In the case of Albán-Cornejo et al.,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court" or "the Tribunal"), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 29, 31, 53(2), 55, 56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers the following judgment.

I. INTRODUCTION OF THE CASE AND SUBJECT-MATTER OF THE DISPUTE

1. On July 5, 2006, pursuant to the provisions of Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed before the Court an application against the State of Ecuador (hereinafter "the State" or "Ecuador") originating in petition No. 12.406, forwarded to the Secretariat of the Commission on May 31, 2001, as supplemented on June 27, 2001, by Carmen Susana Cornejo-Alarcón de Albán (hereinafter "Carmen Cornejo de Albán" or "Mrs. Cornejo de Albán), in her own name and in that of her husband, Bismarck Wagner Albán-Sánchez (hereinafter "Bismarck Albán-Sánchez" or "Mr. Albán-Sánchez"). On October 23, 2002 the Commission adopted Admissibility Report No. 69/02, [FN1] and on February 28, 2006 the Commission adopted Merits Report No. 7/06, [FN2] in the terms of Article 50 of the Convention, containing certain recommendations which, in the opinion of the Commission, were not heeded in a satisfactory manner by the State, for which reason in decided to submit the instant case to the jurisdiction of the Court. [FN3]

[FN1] In Admissibility Report No. 69/02 the Commission held inadmissible Articles 4, 5 and 13 of the American Convention.

[FN2] In Merits Report No. 7/06 the Commission concluded that the State violated the rights enshrined in Articles 8 (Right to Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, in relation to Articles 2 (Domestic Legal Effects) and 1(1) (Obligation to Respect Rights) thereof.
[FN3] The Commission appointed as delegates Commissioner Evelio Fernández-Arévalos and the Executive Secretary, Santiago A. Canton; and Ariel E. Dulitzky, Víctor Madrigal-Borloz, Mario López-Garelli and Lilly Ching-Soto as legal counsel.
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2. According to the facts claimed by the Inter-American Commission, on December 13, 1987 Laura Susana Albán-Cornejo (hereinafter, "Laura Albán" or "Miss Albán-Cornejo) was admitted to the Metropolitan Hospital, a private health institution located in Quito, Ecuador, in view of a set of symptoms of bacterial meningitis. On December 17, 1987, during the night Miss Albán-Cornejo suffered severe pain. The resident physician prescribed her a 10 mg. dose of morphine. On December 18 of the same year, while she was under medical treatment, Miss Albán-Cornejo died, allegedly due to the medication she was administered. After her death, her parents, Carmen Cornejo de Albán and Bismarck Albán-Sánchez (hereinafter, the "alleged victims," or "Laura Albán's parents," or "Miss Albán-Cornejo's parents," or "parents") appeared before the Eighth Civil Court from Pichincha (Juzgado Octavo de lo Civil de Pichincha) (hereinafter, "Eighth Civil Court") to obtain the medical file on their daughter, and before the Honor Tribunal of the Pichincha Medical Association (hereinafter, the "Honor Tribunal"). Later on, they filed a criminal complaint before the state authorities in order to investigate the causes of their daughter's death. In consequence, two physicians were accused of negligence on medical practice; the case against one of them was dismissed on December 13, 1999 based on the court's declaration that the statute of limitations had run out on the criminal action. As regards the other physician, his legal situation is still pending a court decree.

3. The application of the Commission refers that the State has not ensured effective access to a fair trial and to judicial protection for Carmen Cornejo de Albán and Bismarck Albán-Sánchez, who "in their interest to clarify the circumstances surrounding the homicide of their daughter [Laura Albán] for years have been seeking justice and punishment of those responsible by obtaining indiciary pieces of evidence of her death and by trying to get the authorities to pay formal attention to the case." Likewise, the Commission pointed out in the application that neither in the domestic legal system of Ecuador nor in the practice observed there, can rules or procedures be found to allow private parties to press charges for criminal prosecution for the violation of legal interests calling for public prosecution, which, in the opinion of the Commission, was detrimental to the affected party in the instant case.

4. The Commission requested the Court to declare the State to be responsible for having violated the rights enshrined in Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, in relation with those in Articles 2 (Domestic Legal Effects) and 1(1) (Obligation to Respect Rights) thereof in detriment of Carmen Cornejo de Albán and of Bismarck Albán-Sánchez. Likewise, it requested the Court to order the State to adopt certain reparation measures.

5. On October 14, 2006 Mr. Farith Simon-Campaña and Mr. Alejandro Ponce-Villacís, [FN4] of the Legal Clinics of the Law School of the San Francisco de Quito University (Clínicas Jurídicas del Colegio de Jurisprudencia de la Universidad San Francisco de Quito) in Ecuador, in their capacity as representatives of the alleged victims (hereinafter "the representatives"), filed their brief containing pleadings, motions and evidence (hereinafter "brief of pleadings and motions"). The representatives requested the Tribunal to declare that the State violated Articles 4 (Right to Life), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, to the detriment of Laura Albán; and Articles 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 13 (Freedom of Thought and Expression), 17 (Rights of the Family) and 25 (Right to Judicial Protection) of the Convention, to the detriment of Carmen Cornejo de Albán and Bismarck Albán-Sánchez. The representatives alleged a violation of such Articles in relation to Article 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the American Convention. Lastly, they requested the Court to order the State to adopt certain reparation measures and to pay costs and expenses arising from the processing of the case in domestic legal proceedings and in proceedings before the organs the Inter-American System for the Promotion and Protection of Human Rights.

[FN4] The victims, by means of a power of attorney, appointed Farith Simon-Campaña and Alejandro Ponce-Villacís, from the Legal Clinics of the Law School of the San Francisco de Quito University (Clínicas Jurídicas del Colegio de Jurisprudencia de la Universidad San Francisco de Quito), in Ecuador, as representatives before the Court.

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6. On December 15, 2006 the State [FN5] filed its answer to the application and its observations to the brief of pleadings and motions (hereinafter "answer to the application"). It pointed out that it had not violated neither Article 4 (Right to Life), nor Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), all three of the American Convention, and "reaffirm[ed] its purpose of satisfying the right to truth of the alleged victims without acknowledging a violation of the rights protected under Articles 4, 13, and 17 of the American Convention". Regarding Article 5 of the Convention, in its final written arguments, the State requested that the claim be dismissed. Lastly, it objected to the amount of money requested by the representatives as reparations, costs and expenses.

[FN5] The State appointed Erick Roberts, Assistant Director for Human Rights of the Office of the Attorney General (Subdirector de Derechos Humanos de la Procuraduría) as Agent and Salim Zaidán, an official of the Office of the Assistant Director for Human Rights of the Office of the Attorney General (Subdirección de Derechos Humanos de la Procuraduría) as Alternate Agent.

II. JURISDICTION

7. The Court has jurisdiction to hear the current case pursuant to Articles 62(3) and 63(1) of the Convention, as Ecuador has been a State Party to the Convention since December 28, 1977, and accepted the contentious jurisdiction of the Court on July 24, 1984.

III. PROCEEDINGS BEFORE THE COURT

8. The application by the Commission was notified to the State [FN6] and to the representatives on August 17, 2006. During the proceedings before this Tribunal, besides the main briefs forwarded by the parties (supra paras. 1, 5 and 6), the President of the Court [FN7] (hereinafter "the President") ordered the reception of one witness testimony rendered by affidavits as well as an expert witness declaration proposed by the Commission and the representatives, on which the parties were afforded the opportunity to file their observations. Furthermore, considering the specific circumstances of the case, the President summoned the Inter-American Commission, the representatives and the State to a public hearing in order to receive a deposition by one of the alleged victims and a report by an expert witness, as well as the closing arguments by the parties on the merits and possibly on reparations and costs. Such public hearing was held on May 16, 2007 during the XXX Extraordinary Period of Sessions of the Court, held in Guatemala City, Guatemala; [FN8] at the hearing, the State presented a partial acknowledgment of its responsibility (infra para. 10). On June 6, 2007 the Commission and the State each filed their final written arguments on the merits, reparations, and costs. On June 14 and 26, 2007, the representatives filed a brief with their closing arguments and the appendixes thereto. On August 3, 2007 the Secretariat, following instructions of the President, required the Commission, the representatives and the State, pursuant to Article 45(2) of the Rules of Procedure, to forward certain rules and regulations, as well as certain documents, for the purpose of their being considered as evidence to facilitate adjudication of the case. On August 16 and September 12 and 13, 2007 the State forwarded part of the evidence to facilitate adjudication of the case and on August 20, 2007 the Commission produced the evidence requested. On August 18 and 20, 2007 the representatives forwarded part of the aforementioned evidence. On September 20, 2007 the representatives were requested, following instructions of the President, to forward the documents evidencing the disbursements they allege the victims would have effected for costs and expenses, and such documents were forwarded on September 27 and October 18, 2007.

[FN6] When the application was served upon it, the State was informed of its right to appoint an ad hoc judge to participate in determining the case. The State appointed an ad hoc Judge on October 25, 2006, after the term within which it had to do so had expired. On December 6, 2006 the Secretariat, following instructions of the Court, informed the State that the Tribunal had decided to reject such appointment, because it had been presented out of term.

[FN7] Order of the President of the Court, of March 15, 2007.

[FN8] At such public hearing, the following persons appeared: a) for the Inter-American Commission: Evelio Fernández-Arévalos, Commissioner; Lilly Ching-Soto and Mario López-Garelli, Counsels; b) for the representatives: Farith Simon-Campaña and Alejandro Ponce-Villacís, from the Legal Clinics of the Law School of the San Francisco de Quito University, in Ecuador, and Paola Romero-Dueñas, Andrea Carrera-Flores, Rosa Baltazar-Yucailla and Mauricio Alarcón-Salvador, Assistants; and for the State: José Xavier Garaicoa-Ortiz, Attorney General of the State, Agent; Salim Saidán, Alternate Agent, and Gabriela Galeas, Counsel.

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9. Through the order of March 15, 2007, the President asked the Inter-American Commission, the representatives and the State to submit their brief of final arguments on June 6, 2007, a non-extendable deadline. Both the Commission and the State submitted said briefs of final arguments on June 6, 2007. However, the representatives submitted their brief of final arguments and the appendixes thereto on June 14 and 26, 2007, respectively. Accordingly, the Court will not allow them on the grounds of their late filing.

IV. PARTIAL ACKNOWLEDGMENT OF INTERNATIONAL RESPONSIBILITY

10. During the public hearing (supra para. 8), the State presented a partial acknowledgment regarding the violation of the right to a fair trial and of the right to judicial protection, enshrined in Articles 8 and 25 of the American Convention. It stated it acknowledged its international responsibility "derived from not having gone ahead with the procedures for extraditing the resident physician, [Dr. Fabián] Espinoza[-Cuesta]" (hereinafter, "Dr. Fabián Espinoza-Cuesta" or "Dr. Espinoza-Cuesta"), one of the accused in the criminal proceedings carried on in its domestic jurisdiction. Such acquiescence was limited to acknowledging "the facts derived from the extradition procedures, the negligence [and] the omission in which the Supreme Court of Justice (Corte Suprema de Justicia) and the Fifth Criminal Judge from Pichincha (Juez Quinto de lo Penal de Pichincha) incurred by not having acted towards extraditing the aforementioned doctor in a duly manner on their own motion, as an obligation of their own."

11. The State reaffirmed such statements in its final written arguments, indicating that such acquiescence did not include either the civil proceedings aimed at having the medical file exhibited or the criminal proceedings carried out in its domestic jurisdiction. Furthermore, it expressed it acknowledged as "not having done its duty to adopt domestic provisions, pursuant Article 2 of the Convention, by not having enacted a more adequate criminal description to punish physicians who incur in malpractice." It also expressed it had the intention to "prepare and back the enactment of a medical malpractice bill and bills to amend related provisions."

12. The Inter-American Commission considered that "the partial acquiescence of the State must have full effects regarding the facts and the violations accepted by Ecuador and request[ed] the Tribunal to determine so." In its closing arguments, it noted the intention of the State to acquiesce and commended in a positive manner the commitment it had made to start off "procedures aimed at enacting and amending criminal descriptions and at training judges" in order to further compliance with the Convention, as well as the statements the State had made during the public hearing, wherein it acquiesced to having violated Articles 8 and 25 of the Convention regarding the negligence of the authorities in carrying on with the extradition of Dr. Fabián Ernesto Espinoza-Cuesta. Lastly, the Commission pointed out that the State had not denied the facts of the case in the procedures undertaken before the Commission or before the Court, and considered that the abovementioned violations acknowledged by the State were no longer in dispute.

13. The representatives accepted the partial acknowledgment effected by the State, but considered it "absolutely insufficient and not made in an attitude of good faith", for during seven years State authorities did nothing to find out the whereabouts of Dr. Espinoza-Cuesta and to have him brought before the pertinent authorities, and in January 2007 the statute of limitations

ran out and the charges against him lapsed. Such circumstances fostered impunity, both for Dr. Espinoza-Cuesta himself and for the other treating physician, Ramiro Montenegro-López, who was also investigated and for the benefit of whom the statute of limitations also ran out, so that the charges against him also lapsed.

14. Pursuant to Articles 53(2) and 55 of the Rules of Procedure, in exercising its inherent powers for the international judicial protection of human rights, the Court may determine if an acknowledgment of international responsibility effected by a respondent State provides enough grounds, in the terms of the American Convention, to proceed, or not, to dispose of the merits and to determine reparations and costs. To such effects, the Tribunal is to analyze the situation in each specific case. [FN9] For that reason, the Court proceeds to precisely construe the partial acknowledgment of international responsibility effected by the State and the scope of the subsistent dispute.

[FN9] Cf. Case of Myrna Mack-Chang v. Guatemala. Merits, reparations, and costs. Judgment of November 25, 2003. Series C No. 101, para. 105; Case of Zambrano-Vélez et al. v. Ecuador. Merits, reparations, and costs. Judgment of July 4, 2007. Series C No. 166, para. 12; and Case of the Rochela Massacre v. Colombia. Merits, reparations, and costs. Judgment of May 11, 2007. Series C No. 163, para. 9.

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15. In its application the Commission exposed that the State incurred in the violation of Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), in relation to Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects), all of them of the American Convention (supra para. 4). The representatives coincided in that those same provisions had been violated, although on some different grounds, and additionally alleged violation of Articles 4 (Right to Life), 5 (Right to Humane Treatment), 13 (Freedom of Thought and Expression) and 17 (Rights of the Family) of the Convention (supra para. 5).

16. As it has been said, at the public hearing the State acknowledged negligence and omission by State authorities for not having carried out with the extradition of Dr. Espinoza-Cuesta on their own motion, and acquiesced to the charge of having violated Articles 8 and 25 of the American Convention (supra para. 10). Furthermore, it pointed out the significance of this case to update medical malpractice legislation and declared such amendments to be worth the "great effort required to adequately conform both the substantive and the procedural statutory contents, as well as the rules and regulations, on which the State is to act in the future." Likewise, in its final written arguments it dealt expressly with its lack of compliance with Article 2 of the Convention (supra para. 11).

17. As to the facts, the Court observes that the State confessed to an omission by the State authorities, for their not having, on their own motion, gone through the procedures relating to the extradition of one of the accused in the criminal proceedings undertaken before its domestic

jurisdiction in the current case. Therefore, it declares such fact to be no longer in dispute, and holds it to be established in the aforementioned terms (supra para. 16).

18. On the other hand, the other facts alleged in the application and relating to the investigation and determination of the circumstances attending the death of Laura Albán, with regard to the procedures undergone in the civil and criminal jurisdictions, and involving Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), and such facts as could establish the violation of the rights enshrined in Articles 4 (Right to Life), 5 (Right to Humane Treatment), 13 (Freedom of Thought and Expression) and 17 (Rights of the Family) of the American Convention, to the detriment of the next of kin to Laura Albán, are still in dispute.

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19. With regards to Article 2 of the Convention, the Commission requested, among other things, that the State "adopt the legislative or other measures as may be necessary […] to ensure the right to judicial protection and the right to a fair trial [regarding the right to] press criminal charges in case of manslaughter", as well as to prevent repetition of events similar to those in the instant case. The Commission underscored that in order to comply with the prevention and guarantee duties regarding the rights recognized in the Convention, it is necessary to rectify the shortcomings in national medical malpractice legislation and to remove obstructions hindering the quest for truth in this kind of cases. The representatives pointed out that the State must adopt the constitutional and statutory amendments necessary to prevent repetition of events of such nature, and enact a law against medical malpractice.

20. When considering the arguments exposed by the Commission, the representatives and the State [FN10] on the alleged lack of compliance with the obligation enshrined in Article 2 of the American Convention, the Court considers that such arguments should be analyzed in chapter VIII of this Judgment.

[FN10] In such regard, the State informed the Court that it that it "[has] held meetings […] for the purpose of preparing and backing the enactment of a medical malpractice bill and bills to amend related provisions".

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21. This Tribunal observes that the State partially acknowledged having violated Articles 8 and 25 of the American Convention, as it was set forth in paragraphs 10, 11, 16 and 17, but expressly excluded violation of Articles 8 and 25 of the Convention with regard of the events pointed out in paragraph 18, for which reason it is necessary to continue considering the merits on such facts and arguments in chapter VII of the instant Judgment. Likewise, the State excluded the alleged violations of Articles 4 (Right to Life), 5 (Right to Humane Treatment), 13 (Freedom of Thought and Expression) and 17 (Rights of the Family) of the Convention.

22. On the basis of the foregoing, the Court holds that the matter of the international responsibility of the State for having violated Articles 8(1) and 25 of the Convention, to the detriment of Carmen Cornejo de Albán and Bismarck Albán-Sánchez, the parents of Laura

Albán, in the terms set forth in paragraphs 16 and 17, to have ceased being in dispute, independently of the precisions to be made in chapter VII. Violations of Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), as pointed out in paragraph 18, as well as of Articles 4 (Right to Life), 5 (Right to Humane Treatment), 13 (Freedom of Thought and Expression) and 17 (Rights of the Family) of the Convention and the alleged lack of compliance with Articles 1(1) and 2 thereof are matters still in dispute.

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23. When effecting the partial acknowledgment of international responsibility, the State set forth its disagreement regarding the reparations claimed by the representatives. Therefore, such reparations also are matters still in dispute.

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24. The partial acknowledgment of responsibility presented by the State is a positive contribution to the advancement of these proceedings, to the proper disposal of matters before the Inter-American human rights jurisdiction, to the enforcement of the principles that inspire the American Convention, and the conduct of States in this matter. [FN11]

[FN11] Cf. Case of Carpio-Nicolle et al. v. Guatemala. Merits, reparations, and costs. Judgment of November 22, 2004. Series C No. 117, para. 84; Case of Zambrano-Vélez et al., supra note 9, para. 30; Case of Bueno-Alves v. Argentina. Merits, reparations, and costs. Judgment of May 11, 2007. Series C No. 164, para. 34; and Case of the Rochela Massacre, supra note 9, para. 29.

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25. Taking into account the powers vested in this Court as an international organ, for the protection of human rights, the Court deems it necessary to pass Judgment to determine the facts and all elements pertaining to the merits of the case, as well as the relevant consequences thereof, as the rendering of Judgment contributes to the reparation due to Carmen Cornejo de Albán and Bismarck Albán-Sánchez, and to avoid the repetition of similar events and to attain, all in all, the purposes of the Inter-American human rights jurisdiction. [FN12]

[FN12] Cf. Case of Carpio-Nicolle et al, supra note 11, para. 84; Case of Zambrano-Vélez et al., supra note 9, para. 31; Case of Escué-Zapata v. Colombia. Merits, reparations, and costs. Judgment of July 4, 2007. Series C No. 165, para. 20; and Case of Bueno-Alves, supra note 11, para. 35.

V. EVIDENCE

26. Based on the provisions in Articles 44 and 45 of the Rules of Procedure, as well as on the case law of the Court regarding evidence and the assessment thereof, the Court will now examine and assess the documentary evidence forwarded by the Commission, by the representatives and

by the State at various points throughout the proceedings, or as evidence requested by the President to facilitate adjudication of the case, and testimonial and expert evidence rendered through affidavits and before the Court at the public hearing held in the instant case. In doing so, the Court will follow the rules of competent analysis, within the applicable legal framework. [FN13]

[FN13] Cf. Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala. Merits. Judgment of March 8, 1998. Series C No. 37, para. 76; Case of Cantoral-Huamaní and García-Santa Cruz v. Peru. Preliminary Objection, Merits, reparations, and costs. Judgment of July 10, 2007. Series C No. 167, para. 38; Case of Zambrano-Vélez et al., supra note 9, para. 32; and Case of Escué-Zapata, supra note 12, para. 22.

A) Documentary, Testimonial and Expert Evidence

27. The testimonies and expert reports by the following persons were rendered through affidavits:

a) Bismarck Albán-Sánchez: father to Laura Albán, proposed by the Commission and the representatives, testified on the suffering and the emotional and financial burden with which his family had to cope after his daughter died. Likewise, he testified on his frustration and disappointment regarding the judicial system of his country because the State failed to provide an efficient response that was due, for it never afforded the cooperation needed to investigate his daughter's death and to punish those responsible. On the other hand, he stated that "there was a major cover-up [on the part of the Metropolitan Hospital] from the very beginning, [as] they never promptly revealed the names of the doctors or the nurses."

b) Julio Raúl Moscoso-Álvarez: a lawyer, proposed by the Commission and the representatives, rendered his expert report on Ecuadorian legislation relating to the scope of the criminal statutes covering medical malpractice. He stated that no specific statute exists on the matter, and stated that, in his opinion, the criminal statutes in force are not sufficient. Only Articles 456 and 457 of the Ecuadorian Criminal Code (hereinafter, the "Criminal Code") make direct reference to medical malpractice, in an incomplete manner. He further stated that, in the terms of the Ethics Code, the physicians have a "fraternity" duty towards their colleagues who are standing trial before them, for which reason they will not be allowed to testify against them, even if the physician has committed mistakes.

28. At the public hearing, the Court received testimony and an expert report by the following persons, respectively:

a) Carmen Cornejo de Albán: mother to Laura Albán, proposed by the Commission and the representatives, testified on the long and complicated proceedings aimed at clarifying the causes of her daughter's death and to have justice done in the instant case. The witness stated that she abandoned her work as a psychologist in order to devote herself to the quest for justice in the instant case. She stated that she did not file reports against the physicians right away after her daughter's death, because she had been emotionally unable to do so; furthermore, she "ha[d] to

sort many obstacles, [such as] obtaining the medical file, finding a doctor who [would provide] an opinion on the death of [her] daughter. Then, at the [Pichincha] Medical Association [… she] expected their scientific opinion, which [she did] not get." She carried out various procedures, among which: she presented the case before the Ecuadorian Commission on Human Rights (Comisión de Derechos Humanos del Ecuador) and before the Ecumenical Commission on Human Rights (Comisión Ecuménica de Derechos Humanos); she instituted proceedings at the Eighth Civil Court in order to obtain the medical file of her daughter; she filed a complaint before the Honor Tribunal; and she filed another complaint against the physicians who had treated her daughter, in 1995, before the then incumbent Attorney General (Fiscal General), who refused to receive such complaint. She had to wait for a new Attorney General to take office in the year 1996. This one forwarded her complaint to the Fifth Criminal Court from Pichincha (Quinto Juzgado de lo Penal de Pichincha) (hereinafter, the "Fifth Criminal Court"). She told the Court the difficulties she had to face in order to find a physician who was able to help her establish the cause of her daughter's death and a lawyer who would take the case. She considers that impunity had the upper hand in the case of her daughter's death.

b) Ernesto Albán-Gómez: a lawyer, proposed by the Commission and the representatives, rendered his report on Ecuadorian legislation relating to the scope of the criminal statutes covering medical malpractice and the concomitant duties of the judges and the state authorities, in compliance with the criminal legislation. He stated that in Ecuador there is no legislation on medical malpractice, except to pinpoint a very specific aspect contained in the Law on the Rights and Protection of the Patient (Law No. 77, of February 3, 1995). He advised the Court of the existence of several laws and rules regulating medical conduct, which, in his opinion, are not updated; he noted that these are of an administrative or disciplinary, rather than criminal, nature. He made reference to the substantive criminal and criminal procedure provisions to explain how they operate as far as medical malpractice is concerned. Furthermore, he explained how the statute of limitations on criminal prosecution is regulated in Ecuador. Regarding the role of the Medical Federation and the obligation of physicians to stick to professional solidarity, as stipulated in the Medical Ethics Code, it could cause the physicians not to testify against their colleagues. Neither are there specific statutes or regulations setting forth the duties of the judges and the authorities regarding medical malpractice. He stated that, in fifteen years, the Supreme Court of Justice of Ecuador (Corte Suprema de Justicia del Ecuador) has decided only two medical malpractice judgments. He compared the former and the current Criminal Procedure Code as to the procedures for processing cases of such nature. He pointed out that, in case the accused parties have fled from justice, the State must undertake all necessary procedures in order to locate them and bring them to stand trial, regardless of whether they be inside the country or abroad.

B) EVIDENCE ASSESSMENT

Documentary Evidence Assessment

29. As in previous cases, in the instant case the Court recognizes the evidentiary value of those documents submitted by the parties at the appropriate procedural stage which have been neither disputed nor challenged and the authenticity of which has not been brought into question. [FN14]

[FN14] Cf. Case of Velásquez-Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 140; Case of Cantoral-Huamaní and García-Santa Cruz, supra note 13, para. 41; Case of Zambrano-Vélez et al., supra note 9, para. 37; and Case of Escué-Zapata, supra note 12, para. 25.

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30. As regards the documents submitted by the representatives and the State as evidence outside of the indicated procedural opportunities in accordance with Article 44(1) of the Rules of Procedure, the Court has incorporated them to the body of evidence, as some of said documents are evidence to facilitate adjudication of the case, [FN15] based on Article 45(1) of the Rules of Procedure, and others refer to supervening facts, [FN16] in accordance with Article 44(3) of the Rules of Procedure. Regarding the documents submitted by expert witness Ernesto Albán-Gómez at the public hearing, [FN17] the Court admits them into the body of evidence pursuant to Article 45 of the Rules of Procedure, since they are useful to this case.

[FN15] The representatives submitted the following documents: the documents remitted as appendixes to the written closing arguments of the representatives, which contain a part of the domestic judicial file No. 010-97-AP, corresponding to folios 2102 to the 2161 of the file that consists in this Court. On the other hand the State sent the following: the communication of August 21, 2007 filed by the State in which the Metropolitan Hospital (CONCLINA C.A.) informed about the set of rules that regulate the custody and administration of the clinical history and the contractual and labor relations of the professionals of the health; the document named "Unique file for Clinical History, handling of the medical registry oriented by problems, guides for the analysis, redesign of the basic forms" (Expediente único para la Historia Clínica, manejo del registro médico orientado por problemas, guía para el análisis, rediseño de los formularios básicos) from the National Health Council, Ministry of Public Health; the so-called Macro-process of Planning (Macroproceso de Planificación).

[FN16] The order of October 16, 2007 of the Fifth Criminal Court, the motion of appeal filed by the parents of Laura Albán on October 25, 2007, and the official letter of the Fifth Criminal Court of October 29, 2007.

[FN17] Namely: the decision of the Sixth Criminal Chamber of the Supreme Court of Justice, of September 7, 1999, on the appeal for review filed in case No. 327-96-EP (file on merits, reparations, and costs, Volume III, p. 305 to 306); and the decision of the Second Criminal Chamber of the Supreme Court of Justice, of March 5, 2001, on the appeal for review filed in case No. 42-2001 (file on merits, reparations, and costs, Volume III, p. 307 to 308).

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31. On the other hand, the Court adds to the body of evidence the documents that were requested by the Court and submitted by the State, representatives and Commission, [FN18] as they are useful to the resolution of this case in line with Article 45(2) of the Rules of Procedure.

[FN18] List of documents: Law on the Rights and Protections of the Patient (Ley de Derechos y Amparo del Paciente), Law no. 77 of February 3, 1995; Organic Law of Health (Ley Orgánica de

Salud), Law no. 67 of December 22, 2006; Health Code (1971), which was revoked by Law no. 67 of December 22, 2006; Organic Law of National Health System (Ley Orgánica del Sistema Nacional de Salud), Law no. 80 of September 25, 2002; Regulation of the Organic Law of the National Health System (Reglamento de la Ley Orgánica del Sistema Nacional de Salud), Executive Decree no. 3611 of January 28, 2003; Law of the Ecuadorian Medical Federation (Ley de la Federación Médica Ecuatoriana). Supreme Decree no. 3576-A of July 17, 1979; Regulation to the Law of the Ecuadorian Medical Federation (Reglamento a la Ley de Federación Médica Ecuatoriana), Ministerial Agreement no. 1460 of February 26, 1980; Medical Ethics Code (Código de Ética Médica), Ministerial Agreement no. 14660-A of August 17, 1992; Regulation of Contests for the Filling of Medical Positions at National Level (Reglamento de Concursos para la Provisión de Cargos Médicos a Nivel Nacional), Executive Decree no. 1082 of November 20, 1989; and the receipts evidencing the disbursements the victims would have effected for costs and expenses.

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32. The Court observes that the State only sent a part of the documentation and information requested as evidence to facilitate adjudication of the case. In this regard, the Court observes that the parties, and in this case, the State should present the evidence and give all the supporting evidence requested, so that the Court can have the most amount of facts with which to form a judgment.

33. Regarding the affidavit by Bismarck Albán-Sánchez (supra para. 27(a)), the Court deems that such deposition can contribute in determining the facts of and reparations in the instant case, for which reason it admits it, to the extent that it conforms to the purpose defined in the order of the President of March 15, 2007 (supra para. 8). Furthermore, the Court points out that, because of his status as an alleged victim who holds a direct interest in the outcome of this case, his testimony cannot be assessed by itself but only along with the rest of the body of evidence, applying thereto the rules of competent analysis. The statements of victims or their next of kin are of use to the extent that they provide further information on the consequences of the violations committed. [FN19]

[FN19] Cf. Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 25, 2001. Series C No. 76, para. 70; Case of the Ituango Massacres v. Colombia. Preliminary Objection, Merits, reparations, and costs. Judgment of July 1, 2006. Series C No. 148, para. 121; Case of Ximenes-Lopes v. Brazil. Merits, reparations, and costs. Judgment of July 4, 2006. Series C No. 149, para. 56; and Case of Goiburú et al. v. Paraguay. Merits, reparations, and costs. Judgment of September 22, 2006. Series C No. 153, para. 59.

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34. As regards the expert witness report of Julio Raúl Moscoso-Álvarez (supra para. 27(b)), rendered by way of an affidavit, this Court will admit such statement to the extent that it conforms to the purpose defined in the order of the President of March 15, 2007 (supra para. 8), to be assessed together with the entire body of evidence in this case.

35. With regards to the press articles submitted by the Inter-American Commission, the Court has considered that they could be taken into account if they report on matters of fact that are apparent and publicly known or on statements made by State authorities, or else if they provide corroboration for aspects connected to the instant case. [FN20]

[FN20] Cf. Case of Velázquez-Rodríguez, supra note 14, para. 146; Case of Cantoral-Huamaní and García-Santa Cruz, supra note 13, para. 41; Case of Zambrano-Vélez et al., supra note 9, para. 38; and Caso of Escué-Zapata, supra note 12, para. 28.

Assessment of Witness and Expert witness oral evidence

36. The Court allows the testimony provided by Carmen Cornejo de Albán before the Court (supra para. 28(a)), insofar as it conforms to the purpose of the statement as defined in the order of the President of March 15, 2007 (supra para. 8), to be assessed in the context of the body of evidence in the instant case. Furthermore, the Court insists on its above statements regarding the value of her statement in view of her nature as an alleged victim in the instant case (supra para. 33).

37. Regarding to the expert witness statement given by Ernesto Albán-Gómez before the Court (supra para. 28(b)), the Court will allow it insofar as it conforms to the purpose of the expert witness report as defined in the order of the President of March 15, 2007 (supra para. 8), applying thereto the rules of competent analysis.

VI. ARTICLES 4(1) (RIGHT TO LIFE), [FN21] 5(1) (RIGHT TO HUMANE TREATMENT), [FN22] 13 (FREEDOM OF THOUGHT AND EXPRESSION) [FN23] AND 17 (RIGHTS OF THE FAMILY) [FN24] IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) [FN25] OF THE AMERICAN CONVENTION

[FN21] In its relevant part Article 4(1) (Right to Life) reads as follows:
[e]very 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.
[FN22] In its relevant part Article 5(1) (Right to Humane Treatment) reads as follows:
[e]very person has the right to have his physical, mental, and moral integrity respected.
[…]
[FN23] In its relevant part Article 13(1) (Freedom of Thought and Expression) reads as follows:
[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
[…]
[FN24] In its relevant part Article 17(1) (Rights of the Family) reads as follows:
[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
[…]

[FN25] In its relevant part Article 1(1) (Obligation to Respect Rights) reads as follows:
[t]he 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.
[…]
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38. The Inter-American Commission did not submit any arguments regarding Articles 4, 5, 13, and 17 of the American Convention. [FN26]

[FN26] In Admissibility Report No. 69/02 the Commission only admitted Articles 1, 8, and 25 of the American Convention, and declared Articles 4, 5 and 13 thereof inadmissible. Afterwards, in Merits Report No. 07/06, it established the violation of Article 2 of said instrument.
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39. In their brief of pleadings and motions the representatives claimed the violation of Articles 4, 5, 13, and 17 of the American Convention, in relation to Article 1(1) thereof. They requested the Court to declare that the State is responsible for the violation of the above-mentioned articles on the grounds, inter alia, of the following arguments:

a) Regarding Article 4(1) (Right to Life) of the Convention, they pointed out that the State disregarded its duty to ensure said right, as it did not conduct an effective investigation aimed at elucidating the death of Laura Albán, transferring said responsibility to her parents; it did not fulfill its duty to supervise and evaluate periodically public and private health institutions and it did not fulfill its duty to assess the knowledge and training of medical body. They further alleged that the State did not guarantee the right to life due to the lack of specific legislation on medical malpractice, the lack of adequate means to effectively protect such right and the deficient application of justice. They considered that the State is responsible for having failed to fulfill its duty to prevent eventual violations of human rights which might be committed.
b) Regarding Article 5 (Right to Humane Treatment) of the Convention, they argued that the State did not fulfill its duty to control that in all health care institutions, quality health services and treatment are provided, so that the physical, psychological, and moral integrity of patients may be protected, even when the acts or omissions have been committed by private individuals. They also argued that the treatment provided to Laura Albán threatened her physical and psychological integrity, as she felt defenseless in the face of the likelihood of death and endured great suffering at the sight of her parents' intense pain. As to the latter, the representatives argued that as witnesses to the mistreatment and negligence of the medical staff who attended their daughter, they became victims of the violation of their right to psychological and moral integrity. They further pointed out that her mother, Carmen Cornejo de Albán, had to stop practicing her profession as a psychologist to devote all her time to the quest for justice, which prevented her to develop her life aspirations. This affected her psychologically and emotionally; not working resulted in irreparable economic losses. Lastly, they requested the Court to uphold the allegation that any form of impairment or failure to respect human dignity is a form of cruel treatment.

c) Regarding Article 13 (Freedom of Thought and Expression) of the Convention, they argued that the Metropolitan Hospital hid valuable information about the treatment and death of Miss Albán and concealed the identity of the physicians responsible, which directly affected the right of her next of kin to know the truth. Because they were not given the medical documents, Laura Alban's parents could not immediately put into motion any action before justice authorities. The State is responsible for failing to protect the right to information of the patients and their concerned next of kin. Due to this omission, a never-ending wait begun in the quest for justice and the application of the law. They added that the tolerant, passive, and careless attitude of public authorities was the reason why Miss Albán's parents were not able to have timely information about their daughter, which constituted a violation of their right to information and leaving them defenseless.

d) Regarding Article 17 (Rights of the Family) [FN27] of the Convention, they claimed that the State has the duty to protect the family as an institution by adopting the necessary legal and judicial measures which allow protecting and preserving the family union, for which they referred to the provisions of the American Convention, to Article 15 of the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights. According to the representatives, the ignorance of the facts as a result of the misconduct of the authorities in charge of the administration of justice, the lack of procedures and, in general, the non-compliance by the State with the basic rights and freedoms of its citizens, caused great suffering and depression to Laura Albán's parents and siblings, which affected their normal family development, relations and activities. This destabilized the family in general and affected their life quality.

[FN27] This article was first alleged by the representatives in their brief of pleadings and motions.

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40. In its brief of closing arguments, the State requested the Court to dismiss the alleged violations, as they disregard the grounds of the contentious proceedings brought before the Inter-American jurisdiction: the existence of a conduct in violation of human rights which is attributable to the State, an injury committed against an individual and a relationship between both elements. In this regard, the State argued that:

a) Article 4 (Right to Life) of the Convention. Those responsible for the death of Laura Albán were private individuals working in a private hospital, who do not generate international responsibility for the State. This reasoning was endorsed by the Inter-American Commission upon declaring this article inadmissible and rejecting its violation at the stage of the merits. The right to life might be the subject matter of an action for damages before the civil courts, a remedy to seek pecuniary compensation for the damages suffered which has not been exhausted by the alleged victims.

b) Article 5 (Right to Humane Treatment) of the Convention. The alleged responsibility of the State for negligence and lack of quality treatment is groundless. Those are domestically enforceable through constitutional appeal if sufficient evidence is produced to prove the lack of control or negligence by the State and the causative link between the alleged State failure to act and the threat or damages caused.

c) Article 13 (Freedom of Thought and Expression) of the Convention. The responsibility for the concealment of information about a private individual, which could have been the grounds for a judicial action requesting that it be disclosed in due time, cannot be attributed to the State, as the foregoing was requested three years after the death of Laura Albán.
d) Article 17 (Rights of the Family) of the Convention. The extension of the judicial proceedings as a result of wrong private legal advice is not attributable to the State. The civil and criminal judicial officials have acted with due diligence in these proceedings.

41. Now that the arguments by the parties have been pointed out, the Tribunal will thereupon analyze the alleged violation of Articles 4, 5, 13 and 17 of the American Convention.

a) Article 4(1) (Right to Life)

42. Regarding the arguments submitted by the representatives, the Court does not find sufficient elements to attribute the State international responsibility for the death of Laura Albán, in terms with Article 4 of the Convention. Nonetheless, the Court will analyze in chapter VII if the State has complied with its obligation to guarantee the right to life by means of a serious investigation to clarify the facts of the present case which refered to a complaint about a criminal action.

b) Article 5(1) (Right to Humane Treatment)

43. As it has already been pointed out, the Commission did not argue a violation of Article 5 of the Convention. On the other hand, in the written brief containing pleadings and motions, the representatives did allege so in connection with the facts established in the paragraph 39(b). Lastly, the State requested that the Court dismiss the alleged violation.

44. The Court has indicated that the representatives of the victims or their families can allege other rights than the ones claimed by the Commission on the application. Nevertheless, the new rights have to have a relation with the facts established in the application. [FN28]

[FN28] Cf. Case of the “Five Pensioners” v. Peru. Merits, reparations, and costs. Judgment of February 28, 2003. Series C No. 98, para. 155; Case of Escué-Zapata, supra note 12, para. 92; Case of Bueno-Alves, supra note 11, para. 121; and Case of Acevedo-Jaramillo et al. v. Peru. Preliminary Objections, Merits, reparations, and costs. Judgment of February 7, 2006. Series C No. 144, para. 280.
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45. With regard to the subject under discussion, the Court would review if the lack of a judicial answer breached the right to humane treatment of Carmen Cornejo de Albán and Bismarck Albán-Sánchez, the parents of Laura Albán, considering the facts related to the search of justice in the present case.

46. On other occasions, the Court has considered the right to psychological and moral integrity of some next-of-kin to have been violated as a result of the suffering endured due to

actions or omissions committed by State authorities. Among the issues to be considered in all cases is the response given by the State to the steps and procedures taken to seek judicial relief and the existence of a close family tie. [FN29]

[FN29] Cf. Case of Bámaca-Velásquez v. Guatemala. Merits. Judgment of November 25, 2000. Series C No. 70, para. 163; Case of Cantoral-Huamaní and García-Santa Cruz, supra note 13, para. 112; Case of Escué-Zapata, supra note 12, para. 77; and Case of Bueno-Alves, supra note 11, para. 102.

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47. In the instant case the close emotional link between Carmen Cornejo de Albán and Bismarck Albán-Sánchez and their daughter has been proven to the purpose of considering them as victims of acts committed in violation of Article 5 of the American Convention, particularly the situation of Carmen Cornejo de Albán, who fully devoted herself to seek justice regarding the circumstances in which her daughter died.

48. In this regard, during the public hearing, Mrs. Cornejo de Albán expressed that

[she devoted] virtually all of her time [to seek justice in this case,] since she was leaving [her] home at about half past seven in the morning and coming back at about seven in the evening. First, [going] to several libraries to make bibliographical enquiries and visited different physicians, begging them for an opinion on [her] daughter's death, then, looking for an attorney, and during the proceedings, visiting the Court [so] that they would send a brief promptly, answer [them], because in short, all the investigation was left in [their] hands and in those of [their] attorney.
[…]
After all of this, as I have already said honestly, justice was derided, our rights were trampled on and impunity had the upper hand.
[…B]ut I do not want these things to continue to happen, I do not want anyone else to go through what we went through, and therefore and because she believe[s] in human rights she turn[ed] to the Commission to seek justice […] for [her daughter]. [She has] committed herself to fight against injustice, to fight against impunity and she would like physicians to become more humane, to see their profession as a priesthood and not as business. I would like things to change, somehow.

49. Likewise, Bismarck Albán Sánchez expressed in his affidavit that it was his wife "who had, for the most part, followed up on these investigation proceedings in order to obtain evidence and carry out other relevant proceedings." He added that she "firmly insisted on elucidating the causes of [her daughter's] death and, once she managed to find the elements of judgment she could find, despite all the obstacles she faced, she remained at the head of the proceedings [...and], obviously, [he] support[ed] her, in spite of the pain." He added that

[a]ll these years in which they searched for medical information regarding their daughter's death[,] and for justice against those responsible for that death were and still are very hard and

exasperating. It is very frustrating to see the outcome after such a long time and realize that those who are guilty have not been punished and that, despite all our efforts, nothing has happened.
[…]
They have had to carry out so many proceedings and formalities during these years that [he] is unable to recall all the actions they have undertaken; and, despite being an economist, he is not able to remember all the expenses they have incurred in seeking the elucidation of the causes of [his daughter's] death and in the quest for justice. They have been so deeply affected that the economic point of view is no longer applicable, and still, [his] daughter's life cannot be replaced. That is the reason why one of our wishes is to create a foundation to help people with fewer economic resources in their quest for justice.

50. In light of the foregoing, the Court considers that the lack of a judicial answer to clear up the death of Laura Albán impaired the right to humane treatment of her parents, Carmen Cornejo de Albán and Bismarck Albán-Sánchez, which renders the State responsible for violating the right enshrined in Article 5(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of the aforementioned persons.

c) Article 13 (Freedom of Thought and Expression)

51. The Commission submitted no arguments regarding the violation of this right. The arguments submitted by the representatives refer to facts related to the right of the next of kin to know the truth about the events surrounding the death of Laura Albán and the right of her parents to know the information contained in the medical file.

52. As regards the facts claimed by the representatives, this Court observes that the right to access the medical file is part of the right of the victim or the victim's next of kin to have the State clear up facts constituting the violation and determining responsibility as applicable. Accordingly, the Court takes into account these considerations in examining the alleged violations of Articles 8 and 25 of the Convention.

d) Article 17 (Rights of the Family)

53. The Commission did not file any arguments regarding the violation of this right.

54. The representatives alleged that the State violated Article 17 of the Convention, but only mentioned this violation, without furnishing this Court the evidentiary elements to back their allegations. The State rejected the representatives' arguments, as set forth in paragraph 40(d) of this Judgment.

55. This Tribunal considers that the facts alleged in the instant case do not fall within the scope of Article 17 of the Convention, taking into account that the family life of the Albán-Cornejo family was affected, as the representatives alleged, as a result of the actions taken by Laura Albán's next of kin in their quest for justice in order to clarify the circumstances surrounding Miss Albán-Cornejo's death, as was analyzed in the terms of Article 5 of the Convention (supra paras 47 to 50) and will be examined in Chapter VII in connection with

Articles 8(1) and 25(1) of the Convention. Therefore, the Court shall issue no order to that respect.

VII. ARTICLES 8(1) (RIGHT TO FAIR TRIAL) [FN30] AND 25(1) (JUDICIAL PROTECTION) [FN31] IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) [FN32] OF THE AMERICAN CONVENTION

[FN30] Article 8(1) (Right to Fair Trial) of the Convention provides as follows:
[e]very 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.
[FN31] Article 25(1) (Right to Judicial Protection) of the Convention provides as follows:
[e]veryone 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.
[FN32] Article 1(1) of the Convention provides that:
[t]he 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.

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56. The arguments of the Commission and the representatives revolved around the following facts: a) the next of kin of Laura Albán repeatedly requested that the Metropolitan Hospital release the medical file, which was only made available by said institution after the next of kin resorted to the civil courts. Upon receiving the medical file, the civil judge failed to "report the notitia criminis of the death of Laura Albán to a criminal judge." [FN33] The judge also failed to notify the victims that the medical file was available, even though such documents were critical to learning the facts of and circumstances surrounding the death of Laura Albán and "establishing whether criminal, civil or other responsibility applied"; b) the next of kin of Miss Albán-Cornejo appeared before the Honor Tribunal and lodged a complaint for malpractice against Dr. Ramiro Montenegro-López and "every person, physician, nurse and paramedic" involved in the events, who were to be identified by the aforementioned doctor. They claimed that said Honor Tribunal showed a complete lack of interest in finding the truth of the facts and establishing responsibility, and took over one year to rule, even though the period therefore prescribed in Article 24 of the Ecuadorian Medical Federation Law (Ley de la Federación Médica Ecuatoriana) was sixty days; c) the State did not take any steps aimed at investigating the death of Laura Albán as from the attempt at filing the complaint on August 3, 1995. Since the then Attorney General Fernando Casares did not receive the complaint, Miss Albán-Cornejo's parents waited over one year to re-submit the complaint to the new Attorney General, Guillermo Castro-Dager; d) through the order of December 13, 1999, the Sixth Chamber of the Superior Court of Justice of Quito (hereinafter, the "Sixth Chamber") changed the charges against Dr.

Montenegro-López on the grounds that his actions were covered by Article 459, [FN34] rather than Article 456 [FN35], as stated in the complaint. As a result of the change in the charges, the Sixth Chamber declared that the statute of limitations had run out on the criminal action against said defendant. The victims challenged the court order holding the action time-barred under the statute of limitations through a request for revocation (recurso de revocatoria) and an appeal for review (recurso de casación), both of which were dismissed, with the responsible parties thus going unpunished; and e) the state authorities' complete failure to take measures aimed at locating and arresting the accused, Dr. Espinoza-Cuesta, who is a fugitive from justice, entails a failure to comply with the obligations undertaken by Ecuador as a State Party to the Convention regarding the duty to investigate. The state authorities' omissions have led to impunity for the violations.

[FN33] Article 292 of the Code of Criminal Procedure provided as follows: "[a]ny public or Police officer who, after learning that a crime has been perpetrated, fails to immediately report the occurrence to an examining judge shall be punished with imprisonment for a term of fifteen days to six months."

[FN34] Article 459 of the Criminal Code provides that "a person commits the offense of manslaughter if the person causes death due to lack of care or foresight, without intent to do injury." Article 460 of the Criminal Code provides that "a person who involuntarily causes the death of another, provided that a harsher sentence is not established for such action, shall be punished with imprisonment from three months to two years and a fine of fifty to two hundred sucres."

[FN35] Article 456 of the Criminal Code provides that "where voluntarily administered substances which may seriously affect health have been administered without intent to cause death but have nevertheless produced such result, such offense shall be punished with incarceration from three to six years."

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57. Based on the foregoing, the Commission concluded that the State adopted a passive stance during the investigation process, thus shifting onto the alleged victims the burden of preparing the criminal action and driving the investigation forward to find out the truth. The Commission added that the State failed to guarantee the alleged victims' access to justice through an effective recourse, in line with the standards of the Convention, to investigate the death of Laura Albán. Finally, it noted that the State failed to timely prosecute the perpetrators of the crime.

58. The representatives [FN36] agreed on the arguments submitted by the Commission and noted that the proceedings did not meet the required guarantees and were not carried out within a reasonable time, since the state authorities failed to drive the case forward with the required diligence in order to establish that a crime had been committed. Therefore, the State failed to comply with its obligations to investigate, follow, apprehend, prosecute and, if applicable, convict those responsible for the death of Miss Albán-Cornejo. They further contended that the State completely disregarded the submitted evidence, leaving the victims without any sort of judicial protection, which has allowed those responsible for the death of Miss Albán-Cornejo to go unpunished.

[FN36] In the brief containing pleadings and motions, the representatives made separate reference to Articles 8 and 25 of the American Convention. However, at the public hearing and in their final arguments, they relied on said articles jointly.

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59. According to the State, at no time has it hindered Laura Albán's parents' access to justice, as they were heard by the competent authorities and were afforded an opportunity to pursue various judicial remedies. It argued that it cannot be held internationally liable for the failure to institute proceedings to investigate a criminal act not known by it, and that the delay in a proceeding that extended for less than five years cannot be described as unreasonable. It further maintained that the civil judge acted diligently in ordering the production of Miss Albán's medical file by the Metropolitan Hospital. Regarding the order of December 13, 1999, the State observed that, in spite of the dismissal, in exercise of its reviewing authority over the order of the lower court, the Sixth Chamber did declare that the statute of limitations had run out on the charges of "manslaughter" against Dr. Ramiro Montenegro-López, the attending physician, on the grounds that the action was time-barred, and set the case for the trial of Dr. Espinoza-Cuesta, the resident physician.

60. This Tribunal has recognized in previous cases that it is a basic principle of the law of international State responsibility that every State is internationally responsible for acts and omissions of any of its authorities or organs in violation of internationally recognized rights, pursuant to Article 1(1) of the American Convention [FN37]. In addition, Articles 8 and 25 of the Convention determine, with regard to the actions and omissions of internal judicial authorities, the scope of the abovementioned principle of State responsibility for the actions of any State organ. [FN38]

[FN37] Cf. Case of Velásquez-Rodríguez, supra note 14, paras. 164, 169 and 170; Case of the Rochela Massacre, supra note 9, paras. 67 and 68; Case of Zambrano-Vélez et al., supra note 9, para. 103; and Case of Cantoral-Huamaní and García-Santa Cruz, supra note 13, para. 79.

[FN38] Cf. Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C. No. 63, para. 220; Case of Ximenes-Lopes. supra note 19, para. 173; Case of Baldeón García v. Peru. Merits, reparations, and costs. Judgment of April 6, 2006. Series C No. 147, para. 141; and Case of López-Álvarez v. Honduras. Merits, reparations, and costs. Judgment of February 1, 2006. Series C No. 141, para. 28.

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61. States are bound by a general duty to guarantee the free and full exercise of the rights recognized in the Convention to any person subject to their jurisdiction. In accordance with the American Convention, one of the affirmative measures that States Parties are required to take to fulfill their guarantee obligation consists in providing effective judicial remedies in line with the rules of due process, and seeking the restoration of the violated right, if possible, and reparation of any damage caused. [FN39]

[FN39] Cf. Case of Velásquez-Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 91; Case of the Miguel Castro-Castro Prison v. Peru. Merits, reparations, and costs. Judgment of November 25, 2006. Series C No. 160, para. 381; Case of the Rochela Massacre, supra note 9, para. 145; and Case of Zambrano-Vélez et al., supra note 9, para. 114.

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62. The duty to investigate must be discharged "in a serious manner, not as a mere formality that is doomed to fail from the very beginning and it must pursue a goal and be undertaken by the State as its own legal duty rather than a mere processing of private interests, dependent upon the procedural initiative of the victim or the victim's next of kin or on the contribution of evidence by private parties, without an actual quest for truth on the part of the public authorities." [FN40] Due diligence requires that the body in charge of the investigation take all such steps and make all such inquiries as may be necessary to achieve the intended goal. Otherwise, the investigation is not effective in the terms of the Convention. [FN41]

[FN40] Cf. Case of Velásquez-Rodríguez, supra note 14, para. 177; Case of the Miguel Castro-Castro Prison, supra note 39, para. 255; Case of Zambrano-Vélez et al., supra note 9, para. 120; and Case of Cantoral-Huamaní and García-Santa Cruz, supra note 13, para. 131.
[FN41] Cf. Case of the Serrano-Cruz Sisters v. El Salvador. Merits, reparations, and costs. Judgment of March 1, 2005. Series C No. 120, para. 83; and Case of Gómez-Palomino v. Peru. Merits, reparations, and costs. Judgment of November 22, 2005. Series C No. 136, para. 80.

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63. In view of the foregoing, the Court will analyze: A) the steps taken prior to the criminal proceeding; B) the steps taken before the criminal jurisdiction, in the light of the standards laid down in the American Convention.

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64. In the instant case, it has been proven that Laura Albán arrived at the Metropolitan Hospital, a private health institution located in Quito, Ecuador, on December 13, 1987. [FN42] She was admitted that very same day by instruction of the attending physician, Dr. Ramiro Montenegro-López, on account of said doctor's diagnosis of a clinical manifestation of bacterial meningitis rendered once clinical tests had been run on the patient. [FN43] In the night of December 17, Laura Albán complained of a great deal of pain. [FN44] Because Dr. Montenegro-López was not at the hospital at such moment, Dr. Fabián Espinoza-Cuesta, the resident physician, treated Miss Albán and prescribed a 10 milligram injection of morphine to relieve the pain. [FN45] Laura Albán died at 1:30 a.m. on December 18, 1987. [FN46] Her medical file [FN47] reflects that the cause of death was "respiratory and cardiac arrest, intracranial hypertension, fulminating acute purulent meningitis." [FN48]

[FN42] Cf. Metropolitan Hospital's patient admission form of December 13, 1987 (file of internal proceeding, criminal case No. 010-97-AP, Volume I, p. 790).
[FN43] Cf. brief of admission to floor of the Metropolitan Hospital of December 13, 1987 (file of appendixes to the application, appendix 1, pp. 11 and 12).
[FN44] Cf. Medical record form of December 13, 1987 (file of appendixes to the application, appendix 1, p. 8).
[FN45] Cf. record of statement by Dr. Ramiro Montenegro-López, made before the Fifth Criminal Court on January 4, 1987 (file of internal proceeding, case No. 010-97-AP, Volume I, folio 836) and the medical file of Laura Albán (file of appendixes to the application, appendix 1, p. 21).
[FN46] Cf. Simple Free Certificate for the Interment of Laura Albán, Bureau of Civil Records, of December 18, 1987 (file of appendixes to the application, appendix 5, p. 53).
[FN47] The terms medical record, medical file and clinical history have been used interchangeably. For the purposes of the current Judgment, the Court will use the term "medical file." The medical file includes the set of documents regarding the treatment processes for each patient, identifying the physicians and other professionals involved in them, with a view to achieving maximum integration of the clinical documents for each patient, clinical and surgical data, lab tests, and x-rays performed on the patient, at least within each institution.
[FN48] Cf. medical file (file of internal proceeding, criminal case No. 010-97-AP, Volume I, p. 802, and file of appendixes to the application, Appendix 5, p. 53)

A) Steps taken prior to the criminal proceedings

1) Production and acknowledgment of documents: Medical file

65. According to Laura Albán's parents, "[…] about six [or] seven months after the passing of [their] daughter […]," they repeatedly attempted to obtain a copy of the medical file from the Metropolitan Hospital. The Metropolitan Hospital refused to release the medical file of Laura Albán [FN49]. Accordingly, her mother appeared before Julio Prado Vallejo, the President of the Ecuadorian National Branch of the International Society for Human Rights, who requested the medical file to the Hospital's Director on June 28, 1990. [FN50] On August 6, 1990, further to such request, the Metropolitan Hospital advised that "due to the privileged nature of [c]linical [h]istories, a court order [was required] in order to [refer] a copy of the file on Miss Laura Albán-Cornejo." [FN51] On November 6, 1990, Mrs. Cornejo de Albán appeared before the Quito Civil Court to request that the Metropolitan Hospital be ordered to produce the medical file "containing the results of the lab tests, CT scans, and monitoring records, etc, of [her daughter], and that it also supply [to her] duly authenticated copies thereof." [FN52] On the same day, the Eighth Civil Court ordered the production of Laura Albán's medical file. [FN53] The documents were produced on November 16, 1990, in compliance with the order issued by said Court. [FN54]

[FN49] Cf. statement of Carmen Cornejo de Albán, delivered before the Court at the public hearing held on May 16, 2007 in the city of Guatemala, Guatemala; and statement of Bismarck

Albán-Sánchez, delivered through an affidavit on April 16, 2007 (file on merits, reparations, and costs, Volume II, pp. 276 to 283).
[FN50] Cf. brief by Carmen Cornejo de Albán, addressed to Julio Prado-Vallejo, the President of the Ecuadorian National Branch of the International Society for Human Rights, of December 26, 1989 (file of appendixes to the application, appendix 6, p. 55); and brief of Julio Prado-Vallejo, the President of the Ecuadorian National Branch of the International Society for Human Rights, to Dr. Patricio Jaramillo, Director of the Metropolitan Hospital, dated June 28, 1990 (file of appendixes to the application, appendix 7, p. 61).
[FN51] Cf. brief by the Director of the Metropolitan Hospital, Ing. Gonzalo Cordovez, to Julio Prado-Vallejo, the President of the Ecuadorian National Branch of the International Society for Human Rights, dated August 6, 1990 (file of appendixes to the application, appendix 8, p. 63).
[FN52] Cf. request of Carmen Cornejo de Albán displayed before the Eighth Civil Court of Pichincha, of November 6, 1990 (file of appendixes to the application, appendix 17, pp. 83 and 84).
[FN53] Cf. order of the Eighth Civil Court of Pichincha of November 6, 1990 (file of appendixes to the application, appendix 17, p. 84). Article 3 of the Code of Civil Procedure provides that "preventive jurisdiction is that type of jurisdiction under which a case is to be heard by the court that first takes cognizance thereof." Article 68 of said Code provides that "[e]very civil action is instituted by means of a complaint, even though preparatory action may be taken prior thereto […] 3º.- Production and acknowledgment of documents." Furthermore, Article 69 of said Code provides that "[either a]s preparatory action or within the evidentiary stage a request may be made for the production of volumes, deeds, notarial instruments, receipts, accounts and, generally, documents of any kind whatsoever, provided that they are specifically identified, indicating how they relate to the matter at issue or that which will become the subject-matter of the action."
[FN54] Cf. record of production of documents before the Eighth Civil Court, November 16, 1990 (file of appendixes to the application, appendix 19, p. 88).
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66. In December 1990, Carmen Cornejo de Albán and Bismarck Albán-Sánchez informally requested to several physicians that they examine their daughter's medical file. Said doctors determined that the cause of death of Laura Albán "[…] had been the administration of morphine […]." [FN55]

[FN55] Cf. medical examination of the medical file on Laura Albán (appendixes to the brief of pleadings and evidence, pp. 761 and 762); and neurological medical criteria (appendixes to the application, file of the case before de Inter-American Commission, appendix 3, p. 616); testimony of Carmen Cornejo de Albán, supra note 49; and testimony of Bismarck Albán-Sánchez, supra note 49. It should be noted that the medical examination of the medical file on Laura Albán, which has been submitted as evidence, does not feature a date or the name of the authoring physician. In that regard, the Commission and the representatives pointed out that the doctors consulted on the matter stated that they could not comply since medical laws require that physicians refrain from damaging the reputation of their colleagues.
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67. The Court understands that the medical file contains personal information that is, in general, privileged. Custody of the medical file is governed by each State's domestic regulations, under which it is generally entrusted either to the attending physician or to the public or private health institution at which the patient is treated. [FN56] In the event of the patient's death and even in other situations, this does not, however, prevent the file from being released to direct next of kin or responsible third parties who can prove that they hold a legitimate interest therein, subject to the relevant regulations. [FN57]

[FN56] On the subject of custody of the medical file, see: Article 10 of the Medical Practice Law of Bolivia; Article 30 of the Ethics Code of Chile; Article 49 of the Ethics Code of Guatemala; Article 32 of the Rights and Duties of Public and Private Health Services' Users in Costa Rica; Article 170 of the Medical Ethics Code of Venezuela; Article 16(2) of the Medical Ethics Code of Uruguay; Article 19 of Law No. 41/2002, of November 14, 2002, the basic act regulating patient autonomy and rights and obligations regarding clinical information and documentation in Spain; and Article 5(3) of Rule 168-SSA1-1998 on Medical Records of Mexico.
[FN57] See, Law No. 41/2002 of November 14, 2002, the basic act regulating patient autonomy and rights and obligations regarding clinical information and documentation in Spain, Article 18(4); rules on medical ethics; Law No. 23 of 1981, Colombia, Article 34; Chile's Ethics Code, Article 30; and Peru's General Health Act, Article 25; and Argentina's Ethics Code, Article 72.

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68. In general, the relevance of a properly integrated medical file is evident as the guiding instrument for medical treatment and a reasonable source of knowledge regarding the patient's situation, the steps taken to control it and, as the case may be, to establish the resulting responsibility. The lack of a file or the existence of a poorly integrated one, as well as the lack of regulations governing this topic subject to the rules of ethic and best practices, is an omission that needs to be analyzed and assessed, in the light of its consequences, to establish potential liabilities of different nature.

69. With regard to the arguments submitted by the Commission and the representatives to the effect that the Eighth Civil Court failed to notify the victims that it had already received the medical file, the Court notes that there is no evidence in the proceeding to establish whether the civil judge did give notice of receipt thereof. Nevertheless, there is evidence that the Eighth Civil Court ordered the Metropolitan Hospital to deliver the original medical file to the Court. Such order was issued on November 6, 1990, the very same day on which it was requested (supra para. 65). The documents were produced ten days later (supra para. 65). The above proves that the judge acted in a diligent manner and that Laura Albán's parents obtained timely access to the medical file.

70. Moreover, the procedure for the production and acknowledgment of documents was not a step that would allow the authority administering justice, in this case the Eighth Court, to analyze the contents of the documents produced and, accordingly, assess their characteristics and gain knowledge of the possible commission of an unlawful act.

71. Based on the above considerations and taking account of the fact that the action taken by the State in connection with the procedure for the production and acknowledgement of documents was effective, the Court concludes that the State did not violate the rights enshrined in Articles 8(1) and 25(1) of the American Convention to the detriment of Carmen Cornejo de Albán and Bismarck Cornejo-Sánchez, in connection with the facts related to that procedure.

2) Proceedings before the Honor Tribunal of the Pichincha Medical Association (Colegio Médico de Pichincha)

72. On November 25, 1993, Mrs. Cornejo de Albán filed a complaint for negligence in the fulfillment of the professional practice before the Honor Tribunal against Dr. Montenegro-López and "[…] all the persons, doctors, nurses and paramedics, whose names, last names and addresses [were] unknown to her and should be determined by the accused, Dr. Ramiro Montenegro[-López], as said individuals took part in […] the death of [her] daughter Laura Albán." [FN58] At the time of filing the complaint, Carmen Cornejo de Albán was not acquainted with Dr. Espinoza-Cuesta's full name because only his first last name appeared in the medical file.

[FN58] Cf. complaint filed by Carmen Cornejo de Albán, addressed to the President of the Pichincha Medical Association, on November 25, 1993 (file of internal proceeding, criminal case 010-97-AP, volume VI, pp. 1435 to 1439).

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73. The Honor Tribunal issued its decision on January 4, 1995. In said decision, it stated, inter alia, that:

[Laura Albán's] death allegedly occurred as a result of complications associated with her medical condition […]; [t]hat, however, the inherent disease toxicity is hard to distinguish from the toxicity derived from the intramuscular injection of ten (10) milligrams of morphine administered by the resident physician, […] [and found that] there [were] no grounds to determine Dr. Montenegro-López's lack of fulfillment of his professional practice in treating patient Laura Albán […], and, consequently, it refrains from imposing any sanctions on the reported physician. In relation to Dr. N. Espinoza, owing to the fact that his identity was not established in the case and that no responsibility has been determined, this Honor Tribunal also refrains from imposing sanctions. [FN59]

[FN59] In said order, it was also asserted that "in relation to Dr. N. Andrade, owing to the fact that his identity was not established in the file and that no liability has been determined, this Tribunal also refrains from imposing sanctions. In relation to Nurse Myriam Barahona, this Tribunal finds that it lacks jurisdiction to prosecute and punish [...]" Cf. order of the Honor Tribunal dated January 4, 1995 (internal case file, criminal case No. 010-97-AP, volume VII, pp. 1530 to 1533).

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74. The functions from the Honor Tribunal, based on the domestic legislation, do not determine nor do they replace the decisions that may be adopted by an administrative or judicial state body, or release such body from potential liability.

75. Nevertheless, this Court desires to highlight the significance of the work of said association in the investigation and disciplinary punishment of the doctors, among other tasks, when a medical malpractice is reported. Such procedures are to be carried out pursuant to Articles 22 and 24 of the Law of the Ecuadorian Medical Federation (Ley de la Federación Médica Ecuatoriana).

76. This Court finds it appropriate to put forth some considerations regarding the work of medical professional supervision entities taking into account, in particular, the social implications of the responsibility undertaken by professional organizations and their disciplinary bodies, the social expectation that generates and the broad, evolving and desirable bioethical assessment of the health care professionals´ role, which lies at the interface between moral duties and legal accountability. [FN60]

[FN60] Universal Declaration on the Human Genome and Human Rights, articles 13 and 14 adopted at the UNESCO's General Conference held on November 11, 1997; International Declaration on Human Genetic Data, articles 6(b), 20 and 25, adopted at the UNESCO's General Conference held on October 16, 2003; and Universal Declaration on Bioethics and Human Rights, article 19, adopted at the UNESCO's General Conference on October 19, 2005.

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77. The duties of medical professional association tribunals comprise the obligation to oversee and watch over the ethical exercise of the medical profession and protect the legal interests related to medical practice, such as life, humane treatment and handling of scientific and medical information of patients´ health.

78. On account of the aforementioned, when monitoring and controlling the practice of physicians and imposing disciplinary sanctions, professional associations must act as impartial, objective and diligent decision-making bodies to secure the rights and values safeguarded by the medical profession, under generally accepted ethical, bioethical, and scientific and technical principles. It would be unfair to disregard the decisions adopted by professional associations as they may become highly influential in any further analysis of jurisdictional bodies, even though said decisions are not formally conclusive, mandatory or binding on them.

B) Proceedings before criminal jurisdiction

1) Criminal complaints filed in 1995 and 1996 before the Office of the Attorney General

79. On August 3, 1995 Carmen Cornejo de Albán appeared before the Attorney General, Fernando Casares, to file a complaint for the death of her daughter, Laura Albán, occurred on December 18, 1987. The complaint was not lodged by referred authority. [FN61]

[FN61] Cf. brief of Carmen Cornejo de Albán addressed to Fernando Casares, Attorney General dated August 3, 1995 (file of appendixes to the application, appendix 24, p. 99); and testimony of Carmen Cornejo de Albán, supra note 49, and testimony of Bismarck Albán Sánchez, supra note 49.

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80. On November 1, 1996, Mrs. Cornejo de Albán requested the Office of the Attorney General to lodge the accusation for Laura Albán's death and stated that "[a]lmost nine years [had] elapsed [and that she had been] informed that a ten-year statute of limitations applies to these cases," [FN62] so she requested that the case be processed with promptness. After the filing of said request, on November 25, 1996, Miss Albán-Cornejo's mother filed "a formal accusation against the Metropolitan Hospital of Quito and Dr. Ramiro Montenegro-López and Dr. […] Espinoza, [FN63] who were accountable for the death of [her daughter Laura […] Albán […] for having used a CONTRAINDICATED drug" [FN64] (capitalization in original).

[FN62] Cf. brief of Carmen Cornejo de Albán addressed to Guillermo Castro-Dager, Attorney General dated November 1, 1996 (file of appendixes to the application, appendix 25, p. 102).

[FN63] According to the statements made by the Commission and the representatives, the complaint made no mention of Dr. Espinoza-Cuesta's name, because Laura Albán's next of kin were not acquainted with the name of the physician, despite in several occasions they had requested said information to the Metropolitan Hospital, but had no reply. Cf. communications of the Ecumenical Commission on Human Rights addressed to the Director of the Metropolitan Hospital delivered on December 16, 1994, January 13, 1995 and April 18, 1995 (file of appendixes in the internal proceeding, criminal case no. 010-97-AP-AP, volume II, pp. 978 to 981); statement of Carmen Cornejo de Albán, supra note 49, and statement of Bismarck Albán-Sánchez, supra note 49.

[FN64] Cf. brief of accusation of Carmen Cornejo de Albán of November 25, 1996 (file of appendixes to the application, appendix 26, pp. 104 to 105).

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81. On December 19, 1996, the Attorney General informed the Attorney General from Pichincha, Napo y Sucumbios, of the complaint filed by Mrs. Cornejo de Albán. [FN65] On December 30, 1996, the Pichincha Public Prosecutor, Napo y Sucumbios, requested the Ninth Criminal Prosecutor to file the pertinent accusation. [FN66] On January 10, 1997, the Fifth Criminal Judge from Pichincha (Juez Quinto de lo Penal de Pichincha) (hereinafter, the "Fifth Judge"), instituted a formal criminal investigation and issued a court order to investigate the alleged crime to "determine and identify the perpetrators, accomplices, and accessories after the fact of the offense being investigated," [FN67] meaning the death of Miss Albán-Cornejo. On January 23, Laura Albán's parents filed a private complaint [FN68] against Dr. "Ramiro Montenegro-López […]; and [against] all the persons, doctors, nurses and paramedics, whose names, last names and addressed [we]re unknown and must be determined by the accused" in the proceedings conducted against Dr. Ramiro Montenegro-López et al before the Fifth Judge. [FN69] On May 15, 1997, the Fifth Criminal Court requested the Metropolitan Hospital to provide the court with the medical file of Laura Albán, the names of the individuals who assisted

her, [FN70] and "the file containing personal data on Dr. N. Espinoza." On May 26, 1997, in reply to referred request, the Metropolitan Hospital delivered to the Fifth Criminal Court a certified copy of the medical file and asserted that the names of the medical staff who had treated Laura Albán were stated in the clinical file and that the only listed doctor in the hospital by the name of Espinoza was Dr. "Fabián Espinoza." [FN71]

[FN65] Cf. official letter of the Attorney General addressed to the Pichincha Public Prosecutor of December 19, 1996 (file of internal proceeding, criminal case No. 010-97-AP, volume I, p. 783).
[FN66] Cf. official letter No. 379-96-MFP of the Pichincha Public Prosecutor to the Ninth Criminal Prosecutor of December 30, 1996 (file of internal proceeding, criminal case No. 010-97-AP, volume I, p. 788).
[FN67] Cf. court order of the Pichincha Fifth Criminal Court of January 10, 1996 (file of internal proceeding, criminal case No. 010-97-AP, volume I, p. 833).
[FN68] Pursuant to article 14 of the Code of Criminal Procedure in force at the time of the events, a private accusation could have been filed.
[FN69] Cf. private accusation brief filed by Laura Albán's parents to the Fifth Criminal Judge on January 23, 1997 (file of internal proceeding, criminal case No. 010-97-AP, volume I, pp. 896 to 901).
[FN70] Cf. official letter of the Fifth Judge to the director of the Metropolitan Hospital, of May 15, 1997, (file of internal proceeding, criminal case no. 010-97-AP, volume IV, p. 1240); and official letter No. 1120-OIDP of the Pichincha Office of Crime Investigations of the National Police of Ecuador (Oficina de Investigaciones del Delito de Pichincha) addressed to the Fifth Judge, of January 28, 1997 (file of appendixes to the application, appendix 30, pp. 113 to 117).
[FN71] Cf. letter of Cecilia B. de Páez, General Manager of the Metropolitan Hospital addressed to Dr. Jorge W. German R., Pichincha Fifth Criminal Judge (file of internal proceeding, criminal case No. 010-97-AP, volume VI, p. 1395).

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82. On February 16, 1998, with the aim to investigate Dr. Fabián Espinoza-Cuesta's participation in Laura Albán's death, the Pichincha Fifth Criminal Prosecutor (hereinafter, the "Prosecutor") requested the Court to institute investigation proceedings with regard to said health care professional under the assumption that "[…] the doctor that prescribed morphine to patient Laura Albán […] was Dr. Fabián Espinoza[,…]" so "there [were] sufficient procedural and legal grounds" to presume his participation. [FN72] On March 3, 1998, the Fifth Judge, after becoming acquainted with Dr. Fabián Espinoza-Cuesta's full name, "extended" the investigation proceedings against him. [FN73] On July 20, 1998, the Prosecutor filed an accusation against doctors "Ramiro Montenegro-López and Fabián Ernesto Espinoza-Cuesta [accusing them] as perpetrators of the crime defined in Article 456 of the Criminal Code." [FN74] On July 21, 1998, the Fifth Judge served the accusation upon the parties. [FN75] On July 27, 1998, Dr. Ramiro Montenegro-López requested the Fifth Criminal Court for a final dismissal of the case on the grounds that the crime he was accused of was defined in Article 459 of the Criminal Code and that any action against him had become time-barred. [FN76] In consideration of Dr. Montenegro-López's brief, on August 14, 1998, Carmen Cornejo de Albán and Bismarck Albán-Sánchez requested the Fifth Judge to accuse Dr. Montenegro-López of the crime defined in Article 456 of the Criminal Code [FN77] (supra note 35).

[FN72] Cf. brief of the Pichincha Fifth Criminal Prosecutor addressed to Fifth Criminal Judge of February 16, 1998 (file of internal proceeding, criminal case No. 010-97-AP, volume VII, p. 1561).
[FN73] Cf. court order of the Fifth Criminal Court of March 3, 1998 (file of internal proceeding, criminal case No. 010-97-AP-AP, volume VII, p. 1562). The applicable provision was article 129 of the Code of Criminal Procedure, which prescribed that "when there is evidence raising presumption of an individual's criminal liability, the Judge shall extend the investigation against the individual and order that preliminary examination statement be rendered."
[FN74] Cf. brief of the Pichincha Fifth Criminal Prosecutor of July 20, 1998 (file of appendixes to the application, appendix 32, pp. 122 to 127) and court order of the Fifth Criminal Court, of July 21, 1998 (file of internal proceeding, criminal case No. 010-97-AP, volume XI, p. 2000).
[FN75] Cf. notice of July 21, 1998 (file of internal proceeding, criminal case No. 010-97-AP, volume XI, p. 2000).
[FN76] Cf. brief of Dr. Ramiro Montenegro-López addressed to the Fifth Criminal Judge of July 27, 1998 (file of internal proceeding, criminal case No. 010-97-AP, volume XI, pp. 2006 to 2011).
[FN77] Cf. brief filed by Laura Albán's parents with the Fifth Criminal Judge of August 14, 1998 (file of internal proceeding, criminal case No. 010-97-AP-AP, volume XI, p. 2012).

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83. On December 14, 1998, the Fifth Judge issued an order of temporary dismissal of the case in favor of Dr. Montenegro-López and Dr. Espinoza-Cuesta. [FN78] As grounds for said order, the Court asserted that "there [was] not enough evidence [that proved that] the cause of [Laura Albán's] death would be the administration of morphine," and further stated that "[Dr. Montenegro-López's] culpability is not clear or at least there are doubts about it." Lastly, the Fifth Judge ordered that a consultation to the Superior Court of Justice of Quito be made and that the case file be submitted to referred tribunal. [FN79] On December 16, 1998, Dr. Ramiro Montenegro-López and Laura Albán's parents appealed against the order of temporary dismissal. Dr. Montenegro-López moved for a final dismissal in lieu of a temporary order. Miss Laura Albán-Cornejo's parents requested that the order be reversed in full, so that the case be set for trial. [FN80] On December 23, 1998, the Fifth Judge admitted the motions of appeal and forwarded the case to the higher court. On June 15, 2999, the Pichincha Criminal Prosecutor accused Dr. Montenegro-López and Dr. Espinoza-Cuesta, before the Sixth Chamber, as "perpetrators of the crime defined in [articles] 456 and 457 of the Criminal Code." [FN81]

[FN78] The original document features the name of Dr. Fernando Alarcón-Egas. However, it is the Court's view that such document actually makes reference to Dr. Fabián Espinoza-Cuesta. Furthermore, in the accusatory opinion of the Pichincha Public Prosecutor dated June 15, 1999 filed with the Sixth Chamber, the prosecutor noted that: "[…] considering that, in the resolution to be adopted, the Chamber should reverse the Lower court order and issue an order setting the case against Ramiro Montenegro-López and Fabián Ernesto Espinoza-Cuesta for trial and further correct the unintentional error by which the lower judge, in the challenged order, mistook expert

witness Dr. Fernando Alarcón-Egas for Fabián Espinoza-Cuesta." Cf. prosecutor's opinion on June 15, 1999 (file of appendixes to the application, appendix 35, p. 154).
[FN79] Cf. order of temporary dismissal issued by the Fifth Criminal Judge on December 14, 1998 (appendixes to the application, appendix 34, pp. 136 to 147).
[FN80] Cf. brief of the defense attorney of Dr. Ramiro Montenegro-López addressed to the Fifth Criminal Judge, of December 16, 1996 (file of internal proceeding, criminal case No. 010-97-AP, volume XI, p. 2029); and briefs of Laura Albán's parents filed with the Fifth Criminal Judge on December 16 and 21, 1998 (file of internal proceeding, criminal case No. 010-97-AP-AP, volume XI, pp. 2030 and 2032).
[FN81] Cf. court order of the Fifth Criminal Court of December 23, 1998 (file of internal proceeding, criminal case No. 010-97-AP, volume XI, p. 2033), and prosecutor's opinion of June 15, 1999, supra note 78.
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84. On December 13, 1999, the Sixth Chamber of the Superior Court of Justice of Quito issued an order stating, inter alia, that:

[…] the following pieces of evidence of the actual commission of the crime stand out from the analysis of the case file [...] 2) medical experts´ [r]eports [...] 3) Information contained in the Sheet of the Metropolitan Hospital on the reported events [...] 6) Neurological opinion by Dr. Iván Gustavo Reinoso Vaca […] 7) certificate issued by Dr. Marcelo E. Cruz.
[…) Third.- Based on the analysis of the body of evidence reviewed and specially supported in paragraph a) of Dr. Edgar P. Samaniego Rojas´ report; in the preceding whereas clause, it is concluded that: 1) A negligent conduct resulted in the commission of a crime by omission, so far as no information about the evolution of the disease had been recorded in the clinical history for many hours, as it is mandatory to physicians, who act as guarantors and are obliged to act accordingly [...] that in health care institutions, this duty is performed by resident physicians, a material precaution in our opinion, until arrival of the responsible Doctor who is In Charge of the patient [...] and the Doctor In Charge must procure that said recording be done [...] (underline in original)
[…A]s no specific laws providing for MEDICAL MALPRACTICE has been enacted, the conduct has been adapted to the crime defined in Article 459 of the Criminal Code, the elements and punishment of which are prescribed in Article 460 ibidem, as an unintentional crime under our code, that is to say, an essentially negligent criminal conduct
[…] furthermore, in the documents [...] containing scientific criteria of [...] Neurologists Marcelo and Iván Cruz-Utreras [...], "morphine is absolutely contraindicated in patients with symptoms of meningitis" [...] and Dr. Iván Cruz holds [that] "[t]his type of drug in patients with high intracranial pressure signs, or meningitis symptoms, is always contraindicated, no matter the dosage."
[…] [i]n the light of the above-mentioned, the members of the Chamber, taking into account part of the criteria adopted by the Prosecutor, reversed the order in appeal as follows[:] [...] with regard to Dr. Ramiro Montenegro-López, it is worth noting that, based on certain presumptions, he may be signalized as the person who committed the crime as perpetrator under the provisions of Article 459 of the Criminal Code, which defines a negligent act – that in the instant case is committed by omission – nevertheless, the crime is punishable by PRISON according to Article 460 ibidem and the action to prosecute said crime under the provisions of Article 101 subarticle

4 of said code [...] is time-barred. In other words, the action has been exercised out of time since the events occurred on December 18, 1987 [...] and more than five years elapsed from that date that the court ordered to investigate the alleged crime dated January 10, 1997; where a five-year statute of limitations applies.
[…] this Chamber holds that the statute of limitations applies to the action to prosecute the crime of which Dr. Ramiro Montenegro-López was accused. With regard to Dr. Fabián Ernesto Espinoza-Cuesta, based on the presumptions that he perpetrated the crime defined and punishable under Article 456 of the Criminal Code pursuant to the provisions of Article 253 of the Code of Criminal Procedure, the CASE IS SET FOR TRIAL, [...] his property will be impounded in the amount of FIVE HUNDRED MILLION SUCRES. Owing to the fact that the accused is a fugitive.
[I]t is hereby ordered that Trial be adjourned until the accused is held in custody or voluntarily appears in person. [FN82] […]

[FN82] Cf. court order of the Sixth Chamber of December 13, 1999 (file of internal proceeding, criminal case No. 010-97-AP, volume XI, pp. 2036 to 2050).
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85. In December 1999, Laura Albán's parents requested the Sixth Chamber to reverse the order dated December 13, 1999 insofar as it held that the criminal action against Dr. Ramiro Montenegro-López was time-barred and moved the Sixth Chamber for an order setting the case for trial. [FN83] On February 16, 2000, [FN84] the Sixth Chamber dismissed the motion on the grounds that the judge that issued the order was not empowered to reverse it or to alter its spirit. On March 17, 2000, the Sixth Chamber dismissed a motion of appeal filed by the defense attorney of Dr. Espinoza-Cuesta holding that the appealed order had become executory and declaring that the motion had been unduly filed. [FN85] On April 24, 2000, the Sixth Chamber rejected the appeal for the review of the order holding the action time-barred dated December 13, 1999, filed by Mr. Albán-Sánchez and Mrs. Cornejo de Albán, on the grounds that an appeal for review might only be raised against a final judgment, and that in this case the appeal was raised against the order holding the action time-barred. [FN86] On June 8, 2000, the Sixth Chamber dismissed an appeal for review of facts as well of law filed by Dr. Fabián Espinoza-Cuesta where the accused alleged that all the motions he had raised were dismissed. [FN87]

[FN83] Cf. brief filed by Laura Albán's parents addressed to the members of the Sixth Chamber, undated (file of appendixes to the application, appendix 38, pp. 173 to 176).
[FN84] Cf. order of the Sixth Chamber of February 16, 2000 (file of appendixes to the application, appendix 39, p. 178)
[FN85] Cf. order of the Sixth Chamber of March 17, 2000 (file of internal proceeding, criminal case No. 010-97-AP, volume XI, p. 2051). In the proceedings before the Inter-American Court, no evidence on the filing of the motion of appeal was furnished.
[FN86] Cf. order of the Sixth Chamber of April 24, 2000 (file of internal proceeding, criminal case No. 010-97-AP, volume XI, p. 2052).

[FN87] Cf. order of the Sixth Chamber of June 8, 2000 (file of internal proceeding, criminal case No. 010-97-AP, volume XI, p. 2053). In the proceedings before the Inter-American Court, no evidence on the filing of the appeal for review of facts was furnished.

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86. On August 17, 2000, the Fifth Judge issued an official letter addressed to the Property Registrar (Registrador de la Propiedad) ordering the embargo on Dr. Espinoza-Cuesta's property. [FN88] On that same date, the Fifth Judge issued an official letter requesting the Chief of the Pichincha Judicial Police to locate and apprehend Dr. Fabián Espinoza-Cuesta. [FN89] On January 4, 2001, the Fifth Criminal Court requested the Director of the National Migration Office (Director Nacional de Migración) information on Dr. Fabián Espinoza-Cuesta's migration-related action. [FN90]

[FN88] Cf. official letter of August 17, 2000, issued by the Fifth Criminal Court to the Property Registrar (file of internal proceeding, criminal case No. 010-97-AP, volume XI, p. 2057).

[FN89] Cf. official letter of August 17, 2000 issued by the Fifth Criminal Court to the Chief of the Pichincha Judicial Police (file of internal proceeding, criminal case No. 010-97-AP, volume XI, p. 2058).

[FN90] Cf. official letter of January 4, 2001, issued by the Pichincha Fifth Criminal Court to the National Director of Migration (file of internal proceeding, criminal case No. 010-97-AP, volume XI, p. 2068).

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87. On November 10, 2006, Laura Albán's parents informed the Fifth Criminal Court that they had learned that Dr. Espinoza-Cuesta was no longer in Ecuador after searching the Internet. [FN91]

[FN91] Cf. brief filed with the Fifth Criminal Court on November 10, 2006 by Laura Albán's parents with record sheet of the Migration Office-Information Center about Dr. Espinoza-Cuesta dated March 23, 2001 (file of internal proceeding,, criminal case No. 010-97-AP, volume XI, p. 2093).

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88. On November 20, 2006, the Fifth Criminal Court forwarded to the President of the Supreme Court of Justice the case file of the criminal proceedings conducted against Dr. Espinoza-Cuesta to carry on with his extradition. [FN92] On January 30, 2007, the Office of the President of the Supreme Court of Justice took up the request for extradition of Dr. Fabián Espinoza-Cuesta stating that, to carry on with the procedure, evidence that the action was not time-barred must be furnished. Thus, it requested the Fifth Judge to issue an order regarding this point. [FN93]

[FN92] Cf. official letter of the Pichincha Fifth Criminal Court of November 20, 2006 (file of internal proceeding, criminal case No. 010-97-AP, volume XI, p. 2095).

[FN93] Cf. order of the Supreme Court of January 30, 2007 (file of evidence to facilitate the adjudication of the case, pp. 2111 and 2112).

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89. On January 31, 2007, the Fifth Court issued an official letter regarding the request of the President of the Supreme Court of Justice, and stated the following in relation to the legal situation of Dr. Fabián Espinoza-Cuesta: a) a court order to investigate the alleged crime was issued on January 10, 1997; ten years elapsed between said date and January 10, 2007; on December 13, 1999, the Sixth Chamber set the case for trial against said physician for allegedly committing the crime defined and punished under Article 456 of the Criminal Code; b) the established punishment for said crime is incarceration from three to six years. According to Article 101 of the Criminal Code, crimes punishable by incarceration are prosecutable on an on its own motion basis. If no trial has been initiated, a ten-year statute of limitations applies to the action to prosecute said crimes. If a trial has been initiated, the action to go ahead with prosecution is to be barred in a period of ten year as from the issuance of the court order to investigate the alleged crime; and c) ten years have elapsed from the issuance of the court order to investigate the alleged crime (from January 10, 1997 to January 10, 2007). Given that the established punishment for the crime allegedly committed by Dr. Fabián Espinoza-Cuesta is incarceration, the following conclusion has been reached: "the required time – that is, ten years– after which the criminal action brought against the aforementioned individual is to be time-barred has already elapsed[. C]onsequently, in the instant case, the criminal action is time-barred." [FN94]

[FN94] Cf. statement of the Fifth Criminal Court of January 31, 2007, addressed to the President of the Supreme Court of Justice (file of evidence to facilitate the adjudication of the case, pp. 2151 and 2152).

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90. On October 16, 2007 the Fifth Criminal Court took up the criminal case and established that:

[i]n conformity of what is established by Article 101 of the Criminal Code [FN95], all action extinguishes in the time and with the conditions established by Law. The mentioned substantive criminal disposition with regards to the concerning matter, states that in case a crime of public action that goes without trial and that is reprimanded with incarceration will extinguish in 10 years. The period will be counted from the perpetration of the infraction of said crime. In the same crimes of public action if trial begins before this deadline has arrived, the action will extinguish in 10 years starting from the action to go ahead with prosecution. In the present case, as is stated before, preferably the action to go ahead with prosecution is ordered on January 10, 1997 will the purpose to investigate the death of who in life was named [Laura] Susana Albán-Cornejo, a crime that is punishable by incarceration. Defendant Fabián Ernesto Espinoza-Cuesta has submitted certificates of Criminal Courts and Tribunals of Pichincha that he has not been set to trial nor sentenced for another criminal cause. In other means, the extinguishment of the criminal action has not been interrupted. Based upon the previous considerations it deems that in the present cause, the legal dispositions embodied in Articles 101, 108 and 114 of the Criminal

Code are fulfilled. In consequence, in use of [the] legal faculties and in compliance with [my] juridical duty to order the extinguishment of the criminal action in the […] cause." [FN96]

[FN95] Art. 101 of the Criminal Code provides as follows:
"[a]ll criminal actions shall be time-barred under the conditions established by law. In the exercise of the rights embodied by the extinguishment, the next rules will be followed: both in crimes prosecutable on an ex officio basis and in crimes for which charges must be pressed by a private party, a main consideration shall be whether, after commission of the crime, a trial has or has not been initiated.
In cases of crimes prosecutable on an ex officio basis, if no trial has been initiated, the action to prosecute crimes punishable by incarceration shall expire within ten years; while actions to prosecute crimes punishable by prison shall expire within five years. In both cases, the commission of the crime shall be the starting point for time computation. In the same crimes prosecutable on an ex officio basis, if trial has been initiated before the deadlines have expired, the action to continue the cause will extinguish in the same terms counting from the court order to investigate the alleged crime."
[FN96] Cf. order issued by the Fifth Criminal Court on October 16, 2007 (file on merits, reparations, and costs, volume III, fs 496 and 497).
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91. On October 25, 2007, Laura Albán's parents filed a motion for appeal against said order with the Fifth Criminal Court; such motion was allowed on October 19, 2007. As of the date of this Judgment, the appeal is still pending before the Superior Court of Justice of Quito. [FN97]

[FN97] Cf. motion of appeal filed with the Fifth Criminal Court on October 25, 2007 (file on merits, reparations, and costs, volume III, pp. 522 to 524); and official letter issued by the Fifth Criminal Court on October 29, 2007 (file on merits, reparations, and costs, volume III, p. 524).
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92. The Public Prosecutor's Office is the body competent to institute investigation proceedings on its own motion, in accordance with the notitia criminis (the report of an offense having been committed) related to crimes which are publicly actionable. [FN98] However, under the legislation in force at the time of the events, the victim or the victim's next of kin were entitled to file a private prosecution without detriment to the prosecutor's duty to initiate criminal proceedings. On the other hand, Article 428 of the Code of Criminal Proceedings [FN99] provided which unlawful acts call for investigation to be initiated under private prosecution. Crimes against life were not included in said legal provision. In such cases, the State had the duty to initiate immediately and on its own motion the corresponding investigations in order to clarify the circumstances surrounding the death of the victim and to identify, prosecute and, if applicable, punish the perpetrators.

[FN98] The aforementioned had been previously provided for under Articles 14, 21, and 23 of the Code of Criminal Procedure in force at the time of the events. Article 14 established that

"[c]riminal actions are public by nature. They shall be generally exercised ex officio, although private complaints shall be allowed; however, in all cases established in Article 428 of this Code, they may only be exercised by means of private complaint." Moreover, Article 21 established that "[t]he Office of the Prosecutor shall request the corresponding judges to institute criminal proceedings for the commission of any crime, and said request shall have grounds on the acquired knowledge of the crime." Finally, Article 23 established that "[t]he intervention of the Office of the Prosecutor shall be compulsory in all criminal proceedings that, after the commission of a crime, have been initiated in the corresponding courts and tribunals, including cases in which there is a private complainant, provided that the crime is prosecutable on an ex officio basis."

[FN99] Article 428 of the Code of Criminal Procedure established that "[t]he only crimes subject to prosecution by a Court of law when a complaint is filed by the injured party shall be:

a) Statutory rape perpetrated on a woman between sixteen and eighteen years of age;

b) Kidnapping of a woman between sixteen and eighteen years of age having consented to her kidnapping and having willfully followed her kidnapper;

c) False slander and serious non-false slander;

d) Any damage caused to forests, groves or vegetable gardens constituting private property, either by cutting, barking or destroying trees; or to rivers, channels, creeks, ponds, hatcheries, or any other water deposit, whether by destroying aqueducts, dams, bridges or reservoirs constituting private property or by pouring in substances to kill fish or any other ichthyologic species; or any damage resulting in the death, wound or injury of horses or any other domestic or domesticated animal; or caused by the destruction of fences or closings of any kind, the elimination or change of boundaries, and the closing of pits; and

e) Any other crime of unlawful appropriation not listed above.

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93. In regard to the death of Laura Albán, the judicial authorities considered that it had been the result of an "unintentional crime." [FN100] The State did not immediately have knowledge of said death and of the circumstances surrounding the event. Therefore, it is essential to establish the moment in which the State first acquired knowledge of the facts in order to institute investigation proceedings on its own motion.

[FN100] On December 13, 1999, the Sixth Chamber ruled that "as no specific laws providing for MEDIAL MALPRACTICE has been enacted, the conduct has been adapted to the crime define din Article 459 of the Criminal Code, the elements and punishment of which are prescribed in Article 460 ibidem, as an unintentional crime under [the] code, that is to say, an essentially negligent criminal conduct […]" (all capitals in original).

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94. Article 15 of the Ecuadorian Code of Criminal Proceedings [FN101] established six ways in which the State could acquire knowledge of an unlawful act, one of which was by means of a complaint. It has been proven that Mrs. Cornejo de Albán appeared before the then State's Attorney General on August 3, 1995 –seven years and eight months after her daughter's death– in order to file a complaint for the death of Laura Albán. The complaint has not been received by said authority (supra para. 79).

[FN101] Article 15 of the Code of Criminal Procedure established that "with the exception of those cases established in Article 428 of this Code, public criminal prosecution shall begin with a court order to investigate an alleged crime, which shall be based on the following:
1.– an inquiry performed by a competent court or judge ex officio;
2.– a prosecution request;
3.– a criminal complaint
4.– a private complaint
5.– a police report or investigation; and
6.– a superior executive order.

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95. In its oral closing arguments, the State asserted that "the attorneys of Miss Albán[-Cornejo]'s parents filed a criminal complaint with the Attorney General's Office in August, 1995"; and in its written closing arguments, it stated that "it is important to mention that the criminal judicial officers are deemed responsible as from the moment they have acquired knowledge of the crime, that is[,] as from 1995, the year in which the Attorney General acquired such knowledge."

96. Given that the State acquired knowledge of Laura Alban's death on August 3, 1995, it should have instituted investigation proceedings in order to clarify the events as from that date. However, the investigation has not been initiated until fifteen months later, as it has already been proven (supra, para. 81). On this matter, this Court considers that the aforementioned fact indicates that State authorities did not seriously process, with the due guarantees, the complaint filed by Laura Albán's parents. Therefore, the Court considers that the State has infringed Articles 8(1) and 25(1) of the American Convention for not having instituted the investigation on Laura Albán's death in a timely manner.

2) Order issued by the Sixth Chamber of Quito's Superior Court of Justice

97. As previously stated, the Sixth Chamber decided in its order dated December 13, 1999, to dismiss the criminal action against Dr. Ramiro Montenegro-López on the grounds that such action was time-barred, and to set the case for trial against Dr. Fabián Espinoza-Cuesta (supra, para. 84). The Court shall now refer to the investigations conducted by the State in each of these cases.

98. Ecuador's Criminal Code establishes that whoever, without the intention to cause the death, willfully administers substances that may severely affect the health or cause the death of another person commits a crime punishable by three to six years of incarceration (Article 456) (supra, note 35). The intention to cause death is presumed if the person administering said substances is either a physician, a pharmacist or a chemist, or if that person possess knowledge of said professions, even if not the holder of the required titles or degrees to practice them (Article 457). [FN102] On the other hand, Article 459 sets forth a type of manslaughter, which punishment is established in Article 460: three months to two years of prison and a fine of fifty to two hundred sucres (supra, note 34).

[FN102] Article 457 of the Criminal Code establishes that "[r]egarding the crime established in the previous Article, the intention to cause death shall be presumed if the person administering said substances is either a physician, a pharmacist, or a chemist; or if he or she has knowledge of said professions, even if not a holder of the corresponding title or degree in order to practice them."

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99. Article 101 of the Criminal Code establishes that actions to prosecute crimes punishable by incarceration are barred by the statute of limitations after ten years and that a five-year statute of limitations applies to crimes punishable by prison (supra note 95).

100. It has been proven that the Pichincha State's Attorney accused Drs. Montenegro-López and Espinoza-Cuesta before the Sixth Chamber "as perpetrators of the crime defined and punished in [Articles] 456 and 457 of the Criminal Code, considering that, in its decision the Chamber should overturn the Lower court's decision and issue the corresponding decision setting the case against [the aforementioned physicians] for trial." [FN103]

[FN103] Cf. brief of the Pichincha Fifth Criminal Prosecutor, supra note 78.

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101. The Court notes that Article 351 of the Code of Criminal Proceedings applicable to the instant case established that judges who had jurisdiction over a decision issued by a lower court could either set the case for trial or dismiss the case. [FN104] In the instant case, the Sixth Chamber changed the classification of the crime according to a different interpretation of the facts and stated the grounds supporting its decision, in accordance with the powers vested in it (supra para. 84).

[FN104] Article 351 of the Code of Criminal Procedure established that "[i]f on appeal the High Court considers that the case should be set for trial rather than dismissed, the Court shall issue an order setting the case for trial under Article 253. If, on the contrary, the High Court considers that an appealed order to set the case for trial is not pertinent, it shall reverse it and order the dismissal of the case."

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102. Expert witness Ernesto Albán-Gómez expressed that, according to criminal proceedings in force in Ecuador at the time of the events in the instant case, after the preliminary proceedings there was an intermediate stage in which the judge decided whether to set the case for trial or to dismiss it. This stage concluded when the case was either set for trial or dismissed (supra para 28(b)).

103. This Court considers that the Sixth Chamber observed the provisions established in the Code of Criminal Proceedings in force at the time of the events. It changed the crime

classification and put an end to the proceedings conducted against Dr. Montenegro-López by an order of final dismissal based on the statute of limitations, which had the effects of res judicata, [FN105] pursuant to the procedural rules in force.

[FN105] In that sense, Article 247 of the Code of Criminal Procedure established that "[t]he final dismissal of a case puts an end to the proceedings and, consequently, bars any further prosecution of the same event."

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104. Therefore, the Court considers that the allegations made by the Commission and the representatives in relation to the crime classification's change and lack of access to an appropriate remedy shall not proceed in this case, since it has not been proven that the State has incurred in any arbitrary action, nor that it has violated the principle of due process, nor that it has prevented Laura Albán's next of kin's access to justice.

105. As for the situation of Dr. Fabián Espinoza-Cuesta, who is a fugitive, State authorities have not taken the necessary actions aimed at locating him in a timely manner and arresting him. The State acknowledged so before the Court (supra, paras. 10, 16 and 17).

106. In the light of the aforementioned facts (supra, paras. 79 to 84) and considering the partial acknowledgment of responsibility by the State (supra, paras. 10, 16 and 17), this Court notes that on December 13, 1999, the Sixth Chamber issued an order setting the case against Dr. Fabián Espinoza-Cuesta for trial. Under domestic laws, authorities had the duty to have him appear before the court given that the trial had been suspended until the accused was apprehended or voluntarily appeared before the court. The State had the obligation to carry out all the necessary and appropriate actions to try to locate and arrest the accused, including through extradition proceedings.

107. After the aforementioned order of December 13, 1999, there is only evidence that on August 17, 2000 the Fifth Judge sent an official letter to the Chief of the Pichincha Judicial Police in order to pursue with the localization and apprehension of Dr. Fabián Espinoza-Cuesta; on January 4, 2001, the Fifth Court requested information about the migratory activities of Dr. Espinoza-Cuesta to the National Director for Migration; and that on November 20, 2006, it referred the request for extradition to the Office of the President of the Supreme Court of Justice (supra para. 86). Upon request from the Supreme Court dated January 30, 2007, the Fifth Court declared that the case against Dr. Espinoza-Cuesta was already time-barred (supra, paras. 88 and 89)

108. In the instant case, the State itself admitted that the authorities had not conducted a serious and effective investigation aimed at locating Dr. Espinoza-Cuesta and obtaining, if appropriate, the extradition of the accused. However, on October 16, 2007 the Fifth Criminal Court declared that the statute of limitations period had already elapsed on the criminal action against said physician; this decision was appealed on October 25, 2007, was admitted and, at the moment, is pending of decision before the Superior Court of Justice of Quito (supra paras. 90 and 91).

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109. Therefore, the Court concludes that the State is responsible for the violation of the rights enshrined in Articles 8(1) and 25(1) of the American Convention, in relation to Articles 4, 5(1) and 1(1) thereof, to the detriment of Carmen Cornejo de Albán and Bismarck Albán-Sánchez.

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110. The Court was recently informed that the Fifth Criminal Court declared on October 16 2007 that the statute of limitations had barred the criminal action with regards of Dr. Espinoza-Cuesta. Such decision was challenged and is currently pending solution by the competent authorities (supra paras. 90 and 91). Such decision is not firm, meaning it is not non bis in idem. However, the Court has deemed it appropriate to analyze the statute of limitations in the light of the facts of the instant case, wherein the State recognized its international responsibility for its lack of due diligence as it failed to timely commence the process for the extradition of one of the defendants in connection with the investigation undertaken to clarify the death of Miss Albán (supra paras. 10, 16 and 17).

111. In criminal cases, the statute of limitations causes the lapse of time to terminate the right to bring action for punishment and, as a general rule, it sets a restriction on the punishing authority of the State to prosecute and punish defendants for unlawful conduct. This is a guarantee that needs to be duly observed by the judge for the benefit of any defendant charged with an offense. This notwithstanding, the statute of limitations is inadmissible in connection with and inapplicable to a criminal action where gross human rights violations in the terms of International Law are involved. So has been held in the Court's constant and consistent decisions. [FN106] In the instant case, the application of the statute of limitations cannot be excluded as the requirements therefor set in international instruments are not met.

[FN106] Cf. Case of Barrios-Altos v. Peru. Merits. Judgment of March 14, 2001. Series C No. 75, para. 41; Case of Almonacid-Arellano v. Chile. Preliminary Objections, Merits, reparations, and costs. Judgment of September 26, 2006. Series C No. 154, para. 110; and Case of the Rochela Massacre, supra note 9, para. 294.

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112. On the other hand, the accused is not responsible neither of the celerity of the action of the judicial authorities in its development, nor for the lack of due diligence of the state authorities. The burden of the delay on the administration of justice cannot be imposed over the accused in a criminal procedure, which would inevitably represent a breach of the rights of the accused in the terms of the applicable law.

VIII. ARTICLE 2 (DOMESTIC LEGAL EFFECTS) [FN107] OF THE AMERICAN CONVENTION

[FN107] Article 2 of the Convention provides as follows:
[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.
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113. Regarding the alleged failure to comply with the provisions of Article 2 of the Convention, the Commission pointed out that the State has not adopted appropriate domestic measures in order to give effect to the rights enshrined in the Convention. It argued that the Ecuadorian domestic legislation reveals shortcomings which hinder the enforceability of justice in cases of medical malpractice. It also added that the rights of the victims have been violated due to the lack of legislation on medical malpractice, together with the existence of serious obstacles to conduct a real and effective investigation.

114. The representatives pointed out that the State is responsible for not protecting the right to life of its citizens, as a result of its failure to adopt legislation which specifically and effectively regulates medical malpractice. In order to effectively protect the patients and their human rights, it is essential that the State adopt general treatment and care measures in all health centers.

115. The State pointed out that the instant case is a "useful case for reference so that in the future no acts of medical negligence go unpunished as a result of legal shortcomings in the rules related to criminal definition or as a result of a restrictive interpretation by the judges.To accomplish the foregoing, the State will amend criminal definitions and enact others, and will also train judges so that they may apply Criminal Law." In its written closing arguments, it pointed out that it "acknowledges the non-compliance with its duty to adopt domestic legal provisions […] as a result of its failure to enact a more appropriate criminal definition to punish the doctors responsible for medical malpractice." Finally, it expressed its interest in preparing the enactment of a bill on medical malpractice and of other bills to amend legal provisions on this matter.

116. The Court will now analyze some aspects regarding health services assistance and the regulation of medical malpractice.

1) Health services assistance and the State's international responsibility

117. The Court has repeatedly stated that the right to life is a fundamental human right, the enjoyment and exercise of which is a prerequisite for the exercise of all other rights. [FN108] Personal integrity is essential for the enjoyment of human life. In turn, the rights to life and humane treatment are directly and immediately linked to human health care. Also, the Additional Protocol to the Amreican Convention on Human Rights in the Area of Economic, Social and Cultural Rights sets forth that everyone has the right to health, which is defined as the enjoyment of the highest level of physical, mental and social well-being; it further states that health is a public good (Article 10). [FN109]

[FN108] Cf. Case of the "Street Children" (Villagrán-Morales), supra note 38, para. 144; Case of Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela. Merits, reparations, and costs. Judgment of July 5, 2006. Series C No. 150, para. 63; Case of Zambrano-Velez et al., supra note 9, para. 78; and Case of Escué-Zapata, supra note 12, para. 40.
[FN109] Cf. Article 25(1) of the Universal Declaration of Human Rights and Article XI of the American Declaration of the Rights and Duties of Man.

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118. The Court has held that States Parties to the American Convention have the fundamental duty to respect and guarantee the rights and freedoms established in the Convention, pursuant to Article 1(1) thereof. [FN110] Article 2 sets forth the general duty of the States Parties to adopt legislative or other measures as may be necessary to enforce the rights and freedoms enshrined in such instrument.

[FN110] Cf. Case of Velásquez-Rodríguez, supra note 39, para. 91; Case of Cantoral-Huamaní and García-Santa Cruz, supra note 13, para. 79; Case of Zambrano-Velez et al., supra note 9, para. 114; and Case of the Rochela Massacre, supra note 9, para. 145.

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119. The assumptions of the State's liability can be generated when a body or state authority or a public institution, can affect unlawfully, either by acts or omissions, [FN111] some of the legal interests protected by the American Convention. It also may by generated from actions carried out by private parties, such as when a State excludes to prevent conducts of third parties from impairing those legal interests. [FN112] By this order of considerations, when related to the essential jurisdiction of the supervision and regulation of rendering the services of public interest, such as health, by private or public entities (as is the case of a private hospital), the state responsibility is generated by the omission of the duty to supervise the rendering of the public service to protect the mentioned right.

[FN111] Cf. Case of the Last Temptation of Christ (Olmedo Bustos et al.) v. Chile. Merits, reparations, and costs. Judgment of February 5, 2001. Series C No. 73, para. 72; Case of the Pueblo Bello Massacre v. Colombia. Merits, reparations, and costs. Judgment of January 31, 2006. Series C No. 140, paras. 111 and 112; and Case of the Mapiripán Massacre v. Colombia. Merits, reparations, and costs. Judgment of September 15, 2005. Series C No. 134, para. 11.
[FN112] Cf. Case of Velásquez-Rodríguez, supra note 14, para. 172; and Case of Ximenes-Lopes, supra note 19, para. 85.

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120. Special duties derive from these general obligations to respect and guarantee rights, which are ascertainable on the basis of the particular protection needs of the legal person, either on account of his personal situation or of the specific circumstances in which he find himself. [FN113]

[FN113] Cf. Case of the Pueblo Bello Massacre, supra note 111, para. 111; Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations, and costs. Judgment of March 29, 2006. Series C No. 146, para. 154; Case of Baldeón-García, supra note 38, para. 81; and Case of Ximenes-Lopes, supra note 19, para. 88.

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121. The Court has expressed that the States are responsible for regulating and supervising the rendering of health services, [FN114] so that the rights to life and humane treatment may be effectivelly protected. All of this requires setting up a legal system which effectively respects and guarantees the exercise of such rights, and supervising permanently and effectively the rendering of services on which life and humane treatment depend.

[FN114] Cf. Case of Ximenes-Lopes, supra note 19, para. 99.

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122. Laura Albán died at the Metropolitan Hospital, a private health center. The State is not immediately responsible for the intervention of the staff of such private institution, but it is its duty to supervise the activities of such institution to achieve the purposes herein stated.

2) Legislation in relation to health

123. As it has been argued, the States must have effective legislation to guarantee health care users an effective investigation into the acts which are in violation of their rights. Naturally, this includes the acts arising from the rendering of medical services.

124. The Court admits that the State has recently adopted measures aimed at supervising and improving the conditions of health care services, among which are the measures aimed at developing technical standards and national protocols related thereto.

125. The Constitution of June 5, 1998, which came into force on August 11 of the same year, sets forth that "[t]he State shall formulate its national health policy and shall supervise its implementation thereof; [and] shall monitor the operation of the institutions in such area" (Article 44).

126. The State enacted the Health System's National Organic Law, Law No. 80 of September 25, 2002, which sets forth the legal framework of Ecuador's national health system. Article 10 of said Law sets forth that the Ministry of Public Health shall "develo[p] […] the essential functions of the public health system: [this] includes all the State responsibilities regarding the protection of health as a public good;" and "control[ing] and evaluat[ing] […] health plans and policies, the performance of the services rendered and the intervention of the institutions" (paragraphs 5 and 6).

127. The Rules of Procedure of said Organic Law, Executive Decree No. 3611 of January 28, 2003, refers to the Ministry of Public Health's obligation in defining and issuing the rules and procedures regarding health care services (Article 20) and provides that the services rendered by

public and private institutions in the national health system shall meet the licensing provisions and minimum standards set forth by the Ministry of Public Health (Article 21).

128. Recently, the Organic Law of Health, Law No. 67, was enacted on December 22, 2006, standardizing health care services. It states that health "[i]s an inalienable and indivisible human right which cannot be compromised on, the protection and guarantee of which is the main responsibility of the State" (Article 3). The same law sets forth that the Ministry of Public Health shall have the following responsibilities:

[…]
24. To regulate, supervise, control and authorize the operation of public and private health care institutions, whether profitable or non-profitable, and any other persons or entities which render services in the health control area;
25. To regulate and implement licensing and accreditation procedures, and to establish the norms for the accreditation of health services;
[…]
34. To enforce and comply with this Law, the regulations and other legal provisions and standards related to health, as well as with the international instruments to which Ecuador is a State Party [(article 6)].

129. The above-mentioned Organic Law of Health provides that everyone has the right to "[d]uly and effectively initiate, before the competent bodies, proceedings to process administrative or judicial complaints and claims which guarantee the enforcement of their rights, as well as to seek due reparation and due compensation for the damages suffered, in the relevant cases" (Article 7, subsection i). The same Law sets forth that it is the jurisdiction of the "national health authority [Ministry of Public Health] to investigate and punish illegal practice, negligence, lack of skill, recklessness and failure to meet the standards required in the practice of health professions, without prejudice to the ordinary judicial actions" (Article 199). Said law acknowledges the duty of the State and therefore the right of patients that the medical malpractice be investigated and punished at the administrative level, regardless of whether the medical institution or personnel belongs to the private sector.

130. The legislation aimed at improving the conditions of health care services includes the Law on the Rights and Protection of the Patient, Law No. 77 of February 3, 1995, which acknowledges the patients' right to receive decent services, not to be discriminated, to be protected by professional secrecy, to be informed, and to decide on their medical treatment. As to the scope of the Law, Article 14 states that "said Law is binding for all health institutions in the country," with regard to the supervision to which all public and private institutions authorized to render services by the National Health System must be subject, as well as those private institutions which are not included in such system. In this regard, there should be clear and sufficient legislation preventing exceptions that might arise in connection with access to the information contained in the medical file (supra paras. 67 and 68), as well as access to the file by virtue of a judicial or administrative order.

131. In Ecuador there are also union laws such as the Ecuadorian Medical Federation amended and codified Law for the Professional Practice, Improvement and Defense, [FN115] which

provides, among others questions, that medical associations must set up honor tribunals. The Medical Ethical Code enacted in 1992 under the agreement of the Ministry of Public Health should also be mentioned. Such Code states that "[p]hysicians have the sacred duty to respect the principles established in the declaration of human rights. Their professional practice shall be governed by these principles, which in no case may be violated, be it civil, criminal, political or a case of national emergency" (Article 25).

[FN115] The "Amended and Codified Ecuadorian Medical Federation Law for the Professional Practice, Improvement and Defense, Decree No. 3567-A of 1979, sets forth the structure of the Ecuadorian Federation and the regulation of Medical Associations and the Honor Tribunal set up to examine the professional practice of phycisians.

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132. The Court positively assesses the adoption of measures aimed at supervising and monitoring the rendering of health care services and at promoting the protection of the rights to life, to humane treatment, and to health of the individuals who are under medical treatment.

3) Health professionals. Duties of physicians in professional practice.

133. Many international instruments establish the specific duties of physicians and make up a detailed framework for the practice of this profession, subject to highly relevant ethical and legal obligations and to first-order social expectations. Physicians are concerned with the preservation of fundamental values of individuals and of humankind as a whole. [FN116]

[FN116] World Medical Association International Medical Ethics Code, Duties of Doctors towards patients, October 1949; American Medical Association Principles of Medical Ethics, principles I and VIII, version adopted in 1847 and amended on June 17, 2001; Declaration of the World Medical Association on HIV/AIDS and Medical Profession, Article 2, October 2006; World Medical Association Declaration of Helsinki. Ethical principles for medical research involving human subjects, Article 21, June 1964; United Nations Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the Protection of Prisoners and Detainees against torture and cruel, inhuman, and other degrading treatment or punishment, Principle 1, December 18, 1982; World Medical Association Declaration of Geneva, paragraph 5, September 1948; Havanna Medical Charter, Principle II, December of 1946; World Medical Association Declaration of Tokyo. Guidelines for Medical Doctors concerning Torture and other Cruel, Inhuman, and Degrading Treatment or Punishment in relation to Detention and Inprisonment, Article 5, October 1975; Finnish Medical Association Ethics Code, Article I, May 6, 1998; and Declaration of Hawaii adopted in 1977 at the Sixth World Congress of Psychiatry, Article 7, 1977.

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4) Legislation applicable to medical malpractice

134. The adaptation of domestic legislation to the American Convention, pursuant to Article 2 thereof, is to be made according to the nature inherent to the rights and freedoms and to the circumstances in which such adaptation is to be made, in order to ensure the enjoyment, respect, and protection of such rights.

135. In the instant case, it has been alleged that there was no legislation on medical malpractice or that it had shortcomings. Naturally, States must adopt the necessary measures, among which is the enactment of criminal laws and the creation of a judicial system to prevent and punish the violation of fundamental rights, such as the right to life and humane treatment. As far as substantive criminal law is concerned, such purpose is realized through the enactment of adequate criminal descriptions in accordance with criminal legal provisions, which meet the requirements of punitive law in a democratic society and which are adequate for the protection of goods and legal interests, from a criminal perspective. As far as procedural criminal law is concerned, it is necessary to have the effective resources to ensure access to justice and the full satisfaction of legitimate claims in a timely manner.

136. Medical malpractice is usually related to the criminal descriptions related to injuries or homicide. [FN117] It would seem it is not strictly necessary to include specific criminal descriptions for medical malpractice as long as general descriptions suffice and adequate rules pertaining to the judicial examination of the seriousness of the crime, the circumstances in which it was committed and the responsibility of the perpetrator exist. Notwithstanding, it is the duty of the State to decide the best way to respond, in this area, to the needs for punishment, since there is no binding agreement on the formulation of the description as in other cases in which essential elements of the criminal description, including the accuracy of autonomous descriptions, have been provided for in international instruments, for example, genocide, torture, forced disappearance, etc.

[FN117] Cf. articles 84 and 94 of the Criminal Code of Argentina; articles 109 y 111 of the Criminal Code of Colombia; article 117 of the Criminal Code of Costa Rica; article 260 of the Criminal Code of Bolivia; article 132 of the Criminal Code of El Salvador; article 12 of the Criminal Code of Guatemala; articles 228 and 229 of the Federal Criminal Code of the United Mexican States; article 133 of the Criminal Code of Panama; article 142 of the Criminal Code of Spain; article 411 of the Criminal Code of Venezuela; and article 111 of the Criminal Code of Peru.

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137. Regarding the foregoing, the Court takes into account the decision adopted by the State to review the criminal legislation regarding medical malpractice and to include the necessary precisions to adequate the system in such a way as to favor the due realization of justice in this area.

IX. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)

138. According to the principles of International Law, any violation of an international obligation which results in damage entails the duty to make proper reparation for said damage. [FN118] The Court has based its decisions in this regard on Article 63(1) of the American Convention. [FN119]

[FN118] Cf. Case of Velásquez-Rodríguez v. Honduras, Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para. 25; Case of Zambrano-Vélez et al., supra note 9, para. 131; and Case of Escué-Zapata, supra note 12, para. 126.

[FN119] Article 63(1) of the Convention provides that:

[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

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139. The Court shall analyze the claims related to this matter within the framework of the acknowledgment of the State (supra paras. 17 and 23), taking into account the aforementioned considerations on the merits and the violations of the Convention stated in chapters VI and VII, as well as the criteria set forth in the Court's case law regarding the nature and scope of the duty to make reparations. [FN120]

[FN120] Cf. Case of Velásquez-Rodríguez, supra note 118, paras. 25 to 27; Case of Garrido y Baigorria v. Argentina. Reparations and Costs. Judgment of August 27, 1998. Series C No. 39, para. 43; Case of the "White Van" (Paniagua-Morales et al.), supra note 19, paras. 76 to 79; Case of Cantoral-Huamaní and García-Santa Cruz, supra note 13, para. 157; Case of Zambrano-Vélez et al., supra note 9, para. 132; and Case of Escué-Zapata, supra note 12, para. 127.

A) Injured party

140. The Court considers Carmen Cornejo de Albán and Bismarck Albán-Sánchez to be the "injured party", as victims of the violations that were found to exist to their detriment (supra paras. 50 and 109), for which they are entitled to the reparations to be established by the Tribunal.

B) COMPENSATION

141. The Court has developed the concepts of pecuniary [FN121] and non pecuniary [FN122] damages in its case law, as well as the events in which they ought to be compensated. The Court deems it appropriate to analyze pecuniary and non pecuniary damages together, considering the evidence submitted in the instant case.

[FN121] Cf. Case of Aloeboetoe et al. v. Suriname. Reparations and Costs. Judgment of September 10, 1993. Series C No. 15, paras. 50, 71 and 87; Case of Zambrano-Vélez et al., supra note 9, para. 138; Case of Escué-Zapata, supra note 12, para. 132; and Cantoral-Huamaní and García-Santa Cruz, supra note 13, para. 166.
[FN122] Cf. Case of Aloeboetoe et al, supra note 121, paras. 52, 54, 75, 77, 86 and 87; Case of Cantoral-Benavides. Reparations. Judgment of December 3, 2001. Series C No. 88, paras. 53 and 57; Case of Zambrano-Vélez et al, supra note 9, para. 141; Case of Escué-Zapata, supra note 12, para. 147; and Cantoral-Huamaní and García-Santa Cruz, supra note 13, para. 175.
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142. The Commission and the representatives requested compensation for the expenses incurred by Laura Albán's parents in their quest for justice for the clarification of their daughter's death. These expenses cover the actions undertaken to have access to the medical file and "to obtain medical certification of the causes of the death." The representatives also requested compensation in the amount of US$365,781.00 (three hundred sixty-five thousand, seven hundred and eighty-one US dollars) be paid to Carmen Cornejo de Albán, considering she has received no income since the beginning of 1988, when she stopped practicing her profession as a psychologist. She has been unable to resume her professional activities because she has devoted herself, up until now, to the quest for justice.

143. The representatives requested that compensation be paid for non pecuniary damages caused by the "suffering experienced by Laura [Albán] and her death", in the amount of US$2,000,000.00 (two million US dollars). Regarding Mrs. Cornejo de Albán, Miss Albán-Cornejo's mother, they stated that because of what happened to her daughter "she was unable to realize her life aspirations, inasmuch as she stopped practicing her profession and instead devoted her time looking for a fair application of the laws in the instant case and helping others who were undergoing similar situations." Regarding Bismarck Albán-Sánchez, Miss Albán-Cornejo's father, the representatives argued that apart from having to bear his own and his family's suffering for his daughter's death, he had to face the "[…] inefficiency and delays of domestic proceedings and became the only breadwinner of the family." Based on the foregoing, the representatives requested that US$1,000,000.00 (one million US dollars) be granted to each of them.

144. Finally, regarding Laura Albán's siblings, Flavia, Bismarck, Omar and Luis Albán-Cornejo, the representatives also requested that compensation be paid to them for non pecuniary damages, due to the emotional suffering caused by the early death of their sister, because "they were the main witnesses of their parents' failed attempts to have justice done for her death. They have tolerated their mother's constant absence and their father's long working hours." Accordingly, they requested that US$250,000.00 (two hundred and fifty thousand US dollars) be granted to each of them.

145. Regarding the lost earnings, the State argued that Carmen Cornejo de Albán's statement was not enough to prove her monthly income. Consequently, it requested the Court to establish the amount of lost earnings in accordance with relevant documentary evidence. Furthermore, the State argued that the Court should take into account the exact date as from which the State became responsible and disregard the proceedings which do not involve state authorities,

especially those undertaken during the first six years following Miss Albán-Cornejo's death. Lastly, in relation to the compensation for moral damages requested by the representatives, the State considered that it is an "excessive amount" and requested the Court to find that "a condemnatory judgment constitute[s] in itself enough compensation for moral damages".

146. The Court will analyze the expenses pertaining to activities intended to foster investigations and judicial proceedings under the heading "costs and expenses".

147. Regarding the claim of the representatives in connection with the professional fees lost by Mrs. Cornejo de Albán (supra para. 142), the Court does not have sufficient elements to determine the alleged loss of income. However, said claim is to be taken into consideration in determining the compensation due on account of non pecuniary damage.

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148. The judgment constitutes, per se, a form of reparation. [FN123] However, in the instant case, the Tribunal deems it necessary to set compensation.

[FN123] Cf. Case of Suárez-Rosero v. Ecuador. Reparations and Costs. Judgment of January 20, 1999. Series C No. 44, para. 72; Case of Cantoral-Huamaní and García-Santa Cruz, supra note 13, para. 180; Case of Zambrano-Vélez et al., supra note 9, para. 142; and Case of Escué-Zapata, supra note 12, para. 149.

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149. In this regard, it is worth noting that, during the public hearing held before the Court, Carmen Cornejo de Albán, Laura Albán's mother, expressed that, with regard to her daughter, " [...]justice was derided, [their] rights were trampled on and impunity had the upper hand […]" , and added that "[…]despite having all the evidence, all the situations in which justice was not done, the criminals were not charged and, rather, laws were manipulated".

150. Similarly, Bismarck Albán-Sánchez, Miss Albán-Cornejo's father, in his affidavit, expressed that "many facts have [made him] lose faith in the administration of justice". He added that "[i]t is very frustrating to see the outcomes after such a long time and realize that those who are guilty have not been punished and that, despite all [their] efforts, nothing has happened". Finally, when referring to the situation of Dr. Espinoza-Cuesta, Mr. Albán-Sánchez expressed that "[i]t was [our] representatives who, through an Internet search, located Dr. Espinoza[-Cuesta], […] but the State never did anything to locate him".

151. As regards pecuniary damage, the Court notes that there are sufficient elements to conclude that Laura Albán's next of kin incurred various expenses in connection with the steps taken with a view to clearing up the causes of their daughter's death. It is the Court's holding that such pecuniary expenditures have a causal link to the facts of the instant case.

152. Because a violation of the rights enshrined in the Convention to the detriment of Carmen Cornejo de Albán and Bismarck Albán-Sánchez, Laura Albán's parents, has been established in

this Judgment, as they were declared the victims of the violation of Articles 5(1), 8(1) and 25(1) of the Convention (supra paras. 50 and 109), it is the Court view that compensation for such violation is in order.

153. In view of the foregoing, the Court orders, in equity, the amount of US$25,000 (twenty five thousand US dollars) to be paid to each of the victims, Carmen Cornejo de Albán and Bismarck Albán-Sánchez, as compensation for pecuniary and non pecuniary damages. Said amount shall be given to each of them.

154. The State shall pay the compensation directly to its beneficiaries within one year following notification of the instant Judgment.

C) SATISFACTION AND GUARANTEES OF NON-REPETITION

155. Under this heading, the Tribunal shall set the non-pecuniary measures of satisfaction aimed at redressing non pecuniary damages, as well as those measures of public scope or impact.

a) Publication of the judgment

156. The representatives requested that the facts and the operative paragraphs of the Judgment be published in the three newspapers of widest circulation in Ecuador, and that the whole Judgment be published in the State's Official Gazette.

157. The Court deems it relevant, as it has ruled in other cases [FN124], to order that the State publish in the Official Gazette and in another newspaper of wide national circulation, for a single time and as a measure of satisfaction, the following: the operative paragraphs of this Judgment, as well as the following paragraphs: 1, 2, 4, 5 and 6 of Chapter I, "Introduction of the Case and Subject-Matter of the Dispute;" 17, 18, 21, 22 and 24 of Chapter IV, "Partial Acknowledgment of International Responsibility;" 44 to 50 of section (b), "Article 5(1) (Right to Humane Treatment)" of the Convention, of Chapter VI; 64 of chapter VII; and 79 to 109 of section B, "Proceedings before criminal jurisdiction," chapter VII, including the headings of each chapter and the relevant section, but exclusive of the footnotes. These publications shall be made within six months following notification of this Judgment.

[FN124] Cf. Case of Cantoral-Benavides, supra note 122, para. 79; Case of Cantoral-Huamaní and García-Santa Cruz, supra note 13, para. 192; Case of Zambrano-Vélez et al., supra note 9, para. 151; and Case of Escué-Zapata, supra note 12, para. 174.

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b) Legislation

158. Both the representatives and the Commission requested the Court to order the State to adopt necessary measures within its domestic legal system "[…,] by establishing mechanisms (legal or otherwise) to effectively identify the criminal behavior related to medical malpractice."

159. As previously mentioned, the State expressed that "it acknowledges not having done its duty to adopt domestic provisions, under Article 2 of the American Convention, by not having enacted a more adequate criminal description to punish physicians responsible for malpractice."

160. The Tribunal has already indicated that it values in a positive manner the decision of the State to endeavor to improve its health care and adapt its criminal legislation in general, regarding medical malpractice and to include therein the precisions necessary to ensure effectively that the applicable laws will favor the due course of justice in such area (supra paras. 11 and 137).

c) Campaign for the rights of patients and education and training of justice operators

161. The Court acknowledges that the State has adopted different domestic measures to regulate the rendering of health care services by public and private centers, and to foster the observance of patients' rights, which will make it possible to improve health care, as well as its regulation and supervision.

162. Within a reasonable time, the State shall widely disseminate patients' rights, using proper means of communication and applying both existing Ecuadorian legislation and international standards.

163. In this regard, the State shall also take into account the provisions of Article 15 of the Law on the Rights and Protection of the Patient, enacted on February 3, 1995: "[t]he duty of all health care services to place copies of this law at the disposal of users and to display patients' rights in visible places for the public to see".

164. The Court also deems it necessary that, within a reasonable time, the State implement an education and training program for justice operators and health care professionals about the laws enacted by Ecuador in relation to patients' rights and to the punishment for violating them.

D) COSTS AND EXPENSES

165. Costs and expenses are included in the concept of reparations as enshrined in Article 63(1) of the American Convention. [FN125]

[FN125] Cf. Case of Garrido and Baigorria, supra note 120, para. 79; Case of the "White Van" (Paniagua-Morales et al.), supra note 13, para. 212; Case of Cantoral-Huamaní and García-Santa Cruz, supra note 13, para. 203; Case of Zambrano-Vélez et al., supra note 9, para. 159; and Case of Escué-Zapata, supra note 12, para. 186.

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166. Regarding domestic proceedings, the representatives and the Commission requested that the State be ordered to reimburse the expenses incurred to "obtain the medical chart [and] a medical certification of the causes of the death". Furthermore, the representatives requested the reimbursement of the expenses incurred by Laura Albán's next of kin in domestic proceedings,

which amount to US$1,547.36 (one thousand five hundred and forty-seven US dollars with thirty-six cents) for the professional services rendered by Wilson Yupangui in November 1990; and US$75,600.00 (seventy five thousand six hundred US dollars) for the professional services rendered by Nicolás Romero. Likewise, the representatives requested the Court to order the reimbursement of the expenses arising from the processing of the case before the organs of the Inter-American System, which amount to US$40,000.00 (forty thousand US dollars) for specialized professional services rendered by Farith Simon-Campaña, Alejandro Ponce-Villacís and the team of the Legal Clinics of the San Francisco de Quito University. They also requested payment of twenty thousand dollars (US$20,000.00) on account of the litigation expenses incurred before the Inter-American Court, including traveling expenses and per diem expenses in connection with the hearing, notarial fees, stationary and communication services. Lastly, they requested that the State be ordered to reimburse the expenses incurred by Carmen Cornejo de Albán and Bismarck Albán-Sánchez in their appearance before the Commission, in Washington, which amount to no less than US$4,000.00 (four thousand US dollars).

167. Regarding the payment of costs and expenses requested by the representatives, the State challenged their justification, stating that the representation undertaken by the San Francisco de Quito University Law School's Legal Clinics were exclusively limited to the proceedings before the Court. The State also requested that no payment be set to be made to Farith Simon, as he had informed alternate agent Salim Zaidán, by email, that he "[will] not accept any money in the event of a favorable judgment, whether as fees or as a percentage of any compensation ordered."

168. The Court takes into consideration the documentary evidence remitted by the representatives of the disbursements made in domestic proceedings and in those before organs of the Inter-American system. Hence, the Courts decides to award, in equity, US$30,000 (thirty thousand US dollars) to Carmen Cornejo de Albán, who shall give such amounts as she deems appropriate to her representatives, as compensation for the costs and expenses incurred in domestic proceedings, as well as for those arising from the processing of the case before the Inter-American system. The State shall pay said amount for costs and expenses within one year following notice of the instant Judgment.

E) MEANS OF COMPLIANCE WITH THE ORDERED PAYMENTS

169. The compensations awarded to Carmen Cornejo de Albán and Bismarck Albán-Sánchez shall be paid directly to them. In the event any of these persons die before receiving their compensation, the amount shall be paid out to their heirs, pursuant to applicable domestic law. [FN126]

[FN126] Cf. Case of Myrna Mack-Chang, supra note 9; Case of Cantoral-Huamaní and García-Santa Cruz, supra note 13, para. 162; Case of Zambrano-Vélez et al., supra note 9, para. 137; and Case of Escué-Zapata, supra note 12, para. 189.

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170. The reimbursement of costs and expenses incurred by the representatives in the above mentioned proceedings shall be made to Carmen Cornejo de Albán.

171. The State shall comply with its obligations by making payments in US dollars.

172. If the beneficiaries of the compensations were unable to receive the payments within the specified period for reasons attributable to them, the State shall deposit said amounts in an account to the benefit of the beneficiaries or draw a certificate of deposit from an Ecuadorian financial institution, in US dollars, and under the most favorable financial conditions allowed by applicable laws and customary banking practice. If after 10 years the compensation remains unclaimed, the amounts plus any accrued interest shall be returned to the State.

173. The amounts allocated in the instant Judgment as compensations and reimbursement of costs and expenses shall not be affected by or conditioned to tax reasons now existing or hereafter created. Hence, the beneficiaries shall receive such amounts as a whole as provided in this Judgment.

174. Should the State fall into arrears with its payments, interest on the amounts owed shall be paid at Ecuadorian banking default interest rates.

175. In accordance with its constant practice, the Court retains the authority emanating from its jurisdiction and the provisions of Article 65 of the American Convention, to monitor full compliance with this Judgment. The instant case shall be closed once the State has fully implemented the provisions herein. Within one year following notification of this Judgment, the State shall submit to the Court a report on the measures adopted to comply with this Judgment.

X. OPERATIVE PARAGRAPHS

176. Therefore,

THE COURT

DECLARES,

Unanimously, that

1. The Court accepts the partial acknowledgment of international responsibility presented by the State for the violation of the rights to a fair trial and judicial protection enshrined in Articles 8(1) and 25(1) of the American Convention on Human Rights, in conjunction with Article 1(1) of said instrument, in the terms of paragraphs 15 to 25 of the present Judgment.
2. The State violated the right to humane treatment enshrined in Article 5(1) of the American Convention on Human Rights, in conjunction with Article 1(1) thereof, in detriment to Carmen Cornejo de Albán and Bismarck Albán-Sánchez, in the term of paragraphs 44 to 50 of the present Judgment.
3. The State violated the rights to a fair trial and judicial protection enshrined in Articles 8(1) and 25(1) of the American Convention on Human Rights, in conjunction with the Articles 4, 5(1) and 1(1) of said instrument, in detriment of Carmen Cornejo de Albán and Bismarck Albán-Sánchez, in the terms of paragraphs 79 to 109 of the present Judgment.

AND ORDERS,

Unanimously, that

4. This Judgment constitutes per se a form of reparation.
5. Within a period of six months as from notification of this Judgment, and as provided in paragraph 157 hereof, the State shall publish in its Official Gazette and in another newspaper of national circulation, as a one-time publication, the following: the operative paragraphs of this Judgment, as well as the following paragraphs: 1, 2, 4, 5 and 6 of Chapter I, "Introduction of the Case and Subject-Matter of the Dispute;" 17, 18, 21, 22 and 24 of Chapter IV, "Partial Acknowledgment of International Responsibility;" 44 to 50 of section (b), "Article 5.1 (Right to Humane Treatment)" of the Convention, of Chapter VI; 64 of chapter VII; and 79 to 109 of section B, "Proceedings before criminal jurisdiction," chapter VII.
6. The State shall, within a reasonable term, fully divulge the rights of the patients, using the adequate media and according to the existing legislation from Ecuador and the international standards, in the terms of paragraphs 162 and 163 of the present Judgment.
7. The State shall, within a reasonable term, implement an education and training program for justice operators and health care professionals about the laws enacted by Ecuador in relation to patients' rights and the punishment for violating them, pursuant to paragraph 164 of the present Judgment.
8. The State must pay Carmen Cornejo de Albán and Bismarck Albán-Sánchez the sum established in paragraph 153, for compensation for pecuniary and non-pecuniary damage, within a period of one year counted from the date of notice of the present Judgment, as established in paragraphs 146 to 154 hereof.
9. The State shall, within a period of one year from the date of notice of the present Judgment, pay Carmen Cornejo de Albán the sum established in paragraph 168 of the present Judgment for the costs and expenses incurred both in the domestic sphere and before the Inter-American system of protection of human rights, in the terms of paragraphs 167 and 168 of the present Judgment
10. The Court reserves its inherent authority, based on the Article 65 of the American Convention, to monitor compliance with the present Judgment in all its aspects. The case will be closed once the State has fully implemented all of its provisions. Within a period of one year, counted from the date of notice of the present Judgment upon the parties, the State must present to the Court a report of the measures adopted in compliance with its provisions.

Judge García-Ramírez submitted his Separate Opinion to the Court, which has been attached to this Judgment.

Done in San José, Costa Rica, on November 22, 2007, in Spanish and English, the Spanish text being authentic.

Sergio García-Ramírez
President

Cecilia Medina-Quiroga

Manuel E. Ventura-Robles
Diego García-Sayán
Leonardo A. Franco
Margarette May Macaulay
Rhadys Abreu-Blondet

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

SEPARATE OPINION OF JUDGE SERGIO GARCÍA-RAMÍREZ REGARDING THE JUDGMENT RENDERED BY THE THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE CASE OF ALBAN-CORNEJO ET AL. (ECUADOR), ON NOVEMBER 22, 2007

A) The protection of health and the right to life, humane treatment and justice

1. In the analysis of and final decision on the Case of Caso Albán-Cornejo et al. (Ecuador) in its judgment of November 22, 2007, the Inter-American Court has once again reflected on the protection of life and integrity, both of which translate into health care, as a right of individuals, and the duty to provide such care through different means, as an obligation of the State. The Court initially addressed this issue in the Case of Ximenes-Lopes (Brazil), in a judgment to which I also added my own separate Opinion.

2. So far, the protection of health is not a readily actionable right under the Protocol of San Salvador. However, this issue can –and should– be examined, as done by the Court in the instant case, from the perspective of the preservation of the rights to life and humane treatment, and even from the standpoint of access to justice where the impairment of either legal interest –the core of the relevant rights– gives rise to a claim for justice.

3. In such cases, as well as in others, the State's duty is not limited to the provision of health services by the State –i.e. the instant protection of life and humane treatment– through its own units, organs or officials, as is typical of the social State and even the social benefits system, the seed of a social rights law, created by the old welfare State in the public health area. That obligation to respect and guarantee the rights covers – as held by the Court in the Case of Ximenes-Lopes and, again, in the judgment to which this Opinion relates – both situations of service delegation, where the service is provided by private parties on behalf of the State, and the inevitable supervision of public services that concern interests of the greatest social importance, as is the case with health, the oversight of which inexcusably lies with the State. In passing judgment on a violation of human rights and State responsibility, regard must be had to the

private nature of the relevant institution and the employees, officials or professionals performing duties within such institution; however, regard must also be had to the public and/or social importance of the role played by them and the institution, which necessarily represent a State interest and duty and warrant supervision by the State.

B) Rights and duties in the area of health care

4. The instant case concerns a relevant issue that has garnered increasing attention over the past few decades, as the doctor-patient relationship changes – accompanied by a far-reaching revision of the principles of beneficence and respect for autonomy –, the demand for health services increases and diversifies, disease and survival patterns change, institutional or business providers emerge, and so on. Patient rights – as well as the rights of health professionals – have thus gained new prominence within the framework of basic human rights.

5. The legal interests at stake and patient rights lie at the foundation of medical professional liability, which combines both the principles and rules of professional ethics governing medical practice and the technical rules to be observed by health practitioners as the main elements. These become increasingly more developed and strict, hand in hand with the progress of science and technology. The liability of health professionals rests on both pillars.

6. Moreover, the provision of life and humane treatment protection service in the area of health care – with the resulting allocation of duties and claiming for rights – has become remarkably widespread in today's society through the construction and operation of "national health systems." These systems comprise multiple agents for the service and the relevant obligations: private and public providers, companies and doctors, health practitioners, supply vendors, and so on. We are thus dealing with a notoriously large network of rights and duties that is to be managed by the modern State, even where the State is no longer in charge of directly providing the service; such network gives rise to specific duties that are becoming increasingly more complex and growing in number, and relate to the obligations to respect and guarantee the basic rights that are modernized in this context: to life and humane treatment.

C) Health care legislation. Medical file.

7. It is of the utmost importance, both for a smooth operation of the health services and for the determination of responsibility possibly arising from medical care in various fields - in the civil, administrative, criminal, labor spheres--, to have extensive, sufficient regulations that are up to today's circumstances and allow the prevention of problems and the timely, full resolution of problems arising in this area.

8. National legislation on health protection, for all the areas I mentioned above, is already abundant, as is starting to be the case with international regulations as well –whether binding or indicative in nature. Such regulations usually stem from two kinds of constitutional provisions: on the one hand, there are those establishing the right to health protection, viewed as a basic human right; on the other, there are those allocating, at the State level, the authority and functions that lead to such protection, viewed as an issue of public interest subject to State protection.

9. In the instant case, this issue came up in connection with access to the patient's medical record or file. It is worth noting the importance, for multiple purposes, of such comprehensive and changing record of the patient's condition and treatment, a record that often proves to be lacking or insufficient to serve its intended purpose. Hence the various provisions and recommendations regarding medical files: existence, characteristics, implications, and preservation.

10. It is also worth insisting –as inferred from the analysis of the instant case– on the need for domestic legislation to include specific provisions clarifying any disquieting questions or ruling out unacceptable solutions regarding the disclosure of the data contained in the medical life, both during the life of the patient –whose understanding and decision-making abilities might be impaired or non-existent– and subsequently to the patient's passing.

11. Naturally, a person's privacy must be scrupulously respected; however, it is also necessary, with the aid of the authorities that will provide guarantees as to the proper handling of the information, to remove existing obstacles in cases in which it turns out to be lawful and necessary (given the capacity of the petitioners, the existing circumstances and the intended purposes) to access data for use in making urgent decisions or attributing inescapable liability.

D) Health care legislation. Liability. Crime definition

12. Another issue of interest that came up in this case has to do with the provisions on liability (in several spheres, as already noted, even if frequently of a criminal nature) in cases of deficient or misguided care. The subject of malpractice –again, one connected to ethical and technical issues – is one that arises often and intensely. Addressing this issue calls for legal provisions covering both prevention and verification and claims potentially leading to the application of punishment. Creating such body of provisions is also a specific duty of the State, rooted in the respect and guarantee obligation laid down by international human rights treaties, which the State must observe.

13. Different arguments have been raised in this regard. These include a proposal to establish crime definitions providing for punishable malpractice: crime descriptions featuring their own elements based on the protected legal interests, the perpetrator (the health service provider), the victim (the service patient), and the relationship between both (health care), in addition to further specifications of an instrumental or circumstantial nature.

14. The judgment rendered in the instant case establishes – and does so rightly, in my view – that it is not inevitably necessary to create a specific crime of malpractice, which, as a general rule, would be a crime of negligence. The general rules (notwithstanding the inclusion of qualifying rules: aggravated or mitigated crimes) on homicide or injury – maybe even other outcomes of punishable actions – might prove to be enough, on condition that they suffice to timely, sufficiently and proportionately deal with every unlawful conduct that might take place, exclusive of contexts of full impunity or inadmissible benevolence, which amounts to impunity in the end.

15. This situation, which allows the State to opt between different law-making alternatives, is different from a case in which there is an international instrument that is binding on the State and contains a description of the crime, such description being the result of extended analysis into which the concerns and decisions of the international community combine. Such is the case, as stated by the Court on various occasions – including in the judgment to which this Opinion relates –, with genocide, torture and forced disappearance, among others. In such cases, the State's law-making decision is conditioned by a pre-existing normative decision in which the State also participated by ratifying or acceding to the relevant international treaty containing the elements that the domestic crime definition "must" feature.

16. It is true that the State is allowed to reconstruct the crime description provided in the international instrument by restating a given element or including others; however, it is also true that such reconstruction should not entail a reduction of the criminal consequences attributed to the facts, which are binding on the national law-makers, even though the latter may extend the criminal protection afforded to the relevant legal interest. That would create a disruption between the State's duty to comply with the international mandate of criminal protection for that given interest or right, and the decision of the domestic criminal law-maker who has established the crime definition. Such disruption might entail incompatibility and, as the case may be, give rise to international responsibility.

E) Expert bodies

17. In the instant case, the Court has taken into consideration the arguments raised by the parties in connection with the participation of a professional body (the Honor Tribunal) that was asked to issue an opinion on certain aspects of the medical treatment administered to the patient. This draws attention towards the role played by the professional bodies in charge of making determinations on ethical or technical matters. It should be noted that these might be legally relevant to the members of the relevant association, to third parties asserting professional responsibility or a right to access (professionally certified) information regarding certain facts, and, basically, for the formation of more-or-less conclusive criteria concerning the provision of highly important services (as the protection of life and humane treatment, through health care) and the potential expectations of society in this regard.

18. A distinction must certainly be drawn between the opinions of a private association existing and acting through the sole initiative of its members (even though subject to the rules governing this kind of collective person: usually, civil norms), the decisions of which carry mild implications, and those of entities or institutions created by virtue of a State decision (through a law, for instance) attributing to them certain powers over the conduct and rights of their members.

19. Furthermore, it is necessary to analyze the possible impact or implications of such opinions on third parties who are not members of the relevant entity, based on whether such parties actually hold certain effective rights or are mere witnesses and, in a way, the "powerless" targets of the entity's decisions. It is also necessary to determine whether the decisions of any such entity condition, subordinate or influence the performance of the duties or the exercise of

the powers attributed to the formal organs of the State for the performance of inherently public functions such as the administration of justice or the oversight of health-care providers.

20. Where there is no such conditioning – as noted by the Court in the Case of Albán-Cornejo et al. –, the State is required to act further to its powers, with no further requirement or delay. Otherwise, the condition needs to be analyzed (as it may amount to a requirement for admissibility, a procedural obstacle or a pre-judicial matter), and the appropriateness of maintaining a condition that interferes with the rights of a third-party needs to be considered from the perspective of what the law ought to be.

21. Any possible reflections in this case would cover, with the relevant specificity, not only professional associations –in the case at hand, a medial association–, which are traditional union defense and supervision bodies, lato sensu, but also other bodies currently operating in the area under analysis, which are required to act in an increasingly more relevant and decisive manner. Such is the case with ethics and bioethics committees and commissions, largely resorted to and relied on in national and international instruments and incorporated into health and research centers.

22. In all such cases, the actions of such expert bodies – whose decisions and opinions influence the operation of the institutions to which they belong and the conduct of public authorities to various degrees – are subject to national and international, general and specific, ethical and legal regulations, in addition to scientific and technical standards, that they ought to adequately know and apply. It is critical to take into consideration that their decisions, suggestions and instructions will have remarkable bearing on the definition and exercise of the rights and the understanding and fulfillment of the obligations of those who, in different capacities, play a role in the daily relationship between the providers and recipients of services in which human life and integrity are at stake.

e) Human rights and bioethics

23. In connection with the issues addressed in this Opinion, I would like to mention that, in developing the Inter-American corpus juris on human rights –which still suffers a great deficit as far as the states signing and ratifying the American Convention, the protocols thereto and the specific agreements on human rights are concerned –, it is necessary to taken into consideration certain issues that are extremely important and highly current (or long recognized), on which there are still no regional declarations, much less binding treaties. These include the links between bioethics and human rights, which have been the subject of copious work all over the world, particularly in the context of UNESCO and the medical profession. At the European regional level, the Convention for the Protection of Human Rights and Dignity of the Human Being, signed in Oviedo (April 4, 1997) also bears noting. Such convention certainly provides broad authority to seek advisory opinions of the European Court of Human Rights.

24. It is my view that the initiatives to move ahead in the examination and issuing of a declaration and, in due time, a treaty examining and providing orientation on this subject – one that is plagued with questions and grey areas – in the Americas – or, at least, in Latin America – are feasible. The existence of a regional instrument associated to the general and special

international instruments makes sense insofar as emphasis may be placed on problems that present specific features in the various countries in the area, considering the existing conditions of poverty, lack of information, insufficient technology, vulnerable groups, health services coverage, and so on.

G) Statute of limitations on the criminal action

25. There is a topic of the judgment that bears noting. Such is the statute of limitations on the prosecution of a defendant for a certain action that entails criminal medical liability (strictly speaking, the statute of limitations on the criminal action). In analyzing this issue, regard must be had to the implications of the statute of limitations as far as the defendant's defenses go and, accordingly, for the defendant's substantive and/or procedural rights, and the reflections that the Supreme Court of Argentina has revealingly and constructively expressed in its decisions.

26. The coordination of the continental system of human rights, in the defense of human rights, should be the result of a protective trend of dialogue combining the contributions of the international and national jurisdictions. The construction of a corpus juris and its applications are the product of collective thought, which, in turn, is the expression of convictions, values, principles, and shared work. They all converge to define and consolidate the definitions of common human rights culture. Hence, an international tribunal will more than welcome the reflections of a domestic court.

27. The international Law on human rights has brought about a new approach to certain rights that are some times associated with the great dogmas of the liberal movement that introduced precious reforms into the older criminal regulations, particularly from the 18th century onwards. I am not about to argue that the statute of limitations (a guarantee releasing the perpetrator of crime from the imposition of criminal liability) is necessarily one of those "new revised rights." The statute of limitations – which reflects the dilemma between justice and certainty – can be traced to long times past. Whatever the case, under the most constant criminal regulations, it has become a defense for the defendant, and it is so categorized as one of the rights the defendant may assert against criminal prosecution by the State.

29. The protection of human rights against particularly serious, inadmissible violations that might go unpunished – thus diluting the duty to administer criminal justice stemming from the guarantee obligation of the State– has caused certain facts to be excluded from the ordinary statute of limitations system, even a more strict statute of limitations applied on certain conditions and longer terms intended to give extended life to the State's right to prosecute.

30. However, such inapplicability of the statute of limitations to the criminal action (and, as the case may be, the power to enforce) should not extend to just any criminal case. The reduction or exclusion of rights and guarantees appear as extreme in the analysis of the appropriateness of maintaining certain traditional rights where the purpose is to provide, through such strict means, to the better protection of other rights and freedoms. Accordingly, the suppression of traditional rights must be exceptional in nature, rather than a regular or routine occurrence, and allowed precisely in connection with the most severe violations of human rights (considering the contemporary evolution of the international legal system: International human rights Law,

international humanitarian Law, international criminal Law, with broad normative development and jurisdictional and scholarly analysis).

31. The significance or magnitude of such extremely serious violations is thus taken into consideration to justify the reduction of rights and guarantees that would ordinarily apply, as is the case with the statute of limitations. This does not lead to a dismissal or impairment of the importance of a specific fact, as the one sub judice at the national level in the instant case, but to an analysis of the appropriateness of the application of the statute of limitations in that case. In my opinion, the Inter-American Court is moving towards more specific decisions on the matter. It has not changed its view. It has more specifically or better formulated it, acting on the concerns raised by the domestic courts.

Judge Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary