Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 69/02; Petition 419/01
Session:	Hundred and Sixteenth Regular Session (7 – 25 October 2002)
Title/Style of Cause:	Laura Alban Cornejo v. Ecuador
Doc. Type:	Decision
Decided by:	President: Juan Mendez; First Vice-President: Marta Altolaguirre; Second Vice-President: Jose Zalaquett; Commissioners: Robert K. Goldman, Clare Roberts, Susana Villaran. Dr. Julio Prado Vallejo, an Ecuadorian national, did not participate in this case in compliance with Article 17 of the Commission's Rules of Procedure.
Dated:	23 October 2002
Citation:	Alban Cornejo v. Ecuador, Petition 419/01, Inter-Am. C.H.R., Report No. 69/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)

I. SUMMARY

1. On May 31, 2001 Carmen Susana Cornejo de Albán, on behalf of her husband, Bismarck Wagner Albán Sanchez and herself, (hereinafter "the petitioners") submitted a petition to the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR") against the Republic of Ecuador (hereinafter "the State") in which it alleged the violation of the following rights protected by the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"): the right to life (Article 4) the right to humane treatment (Article 5), the right to information (Article 13), and the right to due process and judicial protection (Articles 8 and 25), in violation of the obligations set forth in Article 1(1) to the detriment of their daughter Laura Susana Albán Cornejo, all of Ecuadorian nationality.

2. The allegations of the petitioner in this case concern medical malpractice. Laura Albán Cornejo entered the Metropolitan Hospital in Quito, a private hospital, on Sunday December 13, 1987 suffering from severe headaches. She was diagnosed with "meningitis bacteriana," and was placed in intensive care for one day and then transferred to room Nº 026 until December 18, 1987 the date on which she died. Dr. Ramiro Montenegro Lopez, the attending physician, was the physician in charge of the patient, but Dr. Fabian Ernesto Espinoza Cuesta, the resident physician, was the one who administered the 10 ampoules of morphine to the patient on December 17th, which caused her death. The parents, who were with their daughter when she died, charged medical malpractice and negligence and stated that no doctor or nurse was present at the time of her death. The malpractice involved in this case is criminalized and set forth in Articles 456 and 457 of the Ecuadorian Penal Code, but no one has been brought to justice for

these criminal acts. The State maintains that the petition should be declared inadmissible in light of the fact that domestic remedies have not been exhausted.

3. In this report, the Commission analyzes information submitted in accordance with the American Convention and it concludes that the petition complies with the requirements set forth in Articles 46 and 47 of the American Convention. Consequently, the Commission decides to declare the case admissible, to notify the parties of this decision, and to continue with the analysis of the merits relative to the alleged violations of articles 1, 8, and 25 of the American Convention. Also, the Commission decides to publish the report in its Annual Report.

II. PROCESSING BEFORE THE COMMISSION

4. On July 3, 2001, the Commission transmitted the complaint concerning Laura Albán Cornejo to the Government of Ecuador. On October 16, 2001, the Government of Ecuador responded to the allegations in the complaint alleging that the petitioners had failed to exhaust their available domestic remedies.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

5. On December 13, 1987 Laura Susana Albán Cornejo, 20 years of age, single, a student in the fifth semester of her studies in Sociology, entered the private Metropolitan Hospital in Quito, complaining of severe headaches. She was also suffering from high temperature and convulsions. Although the Metropolitan Hospital is a private hospital it requires authorization to function from the Ministry of Health, a State entity. She was placed under the care of Dr. Ramiro Montenegro Lopez, a neurologist, and the attending physician, and she remained under his care until she died on December 18, 1987. Dr. Ramiro Montenegro Lopez, the resident physician, administered the lethal morphine on December 17, 1987.

6. The petitioners allege that they suffered inhumane treatment from the time they entered the hospital. The authorities demanded Laura's identification card and two blank checks as a guarantee. Laura was immediately placed in the intensive care unit and the petitioners were informed that she would be under the care of a physician and a head nurse. The petitioners, anxious for their daughter's well-being, entered her room, despite the hospital prohibition on their doing so, and found her in an isolated cubicle, complaining of thirst and a headache and with no one attending to her. The only nurse present was on the phone and did not respond to petitioner's request that a doctor be called.

7. The petitioners are primarily concerned about the impunity granted the physicians by the Ecuadorian judicial system. On November 6, 1990, following the death of their daughter, the petitioners were unable to obtain her hospital file from the hospital authorities. Consequently they went to court to obtain a copy of the clinical history of their daughter's case, a procedure that took two years. The Court, the Juzgado Octavo de lo Civil de Pichincha, obtained a copy of the file, but it was not made available to the petitioners.

8. In December 1990, some physicians analyzed the case on the basis of the clinical history. It was determined that the cause of death was the administration of morphine to the patient, a drug which is totally counter-indicated in cases of meningitis, convulsions and inter-cranial hypertension, the three symptoms which Laura suffered from.

9. On November 25, 1993 the petitioners filed a complaint before the Medical Association of Pichincha. On January 4, 1995, the Honor Tribunal of the Medical Association issued a decision acquitting the accused physicians of any responsibility. This decision was rejected by the petitioners and their lawyers for violating the norms of logic and ethics, and for ignoring the medical evidence available.

10. In November 1993, following the appropriate presentation of a cause of action, the petitioners again went to Court. In the Court, the Juzgado 1º de lo Civil de Pichincha, Dr. Ramiro Montenegro López, the accused attending physician was summoned to appear. He was summoned three times and Dr. Montenegro refused to appear. On February 17, 1994 the Judge cited him for contempt and imposed a daily fine until he appeared before him. Dr. Montenegro continued to refuse to appear.

11. On August 3, 1995 petitioners presented a complaint before the then Attorney General (Ministro Fiscal General), Dr. Fernando Casares, who refused to intervene in the case and returned the complaint to the petitioners.

12. On November 1, 1996 the petitioners brought the case to the attention of the Attorney General (Ministro Fiscal General de la Nación), Dr. Guillermo Castro Dager. On November 25, 1996 Dr. Castro received them in his office and the petitioners presented their complaint against the Metropolitan Hospital, and against the two doctors for the death of their daughter, Laura, for having administered an inappropriate drug that caused her death. They based their complaint on Articles 456 and 457 of the Penal Code that renders the administration of drugs, leading to the death of the patient, a crime of intentional homicide when committed by a physician.[FN2]

[FN2] Art. 456 [Homicidio preterintencional por suministro de sustancias]. - Si las sustancias administradas voluntariamente, que pueden alterar gravemente la salud, han sido dadas sin intención de causar la muerte, pero la han producido, se reprimirá al culpado con reclusión menor de tres a seis años. Art. 457.- [Presunción legal].- En la infracción mencionada en el artículo anterior, se presumirá la intención de dar la muerte si el que administró las sustancias nocivas es médico, farmacéutico o químico; o si posee conocimientos en dichas profesiones, aunque no tenga los títulos o diplomas para ejercerlas.

---

13. On December 19, 1996 the Attorney General informed the District Attorney (Ministra Fiscal de Pichincha), Dr. Alicia Ibarra, of the case. On January 10, 1997, the case was opened before the corresponding court (Juez Quinto de lo Penal de Pichincha). On January 23, 1997, the petitioners presented their complaint against the attending physician, pursuant to Articles 456 and 457 of the Penal Code. On January 29, 1997, Judge Jorge German, the Juez Quinto, carried

out an extensive initial investigation (sumario) of the case without placing Dr. Montenegro in preventive detention.

14. On July 24, 1998 the petitioners' lawyer learned that the prosecutor had concluded that a crime had been committed. Despite the prosecutor's conclusion, on December 14, 1998, Dr. Wilson, the Juez Quinto at the time, dismissed the charges against Dr. Montenegro and against Fernando Alarcón. This dismissal included a mistake since it named Fernando Alarcón as one of the physicians when in fact that was not his name. Fernando Alarcón was a witness designated by the Honor Tribunal of the Medical Association. The other accused physician was Dr. Fabián Ernesto Espinoza Cuesta.

15. On December 23, 1998 the petitioners appealed the dismissal. On February 24, 1999 the Sixth Chamber of the Superior Court received the case that was transmitted for consultation to the District Attorney.

16. On June 15, 1999, the petitioners' lawyer again learned the content of the Prosecutor's opinion. Dr. José Marin, the Prosecutor, concluded that the elements of the crime had been proven and that the accused were the authors of a crime set forth and sanctioned by the Penal Code. Further, he stated that the decision of the lower Court should be revoked and the corresponding decision taken to open the plenary stage of the proceedings against Dr. Montenegro and Dr. Espinoza, correcting the mistake in the names committed by the lower court Judge.

17. On December 13, 1999 the Sixth Chamber of the Superior Court, headed by Dr. Pilar Sacoto de Merlyn, declared that the statute of limitations had run out.

18. The crime for which Dr. Montenegro was charged has a ten-year statute of limitations within which the corresponding judicial proceedings must have been initiated. With regard to Dr. Espinoza, the Court declared that, in accordance with Article 253 of the Code of Criminal Procedure, the plenary stage of the proceedings was opened. However, the Court continued, due to the fact that the accused is a fugitive, pursuant to Article 254 of the relevant Penal Code (Código Adjetivo Penal), the plenary proceedings are suspended until the accused is apprehended or he presents himself voluntarily before the Court. Dr. Espinoza did not fall within the ten-year statute of limitations because the Hospital refused to reveal his name for more than ten years, and during that time the proceedings against him were suspended. They were renewed when his identity was obtained.

19. On December 16, 1999 the petitioners requested the Sixth Chamber of the Superior Court to revoke the decision that the statute of limitations had tolled and to open the plenary stage of the proceedings in the case against Dr. Montenegro. On February 16, 2000, the Court rejected the petitioners' request for revocation.

20. On March 22, 2000 the petitioners presented a writ of cassation before the Sixth Chamber of the Superior Court that was rejected on April 24, 2000. The petitioners received notification of the Superior Court's decision on April 26, 2000.

B. Position of the State

21. In its reply, dated October 16, 2001, the State maintained that the petitioners had not exhausted their available domestic remedies.

22. As regards Dr. Fabián Espinoza, the State pointed out that the Superior Court, in its judgment of December 13, 1999 ordered the suspension of the plenary stage of the proceedings against him, since he was a fugitive, pursuant to Articles 254 and 255 of the Code of Criminal Procedure.[FN3] According to the State this demonstrates that domestic remedies have not been exhausted in this case. The State concludes that the Commission ought to wait until the domestic remedies have been exhausted.

[FN3] Article 254 provides: "Si al tiempo de dictar el auto de apertura del plenario el sindicado estuviere prófugo, el Juez, después de dictado dicho auto, ordenará la suspensión de la etapa del plenario hasta que el encausado sea aprehendido o se presentare voluntariamente. Mientras el sindicado estuviera prófugo, no se ejecutoriará el auto de apertura del plenario, auto que se le notificará personalmente en cuanto se presentare o fuere aprehendido."

---

23. The State also indicated that the petitioners had a second recourse available to them as regards Dr. Espinoza. They could have filed a writ of cassation as regards the judgment of the Criminal Court. This is the appropriate remedy to correct errors committed by the lower courts and to protect the legal situation that has been alleged to have been infringed.

24. As regards Dr. Montenegro, the State argued that the Commission is not called upon to resolve the guilt or innocence of the accused or to analyze the situation of the judicial proceedings, but rather to determine whether there have been violations of the rights set forth in the Convention, which it has been demonstrated did not occur. The inter-American system for the protection of human rights is subsidiary to the domestic law of the States parties and if a violation has been remedied internally by the State then the Commission cannot be seized of the matter.

25. The proceedings and the judgment of the Superior Court of Quito have been carried out with the requisite guarantees for all the parties involved in the case; the fact of obtaining an unfavorable resolution in any instance does not imply a violation of the American Convention on Human Rights; this was demonstrated when the Superior Court, in strict conformity with the national norms, declared that the statute of limitations had tolled in favor of Dr. Montenegro and at the same time, declared the plenary stage opened in the case of Dr. Espinoza, once the existence of a crime had been proven and serious grounds for presuming the accused responsible were determined.

26. The State concluded that for the international instance to act, a violation of human rights must have occurred, a violation that must be attributable to a State party of the Organization of American States. In the present case, it may be concluded that the death of Ms. Laura Albán Cornejo occurred as a result of medical malpractice, in a private hospital in the city of Quito, and

that for this reason the criminal proceedings were begun after some delay. The criminal proceedings respected all the procedural guarantees, both for the accused as for the accusers, and resulted in extinguishing the cause of action against one of the accused and in opening the plenary stage of the proceedings against the other. Consequently, international responsibility cannot be attributed to Ecuador for a crime that was not committed by agents of the State, for that would be tantamount to denaturalizing the inter-American system of the protection of human rights, which acts when a violation imputable to a determined State party exists.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission Ratione Materiae, Ratione Personae, Ratione Temporis, and Ratione Loci

27. The Commission has competence ratione materiae, in that the petitioner alleges violations of Articles 1, 4, 5, 8, 13 and 25 of the American Convention.

28. Under Article 44 the petitioner is entitled to submit complaints to the Commission, and the victim in this case is an individual with respect to whom Ecuador had undertaken to guarantee and respect the rights enshrined in the American Convention. As regards the State, the Commission notes that Ecuador has been a State party to the American Convention since ratifying it on December 28, 1977. The Commission therefore has competence ratione personae to examine the complaint.

29. The IACHR has competence ratione temporis in that the sequence of events began in June 1988, when the obligation of respecting and ensuring the rights enshrined in the American Convention was already in force for the Ecuadorian State.

30. The parties have no doubts or disagreements about the fact that the incidents described in the petition took place in Ecuadorian territory, in an area under the jurisdiction of the State. Thus, the competence ratione loci of the Commission is clear.

B. Other Requirements for Admissibility

a. Exhaustion of Domestic Remedies

31. The Commission notes that this petition raises important questions of exhaustion of domestic remedies. Ecuadorian law criminalizes the act of administering a drug to a patient that results in the patient’s death as intentional homicide when a physician administers the drug. The State, however, requires the individual victim or the heirs thereof, to initiate the criminal proceedings by the filing of a complaint and does not provide for the initiation of the proceedings de oficio.

32. In the instant case, the legal responsibility of two physicians for an alleged medical malpractice is in question. The two physicians worked in a private hospital, but since Ecuadorian law considers the alleged act to be tantamount to "intentional homicide" the State has a clear interest in seeing that the perpetrators of such a crime are brought to justice. Therefore, the issue

to be decided is whether the petitioners were afforded due process and access to the appropriate judicial remedies in clarifying the facts of the case and in seeking justice before the Ecuadorian judicial system, pursuant to Articles 8 and 25 of the American Convention. Consequently, the Commission will not consider the alleged violations of the right to life under Article 4 of the American Convention, nor the allegations raised with regard to violations of the right to humane treatment under Article 5 nor the right to information under Article 13, since the facts were not presented in such a way as to substantiate a characterization of a violation of these articles.

33. Ecuador argues that domestic remedies have not been exhausted against Dr. Fabián Espinoza, the physician who actually administered the lethal drug, since the legal proceedings against him have been suspended due to his being a fugitive. The judicial proceedings in the case against him will only be renewed if he is apprehended or returns voluntarily. As regards Dr. Ramiro Montenegro López, the attending physician in the hospital at the time, criminal charges against him were dismissed on December 13, 1999 by the Sixth Chamber of the Superior Court, on the grounds that the statute of limitations had tolled in his case.

34. The State, in its response, dated October 16, 2001, alleged that the petition should be declared inadmissible due to the fact that domestic remedies had not been exhausted since criminal proceedings were pending against Dr. Espinoza, the resident physician who was a fugitive from justice.

35. The petitioners have not had their day in court. The facts of the case reveal that the Metropolitan Hospital refused to release information as to the resident physician's identity for nine years, obstructing the initiation of the criminal action. The criminal action was finally initiated ten years after the death of Laura Albán, on January 10, 1997, by the Court (Juez Quinto de lo Penal de Pichincha), on the basis of the complaint filed by the petitioners against the two doctors. It should be noted in this context that the Inter-American Court of Human Rights has stated "it is the responsibility of the State to conduct serious judicial investigations into human rights violations committed on its territory and not the responsibility of private persons."[FN4]

[FN4] See Blake Case, Judgment of January 24, 1998, at para. 92.

---

36. It is not known in what year Dr. Espinoza left Ecuador, but the petitioners have presented information that he returned to Ecuador in December 1991, September 1993, June 1996 and March 1999 for short periods of time. The Court (Juzgado Quinto) dismissed the charges against Dr. Ramiro Montenegro López and (erroneously) Fernando Alarcón in its decision of December 14, 1998, but sent its decision to the Superior Court, for consultation. The Superior Court, in its decision of December 13, 1999, dismissed the charges against Dr. Montenegro López due to the running out of the statute of limitations, but initiated the trial (plenario) stage of the proceedings against Dr. Espinoza. The Prosecutors, both before the Court of first instance (Juzgado Quinto) and the Superior Court, considered that both of the accused physicians were responsible for the crime of intentional homicide.

37. Since the trial stage of the criminal proceedings have been opened against Dr. Espinoza, there is no information as to whether he has attempted to visit Ecuador since March 1999. There is also no information that the State has sought his extradition in order to allow for the judicial proceedings to proceed and for the internal remedies to be exhausted.

38. For the Commission to determine whether domestic remedies have been exhausted requires that the State alleging non-exhaustion prove that domestic remedies remain to be exhausted and that they are effective.[FN5] In the instant case, the State has not argued that domestic remedies remain to be exhausted as regards Dr. Montenegro Lopez, but it does argue that they remain to be exhausted as regards Dr. Espinoza. Since Dr. Montenegro was in charge of the patient, the Commission considers that his responsibility is derived from the responsibility, if any, on the part of Dr. Espinoza, since it is the latter who allegedly administered the purportedly lethal drug. The State, however, does not argue that the domestic remedies will be effective since Dr. Espinoza is a fugitive and the State has provided no information that it is taking any steps to secure jurisdiction over him. Consequently, the Commission concludes that the State has not proven that there are domestic remedies that remain to be exhausted.

[FN5] See Velásquez Rodríguez Case, Preliminary Objections, Judgment of July 29, 1988, Series C Nº 4, paragraphs 59 and 60.

---

b. Timeliness of the Petition

39. Article 46(1)(b) of the Convention states that a petition must be lodged within a period of six months from the date on which the petitioner is notified of the final judgment exhausting domestic remedies. The petitioner lodged the case with the Commission on May 31, 2001—more than a year after it was notified by the Sixth Chamber of the Superior Court, April 26, 2000 that the statute of limitations had tolled on the charges against the attending physician. The State did not argue a failure to comply with the six months rule.

40. Article 46(2)(b) and (c) of the Convention states that the six months rule does not apply if there has been a denial of justice in the case, specifically, if the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

41. In this case, the Commission finds that the exceptions set forth in Article 46(2) apply insofar as the petitioners have been denied access to the remedies under domestic law and were then prevented from exhausting them, by means of the suspension of the proceedings against the resident physician, since he is a fugitive from justice, and by means of the statute of limitations, as regards the attending physician. In addition, the fact that these proceedings have taken almost ten years without the rendering of a final judgment qualifies as an unwarranted delay. As a consequence the Commission is of the view that the petition was presented within a reasonable time.

c. Duplication of Proceedings and Res Judicata

42. The Commission understands that the substance of the petition is not pending in any other international proceeding for settlement, and that it is not substantially the same as any petition previously studied by the Commission or other international body. Hence, the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have also been met.

d. Characterization of the Alleged Facts

43. The State argues that international responsibility cannot be attributed to Ecuador for a crime that was not committed by agents of the State. Instead it argues that two physicians who worked in a private hospital committed the malpractice alleged in this case. The Commission notes that Ecuadorian penal law criminalizes the acts described in this complaint as "intentional homicide", irrespective of whether they are committed in a public or private hospital. As a consequence, the State has an obvious interest in the investigation, trial and punishment of the perpetrators of such acts. The fact that these events occurred in a private hospital does not remove the attribution of international responsibility. The Commission holds that the petitioner's claims describe events that, if proven true, could tend to establish a violation of the rights protected by Articles 1, 8, and 25 of the American Convention.

V. CONCLUSION

44. Based on the above legal and factual considerations, the Commission concludes that the case at hand satisfies the admissibility requirements set forth in Articles 46 and 47 of the American Convention and, without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this case admissible with respect to Articles 1, 8 and 25 of the American Convention.
2. To transmit this report to the petitioner and to the State.
3. To continue with its analysis of the merits of the case.
4. To publish this report and to include it in the Commission's Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 23rd day of October, 2002. (Signed): Juan Méndez, President; Marta Altolaguirre, First Vice-President; José Zalaquett, Second Vice-President; Commissioners Robert K. Goldman, Clare Roberts, and Susana Villaran.