the analysis to establish the supposed danger or risk to the students at the school.

273. The burden that Talía had to assume as a result of the stigma and stereotypes surrounding HIV accompanied her at different times. According to the testimony of the Lluy family and of Talía, which has not been contested by the State, they had to hide the HIV and the expulsion from the school in order to register her in other establishments. Talía was enrolled in the El Cebollar kindergarten, the Brumel School, the 12 de Abril School and the Ángel Polibio Chávez School. According to Teresa Lluy's testimony, "each time they found out who [they] were, [her] daughter was ostracized in some educational establishments […] alleging that they could not accept a child with HIV, because it was a risk for all the other students. Both the teachers and the parents, discriminated against [them], isolated [them], and insulted [them]."[326]

274. The Court concludes that the real and significant risk of infection that would have jeopardized the health of Talía's companions was extremely small. In the context of an assessment of the need and strict proportionality of the measure, the Court emphasizes that the means chosen constituted the most harmful and disproportionate of those available to meet the objective of protecting the integrity of the other children at the school. Although the judgment of the domestic court was intended to protect Talía's classmates, the reasoning provided in the decision did not prove that the decision was appropriate to achieve this objective. Thus, the assessment by the domestic authority should have included sufficient

323 Public hearing on the application for constitutional protection of February 9, 2000 (evidence file, folio 1134).

324 *Cf.* Note of JOM of December 21, 1999 (evidence file, folio 1138).

325 *Amparo* judgment of the Third Contentious Court of Cuenca of February 11, 2000 (evidence file, folio 1148).

326 Affidavit made by Teresa Lluy on April 22, 2014 (evidence file, folio 1082).

evidence that the reasons which justified the difference in treatment were not based on stereotypes and suppositions. In this case, the decision used abstract, stereotyped arguments to justify a decision that was extreme and unnecessary, so that the decision constituted discriminatory treatment against Talía. This treatment also reveals that the educational environment did not demonstrate any adaptability to Talía's situation by adopting the biosafety or similar measures that should exist in any educational establishment for the general prevention of the transmission of illnesses.

B.4. Attitudinal barriers associated with the stigma suffered by Talía and her family following her expulsion from school

275. According to the United Nations, discrimination resulting from being a person living with HIV "is not only wrong in itself but also creates and sustains conditions leading to societal vulnerability to infection by HIV, including lack of access to an enabling environment that will promote behavioral change and enable people to cope with HIV."[327] On this point, the *International Guidelines on HIV/AIDS and Human Rights* of the OHCHR and UNAIDS mention the promotion of a supportive and enabling environments for people living with HIV.[328]

276. In this case, the problems of the adaptability of the environment are revealed, among other matters, by the problems face by Talía after her expulsion from the Zoila Aurora Palacios School. The Lluy family had to look for schools that were far away to avoid the treatment that was harming Talía, who stated with regard to the time of her expulsion that she:

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[327] Office of the United Nations High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights*, 1996 and 2006, para. 107. Available at: http://www.ohchr.org/Documents/Publications/HIVAIDSGuidelinesen.pdf. UNAIDS has also indicated that: "[t]he stigma is linked to power and control at all levels of society as a whole; it creates social inequality and is strengthened by this. […] The stigma related to HIV/AIDS frequently leads to discrimination based on HIV/AIDS. In turn, this leads to the violation of the human rights of people living with HIV/AIDS [and] their families." Regarding the social stigma caused by HIV, UNAIDS has indicated that this is a characteristic that results in "considerable discredit" to an individual in the eyes of others. It also has important consequences on the way in which individuals see themselves. Much of the stigma related to HIV and AIDS is built on previous negative conceptions and reinforces them. The family and the community often perpetuate the stigma and discrimination, partly from fear, partly from ignorance, and partly because it is convenient to blame those who have been affected first. Often the stigma related to HIV uses and reinforces existing social inequalities. These include gender inequalities, inequalities that deny the rights of sexual workers, inequalities based on ethnic origin and inequalities associated with sexuality in general and with homosexuality and transexuality in particular. UNAIDS, "*Comunicar en VIH y SIDA. Manual de capacitación en VIH y SIDA para comunicadores sociales*," 2006. Available at: http://www.unicef.org/venezuela/spanish/Comunicar_sobre_VIH_ Sida.pdf p. 32.

[328] States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV and people with disabilities from discrimination in both the public and private sectors. States should, in collaboration with and through the community, promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities through community dialogue, specially designed social and health services and support to community groups. Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint Programme of the United Nations on HIV/AIDS (UNAIDS), *International Guidelines on HIV/AIDS and Human Rights.* 2006 consolidated version. Available at: http://www.ohchr.org/Documents/Publications/HIVAIDSGuidelinesen.pdf.

> "had many friends, but after [her] illness, their parents did not let them play with [her]. They gave her dirty looks; they did not want to say hello to [her] or look at [her]. They moved away, as if they were afraid of [her]. [She] felt very lonely, and didn't understand why."

277. Looking for schools so that Talía could complete her education was very complicated, because the different schools advised each other of the child's medical condition. Teresa Lluy indicated that when she went to a new school to enroll Talía "they already knew about [Talía and they] were not even allowed to enter [before they] were told that there were no places available and that [they] should leave."[329]

278. In this regard, the Committee on the Rights of the Child has indicated that "the key goal of education is the development of the individual child's personality, talents and abilities[; and] ensuring that essential life skills are learnt by every child."[330] Similarly, the Court underlines the importance of education in order to reduce the vulnerability of children with HIV/AIDS, by providing pertinent and appropriate information that contributes to improving the knowledge and understanding of HIV/AIDS, preventing negative attitudes towards people living with HIV/AIDS and eliminating discriminatory practices. In the case of children with HIV/AIDS, States must take measures to ensure that they have access to education "to the maximum extent possible."[331] In this regard, the Court recalls the indication of the Committee on the Rights of the Child that "[d]iscrimination against children […] affected by HIV/AIDS deprives them of the help and support they most require."[332]

279. In this case, the Court notes that following the proceedings on constitutional protection, Teresa Lluy turned to the "Radio Splendid" program to denounce the situation that had arisen with her daughter and the Zoila Aurora Palacios School and the fact that Talía had nowhere to study. Clara Vinueza, director of the "El Cebollar" kindergarten, heard the program and contacted Teresa Lluy telling her that she was willing to receive Talía in her establishment.[333] In this regard, Ms. Vinueza, who, as director of a kindergarten, helped Talía remain within the education system, stated that she:

> "traveled to the [kindergarten] by public transport. The radio of the bus was broadcasting the morning news. The newscaster announced a very special case: the presence of a mother who was crying […] because, when she went to collect her daughter, who was only 5 years old, from a certain educational establishment that she was attending, she found her daughter outside the school. The child had a contagious illness. [Clara Vinueza] telephoned the radio station indicating that she was willing to receive the child in [her] educational center […]. During term time, [Talía] had no health problems; [however,] Ministry of Education officials visited [her] establishment on several occasion in order to know if the child with HIV/AIDS was studying there. Very naturally and hedging, [she] changed the subject [and the officials] never found out that Talía was studying with [them]. [She] believe[d] that they would have forbidden [her] from letting Talía continue her schooling at the

329 Sworn statement by Teresa Lluy on April 22, 2014 (evidence file, folios 1082 and 1083).

330 Committee on the Rights of the Child. General Comment No. 1, The Aims of Education, 2001, para. 9.

331 Committee on the Rights of the Child. General Comment No. 3, HIV/AIDS and the rights of the child, 2003, para. 18.

332 Committee on the Rights of the Child. General Comment No. 7, Implementing child rights in early childhood, 2006, para. 11.

333 Affidavit made by Clara Vinueza on February 12, 2015 (evidence file, folio 3595). The State did not contest Ms. Vinueza's testimony.

> educational center because they said [that] 'the child c[ould] infect other children with HIV/AIDS, and it could be seen that they were against the child attending any educational establishment. [She] and [her] daughter […] were threatened by the educational authorities who visited [them] at times asking for information on [Talía], because the authorities told [them] that if the child was there, this would be a serious offense, and […] the punishment [would be] dismissal from [her] position and the end of [her] daughter's contract as a teacher at the establishment. Talía could never take part in social programs, which she never attended, because the authorities were constantly looking for her to know who and where the child was, but not to provide assistance; rather, to the contrary, they appeared to be hunting her down." [334]

280. During term time, Talía had no difficulty in integrating her new environment and she had no health problems.[335] However, the State has not contested the charge that Ministry of Education authorities were checking whether Talía was studying at "El Cebollar," owing to the supposed risk that this would pose for the other children. In addition, the Azuay Red Cross also visited the kindergarten with a parent who knew that a child with HIV attended "El Cebollar" and, for this reason, some children were withdrawn from the establishment.[336] The Court observes that one of the effects of the stigma was the need of both the Lluy family and the teachers of one of the educational establishments that received Talía to deny her status as a person living with HIV so that she would not be subject to arbitrary treatment.

281. In view of the fact that "El Cebollar" was only a kindergarten, after two school years Teresa Lluy had to find another school for Talía. Ms. Vinueza stated that she had provided assistance by mentioning the situation to a trustworthy friend, who was also a teacher, who had no problem in receiving Talía. However, Ms. Vinueza affirmed that "after a time, the educational authorities discovered that [Talía] was attending "El Cebollar" and, on several occasions, the office of the Vice Minister of Education called her asking for information on the child."[337]

282. Given the precarious financial situation of Talía's family and the stigma associated with her illness, she did not receive a stable education in a single educational establishment. In an affidavit, that the State has not contested, Talía indicated that:

> "[Her] mother took [her] to many schools which were far away from [their] home. [… They] had to take the bus for about an hour to reach the school, so that [she] had to get up very early every day; the buses were very full; the trip was long and uncomfortable."[338]

283. In addition, Iván Lluy stated that, in his school, he also faced situations related to Talía's HIV that made him very depressed. In this regard, he stated that his "teachers asked him directly: is it your sister who has problems with the Red Cross?"[339]

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334 Affidavit made by Clara Vinueza on February 12, 2015, (evidence file, folio 3596).

335 Affidavit made by Clara Vinueza on February 12, 2015, (evidence file, folio 3596).

336 Affidavit made by Clara Vinueza on February 12, 2015, (evidence file, folio 3597).

337 Affidavit made by Clara Vinueza on February 12, 2015, (evidence file, folio 3598).

338 Affidavit made by Talía Gonzales Lluy on April 22, 2014 (evidence file, folio 1097).

339 Affidavit made by Iván Lluy on April 22, 2014 (evidence file, folio 1112).

284. As can be seen, in different situations within the educational environment, both Talía and her family faced a climate hostile to the illness. In this regard, taking into account that, under the United Nations Convention on the Rights of Persons with Disabilities, "persons with disabilities are part of human diversity and humanity," the educational establishment were bound to provide an educational environment that would accept and celebrate that diversity. The Court considers that the need for Talía Gonzales Lluy, her family, and some of her teachers to hide the fact that Talía was living with HIV or to hide in order to accede to and remain within the education system constituted a disregard for the value of human diversity. The education system was called upon to help Talía and her family talk about HIV without having to hide it, and to help her retain the highest possible self-esteem as a result of her environment and, to a great extent, to educate the other students and teachers about the meaning of diversity and the need to safeguard the principle of non-discrimination in every sphere.

B.5. Scope of the discrimination that occurred in this case

285. The Court notes that discrimination against Talía has been associated with factors such as being a woman, a person living with HIV, a person with disabilities, and a minor, and also her socio-economic status. These aspects made her more vulnerable and exacerbated the harm that she suffered.

286. In its General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW indicated the following with regard to girl children and adolescents:

> States parties in particular are obliged to promote the equal rights of girls since girls are within the larger community of women and are more vulnerable to discrimination in such areas as access to basic education, trafficking, maltreatment, exploitation and violence. All these situations of discrimination are aggravated when the victims are adolescents. Therefore, States shall pay attention to the specific needs of (adolescent) girls by providing education on sexual and reproductive health and by carrying out programmes that are aimed at the prevention of HIV/AIDS, sexual exploitation and teenage pregnancy.[340]

287. Regarding the situation of the families of children with HIV, General Comment No. 3 of the Committee on the Rights of the Child on HIV/AIDS and the rights of the child establishes that "[d]iscrimination is responsible for heightening the vulnerability of children to HIV and AIDS, as well as seriously impacting the lives of children who are affected by HIV/AIDS, or are themselves HIV infected. […] As a result of discrimination children are denied access to information, education, […] health or social care services or from community life." The General Comment also indicates that "[a]t its extreme, discrimination

[340] CEDAW, General Recommendation No. 28, 2010, para. 21. Also, according to CEDAW, "States parties must legally recognize and prohibit such intersecting forms of discrimination and their compound negative effects on the women concerned." CEDAW, General Recommendaation No. 28, 2010, para. 18. Similarly, article 9 of the Inter-American Convention on the Prevention, Punishment and Eradication of Discrimination against Women (Convention of Belem do Pará) estabishes that: "With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom."

against HIV infected children has resulted in their abandonment by their family, community and/or society. Discrimination also fuels the epidemic by making children in particular those belonging to certain groups like children living in remote or rural areas where services are less accessible, more vulnerable to infection. These children are thereby doubly victimized."[341]

288. The Court notes that certain groups of women suffer discrimination throughout their life based on more than one factor combined with their gender, which increases their risk of enduring acts of violence and other violations of their human rights.[342] In this regard, the Special Rapporteur on violence against women, its causes and consequences, has established that: "[d]iscrimination based on race, ethnicity, national origin, ability, socio-economic class, sexual orientation, gender identity, religion, culture, tradition and other realities often intensifies acts of violence against women."[343] In the case of women with HIV/AIDS, the gender perspective provides a way of understanding living with the illness in the context of the "roles and expectations that affect peoples' lives, choices and interactions (particularly in terms of sexual feelings, desires and behaviors)."[344]

289. In this case, statements that have not been contested by the State illustrate the impact that the Lluy family's situation of poverty had on the approach to Talía's HIV (*supra* para. 215). These statements have also explained the discrimination in the educational environment associated with how, in a prejudiced and stigmatizing way, Talía Gonzales Lluy was considered a risk for her classmates, not only when she was expelled from the Zoila Aurora Palacios School, but at other time when she tried to access the education system. In addition, as regards employment, the Court notes that Teresa Lluy was dismissed from her job owing to the stigma of having a daughter with HIV and, subsequently, in other jobs she obtained, she was also dismissed owing to Talía's status as a person living with HIV (*supra* para. 217).

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341 Committee on the Rights of the Child. General Comment No. 3, HIV/AIDS and the Rights of the Child, 2003, para. 5.

342 In this regard, the European Court of Human Rights, in the case of B.S. v. Spain, recognized the situation of extreme vulnerability of B.S., who suffered discrimination based on gender, race, national origin, and situation as an alien and a sexual worker. The European Court indicated: "In the light of the evidence submitted in the present case, the Court considers that the decisions made by the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute." European Court of Human Rights (ECHR), *Case of B.S. v. Spain,* No. 47159/08, Judgment of 24 July 2012, para. 62. Similarly, consult: IACHR, *Access to justice for women victims of violence in the Americas,* of January 20, 2007, paras. 195 to 197; IACHR, *Violence and discrimination against women in the armed conflict in Colombia*, of October 18, 2006, paras. 102 to 106, and IACHR, *The right of women to be free from violence and discrimination in Haiti*, of March 10, 2009, para. 90.

343 United Nations, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, UN Doc A/HRC/17/26, 2 May 2011. para. 67.

344 With regard to "biological differences, these roles and expectations are generated and affirmed by societal, cultural, economic and political factors." Consequently, "a gender and sexuality approach provides an insight into the driving forces behind the differences and inequalities of males and females within a specific ontext. In turn, these forces affect an individual's vulnerability and risk, as well as their access to services and ability to fulfill their human rights; [… thus] gender and sexuality is a complete approach that takes on board all of the issues that affect HIV." International HIV/AIDS Alliance, *Approaches to Gender and Sexuality: responding to HIV, 2010*, p. 16. Available at: http://www.aidsalliance.org/assets/000/000/741/GenderAndSexualityReport_original.pdf?1406302925.

290. The Court notes that, in Talía's case, numerous factors of vulnerability and risk of discrimination intersected that were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV. The discrimination experienced by Talía was caused not only by numerous factors, but also arose from a specific form of discrimination that resulted from the intersection of those factors; in other words, if one of those factors had not existed, the discrimination would have been different. Indeed, the poverty had an impact on the initial access to health care that was not of the best quality and that, to the contrary, resulted in the infection with HIV. The situation of poverty also had an impact on the difficulties to gain access to the education system and to lead a decent life. Subsequently, because she was a child with HIV, the obstacles that Talía suffered in access to education had a negative impact on her overall development, which is also a differentiated impact taking into account the role of education in overcoming gender stereotypes. As a child with HIV, she required greater support from the State to implement her life project. As a woman, Talía has described the dilemmas she feels as regards future maternity and her interaction in an intimate relationship, and has indicated that she has not had appropriate counseling.[345] In sum, Talía's case illustrates that HIV-related stigmatization does not affect everyone in the same way and that the impact is more severe on members of vulnerable groups.

291. Based on all the foregoing, the Court concludes that Talía Gonzales Lluy suffered discrimination derived from her situation as a person living with HIV, a child, a female, and living in conditions of poverty. Consequently, the Court considers that the Ecuadorian State violated the right to education of Talía Gonzales Lluy contained in Article 13 of the Protocol of San Salvador, in relation to Articles 19 and 1(1) of the American Convention.

XI
JUDICIAL GUARANTEES AND JUDICIAL PROTECTION

292. In this chapter, the Court will examine the arguments presented by the parties and the Commission, and also develop pertinent legal consideration related to the alleged violations of judicial guarantees and judicial protection. To this end, it will make its analysis as follows: (a) arguments and considerations in relation to the alleged violation of Article 8 of the Convention, and (b) arguments and considerations in relation to the alleged violation of Article 25 of the Convention. It will also analyze the alleged violation of Article 19 in relation to Article 8 of this instrument.

[345] In this regard, Talía has testified: "How can I have a friend, a boyfriend, what will I tell him; how can I tell him how I feel, kiss him? I was and still am very frightened. How do I tell a boyfriend that I have HIV; that it wasn't my fault; that he should not run away; that he should not be scared; that I am a person with feelings and that like anyone else I can love and want to be loved? […] I want […] to have what I need to be able to do what I want with my life; go where I want; travel […], study what I want; that in the midst of my loneliness, as a child, adolescent, young woman, if I can't enjoy a good friendship, a husband, children, at least I want my life alone to be as good as possible." Affidavit made by Talía Gonzales Lluy on April 22, 2014 (evidence file, folios 1101, 1103 and 1104).

A) Alleged violations of Article 8 of the Convention – judicial guarantees

A.1. Right to be heard, to due diligence and to a reasonable time in criminal proceedings

Arguments of the Commission and of the parties

293. The Commission indicated that the criminal proceedings lasted nine years, during which "there were numerous indications of lack of due diligence." According to the Commission, there was an unjustified delay in ordering and performing the specialized genetic test suggested by the medical experts; also, "the judicial authorities closed the preliminary investigation on more than three occasions, even though this crucial test had not been performed, [which meant] that the prosecutor had to repeatedly request the judicial authorities to re-open the preliminary investigation, with the consequent additional delays." The Commission also argued that: "[o]ne of the most blatant examples of the lack of diligence in the criminal proceedings relates to the four years that passed after the indictment was drawn up and admitted against [MRR]." According to the Commission, the State did not take steps to find MRR and, to the contrary, remained inactive for four years until the statute of limitations was applicable, owing precisely to its lack of due diligence.

294. The representatives indicated that the Lluy family had invested more than five years in the criminal proceedings and approximately four years in the civil proceeding, which they considered an excessive time if the importance of the rights involved in the case and the gravity of Talía's situation are taken into account. They added that, when protecting persons who are in a special situation of vulnerability, as in the case of a person living with HIV, the prompt settlement of judicial actions is especially important. In addition, the representatives argued that the State had violated the Lluy family's right to be heard, because the presumed victims were not heard at the trial despite their insistent requests during the proceedings. According to the representatives, during both the criminal and the civil proceedings, "only the version of the Red Cross was heard," or the Red Cross was accorded prevalence, assigning the whole burden of proof to the Lluy family.

295. The State argued that the complexity of the matter should be taken into account because, in this case, numerous medical tests were performed on Talía. It also indicated that, at that time, Ecuador did not have the necessary technology to perform the tests and analyses that would have established or eliminated the possibility that the blood transfusion caused Talía's infection. The State also argued that it had had to take measures that involved time and costs to send the blood samples abroad with the necessary request, so that a foreign institution would perform the required analyses.

296. The State also indicated that Talía and her family made use of the remedies available under domestic law, but had not exhausted them, and that the delay in the criminal proceedings could not be attributed to the conduct of the judicial authorities, but to procedural actions of the presumed victims. Regarding the prescription of the proceedings, the State argued that MRR had fled the country and it had not been possible to capture her, despite the efforts made to locate her. Consequently, based on the law at the time, it had not

been possible to try someone *in absentia* and, once the time established by law had elapsed, the exercise of the criminal action was subject to the statute of limitations.

297. In addition, the State indicated that "the judicial guarantees recognized in Article 8 of the Convention were satisfied, based on the rights of Teresa Lluy in the following judicial actions: [c]omplaint, police report, statement to the police, testimony before the judge, expansion of the testimony before the judge, and private prosecution." Lastly, the State argued that judicial proceedings had been held in which the presumed victim, Teresa Lluy, had testified regularly and provided the evidence she considered pertinent. According to the State, "the decisions of the judicial authorities, even though, at times, they do not benefit the claims of the plaintiffs, must be considered legal acts that comply with the international standards established in the Convention."

Considerations of the Court

298. Regarding the presumed failure to comply with the judicial guarantee of a reasonable time in the criminal proceedings, the Court will examine the four relevant criteria established in its case law: (i) the complexity of the matter; (ii) the procedural activity of the interested party; (iii) the conduct of the judicial authorities, and (iv) the general effects on the legal situation of the person involved in the proceeding.[346] The Court recalls that it is for the State to justify, based on these criteria, the reason why it has required the time elapsed to process the case and, if it does not demonstrate this, the Court has broad powers to form its own opinion in this regard.[347]

299. In this case, the criminal proceedings began with the complaint filed by Teresa Lluy on September 29, 1998, and concluded with the declaration of the statute of limitations issued on February 28, 2005 (*supra* paras. 86 and 115), so that the proceedings lasted approximately six and a half years. On this basis, the Court will now determine whether the time was reasonable based on the criteria established in its case law.

a) The complexity of the matter

300. This Court has taken into account different criteria to determine the complexity of proceedings. These include the complexity of the evidence, the number of procedural subjects or the number of victims, the time elapsed since the violation, the characteristics of the remedy under domestic law, and the context in which the violation occurred.[348]

301. The Court observes that, in this case, in the context of the criminal proceedings, there was a certain level of complexity to obtain the evidence required in order to determine the

[346] *Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 192, para. 155, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 255.

[347] *Cf. Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202, para. 156, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 255.

[348] *Cf. inter alia, Case of Genie Lacayo v. Nicaragua. Preliminary objections.* Judgment of January 27, 1995. Series C No. 21, para. 78, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 260.

cause of Talía's infection because, at the time of the events, the required blood tests could not be performed in Ecuador (*supra* para. 95). The Court considers that, at the time of the facts of this case, the requirements and procedures to obtain the tests from a European laboratory constituted an element of complexity in deciding the criminal proceedings.

b) The procedural activity of the interested party

302. The Court notes that the presumed victims endeavored to advance the proceedings and that there is no information on actions by the presumed victims designed to obstruct the criminal proceedings. The Court takes into account the State's argument that the presumed victims had taken judicial measures that had an impact on the duration of the proceedings (*supra* para. 298). Nevertheless, neither the private prosecution filed at the inappropriate time, nor the contestation of a decision that could not be appealed, may be considered actions by the presumed victims that obstructed the proceedings. Taking this into account, it cannot be concluded that the presumed victims' lack of technical expertise as regards litigation truly delayed the criminal proceedings.[349]

c) The conduct of the judicial authorities

303. The Court notes that the criminal complaint was filed on September 29, 1998, and on October 19, 1998, the case was opened to processing and various pieces of evidence were collected. Subsequently, on September 8, 1999, the judge declare the preliminary investigation concluded for the first time and Teresa Lluy requested their re-opening so that the specialized blood test could be performed at the *Université catholique de Louvain* (*supra* paras. 86, 88 and 96). The preliminary investigation was re-opened and, on March 22, 2000, it was once again declared that it had concluded, without the test in Louvain having been ordered and, therefore, Teresa Lluy again requested that the test be performed. The preliminary investigation was re-opened again and, on August 31, 2000, it was again declared concluded without this test having been performed. On January 15, 2001, it was decided to re-open the preliminary investigation in order to incorporate the specialized evidence. Subsequently, the preliminary investigation was again declared closed on March 26, 2001, and re-opened in April that year to include MRR, BRR and PMT (*supra* para. 106). The case against BRR and PMT was dismissed, and this decision was confirmed by the First Chamber of the Superior Court on December 18, 2001 (*supra* para. 112). Finally, on February 28, 2005 the Second Criminal Chamber of the Superior Court of Justice of Azuay ruled that the statute of limitation applied to the action owing to the failure to appear of the accused, MRR, at the trial hearing, and that it had not been possible to apprehend her (*supra* para. 115).

[349] In this regard, the Court observes the indication of UNAIDS in its Guideline 7 of the International Guidelines on HIV/AIDS and Human Rights, that: "States should […] support legal support services that will educate people affected by HIV about their rights, […] develop expertise on HIV-related legal issues and utilize means of protection in addition to the courts, such as ministries of justice, ombudspersons, health complaint units and human rights commissions." The Court notes that, in cases in which individuals are vulnerable owing to their financial situation and, in addition, there are other factors that increase this vulnerability, such as living with HIV, States must provide free legal services so that they may exercise their rights in the case of proceedings that are particularly important to preserve the integrity of persons living with HIV; for example, in proceedings involving a request for medicines.

304. Based on the above, the Court finds that there was a delay in ordering the specialized test and that the numerous closures of the preliminary investigation caused delays in the criminal proceedings. The Court considers that the State has not proved that any justification existed for the prolonged delay in ordering the specialized test, or for the delay caused by the various closures of the preliminary investigation. Consequently, the Court considers that the judicial authority did not ensure, diligently, that a reasonable time was respected in the criminal proceeding.

305. As regards the application of the statute of limitation to the criminal action, the Court observes that this was applied in accordance with the Ecuadorian law in force at the time of the events. Despite this, the Court notes that, after the decision had been issued to open the plenary stage against MRR, on October 29, 2001, only three notes were issued regarding the capture of MRR: one on October 23, 2002, another on June 26, 2003, and a third on February 12, 2004 (*supra* para. 113). These notes merely mentioned that orders had been given to apprehend MRR, without describing the steps taken to find her. In addition to these three notes, between which several months elapsed, there is no evidence that the State took any other step aimed at finding MRR or in any way advancing the criminal proceeding. Consequently, the Court considers that the authorities did not take diligent measures to locate MRR, which culminated in the application of the statute of limitations to the criminal action.

306. The Court emphasizes that the lack of diligence and effectiveness of the agents of justice to find MRR and to continue investigating the case culminated in the prescription of the criminal action. The delay in the proceedings and their consequent prescription was due, above all, to the lack of action by the Ecuadorian judicial authorities, who were responsible for taking the necessary measures to investigate, prosecute and punish those responsible, as appropriate.[350]

307. In this regard, the Court recalls that, in previous cases, it has analyzed the lack of diligence to locate persons against whom a criminal proceedings has been instituted, as well as the failure of the authorities to advance criminal proceedings in Ecuador. For example, in the *Case of Albán Cornejo et al. v. Ecuador,* the statute of limitations was applied to the criminal action instituted against the doctor who treated the victim because he could not be found, and after the 10 years established for the application of the statute of limitations, it was declared that the criminal action had prescribed.[351] Similarly, in the *Case of Suárez Peralta v. Ecuador,* it was declared that the statute of limitations applied to the criminal action, considering that five years had elapsed since the order to investigate the alleged offense had been issued, owing to the lack of diligence and effectiveness of the agents of justice to advance the investigation of the case.[352]

308. The Court notes that the repeated lack of due diligence in cases concerning the Ecuadorian State has meant that the statute of limitations has applied to criminal

350 *Cf. Case of Ximenes Lópes v. Brazil*, para. 199, and *Case of Suárez Peralta v. Ecuador*, para. 101.

351 *Cf. Case of Albán Cornejo et al. v. Ecuador*, para. 90.

352 *Cf. Case of Suárez Peralta v. Ecuador*, paras. 70, 71 and 101.

proceedings on numerous occasions. The Court considers that this negligence in criminal proceedings results in a denial of justice in the context of the proceedings, preventing the effective investigation of those responsible.

d) The effects on the legal situation of the person involved in the proceedings and the impact on that person's rights

309. The Court recalls that, in order to determine whether the time is reasonable, it is necessary to take into account the effects caused by the duration of the proceedings on the legal situation of the person concerned, considering, among other aspects, the subject of the dispute. Thus, the Court has established that if the passage of time has a relevant impact on the legal situation of the individual, the proceedings must advance more diligently so that the case is decided rapidly.[353]

310. In this case, with regard to the criminal proceedings, the Court considers that, even though Talía's legal situation was not affected, her personal health situation, her condition as a child, and the medical treatment that she required were affected, bearing in mind the financial situation of her family and the resulting difficulties. Without a criminal judgment determining those responsible for the infection of Talía, it was not possible to establish those responsible for the payment of damages, a situation that had an impact on Talía's life and prolonged her family's difficult financial situation (*supra* para. 131).

311. The Court considers that, in this case, an exceptional due diligence was required owing to Talía's special situation of vulnerability; thus, it was essential to take pertinent measures in order to avoid delays in processing the proceedings, and to ensure a prompt decision and its swift execution.[354] The Court also underlines that a criminal conviction was required in order to have recourse to the civil jurisdiction, and this entailed an enhanced obligation to act with due diligence in the criminal proceeding.

312. In this regard, this Court has established that it is necessary to act with special promptness when, owing to the design of the domestic laws, the possibility of filing a civil action for damages depends on the criminal proceeding.[355] Moreover, the European Court has indicated that special diligence is required in those cases in which the integrity of the individual is at stake.[356]

313. In addition, the European Court has heard cases in which the deliberations related to the situation of a person with HIV. In the case of *X v. France,* the European Court examined the failure to comply with the judicial guarantees, taking "the view that what was at stake in the contested proceedings was of crucial importance for the applicant, having regard to the

[353] *Cf. Case of Valle Jaramillo et al. v. Colombia*, para. 155, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela*, para. 274.

[354] *Cf. Case of Furlan and family v. Argentina*, para. 196.

[355] *Cf. Case of Suárez Peralta v. Ecuador*, paras. 102 and 103.

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

incurable disease from which he was suffering." That Court indicated that "exceptional diligence" was called for in the said case, notwithstanding the number of cases that were pending.[357] Also, in the case of *F.E. v. France*, the European Court indicated that this exceptional diligence was called for, despite a certain complexity in this type of case.[358].

314. In a similar situation, this Court considered that:

> The failure to conclude the criminal proceedings ha[d] had particular repercussions […], because, under the State's laws, civil reparation for the harm caused by a wrongful act defined under the criminal laws could be subject to the establishment of the crime in criminal proceedings; hence, no first instance judgment had been delivered in the civil action for damages either. In other words, the lack of justice in the criminal jurisdiction ha[d] prevented [obtaining] civil compensation for the facts of the […] case.[359]

315. Taking into consideration: (i) that, in this case, Talía's integrity was at stake; (ii) the consequent urgency derived from her situation as a child with HIV, and (iii) the crucial importance of concluding the proceedings so that Talía and her family could have access to reparation for damages, the Court concludes that there was a special obligation to act with due diligence, and that the State did not comply with this obligation.

e) Conclusion concerning a reasonable time in the criminal proceedings

316. Having examined the four elements to determine the reasonableness of the duration of the criminal proceedings (*supra* para. 300), and taking into account that there was an obligation to act with exceptional due diligence considering Talía's situation (*supra* para. 317), the Court concludes that Ecuador violated the judicial guarantee of a reasonable time established Article 8(1), in relation to Articles 19 and 1(1) of the American Convention, to the detriment of Talía Gonzales Lluy.

317. The Court observes that the Commission and the representatives argued that the right to a reasonable time had also been violated to the detriment of Teresa Lluy and Iván Lluy. In this regard, the Court considers that the holder of the rights violated in this case was Talía and that her mother acted as her representative, but was not exercising a right of her own; thus, the Court does not consider that it should rule with regard to Teresa Lluy. As regards, Iván Lluy, in addition to the fact that Talía was the holder of the violated rights, and not Teresa or Iván, the Court observes that there is no evidence of to what extent Iván participated in the criminal proceedings or in the civil action, because it was only Teresa who took part in the proceedings on behalf of Talía. Consequently, the Court does not consider that it is necessary to rule with regard to Iván Lluy.

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357 *Cf.* ECHR, *X. v. France* (No. 18020/91), Judgment of 31 March 1992, para. 47.

358 *Cf.* ECHR, *F.E. v. France* (No. 60/1998/963/1178), Judgment of 30 October 1998, para. 57.

359 *Case of Ximenes Lopes v. Brazil,* para. 204.

A.2. Due diligence and reasonable time in the civil proceedings

Arguments of the Commission and of the parties

318. The Commission indicated that the civil action had ended by a declaration of the nullity of all the proceedings following the moment the complaint was admitted; thus, "in the context of the civil proceedings, the judicial authorities took four years to make a final ruling that the civil claim did not meet the admissibility requirements."

319. The representatives indicated that they considered that the Lluy family had had to invest an excessive time in the civil proceedings and were not duly heard during those proceedings (*supra* para. 296).

320. The State argued that the presumed victims had always been heard in the course of the proceedings (*supra* para. 299); and indicated that the representatives had merged their analysis of the civil and the criminal proceedings, without making a distinction between the processing, times, formalities and characteristics of each litigation. According to the State, this could lead the Court to make an erroneous assessment of the facts.

Considerations of the Court

321. The Court notes that the civil proceedings began with the request to waiver court costs submitted by Teresa Lluy on September 26, 2001 (*supra* para. 118), and concluded with the declaration of the nullity of all the preceding acts in the proceedings issued on May 18, 2006 (*supra* para. 131); in other words, the proceedings lasted approximately four and a half years.

322. Thus, based on the four criteria established in its case law in this regard (*supra* para. 300), the Court considers that no evidence has been provided that would allow it to conclude that the duration of the civil proceedings violated the guarantees of a reasonable time and due diligence.

A.3. Alleged impact of the lack of a prior judgment on the access to justice

Arguments of the Commission and of the parties

323. The Commission argued that the action for damages was rejected as a result of the absence of a final criminal conviction. It also indicated that "it is not clear how the so-called lack of a prior judgment (*prejudicialidad*) operates in this type of case; according to the expert opinions received during the hearing and, in particular, that of Diego Zalamea León, there was a context of legal uncertainty in this regard."

324. The representatives indicated that, during the civil proceedings for damages, the judge declared that the civil action was not admissible because no responsibilities had been declared in the criminal proceedings that had been held. The representatives also indicated that the absence of a decision in the criminal proceedings had prejudiced the civil trial. In this regard, they asserted that "[t]he civil judge should not have taken several years to

declare something that was known from the time the complaint was filed," and that the petition submitted by Teresa Lluy was for non-pecuniary damage and did not seek compensation for an offense, so that different evidence was required.

325. The State pointed out that, in Ecuador, a criminal conviction was an essential pre-judgment requirement in order to conduct the civil action for damages arising from the perpetration of a criminal offense. The State considered that the inadequate legal advice given to Teresa Lluy induced her in error as to the channel she should use to sue those presumably responsible, by filing a civil action for compensation – which was not admissible because, since no one had been found guilty in a criminal trial "it [was] illogical that they should be obliged to pay civil obligations" – rather than the action for an ordinary hearing designed to establish the right to receive redress for non-pecuniary damage. The State also affirmed that, although it is true that the ruling of the civil first instance judge had declared that the complaint was inadmissible on legal grounds, Teresa Lluy could have contested this ruling, which was later confirmed by the Supreme Court pursuant to the Ecuadorian legal framework in this regard.

Considerations of the Court

326. The Court observes that the argument of the representatives and the Commission focuses on an undue application of the need for a prior ruling (*prejudicialidad*) by the Ecuadorian courts, as well as a context of lack of legal certainty concerning this mechanism.[360] In this regard, it should be pointed out that the need for a prior ruling in civil proceedings was established in the 1983 Code of Criminal Procedure.[361] In addition, the need for a prior ruling has been analyzed by the Ecuadorian domestic courts in various cases, [362] as in the ruling on the claim for damages filed by Teresa Lluy. The Court also observes that this need for a prior ruling exists in some other legal systems in the region,[363] and the Court has assessed it previously in other cases.[364]

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[360] On this point, the Court notes that, with regard to domestic law, expert witness Julio César Trujillo stated during the public hearing that the civil proceedings could have continued even after the prescription of the criminal action. Expert witness Trujillo indicated that the civil proceedings could have been undertaken, dispensing with any criminal ruling, based on simple negligence, provided that the negligence was serious and had caused harm. He also stated that, in this case, the need for a prior ruling (*prejudicialidad*) was not in order, because it was sufficient that there had been negligence, even though there had been no deliberate intention to cause the harm that was in fact caused. Meanwhile, expert witness Diego Zalamea León stated at the public hearing that, in this case, the need for a prior ruling was in order because Teresa had already filed a criminal complaint which ended with the prescription of the action, which meant that this was not the adequate mechanism; rather, it should have been an administrative action. Thus, the civil action for damages was not filed correctly or before the competent judge, which resulted in the application of the need for a prior ruling (*prejudicialidad*) as established by the laws at the time the acts were committed, which indicated that a criminal conviction was required in order to file a civil action to claim damages.

[361] *Cf.* Article 17 of the 1983 Code of Criminal Procedure of Ecuador (evidence file, folio 1885).

[362] According to the former Civil, Mercantile and Family Chamber of the National Court of Justice of Ecuador, "in order to file a claim for non-pecuniary damage, a conviction must first have been obtained in the criminal juisdiction. The action based on non-pecuniary damage is autonomous and independent." Former Civil, Mercantile and Family Chamber of the National Court of Justice of Ecuador. Judgment 0374-2011 of May 26, 2011.

[363] Among others, see article 1775 of the Civil Code of the Argentine Republic: "If the criminal action precedes the civil action, or is filed during the course of the latter, the delivery of the final judgment must be suspended in the civil proceedings until the criminal proceedings have concluded, except in the following cases: (a) if the criminal action has extinguished; (b) if the delay in the criminal proceedings effectively leads to a real obstruction of the right

327. The Court considers that, in this case, there is insufficient evidence to conclude that the existence of the need for a prior judgment (*prejudicialidad*) under Ecuadorian law constitutes, in itself, a violation of judicial guarantees. In this regard, the Court considers that, although the need for a prior judgment was applied in this case, it was based on the Ecuadorian laws in force at the time of the events, in relation to the remedy filed by Teresa Lluy. The Court also considers that insufficient arguments and evidence have been presented to affirm that the remedy filed by Teresa Lluy was the result of a lack of clarity in the laws of Ecuador. The Court observes that the filing of the claim for damages could be due to imprecision by Teresa Lluy's representatives at the domestic level, and there is no evidence to attribute to the State the negative effects that this domestic litigation strategy or the inadequacies of the litigation may have caused the presumed victims.

B) Alleged violation of Article 25 of the Convention – judicial protection

B.1. Application for constitutional protection (amparo)

Arguments of the Commission and of the parties

328. The representatives indicated that, in the *amparo* proceedings, "the judge [protected] those who ha[d] not asked for protection and who [were] not victims of [the violation of their] rights, [which is the case of] the other students, teachers and individuals who c[a]me into contact with Talía."

329. The State argued that the application for constitutional protection was filed under the sponsorship of the Ombudsman, so that Teresa Lluy had the institutional support of the State when filing the application for the constitutional protection of her daughter's rights. The State also emphasized that the jurisdictional organ responsible for deciding the application for *amparo* issued its ruling three days after the application had been filed declaring it inadmissible, and that, "if Teresa Lluy was not satisfied with the decision issued by the competent judge, she could have appealed [the said decision] before the Constitutional Court, in order to obtain a final confirmation or annulment. However, [Mrs. Lluy] did not use this remedy of appeal, and the ruling on the application for *amparo* became final."

330. Lastly, the State advised that, under the new constitutional framework of 2008, the application for *amparo* has been expanded and includes: (i) the action for protection that is admissible even against public policies, private individuals, persons who provide inadequate public services and, in cases in which the victim is in a situation of subordination, defenselessness or discrimination, and (ii) the special action for protection that is admissible against final judgments and decisions that violate constitutional rights, by either act or omission.

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to receive compensation; (c) if the civil action for reparation of the harm is founded on an objective factor of responsibility."

[364] *Cf. Case of Ximenes Lopes v. Brazil,* para. 204, and *Case of Suárez Peralta v. Ecuador*, para. 105.

Considerations of the Court

331. The Court observes that, on February 8, 2000, Teresa Lluy, with the help of the Ombudsman's Commissioner for Azuay, filed an action for constitutional protection before the Third District Contentious Administrative Court against the Ministry of Education and Culture, the director of the Zoila Aurora Palacios School, and the teacher, APA, owing to a presumed deprivation of the right to education of Talía (*supra* para. 135).

332. On February 11, 2000, the District Court declared the application for constitutional protection inadmissible, considering that "there was a conflict of interests between the individual rights and guarantees of [Talía] and the interests of a group of students, a conflict that mean[t] that the societal or collective interests, such as the right to life, outweighed the right to education." That court considered that Talía could exercise her right to education "by means of individualized and distance education" (*supra* paras. 141 and 144).

333. The Court underlines that it does not have any evidence to support the argument presented regarding the lack of judicial protection for Talía during the processing of the *amparo*, and therefore considers that it cannot conclude that there was a violation of the guarantee of judicial protection. Consequently, the Court finds that, with regard to the application for *amparo*, the State did not violate the right to judicial protection established in Article 25(1) of the Convention.

B.2. Civil and criminal proceedings

Arguments of the Commission and of the parties

334. The Commission affirmed that neither Talía nor her mother had received any judicial protection in relation to the infection suffered by Talía. According to the Commission, Talía, her mother and her brother had been prevented from having access to a means of obtaining compensation for the harm suffered as a result of the infection, because the criminal action had not ended with a final conviction and it has now prescribed. According to the Commission, this situation reflected a flagrant denial of justice and, consequently, violated the right to judicial guarantees and judicial protection of Talía and her mother.

335. The representatives indicated that the State had violated Article 25 of the Convention concerning the right to judicial protection, because, during the criminal proceedings, there had been "a reiterated demonstration of the judicial and state intention to avoid presenting the evidence requested by Teresa Lluy"; added to which, the preliminary investigation was closed "three times" without the jurisdictional authorities making the requests that Teresa Lluy had asked for. In addition, the representatives argued that the criminal judge considered that the criminal offense had been proved, but not the responsibility of the accused.

336. The State argued that, "under the Ecuadorian legal framework, the adequate and effective remedy to determine responsibilities with regard to Talía's infection was the criminal proceedings to prosecute those responsible for the violation," and Talía and her family had the right to access this remedy. The State also indicated that the proceedings were also

effective and efficacious, because the different procedural stages signified the real possibility of achieving the required judicial protection. Thus, during the substantiation of the preliminary investigation and plenary stages, both of its own motion and at the request of the parties, the court had ordered and implemented the procedural measures that were considered necessary to clarify the facts. Therefore, according to the State, there were no omissions in the collection of evidence, when requesting and ordering the probative procedures required to determine what happened.

337. In addition, the State argued that, at all stages of the proceedings, Talía and her family were able to file the remedies available under the criminal law in force at the time and that, the fact that a remedy does not produce a favorable result for the complainant, "does not necessarily mean that it is ineffective." Lastly, the State rejected the arguments of the representatives about the reiterated demonstration of the State's intention to avoid the procedural measures they had requested, because the criminal trial "was substantiated by competent, independent and impartial judges and courts, whose actions were in keeping with the law, using the exclusive and exclusionary powers granted by the Constitution to rule pursuant to the law after deliberating, as pertinent, on the case submitted to their consideration."

Considerations of the Court

338. In this Court's opinion, in this case, no evidence has been provided that would allow it conclude that the criminal action was not an adequate and appropriate remedy to determine the criminal responsibility for the infection of Talía. In addition, the Court considers that it has no evidence to determine that the State had the intention not to take into consideration the evidence presented by Teresa Lluy during the criminal and civil proceedings. Hence, there is no evidence to prove that the actions of the judicial authorities infringed the judicial protection of Teresa Lluy and Talía. Consequently, the Court finds that, in relation to the criminal and civil proceedings, the State did not violate the right to judicial protection established in Article 25(1) of the Convention.

C) Conclusion

339. The Court concludes that the State violated the judicial guarantees of due diligence and a reasonable time established in Article 8(1) in relation to Articles 19 and 1(1) of the American Convention to the detriment of Talía, in relation to the criminal proceedings. However, the Court concludes that the State did not violated the judicial guarantees of due diligence and a reasonable time in the processing of the civil proceedings.

340. In addition, the Court concludes that the State did not violate the judicial guarantees recognized in Article 8(1) of the Convention in relation to the application of the need for a prior judgment in this case. Lastly, regarding the decision on the application for constitutional protection and the civil and criminal proceedings, the Court considers that the State did not violate the right to judicial protection recognized in Article 25(1) of the Convention, in relation to Article 1(1) of this instrument.

XII
REPARATIONS
(Application of Article 63(1) of the American Convention)

341. Under Article 63(1) of the American Convention,[365] the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to make adequate reparation,[366] and that this provisions reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[367]

342. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine measures to guarantee the rights that have been violated and to redress the consequences of the violations.[368] Therefore, the Court has found it necessary to award different measures of reparation in order to redress the damage fully, so that, in addition to pecuniary compensation, measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition, have special relevance to the harm caused.[369]

343. This Court has established that the reparations must have a causal nexus to the facts of the case, the violations that have been declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must observe this concurrence in order to rule appropriately and in keeping with law.[370]

344. Considering the violations declared in the preceding chapters, the Court will proceed to examine the claims presented by the Commission and the representatives, as well as the arguments of the State, in light of the criteria established in its case law as regards the nature and scope of the obligation to make reparation,[371] in order to establish measures designed to redress the harm caused to the victims.

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365 Article 63(1) of the American Convention establishes: "[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."

366 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs.* Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of April 17, 2015. Series C No. 292, para. 451.

367 *Cf. Case of Velásquez Rodríguez v. Honduras*, para. 25, and *Case of Cruz Sánchez et al. v. Peru,* para. 451.

368 *Cf. Case of Velásquez Rodríguez v. Honduras*, para. 26, and *Case of Cruz Sánchez et al. v. Peru,* para. 452.

369 *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, para. 226, and *Case of Cruz Sánchez et al. v. Peru,* para. 452.

370 *Cf. Case of Ticona Estrada et al. v. Bolivia*. *Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Cruz Sánchez et al. v. Peru,* para. 453.

371 *Cf. Case of Velásquez Rodríguez v. Honduras*, paras. 25 to 27, and *Case of Cruz Sánchez et al. v. Peru,* para. 454.

A. Injured party

345. The Court reiterates that, in accordance with Article 63(1) of the Convention, the injured party is considered to be anyone who has been declared a victim of the violation of any right recognized therein.[372] Consequently, this Court finds that Talía Gabriela Gonzales Lluy, Teresa Lluy and Iván Lluy are the "injured party" and, in their capacity as victims of the violations declared in Chapters IX, X and XI, they will be considered beneficiaries of the reparations ordered by the Court.

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

346. The Commission asked that the State conduct a complete and effective investigation into the human rights violations declared in this case.

347. The representatives asked the Court to order the State to investigate and punish the persons who caused the violation of the rights of Talía and her family, because these facts "cannot remain unpunished and […] could continue to affect other individuals in similar circumstances to Talía." They emphasized that the need to investigate "should not be restricted to serious violations of civil rights related to offenses," and that they should be of an administrative, civil and constitutional nature.

348. In previous cases, with regard to certain violations, the Court has established that the State must initiate, according to the case, disciplinary, administrative or criminal actions pursuant to its domestic laws, with regard to those responsible for different procedural and investigative irregularities.[373] In this case, this Court has determined that the State violated the judicial guarantee of a reasonable time in the criminal and civil proceedings to the detriment of Talía (*supra* para. 318). However, it indicated that there was no evidence to show that the actions of the judicial authorities entailed an infringement of the judicial protection of Teresa Lluy and Talía in relation to the civil and criminal proceedings (*supra* para. 318). The Court also declared that the State had not violated Talía's right to judicial protection in relation to the *amparo* proceeding (*supra* para. 335). Consequently, the Court does not find it pertinent to order a reparation with regard to the opening of new administrative, disciplinary or criminal investigations into the facts of this case.

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

C.1) Measures of restitution

349. The representatives argued that, since it was not possible to restitute the right violated in this case, "considering that the violation has affected every moment of the lives of

[372] *Cf. Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 163, para. 233, and *Case of Cruz Sánchez et al. v. Peru,* para. 455.

[373] *Cf. Case of the Las Dos Erres Massacre,* para. 233, and *Case of Suárez Peralta v. Ecuador*, para. 172.

the family members in all their social relations," the compensation granted should not be less than US$100,000.00 (one hundred thousand United States dollars) for each victim.

350. Neither the State nor the Commission referred to this request.

351. In this case, the Court notes that it is not possible to restore the victims to their situation prior to the violations declared in this case; in other words, before Talía was infected with HIV. Consequently, the Court will assess this request made by the representatives in the context of the compensation for non-pecuniary damage.

C.2) Measures of rehabilitation

352. The Commission recommended that the State provide, in consultation with Talía, the specialized medical treatment that she requires, "immediately and permanently."

353. The representatives requested that, through the Ministry of Health, Talía be provided with the necessary health care, including medical examinations, the best medicines, and appropriate medical consultations. In addition, they asked that a treatment plan be drawn up that included "a contingency plan in case there is a change in the authorities, or in any other situation that could arise, in order to prevent interruptions in the service and to ensure her right to health and life." They also reiterated the need for the treatment to be prompt, friendly and of high quality. Also, in their final written arguments, they asked that the recommendations made by expert witness Diana Murcia be taken into account. She had indicated that "Talía and her family should undergo a therapeutic procedure for at least eight months, with a minimum of three sessions a month," as well as an evaluation following the procedure to determine whether it was necessary to prolong the therapy or change the approach. Regarding the health problems suffered by Teresa and Iván Lluy, the representatives asked for reparation in the form of financial compensation.

354. The State affirmed that it has public policies for the effective treatment of HIV, and thus the representatives' request "is unfounded." It also indicated that the actions taken in relation to the treatment of HIV are supported by parameters established by international agencies. In addition, it advised that there are 13 centers in the provinces of Azuay and Cañar that provide quality health care services, and reiterated that it "hope[d] that Talía […] would continue being treated at the Homero Castanier Public Hospital" by the internal medicine specialist responsible for the HIV program at that hospital. Furthermore, it "invite[d] Talía Gonzales, her mother and brother to use the Ecuadorian health care services in the different public hospitals and health care centers." In addition, during the public hearing, the State indicated that, if the Court should declare the State's responsibility, it would "continue the Comprehensive Health Care Protocol that [it] had been providing, and implement it through outpatient care, with access to the necessary antiretroviral treatment, and the provision of psychological support and social assistance to Talía and her mother in the different departments and at the different levels of attention of the institutions of the public health network."

355. The Court notes the information provided by the representatives in the request for provisional measures presented during the proceedings that, from May 2014 to date Talía has

been receiving medical treatment in the Azogues hospital, which forms part of the Ecuadorian public health care network. The representatives indicated that, over this period, her health has deteriorated and her CD4 cell count has decreased rapidly.[374] According to the representatives, the medicines provided to her by the public network "do not improve her blood, or keep up her defenses." Consequently, the representatives asked that a high-level committee be appointed, composed of persons that Talía trusted, to determine the conditions required to restore her health, and that the State "cover all the expenses for the emergency treatment of Talía's health."

356. In this regard, the Commission "expresse[d] its deep concern owing to the information presented by the representatives regarding Talía's precarious health situation, specifically the progressive and accelerated decrease in her defenses," and observed that her health, life and personal integrity were "seriously threatened." Therefore, it stressed the importance of the Court "establishing the need for the State to provide the beneficiary immediately with the specific antiretroviral treatment required based on the specific situation of her health, through the public or private institutions that offer this."

357. Meanwhile, the State alleged that, according to the July 20, 2015, report of the medical specialist of the Ministry of Public Health, Talía's health had been subject to various controls.[375] However, the State considered that "there was a probability of resistance to treatment" and, therefore, emphasized the importance of performing a genotyping test and a review of the dosage of the drugs she was taking, in order to determine the future treatment for her condition. The State also advised that there had been difficulties in ensuring that Talía performed the necessary tests and, therefore, the doctor who treated her "had proceeded to make frequent telephone calls, starting on […] July 15, 2014; [but Teresa Lluy had told him] that her daughter was being treated by a private doctor." Lastly, the State indicated that the Minister of Public Health had immediately set up a high-level medical committee to determine the necessary conditions to improve Talía's health.[376]

358. The Court underlines that, in this Judgment, it has been declared that Talía acquired the HIV virus as a direct result of acts and omissions of the State in the context of inspection, supervision and control of the provision of health services by the State. Consequently, although the Court considers it a positive element, and appreciates the institutional effort that has been made to provide quality medical care through the public sector, the Court finds it pertinent that, for the health care to fulfill a reparatory function in this specific case, the State must provide the level of prevention, treatment, care and support that Talía's health care requires.

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[374] According to the information provided by the representatives, before Talía was treated in the Azogues public hospital her CD4 cell count was 518. On November 5, 2014, when she was being treated at the public hospital, the cell count descended to 366, which was desribed as normal by the hospital doctor who treated her. On May 20, 2015, her CD4 cell count was 256, and on July 13, 2015, it descended to 171.

[375] The State advised that, since October 30, 2014, Talía had been treated in the Comprehensive Care Unit (CCU) of the Vicente Corral Moscoso Hospital, where her illness has been monitored periodically. In particular, it indicated that on November 5 and 7, 2014, and January 12, March 3 , May 4, June 26 and July 13, 2015, Talía had attended her monitoring appointments.

[376] This committee was created under the coordination of the Ministry of Health, with the participation of a doctor representing the Pan-American Health Organization, Talía Gonzales Lluy's personal physician, a doctor from the Enrique Garcés Hospital in Quito, and the doctor who treats her at the Azogues hospital.

359. Therefore, the Court finds, as it has in other cases,[377] that it is necessary to establish a measure that provides adequate treatment for the physical and psychological problems suffered by Talía as a result of the violations established in this Judgment. Thus, the Court establishes the State's obligation to provide immediately and free of charge, through specialized public health institutions or specialized health care personnel, prompt, adequate and effective medical and psychological or psychiatric treatment to Talía Gonzales Lluy, including the provision, also free of charge, of the medicines that she may require, taking into consideration her ailments. If the State lacks such resources, it must have recourse to private or specialized civil society institutions. In addition, the respective treatment must be provided, insofar as possible, in the center nearest to her place of residence in Ecuador for as long as necessary. The victim or her legal representatives have six months from notification of this Judgment to advise the State of her intention to receive psychological and/or psychiatric treatment.

360. Furthermore, in emergency situations, the Court establishes that the State must adopt the recommendations of the doctor indicated by Talía. Also, if that doctor determines that there is a well-founded reason for Talía to receive treatment under the private health care system, the State must cover the required expenses to restore her health. It will be for the State to prove before the Court that this measure remains in place and, every three months, it must present a report on the measure.

C.3) Measures of satisfaction

C.3.1) Publication of this Judgment

361. The representatives asked that the State publish the official summary of this Judgment in the Official Gazette; in a newspaper with widespread national and local circulation in Cuenca, and on the websites of the Ministry of Justice, Human Rights and Worship, the Ministry of Public Health, and the Ministry of Education.

362. The State indicated that, if the Court should determine its responsibility, it "would consider publishing the official summary of the judgment in the national newspaper *El Telégrafo,* [and] would make the publications on the different websites of the institutions as requested." It also indicated that it would publish the official summary of the judgment in the Official Gazette, owing to "the importance that the State […] accords to this type of measure which ensures that […] the general public are informed of the Court's ruling and its scope."

363. The Commission did not refer to this request.

364. The Court establishes, as it has in other cases,[378] that the State must publish, within six months of notification of this Judgment: (a) the official summary of this Judgment prepared by

[377] *Cf. Case of Barrios Altos v. Peru. Reparations and costs*. Judgment of November 30, 2001. Series C No. 87, paras. 42 and 45, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, para. 567.

[378] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs.* Judgment of December 3, 2001. Series C No. 88,para. 79, and *Case of Cruz Sánchez et al. v. Peru*, para. 466.

the Court, once, in the Official Gazette; (b) the official summary of this Judgment, once, in a national newspaper with widespread circulation, and (c) this Judgment in its entirety, available for at least one year on an official national website, so that it is accessible to the public.

C.3.2) Public act to acknowledge international responsibility

365. The representatives asked that the State apologize, by the national radio and television network, for the human rights violations declared in this case, as well as for "the humiliation suffered from numerous State officials, recognizing the more than 16 years" that the family has struggled, and indicating the individual and institutional responsibilities in order to prevent a repetition of these facts.

366. The State, in its answering brief and in its final written arguments, asked the Court to reject the representatives' request for a public apology for the violations declared in this case by the national radio and television network, because the judgment, as such, constituted a measure of satisfaction. However, during the public hearing, it indicated that, if its responsibility was declared, "the Minister of Public Health, as the highest authority in the field of public health, would make a public apology to Talía […] and her mother in relation to the specific fact acknowledged by the State."

367. The Commission indicated that the acknowledgement should include all the facts and human rights violations that occurred in this case.

368. The Court finds it necessary, as it has in other cases,[379] in order to redress the harm caused to the victims and to prevent a repetition of events such as those of this case, to establish that the State must organize a public act to acknowledge international responsibility in Ecuador, in relation to the fact of this case. During this act, reference must be made to the human rights violations declared in this Judgment. Moreover, the act must take place during a public ceremony in the presence of senior State authorities, as well as with the participation of the victims in this case. The State must reach agreement with the victims or their representatives on how this public act of acknowledgement should be organized, as well as on its characteristics, such as the place and date. To this end, the State has one year as of notification of this Judgment.

C.3.3) Scholarship

369. The State argued during the public hearing that the marks obtained by Talía to enroll in the university entitled her to a place at the Universidad of Cuenca, which is a free, public university. It indicated that her academic performance "will determine the possibility of […] being a candidate for a scholarship based on academic excellence, which entails the State providing the funding for her to carry out higher or postgraduate studies in any university in the world in which she is accepted."

[379] *Cf. Case of Cantoral Benavides v. Peru*, para. 81, and *Case of Rodríguez Vera et al. ("the Disappeared from the Palace of Justice") v. Colombia*, para. 576.

370. The Commission asked in the Merits Report that the State provide, in consultation with Talía Gonzales Lluy, "primary, secondary and university education, free of charge." Subsequently, in its final written observations, it indicated that the offer of the possible scholarship based on academic excellence did "not appear to be a benefit that the State will award [to Talía], but rather it would depend on her academic performance."

371. The representatives asked during the public hearing that "the scholarship based on academic excellence be considered a reparation owing to the extraordinary efforts that Talía has made under the education system."

372. This Court notes that, in 2013, Talía entered the Universidad Estatal de Cuenca to study graphic design, but had to withdraw owing to health problems resulting from activities inherent in this field of study. Consequently, starting in 2015, Talía began to study social psychology at this university. Taking this into consideration, the Court appreciates the State's observation during the public hearing regarding the possibility of Talía being awarded a scholarship based on academic excellence. However, the Court observes that the scholarship that the State referred to corresponds to a general offer that the State makes to all Ecuadorian students who perform well academically; thus, it does not respond specifically to an acknowledgement of Talía's situation as a victim. Therefore, the Court establishes that the State must grant Talía Gonzales Lluy a scholarship to continue her university studies that is not conditional on obtaining the marks that would earn her a scholarship based on academic excellence. The said scholarship must cover all the expenses until she concludes her studies, for both academic materials and living costs if necessary. The victim or her legal representatives have six months from notification of this Judgment to inform the State of her intention to receive this scholarship.

373. In addition, the State must award Talía a scholarship to undertake postgraduate studies "in any university in the world in which she is accepted." This scholarship must be awarded regardless of Talía's academic performance during her undergraduate studies, and must be awarded based on her condition of victim of the violations declared in this Judgment. To this end, once she graduates, Talía must inform the State and this Court within 24 months of the postgraduate studies she has decided to pursue, and that she has been accepted. The State must cover academic and living costs in advance, in keeping with the cost of living in the country in which Talía will pursue her studies,[380] so that the victim does not have to disburse the amounts corresponding to these items and then be reimbursed.

C.3.4) Provision of housing

374. The State indicated during the public hearing that it would "make the official arrangements to provide decent housing in the province of Azuay to ensure Talía's right to life."

375. The Commission assessed positively the State's offer of housing.

[380] To this end, the State could take as a basis the estimates used by the university in which Talís would undertake her postgraduate studies to determine the amount of the scholarships it awards to students for their living costs.

376. The representatives asked during the public hearing that Talía be awarded decent housing under the program suggested by the State.

377. This Court takes note of the State's offer, made during the public hearing, to award decent housing to Talía in the province of Azuay in order to ensure her right to life. The Court assesses positively the willingness shown by the State, and considers that it constitutes an important step towards providing redress in this case.[381] Consequently, it orders that the State provide Talía Gonzales Lluy with decent housing within one year of the delivery of this Judgment. The housing must be free of charge, "so that the victims will not have to pay any taxes, compensation or contribution."[382]

C.4) Guarantees of non-repetition

C.4.1) Guarantees of non-repetition in the area of health

Arguments of the parties and of the Commission

378. The Commission asked the Court to establish mechanisms of non-repetition including: (i) implementation of serious and effective mechanisms for the periodic supervision and monitoring of the functioning and record systems of both the public and the private blood banks that operate in Ecuador; (ii) implementation of serious and effective mechanisms for the periodic supervision and monitoring of public and private hospitals to ensure that, in their operation, they have the necessary safeguards to verify the safety of the blood products used for transfusions; (iii) implementation of training programs for the personnel of the blood banks that operate in Ecuador, in order to ensure that they perform their tasks in a way that is compatible with the basic technical safety standards recognized internationally, and (iv) provision of free treatment and health care to children with HIV who do not have the required resources. In addition, in its final written observations, the Commission emphasized the importance of determining "whether, at the present time, there is sufficient and specific regulation for this type of health service in accordance with the international standards, and […] existence and implementation of specific supervision and monitoring mechanisms."

379. The representatives stated that, "despite the significant progress made by the [Ecuadorian] Government in the area of health, Talía's case reveals that public policies on HIV/AIDS continue to be deficient in relation to international standards." They therefore indicated that a measure of non-repetition would be the issue of norms and policies to ensure that the rights of persons with HIV are respected, so that all public and private health care institutions are monitored on a monthly, quarterly and annual basis, clearly establishing sanctions and immediate compensation in those cases in which "a situation similar to that of Talía occurs." They also asked that the State support "monitoring the impact of the legal

[381] In this regard, the Court stresses that the Committee on the Rights of the Child, in its General Comment No. 3, underlined the necessity of providing legal, economic and social protection to affected children to ensure their access to shelter, among other services, in order to reduce their vulnerability. *Cf.* Committee on the Rights of the Child. General comment No. 3 HIV/AIDS and the rights of the child. CRC/GC/2003/3. March 2003, para. 31.

[382] Similarly, see *Case of García Cruz and Sánchez Silvestre v. Mexico. Merits, reparations and costs*. Judgment of November 26 2013. Series C No. 273, para. 79.

environment on the support, prevention, treatment, and care of HIV." In addition, they asked the Court to take into account the information provided by the Ombudsman,[383] as well as the report of expert witness Solis Torres which pointed out that, in Ecuador, national efforts to apply programs for treatment, care and support have stalled, as well as efforts to meet the HIV-related needs of orphans and other vulnerable children. Consequently, they affirmed that "the State should avoid the privatization and 'commercialization of blood.'"

380. The representatives also indicated in their final written arguments that "[t]he best way to guarantee and measure compliance with a judgment is by the system of human rights indicators," and alleged that, in this case, it would be desirable to consider the financial context and budgetary commitments, the State's capabilities, and the "three cross-cutting themes: equality and non-discrimination, access to justice, and access to information and participation." Lastly, they specifically asked that the State: (i) update the information on persons living with HIV, services, and availability of medical specialists, medicines and budgets; (ii) prepare case reports and follow up on them; (iii) evaluate the quality and user-friendliness of the service periodically, with the active participation of persons with HIV; (iv) plan, promptly and adequately, public acquisitions of the required medicines and inputs; (v) evaluate the impact of this planning; (vi) guarantee access to medical care and health services that ensure comprehensive care; (vii) provide ongoing training for medical specialists on the rights of persons with HIV, as well as for public servants whose tasks relate to HIV; (viii) disseminate and apply the procedures established in the Manual for the Prevention and Control of Mother to Child Transmission of HIV, and (ix) follow up on the public and private units responsible for offering services to persons with HIV.

381. The State indicated that the right to health is included in several provisions of its Constitution as the basis for other rights that support well-being, and "is guaranteed by economic, social, cultural, educational and environmental programs," as well as by access to "programs, actions and services for the promotion and comprehensive care of health, sexual health and reproductive health." It also alleged that the provision of health care services "is governed by the principles of equity, universality, solidarity, interculturality, quality, efficiency, efficacy, safeguards and bioethics, with a generational and gender-based approach." The State indicated that it has a free universal national health system that ensures promotion, prevention, recovery, and rehabilitation at all levels, "and encourages public participation and social control." According to the State, health services are "safe, good quality and user-friendly, and guarantee informed consent, access to information, and the confidentiality of patient information." In addition, they include all levels of care, as well as the procedures of diagnosis, treatment, medication and rehabilitation. It also underscored that it has accredited six of its public hospitals through an international organization.

382. Furthermore, the State advised that the Law for Prevention of, and Comprehensive Assistance for, HIVAIDS had "declared the fight against […] AIDS to be of national interest,

[383] Resolution No. 0032 of the Ecuadorian Ombudsman of August 19, 2013; Report on monitoring compliance with the decision of the Ombudsman of November 26, 2014, and Decision No. 180 of the Ombudsman of December 22, 2014. These documents were sent as annexes to the *amicus curiae* brief of the Ecuadorian Ombudsman in this case. In these documents, the Ombudsman pointed to the existence of some problems due to the shortage of medicines for patients with HIV/AIDS in Ecuador; he also advised that there are reports that the medical care received by patients with HIV/AIDS was disrespectful and offensive.

establishe[d] mechanisms of prevention, guarantee[d] adequate epidemiological monitoring, and facilitate[d] the treatment of those affected." In addition, the Ministry of Public Health had a protocol for the treatment of persons with AIDS that promoted specialized care and protected the right of persons with HIV to have access to health care services. In addition, in 2012, an HIV/AIDS Multi-sectoral Committee was established with the main task of "defining the strategic lines […] for public policies to design, implement, evaluate and finance the national response to HIV." This committee drew up a National Public Health Strategy for HIV/AIDS-STD, which sought to expand the coverage and quality of the care under the health services, and also of timely diagnosis, comprehensive treatment, rehabilitation or palliative care, and the participation of the general public in the systems for social control and protection in relation to HIV/AIDS.

383. In addition, the State asked the Court to assess the measures it had taken to comply with the judgment delivered in the case of *Albán Cornejo et al. v. Ecuador;* in particular the incorporation of virtual human rights training for health care professionals within the National Health System; a large-scale reprint of the Law on Patients' Rights and Protection; the module on professional malpractice included in the continuing training course on the Organic Comprehensive Criminal Code for administrators of justice and public defenders, and the professional malpractice course for agents of justice.

Considerations of the Court

384. The Court notes that the right to health is currently regulated by several laws in Ecuador. In this regard, the Court notes that the Constitution of Ecuador,[384] the 2006 Organic Health Law,[385] the 2012 Organic Law on Disabilities,[386] and the 2003 Children's and Adolescents' Code[387] all include general provisions on the protection of the right to health.

385. According to UNAIDS, in 2014, approximately 7,600 women of 15 years of age or older were living with HIV in Ecuador.[388] Regarding the instruments adopted to ensure care for persons with HIV, the Court observes that the Organic Health Law and the 2000 Law for Prevention of, and Comprehensive Assistance for, HIV/AIDS[389] contain specific provisions regarding care for persons with HIV/AIDS and the adoption of preventive policies and programs. It also notes that the State has a Manual for the Comprehensive Health Care Model adopted in 2013 that establishes services for HIV/AIDS prevention, detection and counseling

[384] Constitution of the Republic of Ecuador, Available at: http://www.asambleanacional.gov.ec/documentos/constitucion_de_bolsillo.pdf. This Court considers that the said document is useful for the analysis of this case and therefore incorporates it, *ex officio*, into the body of evidence under Article 58(a) of its Rules of Procedure.

[385] *Cf.* Health Act (evidence file, folio 4243).

[386] *Cf.* Disabilities Act (evidence file, folio 4298).

[387] *Cf.* Children's and Adolescents' Code (evidence file, folio 3104).

[388] UNAIDS, HIV and AIDS estimates (2014). Available at: http://www.unaids.org/en/regionscountries/countries/ecuador.

[389] *Cf.* Law for Prevention of, and Comprehensive Assistance for, HIV/AIDS (evidence file, folio 2120).

for all children, adolescents and adults,[390] and has adopted the Millennium Development Goals, one of the targets of which is to reduce the spread of HIV/AIDS and achieve universal access to treatment.[391] In addition, the Court notes the incorporation of different lines of research on HIV/AIDS into the 2013-2017 Health Research Priorities,[392] and the strategy of free and comprehensive care and medicines for children with HIV/AIDS, established in the 2004 National Ten-year Plan for Comprehensive Protection of Children and Adolescents.[393] The Court also takes note of the creation of the "Joaquín Gallegos Lara" subsidy in 2010,[394] and the Ministry of Public Health's 2002 protocol for treating persons with HIV/AIDS.[395] Lastly, the Court notes the establishment of the Ecuadorian Multisectoral Committee on HIV/AIDS in 2011,[396] and the National Public Health Strategy for HIV/AIDS-STD in 2012.[397] On this basis, and in view of the lack of sufficient specific and concrete information and arguments on any problems in relation to these policies, the Court considers that, in the circumstances of this case, it is not pertinent to order the adoption, amendment or adaptation of specific norms of domestic law concerning the treatment of persons with HIV/AIDS.

386. Regarding Ecuador's request that the Court consider the measures taken in the context of complying with the judgment delivered in the *Case of Albán Cornejo v. Ecuador*, the Court finds that it is unnecessary to order another measure addressed at the dissemination of the Law on Patients' Rights and Protection.[398] Nevertheless, the Court establishes that the State must implement a training program for health care officials on best practices and rights of patients with HIV, as well as on the application of the procedures established in the Manual for the Comprehensive Care of Adults and Adolescents infected with HIV/AIDS and the adoption of positive measures to prevent or reverse situations of discrimination suffered by persons living with HIV, and especially children with HIV, which mention the standards established in this Judgment. The State must prove to the Court that this measures is permanent.

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390 *Cf.* Manual for the Comprehensive Health Care Model (evidence file, folio 4460).

391 *Cf.* Millennium Development Goals, targets 6A and 6B (evidence file, folio 4364).

392 *Cf.* 2013-2017 Health Research Priorities (evidence file, folio 4175).

393 *Cf.* National Ten-year Plan for Comprehensive Protection of Children and Adolescents (evidence file, folio 3012).

394 *Cf.* Decree creating the "Joaquín Gallegos Lara" subsidy, and the technical directive for the inclusion, exclusion and temporary exclusion of persons with severe disabilities in a critical socio-economic situation, of persons with rare or catastrophic illnesses, or orphans in a critical socio-economic situation, and children under the age of 14 living with HIV/AIDS in a critical socio-economic situation (evidence file, folios 3163 and 3168).

395 *Cf.* Protocol for treating persons with HIV/AIDS of the Ministry of Public Health (evidence file, folio 3200).

396 *Cf.* Decision of the Ministry of Health to establish the Ecuadorian Multisectoral Committee on HIV/AIDS (CEMAIDS) (evidence file, folio 3227).

397 *Cf.* National Public Health Straregy for HIV/AIDS-STD of the Ministry of Public Health (evidence file, folio 3230).

398 In that case, the Court ordered the State, within a reasonable time, to disseminate information on patients' rights as widely as possible, using the appropriate media and applying the existing laws in Ecuador and the international standards, and taking into account that the Law on Patients' Rights and Protection establishes the obligation to have copies of the law available in all the health care services. In addition, it found it necessary that the State implement a program to educate and train agents of justice and health professionals on the laws that Ecuador has implemented on patients' rights and on the sanctions for failing to comply with them. *Cf. Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs.* Judgment of November 22, 2007. Series C No. 171, paras. 162 to 164.

387. Furthermore, with regard to the mechanisms for supervising and monitoring the blood banks and verifying the safety of the blood products used for transfusions, the Court notes that Ecuador now has external programs to evaluate the performance of the blood banks and internal control programs with regard to serology, which are monitored by the Ministry of Public Health under the National Blood Program, pursuant to the provisions of the 2006 Organic Health Law.[399] Also, according to the Ministry, it has been established that before blood products for transfusion are distributed, a nucleic acid amplification test must be performed in order to reduce the possibility of infected donations. The State has also adopted a Manual on Technical Criteria for the clinical use of blood and blood products, a Technical Manual on hemovigilance in blood banks, and Technical and Administrative Criteria for the implementation of blood transfusion services in operating units offering hospitalization services.[400] In this regard, the Court recalls the State obligation to supervise and monitor the operation of blood banks and hospitals on a permanent basis, in order to ensure that the relevant internationally-recognized basic technical safety standards are applied. However, in this case, the Court does not find it necessary to order a measure of reparation in this regard.

C.4.2) Guarantees of non-repetition in the area of education and non-discrimination

Arguments of the parties and of the Commission

388. The representatives asked that the State take steps to counter stigma and discrimination, such as raising the awareness of society, the police and the judicature, as well as training sessions for health care personnel on non-discrimination, confidentiality and informed consent, and also provide support to national human rights campaigns. They also asked that it should be ensured that the State's response to HIV and AIDS met the specific need of girls, women, and those living in poverty and their families throughout their life. Lastly, in their final written arguments, they asked that information on HIV and the need to respect persons living with HIV be disseminated at the national level, in educational establishments, and in other spheres of social life.

389. The State emphasized, with regard to public policy on education, that the right to education was "a priority area for the implementation of public policies to develop well-being." In addition, it indicated that, in Ecuador, primary and secondary education was free and universal, "and provide[d] services of a social nature and psychological support without cost," under the system of inclusion and social equity. It also indicated that the Ministry of

[399] Article 71 of the 2006 Health Law establishes that: "[t]he health authority shall issue regulations concerning the processes of donation, transfusion, use, and supervision of the quality of human blood with its components and products, in order to ensure equitable, efficient, sufficient, and safe access, the preservation of the health of donors, and the highest protection of recipients, and health care personnel." To this end, article 72 establishes that the national health authority shall issue licenses to public and private blood services in keeping with the norms in force. In addition, article 75 stipulates that "[t]he establishments authorized to collect blood units, prior to their use in transfusions, are obliged to perform the tests established in the corresponding regulations to determine the blood type and Rh factor and the presence of irregular antibodies, as well as serological tests for the markers of infection, according to the local, regional and national epidomiological profile, and technological advances."

[400] *Cf.* Report on the steps taken by the Ministry of Public Health and the National Blood Program to avoid cases of infection transmission by means of blood transfusions (evidence file, folio 2500).

Education had a National Program of Education for Democracy and Well-being that functioned as a "mechanism for participation and promotion of rights" and included education on sexuality, environmental education, education for health, education to prevent drug abuse, counseling and student welfare, and family education.

390. In this regard, the State referred to Ministerial Decision No. 436 adopted in 2008, in which the Ministry of Education decided "[to guarantee] to children, adolescents and young people who are victims of HIV/AIDS and who are enrolled in the national education system, without discrimination and without limitations of any type, the full exercise of their rights"; as well as "[to entrust] the Regional Sub-Secretariats of Education and the Provincial Directorates, as part of their supervision of education, with the responsibility of verifying, monitoring and following up on" the Decision. The State also affirmed that the Higher Education Council, by Resolution No. 166 of 2009, had prohibited "the exclusion of a person living with HIV/AIDS from the academic community, because this violates the principle of non-discrimination," and ordered that higher education establishments be required "to incorporate the response to HIV into the institutional culture, policies, structures, processes, study plans and budget."

391. In addition, Ecuador argued that the policies implemented with regard to HIV were "based on the guarantees of respect, protection and promotion of human rights, and ha[d] even been endorsed by international agencies." In this regard, it emphasized that the Constitution established the right to equal treatment and priority attention for vulnerable groups. It indicated that it has established a subsidy of US$240.00 (two hundred and forty United States dollars) for persons with severe disabilities or rare or catastrophic illnesses, or orphans, as well as for every child under the age of 14 living with HIV/AIDS.[401] To award this subsidy, the State advised that, in 2014, the Technical Secretariat for Disabilities issued a *Technical directive for the inclusion, exclusion and temporary exclusion of persons with severe disabilities in a critical socio-economic situation, of persons with rare or catastrophic illnesses, or orphans in a critical socio-economic situation, and children under the age of 14 living with HIV/AIDS in a critical socio-economic situation*, which established the procedures to follow in order to obtain this assistance.

392. Accordingly, the State concluded that it had the necessary mechanisms to protect and guarantee the rights of persons with HIV/AIDS, so that the Court "could not rule on the guarantees of non-repetition requested by the representatives."

Considerations of the Court

393. This Court has verified that Ecuador has implemented various provisions relating to education and HIV. For example, the Health Law establishes the elaboration of compulsory educational policies and programs for educational establishments to disseminate information and provide counseling in the area of sexual and reproductive health, in order to prevent HIV

[401] The State indicated that Executive Decree No. 422 of August 6, 2010, established the Joaquín Gallegos Lara subsidy, for "persons with severe and profound disabilities in a critical situation who are unable to fend for themselves, […] or with rare or catastrophic illnesses, or orphans […] as well as children under the age of 14 living with HIV[/AIDS]."

and other sexually-transmitted diseases.[402] Also, one of the goals of the National Ten-year Plan for Comprehensive Protection of Children and Adolescents is "to promote universal access of children and adolescent to educational services based on their age," and the policies include ensuring children access to, and permanence in, free public education. Likewise, the Children's and Adolescents' Code establishes that the education system must guarantee every child access to, and permanence in, basic education, and establish alternative and flexible educational options to respond to the needs of all children, according priority to those with disabilities, or those who work or live in a situation that requires increased educational options.[403]

394. Regarding non-discrimination, the Children's and Adolescents' Code stipulates that: "[a]ll children and adolescents are equal before the law and shall not be discriminated against based on their […] health status, disabilities, […] or any other personal situation."[404] In addition, in November 2008, the Ministry of Education adopted a decision prohibiting the authorities of educational establishments from requiring students to undergo any kind of test related to the identification of HIV/AIDS, and decided to guarantee to children with HIV/AIDS, "without discrimination or limitations of any kind, the full exercise of their rights."[405] Similarly, a resolution of the National Higher Education Council (CONESUP) of May 2009 prohibited requiring an HIV test for any procedure in a higher education institution; prohibited the exclusion of a person with HIV from the academic community "because this violates the principle of non-discrimination," and required establishments to implement preventive measures, using information free of stereotypes and prejudices, in order to contribute to education on HIV/AIDS, and eradication of the respective stigmas and discrimination.[406] In addition, the 2013-2017 National Well-being Plan established "the implementation of mechanisms for the access to the education system of the population that has historically been isolated from this, and mechanisms to reverse and to prevent the reproduction of discriminatory and exclusionary practices within and outside the education system."[407] Lastly, the Law for the Prevention and Comprehensive Treatment of HIV/AIDS stipulates that "[n]o one shall be discriminated against because they are infected with HIV/AIDS."[408]

395. The Court notes that, in this case, the State violated Talía's right to education, because she was expelled from school owing to her condition and because the State had not adapted the education system to her situation (*supra* para. 293). However, the Court appreciates the efforts made by the State in order to guarantee non-discrimination in the educational sector. In view of the fact that the representatives did not present specific and concrete arguments on

402 *Cf.* Health Act, article 27 (evidence file, folio 4250).

403 *Cf.* Chldren's and Adolescents' Code, article 37 (evidence file, folio 3108).

404 *Cf.* Chldren's and Adolescents' Code, article 6 (evidence file, folio 3104).

405 *Cf.* Ministerial decision "Sexuality, the prevention of HIV/AIDS-STD free of stereotypes and prejudices to help promote the quality of life and eradicate stigmas and discrimination due to HIV/AIDS" of November 21, 2008 (evidence file, folio 3184).

406 *Cf.* CONESUP Resolution. RCP.S07.No.166 of May 2009 (evidence file, folio 3187).

407 *Cf.* Expert opinion of John Herlyn Antón and Gustavo Medinaceli (evidence file, folio 3801).

408 *Cf.* Law for the Prevention and Comprehensive Treatment of HIV/AIDS (evidence file, folio 2120).

the insufficiency of these public policies, or on any problems in their implementation, the Court does not find it appropriate to order a specific reparation in this regard.

D. Compensation

396. The Commission asked the Court, in its Merits Report, to provide full redress to Talía Gonzales Lluy and her mother for the human rights violations suffered, with regard to both the pecuniary and the non-pecuniary aspects.

397. The representatives, in their final written arguments, emphasized that the reparation should take into consideration Talía's entire life.

398. The State indicated that it was "contrary to the nature of the [inter-American] system that the representatives try to obtain excessive financial benefits" and asked the Court to reject the amount claimed by the representatives in this case.

D.1) Pecuniary damage

Arguments of the parties and of the Commission

399. The representatives pointed out that the victims in this case had "suffered and continue to suffer losses" and failed to perceive earning, and this constituted pecuniary damage that must be redressed. In this regard, they indicated that the victims had incurred different health-related expenses since Talía became ill, and these included the cost of reagents charged by the Red Cross;[409] routine tests and special foods for Talía;[410] the expenses of transportation to Quito from 2001 to 2014; performing the viral genotype test for the proceedings;[411] airfares between Cuenca and Quito;[412] nutritional supplements;[413] hospitalization expenses;[414] tests for opportunistic infections;[415] CD4 and CD8 viral load tests,[416] and treatments with pharmaceuticals.[417] In addition, they asked that the Court take into consideration the cost of "the necessary psychological therapy for each member of the Lluy family," and calculated the

[409] The representatives alleged that the Red Cross charged 80,000 sucres for reagents for Talía's first treatment.

[410] Talía's mother testified that she "spent around $500 to $1,500 each month."

[411] According to the representatives, this examination, performed in 2000, cost $8,000.

[412] According to the representatives, the airfares were purchased in in 2000 and 2003 and amounted to $5,000.

[413] Regarding the expenditure on nutritional supplements, the representatives indicated that from 2005 to 2014, this amounted to $10,000.

[414] The representatives indicated that, in 2005, Talía's hospitalization resulted in expenses totalling $2,000.

[415] The representatives indicated that the Lluy family had incurred expenses of around $15,000 each month for this concept.

[416] According to the representatives, these tests have been performed every three months since 2001, and they calculated that, up until 2014, the expenditure involved was $20,000.

[417] In this regard, they indicated that, from 2005 to 2014, Talía had been treated first with Viracep and Comvivir, which cost $20,196, and subsequently with Stocrin and Tenvir, and is currently being treated with Tenvir and Efavirex.

health-related expenditure at approximately US$90,000.00 (ninety thousand United States dollars).

400. Furthermore, the representatives affirmed that the Lluy family had to take out loans in order to cover the costs of "health care and subsistence expenses." They indicated that Teresa Lluy had to repay debts to "friends, cooperatives, banks and moneylenders (*chulqueros*),"[418] which have amounted to US$148,000.00 (one hundred and forty-eight thousand United States dollars). They argued that, owing to the human rights violations suffered by the family, Teresa Lluy failed to earn around US$117,000.00 (one hundred and seventeen thousand United States dollars), a sum arrived at by "multiplying the remuneration that she received before the violation, subtracting what she now earns on average, and multiplying the result by the number of years that have passed."[419] They also asked that the Court take into consideration the sworn statements and testimony presented to the Court as evidence of the expenses that could not be proved with documents, and that the Court consider that the pecuniary damage extended over time and will continue even after judgment has been handed down.

401. Consequently, the representatives requested compensation for pecuniary damage of US$1,500,000.00 (one million five hundred thousand United States dollars) for Talía Gonzales Lluy; US$1,000,000.00 (one million United States dollars) for Teresa Lluy, and US$750,000.00 (seven hundred and fifty thousand United States dollars) for Iván Lluy.

402. The State alleged that the Court could not assess the information provided by the presumed victims appropriately, since it related to sworn statements, "some illegible invoices, [and] insufficient documentation to calculate the items correctly." In particular, regarding the pecuniary damage requested for Talía Gonzales, the State considered that, "when the incident occurred, Talía was three years old, so that, she could not be a victim of pecuniary damage." It asserted that the "regrettable consequences" described by Talía in her statements could be assessed when considering the non-pecuniary damage, but not as part of the pecuniary damage. It also pointed out that the victim had not suffered loss of earnings, because she had never performed any economic or work-related activity.

403. Regarding Teresa Lluy, the State indicated that "there are no valid vouchers that substantiate the documentation" mentioned by the representatives; and that the Military

[418] The representatives indicated that Teresa Lluy remembered the following debts: (i) US$8,000.00 requested from María Soledad Salinas in 2000 for the test in Belgium; (ii) US$5,000.00 with 5% annual interest requested from Carmen Ruiz in 2001 for Talía's expenses; (iii) US$70,000.00 with 15% annual interest requested from the Alfonso Jaramillo Cooperative from 2005 to 2011 for rental and moving expenses; (iv) US$5,000.00 with 15% annual interest requested from the Coopera Cooperativa in 2004 for Talía's expenses; (v) US$5,000.00 with 15% annual interest requested from the Riobamba Cooperativa in 2006 for Talía's expenses; (vi) US$5,000.00 with 15% annual interest requested from the Banco Pichincha in 2006 for expenses; (vii) US$20,000.00 with 20% annual interest requested in 2007 from moneylenders *(chulqueros)* to pay off debts; (viii) US$10,000.00 with 15% annual interest requested from Marisol Salinas in 2009 for Talía's expenses; ix) US$5,000.00 with 15% annual interest requested from the Cacpe de Gualaquiza Cooperativa from 2010 to 2012 for general expenes; (x) US$5,000.00 with 15.20% annual interest requested from the JEP Cooperative in 2013 for Talía's expenses, and (xi) US$10,000.00 with 15.20% annual interest requested from the JEP Cooperative in 2014 for Talía's expenses.

[419] The representatives stated that, currently, Teresa Lluy earns an average of US$50.00 (fifty United States dollars) a month and, with commissions, this can increase to US$144.00 (one hundred and forty-four United States dollars); however, at times she earns less.

Hospital had certified that the item for the medical care that had been charged was US$117.53 (one hundred and seventeen United States dollars and fifty-three cents). It therefore affirmed that the expenses described by the representatives "are unreal and unsupported." Furthermore, it affirmed that the maximum sum justified by transportation from 1998 until 2014 could not be more than US$1,056.00 (one thousand and fifty-six United States dollars). Regarding the purchase of vitamin supplements, the State indicated that it is only possible to verify the disbursement of US$2,295.81 (two thousand two hundred and ninety-five United States dollars and eight-one cents).

404. Ecuador also indicated that the test performed in Belgium cost US$ 3.20 (three United States dollars and twenty cents); and that it is not possible to assess the amount indicated for rental expenses because there was no evidence in this regard. Regarding the loans listed by the representatives, the State argued that "it is impossible to be sure that the amounts described have been used directly on Talía, owing to the inexistence of probative documentation; therefore, this claim should be rejected." It also indicated that there was "no probative evidence" for the affirmation about Teresa Lluy's monthly income when she worked in Yambal.

405. Regarding the pecuniary damage requested for Iván Lluy, the State asked the Court to reject this claim because the Merits Report had not included any reparation in his favor. Furthermore, it stressed that no documentation had been provided to substantiate that, when he was 16 years old, Iván had to work to help his mother and sister. The State indicated that, according to information from the Ecuadorian Social Security Institute and the Internal Revenue Service, Iván had not begun to work until he was 18 years of age. In addition, the State advised that Iván "has assets"; hence, "he has not been affected economically; to the contrary, […] with his own efforts, he has been able to accumulate assets."

406. Lastly, the State concluded that, "since no evidence exists, it is not possible to assess specific amounts in relation to the supposed pecuniary damage inflicted" on the victims in this case, so that the Court should use the parameter of equity if it establishes international responsibility. In this regard, it indicated that, compared to similar cases in which the responsibility of the Ecuadorian State had been determined, the amount for pecuniary damage could not exceed US$52,500.00 (fifty-two thousand five hundred United States dollars) for the direct victim and US$9,833.00 (nine thousand eight hundred and thirty-three United States dollars) for the indirect victims.

Considerations of the Court

407. The Court has developed its case law on pecuniary damage and the situations in which it should be compensated.[420] The Court has established that pecuniary damage covers "the loss

[420] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Rodríguez Vera et al. ("the Disappeared from the Palace of Justice") v. Colombia*, para. 591.

of, or detriment to, the victims' income, the expenses incurred due to the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case.[421]

408. From the documentation provided, the Court notes that, in the affidavits, Teresa Lluy indicated that she "lost everything in order to cover the expenses and respond to the needs of Talía owing to HIV: doctors' appointments, travel for medical controls, special food [and] medicines. [She] spent around $500 to $1,500 every month. She also alleged that it was she who had paid all the expenses; that she has lawsuits pending owing to her debts, and "threats from the moneylenders" insisting she pay what she owed. She also stated that, at the present time, she earns around US$100.00 a month from the informal sale of food on the street, and that she needs the financial support of her son, Iván. Meanwhile, Iván Lluy stated that, in order to help cover his family's expenses, he had to abandon the university and work as a messenger, cleaning offices, and as a waiter, because "[t]heir needs were urgent and no State authority took them into account." He also indicated that he had to assume all the expenses to provide his sister with nutritious food and appropriate treatment. Lastly, Talía stated that her mother and brother "went into debt and sacrificed a great deal to give [her] what she needed to stay alive."

409. The Court notes that the representatives provided evidence of several debts in the name of Iván and Teresa Lluy,[422] as well as the lawsuit filed by the La Merced Savings and Loan Cooperative before the Civil Court of Cuenca.[423] In addition, the case file contains receipts for medical examinations, food supplements, and transport.[424] However, based on the evidence

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[421] *Cf. Case of Bámaca Velásquez v. Guatemala*, para. 43, and *Case of Rodríguez Vera et al. ("the Disappeared from the Palace of Justice") v. Colombia*, para. 591.

[422] Table of repayment of active debts in the name of Iván Lluy for the sum of US$12,584.88 (evidence file, folio 1193); extracts from credits paid by Teresa Lluy to the Alfonso Jaramillo Cooperative for US$84,590.00 (evidence file, folios 1195 and 1196); credits granted to Teresa Lluy by the La Merced Savings and Loan Cooperative for the sum of US$6,000.00 (evidence file, folios 1197 to 1199); loan in the name of Iván Lluy "*Juventud Ecuatoriana Progresista*" Savings and Loan Cooperative for the sum of US$5,000.00 (evidence file, folio 1204); credit in arrears in the name of Teresa Lluy granted by the Savings and Loan Cooperative of the *Pequeña Empresa Gualaquiza* for the sum of US$2,000.00 for the initial debt, US$400.00 owed on the capital and US$60.92 owed in interest (evidence file, folio 1207); payment of loan made to Teresa Lluy by the "Alfonso Jaramillo León" Cooperative for the sum of US$4,060,00 (evidence file, folio 1210); table of repayment of credits granted to Teresa Lluy by the Coopera Savings and Loan Cooperative for the sum of US$ 2.953,98 (evidence file, folio 1211), and debt in the name of Teresa Lluy in the Banco del Pacífico paid off in 1999 for the sum of 2,600,000 sucres (evidence file, folio 1212).

[423] Lawsuit filed by the La Merced Savings and Loan Cooperative for the payment of US$1,002.96 representing instalment payments owed, US$422.19 for the balance of the debt, interest on arrears calcualted at the legal maximum, and procedural costs. The amount of the lawsuit was established at US$10,000.00 (evidence file, folio 1200).

[424] Receipt for US$489.44 for medical test performed by International Laboratories Services Interlab S.A. in the name of Talía Gonzales (evidence file, folio 1214); receipts from Ejecutivo San Luis de Transportes S.A. for transportation between Cuenca and Guayaquil for two adults dated April 2 and 3, 2014, for US$16.00 each (evidence file, folios 1214 and 1217); receipt in the name of Teresa Lluy from the Cooperativa de Transportes "S.A.N.T.A" for US$18.00 for transportation from Quito to Cuenca on July 27, 2012, for two adults (evidence file, folio 1215); receipts in the name of Teresa Lluy from Cooperativa de Transportes Flota IMBABURA for transportation Cuenca-Quito dated July 26, 2012, and February 14 and August 1, 2013, for two adults for US$24.00 each (evidence file, folios 1215 and 1216), and receipt from Cooperativa de Transportes "Turismo Oriental" for transportation Quito-Cuenca dated June 15, 2011, for two adults for US$28.00 (evidence file, folio 1216). Regarding the vitamin supplements, they presented invoices from Omnilife dated March 4 and 23, 2005, for US$707.40 and US$710.95; October 15, 2007, for US$195.89; November 24 and December 17, 2007, for US$184.43 and US$201.43; April 10,

in the case file, the Court is unable to quantify precisely the amount that the Lluy family disbursed due to the facts, since it is unable to determine clearly the justification for each expense and debt described. However, the Court recognizes that the victims have incurred diverse expenses for the medical treatment and care that Talía Gonzales Lluy required, and therefore establishes, in equity, in favor of Teresa and Iván Lluy, the sum of US$50,000.00 (fifty thousand United States dollars) each, for pecuniary damage.

D.2) Non-pecuniary damage

Arguments of the parties and of the Commission

410. The representatives argued that, considering the suffering for the persistent and incalculable violation of human rights of three individuals who were particularly vulnerable and required special protection, the amount for non-pecuniary damage could not be less than US$1,000,000.00 (one million United States dollars). In addition, the representatives mentioned that, in the Ecuadorian context, in which Ecuadorian justice has compensated the President of the Republic with "judgments worth millions," the claim of the victims in this case is not "farfetched." Nevertheless, they indicated that "in the worst case," the opinion of expert witness Marcelo Pazmiño should be taken into consideration, who proposed taking the life expectancy of Ecuadorian women, which is 72 years, and calculating the number of months multiplied by a family's basic basket of food products.

411. The State asked the Court, if it decided that the State was responsible in this case, "in application of inter-American case law, to calculate the non-pecuniary damages based on the equity principle," taking into account the judgments related to the right to health in which Ecuador has been sentenced. Thus, it asked that the Court use the amounts ordered in the cases of *Albán Cornejo, Vera Vera,* and *Suárez Peralta* as parameters. In this regard, the State indicated that the "non-pecuniary damage caused to the direct victim, if the Court should decide this, […] should not exceed US$52,500.00 (fifty-two thousand five hundred [United States] dollars." For the indirect victims, Ecuador alleged that the amount should not exceed US$12,500.00 (twelve thousand five hundred United States dollars). In addition, the State argued that Iván Lluy had not visited any public health center to receive psychological or psychiatric treatment and indicated 12 centers where he could receive psychological treatment and two where he could receive psychiatric treatment.

Considerations of the Court

412. International case law has repeatedly established that the judgment may constitute *per se* a form of reparation.[425] However, in its own case law, the Court has developed the concept of non-pecuniary damage and has established that this "may include both the suffering and affliction caused to the direct victim and his or her next of kin, the impairment of values that

2008, for US$250.58; December 2, 2009, for US$292.90; invoice with illegible date for US$128.05; invoice dated August 1, 2011, for US$168.46; invoice of June 6, 2013, for US$136.99; invoice of November 15, 2012, for US$262.90, and invoices of February 24 and March 17, 2014, for US$126.81 and US$186.15 (evidence file, folios 1221 to 1230).

[425] *Cf. Case of El Amparo v. Venezuela. Reparations and costs.* Judgment of September 14, 1996. Series C No. 28, para. 35, and *Case of Cruz Sánchez et al. v. Peru*, para. 482.

are very significant for the individual, as well as changes of a non-pecuniary nature in the living conditions of the victim or his or her family."[426]

413. In this case, the Court notes that, according to the expert appraisal of Sonia Nivelo, the infection and living with HIV have caused Talía "serious psychological effects" and a "prolonged depression," "dysthymia" and "a personality and behavioral disorder due to the illness." In addition, in an affidavit, Talía stated that she has felt very much alone; she has been unable to have lasting friendships, and she has suffered from anger and sadness. She also indicated that, at times, she "want[ed] to die […] so that they would not give [her] any more pills that made [her] suffer," and that she has faced rejection and discrimination. When she found out about her illness, she though "that it was a threat to her family and everyone around [her]," and she is "terrified of rejection." Finally, she stated that she has to hide herself, she cannot lead a normal life, and that she "is condemned to live like that for the rest of her life."

414. Regarding Teresa Lluy, expert witness Sonia Nivelo considered that she suffered from a "combined anxiety and depression disorder," as well as "symptoms of reaction to acute stress," owing to the "isolation, the social stigma, […] the loss of her employment, [and] having to take charge of […] her daughter's illness without any preparation and without any social support." In addition, she emphasized that Mrs. Lluy suffered from emotional diabetes, hypertension, chronic physical pain, apprehension, muscular tension and vegetative hyperactivity. Meanwhile, in her affidavit, Teresa indicated that when she found out about her daughter's infection, her whole world fell apart, she was distraught, and worried about her daughter's life and, since then, she had been treated with discrimination and aggressiveness. She also stated that she was constantly afraid that her daughter would become ill owing to the conditions in which they had to live, and she and her children were "tense, frightened, confused, depressed, and had lost their desire to live." Lastly, she indicated that they had diagnosed her with emotional diabetes owing to the stress she had suffered because of her daughter's situation.

415. Meanwhile, according to the psychological appraisal made by expert witness Sonia Nivelo, Iván Lluy suffered from "severe stress reactions and adaptation disorders," depression, anxiety, preoccupation, a feeling of inability to tackle problems, as well as feelings of anger, frustration, despair and guilt. According to the expert witness, Iván Lluy suffered from moderate depression. In his affidavit, Iván stated that his life "was horribly affected" when he found out about his sister's infection, "often he was unable to hold [himself] in check and could only cry." He also stated that he had been diagnosed with "major depression" and had to take medication for 18 months. Also, the Court notes that, in Teresa Lluy's affidavit, she stated that when she had to travel to Quito with Talía for treatment, "her son was left completely alone in Cuenca, and sometimes slept in the parks or wherever he found a space because [they] did not have the money to rent a place."

416. Accordingly, considering the circumstances of this case, the sufferings caused to the victims by the violations that were committed, as well as the change in the living conditions and other consequences of a non-pecuniary nature that they endured, the Court finds it

[426] *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 Cruz Sánchez et al. v. Peru*, para. 482.

pertinent to establish, in equity, for non-pecuniary damage, a compensation equivalent to US$350,000.00 (three hundred and fifty thousand United States dollars) for Talía Gonzales Lluy; US$30,000.00 (thirty thousand United States dollars) for Teresa Lluy, and US$25,000.00 (twenty-five thousand United States dollars) for Iván Lluy.

E. Costs and expenses

417. The representatives argued that the victims had incurred numerous expenses owing to the steps taken at the domestic level and during the proceedings before the inter-American system, which included the expenditure to attend hearings, mailing expenses, the reproduction of documents, transportation, accommodation and food. They therefore asked the Court to consider, in equity, reimbursement of US$50,000.00 (fifty thousand United States dollars) for costs and expenses, "if access to the Victims' Legal Assistance Fund is not granted."

418. The State argued that "the representatives […] are aware of the obligation to issue invoices for professional services," so that, since they do not have documents that substantiate their claim, the State understood that the amount for costs and expenses should not exceed US$10,000.00 (ten thousand United States dollars).

419. The Court reiterates that, pursuant to its case law,[427] costs and expenses are part of the concept of reparation, because the measures taken by the victims in order to obtain justice at both the domestic and the international level, entail disbursements that should be compensated when the State's international responsibility has been declared in a judgment convicting it. As regards the reimbursement of costs and expenses, it is for the Court to assess their scope prudently. They include the expenses incurred before the authorities of the domestic jurisdiction, and also 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 described by the parties, provided the *quantum* is reasonable.[428]

420. This Court has indicated that "the claims of the victims or their representatives for costs and expenses, and the evidence that substantiates them, must be submitted to the Court on the first procedural occasion granted to them; in other words, in the pleadings and motions brief, without prejudice to these claims being updated subsequently, in keeping with the new costs and expenses incurred during the proceedings before this Court."[429] In addition, the Court reiterates that it is not sufficient to merely forward probative documents, but rather the parties are required to present their arguments relating

[427] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs,* para. 42, and *Case of Cruz Sánchez et al. v. Peru*, para. 488.

[428] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Cruz Sánchez et al. v. Peru*, para. 488.

[429] *Case of Garrido and Baigorria v. Argentina. Reparations and costs*, para. 79, and *Case of Cruz Sánchez et al. v. Peru*, para. 489.

the evidence to the fact that it is considered to represent and, in the case of alleged financial disbursements, the items and their justification must be established clearly.[430]

421. In this case, there is no probative support for the costs and expenses incurred by the victims' representatives in the case file. Nevertheless, the Court can infer that the representatives incurred expenses when exercising legal representation during the proceedings before this Court. Also, it is reasonable to suppose that, over the years that this case was processed before the Commission, the victims and the representatives made financial disbursements. Consequently, the Court establishes, in equity, the sum of US$10,000.00 (ten thousand United States dollars) which must be delivered to the representatives for the costs and expenses of processing the proceedings before the inter-American human rights system. At the stage of monitoring compliance with this Judgment, the Court may establish that the State should reimburse subsequent reasonable and duly authenticated expenses to the victims or their representatives.[431]

F. Reimbursement of the Victims' Legal Assistance Fund

422. The victims' representatives had requested the support of the Victims' Legal Assistance Fund of the Court to cover litigation costs before the Court. In an order of the President of October 7, 2014, this request was declared admissible and authorization was given for the necessary financial assistance to present a maximum of three statements and two expert opinions, at the hearing or by affidavit, and also for the appearance of one of the representatives at the public hearing held in this case.

423. On June 30, 2015, the disbursements report was forwarded to the State, as established in article 5 of the Rules for the operation of this Fund. The State indicated that it had no comments to make on the disbursements made for the expenses incurred in this case, which amount to US$4,649.54 (four thousand six hundred and forty nine United States dollars and fifty-four cents). The said amount must be reimbursed to the Inter-American Court within 90 days of notification of this Judgment.

G. Method of complying with the payments ordered

424. The State shall pay the compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses established in this Judgment directly to the persons indicated herein, within one year of notification of the Judgment, in accordance with the following paragraphs.

425. If the beneficiaries should die before they receive the respective compensation, this shall be delivered directly to their heirs, in accordance with the applicable domestic laws.

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[430] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 277, and *Case of Cruz Sánchez et al. v. Peru*, para. 489.

[431] *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs*. Judgment of September 1, 2010. Series C No. 217, para. 291*, and Case of Veliz Franco et al. v. Guatemala*, para. 307.

426. The State must comply with its pecuniary obligations by payment in United States dollars, using the exchange rate in force on the New York Stock Exchange (United States) the day before the payment to make the calculation.

427. 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 indicated time frame, the State shall deposit the said amounts in their favor in a deposit account or certificate in a solvent Ecuadorian financial institution, in United States dollars, and in the most favorable financial conditions allowed by the State's banking laws and practice. If the corresponding compensation is not claimed, after 10 years, the amounts shall be returned to the State with the interest accrued.

428. The amounts allocated in this Judgment as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses shall be delivered to the persons indicated in full, as established in this Judgment, without any deductions derived from possible taxes or charges.

429. If the State falls in arrears, including in reimbursement of the Victims' Legal Assistance Fund, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Ecuador.

XIII
OPERATIVE PARAGAPHS

Therefore,

THE COURT

DECIDES,

Unanimously,

1. To accept the acknowledgement of one fact made by the State, in accordance with paragraphs 49 and 50 of this Judgment.

2. To reject the preliminary objection concerning the alleged failure to exhaust domestic remedies filed by the State, in accordance with paragraphs 27 to 33 of this Judgment.

DECLARES,

Unanimously, that

3. The State is responsible for the violation of the rights to life and to personal integrity recognized in Articles 4 and 5 of the American Convention, in relation to Article 1(1) of this instrument, owing to the violation of the obligation to monitor and supervise the provision of

health care services, to the detriment of Talía Gabriela Gonzales Lluy, in accordance with paragraphs 167 to 191 of this Judgment.

4. The State is responsible for the violation of the right to personal integrity recognized in Article 5(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Teresa Lluy and Iván Mauricio Lluy, in accordance with paragraphs 211 to 229 of this Judgment.

5. The State is responsible for the violation of the right to education recognized in Article 13 of the Protocol of San Salvador, in relation to Articles 1(1) and 19 of the American Convention, to the detriment of Talía Gabriela Gonzales Lluy, in accordance with paragraphs 233 to 291 of this Judgment.

6. The State is responsible for the violation of the judicial guarantee of a reasonable time in the criminal proceedings recognized in Article 8(1) of the American Convention, in relation to Articles 19 and 1(1) thereof, to the detriment of Talía Gabriela Gonzales Lluy, in accordance with paragraphs 298 to 316 of this Judgment.

7. The State is not responsible for the violation of the judicial guarantee of a reasonable time in the civil proceedings recognized in Article 8(1) of the American Convention, in relation to Articles 19 and 1(1) thereof, to the detriment of Talía Gabriela Gonzales Lluy, in accordance with paragraphs 322 and 327 of this Judgment.

8. The State is not responsible for the violation of the right to judicial protection recognized in Article 25(1) of the American Convention, in relation to Article 1(1) thereof, in accordance with paragraphs 331 to 333 and 338 of this Judgment.

AND ESTABLISHES,

unanimously, that:

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

10. The State must provide Talía Gabriela Gonzales Lluy, free of charge and promptly, with medical and psychological or psychiatric treatment, including the provision of the medicines she may require also free of charge, in accordance with paragraphs 355 to 360 of this Judgment.

11. The State must, within six months of notification of this Judgment, make the publications indicated in paragraph 364 of this Judgment, as determined herein. The publication must remain on an official website for at least one year.

12. The State must, within one year of notification of this Judgment, organize the public act to acknowledge international responsibility indicated in paragraph 368 of this Judgment, as established herein.

13. The State must award Talía Gabriela Gonzales Lluy a scholarship to continue her university studies that is not conditional on obtaining the marks that would enable her to obtain a scholarship based on academic excellence, in accordance with paragraph 372 of this Judgment. The victim or her representatives must advise the State of her intention to receive the scholarship within six months.

14. The State must award Talía Gabriela Gonzales Lluy a grant for post-graduate studies that is not conditional on her academic performance during her undergraduate studies, in accordance with paragraph 373 of this Judgment. To this end, once she has graduated, Talía must inform the State and this Court, within 24 months, on the postgraduate studies that she wishes to pursue and that her application has been accepted.

15. The State must provide Talía Gabriela Gonzales Lluy, free of charge, with decent housing, within one year, in accordance with paragraph 377 of this Judgment.

16. The State must organize a program to train health officials on best practice and rights of patients with HIV, in accordance with paragraphs 384 to 386 of this Judgment.

17. The State must pay, within one year of notification of this Judgment, the amounts established in paragraphs 409 and 416 as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses, in accordance with paragraph 421 of this Judgment.

18. The State must reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the amount disbursed during the processing of this case, in accordance with paragraph 423 of this Judgment.

19. The State must provide the Court with a report on the measures taken to comply with this Judgment, within one year of its notification. The reports related to medical and psychological or psychiatric treatments shall be presented every three months.

The Court will monitor full compliance with this judgment, in exercise of its authority and in fulfillment of its obligations under the American Convention on Human Rights, and will consider this case closed when the State has complied fully with all its provisions.

Judges Humberto Antonio Sierra Porto, Alberto Pérez Pérez and Eduardo Ferrer Mac-Gregor Poisot informed the Court of their concurring opinions, which accompany this judgment. Judges Roberto F. Caldas and Manuel E. Ventura Robles adhered to the concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot.

DONE, at San José, Costa Rica, on September 1, 2015, in the Spanish language.

Humberto Antonio Sierra Porto
President

Roberto F. Caldas

Manuel E. Ventura Robles

Diego García-Sayán

Alberto Pérez Pérez

Eduardo Vio Grossi

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Humberto Antonio Sierra Porto
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE HUMBERTO ANTONIO SIERRA PORTO

JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF GONZALES LLUY ET AL. v. ECUADOR

JUDGMENT OF SEPTEMBER 1, 2015

(Preliminary objections, merits, reparations and costs)

A. Introduction

1. The purpose of this opinion is to expand on and supplement the reasons why I consider that it is not necessary to declare the violation of Article 26 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") in order to achieve the effective protection and guarantee of economic, social and cultural rights (hereinafter "ESCR"). To the contrary, my legal opinion on this matter is that using this way to try and make the ESCR justiciable under the inter-American system may be even more problematic than other ways that exist and have already been applied by the Court. For example, in this case, the Court protected the right to health by way of its connectivity to the right to life and to personal integrity, by declaring the violation of "the obligation to monitor and supervise the provision of health care services, within the framework of the right to personal integrity and of the obligation not to endanger life."[1]

2. In this regard, I would like to clarify that I am basing my opinion on the premise that mechanisms must exist to protect these rights, and for this reason I understand the good intentions of the judges and academics who propose the direct application of Article 26 of the Convention. However, I believe it important to point out the main problems that, in my opinion, arise from this proposal and that are, in turn, the reason why I consider that the Inter-American Court should not adopt this position.

3. To support the foregoing, I will proceed to analyze: (i) the scope of Article 26 of the American Convention; (ii) the limitation of competence established in the Protocol of San Salvador, and (iii) the use of evolutive interpretation and the *pro homine* principle. Lastly, and in conclusion, I will include some general considerations on the nature and competence of human rights courts.

B. Scope of Article 26 of the American Convention

4. Before beginning to examine Article 26 of the Convention, I would like to clarify that my position on this issue refers exclusively to the competence of the Inter-American Court to declare a violation of the rights established in the Protocol of San

[1] Para. 191 of this Judgment.

Salvador; consequently, I will not refer in great detail to some of the discussions that exist in the context of the debate on the justiciability of ESCR. In particular, I do not find it relevant to engage in a more in-depth discussion of the nature of ESCR as rights that require action by the public authorities (*derechos prestacionales*), because it is clear that every right requires this to a greater or lesser extent. Furthermore, I do not consider that my position disregards the indivisible nature of human rights, because I make a distinction between the obligations that a State undertakes to meet by the signature and ratification of a treaty, and the competences that the said treaty may accord to the organ or court that monitors it. In this regard, it is true that all rights are intrinsically connected and should not be considered in isolation – which is why I support the justiciability of ESCR by way of connectivity – but the indivisible nature of rights is not a sufficient reason to modify the competence of a court, as proposed by those who seek direct justiciability by means of a broad interpretation of Article 26 of the Convention.

5. Having clarified the foregoing, I consider it pertinent, in the first place, to establish the obligations that arise from Article 26 of the Convention. This article stipulates that:

> CHAPTER III
> ECONOMIC, SOCIAL AND CULTURAL RIGHTS
>
> 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 (underlining added).

6. Regarding the scope of Article 26, the Court has indicated that the main obligation arising from this article is the progressive development of economic, social and cultural rights,[2] which entails "an obligation – although conditional – of non-regressivity, that should not always be understood as prohibiting measures that restrict the exercise of a right."[3] In addition, the Court has asserted that the general obligations under Articles 1 and 2 of the Convention are also applicable to this article.[4]

7. However, Article 26 does not establish a list of rights, but refers directly to the Charter of the Organization of American States (hereinafter "the Charter" or "the OAS Charter"). A reading of the Charter reveals that this does not contain a list of subjective, clear and precise rights either; rather, to the contrary, it includes a list of expectations and goals that the States of the region are striving to attain, which makes it difficult to surmise which rights the article is referring to. In brief, there are no express references to the ESCR and, in order to affirm that they are, in fact,

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[2] *Cf. Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 147.

[3] *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, Merits, reparations and costs*. Judgment of July 1, 2009 Series C No. 198, para. 103.

[4] "[I]t is pertinent to observe that although Article 26 is found in Chapter III of the Convention, entitled 'Economic, Social and Cultural Rights,' it is also located in Part I of this instrument, entitled, "State Obligations and Rights Protected" and, consequently, it is subject to the general obligations contained in Articles 1(1) and 2 of Chapter I (entitled 'General Obligations'), as are Articles 3 to 25 indicated in Chapter II (entitled 'Civil and Political Rights)." *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Officev. Peru*, para. 100**.**

established in the Charter, it is necessary to perform a fairly extensive task of interpretation. An example of this is the right to health, which was analyzed in this case. Some authors affirm that this right is clearly established in the Charter; however, when one looks for this in the text, one finds only two indistinct references in Articles 34[5] and 45.[6] In this regard, I fully agree that "it is not enough just to infer a right by its name from the Charter, it is also necessary that the Charter provides a minimum content for that right. This minimum content could then be clarified – to a certain extent – by other international instruments. Defining the entire content and scope of a right by means of other instruments would invariably result in a modification of the Charter."[7]

8. In this regard, it is worth stressing that:

> "The inclusion [of Article 26] in the text of the Convention requires a theoretical effort in order to endow it with meaning in accordance with the other articles of the Convention and the principles that regulate its interpretation, avoiding two position that we understand are incorrect, [including] the temptation to introduce, by means of this article, a complete list of social rights that, clearly, the States did not intend to incorporate into the system of the Convention, which was designed above all to protect civil and political rights."[8]

9. Even though it would have been desirable when Article 26 was drafted to use a less problematic legislative technique than the complex system of referrals to the OAS Charter, the truth is that the referral is to the Charter and not to the American Declaration of the Rights and Duties of Man, which could have led to a different interpretation, because the Declaration does contain more precise references to the ESCR.[9] Unfortunately, this is not the case.[10]

10. In addition, it has been affirmed that, in the case of *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru,* the Inter-American Court accepted that Article 26 of the Convention contained a precise list of the ESCR that could be enforced directly. In my opinion, this gives an excessive scope to that judgment. First, the judgment does not declare the violation of Article 26 and the considerations made relate precisely to the obligation of progressive development

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[5] Article 34(i) of the OAS Charter establishes among the "basic objectives of integral development" the "[p]rotection of man's potential through the extension and application of modern medical science" (underlining added).

[6] Article 45 of the OAS Charter stipulates: "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."

[7] Oswaldo Ruiz Chiriboga, 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), p. 171.

[8] Víctor Abramovich, and Julieta Rossi, '*La Tutela de los Derechos Económicos, Sociales y Culturales en el Artículo 26 de la Convención Americana sobre Derechos Humanos*', Estudios Socio-Jurídicos, Vol. 9, 2007, p. 37.

[9] For example, Article XI establishes that: "Every person has the right to the preservation of his heatlh through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources."

[10] In this regard, "[w]hen determining whether a rights is implicit in the Charter, it is necessary, in our opinion, to avoid the shortcut of appealing directly to the American Declaration as an instrument that forms the basis for the content of the human rights established in the Charter. [The foregoing, taking into account that] Article 26 refers to the rights derived from the economic, social, educational, scientific and cultural standards of the Charter and does not refer to the Declaration." Víctor Abramovich, and Julieta Rossi, '*La Tutela de los Derechos Económicos, Sociales y Culturales en el Artículo 26 de la Convención Americana sobre Derechos Humanos*', Estudios Socio-Jurídicos, Vol. 9, 2007, p. 47.

and not to a direct enforceability of any right in particular. Second, the judgment does not define or clarify either the scope or minimum content of the ESCR that would be protected. Third, even if the intention was to derive some type of direct justiciability from the affirmation that the obligations of respect and guarantee are applicable to Article 26 of the Convention, it should be stressed that this affirmation is an *obiter dictum* of that judgment, and thus has no direct relationship to the final decision which was to declare that Article 26 had not been violated.[11] Furthermore, this consideration in the judgment has not been reiterated in the subsequent case law of the Court, even though cases have been heard in which the alleged violations could have allowed the Court to reaffirm its position; consequently, doubts remain as to whether, six years after that judgment was adopted, it can be considered a consistent precedent. Lastly, there is a significant basic problem with that judgment, in that it makes no mention of the Protocol of San Salvador, which, as we shall see below, is fundamental to understanding the competence of the Court in this matter.

11. Taking the above into account, it is possible to reach a first conclusion, and this is that Article 26 of the American Convention does not contain a list of clearly established subjective rights, owing precisely to the problems resulting from the referral to the OAS Charter. Therefore, the obligation implied by this article, and that the Court may supervise directly, is compliance with the obligation of progressive development – and the consequent obligation of non-regressivity – of the rights that may be derived from the Charter, over and above the mere reference to their name, such as the right to work, for example.[12]

C. The Protocol of San Salvador

12. As indicated previously, the Inter-American Court's competence with regard to ESCR cannot be discussed without taking into account the Protocol of San Salvador. In this regard, during the eighteenth OAS General Assembly, held in 1988, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) was opened to signature. The text of the Protocol was based on a working draft prepared by the Inter-American Commission[13] and it was adopted on November 17, 1988. The Protocol entered into force on November 16, 1999, after it had been ratified by 11 States and, at the present time, 16 States have ratified it.[14]

13. With regard to the nature of protocols, it should be recalled that, under public international law, they are independent agreements, but they are subsidiary to a

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[11] Indeed, the reason why the judgment decided that there had not been a violation is that "considering that the analysis is not centered on some measure adoptaed by the State that hindered the progressive realization of the right to a pension, but on the State's non-compliance with the payment ordered by the domestic ourts, the Court finds that the violated rights are those protected in Articles 25 and 21 of the Convention and does not find grounds to also declare non-compliance with Article 26 of this instrument." *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Officev. Peru*, para. 106.

[12] For example, Article 45(b) of the Charter establishies that: "Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working."

[13] Inter-American Court of Human Rights, *Documentos Básicos en Materia de Derechos Humanos en el Sistema Interamericano (Actualizado a febrero de 2012),* 2012, pp 11.

[14] The following States have ratified the Protocol: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay. Taken, on September 10, 2015, from: http://www.oas.org/juridico/spanish/firmas/a-52.html.

treaty, that add to, clarify, amend, or supplement the procedural or substantial content of that treaty. The existence of a protocol is directly related to the existence of a treaty; in other words, without a framework treaty, there is no protocol.[15]

14. The relevance of the Protocol stems from the fact that it is on the basis of this agreement that the States of the region took the decision to define the ESCR with which they are obliged to comply. They also established the content of those rights clearly and precisely. For example, Article 10 of the Protocol establishes the right to health as follows:

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.

15. However, the States took the sovereign decision to restrict which of the economic, social and cultural rights established in the Protocol could be monitored by the individual petition mechanism when establishing in Article 19(6) that:

> 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 (underlining added).

16. Thus, by this provision, the States decided to limit the competence of the Commission and of the Court to hear contentious cases that were not related to trade union rights or the right to education. Indeed, in this case, the Court, exercising the competence granted by this article, declared the violation of the right to education established in Article 13 of the Protocol of San Salvador.[16]

17. However, this limitation of competence should not be understood as contradictory to Article 26 of the American Convention, bearing in mind that the said article (19(6)) expresses the subsequent and more specific intention of the States with regard to the competence of the Inter-American Court in relation to ESCR. Furthermore, the American Convention should not be read alone, without taking into account its Protocol, because they are complementary treaties that should be read and interpreted together. Thus the Court may hear contentious cases in which the violation of the obligation of progressive realization of the rights that could be derived from the Charter is argued, based on Article 26 of the Convention, and also those cases in which the violation of Articles 8(a) and 13 of the Protocol is alleged.

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[15] See, Definitionns of key terms used in the UN Treaty Collection. Consulted at: https://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml&clang=_en.

[16] Para. 291 of this Judgment. .

18. It is also relevant to point out that the general obligation of the States Parties arising from the Protocol are independent of the fact that the Court has competence to declare violations within the framework of its contentious function. The States established other mechanisms merely to ensure compliance with those rights, such as those defined in the other paragraphs of Article 19 of the Protocol, such as the possibility of the Inter-American Commission formulating observations and recommendations on the status of the ESCR in its annual report.

19. Despite the fact that that Article 19(6) of the Protocol establishes the limitation of competence clearly and precisely, some authors have indicated that evolutive interpretation and the *pro homine* principle should be used in order to update the normative meaning and scope of Article 26 of the Convention. Consequently, I will now examine some of the arguments employed to justify this position.

D. Evolutive interpretation and *pro homine* principle

20. On this point, those who propose the direct justiciability of ESCR by the application of Article 26 of the Convention have argued that one of the ways to overcome the barrier to competence that the Protocol stipulates would be by applying an evolutive interpretation. In particular, they use comparative law as a tool, because several constitutional courts of the countries of the region have accepted the direct justiciability of ESCR. However, I consider that this issue should be tackled in two ways. The first entails an examination of the other interpretive methods under international law, because the evolutive method is not the only one that should be taken into account. Second, I will present my opinion on how the comparative law on this issue should be assessed.

21. Regarding the means of interpretation that should be taken into account, Articles 31 and 32 of the Vienna Convention on the Law of Treaties establish the most important methods. The Inter-American Court has reflected this in its case law; thus, in addition to the evolutive method, it has used other interpretation criteria, such as literal interpretation, systematic interpretation, and teleological interpretation. In this regard, the Court has understood that literal interpretation is the interpretation made in good faith in accordance with the ordinary meaning to be given to the terms used. The Court has used this type of interpretation when considering the literal meaning of some expressions and terms of the Convention and other treaties.[17] Meanwhile, based on a systematic interpretation, the Court has maintained that the norms must be interpreted as part of a whole, the meaning and scope of which should be established in function of the legal system to which it belongs.[18] In the context of this type of interpretation, the Court has analyzed the *travaux préparatoires* of the American Declaration and of the American Convention, as well as of some instruments of the universal system of human rights and other regional systems of protection such as the European and the African systems.[19] The Court has also used the teleological or

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[17] See, for example, *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. 178, and *Case of Mohamed v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of Novermber 23, 2012. Series C No. 255, para. 93.

[18] *Cf. Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, para. 191, and *Case of González et al. ("Cotton Field") v. Mexico*. *Preliminary objection, Merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 43.

[19] *Cf. Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, paras. 191 a 244.

purposive interpretation. In this regard, the Court has analyzed the purpose of the norms involved in the interpretation, considering that the object and purpose of the treaty and the purposes of the inter-American human rights system are pertinent. Lastly, evolutive interpretation means that:

> [H]uman rights treaties are living instruments whose interpretation must consider the changes over time and present day conditions. […] That evolutive interpretation is consistent with the general rules of treaty interpretation established in Article 29 of the American Convention, and in the 1969 Vienna Convention on the Law of Treaties. By making an evolutive interpretation, the Court has given special relevance to comparative law, and for this reasons has used domestic law or the case law of domestic courts when examining specific disputes in contentious cases.[20]

22. In this regard, it should be pointed out that a method of interpretation should be used when a norm is ambiguous, and I do not consider that this is the case as regards the limitation of competence stipulated in Article 19(6) of the Protocol of San Salvador in relation to Article 26 of the Convention, because, as indicated above, the meaning of the norm is clear. Nevertheless, when a norm must be interpreted, it is not sufficient to use one of the different methods of interpretation that exists, because they are complementary and none of them outranks the others.

23. For example, I will use the other methods of interpretation to show that, instead of upholding the direct justiciability of ESCR by means of Article 26 of the Convention, they support the position that I have been defending in this opinion. The literal interpretation of the two norms: namely, Article 26 of the Convention and Article 19(6) of the Protocol, implies exactly what I have been doing, and that is to conclude that a reading of the two norms reveals that it was not the intention of the States to establish an option of direct justiciability of Article 26 and, to the contrary, in Article 19(6) they determined a limitation of competence. The literal interpretation refers to the good faith with which treaties should be interpreted, which is relevant in this regard, because it would appear that, in some cases, the aim of reaching a specific result leads to confusing the literal meaning of the norm or to disregarding norms or factors that are relevant for the interpretation.

24. Regarding the systematic interpretation, in order to determine the scope of Article 26 of the Convention, the provisions of the Protocol should not be forgotten, because, as I mentioned previously, the two treaties must be read together. Accordingly, a systematic interpretation that only uses the other articles of the Convention cannot be considered valid. In addition, some authors indicate that a systematic interpretation based on Article 4 of the Protocol could lead to the conclusions that Article 19(6) of the Protocol is inapplicable. In this regard, the said article stipulates that:

> **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.

25. In this regard, I consider that this article would be applicable if Article 26 of the Convention had stipulated a list where the ESCR were clearly established, but, as I have already indicated, this is not so; hence, it cannot be argued that the two norms

[20] *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, para. 245, and *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.

compete with each other. In addition, it would not be logical to think that Article 26 cancels or annuls the limitation of competence under Article 19(6), because this does not restrict rights, but rather limits the competences of the Commission and of the Court. Confusing the restriction of a right with the limitation of competences could lead to the absurd result of opening up the Court's competence completely, even contrary to the wishes of the States.

26. With regard to the teleological or purposive interpretation, it has been affirmed that this method favors the direct justiciability of ESCR in two ways: (i) the ultimate purpose of the inter-American system is the protection of human rights and this means trying to make the greatest possible number of rights enforceable, and (ii) when Article 26 of the Convention was established, the States' intention was not to exclude the possibility of the direct enforceability of ESCR. Regarding the first affirmation, it should be pointed out that the Protocol of San Salvador had the specific purpose of incorporating the ESCR into the inter-American system more precisely, and expanding the system's sphere of protection, so that it is not fair to situate the Protocol as a treaty that would contravene the purpose of the inter-American system simply by establishing rules of competence. In addition, on this point it should be stressed that "[i]f the ordinary meaning of a provision is clear in not granting jurisdiction to the IAS bodies, the object and purpose of the Convention cannot be used to overthrow that result."[21]

27. Regarding the second affirmation, although the preparatory work of the treaty is a supplementary means of interpretation, in some cases, the Inter-American Court has used this to try and discern the objective or purpose that the States had when creating the treaty. Thus, in the judgment in the *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru,* the Court referred to the preparatory work with the intention of demonstrating that, perhaps, the State had agreed on the direct justiciability of the ESCR when they discussed Article 26 of the Convention. In this regard, it is worth noting that:

> The Court put forward the points of view of only those States which tried to materialize the exercise of ESC rights by means of the activity of the Court. No mention was made of the countries which opposed the enforceability of ESC rights and, more importantly, as Burgorgue-Larsen recalls: nothing was said about the process which ultimately gave rise to the drafting of Article 26 as such. Nor was anything said about the scope the different States were prepared to confer on this article. Does this mean that the article was the result of a compromise, or did it represent those States which were in favor of giving economic and social rights such an important place? Clearly, the silences of the Court were part of its strategy to reach its objective, come what may, namely conferring the widest scope possible on Article 26. But Brazil and Guatemala aside, the preparatory works show just how reluctant the majority of States were to recognize that what was to become Article 26 should be actionable[22] (underlining added).

28. Regarding the use of comparative law as a means of reinforcing a possible evolutive interpretation in this regard, although it is true that most of the Constitutions of the countries of the region include a list of ESCR, and many of them admit the possibility of the direct justiciability of such rights, I consider that this is not a sufficient argument to expand the scope of Article 26 of the Convention. In this regard, I repeat that it was the States themselves that took the decision not to guarantee

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[21] Oswaldo Ruiz Chiriboga, 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), p. 170.

[22] Oswaldo Ruiz Chiriboga, 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), p. 170.

direct justiciability in this article and, to the contrary, when they established a list of rights in the Protocol, they decided to limit the Court's competence. Thus, even though, internally, the State have gradually expanded their position, it is not for the Court to modify the intention originally expressed in the Protocol. In this regard, Articles 31, 76 and 77 of the American Convention determine that, if the States wish to recognize other rights, they may propose amendments or protocols that allow this. Accordingly, I agree that "[i]f the States really want to take this issue seriously, it is urgent that they revise the relevant treaties so that it is the States themselves that decide to update their obligations in this area."[23]

29. Meanwhile, some authors have used the *pro homine* principle established in Article 29 of the Convention to affirm that this tends towards the direct enforceability of the ESCR via Article 26, given that this position would provide more extensive protection. Regarding this principle, the Court has established that "the international system of protection should be understood to be comprehensive, a principle established in Article 29 of the American Convention, which imposes a protection framework that always accords preference to the interpretation or the norm that is most favorable to human rights, the cornerstone for protection of the whole inter-American system. In this regard, the adoption of a restrictive interpretation of the scope of the Court's competence would not only run counter to the object and purpose of the Convention, but would also affect the practical effects of the treaty itself and the guarantee of protection that it establishes, with negative consequences for the presumed victim in the exercise of his right of access to justice."[24] Thus, the *pro homine* principle should be applied when the Court is faced with two possible precise and valid interpretations. Indeed, what the analysis made in this opinion has demonstrated is that the direct justiciability of the ESCR based on Article 26 of the Convention is not a valid interpretation because its intention is to generate a normative statement that does not correspond to that article.[25]

E. Conclusion and final considerations

30. Having set out the legal arguments that support my decision in this judgment, I also find it appropriate to present other reasons that reinforce my position. To start, one of the reasons why I consider that the arguments of those who are in favor of the direct justiciability of the ESCR under Article 26 are not persuasive is because they have not been able to justify how this approach, which contravenes what is expressly stated in the Protocol, is a better option that the other means of protection that the Court has used, such as the connectivity with the right to life or the right to personal integrity, or the concept of a "decent life." Some authors affirm that that approach is necessary in order to provide a specific sphere of protection for the ESCR, without taking into account that the Protocol of San Salvador created this sphere of protection, but concluded that the Court would only consider directly the rights established in Article 8(a) and 13 of the Protocol. In addition, it has not been proved that the use of connectivity or the concept of a "decent life" as mechanisms for the indirect protection

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[23] Juan Carlos Upegui Mejía, *Diálogos Judiciales en el Sistema Interamericano de Garantía de los Derechos Humanos*. Barcelona, España, February 26, 2015. Available at https://www.youtube.com/watch?v=7cAls8PSzmo&feature=youtu.be

[24] *Case of Vélez Loor v. Panamá. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 34.

[25] Similarly see: *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, Merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 79.

of the ESCR[26] is not effective for the protection and guarantee of the victims' rights, or that it is not an option that provides extensive protection. I agree that it is important that case law must be progressive and provide all possible guarantees, but in those cases in which protection can be achieved by less problematic and controversial mechanisms, it is better to choose the most effective means and leave academic pretensions to one side.

31. Thus, in this judgment, the Court decided to examine Talía Gonzales Lluy's health problems as a persons living with HIV under the rights to life and to personal integrity recognized in Articles 4 and 5 of the Convention. The fact that the Court chose to argue the case in this way, did not prevent it from making important progress as regards the requirements of availability, accessibility, acceptability and quality in the provision of health care services, as well as the obligation to regulate, monitor and supervise the provision of services in private health care centers. This does not entail the creation of a new right, but merely provides content and scope to rights such as to life and to integrity that are recognized in the Convention and, therefore, accepted by the States Parties.

32. Furthermore, another of my concerns is that expanding the Court's competence, in disregard of the will of the States, delegitimizes the Court and calls into question the progress made, with considerable effort, on other issues in its case law. The legitimacy of the courts stems, in the first place, from the will of the States that decided to establish them, as well as from their judgments, the reasoning that they present in those judgments, and their adherence to the law. If the Court exceeds the functions assigned to it under the American Convention and other treaties of the inter-American system, it would be undermining the legitimacy and confidence that the States have deposited in it. A decision that involved disregarding the will of the States on this point could give rise to a negative reaction or displeasure that jeopardizes the system. Even though the Court was not established to please the States, because its mandate is to rule on their international responsibility, it should not create an imbalance that could lead to a lack of protection for the human rights that it seeks to safeguard. In this regard, I agree that:

> "A Court interpretation of the scope of article 26 that would permit direct access for ESC violations could constitute either broadening of the jurisdiction, or expansion of the "opportunities to detect, expose or remedy noncompliance" - in either case, results likely to produce hostile state reaction. Again, in both cases, a given state's hostility would flow primarily from its belief that the supranational body is engaging in more or a different kind of oversight than the state initially accepted. In this model, state perception is more important than the correctness (to the extent that this may be judged objectively) of the supranational decision. If, as we argue, states understand the terms of the American Convention and the Court's rulings in Five Pensioners and subsequent cases as limits on direct access for ESC litigation via article 26, a broader interpretation of that article by the Court would constitute overlegalization."[27]

33. Lastly, I consider that human rights courts, such as the Inter-American Court, cannot try and make up for the democratic deficiencies of the countries, and should therefore exercise caution in this regard.[28] Human rights courts should seek to protect

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[26] Similarly, during the public hearing in this case, expert witness Courtis stated that: "Conceptually, [he had …] no objection [to the interpretation of the right to health by means of the right to physical integrity, because] rights [are] indivisible, interdependent, and of equal rank."

[27] James L. Cavallaro and Emily Schaffer. Rejoinder: Justice before Justiciability: Inter-American Litigation and Social Change, New York University Journal of International Law and Politics, Vol. 39, Issue 2 (Winter 2006), p. 365.

[28] In this regard, see: "*Sin lugar para la soberanía popular. Democracia, derechos and castigo en el caso Gelman*. Roberto Gargarella (2012).

the rights of minorities, but based always on the competences that have been assigned to them. The stability and future of the inter-American system depends to a great extent on the balance that the Court achieves between the temptation to over expand it competences and the need to make progress in legal standards for the effective protection and guarantee of human rights.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE ALBERTO PÉREZ PÉREZ

CASE OF GONZALES LLUY ET AL. v. ECUADOR

JUDGMENT OF SEPTEMBER 1, 2015
(*Preliminary objections, merits, reparations and costs*)

1. I share fully the content of the Judgment delivered in this case, and the profound feeling of solidarity with the victim and understanding of her sufferings. However, I have felt the need to issue a concurring opinion in view of the constant proposals made during the deliberation of the case to cite the right to health as the main right violated by the State's actions. In other words, a right that is not included among those recognized by the American Convention on Human Rights, but rather among those recognized by the Protocol of San Salvador, and which is not one of the two rights that Article 19 of the Protocol includes under the specific system of protection; that is, the intervention of the organs of the system: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. I consider that those proposals were totally unfounded, for the following reasons.

I. *RECOGNITION OF RIGHTS AND INCLUSION IN THE PROTECTION SYSTEM*

2. The American Convention plays a dual role with regard to the rights established therein: on the one hand it recognizes those rights and, on the other hand, it includes them in a protection system that is the substantial innovation made by this instrument.

A. Recognition of rights

3. The American Convention *recognizes the civil and political rights* included in Chapter II of Part I:[1] the right to recognition of juridical personality, the right to life, the right to humane treatment, the prohibition of slavery and servitude, the right to personal liberty, the right to judicial guarantees, the principle of legality and retroactivity, the right to compensation in case of miscarriage of justice, protection of honor and dignity, freedom of conscience and religion, freedom of thought and expression, the right to correction or reply, the right of assembly, freedom of association, protection of the family, the right to a name, the rights of the child, the right to nationality, the right to property, freedom of movement and residence, political rights, equality before the law and judicial protection. These are the rights and freedoms "included in the system of protection of this Convention."[2]

4. This does not mean that the foregoing are the only rights and freedoms; it merely determines *which of the rights and freedoms are included in the system of protection* of the Convention: on the one hand, Articles 31, 76 and 77 regulate the way in which other rights could be included in the system of protection of the Convention; on

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[1] In the draft considered by the Specialized Conference at which the Convention was adopted, this was entitled "Protected rights," and included the article relating to the progressive development of economic, social and cultural rights.

[2] Article 31 of the American Convention on Human Rights.

the other hand, Article 29 ("Restrictions regarding interpretation," included in Chapter IV, "Suspension of Guarantees, Interpretation, and Application") *recognizes* other rights and guarantees (in particular "that are inherent in the human personality or derived from representative democracy as a form of government"), but mentions nothing about their inclusions in the system of protection.

5. Article 31, entitled "Recognition of Other Rights," regulates the way in which these other rights "may be included in the system of protection of this Convention," "in accordance with the procedures established in Articles 76 and 77."

6. This means that there are "other rights," in addition to those recognized by the Convention, that may be justiciable according to domestic law or to another legal order, but they would only be "recognized" for the effects of the Convention (Article 1(1)) and included in the protection system created by this instrument when the procedures established in Article 76 or Article 77 have been followed (either by amendments or protocols).

B. The system of protection

7. The system of protection is established in Part II, "Means of Protection," which assigns this competence to the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (according to Article 33). The whole of this protection system relates to the human rights established in the Convention or to the rights and freedoms recognized by the Convention. Let us look at the pertinent provisions:

a) *The Commission (Chapter VII)*: the pertinent articles refer to the competence of the Commission, the admissibility of cases, and the procedure. The Commission has *competence* in relation to the "petitions" lodged by "[a]ny person or group of persons, or non-governmental entity legally recognized in one or more Member States of the Organization [of American States]" "containing denunciations or complaints of *violation of this Convention* by a State Party (Article 44) or "communications in which a State Party alleges that another State Party has committed a *violation of a human right set forth in this Convention*" (Article 45). "The petition or communication that does not state facts that tend to establish a violation of the rights guaranteed by this Convention" shall be considered *inadmissible* (Article 47(b)). And the section on "Procedure" refers to the case in which the Commission "receives a petition or communication alleging *violation of any of the rights protected by this Convention*."

b) *The Court (Chapter VIII):* the pertinent articles refer to cases that may be submitted to the Court and its competence. Regarding the *submission of cases*: it may only hear a case submitted by the States Parties or the Commission when the procedures before the Commission have been exhausted (Article 61), so that all the norms cited in relation to the Commission are applicable. Regarding *competence*, the Court must decide whether "there has been a *violation of a right or freedom protected by this Convention,"* and, if so, it "shall rule that the injured party be ensured the enjoyment of his *right or freedom that was violated*," and, "if appropriate, that the consequences of the measure or situation that constituted "the *breach of such right or freedom* be remedied."

8. Scope of the "compétence de la compétence." Adding rights is not a competence of the Inter-American Court, but rather of the State. The competence to decide, in each

contentious case whether or not it has competence does not mean that the Court may modify the meaning and scope of the competence assigned to it by the Convention.

II. *A MERE COMMITMENT TO PROGRESSIVE DEVELOPMENT AND NOT A RECOGNITION OF RIGHTS*

9. A reading of Article 26, the sole article under Chapter III of Part I (Economic, social and cultural rights) entitled "Progressive Development," reveals that this article does not recognize or establish the economic, social and cultural rights; rather it establishes something very different; the undertaking of the States to achieve progressively 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 "to the extent permitted by the available resources." The text of the article is absolutely clear, and also its context. This interpretation is corroborated by the subsequent agreements between the parties and by their subsequent conduct. Also, the background information on the article confirm this fully.

A. Rules for the interpretation of treaties

10. According to the general rule of interpretation contained in Article 31 of the Vienna Convention of the Law of Treaties, "1. A treaty shall be interpreted in good faith in *accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*." The context comprises, among other elements, the preamble to the treaty, and "together with the context" any subsequent agreements and practice shall be taken into account:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, and

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

11. Also, "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31."[3]

12. The Inter-American Court's case law, interpreted correctly, does not support a position contrary to the one described. At times, the case of Acevedo Buendía is cited to support the thesis that Article 26 recognizes economic, social and cultural rights as such, but an analysis of that judgment reveals that this is not so.

B. The Protocol of San Salvador as an application of Articles 31 and 77 and as a subsequent agreement or subsequent practice

13. Regarding the economic, social and cultural rights, the States Parties have, indeed, followed the path of Article 77, in the *Protocol of San Salvador* (adopted on November 17, 1988, and entered into force on November 16, 1999). This Protocol:

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[3] Supplementary means may also be used "to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable," although that is not the case here.

a) Proclaims "*the close relationship that exists between economic, social and cultural rights, and civil and political rights*, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified" (Preamble, third paragraph).

b) *Recognizes numerous economic, social and cultural rights:* the right to work and to just, equitable and satisfactory working conditions; trade union rights; the right to social security; the right to health; the right to a healthy environment; the right to food, the right to education; the right to benefits of culture; the right to the formation and protection of the family; the rights of children; protection of the elderly, and protection of the handicapped.

c) But the *system of protection under the Convention only includes two of them* (one only partially): "[a]ny instance in which the rights established in paragraph (a) of Article 8[4] and in Article 13[5] 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" (Article 19(6) of the Protocol of San Salvador). This means that the system under the Protocol is very different from the system under the Convention. While, under the latter, the recognition of a right or freedom entails its inclusion in the system of protection, under the Protocol the recognition does not entail this inclusion, which is exceptional and only occurs in two cases.

14. The Protocol of San Salvador also constitutes an ulterior agreement between the States Parties and an ulterior practice by them that confirms the above interpretation of Article 26.

III. *DIFFERENCE WITH PROGRESSIVE INTERPRETATION*

15. Consequently, the Inter-American Court is unable to assume competence with regard to the presumed violation of a right or freedom that is not included under the system of protection by either the American Convention or the Protocol of San Salvador. On some occasions, it may achieve an analogous result – and it has done so in several cases, including this one – by applying, correctly, other provisions, such as those that protect the right to personal integrity, to property, or to judicial guarantees and judicial protection.

16. Furthermore, the Court may not cite a principle such as the progressive interpretation of international instruments in order to add rights to the system of protection. The appropriate sphere for the application of that principle is in the interpretation of a right or freedom or of a State obligation, which exists and is included under the system of protection of the Convention or the Protocol, in a different and generally broader sense than the one given originally by the authors. An example of this is the inclusion of the gender approach within the mention of "any other social

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[4] Right to organize trade unions, and also national and international federations and confederations, and freedom to choose whether or not to join a trade union.

[5] Right to education.

condition," as one of the reasons of discrimination prohibited by Article 1(1) of the Convention.[6]

IV. *THE TRAVAUX PRÉPARATOIRES*

17. The preparation of the American Convention extended over many years and some of the drafts recognized various economic, social and cultural rights, although this did not necessarily involve their inclusion in the same system of protection established for civil and political rights. We consider it preferable to limit our analysis to the Inter-American Specialized Conference on Human Rights during which the final text of the American Convention was adopted.

18. Above all, it is necessary to indicate that the characterization of these preliminary discussions in the judgment in the *case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office")* is incorrect. The judgment indicates the following:

> In this regard, the Court notes that the content of Article 26 of the Convention was the subject of intense discussion during the *travaux préparatoires* of the Convention, as a result of the States Parties' interest in including a "direct reference" to economic, social and cultural "rights"; "a provision establishing a certain binding legal force […] in compliance and application" [Chile]; as well as "the [respective] mechanisms [for its] promotion and protection" [Chile], since the preliminary draft of the treaty prepared by the Inter-American Commission referred to such mechanisms in two articles that, according to some States, only "referred, in a merely declarative text, to the conclusions reached at the Buenos Aires Conference" [Uruguay]. A review of said *travaux préparatoires* of the Convention also reveals that the main observations, based on which the Convention was adopted, placed special emphasis on "granting the economic, social and cultural rights the maximum protection compatible with the particular conditions of most of the States of the Americas" [Brazil]. In this way, as part of the debate during the *travaux préparatoires*, it was also proposed "to make it possible to implement [the said rights] by means of the action of the courts" [Guatemala]. (The footnotes have been substituted by the name of the State to which the different proposals are attributed.)

19. A review of the proceedings of the Specialized Conference reveals a very different panorama. To begin with, the judgment of the Court includes fragments of observations made by four States from a total of 23 participating States, which is far from indicating a massive or majority movement in a specific direction. In reality, several other States made observations. These are transcribed below:

Observations of Uruguay[7]

> 10. Article 25, paragraph 2, reflects, in a text that is merely declarative, conclusions reached in the Conference of Buenos Aires. Its content does not appear to be suitable for a convention, but it may not be politically correct to oppose the inclusion of this text.

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[6] See, for example, *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 91.

[7] Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 37.

Observations of Chile[8]

14. The provisions concerning economic, social and cultural rights that have remained in the draft are those that warrant the most objections as regards form and content. These are Articles 25, 26 and 41. Any direct mention of those rights has been eliminated; indirectly, in Article 25, paragraph 1, there is an insufficient recognition of "the need for the States Parties to take every effort to ensure that they are adopted in domestic law and, as appropriate, guaranteeing the other rights established in the American Declaration of the Rights and Duties of Man that have not been included in the preceding articles." If, as it has been sought to justify it, the omission of these rights – which are not even referred to in a separate chapter of the draft – is due to their inclusion in special chapters of the OAS Charter, once the amendments contained in the Protocol of Buenos Aires have been adopted, the text should at least contain an explicit reference to the norms adopted in that Protocol, which mentions economic, social and cultural rights.

15. However, based on correct legal standards, these rights should be included appropriately in the draft Convention so that their application can be monitored. Naturally, the list should be consistent with the norms of the Protocol of Buenos Aires. For example, in the document we are examining, the wording of the economic provisions of that Protocol, which are the only ones that are found in the draft Convention (art. 5, paragraph 2), has no relationship to a draft human rights convention. A simple reading of this paragraph confirms this. If the concept of drafting a single convention is retained, the technique followed by the United Nations and the Council of Europe would be recommendable, which is listing the economic, social and cultural rights, and also establishing in detail the means to promote and control them.

16. In this regard, it should be considered whether the Commission on Human Rights, as it has been conceived – that is, as a legal and quasi-judicial organ – is the appropriate organ to receive periodic reports on these rights. If the Organization of American States is going to have an Inter-American Economic and Social Council and an Inter-American Cultural Council, both with Permanent Executive Committees, perhaps we should analyze whether it should not correspond rather to these OAS organs to examine the periodic reports referred to in Article 41. In this way, the Commission on Human Rights would only have competence to consider petitions and complaints concerning civil and political rights, in accordance with its origin, composition, and rules of procedure.

17. In any case, as regards the economic, social and cultural rights a provision should be included that establishes a certain legal enforceability (to the full extent permitted by the nature of these rights) of compliance with them and their application. To this end, *it would be necessary to consider a clause similar Article 2, paragraph 1, of the United Nations Covenant on this matter. That paragraph is as follows:*

> *"1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*

Observations of Argentina[9]

Articles 25, second part, and 26: It can be see that, although the second part of article 25 is a literal transcription of Article 31 of the OAS Charter, amended by the Protocol of Buenos Aires, article 26 obliges the States to report periodically to the Commission on Human Rights on the measures they have adopted to achieve the goals mentioned in article 25. In addition, Article 26 recognizes to the Commission the right to make

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[8] Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, pp. 42 and 43.

[9] Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 47.

recommendations to the States in this regard, which, evidently, exceeds its competence and possibilities. Furthermore, the States are not granted the possibility of making observations on these recommendations by the Commission. Consequently, I suggest that article 26 be reconsidered and revised.

Observations of Dominican Republic[10] Article 25 (note the change in order)

Paragraph 1: We believe it is preferable to eliminate this *paragraph because Article 70 already establishes a procedure for gradually expanding the protection to include other rights that appear in the American Declaration of the Rights and Duties of Man. The obligations of the States Parties should be stipulated clearly and without trying imprecisely to incorporate other obligations by allusion.*

Paragraph 2: Given that this paragraph reaffirms the economic and social goals agreed on when the amendments to the OAS Charter were signed in 1967, this article should also reaffirm this, and in the same words as in the amended Charter.

The proposed title and the amended text would be:

Article 25*. Economic and Social Goals. The States Parties reaffirm the agreement established in the amendments to the OAS Charter signed in 1967 to devote their utmost efforts to accomplishing the following basic goals in order to accelerate their economic and social development, in accordance with their own methods and procedures and within the framework of the democratic principles and the institutions of the inter-American system*: (a) Substantial and self-sustained increase of per capita national product; (b) Equitable distribution of national income; (c) Adequate and equitable systems of taxation; (d) Modernization of rural life and reforms leading to equitable and efficient land-tenure systems, increased agricultural productivity, expanded use of land, diversification of production and improved processing and marketing systems for agricultural products; and the strengthening and expansion of the means to attain these ends; (e) Accelerated and diversified industrialization, especially of capital and intermediate goods; (f) Stability of domestic price levels, compatible with sustained economic development and the attainment of social justice; (g) Fair wages, employment opportunities, and acceptable working conditions for all; (h) Rapid eradication of illiteracy and expansion of educational opportunities for all; (i) Protection of man's potential through the extension and application of modern medical science; (j) Proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food; (k) Adequate housing for all sectors of the population; (l) Urban conditions that offer the opportunity for a healthful, productive, and full life; (m) Promotion of private initiative and investment in harmony with action in the public sector; and (n) Expansion and diversification of exports.

Observations of Mexico[11]

III-3. We have serious doubts as to whether the rights established in article 25 of the preliminary draft should be included in this final version. First, this statement could be repetitive, because it already appears in article 51 of the Protocol on amendments to the OAS Charter. Second, contrary to all the other rights referred to in the draft – which are rights that the individual enjoys as a person or as a member of a specific social group – it would be difficult at any given moment to establish precisely who would be the person or persons that would be directly affected if the rights contained in the said article 25 were to be violated. The same could be said as regard the degree of difficulty implicit in determining who would be, when applicable, the authority responsible for that violation.

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[10] Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, pp. 69 and 70.

[11] Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 101.

Observations of Guatemala[12]

III) In the case of the economic, social and cultural rights

Article 24. In order to protect and promote respect for the economic, social and cultural rights proclaimed in this Convention, the American Commission on Human Rights, in addition to using other measures admitted by international law in force in the Americas, shall have competence to:

a) Obtain reports from the States Parties on the measures they have adopted and the progress made in order to ensure respect for such rights;

b) Undertake research and prepare reports on those rights, separately, or in cooperation with the governments concerned;

c) Adopt recommendations of a general or specific nature for one or several States;

d) Obtain from the General Assembly or other organs of the Organization of American States the necessary cooperation and the adoption of pertinent measures;

e) Hold technical and regional meetings;

e) Encourage the signature of international conventions and agreements in this area;

f) Sign agreements with national and international technical entities.

Article 25. The States Parties undertake to submit periodic reports to the Commission on the measures taken in order to ensure respect for economic, social and cultural rights. The frequency of these reports shall be determined by the Commission. They also undertake to present to the Commission a copy of the reports they send to other international bodies, agencies or organizations in relation to respect for these rights.

Article 26. (i) The Commission may call the attention of the international cooperation or technical assistance agencies or any other relevant international body to any matter that arises from the reports referred to in the preceding articles of this Convention that may assist the said bodies when ruling, each one within its own terms of reference, on the desirability of adopting international measures capable of contributing to the progressive application of this Convention.

(ii) The Commission shall ask the said bodies to forward the result of the reviews they carry out, as well as the measures they adopt on their own initiative based on those reports.

Article 27. The Commission shall consider the reports received from the States, from national and international entities, and from individuals or groups of individuals and, if it finds it desirable, may publish the reports it receives, as well as the measures it has adopted or the requests sent to other entities, in order to allow national and international public opinion to assess the situation.

Observations of Brazil[13]

Article 25. The text of the draft should be substituted as follows:

1. The States Parties to this Convention undertake to *incorporate progressively into their domestic law:*

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[12] Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, pp. 115 and 116.

[13] Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, pp. 124 and 125.

a) the rights included in the American Declaration of the Rights and Duties of Man that have not been included among the rights defined in the preceding articles;

b) the rights and benefits contained in the economic and social norms, and on education, science and culture established in Articles 31, 43 and 47 of the Charter of the Organization of American States established by the Protocol of Buenos Aires.

2. The law may exclude public services and essential activities from the right to strike.

Justification

Civil and political rights require an effective jurisdictional protection, at both the domestic and the international level, against violations perpetrated by the organs of the State or their representatives. To the contrary, economic, social and cultural rights are included in very diverse ways and to different degrees by the laws of the different States of the Americas, and although the Governments wish to recognize all of them, their exercise depends, above all, on the availability of material resources that permit their implementation. Article 25 of the draft is inspired by this concept, but its text does not correspond to its intention. The wording of paragraph 1 is imprecise, and limited to a statement of intention. Meanwhile, paragraph 2, by reproducing the content of Article 31 of the Protocol of Buenos Aires, forgot the right to strike, which is already established, with certain limitations, by the domestic law of the States of the Americas, as are the norms on education, science and culture established in Article 47 of that Protocol. The purpose of the amendment is to give economic, social and cultural rights the maximum protection compatible with the specific conditions in most of the States of the Americas.

20. Following discussions, during which some of the preceding positions were repeated without reaching a consensus, and during which it was never proposed to include economic, social and cultural rights under the protection system established for civil and political rights, a chapter was drafted with two articles. The first one was the same as Article 26 included in the final text of the Convention, while the second one established a limited and indirect system of "control of compliance with the obligations." The part entitled "Articles revised by the Style Committee," includes the text of Articles 26 and 27 that were submitted to a vote:[14]

Chapter III

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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 and in keeping with the resources available, 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,

Article 27. Control of Compliance with Obligations

The States Parties shall transmit to the Inter-American Commission on Human Rights a copy of the reports and studies that they submit every year to the Executive Committees of the Inter-American Economic and Social Council and of the Inter-American Council for Education, Science and Culture, respectively, so that the Commission may verify compliance with the preceding obligations, which provide the essential foundation for the exercise of the other rights established in this Convention.

[14] Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 318.

21. In the second plenary session,[15] the following decision was taken:

> Article 26 is adopted without any change, and article 27 is eliminated. The numbering of the following articles is amended accordingly.

Thus, *at no time was it proposed to include the economic, social and cultural rights under the system of protection established by the Convention, which remained limited to the civil and political rights recognized therein.*

V. *CONCLUSIONS*

22. In conclusion, neither the specific recognition of the economic, social and cultural rights nor their inclusion in the system of protection established by the Convention can be inferred from Article 26 of the American Convention. The recognition of other rights and their inclusion in the system of protection does not correspond to the Court, but rather to the Member States by means of amendments (Article 76) or protocols (Article 77) that apply Article 31.

23. This is not a case in which the Court can make a legitimate progressive interpretation in which it defines or varies the way in which a right or freedom recognized by the Convention should be understood. The *compétence de la compétence* does not allow the Court to modify its own competence, but rather to decide in each specific case, and pursuant to the pertinent norms, whether or not it has competence in that case.

24. Consequently, it is not incumbent on the Court to consider, and eventually declare, a violation of the right to health.

Alberto Pérez Pérez
Judge

Pablo Saavedra Alessandri
Secretary

[15] Proceedings of the Inter-American Specialized Conference on Human Rights, November 7 to 22, 1969, OEA/Ser.K/XVI/1.2, p. 448.

CONCURRING OPINION OF JUDGE EDUARDO FERRER MAC-GREGOR POISOT

CASE OF GONZALES LLUY ET AL. v. ECUADOR

JUDGMENT OF SEPTEMBER 1, 2015
(*Preliminary objections, merits, reparations and costs*)

Judges Roberto F. Caldas and Manuel E. Ventura Robles adhered to this Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot.

INTRODUCTION: THE RIGHT TO EDUCATION AND THE RIGHT TO HEALTH

1. This is the first case in the history of the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court") in which the Court declares the violation of a norm established in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador").[1] Thus, in the case of *Gonzales Lluy et al.,* it declared the violation of the "right to education" established in Article 13 of the Protocol, taking into account that, when she was five years old, Talía Gabriela Gonzales Lluy was expelled from the kindergarten she attended because of her health status and because she was a person with HIV,[2] while the authorities asserted that Talía could exercise her right to education "by individualized distance education."[3]

2. The Inter-American Court concluded that the real and significant risk of infection that could endanger the health of Talía's companions was extremely limited. Following an assessment of the need for, and strict proportionality of, the measure, the Court emphasized that the measure chosen represented the most harmful and disproportionate option of all those available to achieve the aim of protecting the integrity of the other children in the educational establishment. The national authority also used abstract and stereotypical arguments to justify a decision that was extreme and unnecessary, so that the decision constituted discriminatory treatment against Talía. In addition – as I will examine in a subsequent section – the Court considered that the victim had suffered discrimination based on her condition as a person living with HIV, as a minor, as a woman, and as a person living in poverty; hence, for the first time, the Inter-American Court used the concept of "intersectionality" to analyze the discrimination.

3. In addition, in keeping with its previous case law concerning the obligation to regulate, supervise and monitor the provision of health service, the Inter-American Court declared the violation of Articles 4 and 5 of the American Convention with regard to the right to life and the right to personal integrity. In this case, the declaration of the violation of the "right to life" had the particularity of involving arguments that went far beyond the

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[1] Adopted in San Salvador, El Salvador, on November 17, 1988, at the eighteenth General Assembly of the Organization of American States ("OAS"), entering into force on November 16, 1999. To date, this Protocol is in force in 16 countries: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay.

[2] The Third Contentious Administrative District Court declared the application for constitutional protection inadmissible considering that "there [was] a conflict of interests, between the individual rights and guarantees of [Talía] in relation to the interests of a group of students, a conflict that mean[t] that the societal or collective interests, such as the right to life, outweighed the right to education." *Cf.* para. 141 of this Judgment.

[3] Para. 144 of this Judgment.

concept of "decent life" and entailed an analysis of extreme circumstances such as those of this case, where the facts that gave rise to international responsibility are associated with a significant risk for the life of Talía Gonzales Lluy, a risk she will face throughout her life. The declaration of the State's responsibility took into account the particular context of vulnerability of the Lluy family and the specific conditions of Talía as a woman, a minor, a person living in poverty, and a person living with HIV.

4. I agree fully with the findings of the judgment. I issue this opinion because I consider it necessary to emphasize and examine further some elements of the case that I believe are fundamental for the development of the inter-American human rights system: (I) the concept of "intersectionality" in the discrimination (*paras. 5-12*); (II) the possibility of having dealt with the "right to health" directly and, eventually, having declared the violation of Article 26 of the American Convention (*paras. 13-17*), and (III) the need to continue advancing towards the full justiciability of economic, social, cultural and environmental rights under the inter-American system (*paras. 18-23*).

I. INTERSECTIONALITY OF DISCRIMINATION

5. The Inter-American Court considered that the State had violated the "right to education" contained in Article 13 of the Protocol of San Salvador,[4] in relation to Articles 19 (Rights of the Child) and 1(1) (Obligation to Respect Rights) of the American Convention to the detriment of Talía Gonzales Lluy, owing to the discrimination she suffered because of her condition of being a person living with HIV, a minor, a woman, and a person living in poverty.

6. For the first time, the Court used the concept of the "intersectionality" of discrimination as follows:

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[4] "Article 13: Right to education:

1. Everyone has the right to education.

2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.

3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:

a. Primary education should be compulsory and accessible to all without cost;

b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;

c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;

d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;

e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.

4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.

5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties."

> 290. The Court notes that, in Talía's case, numerous factors of vulnerability and risk of discrimination **intersected** that were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV. The discrimination experienced by Talía was caused not only by numerous factors, **but also arose from a specific form of discrimination that resulted from the intersection of those factors; in other words, if one of those factors had not existed, the discrimination would have been different**. Indeed, the poverty had an impact on the initial access to health care that was not of the best quality and that, to the contrary, resulted in the infection with HIV. The situation of poverty also had an impact on the difficulties to gain access to the education system and to lead a decent life. Subsequently, because she was a child with HIV, the obstacles that Talía suffered in access to education had a negative impact on her overall development, which is also a differentiated impact taking into account the role of education in overcoming gender stereotypes. As a child with HIV, she required greater support from the State to implement her life project. As a woman, Talía has described the dilemmas she feels as regards future maternity and her interaction in an intimate relationship, and has indicated that she has not had appropriate counseling. In sum, Talía's case illustrates that HIV-related stigmatization does not affect everyone in the same way and that the impact is more severe on members of vulnerable groups (bold added).

7. The concept of intersectionality allowed the Court to develop the Inter-American Court's case law on the scope of the principle of non-discrimination, taking into account that, in this case, multiple discrimination occurred based on the composite nature of the causes of the discrimination. Indeed, the discrimination against Talía was associated with factors such as the fact that she was a woman, a person with HIV, a person with a disability, a minor, and due to her socio-economic status. These aspects increased her vulnerability and exacerbated the harm she suffered. The intersection of these factors in a discrimination with specific characteristics constituted multiple discrimination that, in turn, constituted, intersectional discrimination. Nevertheless, not every multiple discrimination, is necessarily associated with intersectionality.

8. Indeed, with regard to multiple or composite discrimination, the United Nations Committee on Economic, Social and Cultural Rights has affirmed that "[s]ome individuals or groups of individuals face discrimination on more than one of the prohibited grounds […]. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying."[5] In order to consider that discrimination is "multiple," several factors must exist that give rise to this discrimination. Thus, the Inter-American Convention on Protecting the Human Rights of Older Persons, adopted by the OAS General Assembly in June 2015, defines multiple discrimination as "[a]ny distinction, exclusion, or restriction toward an older person, based on two or more discrimination factors."[6]

9. Thus, the multiple aspect relates to the composite nature of the causes of discrimination. Determining the way in which, in some cases, these causes interact is a different aspect, and requires an assessment of whether they have a separate or a simultaneous impact.

10. Meanwhile, the intersectionality of discrimination not only describes a discrimination for different reasons, but also relates to a meeting or simultaneous concurrence of different reasons for discrimination. In other words, during the same event, discrimination occurs

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[5] United Nations Committee on Economic, Social and Cultural Rights. General comment No. 20, E/C.12/GC/20 of 2 July 2009, para. 17.

[6] Inter-American Convention on Protecting the Human Rights of Older Persons, adopted by the OAS General Assembly on June 15, 2015, article 2.

owing to the concurrence of two or more prohibited factors. This type of discrimination may have a synergetic effect that exceeds the simple sum of several forms of discrimination, or may activate a specific form of discrimination that only operates when several reasons for discrimination are combined. Not all multiple discrimination will be intersectional discrimination. Intersectionality relates to a meeting or simultaneous concurrence of different reasons for discrimination. This activates or underlines a discrimination that only occurs when the said reasons are combined.[7]

11. Thus, intersectional discrimination refers to multiple reasons or factors that interact to create a unique and distinct burden or risk of discrimination. Intersectionality is associated with two characteristics. First, the reasons or the factors are analytically inseparable because the experience of discrimination cannot be disaggregated into different reasons. The experience is transformed by the interaction. Second, intersectionality is associated with a different qualitative experiences, creating consequences for those affected in ways that are different from the consequences suffered by those who are subject to only one form of discrimination.[8] This approach is important because it underscores the particularities of the discrimination suffered by groups that, historically, have been discriminated against for more than one of the prohibited reasons established in various human rights treaties.

12. In sum, in this case, intersectionality is fundamental in order to understand the specific injustice of what occurred to Talía and to the Lluy family, which can only be understood in the context of the convergence of the different forms of discrimination that occurred. Intersectionality constitutes a different and unique harm, which is distinct from the discriminations assessed separately. None of the forms of discrimination assessed independently would explain the particularity and specificity of the harm suffered in the intersectional experience. In future, the Court could gradually define the scope of this approach, which will help to add a new dimension to the principle of non-discrimination in certain kinds of case.

II. THE POSSIBILITY THAT THE RIGHT TO HEALTH COULD HAVE BEEN APPROACHED DIRECTLY AND AUTONOMOUSLY (ARTICLES 26 AND 1(1) OF THE AMERICAN CONVENTION)

13. In a Concurring Opinion in the case of *Suárez Peralta v. Ecuador,*[9] I set out the reasons why I consider that the "right to health" can be interpreted as a right admitting direct justiciability in the context of the provisions of Article 26 of the American Convention.

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[7] For further development of the legal doctrine on this issue, see: Aylward, Carol, "Intersectionality: Crossing the Theoretical and Praxis Divide," *Journal of Critical Race Inquiry*, Vol 1, No 1; and Góngora Mera, Manuel Eduardo, "*Derecho a la salud and discriminación interseccional: Una perspectiva judicial de experiencias latinoamericanas*," in Clérico, Laura, Ronconi, Liliana, and Aldao, Martín (eds.): *Tratado de Derecho a la Salud*, Buenos Aires, Abeledo Perrot, 2013, pp. 133-159.

[8] General Assembly of the United Nations. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. "The idea of 'intersectionality' seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination." "Whatever the type of intersectional discrimination, the consequence is that different forms of discrimination are more often than not experienced simultaneously by marginalized women." A/CONF.189/PC.3/5 of 27 July 2001, paras. 23 and 32. In this regard, the CEDAW Committee has recognized that "discrimination against women based on sex and gender is inextricably linked to other factos that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity." United Nations Committee for the Elimination of Discrimination against Women. Views. *Comunication No. 17/2008, Alyne da Silva Pimentel Teixeira v. Brazil*. CEDAW/C/49/D/17/2008 of 27 September 2011, para. 7.7.

[9] *Cf. Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261.

14. In the instant case, the pertinence of an analysis based on the "right to health" emerges with greater intensity. The Court has made some progress in this area by defining some specific aspects of the scope of this right that had not been established previously in its case law. For example, the Inter-American Court mentioned standards for access to medicines and, in particular, defined how the access to antiretroviral drugs is only one of the elements of an effective response for persons living with HIV, because those living with HIV require a comprehensive approach that includes a continuum of prevention, treatment, care and support.[10] In addition, the Court referred to issues relating to access to health care information;[11] the right to health of children,[12] and the right to health of children with HIV/AIDS.[13] However, the Court's analysis is made in light of its traditional case law on the connectivity of health with the rights to life and to personal integrity.

15. In this regard, as I indicated in the said Concurring opinion in the *case of Suárez Peralta* (2013), the following considerations, at least, exist as to why the right to health should be dealt with directly:

> 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,[14] 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 — 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.
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> 6. Indeed, the competence of the Inter-American Court to examine the right to health is found directly in Article 26 (Progressive Development) 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) and 2 (Domestic Legal Effects), as well as to Article 29 (Restrictions regarding Interpretation) of the American Convention itself. In addition considering Articles 34(i) and 45(h) of the Charter of the Organization of American States, Article XI of the American Declaration on the Rights and Duties of Man, and Article 25(1) of the Universal Declaration of Human Rights (the last two instruments pursuant to the provisions of Article 29(d) 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 – such as Articles 10 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, 12(1) and 12(2)(d) of the International Covenant on Economic, Social and Cultural Rights, 12(1) of the Convention on the Elimination of all Forms of Discrimination against Women, and 24 and 25 of the Convention on the Rights of the Child, among other international instruments and sources — and even national ones by way of Article 29(b) of the American Convention. And this, without being limited by Article 19(6) of the Protocol of San Salvador, which merely refers to the justiciability of certain trade union rights and the right to education, whereas it

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10 *Cf.* Paras. 193 to 197 of the Judgment.

11 *Cf.* Para. 198 of the Judgment.

12 *Cf.* Para. 174 of the Judgment.

13 *Cf.* Paras. 198 and 199 of the Judgment.

14 *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees from the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 16: "the Court has previously indicated that the broad terms in which the Convention is written indicate that the Court exercises full jurisdiction over all its articles and provisions," and, thus, it decided to examine the merits of the matter and reject the preliminary objection filed by the State, precisely with regard to the Court's supposed lack of competence with regard to Article 26 of the American Convention.

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.
[…]

11. Indeed, without denying the progress achieved in the protection of economic, social and cultural rights indirectly 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.
[…]

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. 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.
[…]

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 interpretive 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. 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.

19. The Inter-American Court, without mentioning the Protocol of San Salvador to determine whether it had competence in this regard, 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) suppose the

acceptance of the Court's right *to decide any dispute relating to its jurisdiction* by the States that present this instrument. 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*."

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

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..
[…]

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*. 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.
[…]

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.

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*, 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." […]

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

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 in the *case of Acevedo Buendía et al. v. Peru.*
[…]

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. 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.

43. Differing positions have arisen with regard to the interpretation of Article 26 and its relationship with the Protocol of San Salvador. In my opinion, the principle of the most 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. Moreover, in the terms of Article 29(b) of the American Convention, a restrictive interpretation of the rights is not permitted.

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 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. When making an evolutive interpretation, the Court has given special relevance to comparative law, and has therefore used domestic laws or the case law of domestic courts when analyzing specific disputes in contentious cases
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> 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.
> […]
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> 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 […]. 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. 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).
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> 58. Considering that, in its evolutive case law, the Inter-American Court has already explicitly accepted the justiciability of Article 26 […], 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. […]

16. In addition, regarding the argument that the American Convention does not establish social rights because, if those rights had already been included in that treaty, the States Parties would have preferred to amend it to supplement or expand the scope of those rights – rather than adopt a protocol – in our Concurring Opinion on the judgment in the recent case of *Canales Huapaya et al. v. Peru,* Judge Roberto F. Caldas and the undersigned asserted that a different interpretation of the relationship between "treaties" and their "protocols" was possible under international human rights law, as can be seen in several protocols additional to treaties that establish regulations that supplement the matters developed in the respective treaty. In other words, the protocols are not restricted to establishing new rights;[15] and, we considered this valid in light of a systematic interpretation of Articles 26, 31 and 77 of the Pact of San José.

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[15] Joint Concurring Opinion of Judges Roberto F. Caldas and Eduardo Ferrer Mac-Gregor Poisot. *Case of Canales Huapaya et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of June 24, 2015, especially paras. 26 to 29. In this opinion, we gave examples related to Protocols Additional to the European Convention on Human Rights and to the International Covenant on Civil and Political Rights.

17. In this particular case, the analysis of the right to health, as an autonomous right, would have allowed the Court to assess more thoroughly issues associated with the unavailability of antiretroviral drugs at certain times, and the problems of geographical accessibility owing to the need to travel to other towns to obtain better care, among others. Regarding this type of issue, an analysis in light of the right to life and the right to personal integrity may be limited, because these rights do not directly incorporate any type of obligation associated specifically with the right to health. In order to understand the relationship between the right to health and the health care systems it is important to apply an adequate rights-based approach to these issues which are of special relevance and sensitivity in the region.

III. THE NEED TO CONTINUE ADVANCING TOWARDS THE FULL JUSTICIABILITY OF ECONOMIC, SOCIAL, CULTURAL AND ENVIRONMENTAL RIGHTS UNDER THE INTER-AMERICAN SYSTEM

18. Starting with the first case I heard as a judge of the Inter-American Court, I ruled in favor of the direct justiciability of the right to health, making an evolutive interpretation of Article 26 of the American Convention in relation to Articles 1(1) and 2, together with Article 29 of this instrument and, in light of a systematic interpretation, with Articles 4 and 19(6) of the Protocol of San Salvador.[16]

19. In this case, I would like to repeat the need to defend an interpretation that tries to assert the pre-eminence of the normative force of Article 26 of the American Convention. It is not a question of ignoring the Protocol of San Salvador or undermining Article 26 of the Pact of San José. The interpretation should be made in light of both instruments. In this understanding, the Additional Protocol cannot take normative force away from 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 the rights, even to the economic, social and cultural rights, as the Inter-American Court has expressly recognized.[17]

20. The evolutive interpretation[18] referred to seeks to assign real effectiveness to inter-American protection in this matter, which, more than 25 years after the adoption of the Protocol of San Salvador, and 15 years after its entry into force, is the minimum required to ensure its effectiveness; and calls for an interpretation that is more focused on establishing the greatest practical effects possible of the inter-American norms as a whole, as has been the practice of the Inter-American Court in the case of the civil and political rights.

21. An essential element 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 the autonomy of the scope of that social right based on Article 26 of the American Convention in relation to the obligations to respect and ensure rights contained in Article 1(1) of the Pact itself, which

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[16] Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot in the *Case of Suárez Peralta v. Ecuador*. *Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261.

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

[18] The evolutive interpretation of Article 26 of the American Convention is also based on the constitutional norms and the practice of the highest national courts, especially with regard to the justiciability of the "right to health"; as we tried to show in paras. 73 to 87 of the Concurring Opinion in the *Case of Suárez Peralta v. Ecuador*. Regarding judicial practice to protect the right to health in different countries across the globe, see: 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.

requires that the Pact of San José be interpreted in light of the *corpus iuris* on the right to health – as, indeed, the Court has in the *Case of Gonzales Lluy et al.* which prompts this separate opinion – even though it is referred to as personal integrity, limiting significantly, by connectivity, the real scope of the right to health.[19] As I indicated in m Concurring Opinion in the case of *Suárez Peralta:*

> 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 measure. 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. 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.
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> 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.
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> 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

[19] Paras. 172 and 173 of the Judgment that prompts this Opinion recall "the interdependence and indivisibility that exists between civil and political rights and economic, social and cultural rights, because they should be understood as a whole as human rights, without any order of precedence, and enforceable in all cases before the competent authorities." In addition, the judgment cites numerous norms related to the right to health: "Article XI of the American Declaration of 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 Member States to "dedicate every effort […] to [the] development of an efficient social security policy." Similarly, 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, […] establishes that everyone has the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being, and indicates that health is a public right. In addition, in July 2012, the General Assembly of the Organization of American States emphasized the quality of health care establishments, good and services, which require the presence of skilled medical personnel, and adequate sanitation." See, 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. 66 and 67. The judgment even considers the essential elements of the right to health in relation to the *availability, accessibility, acceptability and quality* referred to by the United Nations Committee on the International Covenant on Economic, Social and Cultural Rights (*General comment No. 14*) in para. 173 of the judgment that prompts this Opinion.

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 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[20] — 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.[21]

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.

22. Almost 46 years after the signature of the American Convention and 27 years after the adoption of the Protocol of San Salvador, it is necessary to take more specific steps towards the direct justiciability of economic, social, cultural and environmental rights, taking into account the progress made in international human rights law,[22] and based on the evident progress made by the States Parties to the American Convention. In this regard, I would like to emphasize, in particular, the 2012 Social Charter of the Americas and, above all, the recent Inter-American Convention on Protecting the Human Rights of Older Persons,

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[20] 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.

[21] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru, supra*, paras. 99-103.

[22] Protocol Additional to the International Covenant on Economic, Social and Cultural Rights, signed by Ecuador.

adopted on June 15, 2015. Indeed, Article 36[23] of this Convention establishes the possibility that the system of individual petitions operates in relation to the rights established in this Convention, which include, among others the right to social security (Article 17), the right to work (Article 18), the right to health (Article 19), and the right to housing (Article 24). As can be seen, this step taken by several OAS Member States reveals a growing tendency towards the full justiciability of the economic, social and cultural rights.

23. Based on all the arguments set forth in this Opinion, this hermeneutic interpretation does not undermine the legitimacy of the Court. Neither has this legitimacy been lessened by adopting case law criteria that had less normative grounds, as occurred when declaring the existence of certain rights that were not named or established in the Convention.[24] To the contrary, systematic, comprehensive and evolutive interpretation supported by the

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[23] Article 36. System of individual petitions. Any person or group of persons, or nongovernmental entity legally recognized in one or more member states of the Organization of American States may submit to the Inter-American Commission on Human Rights petitions containing reports or complaints of violations of the provisions contained in this Convention by a State Party. / In implementing the provisions of this article, consideration shall be given to the progressive nature of the observance of the economic, social and cultural rights protected under this Convention. / In addition, any State Party, when depositing its instrument of ratification of, or accession to, this Convention, or at any time thereafter, may declare that it recognizes the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a State Party alleges that another State Party has committed violations of the human rights established in this Convention. In such an instance, all the relevant procedural rules contained in the American Convention on Human Rights shall be applicable. / […] / Any State Party may, when depositing its instrument of ratification of, or accession to, this Convention, or at any time thereafter, declare that it recognizes as binding, *ipso jure* and without any special agreement, the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of this Convention. In such an instance, all relevant procedural rules contained in the American Convention on Human Rights shall be applicable.

[24] Thus, for example, in the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador,* the Court interpreted the "right to prior, free and informed consultation" of indigenous and tribal peoples and communities by the recognition of the right to their own culture or cultural identity recognized in ILO Convention 169. In the *Case of Chitay Nech v. Guatemala*, the Court established the special obligation to ensure the "right to cultural life" of indigenous children. Also, in the *Case of the Las Dos Erres Massacre v. Guatemala*, when analyzing the State's 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 every individual to receive protection against arbitrary or unlawful interference in the family forms part, implicitly, of the right to protection of the family and of the child. 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), based on the provisions of Article 8 of the Convention on the Rights of the Child, which establishes that this right includes, among other matters, the right to nationality, name and family relations. In the *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, the Inter-American Court declared the violation of the "right to know the truth" (a right that is not established autonomously in the American Convention). In addition, in the *Case of the Massacres of El Mozote and nearby places v. El Salvador,* the Court supplemented its case law in relation to the right to 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 June 8, 1977. Subsequently, in the *Case of the Santo Domingo Massacre v. Colombia*, the Inter-American 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 regarding pillage, in order to give content to the right to property established in Article 21 of the American Convention.

As can be appreciated from these examples of inter-American case law, it has been the consistent practice of the Court to use different international instruments and sources other than the Pact of San José in order to define the content and even expand the scope of the rights established in the American Convention and to stipulate the obligations of the States, because those international instruments and sources are part of a very comprehensive international *corpus iuris* in 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 treaty, is viable and the Inter-American Court has been using the Protocol to give content to many rights of the Convention using treaties and sources other than the Pact of San José. Thus, it could also use 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.

normative grounds established in Article 26 of the American Convention and by its relationship to Articles 1(1) and 2 of this instrument, based on the idea that this article should have practical effects because it has not been rescinded, accords the Inter-American Court full legitimacy to take more decided steps towards the direct justiciability of economic, social and cultural rights, especially taking into account the daily tragedy associated with the systematic denial of these rights in the countries of the Americas.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Secretary