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

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

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

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

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

B) Rights and duties in the area of health care

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

5. The legal interests at stake and patient rights lie at the foundation of medical professional liability, which combines both the principles and rules of professional ethics governing medical practice and the technical rules to be

observed by health practitioners as the main elements. These become increasingly more developed and strict, hand in hand with the progress of science and technology. The liability of health professionals rests on both pillars.

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

C) Health care legislation. Medical file.

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

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

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

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

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

D) Health care legislation. Liability. Crime definition

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

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

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

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

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

E) Expert bodies

17. In the instant case, the Court has taken into consideration the arguments raised by the parties in connection with the participation of a professional body (the Honor Tribunal) that was asked to issue an opinion on certain aspects of the medical treatment administered to the patient. This draws attention towards the

role played by the professional bodies in charge of making determinations on ethical or technical matters. It should be noted that these might be legally relevant to the members of the relevant association, to third parties asserting professional responsibility or a right to access (professionally certified) information regarding certain facts, and, basically, for the formation of more-or-less conclusive criteria concerning the provision of highly important services (as the protection of life and humane treatment, through health care) and the potential expectations of society in this regard.

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

19. Furthermore, it is necessary to analyze the possible impact or implications of such opinions on third parties who are not members of the relevant entity, based on whether such parties actually hold certain effective rights or are mere witnesses and, in a way, the “powerless” targets of the entity’s decisions. It is also necessary to determine whether the decisions of any such entity condition, subordinate or influence the performance of the duties or the exercise of the powers attributed to the formal organs of the State for the performance of inherently public functions such as the administration of justice or the oversight of health-care providers.

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

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

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

e) Human rights and bioethics

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

24. It is my view that the initiatives to move ahead in the examination and issuing of a declaration and, in due time, a treaty examining and providing orientation on this subject – one that is plagued with questions and grey areas – in the Americas – or, at least, in Latin America – are feasible. The existence of a regional instrument associated to the general and special international instruments makes sense insofar as emphasis may be placed on problems that present specific features in the various countries in the area, considering the existing conditions of poverty, lack of information, insufficient technology, vulnerable groups, health services coverage, and so on.

G) Statute of limitations on the criminal action

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

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

27. The international Law on human rights has brought about a new approach to certain rights that are some times associated with the great dogmas of the liberal movement that introduced precious reforms into the older criminal regulations, particularly from the 18th century onwards. I am not about to argue that the statute of limitations (a guarantee releasing the perpetrator of crime from the imposition of criminal liability) is necessarily one of those "new revised rights." The statute of

limitations – which reflects the dilemma between justice and certainty – can be traced to long times past. Whatever the case, under the most constant criminal regulations, it has become a defense for the defendant, and it is so categorized as one of the rights the defendant may assert against criminal prosecution by the State.

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

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

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

Judge Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary