

REPORT No. 102/13

CASE 12.723

MERITS

TGGL

ECUADOR

November 5, 2013

I. SUMMARY

1. On June 26, 2006, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission”, “the Commission” or “IACHR”) received a complaint submitted by Iván Patricio Durazno Campoverde¹ (hereinafter “the petitioners”) in favor of TGGL² (hereinafter “the alleged victim” or “the girl TGGL”), arguing the international responsibility of the Republic of Ecuador (hereinafter “the State of Ecuador”, “the Ecuadorian State” or “Ecuador”) for an alleged contraction of the HIV virus by the girl – then aged 3 years - on June 22, 1998, via a blood transfusion given at the Pablo Jaramillo Humanitarian Clinic Foundation. According to the petitioners, the blood used in the transfusion originated in the Azuay Red Cross Blood Bank without the necessary blood serum tests being undertaken. They alleged that the girl TGGL has been the victim of discrimination and that neither the criminal nor civil trials have provided a solution to the situation. According to the petitioners, the State is responsible for both, the infection and its grave consequences.

2. For its part, in its single submission at the admissibility stage, the State alleged that domestic remedies had not been exhausted, a point that was duly analyzed in the admissibility report. As regards the merits, the State of Ecuador pointed out that it is not responsible for the infection since both the hospitals where TGGL received treatment and the Red Cross, are private law institutions. Similarly, it indicated that the allegations of supposed discrimination were vague and do not involve any state authority whatsoever. Lastly, the State pointed out that it is not responsible for the petitioners’ “disagreements” with the decisions issued by the local courts.

3. After examining the position of the parties, the Inter-American Commission concluded that the State of Ecuador was responsible for the violation of the right to a dignified life, personal integrity, and judicial guarantees and protections, laid down in Articles 4, 5, 8 and 25 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) in conjunction with the obligations established in Article 1.1 of the same instrument to the prejudice of TGGL. Incidentally, the Commission also concluded that the State of Ecuador failed to fulfill its obligations of special protection towards TGGL in her status as a child, in violation of Article 19 of the American Convention. Additionally, the Commission concluded that the State of Ecuador was responsible for violation of the rights to moral integrity and the rights to judicial guarantees and judicial protection, enshrined in Articles 8 and 25 of the American Convention in conjunction with the obligations established in Article 1.1 of the same instrument in prejudice of the mother and brother of TGGL. Consequently, the Commission issued the appropriate recommendations.

II. PROCEEDINGS BEFORE THE IACHR

4. On June 26, 2006, the Commission received the initial petition filed by Mr. Iván Durazno Campoverde.

5. The Admissibility Report issued on August 7, 2009, includes a detailed description of the proceedings carried out from the presentation of the petition until the decision on admissibility.³ In this

¹ Subsequently, the attorneys Gustavo Quito Mendieta and Susana Larriva joined the claim as co-petitioners.

² As the Commission stated in its Admissibility Report, despite the lack of an express request by the petitioners, the alleged victim’s identity was protected. In addition, confidentiality was extended to TGGL’s mother and the blood donors.

³ IACHR, Report No. 89/09 (Admissibility), Petition 663/06, TGGL, Ecuador, August 7, 2009, paras. 4 and 5. Available at the following website: <http://www.cidh.oas.org/annualrep/2009eng/Ecuador663.06eng.htm>.

report, the IACHR declared the petition admissible *vis-à-vis* the possible violation of the rights enshrined in Articles 4, 5, 8, 19 and 25 of the American Convention, in conjunction with the obligations established in Article 1.1 of the same instrument.⁴

6. On August 11, 2009, the Commission notified the said report to the parties and by virtue of Article 38.1 of the Rules of Procedure then in force, fixed a time limit of two months for the petitioners to present their additional observations on the merits. Additionally, in accordance with Article 48.1 f) of the Convention, the Commission placed itself at the disposal of the parties to reach an amicable solution.

7. On October 16, 2009, the petitioners submitted their additional observations on the merits, which were sent to the State of Ecuador on December 29, 2009. The Commission requested that the State file its additional observations on the merits within two months, in accordance with Article 38.1 of the Rules of Procedure then in force.

8. On March 2, 2010, May 3, 2011, and June 4, 2013, the petitioners submitted additional briefs, which were sent to the State of Ecuador for its observations. As at the date of approval of this report on the merits, the State of Ecuador has not presented its observations on the merits of the case, nor has it responded to any of the communications forwarded by the IACHR after the admissibility report.

III. POSITIONS OF THE PARTIES

A. The Petitioners

9. The petitioners observed that on June 20, 1998, the girl TGGL, then three years old, was admitted to the Catholic University Hospital in the city of Cuenca, in the province of Azuay, and remained there for three days, after which she was taken to the Pablo Jaramillo Crespo Humanitarian Clinic Foundation (hereinafter "the Humanitarian Clinic"). They pointed out that there she was diagnosed with thrombocytopenic purpura and needed an urgent blood transfusion. Therefore her family and acquaintances requested two pints of blood and two of platelets from the Azuay Provincial Red Cross in the city of Cuenca (hereinafter "the Red Cross"). They stated that the blood originated from the donor HS, a family acquaintance, and that the blood was donated to the Humanitarian Clinic on June 22, 1998, and administered to the child, the same day.

10. The petitioners alleged that it was the day after the transfusion that the Red Cross obtained the results of Mr. HS's HIV test. At the time of the donation, he did not know that he was a carrier of the virus. They indicated that a few days later, the Director of the Red Cross Blood Bank (hereinafter "the Blood Bank") ordered an HIV test on the child TGGL, which gave a positive result. The petitioners stated that gynecological tests were undertaken to ascertain other possible routes for the infection.

11. The petitioners alleged that the State is responsible for the provision of 'safe blood' through entities such as the Ecuadorian Red Cross and that it has therefore failed to fulfill its obligation to ensure the right to life, to personal integrity and the health of the girl TGGL.

12. They indicated that the mother of TGGL presented a criminal claim from 1998 in order to establish the responsibility of the workers of the *Cruz Roja Provincial del Azuay*. They added that she also presented a civil action in 2002 in order to obtain compensation for damages. They stated that the state of limitations was applied to the only person called for trial. According to the petitioners, that happened as a consequence of the lack of action on the part of the judges. They indicated that, in such circumstances, with no criminal conviction, the civil procedure was nullified in 2006 and, therefore, it was not possible to obtain any moral reparation of the damages caused to TGGL.

⁴ IACHR, Report No. 89/09 (Admissibility), Petition 663/06, TGGL, Ecuador, August 7, 2009, operative para. 1. Available at the following website: <http://www.cidh.oas.org/annualrep/2009eng/Ecuador663.06eng.htm>.

13.As regards the impact on TGGL’s life, they emphasized that social rejection and discrimination have lead to isolation and caused her to suffer from a psychological disorder. They added that she has been prevented from attending primary school due to her illness and that the family have limited financial resources and lack the necessary means to obtain anti-retroviral medicines which they describe as scarce in the country and expensive on the market. They stated that the girl and her mother are surviving on the “charity of the kind people of Cuenca”, occasionally organizing raffles and lotteries to obtain some benefits.

14.They stated that a number of State authorities such as the Governor of Azuay and officials from the Ministry of Justice have been made aware of the situation, but no measures have been adopted to address it. They added that this latter authority pointed out that since there was a petition pending before the IACHR, they had to await a definitive decision before providing aid.

B. The State

15.The State of Ecuador did not present observations at the merits stage. Bearing in mind that questions of competence and admissibility have already been decided in the admissibility report, the Commission will only restate those arguments presented by the State at the admissibility stage which may be relevant to the decision on the merits of the case.

16.The State pointed out that in terms of international responsibility “(...) the crucial point is to find out whether a specific violation has taken place with the support or tolerance of the State or whether the latter has acted in a manner ensuring that the violation has taken place without any preventive action or with impunity (...)” In this regard, it pointed out that the infection of the girl TGGL with the HIV virus and the alleged humiliation and social discrimination suffered by her are not attributable to state agents.

17.According to the State, the International Committee of the Red Cross is an association created pursuant to the Swiss Civil Code, according to the functions established in the Geneva Conventions. It added that both the International Committee of the Red Cross and the Red Cross of Ecuador have “international legal personality” or a “separate status”. From the above, the State concluded that it is free from “any responsibility” relating to the facts of the present case.

18.As regards the domestic proceedings, it alleged that it was the family of TGGL that allowed the criminal trial to expire and that they delayed the continuance or the examination of the case. According to the State, the family showed “negligence and little interest in pursuing the case and in obtaining the conviction of the alleged perpetrators.” It pointed out that TGGL’s mother lacked competent legal counsel in her claim before the First Special Chamber of Civil, Commercial, Leasehold, and Residual Matters of the Superior Court of Justice of Cuenca, which declared all proceedings null and void starting with the order allowing the civil suit to proceed.

19.Finally, the State alleged that faced with adverse judicial decisions, the petitioners are attempting to use the Commission as an instance to review the merits of lawfully concluded trials at the domestic level.

IV. PROVEN FACTS

20.The Commission will set out the established facts, in the following order: i) facts relating to TGGL, her health condition and blood transfusion on June 22, 1998; ii) facts that followed the transfusion; iii) the experts’ conclusions with respect to the causes of the infection; iv) facts relating to the impact upon TGGL’s life; v) facts relating to the Red Cross of Ecuador, the Blood Bank and the applicable domestic legal framework; vi) facts relating to the criminal proceedings; and vii) facts relating to the civil suit.

A. Facts relating to TGGL, her health condition and the June 22, 1998, blood transfusion

21. TGGL was born on January 8, 1995, in the city of Cuenca, in the Province of Azuay.⁵ Her mother is TL and her father is SEG⁶ (hereinafter “TGGL’s mother” and “TGGL’s father”, respectively). TGGL’s father, mother and brother are not HIV carrier.⁷

22. On June 20, 1998, TGGL, then aged three, was taken by her mother to the Catholic University Hospital⁸ where she was admitted for two days. Subsequently, TGGL’s mother took her to the Pablo Jaramillo Humanitarian Clinic Foundation where she was diagnosed with thrombocytopenic purpura⁹ and which showed that the little girl needed an urgent blood and platelet transfusion.¹⁰

23. As regards TGGL’s medical condition on admission to the Humanitarian Clinic, Doctor Pablo Arturo Monsalve indicated that “she showed signs of a serious general condition with bleeding from the nose and from the skin tissue (ecchymosis and widespread petechiae), she showed no response to pain stimuli and her vital signs showed that she was close to death.”¹¹ He added that “she showed a clinical condition characterized by hemorrhaging from different areas, both nasal, skin and mucus. Thus, on examination, she presented extreme paleness (...) with her vital signs on the verge of collapse”¹². For their part, the medical experts indicated that the constant clinical signs included epistaxis (nasal bleeding), hematemesis (blood in the vomit), signs of plateletopenia and symptoms of acute anemic syndrome, secondary to the nasal bleeding.¹³

24. Due to the indication given at the hospital as to the necessity of performing a blood and platelet transfusion, TGGL’s mother went to the Azuay Red Cross Blood Bank where she was told to bring donors.¹⁴ For this reason she asked acquaintances to help by giving blood. Among the donors was Mr. HS, who is the steady partner of a friend of TGGL’s mother.¹⁵

⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. TGGL’s Birth Certificate. Folio 219.

⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. TGGL’s Birth Certificate. Folio 219.

⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. TGGL’s mother’s brief presented on December 14, 1998, and results of the her mother’s, brother’s and father’s HIV tests, Folios 35 – 38.

⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Private Prosecution of May 16, 2001. Folios 145 and 146.

⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Pablo Monsalve of November 23, 1998. Folios 307 and 308.

¹⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. TGGL’s medical history between June 22, and 29, 1998. Folio 50. Almost totally illegible.

¹¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Pablo Arturo Monsalve Toral on October 19, 1998. Folio 279 and 280.

¹² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Pablo Monsalve of November 23, 1998. Folios 307 and 308.

¹³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witness report of Drs. Juan Peralvo Roman and Nardo Vivar Idrovo of August 16, 1999. Folios 67 to 74.

¹⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Request to reopen summary proceedings of September 14, 1999. Folios 76-78; Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. TGGL’s mother’s private prosecution of December 22, 1999. Folio 85; and Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of TGGL’s mother of November 15, 1998. Folio 284.

¹⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Request to reopen summary proceedings of September 14, 1999. Folios 76-78; Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Corte Superior Court of Justice of Cuenca. First Chamber. HS’s statement of November 18, 1998. Folio 270; and Annex 2. Court File. Second Criminal Court of Cuenca.

25. There is no dispute as to the fact that Mrs. Mariana Ramírez took the blood sample from Mr. HS on June 22, 1998¹⁶ and that she herself gave the pints of blood to the family and acquaintances of TGGL; that the platelet concentrates were handed over later that night to two friends of TGGL's mother,¹⁷ by Mrs. Bertha Regalado¹⁸; and that on the following day, June 23, 1998, Mrs. Edith Orellana performed tests for the first time – including for HIV – on HS's blood sample.¹⁹

26. There is no controversy surrounding the fact that the transfusions were carried out on June 22, 1998, and continued to be performed on the following day by staff of the Humanitarian Clinic.²⁰ In this regard, Rolando Remigio Patiño, a doctor at the Humanitarian Clinic, stated that the transfusion was performed by the nursing staff and that "total reliance was placed on the blood and platelets sent by the Red Cross."²¹

27. TGGL remained at the Humanitarian Clinic until June 29, 1998, when she was discharged.²²

B. Facts taking place after the transfusion

28. Regarding what happened after her discharge from the Humanitarian Clinic, TGGL's mother made several statements. In her own words:

Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of TGGL's brother of November 23, 1998. Folio 305

¹⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. TGGL's mother's private prosecution of December 22, 1999. Folio 85; and Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of TGGL's mother of November 15, 1998. Folio 284.

¹⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Eulalia Catalina Dávalos Landivar October 29, 1998. Folio 267; and Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Luz Elena Dávalos Landivar of October 29, 1998. Folio 268; Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Bertha Regalado of February 10, 2000. Folio not numbered between 91 and 92; Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Bertha Regalado of July 18, 2001. Folio 188.

¹⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Edith Orellana of February 9, 2000. Folio 90; Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Pablo Arturo Monsalve of February 9, 2000. Folio 91; and Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Mariana Ramírez Ramírez of December 14, 1998. Folio 33; Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Bertha Regalado of February 10, 2000. Folio not numbered between 91 and 92; Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Bertha Regalado of July 18, 2001. Folio 188.

¹⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Edith Alexandra Orellana of October 19, 1998. Folio 282.

²⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. TGGL's mother's private prosecution of December 22, 1999. Folio 85; Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Sandra Elizabeth González of October 23, 1998. Folio 281; Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Sandra Elizabeth González of November 30, 1998. Folio 307; and Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witness report of August 16, 1999, of Drs. Juan Peralvo Roman and Nardo Vivar Idrovo. Folios 67 to 74.

²¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Remigio Rolando Patiño of August 1, 2001. Folio 196.

²² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. TGGL's medical history between June 22 and 29, 1998. Folio 50. Almost totally illegible.

(...) they discharged my daughter but she had to follow a course of treatment at home, therefore Dr. Pablo Monsalve indicated that she had to follow the treatment for a period of six months and have a blood test every month, but it also turned out that ten days after leaving the Clinic I took her to Dr. Monsalve's consultation room at the Paucarbamba Clinic, where he told me to obtain another blood test to control her illness; after this, he stated that everything appeared to be normal but afterwards, on July 22, I visited Dr. Monsalve again and to my surprise he requested another blood test on my daughter, including for AIDS, so I went to the Humanitarian Clinic to do the test, who in turn sent the lab test to the Leopoldo Izquieta Pérez (illegible), where they told me that my daughter [TGGL] had the AIDS virus.²³

29. In a subsequent statement she said the following:

That afterwards, on July 8, 27, and 28, they performed blood tests on the girl at the Humanitarian Clinic and that on the latter day they said it was a special sample to be sent to Quito. That on the first days of August, Dr. Aguilar at the Humanitarian Clinic told her to go to the Izquieta Pérez Institute in order to speak to Dr. Vidal, who asked her whether the parents or donors had been to the United States, and indicated that the girl's blood was bad and that she should return when the results were back from Guayaquil. That then she visited Dr. Pablo Monsalve and that when she questioned him he answered: 'get used to the idea that the girl has AIDS from the blood transfusion, stating that it never shows in the first few days, but in the next months.' That in mid-August she visited Dr. Vidal again and he told her: 'if she received HS's blood there was nothing to be done.' That she returned to Dr. Monsalve and at the Red Cross this professional seeing the tests said that yes, TGGL was infected. That later it turned out that HS had AIDS, so that she went back to Dr. Monsalve to ask him when this was uncovered, and the doctor said that he himself had run the test the day after the donation, or perhaps on June 23, and then he knew that the gentleman had AIDS. That a few days later she returned since Dr. Monsalve had offered to continue treating TGGL and he then confessed that what happened was down to human error, was unwitting, and that he would go on treating her, giving her injections and the respective medical check-ups.²⁴

30. The available written evidence shows that on July 28, 1998, a blood test was indeed performed on TGGL at the Cuenca Laboratory of the National Institute of Hygiene and Tropical Medicine, with the result of "presence of HIV antibodies, micro-ElISA double reactivity".²⁵ On August 13, 1998, a blood sample test No.11196 under the name "TG" was performed at the request of the National Institute of Hygiene and Tropical Medicine, the Cuenca Laboratory. The results of this confirmatory test were "immunoelctrotransfer Western Blot for HIV 1-2, POSITIVE".²⁶ On January 15, 1999, a blood test was again performed on the TGGL, resulting in "the presence of HIV antibodies, micro-ElISA double reactivity."²⁷

31. For his part, Mr. HS stated at the criminal trial that approximately two weeks after donating blood, he was called by the Red Cross to ask him to come in to take other samples since "the vials had been watered down." He pointed out that he asked the nurse why they needed a new sample and whether there was any

²³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of TGGL's mother of November 15, 1998. Folio 284.

²⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of TGGL's mother of November 23, 1998. Folio 303.

²⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Result of TGGL's blood test of July 28, 1998. Folio 42.

²⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Result of TGGL's blood test of August 13, 1998. Folio 43.

²⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Result of TGGL's blood test of January 15, 1999. Folio 46.

problem with his blood; they replied that he should not worry, that “it was to maintain the sample at the Red Cross.” He added that a week later they called to inform him that he was infected with the HIV²⁸ virus, and then other tests were performed confirming that he was infected with HIV.²⁹

C. Regarding the current evidence as to the cause of the infection

32. At the request of TGGL’s mother, in October 1998, a gynecological certificate was issued which stated as follows: “for the present she is asymptomatic. At the mother’s request a gynecological examination was undertaken, indicating: external genitalia with normal characteristics with no evidence of recent or past trauma lesions; additionally, it is noted that the hymeneal membrane shows normal characteristics.”³⁰

33. The individuals under investigation in the context of the criminal trial are Claudio Arias (President of the Azuay Red Cross); Pablo Monsalve (doctor of hematology who diagnosed TGGL at the Humanitarian Clinic); Mariana Ramírez (lab technician who took Mr. HS’s samples); Bertha Regalado (intern at the clinic who provided platelets for TGGL); and Edith Orellana (a biochemist who performed the tests, on the following day, on HS’s blood). According to an overall review of their many statements, it turns out that in their version, HS’s blood was not delivered for TGGL either as fresh blood or as platelets. There is no documentation corroborating the truth of this version. The few existing documents were rejected by the experts, as indicated below. Moreover, Mr. Pablo Monsalve has indicated that the thrombocytopenic purpura can be activated by the HIV, suggesting that TGGL was living with HIV before the transfusion. It is relevant to mention that there is no evidence indicating that TGGL was living with HIV before her entry to the hospital of the Humanitarian Clinic.

34. The Commission notes that throughout the criminal proceedings there were various experts’ reports and orders for the inspection of files. At different times reference is made to irregularities and omissions in the registries.

35. Thus, during an inspection of the archives of the Blood Bank, it was noted that each donor had a code assigned on the computer database; that for HS, Galo Calle, Luis Orellana, Janeth Pérez, Rolando Ordóñez and Wilson Morocho the corresponding numbers were 43137, 43144, 43141, 43149, 43146 and 43142, respectively. Donor 43137 has a positive result for HIV. The record of the inspection of the archives indicates that: “from the observations it was found that no test dated June 22, 1998, was administered to the donors in question, but rather on June 23, 1999; in addition, there are smudges in the dates in which the tests were carried out, as well as other smudges on other dates.”³¹

36. On August 16, 1999, the first medical experts report was prepared by doctors Peralvo and Vivar, appointed in the context of the criminal proceedings reported below. In regard to the question of which blood and from which donor the platelets used in TGGL’s transfusion was obtained, they indicated that according to the available records, two contradictions were found and described in detail in the experts’ report. These contradictions were based on a situation described as impossible in scientific terms (the assumption that the blood of donor 43146 was given to TGGL, when there was evidence showing that the

²⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of HS of October 20, 1998. Folio 283.

²⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of HS of November 18, 1998. Folio 270; Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Result of HS’s blood test of July 7, 1998. Folio 47; and Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Result of HS’s blood test of August 13, 1998. Folio 48.

³⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Gynaecological Certificate of October 27, 1998. Folio 34.

³¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Record of Inspection of Archives of May 18, 2000. Folio 102.

blood from this donor was given wholly as blood to another person days afterwards)³² and under the name of the staff member taking one of the samples who, according to the statements, was not present during working hours. They added that “at the Blood Bank there is no registry of the times when the units were extracted from the donors.”³³ Regarding the first contradiction, in a supplementary experts’ report, the doctors indicated that in effect the blood of donor 43146 was given as TB, total blood, to Mrs. Ana Plaza Suconota on June 25, 1998.³⁴

37. In regard to the question relating to the date and time that Mr. Henry Salazar’s blood was received, they indicated that it cannot be established since there is no such registry entry. They added that there is no “record of the tests performed on June 22 on Mr. Henry Salazar’s blood as, according to oral statements from Dr. Pablo Monsalve and Mrs. Mariana Ramírez, the urgent tests done as from 18:00 hs (...) were not registered in any book or log; but they state that they are performed by duty personnel and registered the following day.”³⁵

38. The expert witnesses indicated that it was impossible to have definitive findings from the registries and therefore suggested a fresh specialized examination for a genetic match between TGGL’s and HS’s virus. As outlined in the section dealing with the criminal trial, after many requests, the blood samples were finally sent to the Catholic University of Louvain, in Belgium. In order to perform the specialized test, Professor Marc Van Ranst, of the said university, required a sample from two HIV positive volunteers, and from TGGL and the donor HS. The samples were taken in the laboratory in the presence of the expert witnesses and were then “packed” in refrigeration gel to be taken to Quito the following day; they were then handed over to Dr. Juan Herteleer, a Dutch physician, who travelled to Belgium the following day. Five days afterwards an email was received from this doctor confirming that he had handed the samples to Dr. Marc Van Ranst.³⁶

39. What follows is a transcription of the relevant sections of the Report of the University of Louvain, based upon four samples. Samples 1 and 2 belonged to TGGL and to HS, respectively. Samples 3 and 4 belonged to the two volunteers:³⁷

In response to the request to reassess the RNA-nucleotide sequence of different blood samples infected with HIV and to establish whether they are identical or not, we were required to undertake this investigation on different blood samples. As one of the world’s leading research institutes into HIV, as well as one of the few institutes in Europe possessing the necessary technology and equipment (...) we were both challenged and honored by this request.³⁸

³² They explained that it was not possible to extract a platelet from a sample and maintain the blood whole to give it in the form of “total blood”.

³³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witness report of August 16, 1999, of Drs. Juan Peralvo Roman and Nardo Vivar Idrovo. Folios 67 to 74.

³⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Amplification of expert witnesses of July 10, 2000, and list of transfusions. TGGL’s mother’s brief of May 5, 2000. Folios 107 and 108.

³⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witness report of August 16, 1999, of Drs. Juan Peralvo Roman and Nardo Vivar Idrovo. Folios 67 to 74.

³⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Ana Cordero of September 3, 2013. Folio 214; Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Brief of Expert Witnesses Peralvo and Vivar of August 29, 2000. Folios 212 and 213.

³⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Dr. Urgilez’s translation received on February 14, 2001. Folio 130.

³⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Report of the University of Louvain. Folios 124 and 125.

Four samples were received:

- Sample 1, taken on July 27, 2000, marked [TGGL], (laboratory code X00453)
- Sample 2, taken on July 27, 2000, marked D.I 170686285-9 (laboratory code X00454)
- Sample 3, taken on July 27, 2000, marked D.I 01-0110340-6 (laboratory code X00455)
- Sample 4, taken on July 27, 2000, marked D.I 01-0097287-6 (laboratory code X00456)

(...)

The four samples were clearly positive.

(...)

Sample No. 4 was not pursued.

(...)

Three samples (1, 2, and 3) have sufficient viral RNA to perform a nucleotide sequence (...).

Based on this limited sequence, we concluded that samples 1 and 2 were identical, and that sample 3 is genetically different to samples 1 and 2.³⁹ (Unofficial translation).

40. After this report was issued, the two medical expert witnesses Peralvo and Vivar issued a supplementary experts' report stating that on the basis of the University of Louvain's report "the same virus affected the blood samples of the two people", that is the child TGGL and the person whose blood sample was marked as number 2, that is, HS. They added that "HIV could only have been transmitted to the girl [TGGL] from the person identified as 170686285-9 via two pathways: sexual transmission or from contaminated blood products emanating from this person." In concluding their report they stated that "if the court investigations have excluded sexual transmission, medical logic draws the inevitable conclusion that the only means of spreading HIV to the child [TGGL] was a blood transfusion."⁴⁰

41. They explained the significance of these findings in the following terms: "the dissimilarity of two viruses is proportional to the time elapsed when the two viruses separated from a common ascendant. The closer the epidemiological link between two individuals infected with HIV, the more similar will be the viruses of these two individuals. This experimental diagnosis is a basic concept of the molecular epidemiology of the HIV virus, allowing us to understand the epidemiological relationships based on the genetic data of viruses."⁴¹

42. In response to the question as to whether the University of Louvain report is "irrefutable" as evidence confirming that the infection occurred via the blood transfusion coming from the Red Cross, the expert witnesses quoted doctrine to the effect that: "in many cases, as in cases of proving the transmission of HIV, the genetic data provides the only reliable evidence of direct epidemiological links between the infections. As well as purely scientific undertakings, genetic analysis has been used in various cases as legal evidence to support potential criminal HIV infections. In legal cases, genetic testing can be used in conjunction with other types of evidence to decide whether transmission occurred with a certainty beyond reasonable doubt."⁴²

³⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Report of the University of Louvain. Folios 124 and 125.

⁴⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witnesses' Report of March 9, 2001. Folio 135.

⁴¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Response of the Expert Witnesses Peralvo and Vivar of July xx, 2001. Folios 176 - 185.

⁴² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Response of the Expert Witnesses Peralvo and Vivar of July xx, 2001. Folios 176 - 185.

D. Regarding the effects on TGGL's life

43. TGGL's mother has at various times pointed out that her daughter "has been the victim of the most cruel discrimination, since she has been prevented from studying in primary school, due to her illness; due to the fact that we do not own a place to live, my family and myself have been forced to rent a property, but as soon as the landlords find out about [TGGL's] illness, they find any excuse to throw us out onto the street."⁴³

44. In the framework of the *amparo de pobreza* (legal aid motion) in the civil action described below, several individuals came forward to make statements about TGGL and her mother's situation. From what they described it appears that: TGGL's mother has a precarious economic situation; her spouse has "left" her; she has no stable employment; she maintains her family by selling Yambal and Avon products; she was fired from a company for allegedly giving a bad image to the firm; she is involved in the informal trade in order to meet the needs of three persons; and not only the child TGGL but the whole family suffer discrimination.⁴⁴

45. TGGL sent a letter directly to the IACHR on June 4, 2013, describing her situation in the following terms:

Members of the Organization of American States, although everything is progressively lost, the night will shelter the sad story of my unhappy life; however, I still have the hope of continuing to fight until my last day.

On January 8 of this year, I reached the 18th year of my unhappy existence, that is, now I am able to speak for myself, and claim my rights that were never heard before, simply because I was a minor.

(...)

By now I was tired of the humiliation of injustice, of corrupt judges, biased judges, I came before you as protectors of the rights of all persons, my mother presented this petition in 2006, that is, 7 years ago. Time passed, you declared the claim admissible and sent it to the State of Ecuador to see whether it would acknowledge its error, and at least they would give me something with the meager money that belongs to the people of Ecuador; however this made them insult and mock me and my mother again – not even my lawyer is immune – since they are saying we all want to become millionaires with this money. I have many times wondered how much is a life worth since my life was snatched by those citizens who have their freedom and continue to work in the same institution harming others. I was insulted by the representatives of the State of Ecuador and every day the same questions came to my mind, how much money would they want if infected with AIDS and I cannot respond. While they insult me I get worse with the disease, that is, my counted days recede with each date in the calendar of life. One less day of my existence.

Since the time I was infected with this disease, every day I am penned in, because I cannot expose myself to the cold or the heat. I have to use antiretrovirals, two pills per day, that leave me half asleep day and night as well as the painful and frequent viral tests and many other tests that torment me. There are times when I wake up to watch my mother who puts aside the humiliations, insults, contempt and every day goes out to the street showing products of any description so that in this way she can cover the huge costs caused by this

⁴³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Request for legal aid *amparo* of September 26, 2001. Folios 221 and 222.

⁴⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statements in support of legal aid *amparo*. Folios 227 and 228.

illness while the State of Ecuador prides itself on protecting the rule of law and protecting children, which makes me ask perhaps I'm not a human being, perhaps I'm not a girl or an Ecuadorian, but nobody answers me, while my sad life goes on but nobody takes pity on me.

Someday, someone will describe my sad life, since I can't tell you everything, since it is very drawn out and very sad. Once we had a single loaf of bread somebody gave us, we divided it into three, my mother, brother and myself and we had it with a glass of water from the faucet, that was many times our lunch or at night heating a liter of water and putting some vegetation we found by the wayside in there and serving it to ward off hunger; however many times we went to somebody or some institution asking for help, the simple answer we got was that I should leave because they are afraid, while the State of Ecuador gives bonds and other help to many people who are healthy. However I have not even been given a poverty bond as a reprisal for this claim.⁴⁵

(...)

E. Regarding the Red Cross of Ecuador and the Blood Bank y regulation of the health entities

46. On November 14, 1910, Gen. Ely Alfaro legally acknowledged the institution through Legislative Decree published in the Official Gazette No.1392, in which it states: "Art. 1. It is hereby decreed that the Red Cross of Ecuador, a Charitable Institution of Public Benefit, is hereby granted exemption from the payment of all State or Municipal taxes (...)"⁴⁶.

47. In August 1922, the first statutes of the Red Cross of Ecuador were promulgated. This contributed to its recognition at the international level by the League of Societies of the Red Cross (now the International Federation of Societies of the Red Cross and Red Crescent) in 1923.⁴⁷ These statutes establish that:

Art. 1.- The bases on which the National Society of the Red Cross of Ecuador is founded are as follows:

FIRST. – The Red Cross of Ecuador is constituted by national organs and Provincial, Canton, and Local Councils, in accordance with the resolutions of the International Conference of Geneva of 1864 and with the Principles of the Geneva Convention of 1906. In conformity with the peace mission given to the Institution of the Red Cross, this was founded in the city of Guayaquil on April 22, 1910, its constitution was ratified by an Act of the National Congress of the Republic of Ecuador on October 20, 1910 and published in the Official Gazette No.1392, on November 14 of the same year. The Red Cross of Ecuador was recognized by the Government of Ecuador and by the International Committee of the Red Cross on April 10, 1923, and was accepted as a member of the International Federation of Societies of the Red Cross and Red Crescent on June 9, 1923. The Red Cross of Ecuador is recognized by the Government of Ecuador, as a voluntary aid organization, supplementary to the public powers in the humanitarian field, in accordance with the provisions of the 1949 Geneva Conventions and as the sole Red Cross society in Ecuador.

SECOND. – The National Society of the Red Cross of Ecuador is governed by its founding law, and by the conventions and international treaties lawfully ratified by Ecuador and by these Statutes. It is a private law, non-profit institution, with its own legal personality. Its legal, judicial and extrajudicial functions, at national level, shall be exercised by the National

⁴⁵ Annex 3. Letter addressed by TGGL to the IACHR, dated June 4, 2013.

⁴⁶ See. http://www.cruzroja.org.ec/plantilla_texto.php?id_submenu1=2&id_menu=2

⁴⁷ See. http://www.cruzroja.org.ec/plantilla_texto.php?id_submenu1=2&id_menu=2

President; and at the provincial level by the Provincial President. This is in accordance with the provisions of Title XXX of the First Book of the Civil Code (...) ⁴⁸.

48. The Blood Bank of the Red Cross of Azuay has been operating since 1951, when it opened its doors to serve the community of the province of Azuay and sometimes others such as del Cañar, El Oro, etc. ⁴⁹

49. The Commission does not have information on the regulations governing the working of the Blood Bank at the time of the events. The 1971 Health Code does not include provisions in this field. By 2006, with the enactment of the Organic Health Law, the following was established:

Art. 71.- The national health authority shall enact rules relating to the procedures for the donation, transfusion, use and monitoring of the quality of human blood with its components and derivatives, to ensure equal, efficient, sufficient and safe access, the preservation of the health of donors, and the highest level of protection for the recipients as well as for the health personnel.

Art. 72.- The national health authority, through the competent bodies, shall provide licenses to blood providers (haemocentres, Banks, storage and transfusion services) and to the industrial plasma fractionation facilities, both public and private, in accordance with the law in force.

50. In general terms, regarding health facilities, the Health Code of 1971 established that:

Art. 168.- The health authority will establish the norms and requirements that medical facilities should comply, and will inspect them and evaluate them periodically.

Art. 169.- The medical facilities will submit their annual programs and rules of procedure, for the approbation of the health authority.

F. Regarding the Criminal Trial

51. On September 29, 1998, TGGL's mother lodged a criminal complaint. ⁵⁰ On October 19, 1998, the Fourth Criminal Court of Azuay (hereinafter "the Fourth Court") ordered the trial to proceed. ⁵¹

52. On the same date, Pablo Arturo Monsalve –the doctor who diagnosed TGGL with thrombocytopenic purpura and considered a transfusion of two units of blood and platelets necessary— made a statement. He was the Director of the Red Cross Blood Bank at the date of the events. ⁵²

53. On October 19, 1998, Edith Alexandra Orellana made a statement. She was the Biochemist at the Red Cross, who performed the HIV tests on the blood of HS on June 23, 1998. ⁵³

54. On October 20, 1998, the donor HS made a statement as to what happened on the day he donated blood and how he later learned that he was an HIV carrier. ⁵⁴

⁴⁸ See http://www.cruzroja.org.ec/plantilla_texto.php?id_submenu=2&id_menu=2

⁴⁹ See <http://www.cruzrojaazuay.org/CR/bs.php>

⁵⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Complaint received on September 29, 1998. Folio 264.

⁵¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order for trial to proceed of October 19, 1998. Folio 266.

⁵² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Pablo Arturo Monsalve Toral of October 19, 1998. Folios 279 and 280.

⁵³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Edith Alexandra Orellana of October 19, 1998. Folio 282.

55. On October 23, 1998, Sandra Elizabeth González Álvarez, the resident physician in pediatrics at the Humanitarian Clinic, made a statement.⁵⁵

56. On October 29, 1998, Eulalia Catalina Dávalos Landivar and Luz Elena Dávalos Landivar, two close friends of TGGL and her family, made statements as to what occurred when they arrived at the Red Cross to help with the delivery of blood and platelets.⁵⁶

57. On November 15, 1998, TGGL's mother made a statement explaining what happened between June 20 and 22, 1998, as well as after the transfusion up until the moment that she became aware that her daughter was an HIV carrier.⁵⁷

58. On November 18, 1998, the donor HS made another statement regarding his donation to the Red Cross of June 22, 1998, and the way in which he learned that he was an HIV carrier. At this point he added that when he was informed of his illness, the Red Cross told him that his blood had not been given to TGGL.⁵⁸

59. On November 19, 1998, Mrs. Bertha Florencia Criollo Largo, an acquaintance of TGGL's family who was also present at the Red Cross on the day of the events, made a statement.⁵⁹

60. On November 23, 1998, TGGL's mother made another statement, describing in greater detail the information that she was given at the Humanitarian Clinic indicating that the blood used for her daughter was from HS.⁶⁰ She also provided more details as to what occurred after TGGL was discharged from the Humanitarian Clinic.⁶¹

61. On the same date, TGGL's brother made a statement describing both hospitalizations and the request for two pints of blood and platelets, in the same terms as his mother. He also described what happened when he arrived at the Red Cross with Mr. HS for him to give blood.⁶²

62. On November 30, 1998, Sandra Elizabeth González Álvarez made another statement.⁶³

⁵⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of HS of October 20, 1998. Folio 283.

⁵⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Sandra Elizabeth González of October 23, 1998. Folio 281.

⁵⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Eulalia Catalina Dávalos Landivar of October 29, 1998. Folio 267; and Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Luz Elena Dávalos Landivar of October 29, 1998. Folio 268.

⁵⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of TGGL's mother of November 15, 1998. Folio 284.

⁵⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of HS of November 18, 1998. Folio 270.

⁵⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Bertha Florencia Criollo Largo November 19, 1998. Folio 271.

⁶⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of TGGL's mother of November 23, 1998. Folio 303.

⁶¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of TGGL's mother of November 23, 1998. Folio 303.

⁶² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of TGGL's brother of November 23, 1998. Folio 305.

⁶³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Sandra Elizabeth González of November 30, 1998. Folio 307.

63. On the same day, Pablo Arturo Monsalve made another statement giving more details as to TGGL's clinical condition on June 22, 1998. He also provided information on his role at the Red Cross Blood Bank and on the procedures at the said institution.⁶⁴

64. On December 1, 1998, Edith Alexandra Orellana made another statement. At this point she indicated that Mariana Ramírez had taken the blood samples.⁶⁵

65. On December 11, 1998, the Fourth Court, together with expert witnesses, convened at the branch of the Red Cross in order to establish the details of the functioning of the Blood Bank and to solicit information from the personnel. Specifically, information was requested about the donors and the deliveries made during the period covering the date when the blood from the donors of TGGL was received. A document showing a detailed account of the blood given to the girl and the blood extracted to prepare the platelets was also requested.⁶⁶

66. On December 14, 1998, Mariana Ramírez Ramírez, a nursing assistant at the Red Cross Blood Bank, made a statement. She had taken the blood samples from the two donors on June 22, 1998, and had "dispatched" the blood, leaving the platelets ready to be "dispatched" by another individual.⁶⁷

67. On December 14, 1998, TGGL's mother lodged a gynecological certificate issued on October 27, 1998, and three negative tests results for HIV for herself, TGGL's brother and father, in order to show that no members of the family were carriers of the HIV virus.⁶⁸

68. On December 17, 1998, TGGL's mother requested that the Fourth Criminal Prosecutor of Azuay (hereinafter the "fourth prosecutor") summon Mr. Rolando Ordoñez and Janeth Pérez to make statements as to why they had gone to the Cuenca Red Cross to donate blood, the date and time that they had done so, and whether they knew who the blood was for or what would be done with it.⁶⁹

69. On December 18, 1998, TGGL's mother asked that the Director of the "INHL" be requested to order Dr. Eduardo Vidal Ochoa⁷⁰ – Head of the AIDS Laboratory, Microbiologist Two, at the "Leopoldo Izquieta Pérez" National Institute of Hygiene – to appear in order to make a statement, which he made on December 23, 1998.⁷¹ This individual made a statement as to the receipt of TGGL's blood serum sample on July 28, 1998, for the purpose of the HIV testing unavailable at the Red Cross.⁷²

⁶⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Pablo Monsalve of November 23, 1998. Folios 307 and 308.

⁶⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Edith Orellana of December 1, 1998. Folio 309.

⁶⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order to inspect the Red Cross Branch. Folio 32.

⁶⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Mariana Ramírez Ramírez of December 14, 1998. Folio 33.

⁶⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. TGGL's mother's brief presented on December 14, 1998, and results of HIV tests on TGGL's mother, brother and father. Folios 35 – 38.

⁶⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Brief of TGGL's mother presented on December 17, 1998. Folio 39.

⁷⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. TGGL's mother's communication of December 18, 1998. Folio 40.

⁷¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Dr. Eduardo Vidal Ochoa. Folios 40 and 41.

⁷² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Dr. Eduardo Vidal Ochoa. Folios 40 and 41.

70. On January 5, and 6, 1999, TGGL's mother sent separate communications to the Fourth Prosecutor requesting that: i) three doctors of hematology be nominated as expert witnesses; ii) the blood tests performed on TGGL "being stored at the Institute of Hygiene and Tropical Medicine" be collected; iii) the Director of the National Institute of Hygiene and Tropical Medicine be ordered to send the tests performed on HS to determine HIV antibodies; and iv) the Director of the Pablo Jaramillo Humanitarian Clinic be ordered to send TGGL's medical history, and specifically the "bone marrow test" performed by Pablo Arturo Monsalve."⁷³

71. On January 14, 1999, the Humanitarian Clinic sent to the Fourth Court the medical history and all the tests performed on the girl TGGL.⁷⁴

72. On January 21, 1999, Mr. José Rolando Ordoñez, one of the individuals who went to donate blood at the Red Cross on June 22, 1998, made a statement.⁷⁵

73. On March 24, 1999, two expert witnesses were nominated and they formulated some of the questions put forward by TGGL's mother.⁷⁶ Thus, they asked the following questions:

- 1.- That an examination be made of the medical history of the minor both at the Catholic Hospital as well as at the Humanitarian Clinic as it appears in the files, to determine the symptoms she arrived with, what was the treatment administered, and under what conditions she was discharged;
2. That the expert witnesses verify the codes assigned to each donor on June 22, 1998, and indicate the code number of Mr. [HS];
3. That the Red Cross verify from what blood and from which donor they obtained the platelets used in the transfusion to the minor (...);
4. That the Azuay Red Cross also verify the time and date when Mr. Henry Salazar donated blood and the tests undertaken on this blood;
- 4(sic) That the expert witnesses indicate what scientific methods were used by the Azuay Red Cross and when (sic) confident with these to establish whether the blood of a donor has the HIV virus;
- and 5. To specify the day and time when the blood transfusion to (...) took place"⁷⁷.

74. After various proceedings, the nomination of these expert witnesses was declared invalid, and on July 5, 1999, two expert witnesses from the list of the College of Physicians were designated: Doctors Juan Peralvo and Nardo Vivar, who were asked to present a report within ten days.⁷⁸ These expert witnesses took up their posts on July 28, 1999.⁷⁹

75. After requesting an adjournment, on August 17, 1999, doctors Juan Peralvo and Nardo Vivar issued their experts' report which referred to: i) the time and method used to obtain the platelet concentrate

⁷³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Requests from TGGL's mother of January 5 and 6, 1999. Folios 44 and 45.

⁷⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Communication of the Pablo Jaramillo Humanitarian Clinic Foundation of January 14, 1999. Folio 49.

⁷⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of José Rolando Ordoñez. Folio not numbered, between 56 and 57.

⁷⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of March 24, 1999. Folio 58.

⁷⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of March 24, 1999. Folio 58.

⁷⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of June 5, 1999. Folio 62.

⁷⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Certificate of July 28, 1999. Folio 63.

at the Blood Bank⁸⁰; ii) the codes assigned to each donor on June 22, 1998, including that of HS⁸¹; iii) the contradictions found in the registers available on the donor from whom the platelets given to TGGL originated⁸²; iv) the absence of an entry on the time when HS's blood was received and on the tests performed on June 22, 1998 on HS's blood⁸³; and the absence of an entry in the medical history, of the "identity stickers on the blood units."⁸⁴

76. In addition to the above points, the expert witnesses pointed out that according to the Manual of Rules for Banks, Blood Deposits and Transfusion Services, the following tests are obligatory before a transfusion: "determination of blood group and Rh, tests for syphilis, surface antigen for Hepatitis B, antibodies for Hepatitis C, antibodies for HIV, antibodies for Chagas, a malaria study in certain cases, and the said tests cross matched."⁸⁵

77. With respect to the existing HIV tests, they pointed out that the most common methodology in the world is ELISA, in which a positive result is confirmed with a Western Blot test. They emphasized that these tests have a 99.3% accuracy and 99.7% specificity. The frequency of false negatives among a low prevalence population is around 0.0001%. They added that there are other tests – such as those at the Red Cross Blood Bank – called "rapid" which provide accuracy between 95.2% and 98.6% and a specificity of 98.6%. They indicated that the advantages are quick results, low cost and the ease of performance. They pointed out however that the purpose of these tests was to identify and exclude potentially infected products. They

⁸⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witness report of August 16, 1999, of Drs. Juan Peralvo Roman and Nardo Vivar Idrovo. Folios 67 to 74.

On this point, the expert witnesses said that "what is taken is recently extracted total blood or blood extracted within a maximum of six hours." According to the procedures described by the expert witnesses, "from one unit of fresh complete blood initially extracted from a donor, we obtained 3 sections separated into 3 different bases: one globular bag (red globule concentrate), one platelet deficient and one platelet concentrate". They added that "spinning timing is exact, but the time needed for the Blood Bank to give the platelets varies (but in any case it should be done within 6 hours from extracting blood from the donor) since it will depend on the working conditions, the following circumstances should be considered: firstly have available (as in the case under investigation) two donors of the same blood group as the recipient, since two platelets concentrate have been requested (...) (illegible) in this time all the tests should be performed (...) (illegible), on the donor (antibodies for HIV/AIDS, antibodies for Hepatitis C, antigens for surface Hepatitis B, syphilis tests, etc) and all this in addition to the rest of the Blood Bank's work." This additional work was described by the expert witnesses who concluded that the foregoing depended on the staff available at the Blood Bank.

⁸¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witness report of August 16, 1999, Drs. Juan Peralvo Roman and Nardo Vivar Idrovo. Folios 67 to 74.

On this point, they indicated that this information was taken from the Azuay Red Cross Blood Bank's computer printout and from photocopies of forms filled out by the donors. At the Blood Bank they were told that "they did not have a copy book."

⁸² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witness report of August 16, 1999, Drs. Juan Peralvo Roman and Nardo Vivar Idrovo. Folios 67 to 74.

On this point they indicated that these contradictions were based on a situation impossible in scientific terms, and under the name of the staff member who had taken one of the samples which, according to the statements, was not present during working hours. They added that "in the Blood Bank, there is no registry recording the time at which the blood units were taken from the donors."

⁸³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witness report of August 16, 1999, of Drs. Juan Peralvo Roman and Nardo Vivar Idrovo. Folios 67 to 74.

On this point, the expert witnesses indicated that "according to oral information from Dr. Pablo Monsalve and Mrs. Mariana Ramírez, the urgent tests performed from 18hrs onwards (...) were not recorded in any registry or book; but they stated that they were performed by the duty personnel and were recorded the next day."

⁸⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witness report of August 16, 1999, Drs. Juan Peralvo Roman and Nardo Vivar Idrovo. Folios 67 to 74.

⁸⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witness report of August 16, 1999, Drs. Juan Peralvo Roman and Nardo Vivar Idrovo. Folios 67 to 74.

indicated that they have been used in developing countries where the equipment or training has been lacking and concluded that, in general, they are reliable tests.⁸⁶

78. Concerning the question of how long it takes to detect the presence of the HIV virus after a blood transfusion and contaminated platelets, they indicated that it could be done by “virus quantification techniques within a relatively short period (from 1 to 3 weeks after exposure) with the said acute HIV infection. But the sero-conversion (...) generally takes from 6 to 12 weeks after transmission.” They added that it is variable from one subject to another and that in cases of blood transfusion antibodies may be detected within a shorter period than that of transmission by sexual means.⁸⁷

79. In the final part of their experts’ report, they indicated the necessity for undertaking a viral genotype comparison test and a nucleotide sequence analysis, in the following terms:

From a scientific standpoint, what may help to establish or eliminate the possibility that the blood transfusion caused the presence of HIV antibodies in the child [TGGL] is the identification and comparison of viral genotype and nucleotide sequential analysis of the HIV through hybridization techniques, on the blood of Mr. Henry Salazar and the child (...). This highly sophisticated technique (corresponding to molecular biology specialty) has not yet been fully implemented in this country, but, if necessary, contact could be made to send blood samples to the European Molecular Biology Bank (in Heidelberg, Germany).⁸⁸

80. On September 8, 1999, summary proceedings were closed and the Prosecutor was asked to issue an opinion within the legal timeframe.⁸⁹

81. On September 14, 1999, TGGL’s mother requested that the Fourth Court reopen the summary proceedings, indicating that essential pieces of evidence needed to be produced, including those suggested by the expert witnesses.⁹⁰

82. On October 19, 1999, the Fourth Prosecutor requested the reopening of summary proceedings in order to carry out the necessary procedural steps “to establish who was the person responsible” for the infection. These procedural steps included: i) amplification of Dr. Pablo Monsalve and Dr. Edith Orellana’s testimony, to ascertain “which person or employee of the Red Cross, on the night of June 22, 1998, received the blood or platelets” for TGGL’s transfusion; ii) amplification of the evidence provided by TGGL’s mother, and of Eulalia Dávalos and Luz Elena Dávalos; iii) the statement of Berta Regalado; and vi) the statement of HS’s cohabitee.⁹¹

⁸⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witness report of August 16, 1999, of Drs. Juan Peralvo Roman and Nardo Vivar Idrovo. Folios 67 to 74.

⁸⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witness report of August 16, 1999, of Drs. Juan Peralvo Roman and Nardo Vivar Idrovo. Folios 67 to 74.

⁸⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witness report of August 16, 1999, of Drs. Juan Peralvo Roman and Nardo Vivar Idrovo. Folios 67 to 74.

⁸⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of September 8, 1999. Folio 75.

⁹⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Request to reopen summary proceedings of September 14, 1999. Folios 76-78.

⁹¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Request to reopen summary proceedings of October 19, 1999. Folio 81.

83. On November 4, 1999, a reopening of summary proceedings was ordered “for the maximum time provided by law”, and additional procedural steps were ordered, including those mentioned in the preceding paragraph, and a requirement that the expert witnesses Vivar and Peralvo draw conclusions.⁹²

84. Neither in the Fourth Prosecutor’s request of October 19, 1999, nor in the reopening of summary proceedings by the Fourth Court on November 4, 1999, was reference made to the possibility of undertaking the specialized test suggested by the expert witnesses.

85. On November 26, 1999, the expert witnesses Juan Peralvo Román and Nardo Vivar Idrovo addressed the Fourth Court indicating that the evidence produced thus far in the proceedings “does not scientifically allow it to be established unequivocally what may have been the cause of the HIV infection”. They repeated the suggestion of performing the specialized testing in the following terms: “at the end of our report we suggested evidence which scientifically could provide a conclusive finding (genetic sequencing to be undertaken in Europe as we pointed out in the prior report, but we have also ascertained that if done at the Jackson Memorial Hospital of Miami (...); with the results of this test, we could state one or other possibility.”⁹³

86. On December 22, 1999, TGGL’s mother lodged a “private prosecution” action against Pablo Arturo Monsalve, Edith Alexandra Orellana and Mariana Ramírez.⁹⁴ On January 5, 2000, TGGL’s private prosecution action was rejected on the grounds that “summary proceedings were reopened so that the steps ordered be undertaken (...) and the private prosecution is not an essential procedural step and should have been lodged opportunely.”⁹⁵

87. On February 9, 2000, Edith Alexandra Orellana made another statement reproducing her prior statement and indicated that the person who delivered the blood was Mariana Ramírez and the person who delivered the platelets was the intern Bertha Regalado.⁹⁶

88. On February 9, 2000, Pablo Arturo Monsalve again made a statement which repeated his earlier testimony and replied to the question submitted that he was not present at the point in which the blood and platelets were delivered.⁹⁷

89. On February 9, 2000, Eulalia Catalina Dávalos and Luz Elena Dávalos again appeared in order to provide statements.⁹⁸

90. On February 10, 2000, Bertha Regalado provided a statement; she was an intern at the Red Cross and she was on duty when the platelets were delivered.⁹⁹

⁹² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order Reopening Summary Proceedings of November 4, 1999. Folio not numbered, between 81 and 82.

⁹³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witnesses’ communication received on November 26, 1999. Folio 83.

⁹⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. TGGL’s mother’s private prosecution of December 22, 1999. Folio 85.

⁹⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of January 5, 2000. Folio 86.

⁹⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Edith Orellana of February 9, 2000. Folio 90.

⁹⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Pablo Arturo Monsalve of February 9, 2000. Folio 91.

⁹⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statements of Eulalia Catalina Dávalos and Luz Elena Dávalos of February 9, 2000. Folio 91.

91. On February 10, 2000, TGGL's mother once more requested from the Fourth Prosecutor that the specialized tests suggested by the expert witnesses be performed.¹⁰⁰

92. On February 25, 2000, the Judicial Police was requested to provide an answer to the order relating to the detention of Mrs. Marcia Méndez – partner of Mr. HS – so that she should provide a statement.¹⁰¹ Without receiving the said declaration, on March 22, 2000, the summary proceedings were closed for a second time, and the Prosecutor was ordered to produce an opinion within the legal time limit.¹⁰²

93. On May 5, 2000, TGGL's mother again requested that the specialized test suggested by the expert witnesses be carried out.¹⁰³

94. On May 15, 2000, at the request of the Prosecutor, the Fourth Court ordered the reopening of the summary proceedings and required the following procedural steps be carried out: i) inspection of the Red Cross files for May 18, 2000; ii) a request to the Red Cross to certify the signatures and initials on the documents registering the blood taken under numbers 43137, 43144, 43141, 43149, 43146, 43142, 43097 and 43095; iii) a request to the Humanitarian Clinic to provide the medical history of Mrs. Ana Plaza Suconota; iv) amplification of the expert witnesses' report indicating the importance of the initials found on the document called "transfusions"; and v) undertaking a test for identifying and comparing the viral genotype by hybridization techniques on the blood of Henry Salazar and of TGGL.¹⁰⁴

95. On May 18, 2000, the Secretariat of the Provincial Council of the Azuay Red Cross sent a copy of the Blood Bank registry, showing the list of persons who donated blood on June 22, 1998, and the negative results of these samples for HIV. With regard to June 23, 1998, a donor number 37 appears, with a positive HIV result.¹⁰⁵

96. On May 18, 2000, the procedural step of inspecting the Red Cross Blood Bank archives was undertaken. It may be noted that each donor has a code entered on the computer database; that HS and five other persons were given the numbers 43137, 43144, 43141, 43149, 43146 and 43142, respectively; and that donor 43137 has a positive HIV result. The following is recorded: "from the observations it may be stated that no tests whatsoever were carried out on June 22, 1998, on the donors in question, but only on June 23, 1999; smudges may also be observed in the dates on which the tests were performed, and there are also smudges on other dates." It is recorded that "Dr Ruth¹⁰⁶ Orellana" stated that before December 1998, donations received after 6pm and at weekends were not registered.¹⁰⁷ In a communication dated May 24,

⁹⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Bertha Regalado of February 10, 2000. Folio not numbered, between 91 and 92.

¹⁰⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Request of TGGL's mother of February 10, 2000. Folio 92.

¹⁰¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of February 25, 2000. Folio not numbered between 94 and 95.

¹⁰² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Closure of Summary Proceedings of March 22, 2000. Folio 95.

¹⁰³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Brief of TGGL's mother received on May 5, 2000. Folio 96.

¹⁰⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of May 15, 2000. Folio not numbered between 97 and 98.

¹⁰⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Red Cross Copies. Folio 100.

¹⁰⁶ The Commission understands this represents a material error and the reference is to Edith Orellana, a biochemist at the Red Cross Blood Bank.

¹⁰⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Record of files inspection of May 18, 2000. Folio 102.

2000, the Provincial Council of the Red Cross Blood Bank indicated that the signatures and initials belonged to the following staff of the Bank, Mariana Ramírez, samples 43097, 43095, 43144, 43142, 43141 and 43137; and Bertha Regalado, samples 43149 and 43146.¹⁰⁸

97. On July 10, 2000, the expert witnesses clarified the importance of the initials, indicating CGR meant concentration of red blood cells, ST1 meant total blood 1, ST meant total blood, and CPQ meant concentration of platelets. From these initials, it can be shown that the blood allegedly given to TGGL (according to the Red Cross, belonging to donor 43136) was delivered as ST (total blood) to Mrs. Ana Plaza Suconota on June 25, 1998.¹⁰⁹

98. On July 18, 2000, it was ordered that the two expert witnesses Peralvo and Vivar obtain blood samples from TGGL and HS to be sent to the Catholic University Hospital of Louvain, Belgium, in order to carry out the appropriate tests.¹¹⁰

99. On July 25, 2000, TGGL's mother requested the arrest of Mr. HS, because he had failed to appear voluntarily to give a sample.¹¹¹ This request was rejected on July 31, 2000.¹¹² On August 15, 2000, the Humanitarian Clinic was again ordered to send Ana Plaza Suconota's medical history, "under lawful constraints"¹¹³. The medical history submitted on August 31, 2000, had one page, indicating that she was hospitalized for seven days until July 2, 1998. No reference was made to blood transfusions.¹¹⁴

100. On the same day, August 31, 2000, summary proceedings were closed for the third time, and the Prosecutor was ordered to issue an opinion. At that time, the specialized test suggested by the expert witnesses had not yet been performed.¹¹⁵

101. On October 11, 2000, the Fourth Prosecutor issued an opinion examining the various pieces of evidence, taking into account the expert witnesses' report, the inspection of documents, among other elements in the record of the case. He concluded that "the occurrence of an offence is demonstrated, consisting of the negligent infection with a deadly illness - such as AIDS - into the person of the child [TGGL], by failure to observe the obligatory rules contained in the Manual for Banks, Blood Storage and Transfusion Services." As regards criminal responsibility, the Prosecutor stated that "it is not procedurally possible to lay charges, since no individual has been identified, despite a request during a prosecutorial visit concerning criminal responsibility and clear grounds for its existence."¹¹⁶

¹⁰⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Communication of the Provincial Council of the Azuay Red Cross of May 4, 2000. Folio 103.

¹⁰⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witnesses' additional information of July 10, 2000, and list of transfusions. Brief of TGGL's mother received on May 5, 2000. Folios 107 and 108.

¹¹⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of July 18, 2000. Folio not numbered between 109 and 110.

¹¹¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Brief of TGGL's mother received on July 25, 2000. Folio 110.

¹¹² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of July 31, 2000. Folio 110.

¹¹³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Information Request of August 15, 2000. Folio 112.

¹¹⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Medical Record of Ana Plaza Suconota. Folio 113.

¹¹⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of August 31, 2000. Folio 114.

¹¹⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Opinion of October 11, 2000. Folios 115 - 116.

102. On January 11, 2001, the Ombudsman sent a brief to the Public Prosecutor's office, requesting that the latter require the First Chamber of the Superior Court of Justice of Azuay to reopen summary proceedings, in order for the expert witnesses Peralvo and Vivar to report whether they had sent TGGL's and HS's blood samples to the Hospital of the Catholic University of Louvain, Belgium.¹¹⁷ On January 15, 2001, there was an order reopening summary proceedings, granting a time limit of 10 days.¹¹⁸

103. The report from the University of Louvain was completed on January 8, 2001. The test was performed on four blood samples. Sample 1, belonging to TGGL; sample 2, belonging to HS's identity document; and samples 3 and 4 belonging to 2 HIV positive volunteers. The results indicated that the four samples were clearly positive, that sample 4 could not be dealt with, and that only samples 1, 2, and 3 possessed sufficient viral RNA to perform a nucleotide sequence test; and that samples 1 and 2 were identical, whilst sample 3 was genetically different from the first two.¹¹⁹ (Unofficial Translation).

104. On January 24, 2001, the Ombudsman requested that the report of the Catholic University of Louvain, Belgium be added to the evidence; that it be translated into Spanish; and that the expert witnesses Peralvo and Vivar be required to issue definitive conclusions as to the origin of the infection.¹²⁰

105. On February 19, 2001, the translations were sent to the expert witnesses Peralvo and Vivar¹²¹ who stated on March 9, 2001, that "the same virus has infected the blood samples of the two individuals", referring to the girl TGGL and the individual to whom blood sample 2 belonged. They added that "the HIV virus could only have been passed to the girl [TGGL] from the individual identified as 170686285-9 via two routes: sexual transmission or by transfusion of contaminated blood products originating from this person." At the end of their report they pointed out that "if the court investigations have excluded sexual transmission, from the medical perspective it must be concluded that the only way of transmission of the HIV virus to the child [TGGL] was the blood transfusion."¹²²

106. On March 26, 2001, there was an order closing summary proceedings for the fourth time.¹²³ On April 9, 2001, the Prosecutor's office requested that the Fourth Court reopen summary proceedings and to extend this to Mariana Ramírez, Bertha Regalado and Pablo Arturo Monsalve.¹²⁴ On April 10, 2001, summary proceedings were extended to Mariana Ramírez, Bertha Regalado and Pablo Monsalve.¹²⁵

¹¹⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Ombudsman's Communication of January 11, 2001. Folio 120.

¹¹⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Decision of January 15, 2001. Folio 121.

¹¹⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Report of the University of Louvain. Folios 124 and 125.

¹²⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Communication of the Ombudsman of January 24, 2001. Folio 123.

¹²¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of February 19, 2001. Folio not numbered, between 133 and 134.

¹²² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Expert witnesses' report of March 9, 2001. Folio 135.

¹²³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of March 26, 2001. Folio 136.

¹²⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Request of Public Prosecutor of April 9, 2001. Folio 137.

¹²⁵ Referido en: Annex 2. Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of April 10, 2001. Folio not numbered between 137 and 138.

107. On April 18, 2001, Pablo Arturo Monsalve made a statement, this time to deliver preliminary investigation testimony.¹²⁶

108. On May 16, 2001, TGGL's mother filed a private prosecution action against Claudio Arias (President of the Provincial Committee of the Azuay Red Cross), Pablo Arturo Monsalve, Edith Alexandra Orellana, Mariana Ramírez and Bertha Regalado for the crime of infection with a contagious disease.¹²⁷ On the same day, the private prosecution proceedings were admitted and summary proceedings were extended against Claudio Arias and Edith Alexandra Orellana.¹²⁸

109. On June 14, 2001, TGGL's mother requested that the Fourth Criminal Court order a date and time for the inspection of the Red Cross facilities.¹²⁹

110. On June 22, 2001, doctors Ruth Rosas and Gabriel Tenorio took over the role of expert witnesses in order to investigate the procedures and equipment used at the Red Cross blood laboratory. During this procedural step they concluded that the qualitative methods used were unreliable since the tests had to be crosschecked by reference methods such as Western Blot and Micro-ELISA, which were unavailable at the facilities.¹³⁰

111. On May 10, 2001, two affidavits were received from the Provincial Council of the Azuay Red Cross stating that Dr. Pablo Monsalve did not receive blood donations, did not perform serum tests, did not deliver the blood and platelets to TGGL and that the foregoing were requested by a doctor of the Pablo Jaramillo foundation. In addition, the working hours were said to finish at 17:00 hours.¹³¹

112. On June 27, 2001, Claudio Arias, Pablo Arturo Monsalve, Bertha Regalado and Edith Orellana sent a brief to the Fourth Court setting out a list of questions for the expert witnesses Peralvo and Vivar.¹³² It was ordered that they should respond to the questionnaire within six days.¹³³

¹²⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Pablo Monsalve of April 18, 2001. Folio 139, before and following unnumbered.

¹²⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Private Prosecution of May 16, 2001. Folios 145 and 146.

¹²⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of May 16, 2001. Folio not numbered between 146 and 147.

¹²⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Brief of TGGL's mother of June 14, 2001.

¹³⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Record and Results of Inspection of Blood Bank of June 22, 2001. Folio 153. They added that there were circumstances such as: low levels of antibodies, below the test detection limits; infection with a virus variant which did not react with the specific antigens used or manipulation of the results leading to a loss of the multivalency of HIV antibody, which could give false negative results, as is described in the bibliography of proceedings used at the Blood Bank.

¹³¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Certifications of May 10, 2001. Folios 156 and 157.

¹³² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Brief received on June 27, 2001. Folio 159. The questions posed were the following: 1. Do you have an accredited qualification as an infectologist, virologist or molecular biologist?; 2 Do you know whether there is in Cuenca any organ recognized as belonging to the Public Health Ministry of to any other official entity capable of resolving problems relating to AIDS?; 3 - Is it true or not that there are various horizontal avenues for transmission of the HIV virus, including accidental or unintentional ways, by contaminated needles in household use, by the using shared toothbrushes or razors, or at hairdressers or the dentist's office?; 4 -Do you know of the existence in our city of special doctors linked with the diagnosis and treatment of AIDS?; 5 - It turns out there is no other transmission route, and that the girl TGGL only could have been infected by blood transfusion or by vaginal sexual relations?; 6- Can you confirm whether two individuals can have the same virus and do you believe that this cannot be found in other infected individuals from the same source?; 7- If an individual infects various persons, will these latter have the same virus or not?; 8- Do you know the different strains or varieties existing with the HIV virus, and could you indicate the basis for classification within the same strain or family?; 9- Blood refrigerated to temperatures between 2-8 degrees centigrade and left still, does it have active platelets or not?; 10- Do you believe that it is impossible to prepare platelets in double funds?; 11 - Do you agree with the report sent by the University of Louvain that it is irrefutable as evidence confirming that the HIV infection came from a blood transfusion originating at the Azuay Red Cross, and that another means of infection is impossible? 12 - Can thrombocytopenic purpura be triggered by the HIV virus

113. On June 28, 2001, Edith Alexandra Orellana made a statement. She stated that she confirmed her initial statement and subsequent extension. She indicated the reasons why she considered that Mr. HS's blood was not given to TGGL and detailed the procedures used at the Red Cross Blood Bank.¹³⁴

114. On June 29, 2001, Pablo Arturo Monsalve issued an affidavit in the name of the Red Cross which said the following: "on June 22, 1998, two red blood concentrates (CGRs) were sent for [TGGL], whose codes matched numbers 43095 and 43097 sent at 18:00 hours by Mrs. Mariana Ramírez, and two plasma concentrates (CPq), whose codes matched numbers 43146 and 43142 sent at 21:49 hours by Miss. Bertha Regalado."¹³⁵

115. On July 5, 2001, Claudio Arias gave preliminary investigation evidence indicating that the Red Cross "has been subjected to a systematic smear campaign." As regards the salient questions on aspects of the present case, he pointed out that his role was administrative and that he lacked specific knowledge. He made reference in general terms to the procedures followed and the available evidence.¹³⁶

116. On July 11, 2001, the expert witnesses Peralvo and Vivar responded to the questions sent on June 27, 2001.¹³⁷ The answers given, so far as it is relevant, can be summarized in the following points:

- The general modes of transmission and their frequency according to Johns Hopkins Hospital are: sexual transmission, 71%; injectable drug use, 27%; transfusions, 1%; and prenatal transmission, 1%. Less frequent modes of transmission occur due to occupational exposure.
- The mode of transmission in children has particular characteristics: born to a parent with AIDS, 80%; blood transfusions, 11%; hemophiliacs who received factor VIII or IX, 6%; and incomplete information, 3%.
- Modes of transmission that may occur (shared toothbrushes, hair salons, etc.) are theoretically possible routes, but the incidence is so low that global statistics are not kept.
- According to the statistics, the experts confirm that "the human immunodeficiency virus can be passed to children from transmission by an infected mother or by contaminated blood products (...) other possible routes of infection have an insignificant or zero role."
- According to the trial findings, TGGL's mother is not an HIV carrier and consequently the infection was not antenatal.
- Their previous experts' report specifies that the results of the University of Louvain indicate that the genetically identical virus affected the two individuals.
- They explained the significance of these findings in the following terms: "the dissimilarity of two viruses is proportional to the time elapsed from when the two viruses separated from a common host. The closer the epidemiological link between the two individuals infected with HIV, the more similar will be the viruses of those individuals. This experimental confirmation is a basic concept of HIV molecular epidemiology, allowing us to understand the epidemiological relationships on the basis of viral genetic data."

producing AIDS?; 13 – Did the girl TGGL have a negative HIV test prior to her transfusion to confirm irrefutably that the infection was caused by the blood originating from the Red Cross? (...)?"

¹³³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of June 28, 2001. Folio 160.

¹³⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Edith Orellana June 28, 2001. Folio 162.

¹³⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Certificate of the Red Cross of June 29, 2001. Folio 164.

¹³⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Claudio Arias of July 5, 2001. Folios 166 – 168.

¹³⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Response of the Expert Witnesses Peralvo and Vivar of the July xx, 2001. Folios 176 - 185.

- In response to the question whether the University of Louvain report is “irrefutable” as evidence confirming that the infection occurred via the blood transfusion coming from the Red Cross, the expert witnesses quoted doctrine to the effect that in order to prove the transmission of HIV, the genetic data provides the only reliable evidence of direct epidemiological links between the infections. Specifically, they pointed out that it is used as legal evidence to support potential criminal HIV infections.
- In answer to the questions as to whether thrombocytopenic purpura may be triggered by the HIV virus, the expert witnesses indicated that some HIV patients might have thrombocytopenia, but that this illness has multiple causes.¹³⁸

117. On July 18, 2001, Bertha Regalado provided a preliminary investigation statement.¹³⁹

118. On July 19, 2001, the Director of the Humanitarian Clinic issued an affidavit indicating that Pablo Arturo Monsalve’s duties as a haematologist are performed as a “co-consultancy” in this clinic, such as occurred in TGGL’s case on June 22, 1998.¹⁴⁰

119. On July 25, 2001, at the request of the defense it was declared that “the private prosecution is abandoned due to a lapse of thirty days, and the claimant is definitively severed from the present suit, the latter being maintained and supported by the intervention of the Public Prosecutor.”¹⁴¹ On July 29, 2001, TGGL’s mother requested the reversal of this decision and on July 31, 2001, her request was denied.¹⁴²

120. On August 1, 2001, Remigio Rolando Patiño Venegas made a statement. He was the doctor who also examined TGGL at the Humanitarian Clinic. He observed that the transfusion was performed by the nursing staff and that “he had complete confidence in the blood and platelet units sent by the Red Cross.”¹⁴³

121. On August 9, 2001, the file was delivered to the Azuay District Prosecutor (hereinafter “the District Prosecutor”), who requested it in order to examine it.¹⁴⁴ On August 22, 2001, the District Prosecutor requested certain essential “procedural steps” from the Fourth Court.¹⁴⁵

122. On August 28, 2001, the expert witnesses Nardo and Vivar related the procedures for taking the samples that were sent to the Catholic University of Louvain.¹⁴⁶

¹³⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Response of the Expert Witnesses Peralvo and Vivar of July, aa, 2001. Folios 176 - 185.

¹³⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Bertha Regalado of July 18, 2001. Folio 188.

¹⁴⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Affidavit of July 19, 2001. Folio 189.

¹⁴¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Order of July 25, 2001. Folio not numbered between 193 and 194.

¹⁴² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Request and Decision of July 29, and 31, 2001, respectively. Folio 195.

¹⁴³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Remigio Rolando Patiño of August 1, 2001. Folio 196.

¹⁴⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Bertha Regalado of July 18, 2001. Folio 200.

¹⁴⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Communication of the District Prosecutor of August 22, 2001. Folio 201. He specifically requested amplification of the Expert Witnesses’ report in regard to the following queries: i) how and when were the blood samples to be sent to the University of Louvain taken and who supervised them? ii) Was Mr. HS present at the time the samples were taken?; and iii) who was the individual in charge of sending the samples to the University of Louvain? He also requested Ana Cordero’s statement.

¹⁴⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Brief of the expert witnesses Peralvo and Vivar of August 29, 2000. Folios 212 and 213. They pointed out that the samples were taken on July 27, 2000, in the Clinical Laboratory of Dr. Patricia Silva, where TGGL and her mother came, together with two adult males, and the Technical Secretary of the Azuay AIDS network, Ana Cordero Cueva. They added

123. On September 3, 2001, Ana Cecilia Cordero Cueva made a statement. She was the Technical Secretary of the Azuay AIDS network, an organization that was aware of TGGL's and her mother's situation, and that assisted in the procedures for the taking of samples and sending them to Belgium.¹⁴⁷ She pointed out that the Catholic University of Louvain requested samples from two HIV positive volunteers, from the child TGGL, and the donor HS. She said that they had to insist that HS appear and give a sample and finally managed through the mediation of a priest. She said that the samples were taken at the Santa Ana laboratory in the presence of two expert witnesses, and then were "packed up" with refrigeration gel to be taken to Quito the following day where they were handed over to Dr. Juan Herteleer, a Dutch volunteer doctor, who travelled the next day to Belgium. She indicated that five days later she received an email from this volunteer doctor stating that the samples had been handed to Dr. Marc Van Ranst of the Catholic University of Louvain.¹⁴⁸

124. On September 20, 2001, the Department of Research and Diagnostic Microbiology sent a communication to Pablo Arturo Monsalve in reply to various questions on the sub-types of HIV, indicating that "the fact that various individuals present with the same sub-type or variant (...) means nothing as to whether they infected each other."¹⁴⁹

125. On September 23, 2001, the Azuay District Prosecutor issued a Prosecutor's Opinion analyzing the documentary evidence, expert witness reports and testimony, and filed charges against Mariana Ramírez as perpetrator of the offense set out in Art.436 of the Criminal Code.¹⁵⁰ Charges were also brought against Pablo Arturo Monsalve and Edith Alexandra Orellana for concealment of the said offense.¹⁵¹ From the Prosecutor's conclusions the following are noteworthy:

It is been indisputably established that the infection of the minor (...) with the blood of donor [HS] – plasma and platelets obtained in the Azuay Red Cross Blood Bank on June 22, 1998 – and as a result of administering this blood, as admitted by the accused Mariana de Jesús Ramírez. That the donor [HS] at the time of the donation was unaware that he had the HIV virus (...)

The Staff Nurse of the Blood Bank of the Azuay Red Cross, the accused Mariana de Jesús Ramírez, in her only court statement, admitted her role in the administration of blood and plasma on June 22, 1998. However, she lied when stating that she performed serum tests. The accused, due to oversight, negligence, recklessness, or non-compliance with basic Laboratory routine, omitted to perform the HIV test before administering the blood and plasma originating from a donor infected with HIV – an infection that was established 24 hours after the transfusion (...). The criminal elements of negligence and recklessness

that "extraction tubes were labelled 1 to 4", and tube 1 was assigned to TGGL's sample, and that tubes 3 and 4 were assigned to the two adult males labelled under national identity document numbers 01-01103406 and 01-00972877, respectively. They indicated that tube labelled No. 2 was reserved for HS who came on the following day at 10:00 am to the laboratory in the presence of the expert witness Vivar and of Ana Cordero. It added that the "duly labelled" samples were handed to Ana Cordero and that as from that moment they were not aware of the procedures for sending them to Belgium.

¹⁴⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Ana Cordero of September 3, 2013. Folio 214

¹⁴⁸ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statement of Ana Cordero of September 3, 2013. Folio 214.

¹⁴⁹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Communication of the Department of Investigation and Microbiological Diagnostics of September 20, 2001. Folios 321 and 322.

¹⁵⁰ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Prosecutor's opinion of September 23, 2001. Folios 315 – 319.

¹⁵¹ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Prosecutor's opinion of September 23, 2001. Folios 315 – 319.

attributable to the accused are set out in the definition of the last indent of Art.14 of the Criminal Code.

(...)

The behavior of the accused Monsalve Toral and Orellana Quezada identifies them in the context of the summary evidence as accessories to the proven offense. Their alleged culpability is unquestionably proven by their repeated lies.¹⁵²

126. On October 29, 2001, the Fourth Court issued a decision declaring that the occurrence of the offense had been proven and ordering the opening of plenary proceedings for the alleged commission of the crime under Article 436 of the Criminal Code by Mariana Ramírez. It ordered the provisional dismissal of proceedings and a definitive dismissal in favor of the rest of the suspects under investigation.¹⁵³

127. On December 18, 2001, the First Chamber of the Superior Court decided the issue raised by the Fourth Court with respect to the dismissals, as well as the appeal lodged by the Public Prosecutor alleging that Pablo Arturo Monsalve and Edith Orellana should have been tried as being responsible for a cover up. The Chamber's decision was to uphold the definitive dismissal in favor of Claudio Arias and Bertha Regalado; and to modify the definitive dismissal with respect to Pablo Arturo Monsalve and Edith Alexandra Orellana to a provisional dismissal.¹⁵⁴

128. The Commission has no access to the documentary elements introduced into the criminal file after this date. However, in its brief of December 4, 2008, the State of Ecuador indicated that on February 28, 2005, the Second Criminal, Collusive and Traffic Chamber of the Honorable Superior Court of Justice of Azuay "ruled that the trial be time barred" in light of the legal requirements".

G. Regarding the Civil Trial

129. On September 26, 2001, TGGL's mother filed a "legal aid *amparo*" before the Civil Court of Cuenca.¹⁵⁵ On subsequent days, two individuals made statements as to the precarious situation of TGGL's mother.¹⁵⁶ On December 5, 2001, her legal aid *amparo* was granted so that she could file a civil suit for damages, in accordance with Articles 905 and 906 of the Code of Civil Procedure.¹⁵⁷ On March 5, 2002, proceedings were begun at the request of TGGL's mother against Claudio Arias and Pablo Monsalve,¹⁵⁸ who opposed the action, arguing the it was not proven that the infection was caused by the blood obtained from the Red Cross, nor that the samples sent to the Catholic University of Louvain had been taken from the donor

¹⁵² Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Prosecutor's opinion of September 23, 2001. Folios 315 - 319.

¹⁵³ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Decision of the Second Criminal Court of October 29, 2001. Folios 244 - 247.

¹⁵⁴ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Decision of the First Chamber of the Superior Court of December 18, 2001. Folios 250 - 254.

¹⁵⁵ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Request for legal aid *amparo* of September 26, 2001. Folios 221 and 222.

¹⁵⁶ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Statements in support of the legal aid *amparo*. Folios 227 and 228.

¹⁵⁷ Annex 2. Court File. Second Criminal Court of Cuenca. Incorporated into Annex 1, Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Decision on the legal aid *amparo* of December 5, 2001.

¹⁵⁸ Annex 1. Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Decision of July 12, 2005 of the Sixth Civil Court of Cuenca. Folios 6-9.

and the little girl.¹⁵⁹ The judicial authorities convened a conciliation meeting without reaching “any agreement.”¹⁶⁰

130. On July 12, 2005, the Sixth Civil Court of Cuenca ruled that the suit filed by TGGL’s mother was groundless. The Sixth Court relied on Articles 117 and 118 of the Civil Procedural Code providing that each party must prove the facts they allege.¹⁶¹ Relying on the outcome of the criminal trial, it invoked Article 2241 of the substantive Civil Code which provides: “whoever has committed an offense or quasi-offense causing damage to another shall be obliged to provide reparations: without prejudice to the sentence imposed by law for the offense or the quasi-offense.”¹⁶² Based on this provision, the Sixth Court indicated that in order to rule on the obligation to pay compensation it must be established whether the person committed the offense, and therefore there ought to be a trial and an enforceable criminal sentence. Given the dismissals ordered in the criminal proceedings, the Sixth Court rejected the civil suit.¹⁶³

131. TGGL’s mother filed an appeal against the Sixth Court’s decision, and therefore the case was officially referred to the Superior Court of Justice of Cuenca on July 22, 2005.¹⁶⁴ On September 2, 2005, TGGL’s mother provided further grounds for her appeal. In support of her appeal, she indicated that it referred to all the elements of the judgment, including the reasoning and the findings. She added that the compensation claim was independent from the criminal trial because it seeks compensation for a tortious act even without a criminal sentence. She relied on Article 14 of the Children and Young Persons Code on the interpretation of the superior interest of the child and emphasized the discrimination of TGGL in several areas of her life.¹⁶⁵

132. On September 12, 2005, one of the defendants filed a brief disputing the claim that the civil action was independent from the criminal proceedings, on the basis of Articles 31 and 41 of the Code of Criminal Procedure. Additionally, it was argued that it had not been proven in the criminal proceedings that the infection was due to the blood transfusion received at the Red Cross, and that this allegation had affected the institution’s prestige.¹⁶⁶ On November 23, 2005, TGGL’s mother requested that a decision on the appeal be issued.¹⁶⁷

133. On May 18, 2006, the First Chamber of the Superior Court of Justice of Cuenca annulled “all steps taken as from the acceptance of the suit”, and referred the case file to the original court. This decision was based on Article 41 of the Code of Criminal Procedure which provides that “there shall be no claim for civil compensation deriving from a criminal offense whilst there is no enforceable criminal sentence.” The

¹⁵⁹ Annex 1. Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Decision of the First Chamber of the Superior Court of Justice of Cuenca of May 18, 2006. Folios 17 – 20.

¹⁶⁰ Annex 1. Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Decision of July 12, 2005 of the Sixth Civil Court of Cuenca. Folios 6-9.

¹⁶¹ Annex 1. Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Decision of July 12, 2005 of the Sixth Civil Court of Cuenca. Folios 6-9.

¹⁶² Annex 1. Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Decision of July 12, 2005 of the Sixth Civil Court of Cuenca. Folios 6-9.

¹⁶³ Annex 1. Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Decision of July 12, 2005 of the Sixth Civil Court of Cuenca. Folios 6-9.

¹⁶⁴ Annex 1. Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Request of July 22, 2005. Folio 10.

¹⁶⁵ Annex 1. Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Further grounds for appeal, September 2, 2005. Folio 13.

¹⁶⁶ Annex 1. Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Brief of Dr. Claudio Arias of September 19, 2005. Folio 14.

¹⁶⁷ Annex 1. Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Request to issue judgment of November 23, 2005. Folio 16.

Chamber added that as no such sentence existed in this action, a fundamental requirement was lacking and therefore, all proceedings up this point were null and void.¹⁶⁸

V. LEGAL ANALYSIS

A. TGGL's Right to Physical Integrity *vis-à-vis* the Right to Health (Articles 5, 19, and 1.1 of the American Convention)

134. Article 5, so far as is relevant, provides:

1. Every person has the right to have his physical, mental, and moral integrity respected.

135. Article 19 of the American Convention states:

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

136. Article 1.1 of the American 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.

137. The Commission will examine the facts, as established, in the light of these provisions in the following order: 1. general considerations on the duty to ensure the right to humane treatment *vis-à-vis* the right to health; 2. special obligations to fulfill the duty to ensure the right to physical integrity *vis-à-vis* the right to health in the case of children; and 3. examination of the specific case.

1. General Considerations on the Duty to Ensure the Right to Humane Treatment *vis-à-vis* the Right to Health

138. The Inter-American Court has repeatedly interpreted that Article 5.1 of the American Convention is "directly and closely linked with human health care"¹⁶⁹ and "the lack of adequate medical attention" may contribute to its breach.¹⁷⁰ This intrinsic relationship constitutes a manifestation of the interdependence and indivisibility that exists between the civil and political rights and economic, social and

¹⁶⁸ Annex 1. Court File. Civil Action No. 323 05. Superior Court of Justice of Cuenca. First Chamber. Decision of the First Chamber of the Superior Court of Justice of Cuenca of May 18, 2006. Folios 17 – 20.

¹⁶⁹ IA Court HR Case of Suarez Peralta v. Ecuador, Judgment of May 21 2013, para. 130. *Cf. Case of Albán Cornejo et al., above*, para. 117, and *Case of Vera Vera and another v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 19, 2011. Series C No. 226, para. 43. Regarding the regulation and Inter-American developments of the elements of the right to health which may be relevant to the analysis of cases such as this one, the Court restated: "Article XI of the American Declaration on the Rights and Duties of Man establishes that every person has the right 'to the preservation of his health through sanitary and social measures relating to [...] medical care, to the extent permitted by public and community resources.'" Meanwhile, Article 45 of the OAS Charter requires all Member States 'to dedicate every effort [...] [d]evelop [...] and efficient social security policy.'" In this regard, Article 10 of the Additional Protocol to the American Convention on Human Rights in the Areal of Economic, Social and Cultural Rights, ratified by Ecuador on March 25, 1993, stipulates that everyone has the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being, and indicates that health is to the public good. In addition, in July 2012, the General Assembly of the Organization of American States emphasized the need for high quality health facilities, goods and services, which required the presence of trained medical personnel, as well as satisfactory conditions of hygiene."

¹⁷⁰ IA Court HR Case of Suarez Peralta v. Ecuador, Judgment of May 21 2013, para. 130. *Cfr. Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 7, 2004. Series C No. 114, para. 157, and *Case of Vera Vera et al. v. Ecuador. Preliminary Objection, Merits, Reparations, and Costs*. Judgment of May 19, 2011. Series. C no. 226, para. 44.

cultural rights. In the words of the Court, both groups of rights must be “ .. fully understood as human rights, without any rank and enforceable in all the cases before competent authorities.”¹⁷¹

139. An examination of whether there has been a failure to fulfill the duty to respect or ensure is related to the circumstances of each case at hand.

140. In the present case, the Commission has accepted as proven that both the Red Cross of Ecuador – to which the Blood Bank that provided the blood used for TGGL belongs – as well as the Humanitarian Clinic, where the transfusion was performed, constitute private institutions.

141. In one of its most recent judgments, the Court listed three principal obligations deriving from the duty to ensure the right to physical integrity *vis-à-vis* the right to health, that is, the obligations of regulation, oversight and control.¹⁷² Such obligations apply both, to the direct provision of services on the part of the State and private entities.

142. With specific regard to the obligation of regulating, in the cases of *Ximenes Lopes v. Brazil* and *Suárez Peralta v. Ecuador*, the Court emphasized the following:

the States are responsible for regulating [...] at all times the rendering of services and the implementation of the national programs regarding the performance of public quality health care services so that they may deter any threat to the right to life and the physical integrity of the individuals undergoing medical treatment. They must, *inter alia*, create the proper mechanisms to carry out inspections at institutions, [...] submit, investigate, and solve complaints and take the appropriate disciplinary or judicial citations regarding cases of professional misconduct or the violation of the patients’ rights.¹⁷³

143. With regard to the elements of the obligations of **supervision and control**, the Inter-American Court has quoted the European Court of Human Rights to emphasize that the State is still under an obligation to issue licenses and exercise supervision and control over private institutions.¹⁷⁴

144. The Inter-American Court has been clear in indicating that the obligation to inspect includes both, services provided by the State or by private actors¹⁷⁵. The Court detailed the scope of the State responsibility when such obligations regarding private entities are not fulfilled:

¹⁷¹ *Case of Acevedo Buendía et. al. (“Cesantes and Jubilados de la Contraloría”) v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 1, 2009, Series C No. 198, para. 101. In the same sense: United Nations, Economic and Social Committee, Committee of Economic, Social and Cultural Rights. General Comment No.9, *supra*, para. 10. See also: *Case of Airey v. Ireland*, No. 6289/73. Judgment of October 9, 1979, para. 26 and *Case of Sidabras and Dziautas v. Lithuania*, Nos. 55480/00 and 59330/00. Second Section. Judgment of July 27, 2004, para. 47. In the *Case of Airey v. Ireland*, the European Court stated: “Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of to social and economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be to decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.”

¹⁷² *Cfr.* I/A Court H.R., *Case of Ximenes Lopes v. Brazil. Preliminary Objection.* Judgment of November 30, 2005. Series C No. 139, paras. 89 and 99.

¹⁷³ *Cfr.* I/A Court H.R., *Case of Ximenes Lopes v. Brazil. Preliminary Objection.* Judgment of November 30, 2005. Series C No. 139, para. 99.

¹⁷⁴ *Cfr.* EurCtHR. *Case of Storck v. Germany*, No. 61603/00. Third Section. Judgment of June 16, 2005, para. 103. In the above case, the European Court established that: “the State is under an obligation to secure to its citizens their right to physical integrity under Article 8 of the [European] Convention [on Human Rights]. For this purpose, there are hospitals run by the State which coexist with private hospitals. The State cannot completely absolve itself of its responsibility by delegating its obligations in this sphere to private bodies or individuals.[...]”[T]he State remained under to duty to exercise supervision and control over private [...] institutions. Such institutions, [...] need not only to licence, but also competent supervision on to regular basis of whether the confinement and medical treatment is justified.”

¹⁷⁵ IA Court HR *Case of Suarez Peralta v. Ecuador*, Judgment of May 21 2013, para. 130. *Cfr. Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 7, 2004. Series C No. 114, para. 149.

In the case of essential competences related to the supervision and control of the provisions of services of public interest, such as health care, by either public or private entities (as in the case of a private hospital), responsibility stems from the failure to comply with the obligation to supervise the provision of the services in order to protect the respective right¹⁷⁶.

145. In the *Case of Suárez Peralta v. Ecuador*, the Inter-American Court linked these obligations of supervision and control over health services with the principles of availability, accessibility, acceptability and quality in medical services, indicating that the former obligations must be “aimed at” satisfying these principles,¹⁷⁷ which were formulated by the Committee on Economic, Social and Cultural Rights in General Comment No.14 as “essential and interrelated”, in the following terms:

a) *Availability*. Functioning public health and health-care facilities, goods and services, as well as programs, have to be available in sufficient quantity within the State party. [T]hese services will include the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel [...];

b) *Accessibility*. Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party;

c) *Acceptability*. All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, [...] as well as being designed to respect confidentiality and improve the health status of those concerned;

d) *Quality*. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.¹⁷⁸

146. Regarding the quality of the service, the Court indicated that the State has the duty to regulate, supervise and inspect health services, ensuring among other aspects that the sanitary conditions and the personnel are adequate, that are duly qualified and that continue to be capable to exercise the profession¹⁷⁹.

147. In brief, the Court has indicated that “the eventual provision of medical care in institutions without the proper authorization, the infrastructure and hygiene of which are inadequate for the provision of medical services, or by professionals who do not have the appropriate qualifications for such activities, could have a significant impact on the rights to life and to integrity of the patient¹⁸⁰.”

148. In this sense, the Commission will examine whether the State is responsible for the failure to fulfill its obligation to ensure the right to physical integrity *vis-à-vis* the right to health to the prejudice of TGGL, while she was in hospital at the Humanitarian Clinic and when she received a blood transfusion originating from the Azuay Red Cross Blood Bank.

2. Special Obligations for the Fulfillment of the Duty to Ensure the Right to Humane Treatment *vis-à-vis* the Right to Health in the case of Children

¹⁷⁶ IA Court HR Case of Suarez Peralta v. Ecuador, Judgment of May 21 2013, para. 150.

¹⁷⁷ IA Court HR Case of Suarez Peralta v. Ecuador, Judgment of May 21 2013, para. 144, citing *Cfr.* I/A Court H.R., Case of Ximenes Lopes v. Brazil. Preliminary Objection. Judgment of November 30, 2005. Series C No. 139, paras. 89 and 99, para. 152.

¹⁷⁸ United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comment No.14 (2000).

¹⁷⁹ Corte IDH. *Caso Suárez Peralta Vs. Ecuador*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 21 de mayo de 2013. Serie C No. 261. Párr. 152.

¹⁸⁰ United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comment No.14 (2000, paras. 12 and 35.

149. Taking into account that at the moment of her admission to the Humanitarian Clinic and of the blood transfusion originating at the Azuay Red Cross, TGGL was three years old, the Commission considers it necessary to incorporate into the analysis of this case, the international *corpus juris* on the protection of children.¹⁸¹ This international *corpus juris*, used by both organs of the Inter-American system to define the scope and content of States' obligations towards children, has as central focal points the special duty of protection and the principle of the best interest of the child.

150. With regards to these central focal points, the Inter-American Court has indicated that children are beneficiaries of the rights enshrined in the American Convention, as well as enjoying special protective measures set out in Article 19, which must be interpreted according to the particular circumstances of each case at hand.¹⁸²

151. In addition, every decision of the State, society or the family which involves any limitation on the exercise of any rights of children, must taken into account the best interest of the child, which has been formulated by the Inter-American Court as the core principle of the law on the rights of the child, based on the dignity of every human-being; in the characteristics of children themselves; and the necessity of fostering their development, with full appreciation of their potential.¹⁸³

152. Specifically relating to health, Article 24 of the Convention on the Rights of the Child sets out a series of special and reinforced components. With particular relevance to the present case, the Commission emphasizes that this norm, in paragraph 1, provides: "States Parties recognize the right of the child to the enjoyment of the highest standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services."

153. The Committee on the Rights of the Child has formulated two General Comments which are relevant for the analysis of the special obligations incumbent on the State in the present case with regard to TGGL.

154. The Committee on the Rights of the Child has recently issued *General Observation No.15 "The right of the child to the enjoyment of the highest attainable standard of health"*, containing important elements which contribute to determining the special implications involved in the duty of special protection of the right to physical integrity of children in situations related to health.

155. Thus, the Committee referred specifically to the makeup of the "quality" element in health services in children's cases, and at various points in the Comment, it emphasized the importance of providing safe treatment and services:

Health-related facilities, goods and services should be scientifically and medically appropriate and of good quality. Ensuring quality requires, inter alia, that (a) treatments, interventions and medicines are based on the best available evidence; (b) medical personnel are skilled and provided with adequate training on maternal and children's health, and the principles and provisions of the Convention; (c) hospital equipment is scientifically approved and appropriate for children; (d) drugs are scientifically approved, have not expired, are child-specific (when necessary) and are monitored for adverse reactions; and (e) regular quality of care assessments of health institutions are conducted¹⁸⁴.

¹⁸¹ I/A Court H.R., Case of Fornerón and daughter v. Argentina. Merits, Reparations and Costs. Judgment of April 27, 2012. Series C No. 242, para. 144; and I/A Court H.R., Case of Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 125.

¹⁸² I/A Court H.R., Case of Fornerón and daughter v. Argentina. Merits, Reparations and Costs. Judgment of April 27, 2012. Series C No. 242, para. 144; *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2001 Series C No. 221, para. 121.

¹⁸³ I/A Court H.R., Case of Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, para. 127.

¹⁸⁴ CRC. General Comment No. 15. On the right of the child to the enjoyment of the highest attainable standard of health, para. 116.

156. Concerning the role of legislation in establishing quality services and in the importance of the functions and responsibilities of the protection agencies, the Committee also observed:

Legislation should fulfill a number of additional functions in the realization of children's right to health by defining the scope of the right and recognizing children as rights-holders; clarifying the roles and responsibilities of all duty bearers; clarifying what services children, pregnant women and mothers are entitled to claim; and regulating services and medications to ensure that they are of good quality and cause no harm. States must ensure that adequate legislation and other safeguards exist to protect and promote the work of human rights defenders working on children's right to health.¹⁸⁵

157. With specific regard to the issue of HIV/AIDS, in its *General Comment No. 3 "HIV/AIDS and the rights of the child"*, the Committee referred to the importance of preventing HIV/AIDS in children, due to the profound impact it has on their lives and on the exercise of their rights, including the right to "life, survival and development" and other social rights.¹⁸⁶

3. Analysis of the Present Case

158. In light of the evidence in the present case, there is no dispute as to the following facts:

- On June 22 1998, three-year old TGGL was admitted to the Humanitarian Clinic where she was diagnosed with thrombocytopenic purpura; her mother was told that she needed an urgent blood and platelet transfusion.
- In these circumstances, TGGL's mother went to the city's Red Cross Blood Bank, and was told she had to bring donors.
- TGGL's mother then asked for help from two acquaintances, among them HS, who actually donated blood the same day.
- On the same day, June 22, 1998, the Blood Bank dispatched blood products for TGGL on two occasions: the blood was delivered in the afternoon, and the platelets at night.
- The transfusion of these products was administered on the same day, June 22, 1998, at the Humanitarian Clinic, and was completed on the following day.
- At the Blood Bank, tests on HS's blood, including tests for HIV, were performed on June 23, 1998. In the registers there is a positive HIV result entry.
- TGGL was discharged on June 29, 1998. Approximately one month afterwards, the doctor who had initially diagnosed her with thrombocytopenic purpura requested that an HIV test be performed, which gave a positive result.
- At the same time, a few days after the donation, the Blood Bank called donor HS, and an HIV test was performed on him. Afterwards he was told he was a virus carrier.
- Neither TGGL's mother, father, nor her brother is an HIV carrier.

¹⁸⁵ CRC. General Comment No. 15. On the right of the child to the enjoyment of the highest attainable standard of health, para. 95.

¹⁸⁶ CRC. General Comment No. 15. On the right of the child to the enjoyment of the highest attainable standard of health, para. 5.

159. Considering this sequence of events, the disputes raised in the context of the domestic criminal proceedings and the position of the State of Ecuador at the admissibility stage, the Commission considers it necessary to examine, firstly, the causal nexus between the blood transfusion originating from the Blood Bank and TGGL's infection with HIV. Secondly, the Commission will examine whether the State is internationally responsible for these facts.

3.1 The Commission's Evaluation of the Causal Nexus between the Transfusion and Infection

160. The Commission notes in the first place that the case file contains no information – even circumstantial – indicating that TGGL was already an HIV carrier at the time the blood transfusion was administered. Again it is undisputed that neither the mother nor any member of her immediate family is an HIV carrier.

161. In the course of the domestic investigations, there has been no hypothesis raised – other than the blood transfusion – which might suggest any different mode of infection. Although at one point the accused's defense suggested that the “window” of infection could not be explained with the transfusion, the case file establishes that this window depended on the particular circumstances and that –specifically in cases of infection via a blood transfusion— the period of verification through testing is much lower, from the point of three weeks. In the present case, the blood transfusion took place on June 22, 1998, and it was only five weeks later that the resulting positive HIV test was performed.

162. From the expert witness' test initially performed by doctors Peralvo and Vivar there is a clear tendency towards the hypothesis of infection via blood transfusion and indicating the specialized genetic testing that might lead to a more definitive conclusion. This specialized genetic testing was performed by a group of experts at the University of Louvain, using four samples: from TGGL, for HS and from two individual volunteer HIV carriers. The results of this test showed that TGGL's and HS' viruses were “genetically identical” and pointed out that this test is used precisely in the context of investigations related to infection via blood transfusion.

163. With these elements, the Commission takes special note of the different expertises and evidences during the investigation that indicate the absence of documentation, as well as the irregularities and contradictions on the few existing documents. With respect to the first point, the Commission notes that the expert witnesses' reports show an absence of records indicating the origin of the blood and platelets given to TGGL on June 22, 1998. From information obtained from blood bank staff themselves, mention should also be made that it was only by the end of 1998 that they started to record the administration of emergency blood products in the night hours, as was the case of the platelets provided for TGGL.

164. With respect to the second point, the Commission observes that the expert witnesses' reports refer to those few records found –relating to the donors on June 22, 1998 and the tests performed on the samples of the same date— having “smudges” and “defacements”. Similarly, the expert witness report of doctors Peralvo and Vivar indicated that the version given by the Blood Bank –that the platelets provided for TGGL matched another donor– was unsupported and inconsistent. Specifically, they explained that given that the blood from this donor was provided to another patient in the form of “total blood”, it was scientifically impossible to extract platelets from this donor.

165. In such circumstances, the Commission notes that the State limit itself to deny its responsibility for being private entities and not State conduct. However, the State has not objected the consistent, detailed and concrete indicia that confirm that the transfusion was the source of infection.

166. On its part, the declarations of the investigated persons, who denied that Mr. HS' blood was used for TGGL, were based in the security procedures that in theory should be performed, but were not proved by means of reliable documents, as the expertises noted. In this sense, when the Public Prosecutor set out the formal charges, explicit reference was made to the contradictions in the statements of the respondents, which also lead to drafting charges of concealment.

167. By reason of the aforementioned considerations, the Commission believes there are sufficient elements to show a clear causal nexus between the blood transfusion originating at the Azuay Red Cross Blood Bank on June 22, 1998, and the HIV infection suffered by TGGL.

3.2 As to whether the State of Ecuador is responsible for the events

168. The Commission accepts the premise that infection with the HIV virus presents an obvious adverse effect on the health of an individual which, in turn, has an impact on personal integrity and may also generate a serious risk to life. This effect takes on special intensity and gravity when it concerns a child. In this sense, the Commission considers that it is unnecessary to go into detail as to TGGL's current state of health or into the development of her illness, since the fact of infection on its own constitutes the source of the breach of her right to personal integrity *vis-à-vis* the right to health.

169. From the evidence it appears that the two institutions associated with the proven facts are: the Azuay Red Cross Blood Bank, from where both the blood as well as the platelets provided to TGGL originated; and the Humanitarian Clinic, where the blood transfusion was performed. The Commission notes that both the Red Cross of Ecuador – to which the Azuay Red Cross belongs – as well as the Humanitarian Clinic are institutions of a private nature.

170. However, as was indicated in the section relating to the State's obligations towards the right to physical integrity in the context of health, the duty of regulation, supervision and control devolves upon the State with regard to all entities offering health services. In this sense, if a breach of the right to humane treatment or to life occurs in a private health facility operating without an appropriate regulatory framework, without supervision and adequate and timely control, the State will be responsible for the failure to fulfill the duty of ensuring those rights. Moreover, there are certain activities in the same ambit of the health that, for the risk that imply for the life and personal integrity, impose on the States a strong duty to regulate, supervise and inspect the activity. The Commission considers that the Blood Banks, for its own nature and functions, are within this category.

171. The State of Ecuador presented no response to the merits of the instant case nor presented information, despite the repeated requests by the IACHR. Therefore, the Commission has not have information on the part of the State regarding compliance with the requirements of regulation, supervision and inspection. In that sense, the Commission will analyze the case based on the information available in the file.

172. In this sense, the Commission observes at the outset that at the time the events, the regulations were set out in Articles 168 and 169 of the 1971 Health Code which provide that the Health Authority shall establish laws and requirements to be observed by medical health facilities, and shall periodically inspect and evaluate them. The medical health facilities must also submit their annual programs and regulations for the approval of the Health Authority.

173. In the *Case of Suárez Peralta v. Ecuador*, the Inter-American Court examined this regulation and stated, in general terms, that "the above-mentioned norms established (...) a regulatory framework for the provision of medical services, granting the corresponding State authorities the necessary competence to control these, with regard to both the supervision and control the functioning of public and private facilities, and the supervision of the exercise of the medical profession." In this sense, in the above case, the Court considered that the State had failed to fulfill its duty of regulation, and focused its analysis on the failure to fulfill the duties of supervision and control.

174. In the present case, the Commission observes that beyond this general regulation of the "medical services" offered by public and private institutions, there was no information in the case file indicating that at the time of the events, the Blood Banks -due to the specificity of their functions and the risks inherent therein- were regulated in such way that minimum standards and obligations susceptible to supervision and control by the competent State authorities were present, in order to protect the public from

inadequacies of these institutions. Information was also lacking which might show there was a regulatory framework establishing safe transfusions by the health entity receiving blood products, before proceeding with a transfusion. In effect, the Commission notes that the Health Code does not make any reference to Blood Banks nor to transfusion services. The available information demonstrates that it was only recently, in the 2006 Organic Health Law, that the exercise of supervision and actual control over the workings of these entities by the Ministry of Health was established. Therefore, the Commission considers that the State did not prove compliance with its obligation to regulate the functioning of the blood banks.

175. As regards the functioning itself of the two institutions in question, various elements emerge from the evidence, demonstrating deficiencies in their functioning.

176. In the case of the Azuay Red Cross Blood Bank, it has been established that at the time of the events, it did not possess a reliable registry system allowing for verification of the origin of the blood products donated, nor express indication that the respective security measures, including a serum test, had been completed. As the expert witnesses indicated, the few registers – which did not include the Blood Bank's procedures during night hours – showed irregularities. The situation of an absence of registers is compounded by the precarious procedures of the Azuay Red Cross Blood Bank at the time of the events. This may be seen in the lack of a minimum staff to safely attend to the needs of the daily transfusions of an entire area, as well as the lack of certainty in the serum tests available at the institution in comparison to those available in other areas.

177. In the case of the Humanitarian Clinic, where the transfusion was administered, the Commission observes that at the time of the events, there were no corroboration or registration requirements in order to verify both the origin of the blood to be used in the transfusion or whether all the respective tests had been done. The Commission emphasizes that the staff themselves in charge of supervising TGGL's transfusion stated that they were unaware of the origin of the blood and that it was an established practice to fully trust the products sent by the Blood Bank.

178. The Commission notes that the absence of registry and documents of the blood given to each persons with an specific indication of the negative results of the HIV tests, the scarcity of the functioning of the Blood Bank and the absence of any verification in the health facilities receiving the blood coming from the Red Cross, constitute structural deficiencies or, at least, rooted in the practice of the institutions. Therefore, the Commission understands that the instant case is not an unfortunate event that took place exceptionally, but the result of a situation of risk that could have been prevented by the State with an adequate regulatory framework of the blood banks and, specially, with the periodic supervision and inspection of its functioning.

179. In view of the deficiencies of a structural nature or, at least, ingrained in the practice of the institutions, there is no indication from the State or any evidence showing that the State, through the competent health authorities, undertook any supervision or control of the procedures of the Azuay Red Cross Blood Bank or Humanitarian Clinic. The use of practices that in themselves fail to satisfy minimum standards of safety reveals the omission of the State in relation to its duty to ensure the right to physical integrity *vis-à-vis* the right to health.

180. All these omissions by the State created a situation of risk in the procurement and transfusion of blood, which materialized with TGGL's infection with HIV and the consequent impact on her personal integrity and health. As a result, the Commission concludes that the State of Ecuador is responsible for the failure to fulfill its duty to ensure the right established in Article 5.1 of the American Convention, in relation to the obligations established in Articles 1.1 and 19 of the same instrument.

B. The Right of TGGL to Personal Integrity and to a Dignified Life after Infection (Articles 4, 5, 19, and 1.1 of the American Convention)

181. Article 4 of the American Convention establishes, where relevant:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

182. Article 5 provides, where relevant:

Every person has the right to have his physical, mental, and moral integrity respected.

183. Article 19 of the American Convention provides:

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

184. Article 1.1 of the American 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.

185. In this section, the Commission will examine the response provided by the State of Ecuador after TGGL's infection on June 22, 1998, as well as the impacts in TGGL and her family members.

186. In this regard, TGGL's mother has described before the Commission and the domestic judicial authorities, both civil and criminal, that the State failed to provide her daughter with the treatment she required. Similarly, the individuals who made statements supporting her legal aid *amparo* in order to file civil suit highlighted the enormous efforts of TGGL's mother in order to buy the medicines needed. For her part, TGGL herself, in a recent communication to the IACHR explained the continuing deterioration of her health; the personal, family and social impact of this situation; the deprivations she has undergone in the last 15 years since she was infected; and the discrimination she has suffered for being an HIV carrier. The State has not contested the information on the lack of public treatment nor the social and family environment suffered by the TGGL.

187. The Commission observes that as from the moment TGGL's mother filed a criminal complaint regarding the infection in 1998, the State has been aware of the child's situation and her need for treatment. Throughout the criminal proceedings, and afterwards in the civil suit, various State entities, including the Ombudsman, became aware of TGGL's need for treatment. Thereafter, from the beginning of 2008 with the proceedings before the Inter-American system, the State was again informed of TGGL's situation.

188. Despite the foregoing, even today TGGL has not received any response from the State, which inevitably causes a progressive deterioration in her health and personal integrity. Although the efforts of the mother of TGGL, there is no information indicating that any State institution in charged of the interests of the child was part of the judicial procedure or contributed to the searching for medical attention. At this situation has been extended to the family members of TGGL, to the exercise of her right to education and, in sum, to the minimum conditions to live and develop with dignity.

189. The Inter-American Court has referred to the concept of a dignified life among the obligations imposed by Article 4 of the Convention. In the *Case of Villagrán Morales et. al.* the Court established that "the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that persons will not be prevented from having access to the conditions that guarantee a dignified existence."¹⁸⁷ This interpretation was applied in the indigenous

¹⁸⁷ I/A Court H.R. *Case of "the Street Children" (Villagrán Morales et. al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, para. 144 and 191.

community cases *Yakye Axa, Sawhoyamaxa and Xákmok Kásek, against Paraguay*, where the State had not taken the necessary measures to provide them with a dignified life, in relation to the provision of water, food, health and education.¹⁸⁸

190. The Commission considers that the obligations of the State towards the right to humane treatment and the necessity to provide conditions allowing a dignified life, read in conjunction with the duty of special protection of children and the principle of the best interest of the child, required the State of Ecuador to respond effectively which meant the access to the treatment that TGGL required.

191. Regarding the appropriate response in cases of HIV-infected children, the Committee on the Rights of the Child indicated that States must

extend to ensuring that children have sustained and equal access to comprehensive treatment and care, including necessary HIV-related drugs, goods and services on a basis of non-discrimination. It is now widely recognized that comprehensive treatment and care includes anti-retroviral and other drugs, diagnostics and related technologies for the care of HIV/AIDS, related opportunistic infections and other conditions, good nutrition, and social, spiritual and psychological support, as well as family, community and home-based care.¹⁸⁹

192. This obligation was particularly pressing in the present case due to the multiple vulnerability factors faced by the victim in her condition as a child who is an HIV carrier and who has very limited financial resources at her disposal. Given these circumstances, the lack of a response affected TGGL's chances to pursue her life goals, her personal integrity and her dignified existence and development. As she and her mother explained on various occasions, this exposed her to a situation of discrimination at several levels.

193. In its *General Comment No. 3 "HIV/AIDS and the Rights of the Child"*, the Committee on the Rights of the Child stated that:

[d]iscrimination is responsible for heightening the vulnerability of children to HIV and AIDS, as well as seriously impacting the lives of children who are affected by HIV/AIDS, or are themselves HIV infected. Girls and boys of parents living with HIV/AIDS are often victims of stigma and discrimination as they too are often assumed to be infected. As a result of discrimination, children are denied access to information, education (see the Committee's General Comment No.1 on the aims of education), health or social care services or community life. At its extreme, discrimination against HIV-infected children has resulted in their abandonment by their family, community and/or society. Discrimination also fuels the epidemic by making children in particular those belonging to certain groups like children living in remote rural areas where services are less accessible, more vulnerable to infection. These children are thus doubly victimized.¹⁹⁰

194. In its recent General Observation No.15 "The Right of the Child to the Enjoyment of the highest attainable standard of health", the Committee on the Rights of the Child emphasized that children's health should not be compromised by discrimination, an important factor contributing to their vulnerability. In these general comments, the Committee explained the special risk of discrimination faced by children due to their state of health, particularly HIV/AIDS.¹⁹¹

¹⁸⁸ I/A Court H.R. *Case of the Yakye Axa Indigenous Comunidad v. Paraguay*. Interpretation of Judgment of Merits, Reparations and Costs. Judgment of February 6, 2006. Series C No. 142, para. 161; I/A Court H.R. *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146; I/A Court H.R. *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010, Series C No. 214, paras. 194 to 217.

¹⁸⁹ CRC. General Comment No. 3. HIV/AIDS and the rights of the children. Para. 28.

¹⁹⁰ CRC. General Comment No. 3. HIV/AIDS and the rights of the children. Para. 7.

¹⁹¹ CRC. General Comment No. 3. HIV/AIDS and the rights of the children. Para. 8.

195. In the present case, the international responsibility of the State is not limited to having omitted its basic obligations of regulation, supervision and control over the Blood Bank and Humanitarian Clinic but, as explained above, it extends to its total lack of response after becoming aware of the infection through various channels. To date, the State has ignored the situation of a child under its jurisdiction in an extremely vulnerable condition, causing additional damage to her personal integrity and the possibility of living a dignified life, thereby exposing her to a situation of discrimination. This situation, as a whole, has affected her family members.

196. By virtue of the foregoing, the Commission concludes that the State is responsible for a violation of the right to personal integrity and to a dignified life established in Articles 4 and 5 of the American Convention, in relation to the obligations established in Articles 1.1 and 19 of the same instrument, to the prejudice of TGGL. Moreover, the State is responsible for the violation of the rights to moral integrity of the mother and brother of TGGL.

C. The Right to Judicial Guarantees and Judicial Protection for TGGL and her Mother (Articles 8, 25, 19, and 1.1 of the American Convention)

197. Article 8.1 of the American Convention provides:

1. 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.

198. Article 25.1 of the American Convention establishes:

1. 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.

199. Article 19 of the American Convention provides:

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

200. Article 1.1 of the American 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.

201. The Court has pointed out that, according to the American Convention:

States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due process of law (Article 8.1), all in keeping with the general obligation of such

States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Article 1.1).¹⁹²

202. The jurisprudence of the Inter-American system has established that even though the duty to investigate is an obligation of means not of results, it must be assumed by the State as its own legal duty, and not as a mere formality preordained to be ineffective,¹⁹³ nor as a step taken by private interests depending on the initiative of the victims or their families or upon their offer of proof.¹⁹⁴

203. The Court has determined that the investigations undertaken by the State must be made with due diligence so that the enquiries are made utilizing all legal means available and are oriented toward the determination of the truth.¹⁹⁵ In this sense, the Inter-American Commission has stated that

the fact that no one has been convicted in the case or that, despite the efforts made, it was impossible to establish the facts does not constitute a failure to fulfill the obligation to investigate. However, in order to establish in a convincing and credible manner that this result was not the product of a mechanical implementation of certain procedural formalities with the State genuinely seeking the truth, the State must show that it carried out an immediate, exhaustive and impartial investigation.¹⁹⁶

204. The Inter-American Court has established that a long delay may *per se* constitute a violation of the principle of due process,¹⁹⁷ and it is for the State to explain and prove why it has required more time than would be reasonable to deliver final judgment in a specific case.¹⁹⁸ The reasonability of the time period must be analyzed with regard to the total duration of the criminal process. In criminal matters this period of time starts when the first procedural act against a specific person as the probable responsible for a certain crime is presented and ends with the issuing of a definitive judgment.¹⁹⁹

205. In its consistent jurisprudence, the organs of the Inter-American system have considered three elements that are relevant to an analysis of the present case, that is: a) the complexity of the case; b) the

¹⁹² I/A Court H.R., Cf. *Case of Godínez Cruz v. Honduras*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 3, para. 93. See also the *Case of the la Rochela Massacre v. Colombia*, supra note 7, para. 145, and *Case of the Miguel Castro Castro Penitentiary v. Peru*, Judgment of November 25, 2006. Series C No. 160, paras. 183.

¹⁹³ I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 177; I/A Court H.R., *Case of Cantoral Huamaní and García Santa Cruz v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 131; and I/A Court H.R., *Case of Zambrano Vélez et. al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 120.

¹⁹⁴ I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 177; I/A Court H.R., *Case of Zambrano Vélez et. al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 120.

¹⁹⁵ I/A Court H.R., *Case of García Prieto et. al. v. El Salvador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 168, para. 101.

¹⁹⁶ IACHR, Annual Report 1997, Report No. 55/97, Case 11.137 (*Juan Carlos Abella et. al.*), Argentina, para. 412. On the same point, see also: IACHR, Annual Report 1997, Report No. 52/97, Case of 11.218 (*Arges Sequeira Mangas*), Nicaragua, para. 96 and 97.

¹⁹⁴ The Inter-American Court has stated, for example, that “the American Convention guarantees everyone access to justice to enforce their rights, and the States Parties have the obligation to prevent, investigate, identify and punish the masterminds and accessories of human rights violations.” I/A Court H.R., *Case of the Constitutional Court*, Judgment of January 31, 2001. Series C No. 71, para. 123. See also I/A Court H.R., *Case of Blake*, Reparations, Judgment of January 22, 1999, Series C No. 48, para. 65.

¹⁹⁷ I/A Court H.R., *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, para. 166; *Case of Gómez Palomino v. Peru*. Judgment of November 22, 2005. Series C No. 136, para. 85; *Case of the Moiwana Community v. Surinam*. Judgment of June 15, 2005. Series C No. 124, para. 160.

¹⁹⁸ I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 142.

¹⁹⁹ I/A Court H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 129; *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, para. 104; and *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, para. 168.

conduct of the judicial authorities and c) the procedural activities of the interested party.²⁰⁰ The Court has also established that in addition to these factors, account must be taken of the interests involved and the adverse effect of the duration of the proceedings on the judicial situation of the person involved, in the following terms:

In addition, the Court finds it pertinent to clarify that, in this analysis of reasonableness, the adverse effect of the duration of the proceedings on the judicial situation of the person involved in it must be taken into account; bearing in mind, among other elements the matter in dispute. If the passage of time has a relevant impact on the judicial situation of the individual, the proceedings should be carried out more promptly so that the case is decided as soon as possible.²⁰¹

206. The jurisprudence of both the European Court and the Inter-American Court demonstrate various circumstances requiring a duty of special and exceptional diligence in the pursuit of investigations. Thus, for example, the Inter-American Court has stated that:

in view of the importance of the interests under consideration, administrative and judicial procedures concerning the protection of the human rights of the child, particularly those legal proceedings related to adoption, guardianship and custody of boys and girls in early childhood, should be handled by the authorities with exceptional diligence and celerity²⁰².

207. In addition to the condition as children of the individuals involved, the Commission points out the statement of the European Court in the case *Laudon v Germany*, where especial diligence was required in those cases in which “the individual’s integrity is involved.”²⁰³

208. Moreover, the European Court has decided cases in which the debate of the procedures was related to the situation of a person living with HIV. Specifically, in the case of *X vs. France*, it analyzed the lack of compliance with due process. Taking into account that “what was at stake in the judicial procedure was of crucial relevance for the petitioner”, given the nature of his disease²⁰⁴. In that regard, the European Court indicated that there was a risk that because of the delay in the procedure, its objective became illusory. In sum, the European Court indicated that in the mentioned case an “exceptional diligence” was required, despite the number of pending cases.²⁰⁵ In the case *F.E v. France*, the European Court stated that such diligence must apply even existing a certain level of complexity in these cases²⁰⁶.

209. In addition to the foregoing factors, which are simultaneously present in the instan case, the Court has ruled on the necessity of pursuing criminal proceedings with special celerity when, due to the domestic legal context, the possibility of pursuing a civil suit for damages, and consequently, the real prospect of obtaining reparations, depends on the results of those criminal proceedings.

²⁰⁰ IACHR, Report on the Merits No. 77/02, *Waldemar Gerónimo Pinheiro and José Víctor dos Santos* (Case of 11.506), December 27, 2002, para. 76. See also I/A Court H.R., *Case of López Álvarez*. Judgment of February 1, 2006. Series C No. 141, para. 132; *Case of García Asto and Ramírez Rojas*. Judgment of November 25, 2005. Series C No. 137, para. 166; and the *Case of Acosta Calderón*. Judgment of June 24, 2005. Series C No. 129, para. 105; UN Doc. CCPR/C/GC/32 of August 23, 2007, Human Rights Committee, General Comment No. 32, para.35.

²⁰¹ I/A Court H.R., *Case of Valle Jaramillo et. al. v. Colombia*. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, para. 155. See also I/A Court H.R., *Case of Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009, Series C No. 196, paras. 112 and 115; I/A Court H.R., *Case of Anzualdo Castro v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, para. 156; I/A Court H.R., *Case of Garibaldi v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 23, 2009. Series C No. 203, para. 133; See also. IACHR. Merits report 83-10. 12.584. July 13, 2010. Para. 77.

²⁰² I/A Court H.R., *Case of Furlan and Family v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246. para. 127.

²⁰³ Cr. EDH. Case of *Laudon v. Germany*, No. 14635/03. Fifth Section. Judgment of April 26, 2007. Para. 72.

²⁰⁴ Cr. EDH. Case of *X. vs. France*. Application 18020/91. Judgment of March 31, 1992. Para. 47.

²⁰⁵ Cr. EDH. Case of *X. vs. France*. Application 18020/91. Judgment of March 31, 1992. Para. 47.

²⁰⁶ Cr. EDH. Case of *F.E. vs. France*. 60/1998/963/1178. Judgment of October 30, 1998.

210. On this point, in the Case of *Suárez Peralta v. Ecuador*, the Court highlighted the jurisprudence of the European Court²⁰⁷ which establishes that whenever civil compensation is subject to the conclusion of criminal proceedings, the duty to investigate within a reasonable time “increases in light of the health condition of the person affected” since this person “requiring special care [the length of the proceedings] damages [...] the possibility of living a full life.”²⁰⁸

211. Thus, in the Case of *Ximenes Lopes v. Brazil*, the Court considered that:

the fact that the criminal proceeding has not been concluded has had specific consequences [...] since, under the legislation of the State, the civil reparation for the damages caused by a wrongful act that constitutes a crime may be subject to the establishment of a crime in a criminal action; therefore, no decision has been rendered by the trial court in the civil action for damages. In other words, the lack of justice in the criminal proceedings has prevented [receipt] of monetary compensation for the damage caused in the instant case.²⁰⁹

212. In the same line, the European Court in the case of *Oyal v. Turquía*, referred to the right to an effective remedy with respect to the situation of HIV infections in the Red Cross of such country. In that case, the European Court highlighted the relevance of civil actions, joint or separate of the criminal actions, with the aim of establishing responsibilities and favor the granting of the respective reparations.²¹⁰

213. In the present case, it has been established that a criminal and civil action have been started. Similarly, in accordance with the legal system in Ecuador, the possibility of filing a civil suit depends on the results of the criminal trial. This depends specifically on the existence of a final criminal sentence. In TGGL’s case itself, the criminal proceedings were begun on September 29, 1998, and they were closed on February 28, 2005 with a decision declaring the proceedings time barred. For its part, the civil suit was started on March 5, 2002, and ended on May 18, 2006, with a judgment declaring the proceedings null and void, in the absence of an enforceable criminal sentence.

214. As a result of the foregoing, neither TGGL nor her mother has received any judicial protection whatsoever for the infection suffered. In accordance with the Ecuadorian legal framework, TGGL and her mother have been denied access to claim reparations for the damages suffered as a consequence of her infection, due to the fact that the criminal trial did not end with a final criminal sentence and is now time-barred.

215. In the Commission’s view, this situation *per se* represents a flagrant denial of justice, and, consequently, violates the rights to due process and judicial protection to the prejudice of TGGL and her mother.

216. Nevertheless, from a complete analysis of the criminal case file and the elements available from the civil suit, the Commission has identified a series of additional factors contributing to this situation of a denial of justice, both in terms of due diligence and reasonable time.

217. In the first place, the Commission notes that the criminal proceedings lasted nine years, and repeatedly displayed a lack of due diligence. As the case file shows, TGGL’s mother repeatedly urged the investigation forward, by offering evidence, including expert witnesses, and by repeatedly requesting that

²⁰⁷ *Cfr. Laudon v. Germany*. No. 14635/03. Fifth Section. Judgment of April 26, 2007, para. 72; *Orzel v. Poland*. No. 74816/01. Fourth Section. Judgment of June 25, 2003, para. 55, and *Inversen v. Denmark*. No. 5989/03. Fifth Section. Judgment of December 28, 2006, para. 70.

²⁰⁸ IA Court HR Case of Suarez Peralta v. Ecuador, Judgment of May 21 2013. Para. 103.

²⁰⁹ I/A Court H.R., Case of Ximenes Lopes v. Brazil. Preliminary Objection. Judgment of November 30, 2005. Series C No. 139, para. 204.

²¹⁰ Cr. EDH. Case of Oyal vs. Turkey. Application 4864/05. Judgment of March 23, 2010. Para. 66.

matters be advanced with due speed despite the delays associated with the production of evidence. The Commission takes special note of the unjustifiable delay which occurred in ordering and performing the specialized genetic testing suggested by the medical expert witnesses early on in the investigation. This delay even caused the intervention of the Ombudsman. The Commission observes that the case was closed on more than three occasions by the judicial authorities without performing this crucial testing. This situation caused the Public Prosecutor to repeatedly request that the judicial authorities reopen the case, with the attendant additional delays.

218. One of the most blatant examples of a lack of diligence in the criminal proceedings relates to the four years which elapsed between the time when the indictment was drawn up and accepted against Mrs. Mariana Ramírez in 2001, and February 2005 when the criminal proceedings were declared time barred. The available information indicates that it was not possible to pursue the trial against Mrs. Mariana Ramírez, since she was out of the country. From the case file, no procedural steps appear on the part of the State to locate Mariana Ramírez's whereabouts in order to continue the trial and criminal proceedings. On the contrary, when this individual failed to appear at the criminal trial, the State of Ecuador remained inactive for a period of four years until the time limit elapsed, precisely due to its own lack of due diligence.

219. Besides this, in the context of the civil suit, the Commission observes that it lasted four years. The conclusion of the civil proceedings took place on May 18, 2006, with a judgment nullifying all proceedings from the time the plaint was admitted in 2002. In other words, in the context of the civil proceedings, the judicial authorities took four years to finally decide that the civil claim did not fulfill the requirements to be admitted, due to the absence of a final criminal sentence.

220. In light of the above, the Commission considers that the State of Ecuador has violated the rights to due process and judicial protection laid down in Articles 8 and 25 of the Convention, in relation to the obligations established in Articles 1.1 and 19 of the same instrument to the prejudice of TGGL, her mother and her brother.

VI. CONCLUSIONS

221. Based on the considerations of fact and law set out in the present report, the Inter-American Commission concludes that the State of Ecuador is responsible for the violation of the rights to a dignified life, human treatment, judicial guarantees and due process, established in Articles 4, 5, 8 and 25 of the American Convention in relation to the obligations set out in Article 1.1 of the same instrument, to the prejudice of TGGL. Throughout, the Commission has concluded that the State of Ecuador has failed to fulfill its obligations of special protection of TGGL in her status as a child, in violation of Article 19 of the American Convention. Thus, the Commission concluded that the State of Ecuador is responsible for the violation of the rights to the moral integrity, judicial protection and due process, enshrined in Articles 8 and 25 of the American Convention in relation to the obligations established in Article 1.1 of the same instrument to the prejudice of TGGL's mother and brother.

VII. RECOMMENDATIONS

222. By virtue of the foregoing conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, RECOMMENDS THAT THE STATE OF ECUADOR,

1. Make reparations in full to TGGL and her mother for the violations of the human rights set forth in the present report, including both the material and moral aspects.
2. Provide, in consultation with TGGL, immediately and permanently, the specialized medical treatment that she requires.

3. Provide, in consultation with TGGL, the primary, high and university education, in a free manner.
4. Undertake a complete and effective investigation into the violations of human rights highlighted in the present report.
5. Put in place procedures to prevent a repetition, including: i) the implementation of serious and effective mechanisms of periodic inspection and supervision of the functioning and systems of registry in the blood Banks that operate in Ecuador, including public and private; ii) the implementation of serious and effective mechanisms of periodic inspection and supervision of the public and private hospitals, in order to ensure that the necessary safeguards to verify the security of the blood products that are used for transfusions, are in place; iii) the implementation of programs of training to the personnel of the blood banks that operate in Ecuador, in order to ensure that they perform their work in a manner compatible with the minimum standards of security internationally recognized; and iv) the provision of free treatment and health attention for children living with HIV that have no economic resources.