Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 85/08; Petition 162-06
Session:	Hundred Thirty-Third Regular Session (15 – 31 October 2008)
Title/Style of Cause:	Melba del Carmen Suarez Peralta v. Ecuador
Doc. Type:	Decision
Decided by:	Chairman: Paolo Carozza; First Vice-Chairwoman: Luz Patricia Mejia Guerrero; Second Vice-Chairman: Felipe Gonzalez; Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Florentin Melendez, Victor E. Abramovich.
Dated:	30 October 2008
Citation:	Suarez Peralta v. Ecuador, Petition 162-06, Inter-Am. C.H.R., Report No. 85/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2008)
Represented by:	APPLICANT: Jorge Sosa Meza
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I. SUMMARY

1. On February 23, 2006, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition submitted by Mr. Jorge Sosa Meza (hereinafter "the petitioner") alleging the responsibility of the Republic of Ecuador for the failure to prosecute the healthcare professionals who caused injury to Mrs. Melba del Carmen Suárez Peralta, in a surgery performed on July 1st, 2000 at the private Minchala clinic in the city of Guayaquil.

2. The petitioner alleged that the State was responsible for violating the rights to a fair trial and judicial protection established in Articles 8 and 25 of the American Convention on Human Rights (hereinafter the "Convention" or the "American Convention") as they relate to the duties to guarantee rights in accordance with Article 1.1 of the Convention. In addition, the petition invoked the application of the exceptions to the requirement regarding the prior exhaustion of domestic remedies, as provided in Article 46.2.a of the American Convention. For its part, the State alleged that the petitioner's complaints were inadmissible due to a failure to exhaust the domestic remedies and considered the exceptions established in Article 46.2 to be inadmissible.

3. After analyzing the positions of the parties and in compliance with the requirements established in Articles 46 and 47 of the American Convention, the Commission decided to declare the case admissible for purposes of examining the complaint regarding the alleged violation of Articles 8.1, and 25.1 consistent with Article 1.1 of the American Convention, to notify the parties, and to order the publication of the report.

II. PROCESSING BY THE COMMISSION

4. The Commission recorded the petition under number P-162-06 and on March 20, 2006 proceeded to forward copy of the relevant sections to the State so that it could submit its observations within two months. On June 19, 2006, the State requested a 30-day extension to submit its observations, which was granted by the Commission. On October 23, 2006, the petitioner sent a communication referring to the expiration of the period granted to the State. On December 1st, 2006, the Commission repeated its request for observations to the State.

5. On July 25, 2007, the State sent its response to the Commission. In addition, on November 29, 2007, it sent another communication for the same purpose. Both communications were forwarded to the petitioner, who submitted his observations on November 21, 2007, which was forwarded to the State on December 6, 2007 for its observations.

III. POSITIONS OF THE PARTIES

A. The petitioner

6. The petitioner alleges that on July 1, 2000 Mrs. Melba del Carmen Suárez Peralta was operated on by Dr. Emilio Guerrero Gutiérrez at the private Minchala clinic in the city of Guayaquil for "possible appendicitis problems."[FN1] It is alleged that three days after the surgery and after having been discharged, the patient suffered from internal abdominal pains, vomiting, and other complications that caused pallor, abdominal distension and anorexia.

[FN1] Complaint submitted by Melba Peralta Mendoza to the First Tribunal of Guayas, annex to the original petition received by the IACHR on February 23, 2006.

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7. The petitioner alleges that as a result the patient sought an outpatient visit at the Luis Vernaza hospital where she was diagnosed with acute post-surgical abdomen. When they operated on her again, they found numerous sutures, "intestinal fluid, purulent matter, fecal content, and abdominal viscera, covered by fatty fibrin […]" and thus had to perform various procedures[FN2] and wash and drain the pelvic abdominal cavity. The petitioner alleges that the diagnosis from the anatomical-pathological study was "acute post-operative abdomen, dehiscence of the appendicular stump"[FN3] as a result of medical malpractice.[FN4]

[FN2] "Right hemicolectomy, plus ileo-transverse anastomosis". Original petition received by the IACHR on February 23, 2006, p. XXX. Citing the version prepared by Dr. Héctor Luis Taranto Ortiz, who attended the patient. The report from the forensic physician, Juan Montenegro Clavijo, dated September 18, 2001, indicates that the reason for the patient's admission was "post-operative fever, vomiting, abdominal pain, suture dehiscence (right parietal). On July 12, 2000 it was appendicular stump. Operation performed: Reexplorative laparotomy: Right hemicolectomy plus ileo-transverse anastomosis and washing and draining of cavity. Surgical findings: dehiscence of the appendicular stump (suture), localized peritonitis, fibrin clumps. Pathological diagnosis: transverse colon and ileum: acute peritonitis. Vascular

thrombosis (area of appendicular stump). Clinical history of appendectomy seven days prior. Abdominal sepsis." Original petition received by the IACHR on February 23, 2006, p. XXIX.
[FN3] Original petition received by the IACHR on February 23, 2006, p. XXIX.
[FN4] The petitioner states that the crime of medical malpractice is defined in Arts. 436, 456, and 457 of the Penal Code of Ecuador, but its passive subjects are only those who have been harmed by having been given a substance. Original petition received by the IACHR on February 23, 2006, p. XXX.
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8. The petitioner states that the partial spill of feces inside Mrs. Suárez Peralta's intestine led the doctors to remove a portion of her intestine to prevent total contamination of her body and at the time the petition was submitted to the Commission she had to follow a strict diet and take special care of her food. The petition also states that Mrs. Suárez Peralta still needed to undergo another surgery to correct the effects of medical malpractice.

9. It is alleged that on August 3, 2000, Mrs. Melba Peralta Mendoza, mother of Melba Suárez Peralta, filed a criminal complaint for medical malpractice against Dr. Emilio Guerrero Gutiérrez in her daughter's name. The petition states that on August 16, 2000 the First Judge for Criminal Matters of Guayas issued an Order to Open the Judicial Process and precautionary measures in order to determine liabilities. The petitioner alleges that during 2000 the aforementioned judge issued a series of official letters and notices ordering relevant investigations and various procedures. These included a request to the National Police to conduct forensic tests on Mrs. Suárez Peralta. In addition, the petitioner alleges that it was demonstrated that Dr. Emilio Guerrero Gutiérrez had not begun procedures for approval of his employment or professional identification, and he is thus alleged to have been practicing medicine illegally.

10. The petitioner alleges that on November 14 and December 27, 2000 Mrs. Peralta Mendoza filed complaints with the judge due to the delay in processing her briefs and handling her requests for inspection of the location where the events took place. That inspection was finally carried out on February 6, 2001. On March 22, 2001, the First Court for Criminal Matters of Guayas declared the preliminary phase concluded as the period for it had expired and ordered Mrs. Peralta Mendoza to present a formal accusation to send the case files to the Public Prosecutor's Office for issuance of an opinion.

11. The petitioners allege that the accusation was formalized by Mrs. Peralta Mendoza on March 29, 2001 and that on May 29, 2001 the First Prosecutor for Criminal Matters of Guayas issued an opinion accusing Dr. Emilio Guerrero Gutiérrez. They also state that on June 7, 2001, a request was made to extend the summary proceeding to include Dr. Wilson Benjamín Minchala Pinchú, the owner of the Minchala clinic, because of his complicity in having allowed Dr. Guerrero Gutiérrez to practice medicine without authorization from the Ministry of Health. On August 14, 2001, the First Judge for Civil Matters of Guayaquil ordered expansion of the preliminary proceeding and an Order to Open the Judicial Process against Dr. Minchala Pinchú. On August 29, 2001, Drs. Minchala and Guerrero asked the judge to declare the case invalid and on September 19, 2001 the judge declared the preliminary proceeding concluded because the period for reopening the case had more than expired. On September 25, 2001, Mrs. Peralta

Mendoza formalized her accusation against Dr. Guerrero Gutiérrez as the perpetrator of the crime and Dr. Minchala Pinchú, as accomplice and accessory after the fact.

12. The petitioner alleges that on October 12, 2001 the First Prosecutor for Criminal Matters of Guayas asked to reopen the preliminary proceeding in order to take signed statements from both doctors. On October 18, 2001, the complainant submitted a brief indicating her objection to the reopening of the process because she felt that it suggested a desire on the part of those under investigation to delay the process indefinitely. In addition, on October 29, 2001 she asked that the preliminary proceeding be extended to Dr. Jenny Bohórquez, who had asked to lease the operating suite at Dr. Michala's clinic so that Dr. Guerrero could perform the surgery in question. On November 13 and 20, 2001, Mrs. Peralta Mendoza submitted requests to close the preliminary proceeding so as not to continue delaying the process.

13. The petitioner states that on February 7, 2003, a summons was issued for Dr. Emilio Guerrero Gutiérrez to appear for the full trial. However, because he was a fugitive, the proceeding against him was suspended until he appeared or was captured. The petitioner alleges that the same ruling provisionally acquitted Wilson Minchala Pinchú due to insufficient evidence of guilt.

14. The petitioner states that on February 24, 2004 Dr. Guerrero Gutiérrez filed his appeal, which was admitted. She states that on June 29, 2004 the Third Specialized Chamber for Criminal, Collusion, and Traffic Matters confirmed all parts of the summons to appear at the full trial issued against Guerrero Gutiérrez, as well as the provisional stay of the process and acquittal of Dr. Minchala Pinchú.[FN5] On September 17, 2004, Dr. Guerrero Gutiérrez requested bail and replacement of the precautionary measure of preventive detention with alternative measures. On September 21, 2004, he was granted bail, which was paid.[FN6] On September 20, 2004, Dr. Guerrero Gutiérrez requested that the operation of the statute of limitations be declared because more than four years had passed since the Order to Open the Judicial Process was issued against him.

[FN5] After two requests from the accused to clarify and expand this ruling, which were denied; the judge issued an order notifying the parties that Dr. Guerrero Gutiérrez was a fugitive and the Police should be ordered to find and capture him. Original petition received by the IACHR on February 23, 2006, p. XIX.

[FN6] The petitioner stated that bail was set at $837.00, so the complainant asked that the amount be reconsidered and increased, because its value was not enough to cover damages and procedural costs. The petitioner states that the accused asked that bail be reduced. Original petition received by the IACHR on February 23, 2006, p. XX.

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15. The petitioner states that on June 28, 2005 the complainant again filed a brief indicating her objection to the "improper and illegal" procedural delay. The petitioner also states that on September 8, 2005 the accused again sought the operation of the statute of limitations because more than five years had passed since the issuance of the Order to Open the Judicial Process.

16. The petitioner states that on June 30, 2005 competence was assigned to the First Tribunal for Criminal Matters, which returned the case file to the First Court for Criminal Matters on July 5, 2006, given that the accused's petition to suspend the preventive detention order had not been resolved. On July 28, 2005, the First Court for Criminal Matters suspended the preventive detention order, given that the amount of the bail had been assigned. Mrs. Peralta Mendoza submitted petitions on August 23, September 5, and September 7, 2005 asking that public prosecution proceedings be conducted.[FN7]

[FN7] Original petition received by the IACHR on February 23, 2006, p. XXII.

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17. The petitioner states that on September 20, 2005 the First Tribunal for Criminal Matters issued a ruling ordering the operation of the statute of limitations in favor of Emilio Guerrero, because more than five years had passed since the Order to Open the Judicial Process had been issued against him. The petitioner states that in response, the complainant asked that the corresponding fine be imposed on the administrator of justice given that the lapse of the proceeding occurred due to the judges' failure to process the case in a timely manner.[FN8] That claim was denied on November 10, 2005.

[FN8] The petitioner states that this is established in Article 110 of the Ecuadoran Penal Code. "…if lapse occurred due to the judges' failure to process the case in a timely manner, those judges shall be punished by the superior judge with a fine of forty-four to four hundred and seven United States dollars, leaving open the issue of action for damages and injury that may be admissible against those officials in accordance with the provisions of the Code of Civil Procedure…". Original petition received by the IACHR on February 23, 2006, p. XXIII.

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18. The petitioner alleges that although the unlawful act was committed by a private physician in a private clinic, the agents of the State responsible for the administration of justice are accountable for the failure to prosecute those responsible for the medical malpractice that damaged the health of Melba del Carmen Suárez Peralta. The petitioner argues that the actions and omissions of the administrators of justice caused the operation of the statute of limitations and fostered impunity and the concealment of the crime committed by private individuals.[FN9]

[FN9] The petitioner cites IACHR admissibility report 69/02 regarding Laura Albán Cornejo as part of its argument. Original petition received by the IACHR on February 23, 2006, p. XXXIII.

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19. The petitioner alleges that more than five years passed between the date when the Order to Open the Judicial Process was issued and the summons to appear at the full trial; that the First Judge for Criminal Matters improperly held up the process for more than 16 months; and that during that period no actions were taken toward prosecuting the case despite the fact that there was evidence of liability on the part of the accused. The petitioner alleges that despite the

existing evidence, in the case operated the statute of limitations in a definite manner due to unwarranted delay because of the acts and omissions of the judge and despite the requests for speediness filed by the complainant in the process. The petitioner specifically alleges that the preliminary proceeding was initiated on August 16, 2000 and was closed on November 27, 2001, which means that it took more than three times the maximum time established in the procedural standards, which is six months. The petitioner alleges that this is in addition to the delay between the order issuing the summons to appear at the full trial, issued on February 17, 2003, and the appeals ruling, dated June 17, 2004, as well as the delay in establishing bail.

20. As a result, the petitioner alleges that the Ecuadorean State has violated its obligation to respect judicial guarantees and the right to judicial protection as they relate to the general obligation to respect and guarantee the rights protected under the American Convention, to the detriment of Mrs. Melba del Carmen Suárez Peralta.

21. Regarding the admissibility of the complaint, the petitioner alleges that in accordance with the Criminal Procedures Code, the State has the procedural burden of pursuing the case ex officio at all times.[FN10] The petitioner alleges that the final result of the criminal process depended on the speediness of its handling by the judges and the result would have been different if the procedural deadlines had been honored. In contrast, the petitioner states that the judges contributed to the unwarranted delay of justice, which made the Ecuadorean State an accomplice in the impunity and responsible for human rights violations.

[FN10] The petitioner states that Art. 14 of the Old Criminal Procedures Code established that "criminal action is public in nature. In general, it shall be conducted ex officio, and individual accusations may be admitted, but in the cases indicated in Art. 428 of this Code criminal action shall be carried out through individual accusation." Original petition received by the IACHR on February 23, 2006, p. XXXIII.

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22. Regarding the State's allegation about the failure to exhaust domestic remedies (see B below), the petitioner indicates that the recusal proceeding, the oral summary proceeding, the appeal, and the action for damages and injury are not suitable, appropriate, or effective remedies for protecting the legal right that has been violated and cannot be defined as "remedies" in the context of the American Convention.

23. Regarding recusal, the petitioner alleges that it is not a suitable remedy because it is not designed to prevent or impede the violation of a human right but rather to suspend or terminate the competence of the judge in a case. Regarding the oral summary proceeding as a suitable remedy (see B below), the petitioner indicates that following the preceding logic, this is not a judicial remedy, but rather a specific proceeding the purpose of which is to settle damages and injury already determined in a prior civil or criminal proceeding. The petitioner states that the complaints subject to oral summary proceedings are those for payment of interest, benefits, damages, and injuries,[FN11] and that in this case this was not determined, since the judge and the tribunal did not hear the proceeding and unjustifiably delayed it up to the point when it was time barred. Regarding the State's allegation regarding the failure to exhaust suit for damages

and injury (see B below), the petitioner responds that the purpose of that action is not to remedy or impede impunity for the violation of a fundamental right, so it would not be a suitable and effective method for impeding, suspending, or repairing the violation of a right.[FN12]

[FN11] The petitioner cites Article 843 of the Ecuadoran Code of Civil Procedure.
[FN12] Petitioner's brief received November 21, 2007.

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24. With respect to the State's allegation regarding the failure to exhaust the remedy of appeal (see B below), the petitioner responds that this remedy is used to appeal a decision when someone disagrees with the content of that decision.[FN13] The petitioner states that the State's assertion to the effect that the operation of the statute of limitations could be appealed is groundless in that the appeal would have been ineffective since the statute of limitations operated de jure given the passage of time and the only purpose of the appeal would be to have the Superior Court confirm that the statute of limitations had already operated.

[FN13] The petitioner cites: "The appeal is the measure the law provides to the parties to have a judicial decision changed or rendered without effect. The judge may make a mistake or act deliberately outside of procedural standards in handling cases, which affects the formal part; […]". Juan Falconí Puig, Código de Procedimiento Civil Comentado. Edino 1991, Guayaquil, Ecuador. Petitioner's brief received November 21, 2007.

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25. The petitioner also alleges that in the instant case it was not appropriate to exhaust the cassation (recurso de casación) in that the function of that remedy is to review the "improper application of rules," which was not relevant to the proceeding under review. The petitioner states that " A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective […] for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments."[FN14]

[FN14] The petitioner cites the I/A Court HR, Advisory Opinion 9/87 on Judicial Guarantees in States of Emergency, of October 6, 1987. Original petition received by the IACHR on February 23, 2006, p. XXXIII.

B. The State

26. In response to the petitioner's complaint, the State alleges the failure to exhaust domestic remedies. In this regard, in response to the petitioner's allegation regarding the failure to honor the obligation to investigate the facts and prosecute those responsible within a reasonable period of time, the State alleges that Mrs. Melba Suárez Peralta had the opportunity to initiate a recusal

proceeding.[FN15] It alleges that the Inter-American Court has declared that remedies "suitable to address an infringement of a legal right" must be exhausted and that recusal could be appropriate and effective.[FN16]

[FN15] The recusal proceeding is provided under Article 856(10) of the Code of Civil Procedure. "A judge, whether in a tribunal or court, may be recused by either of the parties and must refrain from hearing the case for any of the following reasons: 10. No handling the proceeding within three times the time period indicated." Note No. 4-2-210/06 of July 20, 2006 from the Permanent Mission of Ecuador to the OAS, forwarding the report from the Office of the Attorney General of Ecuador, Official Letter No. 025898 of June 30, 2006. In addition, the State indicates that recusal is provided for under Article 264 of the Criminal Procedure Code and Article 863 of the Code of Civil Procedure. Note No. 4-2-281/07 received on November 29, 2006 from the Permanent Mission of Ecuador to the OAS, forwarding the report from the Office of the Attorney General of Ecuador, Official Letter No. 006206, of November 19, 2007.
[FN16] The State cites the I/A Court H.R., Velásquez Rodríguez Case. Judgment on the Merits, para. 64. Note No. 4-2-210/06 of July 20, 2006 from the Permanent Mission of Ecuador to the OAS, forwarding the report from the Office of the Attorney General of Ecuador, Official Letter No. 025898, dated June 30, 2006.

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27. In addition, the State alleges that the appeal to the Superior Court of Guayaquil against the operation of the statute of limitations ordered by the First Tribunal for Criminal Matters of Guayas would also represent an effective remedy.[FN17] In addition, the State argues that there was also the possibility of filing for damages and injury against the judge or magistrate responsible for error, in accordance with the Code of Civil Procedure.[FN18] The State adds that "the mere fact that a domestic remedy does not produce a result favorable to the petitioner does not in and of itself demonstrate the inexistence or exhaustion of all effective domestic remedies. For example, the petitioner may not have invoked the appropriate remedy in a timely fashion."[FN19]

[FN17] The State indicates that this remedy is provided by Article 348(3) of the 1983 Code of Civil Procedure. Note No. 4-2-281/07 received on November 29, 2006 from the Permanent Mission of Ecuador to the OAS, forwarding the report from the Office of the Attorney General of Ecuador, Official Letter No. 006206, dated November 19, 2007.
[FN18] The State indicates that this remedy is provided by Article 979 of the Code of Civil Procedure: "Action for damages and injury is admissible against the Judge or Magistrate who in the performance of his duties causes economic damage to the parties or interested third parties, due to delay or denial of justice, for breaking express laws, for usurpation of functions, for granting denied appeals, or for rejecting remedies granted by the law, expressly or for altering the decision when finalizing it. This action is also admissible against clerks and other employees of the Court, who through their action or omission have caused economic damage, through bad faith or negligence …" and Art. 984 provides that if a complaint is admitted, the payment of damages, injury, and costs shall be ordered in the decision. Note No. 4-2-210/06 of July 20, 2006 from the Permanent Mission of Ecuador to the OAS, forwarding the report from the Office of the

Attorney General of Ecuador, Official Letter No. 025898, dated June 30, 2006 and Note No. 4-2-281/07 received on November 29, 2006 from the Permanent Mission of Ecuador to the OAS, forwarding the report from the Office of the Attorney General of Ecuador, Official Letter No. 006206, dated November 19, 2007.
[FN19] The State cites the I/A Court H.R., Velásquez Rodríguez Case. Judgment on the Merits, para. 67. Note No. 4-2-210/06 of July 20, 2006 from the Permanent Mission of Ecuador to the OAS, forwarding the report from the Office of the Attorney General of Ecuador, Official Letter No. 025898, dated June 30, 2006.
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28. Regarding the petitioner's allegations regarding unwarranted delay, the State responds that the courts honored the guarantee of a reasonable period of time. It states in this regard that jurisprudence has not established a precise timeframe for the duration of a proceeding but rather criteria have been established that should be taken into account in each specific case. It considers that the time used is within the limits of reasonability established by the Inter-American Court and the Commission in its precedents and that the instant case was resolved in a time period consistent with the type of trial involved, with the capabilities that the State has within its reach. The State indicates that Mrs. Peralta Suárez had free access to the apparatus of the courts and at no time was she prevented from exercising her right to be heard under equitable conditions by the competent bodies.[FN20] Therefore, the State considers that it has not violated Article 8.1 of the American Convention.

[FN20] Note No. 4-2-281/07 received on November 29, 2006 from the Permanent Mission of Ecuador to the OAS, forwarding the report from the Office of the Attorney General of Ecuador, Official Letter No. 006206, dated November 19, 2007.
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29. In view of the preceding arguments, the State feels that the petition does not meet the requirements established in Article 46 of the American Convention and Article 38 of the Commission's Rules of Procedure and asks the Commission to declare it inadmissible.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

30. The petitioners have standing, in principle, under Article 44 of the American Convention, to submit petitions to the Commission. The petition indicates as the alleged victim an individual, with respect to whom the Ecuadoran State agreed to respect and guarantee rights enshrined in the American Convention. With respect to the State, the Commission indicates that Ecuador has been a state party to the American Convention since December 8, 1977, the date on which it deposited its ratifying instrument. Therefore, the Commission is competent ratione personae to review the petition.

31. In addition, the Commission is competent ratione loci to hear the petition, in that it alleges violations of rights protected in the American Convention that would have taken place

within the territory of Ecuador, a state party to the Convention. The Commission is competent ratione temporis in that the obligation to respect and guarantee the rights protected in the American Convention was already in force for the State on the date on which the facts alleged in the petition would have occurred. Finally, the Commission is competent ratione materiae, because the petition denounces possible violations of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

32. Article 46.1.a of the American Convention requires the prior exhaustion of remedies available in the domestic courts in accordance with generally recognized principles of international law as a requirement for the admission of complaints regarding the alleged violation of the American Convention.

33. Article 46.2 of the Convention provides that the requirement of prior exhaustion of domestic remedies is not applicable when:

a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; and
c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

As established in the Commission's Rules of Procedure and as confirmed by the Inter-American Court, whenever a State alleges the failure to exhaust domestic remedies on the part of the petitioner, it has the burden of demonstrating that the remedies that have not been exhausted are "adequate" for remedying the alleged violation, which means that the function of those remedies within the system of domestic law is suitable for protecting the legal right that has been infringed.[FN21]

[FN21] I/A Court HR, Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C, No. 4, para. 64.
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34. In the instant case, the State alleges that the petition does not meet the requirement of prior exhaustion of remedies in the domestic courts, as provided in Article 46.1 of the American Convention given that there are three remedies that could have been exhausted by Mrs. Suárez Peralta -- the remedy of appeal against the operation of the statute of limitations; the recusal proceeding against the judge for delay in resolving the case; and the suit for damages and injury -- and thus Mrs. Suárez Peralta had access to the jurisdictional guarantees provided by the State. For his part, the petitioner alleges that the failure to act by the administrators of justice caused the definitive operation of the statute of limitations, and encouraged and promoted impunity by

concealing the unlawful actions of individuals. In addition, the petitioner alleges that he did not have suitable, adequate, or effective remedies to protect the legal right that was violated, given that they would have been ineffective for prosecuting and punishing the perpetrators of the crime and preventing impunity.

35. The petitioner's allegation falls within the exception to the exhaustion of domestic remedies provided under Article 46.2.a of the Convention, which establishes that the exception applies when "the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated."

36. The Commission notes that the petitioner's complaint revolves around the alleged failure to guarantee the duty of judicial protection through access to rapid and effective remedies. In concrete terms, this refers to the alleged unwarranted delay in resolving the proceeding on medical malpractice initiated on August 16, 2000, in which as the petitioner alleges the statute of limitations operated on September 20, 2005, due to the justice system's failure to act.

37. The petitioner's allegations indicate that after the operation of the statute of limitations, the petitioner sought to impose a fine on the judges because of the lack of timely handling, which claim was denied on November 10, 2005, as it was deemed irrelevant. The complainant did not file an appeal against the operation of the statute of limitations with the Superior Court in that this would only have achieved confirmation of the order being challenged, given that the statute of limitations operated de jure, based on the passage of time. The petitioner felt that that appeal would be ineffective for prosecuting the alleged perpetrators of medical malpractice.

38. In addition, the petitioner alleges that the proceeding to recuse the judge and the suit for damages and injury were not filed because they are designed to suspend or terminate the competence of the judge in a case and to obtain other reparations, respectively, and not to prevent or punish a crime and prevent impunity.

39. For purposes of the admissibility of the instant case, the Commission notes that the suitable remedy for resolving the matter that is the subject of the complaint is the criminal proceeding. Ecuadorean law defines medical malpractice in its Penal Code, and as an exception, it requires that said public proceeding be initiated through an individual accusation. Given that said proceeding is public in nature, it should be pursued ex officio.

40. The criminal proceeding filed by the mother of the alleged victim, representing her daughter, lapsed when the statute of limitations operated after five years as established by law. During that period, the complainant filed two briefs disputing the procedural delay and three ex parte requests that the public prosecution proceeding be conducted. The Commission's jurisprudence recognizes that whenever a crime that must be pursued ex officio is committed, the State has the obligation to promote and pursue the criminal process until its final results[FN22] and that, in such case, this constitutes the suitable route for clearing up the facts, prosecuting those responsible, and establishing the respective criminal punishment, in addition to making possible other monetary means of reparation. The Commission considers that the facts alleged by the petitioners in the instant case involve alleged violations of fundamental rights, which violations are reflected in domestic law as crimes to be prosecuted ex officio and thus it is this

proceeding, conducted by the State itself, which should be considered for purposes of determining the admissibility of the complaint.

[FN22] Report No. 52/97, Case 11.218, Arges Sequeira Mangas, Annual Report of the IACHR 1997, paras. 96 and 97. See also Report No. 55/97, para. 392. Report No. 62/00, Case 11.727, Hernando Osorio Correa Annual Report of the IACHR 2000, para. 24.

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41. The Commission notes that the State has not demonstrated that the exhaustion of the appeal regarding the operation of the statute of limitations, the recusal proceeding, and the proceeding for damages and injury could be conducive to clearing up the facts and prosecuting and punishing those responsible for the medical malpractice that caused the damage in question. In addition, the Commission considers that the State has not presented information to dispute the allegations of the petitioner regarding the futility of the appeal with respect to the operation of the statute of limitations.

42. The inability to exhaust domestic remedies in the administration of justice is one of the reasons why Article 46.2 establishes exceptions to the exhaustion of domestic remedies as a requirement for invoking international protection, precisely in situations in which, for various reasons, said remedies are not effective.

43. The invocation of the exceptions to the rule of exhausting domestic remedies as provided in Article 46.2 of the Convention is closely tied to the determination of possible violations of certain rights enshrined therein, such as guarantees on access to justice. However, Article 46.2, based on its nature and purpose, is a rule the content of which is autonomous vis à vis the substantive rules of the Convention. Therefore, the determination as to whether the exceptions to the rule of exhausting domestic remedies are applicable to the case in question should be made prior to and separate from the analysis of the merits of the case, in that it depends on a standard of evaluation different from that used to determine the possible violation of Articles 8 and 25 of the Convention. It should be made clear that the causes and effects that impede the exhaustion of domestic remedies will be analyzed in the report that the Commission adopts regarding the merits of the dispute, in order to establish whether there are violations of the American Convention.

2. Deadline for submitting the petition

44. The American Convention establishes that in order for a petition to be considered admissible by the Commission, it must be lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment. Article 32 of the Commission’s Rules of Procedures establishes that in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition must be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission will consider the date on which the alleged violation of rights occurred and the circumstances of each case.

45. In the instant case, the petition was received on February 23, 2006 and statute of limitations operated on September 20, 2005. Therefore, , in view of the context and the characteristics of this case, the Commission considers that the petition was presented within a reasonable period of time and that the admissibility requirement referring to the deadline for presentation should be regarded as having been met.

3. Duplication and res adjudicata

46. The case file does not indicate that the subject of the petition is pending in another international proceeding for settlement, nor that it reproduces a petition already examined by this or any other international body. Therefore, it is appropriate to consider the requirements established in Articles 46.1.c and 47.d of the Convention as having been met.

4. Characterization of the alleged facts

47. Given the de facto and de jure arguments submitted by the parties and the nature of the subject submitted for its consideration, the Commission finds that in the instant case it is appropriate to establish that the allegations of the petitioner regarding the alleged violation of judicial guarantees and judicial protection could characterize violations of the rights protected under Articles 8.1 and 25.1 consistent with Article 1.1 of the American Convention.

V. CONCLUSIONS

48. The Commission concludes that it is competent to examine the complaints submitted by the petitioner regarding the alleged violation of Articles 8.1, and 25.1 consistent with Article 1.1 of the American Convention and that these complaints are admissible, in accordance with the requirements established in Articles 46 and 47 of the American Convention.

49. Based on the de facto and de jure arguments presented above 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 8.1, and 25.1 of the American Convention as they relate to Article 1.1.
2. To notify the Ecuadoran State and the petitioner of this decision.
3. To continue with analysis of the merits of the case.
4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 30th day of October, 2008. (Signed): Paolo G. Carozza, Chairman; Luz Patricia Mejía Guerrero, First Vice Chairwoman; Felipe González, Second Vice

Chairman; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez, and Víctor E. Abramovich, members of the Commission.