

REPORT No. 75/11
CASE 12.683
MERITS
MELBA DEL CARMEN SUAREZ PERALTA
ECUADOR
July 20, 2011

I. SUMMARY

1. On February 23, 2006, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition lodged by Jorge Sosa Meza (hereinafter “the petitioner”) alleging the responsibility of the Republic of Ecuador (hereinafter “the State” or “Ecuador”) for failing to prosecute the health professionals who incurred in medical malpractice with respect to Melba del Carmen Suárez Peralta (hereinafter “the victim” or “Ms. Suárez Peralta”) during surgery performed on July 1, 2000, at the Clínica Minchala, a private clinic in the city of Guayaquil.

2. The petitioner claimed that the State was responsible for violating the rights to a fair trial and to judicial protection established in Articles 8 and 25 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), in conjunction with the obligation of respecting those rights established in Article 1.1 thereof. In turn, the State claimed that it had not violated the rights referred to by the petitioner since it provided appropriate remedies, respected the guarantee of reasonable time, and statutory limitations were triggered in the case because the victims had failed to pursue the available remedies.

3. On October 30, 2008, the Commission adopted Report No. 85/08, in which it concluded that it was competent to hear the petition and found that it was admissible for the possible violation of the rights enshrined in Articles 8.1 and 25.1 of the American Convention, in conjunction with Article 1.1 thereof.

4. After analyzing the positions of the parties, the Commission concluded that the State of Ecuador is responsible for violating the rights to a fair trial and to judicial protection enshrined in Articles 8 and 25 of the American Convention, in conjunction with the obligations established in Article 1.1, with respect to Melba del Carmen Suárez Peralta and to her mother, Melba Peralta Mendoza. In addition, the IACHR issued the corresponding recommendations.

II. PROCESSING BY THE COMMISSION FOLLOWING THE ADMISSIBILITY REPORT

5. On October 30, 2008, the IACHR issued Admissibility Report No. 85/08.¹ On January 7, 2009, the Commission notified the parties of that report, informed them that the case had been registered as No. 12.683, and, under Article 38.1 of the Rules of Procedure then in force, set a two-month deadline for the petitioners to submit additional comments on the merits. In addition, in compliance with Article 48.1.f of the Convention, the Commission made itself available to the parties with a view to reaching a friendly settlement in the matter. On February 26, 2009, the IACHR sent the parties an erratum regarding Report No. 85/08.

6. On April 13, 2009, the petitioner submitted his comments on the merits, which were forwarded to the State on April 14, 2009, with a deadline of two months for it to return its comments. The State sent its reply on August 20, 2009, which was forwarded to the petitioner for his comments by means of a note dated August 27. On September 28, 2009, the petitioner submitted his response, which was conveyed to the State for its comments on October 2, 2009. The Commission noted that in that communication the State had offered to reach a friendly settlement but that the offer was not accepted.

¹ IACHR, Report No. 85/08 (Admissibility), Petition 162-06, Melba del Carmen Suárez Peralta, Ecuador, October 30, 2008.

7. On November 4, 2009, a working meeting was held during the IACHR's 137th period of sessions. On that occasion, the State agreed to provide Melba del Carmen Suárez with free medical care through the state health network, without that implying any kind of acceptance of international responsibility.²

8. On December 14, 2009 the petitioner submitted information, which was conveyed to the State for its comments, on January 13, 2010, along with additional information furnished by the petitioner at the aforesaid working meeting. On that same date, the Commission asked the petitioner for information on the steps taken by the State to comply with the commitment assumed at the working meeting.

9. The petitioner submitted his response on February 22, 2010, which was conveyed to the State for its comments on March 16, 2010. The State submitted its final comments on April 13, 2010, which were forwarded to petitioner for information purposes the following April 23. On March 28, 2011, the petitioner submitted additional information, which was conveyed to the State for information purposes on April 1, 2011. On May 3 and 24, 2011, respectively, the State and the petitioner submitted additional information, which was conveyed to the other party for information purposes.

III. POSITIONS OF THE PARTIES

A. Petitioner

10. As background, the petitioner states that on July 1, 2000, Melba del Carmen Suárez Peralta was operated on by Dr. Emilio Guerrero Gutiérrez at the private Minchala Clinic in the city of Guayaquil for "possible appendicitis problems." He indicates that three days after the surgery the patient experienced complications and had to undergo a further surgery in another health center. As a result of the second surgery it was determined that a "dirty surgery" had been performed and she had to undergo several medical procedures.

11. The petitioner states that an accusation of medical malpractice against Dr. Emilio Guerrero Gutiérrez was filed by Melba Peralta Mendoza, the victim's mother. Between August 2000 and May 2001 the preliminary investigation began, the accusation was formalized and formal charges were issued against Guerrero Gutiérrez.³ In addition, the petitioner indicates that in June 2001 Mrs. Peralta Mendoza requested that the investigation be expanded to cover Dr. Wilson Benjamín Minchala Pinchú, owner of the Minchala Clinic, for having allowed Mr. Guerrero Gutiérrez to practice medicine without the authorization of the Ministry of Health. Between August and September of 2001, the judge ordered the investigation and trial commencement deed to be expanded to cover Dr. Minchala Pinchú and the accusation was formalized against Mr. Minchala and Mr. Guerrero.

12. The petitioner indicates that in October 2001 the reopening of the summary was ordered, the following November the investigation was concluded and in May 2002 the Prosecutor requested the nullification of all previous proceedings. In addition, in February 2003, a Resolution was handed down against Emilio Guerrero, his arrest was ordered and, since he was a fugitive from justice, the proceedings against him were suspended until he either appeared or was captured. In September 2004, Guerrero requested the Judge to rule that statutory limitations had been triggered because more than four years had passed since the issuing of the trial commencement deed. The petitioner indicates that in June 2005 the First Criminal Tribunal assumed competence for the proceedings and in September 2005, it ruled that statutory limitations had been triggered. Consequently, Melba Peralta Mendoza requested that the

² Annex 79. Working meeting minutes signed on November 4, 2009. Annex 2 of the petitioner's submission received on December 14, 2009.

³ The petitioner indicates that the crime of medical malpractice is described in articles 436, 456 y 457 of the Ecuadorian Criminal Code of 1971, but that it only has as passive subjects those that have caused harm administering a substance. Original petition received by the IACHR on February 23, 2006.

corresponding fine be imposed on the judge, believing that the triggering of statutory limitations was due to the lack of dispatch on the part of the court, but this claim was denied on November 10, 2005.

13. The petitioner explains that the Ecuadorian Criminal Code establishes a period of five years before statutory limitations apply to criminal proceedings, which indicates that five years represents the tolerable limit for the judiciary to reach a decision on a complainant's claims. He claims that failing that, the legal system itself concludes the examination of the case for reasons of legal security. He contends that there was an unwarranted delay in the administration of justice in the instant case. Thus, he notes that more than five years went by from the issuing of the trial commencement deed to the call for the plenary trial; that the First Criminal Judge suspended the proceedings for more than 16 months during which no steps to further the case were taken; that the investigation stage took three times the maximum duration of six months allowed by procedural law, beginning on August 16, 2000, and concluding on November 27, 2001; and that there was a delay between the call for plenary proceedings, issued on February 17, 2003, and the resolution of the appeal on June 17, 2004, together with a delay in assessing bail and replacing preventive custody with alternative precautionary measures.

14. The petitioner adds that the criminal case file contains several documents urging the justice authorities to substantiate the process to prevent statutory limitations from being triggered; these include two documents from Melba Peralta Mendoza expressing her dissatisfaction with the slowness of the proceedings and three requests from interested parties for the public trial to take place. The unwarranted delay in justice was compounded in that, although the criminal charges against the physicians had been objectively established, the State's power to take action was extinguished: not because of inadequate evidence, or because the accused succeeded in challenging the criminal charges, but on account of "a strange, undue delay in substantiating the proceedings which, in spite of the insistence of the complainant, culminated with their prescription."⁴

15. The petitioner notes that although the Ecuadorian penal system establishes administrative and civil sanctions for authorities that cause unwarranted delays leading to the activation of statutory limitations, it failed to apply Article 101 of the Criminal Code in order to determine the responsibility for that unwarranted delay in justice. In addition, he contends that people effectively enjoy their right to legal security during judicial proceedings when the judge guarantees and upholds human rights and due process, in accordance with Article 24.13 of the Constitution, and hands down a grounded judgment in accordance with the guarantees of due process. However, the State denied justice by favoring impunity and promoting a delay in the substantiation of the proceedings in order for statutory limitations to be triggered.

16. He claims that the State was responsible for the triggering of statutory limitations, since the justice administration was warned of their possible application to the proceedings and, in spite of that, failed to prevent the possibility of punitive action from prescribing through the passage of time, which serves to make the violation of Articles 8 and 25 of the American Convention even more apparent. He adds that Article 1.1 of the Convention establishes the international responsibility of the State when it responds to a victim's claim with a passive and complacent attitude.

17. At the same time, in response to the State's argument that the delay was due to the victim's procedural inactivity, in that there were remedies that could have been filed, the petitioner explains that the prosecution brought against Dr. Emilio Guerrero was for the crime of bodily harm, which is a publicly actionable offense; hence, the onus of ensuring swift and accurate substantiation was on the State and not on the victim. He adds that the State is confusing certain cases of civil statutory limitations through abandonment of the proceedings or procedural delays with statutory limitations in criminal cases, for which the justice administration is responsible, and that prescription is a formal recognition that the State has failed to resolve a criminal claim within a reasonable time, whereby it loses the ability to impose sanctions, creates impunity, and prevents the victim from continuing with the proceedings, which therefore constitutes a clear violation of the right to effective judicial protection and due process.

⁴ Petitioner's submission, received on April 13, 2009.

18. In response to the State's contentions regarding the failure to exhaust recusal proceedings and to appeal against the statutory limitations decision, he states that those are not suitable, appropriate, or effective mechanisms for protecting the legal situation that was violated and that, in the context of the American Convention, they cannot be defined as "remedies," as has been established by the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"). Thus, if a remedy is not suitable, it need not be exhausted.

19. With specific reference to recusal proceedings, he maintains that they are not a remedy for preventing or halting an ongoing violation of a fundamental right; instead, they are intended to suspend or terminate a judge's competence in a specific case. He contends that recusal is a different procedure, filed with another judge from the same area as the one being challenged, who assesses the recusal and refers it to a drawing of lots to assign competence to another judge. When recusal is sought, three judges coexist: the judge of the main proceedings, who is challenged; the judge who substantiates the recusal; and the judge to whom responsibility for the case is transferred. Consequently, trials of that kind do not guarantee speed and dispatch in substantiating the proceedings; the procedure does not automatically or necessarily resolve the undue delay, since there are no guarantees that the new judge will conduct the case in a more efficient way. He adds that Ecuador's Attorney General has himself stated in some public trials that "recusal is a delaying tactic"⁵ and states that in cases involving breaches of human rights, recusal cannot be seen as a suitable means for rectifying and repairing an alleged violation.⁶

20. Regarding an appeal against the decision applying statutory limitations, the petitioner notes that such remedies are filed when one of the parties disagrees with the contents of a judicial decision or for the annulment or modification of a decree or judgment from a lower court. He claims that statutory limitations, pursuant to the provisions of the Criminal Code and of the Civil Code, are triggered by the simple passage of time and a declaration to that effect may be made on an ex officio basis by the competent authority under Article 114 of the Ecuadorian Criminal Code, which states that "statutory limitations may be declared applicable at the request of a party, or on an ex officio basis, necessarily, when the conditions set in this Code are met." He contends that appealing against the imposition of statutory limitations in the case at hand would have been an unofficial and ineffective remedy, since their activation was caused *de iure* by the passage of time; hence, an appeal would not have been able to amend any ruling on the merits of the case, but would merely have enabled a higher court to confirm that the proceedings had in fact been extinguished.⁷

21. The petitioner describes the State's claim that it acted within a reasonable time in spite of the triggering of statutory limitations as a legal impossibility, since the expiration of proceedings is in and of itself a violation of due process and formally indicates that the State has failed to take procedural steps within a reasonable time. He notes that on this point, the Inter-American Court has ruled that a prolonged delay in proceedings may in and of itself constitute a violation of the right to a fair trial.

22. The petitioner claims that Melba del Carmen Suárez Peralta is in a situation of extreme vulnerability on account of her medical condition, which prevents her from carrying out any normal physical activity or work. He states that between 2001 and 2005, Melba del Carmen Suárez Peralta was treated at different medical facilities and that between 2005 and 2009 she received treatments and surgery to eliminate adhesions, an abdominoplasty, as well as other stomach and medical problems. He

⁵ The petitioner cites: Press report in the newspaper *El Universo*, May 23, 2009, politics section: "Attorney General Washington Pesantes says the recusal proceedings (filed to separate a judge from hearing a case) brought against the judges in the Filanbanco case could be a tactic to delay the proceedings and prevent a final decision." Petitioner's submission, received on September 28, 2009.

⁶ The petitioner cites Articles 856 to 889 of Ecuador's Code of Civil Procedure, which describe the grounds and procedure for initiating recusal proceedings. Petitioner's submission, received on September 28, 2009.

⁷ The petitioner cites Article 327 of Ecuador's Code of Civil Procedure and Article 101 of the Criminal Code. Petitioner's submission, received on September 28, 2009.

claims that Melba del Carmen Suárez Peralta has required several surgeries as a result of the medical malpractice and that she is in a state of extreme vulnerability that prevents her from carrying out any normal form of work, which in turn affects her economic situation. He contends that in her condition, she has no access to appropriate medical treatment and that the State – in spite of the commitment to provide free medical care assumed at the working meeting during the IACHR's 137th period of sessions – has taken no steps toward providing her with such services.

23. To summarize: the petitioner contends that the State's international responsibility was triggered by its failure to observe the positive obligation of adopting the necessary measures to ensure the effective protection of the victim's human rights and that the State did violate Articles 8 and 25 of the American Convention, in conjunction with Article 1.1 thereof. He requests that the Commission rule the State responsible; require the State to pay fair compensation to Melba del Carmen Suárez Peralta and her family, including consequential damages and future losses; and to order the commencement of the corresponding legal actions against the perpetrators, accomplices and accessories after the fact responsible for violating the rights enshrined in the Convention.

B. State

24. The State contends that the guarantee of reasonable time was observed and that the victims did not pursue the available remedies. It also holds that Ecuadorian law offered Melba Peralta Mendoza, the victim's mother, actions for speeding up the proceedings and satisfying her claims, which were not invoked at the appropriate time. It therefore maintains that it did not violate the rights alleged by the petitioner and asks the Commission to issue a ruling establishing that.

25. Regarding Article 25.1 of the Convention, the State claims that amparo is a simple remedy in which the judge hears a case, issues his orders, and respects the right of defense, and in which "the actions of the applicant have to be conducted under his own responsibility and interest."⁸ It holds that the right of effective protection, according to the Inter-American Court, requires judges to conduct proceedings in such a way as to avoid the probability of undue hindrance, but that consideration does not preclude the responsibility of the victim in seeking to satisfy his claims.

26. It maintains that the alleged victims' representative was in a position to pursue the actions offered by law, and could even have lodged a personal accusation to become a party to the proceedings and, later, to demand the relevant compensation. It holds that the State has no obligation to ensure that proceedings produce results that are favorable to the applicants, particularly if they do not meet the legal requirements set for their filing, as was the case with the amparo actions brought by the petitioner, as indicated by the decisions handed down by the judges who heard those applications.⁹

27. The State claims that Melba Peralta Mendoza could have filed for recusal or lodged an appeal remedy. It notes that recusal is a request for a judge to be replaced when he has incurred in a cause for separation from the proceedings and has not separated himself of his own volition.¹⁰ It explains that the remedy was established as one of the means for ensuring that judges act with impartiality and justice, rectitude and integrity, equality and objectivity. It states that this action is an effective way of speeding up proceedings when they have been halted by the justice administration. It contends that in the case at hand, the victim's mother could have invoked that remedy if she felt she was affected by the delay in the proceedings, and that it could have led to a transfer of competence and sped up the process.

28. It further holds that Melba Peralta Mendoza could have lodged an appeal against the triggering of statutory limitations, and that such appeals are admissible against decisions to cancel or

⁸ Office of the Attorney General of the State, document received on August 20, 2009.

⁹ The Commission has no copies or more specific references to those amparo actions.

¹⁰ Ecuador indicates that this remedy is provided for in Art. 856 of the Code of Civil Procedure and Art. 265 of the Code of Criminal Procedure (CCP) of 2000. Office of the Attorney General of the State, document received on August 20, 2009.

suspend proceedings and “provide an opportunity for ratification of the order to invoke statutory limitations.”¹¹ It states that the petitioner’s argument that he did not file for this remedy since the Superior Court of Justice would have ratified the statutory limitations indicates beforehand that the Court’s ruling would have been unfavorable. It adds that the remedy would have been resolved swiftly, since if it were not settled within 15 days a request could have been lodged for fines to be imposed on the judges responsible for the delay.¹²

29. Ecuador holds that Melba Peralta Mendoza “was able to participate in the criminal proceedings, present the relevant evidence, and PURSUE EFFECTIVE REMEDIES (which she never did), without any curtailment of her procedural rights”;¹³ instead, they were not exercised, as a result of which statutory limitations were triggered and the case could not be reopened. Ecuador adds that the delay in the proceedings was due to circumstances beyond the control of the State, such as the fact that the accused were fugitives from justice and that it was impossible to violate their basic procedural guarantees.

30. The State notes that if the principle of reasonable time is not obeyed, the suspect is entitled to be released. It explains that that principle applies in consideration of the complexity of the matter, the procedural activity of the interested parties, and the actions of the judicial authorities. On this point, it contends that the matter is highly complex in that establishing medical negligence and the corresponding penalties requires numerous technical and scientific studies that must be carefully analyzed by the judge.

31. It further contends that the parties at no point cooperated with the investigation: partly because of the delays in the proceedings caused by the accused, and partly because of the fact of active involvement on the part of the injured parties. Ecuador holds that the deliberate lack of cooperation with the proceedings by the accused led to delays for which the State cannot be blamed. On this point, it notes that the European Court of Human Rights (hereinafter “ECHR”) has ruled that delays in a court’s work do not trigger the responsibility of the State in question.¹⁴

32. It holds that the time limits established in domestic law cannot be considered ‘deadlines’ in that an unwarranted delay and possible violations of the principle of reasonable time take place whenever a case fails to observe them; instead, the limits are merely referential for later procedural analysis. Ecuador contends that although the proceedings lasted slightly over three years, that time does not *per se* represent a violation of Article 8 of the American Convention, since there were several elements that caused that delay, in addition to those that have already been pointed out. It holds that the accused used the remedies provided for by law to remedy their legal situation, and it would be unacceptable to blame those delays on the Ecuadorian authorities, “which ultimately ruled in accordance with the applicable procedural and substantive criminal law.”¹⁵

33. Finally, with respect to the medical treatment given to the victim, the State reports that on November 24, 2009, it urged the Ministry of Health to take the steps necessary to ensure Melba del Carmen Suárez Peralta free access to care for her ailments at one of the public hospitals in the city of Guayaquil. The Ministry of Health replied that “the public health agencies are obliged to admit all persons

¹¹ The State notes that this remedy is provided for in Art. 348.3 of the 1983 CCP. Office of the Attorney General of the State, document received on August 20, 2009.

¹² The State notes that such a punishment is provided for in Art. 350 of the 1983 CCP. Office of the Attorney General of the State, document received on August 20, 2009.

¹³ Office of the Attorney General of the State, document received on August 20, 2009. The State grounds its arguments on: I/A Court H. R., *Case of Genie Lacayo v. Honduras*, para. 85.

¹⁴ The State cites: ECHR, *Case of Deumeland*, Judgment of May 29, 1986, para. 80. Office of the Attorney General of the State, document received on August 20, 2009.

¹⁵ Office of the Attorney General of the State, document received on August 20, 2009.

and to provide free attention in their different services,”¹⁶ pursuant to Article 362 of the Constitution of Ecuador. The State maintains that good faith assumes honest collaboration among the parties, visible in reasonable and coherent actions that aim at the conclusion of a mutually satisfactory settlement and that, in the case at hand, “the disposition of the Ecuadorian State is evident, but reasonable and coherent behavior on the part of the victim’s representative cannot be seen.”¹⁷

IV. ANALYSIS OF THE MERITS

A. Findings of fact

34. On July 1, 2000, Melba del Carmen Suárez Peralta was operated on by, among others, Dr. Emilio Guerrero Gutiérrez, at the private Minchala Clinic¹⁸ in the city of Guayaquil for “possible appendicitis problems.”¹⁹ Three days after her surgery, and after she had been released, the patient began to suffer intense abdominal pain, vomiting, and other complications.²⁰

35. On July 12, 2000, Dr. Héctor Luis Taranto received Ms. Suárez Peralta in the emergency room of Luis Vernaza Hospital. The victim was pale, with abdominal swelling, anorexia, and abdominal pain, and she was diagnosed with acute postsurgical abdomen and, as a result, had to undergo surgery again for a reexploratory laparotomy.²¹ That procedure found dehiscence of the appendicular stump (suture), localized peritonitis, and fibrin clumps.²² The patient had to undergo several procedures, including the aspiration of purulent matter, her abdominal cavity was washed and drained, and part of her intestine was removed, because a “dirty operation” had been performed.²³

36. On August 3, 2000, Melba Peralta Mendoza, the mother of Melba del Carmen Suárez Peralta, lodged a criminal complaint²⁴ on behalf of her daughter against “Dr. Emilio Guerrero Gutiérrez,

¹⁶ Office of the Attorney General of the State, document received on April 13, 2010.

¹⁷ Office of the Attorney General of the State, document received on April 13, 2010.

¹⁸ Annex 1A. According to press reports, the Minchala Clinic was closed down on at least two occasions (May 7, 2002, and October 2007) by the Health Ministry and the Provincial Health Directorate, respectively. Information available at: <http://www.eluniverso.COM/2002/05/08/0001/18/A094FBD74A8B4FFD80CAC7B6BAA1747A.HTML> (“Two Clinics Closed by Ministry of Health”) and <http://www.eluniverso.COM/2007/10/14/0001/1064/D2D46BDDA22A46E79986D9EE912809BB.HTML> (“Failed Medical Care Causes More Deaths”).

¹⁹ Annex 1. Private accusation presented by Melba Peralta Mendoza, assigned by lot to the First Criminal Trial Court of Guayas, on August 3, 2000. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 1.

²⁰ Annex 1. Private accusation presented by Melba Peralta Mendoza, assigned by lot to the First Criminal Trial Court of Guayas, on August 3, 2000. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 1; and Annex 2: Statement to the inquiry given by Melba del Carmen Suárez Peralta to the First Criminal Trial Court of Guayas, September 6, 2000. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 p. 38.

²¹ Annex 3. Luis Vernaza Hospital, Operation report of July 12, 2000. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 p. 4.

²² Annex 4. Testimony of Dr. Héctor Luis Taranto Ortiz, given to the First Criminal Judge of Guayas, November 12, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 121. The reasons for the patient’s admission were “fever, vomiting, abdominal pain, and postsurgical dehiscence of suture (right parietal). She underwent surgery on July 12, 2000. Postoperation diagnostic: dehiscence of appendicular stump. Operation performed: Reexploratory laparotomy. Right hemicolectomy + ileo-transverse anastomosis + washing and draining the cavity. Surgical findings: dehiscence of the appendicular stump (suture), localized peritonitis, and fibrin clumps. Pathological diagnosis: Transverse colon and ileum: acute peritonitis. Vascular Thrombosis (area of appendicular stump). Clinical history of appendectomy seven days prior. Abdominal sepsis.” Annex 5. Report of forensic physician Juan Montenegro Clavijo of September 18, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 p. 46.

²³ Annex 3. Luis Vernaza Hospital, Operation report of July 12, 2000. Annex 1 of the initial petition received on February 23, 2006, Case file in prosecutorial inquiry No. 2316-2000 p. 4.

²⁴ Complaint lodged in accordance with Art. 40 of Ecuador’s CCP of 1983:

“Form and contents of the complaint.

the nurse, and the anesthetist” who participated in Ms. Suárez Peralta’s operation. The accusation against Dr. Guerrero “plus any accomplices and accessories after the fact that might emerge” was for “incurring in medical malpractice as a result of a dirty operation, without the proper precautions and without the necessary human materials, with a lack of professionalism in addition to unskilled negligence.”²⁵

37. The Code of Criminal Procedure of Ecuador (hereinafter also “Code of Procedure” or “CCP”) states that all criminal proceedings brought before a competent court or judge for the commission of a crime require the participation of the Public Prosecution Service (MP), even proceedings involving a private accuser, provided that the offense was publicly actionable.²⁶

38. On August 16, 2000, the First Criminal Judge of Guayas, Ángel Rubio Game, issued a trial commencement deed against “Emilio Guerrero Gutiérrez, plus any accomplices or accessories after the fact who might emerge,” thereby beginning the investigation stage of the proceedings (*sumario*).²⁷

39. On August 7, 14, and 28, 2000, the complainant asked the judge to carry out such formalities as assessing the private accusation, examining the place of the facts, the diagnostic assessment and evaluation of the patient, and the certification of Emilio Guerrero’s contract.²⁸ During 2000, the judge issued a series of documents and notices ordering the performance of various formalities. *Inter alia*, he requested the patient’s medical records and ordered the start of investigations, the examination of the place of the facts, the verification of the employment status of Dr. Emilio Guerrero, a forensic medical examination of Melba del Carmen Suárez, and the report on the license and operating requirements of the Minchala Clinic.²⁹

...Cont.

The private accuser shall appear before the competent judge with his complaint, which shall be in writing and shall contain:

1. Full name and address of the accuser;
2. Full name of the accused and, if possible, his address;
3. Detailed description of the infraction, indicating place, day, approximate time, month, and year when it was committed;
4. A request for the procedural formalities deemed necessary to justify the narrative;
5. A statement formalizing the private accusation. [...].”

Annex 1. Private accusation presented by Melba Peralta Mendoza, assigned by lot to the First Criminal Trial Court of Guayas, on August 3, 2000. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 1.

²⁵ Annex 1. Private accusation presented by Melba Peralta Mendoza, assigned by lot to the First Criminal Trial Court of Guayas, on August 3, 2000. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 1 to 3

²⁶ Article 23 of Ecuador’s 1983 CCP.

²⁷ In the trial commencement deed, the judge ordered the following procedural formalities: receiving a statement to the investigation from the complainant; receiving a statement to the investigation from the accused (no such statement was given at any time in the proceedings); performing an examination of the place of the facts, with the appointment of experts; serving notice on: the Director of the Luis Vernaza Hospital (to submit the patient’s medical records), Director General of Immigration Affairs (to report on the entry of the accused into the country), Minchala Clinic (to submit the patient’s medical records); Head of Immigration of the Tax Police, Deputy Director of Labor (to certify or submit copies of the work permit or professional license enabling him to work in the country), and Judicial Police (to conduct investigations); receiving statements from all individuals aware of the offense; and performing all procedural formalities necessary for the complete and optimal organization of the investigation. Annex 6. Trial commencement deed of August 16, 2000. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 25 to 26

²⁸ Annexes 7, 8 and 9. Documents dated August 7, 14, and 28, 2000. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 22, 24, and 40.

²⁹ Annex 10. Documents ordering formalities. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, between pp. 27, 37, and 54.

40. The investigation revealed that Dr. Emilio Guerrero Gutiérrez, a foreign physician, had not begun formalities for a work permit nor for approval of his professional license in Ecuador.³⁰ On September 18 and 20, October 16, November 14, and December 27, 2000, the complainant submitted a filing with the First Criminal Judge of Guayas for a warrant for the arrest of the accused to be issued,³¹ and she spoke of the delay in processing her submissions and in responding to her requests for an examination of the place of the facts.³²

41. On March 22, 2001, Judge Fernando Moreira, the Second Criminal Judge of Guayas, declared the investigation at an end for the reason that the deadline had been reached and ordered the complainant to make a formal accusation in order for the file to be referred to the Public Prosecution Service for its ruling.³³ On March 27, 2001, the parties were informed of the conclusion of the investigation³⁴ and the accusation was formally made by the complainant on March 29, 2001³⁵; two months later, on May 29, 2001, the First Criminal Prosecutor of Guayas, Bolívar Escobar Rodríguez, issued a ruling accusing Emilio Guerrero of the crime of bodily harm as described in the Ecuadorian Criminal Code of 1971, Article 466,³⁶ which provides:

If the blows or wounds cause an illness or inability to work lasting more than ninety days, or a permanent inability to pursue the work that the victim previously pursued on a habitual basis, or a serious illness, or the loss of a secondary organ, the punishment shall be a prison term of between one three years and a fine [...].

42. On June 7, 2001, the complainant requested that the investigation be expanded to cover Dr. Wilson Minchala Pinchú, that the Minchala Clinic be closed down, that Drs. Minchala and Guerrero be taken into custody, and that Drs. Minchala and Guerrero be prevented from leaving the country “since the proceedings have ignored the level of responsibility of Dr. Wilson Minchala Pichú [owner of the Minchala Clinic] as an accomplice and accessory after the fact in the commission of the crime, in light of his careless and reckless negligence, and for authorizing a unlicensed physician to practice in the country [...]”³⁷

43. Two months later, on August 14, 2001, the judge reopened the investigation, summoned Dr. Guerrero Gutiérrez to appear, and ordered the expansion of the investigation and the trial commencement deed to cover Wilson Minchala.³⁸ On August 23, 2001, Dr. Minchala Pichú appeared before the court; he challenged the grounds of the private accusation lodged by Ms. Melba Peralta and requested a new date to give his statement to the investigation and, on August 29, he requested the

³⁰ Annex 11. Document No. 075-SERH-MIG-2000 of September 1, 2000. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 44.

³¹ Annexes 12, 13, 14, and 15. Documents of September 18 and 20, October 16, and November 14, 2000. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 42, 45, 55, and 56.

³² Annexes 14 and 15. Documents of October 16 and November 14, 2000. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 55 and 56. The petitioner reports that the examination of the place of the facts took place on February 6, 2001.

³³ Annex 17. Declaration of conclusion of investigation, March 22, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 60.

³⁴ Annex 16. Notice of conclusion of investigation, March 27, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 60.

³⁵ Annex 18. Formal accusation against Emilio Guerrero, March 29, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 61.

³⁶ Annex 19. Accusation ruling against Emilio Guerrero of May 29, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 63.

³⁷ Annex 20. Request for expansion of investigation, dated June 7, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 66.

³⁸ Annex 21. Order expanding the investigation to cover Wilson Minchala, August 14, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 67 and 68.

voiding of the proceedings.³⁹ On August 30, 2001, Dr. Guerrero challenged the prosecutor's ruling and asked the judge to void the proceedings.⁴⁰

44. In September 2001, Wilson Minchala was summoned to give a statement to the investigation⁴¹ and on September 13, 2001, the complainant presented a document and requested the closure of the investigation, given that the deadline for its completion had passed.⁴² On September 19, 2001, the judge ruled the investigation concluded because the reopening period of the case had expired.⁴³ On September 25, 2001, the complainant formalized her accusation against Emilio Guerrero as the perpetrator of the crime and against Wilson Minchala as his accomplice and accessory after the fact.⁴⁴

45. On October 11, 2001, the First Criminal Judge of Guayas ordered the reopening of the investigation for a period of 10 days in order for Drs. Guerrero and Minchala to give their statements.⁴⁵ On October 12, 2001, the First Criminal Prosecutor of Guayas requested that the investigation be reopened to receive statements from the two physicians.⁴⁶ On October 18, 2001, the complainant lodged a document expressing her disagreement with the reopening of the proceedings, seeing in it the wish of the accused to delay the process indefinitely.⁴⁷

46. On October 19, 2001, Wilson Minchala gave his statement to the investigation, in which he stated that he rented the operating theater to Dr. Jenny Bohórquez, Dr. Guerrero's partner, because it was an emergency surgery, as indicated in medical record No. 975.⁴⁸ On October 24, Emilio Guerrero requested that a date be set for his statement and that of Dr. Bohórquez to be taken.⁴⁹ On October 29, 2001, the complainant spoke of Dr. Minchala's statement and requested that the investigation be extended to Dr. Jenny Bohórquez.⁵⁰

³⁹ Annex 22. Presentation document of Wilson Minchala, dated August 23, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 70. Annex 23. Application for voiding of the proceedings by Wilson Minchala, dated August 29, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 85 to 88

⁴⁰ Annex 24. Application for voiding of the proceedings by Emilio Guerrero, dated August 30, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 89 to 91.

⁴¹ Annex 25. Summons for testimony of Wilson Minchala. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 92.

⁴² Annex 26. Complainant's submission of September 13, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 94.

⁴³ Annex 27. Declaration of conclusion of investigation, September 19, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 102.

⁴⁴ Annex 28. Formal accusation against Emilio Guerrero and Wilson Minchala, document of September 25, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 105.

⁴⁵ Annex 29. Reopening of investigation, October 11, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 106. On September 19, 2001, Wilson Minchala informed the judge that he had been unable to appear to give his statement on account of health reasons (Annex 30. Submission by Wilson Minchala, September 19, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 101).

⁴⁶ Annex 31. Request for reopening of investigation, October 12, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 108.

⁴⁷ Annex 32. Document dated October 18, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 115.

⁴⁸ Annex 33. Statement to the investigation of Wilson Minchala, October 19, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 116. Annex 34. Medical record No. 975 of Melba del Carmen Suárez Peralta at the Minchala Clinic, pp. 71 to 77.

⁴⁹ Annex 35: Application by Emilio Guerrero of October 24, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 118.

⁵⁰ Annex 36. Request for investigation to be extended to Jenny Bohórquez, October 29, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 104. There is nothing in the case file
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47. On October 31, the judge summoned Drs. Guerrero, Taranto, and Bohórquez to appear.⁵¹ On November 12, 2001, Emilio Guerrero reported that he was unable to give a statement because his counsel had only notified him of the appointment that same day.⁵² On November 12, Dr. Héctor Luis Taranto Ortiz confirmed the findings and the operation he performed on the victim on July 12, 2000.⁵³ On November 13, 2001, Dr. Jenny Bohórquez stated that on July 1, 2000, in conjunction with Dr. Guerrero, she had conducted a physical examination of Ms. Suárez Peralta, in which it was concluded that the patient was suffering acute appendicitis, “and so we decided to operate, with myself as the lead surgeon in the operation and Dr. Guerrero serving as my assistant [...]”⁵⁴

48. On November 13, 20, 2001, the complainant filed requests for the investigation to be closed to prevent further delays in the proceedings.⁵⁵ On November 27, the First Criminal Judge of Guayas, Ángel Rubio Game, ruled the reopened investigation closed because the deadline had passed, ordered the chief complainant to file a formal accusation, and gave instructions that the proceedings be referred to the prosecutor for a ruling to be issued.⁵⁶

49. On November 28, 2001, Emilio Guerrero lodged a defense filing. He maintained that the dehiscence of Ms. Suárez Peralta’s appendicular stump was not caused by a lack of skill, but rather by causes inherent to the patient, such as her cardiopathy, and he ask the judge to indicate a date for taking his statement.⁵⁷ On November 29, 2001, the complainant filed a formal accusation against Emilio Guerrero, Wilson Minchala, and Jenny Bohórquez, as well as any other accomplices and accessories after the fact.⁵⁸ On November 30, 2001, Emilio Guerrero lodged a complaint with Judge Rubio Game for closing the investigation before he had given a statement and for a lack of dispatch in his documents.⁵⁹

50. On May 13, 2002, more than five months after the conclusion of the reopened investigation, the First Criminal Prosecutor of Guayas, Marcela Estrada Paredes, requested the voiding of all the proceedings since they were expanded to cover Wilson Minchala and requested that an interlocutory order calling for plenary proceedings be handed down, since a prosecutor’s ruling against Emilio Guerrero already existed.⁶⁰ On June 6, 2002, the complainant challenged the prosecutor’s ruling

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before the IACHR indicating the steps taken with the complainant’s request other than summoning Dr. Bohórquez to give a statement.

⁵¹ Annex 37. Summons of October 31, 2001, for the appearance of Drs. Guerrero, Taranto and Bohórquez. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 119.

⁵² Annex 38. Document of November 12, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 125.

⁵³ Annex 4. Statement of Héctor Luis Taranto, November 12, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 121.

⁵⁴ Annex 39. Statement of Jenny Bohórquez, November 13, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 122 to 124.

⁵⁵ Annexes 40 and 41: Documents of November 13 and 20, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 126 to 128, and 131.

⁵⁶ Annex 42. Declaration of conclusion of investigation, November 27, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 132.

⁵⁷ Annex 43. Document of November 28, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 133 to 135.

⁵⁸ Annex 44. Document of November 29, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 151 to 152.

⁵⁹ Annex 45. Document of November 30, 2001. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 153.

⁶⁰ The prosecutor held that there had been procedural violations that influenced the decision of the case, since criminal trials cannot admit two prosecutorial rulings for the same facts. The prosecutor also held that the reopened investigation failed to abide by the three-day deadline, stipulated in Article 240 of the Code of Criminal Procedure, for the complainant to submit her
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for annulment, holding it to be contrary to law, and requested that an order be issued for plenary proceedings to begin.⁶¹ That same day, June 6, Dr. Guerrero requested that the investigation be reopened.⁶²

51. Fourteen months after the investigation was concluded, on February 17, 2003, Judge Rubio Game handed down an interlocutory order against Emilio Guerrero, presuming him guilty of the offense described in Article 466 of the Criminal Code⁶³ with an order for him to be taken into preventive custody; his arrest was ordered and, since he was a fugitive from justice, the procedure was suspended until such time as he appeared or was detained. In addition, the charges against Wilson Minchala were provisionally dismissed, given a lack of evidence of his criminal responsibility.⁶⁴

52. On February 24, 2003, Emilio Guerrero lodged an appeal,⁶⁵ which was admitted.⁶⁶ However, on June 29, 2004, the Third Specialized Chamber for Criminal, Collusion, and Traffic Matters upheld all aspects of the summons for plenary proceedings issued against Emilio Guerrero and of the (provisional) dismissal of the charges against Wilson Minchala.⁶⁷ On September 17, 2004, Emilio Guerrero, who was a fugitive from justice, asked the First Criminal Judge of Guayas to set bail and to replace the preventive custody with alternative precautionary measures.⁶⁸ Four days later, on September 21, 2004, Judge Rubio Game granted the bail request.⁶⁹ On September 22, Emilio Guerrero presented the receipt for the bail deposit and requested that the preventive custody order be suspended.⁷⁰

53. On September 20, 2004, Emilio Guerrero asked the First Criminal Judge of Guayas to rule that statutory limitations had been triggered on the grounds that more than four years had gone by since the trial commencement deed was issued.⁷¹ On September 23, 2004, the complainant lodged a complaint, holding that the bail, set at US\$837, was not enough to cover costs and damages.⁷² The

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request for the expansion of the investigation. Annex 46. Prosecutor's ruling of May 13, 2002. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 154.

⁶¹ Annex 47. Document of June 3, 2002. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 157.

⁶² Annex 48. Submission of Emilio Guerrero, June 6, 2002. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 158.

⁶³ Ecuadorian Criminal Code of 1971. Art. 466. "If the blows or wounds cause an illness or inability to work lasting more than ninety days, or a permanent inability to pursue the work that the victim previously pursued on a habitual basis, or a serious illness, or the loss of a secondary organ, the punishment shall be a prison term of between one three years and a fine. If any of the circumstances in Art. 450 are involved, the punishment shall be a prison term of between two and five years, and a fine of between two hundred and eight hundred sucres."

⁶⁴ Annex 49. Resolution of February 17, 2003. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 159 and 160.

⁶⁵ Annex 50. Appeal remedy of February 24, 2003. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 162.

⁶⁶ Annex 51. Appeal remedy admitted, February 26, 2003. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 163.

⁶⁷ Annex 52. Document of the Third Specialized Chamber for Criminal, Collusion, and Traffic Matters of June 29, 2004. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 165 to 166.

⁶⁸ Annex 53. Document of September 17, 2004. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000 pp. 170 and 171.

⁶⁹ Annex 54. Document of September 21, 2004. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 180.

⁷⁰ Annex 55. Document of September 22, 2004, and certificate of judicial deposit. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, pp. 182 to 183.

⁷¹ Annex 56. Document of September 20, 2004. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 179.

⁷² Annex 57. Document of September 23, 2004. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 184.

following day, the accused lodged a complaint, seeking to have the amount of his bail reduced.⁷³ On June 28, 2005, the complaint presented the judge with an additional complaint related to the delays in the proceedings and his lack of dispatch.⁷⁴

54. On June 30, 2005, competence was assigned to the First Criminal Trial Court of Guayas⁷⁵ which, on July 5, 2005, returned the case to the First Criminal Committal Court since the accused's applications for the suspension of the preventive custody order had not been resolved.⁷⁶ On July 28, 2005, the First Criminal Committal Court suspended the preventive custody order on the grounds that the bail amount had been deposited.⁷⁷ The complainant filed applications on August 23 and on September 5 and 12, 2005, requesting that the public hearing be held.⁷⁸ On September 8, 2005, the accused asked the First Criminal Trial Court of Guayas to rule that statutory limitations had been triggered, given that more than five years had passed since the issuing of the trial commencement deed.⁷⁹

55. On September 20, 2005, the First Criminal Trial Court handed down a ruling on behalf of Emilio Guerrero finding that statutory limitations had been triggered since more than five years had passed since the trial commencement deed was issued against him, pursuant to the terms of Article 101 of the Criminal Code.⁸⁰ As a result, the complainant requested that the applicable fine be imposed on the official of the judiciary, holding that the triggering of statutory limitations was due to the lack on dispatch on the part of the judges, pursuant to the same Article 101 of the Criminal Code.⁸¹ That claim was denied, with no grounds given ("inadmissible"), on November 10, 2005.⁸²

56. With reference to the victim's health, the case file indicates that Melba del Carmen Suárez Peralta's health has not been restored; on the contrary, it has worsened, and she continues to suffer serious symptoms. It also shows that Melba del Carmen Suárez Peralta has been hospitalized and has undergone surgery on several occasions,⁸³ without, to date, the State having investigated or

⁷³ Annex 58. Document of September 24, 2004. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 185.

⁷⁴ Annex 59. Document of June 28, 2005. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 187.

⁷⁵ Annex 60. First Criminal Committal Court of Guayas, Document No. 2316-2000-JPPG of June 30, 2005. Annex 2 to the initial petition received on February 23, 2006, Case file in Plenary Proceedings No. 136-05, p. 1.

⁷⁶ Annex 61. First Criminal Committal Court of Guayas, Document No. 136-2005 of July 5, 2005. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 189.

⁷⁷ Annex 62. Suspension of preventive custody order of July 28, 2005. Annex 1 to the initial petition received on February 23, 2006, Case file in Prosecutorial Inquiry No. 2316-2000, p. 191.

⁷⁸ Annexes 63, 64, and 65. Documents of August 23 and September 5 and 12, 2005. Annex 2 to the initial petition received on February 23, 2006, Plenary case file No. 136-05, pp. 5, 7, and 16, respectively.

⁷⁹ Annex 66. Document of September 8, 2005. Annex 2 to the initial petition received on February 23, 2006, Case file in Plenary Proceedings No. 136-05, p. 15.

⁸⁰ Annex 67. First Criminal Trial Court of Guayas, Deed ruling statutory limitations of September 20, 2005. Annex 2 to the initial petition received on February 23, 2006, Case file in Plenary Proceedings No. 136-05, p. 17.

⁸¹ Article 101 of the Criminal Code: "If statutory limitations are triggered as a result of a lack of timely dispatch on the part of the judges, they shall be punished by a fine imposed by the higher court [...], without prejudice to the actions for damages admissible against such officials, pursuant to the terms of the Code of Civil Procedure. The same penalty shall apply to officials of the prosecution service and court clerks as a result of whose negligence statutory limitations are triggered." Annex 68. Document of September 22, 2005. Annex 2 to the initial petition received on February 23, 2006, Case file in Plenary Proceedings No. 136-05, p. 18.

⁸² Annex 69. First Criminal Trial Court of Guayas, Document 136/2005 of November 10, 2005. Annex 2 to the initial petition received on February 23, 2006, Case file in Plenary Proceedings No. 136-05, p. 19.

⁸³ Following the operations, an abdominoplasty was performed on her on February 15, 2006. Annex 70. Certificate from Houston Memorial Clinic Medihouston S.A., February 5, 2009. Annex 8 of the petitioner's submission received on December 14, 2009. During 2007, she received treatment on August 11 and 20, and on December 2, at the Family Medical Center (CE.ME.FA.) for stomach problems. Annex 71. Medical certificates. Annex 6 of the petitioner's submission received on December 14, 2009. On August 17, she was treated for headaches at the Kennedy Clinic, Annex 72. Medical prescriptions. Annex 5 of the petitioner's
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punished the persons responsible for her condition.⁸⁴ In addition, the Commission notes that because of her deteriorating health and grave medical condition, Melba del Carmen Suárez Peralta is unable to work; this, in conjunction with the cost of the medical treatments she requires, has affected her economic situation.⁸⁵

B. Provisions of Ecuadorian law applicable to the case

57. The Commission believes it is appropriate to offer a few preliminary reasonings on the legal provisions in force at the time of the facts in the case at hand. Thus, the Code of Criminal Procedure of 1983 (Law 134, published on June 10, 1983)⁸⁶ stated that, in general terms, criminal prosecutions were public in nature and were therefore to be brought on an ex officio basis. Article 14 provided:

Art. 14. Criminal prosecutions are public in nature. In general, they shall be brought on an ex officio basis, but private accusations shall be admissible; in the cases indicated in Art. 428 of this Code, however, they shall be brought solely by private accusation.⁸⁷

58. In addition, the CCP previously in force stated that in publicly actionable offenses, the bringing and pursuit of criminal proceedings for their investigation was the task of the Public Prosecution Service. That is regardless of the ability of the victims or their relatives to make filings as private accusers,

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submission received on December 14, 2009. In September, she was treated for nervous hypertension at the Moreno Specialties Clinic. Annex 73. Medical Certificate of September 24, 2007. Annex 4 of the petitioner's submission received on December 14, 2009. In 2008, she underwent medical examinations at the Family Medical Point. Annex 74: Documents from Family Medical Point. A series of medical examinations were carried out, and a bland diet and drug regime were imposed. Annex 7 of the petitioner's submission received on December 14, 2009. In May, she was admitted to the San Francisco Hospital for five days, on account of abdominal and precordial pain, nausea, and vomiting. Annex 75: Documents related to Melba del Carmen Suárez Peralta's admission to the San Francisco Hospital on May 18 to 22, 2008. Annexes to the petitioner's submission received on May 27, 2008. Annex 76. Medical certificate of August 8, 2008. Annex 2 of the petitioner's submission received on December 14, 2009. In August 2008, she was again hospitalized on account of precordial pain. Annex 77. Consumption in hospitalized patients as of August 8, 2008. Annex 2 of the petitioner's submission received on December 14, 2009. In addition, Melba del Carmen Suárez Peralta was admitted to the Alcívar Clinic on January 18, 2009, where she remained for six days on account of intestinal problems; on January 24, she was operated on to eliminate adhesions; on June 23, she was treated for a series of complaints including stomach pains and vomiting; and on October 20, she was admitted for five days for similar health problems. Annex 78. Alcívar Hospital, Epicrisis sheet of January 20, 2009. Annex 2 of the petitioner's submission received on December 14, 2009.

⁸⁴ At the working meeting between the parties held on November 4, 2009, during the IACHR's 137th period of sessions in Washington, D.C., Ecuador agreed to provide Melba del Carmen Suárez with free medical care through the state health network, without that implying any kind of acceptance of international responsibility by the State. Annex 79. Working meeting minutes signed on November 4, 2009. The petitioner has stated that such assistance has not materialized. Petitioner's submission, received on February 22, 2010. In response, the State contends that on November 24, 2010, it urged its Ministry of Health to take the steps necessary to ensure Melba del Carmen Suárez Peralta free care at one of the public hospitals in Guayaquil. Office of the Attorney General of the State, Document No. 13321, received on April 13, 2010.

⁸⁵ Petitioner's submission, received on February 22, 2010. Petitioner's claim not disputed by the State. See also Annex 79: Working meeting minutes signed on November 4, 2009.

⁸⁶ On January 13, 2000, Law No. 000.RO/Sup 360 was published, whereby the new Code of Criminal Procedure was issued; it came into force eighteen months after its publication (final transitory provision) and, pursuant to its first transitory provision, "Criminal proceedings already underway when this Code of Criminal Procedure comes into effect shall continue under the previous rules of criminal procedure until their conclusion, while observing the provisions of due process enshrined in the Constitution of the Republic."

⁸⁷ Article 428 of the CCP stated:

Under private accusations, criminal judges shall judge the following offenses only: (a) Statutory rape against a woman aged between sixteen and eighteen years; (b) Abduction of a woman aged between sixteen and eighteen years who consented to her abduction and voluntarily followed her abductor; (c) Defamatory slander and serious nondefamatory slander; (d) Damage to privately-owned woods, orchards, or gardens, through the felling, stripping, or destruction of trees; damage to rivers, canals, streams, hatcheries, or deposits of water, either by destroying privately-owned aqueducts, dikes, bridges, or dams, or by introducing substances intended to destroy fish and other ichthyological species; damage leading to the death or injury to horses and other domestic and domesticated animals; damage caused by the destruction of fences or any type of enclosures; the suppression or modification of boundaries, and the blocking of ditches; and (e) all other usurpation offenses not covered in the previous section.

a power that, as indicated in the Code, neither replaced nor negated the prosecutors' duty of initiating and pursuing criminal action. On this point, Article 23 stated:

Art. 23. All criminal proceedings brought before a competent court or judge for the commission of a crime require the participation of the Public Prosecution Service (MP), even proceedings involving a private accuser, provided that the offense is publicly actionable.

59. In the case at hand, the process was initiated by a private accusation lodged by the victim's mother and the subsequent opening of the investigation by the judge.⁸⁸ The investigation (*sumario*), the purpose of which was to prepare for the trial,⁸⁹ establishes short deadlines for conducting the set of proceedings leading to a criminal trial. Articles 216 and 217 of the CCP set out the duties of the judge and other parties involved in substantiating the investigation and also set sanctions for delays:

Art. 216. The judge shall ensure that the investigation is not prolonged by unnecessary procedural steps, and he shall bring it to a conclusion with the deadline set by Art. 231, allowing no motions that might delay the proceedings.

Art. 217. Secondary parts in the proceedings who, through negligence, delay the substantiation of the investigation shall be punished by the judge with a fine equal to one twentieth of the general minimum wage for each day of the delay.

Criminal courts and superior courts shall impose the same fine on lower-court judges who fail to impose the fine stipulated in the previous paragraph or who, through negligence, delay the substantiation of the investigation.

60. The CCP also regulated the deadlines for completing various phases in the investigation, in line with the spirit of brevity that characterized it. Thus, the CCP established a maximum period of 15 days for organizing the investigation and conducting the formalities necessary to prepare the trial. It also set a maximum duration of sixty days for the investigation, and established sanctions applicable in cases of noncompliance. Thus, Articles 228, 231, and 232 of the CCP provided:

Art. 228. The judge initiating proceedings must organize the investigation within a maximum of fifteen days, during which time he shall perform all the procedural formalities indicated in Art. 215.

[...]

Art. 231. When the judge notices that necessary procedural formalities have not been carried out, he shall extend the investigation for an additional fifteen days for those formalities to be completed, either performing them himself or by instructing another judge to do so. If the procedures to be followed are numerous or need to be carried out in different locations, the judge may extend the investigation phase for up to an additional thirty days. Thus, in no instance may an investigation last for more than sixty days in all, punishable by a fine equal to up to one and a half times the general minimum wage, which the higher court shall impose, under its monetary responsibility, on the negligent judge.

Art. 232. If a person is charged after the investigation begins, it shall remain open for fifteen days after the date on which the trial commencement deed and the deed expanding it to cover the newly named accused are issued.

61. Once all the procedural formalities of the investigation have been performed, the judge shall rule it concluded and order the private accuser, if any, to file formal charges. Article 235 of the CCP provided that "either with or without the filing of formal charges, the judge shall order the Public Prosecution Service to issue a ruling within the following six days." Regarding the ruling of the Public Prosecution Service, the CCP provided:

⁸⁸ According to Article 221, the investigation phase was to begin with the trial commencement deed.

⁸⁹ Article 215 of the CCP: "During the investigation phase, all procedural steps necessary to establish the existence of the crime and to name and identify its perpetrators, accomplices, and accessories after the fact shall be carried out."

Art. 237. Should the Public Prosecution Service fail to issue its ruling within the deadline specified in Art. 235 of this Code, the judge shall immediately impose a fine on it [...] for the delay, he shall notify the corresponding Collections Office to enforce it, and the receipt issued by that Office shall be included in the proceedings.

In the same order, the judge shall grant the Public Prosecution Service a further unextendable period of six days, at the end of which, should no ruling have been issued, the proceedings shall continue with the Public Prosecution Service in contempt.

62. In this way, the intermediate phase was regulated by a deadline of six days both for the ruling from the Public Prosecution Service (*supra*) and for the response of the accused, and the CCP allowed for the possibility of reopening the investigation for a period of ten days:

Art. 238. With the formalization of the charges or the prosecutor's ruling, or both, if applicable, the accused shall be given a period of six days in which to respond, with the warning that should be fail to do so, the proceedings shall continue with him in contempt.

If there are no formal charges and no prosecutor's ruling, the judge shall make himself available to hear the accused's defense counsel during a period of six days.

Art. 239. With the reply of the accused's counsel or with the accused in contempt, the judge shall issue a ruling to dismiss or to open the plenary phase, as applicable. If he notes that procedural formalities that he deems essential have not been carried out, he shall order the investigation reopened for a period of ten days for those formalities to be performed.

Art. 240. If the accuser, the Public Prosecution Service, or the defense counsel of the accused, upon application of the provisions of Arts. 235 and 238 of this Code, as applicable, see that essential procedural formalities have been omitted, they may ask the judge to reopen the investigation for those formalities to be performed, for the same period of time as indicated in the previous article.

63. Once the intermediate phase is concluded, the judge, if he finds that the existence of the crime and an assumption of the accused's guilt have been established, shall issue a deed calling for the plenary phase to begin.⁹⁰ Article 254 of the CCP stated:

Art. 254. If, when the declaration of commencement of the investigation phase is issued, the accused is a fugitive from justice, the judge shall, after issuing said declaration, order the suspension of the investigation phase until such time as the accused is apprehended or presents himself voluntarily. [...]

64. In addition, Article 101 of the Ecuadorian Criminal Code addressed the application of statutory limitations and established the following rules:

In both publicly actionable crimes and privately brought actions, the first determination shall be, once the crime is established, whether prosecution has or has not begun.

With the exception of the cases of actions and punishments to which statutory limitations do not apply specified in the final section of Article 23.2 and in the second section of Article 121 of the Constitution of the Republic, in all other publicly actionable offenses punishable by imprisonment, if no sentence is handed down, statutory limitations shall apply after ten years; for offenses punishable by special lengthier periods of imprisonment, statutory limitations shall apply after fifteen years. In offenses punishable by minor jail terms, statutory limitations shall apply after five years. These periods shall begin to run on the date on which the offense was committed.

⁹⁰ Article 253 of the CCP stated:

If the judge finds that the existence of the crime has been established and that, in addition, there are indications that the accused is the perpetrator, accomplice, or accessory after the fact of that crime, he shall issue a deed declaring the plenary phase open and shall order the accused to name defense counsel, within a period of two days.

In the same publicly actionable offenses, if prosecution has commenced before the end of those deadlines, statutory limitations shall apply to the continuation of the proceedings with the same deadlines, counting from the date on which the trial commencement deed was issued.

Should the accused report voluntarily to the judiciary within a maximum period of six months following the start of the investigation, the corresponding deadlines shall be reduced to ten years for offenses punishable special lengthier imprisonment; to eight years for other offenses punishable by imprisonment; and to four years for offenses punishable by jail terms. In those cases, the deadlines shall be calculated from the date on which the investigation begins. This rule shall not apply in cases of recidivism.

[...]

If statutory limitations are triggered as a result of a lack of timely dispatch on the part of the judges, they shall be punished by a fine imposed by the higher court of between forty-four and four hundred and thirty-seven United States dollars, without prejudice to the actions for damages admissible against such officials, pursuant to the terms of the Code of Civil Procedure.

The same penalty shall apply to officials of the prosecution service and court clerks as a result of whose negligence statutory limitations are triggered. [...]

65. Article 114 of the Ecuadorian Criminal Code provides that “statutory limitations may be declared applicable at the request of a party, or on an ex officio basis, necessarily, when the conditions set in this Code are met.”

66. Finally, Article 24 of the Ecuadorian Constitution of 1997 (dealing with the basic guarantees of due process) provided as follows:

To ensure due process, the following basic guarantees shall be observed, regardless of any others established by the Constitution, international instruments, laws, or jurisprudence: [...] 13. Resolutions by the branches of government affecting persons shall be duly grounded. A resolution shall be ungrounded if it fails to indicate the legal provisions or principles on which it is based and if it fails to explain the relevance of their application to the facts of the matter. In resolving a challenge lodged against a sanction, the situation of the appellant may not be worsened.

C. Findings of law

67. The Commission’s task is to determine whether, in the case at hand, the Ecuadorian State offered effective access to justice in accordance with the standards for a fair trial and judicial protection enshrined in the American Convention. It must also analyze the effectiveness of that access within the criminal trial conducted before the domestic courts. The Commission will not, however, analyze the individual actions of the citizens prosecuted for alleged medical malpractice against Melba del Carmen Suárez Peralta; instead, it will make a determination on the possible existence of the State’s responsibility under its obligations in connection with Articles 8.1 and 25.1 of the American Convention and in accordance with the general duties set out in Article 1.1 thereof.

1. Right to a fair trial and judicial protection in the criminal proceedings (Articles 8 and 25 of the Convention, in conjunction with Article 1.1)

68. Article 8.1 of the American Convention provides that:

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

69. Similarly, Article 25 of the Convention establishes that:

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

70. Article 1.1 of the Convention provides:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

71. Articles 8 and 25 of the American Convention enshrine the right of access to justice and specify its scope and characteristics. In turn, Article 1.1 establishes the positive duty of the State to uphold it. In the case at hand, it must be specifically determined whether the Ecuadorian State offered access to a swift and effective remedy to protect the injured party against acts that violated her rights, pursuant to Article 25.1 of the Convention, and whether the Ecuadorian State ensured the guarantees necessary for the pursuit of an effective investigation and prosecution within a reasonable time, pursuant to Article 8.1 of the Convention.

72. The Commission understands that Melba Peralta Mendoza lodged a criminal complaint on behalf of her daughter, with the aspiration of securing justice and fair compensation, to allow her to meet the costs of the medical treatments needed to resolve the weakened health situation of Melba del Carmen Suárez Peralta. In this regard, the Commission also understands that in this case, the possible lodging of a civil action for damages, established by Article 2214 of the Ecuadorian Civil Code, demanded a prior criminal ruling against the defendants, because of the prejudicial nature of criminal matters.

73. In this regard, the Commission must also refer to the impact on Melba del Carmen Suárez Peralta of having brought and pursued a criminal trial for alleged medical malpractice that concluded without a result under statutory limitations. The Commission notes that the facts reported to the judicial authorities are related to the medical attention provided to Mrs. Suárez Peralta and had permanent consequences on the alleged victim's day-to-day life, requiring several surgeries and constant medical attention. The Commission also notes that Melba del Carmen Suárez Peralta's ability to work was affected.

74. As the IACHR stated in its admissibility report, under the Ecuadorian legal system, the suitable and effective remedy for resolving the situation described in the complaint was a criminal trial.⁹¹ This, under Article 52 of the Ecuadorian Criminal Code,⁹² allowed, first, the prosecution of the parties responsible and, second, the possibility of compensation for the damages suffered by the responsible parties against whom the private accusation was brought in pursuit of that compensation.

75. The criminal proceedings initiated in the case at hand concluded when statutory limitations were triggered. On this point, the State maintained that the complainant did not pursue an appeal remedy to challenge the statutory limitations. Thus, the State contended, first, that the criminal proceedings could not be reopened since the complainant failed to pursue that appeal; nevertheless, it also maintained that the remedy in question "provides the opportunity for ratification of the order to invoke statutory limitations."⁹³

76. The Commission notes that, according to the Ecuadorian Criminal Code applicable to the case at hand, for offenses punishable by jail terms statutory limitations were triggered five years after the

⁹¹ IACHR, Report on Admissibility No. 85/08, Melba del Carmen Suárez Peralta v. Ecuador, para. 39.

⁹² Ecuadorian Criminal Code of 1983.

⁹³ Office of the Attorney General of the State, document received on August 20, 2009.

date of the trial commencement deed. In other words, statutory limitations applied *de iure* on account of the passage of time in accordance with the terms of the law. In addition, Article 398 of the Criminal Code required judges hearing criminal matters to refer orders declaring statutory limitations for consultation by a higher court.⁹⁴ The Commission consequently believes that in this case, an appeal against the statutory limitations order was not a suitable remedy for reversing that decision or – contrary to the State's contentions – the only possible way to reopen the proceedings, in that an *ex officio* consultation was needed.

77. On this point, the IACHR further notes that the expiration of the criminal proceedings in the case at hand does not automatically trigger the State's international responsibility; to make such a determination, the effectiveness of the remedy provided for in Article 25 of the Convention must be analyzed in light of compliance with the due guarantees established in Article 8 – in particular, as regards "reasonable time" under the following criteria: complexity of the matter, actions of the judicial authorities and the impact of the duration of the proceedings, and the procedural activity of the affected individuals.⁹⁵ This analysis will be performed regardless of the fact that it is the duty of the State, in its capacity as the bringer of punitive action, to initiate and pursue procedures toward identifying, and, potentially, prosecuting and punishing those responsible by diligently carrying through all phases in the proceedings to their conclusion.⁹⁶

a. Complexity of the matter

78. The petitioner claims that in the case at hand, there was an unwarranted delay in the administration of justice; however, the State contends that it acted with diligence but that the matter is highly complex, in that establishing medical negligence and the corresponding penalties demands numerous technical and scientific studies that must be carefully analyzed by the judge.

79. The Commission believes that this case involves certain aspects that could make it complex by reason of their relationship with medical science; however, an analysis of the case file fails to indicate that the delay in the proceedings was due to the analysis of those matters or technical evidence. It further believes that the limit of five years set by law for the activation of statutory limitations should have been enough, in light of that complexity, for the Public Prosecution Service and the judicial authorities to investigate and rule on the case. These considerations, together with the level of progress in the proceedings (which will be analyzed below), indicate that the complexity of the matter was not a determining factor in the lack of effectiveness of the remedy in the case at hand.

b. Actions of the judicial authorities and impact of the duration of the proceedings

80. The petitioner claims that the State is responsible for failing to prosecute the health professionals accused of medical malpractice with respect to Ms. Suárez Peralta, while the State maintains that it provided adequate remedies and upheld the guarantee of reasonable time.

81. The obligation of conducting an investigation and of prosecuting and punishing those responsible for criminal human rights violations is a nondelegable duty of the State. On this point, the IACHR has stated that whenever a publicly actionable offense is committed, the State has the obligation

⁹⁴ Article 398 stated:

Criminal judges shall be required to refer all dismissal rulings to the corresponding superior court for consultation purposes.

Orders declaring the activation of statutory limitations in public criminal actions shall also be referred for consultation, by both criminal courts and criminal judges.

⁹⁵ See: I/A Court H. R., *Case of Valle Jaramillo et al. v. Colombia*, Judgment of November 27, 2008, Series C No. 192, para. 155.

⁹⁶ IACHR, Report No. 27/99, Case 11.697, Ramón Mauricio García-Prieto Giralt, March 9, 1999, para. 40.

of bringing criminal proceedings and pursuing them to their conclusion.⁹⁷ In turn, the Inter-American Court has said that the obligation of conducting an investigation “must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.”⁹⁸

82. Now, a breach of the State’s obligation of investigating does not occur simply because no one has been convicted or because, in spite of the efforts made, it was impossible to establish the facts. However, the judicial investigation must be undertaken in good faith in a diligent, exhaustive, and impartial fashion, and it must be aimed at exploring all the possible lines of inquiry to identify the perpetrators of the crime with a view to their subsequent prosecution and punishment.⁹⁹ To this end, Ecuadorian domestic law establishes guarantees, including the obligation of the Public Prosecution Service to pursue *ex officio* proceedings and the obligation of the judges who hear cases to act diligently and promptly.¹⁰⁰ In the addition, Ecuadorian laws stipulate the right to health as a fundamental human right and establish the obligation of the State to regulate health services provided to people subjected to its jurisdiction, directly or through third parties.¹⁰¹

83. It is not the function of the IACHR to serve as a fourth instance with respect to matters settled by the domestic courts. However, when the actions of the State’s authorities lead to a failure in the guarantees protected at the domestic and inter-American levels – hindering the right of access to justice associated with a claim related to the right to health, a public service protected by the States¹⁰² and violating the right to a fair trial and judicial protection, a detailed analysis of the diligence with which the two phases of the criminal trial were pursued during the permitted five-year period is called for. On this point, for example, it can be seen that:

- a) Article 216 of the CCP (*supra* IV B) stated that judges must ensure that investigations are not overly long and are concluded within a maximum of sixty days (*supra* IV B); however, the judge ruled the investigation closed seven months after it had been opened.¹⁰³
- b) On October 11, 2001, the judge ordered the second reopening of the investigation (*supra* IV B), on this occasion for a period of 10 days. On November 27, more than a month after the expiration of that ten-day period, the judge ruled the reopened investigation concluded.¹⁰⁴

⁹⁷ IACHR, Report No.52/97, Case 11.218, Arges Cerqueira Mangas v. Nicaragua, para. 96.

⁹⁸ I/A Court H. R., *Case of Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Series C No. 1, para. 177.

⁹⁹ IACHR, Annual Report 1997, Report No. 55/97, Case 11.137 (Juan Carlos Abella *et al.*), Argentina, para. 412. In connection with this point, see *also*: IACHR, Annual Report 1997, Report No. 52/97, Case 11.218 (Arges Sequeira Mangas), Nicaragua, paras. 96 and 97.

¹⁰⁰ See Articles 14, 23, 216, 217, 228, 231, 232, 237, 238, 239, and 240 of the Code of Criminal Procedure, *supra* paras. 60-65.

¹⁰¹ Article 42 of the Constitution of 1998 establishes that the State will “guarantee the right to health, its promotion and protection [...] and the possibility of permanent and uninterrupted access to health services, in conformity to the principles of equity, universality, solidarity, quality and efficiency”. Additionally, Article 44 refers that the State will “formulate a national health policy and will oversee its application; control the functioning of the entities of this sector [...]” and Article 45 establishes that the State will “organize a national system of health, that will be integrates with public, autonomous, private and community entities of the sector [...]”.

¹⁰² I.A. Court, *Ximenes Lopes Case*. Judgment of July 4, 2006. Series C No. 149, para. 89.

¹⁰³ See: Annex 6. Trial commencement deed of August 16, 2000; and Annex 17. Declaration of conclusion of investigation, March 22, 2001. See also the request for the expansion of the investigation to cover Dr. Wilson Minchala Pinchú, which was resolved by the judge two months later. Annex 20. Request for expansion of investigation, dated June 7, 2001; and Annex 21. Order expanding the investigation.

¹⁰⁴ See: Annex 27. Declaration of conclusion of investigation, September 19, 2001; Annex 29. Reopening of investigation, October 11, 2001; and Annex 42. Declaration of conclusion of investigation, November 27, 2001.

c) On November 29, 2001, two days after the investigation was closed, the complainant filed a formal accusation against Jenny Bohórquez who, as stated in her own testimony, was the lead surgeon on the operation during which Ms. Suárez Peralta was injured (*supra* IV A). However, there is no record of either the court or the prosecution service taking any steps in connection with the complainant's application.¹⁰⁵

d) On May 13, 2002, five months after the second reopening of the investigation was concluded, the First Criminal Prosecutor of Guayas requested the voiding of all the proceedings since the investigation was expanded to cover Wilson Minchala, even though that had taken place nine months earlier (*supra* IV B).¹⁰⁶

e) It was not until February 17, 2003, fourteen months after the investigation was closed, that the judge issued a resolution against Emilio Guerrero and, since he was a fugitive from justice, the proceedings were suspended until such time as he appeared or was captured (*supra* IV B).¹⁰⁷

f) There is no evidence indicating that the State took any steps to apprehend the fugitive defendant, in spite of the terms of Article 254 of the CCP, where the plenary phase was to be suspended "until the accused is apprehended or appears voluntarily" (*supra* IV B).¹⁰⁸

g) On February 24, 2003, Emilio Guerrero filed an appeal, which the Third Specialized Chamber for Criminal, Collusion, and Traffic Matters took 16 months to resolve,¹⁰⁹ notwithstanding Article 350 of the CCP, which required such remedies to be resolved with a period of 15 days.¹¹⁰

84. In light of this, the Commission notes the passive role of the prosecution service and the lack of diligence of the judge in the case at hand. The investigation was opened to investigate "Emilio Guerrero Gutiérrez, plus accomplices or accessories after the fact" in the crime allegedly committed against Ms. Suárez Peralta. However, in the five years that went by, few procedural formalities were carried out, in spite of the complainant's constant requests, and neither the chief defendant or his possible accomplices were subjected to an effective investigation.

85. It is worth noting that one of the procedural acts that were practiced was the verification of the working situation of Mr. Emilio Guerrero;¹¹¹ as a result, it was verified that Guerrero Gutiérrez had

¹⁰⁵ See: Annex 36. Request for investigation to be extended to Jenny Bohórquez, October 29, 2001; and Annex 39. Statement of Jenny Bohórquez, November 13, 2001.

¹⁰⁶ See: Annex 21. Order expanding the investigation to cover Wilson Minchala, August 14, 2001; Annex 27. Declaration of conclusion of investigation, September 19, 2001; and Annex 46. Prosecutor's ruling of May 13, 2002.

¹⁰⁷ See: Annex 48. Resolution of February 17, 2003.

¹⁰⁸ The case file indicates that while Mr. Guerrero was a fugitive from justice, he requested the replacement of the preventive custody order with alternative precautionary measures and the granting of bail; this request was granted four days later. See: Annex 53. Document of September 17, 2004; and Annex 54. Document of September 21, 2004.

¹⁰⁹ See: Annex 50. Appeal remedy of February 24, 2003; and Annex 52. Document of the Third Specialized Chamber for Criminal, Collusion, and Traffic Matters of June 29, 2004.

¹¹⁰ Ecuadorian CCP of 1983, Art. 350:

Deadline for resolving remedies: In the event of an appeal against the ruling described in the first three sections of Article 348, once the proceedings have been received by the corresponding superior court, it shall resolve the remedy on the merit of the documents within a period of fifteen days from the date on which the proceedings were received."

should it fail to resolve it within the period indicated, any of the parties in the proceedings may request the Prosecutor General to impose a fine equal to half the general minimum wage on each of the negligent judges."

¹¹¹ Anexo 10. Oficios de diligencias. Anexo 1 a la petición inicial recibida el 23 de febrero de 2006, Expediente de la Instrucción Fiscal No. 2316-2000 entre fojas 27, 37 y 54.

not initiated the procedures for work permit nor for approval of his professional license in Ecuador.¹¹² In this regard, the Commission notes that the Ecuadorian Health Code regulated all matters related to public or private health and established a procedure for the exercise of the medical profession.¹¹³ In addition, the “Law of the Ecuadorian Medical Federation for exercise, improvement and professional defense” establishes the procedure for doctors who obtained their degrees abroad, to be admitted to practice in the country.¹¹⁴ Nevertheless, the verification did not have any consequence in the search for justice and reparation for the victims at the internal level.

86. It should be noted that although the complaint was lodged for the investigation of any accomplices and accessories after the fact, no *ex officio* investigation was opened against Drs. Minchala and Bohórquez until the complainant requested the expansion of the investigation. As a result of the authorities’ lack of procedural dispatch, it was the complainants who had to request and formalize the accusation against each of the possibly implicated parties, based on their own monitoring of the proceedings. The State failed to conduct a comprehensive investigation of the alleged facts, even though the information on the Minchala Clinic was furnished by the complainants at the start of the process, in their original filing. The fragmentary nature of the investigation made a significant contribution to its lack of dispatch.

87. Thus, the proceedings were characterized by the failure to pursue matters on an *ex officio* basis and an absence of minimal guarantees of due diligence. The lack of response and delays in pursuing the proceedings led to the impunity of the possible guilty parties, in that the deadline for statutory limitations fell due on August 16, 2005, and prescription was declared the following September 20.¹¹⁵

88. The IACHR addressed this point in its 1997 Report on the Situation of Human Rights in Ecuador. On that occasion, it noted that many violations of fundamental rights stemmed from shortcomings in the administration of justice, that delays were particularly common in the criminal justice system, and that according to the information received, in “extreme cases, delay [could] result in a form of legally sanctioned impunity for the perpetrators of violations.”¹¹⁶

¹¹² Anexo 11. Oficio No. 075-SERH-MIG-2000 de 1° de septiembre de 2000. Anexo 1 a la petición inicial recibida el 23 de febrero de 2006, Expediente de la Instrucción Fiscal No. 2316-2000 foja 44.

¹¹³ Supreme Decree 188, Official Registry 158 of February 8, 1971, Articles 2, 174. Article 174 established that for the exercise of the medical professions “it is required to have obtained or revalidated the academic degree by the universities [...]. Those degrees have to be registered in the National Counsel for Higher Education CONESUP, in the Registry of Medical Professions of the Ministry of Health and in the Provincial Health Direction of the Geographic area where the profession has to be exercised.”

¹¹⁴ Article 1 establishes that for doctors to exercise legally the profession in the country “they must affiliate themselves to the Provincial Medical Schools previous compliance with the Rural Medicature and the inscription of the degree in the Ministry of Health”. In addition, Article 34 established that: “only doctors that would have legally obtained their professional degree in Ecuador or that would have duly revalidated the degree obtained abroad and that finding themselves protected by international treaties in force for Ecuador, be subjected to the legal provisions applicable, will be admitted to the exercise of the profession in the country. The degrees obtained like that will be registered in the Ministry of Public Health, having to observe the inscription established in Article 174 of the Code of Health, previous compliance with what is established in Article 175 of the same Code and the Rural Medicature.” Law of the Ecuadorian Medical Federation for exercise, improvement and professional defense (Supreme Decree No. 3576-A) available at: <http://www.galeno21.com/SECCIONES%20DE%20APOYO/NOVEDADES/a13.htm>.

¹¹⁵ In this regard, the Inter-American Court has ruled that the termination of the right to bring punitive action as a result of the passage of time is a guarantee that needs to be duly observed by the judge for the benefit of any defendant and that it is inapplicable to criminal actions where gross human rights violations in the terms of international law are involved. It has also ruled that the inadmissibility of statutory limitations does not apply if the facts of the case are not covered by the nonprescriptibility provisions of the corresponding international treaties, as in the instant case. I/A Court H. R., *Case of Albán Cornejo et al. v. Ecuador*, Judgment of November 22, 2007, Series C No. 171, para. 111. See also: I/A Court H. R., *Case of Barrios Altos v. Peru*, Judgment of March 14, 2001, Series C No. 75, para. 41; *Case of Almonacid Arellano v. Chile*, Judgment of September 26, 2006, Series C No. 154, para. 110; and *Case of the La Rochela Massacre v. Colombia*, Judgment of May 11, 2007, Series C No. 163, para. 294.

¹¹⁶ The Inter-American Commission spoke about the right to judicial remedies and the administration of justice in its 1997 Report on the Situation of Human Rights in Ecuador. On that occasion, it noted that many violations of fundamental stemmed from shortcomings in the administration of justice, that delays were particularly common in the criminal justice system. See: See, IACHR, cont.

89. The IACHR must point out that the established precedent of the inter-American system holds that the guarantee of an effective remedy is one of the basic pillars of the Convention. That means that for the State to be in compliance with Article 25 of the Convention, those resources must not only exist: they must be effective in accordance with the rules of due legal process, serve to restore the infringed right, if possible, and redress the harm produced.¹¹⁷ This is particularly applicable, since their purpose should be to avoid and combat impunity.

90. A remedy is effective when it produces the outcome for which it was designed; it is therefore not effective if it is illusory or excessively onerous for the victim, or when the State has not ensured its proper application by the judicial authorities. The IACHR has established that in determining the simplicity, celerity, and effectiveness of a remedy, the following must be taken into account: the possibility of establishing the existence of violations of basic rights offered by the resource; the possibility of remedying them; and the possibility of repairing the damage done and of punishing those responsible.¹¹⁸ In turn, the Inter-American Court has said that remedies involving a pattern of denial of justice cannot be deemed effective, such as when there is an unwarranted delay in issuing a decision, or when, for any reason, the alleged victim is denied access to a judicial remedy.¹¹⁹

91. Consequently, the Commission believes that both Ecuador's investigating system and criminal justice system were ineffective and contributed to the impunity in the case at hand, by reason of the negligence and failures of the authorities responsible for bringing and pursuing the proceedings. The Commission further notes that in these criminal proceedings –associated with a State duty such as the monitoring of care and health services- the passage of time had a significant impact on the victims, given the triggering of statutory limitations and the consequent inability to secure justice. For that reason, the judicial authorities should have ensured that the proceedings were conducted with greater diligence in order to resolve the case with dispatch.¹²⁰

c. Procedural activity of the affected persons

92. The Commission again states that Melba Peralta Mendoza, as an affected person, lodged a criminal complaint on behalf of her daughter, with the aspiration of securing justice and fair compensation and allowing her to meet the costs of the medical treatments needed to resolve the weakened health situation of Melba del Carmen Suárez Peralta.

93. First of all, the Commission reiterates that the obligation of pursuing criminal proceedings in the case at hand lay solely with the State, as indicated by its own laws. In a criminal case, analyzing the actions of the affected persons may be of relevance in order to determine whether their behavior had any sort of delaying effect.

...Cont.

Report on Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, April 24, 1997, Chapter III, available at: <http://www.cidh.oas.org/countryrep/Ecuador-sp/indice.htm>.

¹¹⁷ See, for example: *I/A Court H. R., Case of Albán Cornejo et al. v. Ecuador*, Judgment of November 22, 2007, Series C No. 171, para. 61.

¹¹⁸ See also: IACHR, Report No.34/98, Loren Laroye Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz, May 5, 1998, para. 81. *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129 Doc. 4, September 7, 2007, para. 248.

¹¹⁹ *I/A Court H. R., Judicial Guarantees in States of Emergency* (Arts. 27.2, 25, and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Series A No. 9, para. 24. See also: *I/A Court H. R., Case of Bámaca Velásquez v. Guatemala*, Judgment of November 25, 2000, Series C No. 70, para. 191; *Case of Ivcher Bronstein v. Peru*, Judgment of February 6, 2001, Series C No. 74, para. 137. See also: *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129 Doc. 4, September 7, 2007, para. 251.

¹²⁰ *I/A Court H. R., Case of Valle Jaramillo et al. v. Colombia*, Judgment of November 27, 2008, Series C No. 192, para. 155.

94. In this case, the petitioner claims that although the crime was publicly actionable, the complainant initiated the proceedings and urged the justice authorities to substantiate it to prevent the triggering of statutory limitations. In contrast, the State holds that the complainant failed to pursue the appropriate, effective remedies that its justice system provided. It states that Ecuadorian law offered the possibility of filing for recusal (which would be an effective means to speed up the process if the justice administration had brought it to a halt).

95. Regarding the State's claim that the complainant was obliged to file for a recusal, the Commission again notes that the case at hand involves the alleged crime of causing personal injuries, which is a publicly actionable offense. Consequently, the State, through the agencies of its justice administration, held sole responsibility for bringing the prosecution and pursuing it until its conclusion;¹²¹ hence, the affected parties in the case were under no obligation to file for a recusal in order to speed up the proceedings.

96. Second, the Commission notes that the affected parties, Melba del Carmen Suárez Peralta and her mother, actively participated in the investigation and the proceedings and that, in addition to complying with the authorities' requests, they both filed applications for formalities to be carried out and complaints to protest the delay and to speed up the proceedings,¹²² and that those motions were ineffective. Consequently, the Commission believes that in the case at hand, the procedural activity of the affected parties was not a factor behind the delay, nor did it affect the timely substantiation of the proceedings; on the contrary, their procedural activity was diligent.

97. The IACHR reiterates that in order to provide an appropriate resource for remedying a situation about which a complaint is filed, it falls to the State, in its capacity as the bringer of punitive action, to initiate and pursue procedures to identify and, ultimately, prosecute and punish the guilty, following each step in the proceedings until their conclusion.¹²³

98. In light of the above analysis on whether the time taken was reasonable, the Commission holds that the violation of the guarantees of due process and reasonable time rendered illusory the remedy afforded by domestic law for protecting the victim against acts that could violate her rights. In consideration of the above analysis, the Commission holds that Melba del Carmen Suárez Peralta and her mother, Melba Peralta Mendoza, were in a situation of defenselessness and were therefore prevented from obtaining the proper prosecution of the suspected perpetrators of the offense they reported on account of circumstances beyond their control and in spite of their own diligent participation in the proceedings.

99. Consequently, the Commission concludes that the State did violate the right of Melba del Carmen Suárez Peralta and of Melba Peralta Mendoza to a fair trial and to judicial protection, enshrined

¹²¹ IACHR, Report No.7/06 *Laura Albán Cornejo and others v. Ecuador*, February 28, 2006, para. 46.

¹²² Thus, following the private accusation against Emilio Guerrero, Melba Peralta Mendoza – the victim's mother – on August 7, 14, and 28, 2000, filed requests for the judge to carry out such formalities as assessing the private accusation, inspecting the place of the facts, ordering an examination and evaluation of Melba del Carmen Suárez Peralta, and certifying Emilio Guerrero's contract; and, on September 18 and 20, October 16, November 14, and December 27, 2000, the complainant asked the judge to issue a warrant for the accused's arrest and filed a complaint for his delay in processing her documents and in responding to her requests that the place of the facts be inspected. In the year 2001, she requested that the investigation be expanded to cover Wilson Minchala on June 7; on September 13, she requested the closure of the investigation because the allotted time had expired; on September 25, she filed a formal accusation against the two physicians; on October 18, she lodged a complaint for the delay in the proceedings; on October 29, she requested that the investigation be extended to cover Dr. Jenny Bohórquez; on November 13 and 20, she requested that the investigation be closed to prevent further delays in the proceedings; and on November 29, she filed a formal accusation against Jenny Bohórquez. In 2002, on June 6 the complainant challenged the prosecutor's ruling voiding the proceedings, holding it to be contrary to law, and, on September 23, she filed a complaint about the amount at which Emilio Guerrero's bail had been set. In 2005, the complainant filed a complaint regarding the delays in the proceedings and the failure to issue prompt rulings on June 28; and on August 23 and September 5 and 12, 2005, she requested that the public judgment hearing be held, even though statutory limitations had been triggered on August 16, 2005.

¹²³ IACHR, Report No. 27/99, Case 11.697, Ramón Mauricio García-Prieto Giralt, March 9, 1999, para. 40.

in Articles 8.1 and 25.1 of the American Convention, in conjunction with Article 1.1 thereof, through the delays and failings of its judicial authorities in bringing and pursuing the criminal proceedings.

2. Right to a fair trial in connection with the action brought against the judge for his “lack of timely dispatch” (Article 8 of the Convention, in conjunction with Article 1.1)

100. Inter-American precedent has established that when criminal action is brought against private citizens, judges must ensure observance of the rules of due process by enabling the unrestricted exercise of the guarantees set out in Article 8 of the American Convention.¹²⁴ That guarantee is also provided for in Ecuadorian domestic law and its nonobservance, in cases such as the one at hand, leads to the imposition of penalties (*supra* IV B).

101. As indicated in the established facts, once the court had ruled that statutory limitations had been triggered, the complainant requested that a fine be imposed, in compliance with the provisions of Article 101 of the Criminal Code, holding that the prescription of the case was due to the judges’ lack of timely dispatch.¹²⁵ That claim was denied, with no grounds given (“inadmissible”), on November 10, 2005.¹²⁶

102. The IACHR wishes to point out that the guarantees established by Article 8.1 of the Convention must be upheld in all the different proceedings in which state agencies adopt decisions in the determination of individuals’ rights and that, in all instances, the guarantees intended to ensure that such decisions are neither arbitrary nor unjust must be observed.¹²⁷

103. As reference, Article 66.23 of the Ecuadorian Constitution establishes the right to address complaints and requests to the authorities and to receive attention and grounded replies. In addition, Article 76.I of the Constitution states that due process shall be ensured in all proceedings in which rights and obligations of any kind are established, including such guarantees as “resolutions by the branches of government shall be grounded” and the provision that administrative actions, resolutions, or judgments that are not duly grounded shall be deemed void of effect.

104. Hence, the need to indicate grounds that are related to the reasonableness of a decision is – in general, with the exception of those cases where the decision is a mere formality – a guarantee of due process and, applying Article 8 of the Convention to the case at hand, it must be understood as including the right of people under the jurisdiction of the Ecuadorian State to grounded decisions that indicate both the considerations of law and the considerations of fact.¹²⁸

¹²⁴ IACHR, Report No.7/06, Laura Albán Comejo and others v. Ecuador, February 28, 2006, para. 61. I/A Court H. R., *Case of Bulacio v. Argentina*, Series C No. 100, Judgment of December 8, 2003, opinion of Judge Ricardo Gil Lavedra.

¹²⁵ Article 101 of the Criminal Code: “If statutory limitations are triggered as a result of a lack of timely dispatch on the part of the judges, they shall be punished by a fine imposed by the higher court [...], without prejudice to the actions for damages admissible against such officials, pursuant to the terms of the Code of Civil Procedure. The same penalty shall apply to officials of the prosecution service and court clerks as a result of whose negligence statutory limitations are triggered.” Annex 68. Document of September 22, 2005.

¹²⁶ Annex 69. First Criminal Trial Court of Guayas, Document 136/2005 of November 10, 2005. Annex 2 to the initial petition received on February 23, 2006, Case file in Plenary Proceedings No. 136-05, p. 19.

¹²⁷ I/A Court H. R., *Case of Claude Reyes*, Judgment of September 19, 2006, Series C No. 151; *Palamara Iribarne Case*, Judgment of November 22, 2005, Series C No. 136, para. 164; *Yatama Case*, Judgment of June 23, 2005, Series C No. 127, para. 149; and *Ivcher Bronstein Case*, Judgment of February 6, 2001, Series C No. 74, para. 104.

¹²⁸ In the case of *Lori Berenson v. Peru*, for example, the Commission held that in addition to the guarantees enshrined both sections of Article 8 of the Convention, those arising from general principles of law were also applicable, provided that the case in question entailed an impairment of the right of defense of one of the parties. As the Inter-American Court has ruled, “by labeling these guarantees as minimum guarantees, the Convention assumes that other, additional guarantees may be necessary in specific circumstances to ensure a fair hearing.” I/A Court H. R., *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46.1, 46.2.a, and 46.2.b of the American Convention on Human Rights)*, Advisory Opinion OC-11/90 of August 10, 1990, Ser. A No. 11, para. 24.

105. Giving a grounded ruling on the admissibility or otherwise of the penalty sought was the task of the competent Ecuadorian jurisdictional organ alone. On this point, the Commission must point out that the matter at hand is the international responsibility of the State for violating the human rights of the victims in the case at hand and that its analysis does not represent a ruling on whether or not the filed remedy should have been admissible or not, simply that the answer given to it had to be in line with the guarantees of the Convention. In light of the foregoing, the failure to indicate any grounds in the response to the complainant's filing entails a violation of the right to a fair trial enshrined in Article 8 of the American Convention, in conjunction with Article 1.1 thereof.

V. CONCLUSIONS

106. In accordance with the legal and factual considerations set out in this report, the Commission concludes that the Ecuadorian State did violate the right to a fair trial and to judicial protection enshrined in Articles 8.1 and 25.1 of the American Convention, in conjunction with the general obligation of respecting and ensuring those rights set out in Article 1.1 thereof, with respect to Melba del Carmen Suárez Peralta and her mother, Melba Peralta Mendoza.

VI. RECOMMENDATIONS

107. Based on the foregoing considerations of fact and law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS:

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

2. Adopting the measures necessary to provide appropriate redress to Melba del Carmen Suárez Peralta and to her mother, Melba Peralta Mendoza, for the human rights violations identified in this report, including both material and moral damages. Given the particular nature of the facts in this case, this redress must include payment of the expenses incurred by the victims in their pursuit of justice and a recognition of international responsibility and public apology by the State;

3. Adopting the measures necessary to provide the required medical attention, immediately and without charge, through its specialized health agencies, and at the place of residence of Ms. Suárez Peralta, including the medicines she requires and with consideration for her ailments;

4. Adopting the measures necessary to ensure that the laws related to the exercise of the medical profession are regulated and effectively implemented, in accordance with the national and international standards in the matter; and

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