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REPORT No. 111/18
CASE 12.786
REPORT ON MERITS

LUIS EDUARDO GUACHALÁ CHIMBÓ AND NEXT OF KIN
ECUADOR

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I. SUMMARY

1. On March 1, 2007, the Inter-American Commission on Human Rights (hereinafter “the Commission”, “the Inter-American Commission” or “the IACHR”) received a petition submitted by the Human Rights Clinic of the Pontifical Catholic University of Ecuador (*Pontificia Universidad Católica del Ecuador*), the Foundation for Assistance in Human Rights (*Fundación Regional de Asesoría en Derechos Humanos*) and the Ecumenical Commission on Human Rights (*Comisión Ecuémica de Derechos Humanos*) (hereinafter “the petitioners”). The petitioners alleged the international responsibility of the Republic of Ecuador (hereinafter “the State”, “the Ecuadorian State” or “Ecuador”) for the disappearance of Luis Eduardo Guachalá Chimbó in January 2004 while he was in a psychiatric public hospital in the city of Quito. The petitioners indicated that to date the State has not clarified what happened to Mr. Guachalá and nor have his whereabouts been determined.

2. For its part, the State argued that Mr. Guachalá would have escaped the institution, therefore the State would not bear responsibility for his disappearance. The State held that an investigation was initiated with the objective to clarify the events and to determine the eventual responsibilities.

3. After analyzing the information available, the Commission concluded that the State is responsible for the violation of the rights to the recognition of juridical personality, life, humane treatment, personal liberty, equality and non-discrimination, and health, and to judicial guarantees and judicial protection, established in Articles 3, 4(1), 5(1), 7(1), 7(3), 8(1), 13(1), 24, 25(1) and 26 of the American Convention in relation to the obligations established in Articles 1(1) and 2 of the same instrument, to the detriment of Luis Eduardo Guachalá Chimbó and his family members in the terms explained throughout this merits report.

II. PROCEEDINGS BEFORE THE COMMISSION

4. On March 1, 2007, the IACHR received the initial petition. The detail of the proceedings before the Commission until the decision of admissibility of the case is in the admissibility report No. 141/10 of 1 November 2010.¹

5. On November 10, 2010, the IACHR notified the parties of the admissibility report. In said communication, the Commission made itself available to the parties in order to reach a friendly settlement. On May 25, 2011, the petitioners submitted a communication in which they stated that they did not wish to initiate a friendly settlement. In said communication, they also presented their observations on the merits. On December 23, 2011, the State submitted its observations on the merits.

6. Subsequently, the Commission received communications from both parties, which were duly transferred. Additionally, on April 4, 2016, within the framework of its 157th Period of Sessions, the IACHR carried out a public hearing of the case in which both parties participated.²

III. POSITION OF THE PARTIES

A. Position of the Petitioners

¹ IACHR, Report No. 141/10, Petition 247-07, Admissibility, Luis Eduardo Guachalá Chimbó, Ecuador, November 1, 2010. Available at: www.cidh.org/annualrep/2010eng/ECAD247-07EN.DOC.

² IACHR, Public hearing, April 4, 2016.

7. The petitioners argue that the State is responsible for the disappearance of Mr. Guachalá. The petitioners stated that the alleged victim, who is a person with mental disability, disappeared in January 2004 while institutionalized in a public hospital where he had been admitted on January 10, 2004. They stated that a week later the staff of said hospital informed the mother of Mr. Guachalá that he was missing. They stated that despite the legal actions presented to that date, the whereabouts of Mr. Guachalá have not been determined. The detail of the facts and the internal processes shall be referred to in the Commission's factual analysis, based on the information provided by both parties.

8. The petitioners argued that what happened to Mr. Guachalá constitutes a forced disappearance because the three concurring elements which constitute it are present: i) deprivation of freedom; ii) the direct intervention of agents of the state or their acquiescence; and iii) the refusal to acknowledge the deprivation of freedom or to give information on the whereabouts of that person. Consequently, the petitioners stated that the State violated their right to juridical personality, right to life, right to humane treatment, and right to personal freedom.

9. In relation to the **right to personal freedom**, the petitioners stated that the confinement in a psychiatric hospital is a restriction of this right. They stated that even though consent was initially granted for the hospitalization of Mr. Guachalá, there was a systematic denial of his whereabouts to his mother, and this, consequently, became a non-consensual and illegitimate denial of his freedom.

10. In relation to the alleged violation of the **right to legal personality**, the petitioners argue that the forced disappearance of Mr. Guachalá resulted in a "juridical limbo" of his legal status. They argued that the disappearance of Mr. Guachalá deprived him of his capacity to exercise his rights and have legal personality before the State and society.

11. In relation to the alleged violation of the **rights to life and humane treatment**, the petitioners stated that the State did not carry out any actions with the objective of clarifying what happened to Mr. Guachalá. The petitioners stated that in this way the rights to life and humane treatment were not protected. Also, they stated that this State omission, as well as the presumed escape of Mr. Guachalá, constituted a breach of the specific and reinforced duty of care to institutionalized persons with disabilities. They alleged that given the health condition of Mr. Guachalá the medical staff had the duty of vigilance.

12. In relation to the alleged violation of the **rights to fair trial and judicial protection**, the petitioners explained that, despite the version of the State that Mr. Guachalá escaped from the hospital on January 17, 2004, only two days later did they inform the police about it. The petitioners expressed that none of the legal actions filed (criminal complaint, a complaint submitted before the *Ombudsman*, and a writ of habeas corpus) clarified what happened with Mr. Guachalá or determined his whereabouts. They stated that several authorities failed to adopt significant actions to locate Mr. Guachalá, therefore, the remedies were not adequate or effective.

13. They added that to-date an investigation of the crime of forced disappearance has not been started. They stated that this leads to the lack of clarification of the historic reality in relation to the facts that permit the identification of the officials responsible for the victim's situation. They asserted that currently the State is investigating all the cases of disappearance of persons, including that of Mr. Guachalá, under an administrative procedure. They stated that the administrative procedure to determine the whereabouts of Mr. Guachalá remains active to date. They held that said procedure cannot be considered an ideal remedy because the present case relates to a specific situation of the forced disappearance of a person that was under the protection and custody of the State.

14. The petitioners also argued that the State failed its **duty to adopt provisions of domestic law**. This, due to the inexistence of a norm that allows the demand of compliance of the resolution of the Constitutional Tribunal in the context of the writ habeas corpus filed. They stated that the action of non-compliance with the judgments and constitutional opinions enshrined in the Law of Jurisdictional Guarantees and Constitutional Control is not adequate or effective. This, because "to initiate an action before the same body that issued the judgment would place a disproportionate burden on the victim."

15. Finally, the petitioners alleged the violation to the **right to humane treatment** to the detriment of the next of kin of Mr. Guachalá: his mother, Zoila Rosario Chimbó Jarro, his three sisters, Martha, Nancy and Alexandra, and his brother Ángel. This, as a result of the emotional distress generated by the forced disappearance of her son, as well as the lack of clarification of the events.

B. Position of the State

16. The State argued that it is not responsible for the disappearance of Mr. Guachalá from the Julio Endara Psychiatric Hospital. It explained that when Mr. Guachalá entered the hospital, his mother, Zoila Chimbó, signed a document whereby in case of “escape (...) it is not responsible for the consequences.”

17. Likewise, the State argued that on the two occasions that Mr. Guachalá was admitted to the hospital he was provided with all respective health services. The State held that the hospitalization of Mr. Guachalá fulfilled the standards established in the “Principles and Best Practices on the Protection of the Persons Deprived of Liberty in the Americas” adopted by the IACHR. This, because Mr. Guachalá was hospitalized after a thorough analysis of his health condition, as well as the risks that his condition generated for him and third parties. The State held that on his second admission, Mr. Guachalá was sedated “in order to control his health condition, reason why the mother (...) signed a medical authorization as his legal representative.” The State added that Ms. Chimbó was periodically informed about the condition of her son.

18. The State stated that on January 17, 2004, Mr. Guachalá “escaped the psychiatric center while the nursing assistant attended another patient.” In this regard, the State held that, despite having security guards, this hospital “is designed in such a way that patients do not feel confinement, this being also the reason it had open spaces.” The State indicated that the “escape of patients in psychiatric centers constitutes a major public health challenge in various countries around the world.” The State held that consequently, “persons with psychiatric factors, hospitalized in specialized institutions are prone to escape (...) thus it is impossible to completely avoid the risk of escape, given the conditions of this type of patients.”

19. The State held that without prejudice, the hospital staff adopted several measures of search with the objective of locating Mr. Guachalá. It stated that in spite of these actions, it was not possible to find him.

20. The State also noted that after receiving the complaint by Ms. Chimbó, the Office of the Attorney General carried out various proceedings with the objective of locating Mr. Guachalá, such as, *inter alia*, gathering declarations, surveying the site of the events, requesting migration movements. In relation to the habeas corpus action, the State indicated that it complied with the resolution of the Constitutional Court because it decided to continue the investigations. The State also indicated that since 2012 it has a “Protocol of action for the search, investigation and location of missing, lost or strayed persons” and that, in 2015, the Ministry of Public Health issued the “Regulation to provide integral health attention to the victims of disappearance, their next of kin, and persons in condition of not providing evidence of their identity.”

21. The State held that the duty to investigate is an obligation of means and not of results. It stated that, as a result, it cannot be held internationally responsible since it adopted all measures within its power to locate Mr. Guachalá.

22. Additionally, the State alleged that what happened to Mr. Guachalá cannot be characterized as a forced disappearance because: i) there was no detainment of the victim by the State or acquiescence of State agents; ii) even though Mr. Guachalá was admitted to the hospital, it was a legal restriction of his freedom given his physical and mental situation at the time he was institutionalized, in accordance with Article 83 of the then-in force Health Code; iii) there was no denial of information about the situation of Mr. Guachalá after he escaped the hospital; and iv) Ms. Chimbó had access to file a habeas corpus action.

IV. PROVEN FACTS

A. About the situation of Luis Eduardo Guachalá Chimbó before his admission to the Julio Endara Psychiatric Hospital

23. Luis Eduardo Guachalá Chimbó was born on February 27, 1980.³ He was 23 years old at the time of the events. Also, his family was comprised of his mother, Zoila Rosario Chimbó Jarro, his three sisters, Martha, Nancy, and Alexandra, and his brother Ángel.⁴ According to a medical report of January 21, 2004, Mr. Guachalá was diagnosed with “mental and behavior disorder due to cerebral dysfunction, epilepsy.”⁵ According to the National Directorate of Disabilities, Mr. Guachalá was not registered as “person with disability” in his citizen identification document.⁶

24. The information available indicates that the family was in a situation of poverty. Ms. Chimbó expressed that Mr. Guachalá’s father abandoned the family when their children were very young.⁷ She also noted that she worked in “the occupation of laundry in people’s houses” during the day, and as a rose peddler during the night.⁸

25. Mr. Guachalá completed primary education.⁹ His mother stated that he was unable to finish secondary education because he “had illness of epilepsy” that would not allow him to concentrate to study.¹⁰ Ms. Chimbó held that she did not have the financial means to buy text books and school supplies.¹¹

26. Ms. Guachalá explained that her son began suffering epilepsy attacks from the age of thirteen.¹² She stated that she took her son to various hospitals, where he was given medication to prevent these attacks.¹³ Ms. Chimbó held that every so often her son would suffer epileptic attacks and therefore they had to change his medication.¹⁴ She held that because the prescription medication for her son was very expensive that she was sometimes unable to purchase them.¹⁵ She stated that because of this, she would provide her son with homemade remedies based on medicinal herbs.¹⁶ She stated that the lack of a continuous and adequate medical treatment caused the continuation of the attacks he suffered.¹⁷

27. She stated that because of their poverty, her son Luis Guachalá began working as a mason.¹⁸ She stated he earned very little, “only for his daily subsistence and sometimes enough to provide her a little support at home.”¹⁹ Ms. Chimbó expressed that on occasions she was called to inform her that her son had a crisis whilst working, therefore she had to go where he was, “accommodate him with pillows (...) on the ground, for him to sleep through the crisis until he wakes up.”²⁰ Ms. Guachalá stated that “when he was by himself, he would fall anywhere, sometimes in public transportation vehicles.”²¹

B. About the admission of Luis Guachalá to the Julio Endara Psychiatric Hospital in May 2003

³ Annex 15. Letter of the Office of the Attorney General of the State, March 21, 2016. Annex 9 to the communication of the State of May 20, 2016, p. 15.

⁴ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition. Likewise, see: Communication of the State of 20 May 2016.

⁵ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁶ Annex 15. Letter of the Ministry of Public Health, 6 May 2016. Annex 10 to the communication of the State of May 20, 2016.

⁷ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁸ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁹ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹⁰ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹¹ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹² Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹³ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹⁴ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹⁵ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹⁶ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹⁷ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹⁸ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹⁹ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

²⁰ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

²¹ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

28. Ms. Chimbó declared that on May 2003 she took her son to the Julio Endara Psychiatric Hospital.²² Said hospital is a dependency of Ecuador's Ministry of Public Health.²³ The State detailed that this hospital constitutes a public institution of Third Level of Specialized Attention in Mental Health.²⁴ According to the hospital's documentation, it has an area of 303,897 square meters "with extensive gardens and green areas."²⁵ Likewise, it states that the hospital has the objective "to provide better assistance to the patients suffering mental diseases."²⁶

29. The details described below about the first admission to the hospital and what happened later, result from the affidavit of Luis Guachalá's mother.²⁷ Ms. Chimbó stated that a neighbor recommended said hospital because he had been in that institution for some time, and that there "they could cure her son." She held that she decided to take him to the hospital because her son had "become sick, and became aggressive." She stated that upon arriving, Luis Guachalá was examined by a hospital's doctor, who said that her son "had to remain hospitalized" and that she should buy the medication for him. Ms. Chimbó expressed that she signed some documents in order to authorize her son to remain in the hospital for one month.

30. She held that Luis Guachalá remained in the hospital for the entire month of May 2003. She indicated that she visited him once every two days for three hours approximately and she never had any problems entering and talking to her son. She also stated that she would regularly talk to the medical staff of the hospital, who informed her about the health condition of her son.

31. She stated that during the first conversation she had with her son, he asked her why he had been left at the hospital. She expressed that it was for him to cure himself. She held that a week after being admitted, her son Luis stated that "he wanted to go home." She stated that she said "no, he should leave that place cured." She held that after that "he remained calm."

32. Ms. Chimbó held that on one occasion her son expressed concern that in the hospital they beat "the sick persons that are (...) in the worst condition." He stated that he had not been beaten. She also expressed that her son stated that "one of the nurses was rude (...), he would take away the apples, the mandarins that (...) left for him."

33. Ms. Chimbó stated that at the end of May, the doctor of the hospital, Erika Quimbiulco, said that Luis would be discharged. Ms. Chimbó stated that in June she should have taken her son for a new examination but she could not take him because of lack of money. She stated that there was no follow up on behalf of the medical staff or social workers of the hospital.

34. Ms. Chimbó expressed that by December 2003 the crises of her son returned and were aggravated. She held that at the beginning of January 2004 the following happened with her son Luis:

(...) he started laughing by himself, to look to the roof, grabbed objects and stared at them, like gone, like absent, he would not realize that he was with other persons, he would relieve himself in his pants without warning, I had to bathe him (...). He also became aggressive and since January 7 he would not eat anymore (...). The epileptic crises happened every half hour since January 8 (...). On January 9 he woke up in a worst condition, he would not recognize anyone, the crises continued, he was aggressive, and at one time he pushed me, it seems he realized, he stopped and tears came out, he did not eat a thing.

C. About the admission of Luis Guachalá to the Julio Endara Psychiatric Hospital in January 2004

²² Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

²³ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²⁴ Communication of the State of May 20, 2016.

²⁵ Letter No. 202-G-HJE-2016, 21 March 2016. Annex 11 to the communication of the State of May 20, 2016.

²⁶ Letter No. 202-G-HJE-2016, 21 March 2016. Annex 11 to the communication of the State of May 20, 2016.

²⁷ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

35. On January 10, 2004, Ms. Chimbó took her son again to the Julio Endara Psychiatric Hospital.²⁸ Mr. Guachalá was received by the resident medical doctor and the nursing staff.²⁹ According to the institution's report, the reason for his admission was due to the following factors: "Physical and verbal aggressiveness, impulsiveness, disruptive conduct, insomnia, mutism, hallucination attitudes, generalized (...) convulsive crises."³⁰ It was indicated that it had been one week since Mr. Guachalá had suspended the use of prescription medication and thus there was a "reappearance of a psychopathological episode."³¹

36. Ms. Chimbó stated that she signed a document holding her responsible for the purchase of the medications.³² She also held that she paid the amount of \$10.00.³³ The document signed by Ms. Chimbó states the following:

The undersigned (...) Rosario Chimbó (...) authorizes the doctors of the hospital to carry out the treatments that they consider convenient on the patient Luis Eduardo Guachalá Chimbó and are aware of the risks thereof.

We commit to collaborate with the necessary medication, in addition we will look after the patient during the time of hospitalization in this health facility, visiting him according to the frequency advised by the treating doctors and providing the essential elements for his clothing and personal care.

We know that the hospital foresees all possibility of escape and accident, but in case this happens it is not liable of the consequences.³⁴

37. Ms. Chimbó stated that she accompanied her son to a room with six beds.³⁵ She expressed that only one of the beds was occupied by a person "that was like dead."³⁶ She held that the doctor ordered a nurse to inject a tranquilizer to Mr. Guachalá.³⁷ She added that the nurse that was in the room had a smell "as if he just had alcohol."³⁸ She held that said nurse was shaking and "injected (her son) over six times in one arm (...) (because) he could not find the vein."³⁹ She held that once her son Luis was properly injected "he remained like dead, not like the first time when I took him in May when he was injected."⁴⁰

38. Ms. Chimbó received a list of cleaning objects she should buy: toilet paper, soap, comb, toothbrush, and toothpaste.⁴¹ She stated that Mr. Guachalá was given used clothes, which according to the nurse "were donated by other persons and (...) were given to the sick patients."⁴²

39. Ms. Chimbó asked the doctor whether it was possible to visit her son the next day.⁴³ The doctor indicated it was better to come back on Monday because her son "was going to be asleep on Saturday and Sunday."⁴⁴

D. About the events at the hospital between January 11 and 16

²⁸ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

²⁹ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

³⁰ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

³¹ Annex 5. Entry sheet of Luis Guachalá, Julio Endara Psychiatric Hospital, 10 January 2004. Annex 2 to the initial petition.

³² Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

³³ Annex 7. Declaration of Zoila Chimbó before the Judicial Police of Pichincha, 3 February 2004. Annex 4 to the initial petition.

³⁴ Authorization of the Julio Endara Psychiatric Hospital, 10 January 2004. Annex to the communication of the State of January 7, 2015.

³⁵ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

³⁶ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

³⁷ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

³⁸ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

³⁹ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁴⁰ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁴¹ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁴² Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁴³ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁴⁴ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

40. Ms. Chimbó expressed that on Sunday January 11 she communicated over the phone with a nurse at the hospital who stated that her son “remained asleep and was sedated.”⁴⁵

41. On Monday January 12, 2004, a meeting was held among the medical staff of the hospital.⁴⁶ The doctor, Erika Quimbiulco, held that during that meeting she was appointed to attend to Mr. Guachalá.⁴⁷ She stated that when she went to perform a full examination, she found him “sedated because of the effects of the treatment prescribed, therefore she only carried out the physical examination.”⁴⁸ She expressed that said physical examination was “normal.”⁴⁹ Likewise, she stated that she prescribed specific medications “for necessary reasons in case he convulses” and requested the surveillance of Mr. Guachalá.⁵⁰

42. That same day in the morning, Ms. Chimbó went to the hospital⁵¹ and stated that when she entered she went to her son’s room but did not find him there.⁵² Afterwards, Ms. Chimbó asked doctor Quimbiulco of the whereabouts of her son⁵³ and said that the doctor informed her that her son was sedated.⁵⁴ Doctor Quimbiulco stated that she gave Ms. Chimbó the list of medications that she prescribed for her son.⁵⁵

43. Doctor Quimbiulco stated that on the afternoon of that same day, while she was tending other patients in the hospital, she met Ms. Chimbó again.⁵⁶ She expressed that Ms. Chimbó asked again of the whereabouts of her son, to which she responded that “he could be at the hairdresser or in occupational therapy with the rest of the patients.”⁵⁷ She added that “in reality (...) at that time I did not know where he was because (...) she does not have the direct responsibility to look after the patients, this duty corresponds to the nursing assistants.”⁵⁸

44. Ms. Chimbó stated that she headed to the hospital’s hairdresser but did not find her son there.⁵⁹ She recounted that doctor Quimbiulco indicated to “look among the patients, that he must be somewhere around there with the sick people, that he could be in rehabilitation, which is the place where the sick thresh corn.”⁶⁰ Ms. Chimbó stated that she questioned doctor Quimbiulco about not knowing the whereabouts of her son, who also would be sedated.⁶¹ She stated that doctor Quimbiulco did not respond.⁶²

45. Ms. Chimbó stated that she left the hospital to buy the medications she was instructed to buy and that, upon returning, asked the personnel of the center where her son was.⁶³ She stated that no one could tell her where her son was.⁶⁴ She expressed that she delivered the medications to doctor Quimbiulco and stated that she still could not find her son, to which the doctor replied “he must be somewhere around there.”⁶⁵

46. Doctor Quimbiulco stated that afterwards she told Ms. Chimbó that it was “therapeutically convenient” not to see her son.⁶⁶ This, because “the patients upon receiving their next of kin on many

⁴⁵ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁴⁶ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁴⁷ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁴⁸ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁴⁹ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

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⁵² Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁵³ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁵⁴ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁵⁵ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

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⁵⁸ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁵⁹ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁶⁰ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁶¹ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁶² Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁶³ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁶⁴ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁶⁵ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁶⁶ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

occasions become agitated and want to leave with them.”⁶⁷ She also expressed that she agreed with Ms. Chimbó that she would call her on a daily basis to inform her about the health condition of Luis Guachalá and to agree on a date for her to visit him.⁶⁸

47. According to the hospital’s medical report, doctor Quimbiulco stated that on Tuesday January 13, 2004 she performed a new test on Mr. Guachalá.⁶⁹ She expressed that he was “not very communicative, hypoprosenic, bradipsychic thought, poor content, (...) memory, impaired, deteriorated judgment and reasoning.”⁷⁰ She added that Mr. Guachalá had not suffered convulsive crises, and that he was feeding and sleeping adequately.⁷¹ She stated that due to his improvement, she decided to change the prescribed medications.⁷² Ms. Chimbó stated that she called doctor Quimbiulco that day, who said that her son “was fine.”⁷³

48. Doctor Quimbiulco held that on Thursday January 15, 2004, when she arrived at the hospital, she was informed that Mr. Guachalá had suffered a fall in the bathroom on the previous day.⁷⁴ She stated that she proceeded to stitch the wound to the left ciliary region.⁷⁵ Doctor Quimbiulco stated that she talked over the phone with Ms. Chimbó and indicated that she could visit her son that day because “he was better.”⁷⁶ She held that Ms. Chimbó said that “she was not going to come during the week because of her work and she would visit him during the weekend.”⁷⁷

49. According to the Hospital’s medical report, on Friday January 16, 2004, doctor Quimbiulco performed another test on Mr. Guachalá.⁷⁸ She held that Mr. Guachalá had not had convulsive crises and was eating and sleeping adequately.⁷⁹ Ms. Chimbó stated that she communicated over the phone with doctor Quimbiulco, who said that “her son was calling for (her), that he wanted to see her.”⁸⁰ Doctor Quimbiulco stated that when she left the hospital that day he was “stable.”⁸¹

E. About what happened on January 17, 2004

50. The Commission observes that Mr. Guachalá’s medical chart at the Julio Endara Psychiatric Hospital contains his “evolution notes” and “medical prescriptions” from January 10, 2004, the date of his admission to the medical center, to the 16 January.⁸² On said chart there are no annotations for January 17, 2004.⁸³ In the report of the hospital’s shift change for that date, it indicates the name of the personnel at the institution during the morning and evening.⁸⁴ In said report there is a record of an annotation indicating that “the patient Luis Guachalá abandoned the hospital, he is searched for, he is not found.”⁸⁵

51. Nurse Luis Borja sent a communication to the hospital’s director, Rommel Artieda, stating that on the afternoon of January 17, Mr. Guachalá was at the institution’s patio “along with all the other patients, most of them in care.”⁸⁶ He held that afterwards he brought Mr. Guachalá to the television room

⁶⁷ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁶⁸ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁶⁹ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁷⁰ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁷¹ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁷² Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁷³ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁷⁴ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁷⁵ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁷⁶ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁷⁷ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁷⁸ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁷⁹ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁸⁰ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁸¹ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁸² Annex 4. Medical Chart of Luis Guachalá, Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁸³ Annex 4. Medical Chart of Luis Guachalá, Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁸⁴ Annex 8. Report of shift change of the Julio Endara Psychiatric Hospital, 17 January 2000. Annex 5 to the initial petition.

⁸⁵ Annex 8. Report of shift change of the Julio Endara Psychiatric Hospital, 17 January 2000. Annex 5 to the initial petition.

⁸⁶ Annex 10. Communication of Luis Borja, 27 September 2004. Annex 7 to the initial petition.

where he remained sitting down.⁸⁷ He stated that he went to see “another patient (...) who was threatening to leave the hospital and was restless.”⁸⁸ The State indicated that this occurred close to 3:30 pm.⁸⁹

52. Nurse Borja stated that he took between fifteen to twenty minutes to return to the television room and no longer found Mr. Guachalá there.⁹⁰ He said that he immediately searched for him in the different halls and rooms of the hospital, but could not find him.⁹¹ He stated that at the time of the events the on-call doctor was not in the hospital.⁹²

F. About the events as of January 18, 2004

53. Ms. Chimbó stated that on Sunday January 18, 2004, she went to the hospital to see her son and she spoke to the nurse who had injected her son at the time of his admission, who told her that “he had escaped from the hospital on Saturday February 17.”⁹³ She said that the nurse asked whether her son had arrived home, to which she responded that she had not seen her son since she left him at the hospital.⁹⁴ She stated that the nurse said “that was (her) problem, (...) that they had looked for him through the entire sector but had not found him.”⁹⁵

54. Ms. Chimbó stated that the nurse did not want to allow her in the room that had been assigned to her son, but that a female nurse opened the door of said room and thus she was able to enter.⁹⁶ She added that “there was already another patient” on the bed that was assigned to Luis, that she did not find doctor Quimbiulco and that she spoke to a shift nurse, who recommended that she look for her son “in the house of other relatives”, so she left the hospital crying.⁹⁷

55. Doctor Quimbiulco stated that on Monday January 19, 2004, upon arriving to the hospital, she was informed that Mr. Guachalá “had abandoned the institution during the weekend”⁹⁸, so she ordered the social worker, Jenny Beltran, “to carry out the respective procedures to locate the patient.”⁹⁹

56. That same day, Ms. Chimbó came to the hospital and met with the director of the institution. The director informed Ms. Chimbó the following:

(...) the patients become restless when the next of kin do not visit them, and regrettably the hospital does not have high walls so it is very easy for them to leave; the personnel cares for them but they are not enough to follow the patients that want to escape, but even so, the personnel is usually monitoring them.¹⁰⁰

57. According to the hospital’s report, that day calls were made to the San Juan de Dios Shelter, to the San Lázaro Hospital, and the morgue, where they were informed that no person with the characteristics of Mr. Guachalá was found.¹⁰¹ Likewise, the social worker, Jenny Beltran, communicated with the National Police to notify them of the disappearance of Mr. Guachalá.¹⁰² According to the hospital’s report, that same day Sergeant Max Alua came “to obtain the routine information.”¹⁰³ For her part, Ms. Chimbó said

⁸⁷ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁸⁸ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁸⁹ Communication of the State of May 20, 2016.

⁹⁰ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁹¹ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁹² Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁹³ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁹⁴ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁹⁵ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁹⁶ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁹⁷ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

⁹⁸ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

⁹⁹ Annex 1. Medical Report of the Julio Endara Psychiatric Hospital. Annex to the initial petition.

¹⁰⁰ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹⁰¹ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹⁰² Annex 11. Call management system of the National Police of Ecuador. Annex 8 to the initial petition.

¹⁰³ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

that she and her daughter were looking for Luis in the areas surrounding the hospital. She added that “from the hospital they told us that they had notified the police, the firemen, the red cross, but no one showed up.”¹⁰⁴

58. On January 20, the hospital called Ms. Chimbó to find out whether she had any information about her son.¹⁰⁵ According to the hospital records, no one picked up that call.¹⁰⁶ On her side, Ms. Chimbó said that on that day she went to the police checkpoint located in Guangopolo and the chief of the checkpoint stated that “it was not the first time that a patient from the hospital went missing”, and he recommended that she file a complaint before the Judicial Police.¹⁰⁷

59. Ms. Chimbó stated that one of the persons resident in the hospital told her that Luis was dead.¹⁰⁸ She stated that the person told her that her son “had suffered a heart attack during the mass” and that even she asked her to request help from the police.¹⁰⁹

60. On January 21, 2004, the hospital issued a release form for Luis Guachalá.¹¹⁰ It was stated that “the patient left the hospital (...); they have tried to locate him (...) but it has not been possible so they proceed to discharge him for abandoning the hospital.”¹¹¹

61. On January 26, a social worker from the hospital visited the morgue because she received a call that they had two unidentified cadavers, but neither corresponded to Mr. Guachalá.¹¹²

62. The following day a meeting was held at the hospital and it was agreed to create a search team for Mr. Guachalá.¹¹³ It was also agreed to print flyers and place them in areas near to the institution.¹¹⁴ The IACHR does not have information about the effective realization of said actions. Additionally, it was stated that the hospital called a television network to air a notice informing of the disappearance of Mr. Guachalá.¹¹⁵ According to the hospital, the network’s personnel informed them that Ms. Chimbó had already made that request.¹¹⁶

63. On February 5, 2004, a social worker from the hospital contacted the sister of Mr. Guachalá by phone and stated that during the night they would go with the police to a location where homeless people are found to see if they could locate him.¹¹⁷

64. On February 10, 2004, Ms. Chimbó went to the hospital to ask about what measures had been adopted in the search for her son.¹¹⁸ One of the hospital’s doctors communicated over the phone with the Barracks of la Rivera, who offered to provide a patrol to search for Mr. Guachalá.¹¹⁹ A group of officers arrived in the hospital in the afternoon and, after talking with Ms. Chimbó and receiving a photograph of her son, went out to look for him.¹²⁰

¹⁰⁴ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹⁰⁵ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹⁰⁶ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹⁰⁷ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹⁰⁸ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹⁰⁹ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹¹⁰ Annex 9. Release form of the Julio Endara Psychiatric Hospital, 21 January 2004. Annex 6 to the initial petition.

¹¹¹ Annex 9. Release form of the Julio Endara Psychiatric Hospital, 21 January 2004. Annex 6 to the initial petition.

¹¹² Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹¹³ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹¹⁴ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹¹⁵ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹¹⁶ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹¹⁷ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹¹⁸ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹¹⁹ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹²⁰ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

65. The following day, Ms Chimbó and a hospital social worker went to the barracks to find out whether they had information of the whereabouts of Mr. Guachalá.¹²¹ A sergeant informed them that they had not located him and that “they should rather pressure the PJ (Judicial Police) for them to attend and carry out the prior investigations at the hospital.”¹²²

66. On February 12, 2004, a hospital social worker went to the Judicial Police.¹²³ She stated that she had spoken with the sergeant responsible for the case, who stated that:

(...) the complaint issued by the mother of the patient is based on maybe (sic) something [that] happened at the hospital and they do not want to let her know about it and therefore the hospital is ignoring finding her son.¹²⁴

67. According to an official letter from the Fire Department of the Metropolitan District of Quito, between February 12 – 15 they carried out a search for Mr. Guachalá, without result. It stated that the search was carried out because of a request made by a social worker from the hospital.¹²⁵

68. On June 10, 2004, the National Directorate of the Defense of the Rights of the Elderly and Person with Disabilities (DINATED) sent a communication to the Julio Endara Psychiatric Hospital.¹²⁶ The DINATED expressed its concern about the lack of information about his disappearance that occurred between January 17 and 18, 2004.¹²⁷

69. On June 30, 2004, Jenny Beltrán, a social worker at the Julio Endara Psychiatric Hospital, replied to DINATED’s communication.¹²⁸ Ms. Beltrán stated that January 17 and 18, 2004 was a weekend and “therefore she did not know about the event until Monday January 19 in the office meeting held every morning of office days.”¹²⁹ She added that once she was aware of the disappearance of Mr. Guachalá, “they proceeded to carry out the respective proceedings that the case requires.”¹³⁰

70. On April 7, 2005 a doctor at the hospital, Sonia Sánchez, informed the director of said center that they performed forensic dental exams on two unidentified cadavers found on August 13 and September 18, 2004.¹³¹ She held that the results do not match with Mr. Guachalá.¹³²

G. About the legal actions presented

1. Complaint before the Judicial Police

71. On January 21, 2004, Ms. Chimbó filed a complaint before the Judicial Police of Pichincha about her son’s disappearance.¹³³ The State indicated that the Office of the District Prosecutor of Pichincha began a prior investigation.¹³⁴ The same date, the prosecutor agent of the Unit of Crimes against Life of Pichincha requested: i) Ms. Chimbó’s affidavit; and ii) reconnaissance of the place of the events.¹³⁵

¹²¹ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹²² Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹²³ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹²⁴ Annex 3. Report of the Julio Endara Psychiatric Hospital, Social Work. Annex to the initial petition.

¹²⁵ Annex 15. Letter of the Fire Department of the Metropolitan District of Quito, 4 October 2004. Annex to the communication of the State of May 20, 2016, p. 8.

¹²⁶ Annex 2. Communication of Jenny Beltrán, Julio Endara Psychiatric Hospital, 30 June 2004. Annex to the initial petition.

¹²⁷ Annex 2. Communication of Jenny Beltrán, Julio Endara Psychiatric Hospital, 30 June 2004. Annex to the initial petition.

¹²⁸ Annex 2. Communication of Jenny Beltrán, Julio Endara Psychiatric Hospital, 30 June 2004. Annex to the initial petition.

¹²⁹ Annex 2. Communication of Jenny Beltrán, Julio Endara Psychiatric Hospital, 30 June 2004. Annex to the initial petition.

¹³⁰ Annex 2. Communication of Jenny Beltrán, Julio Endara Psychiatric Hospital, 30 June 2004. Annex to the initial petition.

¹³¹ Letters of Sonia Sánchez to Rommel Artieda, 7 April 2005. Annex to the petitioners communication received on May 25, 2011.

¹³² Letters of Sonia Sánchez to Rommel Artieda, 7 April 2005. Annex to the petitioners communication received on May 25, 2011.

¹³³ Annex 12. Complaint of Zoila Chimbó, 21 January 2004. Annex 9 to the initial petition.

¹³⁴ Communication of the State of May 20, 2016.

¹³⁵ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

72. On February 3, 2004, Ms. Chimbó gave her judicial declaration.¹³⁶ Likewise, nurse Luis Borja indicated that he gave his declaration before the Judicial Police and stated the following:

(...) the hospital is not a closed hospital and there is always a possibility of patients leaving because during those days trees surrounding the hospital were being cut down, which damaged part of the enclosure. (...) [W]hen a patient is admitted to the hospital their next of kin signs a document whereby they do not hold the hospital liable in these cases given the critical condition of the patients, in spite of the care that is provided here, of which they were duly informed.¹³⁷

73. On March 22, 2004, the Provincial Chief of the Judicial Police filed before the Prosecutor's office a report of the proceedings undertaken.¹³⁸ Said report stated that they took the declarations of some of the hospital personnel.¹³⁹ The IACHR does not have said declarations.

74. The petitioners stated that autopsies were performed on two cadavers found on August 13 and September 18, 2004, respectively, which did not correspond to Mr. Guachalá.¹⁴⁰ For its part, the State maintained that on October 18, 2004, the expert credentialed by the Public Ministry submitted to the Prosecutor's Office his expert report of reconnaissance of the place of the events.¹⁴¹ The State did not mention anything about the form by which said reconnaissance was made or of the results obtained.

75. Ms. Chimbó sent communications to the Prosecutor's Office on November 26, 2004, and on January 28 and July 4, 2005, requested that various proceedings be undertaken.¹⁴² The State held that the prosecutor appointed to the investigation informed Ms. Chimbó that several of the procedures requested by Ms. Chimbó had already been done, and in relation to the others, "they would be carried out at the moment it is considered timely."¹⁴³

76. On July 12, 2005 the Director of the hospital, Rommel Artieda, made his declaration before the Twenty First Judge of Civil Matters of Pichincha.¹⁴⁴ Mr. Artieda stated that the medical condition of Mr. Guachalá was "unstable, thus the medical personnel of the hospital provided him all the priority, preference, specialized attention and necessary care."¹⁴⁵ He added that:

(...) since this is a psychiatric hospital, it has a large area, where the patients move freely and calmly, the enclosure has a medium height, and patients not seeing their next of kin, in their desperation, try to leave the premises, as has happened with Mr. Luis Guachalá.¹⁴⁶

77. The State informed that on July 13, 2005, the forensic odontologist appointed to the case submitted a report to the Prosecutor's Office stating that a study of the teeth of Mr. Guachalá and two unidentified cadavers had been done, with negative results.¹⁴⁷

78. Ms. Chimbó stated that since she filed her complaint until mid-2005, she had to pay for the mobilization of the agents of the Judicial Police to the hospital.¹⁴⁸ She held that despite her request, no major

¹³⁶ Annex 7. Declaration of Zoila Chimbó before the Judicial Police of Pichincha, 3 February 2004. Annex 4 to the initial petition.

¹³⁷ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

¹³⁸ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹³⁹ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁴⁰ Communication of the petitioners received on May 25, 2011.

¹⁴¹ Communication of the State of May 20, 2016.

¹⁴² Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁴³ Communication of the State of May 20, 2016.

¹⁴⁴ Declaration of Rommel Artieda, 12 July 2005. Annex to the communication of the petitioners received on May 25, 2011.

¹⁴⁵ Declaration of Rommel Artieda, 12 July 2005. Annex to the communication of the petitioners received on May 25, 2011.

¹⁴⁶ Declaration of Rommel Artieda, 12 July 2005. Annex to the communication of the petitioners received on May 25, 2011.

¹⁴⁷ Communication of the State of May 20, 2016.

¹⁴⁸ Annex 6. Affidavit of Zoila Chimbó, 27 September 2005. Annex 3 to the initial petition.

proceedings were undertaken, and the information from one of the patients about the possible death of Mr. Guachalá was not recorded.

79. On August 29, 2005, the Prosecutor's Office of Pichincha requested the Eighteenth Criminal Court of Pichincha to dismiss the complaint and archive it based on Article 38 of the Code of Criminal Procedure.¹⁴⁹ This, because, despite "having carried out all proceedings and investigations around the case, it was impossible to find the whereabouts of Mr. Guachalá."¹⁵⁰ The State informed that Ms. Chimbó requested that the complaint not be dismissed.¹⁵¹

80. On September 27, 2005, the Judge in charge ordered the transfer, for consultation, of the case file to the Minister Prosecutor Superior, with the objective of revoking or ratifying the requested dismissal.¹⁵² On July 13, 2006 the Provincial Minister Prosecutor of Pichincha ratified the request for archival of the investigation.¹⁵³ In his resolution he stated the following:

(...) this Prosecutor's Office considers that there is no determination of the existence of any crime whatsoever, therefore the undersigned District Minister Prosecutor of Pichincha, ratifies the request of archival enhanced in order.¹⁵⁴

81. On July 19, 2006, the Judge of the Eighteenth Criminal Court of Pichincha ordered the archival of the case.¹⁵⁵

2. Administrative case file

82. On May 23, 2013 an investigation officer of the Judicial Police filed a report to the Provincial Prosecutor indicating that they carried out a work meeting with the objective of complementing the investigation activities of the present case.¹⁵⁶ The prosecutor referred said report to the Unit of Integral Attention to the Public with the objective of referring it to the Unit of Administrative Operations.¹⁵⁷

83. According to an official letter of Prosecutor Four of the Unit of Administrative Operations of Pichincha, of November 4, 2013, and August 19, 2013, it requested the case file about the disappearance of Mr. Guachalá.¹⁵⁸ The Prosecutor stated that he requested the National Police to "carry out the respective investigations" and to send a report about the proceedings undertaken within thirty days.¹⁵⁹ Likewise, the Prosecutor ordered that official letters be sent to several institutions, among the most relevant are the following: i) the NCB-INTERPOL (OCNI-INTERPOL) with the objective of issuing a "yellow notice of the missing person," Mr. Guachalá; ii) the National Directorate of the Judicial Police and Investigations with the objective of certifying whether there were somewhere in the country unidentified cadavers that matched the characteristics of Mr. Guachalá; iii) the Ministry of Public Health with the objective of reporting whether Mr.

¹⁴⁹ Initial Petition. Communication of the State of May 20, 2016.

¹⁵⁰ Initial Petition. Communication of the State of May 20, 2016.

¹⁵¹ Communication of the State of May 20, 2016.

¹⁵² Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁵³ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁵⁴ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁵⁵ Communication of the State of May 20, 2016.

¹⁵⁶ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁵⁷ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁵⁸ Letter of Prosecutor 4 of the Unit of Administrative Operations of Pichincha, 4 November 2013. Annex to the communication of the State of January 7, 2015.

¹⁵⁹ Letter of Prosecutor 4 of the Unit of Administrative Operations of Pichincha, 4 November 2013. Annex to the communication of the State of January 7, 2015.

Guachalá was tended or interned at any psychiatric hospital or shelter after January 2004.¹⁶⁰ In said letter, the Prosecutor stated that he was waiting for the requested information.

84. On October 30, 2013, the Prosecutor sent a letter to the Chief of the Judicial Police of Pichincha stating that he was aware that the investigator in charge of this case had been transferred to a different unit, thus it was necessary to designate another police officer to continue with the investigation.¹⁶¹

85. In January 2014, the Prosecutor requested the undertaking of various proceedings, such as: i) taking declarations from the hospital personnel; ii) the appearance of Ms. Chimbó; and iii) the DNA match of Ms. Chimbó with the unidentified cadavers in Pichincha.¹⁶²

86. On January 21, 2014, the chief of NCB-INTERPOL notified the prosecutor about Mr. Guachalá's yellow notice, with the objective of communicating the disappearance of a person to the international level.¹⁶³

87. There is information about the search in shelters and a flyer posting carried out between April and May 2014.¹⁶⁴ In June 2014, the Prosecutor of the Specialized Unit in Investigation of Missing Persons carried out a raid of the hospital with the objective of gathering relevant documents of the case at hand.¹⁶⁵ In July 2014, the prosecutor ordered the undertaking of proceedings such as: i) to determine whether there are travel tickets purchase in the name of Mr. Guachalá; and ii) matching the registered finger prints of Mr. Guachalá with unidentified cadavers in January 2004, among others.¹⁶⁶

88. In September 2014 the prosecutor requested: i) to order the social worker of State's General Attorney to carry out an "assessment of the social and family environment"; and ii) to receive statements of the hospital doctors, among other proceedings.¹⁶⁷ In January 2015, the Prosecutor requested statements from the hospital's nursing assistants.¹⁶⁸ In February 2015, the Prosecutor ordered the National Directorate of Crimes Against Life, Violent Deaths, Disappearances, Extortion and Kidnappings (DINASED) to review at the Department of Legal Medicine of Pichincha the records of cadaver removals since 2004 and verify whether there are similarities between the unidentified bodies and Mr. Guachalá.¹⁶⁹

89. In June 2015, the Prosecutor ordered the commanders of the Police of various districts to carry out a census of homeless people, beggars, alcoholics and "other people that wander the streets."¹⁷⁰ One of the commanders stated that "they cannot fulfill the request (...) due to the unavailability of vehicles because there are three vehicles with damages."¹⁷¹

¹⁶⁰ Letter of Prosecutor 4 of the Unit of Administrative Operations of Pichincha, 4 November 2013. Annex to the communication of the State of January 7, 2015.

¹⁶¹ Letter of Prosecutor 4 of the Unit of Administrative Operations of Pichincha, 4 November 2013. Annex to the communication of the State of January 7, 2015.

¹⁶² Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁶³ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁶⁴ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁶⁵ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁶⁶ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁶⁷ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁶⁸ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁶⁹ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁷⁰ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁷¹ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

90. On July 16, 2015, the prosecutor received a letter from the chief of the Unit of Person Disappearances in relation to the declaration of Andrés, the brother of Mr. Guachalá, who stated that:

(...) a person also known as “Guatas” had seen Luis Guachalá a few years back (2012) and that said information would have been provided to his mother Ms. Zoila Chimbó Jarro, who was in charge of the investigation for the alleged disappearance of Luis.¹⁷²

91. Andrés Guachalá also stated that presently, the person also known as “Guatas” said that “he was not a hundred percent sure that it was Luis Guachalá.”¹⁷³

92. On October 1, 2015, Ms. Chimbó requested that a search be done inside the hospital, “in the sector of the former establishment with dogs trained in the search of bones.”¹⁷⁴ This proceeding was scheduled for November 11, 2015.¹⁷⁵ Nonetheless, it was suspended because the Unit of Order Maintenance reported that it “lacked personnel for this search.”¹⁷⁶ The proceeding was carried out on November 27, 2015, without positive results.¹⁷⁷

93. In January 2016 the prosecutor ordered DINASED to again review the records in the Department of Legal Medicine of Pichincha.¹⁷⁸ This, because they only reviewed the documents between 2001 and 2014.¹⁷⁹ In February 2016, the prosecutor requested that six television networks and four newspapers broadcast the picture and information of Mr. Guachalá.¹⁸⁰

94. On March 15, 2016, the prosecutor requested from the Archival Unit of the Prosecutor’s Office “the entire original case file (...) that is related to the complaint filed by Ms. Chimbó (...) about the disappearance of Mr. Luis Eduardo Guachalá.”¹⁸¹ The same day the prosecutor received the requested case file.¹⁸²

95. In the State’s communication of May 2016, the State held that the case is still in a priori investigation state and in charge of a prosecutor.¹⁸³ In July 2016 the petitioners informed that the case file was open.¹⁸⁴

96. The State indicated that in August 2016, the personnel of the Directorate of Citizen’s Attention accompanied Ms. Chimbó to the area of Conocoto in Quito, “to witness a track and search proceeding for her son.”¹⁸⁵ The Ecuadorian State held that said proceeding was carried out by the team of the

¹⁷² Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁷³ Annex 15. Report of the National Directorate of Crimes against life, violent deaths, disappearances, extortion and kidnapping, 22 March 2016. Annex 19 to the Communication of the State of May 20, 2016.

¹⁷⁴ Letter of the Ministry of Security Coordination, 4 May 2016. Annex 13 to the communication of the State of May 20, 2016.

¹⁷⁵ Letter of the Ministry of Security Coordination, 4 May 2016. Annex 13 to the communication of the State of May 20, 2016.

¹⁷⁶ Letter of the Ministry of Security Coordination, 4 May 2016. Annex 13 to the communication of the State of May 20, 2016.

¹⁷⁷ Letter of the Ministry of Security Coordination, 4 May 2016. Annex 13 to the communication of the State of May 20, 2016.

¹⁷⁸ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁷⁹ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁸⁰ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁸¹ Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁸² Annex 15. Letter of the Office of the Attorney General of the State, 21 March 2016. Annex 9 to the communication of the State of May 20, 2016.

¹⁸³ Communication of the State of May 20, 2016.

¹⁸⁴ Communication of the petitioners of July 5, 2016.

¹⁸⁵ Letter of the Ministry of Justice, Human Rights and Worship, 17 November 2016. Annex to the communication of the State of December 21, 2016.

National Directorate of Crimes against Life, Violent Deaths, Disappearances, Extortion and Kidnappings, and the prosecutor responsible for the case was present.¹⁸⁶

97. In the State's report of 2016, the State asserted that, despite the proceedings carried out by the Attorney General's Office of Ecuador, "it has not been possible to determine the whereabouts of the alleged victim."¹⁸⁷

3. Complaint before the *Ombudsman*

98. On April 2, 2004, the INREDH presented a complaint before the *Ombudsman* (*Defensoría del Pueblo*) about the disappearance of Mr. Guachalá.¹⁸⁸ Said request was addressed to the National Directorate of the Defense of the Rights of the Elderly and Persons with Disabilities (DINATED).¹⁸⁹ On October 5, 2004, DINATED convened a hearing in which Ms. Chimbó participated.¹⁹⁰ In said proceeding, Ms. Chimbó expressed her concern about the lack of clarification of the facts related to the disappearance of her son.¹⁹¹ For their part, the representatives of Ms. Chimbó argued that the hospital communicated to the State authorities about the disappearance of Mr. Guachalá two days after the events took place.¹⁹² They also requested DINATED to undertake various proceedings such as: i) receiving the statement of a nurse allegedly with Mr. Guachalá before his disappearance; ii) contacting all the medical and nursing personnel on duty at the time; and iii) gathering information from the Judicial Police and the Public Ministry about the investigation of the case.¹⁹³

99. On October 7, 2004, the director of DINATED issued a resolution stating that it would take over the case as it fulfilled the legal requirements.¹⁹⁴

100. On February 17, 2005, the Director of DINATED issued a communication to the Health Minister.¹⁹⁵ He stated that they should undertake the necessary proceedings to carry out a DNA test on a cadaver at the Police morgue, whose cost would be covered by the Julio Endara Hospital.¹⁹⁶ This, because of the "total responsibility that (the hospital) for this disastrous event; that remains unsolved for a year and given that Ms. Zoila Chimbó Jarro (...) has very limited financial resources."¹⁹⁷ Likewise, he requested that "the necessary dispositions be issued for the adequate investigation of this case."¹⁹⁸

101. The IACHR has no information about additional proceedings adopted in the context of this investigation.

4. Writ of habeas corpus

102. On November 29, 2004, the INREDH filed a writ of habeas corpus before the Mayor of Quito in favor of Mr. Guachalá.¹⁹⁹ In its request it stated that to date the hospital has not provided information about the circumstances under which Mr. Guachalá could have left said institution.²⁰⁰ It stated that the events

¹⁸⁶ Letter of the Ministry of Justice, Human Rights and Worship, 17 November 2016. Annex to the communication of the State of December 21, 2016.

¹⁸⁷ Communication of the State of October 28, 2016.

¹⁸⁸ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

¹⁸⁹ Communication of the petitioners received on May 25, 2011.

¹⁹⁰ Communication of INREDH, 6 October 2004. Annex to the communication of the petitioners received on May 25, 2011.

¹⁹¹ Communication of INREDH, 6 October 2004. Annex to the communication of the petitioners received on May 25, 2011.

¹⁹² Communication of INREDH, 6 October 2004. Annex to the communication of the petitioners received on May 25, 2011.

¹⁹³ Communication of INREDH, 6 October 2004. Annex to the communication of the petitioners received on May 25, 2011.

¹⁹⁴ Resolution of DINATED, 14 October 2004. Annex to the communication of the petitioners received on May 25, 2011.

¹⁹⁵ Communication of José Oña to the Minister of Health, February 17, 2004. Annex to the communication of the petitioners received on May 25, 2011.

¹⁹⁶ Communication of José Oña to the Minister of Health, February 17, 2004. Annex to the communication of the petitioners received on May 25, 2011.

¹⁹⁷ Communication of José Oña to the Minister of Health, February 17, 2004. Annex to the communication of the petitioners received on May 25, 2011.

¹⁹⁸ Communication of José Oña to the Minister of Health, February 17, 2004. Annex to the communication of the petitioners received on May 25, 2011.

¹⁹⁹ Writ of habeas corpus, 29 November 2004. Annex to the communication of the petitioners received on May 25, 2011.

²⁰⁰ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

constitute inadmissible negligence on the part of the personnel of said hospital, which is a dependency of the Ministry of Public Health of Ecuador.²⁰¹ Likewise, it was stated that the Prosecutor's Office of Pichincha has been unable to determine the whereabouts of Mr. Guachalá.²⁰²

103. On December 14, 2004, the Office of the Mayor of the metropolitan district of Quito ordered that Mr. Guachalá is "conducted to its presence on December 15, 2004, with the respective order of liberty deprivation."²⁰³

104. The next day the hospital director sent a communication stating that Mr. Guachalá "was a patient of said health center until January 17, 2004, the date when he abandoned the institution."²⁰⁴ He stated that there have been attempts to locate him "but it is always foreseen as a risk of the patients with psychiatric diseases that are hospitalized, of which the next of kin are aware and knowledgeable and who accept the terms of the internment and its risks."²⁰⁵

105. On December 2004, the IREDH submitted a written document to the mayor of the metropolitan district of Quito where they left on the record having been informed that there would not be an habeas corpus hearing.²⁰⁶ This, because Mr. Guachalá "would not be presented, because he was not at the hospital (...), according to the information that had been gathered in that health center, the basis for resolving the matter."²⁰⁷ They requested that the mayor consider, at the time of resolving, that the writ of habeas corpus is the suitable guarantee to find a missing person.²⁰⁸

106. On April 27, 2005, INREDH submitted a written document to the Constitutional Tribunal stating that it had not received a response to the letter sent on December 16, 2004.²⁰⁹ It stated that the writ of habeas corpus has not been resolved despite personally asking the municipality to request its processing.²¹⁰ It explained that at the municipality they were informed that the record had been archived and "that they would not issue any resolution".²¹¹ It also stated that considering this would imply that the writ of habeas corpus has been denied, and, thus, they requested the Constitutional Tribunal to give an opinion about said action.²¹²

107. On April 11, 2006, the Third Chamber of the Constitutional Tribunal took over the case.²¹³ Afterwards, on July 6, 2006, the Constitutional Tribunal issued a resolution giving its views on the habeas corpus.²¹⁴ In relation to the processing of the remedy before the mayor, the Constitutional Tribunal held the following:

(...) the mayor in his duty as a constitutional judge to hear the guarantee of habeas corpus had the duty to guard compliance with said disposition, and by not issuing a resolution in the case submitted, has left the party in a defenseless state, a situation which must be corrected by the Constitutional Tribunal.²¹⁵

108. In relation to the feasibility of the habeas corpus for persons with disabilities and institutionalized in hospitals, the Constitutional Tribunal stated the following:

²⁰¹ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²⁰² Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²⁰³ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²⁰⁴ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²⁰⁵ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²⁰⁶ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²⁰⁷ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²⁰⁸ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²⁰⁹ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²¹⁰ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²¹¹ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²¹² Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²¹³ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²¹⁴ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²¹⁵ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

(...) it is feasible to file [a writ of] habeas corpus against any form of illegal deprivation of liberty by any State institution (...) especially (...) against hospital medical centers, given that there are situations where the committal of a person in one of these could be an illegal deprivation of personal liberty, because not all committal and detainment of a person with a mental disability, as it is generally-but-wrongly believed, is exempt of any expression of their own will, and there are principles that must be respected to carry out such committal and detainment, which in case they are violated result in a direct breach of the dignity of the affected person.²¹⁶

109. The Constitutional Tribunal highlighted that in the present matter, Mr. Guachalá's next of kin filed other actions before the *Ombudsman* and before the Public Ministry, without favorable results. Finally, it concluded the following:

(...) it is inadmissible that in a State (...) a person remains disappeared for over two years, and it is less admissible that its organs do not coordinate the adequate actions to determine the whereabouts of the person. (...)

Definitely, it is about leaving a door open, for the next of kin of the disappeared person to try this avenue, when they consider it appropriate, to definitely resolve the problem. This way, granting habeas corpus, can be determined not from its immediate effects, for the impossibility to produce them, but permanent, indistinct from their duration, for the justice that it represents to be able to count on an additional State body until the definitive resolution of the cause, the moment at which it can be considered closed.²¹⁷

110. The petitioners reported that in spite this resolution the Prosecutor's Office did not adopt any measures to determine the whereabouts of Mr. Guachalá.²¹⁸

111. The petitioners stated that after the events of Mr. Guachalá, other in-patients have disappeared from that hospital.²¹⁹ The IACHR notes a flyer of the Ministry of Interior which indicates that a hospital inpatient, Álvaro Nazareno, disappeared from that institution on March 14, 2011.²²⁰

V. LEGAL ANALYSIS

A. Preliminary matter

112. On a preliminary basis the Commission notes that in its admissibility report it did not expressly include Articles 13, 24, or 26 of the American Convention among the rights that could be considered in the merits stage. Nonetheless, from the totality of arguments and evidence available in the merits stage, the IACHR considers it relevant to also analyze the facts established in light of the rights contained in those provisions. The Commission highlights that in both the admissibility phase and the merits phase the State learned of the facts on which the totality of the analysis that follows is based. By virtue of the foregoing, and in application of the principle of *iura novit curia*, the Commission will analyze whether in the instant case the State violated Articles 13, 24, and 26 of the American Convention²²¹ with respect to informed consent in relation to health care, the principle of equality and non-discrimination, and the right to health.

²¹⁶ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²¹⁷ Annex 13. Resolution of the Constitutional Tribunal, 6 July 2006. Annex 10 to the initial petition.

²¹⁸ Communication of the petitioners received on May 25, 2011.

²¹⁹ Public Hearing of the 157th Period of Sessions of the Inter-American Commission on Human Rights. Available at: <https://www.youtube.com/watch?v=8pG-hHzzZ-Y>

²²⁰ Flyer of the Ministry of Interior. Annex to the documentation submitted by the petitioners during the Public Hearing of the 157th Period of Sessions of the Inter-American Commission on Human Rights.

²²¹ The Inter-American Court has established that the inclusion of articles of the American Convention by the IACHR in the merits stage "does not entail a violation of the right to defense [of the State]" in cases in which the State has taken cognizance of the facts that are the basis of the alleged violation. See: 1/A Court HR, *Case of Furlan and family v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 50.

B. Rights to recognition of juridical personality²²², life²²³, personal liberty²²⁴, humane treatment²²⁵, health²²⁶, access to information²²⁷, equality and non-discrimination²²⁸ (Articles 3, 4, 5(1), 7(1), 7(3), 13(1), 24 and 26 of the American Convention)

1. General considerations on the international obligations of the States with respect to persons with disabilities and the principle of equality and non-discrimination

113. Both the IACHR and the Inter-American Court have noted that since the beginning of the inter-American system, and as it has evolved, the rights of persons with disabilities have been vindicated.²²⁹ In addition, the IACHR has indicated that every person who is in a situation of vulnerability, such as persons with disabilities, has the right to special protection.²³⁰ This is in light of the special duties that the State must assume to satisfy the general obligations to respect and ensure human rights.²³¹

114. The Court has indicated that “it is not sufficient for States to refrain from violating rights, and that it is imperative to adopt affirmative measures to be determined according to the particular protection needs of the subject of rights, whether on account of his personal situation or his specific circumstances, such as disability.”²³²

115. In this regard, it is an obligation of the States to strive to include persons with disabilities by means of equality of conditions, opportunities, and participation in all spheres of society²³³ to ensure that legal or de facto limitations that perpetuate or deepen that vulnerability and exclusion are dismantled.²³⁴ Therefore, it is necessary for the States to promote practices of social inclusion and to adopt measures of positive differentiation to remove those barriers.²³⁵

116. The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities is the first international human rights instrument specifically dedicated to persons with disabilities. The IACHR notes that Ecuador ratified that treaty on March 18, 2004.²³⁶

²²² Article 3 of the American Convention provides: Every person has the right to recognition as a person before the law.

²²³ Article 4.1 of the American Convention provides: Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

²²⁴ Article 7 of the American Convention establishes, as relevant:

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment....

²²⁵ Article 5(1) of the American Convention indicates, as relevant: 1. Every person has the right to have his physical, mental, and moral integrity respected....

²²⁶ Article 26 of the American Convention establishes, as relevant: 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.

²²⁷ Article 13 indicates, as the relevant part: 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

²²⁸ Article 24 of the American Convention establishes: All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

²²⁹ IACHR, Report No. 7/14, Case 12.739, Merits, María Inés Chinchilla Sandoval et al., Guatemala, April 2, 2014, para. 157. I/A Court HR. *Case of Furlan and family v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 128.

²³⁰ IACHR, Report No. 7/14, Case 12.739, Merits, María Inés Chinchilla Sandoval et al., Guatemala, April 2, 2014, para. 158.

²³¹ IACHR, Report No. 7/14, Case 12.739, Merits, María Inés Chinchilla Sandoval et al., Guatemala, April 2, 2014, para. 158.

²³² I/A Court HR. *Case of Furlan and family v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 134.

²³³ I/A Court HR. *Case of Chinchilla Sandoval V. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of February 29, 2016*. Serie C No. 312, para. 208.

²³⁴ I/A Court HR. *Case of Chinchilla Sandoval v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of February 29, 2016*. Serie C No. 312, para. 208.

²³⁵ United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 5, 1994, para. 13.

²³⁶ Information available at the webpage of the Department of International Law of the Organization of American States: <http://www.oas.org/juridico/spanish/firmas/a-65.html>

117. In the universal system the Convention on the Rights of Persons with Disabilities (hereinafter CRPD) came into force on May 3, 2008. It establishes the following guiding principles: (i) respect for the inherent dignity, individual autonomy (including the freedom to make one's own decisions) and independence of persons; (ii) non-discrimination; (iii) full and effective participation and inclusion in society; (iv) respect for difference and acceptance of persons with disabilities as part of human diversity and the human condition; (v) equal opportunity; (vi) accessibility; (vii) equality between men and women; and (viii) respect for the evolution of the faculties of children with disabilities and their right to preserve their identity. The Commission takes note that Ecuador ratified this Convention on April 3, 2008.²³⁷

118. The IACHR notes that the CRPD implied a fundamental change in paradigm for adequately understanding the rights of persons with disabilities in terms of understanding them as subjects of rights and not as objects of protection. In addition, it is of crucial relevance as it adopts a social approach for addressing disability. This implies that disability is not defined exclusively by the presence of a physical, mental, intellectual, or sensorial deficit, but that it is interconnected with the social barriers or limitations that exist for persons to be able to effectively exercise their rights.²³⁸ The types of limits or barriers that persons with functional diversity in society commonly encounter are, among others, physical or architectural barriers, barriers related to communication and attitudes, and socioeconomic barriers.²³⁹

119. Finally, as regards the principle of equality and non-discrimination, the inter-American system not only picks up on a formal notion of equality, limited to demanding objective and reasonable criteria for distinction, and, therefore, to prohibiting unreasonable, arbitrary or capricious differences in treatment, but it puts forth a concept of material or structural equality that is based on recognizing that certain sectors of the population require the adoption of affirmative measures to promote greater equality. This implies the need for differential treatment when, due to the circumstances that affect a disadvantaged group, equal treatment would entail suspending or limiting access to a service or good, or the exercise of a right.²⁴⁰ Similarly, being in mind the situation of poverty affecting Mr. Guachalá and his family, the IACHR recalls that having a disability increases the likelihood of being in a situation of poverty, since the discrimination that stems from living with this condition may entail social exclusion, marginalization, the lack of education, and unemployment.²⁴¹

120. In this way, the organs of the inter-American system have emphasized the duty of the states to adopt measures to ensure real equality among persons and to fight the historical or *de facto* discrimination against a variety of social groups. The Commission has noted that implementing affirmative measures is needed to ensure the exercise of the rights of persons associated with groups that suffer structural inequalities or have been victims of historical processes of exclusion²⁴², such as persons with a mental disability. Along these lines, the Court has established that the states are obligated to adopt affirmative measures to turn back or change discriminatory situations that exist in their societies to the detriment of a given group of persons. This implies the special duty of protection that the state should exercise with respect to the actions and practices of third persons which, with its tolerance or acquiescence, they believe, maintain or favor discriminatory situations.²⁴³

121. The Commission highlights the importance of the CRPD as a specific instrument that contributes to adequate and broader interpretation of the American Convention in cases of persons with

²³⁷ See: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en

²³⁸ Convention on the Rights of Persons with Disabilities. Article 1.

²³⁹ I/A Court HR. *Case of Furlan and family v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 133.

²⁴⁰ IACHR. Report on Poverty and Human Rights in the Americas, September 7, 2017, para. 160

²⁴¹ IACHR. Report on Poverty and Human Rights in the Americas. September 7, 2017, para. 432

²⁴² IACHR, Access to Justice for Women Victims of Violence in the Americas, January 20, 2007, paras. 100 and 101. IACHR. Considerations regarding the compatibility of affirmative action measures designed to promote the political participation of women with the principles of equality and non-discrimination, Annual Report, 1999, April 13, 2000, Chapter VI.

²⁴³ I/A Court HR. Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 104.

disabilities. As indicated by the United Nations High Commissioner for Human Rights, the CRPD clarifies the state's obligations to respect and ensure enjoyment of their rights by persons with disabilities.²⁴⁴

2. On the institutionalization of person in mental health centers

122. The Commission notes that the institutionalization of persons in mental health centers is an issue regionally and internationally. Such situations have been analyzed consistently by the United Nations Committee on the Rights of Persons with Disabilities (hereinafter “the CRPD Committee”) on considering that institutionalization has a detrimental impact on the enjoyment of several rights of persons with disabilities. For the analysis of the instant case the Commission will offer considerations on the rights to recognition of juridical personality, personal liberty, humane treatment, and health.

2.1 Considerations on the right to the recognition of juridical personality and legal capacity

123. The Court has held that the right to the recognition of juridical personality implies the ability to be the subject of rights (capacity to enjoy) and duties.²⁴⁵ The Court also explained that being the subject of rights implies the following:

Adulthood ... means that a person can exercise his or her subjective rights personally and directly, as well as fully undertake legal obligations and conduct other personal or patrimonial acts.²⁴⁶

124. Accordingly, the Commission considers that the right to the recognition of juridical personality includes as one of its components legal capacity, i.e. the right of each person to make decisions and to create, modify, or extinguish legal relationships. The CRPD Committee itself has held that the right to legal capacity, established at Article 12 of the CRPD, is included in Article 3 of the American Convention.²⁴⁷

125. As regards the content of the right to legal capacity, the CRPD Committee has indicated that it is a universal attribute inherent to all persons by dint of their human condition, and should be maintained for persons with disabilities in equal conditions as all others.²⁴⁸ In this respect, the CRPD Committee has indicated that according to international human rights law there is no circumstance that makes it possible to deprive a person of the right to recognition as such before the law, or that allows any limitation of that right.²⁴⁹

126. In this sense, “a person’s statute as a person with a disability or the existence of an impairment ... must never be grounds for denying legal capacity.”²⁵⁰ The CRPD Committee has argued that the CRPD “makes it clear that ‘unsoundness of mind’ and other discriminatory labels are not legitimate reasons for the denial of legal capacity (both legal standing and legal agency).”²⁵¹

127. This implies, for the states, the obligation to ensure that the right to legal capacity of persons with disabilities is not limited in a way that is different compared to all other persons.²⁵² And so domestic

²⁴⁴ United Nations, Office of the United Nations High Commissioner for Human Rights, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol, Geneva, 2007. p.20.

²⁴⁵ I/A Court HR. Case of *Bámaca Velásquez v. Guatemala*. Judgment of November 25, 2000. Serie C No. 70, para. 179.

²⁴⁶ I/A Court HR. *Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, para. 177.

²⁴⁷ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 7.

²⁴⁸ General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 8.

²⁴⁹ General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 5.

²⁵⁰ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 9.

²⁵¹ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 13.

²⁵² United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 7.

regimes based on another person making decisions for someone, such as guardianship, wardship, or laws on mental health that allow forced treatment, should be abolished.²⁵³

128. The CRPD Committee has held emphatically that regimes based on substitute decision-making and denial of legal capacity have had a detrimental impact and continue to have a disproportionate detrimental impact on persons with disabilities, especially those with a cognitive or psychosocial disability.²⁵⁴ At the same time, many states maintain a medical conception of persons with disabilities, on considering them as objects of rights and as unable to make decisions for themselves. The then-U.N. High Commissioner for Human Rights indicated that under that conception guardians, wards, or representatives of persons with mental disabilities are appointed who on many occasions abuse their position of authority.²⁵⁵

129. The CPRD Committee has held that the model of support for adopting decisions of the person with disabilities should take into account the following elements:

States parties have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity. States parties must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect.

Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making... [S]afeguards must be present in a system of support in the exercise of legal capacity.... The primary purpose of these safeguards must be to ensure the respect of the person's rights, will and preferences. In order to accomplish this, the safeguards must provide protection from abuse on an equal basis with others.²⁵⁶

130. Based on what is indicated, the states should examine the laws that regulate wardships and guardianships and take measures to draw up laws and policies to replace the basic regimes of substitution decision-making by providing support for decision-making that respects the autonomy, will, and preferences of the person.²⁵⁷

131. The European Court has noted that the states should provide persons with disabilities resources that make it possible to challenge any limitation on their right to legal capacity.²⁵⁸

132. Among the violations that may arise, the IACHR highlights institutionalization in psychiatric institutions of persons who have a mental health disorder or condition without their consent, forced medical treatment, and the impossibility of living a life in community. In these situations, institutionalization may itself end up being the conditioning factor for a mental health disorder or condition to become a disability, precisely because of building a barrier in the terms of the social approach already referred to.

2.2 General considerations on institutionalization and the right to personal liberty

133. The right to person liberty, established at Article 7 of the American Convention, distinguishes two regulations, one general and the other specific.²⁵⁹ While the general one is found in Article

²⁵³ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 7.

²⁵⁴ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 9.

²⁵⁵ United Nations, High Commissioner for Human Rights. *From Exclusion to Equality: Realizing the rights of persons with disabilities*. Geneva: United Nations. 2007, p. 97.

²⁵⁶ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, paras. 16, 17, and 20.

²⁵⁷ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 26.

²⁵⁸ ECHR (European Court of Human Rights), *A.N. v. Lithuania*. Judgment of August 31, 2016, para. 90.

7(1), the specific part is made up of a series of guarantees that protect the right to not be deprived of liberty illegally (Article 7(2)) or arbitrarily (Article 7(3)), to learn the reasons for the detention and the charges brought against the person detained (Article 7(4)), to judicial review of the deprivation of liberty (Article 7(5)), and to challenge the legality of the detention (Article 7(6)).²⁶⁰ Any violation of paragraphs 2 to 7 of Article 7 of the Convention would necessarily entail a violation of Article 7(1).²⁶¹

134. In its recent Report on the Situation of Human Rights in Guatemala, the IACHR indicated:

The right of persons with disabilities to independent living and to be included in the community, according to the CRPD Committee, means on the one hand that said persons are provided all the necessary means enabling them to exercise choice and control over their lives and make all decision concerning their lives.²⁶² On the other hand, this right is related to full and effective participation and inclusion of persons with disabilities in society, through the development of inclusive environments.²⁶³ In and of itself, the protection of this right means that the lives of persons with disabilities take place outside residential institutions of all kinds. It is not “just” about living in a particular building or setting, it is, first and foremost, about losing personal choice and autonomy as a result of the imposition of certain life and living arrangements.²⁶⁴ In this regard, the CRPD Committee has established that involuntary commitment due to disability is frequently caused or aggravated by the lack of specific support, and leads to arbitrary deprivation of liberty.²⁶⁵ Considering the above, the IACHR considers that the lack of support and services in the community for people with disabilities and their families, encourage institutionalization, and consequently, violate the right to live in the community of people living with this condition of life.²⁶⁶

135. The CRPD Committee has indicated that denying the legal capacity of persons with disabilities and their deprivation of liberty in institutions against their will, without their consent, and with the consent through substitute decision-making is a practice that “constitute arbitrary deprivation of liberty.”²⁶⁷ The European Court has also held that the institutionalization of persons with disabilities in mental health centers may have a negative impact on their right to personal liberty, in particular when it is done without their consent or against their will.²⁶⁸

136. The CPRD Committee has indicated in its various observations on the member states of the CPRD that the segregation of persons with disabilities in institutions continues to be a widespread problem.²⁶⁹ This is aggravated by the frequent denial of legal capacity in the case of persons with disabilities, allowing others to give consent have them placed in institutions.²⁷⁰

²⁵⁹ Corte, *Case of J. v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013. Series C No. 275, para. 125.

²⁶⁰ I/A Court HR. *Case of Nadege Dorzema e al. v. Dominican Republic*. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251, para. 125.

²⁶¹ I/A Court HR. *Case of Chaparro Álvarez and Lapo Ñiquez v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 54.

²⁶² IACHR. Report on the Situation of Human Rights in Guatemala. Adopted December 31, 2017. Para. 469. Citing: UN Committee on the Rights of Persons with Disabilities, *General comment on article 19: Living independently and being included in the community*, CRPD/C/18/1, August 29, 2017, para. 16(a).

²⁶³ IACHR. Report on the Situation of Human Rights in Guatemala. Adopted December 31, 2017. Para. 469. Citing: *Id.* paras. 16(b) and 19.

²⁶⁴ IACHR. Report on the Situation of Human Rights in Guatemala. Adopted December 31, 2017. Para. 469. Citing: *Id.*, para. 16(c).

²⁶⁵ IACHR. Report on the Situation of Human Rights in Guatemala. Adopted December 31, 2017. Para. 469. Citing: *Id.*, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities, September 2015, para. 8.

²⁶⁶ IACHR. Report on the Situation of Human Rights in Guatemala. Adopted December 31, 2017. Para. 469.

²⁶⁷ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 40.

²⁶⁸ ECHR, *H.L. v. United Kingdom*. Judgment of May 1, 2005, paras. 91-94.

²⁶⁹ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 46.

²⁷⁰ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 46.

137. The CPRD Committee has held in that in no case should states allow a person to be institutionalized based on the real or perceived presence of a real or perceived psychosocial impairment²⁷¹ or on grounds that they “constitute a danger to themselves or to society.”²⁷² The European Court found a violation of the right to personal liberty when a person with a psychosocial disability was institutionalized in a mental health center without giving consent.²⁷³

138. In the face of this situation, the CRPD Committee has held that states should eliminate such practices and establish a mechanism for examining the cases in which persons with disabilities have been placed in an institutional setting without their express consent.²⁷⁴ In addition, the states should proceed to deinstitutionalize, and all persons with disabilities should regain their legal capacity, with the corresponding support, and be able to choose where and with whom to live.²⁷⁵ The duties of the state on this point are tied to the right to live independently and to be included in the community, established at Article 19 of the CRPD. The institutionalization of a person in a mental health center may constitute an obstacle to that fundamental objective and, as has been indicated, constitutes an arbitrary deprivation of liberty in the terms of the American Convention. One element of the arbitrariness of such a deprivation of liberty takes place when it occurs in breach of the standards on informed consent that will be addressed below. Suffice it to note on this point that in cases of persons with mental disabilities consent is not established by the consent given by a guardian or family member. In any event, as analyzed below, any exception to the obligation to obtain informed consent must be based on a specific and exceptional emergency situation in the particular case, a situation which may not be constituted merely by the fact of having a mental disability. In this sense, in a case such as the instant one, there is a direct relationship between the right to informed consent with the characteristics that will be described next and the arbitrariness of being deprived of liberty in a mental health institution in breach of this right.

139. In addition, the European Court has indicated that states must have adequate and effective remedies so that those persons with disabilities who are institutionalized may challenge the restriction of their liberty.²⁷⁶ The European Court reiterated the duty of the states to undertake, on their own initiative, periodic judicial reviews when persons are institutionalized.²⁷⁷

2.3 General considerations on institutionalization and the right to humane treatment

140. As regards the right to humane treatment, the Court has indicated that states have the duty to adopt the measures necessary aimed at addressing the threats to the physical integrity of persons.²⁷⁸ The IACHR notes that in cases of persons deprived of liberty, such as the persons institutionalized in mental health centers, the states have an enhanced obligation to ensure their integrity since they are under its custody.

141. On this point the Inter-American Court has indicated that one must take into account the special position of guarantor that the state assumes with respect to persons who are under its custody or care, such as persons institutionalized in mental health centers, to whom the state has the positive obligation of providing the conditions needed to leave a dignified life.²⁷⁹ Along the same lines, the European Court has

²⁷¹ United Nations, Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report on Honduras, April 12, 2017, para. 35.

²⁷² United Nations, Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report on Jordan, April 12, 2017, para. 29.

²⁷³ ECHR, *Stanev v. Bulgaria*. Judgment of January 17, 2012, para. 129.

²⁷⁴ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 40.

²⁷⁵ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 46.

²⁷⁶ ECHR, *Stanev v. Bulgaria*. Judgment of January 17, 2012, para. 190.

²⁷⁷ ECHR, *Stanev v. Bulgaria*. Judgment of January 17, 2012, para. 172.

²⁷⁸ I/A Court HR. *Case of Suárez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, para. 128.

²⁷⁹ I/A Court HR. *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 138.

held that the states, on being responsible for public mental health centers, should adopt the measures necessary for the conditions of those centers to be adequate.²⁸⁰ Accordingly, the staff at mental health centers should adopt all measures necessary for protecting the life and integrity of persons with disabilities who have been institutionalized²⁸¹; and the enhanced nature of the state's obligations as a result of its special position as guarantor of the rights of the persons under its custody is equally applicable.

142. In the case of *Ximenes Lopes v. Brazil*, the Court indicated as follows regarding the particular risks faced by persons with mental disabilities who have been institutionalized:

Regarding the safeguard of life and personal integrity, it is necessary to consider that the persons with disabilities, who live in psychiatric institutions or are undergoing treatment therein, are particularly vulnerable to torture and other types of cruel, inhuman or degrading treatment. The vulnerability inherent to people with mental disabilities is compounded by the high degree of intimacy which is typical of the treatment of psychiatric illnesses, which makes these persons more susceptible to mistreatment when they are hospitalized.

In the context of health care institutions, whether they are public or private centers, the staff in charge of the care of patients exercise a strong control or dominance over the persons who are under their custody. This intrinsic imbalance in power between hospitalized patients and the persons having authority over them is usually greater in psychiatric institutions. Torture and other forms of cruel, inhuman, or degrading treatment, when inflicted on these people, affect their psychic, physical, and moral integrity, entail an insult to their dignity, and seriously restrict their autonomy, which could aggravate their condition

All the foregoing circumstances require the strict supervision of such institutions. The States have the duty to supervise and guarantee that in all psychiatric institutions, either public or private, the patients' right to receive a worthy, human, and professional treatment be preserved and that said patients be protected against exploitation, abuse, and degradation.²⁸²

2.4 General considerations on the right to health and to informed consent in health matters

143. Both the IACHR and the Court have issued pronouncements on the relationship between the right to humane treatment and the right to health.²⁸³ The Inter-American Court has interpreted on repeated occasions that the right to humane treatment is directly and immediately tied to care for human health²⁸⁴ and that "the lack of adequate medical care" may entail its violation.²⁸⁵ The Commission considers that this intrinsic relationship constitutes an expression of the interdependence and indivisibility existing between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. In the words of the Court, both groups of rights should be "fully understood as human rights, without any rank and enforceable in all the cases before competent authorities."²⁸⁶

²⁸⁰ ECHR, *Stanev v. Bulgaria*. Judgment of January 17, 2012, para. 209.

²⁸¹ ECHR, *Valentin Campeanu v. Rumania*. Judgment of July 17, 2014, para. 130.

²⁸² I/A Court HR. *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, paras. 106-108.

²⁸³ IACHR, Report No. 102/13, Case 12,723, Merits, TGGL, Ecuador, November 5, 2013. IACHR. Report: Access to Maternal Health Services from a Human Rights Perspective. June 7, 2010. Section II.

²⁸⁴ I/A Court HR. *Case of Suárez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, para. 130; and *Case of Vera Vera et al. v. Ecuador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of May 19, 2011. Series C No. 226, para. 43.

²⁸⁵ I/A Court HR. *Case of Suárez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, para. 130; *Case of Tibi v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, para. 157, and *Case of Vera Vera et al. v. Ecuador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of May 19, 2011. Series C No. 226, para. 44.

²⁸⁶ I/A Court HR. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2009. Series C No. 198, para. 101. Along the same lines, see: United Nations. Committee on Economic, Social and Cultural Rights. General Comment No. 9, para. 10.

144. Article 26 of the American Convention establishes an obligation of the States parties to seek to achieve the progressive development of the rights that said provision contains. Though both organs of the inter-American system²⁸⁷ have reaffirmed their competence to rule on possible violations of Article 26 of the American Convention in the context of the system of individual petitions and cases, this provision had been developed very little in the case-law of the inter-American system in contentious cases.

145. The Commission recognizes that the interpretation of Article 26 of the Convention and the determination of its specific scope and content may entail certain complexities. In this vein, the Commission considers it necessary to develop some of its earlier pronouncements in this respect, specifically in terms of what it considers to be an appropriate methodology of analysis that takes into account the text of the provision, but that interprets it in a manner consistent with the developments in the area internationally, and that are most useful for fleshing out their scope and content.

146. Accordingly, the Commission considers that the analysis of a specific case in light of Article 26 of the American Convention should proceed on two levels. Initially, it is necessary to establish whether the right in question in the case derives from “the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States,” as indicated by the text of Article 26. In other words, it is Article 26 of the ACHR that refers to the Charter of the OAS as the direct source of rights and describing the relevant provisions of that treaty as human rights provisions. Given that the purpose of the OAS Charter was not to individually identify rights but rather to constitute an international organization, one must have recourse to auxiliary texts to identify the rights that stem from the Charter provisions.

147. Once this is established, one must determine whether the state in question breached the obligation to “achieve progressively” the full effectiveness of that right, or those general obligations to respect and ensure it. At this second level of analysis, one must take into consideration the nature and scope of the obligations that may be demanded of the state under Articles 1(1), 2 and 26 of the Convention, as well as the contents of the right in question, as will be done below.

148. To establish the criteria that make it possible to derive specific rights from the Charter of the OAS, to determine their content and the obligations of the states in relation to them, Article 29 of the American Convention becomes relevant insofar as it establishes the parameters of the general rules of interpretation of that treaty. According to that article, the interpretation of the provisions of the American Convention may not limit or suppress rights recognized by the domestic law of the states or by any treaty to which a state is a party, nor exclude the effects of the American Declaration of the Rights and Duties of Man or other international instruments of the same nature. The provision incorporates the *pro homine* principle in the inter-American system and offers a crucial tool for the effective protection of all the human rights recognized in the constitutions of the states party, and in the inter-American and universal human rights instruments they have ratified.

149. Based on the integral interpretation that Article 26 requires in light of the provisions of Article 29, the Commission considers it relevant to refer to the obligations that arise from Article 26 of the American Convention and that may be the subject of a pronouncement by the organs of the inter-American system in the context of contentious cases. In this respect, for the specific case the Commission considers that for the interpretation of Article 26 of the American Convention one should consider the Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights, the “Protocol of San Salvador,”²⁸⁸ for it allows one to determine the scope of the state obligation when it comes to progressive

²⁸⁷ See, for example, some admissibility reports in which a possible violation of Article 26 of the Convention has been admitted: Report 29/01. Case 12,249. Jorge Odir Miranda Cortez et al. El Salvador, March 7, 2001; and Report 70/04. Petition 667/01. Admissibility. Jesús Manuel Naranjo Cárdenas et al. (Pensioners of the Venezuelan Aviation Company – VIASA. Venezuela, October 13, 2004. See also the ruling on the merits concerning Article 26 in Report 38/09. Case 12,670. National Association of ex-Employees of the Peruvian Social Security Institute et al. v. Peru. March 27, 2009. Along similar lines, the Court reaffirmed that competence in the Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller”) v. Peru (Preliminary Objection, Merits, Reparations and Costs), Judgment of July 1, 2009.

²⁸⁸ The Ecuadorian State ratified that Protocol on March 25, 1993.

development of the right in question. In its Article 1, the Protocol establishes that the states parties undertake to adopt the necessary measures, to the extent allowed by available resources, and taking into account their degree of development, for the purpose of achieving progressively the full observance of the rights recognized in the instrument.²⁸⁹

150. The International Covenant on Economic, Social and Cultural Rights²⁹⁰ provides, at Article 2(1)²⁹¹, provisions similar to those of Article 26 of the American Convention and those of Article 1 of the Protocol of San Salvador. The Commission has already looked at the pronouncements of the Committee on Economic, Social and Cultural Rights in terms of the notion of progressivity and the scope of the obligations that stem from it.²⁹² And it has underscored that this concept does not empty the state obligations of any significant content; to the contrary, one should interpret it in light of the general objective of the treaty with a view to giving full effective to the rights involved.²⁹³

151. In light of what is described above, it can be said that the Commission understands that Article 26 of the American Convention imposes various obligations on the States that are not limited to a prohibition on regressivity, which is a correlate of the obligation of progressivity, but it cannot be understood as the sole justiciable obligation in the inter-American system under this provision. Accordingly, the Commission affirms that bearing in mind the interpretative framework of Article 29 of the American Convention, Article 26 seen in light of Articles 1(1) and 2 of the same instrument, one can discern at least the following immediate and enforceable obligations: (i) general obligations to respect and ensure the rights provided for in the Convention; (ii) application of the principle of non-discrimination to economic, social, and cultural rights, (iii) obligations to take steps or adopt measures to achieve the enjoyment of the rights incorporated in that article, and (iv) offer suitable and effective remedies for their protection. The methodologies or sources of analysis that are relevant for each of these obligations should be established according to the circumstances particular to each case.

152. As regards the enforceable and immediate components of the obligation to take steps or adopt measures, the Committee on ESC Rights has indicated, for example, that the adoption of measures alone is not limited or conditioned on other considerations; accordingly, while achieving the effective realization of the rights may be gradual, the adoption of measures for those purposes should be deliberate, specific, and geared as clearly as possible to their attainment. The State also has basic obligations that must satisfy essential levels of those rights, which are not subject to progressive development but are immediate.²⁹⁴

153. Specifically in terms of the right to health, with respect to the first level of analysis, Article 45 of the OAS Charter enshrines it. Article 34(i) of the Charter also underscores the role of the state in the “protection of man’s potential through the extension and application of modern medical science,” thereby emphasizing the importance of guaranteeing health for the integral development of the person. In addition, Article XI of the American Declaration establishes: that “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.” Article 10 of the Protocol of San Salvador notes that every person has the right to health, understood as the enjoyment of the highest level of physical, mental, and social well-being, and indicates that health is a public good.

²⁸⁹ IACHR. Report No. 38/09. Case 12,670. Admissibility and Merits. Ex-Employees of the Peruvian Social Institute, et al. Peru. March 27, 2009. Para. 134.

²⁹⁰ The Brazilian State acceded to that treaty on January 24, 1992.

²⁹¹ According to this provision, “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.”

²⁹² IACHR. Report No. 38/09. Case 12,670. Admissibility and Merits. Ex-Employees of the Peruvian Social Institute, et al. Peru. March 27, 2009. Para. 136.

²⁹³ Committee on Economic, Social and Cultural Rights of the United Nations, General Comment 3: The Nature of States parties obligations (Article 2(1) of the Covenant), 1990.

²⁹⁴ Committee on Economic, Social and Cultural Rights of the United Nations, General Comment 3: The nature of States parties obligations (Article 2(1) of the Covenant), 1990. Along these lines see: IACHR. Report on Poverty and Human Rights in the Americas OEA/Ser.L/V/II.164 Doc. 147 (September 7, 2017) paras. 236 and 237.

154. The Inter-American Court has indicated: “the [American] Declaration contains and defines the fundamental human rights referred to in the Charter. Thus, the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.” Accordingly, the American Declaration represents one of the relevant instruments for identifying the economic, social and cultural rights to which Article 26 of the American Convention makes reference. As has already been indicated, having recourse to other international instruments may be necessary for noting the derivation of a right based on a measure or public policy objective included in an economic, social, cultural, educational, or scientific provision of the OAS Charter.²⁹⁵

155. Based on the foregoing, the Commission considers it clear that the right to health constitutes one of the economic and social provisions mentioned in Article 26 of the Convention, and in that sense the states parties are under the obligation to seek to achieve its progressive development as well as to respect, ensure, and adopt the measures necessary for upholding that right.

156. On the contents of the right to health, the Committee on Economic, Social and Cultural Rights has indicated that all health services, goods, and facilities should meet the requirements of availability, accessibility, acceptability, and quality.²⁹⁶ Both the Commission and the Court have taken into account these concepts and have incorporated them into the analysis of various cases.²⁹⁷ In that context, and bearing in mind the facts described above, for the IACHR the states should ensure the availability of adequate mental health establishments and services, which should be integrated to the general social services, limiting the approach of segregated, centralized, and long-term psychiatric care.²⁹⁸

157. In this respect, the United Nations Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dainius Pūras, has recently indicated with respect to mental health services: “Overreliance on pharmacological interventions, coercive approaches and in-patient treatment is inconsistent with the principle of doing no harm, as well as with human rights. Human rights capacity-building should be routinely provided to mental health professionals.”²⁹⁹ In that regard, for the IACHR the states, through their health systems, should empower the persons with particular mental health needs, prioritizing the defense of their own interests, seeking greater control and independence over their health, promoting their inclusion in the community, and offering treatments based on their rights and psychosocial support that protect them from harmful medical practices that contribute to their exclusion or mistreatment.

158. In addition, the IACHR has recognized that the right of access to information, which in turn is encompassed in Article 13 of the American Convention³⁰⁰, is an essential element for persons to be able to be in a position to make free decisions grounded in respect for intimate aspects of their health, body, and

²⁹⁵ Particularly important are the International Covenant on Economic, Social and Cultural Rights, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) and even other treaties such as the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the conventions of the International Labor Organization.

²⁹⁶ United Nations, Committee on Economic, Social and Cultural Rights. General Comment No. 14, E/C.12/2000/4, August 11, 2000, para. 12.

²⁹⁷ IACHR. Report No. 2/16. Case 12,484. Merits. Cuscul Pivaral et al. Guatemala, April 13, 2016, para. 106; I/A Court HR. Case of Poblete Vilches et al. v. Chile. Merits, Reparations and Costs. Judgment of March 8, 2018. Series C No. 349, para. 120.

²⁹⁸ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. E/CN.4/2005/51, February 14, 2005, para. 14; 298. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/HRC/35/21, March 28, 2017, paras. 39, 55, 61, and 94.a.

²⁹⁹ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/HRC/35/21, March 28, 2017, para. 58.

³⁰⁰ I/A Court HR, *Case of Claude Reyes et al. v. Chile*, Merits, Reparations and Costs, Judgment of September 19, 2006, Series C No. 151, para. 77.

personality³⁰¹, including decisions on the application of medical procedures or treatments. In this regard, particular reference has been made to informed consent as an ethical principle of respect for the autonomy of persons, which requires that they understand the different options for treatment available to them and are involved in their own health care.³⁰²

159. The European Court has also indicated that compliance with the positive obligation of the state to effectively ensure its citizens the right to physical and psychological integrity may require, in turn, adopting provisions on access to information on the health of an individual.³⁰³

160. The international community has recognized informed consent³⁰⁴ as an active and continuing process that seeks to ensure that no treatment is performed without the agreement of the person to be treated, and without the person having been duly informed of its effects, risks, and consequences.³⁰⁵ The IACHR has noted that informed consent is an appropriate process for disseminating all the information needed for a patient to be able to freely make his or her own decision to grant (or deny) his or her consent to a treatment or medical intervention. This process seeks to ensure that persons see their human rights respected in the area of health, and that can make truly free choices.³⁰⁶

161. In this respect, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, indicated: “Informed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision, protecting the right of the patient to be involved in medical decision-making, and assigning associated duties and obligations to health-care providers.”³⁰⁷

162. The European Convention on Human Rights and Biomedicine³⁰⁸ also refers to this matter at its Article 5, establishing: “An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks....”

163. According to a systematic interpretation of the standards applicable to this area, a process of informed consent should include the following three elements, which are closely interrelated: (i) inform on

³⁰¹ IACHR. Report No. 72/14. Case 12,655. Merits I.V. Bolivia. August 15, 2014. Para 115. Citing, IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011; IACHR. *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights*, July 19, 2008, indicators on the right to health, p. 48.

³⁰² IACHR. Report No. 72/14. Case 12,655. Merits I.V. Bolivia. August 15, 2014. Para 115. Citing, IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011, para. 43.

³⁰³ European Court of Human Rights, *Case of RR v. Poland*, Application 27617/04, May 26, 2011, para. 188. See also: IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011, para. 61. In addition, for other treatments on related matters in the international sphere, see: United Nations, Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment, Juan E. Méndez, A/HRC/22/53*, February 1, 2013, paras. 32, 46, and 48.

³⁰⁴ IACHR. Report No. 72/14. Case 12,655. Merits I.V. Bolivia. August 15, 2014. Para. 116. The term “informed consent” is the most widely used term. Nonetheless, some argue that the term may be misinterpreted and should be replaced by the term “informed choice.” This is because the choice not to consent is essential to the integrated concept of voluntary or consent given voluntarily. See B.M. Dickens, R.J. Cook, *Dimensions of informed consent to treatment, Ethical and legal issues in reproductive health*, International Journal of Gynecology & Obstetrics 85 (2004), pp. 309-314.

³⁰⁵ IACHR. Report No. 72/14. Case 12,655. Merits I.V. Bolivia. August 15, 2014. Para. 116, citing 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*, submitted pursuant to resolution 6/29 of the Human Rights Council, A/64/272 of August 10, 2009; United Nations, Committee for the Elimination of Discrimination against Women, *Communication No. 4/2004, Case of A.S. v. Hungary*, August 29, 2006, CEDAW/C/36/D/4/2004, para. 11.3. For example, the Amsterdam Declaration on Patients’ Rights provides: “Patients have the right to be fully informed about their health status, including the medical facts about their condition; about the proposed medical procedures, together with the potential risks and benefits of each procedure; about alternatives to the proposed procedures, including the effect of non-treatment; and about the diagnosis, prognosis and progress of treatment.” (ICP/HLE 121, 1994).

³⁰⁶ IACHR. Report No. 72/14. Case 12,655. Merits I.V. Bolivia. August 15, 2014. Para 115. Citing, IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011, para. 42.

³⁰⁷ IACHR. Report No. 72/14. Case 12,655. Merits I.V. Bolivia. August 15, 2014. Para. 117. Citing, 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*, submitted pursuant to resolution 6/29 of the Human Rights Council, A/64/272 of August 10, 2009, para. 9.

³⁰⁸ IACHR. Report No. 72/14. Case 12,655. Merits I.V. Bolivia. August 15, 2014. Para. 116. Citing, Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, signed April 4, 1997 in Oviedo, Spain, entered into force December 1, 1999.

the nature of the procedure, treatment options, and reasonable alternatives, including the possible benefits and risks of the procedures proposed; (ii) take into account the needs of the person and ensure that they understand the information provided; and (iii) ensure that the consent that is given is free and voluntary. Implementation of this process includes adopting legislative, policy, and administrative measures, and it extends to physicians, health professionals, and social workers, in both public and private hospitals, and from other health institutions and detention centers.³⁰⁹

164. As regards the first element of the process of informed consent – informing on the nature of the procedure, treatment options, and reasonable alternatives, which includes the possible benefits and risks of the procedures proposed – the Commission has noted that the information that is provided to the patient must be complete, accessible, reliable, timely, and proactive.³¹⁰ “In order for the information to be complete, it is incumbent upon the health professionals to obtain and disclose all relevant information of the highest quality regarding diagnosis, proposed treatment and its effects, risks, and alternatives. In order to be accessible, it must be provided under adequate conditions and in a language and manner that is culturally acceptable to the person consenting,”³¹¹ which includes the use of translation and interpretation services. It is not enough for the information to be complete and accessible; the information must be reliable. Finally, the information should be provided in a timely manner and at the initiative of the provider, that is, prior to applying the intervention and without any need to request it.

165. With respect to the second element of informed consent – taking into account the needs of the person and ensuring that he or she understands the information provided – the IACHR observes that medical professionals have a major duty to ensure that the information they provide is understood, so that the patient or his or her representative may make a truly informed decision with respect to the intervention and/or treatment proposed. In this regard, one should pay particular attention to the needs and conditions of the patient, as well as the methods used to provide the information.³¹²

166. As regards the third element of informed consent – ensuring that the consent given is free and voluntary – the Commission considers that for it to be effective, consent should be granted through a process free of any coercion or manipulation. Due to the imbalance of power characteristic of the relationship between health professionals and their patients it has been recognized that the time and way in which information is provided may unduly influence the decision as to whether to accept the treatment proposed. The Commission recognizes that while consent may be granted verbally or in writing, for the purposes of safeguarding the rights involved the State should take measures to facilitate written consent.³¹³

167. Finally, the Commission recognizes that there are exceptional situations in which consent does not apply. Those exceptions are related to situations associated with emergencies, for example when a person must be given medical treatment to preserve his or her life or health, but neither the person nor a family member can give consent.³¹⁴

168. As indicated above, in relation to persons institutionalized in mental health centers, the states are the ones responsible for ensuring their integrity and health, which stems from its special position as guarantor.³¹⁵

³⁰⁹ IACHR. Report No. 72/14. Case 12,655. Merits I.V. Bolivia. August 15, 2014. Para 119. Citing, IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011, para. 44.

³¹⁰ IACHR. Report No. 72/14. Case 12,655. Merits I.V. Bolivia. August 15, 2014. Para 120. Citing, IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011, para. 45.

³¹¹ IACHR. Report No. 72/14. Case 12,655. Merits I.V. Bolivia. August 15, 2014. Para. 120. Citing, 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*, submitted pursuant to resolution 6/29 of the Human Rights Council, A/64/272 of August 10, 2009, para. 23.

³¹² IACHR. Report No. 72/14. Case 12,655. Merits I.V. Bolivia. August 15, 2014. Para. 121.

³¹³ IACHR. Report No. 72/14. Case 12,655. Merits I.V. Bolivia. August 15, 2014. Para 122. Citing, IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011, para. 72.

³¹⁴ IACHR, *Access to Information on Reproductive Health from a Human Rights Perspective*, November 22, 2011, para. 74.

³¹⁵ United Nations, Committee on the Rights of Persons with Disabilities. Views adopted. Marlon James Noble, Australia, October 10, 2016, para. 8.9.

169. Indeed, the states have various obligations to persons with disabilities who are institutionalized. The CRPD Committee has held that states should provide health care based on the free and informed consent of persons with disabilities before any treatment is given.³¹⁶ This is based on legal capacity taking on special importance when these persons have to make fundamental decisions with respect to their health.³¹⁷ Accordingly, for the IACHR free and informed consent is a fundamental element for guaranteeing the right to health; in particular, in the area of mental health coercive measures perpetuate skewed power relations between patients and their caregivers, facilitating situations of abuse, stigma, and discrimination.

170. In addition, the states should train the personnel of those institutions and provide inclusive care that meets the specific needs of persons with disabilities in which their wishes are taken into account.³¹⁸ The CRPD Committee has held that forced treatment by psychiatrists and other health and medical professionals constitutes a violation of the right to integrity³¹⁹, insofar as that practice denies the legal capacity of a person to choose the medical treatment he or she is to receive.³²⁰

171. Since all medical and health personnel must ensure appropriate consultation directly with the person with a disability³²¹, such staff should also ensure, to the extent they are able, that the caregivers, family members, or persons in charge or providing support do not replace persons with disabilities when it comes to their own decisions, and that they not have undue influence over them.³²² Accordingly, they should ensure that (i) accurate and accessible information is provided on the options of available services; (ii) non-medical alternatives are offered; and (iii) access is provided to independent support.³²³

2.5 Analysis of the instant case

2.5.1 On the institutionalization of Luis Guachalá

172. In the instant case the IACHR notes that Luis Guachalá is a person with a mental disability, on taking into account: (i) the medical reports that identify a mental deficit; and (ii) the socioeconomic barriers he faced. The Commission also notes that Mr. Guachalá, who at the time was 23 years old, was institutionalized at the Julio Endara Psychiatric Hospital on January 10, 2004. The IACHR observes that it is not disputed that Mr. Guachalá was hospitalized without his consent, as all that was required to do so was the signature of his mother, Rosario Chimbó.

173. In this respect, the IACHR recalls that in October 2014 the CRPD Committee issued its observations with respect to the report of Ecuador on implementation of the CRPD. In that report the CRPD Committee found that the Ecuadorian State maintains a model of substitute decision-making, in violation of Article 12 of the CRPD, which establishes the right to legal capacity of persons with disabilities. The CRPD Committee indicated that it requested information of the State as to the existence of an initiative to transform the model of substitute decision-making by the system of support in decision-making; nonetheless, Ecuador did not present information in this respect.³²⁴

³¹⁶ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 42.

³¹⁷ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 8.

³¹⁸ ONU, Committee on the Rights of Persons with Disabilities. Concluding observations on the report of Brazil, September 4, 2015, paras. 46 and 47.

³¹⁹ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 42.

³²⁰ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 42.

³²¹ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 41.

³²² United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 41.

³²³ United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 42.

³²⁴ See: United Nations, Committee on the Rights of Persons with Disabilities. List of issues in relation to the initial report of Ecuador, August 7, 2014.

174. The CRPD Committee added:

The Committee is concerned that, although the Organic Act on Disabilities was published after the State party's ratification of the Convention, it retains a definition and understanding of disability that are based on a medical approach. This definition of persons with disabilities emphasizes their limited abilities and neglects the social and relational dimension of disability.³²⁵

...

The Committee is concerned that the State party's civil legislation provides for a substitute decision-making model through the use of roles such as guardians and wards, and that there is no immediate plan to reform the Civil Code and the Code of Civil Procedure to include a supported decision-making model....³²⁶

175. Furthermore, the CRPD Committee concluded that persons with disability, characterized as "cases of acute and chronic mental disorder" ("*casos oligofrénicos de gravedad y de cronicidad*"), are institutionalized at the Julio Endara Psychiatric Hospital permanently, without the necessary support for them to live in the community.³²⁷ The Commission observes that the State itself acknowledged the existence of that situation when it stated:

Persons with mental disabilities confined in institutions constitute a minority and correspond to patients abandoned by their families and cases of acute and chronic mental disorder treated in strict compliance with mental health protocols.³²⁸

176. In the instant case, the institutionalization of Mr. Guachalá at the Julio Endara Psychiatric Hospital on January 10, 2004 was done with the authorization of his mother and based on the evaluation done by the hospital authorities about the possible consequences of his cognitive or psychosocial disability. The IACHR observes that at no time did Mr. Guachalá give his informed consent to be admitted to that hospital. This has not been controverted by the State. Based on the information available in the record, there is no assessment whatsoever of the reasons why it was not possible to obtain Mr. Guachalá's informed consent in respect of his hospitalization. Nor is there any information about – in the face of possible difficulties arising from the symptoms with which he arrived at the center – the measures adopted to seek to give him the support needed for him to be able to give such consent. To the contrary, from the medical record it appears that the staff of the hospital proceeded to totally sedate Mr. Guachalá; this will be analyzed next in relation to the medical treatment received.

177. In addition, the IACHR emphasizes that "while some forms of confinement, including retention in hospitals and psychiatric and other medical facilities, may constitute de facto deprivation of liberty, virtually all forms of confinement without informed consent represent a violation of the right to health."³²⁹ And this is because centers of confinement and hospitalization in general are not considered to provide an adequate therapeutic setting, as they make it difficult to establish non-violent, respectful, and healthy relationships, and because they have a negative impact on the basic and social determinants of mental health, such as the physical, psychosocial, political, and economic surroundings.³³⁰ The IACHR also

³²⁵ United Nations, Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report on Ecuador, October 27, 2014, paras. 8 and 24.

³²⁶ United Nations, Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report on Ecuador, October 27, 2014, paras. 8 and 24.

³²⁷ United Nations, Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report on Ecuador, October 27, 2014, para. 28.

³²⁸ United Nations, Committee on the Rights of Persons with Disabilities. List of issues in relation to the initial report Ecuador, August 7, 2014, para. 16.3.

³²⁹ Report of the Special Rapporteur on the right of every person to the enjoyment of the highest possible level of physical and mental health, UN Doc. A/HRC/38/36, April 10, 2018, para. 6.

³³⁰ Report of the Special Rapporteur on the on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/HRC/38/36, April 10, 2018, para. 33; Report of the Special Rapporteur on the on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/HRC/35/21, March 28, 2017, para. 67

observes that the actions of the medical center were influenced by stereotypes about persons with mental disabilities and their ability to when it comes to making autonomous decision about their own health. Hospitalization and medication without their consent are clear expressions of the predominance of discriminatory treatments in the mental health services that deprive persons with some type of mental disability of the ability to decide about their own body and health.

178. On this point, and specifically on institutionalization, the Commission considers that Mr. Guachalá's situation fits within the issue identified by the CRPD on the existence of the model of substitute decision-making, and the institutionalization of persons with disabilities without their consent in mental health centers and without giving them the support needed for them to be able give it. In this sense, the IACHR considers that the State did not allow Mr. Guachalá to exercise his right to legal capacity for the purposes of deciding on his admission to the psychiatric hospital, since it did not give Mr. Guachalá the support needed to guarantee that right, such that he would be able to give his informed consent with respect to his hospitalization in the Julio Endara Psychiatric Hospital. To the contrary, Ecuador restricted Mr. Guachalá's right to decide on his institutionalization, based exclusively on his disability, which is a form of discrimination.

179. In view of the foregoing, the IACHR considers that the State violated Mr. Guachalá's right to legal capacity (as a component of the right to the recognition of juridical personality) on institutionalizing him in a mental health center without his informed consent. In addition, the Commission considers that for those reasons the hospitalization of Mr. Guachalá constituted an arbitrary deprivation of liberty incompatible with the American Convention and a form of discrimination based on his disability. Accordingly, the Commission concludes that the State violated the rights to the recognition of juridical personality, to access to information for giving consent in relation to health matters, and to health, established at Articles 3, 7(1), 13(1), 24, and 26 of the American Convention, in relation to Articles 1(1) and 2 of the same instrument, to the detriment of Mr. Guachalá.

2.5.2 On the medical treatment received

180. The Commission does not have detailed information about the diagnosis and treatment received by Mr. Guachalá as from his hospitalization on January 10, 2004, so as to allow it to determine whether it constituted adequate treatment in light of his particular condition. On this point, the Commission will analyze the information available on the care received in light of the standards on legal capacity of persons with disabilities and informed consent in health-related matters. From the facts established it appears that once Mr. Guachalá was institutionalized in the psychiatric hospital: (i) he received medicine the same day he was admitted with the aim of sedating him, which occurred immediately according to his mother's testimony; (ii) he was sedated on January 11 and 12; and (iii) the medicines given to him were changed on January 13.

181. The IACHR emphasizes that the CRPD Committee, in its concluding observations on Ecuador, identified situations in which persons with disabilities institutionalized in mental health centers receive forced medical-psychiatric treatment, without their consent.³³¹ For that reason, the CRPD Committee recommended to the Ecuadorian State that it "Ensure that all mental health services are delivered with the free and informed consent of the person concerned."³³²

182. In the instant case, the Commission notes that the documentation produced by the parties on Mr. Guachalá's health conditions during his hospitalization does not include any confirmation that he was given information on his diagnosis and treatment or that he gave his consent for the purposes of receiving that treatment. Just as in relation to his hospitalization, nor is there anything on record indicating that he was offered the support necessary to be able to give his consent. Accordingly, the IACHR finds that the medical

³³¹ United Nations, Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report of Ecuador, October 27, 2014, para. 29.

³³² United Nations, Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report of Ecuador, October 27, 2014, para. 29.

center performed an unjustified paternalistic intervention since, on limiting his legal capacity without seeking to obtain his prior, full, and informed consent, it restricted Mr. Guachalá's autonomy, integrity, and health so as to make a decision regarding his mental health through the medical treatment that was provided. Nor does the IACHR find that the Ecuadorian State has facilitated alternatives to the unconsented medication and hospitalization, for example, evaluating the advisability of effective psychosocial interventions in the community setting aimed at ensuring his mental health. Clearly, in the instant case the State's omission is absolute and reflects a conception of mental disorders that automatically equates them with disability, and, in turn, a conception of persons with mental disabilities that assumes they have no autonomy to make decisions regarding their own health and treatment, which constitutes a form of discrimination.

183. In view of the foregoing considerations, the IACHR concludes that in relation to the treatment received by Luis Eduardo Guachalá, the State violated his rights to legal capacity, access to information so as to be able to give informed consent on health matters, the right to health, and the principle of equality and non-discrimination, established at Articles 3, 5(1), 13(1), 24, and 26 of the American Convention, in relation to Articles 1(1) and 2 of the same instrument.

3. On the disappearance of Luis Eduardo Guachalá

184. In the present case, there is no controversy that Mr. Guachalá disappeared while he was institutionalized at the Julio Endara Psychiatric Hospital in January 2004. On the one hand, the State has argued that Mr. Guachalá escaped from said center on January 17, 2004. The hospital staff, in the context of the investigations initiated, stated that it was foreseeable to consider that Mr. Guachalá escaped while the walls of the mental health center are not high, so he could have climbed and get out. On the other hand, both the petitioners and the relatives of Mr. Guachalá have argued that the State has failed to prove that Mr. Guachalá effectively escaped from the hospital and that what happened rather is framed as a disappearance. The IACHR notes that a possible version has been alleged, supported by the statement of an institutionalized person in the hospital, which indicates that Mr. Guachalá would have suffered a heart attack and that center staff would have covered up his death.

185. The Commission recalls, first, that Mr. Guachalá was institutionalized in a public health center, that is, under the custody of the State. In this scenario, according to the repeated jurisprudence of the IACHR and the Court, what happens to a person for whom the State has the special duty of guarantor, state responsibility is presumed unless the State itself provides a convincing and satisfactory explanation of what happened. On this point, the European Court has argued that in cases where the affectation to the life or integrity of a institutionalized person with disability in a public mental health center is alleged, the State must present a satisfactory and convincing explanation of what happened for that purpose to dispute such allegations³³³.

186. In the instant case, the Ecuadorian State has not succeeded in clarifying the disappearance of Mr. Guachalá, nor has it determined his fate or whereabouts. As will be analyzed in the next section, the internal investigations have not been diligent nor have they been carried out in a reasonable time, which, in addition to the legal implications in relation to denial of justice, has evidentiary implications in terms of what happened to the victim. This stems not only from the presumption that operates in the instant case stemming from Guachalá being in the custody of the State, but from the possible involvement of persons who act in the name of the State. On this last point, the Court has reiterated that the failure to investigate the alleged violations committed against a person when there are indicia of the participation of state agents "prevents the State from presenting a satisfactory and convincing explanation of the ill-treatment alleged, and disproves the arguments concerning its responsibility, with adequate probative elements."³³⁴ Accordingly, the Court has considered the failure to clarify as a factor to take into account for showing the alleged violation and consequent international responsibility.³³⁵

³³³ ECHR. *Valentin Campeanu v. Romania*. Judgment of July 17, 2014, para. 131.

³³⁴ I/A Court HR. *Case of J. v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013. Series C No. 275, para. 353.

³³⁵ I/A Court HR. *Case of J. v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013. Series C No. 275, para. 354.

187. In addition to the fact that the State has failed to offer a convincing and satisfactory explanation of what happened to Mr. Guachalá, the Commission takes note of other indications of State responsibility.

188. With respect to the refusal to give information or reveal his fate or whereabouts, the Commission notes that Mr. Guachalá's mother, from the moment she went to the hospital on January 17, 2004 and was told that her son had escaped, continued seeking information about what happened at the hospital itself, as well as from various state authorities, as appears from the facts proven. The Commission notes that at the hospital she was not given accurate information about what happened to her son and the supposed conditions in which he was said to have escaped. To the contrary, based on what the director of the center said, it would appear he is shifting responsibility for the disappearance to the mother, supposedly for having failed to visit. It should be mentioned that from the facts proven it is not clear what person or persons were responsible for the custody of Mr. Guachalá. For example, Dr. Erika Quimbuilco indicated on several occasions that keeping custody over him was not her duty. As indicated, the director indicated that the patients become very anxious when their family members do not visit, without specifically indicating who was responsible for his custody. At the same time, the nurse said that Luis Eduardo Guachalá Chimbó was separated for a few minutes to help another patient, but that upon returning he was no longer there, which could reflect a structural shortcoming in terms of hospital staffing. In sum, the hospital did not give Ms. Guachalá detailed information about what happened to her son during his stay at the center. To the contrary, just days after the disappearance, the Hospital rushed to issue a "discharge sheet" ("*hoja de egreso*"), indicating that Mr. Guachalá had left the hospital.

189. In addition, the Commission considers that the fact that Luis Eduardo Guachalá's mother had not been able to see her son during the time he was hospitalized, particularly in the first days, because supposedly he was completely sedated, is an indication of the State's responsibility for what happened to Luis Eduardo Guachalá. The IACHR notes that on Monday, January 12, 2004, Mr. Guachalá's mother went to see her son and did not find him in the room where she had left him, or in the barber shop where they told her he could be found, or anywhere else in the hospital. According to her own testimony no one was able to tell her where her son could be found. To this is added the account of another patient, according to which Mr. Guachalá had suffered a heart attack, and that this information was being covered up by the hospital. It should be mentioned that the State has not denied that Mr. Guachalá's mother was told that her son would remain sedated for practically two whole days after his hospitalization, without any explanation for such a severe intervention.

190. The Commission also attributes special importance to the fact that the State has not been able to make a showing of its version that the victim supposedly fled the hospital. That version, as will be seen below, did not result from an effective and diligent investigation into what happened, and it loses credibility considering that neither the victim nor his corpse has not been found to this day, and that he never contacted his family. Rather, the time that has elapsed without any information whatsoever about Mr. Guachalá strengthens the hypothesis that his fate may be death in the context of the treatment received by the State and its subsequent coverup.

191. All these elements, taken together and analyzed in light of the State's breach of the duty to investigate the facts seriously so as to clarify them as well as the presumption of responsibility when a person disappears while under the custody of the State lead to the conclusion that the State of Ecuador violated the right to life and personal integrity, established in Articles 4.1 and 5.1 of the American Convention, in relation to Article 1.1 of the same instrument, to the detriment of Luis Eduardo Guachalá Chimbó.

C. On the rights to judicial guarantees³³⁶ and judicial protection³³⁷ (Articles 8(1) and 25(1) of the American Convention in relation to Article 1(1) of the same instrument)

192. According to the Court, the right to judicial guarantees implies that every person who has suffered a violation of his or her human rights “has the right ... to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution....”³³⁸ The Court has established that the right to judicial protection:

obliges the State to guarantee to every individual access to the administration of justice and, in particular, to simple and prompt recourse, so that, *inter alia*, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered.... Article 25 ‘is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society ...’³³⁹

193. It is important to note that the Court has indicated that for the State to carry out what is provided for in Article 25(1) of the Convention it does not suffice for the remedies to exist formally; rather, they must also be effective.³⁴⁰ This means that one should afford the person the real possibility of pursuing a simple and speedy remedy that makes it possible to attain, in his or her case, the judicial protection required.³⁴¹

194. As regards the right of access to justice, Article 13 of the Convention on the Rights of Persons with Disabilities provides as follows:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

195. The CRPD Committee, in this regard, has held: “The recognition of the right to legal capacity is essential for access to justice in many respects.”³⁴² In addition, the Inter-American Court, in the case of *Furlan and family v. Argentina*, highlighted the importance of access to justice for persons with disabilities on an equal footing with all others.³⁴³ It considered that states should adopt the relevant measures to prioritize

³³⁶ Article 8(1) of the American Convention: Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature

³³⁷ Article 25(1) of the American Convention: Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

³³⁸ I/A Court HR. *Case of Barrios Altos v. Peru*. Merits. Judgment of March 14, 2001. Series C No. 75, para. 48.

³³⁹ I/A Court HR. *Case of Loayza Tamayo v. Peru*. Reparations and Costs. Judgment of November 27, 1998. Series C No. 42, para. 169

³⁴⁰ I/A Court HR. *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, para. 121.

³⁴¹ I/A Court HR. *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, para. 121.

³⁴² United Nations, Committee on the Rights of Persons with Disabilities, General Comment No. 1. Article 12: Equal recognition before the law, May 19, 2014, para. 38.

³⁴³ I/A Court HR. *Case of Furlan and family v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 196.

attention and the resolution of proceedings related to persons with disabilities so as to ensure their prompt resolution and implementation.³⁴⁴

196. The IACHR takes note that in the instant case (i) a writ of habeas corpus was filed, along with a complaint with the Judicial Police and a complaint with the Office of the Human Rights Ombudsperson (Defensoría del Pueblo); and (ii) an administrative case file was opened. Taking into account that these proceedings were conducted simultaneously, the Commission will rule on whether they constituted effective mechanisms for establishing the Mr. Guachalá's whereabouts, as well as for identifying the persons possibly responsible, and imposing the corresponding sanctions.

1. On due diligence

197. The Court has indicated that the investigation should be carried out by all legal means available³⁴⁵ and conducted with due diligence.³⁴⁶ The IACHR recalls that from the first steps the States are obligated to act diligently.³⁴⁷ This is due to the fact that the first steps in an investigation are fundamental for the sound development of the judicial investigation.³⁴⁸ Accordingly, the Court has noted: "All these requirements, together with criteria of independence and impartiality also extend to the non-judicial bodies responsible for the investigation prior to the judicial proceedings."³⁴⁹

198. The Inter-American Court took cognizance of two matters under its provisional measures mechanism in which two persons disappeared while they were being detained in prison.³⁵⁰ The Court held that whenever there are reasonable grounds for suspecting that a person has been subjected to a disappearance it is essential for the prosecutorial and judicial authorities to act promptly and immediately.³⁵¹ This is for the purpose of ordering timely and necessary measures aimed at determining the victim's whereabouts or where he or she may be found.³⁵²

199. In addition, the Court noted that in situations of deprivation of liberty such as in the instant case, habeas corpus represents, among the essential judicial guarantees, the suitable means for determining the situation and whereabouts of the person disappeared, as well as to ensure respect for his or her life, and to protect his or her integrity.³⁵³ The IACHR recalls that in cases of alleged disappearance "the mere formal verification of the official detainee records, as occurred in this case, or the acceptances as true of the denial of the detention by those presumably responsible, without an objective, impartial and independent verification, is neither reasonable nor diligent and does not constitute an effective remedy."³⁵⁴ Taking into account that the deprivation of liberty of a person in a mental health center may constitute an arbitrary detention in the terms of the Convention, the Commission considers that writs of habeas corpus may also be designed to address this kind of situation in which it is argued that there is a need to review deprivation of liberty in such centers and/or determine the fate or whereabouts of a person in custody as a result of an institutionalization such as that which occurred in the instant case.

³⁴⁴ I/A Court HR. *Case of Furlan and family v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 196.

³⁴⁵ I/A Court HR. *Case of García Prieto et al. v. El Salvador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 168, para. 101.

³⁴⁶ I/A Court HR. *Case of the brothers Gómez Paquiyauri v. Peru*. Judgment of July 8, 2004. Series C No. 110, para. 146; and *Case of Cantoral Huamaní and García Santa Cruz v. Peru*. Judgment of July 10, 2007. Series C No. 167, para. 130.

³⁴⁷ I/A Court HR. *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166. Para. 121.

³⁴⁸ I/A Court HR. *Case of Myrna Mack Chang v. Guatemala*. Judgment of November 25, 2003. Series C No. 101, para. 167. IACHR, Report No. 37/00, Case 11,481, Merits, Monsignor Oscar Arnulfo Romero y Galdámez, El Salvador, April 13, 2000, para. 85.

³⁴⁹ I/A Court HR. *Case of Cantoral Huamaní and García Santa Cruz v. Perú*. Judgment of July 10, 2007. Series C No. 167, para. 133.

³⁵⁰ See: I/A Court HR. *Matter of Guerrero Larez with respect to Venezuela*. Provisional Measures. Order of August 19, 2013; *Matter of Natera Balboa with respect to Venezuela*. Provisional Measures. Order of August 19, 2013.

³⁵¹ I/A Court HR. *Matter of Guerrero Larez with respect to Venezuela*. Provisional Measures. Order of August 19, 2013, considering paragraph 6.

³⁵² I/A Court HR. *Matter of Guerrero Larez with respect to Venezuela*. Provisional Measures. Order of August 19, 2013, considering paragraph 6.

³⁵³ I/A Court HR. *Matter of Guerrero with respect to Venezuela*. Provisional Measures. Order of August 19, 2013, considering paragraph 6.

³⁵⁴ I/A Court HR, *Case of García and family v. Guatemala*. Merits, Reparations and Costs. Judgment of November 29, 2012. Series C No. 258, para. 143.

200. In the instant case, the State's duty to investigate was qualified, in terms of its nature and intensity, by several considerations. In the first place, it was qualified because it was a report of a disappearance that implied presuming the existence of a risk to the life and integrity of the person. Accordingly, having a prompt and diligent investigative response and search was fundamental not only for obtaining justice, but for protecting the life and integrity of Luis Guachalá. Second, it was qualified because it was the disappearance of a person with a disability institutionalized in a public mental health center with respect to whom the State was in a special position of guarantor.

201. The Commission observes that the report of the disappearance was filed on January 21, 2004, by Mr. Guachalá's mother. The IACHR notes that the Office of the District Prosecutor of Pichincha (i) took the statements of Ms. Chimbó and hospital staff; (ii) conducted reconnaissance of the scene; and (iii) ordered autopsies of unidentified corpses.

202. The IACHR notes that Ms. Chimbó said that from the filing of the complaint until mid-2005 she had to pay for police agents to go to the Julio Endara Psychiatric Hospital. She also said that the prosecutor told her that her son "is already lost, doesn't she have other children to look after" ("*ya está perdido, que si no tiene otros hijos para ir a cuidar*").³⁵⁵ In addition, Ms. Chimbó said that even though she told the authorities that a person institutionalized at the hospital told her that Mr. Guachalá had suffered a heart attack at that center, and that he asked him to ask for help, the State did not act with diligence to look further into that account and to confirm or discard its veracity based on a lines of investigation to look into it and the taking of other evidence. The IACHR notes that the CRPD Committee has held that persons with intellectual or psychosocial disabilities may appear in judicial proceedings.³⁵⁶ Despite that, in the context of the investigation, the taking of statements was focused on the hospital staff and not the patients who were institutionalized at the time of the facts, including the person who Ms. Guachalá says told her about the heart attack.

203. The Commission further notes that from mid-2005 to July 2006, the date on which the case was archived, no investigative steps were taken. The IACHR says that the decision to archive the matter was based on the fact that "there has not been a determination of the existence of any offense". Nonetheless, in general terms, the evidence put into the record prior to that decision does not suggest the design and exhaustion of a line of investigation taking into account the possible death of Mr. Guachalá at the hospital and a possible coverup of his death by the staff at that center.

204. The IACHR notes that after the criminal complaint was filed the petitioner filed a complaint with the Office of the Human Rights Ombudsperson and a writ of habeas corpus. As regards the complaint before the Office of the Human Rights Ombudsperson, the IACHR notes that the DINATED said that the Julio Endara Psychiatric Hospital has "full responsibility ... for this nefarious occurrence, which has now gone one year with no solution." The IACHR observes that even though the DINATED asked the Ministry of Health to take several steps, there is no information as to whether they were carried out. In addition, in its January 2015 submission the State indicated that the investigations into that complaint continue, without Mr. Guachalá's whereabouts having been determined. In this regard, the Commission observes that beyond isolated actions to search for the victim, there is no information about a search plan designed to find Mr. Guachalá, that takes into account the indicia that arise from the record and that involves, in a coordinated manner, all the relevant state authorities.

205. With respect to the writ of habeas corpus, the IACHR notes that initially the office of the mayor of the metropolitan district of Quito merely summonsed Mr. Guachalá, even though it had already been indicated that he had gone missing from the hospital. In response to that situation the petitioners filed a submission asking that the State be called on to adopt measures to search for Mr. Guachalá's whereabouts. The Commission observes that during a year-and-a-half there was no response from the authorities, until in

³⁵⁵ IACHR, Public hearing, April 4, 2016.

³⁵⁶ United Nations, Committee on the Rights of Persons with Disabilities. Concluding observations on the initial report of Ethiopia, November 4, 2016, para. 31.

April 2006 the Constitutional Court indicated that as there was no resolution of the case in this time, the “party has been left in a defenseless state.” The IACHR recalls that the Constitutional Court held that “it is not admissible in a State ... for a person to remain disappeared for more than two years, and less admissible is it for its organs to not coordinate appropriate actions to determine his whereabouts.” Despite that resolution, the Commission does not have any information about the measures taken in the context of the writ of habeas corpus. In this connection, the IACHR considers that habeas corpus is not an effective remedy for addressing the situation of deprivation of liberty and disappearance of Luis Eduardo Guachalá in a psychiatric hospital under the custody of the State. In addition, in view of the time elapsed, it did not come forth with a prompt and effective response with the immediacy required in circumstances such as those of the instant case.

206. Moreover, the IACHR observes that in 2013 an administrative investigation was launched into the disappearance of Mr. Guachalá. The IACHR notes that said investigation was begun 10 years after the facts. The IACHR emphasizes the lack of impetus in the investigation and the absence of specific measures to search for him and clarify what happened during that time.

207. Based on the documentation provided by the parties, the Commission takes note of the various measures taken by the prosecutor of the Unit for Administrative Proceedings of Pichincha from 2014 to 2016. The Commission notes that the State did not report on whether it had taken any measure to verify the account of the institutionalized person who told Ms. Chimbó that her son had suffered a heart attack at the hospital, nor, in general, to develop the hypothesis that he may have died in the hospital followed by a coverup of what happened. To the contrary, the search measures appear to focus on the hypothesis that he escaped.

208. The Commission considers that in view of facts in the record, neither the criminal investigation, or the administrative investigation, or the remedies of habeas corpus (*exhibición personal*) and complaint (*queja*) before the Office of the Human Rights Ombudspersons, were pursued with the due diligence that was required of the authorities in charge of the domestic proceedings in the instant case. The IACHR recalls that in cases of alleged disappearances only if all necessary efforts available to the State are deployed to determine the truth of what happened to the victim and his or her whereabouts may it be considered that an effective remedy was made available.³⁵⁷

209. Accordingly, the Commission concludes that the Ecuadorian State violated the rights to judicial guarantees and judicial protection established at Articles 8(1) and 25 of the American Convention in relation to the obligations established at Article 1(1) of the same instrument, to the detriment of Luis Eduardo Guachalá Chimbó and his family members identified in this report. The State also violated Article I(b) of the Inter-American Convention on Forced Disappearance of Persons.

2. On reasonable time

210. Article 8(1) of the American Convention establishes as one of the elements of due process that the courts must decide the cases submitted to them in a reasonable time. Accordingly, a prolonged delay may constitute, in itself, a violation of the right to judicial guarantees.³⁵⁸ It is up to the State to set forth and prove why more than a reasonable time has been needed to hand down a final judgment in a particular case.³⁵⁹ The reasonableness of the time should be weighed in relation to the total duration of the criminal proceeding³⁶⁰ and in light of the four elements that the Court has identified 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) general impairment of the legal situation of the person involved in the process.³⁶¹

³⁵⁷ IACHR, Report No. 111/09, Case 11,324, Merits, Narciso González Medina, Dominican Republic, November 10, 2009, para. 225.

³⁵⁸ I/A Court HR. *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, para. 166.

³⁵⁹ I/A Court HR. *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 142.

³⁶⁰ IACHR, Report No. 77/02, Case 11,506, Merits, Waldemar Gerónimo Pinheiro and José Víctor dos Santos, Paraguay, December 27, 2002, para. 76.

³⁶¹ I/A Court HR. *Case of Massacre of Santo Domingo v. Colombia*. Preliminary Objections, Merits and Reparations. Judgment of November 30, 2012. Series C No. 259, para. 164.

211. In relation to complexity, the IACHR notes that the State indicated that despite having taken various steps, it has not been possible to identify Mr. Guachalá's whereabouts. The IACHR considers that for an argument on complexity to be admissible, the State must present specific information that directly ties the elements of complexity invoked with the delays in the proceeding. That has not happened in the instant case. The Commission recalls what has been indicated by the Court to the effect that the delay in the pursuit of the investigation cannot be justified based on the complexity of the matter when there are possible hypotheses of what may have happened that have not been investigated³⁶², as in the instant case and already described in this report.

212. In terms of the participation of the interested parties, the Commission observes that there is no element whatsoever in the record that indicates that the family members obstructed the process or had any responsibility for the delay. To the contrary, the family members participated actively in the proceedings and pursued several channels to seek to clarify what happened.

213. In relation to the conduct of the judicial authorities, the Commission already established in this report the breach of the duty of due diligence in the proceedings that were instituted. The Commission refers to the recapitulation of the omissions and inactivity described *supra*.

214. As for the fourth element, the Court has indicated that to determine the reasonableness of the time one must consider the impact of the duration of the proceeding on the legal situation of the person involved in it as well as on the interests at stake.³⁶³ The Commission considers that in cases of alleged disappearance the passage of time has a particularly important impact on the victim's situation, for whether the risk to his or her life and integrity materializes may depend on a prompt and efficient state response. In addition, the Court has held that in cases of persons with disabilities it is essential to take the relevant measures, such as, for example, by the authorities in charge assigning priority to addressing and resolving the situation, with the aim of avoiding delays in the conduct of the proceedings so as to guarantee a prompt resolution and their implementation.³⁶⁴

215. In view of what has been noted, the Commission considers that the almost 16 years that have elapsed from the filing of the complaint to date without the State having clarified the facts, determined the applicable sanctions, or identified the fate or whereabouts of Luis Eduardo Guachalá, is an excessive time that has not been adequately justified. Accordingly, the Commission considers that the State breached the guarantee of reasonable time in violation of Article 8(1) of the American Convention, in relation to Article 1(1) of the same instrument, to the detriment of Luis Eduardo Guachalá Chimbó and his family members.

D. Right to humane treatment of the family members (Article 5(1) of the American Convention in relation to Article 1(1) of the same instrument)

216. Article 5(1) of the American Convention establishes: "Every person has the right to have his physical, mental, and moral integrity respected." With respect to the family members of victims of certain human rights violations, the Court has indicated that they may be considered, in turn, as victims.³⁶⁵ The Court has ruled that they may be impaired in their mental and moral integrity as a result of the particular situations the victims suffered, and the subsequent acts or omissions on the part of the domestic authorities in dealing with these facts.³⁶⁶

³⁶² I/A Court HR. *Case of the Barrios Family v. Venezuela*. Merits, Reparations and Costs. Judgment of November 24, 2011. Series C No. 237, para. 275.

³⁶³ I/A Court HR. *Case of Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009 Series C No. 196, para. 115.

³⁶⁴ I/A Court HR. *Case of Furlan and family v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 196.

³⁶⁵ I/A Court HR. *Case of Cantoral Huamaní and García Santa Cruz v. Perú*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167. para. 112; and *Case of Bueno Alves v. Argentina*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C. No. 164. para. 102.

³⁶⁶ I/A Court HR. *Case of Vargas Areco v. Paraguay*. Judgment of September 26, 2006. Series C No. 155. para. 96.

217. The Commission considers it sufficiently shown that in the instant case Mr. Guachalá's mother and his immediate family suffered profoundly due to the disappearance of their loved one, which has been further aggravated by the failure to clarify the facts and the lack of any justice with respect to what happened. Accordingly, the Commission concludes that the State violated the right to mental and moral integrity enshrined in Article 5(1) of the American Convention in relation to its Article 1(1) to the detriment of the family members of Mr. Guachalá Chimbó who are identified in this merits report.

VI. CONCLUSIONS

218. Based on the considerations of fact and law set forth above, the Inter-American Commission concludes that the State is responsible for violating the rights to the recognition of juridical personality, life, humane treatment, personal liberty, equality and non-discrimination, and health, and to judicial guarantees and judicial protection, established in Articles 3, 4(1), 5(1), 7(1), 7(3), 8(1), 13(1), 24, 25(1) and 26 of the American Convention in relation to the obligations established in Articles 1(1) and 2 of the same instrument, to the detriment of Luis Eduardo Guachalá Chimbó and his family members in the terms explained throughout this merits report.

VII. RECOMMENDATIONS

219. In light of the foregoing conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS TO THE STATE OF ECUADOR THAT IT:

1. Make integral reparation for the human rights violations found in this report, both material and non-material. The State should order measures of economic compensation and satisfaction.
2. Undertake a search, using all means available, for the fate or whereabouts of Luis Eduardo Guachalá Chimbó or his mortal remains. If appropriate, order adequate mechanisms for identifying and proceeding to the return of his remains to his family members.
3. In the event that Luis Eduardo Guachalá Chimbó appears alive, provide him, free of charge and for the time necessary, and in coordination with him, the mental health treatment he requires, in keeping with the standards set forth in this report.
4. Continue the investigations impartially, effectively, and within a reasonable time for the purpose of clarifying the facts completely, identifying the perpetrators, and imposing the corresponding sanctions.
5. Order measures of non-repetition that include: (i) review the domestic legislation and deep-rooted practices in terms of decision-making of persons with disabilities, so as to ensure that both the legal framework and practice are compatible with the international standards described in this merits report; (ii) draw up a comprehensive plan for the purpose of reviewing the policy of hospitalizing persons in public mental health institutions and gear it to de-institutionalization, in keeping with the relevant international standards, ensuring the conditions of personal security and guarantees needed for their inclusion in the community; and (iii) adopt specific measures to eradicate coercion and forced psychiatric treatments as well as to ensure informed consent in mental health, in relation both to being committed and to treatment, in keeping with the standards described in this report. (iv) Incorporate the components of the right to mental health in the general health strategies and plans, prioritizing psychosocial and community services.