



ORGANIZATION OF AMERICAN STATES
Inter-American Commission on Human Rights

Application to the Inter-American Court of Human Rights
in the case of Laura Albán Cornejo
(Case 12.406)
Against the Republic of Ecuador

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APPLICATION BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS AGAINST THE STATE OF ECUADOR

**CASE 12.406
LAURA ALBÁN CORNEJO**

I. INTRODUCTION

1. The Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission " or "the IACHR") submits to the Inter-American Court of Human Rights ("the Inter-American Court", "the Court", or "the Tribunal") the application in case 12.406, Laura Albán Cornejo against the Republic of Ecuador (hereinafter "the State of Ecuador", "the State", or "Ecuador") in accordance with the provisions of Article 51 of the American Convention on Human Rights ("the Convention", or the "American Convention").

2. The IACHR requests the Court to establish the international responsibility of the State of Ecuador for failing to honor its international obligations to the prejudice of Mrs. Carmen Susana Cornejo de Albán and Mr. Bismarck Wagner Albán Sánchez (hereinafter "the victims" or "the injured party"), who in their attempt to clarify the murder of their daughter, Laura Susana Albán Cornejo (hereinafter "Laura Albán"), have spent years seeking justice and punishment for those responsible, collecting evidence regarding her murder, and attempting to draw this case to the formal attention of the authorities.

3. The State of Ecuador has violated Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) in connection with Articles 1(1) (Obligation to Respect Rights), and 2 (Domestic Legal Effects) of the American Convention because neither in practice nor in its domestic legislation does it ensure the existence of provisions or adequate mechanisms to allow it to take action and fulfill its duty of criminal prosecution when rights that call for public action are infringed, all of which has resulted in a burden on the injured party. Furthermore, the State has committed these violations because it has not attempted to arrest the person who in the domestic criminal jurisdiction was alleged to be responsible for the "praeterintentional homicide by supplying substances¹" to the detriment of Laura Albán Cornejo².

4. The instant case has been processed in accordance with the provisions of the American Convention and it is presented to the Court pursuant to Article 33 of the Court's Rules of Procedure. The Commission attaches as an appendix to the present application a copy of Report No. 7/06 drawn up under Article 50 of the Convention.³ This report was adopted by the Commission on February 28, 2006 and transmitted to the State on April 5, 2006, with a period of two months for the State to adopt the recommendations made therein. This period elapsed without the State having made a response in this respect. On June 16, 2006, the Inter-American Commission decided in this regard that the State had not adopted its recommendations to a satisfactory extent and that in accordance with Articles 51(1) of the Convention and 44 of the Rules of Procedure of the IACHR, it would refer the present case to the jurisdiction of the Inter-American Court.

¹ According to the terms of Article 456 of the Ecuadorian Penal Code.

² See Annex 37.

³ IACHR, Report No. 7/06, Merits, Case 12,406, Laura Albán Cornejo, Ecuador, February 28, 2006. Appendix 1.

5. The significance of the present case arises from the need for it to be recognized in the domestic jurisdiction that the protection of the fundamental rights enshrined in the American Convention requires the active exercise of State functions.

II. PURPOSE

6. The purpose of the present application is to request the Court to conclude and declare that the State of Ecuador has not ensured the effective access of Mrs. Carmen Susana Cornejo de Albán and Mr. Bismarck Wagner Albán Sánchez to their judicial guarantees and protection, and has therefore violated the following rights protected by the American Convention: Right to a Fair Trial (Article 8), and Right to Judicial Protection (Article 25), in relation to the general obligation to respect and protect rights and to adopt the necessary legal provisions at the domestic level to ensure the rights protected by said international instrument, in accordance with its Articles 1(1) and 2.

7. Based on the foregoing, the Inter-American Commission requests the Court to order the State:

- a. To adopt all legal or other measures necessary to give effect in Ecuador to the right to judicial protection in accordance with Article 25 of the Convention and the right to a fair trial in accordance with Article 8(1) of the Convention, with regard to taking criminal action in the case of felony murder;
- b. To use all the available means necessary to detain the person allegedly responsible for the homicide of Laura Albán Cornejo, so that he can be brought to trial and a definitive judgment can be rendered regarding his possible criminal responsibility in the case;
- c. To acknowledge publicly the international responsibility of the State in relation to the facts of the case and the lack of due diligence in its pursuit of justice in relation to the death of Laura Albán Cornejo;
- d. To adopt all the measures necessary to ensure the adequate reparation or mitigation of the injury caused to the victims, including material and non-pecuniary damage;
- e. To adopt all the measures necessary to prevent the recurrence of acts of this nature in the future, in keeping with the duties to respect and protect the rights recognized in the American Convention;
- f. To pay the costs and legal expenses incurred by the victims in pursuing the case, both at the domestic level and in the inter-American jurisdiction.

III. REPRESENTATION

8. In conformity with Articles 22 and 33 of the Rules of Procedure of the Court, the Commission has designated Commissioner Evelio Fernández Arévalos, Chairman, and Executive Secretary Santiago A. Canton, as its delegates in this case. Attorneys Ariel E. Dulitzky, Víctor Madrigal Borloz, Mario López Garelli and Lilly Ching Soto, specialists of the Executive Secretariat of the IACHR, have been designated to act as legal advisers.

IV. JURISDICTION OF THE INTER-AMERICAN COURT

9. The Court is competent to hear this case. The State ratified the American Convention on December 28, 1977 and recognized the contentious jurisdiction of the Tribunal on July 24, 1984.

10. Pursuant to Article 62(3) of the Convention, the Inter-American Court has jurisdiction to hear any case submitted to it regarding the interpretation and application of the provisions of the Convention, so long as the State party has recognized, or recognizes, the Court's jurisdiction.

V. PROCESSING BY THE INTER-AMERICAN COMMISSION

A. Before the admissibility decision

11. On May 31, 2001, the Inter-American Commission received the original petition lodged by Mrs. Carmen Susana Cornejo, in the name of her husband Bismarck Wagner Albán Sánchez, and in her own, against the State of Ecuador. On June 27, 2001, the Commission received additional information from the victims. On July 3, the Commission, in accordance with the stipulations of Articles 26 to 30 of its own Rules of Procedure, began to process petition 0419/01, requested the relevant information from the State, and granted it a period of two months.

12. The State lodged its observations in a communication on October 16, 2001, and alleged that the victims had not exhausted the domestic remedies available. The relevant parts of the State's response were transmitted to the victims on the following October 29; to which the victims responded on November 30, and December 2, 2001 (copies of the same document were received on later dates). The observations lodged by the victims were transmitted to the State on December 13, 2001. While the case was being processed prior to the decision on admissibility, the victims sent several communications requesting that it be studied.

B. Decision on admissibility and subsequent procedures

13. On October 23, 2002, during its 116th regular session, the IACHR examined the positions of the parties and in the light of the requirements laid down in Articles 31 and 37 of its Rules of Procedure, approved Admissibility Report No. 69/02.⁴ In its admissibility report, the Commission concluded that the petition met the requirements established in Articles 46 and 47 of the American Convention, and consequently, it decided to declare the case admissible, to notify the parties of the decision, and to continue with the examination of the merits.

14. In accordance with Article 38(1) of the Rules of Procedure of the IACHR, this report was transmitted to both parties on October 29, 2002, and a period of two months was given for the victims to submit any additional observations on the merits. On this date, the Commission made itself available for the parties and asked them if they were interested in embarking on the procedure for friendly settlement established in Article 48 (1) (f) of the American Convention, in accordance with Articles 38 and 41 of the Rules of Procedure of the IACHR. In a communication received on January 9, 2003, Mrs. Carmen Cornejo expressed her decision to "accept a possible dialogue with the Ecuadorian State in order to reach a just agreement with the mediation of the Inter-American Commission of Human Rights."

⁴ IACHR, Report No. 69/02, Admissibility, Petition 419/01, Laura Albán Cornejo, Ecuador, October 23, 2002. Appendix 2.

15. On January 31, 2003, the Commission once more made itself available to the parties in order to reach a friendly settlement of the matter and requested a response to this offer within ten days.

16. On July 8, 2003, the victims stated that "given that no response had been received from the State in relation to the proposal for friendly settlement" they would cease to resort to it and they therefore lodged their observations on the merits.⁵ This communication was transmitted to the State on December 3, 2003. At the same time, the State was also asked to submit its observations on the merits of the case within two months. During later proceedings, the victims sent various communications specifying their position.

17. On February 18, 2005, the Inter-American Commission reiterated its request to the State, originally made on December 3, 2003, for its observations. On March 31, 2005, the State lodged its observations on the merits of the case and disputed the violations alleged by the victims. These observations were transmitted to the injured party on the following June 10.

18. On July 8, and August 18, 2005, respectively, the IACHR received communications from the victims. The relevant parts of both communications were transmitted to the State on the following September 8.

19. Having studied the positions of the parties, on February 28, 2006, the Inter-American Commission approved Report No. 7/06 according to the provisions of Article 50 of the American Convention and of Article 42 of its Rules of Procedure.⁶ In said report, the IACHR concluded that the Ecuadorian State violated the right of Carmen Susana Cornejo de Albán and Bismarck Wagner Albán Sánchez to judicial guarantees (Article 8), and to judicial protection (Article 25), in conjunction with the general obligations to respect and protect rights and to adjust domestic legislation in line with the American Convention as established in Articles 1(1) and 2 of the above-mentioned instrument.

20. In its report on the merits, the Commission recommended that the State:

1. Adopt the legislative or other measures necessary to ensure the effective protection in Ecuador of the right to judicial protection in accordance with Article 25 of the Convention, and the right to a fair trial in accordance with Article 8(1) of the Convention, where it refers to the possibility of taking criminal action in cases of murder caused by medical malpractice.

2. Use all the available means necessary to apprehend the person alleged to be responsible for the murder of Laura Albán Cornejo, so that criminal proceedings might be brought against him, and a final judgment rendered regarding his possible criminal responsibility in the case.

3. Make adequate reparation to the victims named in [the] report on the [merits], or to their families, if appropriate, for the human rights violations established in the [...] report [7/06]. Given the particular nature of the events, these reparations, amongst others [implies] paying the expenses relating to the search for

⁵ The victims communicated this decision via an electronic mail message on July 8, then sent by post and received at the IACHR on July 16, 2003.

⁶ IACHR, Report No. 7/06, Merits, Case 12,406, Laura Albán Cornejo, Ecuador, February 28, 2006. Appendix 1.

justice by the members of the family of Laura Albán; and the public acknowledgment and apology by the State.

21. On April 5, 2006, the Inter-American Commission in accordance with Article 43(2) of its Rules of Procedure transmitted the report on the merits to the State and established a period of two months for it to inform on the measures taken to comply with its recommendations.

22. In line with Article 43(3) of its Rules of Procedure, on April 5, 2006, the Commission notified the victims that the report on the merits had been adopted and transmitted to the State, and asked the victims their position with regard to submitting the case before the Inter-American Court. On May 5, 2006, the victims indicated their interest that the case should be submitted to the Court.

23. The State has not lodged any observations. On June 16, 2006, in view of the State's failure to comply with the recommendations of the report approved in accordance with Article 50 of the American Convention, and in accordance with Articles 51(1) of the Convention and Article 44 of its Rules of Procedure, the Inter-American Commission decided to submit the present case to the jurisdiction of the Tribunal.

VI. FACTS

A. Evaluation of evidence

24. Since its earliest judgments in contentious cases, the Inter-American Court has always established that because proceedings before it are taking place before an international tribunal and refer to violations of human rights, they are bound by less formal criteria than those applicable in domestic legislation for the evaluation of different means of evidence. It has therefore always avoided making a rigid determination as to the *quantum* of evidence needed to support a judgment because international courts have the authority to assess and evaluate the evidence according to the rules of sound criticism (*sana crítica*). In order to establish the international responsibility of a State for the violation of human rights, the Court has greater flexibility to evaluate the evidence presented to it regarding the pertinent facts, in accordance with the principles of logic and on the basis of experience.⁷

25. In the instant case, the State did not in any way dispute the facts described by the victims in their original petition or in their subsequent communications. The two communications received by the Commission from Ecuador referred on the one hand to the alleged non-exhaustion of domestic remedies available, an issue that was clarified in the admissibility proceedings; and on the other, the reasonableness of the proceedings and the absence of violations of the American Convention. Consequently, according to the provisions of Article 39 of the Rules of Procedure of the IACHR, and in exercising the rules of evidence, the Commission assumed as true the facts on which the State had made no comment and which the Commission considered as proven in its report on the merits, as described below.⁸

⁷ See for example: I/A Court H.R., *the Case of the Brothers Gómez Paquiyaurí*, Judgment July 8, 2004, Series C, No 110, paragraph 41, quoting *Maritza Urrutia Case*. Judgment November 27, 2003. Series C, No. 103, paragraph 48; See also I/A Court H.R., *Myrna Mack Chang Case*. Judgment November 25, 2003. Series C, No. 101, paragraph 120; I/A Court H.R., *Bulacio Case*. Judgment September 18, 2003. Series C, No. 100, paragraph 42, and I/A Court HR , *Juan Humberto Sánchez Case. Interpretation of Judgment on Preliminary Exceptions, Merits and Reparations* (Article 67 of the American Convention on Human Rights). Judgment dated November 26, 2003, Series C, No. 102, paragraph 42.

⁸ I/A Court H.R., *Velásquez Rodríguez Case*. Judgment July 29, 1988. Series C, No 4. paragraph 138, and I/A Court of HR *Godínez Cruz Case*. Judgment January 20, 1989. Series C, No. 5, paragraph 144.

B. Death of Laura Susana Albán Cornejo

26. On December 13, 1987, Laura Susana Albán Cornejo, an Ecuadorian citizen, aged 20, arrived at the Metropolitan Hospital, a private health center in Quito, Ecuador. She was suffering from severe headaches, a fever and convulsions, and she was admitted to the hospital under the care of neurologist Ramiro Montenegro López.

27. After several tests were done, Laura Albán was diagnosed as having “bacterial meningitis” and on December 17 she suffered a severe headache. Seeing that their daughter’s condition was worsening, her parents asked for the doctor responsible for her treatment to be present, However, Dr. Montenegro López did not come to see the patient. As a result of this, Laura Albán was treated by the resident doctor, Fabián Espinoza Melo,⁹ who prescribed a 10mg injection of morphine¹⁰ to alleviate the pain. Almost immediately after the dose prescribed by Dr. Espinoza Melo had been applied, Laura Albán began to feel unwell and died.¹¹

28. The Metropolitan Hospital medical record for the patient Laura Albán describes the cause of death as “cardio respiratory arrest, cranial hypertension, and sudden acute purulent meningitis.”¹²

C. Steps taken between 1989 and 1996 to clarify the death of Laura Albán Cornejo

29. After Laura Albán’s death, her parents began a process of investigation and denunciation, in order to determine the causes of their daughter’s death. In order to do this, they requested from the Metropolitan Hospital a certified copy of their daughter’s medical record, which was denied.¹³ Specifically, the Hospital responded as follows:

[...] we inform you that due to the “confidential” nature of medical records, a court order is needed requesting a copy of the medical record of Miss Laura Susana Albán Cornejo.¹⁴

30. Therefore, on November 6, 1990, the victims appeared before the Civil Judge in Quito and requested that a day and time be set for the Medical Director of the Metropolitan Hospital to deliver the medical record, the results of laboratory tests scans, monitoring records, etc, relating to Laura Albán Cornejo. The Eighth Civil Court of Pichincha ordered the information to be produced that same day. The Metropolitan Hospital lodged the copy with the tribunal on November 16, 1990.¹⁵ However, the court failed to notify the availability of the document.

31. In December 1990, the victims asked several doctors to examine their daughter’s medical record and they determined that the cause of death had been the administration of morphine which, in their opinion, is a medication which is totally counter-indicated for cases of

⁹ It should be pointed out that the victims were ignorant of the complete name of Dr. Fabián Espinoza until 1997. See Annexes 30, 34, 37 and 43.

¹⁰ See Annex 2.

¹¹ See Annexes 1 and 34.

¹² See Annex 1

¹³ See Annexes 6, 7, and 8.

¹⁴ See Annex 7

¹⁵ See Annexes 17, 18, and 19.

meningitis, convulsions, or intra-cranial hypertension, which were the three symptoms presented by Laura Albán Cornejo at the time when the above-mentioned substance was prescribed in the form and amount determined by Dr. Espinoza.¹⁶

32. On November 25, 1993, the victims lodged a denunciation with the Board of the Pichincha Medical College.¹⁷ However, on January 4, 1995, said Board resolved as follows:

there is no basis on which to establish professional negligence in the exercise of his medical duties by Dr. Ramiro Montenegro López regarding the patient Laura Susana and therefore we refrain from applying any sanction against him. With regard to Dr. N Espinoza, whose identity is not clear from the file, and who is not found in any way responsible either, this Board refrains from applying any sanction. In relation to Dr. N. Andrade, who is not fully identified in this file and who is not held responsible, this Board also refrains from applying any sanction. With regard to the nurse Myriam Barahona, this Board declares that it is not competent to judge her conduct and punishment because competence for this lies with the Pichincha College of Nurses and its respective Law, and therefore this Board also refrains from applying any sanction.¹⁸

33. The parents of Laura Albán also tried to discover the names and surnames of the doctors who treated their daughter, in particular the doctor who prescribed the 10mgs of morphine. This information was requested on many occasions from hospital staff, however they did not have access to the data until 1997.¹⁹

34. Once the victims were able to establish that their daughter had died as a result of medical malpractice, specifically the morphine injections she was given in hospital and which were counter-indicated for her condition, on August 3, 1995, they lodged a complaint with the then Attorney General, Dr. Fernando Casares.²⁰ In the complaint, the victims requested that criminal proceedings be filed against the doctors who had taken part in their daughter's case. However, the Attorney General refused to intervene in the case and would not receive the complaint lodged by the victims.

35. On November 1 and 25, 1996, the victims took the case to the new Attorney General, Dr. Guillermo Castro Dager.²¹ On this occasion they lodged their complaint against the Metropolitan Hospital and against the two doctors who, in their understanding of the matter, had

¹⁶ Communication from the victims on June 27, 2001, present in the file lodged with the Commission. In this context it should be stated that the above-mentioned examination by the doctors was carried out very cautiously by those who voiced their opinion in view of the fact that Article 24 of the Medical Federation Law, valid at the time, stated that:

Art. 24.- The Board will judge the professional conduct of doctors, whether affiliates or not, and will issue a finding within a period not greater than 60 in the following cases:

- a) Public behavior that diminishes the prestige of the medical classes, their organizations or their members;
- b) Behavior that damages the professional code of ethics
- c) Negligence in the course of professional practice
- d) Disagreement amongst doctors with regard to their professional duties, and
- e) Acts that suggest partiality in competition boards or appeals.

¹⁷ See Annex 37, page 3.

¹⁸ See annex 43.

¹⁹ See annexes 9, 10, 11, 12, 13, 14, 15, 16, 27, 28, 30, 31, 37, and 43.

²⁰ See annex 24

²¹ See annexes 25 and 26

caused the death of their daughter Laura, and to this effect invoked Articles 456 and 457 of the criminal code in force at that time.²² These articles define as homicide the administration of medication that causes death when carried out by a doctor.

D. Criminal Proceedings between 1997 and 1999

36. As a result of filing the complaint to the office of the Attorney General, on December 19, 1996, the Attorney General informed the Pichincha Prosecutor, Dr. Alicia Ibarra, about the case; on January 10, 1997 the Fifth Criminal Judge in Pichincha opened criminal proceedings.²³ On January 23, 1997, the victims launched private prosecutions against the doctors who treated Laura Albán and against anyone who had played a part in her treatment, and invoked for this purpose the crime defined in Articles 456 and 457 of the Penal Code.²⁴

37. On January 28, 1997, a police report was issued by order of the Fifth Criminal Court of Pichincha, which amongst other things concluded:

[t]hat the Metropolitan Hospital refuses to give the complete names of the Dr. Espinoza who prescribed a dose of morphine for the above mentioned patient (Laura Albán Cornejo).²⁵

38. The police report recommended the competent authority to have the medical record of the patient Laura Susana Albán Cornejo examined taking into account the expert opinion of neurologists, in order to determine whether or not the injection given to the patient was the cause of her death.²⁶

39. On September 12, 1997, the doctors José A. Vergara G., forensic expert, and Dr. Carlos Salina, medical expert, presented a forensic medical report to the Fifth Pichincha Judge, concerning their examination of the medical record of Laura Albán. This report was expanded on September 30, and they stated as follows:

Counter indications for morphine include, amongst others, endocranial hypertension and convulsions. Both pathologies, according to the clinical history and as described in our first report, were present in the patient.²⁷

40. Once the full name of the doctor Fabián Espinoza had been obtained, summary proceedings were instigated against him before the Fifth Criminal Judge of Pichincha on March 3, 1998.²⁸

²² The text of these provisions states:

Article 456: If the substances that are voluntarily administered are capable of serious impact on health, and if they are given without intention of causing death, but have brought it about, the guilty party must be punished by medium-term imprisonment of between three and six years.

Article 457: In the case of the offense referred to in the above article, an intention to cause death will be assumed if the person who administers the toxic substance is a doctor, a pharmacist or a chemist; or if he possesses the knowledge of these professions even though he may not have the qualifications to exercise as such.

²³ See annex 29

²⁴ See annex 33

²⁵ See annex 30

²⁶ See annex 30

²⁷ See annex 44(b)

²⁸ See annex 34

41. On July 24, 1998, the victims' lawyer was notified of the prosecutor's final finding which concluded that in accordance with the evidence contained in the file, there were sufficient indications to presume that an offense had been committed by the doctors accused.²⁹ However, in spite of the prosecutor's finding, on December 14, 1998, the Fifth Judge dismissed the accusations against the doctors named in the complaint and granted their provisional acquittal.³⁰ The judge then ordered that this resolution be consulted with the High Court in Quito and forwarded the proceedings immediately, summoning the parties before the High Court to assert their rights.

42. On December 23, 1998, the victims appealed against the Fifth Judge's finding. Consequently, on February 24, 1999, the Sixth Court of the Superior Court received the case, which was sent for consultation to the Pichincha prosecuting judge. On June 15, 1999, the Pichincha prosecuting judge, Dr. José Marín, concluded that there was sufficient evidence to presume that the accused were guilty of the crime defined and sanctioned in Articles 456 and 457 of the criminal code and that therefore the decision of the lower court should be rescinded and the plenary stage of the proceedings against Drs. Montenegro and Espinoza opened.³¹

43. Within the framework of the plenary proceedings opened against those allegedly responsible for the homicide, the Sixth Court of the Superior Court of Justice of Quito appointed Dr. Marcelo E. Cruz as an expert witness. Dr. Cruz responded as follows to the questions posed by the Court:

1. Morphine is completely counter-indicated for patients presenting symptoms of endocranial hypertension.
2. Morphine is completely counter-indicated for patients with meningitis.
3. No trained doctor would prescribe even minimal doses of morphine for patients with meningitis and endocranial hypertension³²

44. The Court also requested the opinion of Dr. Iván Cruz Utreras who replied that, in his opinion, "whatever the dose, it is always counter-indicated in patients presenting with signs of endocranial hypertension and meningitis."³³

45. The Sixth Court of the Superior Court of Justice of Quito decided on December 13, 1999, that although there existed sufficient grounds to establish Dr. Montenegro as the unintentional perpetrator (by omission) of the death of Laura Albán, and although the crime of which he was accused was subject to a term of imprisonment (in accordance with the provisions of Article 459 of the Ecuadorian Criminal Code),³⁴ it was correct to declare the criminal action prescribed. The Court considered that, as established in Article 101 of the aforementioned legal code, the prescriptive period of five years had elapsed from the time when the illegal act took place to the time when criminal proceedings were opened.³⁵

²⁹ See annex 32

³⁰ See annex 34

³¹ See annex 35

³² See annex 44(e)

³³ See annex 44(f)

³⁴ The text of this provision states the following:

Article 459.- A person is guilty of unintentional homicide when he has caused the offense through lack of foresight or precaution but has no intention of hurting the other person.

³⁵ Article 101 states the following:

46. Therefore, because more than five years had passed since the death of Laura Albán and before proceedings were opened, the Sixth Court of the Superior Court of Justice of Quito decided that criminal action against Dr. Ramiro Montenegro López had lapsed because the article applicable referred to unintentional homicide (Article 459) instead of praeterintentional homicide by supplying substances (Article 456) with an aggravating factor being that the person who supplied same was a doctor (Article 257), which was the crime on which the charge was based.

47. With regard to Dr. Fabián Espinoza, the Sixth Court stated that:

Because presumptions exist that he was the perpetrator of a crime defined and sanctioned in Article 456 of the Criminal Code in accordance with the provisions of Article 253 of the Law of Criminal Procedures, THE PLENARY STAGE IS DECLARED OPEN, a warrant is issued for his preventive custody, a psychological evaluation of his personality is to be carried out if possible, for which two experts from the Center for Criminal Research of the Central University have been named [...] Given that the accused person is currently a fugitive from justice, in line with Article 254 of criminal adjective law, a suspension is ordered of the Plenary Stage until such time as the accused person is apprehended or presents himself voluntarily.³⁶

48. Furthermore, in its writ of prescription on January 13, 1999, the Sixth Court of the Superior Court of Justice referred to the concealment by the Metropolitan Hospital in relation to Dr. Espinoza, and stated the following:

In addition, given the fact that specific documents existed concerning Dr. Espinoza Cuesta in the archives of the Metropolitan Hospital, it is truly surprising that the aforementioned hospital which has a professional reputation should have gone along with such a serious concealment (referring to the concealment of his name, obstructing the investigation and therefore obstructing the administration of justice).³⁷

49. In spite of the foregoing, the Court concluded that because the hospital was a legal person it could not be called an accessory "because the criminal offense demands the existence of intention which can not be attributed to a corporate body."³⁸

50. In its judgment of December 13, 1999, the Sixth Court of the Superior Court also stated that:

Equally notable is the negligence of the nursing staff and other staff responsible for the care of patients in the ward who were on duty the fateful night when Laura Albán died, because the investigations in the proceedings reveal that, because they did not provide the help needed, they, by omission, prevented Dr. Montenegro, who was the doctor in charge, from attending in time, although it has to be noted that Dr. Montenegro did attend subsequently; however, as these persons have not been identified, any analysis would be useless.³⁹

...continuation

In criminal actions, where no trial has taken place, criminal liability will prescribe in ten years when the offense is punishable by a term of imprisonment, and in five years when the offense is punishable by medium-term prison. In both cases, the time will be counted from the date on which the offense was perpetrated.

In addition, see annex 37.

³⁶ See Annex 37.

³⁷ See annex 37.

³⁸ See annex 37.

³⁹ See annex 37.

51. On December 16, 1999, the victims asked the Sixth Court to rescind its decision concerning the prescription and to launch the plenary stage of proceedings against Dr. Montenegro. For this purpose, the victims considered that the crime for which the doctor should be charged should be the offense defined in Article 456 of the Criminal Code, which prescribes at 10 years from the date on which the offense is committed. On February 16, 2000, this request was rejected.⁴⁰ On April 24, 2000, the Sixth Court of the Superior Court of Justice also rejected the appeal for reversal of the judgment [*recurso de casación*] on the basis that it was time-barred,⁴¹ and on June 15 of the same year, the same Court rejected an “appeal on the basis of fact” [*recurso de hecho*] lodged by Dr. Fabián Ernesto Espinoza Cuesta.⁴²

52. To date there is nothing to show that the State has taken any steps to locate the accused and finally bring him to trial, or to investigate in any way who might be responsible for the homicide of Laura Albán Cornejo. Therefore, her parents have been unable to access proceedings with due judicial guarantees and protection.

E. Domestic laws of Ecuador applicable to this case

53. The Commission considers it appropriate to present some preliminary considerations regarding the legislative framework applicable to this case.

54. Chapter V, “Duties of Fraternity”, of Article 29 of the Code of Medical Ethics,⁴³ in force since 1992, states that:

Medical *corps* honor demands of its members that they should refrain from injuring the reputation of their colleagues with calumnies or insults, or detracting from their merits by revealing their defects or errors.

55. Articles 456 and 457 of the Ecuadorian Criminal Code in force at the time of the events of this case⁴⁴ define the crime of “praeterintentional homicide by supplying substances,” and the legal presumptions applicable to doctors in relation to the above and establish the basis of a definition of malpractice in relation to the death of a patient. They state as follows:

Article 456.- If the substances that are voluntarily administered are capable of serious impact on health, and if they are given without intention of causing death, but have produced it, the guilty party must be punished by medium-term imprisonment of between three and six years.

Article 457.- In the case of the offense mentioned above, an intention to cause death will be assumed if the person who administers the toxic substances is a doctor, a pharmacist, or a chemist; or if he possesses the knowledge of such professions even though he may not have the qualifications to operate as such.

56. Article 459 defines the crime of “unintentional homicide” and states that “a person is guilty of unintentional homicide if he has committed the crime because of a lack of foresight or precaution, but without the intention of injuring another person.”

⁴⁰ See annex 38 and 39.

⁴¹ See annex 40.

⁴² See annex 41.

⁴³ See annex 48

⁴⁴ Law No 134, published on June 10, 1983. Annex 46

57. With regard to the prescription of criminal proceedings, this is defined in general terms in Article 101 of the Ecuadorian Criminal Procedure Law as follows:

In criminal actions, where no trial has taken place, criminal liability will prescribe in ten years when the offense is punishable by a term of imprisonment (*reclusión*), and in five years when the offense is punishable by medium-term imprisonment (*prisión*). In both cases, the time will be counted from the date on which the offense was perpetrated.

58. According to the same clause, the only circumstances in which a prescription may be interrupted occurs when the accused commits another crime during the period before the offense becomes time-barred. Article 108 of the Ecuadorian Penal Code states the following in this respect:

Article 108. - Prescription of the proceedings as well as of the punishment may be interrupted if the accused commits another offense that is punishable with the same or greater sanction before the time elapses after which the action becomes time-barred.

The duty to initiate, file charges and investigate within the framework of a criminal action

59. The Criminal Procedure Law in force in Ecuador at the time when the events that are the subject of this case took place, like the law currently in force⁴⁵, stated in general terms that criminal action is public in nature and is therefore the responsibility of the State. Article 14 states:

Article 14.- Criminal law is public in nature. It will generally be the responsibility of the state, although private accusations may be admitted. In the cases described in Article 428 of this Law, criminal action may only be brought by private accusation.

60. In accordance with Ecuadorian criminal law, it is the State in criminal actions – through the intermediation of public bodies constituted for that purpose – whose duty it is to bring criminal proceedings and to pursue them through to completion.

61. Article 428 defines the only offenses in which private accusations are essential in order to launch criminal proceedings. The provision states the following:

Article 428.- On the basis of private accusations, criminal judges will only judge the following crimes:

- a) The statutory rape of a woman over sixteen years of age and under eighteen;
- b) The abduction of a woman over sixteen years of age and less than eighteen, who agreed to her abduction and accompanied the abductor voluntarily;
- c) Calumny and serious slander;
- d) The damage caused in privately owned woods, groves, or orchards by cutting down, damaging the bark or destruction of trees; in rivers, canals, streams, ponds, fishponds or water tanks, either by destroying aqueducts, sea walls, bridges or dams or by throwing in substances designed to destroy fish or other aquatic species; damage caused by the death or wounding or injuries to horses and other domestic and domesticated animals; damage

⁴⁵ Law No. 000, RO/SUP 360, published January 13, 2000.

caused by the destruction of fencing or enclosures of any kind; the removal or alteration of boundaries and the blockage of ditches; and

e) All other crimes of usurpation not listed in the previous paragraph.

62. Amongst the offenses listed there and for which a private accusation is needed to launch criminal proceedings, there are no crimes against life.

63. Furthermore, as in the current version, the adjective law that was previously in force stated that it was for the Attorney General's Office to launch and drive criminal proceedings for public action crimes, in order to investigate them. This does not prejudice the possibility that the victims or their families might lodge private accusations although this is only an optional faculty that the Code expressly states neither supplants nor displaces the duty of government prosecutors to launch and drive criminal proceedings. Therefore, Articles 21 and 23 state:

Article 21.- The Public Prosecutor will incite judges to launch criminal proceedings when crimes are committed, basing this incitement on the notification received.

Article 23.- When a crime has been committed, the Public Prosecutor will need to intervene in all the criminal proceedings launched in corresponding courts and tribunals, even when proceedings are launched on the basis of a private accusation, as long as the infraction should be prosecuted by the State.

64. Having presented these prior considerations, the IACHR now proceeds to describe its allegations in the instant case regarding the violation of the rights to respect for judicial rights and protection; and regarding the responsibility of the Ecuadorian State to do what is necessary to apprehend the accused, who is a fugitive from justice.

VII. LEGAL ARGUMENTS

65. Having established the facts, the Commission considers it appropriate to clarify that the focus of this application, inter alia, is effective access to justice according to the standards established in the American Convention regarding judicial guarantees and protection. The Commission will also examine how effective this is within the framework of criminal procedure in Ecuadorian law for situations in which a basic right is affected, such as the right to life, while also taking into account the particular circumstances of this case.

A. The international responsibility of the State

66. The Commission considers it necessary to make a general observation regarding the generation of the State's international responsibility for the acts or omissions of its instruments or agents. In line with general principles of international law, any act or omission by any of the instruments of the state may give rise to international responsibility. In this regard, Article 1(1) of the Convention is essential in defining the responsibility of the State with regard to the violation of the human rights protected in said legal instrument. This clause states that:

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

67. This principle was reaffirmed by the Court when it stated that:

The international responsibility of the State may be engaged by acts or omissions of any power or organ of the State, whatsoever its rank, that violate the American Convention. That is, any act or omission that may be attributed to the State, in violation of the norms of international human rights law engages the international responsibility of the State.⁴⁶

68. It is important to underline that from its first judgment on the merits onwards,⁴⁷ the Court has stated that:

Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, or all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

[...] For the purposes of analysis, [...] what is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1 (1) of the Convention.

69. The Court also said that:⁴⁸

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

[...] In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

⁴⁶ I/A Court H.R., *Olmedo Bustos and others case, (The Last Temptation of Christ)*, Judgment February 5, 2001, Series C, No 73, paragraph 72.

⁴⁷ I/A Court H.R., *Velásquez Rodríguez Case*. Judgment July 29, 1998. Series C, No. 4, paragraphs 172 and 173.

⁴⁸ See I/A Court H.R., *Velásquez Rodríguez Case*. Judgment July 29, 1988. Series C, No. 4, paragraphs 176 and 177.

70. Recent⁴⁹ rulings of the Court have also developed the issue of the international responsibility of the state and said that:

[...] In order to establish whether a violation has occurred of rights protected under the Convention [...] it is sufficient to demonstrate that there has been support or toleration on the part of public authorities for the infringement of the rights protected by the Convention, or omissions that have allowed the violations to take place.

[...] States party to the Convention assume obligations *erga omnes* to respect and ensure the respect of laws that protect human rights, and in all circumstances to ensure the effective exercise of the rights enshrined, for all persons subject to its jurisdiction. The effects of these obligations of the State's go beyond the relationship between its agents and the persons subject to its jurisdiction because they are evident also in the positive obligation of the State to adopt the measures necessary to ensure the effective protection of human rights in relations between individuals. The attribution of responsibility to the State for actions by private individuals may happen in cases where the State, by the act or omission of its agents when in a position of responsibility, has failed to observe those obligations *erga omnes* enshrined in Articles 1.1 and 2 of the Convention.

71. All of this shows that it is the obligation of the State not only to respect the rights and freedoms established in the Convention but also to ensure their exercise. In meeting these obligations, the State as a whole is one entity and pursuant to the principles of international law may not decline its responsibility for the conduct of one or more of its instruments or authorities. The behavior of agents of the State – in this case, the judiciary – displays a lack of even minimum standards of due diligence and has given rise to the violation of the victims' rights to judicial guarantees and protection. This behavior has therefore lead to the State failing to meet its obligations to respect the rights protected in the American Convention, as established in its Article 1(1).

B. The right to access to justice in the American Convention. The right to bring criminal proceedings against those responsible for violations of human rights

72. The Commission stresses the obligations assumed by Ecuador within the framework of the American Convention with regard to the investigation and punishment of conduct by private individuals that might be prejudicial to human rights. This determination is essential because the Commission has found that according to the facts established in its report on the merits, conduct by the State incurs international responsibility for obligations assumed in relation to Articles 8(1) and 25 of the American Convention in accordance with the generic duties enshrined in Articles 1(1) and 2 of the aforementioned instrument.

73. In this case, the State of Ecuador did not ensure effective access to justice for the victims in accordance with the parameters established in the American Convention. It is important here to indicate that the Commission as well as the Inter-American Court have both established precedents that States have, among their general obligations, a positive duty to ensure the respect of individuals within their jurisdiction and this duty includes, inter alia, the duty to ensure access to courts of justice in the domestic jurisdiction of each State. This obligation presupposes a need to:

take all necessary measures to remove any impediments which might exist that would prevent individuals from enjoying the rights the Convention guarantees. Any state which tolerates circumstances or conditions that prevent individuals from having recourse to the legal

⁴⁹ See for example: I/A Court of HR. *Case of the Mapiripán Massacre vs. Colombia*. Judgment September 15, 2005. Series C, No. 134, paragraphs 110 and 111.

remedies designed to protect their rights is consequently in violation of Article 1(1) of the Convention.⁵⁰

74. Similarly, Article 8(1) of the American Convention defines the scope and nature of the right to have access to a court of law when it states:

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

75. The Inter-American Court has interpreted that this provision in the American Convention enshrines the right of access to justice and from this therefore flows the obligation of States to refrain from preventing persons from having recourse to judges or tribunals when seeking to determine their rights or ensure their protection. Therefore, any provision or measure under domestic law that imposes costs or obstructs in any other way the access of individuals to the courts and that is not justified by the reasonable needs of the administration itself of justice, must be understood to be at odds with the aforementioned Article 8(1) of the American Convention.⁵¹

76. In accordance with the provisions of Article 8 of the American Convention, Article 25 of the same instrument states that:

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

77. The same Article also enshrines the right of recourse to justice. In fact, the article cited defines the positive obligation of the State to provide for all persons within its jurisdiction an effective judicial remedy against acts that violate their basic rights and the guarantee enshrined there is therefore applicable not only to the rights established in the Convention, but also to those rights that are recognized by each State's constitution or law.⁵²

78. In addition to this, as has also been shown previously, the right of effective recourse "is one of the basic mainstays, not only of the American Convention, but also of the Rule of Law in a democratic society in the sense set forth in the Convention."⁵³ So, for a State to comply with the terms of Article 25 of the American Convention, it is not enough for the remedies to formally exist,

⁵⁰ I/A Court H.R., *Hilaire, Constantine and Benjamin and Others Case*. Series c, No 94, judgment dated June 21, 2002, paragraph 151; and I/A Court HR *Exceptions to the exhaustion of remedies available under domestic law* (Articles 46.1, 46.2.a and 46.2.b American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990. Series A, No. 11, paragraph 34.

⁵¹ I/A Court H.R., *Cantos Case*, Series C, No. 97, judgment November 28, 2002, paragraph 49.

⁵² I/A Court H.R., *Mayagna Community (Sumo) Awajitjini Case*, judgment August 31, 2001, Series C, No. 79, paragraph 112, *Constitutional Tribunal Case*, judgment January 31, 2001, Series C, No. 71, paragraph 89; and *Judicial Guarantees during States of Emergency* (Articles 27.2, 25 and 8 of the American Convention on Human Rights), paragraph 24. Advisory Opinion OC-9/87 dated October 6, 1987, Series A, No. 9, paragraph 22.

⁵³ I/A Court H.R., *Durand and Ugarte Case*. Judgment August 16, 2000, Series C, No. 68, paragraph 101; and I/A Court HR., *Street Children (Villagras Morales and others) Case*. Judgment November 19, 1999. Series C, No 63, paragraph 234.

but they must also be effective, that is to say, they must provide for the person a real possibility of recourse to an independent and impartial authority⁵⁴ and subsequently to a final judgment.

79. Consequently, any laws or measures that prevent or obstruct use of the remedy in question, or that prevent the remedy being used or reaching a judgment that finds in favor of the claim argued in the proceedings, constitutes a violation of the right to access to justice as established in Article 25 of the American Convention.

80. In addition to the above, other precedents established by the Court have stated that specifically in criminal cases, when criminal action is against other private individuals,

judges must ensure compliance with the rules of due process enabling unrestricted exercise of the guarantees set forth in Article 8 of the American Convention but on the other hand they must protect the victim's right to justice (Article 25 of the Convention), the concrete expression of which is delivery of a judgment on the facts and responsibilities.⁵⁵

81. Article 8(1) of the American Convention, in connection with Article 25(1) of the same, confers on the parents of Laura Albán the right to have her death investigated effectively by State authorities; the right to have proceedings undertaken with due guarantees against those responsible for the illicit acts; and, where applicable, to have the appropriate sanctions imposed and to have made good the damage and loss they suffered as a result of the violations of their rights during their struggle to obtain justice because of the lack of due diligence displayed by the behavior of the State in this case.⁵⁶

82. It is evident, then, that in accordance with the principles and provisions described above, this aspect of the right to justice includes the power to demand of the State of Ecuador that it take criminal proceedings against those who are alleged to be responsible for acts that affect or damage human rights protected by the American Convention. In this context, protection of the right to life and personal integrity is particularly important. This cannot be exhausted by simply launching proceedings in the domestic jurisdiction, but must also include the right of victims to know the truth of what happened and the punishment of those finally found guilty.⁵⁷

83. In order to comply with these duties, States are obliged to adopt the legislative measures and establish the procedures that are appropriate to permit the trial and possible sentencing, where guilt has been established, of those persons accused of human rights violations.

84. In this way, once the State has ratified a treaty that recognizes the existence of certain human rights of those people subject to its jurisdiction, and therefore has assumed various duties in the international arena, the State must make the necessary changes to its own domestic laws to ensure the proper compliance with the supranational obligations it has assumed.⁵⁸ In the case of the American Convention, this principle is expressly incorporated in Article 2.

⁵⁴ I/A Court H.R., *Mayagna Community (Sumo) Awas Tingni Case*, judgment August 31, 2001, Series C, No 79, paragraph 112; *Ivcher Bronstein*, Judgment February 6, 2001, Series C, No. 74, paragraph 134; and I/A Court H.R., *Constitutional Tribunal Case*, Judgment January 31, 2001, Series C, No. 71, paragraph 90. Similarly, European Court of Human Rights, *Keenan vs. the United Kingdom*. Judgment April 3, 2001.

⁵⁵ I/A Court H.R., *Bulacio Case*, Series C, No. 100, judgment dated December 8, 2003, Judge Ricardo Gil Lavedra.

⁵⁶ I/A Court H.R., *Durand and Ugarte Case*, Judgment August 16, 2000, Series C, No. 68, paragraph 117.

⁵⁷ I/A Court H.R., *Myrna Mack Case*, Series C, No 101, judgment dated November 25, 2003, paragraph 209; I/A Court H.R., *Bulacio Case*. Judgment September 18, 2003, Series C, No. 100, paragraph 114; and I/A Court H.R., *Hilaire, Constantine and Benjamin, and others Case*. Judgment June 21, 2002, Series C, No. 94, paragraphs 142-145.

⁵⁸ I/A Court H.R., *"The Last Temptation of Christ" (Olmedo Bustos and others) Case*, judgment dated February 5, 2001, Series C, No. 73, paragraph 87.

85. Both the rights of access to jurisdiction and to prosecution of those alleged to be responsible for violations of rights protected under the American Convention are susceptible to regulation in the domestic jurisdiction of states parties to said instrument. With regard to crimes that result in damage to personal integrity or life, such as in the instant case, the main concern of the State is to avoid those responsible going unpunished⁵⁹ by adopting in its own legal system the primary obligation to investigate and prevent such crimes throughout its jurisdiction.

86. The instant case has certain peculiarities since the filing of criminal charges in this type of case relies on the resolution of prior or extrajudicial procedures that are intended, *prima facie*, to establish the actual existence of the crime. For example, in many cases, it is beyond the capacity of a person untrained in medical science to arrive at a judgment on the conduct of a medical doctor and determine whether or not this has been the cause of the injury incurred. Consequently, effective cognizance of the possible existence of the crime – and the consequent possibility of embarking on the relevant criminal proceedings – may only materialize once certain prior formalities have been carried out, such as consulting an expert in medical jurisprudence, or the possible intervention of other health professionals in a consultative capacity.

87. Furthermore, the undertaking of criminal proceedings also requires, in a high percentage of cases, prior access to the medical records of the patient. In general, neither the State nor the patient or his family have access to this information which is kept in the archives of the health institution where the alleged victim of the malpractice was treated.

88. In the instant case, the family of Laura Albán encountered several obstacles before criminal proceedings in the strict sense were instituted. Furthermore, in the case of Ecuador, in accordance with domestic legislation detailed *supra*, the competent authority responsible for launching criminal proceedings is essentially the Attorney General's Office [*Ministerio Público*]. The efforts made in vain by the victims to obtain justice for the death of their daughter reveal the lack of will to investigate the facts of the case and the lack of due diligence to punish those responsible on the part of the State.

89. In this sense, the inadequate performance of state authorities, seen as a whole, has had the logical result that those responsible for the death of Laura Albán have been neither identified nor sanctioned appropriately. Therefore, the victims have not seen that their right to due diligence in the investigation, or to the sanctioning of those responsible for the death of their daughter, has been protected. This absence of protection has made it impossible for them to access justice and the truth because proceedings in the domestic jurisdiction appeared to be a mere formality and failed to order even the most basic procedures, in spite of the gravity of some of the assertions made in the judgment issued by the Sixth Court of the Superior Court of Justice concerning the responsibility of certain individuals for Laura Albán's death.

⁵⁹ I/A Court H.R., *Juan Humberto Sánchez Case*, Interpretation on Judgment on Preliminary Exceptions, Merits and Reparations (Article 67 American Convention on Human Rights). Judgment November 26, 2003, Series C, No 102, paragraph 143 and 185. I/A Court HR *Las Palmeras Case, Reparations* (Article 63.1 American Convention on Human Rights). Judgment November 26, 2002, Series C, No. 96, paragraph 53.a); I/A Court H.R., *Caracazo Case, Reparations* (Article 63.1 American Convention on Human rights). Judgment August 29, 2002. Series C, No. 95, paragraphs 116 and 117.

C. The State of Ecuador, to the detriment of Carmen Cornejo de Albán and Bismarck Wagner Albán, has violated the rights to judicial guarantees (Article 8) and to judicial protection (Article 25) of the American Convention in relation to Articles 1(1) and 2 of the same Convention

90. Having already described the principles outlined in these rights, it should be stated that when the Ecuadorian Criminal Code defines a crime it recognizes that any event that falls within this definition is liable to be sanctioned by the State. Furthermore, an important aspect is that for example for a case to fall within the definition of unintentional homicide [*homicidio inintencional*], certain formalities must have taken place before criminal proceedings can be opened. The Commission explains that it is not pronouncing, nor asking the Court to pronounce, with regard to the adoption of the definition of crimes in the domestic jurisdiction of a country, but rather that if they should already exist whether it is necessary, in line with inter-American case law, to create the conditions necessary to give them effect.⁶⁰

91. In line with the legal framework described in previous paragraphs, the definition of a crime should be accompanied by measures that are accessible to people so that they can denounce effectively the infringement of a right to the appropriate judicial authorities. This is especially true in cases where it is necessary to carry out extra-judicial proceedings before the case opens (e.g. obtaining the clinical record, finding out the name of the doctor who applied the treatment, etc.) as in crimes defined in Articles 456 and 457 of the then Ecuadorian Criminal Code. If this were not the case, it would interfere with the protection of the right to access to justice enshrined in Articles 8 and 25 of the American Convention, as will be shown below.

92. It has been shown that the victims were not aware, until some time after her death when they finally, after years, gained access to her clinical record, that Laura Susana Albán had died as a consequence of an injection of morphine administered by one of the doctors who had attended her in the Metropolitan Hospital and that this was completely counter-indicated in her case. However, in spite of having carried out the different formalities with a view to establishing whether or not a crime had taken place – formalities which, as we have seen above, are a prerequisite – the time was passing that led the tribunal to declare the case time-barred.

93. The attitude of the State throughout the proceedings in the domestic jurisdiction was absolutely passive even though the legal authorities were aware of the events since 1990, when they ordered the hospital to produce a copy of the clinical record. The IACHR considers that this attitude contravenes the provisions of the American Convention in that it transfers to the victims the burden of identifying the indications of a possible violation of a basic right. The passivity of the State is aggravated by the way in which the prescription of the case was defined, the period for which was counted from the date on which the events took place. As has been shown, this is not necessarily adequate for particular situations such as this one.

94. In this context, the victims were not aware of the existence of the crime until long after it was committed, a situation which was exacerbated by the fact that, as had been shown in the criminal action in the domestic jurisdiction, the hospital authorities⁶¹ had engaged in concealment. The Commission considers that because the procedure laid down by law for a case of a public action crime such as the present one transfers the responsibility for the preliminary investigation to the private interested party, this infringes the right of the family of Laura Albán, the victims in this case, to due process.

⁶⁰ See, I/A Court H.R., *Judicial Guarantees in States of Emergencies*, (Articles 27.2, 25, and 8 of the American Convention on Human Rights. Advisory Opinion OC-9/87 of October 6, 1987, Series A, No. 9, paragraph 24.

⁶¹ See Annex 37.

95. It should be emphasized that obstacles of this sort are encountered in relation to crimes of this nature where the knowledge of the crime is not always immediate. Consequently, it becomes essential that these prior procedures are carried out so that the public authorities, the victims, or their family members are able to file criminal proceedings. In addition to being incompatible with Articles 8(1) and 25 of the American Convention, this also goes against the general obligations of the State to respect and protect the rights enshrined therein, in accordance with Article 1(1) of said instrument.

96. Because this is a question of a criminal action, the Commission stresses the duty of all States party to the American Convention to “organize the government apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights,” as required by Article 2 of said instrument.⁶²

97. The Commission is of the opinion that the victims were in a situation where they were not protected and were prevented from obtaining appropriate legal redress against those persons alleged to have committed the crime against their daughter by circumstances that were not attributable to them, in spite of having carried out the prior proceedings that were necessary for the corresponding criminal action.

98. These circumstances illustrate that the right of access to justice enshrined in the American Convention and the extent of its protection described above, has become illusory in relation to the case under examination here, in violation of Articles 1(1), 2, 8, and 25 of the American Convention.

D. The responsibility of the Ecuadorian State for taking the steps necessary to apprehend the accused who is currently a fugitive from justice

99. The above considerations also permit the conclusion that the actions of the Ecuadorian State have occasioned a violation of the right of the family of Laura Albán Cornejo to judicial guarantees (Article 8(1) of the Convention) by the failure, attributable to the State, to comply with its obligation to investigate, try, capture, and punish those allegedly responsible for her death.

100. In accordance with the principles and provisions of the American Convention, the obligation on the State to protect the right to judicial guarantees is not exhausted by establishing an impartial and independent body with the power to judge crimes, or by the existence of a criminal process that respects the rights of both accuser and accused. Such protection would become illusory if, after it has been established that evidence exists that gives reasonable grounds for considering the accused guilty, or once he has been convicted, the State does not exercise its coercive power to find, arrest, and punish those alleged to be responsible.

101. As the Inter-American Court has stated in several previous cases, in order to dissuade potential offenders and in order to punish violations of the Convention, it is essential that States investigate any loss of life caused by third parties, bring to trial those alleged to be guilty, and where applicable, apply the appropriate sanctions to those found guilty.⁶³

⁶² I/A Court of HR, *Exceptions to the exhaustion of remedies available under domestic law* (Articles 46.1, 46.2.a. and 46.2.b. of the American Convention on Human Rights) Advisory Opinion OC-11/90 of August 10, 1990, Series A, No. 11, paragraph 23.

⁶³ See, I/A Court H.R., *Godínez Cruz Case*, Series C, No. 5, January 20, 1980; *Castillo Páez Case*, Series C, No. 34, judgment November 3, 1997; *Paniagua Morales Case*, Series C, No 37, March 8, 1998, amongst others.

102. In particular, the case history of the Court has been consistent in stating that:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation. [...] If [...] a violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.⁶⁴

103. The duty to investigate, bring proceedings, and punish should therefore be undertaken "in a serious manner and not as a mere formality preordained to be ineffective."⁶⁵ In this way, the duty of investigating possible crimes against life:

must have a purpose and be undertaken as a juridical obligation of its own and not as a mere processing of private interests, subject to procedural initiative of the victim or his or her next of kin or to evidence privately supplied, without the public authorities effectively seeking the truth.⁶⁶

[...]regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.⁶⁷

104. On the other hand, the actions implemented by the State when complying with this obligation, "must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the Government."⁶⁸ Consequently, this obligation must be observed, generally, evenly, and without discrimination.

105. The obligation described in these precedents demonstrates the incompatibility of the principles of the American Convention with the phenomenon of impunity which has been defined by the Inter-American Court as the "overall lack of investigation, pursuit, capture, trial and conviction of those responsible for violations of rights protected under the American Convention."⁶⁹

106. In the present case, the victims have indicated that one of the two doctors indicted for the death of Laura Albán, Dr. Fabián Espinoza Cuesta, is a fugitive from justice. This was declared when the copy of the judgment of the Sixth Court of the Superior Court of Justice dated

⁶⁴ See I/A Court H.R., *Velásquez Rodríguez Case*, Series C, No. 101, judgment June 29, 1988; *Godínez Cruz Case*, *supra*, note 24; *El Amparo Case, Reparations*, Series C, No. 98, judgment September 14, 1996; *Neira Alegría and Others Case, Reparations*, Series C, No. 20, judgment January 19, 1995, *Caballero Delgado Case*, Judgment December 6, 1995, Series C, No. 22, *Castillo Páez Case*, judgment November 3, 1007. Series C, No. 34; *Case Suárez Rosero*, judgment November 12, 1997. Series C, No. 35; *Blake Case*, judgment January 24, 1998, Series C, No. 36; and *Paniagua Morales and Others Case*, Judgment March 8, 1996, Series C, No. 37.

⁶⁵ See I/A Court H.R., *Velásquez Rodríguez Case*, Series C, No. 101, judgment June 29, 1988.

⁶⁶ I/A Court H.R., *Bulacio Case*, Judgment September 18, 2003, Series C, No 100, paragraph 112; *Juan Humberto Sánchez*, Judgment June 7, 2003, Series C, No. 99, paragraph 144; and *Bámaca Velásquez Case*, Series C, No 70, November 25, 2000, paragraph 212

⁶⁷ I/A Court H.R., *Velásquez Rodríguez*. Judgment July 29, 1988, Series C, No. 4, paragraph 177.

⁶⁸ I/A Court H.R., *Juan Humberto Sánchez Case*, Series C, No. 99, June 7, 2003, paragraph 144.

⁶⁹ I/A Court H.R., *Bulacio Case*, Judgment September 18, 2003, Series C, No. 100, paragraph 120.

December 19, 1999, in which the court ordered the suspension of criminal proceedings against him until such time as he was apprehended or presented himself voluntarily, was presented.

107. As regards any proceedings against Dr. Espinoza, the victims claim that he is currently in the United States of America⁷⁰, waiting for the case to become time-barred, and in spite of the fact that it was the Ecuadorian authorities who told them this, the authorities have done nothing to locate him, and therefore, to attempt to detain him.

108. It cannot be assumed in this case that the State has activated its apparatus, mobilized its security forces, its intelligences services, and its foreign affairs representatives to locate a defendant who is a fugitive from justice in order to bring him to justice.

109. If this could be assumed from the documentation, there would be evidence that the rights and guarantees enshrined in the American Convention had not been violated. In fact, the obligation imposed on States party by the Convention is not the effective apprehension of the fugitive, whose location and capture might not be possible due to causes that would not be attributable to the State, and which might be beyond its real ability to act. But, what the Convention does require, as was said when relevant precedents were identified on this point, is that the State must embark on the task with seriousness and diligence.

110. In view of the above, the complete absence of measures by the Ecuadorian authorities designed to locate and apprehend the defendant, who is a fugitive from justice, constitutes a breach of the obligations assumed by Ecuador as a state party to the American Convention, as has been established in earlier paragraphs. Consequently, the action of the State is incompatible with the rights enshrined in Articles 8(1) and 25 of the instrument in question.

111. The protection provided by the provisions described above is reinforced by the general obligation to respect human rights established in Article 1(1) of the Convention. Article 25 of the American Convention, interpreted with Article 1(1), obliges the State to protect the right of all persons to access the administration of justice, and in particular to simple and prompt recourse designed to, amongst other things, bring those responsible for the violations of human rights to trial, and to obtain reparation for the damage suffered. Article 25 is one of the basic pillars, not only of the American Convention, but also of the state of law itself in a democratic society. Article 25 is directly linked to Article 8(1) which proclaims the right of all persons to be heard with due guarantees for the determination of their rights of all kinds.⁷¹ In this respect, the Court has stated expressly that,

The Court considers it necessary to emphasize that in the light of the general obligations enshrined in Articles 1.1 and 2 of the American Convention, States party have the duty to adopt those measures that are necessary so that no-one remains without judicial protection and unable to exercise their right to simple and prompt recourse, as defined in Articles 8 and 25 of the Convention.⁷²

112. Consequently, States party are obliged to adopt those measures that are necessary so that no-one remains without judicial protection and unable to exercise their right to simple and prompt recourse. The absence of procedures in domestic law that permit the effective exercise of

⁷⁰ See annexes 41 and 41.

⁷¹ I/A Court H.R., *Loayza Tamayo Case*, Judgment on Reparations, November 27, 1998, paragraph 169. I/A Court H.R., *Velásquez Rodríguez Case*, Judgment July 29, 1988, Series C, No. 4, paragraphs 91, 90, and 93.

⁷² I/A Court H.R., *Barrios Altos Case*, Judgment March 14, 2001, paragraph 43.

the right to judicial guarantees and protection has meant in this case that the State has failed to protect the fundamental rights of Mssrs. Albán and Cornejo.

113. In this sense, the lack of an effective recourse against violations of the fundamental rights protected in the Convention in itself constitutes a violation of this instrument by the State party in which this situation exists. Consequently, according to the Court,⁷³ the absence of an effective remedy exempts the victims from the obligation to exhaust remedies available under domestic law, and at the same time, constitutes a new violation of the obligations assumed by the State under the Convention.

114. In its ninth Advisory Opinion, the Court concluded that remedies that become illusory as a consequence of general conditions in the country, or even because of the particular circumstances of a specific case, may not be considered effective. Therefore it stated:

Article 25(1) incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights. As the Court has already pointed out, according to the Convention:

... States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdictions (Art.1) (Velásquez Rodríguez, Fairen Garbi and Solís Corrales and Godínez Cruz Cases, Preliminary Objections, Judgments of June 26, 1987, paras. 90, 90 and 92, respectively).

According to the principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judiciary lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unwarranted delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.⁷⁴

115. In the *Mayagna Community (Sumo) Tingni Case*, although the Court considered that there was evidence of the existence of norms recognizing and protecting indigenous communal property in Nicaragua, it concluded that the State had not adopted the adequate domestic legal measures to make the laws effective.⁷⁵ Although in the present case the situation is different, the underlying principle is still applicable. In effect, in spite of the fact that Ecuadorian criminal law defines the crime of homicide, the facts of this case have demonstrated that the appropriate measures have not been adopted to effectively identify behavior that meets its definition of homicide.

⁷³ I/A Court H.R., Advisory Opinion, OC-9/87, October 6, 1987, Series A, No. 9, paragraph 24.

⁷⁴ I/A Court H.R., Advisory Opinion, OC-9/87, October 6, 1987, paragraph 9.

⁷⁵ I/A Court H.R., *Mayagna Community (Sumo) Tingni Case*, Judgment 31 August, 2001, Series C, No 79, paragraphs 122 and 137.

116. According to Articles 25 and 8(1) of the Convention, the Ecuadorian State is obliged to provide effective recourse to all persons subject to its jurisdiction. In this context, the Commission observes that the Ecuadorian State has not ensured the existence of a prompt and effective recourse which responds to the charges made by the parents of Laura Albán.

E. Failure by the State to observe Articles 1(1) and 2 of the American Convention (Obligation to respect rights and duty to adopt provisions in domestic law)

117. As has been mentioned above, the violation of the rights of victims in the present case is aggravated by the general obligation imposed by Article 1(1) of the Convention to respect fundamental rights.

118. Furthermore, Article 2 of the American Convention establishes that if the exercise of the rights and freedoms enshrined in Article 1 is not already ensured by legislative or other provisions, 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 and freedoms.

119. The Court has stated the following in this respect:

Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights that can be attributed, under the rules of international law, to the act or omission of any public authority constitutes an act imputable to the State and which entails its responsibility as established in the Convention.

According to Article 1(1), any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a state organ or official, or a public entity violates one of those rights, this constitutes a failure in the duty to respect the rights and freedoms set forth in the Convention.

This conclusion is independent of whether the organ or official has contravened provisions of domestic law or overstepped the limits of his authority. Under international law, a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.⁷⁶

120. In relation to Article 2 of the Convention, the Court has stated that:

In international law, it is usual for States that have ratified a human rights treaty to be bound to adopt in national law the modifications that are necessary to ensure their faithful observance of the obligations assumed.⁷⁷ This law is universally accepted, and supported by jurisprudence. The American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights that it embodies. This general obligation of the State party implies that the measures of domestic law must be effective (the principle of *effet utile*). This means that the State must

⁷⁶ I/A Court H.R., “*Cinco Pensionistas*” Case, Judgment, February 28, 2003, Series C, No. 98, paragraph 163; I/A Court H.R., *Mayagna Community (Sumo) Tingni Case*, Judgment August 31, 2001, Series C, No. 79, paragraph 154; I/A Court H.R., *Baena Ricardo and Others Case*, Judgment February 2, 2001, Series C, No. 72, paragraph 178; and I/A Court H.R., *Caballero Delgado y Santander Case*, Judgment December 8, 1995. Series C, No 22, paragraph 56.

⁷⁷ I/A Court H.R., *Bulacio Case*. Judgment September 18, 2003, Series C, No. 100, paragraph 140; I/A Court H.R., “*Cinco Pensionistas*” Case, Judgment February 28, 2003, Series C, No 98, paragraph 164; and I/A Court H.R., *Cantos Case*, Judgment November 28, 2002, Series C, No 97, paragraph 59.

adopt all the measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires. Such measures are only effective when the State adjusts its actions to the Convention's rules on protection.⁷⁸

121. On this same issue, the Tribunal has also declared that:

The general duty of Article 2 of the American Convention implies the adoption of measures in two ways. On the one hand, derogation of rules and practices of any kind that imply the violation of guarantees in the Convention. On the other hand, the issuance of rules and the development of practices leading to an effective enforcement of said guarantees.⁷⁹

122. States parties are obliged to ensure respect for the human rights of all persons subject to their jurisdiction. Therefore, in order to avoid international liability, any protective measures adopted by the State must be appropriate and effective.

123. As a result of the violation of the rights enshrined in Articles 8 and 25 of the American Convention, the State was in breach of its obligation to respect the rights and freedoms enshrined therein, and to ensure to all persons under its jurisdiction the free and full exercise of human rights.⁸⁰ Consequently, the State of Ecuador has the obligation to organize public authority in such a way as to ensure for all persons under its jurisdiction the free and full exercise of human rights. In accordance with the declarations of the Inter-American Court, the above:

applies independently of whether those responsible for violation of said rights are agents of public authority, private individuals, or groups of individuals,⁸¹ as according to the rules of International Human Rights Law, action or omission by any public authority is an act attributable to the State, one that involves its responsibility under the terms set forth in that Convention.⁸²

124. From the above derives also the obligation of States to use diligently all the measures at their disposal to carry out a serious and effective investigation within a reasonable period, so that it may provide the basis of any proceedings, investigation of the events, judgment of, and punishment of those materially and intellectually responsible for any violation of the rights

⁷⁸ I/A Court H.R., "*Cinco Pensionistas*" Case, Judgment February 28, 2003, Series C, No. 98, paragraph 164; I/A Court H.R., "*La última tentación de Cristo*" (*Olmedo Bustos and others*) Case, Judgment February 5, 2001, Series C, No. 73, paragraph 87; I/A Court H.R., *Baena Ricardo and others Case*, Judgment February 2, 2001, Series C, No. 72, paragraph 179; I/A Court H.R., *Durand y Ugarte Case*, Judgment August 16, 2000, Series C, No. 68, paragraph 136; and "*principe allant de sol*"; *Echange de populations grecques et turques, avis consultatif*, 1925, CPJ, series B, No 10, page 20.

⁷⁹ I/A Court H.R., "*Cinco Pensionistas*" Case, Judgment February 28, 2003, Series C, No. 98, paragraph 165; I/A Court H.R., *Baena Ricardo and others, Case*, Judgment February 2, 2001, Series C, No. 72, paragraph 179; I/A Court HR *Castillo Petruzzi and others Case*, Judgment May 30, 1999, Series C, No. 52, Paragraph 207.

⁸⁰ I/A Court H.R., *Juan Humberto Sánchez Case*, Judgment June 7, 2003, Series C, No. 99, paragraph 142; I/A Court H.R., *Bámaca Velásquez Case*, Judgment November 25, 2000, Series C, No. 70, paragraph 210; I/A Court H.R., *Caballero Delgado y Santana*, Judgment June 8, 1995, Series C, No. 22; I/A Court H.R., *Godínez Cruz Case*, Judgment January 20, 1989, Series C, No. 5, paragraphs 175 and 176; and I/A Court H.R., *Velásquez Rodríguez Case*, judgment July 29, 1988, Series C, No. 4, paragraphs 166 and 167.

⁸¹ I/A Court H.R., *Juan Humberto Sánchez Case*, Judgment June 7, 2003, Series C, No. 88, paragraph 142; I/A Court H.R., *Bámaca Velásquez Case*, Judgment November 25, 2000, Series C, No. 70, paragraph 210; and I/A Court H.R., *Case of the "Panel Blanca (Paniagua Morales and Others)*, Judgment March 8, 1998, Series C, No. 37, paragraph 174.

⁸² I/A Court H.R., *Juan Humberto Sánchez Case*, Judgment June 7, 2003, Series C, No. 99, paragraph 142; I/A Court H.R., "*Cinco Pensionistas*" Case, Judgment February 28, 2003, Series C, No. 98, paragraph 163; I/A Court H.R., *Bámaca Velásquez Case*, Judgment November 25, 2000, Series C, No. 70, paragraph 210; I/A Court H.R., *Mayagna Community (Sumo) Tingni Case*, Judgment August 31, 2001, Series C, No. 79, paragraph 154; and I/A Court H.R., *Baena Ricardo and Others Case*, Judgment February 2, 2001, Series C, No. 72, paragraph 178.

protected under the terms of the American Convention. In this respect, the Inter-American Court has stated that the obligation to investigate must be undertaken:

it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.⁸³

125. In fact, it should be pointed out in relation to Article 2 of the American Convention, that the State has not adopted the measures necessary to give effect at the national level to the rights enshrined in the Convention.

126. As a result of the foregoing, the Commission asks the Court to declare that the State of Ecuador is in breach of its obligations established by Articles 1(1) and 2 of the Convention to the detriment of Carmen Susana Cornejo de Albán and Bismarck Wagner Albán Sánchez, because it has neither respected nor protected their rights; nor has it adopted at the national level the legal measures necessary to protect their right to judicial guarantees and protection.

VIII. REPARATIONS AND COSTS

127. Based on the facts alleged in the present application, and on the consistent case law of the Inter-American Court, which holds that it is a principle of international law that “any violation of an international obligation that has caused a loss, generates an obligation to provide adequate reparation for that loss,”⁸⁴ the IACHR presents to the Court its position on the reparations and costs imputable to the State of Ecuador in light of its responsibility for the human rights violations committed to the detriment of Carmen Susana Cornejo de Albán and Bismarck Wagner Albán Sánchez.

128. Article 63(1) of the American Convention states that:

If 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.

129. The Inter-American Commission requests the Court to order the State to remedy the material loss and pain and suffering experienced by Carmen Cornejo de Albán and Bismarck Wagner Albán in the terms indicated below. The Inter-American Commission also requests the Court to order the State to pay the costs and legal expenses incurred by the victims in bringing proceedings at national level, as well as those incurred in bringing the proceedings of the present case before the inter-American system.

⁸³ See, I/A Court H.R., *Case of Myrna Mack Chang*, Judgment November 25, 2003, paragraph 273. See I/A Court H.R., *Juan Humberto Sánchez Case*, Judgment June 7, 2003, Series C, No. 99, paragraph 144; I/A Court H.R., *Bámaca Velásquez Case*, Judgment November 25, 2000. Series C, No. 70, paragraph 212; I/A Court H.R., “*The Street Children*” (*Villagrán Morales et al.*) *Case*, Judgment November 19, 1999. Series C, No. 63, paragraph 226; and I/A Court H.R., *Godínez Cruz Case*, Judgment January 20, 1989, Series C, No. 5, paragraph 188.

⁸⁴ I/A Court H.R., *Lori Berenson Mejía Case*, Judgment November 25, 2004, Series C, No. 119, paragraph 230; I/A Court H.R., *Carpio Nicolle and Others Case*, Judgment November 22, 2004, Series C, No. 117, paragraph 85; I/A Court H.R., *De la Cruz Flores Case*, Judgment November 18, 2004, Series C, No. 115, paragraph 138.

A. Obligation to make reparation

130. According to the consistent case law of the Court:

Article 63(1) of the American Convention codifies a customary law that is one of the fundamental principles of contemporary international law regarding the responsibility of States. Thus, when an illegal act is attributable to the State, the latter incurs immediately the international responsibility for violation of an international rule, with the attendant duty to redress and to make the consequences of the violation.⁸⁵

131. Reparations are crucial in an individual case for ensuring that justice is done, and they constitute a mechanism for raising the finding of the Court beyond the sphere of moral condemnation. Reparations are designed to eliminate the impact of any violations that have been committed. Reparation for damage resulting from the violation of an international obligation requires, where possible, full restitution (*restitutio in integrum*), which amounts to re-establishing the situation that existed prior to the violation.

132. When this restitution is not possible, the Inter-American Court must order the adoption of a series of measures that, in addition to ensuring the protection of the rights that were violated, also make good the consequences of the violations and, when relevant, pay an indemnity in compensation for the losses incurred.⁸⁶ The fundamental objective of compensation in such cases is to make good the damage caused to the injured party in both material and non-material realms.⁸⁷ The calculation of the damages and loss suffered should necessarily be proportionate to the “gravity of the violations and the resulting damage.”⁸⁸ Furthermore, reparations have the additional and no less essential purpose of preventing and deterring violations.

133. The obligation to redress, which is regulated in all its aspects (scope, nature, modes, and establishment of beneficiaries) by international law, cannot be modified by the State nor can it avoid complying with it by invoking provisions of its domestic law.⁸⁹

134. In the present case, the Inter-American Commission has shown that the State incurred international responsibility for the violation of the rights to judicial guarantees and

⁸⁵ I/A Court H.R., *Case of Myrna Mack Chang*, Judgment November 25, 2003, paragraph 142; I/A Court H.R., *Bulacio Case*, Judgment September 18, 2003, Series C, No. 100, paragraph 71; I/A Court H.R., *Juan Humberto Sánchez Case*, judgment June 7, 2003, Series C, No. 99, paragraph 148; I/A Court H.R., “*Cinco Pensionistas*” *Case*, judgment February 28, 2003, Series C, No. 98, paragraph 174, and I/A Court H.R., *Cantos Case*, judgment November 28, 2002, Series C, No. 97, paragraph 67, amongst others.

⁸⁶ I/A Court H.R., *Case of Myrna Mack Chang*. Judgment November 25, 2003, paragraph 143; I/A Court H.R., *Bulacio Case*, Judgment September 18, 2003, Series C, No. 100, paragraph 72, and I/A Court H.R., *Juan Humberto Sánchez*, Judgment June 7, 2003, Series C, No. 99, paragraph 149.

⁸⁷ I/A Court H.R., *Bulacio Case*, judgment September 18, 2003, Series C, No. 100, paragraph 70; I/A Court H.R., *Hilaire, Constantine and Benjamin and Others Case*, judgment June 21, 2002, Series C, No. 94, paragraph 204; and I/A Court H.R., “*Panel Blanca*” (*Paniagua Morales and Others*) *Case, Reparations* (Article 63.1 American Convention on Human Rights). Judgment May 25, 2001. Series C, No. 76, paragraph 80.

⁸⁸ United Nations, *Basic Principles and Guidelines on the Right to Reparation for victims of gross violations of human rights and humanitarian law*, E/CN.4/Sub.2/1996/17, paragraph 7. Also, See I/A Court H.R., *Hilaire, Constantine, y Benjamin and Others Case*, Judgment June 21, 2002, Series C, No. 94, paragraph 205; *Cantoral Benavides Case, Reparations* (Article 63.1 American Convention on Human Rights). Judgment December 3, 2001, Series C, No. 88, paragraph 42, and *Cesti Hurtado Case, Reparations* (Article 63.1 American Convention on Human Rights). Judgment May 31, 2001, Series C, No. 78, paragraph 36.

⁸⁹ I/A Court H.R., *Case of Myrna Mack Chang*, Judgment November 25, 2003, paragraph 143; I/A Court H.R., *Bulacio Case*, Judgment September 18, 2003, Series C, No. 100, paragraph 72, and I/A Court H.R., *Juan Humberto Sánchez Case*, Judgment June 7, 2003, Series C, No. 99, paragraph 149.

protection, to the detriment of Carmen Cornejo de Albán, and Bismarck Wagner Albán, by not ensuring effective access to procedural measures established to investigate and verify the death of their daughter Laura Albán Cornejo.

135. Finally, and with regard to the legal provisions established by the Court which grant autonomous powers of representation to the individual, the Inter-American Commission in this application will restrict itself to the general criteria affecting reparations and costs which it considers should be applied by the Tribunal in the present case. The Inter-American Commission understands that it is for Carmen Susana Albán and her husband Bismarck Wagner Albán Sánchez and their representatives to specify their claims under Article 63 of the American Convention and Articles 23 and concurrent clauses of the Rules of Procedure of the Court. Should the injured party opt not to make use of this right, the Court is requested to grant the IACHR an opportunity during the procedure to quantify the claims. The Inter-American Commission would like to state that it will notify the Court at the appropriate moment if it has any observation to make regarding the quantification of the position of the victims or their representatives.

B. Reparation measures

136. The Court has stated that reparations consist of measures that tend to make the effects of the violations committed disappear.⁹⁰ The measures represent the different ways in which a State may resolve the international responsibility it has incurred, and under international laws these consist of procedures for restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.⁹¹

137. Therefore, the United Nations Human Rights Committee established that:

In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁹²

138. By virtue of the foregoing, the Inter-American Commission expects the Court to order wide-ranging reparation measures and in this way take a stand against the impunity which characterizes most of the human rights violations in member states of the Organization of American States. In order to do this, legal and administrative mechanisms need to be set up and strengthened

⁹⁰ I/A Court H.R., *Case of Myrna Mack Chang*, Judgment November 25, 2003, paragraph 143, paragraph 237; I/A Court H.R., *Cantos Case*, Judgment November 28, 2002, Series C, No. 97, paragraph 108, and I/A Court H.R., *Carazco Case, Reparations*, (Article 63.1, American Convention on Human Rights). Judgment August 29, 2002, Series C, No. 95, paragraph 78.

⁹¹ See United Nations, *Definitive Report presented by Theo Van Boven, Special Rapporteur on the right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Humanitarian Law*, E/CN/Sub2/1990/10, July 26 1990. See also: I/A Court H.R., *Blake Case, Reparations*, (Article 63.1 American Convention on Human Rights), Judgment January 22, 1999, Series C, No. 48, paragraph 31; *Suárez Rosero Case, Reparations*, (Article 63.1 American Convention on Human Rights), judgment January 20, 1999, Series C, No. 44, paragraph 41, and I/A Court H.R., *Castillo Páez Case, Reparations* (Article 63.1 American Convention on Human Rights), Judgment November 27, 1998, Series C, No. 43.

⁹² United Nations Human Rights Committee, Subcommittee on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1996/17. *The Administration of Justice and the human rights of detainees: Revised set of basic Principles and Guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law*, prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117, May 24, 1996, paragraph 7.

that are quick, fair, affordable, and accessible to allow victims to obtain reparation through official channels.

139. According to the evidence presented in the present application, and in the light of the criteria established by the case history of the Tribunal, the Inter-American Commission presents its conclusions and position regarding the reparation measures for material damages as well as pain and suffering, and relating also to any other forms of reparation and satisfaction that are appropriate in the instant case.

b.1 Reparation measures

140. The Court has established basic criteria to guide decisions on fair reparation designed to provide adequate and effective economic compensation for damages incurred as a result of human rights violations. The Court has also established that indemnification is merely compensatory in nature and will be granted to the extent and degree necessary to make up for material as well as non-material damage caused.⁹³

b.1.i Material damages

141. The position of the Court in its treatment of reparations has been consistent in stating that material damages includes consequential damage [*daño emergente*] and loss of income, as well as invisible damage of pain and suffering not only of the victim but in certain cases also of his family.⁹⁴

142. With regard to consequential damage, it is for the Court to consider the material costs incurred by Carmen Susana de Albán and Bismarck Albán Sánchez in their ceaseless search to investigate the death of their daughter.⁹⁵ Consequently, these damages will cover: the cost of the steps taken to acquire the clinical record, the expenses associated with the medical certification of the cause of death, and the costs of taking proceedings before the courts. The Commission considers that in order to determine the appropriate fair and just compensation it should emphasize that the parents of Laura Albán Cornejo have spent several years trying to clarify the cause of her death and to bring to justice those responsible for it, still without success almost twenty years after her death.

143. Taking this last consideration into account and without prejudice to the position that the victims' representatives might present at the appropriate moment in the proceedings, the IACHR

⁹³ I/A Court H.R., *Hilaire, Constantine and Benjamin and Others Case*, Judgment June 21, 2002, Series C, No. 91, paragraph 201; I/A Court H.R., "*Panel Blanca*" (*Paniagua Morales and Others*) *Case, Reparations* (Art. 63.1 American Convention on Human Rights). Judgment May 25, 2001, Series C, No. 76, paragraph 80; I/A Court H.R., *Castillo Páez Case, Reparations*, (Art.63.1 American Convention on Human Rights), Judgment November 27, 1998, Series C, No. 43, paragraph 52, and I/A Court HR *Garrido and Baigorria Case, Reparations* (Article 63.1 American Convention on Human Rights). Judgment August 27, 1998, Series C, No. 39. paragraph 41.

⁹⁴ See, for example, I/A Court H.R., *Caracazo Case, Reparations* (Article 63.1 American Convention on Human Rights), Judgment August 29, 2002, Series C, No. 95; I/A Court H.R., *Hilaire, Constantine and Benjamin and Others Case*, judgment June 21, 2002, Series C, No. 94; I/A Court H.R., *Trujillo Oroza Case, Reparations*, (Article 63.1 American Convention on Human Rights), Judgment February 27, 2002, Series C, No. 92, and *Bámaca Velásquez Case, Reparations* (Article 63.1 American Convention on Human Rights), Judgment February 22, 2002, Series C, No. 91.

⁹⁵ See I/A Court H.R., *Loayza Tamayo Case, Reparaciones* (Article 63.1 American Convention on Human Rights), Judgment November 27, 1998, Series C, No. 42, paragraph 147, and I/A Court H.R., *Aloeboetoe and Others Case, Reparations*, (Article 63.1 American Convention on Human Rights), Judgment September 10, 1993, Series C, No 15, paragraph 50.

requests the Court to set the amount of indemnity to take into account consequential damage and loss of income, in the full use of its powers in this area.

b.1.ii. Non-pecuniary damages

144. With regard to non-pecuniary damages the Court has found that:

Non-pecuniary damages may include the suffering and hardship caused to the direct victim and to his next of kin, of a non-pecuniary nature, in the living conditions of the victim or his family. Since it is not possible to allocate a precise monetary equivalent to non-pecuniary damage, it can only be compensated in two ways in order to make integral reparation to the victims. First, by the payment of a sum of money or the granting of goods or services with a monetary value, that the Court decides by the reasonable exercise of judicial discretion and in terms of fairness. Second, by performing acts or implementing projects with public recognition or repercussion designed to restore the good name of the victims, acknowledge their dignity, console the bereaved, or broadcast a message that officially condemns the human rights violations in question and makes a commitment to efforts designed to ensure that they do not happen again.⁹⁶

145. With regard to the non-pecuniary damage experienced by the victims, the Court makes a presumption in relation to the non-pecuniary damage experienced by victims of human rights violations and their families and states that it is evidently part of human nature that any person subjected to aggressions and attacks on his human rights experiences pain and suffering, and “no evidence is needed to reach said conclusion”.⁹⁷

146. In order to establish the invisible damages incurred in the present case, the profound pain experienced by the Albán family must be taken into account not only because they suffered the loss of their daughter, but also because they have suffered years of trying to investigate her death using every means at their disposal. This suffering was long term and remains today because in spite of all their efforts they do not feel they have achieved justice. It is important to note also that their lives have been transformed to the extent that Mrs. Albán, having so closely identified with the case, was elected Chairperson of the Association against medical malpractice.

147. In accordance with the above and on the basis of the particular considerations of this case, the intense uncertainty and the lack of judicial redress experienced by Carmen Susana Cornejo de Albán and Bismarck Albán Sánchez for the respective events, as well as the impact on their lives, the Commission requests the Court to order payment of compensation for pain and suffering, according to what is just and with regard to the specific circumstances of the case.

b.2 Measures for satisfaction and guarantees on non-repetition

148. Satisfaction is understood as any measure that the instigator of any violation must undertake under the terms of international instruments or customary law, the purpose of which is to acknowledge the perpetration of an illicit act.⁹⁸ Satisfaction is achieved when three purposes are

⁹⁶ I/A Court H.R., “*Maritza Urrutia*” Case, Judgment, November 27, 2003, paragraph 161; I/A Court H.R., *Case of Myrna Mack Chang*, Judgment November 25, 2003, paragraph 255, and I/A Court H.R., *Bulacio Case*, Judgment September 18, 2003, Series C, No. 100, paragraph 90.

⁹⁷ I/A Court H.R., *Juan Humberto Sánchez*, Judgment June 7, 2003, Series C, No. 99, paragraph 175; *El Caracazo Case, Reparations*, (Article 63.1 American Convention on Human Rights), Judgment August 29, 2002, Series C, No. 95, paragraph 50 e), and *Trujillo Oroza Case, Reparations*, (Article 63.1 American Convention on Human Rights), Judgment February 27, 2002, Series C, No. 92, paragraph 88.

⁹⁸ Brownlie, *State Responsibility, Part 1*. Clarendon Press, Oxford, 1983, page 208.

fulfilled, generally in a cumulative fashion: apology, or other gesture that reflects acknowledgment of responsibility for the act in question; the judgment or punishment of the individuals concerned, and the taking of steps to ensure the damage is not repeated.⁹⁹

149. The particular circumstances of this case give rise to an expectation on State to satisfy the victims¹⁰⁰ by establishing measures (legislative or of any other nature) that make it possible to identify medical malpractice as criminal conduct. In this sense, as the Inter-American Court has indicated:

To comply with this obligation, the State must also remove all de facto and legal mechanisms and obstacles that maintain impunity in the present case; it must provide sufficient security measures to the judicial authorities, prosecutors, witnesses, legal operators, and to the next of kin of [the victim] and use all means available to it so as to expedite the proceeding.¹⁰¹

C. The beneficiaries

150. Article 63(1) of the American Convention demands that the consequences of a violation be remedied and that “fair compensation be paid to the injured party.” The persons who have the right to such compensation are generally those directly injured by the events of the violation in question.

151. Given the nature of the present case, the beneficiaries of the reparations ordered by the Court as a consequence of the human rights violations perpetrated by the State to the detriment of the victims are: Carmen Cornejo de Albán and Bismarck Wagner Albán, as well as Omar, Luís, Bismarck, and Flavia, all with the surname Albán Cornejo, who should be included in the category of victims and be beneficiaries of any reparations established by the Court because they have been profoundly affected by the events.

D. Costs and expenses

152. The Court has stated that costs and expenses should be included in the concept of compensation enshrined in Article 63(1) of the American Convention.

153. In line with what has consistently been stated in the case history of the Court, costs and expenses are included in the concept of reparation embodied in Article 63(1) of the American Convention because the measures taken by the victim to accede to international justice imply expenditure and commitments of a financial nature that must be compensated.¹⁰² The Tribunal also considers that the costs referred to in Article 56(1)(h) of the Rules of Procedure of the Court include any necessary and reasonable costs incurred by the victims in order to accede to the supervisory organs of the American Convention, including in those costs, the fees of legal assistance. In the

⁹⁹ *Idem.*

¹⁰⁰ I/A Court H.R., *Case of Myrna Mack Chang*, Judgment November 25, 2003, paragraph 274; I/A Court H.R., *Trujillo Oroza Case, Reparations* (Article 63.1 American Convention on Human Rights). Judgment February 29, 2002. Series C, No. 92, paragraph 114; I/A Court H.R., *Bámaca Velásquez, Reparations*, (Article 63.1 American Convention on Human Rights). Judgment February 22, 2002, Series C, No. 91, paragraph 76; *Castillo Paez Case*, Judgment November 3, 1997, Series C, No. 34, paragraph 90.

¹⁰¹ I/A Court H.R., *Case of Myrna Mack Chang*, Judgment 25 November, 2003, paragraph 276.

¹⁰² I/A Court H.R., *Case of Myrna Mack Chang*, judgment November 25, 2003, paragraph 290; I/A Court H.R., “*Maritza Urrutia*” *Case*, judgment November 27, 2003, paragraph 182, and I/A Court H.R., *Bulacio Case*, Judgment September 18, 2003, Series C, No. 100, paragraph 150.

light of this, the Court must prudently assess the scope of the costs and expenses,¹⁰³ having studied the circumstances of the specific case, amongst others.

154. In the present case, the Commission requests the Court, once it has heard the victims, to order the Ecuadorian State to pay the expenses incurred before the authorities of the domestic jurisdiction and also those incurred during the international proceedings before the Commission, and those arising as a consequence of bringing the present proceedings before the Court.

IX. CONCLUSIONS

155. The State of Ecuador is guilty of the violation of Articles 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection), in connection with Articles 1(1) (Obligation to Respect Rights), and 2 (Domestic Legal Effects) of the American Convention, by not adopting in its domestic legislation and practice the appropriate provisions or mechanisms that would allow the operation and fulfillment of its duty to institute criminal proceedings when rights that call for public action are affected, which has placed a burden on the injured party. Furthermore, the State is guilty of violations by not attempting to arrest the person who in the domestic criminal jurisdiction was identified as possibly responsible for the “praeterintentional homicide by administering substances” to the detriment of Laura Albán Cornejo.

X. PETITION

156. The Inter-American Commission requests the Court to conclude and declare that the State of Ecuador has not ensured the effective access to judicial guarantees and protection of Mrs. Carmen Susana Cornejo de Albán, and Mr. Bismarck Wagner Albán Sánchez and therefore has violated the following rights enshrined in the American Convention: judicial guarantees (Article 8), and judicial protection (Article 25), in relation to the general obligations to respect and protect rights and to adopt the measures necessary in domestic law to reflect said international instrument, in accordance with its Articles 1(1) and 2.

157. The Inter-American Commission consequently requests the Court to order the State to:

- a. To adopt all legislative or other measures necessary to ensure effective respect in Ecuador for the right to judicial protection in line with Article 25 of the Convention, and the right to a fair trial in accordance with Article 8(1) of the Convention, with regard to the pursuit of criminal action in a case of praeterintentional homicide;
- b. To use all the means at its disposal to apprehend the person charged with the crime of the homicide of Laura Albán Cornejo, so that he might appear in criminal proceedings brought against him, and so that a final judgment may be reached on criminal responsibility in the case;
- c. To carry out a public act of acknowledgment of the State’s international responsibility in relation to the events of the case and its lack of due diligence in seeking justice with reference to the death of Laura Albán Cornejo;

¹⁰³ I/A Court H.R., “*Panel Blanca*” (*Paniagua Morales y Otros*) vs *Guatemala, Reparations*, Judgment May 25, 2001, paragraph 212.

- d. To adopt all measures necessary for the adequate reparation for, or mitigation of, the damage caused to the victims, covering both the pain and suffering as well as the material aspects;
- e. To adopt all measures necessary to ensure that similar events may not happen again in the future, in compliance with its duties to respect and protect the rights enshrined in the American Convention; and
- f. To pay any costs and expenses incurred by the victims in processing the case at the domestic level, and in bringing the instant case before the inter-American system.

XI. SUPPORTING EVIDENCE

158. In support of the arguments on fact and law in the present application, the Commission hereby attaches the documentary evidence listed below:

A. Documentary evidence

- APPENDIX 1:** IACHR, Report 7/06, Case 12,406, Laura Albán Cornejo, Merits, Ecuador, February 28, 2006.
- APPENDIX 2:** IACHR, Report 69/02, Case 12,406, Laura Albán Cornejo, Admissibility, Ecuador, October 23, 2006.
- APPENDIX 3:** File of the case before the Inter-American Commission
- ANNEX 1:** Medical record of patient Laura Susana Albán Cornejo, Metropolitan Hospital, Quito, Ecuador (date of admission: December 13, 1987; date of discharge: December 18, 1987).
- ANNEX 2:** Prescription sheet patient Laura Susana Albán Cornejo
- ANNEX 3:** Laboratory tests of Laura Susana Albán Cornejo, dated December 16, 1987.
- ANNEX 4:** Notification of Certificate of Discharge patient Laura Susana Albán Cornejo, Metropolitan Hospital, Quito, Ecuador (reason for discharge: death) dated December 18, 1987.
- ANNEX 5:** Simple cost-free Inhumation and Burial Certificate, Republic of Ecuador, General Directorate of Civil Registry, Identification, and Registration, dated December 18, 1987.
- ANNEX 6:** Letter from Mrs. Laura Susana Cornejo de Albán to Mr. Julio Prado Vallejo dated December 26, 1989.
- ANNEX 7:** Letter from Mr. Julio Prado Vallejo, Chairman of the Human Rights Commission, to Mr. Patricio Jaramillo, Director of the Metropolitan Hospital dated June 28, 1990.
- ANNEX 8:** Letter from Dr. Patricio Jaramillo, Medical Director and Mr. Gonzalo Cordovéz, General Manager to Mr. Julio Prado Vallejo, Chairman of the Human Rights Commission, dated August 6, 1990.

- ANNEX 9:** Letter from Dr. Nicolás Romero and Mrs. Carmen Cornejo to the Director of the Metropolitan Hospital, dated May 31, 1994.
- ANNEX 10:** Letter from Sister Elsie Monge, Chairperson of CEDHU (the Ecumenical Commission on Human Rights) to Dr. Wellington Sandoval, Medical Director of the Metropolitan Hospital, dated November 15, 1994.
- ANNEX 11:** Letter from Sister Elsie Monge, Chairperson of CEDHU (the Ecumenical Commission on Human Rights) to Dr. Wellington Sandoval, Medical Director of the Metropolitan Hospital, dated November 24, 1994.
- ANNEX 12:** Letter from Dr. Wellington Sandoval, Medical Director of the Metropolitan Hospital to Sister Elsie Monge, Chairperson of CEDHU (the Ecumenical Commission on Human Rights) dated December 19, 1994.
- ANNEX 13:** Letter from Sister Elsie Monge, Chairperson of CEDHU (the Ecumenical Commission on Human Rights) to Dr. Wellington Sandoval, Medical Director of the Metropolitan Hospital, dated January 5, 1995.
- ANNEX 14:** Letter from Sister Elsie Monge, Chairperson of CEDHU (the Ecumenical Commission on Human Rights) to Dr. Wellington Sandoval, Medical Director of the Metropolitan Hospital, dated April 6, 1995.
- ANNEX 15:** Letter from Dr. Wellington Sandoval, Medical Director of the Metropolitan Hospital to Sister Elsie Monge, Chairperson of CEDHU (the Ecumenical Commission on Human Rights), dated April 21, 1995.
- ANNEX 16:** "Hospital responds to all requests," HOY Newspaper, Ecuador, October 15, 1996, page 1B.
- ANNEX 17:** Document from Carmen Cornejo de Albán to the Judge of the Quito Civil Court requesting him to name a time and date for the General Director and Medical Director of the Metropolitan Hospital to present the medical record, the results of laboratory tests, scans, monitoring records, etc, relating to Miss Laura Albán Cornejo, dated November 6, 1990. The same document includes the writ issued by the Eighth Civil Judge in Pichincha requesting the presentation of the above documents.
- ANNEX 18:** Document addressed by Mr. Gonzalo Cordobés and Dr. Patricio Jaramillo to the Eighth Civil Judge in Pichincha relating to the procedure for the proposed presentation, indicates post box address for further notifications, dated November 15, 1990.
- ANNEX 19:** Record of presentation of documents, Eighth Civil Judge in Pichincha, dated November 16, 1990.
- ANNEX 20:** Writ of prior proceeding in deposition No. 118-93, First Civil Court which imposes fine on Dr. Ramiro Montenegro López, until such time as he appears before the court and renders deposition, dated February 17, 1994.
- ANNEX 21:** Document from Carmen Susana Cornejo Alarcón de Albán to the First Civil Court in Pichincha, dated February 21, 1994.

- ANNEX 22:** Document from Dr. Ramiro Montenegro to the First Civil Court in Pichincha, undated.
- ANNEX 23:** "Death Still Unresolved: Continuing Controversy in case of alleged medical malpractice." HOY Newspaper, 3B, November 4, 1996.
- ANNEX 24:** Letter from Mrs. Carmen Susana Cornejo de Albán, to the Attorney General, Dr. Fernando Casares, dated August 3, 1995, (unstamped).
- ANNEX 25:** Letter from Mrs. Carmen Susana Cornejo de Albán to the Attorney General Dr. Guillermo Castro Dager, dated November 1, 1996, (stamped).
- ANNEX 26:** Letter from Mrs. Carmen Susana Cornejo de Albán, to the Attorney General Dr. Guillermo Castro Dager, dated November 25, 1996, (stamped).
- ANNEX 27:** Letter from Mrs. Carmen Susana Cornejo de Albán to the Attorney General, dated April 29, 1997, (stamped).
- ANNEX 28:** Letter from Alexis Ponce, Spokesman for the Human Rights Permanent Assembly of Ecuador to the Pichincha Prosecutor.
- ANNEX 29:** Writ of Court Order for investigation of crime "in order to investigate and identify the perpetrators, the accomplices and those who concealed the crime under investigation," Fifth Criminal Court in Pichincha, dated January 10, 1997.
- ANNEX 30:** Official letter No. 1120-OIDP to the Fifth Criminal Judge in Pichincha from the Office of Criminal Investigations in Pichincha, in which the results of the investigation were remitted), dated January 28, 1997.
- ANNEX 31:** Statement by Dr. Ramiro Montenegro López to the National Office of Investigations, dated January 23, 1997.
- ANNEX 32:** Accusatory fiscal report issued by Dr. Marco V. Lastra M, Fifth Criminal Prosecutor in Pichincha, received by the Tribunal on July 24, 1998.
- ANNEX 33:** Document directed to the Fifth Criminal Court of Pichincha, formalizing the private accusation, dated January 29, 1997.
- ANNEX 34:** Decree of temporary stay of proceedings, Fifth Criminal Court, dated December 14, 1998, in which reception is recorded of the private accusation which is included in the case.
- ANNEX 35:** Accusatory fiscal report issued by José Ramón Marín, Pichincha Prosecutor, presented before the Sixth Court of the Superior Court of Quito, June 15, 1999. Criminal Case No. 38-99.
- ANNEX 36:** Document to the Sixth Court of the Superior Court of Justice of Quito, Criminal Case No. 38-99.
- ANNEX 37:** Decree of Prescription, dated December 13, 1999, issued by the Sixth Court of the Superior Court of Justice, Criminal Case No. 38-99.

- ANNEX 38:** Document to the Sixth Court of the Superior Court of Justice of Quito, requesting the annulment of the decree of prescription of December 13, 1999, (date illegible). Criminal case No. 38-99.
- ANNEX 39:** Decree issued by the Sixth Court of the Superior Court of Justice dated February 16, 2000, refusing the request to annul the decree of prescription. Criminal Case No. 38-99.
- ANNEX 40:** Decree issued by the Sixth Court of the Superior Court of Justice dated April 24, 2000, refusing the temporary stay of proceedings.
- ANNEX 41:** Decree issued by the Sixth Court of the Superior Court of Justice, notified on June 15, 2000, in which the "appeal for review of fact" lodged by Fabián Ernesto Espinoza Cuesta was declared contrary to law.
- ANNEX 42:** Record of international entries and departures of Fabian Espinosa (sic), dated January 23, 2001. Signed by Mr. Roberto Padilla Mósquera, police lieutenant. Stamped by the Registry of the National Office for Migration, Statistics and Archives of the National Office for Migration.
- ANNEX 43:** Official Document No. 101 CMP-95, File No 1/93. Resolution of the Board of Honor of the Medical College of Pichincha, January 4, 1995.
- ANNEX 44:**
- a) Specialist Medical Report: Examination and study of the Medical Record. Document to Fifth Judge in Pichincha, dated September 12, 1997. Signed by Dr. José A. Vergara G., Specialist Legal Doctor, and Dr. Carlos Salinas, Medical Expert.
 - b) Addition to the Specialist Medical Report. Document to Fifth Judge in Pichincha, dated September 30, 1997. Signed by Dr. José A. Vergara G., Specialist Legal Doctor, and Dr. Carlos Salinas, Medical Expert.
 - c) Medical certificate issued by Dr. Marcelo Cruz dated February 1, 1995.
 - d) Decree issued by the Sixth Court of the Superior Court of Justice dated September 20, 1999, requesting Drs. Marcelo Cruz Utreras and Iván Cruz Utreras to "do us the honor of sharing your knowledge." Dr. Marcelo Cruz Utreras was also asked to provide further details regarding the medical certificate he issued on February 1, 1995.
 - e) Reply to the request from the Sixth Court of the Superior Court of Justice by Dr. Marcelo E. Cruz, dated September 23, 1999.
 - f) Reply to the request from the Sixth Court of the Superior Court of Justice by Dr. Iván Cruz Utreras, dated September 27, 1999.
- ANNEX 45:** Copy of the book by Samaniego Rojas, Edgar and Ruperto Escalera Busto, "Fundamento de Farmacología Médica", page 297. Text used (according to the victims) for study in medical faculties.
- ANNEX 46:** Copy of the applicable Criminal Code with the description of the relevant articles.

- ANNEX 47:** "A pain that never ends: young girl dies in 1987 in the Metropolitan Hospital. The family is still looking for the person alleged responsible." HOY newspaper, Ecuador, October 15, 1996, page 1b.
- ANNEX 48:** Code of Medical Ethics
- ANNEX 49:** Applicable Code of Criminal Proceedings for the events of the case.
- ANNEX 50:** Specialist CV
- ANNEX 51:** Copy of the power granted the representative.

159. In addition, the Commission requested the Court to require the State to present whole and certified copies of the judicial file relating to the present case.

B. Expert and witness evidence

a. Witness evidence

160. The Commission requests the Court to accept the statements by the following witnesses:

1. **Carmen Susana Cornejo de Albán**, mother of Laura Albán. The Commission offers this witness to present her evidence regarding the arduous process she has undergone in her attempt to investigate the causes of the death of her daughter, one of several aspects relating to the objective and purpose of the present application. The address, to which correspondence may be sent to her, belongs to her legal representative, detailed *infra*.

2. **Bismarck Albán Sánchez**, father of Laura Albán. The Commission offers this witness to present his evidence regarding the arduous process he has undergone in his attempt to investigate the causes of the death of his daughter, one of several aspects relating to the objective and purpose of the present application. The address, to which correspondence may be sent to him, belongs to his legal representative, detailed *infra*.

b. Expert evidence

161. The Commission requests the Court to call the following experts to give evidence:

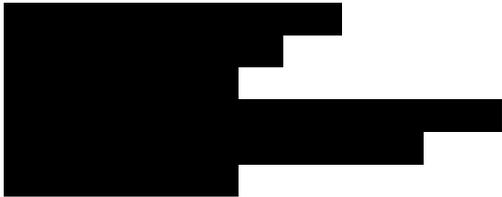
1. **Ernesto Albán Gómez**, lawyer, specialist in Ecuadorian legislation. The Commission offers this expert so that he may describe to the Court the aspects of Ecuadorian legislation relating to the scope of criminal provisions governing medical malpractice and the duties of judges and authorities with regard to such provisions, amongst other aspects relating to the objective and purpose of the present application.

2. **Raúl Moscoso Álvarez**, lawyer, specialist in Ecuadorian constitutional and procedural law. The Commission offers this expert so that he may describe the procedural aspects of the judgments relating to medical malpractice and the duty in Ecuadorian law and in forensic practice to respect the guarantees of due process. His field of expertise will also take in constitutional aspects relating to medical malpractice, amongst other aspects relating to the objective and purpose of the present application.

XII. PARTICULARS OF THE ORIGINAL PETITIONERS AND VICTIMS

162. In Accordance with the terms of Article 33 of the Rules of Procedure of the Court, the Inter-American Commission informs:

163. The original petitioners in the present case are Mrs. Carmen Susana Cornejo de Albán, and her husband, Mr. Bismarck Albán Sánchez. Both have designated power according to the attached document to Drs. Farith Simon Campaña and Alejandro Ponce Villacís, from the Legal Clinics of the San Francisco University of Quito to represent them in any subsequent proceedings in the present case. At the same time, it is confirmed that all communications should be remitted to the following address:



Washington, D.C.
July 5, 2006