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REPORT No. 80/15
CASE 12.689

REPORT ON MERITS (PUBLICATION)

J.S.C.H AND M.G.S
MEXICO

Approved by the Commission at its session No. 2054 held on October 28, 2015
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Organization of American States

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OCTOBER 28, 2015

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[1] Commissioner José de Jesús Orozco Henríquez, a Mexican national, did not participate in the discussion or decision of the present case, in accordance with Article 17.2.a of the Rules of Procedure of the IACHR.

[2] Through resolution 01/09 dated March 20, 2009, the Commission decided not to reveal the identity of the alleged victims when it Publisher the Report on Admissibility No. 02/09 and to replace their names with their initials, adding a footnote indicating that the identity of the alleged victims is not being disclosed at the request of the petitioners.

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I. SUMMARY

1. The Inter-American Commission on Human Rights (hereinafter "the Commission", "the Inter-American Commission" or "the IACHR") received two petitions lodged by Pedro Isabel Morales Ache, Ricardo González Gutiérrez, and Cynthia Paola Lepe González (hereinafter "the petitioners")[3]: one on April 9, 2004, on behalf of J.S.C.H., a former driver with the rank of Second Lieutenant in the Secretariat of National Defense (Petition 302-04); and the other on April 21, 2004, on behalf of M.G.S., a former infantry corporal in the Secretariat of National Defense (Petition 386-04), (hereinafter the "alleged victims"). The petitions were lodged against the United Mexican States (hereinafter "the State" or "the Mexican State" or "Mexico"), for alleged discrimination against the alleged victims because they were discharged from the Mexican Army because they have the human immunodeficiency virus (hereinafter "HIV"), as well as for alleged violation of their rights to a fair trial and judicial protection.

2. On October 3, 2008, it was decided to join petitions 302-04 and 386-04.

3. On February 4 2009, the Commission approved admissibility report No. 03/09[4] and assigned it case number 12.689. In the Report it concluded that it was competent to examine the complaint and decided on the basis of factual and legal arguments, and without prejudging the merits of the case, to declare the petition admissible in relation to alleged violations of Articles 2, 5(1), 8(1), 11, and 24 of the American Convention on Human Rights (hereinafter the "American Convention" or the "Convention"), in connection with the general obligations provided at Article 1(1) of said international instrument.

4. The petitioners maintain that the alleged victims were discharged from the Mexican Army because they have HIV and that that constituted a form of discrimination against persons with that disease. Further, they hold that discharge from the Mexican army held grave consequences for the alleged victims: inter alia, cessation of payment of their salaries as servicemen, loss of the right to receive a pension in accordance with military laws, and loss of their right, as members of the Armed Forces, to receive medical care and drugs needed to treat HIV. They also maintain that the disclosure of information about their state of health to non-medical Armed Forces personnel constituted a violation of their private life.

5. The Mexican State argues that in the instant case there were no violations of the human rights of J.S.C.H and M.G.S. It states that the alleged victims, in contracting HIV, placed themselves in a situation attributable only to them that rendered them unfit for duties in the Army. Consequently, their "acquired illness" warranted their discharge from active duty and it was appropriate to initiate the procedure for retirement due to unfitness acquired outside the performance of duty in accordance with military laws and regulations.

6. In this report, after assessing the positions of the parties and analyzing the facts of the case in accordance with Article 50 of the American Convention, the IACHR concludes that the Mexican State violated Articles 2, 8.1, 11 and 24 of the American Convention, to the detriment of J.S.C.H. and M.G.S., in connection with Article 1.1 of that international instrument.

[3] Through communication dated March 16, 2009, Graciela Rodríguez Manzo and Luis Miguel Cano López were included as co-petitioners.

[4] *See, IACHR, Report No. 03/09 (Admissibility), Petitions 302-04 and 386-04, J.S.C.H. and M.G.S., February 4, 2009.*

II. PROCESSING SUBSEQUENT TO THE ADMISSIBILITY REPORT

7. In Report No. 02/09 dated February 4, 2009, the Commission concluded that the petition was admissible in relation to Articles 2, 5.1, 8.1, 11 and 24 of the American Convention in connection with Article 1.1 of that international instrument. The Commission transmitted the report to the petitioners and to the State on February 10, 2009, and gave them two months to submit additional observations on the merits. It also placed itself at the disposal of the parties, in accordance with Article 48.1.f of the American Convention, with a view to reaching a friendly settlement of the matter.

8. The petitioners' additional observations on the merits were received on May 20, 2009 and those of the State on December 17, 2009.

9. In addition, the IACHR received information from the petitioners on the following dates: March 17, 2009, March 5, 2010, September 20, 2010, July 3, 2011, and July 31, 2011. Those communications were duly forwarded to the State.

10. The IACHR received observations from the State on the following dates: June 21, 2010 and December 13, 2010. Those communications were duly forwarded to the petitioners.

III. POSITIONS OF THE PARTIES

A. The Petitioners

11. The petitioners maintain that the alleged victims -- J.S.C.H., who served for 19 years as a driver with the rank of Second Lieutenant attached to the Seventh Section of the General Staff of the Secretariat of National Defense, and M.G.S., who held the rank of Infantry Corporal in the Secretariat of National Defense with 12 years of service on his record – were victims of discrimination in that they were discharged from the Mexican Army in 1998 and 2002, respectively, because they had HIV. They also allege that discharge from the Mexican army held grave consequences for the alleged victims: in particular, cessation of payment of their salaries as servicemen, loss of the right to receive a pension in accordance with military laws, loss of their right, as members of the Armed Forces, to receive medical care and drugs needed to treat HIV, and interference in their private life caused by the disclosure of their state of health within the Armed Forces.

12. The petitioners claim that there was no reasonable justification for discharging the alleged victims. They report that when they were diagnosed with HIV, a process was started which would culminate in their retirement from the Army due to an inadequate assessment of their state of health. They allege that the authorities applied Article 22 (IV) of the Mexican Armed Forces Social Security Law (hereinafter "ISSFAM"), which established being rendered unfit in acts outside the line of duty as cause for retirement, in conjunction with paragraph 117 of the same law which established as grounds for unfitness "susceptibility to recurring infections attributable to untreatable conditions of cellular or humoral immunodeficiency of the organism" in order to discharge persons with HIV from the Armed Forces, in the improper understanding that HIV was untreatable. With that, according to the petitioners, the State violated Article 24 of the American Convention.

13. They indicate that the legislation referred to cannot be regarded as reasonable, because it does not pass muster in a test or judgment of proportionality or of necessity to be considered non-arbitrary. Although it might be argued that the effectiveness of the Armed Forces and the integrity of its personnel and of third parties are legitimate ends, the truth is that such ends do not justify segregating persons with HIV. The reason is that their presence does jeopardize the physical integrity and health of anyone else and that their condition does not automatically impair their professional performance. Nor is segregation the most appropriate measure because the Army's effectiveness is related to the actual performance of its servicemen, to their training, skills-development, equipment, and other factors, and because, with due precautions and information, HIV is not problematic. Furthermore, they indicate that segregation is not a necessary measure because it leads to excessive encroachment on the principle of equality and the other rights involved, such as

the right to work. They add that taking this measure is disproportionate because it deprives the alleged victims of their work and income, social security, medical and overall care, which not only discriminates against them: it also impacts their physical integrity.

14. They add that although people's health may affect their performance at work, it cannot be automatically and permanently declared a ground for unfitness or inability to work.

15. They point out that the discrimination they suffered through the established legal norms impaired the alleged victims' rights to work, security, and health recognized in the Protocol of San Salvador. They add that the mere fact of having HIV deprived them of the comprehensive and cost-free health care they used to receive at the Mexican Armed Forces Social Security Institute and at the Central Military Hospital. They indicate that the alleged substitute health care services that the State says it made available to the alleged victims do not comply with the alleged availability, accessibility, affordability, and quality standards required for adequate treatment. To substantiate that, they submit a copy of the report of the National Center for HIV/AIDS Prevention and Control (hereinafter CENSIDA), in which that Institution admits, contrary to the claims of the Mexican State, that "it does not provide medical care for HIV patients" and does not "have a network of hospital services" for comprehensive care of HIV patients.

16. They also point out that CENSIDA explained that the specialized "Flora" clinic, mentioned by the State, does not exist. They say that the "Specialized Condesa Clinic" to which the State referred M.G.S. after discharging him from the Armed Forces only provides antiretroviral drugs free of charge; it does not provide inpatient facilities, emergency medical services, or comprehensive care for HIV or AIDS patients who contract opportunistic infections and/or cancer associated with AIDS. If those patients require said services, they are referred to the hospital network of the Secretariat for Health of the Government of the Federal District or to the General Federal Hospitals [*Hospitales Federales de Concentración*] and National Institutes of Health, which charge for services in accordance with the General Health Law. The reason for that is that the provision of medical care for persons with HIV is not part of the 2008 Universal Catalogue of Health Services of the Social Health Protection System. Consequently, the alleged victims will have to pay for any other medical service required for treatment.

17. As for care for J.S.C.H., the petitioners assert that the fact that he can currently receive medical care at the Central Military Hospital is not due to any step taken by the State to safeguard his rights, but rather to the entitlement of his wife, who is presently a member of the Armed Forces. They claim that this state of affairs relegates his status to that of a dependent, which is not compatible with the respect and guarantees to which he entitled in his own right.

18. As regards violation of the right to privacy, they say that the disclosure by the State of confidential information regarding his state of health to a number of officials in the Armed Forces who were not medical personnel was not only unwarranted; it also resulted in his discharge from the Army, thereby constituting a violation of Article 11 of the American Convention. They point out that the reasons adduced by the State for that disclosure, namely, "to prevent determinations that increased risks to the health of army personnel or of the civilian population in contact with him, or else that said disclosure enables the Armed Forces to know whether its members are apt to carry out the missions entrusted to them without risk not only had nothing to do with a supposed public interest bur rather simply demonstrated evident prejudice, ignorance, and discrimination on the part of the State."[5] The reason for that being that persons carrying the HIV virus are not a health hazard, particularly if they receive medical care; nor are their abilities automatically diminished.

19. As regards the violation of judicial protection, the petitioners argue that the competent authorities lent their support to a discriminatory practice based on law and at the same time improperly applied legal provisions with respect to the ground for unfitness, because the alleged victims' condition was

[5] Reply by the petitioners dated September 14, 2010.

in fact treatable. Furthermore, they allege violation of Articles 8 and 25 of the Convention, because, due to the actions of the authorities, the alleged victims were left without judicial guarantees and effective remedies.

20. More specifically, in the case of J.S.C.H., they maintain that in the end the authorities endorsed and reiterated the discriminatory treatment when they determined that being an HIV carrier automatically disqualified a person from continuing to work in the Armed Forces. In the case of M.G.S., they maintain that the courts arbitrarily invoked a number of grounds for inadmissibility that avoided having to examine the merits of the case. They maintain, furthermore, that the Ninth Collegiate Tribunal for Administrative Matters ruled differently on this matter in the case of J.S.C.H., faced with identical factual circumstances: an act that is considered definitive for challenging the discharge from the army in the courts and the best way of pursuing that challenge.

21. The petitioners point out that the ISSFAM Law of 1976 was repealed and replaced by another law published on July 9, 2003. However, the amended law reiterated discriminatory treatment of persons testing positive for human immunodeficiency virus antibodies (HIV positive).

22. They report that the in February and March 2007, the Supreme Court had the opportunity to review a number of amparo actions brought by other people serving in the Mexican Armed Forces who were in a situation similar to that of the alleged victims. They argue that the Supreme Court confirmed that discrimination was practiced in Mexico under the legislation of 1976 and later under the new IISFAM Law of 2003, so much so that the provisions of the new Law were declared unconstitutional. The importance those judgments later acquired was reflected in the amendment to the Law published on November 20, 2008.

23. As regards the 2008 amendments to the Law, they claim that discriminatory treatment persists, since the new law establishes that seropositivity for HIV antibodies, confirmed through additional testing, is automatically deemed to limit military activity because of the medical oversight and treatment required which produces functional disorders of under 20%, which warrants "a change to another branch of the armed forces or other service at the request of a Medical Council. They indicate that the new law does not refer to a certain and determined state of health warranting a change of posting because it prevents a person from serving in the Armed Forces in the same manner and on the same terms as he did prior to testing HIV positive. They state that testing positive for HIV in itself no does not endanger the health or physical integrity of anyone else or even of the seropositive person, nor does it automatically impair his performance at work, quite apart from the empirical and scientific evidence that many years may elapse between the moment of HIV infection and the appearance of AIDS symptoms. They add that even in cases where symptoms of HIV are present, with the drugs currently available, the survival rate for such persons may exceed 20 years.

24. The petitioners state that the following family members of the alleged victims have suffered losses as a result of the human rights violations alleged in this case: J.S.C.H (son of J.S.C.H.), B.C.C (father of J.S.C.H.), M.G.G. (father of M.G.S.), M.S.L (mother of M.G.S.) They argue that due to the unjustified discharge of the alleged victims, the family members, with the exception of B.C.C., a retired member of the Armed Forces, lost the rights, benefits, and pensions to which they were entitled by law. They also lost their right to enjoy housing that the alleged victims could have acquired with a loan had they not been unjustly discharged, as well their right to comprehensive medical care. They also maintain that "the family members' personal integrity was injured by the unjustified discharge from the Army of J.S.C.H and M.G.S when they were diagnosed as being HIV carriers."

B. The State

25. The State argues that it was legitimate to apply the procedure of retirement because the alleged victims were rendered unfit in acts outside the line of duty. It maintains that the alleged victims voluntarily enlisted in the Armed Forces and under that contract they agreed to abide by military laws and regulations. One of their obligations was to remain in good health in order to be effective in the performance of their military duties. That ceased to be the case, according to the State, when they voluntarily put themselves in a situation that was neither in their line of duty nor a consequence of it whereby they would not be able to fulfill the duties imposed by the Armed Forces.

26. The State maintains that applying a standard to which the alleged victims freely agreed to abide by, and which is required so that Army personnel can fully comply with the missions entrusted to the Armed Forces, cannot be considered an act of discrimination.

27. The State says that the petitioners are mistaken in their interpretation when they maintain that the disclosure of sensitive medical information was unjustified because the purpose of that disclosure was to process their separation from the Armed Forces. It asserts that all members of the Armed Forces must be prepared to adequately perform missions entrusted to them, which require intense physical exertion. For that reason, it claims, the General Staff has a duty to know the physical and psychological condition of the personnel under its command, because personnel lacking the physical or mental condition required for the adequate performance of a mission cannot be sent on it. That would jeopardize not only the mission, but also the health of the personnel and of society, in the case of a mission to protect civilians.

28. It goes on to say that the purpose for which medical staff report to superiors and the General Staff on a serviceman's state of health is not to remove the patient from the Army but to prevent decisions being taken that could place the health of the personnel under an officer's command at greater risk. That cannot be regarded as an arbitrary interference in the private life of a serviceman or woman. On the contrary, it is fully justified because it pursues a legitimate purpose and meets the requirements of appropriateness, necessity, and proportionality.

29. Concerning judicial guarantees, the State points out that all guarantees were assured, in both the administrative and jurisdictional proceedings, pursuant to Article 8 of the American Convention. With respect to both J.S.C.H. and M.G.S., the Bureau of Military Justice (*Dirección General de Justicia Militar*) justified the legitimacy of retirement due to unfitness acquired outside the line of duty on the grounds of being diagnosed positive in an ELISA test for human immunodeficiency virus antibodies, which diagnosis was confirmed by a Western Blot test and data indicating infection with opportunistic germs, which are manifestations of cell immunodeficiency," a procedure included in paragraph 117 of the First Category of the of the Appended Tables to the ISSFAM Law. The documentation supporting the grounds for retirement consisted of the respective certificates issued by the Central Military Hospital.

30. The State adds that the alleged victims were duly notified of the decision of the Bureau of Military Justice and granted the right to a hearing. Specifically, it says the alleged victims were informed of their right to challenge the legitimacy or illegitimacy of their retirement, the calculation of their services rendered, and their rank at retirement pursuant to law.

31. As regards the jurisdictional proceeding in the case of J.S.C.H, the State points out that he filed appeals with various domestic jurisdictional bodies and thus had ample access to justice. All the appeals were heard by different, competent, independent, and impartial judges and courts. Each of the courts and judges hearing the appeals examined in depth each of the alleged violations, which the petitioner constantly modified. He also had the opportunity to file several amparo applications. According to the State, he was even granted amparo in respect of some violation claims, as when the Collegiate Court ordered the reinstatement of the amparo action for the District Judge to present expert medical testimony.

32. Concerning the adjudicatory proceedings in the case of M.G.S., the State maintains that he had full access to the judicial remedies provided for by law, before independent and impartial judges, and that his right to a hearing was respected at all times.

33. The State affirms that the alleged victims' right to health has been guaranteed at all times. The fact that they had "left the Armed Forces" did not mean that they no longer enjoyed the right to a healthy life guaranteed under Article 4 of the Political Constitution of the United Mexican States, since the State has different ways of providing medical assistance, of which the alleged victims were informed. Specifically, the State points out that J.S.C.H. always had at his disposal the medical services provided by SEDENA and was currently covered as a beneficiary of his wife's entitlement to health care as a member of the Armed Forces. In the case of M.G.S., the State indicates that during the substantiation of the amparo application he filed, he

received medical care and medicines through SEDENA and when he was discharged from the Armed Forces he was referred to the General Hospital in Cuautitlán, State of Mexico, to continue his medical treatment. The State reiterates that the alleged victims have at their disposal the specialized Condesa and Flora clinics, where they can receive immediate care and treatment adapted to their specific needs. The State also proposes that the Secretariat for Foreign Affairs accompany the petitioners during their first appointments at the aforementioned clinics to ensure that proper service is delivered.

34. The State makes mention of the National Center for HIV/AIDS Prevention and Control (CENSIDA), an institution said to have all the medical infrastructure needed to treat HIV/AIDS, and of the Mexican Official Standard (NOM-010-SSA2-1993), which requires all health facilities to provide emergency medical care to HIV/AIDS patients. It adds that it has a free distribution policy on antiretroviral drugs for anyone who needs them, in keeping with the Antiretroviral Management Guidelines for persons with HIV/AIDS, regardless of their insurance status.

IV. ANALYSIS OF THE MERITS

A. Proven facts

35. Pursuant to Article 43.1 of its Rules of Procedures, the Commission will examine the arguments and evidence presented by the parties. It will also take into account other information that is a matter of public knowledge.[6]

36. As established by the IACHR in its admissibility report, dated February 4, 2009, the controversy in this matter has to do with the compatibility with the American Convention of the measure taken by the Mexican State of discharging the alleged victims for being HIV carriers. In both cases, the alleged victims instituted administrative proceedings as provided in the Mexican Armed Forces Social Security Law (hereinafter the "ISSFAM Law") and then continued to press their claims in the judicial venue.

37. The provisions of the ISSFAM Law, promulgated on June 29, 1976, and in force at the time that the alleged victims were discharged from the Mexican Army established the following[7]:

> **Article 22:** The following are cause for retirement:
> To reach the age limit set in Article 23 of this law;
> To be rendered unfit in action or as a result of injuries sustained therein;
> To be rendered unfit in other acts in the line of duty or as a consequence thereof;
> To be rendered unfit in acts outside the line of duty;
> To be prevented from performing military duties by illness that lasts more than six months, in which case, the Secretary of National Defense or, as appropriate, of the Navy, may extend this period by up to three months, subject to the opinion of two active military physicians indicating the possibility of recovery within that time.
>
> **Paragraph 117 of the Appended Tables to the ISSFAM Law recognizes as grounds for unfitness:**
> Susceptibility to recurring infections attributable to untreatable conditions of cellular or humoral immunodeficiency of the organism.

[6] Article 43.1 of the Rules of Procedure of the IACHR: "The Commission shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge.

[7] ISSFAM Law promulgated on June 29, 1976.

> **Article 183:** Being rendered unfit in acts outside the line of duty shall be accredited solely by the certificates to be issued by the medical physicians appointed by the Secretariats of National Defense or the Navy.
>
> **Article 197:** Based on the evidence collected, the Secretariat concerned shall issue a notice of approval of retirement should it deem that the military status of the interested party is proven, they are in active service, and one or more grounds for retirement are shown. Otherwise, the Secretariat shall issue a notice of disapproval of retirement, which shall be based on appropriate grounds and causes.
>
> These notices shall be communicated to the serviceman, who will be informed, as appropriate, of the calculation of his length of service and the rank at which he shall retire, so that within 15 days he might express his assent therewith or challenge it and state his objections, which may only refer to the propriety or impropriety of his retirement, the military rank at which the interested party should retire, and the calculation of his length of service.
>
> Should he consider it appropriate, he may offer evidence in the challenge brief, which shall be received within 15 days after the foregoing deadline.
>
> **Article 202:** If military personnel and their family members have formulated objections to the statements made by the Secretariat concerned, or to the calculation of their services, said Secretariat shall within the following 45 business days issue its definitive statement resolving the objections by either accepting or rejecting them. […]

Proceedings in the case of J.S.C.H

38. On July 15, 1998, the Central Military Hospital of the National Defense Secretariat issued a medical certificate stating that J.S.C.H. was "unfit in the first category for active service in the Armed Forces" in accordance with paragraph 117 of the Table of Diseases Appended to the ISSFAM Law in force, for testing positive in the ELISA test for human immunodeficiency virus antibodies.[8]

39. In Official Letter ML-20887 of July 16, 1998, the Colonel in charge of the Forensic Medicine Section asked the National Defense Secretary, Transportation Directorate, for the alleged victim to be placed "at the disposal of that Directorate" given that he would soon be discharged after being diagnosed with HIV. The same letter stated that "on account of that illness, he is unfit to perform the duties corresponding to his rank and post and while his retirement is being processed he should remain in the custody of his family […]"[9]. That Official Letter was sent "for their information" to 12 internal authorities.

40. Official Letter AD-1-88617, dated July 21, 1998, issued by the Office of the Director General of Military Transportation and addressed to the Commander of Military Region I, reported that J.S.C.H. had been discharged from the General Staff of the National Defense Secretariat for testing positive in the Elisa test

[8] Appendix 1. Medical certificate of J.S.C.H.'s health, dated July 15, 1998. issued by the forensic medicine section of the Central Military Hospital of the Secretariat for National Defense. Appended to the communication of the State, OAS Note 01927 of August 29, 2005.

[9] Appendix 2. Official Setter ML-20887 dated July 16, 1998, issued by M.C. Colonel, Head of the Forensic Medicine Section, Regulo Nava Frias, addressed to the Secretary of National Defense. Appended to the communication of the State, OAS Note 01927 dated August 29, 2005.

and was in the custody of his family pending the processing of his retirement.[10] That Official Letter was, as stated therein, remitted "for their information" to six military authorities.[11]

41. Official Letter SGB-V-33561, dated September 14, 1998, requested that the alleged victim be notified of the retirement approval notice.[12] On September 19, 1998, J.S.C.H was notified by the National Defense Secretariat of a) the notice approving retirement due to unfitness incurred outside the line of duty; and b) the request for notification of the retirement approval notice.[13]

42. On October 2, 1998, Mr. J.S.C.H. challenged the retirement approval notice to the Bureau of Military Justice under Article 197 of the ISSFAM Law then in force.[14] A resolution dated October 22, 1998 (Official Letter SGB-V-40209) declared the challenges inadmissible and ratified approval of retirement.[15] J.S.C.H. received notice of final approval of his retirement by official letter dated October 27, 1998.[16]

First Amparo Application

43. In response to the definitive approval of retirement notice (Official Letter SGB-V-40209, of November 25, 1998), Mr. J.S.C.H., filed amparo action 624/98 with the Second District Court for Administrative Matters in the Federal District (hereinafter the "Second District Court"), against a) the adoption, issuance, promulgation, and publication of the Mexican Armed Forces Social Security Law published on June 29, 1976, especially its Article 183; b) the contents of Official Letter SGB-V-40209 of October 22, 1998, declaring definitive approval of the retirement of the alleged victim c) execution of Official Letter No. SGB-V-40209 of October 22, 1998; d) Official Letter No. AD-1-132999 of October 27, 1998 enclosing a copy of Official Letter SGB-V-40209; and; e) any other act that is an effect or consequence of Official Letter SGB-V-40209.[17]

44. Furthermore, in a writ dated December 28, 1998, J.S.C.H. asked to add to the complaint in respect of 1) Official Letter No. AD-1-142331 of November 18, 1998; 2) radio message No. 11212/19294/98 of November 12, 1998, 3) execution of the acts referred to; and 4) any other act that is an effect or consequence of acts referred to.[18]

[10] Appendix 3. Official Letter No. AD-88617, dated July 21, 1998 issued by the Director General of Military Transportation, addressed to the Commander of the First Military Region. Appended to the communication of the State, OAS Note 01927 dated August 29, 2005.

[11] Appendix 3. Official Letter No. AD-88617 dated July 21, 1998 issued by the Director General of Military Transport addressed to the Commander of the I Military Region. Appendix to the Communications of the State, OAS Note 01927 dated August 29, 2005.

[12] Appendix 4. Official Letter No. SGB-V-33561, dated September 14, 1998 issued by the Military Justice Bureau. Appended to the communication of the State, OAS Note 01927 dated August 29, 2005.

[13] Appendix 5. Official Letter No. AD-1-115420 XIII/III, issued by the Secretariat for National Defense; Appendix 5. Official Letter No. SGB-V-32386 dated September 4, 1998, signed by the Military Justice Bureau.

[14] Appendix 6. Communication of J.S.C.H. addressed to Brigadier General J.M. and Interim Director David Quintero Rocha. Appended to the communication of the State, OAS Note, 01927 dated August 29, 2005.

[15] Appendix 7. Official Letter No. SGB-V-40209, dated October 22, 1998, signed by the Military Justice Bureau and addressed to the Director General of the Social Security Institute for the Mexican Armed Forces. Appended to the communication of the State, OAS Note 01927 dated August 29, 2005.

[16] Appendix 8. Official Letter No. AD-1-132999 XIII/111/ dated October 27, 1998, issued by Brigadier General (Dem) Director, Miguel Alfonso López Conde, addressed to J.S.C.H. Appended to the communication of the State, OAS Note 01927 dated August 29, 2005.

[17] Appendix 9. Amparo Judgment, dated February 9, 1999. Suit No. 624/98 brought by J.S.C.H. before the Second District Court in Administrative Matters in the Federal District. Appended to the communication of the State, OAS Note 01927, dated August 29, 2005.

[18] Appendix 8. Amparo under review 494/99, dated June 8, 2000. Agreement of the Full Court of the Supreme Court of Justice of the Nation. Appended to the communication of the State, OAS Note 01927 dated August 29, 2005.

45. In said proceeding, J.S.C.H. was granted a precautionary measure to ensure that he continued receiving medical care and the drugs that were essential for appropriate treatment of the HIV virus until the issue was settled.[19]

46. In a judgment dated February 9, 1999, the Second District Judge for Administrative Matters in the Federal District dismissed the amparo action on the grounds that 1) the amparo suit should have been filed against the first official letter that contained the retirement approval notice and 2) final approval of retirement is not an act that terminates administrative proceedings.[20]

47. Disagreeing with the foregoing judgment, J.S.C.H. filed a motion to review. The matter was referred to the Supreme Court of Justice, where for reasons of competence it fell to the Plenary, which assigned it number A.R.494/99.[21] The motion to review moved that: 1) the appealed judgment violated the Amparo Law as a result of the failure to apply Articles 197, 202 and 205 of the ISSFAM Law in view of the Court's improper weighing of the complained of acts (with respect to the conclusion that J.S.C.H. did not file the amparo suit within 15 business days of his being notified of Official Letter SGB-V-32386 of September 4, 1998 and that he therefore tacitly consented to Article 183 of the ISSFAM Law); 2) the appealed judgment violated the Amparo Law as a result of the failure to apply Articles 197 and202 of the ISSFAM Law and the improper interpretation and application by the Court of Article 205 of the ISSFAM Law in respect of the acts complained of; 3) the appealed judgment violated Article 151 of the Amparo Law because when the constitutional hearing was held a decision was omitted on admission of expert testimony on drugs offered in due time and manner by J.S.C.H.; 4) Article 183 of the ISSFAM Law was unconstitutional; and 5) [the discontinuation of medical assistance to Mr. J.S.C.H.] violated Article 4 of the Federal Constitution.[22]

48. In its resolution dated June 8, 2000, the Supreme Court decided 1) not to touch the dismissal ordered in amparo suit No. 624/98 due to the fact that Article 78 of the Amparo Law provided that "in judgments on amparo the complained of act shall be weighed precisely as it appears proven to the competent authority and no evidence that was not presented to said authority shall be or admitted or considered;" 2) to amend the appealed judgment because the Supreme Court deemed it appropriate to reject the considerations of the Second District Judge in the amparo action and found that the amparo application was correctly brought against the final retirement notice issued after the challenge provided by law had been presented; 3) to deny the amparo application in respect of the alleged unconstitutionality of Article 183 of the ISSFAM Law; and 4) in relation to the supposed violation of Article 4 of the Federal Constitution, the Supreme Court considered it unviable because the retirement approval notice mentioned nothing about ceasing to provide medical assistance or supply drugs to Mr. J.S.C.H.[23]

49. The Supreme Court further determined that the First Circuit Collegiate Tribunal on duty for Administrative Matters had jurisdiction to decide on the legality of the act complained of, namely Official Letter No. SEB-V-40209 dated October 22, 1998 (retirement approval notice).

50. On November 22, 2000, the Ninth Collegiate Tribunal for Administrative Matters of the First Circuit (hereinafter the "Ninth Collegiate Tribunal"), granted amparo because the authorities that issued official letter SGB-V-40209 (signed by the Bureau of Military Justice on October 22, 1998), which contains the

[19] Appendix 9. Official Letter No. J-AMPS-1-162376-1, dated December 7, 1998, issued by the Attorney General of Military Justice, addressed to the Director General of Health. Appended to the communication of the State, OAS Note 01927 dated August 29, 2005.

[20] Appendix 10. Amparo Ruling dated February 9, 1999. Suit No. 624/98.

[21] The Supreme Court of Justice is competent to take up the motion to review under Article 107(VIII)(a) of the Constitution, Article 84(I)(a) of the Amparo Law, and Article 10(II)(a) of the Organic Law of the Federal Judiciary particularly since the motion is brought against a decision adopted by a district judge in a constitutional hearing on an amparo action that challenges the constitutionality of Article 183 of the ISSFAM Law.

[22] Appendix 11. Amparo under review 494/99, dated June 8, 2000; Appendix 11. Amparo review RA 2639-2000, dated November 22, 2000.

[23] Appendix 11. Amparo under review 494/99, dated June 8, 2000.

notice of final approval of retirement, lacked jurisdiction and the power to issue it.[24] The competent authority for issuing those kinds of acts is the National Defense Secretary, according to the internal regulations of the National Defense Secretariat.[25].

Second Amparo Application

51. Mr. J.S.C.H. filed a second Amparo Application with the Sixth District Court for Administrative Matters in the Federal District (Case 395/99), in which he asserted the unconstitutionality of: 1) the adoption, issuance, promulgation, and publication of the ISSFAM Law of 1976, especially Article 209; 2) official letter 308-A1.1.1./10772 of November 30, 1998 (official letter from the Office for Civilian and Military Security to the ISSFAM which indicates the retirement pay amount); 3) official letter AD-1-56325 XIII/III of April 15, 1999, from the Military Transport Bureau to the Commander of the First Military Region (official letter informing the Commander of the First Military Region of the retirement of J.S.C.H.; 4) the execution of the official letters mentioned in the preceding paragraphs; and, 5) any act that might be an effect or consequence of the official letters mentioned in the preceding paragraphs. [26]

52. On October 11, 1999, the amparo application was granted only in respect of official letter AD-1-56325 XIII/III of April 15, 1999, because said official letter was not signed.[27]. On November 3, 1999, the alleged victim entered a motion to review the aforesaid judgment. The Supreme Court declared itself incompetent to hear the matter and referred it to Court on duty, the Fourth Collegiate Tribunal for Administrative Matters of the First Circuit.[28] In this action, Mr. J.S.C.H. was granted a precautionary measure so that he might continue to receive the medical care and drugs that he needed for HIV treatment.[29] The Fourth Collegiate Tribunal for Administrative Matters of the First Circuit granted the amparo because it found that official letter of discharge AD-1-56325 XIII/III of April 15, 1999 was unconstitutional due to the fact that it did not state grounds and cause and lacked an original signature.[30]

53. On February 12, 2001, the Military Attorney General's Office, sent official letter J-AMPS-1-4761 to the Office of the Director General of the ISSFAM which issued a final retirement approval notice on the grounds that "[…] the disease that J.S.C.H has is susceptible to treatment, which may be feasible. However, as he still has the disease, that is cause enough for the retirement procedure to continue" and it was decided that Mr. J.S.C.H. was apt for "discharge from active duty and retirement, effective retroactively as of October 22, 1998."[31]

Third Amparo Application

54. On March 14, 2001, J.S.C.H. lodged an amparo application with the Fifth Court of District A for Administrative Matters in the Federal District (Case 173/2001), in which he challenged: 1) Articles 22(IV)

[24] Appendix 12. Amparo review RA 2639-2000 of November 22, 2000. Judgment issued by the Ninth Collegiate Court for Administrative Matters. Appended to the communication of the State, OAS Note 01927, dated August 29, 2005.

[25] Appendix 12. Amparo review RA 2639-2000 of November 22, 2000.

[26] Appendix 13. Amparo Judgment 395/99 of August 4, 1999 issued by the Sixth District Court for Administrative Matters of the First Circuit in the Federal District. Appended to the communication of the State, OAS Note 01927 dated 29 de August de 2005.

[27] Appendix 13. Amparo Judgment 395/99 of August 4, 1999.

[28] Appendix 14. Amparo Judgment in review 144/2000, dated November 8, 2000, issued by the Fourth Collegiate Court for Administrative Matters of the First Circuit. Appended to the communication of the State, OAS Note 01927, dated August 29, 2005.

[29] Appendix 15. Incidental motion for suspension relating to amparo action No. I-395/99 dated June 11, 1999 issued by the Sixth District Judge for Administrative Matters in the Federal District. Appended to the communication of the State, OAS Note 01927 dated August 29, 2005.

[30] Appendix 14. Amparo Judgment in review 144/2000 of November 8, 2000.

[31] Appendix 16. Official Letter No. J-AMPS-1-4761, dated February 12, 2001, issued by the Secretary for National Defense, definitively approving the retirement of Driver, Second Lieutenant J.S.C.H. Appended to the communication of the State, OAS Note 01927, dated August 29, 2005.

and 197 of the ISSFAM Law; 2) official letter J-AMPS-1-4761 of February 12, 2001, which contained the final retirement approval notice; 3) the execution of official letter J-AMPS-1-4761 of February 12, 2001; 4) any act that might be a consequence of official letter J-AMPS-1-4761 of February 12, 2001; 5) official letter J-AMPS-1-4761 of February 12, 2001 in which it was decided that J.S.C.H. was apt for discharge from active duty and retirement; and, 6) any act that might be an effect or consequence of official letter AMP-II-4755/432 of February 12, 2001. [32]

55. In this proceeding, precautionary measures were granted to enable Mr. J.S.C.H. to receive medical treatment and the necessary drugs [33] In a judgment of March 22, 2002, the Fifth District Court accepted the amparo application on the grounds that HIV is treatable and, therefore, not consistent with the grounds for unfitness for duty provided in paragraph 117 of the first category of tables appended to the ISSFAM Law.[34]

56. Against this judgment, the Secretariat of National Defense filed a motion to review with the Ninth Collegiate Tribunal for Administrative Matters of the First Circuit which was admitted for processing on May 10, 2002. On June 27, 2002, the Ninth Collegiate Tribunal for Administrative Matters of the First Circuit (Case 141/2002-1797) overturned the appealed judgment and, based on the particular characteristics of the case, ordered an expert examination and a new trial, "given the significance of the individual guarantee involved in this case, namely the right to health of the citizen, coupled with the fact that this determination does not affect the principle of *egalité des armes* of the parties in the proceeding, since such evidence could benefit one party as much as the other."[35]

57. Expert examinations were conducted by the parties and added to the proceedings.[36] A new proceeding on constitutional guarantees was held before the Fifth Court of District A for Administrative Matters in the Federal District. The Fifth District Judge for Administrative Matters in the Federal District rejected the amparo application because it found that the expert opinions "were not conclusive" [37] The Court found that:

> […] even though the expert opinions of the complainant and of the official party concur that the disease of which the petitioner for guarantees is a carrier can be treated and appropriate management of the disease allows the complainant to pursue his normal activities, including the work for which he is responsible in the Armed Forces of the country, such expert opinions are not sufficient to convince [*no crean ánimo de convicción en*] this adjudicatory organ […] because it must be granted in principle that active service in the army demands the availability of the personnel comprising it and that they be in apt and optimal condition to perform their duty effectively (…].[38]

[32] Appendix 17. Incidental motion for suspension relating to amparo action No. 173/2001 of May 2, 2001 issued by the Fifth District Court for Administrative Matters in the Federal District. Appended to the communication of the State, OAS Note 01927, dated August 29, 2005.

[33] Appendix 17. Incidental motion for suspension relating to amparo action No. 173/2001, dated May 2, 2001.

[34] Appendix 18. Judgment in amparo suit No. 173/2001 of March 22, 2002, issued by the Fifth District Judge for Administrative Matters in the Federal District. Appended to the communication of the State, OAS Note 01927, dated August 29, 2005.

[35] Appendix 19. Amparo judgment in review No. 141/2002-1797, dated June 26, 2002 issued by the Ninth Collegiate Administrative Tribunal in Administrative Matters of the First Circuit. Appended to the communication of the State, OAS Note 01927, dated August 29, 2005.

[36] Appendix 20. Amparo Judgment No. 173/2001 of May 21, 2003 issued by the Fifth Judge of District "A" for Administrative Matters in the Federal District. Appendix to the communication of the State, OAS Note 01927, dated August 29, 2005.

[37] Appendix 20. Amparo Judgment No. 173/2001, dated May 21, 2003.

[38] Appendix 20. Amparo Judgment No. 173/2001, dated May 21, 2003.

58. The Court ruled that treatment of HIV "is a palliative, whose object is not to restore the health of the patient and, therefore, the physical and mental capacities necessary to deal with their normal activities in the workplace.[39]

59. Mr. J.S.C.H. filed a motion to review on June 11, 2003, which fell to the Ninth Collegiate Tribunal for Administrative Matters of the First Circuit. In a decision of September 3, 2003, the Ninth Collegiate Tribunal for Administrative Matters upheld the appealed judgment.[40] On October 7, 2003, the Fifth District Judge ruled that *amparo* action 173/2001 was a fully concluded matter and ordered it to be archived.[41]

Proceedings in the case of M.G.S.

60. The file presented by the State contains a valid document of consent to carrying out tests for HIV, signed by M.G.S. on July 24, 2001, which reads as follows:[42]

> I hereby freely and voluntarily authorize the carrying out of laboratory tests for the detection of human immunodeficiency virus (HIV) antibodies using the immunoenzymatic analysis technique (ELISA). I have been explained and I have understood all the references to the expected risk-benefit. I have understood that further tests may be needed to confirm a finding of positive and also that the results will be delivered to the physician requesting the test and will be handled confidentially and discreetly.

61. On July 28, 2001, a medical certificate was issued determining that M.G.S. "was unfit (First Category) because he had tested positive in an Elisa test to detect HIV antibodies, which was confirmed by a Western Blot test and data on infection with opportunistic germs. [....] Said illness warranted family custody."[43]

62. An official letter dated August 3, 2001, issued by the Administrative Infantry Office and addressed to the Commander of the Sixth Military Region, reported that M.G.S. had been discharged from the Infantry Battalion for "having tested positive in the Elisa test for detecting the human immunodeficiency virus [...] according to a medical certificate of unfitness in the first category, paragraph 117 of the Tables Appended to the Mexican Armed Forces Social Security Law."[44] It transpires from the file that said official letter was transmitted for their "information" and "information as superiors" to 19 internal authorities, including the concubine of the alleged victim.[45]

63. On December 7, 2001, M.S.G. was informed of the decision of the Secretary General of National Defense notifying approval of his retirement by reason of unfitness because of acts outside the line

[39] Appendix 20. Amparo Judgment No 173/2001, dated May 21, 2003.

[40] Appendix 21. Amparo Judgment in review No. 314/2003-3973, dated September 3, 2003 issued by the Ninth Collegiate Administrative Tribunal for Administrative Matters of the First Circuit. Appended to the communication of the State, OAS Note 01927, dated August 29, 2005.

[41] Appendix 22. Resolution dated October 7, 2003, issued by the Fifth Judge of District "A" for Administrative Matters in the Federal District. Appended to the Communications of the State, OAS Note 01927 dated August 29, 2005.

[42] Appendix 23. Informed consent document valid for laboratory studies, signed by M.G.S., dated July 24, 2001. Appended to the communication of the State, OAS Note 2015 dated September 7, 2005.

[43] Appendix 24. Medical certificate issued by medical surgeons of the Central Military Hospital in respect of the health of M.G.S. Appended to the communication of the State, OAS Note 2015, dated September 7, 2005.

[44] Appendix 25. Official Letter No. SAMT-13181 dated August 3, 2001 issued by the General Director of Infantry addressed to the Commander of the VI Military Region. Appendix to the communication of the State, OAS Note 2015 dated September 7, 2005.

[45] Appendix 25. Official Letter No. SAMT-13181, dated August 3, 2001, issued by the Infantry Bureau, addressed to the Commander of the Sixth Military Region. Appended to the communication of the State, OAS Note 2015, dated September 7, 2005.

of duty. [46] On December 27, 2001, M.G.S. expressed his dissent to the Secretary General of National Defense with the "sudden urgency caused by notice of approval of involuntary retirement" and requested medical care and that he be provided with the necessary drugs, as well as the possibility that he be granted a retirement benefit.[47]

64. Through Official Letter No. SGB-III-06650, the Bureau of Military Justice notified M.S.G. that it was not possible to grant the benefit he had requested because Article 197 of the ISSFAM Law establishes that a serviceman advised of his discharge may only manifest his dissent regarding the legitimacy or illegitimacy of retirement, the military ranks with which he was discharged, and the calculation of his services.[48]

65. By official letter SAMT-7573 of June 29, 2002, sent by the Administrative Infantry Office to the Commander of the First Military Region, M.S.G.'s discharge was ordered from the Armed Forces on June 30, 2002 and his retirement as of July 1, 2002.[49]

66. On July 31, 2002, M.G.S. filed an amparo action (1042/2002-IV) with the Ninth District Court for Administrative Matters in the Federal District, in which he challenged: i) the constitutionality of Article 22 (IV) of the ISSFAM Law; ii) official letter SAMT-7573 of June 29, 2002, which notified the discharge from active duty and retirement of Mario Gómez; iii) any act that might be an effect or consequence of official letter SAMT-7573 of June 29, 2002; iv) official letter 308-A.1.1.1./5509/02 of May 28, 2002, from the Office for Civilian and Military Security to the ISSFAM which indicates the amount of retirement pay due to M.G.S., and other related official letters.[50] He was also granted a precautionary measure so that he might continue to receive medical care and the drugs essential for adequate HIV treatment. [51]

67. In a judgment of April 9, 2003, the Ninth District Court for Administrative Matters decided to dismiss the amparo action on the ground that M.G.S. did not contest the first decision in which the ISSFAM Law was applied, "tacitly consenting to the decision by not lodging an amparo application within 15 business days after he was notified of official letter SGB-III-37787 of December 7, 2001, the first document that approved his retirement."[52] M.G.S. entered a motion to review the aforementioned judgment, which was assigned to the Ninth Collegiate Tribunal for Administrative Matters on June 11, 2003. The Ninth Collegiate Tribunal for Administrative Matters of the First Circuit, in a judgment of September 19, 2003 (Case R.A. 292/2003-3708), upheld the lower court's judgment.[53]

68. The Tribunal also considered that, having filed an administrative objection as provided in Article 197 of the ISSFAM Law, he should have brought an action for annulment before the Federal Court of Fiscal and Administrative Justice pursuant to Article 11(V) of the organic law of the Tribunal. On October 22,

[46] Appendix 26. Official Letter No. SGB-III-37787, dated December 7, 2001, issued by the Military Justice Bureau, addressed to M.G.S. Appended to the communication of the State, OAS Note 2015, dated September 7, 2005.

[47] Appendix 27. Communication issued by M.G.S., dated December 27, 2001 addressed to the Secretary for National Defense. OAS Note 2015, dated September 7, 2005.

[48] Appendix 28. Official Letter No. SGB-III-06650, dated March 8, 2002 issued by the Military Justice Bureau, addressed to M.G.S. OAS Note 2015, dated September 7, 2005.

[49] Appendix 29. Official Letter No. SAMT-7573, dated June 29, 2002, issued by the Military Justice Bureau, addressed to the Commander of the First Military Region. OAS Note 2015, dated September 7, 2005.

[50] Appendix 30. Amparo judgment in review No. 292/2003-3708, dated September 19, 2003, issued by the Ninth Collegiate Administrative Tribunal for Administrative Matters of the First Circuit. OAS Note 2015, dated September 7, 2005.

[51] Appendix 31. Official Letter AMP-V-3983/232, dated February 3, 2003, issued by the Attorney General of Military Justice, addressed to the Secretary for National Defense. OAS Note 2015, dated September 7, 2005.

[52] Appendix 30. Amparo judgment in review No. 292/2003-3708, dated September 19, 2003. *See*, IACHR, Report No. 03/09 (Admissibility), Petitions 302-04 and 386-04, J.S.C.H. and M.G.S., February 4, 2009.

[53] Appendix 30. Amparo judgment in review No. 292/2003-3708, dated September 19, 2003.

2003, the Ninth District Court, in keeping with Article 113 of the Amparo Law, set the case aside as a concluded matter.[54]

69. Regarding access to the health services provided by the Social Security Institute for the Armed Forces, it is a fact not disputed by the parties that, after being discharged from the Armed Forces, J.S.C.H. continued receiving health care from the aforementioned Institute as a dependent beneficiary of his wife, who also serves in the Armed Forces. M.G.S., however, lost access to health care provided by the Social Security Institute for the Armed Forces.

Subsequent amendments to the ISSFAM Law

70. In order to understand the context applicable under domestic law, it should be noted that on July 9, 2003, the ISSFAM Law of 1976 was repealed and a new Law of the Social Security Institute for the Armed Forces was passed. Article 226, Category One, Paragraph 83 of the new law specifically established HIV as a cause for discharge from the Armed Forces:[55]

> Article 226: To determine the categories and degrees of accidents and diseases that are cause for discharge for unfitness, the following Tables shall apply:
>
> Category One
> 83. Testing positive for human immunodeficiency virus antibodies, confirmed with supplementary tests in addition to infection with opportunistic germs and/or malignant neoplasia.
>
> Category Two
> 45. Testing positive for human immunodeficiency virus antibodies, confirmed with supplementary tests.

71. On February 19, 2007, the Plenary of the Supreme Court of Justice of the Nation began deliberation of 12 amparo actions under review, not the instance case, which questioned the constitutionality of discharges on account of unfitness acquired by acts outside the line of duty of members of the Armed Forces subject to the SFFAM Law[56] Said procedure was declared unconstitutional by the Supreme Court in a private session on February 27, 2007. The Court found that the only constitutional ground justifying discharge from the Armed Forces and retirement for health reasons is unfitness, construed as the absence of physical or mental competence to serve in the Armed Forces, not the existence of an ailment or disease, because the latter do not necessarily imply that the health of the servicemen is so impaired that it prevents him from performing the duties inherent in his assigned work.[57]

72. Consequently, the Supreme Court declared unconstitutional Article 226 of the ISSFAM Law of 2003, Category Two, numbered paragraph 45, which provided that testing positive for HIV was cause for unfitness, because it violated the guarantees of equality and non-discrimination proclaimed in Article 1 of the Federal Constitution. It also considered that being an HIV carrier does not imply incapacity to serve in the Armed Forces, so that it is incumbent upon the military authorities to determine, in each case, whether the extent to which a serviceman's health was affected made it impossible for him or her to remain in active service.

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[54] Appendix 30. Amparo judgment in review No. 292/2003-3708, dated September 19, 2003.

[55] Appendix 32. Law of the Institute of Social Security for the Mexican Armed Forces, New Law published in the Official Gazette (*Diario Oficial*) of the Federation on July 9, 2003.

[56] Appendix 33. Secretary for Foreign Relations, Office of the Director General of Human Rights and Democracy, Boletín No. 98, October 20, 2008. Available at: http://portal.sre.gob.mx/oi/pdf/dgdh98.pdf.

[57] Appendix 33. Secretary of Foreign Relations, Office of the Director General of Human Rights and Democracy, Boletín No. 98, October 20, 2008. Available at: http://portal.sre.gob.mx/oi/pdf/dgdh98.pdf.

73. In granting five Amparo actions against Article 226, Category Two, numbered paragraph 45 of the ISSFAM Law, the Supreme Court established legal precedent in this matter.[58] On October 15, 2007, the Supreme Court (SCJN) adopted Jurisprudential Thesis 131/2007, which established the following:[59]

> "SOCIAL SECURITY FOR THE MEXICAN ARMED FORCES. ARTICLE 226, CATEGORY TWO, PARAGRAPH 45, OF THE LAW OF THE INSTITUTE CONCERNED, WHICH ESTABLISHES AS LEGAL CAUSE FOR DISCHARGE UNFITNESS BASED ON TESTING POSITIVE FOR HUMAN IMMUNODEFICIENCY VIRUS (HIV) ANTIBODIES, VIOLATES ARTICLE 1 OF THE FEDERAL CONSTITUTION. By means of that legal ground for discharge, the legislator seeks to ensure, as a constitutionally valid purpose, the effectiveness of the Armed Forces and protection of the integrity of their members and of third parties; however, that regulation entails a legal distinction among members of the Mexican Armed Forces that violates the guarantees of equality and nondiscrimination on grounds of health, contained in Article 1 of the Political Constitution of the United Mexican States that lacks proportionality and juridical reasonableness, particularly since: 1) it is inappropriate for achieving the stated purpose, because medical science, reflected in a number of different national and international directives, has demonstrated the inaccuracy of the claim that HIV carriers are –per se- sources of direct contagion and, therefore, individuals unfit for performing the functions required in the Army; 2) it is disproportionate, because to achieve the stated objective, the legislator had less onerous options vis-à-vis the serviceman involved, considering that military law provides for his deployment to another area, in accordance with the physical abilities he may possess as the disease progresses, as with a number of incurable diseases; and 3) it lacks a reasonable basis in law, given that there are no grounds for justifying the legislator's equation of the concept of unfitness with the concept of illness or, in this case, with testing positive for human immunodeficiency virus (HIV) antibodies, because under that conception there would be innumerable cases in which a decline in health would justify immediate separation from work and denial of the respective health services, without first analyzing whether the effects of the illness do or do not allow a person to readily perform the activity for which he or she was hired, appointed, or recruited."

74. In an amendment published on November 20, 2008, the ISSFAM Law of 2003 was modified as follows:[60]

> Article 226: To determine the categories and degrees of accidents or diseases that are cause for discharge for unfitness, the following Tables shall apply:
>
> Category One, paragraph 83**:** Testing positive for human immunodeficiency virus antibodies, confirmed with supplementary tests in addition to infection with opportunistic germs and/or malignant neoplasia, in a terminal stage for more than six months.
>
> List of ailments that cause dysfunctionality of less than 20% shall merit a change of Branch (Arm) or Service at the request of a Medical Board (*Consejo Médico*).

[58] Appendix 34. The five applications for amparo are: 2146/2005, 810/2006, 1285/2006 and 1659/2006 and 307/2007. Supreme Court of Justice of the Nation. Available at:

http://www.scjn.gob.mx/2010/comunicacion/Paginas/2007-98.aspx.

[59] Appendix 35. Supreme Court of Justice of the Nation. Jurisprudential thesis 131/2007, page 12 of volume XXVI, December 2007, of the *Semanario Judicial* of the Federation and its Gazette, Ninth Series. Available at: http://www.scjn.gob.mx/2010/transparencia/Documents/IMF%20Otorgada%20Jur/2007/174_01.pdf.

[60] Appendix 36. Decree which amends, adds, and repeals certain provisions of the Law of the Institute of Social Security for the Mexican Armed Forces, published on November 20, 2008. The decree entered into force the day after its publication. Appended to the communication of the petitioners received on May 20, 2009.

19. Testing positive for human immunodeficiency virus antibodies, confirmed with supplementary tests, in cases in which functional military activity is limited due to the need for medical supervision and treatment.

V. LAW

75. The IACHR will now proceed to analyze whether the discharge of the alleged victims from the Armed Forces established the international liability of the Mexican State with respect to the obligations derived from the American Convention.

1. Consideration of the scope of Articles 1.1 and 24 of the American Convention

76. Article 24 of the American Convention established that:

> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

77. Article 1(1) of the American Convention establishes 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.

78. The Commission and the Inter-American Court have repeatedly stated that the right to equality and nondiscrimination are the linchpin and fundamental core of the inter-American human rights system. They have also established that it "entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals."[61] The Court has also pointed out that noncompliance by the State, though any discriminatory treatment, of the general obligation to respect and guarantee human rights, establishes its international responsibility.[62]

79. Dating back to its earliest jurisprudence on the subject, the Inter-American Court emphasized with respect to the principle of equality that:

> The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character[63].

[61] IACHR, Access to Justice for Women Victims of Violence in the Americas, OAS/Ser.L/V/II. Doc 68, January 20, 2007; I/A Court H.R., Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paragraph 173 (5); IACHR, Application to the Interamerican Court of Human Rights, Karen Atala and Daughters, September 17, 2010, paragraph 74.

[62] I/A Court H.R., *Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214*, paragraph 268. I/A Court H.R., Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paragraph 85.

[63] I/A Court H.R., *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paragraph 55.

80. With regard to the concept of "discrimination", although the American Convention and the International Covenant on Civil and Political Rights do not contain a definition of this term, the Commission, the Court and the United Nations Human Rights Committee have used as a basis the principles of Articles 24 and 1.1 of the American Convention, along with the definitions contained in the International Convention on the Elimination of All Forms of Racial Discrimination and in the Convention on the Elimination of All Forms of Discrimination against Women in order to assert that discrimination is[64]:

> […] any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[65]

81. Concerning the link between the principle of equality and nondiscrimination, the Court has established that "the element of equality is difficult to separate from non-discrimination" and that there is

> an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination. States are obliged to respect and guarantee the full and free exercise of rights and freedoms without any discrimination. Non-compliance by the State with the general obligation to respect and guarantee human rights, owing to any discriminatory treatment, gives rise to its international responsibility[66].

82. The Inter-American Court has resorted to differentiation between autonomous and subordinate provisions of the American Convention, establishing early on in its case law that Article 1(1) includes a prohibition of discrimination in the exercise and application of the rights enumerated in that instrument, while Article 24 prohibits said discrimination in respect not only of the rights established in the Convention but also "with regard to all the laws that the State adopts and to their application."[67] This distinction was reiterated by the Inter-American Court in the *Apitz Barbera et al v. Venezuela* case, as follows:

> The difference between the two articles lies in that the general obligation contained in Article 1(1) refers to the State's duty to respect and guarantee "non-discrimination" in the enjoyment of the rights enshrined in the American Convention, while Article 24 protects the right to "equal treatment before the law." In other words, if the State discriminates upon the enforcement of conventional rights containing no separate non-discrimination clause a violation of Article 1(1) and the substantial right involved would arise. If, on the contrary, discrimination refers to unequal protection by domestic law, a violation of Article 24 would occur.

83. Without prejudice thereto, the development of the right to equality and nondiscrimination points to several notions of it. For instance, one notion is that relating to arbitrary difference in treatment –

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[64] IACHR, Application to the Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, paragraph 76.

[65] United Nations, Human Rights Committee, General Comment 18, Non-discrimination, 10/11/89, CCPR/C/37, paragraph 7; I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paragraph 92; Fourth Progress Report of the Rapporteur on Migrant Workers and Members of their Families in the Hemisphere, OAS/Ser.L/V/II.117, Doc. 1 rev. 1, IACHR Annual Report 2002, March 7, 2003, paragraph 87; IACHR, María Elena Morales de Sierra v Guatemala, Report No. 4/01, Case11.625, January 19, 2001.

[66] I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paragraph 85.

[67] I/A Court H.R., *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paragraph 54; I/A Court H.R., *Case Yatama Vs. Nicaragua.* Judgment of June 23, 2005. Series C No. 127, paragraph 186; IACHR, Application to Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, paragraph 79.

whereby difference in treatment is understood as any distinction, exclusion, restriction, or preference;[68] another has to do with the obligation to establish conditions of real equality for persons that historically have been excluded.

84. Accordingly, although certain criteria may serve as a basis, determination of the applicable provisions of the American Convention must be made in each case in the context of an analysis involving the person or group of persons affected, the reasons that motivated the alleged discrimination, the rights or interests involved, the means or omissions through which it came about, and other factors.[69]

85. In the instant case, for instance, the Commission notes that the petitioners argued that the alleged victims were subjected to arbitrary difference of treatment when they were discharged from the Armed Forces for being HIV carriers and that that discharge had serious effects on their health, the exercise of their labor rights, and on their private lives (rights contemplated in the American Convention).

86. In that sense, the Commission considers that the instant case involves elements within the scope of both Article 1.1 of the American Convention and Article 24 of the same instrument. Therefore, the arguments will be presented in light of both provisions.

87. The Commission and the Inter-American Court have repeatedly pointed out that the American Convention does not prohibit all differences in treatment[70] The Court has underscored the difference between "distinctions" and "discriminations," whereby the former are differences compatible with the American Convention because they are reasonable and objective, while the latter constitute arbitrary differences detrimental to human rights.[71]

88. Article 1.1 of the American Convention has been used to interpret the word "discrimination" as contained in Article 24 of the same instrument. In particular, in the analysis of reasonability habitually used to determine whether a State is internationally responsible for violating Article 24 of the American Convention, the invocation of the "categories" specifically listed in Article 1.1 has certain effects.[72]

89. Since evaluating whether a distinction is "reasonable and objective" is done on a case-by-case basis, the Commission, the Court, and other international courts and agencies have made use of a staggered test of proportionality which includes the following steps: i) legitimate goal; ii) suitability; iii) the existence of less restrictive alternatives; and iv) strict proportionality.[73]

[68] See: United Nations, Human Rights Committee, General Comment 18, Non-discrimination, 10/11/89, CCPR/C/37, paragraph 7; I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paragraph 92; Fourth Progress Report of the Rapporteur on Migrant Workers and Members of their Families in the Hemisphere, OAS/Ser.L/V/II.117, Doc. 1 rev. 1, IACHR Annual Report 2002, March 7, 2003, paragraph 87.

[69] IACHR, Application to the Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, paragraph 82.

[70] IACHR, Merits Report, Nº 4/01, María Eugenia Morales de Sierra (Guatemala), January 19, 2001; I/A Court H.R., Case of *Castañeda Gutman v. Mexico* . Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184, paragraph 211 citing *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paragraph 56; *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. *Series A No. 17*, paragraph 46; and *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paragraph 89.

[71] I/A Court H.R., *Case of Castañeda Gutman v. Mexico* . Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184, paragraph 211 citing *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, paragraph 84.

[72] IACHR, Application to Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, para. 78.

[73] IACHR, Application to Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010.

90. In addition, in assessing measures that the State claims are neutral, it is important to evaluate the effects of such measures on certain persons and whether they have a disproportionately negative impact.[74]

Discrimination, state of health and HIV/AIDS

91. The IACHR notes that internationally it has been established that the general prohibition of discrimination includes a ban on discriminating based on infection with HIV or AIDS. Thus, the United Nations Commission on Human Rights maintained repeatedly that the expression "other status" contained in provisions on nondiscrimination in international human rights instruments must be construed to include state of health, including HIV and AIDS.[75] Accordingly, it has maintained that:

> […]discrimination on the basis of AIDS or HIV status, actual or presumed, is prohibited by existing international human rights standards, and that the term "or other status" in non-discrimination provisions in international human rights texts should be interpreted to cover health status, including HIV/AIDS.[76]

92. Likewise, in its General Comment 20, the United Nations Committee on Economic, Social and Cultural Rights (hereinafter "ESCR Committee") established, in reference to Article 2.2 of the International Covenant on Economic, Social and Cultural Rights[77], that the inclusion of "or other status" indicates that the list of prohibited grounds of discrimination is not exhaustive and that other grounds may be incorporated in this category[78] According to the ECSR Committee, given that the nature of discrimination varies according to context and evolves over time, a flexible approach to the ground of "other status" is needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2.2 of the International Covenant on Economic, Social and Cultural Rights. In the Committee's opinion these additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. [79] Thus, "state of health" was recognized by the ESCR Committee as one of those additional discrimination criteria. In this regard, the ESCR Committee stated that:[80]

> States parties should also adopt measures to address widespread stigmatization of persons on the basis of their health status, such as mental illness, diseases such as leprosy and women who have suffered obstetric fistula, which often undermines the ability of individuals

[74] IACHR, Application to Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, paragraph 87.

[75] United Nations, Commission on Human Rights, Resolution 1996/43 dated April 19, 1996, The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS). See also Resolution 1995/44 dated March 3, 1993 and Resolution 2005/84 dated April 21, 2005.

[76] United Nations, Commission on Human Rights, Resolution 1996/43 dated April 19, 1996, The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS). See also Resolution 1995/44 dated March 3, 1993 and Resolution 2005/84 dated April 21, 2005.

[77] Article 2.2 of the International Covenant on Economic, Social and Cultural Rights establishes that: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[78] United Nations, Committee on Economic, Social, and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (Article. 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, paragraph15.

[79] United Nations, Committee on Economic, Social, and Cultural Rights General Comment No. 20: Non-discrimination in economic, social and cultural rights (Article. 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, paragraph 27. Also, the CESCR signaled that other possible prohibited motives of discrimination could be "the *intersection* of two prohibited grounds of discrimination, e.g., where access to a social service is denied on the basis of sex and disability"[79].

[80] United Nations, Committee on Economic, Social, and Cultural Rights, , General Comment No. 20: Non-discrimination in economic, social and cultural rights (Article. 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, paragraph33.

> to enjoy fully their Covenant rights. Denial of access to health insurance on the basis of health status will amount to discrimination if no reasonable or objective criteria can justify such differentiation.

93. For its part, the Committee on the Rights of the Child also interpreted the phrase "other status", in the list of grounds of discrimination established in Article 2 of the Convention on the Rights of the Child, to mean that HIV/AIDS is included[81]. Thus, the Committee stated that:[82]

> Article 2 of the Convention obliges States to ensure all the rights under the Convention without discrimination of any kind, and "irrespective of the child's or her or his parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". The Committee interprets "other status" under article 2 of the Convention to include HIV/AIDS status of the child or her/his parent(s). Laws, policies, strategies and practices should address all forms of discrimination that contribute to increasing the impact of the epidemics. Strategies should also promote education and training programs explicitly designed to change attitudes of discrimination and stigmatization associated with HIV/ AIDS.

94. The European Court of Human Rights recently determined that the word "status" contained in Article 14 of the European Convention has been given a wide meaning and its interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent, they also encompass circumstances of people or groups of people that have suffered from a history of prejudice and social exclusion.[83] The European Court considered that a distinction made on account of one's health status, including such conditions as HIV infection, should be covered by the term "other status" in the text of Article 14 of the European Convention.[84]
According to the European Court of Human Rights, people living with HIV constitute a vulnerable group with a history of prejudice and stigmatization.[85]

95. At the regional level, the IACHR notes that the Americas Preparatory Conference for the World Conference in South Africa, held in Santiago, Chile, on December 4-7, 2000, adopted a Declaration and Plan of Action in which people living with HIV were recognized as particularly vulnerable:[86]

> We observe with profound concern that in many countries of the Americas persons infected and affected by HIV/AIDS, and those presumed to be infected, pertain to vulnerable groups in which race and poverty impair and obstruct their access to medicines and health care. We urge that programs be developed to prevent and treat these diseases;

96. Likewise, in the Declaration of Nuevo León, issued at the Special Summit of the Americas in 2004, a commitment was made to confront the stigma, discrimination, and fear, which deter people from being tested and from accessing treatment and care.[87]

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[81] United Nations, Committee on the Rights of the Child, General Comment No. 3 (2003), March 17, 2003, paragraph 9.

[82] United Nations, Committee on the Rights of the Child, General Comment No, 3 (2003), March 17, 2003, paragraph 9.

[83] See European Court of Human Rights. Case of Kiyutin v. Russia. Application No, 2700/10, Judgment dated March 10, 2011, paragraph 48.

[84] See European Court of Human Rights. Case of Kiyutin v. Russia. Application No, 2700/10, Judgment dated March 10, 2011, paragraph 57.

[85] See European Court of Human Rights. Case of Kiyutin v. Russia. Application No, 2700/10, Judgment dated March 10, 2011, paragraph 64.

[86] Document adopted by the Americas Preparatory Conference, conducted in Santiago, Chile, on December 47, 2000, paragraph 58.

[87] Declaration of Nuevo León. Special Summit of the Americas. Monterrey, Mexico, January 13, 2004.

97. The IACHR recognizes that persons living with HIV constitute a group in a particular situation of vulnerability subject historically to discrimination.[88] It is well-known that since the HIV/AIDS epidemic appeared, people affected by it have been victims of stereotypes and stigma associated with ignorance regarding the ways the disease is spread and with social inequalities related especially to gender, race, ethnic origin, and sexuality, reinforced by stigma.[89] According to UNAIDS, the stigma is deeply rooted and operating within the values of everyday life. Accordingly, the United Nations Declaration of Commitment on HIV/AIDS established back in 2001 that:[90]

> Stigma, silence, discrimination and denial, as well as a lack of confidentiality, undermine prevention, care and treatment efforts and increase the impact of the epidemic on individuals, families, communities and nations" (paragraph 13).
>
> "[…] the full realization of human rights and fundamental freedoms for all is an essential element in a global response to the HIV/AIDS pandemic, including in the areas of prevention, care, support and treatment, and that it reduces vulnerability to HIV/AIDS and prevents stigma and related discrimination against living with or at risk of HIV/AIDS." (paragraph 16)
>
> "By 2003 [countries should] ensure the development and implementation of multisectoral national strategies and financing plans for combating HIV/AIDS that address the epidemic in forthright terms; confront stigma, silence and denial; address gender and age-based dimensions of the epidemic; eliminate discrimination and marginalization" (paragraph 37).
>
> "By 2003, [countries should] enact, strengthen or enforce as appropriate legislation, regulations and other measures to eliminate all forms of discrimination against, and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups; in particular to ensure their access to, inter alia education, inheritance, employment, health care, social and health services, prevention, support, treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic" (paragraph 58)

98. The Pan American Health Organization has also issued a number of resolutions that emphasize the pervasive stigmatization and discrimination found in many countries in the Americas with regard to HIV and AIDS and the pressing need for measures to curb those reactions and increase confidence in health care centers at every level.[91] It was also pointed out that treatment of people living with HIV or AIDS in the Americas has not kept pace with prevention efforts due until recently to the high costs of medication and considerable stigma and discrimination resulting in the limited use of counseling and testing services"[92].

99. According to the jurisprudence of the inter-American human rights system, human rights treaties, like the American Convention, are "living instruments," whose interpretation must consider the

[88] See the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, adopted in Guatemala on June 7, 1999.

[89] See also UNAIDS (2000) in the *Protocol for Identification of Discrimination Against People Living with HIV.*

[90] United Nations, Resolution approved by the General Assembly, Declaration of Commitment on HIV/AIDS, A/RES/S-26/2, dated August 2, 2001.

[91] Pan American Health Organization, Resolution CD43/20, Access to Care for People Living with HIV/AIDS, issued by the 46th Directing Council on August 4, 2005. See also: Pan American Health Organization, Resolution CD46/20, Add. I, issued by the 46th Directing Council, September 23, 2005; Pan American Health Organization, Resolution CD45.R10 Scaling-up of Treatment within a Comprehensive Response to HIV/AIDS, issued by the 45 Directive Council, October 1, 2004.

[92] Pan American Health Organization, Resolution CD45.R10 Scaling-up of Treatment within a Comprehensive Response to HIV/AIDS, issued by the 45th Directing Council, on October 1, 2004.

changes over time and present-day conditions[93]. The Court has established how international human rights law has progressed substantively thanks to the "evolutive interpretation" of international instruments of protection, which is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention.[94] The Inter-American Court has also pointed out, following the precedent set by the International Court of Justice, that "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation."[95] The Court has analyzed the principles of equality and nondiscrimination bearing in mind that interpretation framework and the ongoing evolution of international law.[96]

100. In comparative law, it is also possible to identify a series of decisions, including some of the Supreme Court of Justice of Mexico, that have banned discrimination based on state of health, particularly HIV[97] and they have subjected any ruling based on that criterion to scrutiny or a strict test.[98] Among the criteria considered in reaching that conclusion was: exclusion of traditionally stigmatized persons or groups.

101. The IACHR considers that the reason why the alleged victims were automatically discharged from the Armed Forces was because of their state of health, specifically being HIV carriers. In this regard, any distinction, restriction, exclusion of preference had to be justified as reasonable and proportional in the terms that will be analyzed below.

Analysis of the facts of the case

102. 102. The Commission will now proceed to evaluate whether the State's action, by having discharged the alleged victims from the Armed Forces due to their state of health, in this case because they had

[93] IACHR, Application to the Inter-American Court of Human Rights, Karen Atala and Daughters, Case 12.502, September 17, 2010; I/A Court H.R., *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paragraph 114.

[94] I/A Court H.R., *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala.* Preliminary Objections. Judgment of September 11, 1997. Series C No. 32, paragraph 193; *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law*, paragraph 114.

[95] IACHR, Application to the Inter-American Court of Human Rights, Karen Atala and Daughters, Case12.502, September 17, 2010; I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man in the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89 dated July 14, 1989. Series A No. 10, paragraph 37 citing Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa_ notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 16 ad 31.

[96] I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No.18, paragraph 120. In this regard, the Inter-American Court has stated that:

The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.

I/A Court H.R. *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paragraph 115; See also American Convention, Article 29(b) (No provision of this Convention shall be interpreted as….b) restricting the enjoyment or exericise of any right or freedom recognized by virtue of the laws of any State Party or by birtue of another convention to which one of the said states is a party;…)

[97] See Labor Court of South Africa, Gary Shane Allpass and Mooikloof Estates (PTY) LTD t/a Mooilkloof Equestrian Centre, Case JS178/09, February 16, 2011; Constitutional Court of South Africa, Case CCT 17/00, Jacques Charl Hoffmann v. South African Airways, September 18, 2000. Posted at: www.saflii.org/za/cases/ZACC/2000/17.rtf; High Court of Bombay, Case MX v. ZY AIR 1997 Bom 406.

[98] In this regard, See: Constitutional Court of Colombia, Action for Protection (*Acción de Tutela*), Judgment T-577-05, dated May 27, 2005; Supreme Court of Justice of the Nation of Mexico, Amparo under review No. 259/2005, dated March 6, 2007, Amparo under review No. 510/2004, dated March 6, 2007, Amparo under review No. 1015/2005, dated February 27, 2007, Amparo under review No. 1185/2004, dated March 6, 2007, Amparo under review No. 1200/2006, dated March 6, 2007, Amparo under review No. 1666/2005, dated March 6, 2007; Amparo under review No. 307/2007, dated September 24, 2007, Amparo under review No. 810/2006, dated February 27, 2007, Amparo under review No. 1285/2006, dated February 27, 2007, Amparo under review No. 1659/2006, dated February 27, 2007, Amparo under review No. 2146/2005, dated February 27, 2007.

HIV, is compatible with the American Convention, based on a staggered analysis of proportionality which includes the following steps: i) legitimate purpose; ii) suitability; iii) the existence of less restrictive alternatives; and iv) proportionality in the strict sense.

103. The principal argument of the State is based on the existence of military laws and regulations that established that the alleged victims had to "keep in good health in order to be effective in the performance of their military duties."[99] According to the State, those norms are applied so that Army personnel "can fully comply with the general missions entrusted to them by the Armed Forces."[100] For that reason it considers that it was legitimate to have instituted a retirement procedure on account of unfitness acquired outside the line of duty.

104. The Commission considers that, in general terms, the State had a legitimate purpose, which consisted of ensuring a "good health" policy for members of the Armed Forces. That said, the measures that States adopt to attain that goal must be compatible with the obligations derived from the American Convention. In that sense, the discharging of the alleged victims from the Armed Forces does not necessarily match the goal indicated by the State. The analysis of whether the retirement of the alleged victims from the Armed Forces for having HIV unduly restricted their rights in relation to the obligations established in the American Convention will be analyzed in the following points of the test.

105. The IACHR notes that the alleged victims were separated from the Armed Forces for having HIV, based on a determination by the medical authorities that being infected with HIV fits into the following ground for unfitness: "Susceptibility to recurring infections attributable to untreatable conditions of cellular or humoral immunodeficiency of the organism" in accordance with paragraph 117 of the Tables Appended to the ISSFAM Law of June 26, 1976 and Article 22 of that Law. In other words, the State interpreted that the aforementioned ground for unfitness included HIV because in its opinion there is no medical treatment for that disease. Which is why the alleged victims were discharged.

106. On that point, it is a well-known fact that HIV is indeed susceptible to medical treatment. According to the World Health Organization, antiretroviral drugs fight the disease by stopping or interfering with the reproduction of the virus in the body.[101] Moreover, persons living with HIV who receive adequate medical treatment can go about their work in the same conditions as a person who does not have the disease.[102] Accordingly, the World Health Organization has stated that there is no health-related reason for placing restrictions on the employment of persons infected with HIV.[103]

107. The CESCR has said that States often invoke protection of public health to justify restrictions on human rights related to a person's state of health. It added: "However, many such restrictions are discriminatory, for example, when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum.[104]"

[99] Reply by the Mexican State, dated November 15, 2009.

[100] Reply by the Mexican State, dated December 15, 2009.

[101] World Health Organization, Q&A HIV/AIDS. Available at: http://www.who.int/features/qa/71/en/index.html

[102] According to the World Health Organization, with adequate medical treatment, the progression of HIV can decrease until it is contained, World Health Organization, Q&A HIV/AIDS. Available at: http://www.who.int/features/qa/71/en/index.html

[103] World Health Organization, HIV and certain common social situations, WHO, GPA/IMF/89.5, January 1989. Available at: http://whqlibdoc.who.int/hq/1989/WHO_GPA_INF_89.5_spa.pdf.

[104] United Nations, Committee on Economic, Social, and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (Article. 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, paragraph 33. The document refers to the guidelines published by the Office of the United Nations High Commission for Human Rights and the Joint United Nations Programme on HIV/AIDS. International Guidelines on HIV/AIDS and Human Rights. 2006 Consolidated Version. Available at: http://data.unaids.org/Publications/IRC-pub07/JCL1252-InterGuidelines_es.pdf.

108. The IACHR notes that in the instant case there was no health assessment or accurate scientific evidence to determine that the alleged victims, because of the development of the disease, had to be discharged from the Armed Forces because they could not go about their work effectively. Indeed, as it transpires from the proven facts, in the case of J.S.C.H., despite the existence of expert opinions establishing that HIV is susceptible to treatment, the Judge deciding the Amparo action brought by the alleged victim ruled that the expert evidence submitted did not "convince" him, so he rejected the appeal.[105] In short, instead of evaluating the individual capacity of the alleged victim to perform the duties assigned to him in his work, he concluded that the alleged victim, because he had HIV, should automatically be retired from the Armed Forces.

109. In the Commission's opinion, said interpretation is a product of the stereotypes and stigmas surrounding that disease. UNAIDS defines the stigmatization and discrimination associated with HIV as "a process by which people living with HIV are discredited. It may affect both those infected or suspected of being infected by HIV and those affected by AIDS by association, such as orphans or the children and families of people living with HIV"[106]: "Discrimination can be described as the enactment of stigma. In turn, discrimination encourages and reinforces stigma."[107]

110. The IACHR recognizes that depending on the degree to which the disease has developed, some persons infected with HIV will not be in optimal capacity to work. However, that is not a sufficient reason to justify the immediate forced retirement of all persons suffering from HIV without a prior individual evaluation of their state of health.

111. The IACHR notes that back in 1988 the World Health Assembly issued a resolution urging member states to protect the human rights of HIV-positive people and people with AIDS, avoid all discriminatory action against and stigmatization of them in the provision of services and employment, and promote the availability of confidential counseling and other support services.[108]

112. For its part, the International Labour Organization recently issued Recommendation 200 in which it established that real or perceived HIV status should not be a ground of discrimination preventing the recruitment or continued employment, or the pursuit of equal opportunities consistent with the provisions of the Discrimination (Employment and Occupation) Convention, 1958.[109] It also established that HIV status should not be a cause for termination of employment. Temporary absence from work because of illness or care-giving duties related to HIV or AIDS should be treated in the same way as absences for other health reasons[110].

113. In light of the above considerations, the IACHR concludes that the discharge of the alleged victims from the Armed Forces because they had HIV, without analyzing the extent to which their health was affected in respect of their work obligations, is not reasonable in keeping with the relationship of means to end with the objective pursued and is the result of the perpetuation of stereotypes, stigma and exclusion that

[105] Appendix 20. Amparo Judgment No 173/2001, dated May 21, 2003.

[106] UNAIDS, Violations of human rights, stigmatization and discrimination related to HIV, Case studies of successful interventions, UNAIDS/05.05S, April 2005 [*Tr. translated from Spanish; English title not found*]; United Nations, Reducing HIV Stigma and Discrimination: a critical part of national AIDS programmes A resource for national stakeholders in the HIV response, UNAIDS/07.32E / JC1420E, December 2007..

[107] Violations of human rights, stigmatization and discrimination related to HIV, Case studies of successful interventions, UNAIDS/05.05S, April 2005 [*Tr. translated from Spanish; English title not found*].

[108] Resolution of the 41st World Health Assembly of interest to the Americas Regional Committee on the "Avoidance of discrimination in relation to HIV-infected people and people with AIDS, WHA41.24, dated May 13, 1988. Available at: http://hist.library.paho.org/Spanish/GOV/CD/25057.pdf

[109] International Labour Organization, Recommendation No. 200 concerning HIV and AIDS and the world of work, 2010, paragraph 10.

[110] International Labour Organization, Recommendation No. 200 concerning HIV and AIDS and the world of work, 2010, paragraph 11. Reference is also made to the Termination of Employment Convention, 1982.

the State is in a particular duty to attack. Therefore, the State action does not pass the proportionality test and consequently constituted an act of discrimination according to the provisions of the American Convention.

114. As a result of the foregoing considerations, the Commission concludes that the Mexican State violated the right established in Article 24 of the American Convention, in conjunction with the general obligations established in Articles 1.1 and 2 of the same instrument, to the detriment of J.S.C.H. and M.G.S.

2. Right to privacy (Article 11 of the American Convention)

115. Article 11.1 of the American Convention established that everyone has the right to have his honor respected and his dignity recognized. According to Article 11(2), "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation". Article 11.3 provides that this right must be protected by law.

116. According to the jurisprudence of the IACHR and of the Inter-American Court, Article 11 of the Convention has a wide content that includes protection of the home, private life, the family and correspondence.[111] Bearing in mind the jurisprudence of the European Court of Human Rights, the IACHR has maintained that protection of private life encompasses a series of factors relating to the dignity of the individual, including, for example, capacity to develop his or her own personality and aspirations, determine her or his own identity, and define his or her own personal relations.[112] The European Court of Human Rights has addressed in its jurisprudence the question of the contents of the right to respect of one's private life and established that the concept of private life not only covers a person's physical and psychological integrity;[113] it also embraces aspects of his or her physical and social identity, including the right to personal autonomy, personal development, and the right to establish and develop relations with other human beings and with the outside world.[114] These attributes of human beings have been referred to in both inter-American and international jurisprudence as the right to intimacy [or privacy]. The right to privacy guarantees that each individual has a sphere into which no one can intrude, a zone of activity which is wholly one's own[115].

117. The IACHR emphasizes that a fundamental objective of Article 11 is to protect people against the arbitrary action of State authorities intruding into their private sphere.[116] Thus, the Inter-American Court has maintained that "the sphere of privacy is characterized by being exempt and immune

[111] I/A Court H.R. Case of Escué Zapata v. Colombia**.** Merits, Reparations, and Costs. Judgment of July 4, 2007. Series C No. 165, paragraph 91. It is important to point out that the American Declaration on the Rights and Duties of Man also recognizes the right of every person to the protection of the Law against abusive attacks upon his honor, his reputation, and his private and family life.

[112] IACHR, María Elena Morales de Sierra v Guatemala, Report No. 4/01, Case 11.625, January 19, 2001, paragraph 46. *See*, *inter alia*, European Court of Human Rights, Gaskin v. United Kingdom, Ser. A No. 169 (in relation to the petitioner's interest in accessing records relating to his childhood and adolescence); Niemetz v. Germany, Ser. A No. 251-B, paragraph 29 (where it is pointed out that respect for private life includes the right "to establish and develop relationships" both personal and professional).

[113] European Court of Human Rights, Tysiac v. Poland, paragraph 107; European Court of Human Rights, Pretty v. The United Kingdom, Application 2346/02, April 29, 2002, paragraph 61.

[114] European Court of Human Rights, Tysiac v. Poland, paragraph 107; European Court of Human Rights, Pretty v. The United Kingdom, Application 2346/02, April 29, 2002, paragraph 61.

[115] IACHR, X and Y v. Argentina, Report No. 38/96, case 10.506, October 15, 1996, paragraph 91.

[116] IACHR, María Elena Morales de Sierra v. Guatemala, Report No. 4/01, Case11.625, January 19, 2001, paragraph 47, citing *See, in general*, European Court of Human Rights., Kroon v. Netherlands, Ser. A No. 297-B, paragraph 31 (1994); European Court of Human Rights, Tysiac v. Poland, paragraph 109.

from abusive and arbitrary invasion by third parties or public authorities."[117] This protection extends to the family sphere.[118]

118. The purpose of the guarantee against arbitrariness is to ensure that any regulation (or other measure) of this type is consistent with the provisions and objectives of the Convention and reasonable under the circumstances.[119] In cases relating to the right established in Article 11 of the Convention, the Commission has established that the State has a special obligation to prevent "arbitrary or abusive" interferences.[120] The IACHR has maintained that the idea of "arbitrary interference" refers to elements of injustice, unpredictability and unreasonableness.[121] The IACHR has stated that protecting the individual from any arbitrary interference by public officials requires the State to adopt all necessary legislation in order to ensure this provision's effectiveness.[122]

119. The petitioners maintain that the State violated the right to a private life of the alleged victims by divulging confidential information on their state of health, which was also the ground for their discharge. The State, for its part, affirms that the General Staff has an obligation to known about the physical and psychological conditions of the personnel under its command, because members of the Armed Forces could not be sent on a mission if they lack the physical or mental conditions required to fulfill that mission adequately, as that would jeopardize the mission, the health of the personnel, and that of civilians, should the mission in question be to protect civilians.

120. In the instance case, it transpires from the file on the alleged victims that the medical certificates therein established that they were unfit for active service in the Armed Forces because they were infected with HIV, pursuant to paragraph 117 (Category One) of the Law, for which reason, in both cases, family custody was warranted.[123]

121. In the case of J.S.C.H., following the issuance of the medical certificate stating that he was HIV-positive, his state of health was disclosed to a number of authorities outside the medical sphere, even though his retirement had not been formalized. Indeed, as established in the proven facts section, in the file before the IACHR there is an official letter in which the head of forensic medicine informed the National Defense Secretary, Office of the Director General of Military Transportation, that J.S.C.H. was about to be discharged after having "tested positive in the Elisa test for detecting human immunodeficiency virus antibodies […]"[124]. He indicated that for that reason the alleged victim was "unfit to perform the obligations of his rank and post and during the processing of his retirement should remain in the custody of his family […]"[125]. It transpires from the file that said official letter was transmitted to 12 authorities, including, in

[117] I/A Court H.R. Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 199, paragraph 113; I/A Court H.R. *Case of the Ituango Massacres v. Colombia***.** Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148. paragraph 194; I/A Court H.R. Case *Escué Zapata Vs. Colombia. Merits, Reparations, and Costs*. Judgment of July 4, 2007. Series C No. 165, paragraph 95, and I/A Court H.R. Case of Tristán Donoso v. Panama**.** Preliminary Objection, Merits, Reparations, and Costs. Judgment of January 27, 2009 Series C No. 193, paragraph 55.

[118] I/A Court H.R. Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 199, paragraph 113, /A Court H.R. Case of Tristán Donoso v. Panama**.** Preliminary Objection, Merits, Reparations, and Costs. Judgment of January 27, 2009 Series C No. 193, paragraph 55.

[119] IACHR, María Elena Morales de Sierra v Guatemala, Report No. 4/01, Case 11.625, January 19, 2001, paragraph 47, *See* Human Rights Committee., Toonen v. Australia, Comm. No. 488/1992, paragraph 8.3, citing, General Comment 16[32] on Article 17 (of ICCPR), Doc. CCPR/C/21/Rev. 1 (May 19, 1989).

[120] IACHR, X and Y v. Argentina, Report No. 38/96, case 10.506, October 15, 1996, paragraph 92

[121] IACHR, X and Y v. Argentina, Report No. 38/96, case 10.506, October 15, 1996, paragraph 92

[122] IACHR, X and Y v. Argentina, Report No. 38/96, case 10.506, October 15, 1996, paragraph 91

[123] Appendix 1 and Appendix 24.

[124] Appendix 35. Official Letter-20887, File IX/III/10 issued by the Colonel in charge of the Forensic Medicine Section, Regulo Nava Frias, dated July 16, 1998. Appendix provided by the State through OAS Note 01927, dated August 29, 2005.

[125] Appendix 35. Official Letter-20887, File IX/III/10 issued by the Colonel in charge of the Forensic Medicine Section, Regulo Nava Frias, dated July 16, 1998

particular, the Office of the Director General of Informatics, Banjército, the Office of the Undersecretary for Special Services of the General National Defense Staff, the Head of the S-7 of the General Staff, and the Office of the Director General of Military Justice, all entities unrelated to the medical sphere.

122. Subsequently, Office of the Director General of Military Transportation sent the Commander of the First Military Region a communication indicating that the alleged victim was being discharged from the staff of the General National Defense Staff for having been diagnosed with HIV (proven facts section). That communication was forwarded "for their information" to six authorities unrelated to the medical sphere.

123. In the case of M.G.S., subsequent to the issuance of the medical certificate documenting that he had tested HIV-positive, there is Official Letter No. SAMT-13181 in which the Commander of the Sixth Military Region was informed that the alleged victim was being discharged from the Infantry Battalion for being an HIV carrier (proven facts section). Said official letter was forwarded "for their information" to 19 authorities, and even to the alleged victim's concubine, persons who bear no relation to the strictly medical sphere. That occurred despite the existence in the file of a valid document consenting to take the HIV test, which states that the results will be handled confidentially and discretely.[126] The letter also indicated that the alleged victim was "unfit to perform the obligations of his rank and post and during the processing of his retirement should remain in the custody of his family […]"

124. Although the IACHR recognizes the importance in principle of the State being familiar with state of health of the members of the Armed Forces, so as to keep them in good health, in the instant case the IACHR notes that the State has not demonstrated what legitimate goal it pursued when it disclosed the state of health of the alleged victims to a number of authorities in the Armed Forces that had nothing to do with the medical sphere during the processing of retirement.

125. In that regard, the Inter-American Court has pointed out that doctors have a right and duty to keep information to which they have access as physicians confidential.[127] The Court has also underscored that the United Nations Human Rights Committee has already recommended that domestic laws be amended in such a way as to protect the confidentiality of medical information.[128]

126. The IACHR considers that an important aspect to consider with respect to health, in the case of both civilians and military, is the professional relationship between health professionals and users of the service. The World Health Organization (WHO) defines the duty of confidentiality as the duty of health providers to "protect patients' information from unauthorized disclosures."[129]

127. The IACHR notes that matters relating to sexual and reproductive health, especially HIV/AIDS, are highly sensitive, because of the stigma surrounding the disease, as occurred in this case, which resulted in the loss of employment. The former Special Rapporteur of the United Nations on the right of everyone to the enjoyment of the highest attainable standards of physical and mental health has pointed out the importance of confidentiality in connection with sexual and reproductive health. To use his words:

> […]in the context of sexual and reproductive health, breaches of medical confidentiality may occur. Sometimes these breaches, when accompanied by stigmatization, lead to unlawful dismissal from employment, expulsion from families and communities, physical assault and other abuse. Also, a lack of confidentiality may deter individuals from seeking advice and

[126] Appendix 36. Informed consent document valid for laboratory studies, issued by the Office of the Director General of Health of the Central Military Hospital of the Secretariat of National Defense, signed by M.G.S., dated July 24, 2001.

[127] I/A Court H.R., *Case of De la Cruz Flores v. Peru*. Judgment of November 18, 2004. Series C No. 115, paragraph 101.

[128] I/A Court H.R., *Case of De la Cruz Flores v. Peru*. Judgment of November 18, 2004. Series C No. 115, paragraph 100, citing the final observations of the Human Rights Committee, Chile, UN Doc. CCPR/C/79/Add.104 (1999).

[129] World Health Organization. Safe Abortion: Technical and Policy Guidance for Health Systems. Geneva: WHO; 2003. pp. 68.

treatment, thereby jeopardizing their health and well-being. Thus, States are obliged to take effective measures to ensure medical confidentiality and privacy [130].

128. For its part, the CESCR has emphasized that access to information must not detract from the right to confidential handling of health-related personal data.[131] Likewise, the IACHR notes with regard to confidentiality of information, especially on HIV/AIDS, the European Court has maintained that:

> The Court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention (art. 8. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general[132].
>
> Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community[133].
>
> The domestic law must therefore afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention[134].
>
> The above considerations are especially valid as regards protection of the confidentiality of information about a person's HIV infection. The disclosure of such data may dramatically affect his or her private and family life, as well as social and employment situation, by exposing him or her to opprobrium and the risk of ostracism. For this reason it may also discourage persons from seeking diagnosis or treatment and thus undermine any preventive efforts by the community to contain the pandemic [...].The interests in protecting the confidentiality of such information will therefore weigh heavily in the balance in determining whether the interference was proportionate to the legitimate aim pursued. Such interference cannot be compatible with Article 8 of the Convention (art. 8) unless it is justified by an overriding requirement in the public interest[135].
>
> In view of the highly intimate and sensitive nature of information concerning a person's HIV status, any State measures compelling communication or disclosure of such information the consent of the patient call for the most careful scrutiny on the part of the Court, as do the safeguards designed to secure an effective protection[136].

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[130] United Nations, Report of Special Rapporteur Paul Hunt, The Right of Everyone to the Enjoyment of the Highest Attainable Standards of Physical and Mental Health, E/CN.4/2004/49, February 16, 2004, paragraph 40..

[131] United Nations, Committee on Economic, Social, and Cultural Rights. The Right of Everyone to the Enjoyment of the Highest Attainable Standards of Physical and Mental Health (Article 12 of the International Pact of Economic, Social, and Cultural Rights), General Comment14, August 11, 2000, paragraph 12.

[132] European Court of Human Rights, Case of Z v. Finland, Application 22009/93, February 25, 1997, paragraph 95. See also European Court of Human Rights, Case of I. v. Finland, Application *20511/03,* paragraph 38; European Court of Human Rights, Case of C.C. V. Spain, paragraphs 31 and 32.

[133] European Court of Human Rights, Case of Z v. Finland, Application 22009/93, February 25, 1997, paragraph 95.

[134] European Court of Human Rights, Case of Z v. Finland, Application 22009/93, February 25, 1997, paragraph 95.

[135] European Court of Human Rights, Case of Z V. Finland, Application 22009/93, February 25, 1997, paragraph 96; European Court of Human Rights, Case of C.C. v. Spain, paragraph 33.

[136] European Court of Human Rights, Case of Z v. Finland, Application 22009/93, February 25, 1997, paragraph 96; European Court of Human Rights, Case of C.C. v. Spain, paragraph 34.

129. In light of the above considerations, the IACHR concludes that the Mexican State violated the right established in Article 11 of the American Convention, in conjunction with the general obligations established in Articles 1.1 and 2.

3. Right to a Fair Trial/Due Guarantees (Article 8.1 of the American Convention)

130. Article 8.1 of the American Convention establishes that:

> 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.

131. Regarding that Article, the Court has stated that:

> [f]or cases which concern *the determination of [...] rights and obligations of a civil, labor, fiscal, or any other nature,* Article 8 does not specify any *minimum guarantees* similar to those provided in Article 8(2) for criminal proceedings. It does, however, provide for *due guarantees;* consequently, the individual here also has the right to the fair hearing provided for in criminal cases. [137]

132. The Inter-American Court has maintained that:

> The right to obtain all the guarantees through which it may be possible to arrive at fair decisions is a human right, and the administration is not exempt from its duty to comply with it. The minimum guarantees must be observed in the administrative process and in any other procedure whose decisions may affect the rights of persons.[138]

133. In the instant case, the IACHR notes that, as established in the proven facts section, J.S.C.H. filed a dissent appeal in accordance with Article 197 of the ISSFAM Law against the decision to discharge him from the Armed Forces. In response to that appeal, the Military Justice Bureau ruled that "the objections put forward by the appellant were inadmissible, based on all the logical and legal arguments already set forth in this statement" and ratified section a) of his statement which established the following:.

> In official letter No. SGB-V-32386 of September 4, 1998, this Bureau approved the discharge of the officer in question due to unfitness acquired outside the line of duty on the grounds of being diagnosed POSITIVE IN AN ELISA TEST FOR HUMAN IMMUNODEFICIENCY VIRUS ANTIBODIES, WHICH DIAGNOSIS WAS CONFIRMED BY A WESTERN BLOT TEST AND DATA INDICATING INFECTION WITH OPPORTUNISTIC GERMS, WHICH ARE MANIFESTATIONS OF CELL IMMUNODEFICIENCY," a disease included in paragraph 117 of the First Category of the Appended Tables to the Law of the Social Security Institute for the Mexican Armed Forces.[139]

134. Subsequently, J.S.C.H. sought judicial recourse. The IACHR notes that in 1998 he filed the first amparo application and that in 2003 a ruling was handed down on the third and last amparo application filed. As established in the proven facts section, in almost all cases, the judges did not examine the merits of the matter. In the third amparo action, the Fifth Judge of District "A" for Administrative Matters in the Federal District ruled that the alleged victim suffers from HIV and, as this is incurable, is unable to have "the physical

[137] I/A Court H.R., *Case of the "White Van" (Paniagua Morales et al) vs. Guatemala.* Judgment of March 8, 1998. Series C No. 37, paragraph 149.

[138] I/A Court H.R., *Case Baena Ricardo and others vs. Panama.* Judgment of February 2, 2001, paragraphs 126 and 127.

[139] Appendix 7. Official Letter No. SGB-40209 dated October 22, 1998.

and mental capacity to carry out his work activities." That decision was upheld in an appeal review before the Ninth Collegiate Court for Administrative Matters of the First Circuit.

135. The IACHR already determined that the alleged victims were victims of discrimination in that they were discharged from the Armed Forces simply for having HIV. Accordingly, the Commission considers that the proceedings of the judicial authorities manifest and clearly perpetuate with their decision prejudice and stigmatization of persons living with HIV, which, as the IACHR has already established, is incompatible with the American Convention.

136. M.G.S., for his part, appealed the legitimacy of his involuntary retirement, requesting medical care and the appropriate medicines. In response to that request, the Military Justice Bureau replied that it was not admissible to grant the requested benefit because dissent could only refer to the legitimacy or illegitimacy of the retirement, the military rank assigned at discharge, or the calculation of time served.

137. M.G.S. resorted to judicial recourse by filing an amparo application. The Ninth District Judge for Administrative Matters in the Federal District dismissed the case on the grounds that the alleged victim had not filed the amparo application against the first document notifying him of the approval of his retirement. Later, the Ninth Collegiate Court for Administrative Matters upheld the judgment of the lower court.

138. In this regard, the IACHR notes that in the judicial proceedings in the case of M.G.S. the merits of the matter were never examined. In such cases, the Inter-American Court has pointed out that there is a duty to substantiate state decision and failure to do so contravenes the guarantees of Article 8.1 of the American Convention.[140]

139. In short, in both cases the standards applied under domestic jurisdiction to decide on the judicial appeals filed by the alleged victims were incompatible with Article 8.1 of the American Convention and therefore constitute violation of their right of access to justice.

140. Based on the above considerations, the IACHR concludes that the Mexican State violated the right established in Article 8.1 of the American Convention, in conjunction with the general obligation established in Articles 1.1 and 2, to the detriment of the alleged victims.

VI. ACTIONS SUBSEQUENT TO REPORT No. 139/11

141. The Commission adopted Merits Report No. 139/11 on October 31, 2011, and passed it on to the State on November 16, 2011. In this report, the Commission made the following recommendations:

1. Provide the victims in the instant case with such comprehensive health services as they may require.
2. Make complete reparation to the victims in the instant case, both material and moral, including measures to compensate the damage caused, as well as their reinstatement in the Armed Forces, should victims so desire.
3. Ensure that the ISSFAM Law in force is compatible with the State's obligations in respect of the rights established in Articles 1.1,11, and 24 of the Convention, as established throughout this report. In particular that it clarifies that testing positive for HIV does not automatically restrict the ability to perform military functions.

[140] See, I/A Court H.R.: *Case of Yatama vs. Nicaragua*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of June 23, 2005. Series C Nº 127, paragraphs 160 – 164 and *Case of Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, paragraphs. 86 – 91.

142. After sending the merits report, the Commission received reports from both the State and the petitioners. The Commission granted the State 14 extensions in which to make progress on complying with the recommendations. The most relevant contents of the State and petitioners' reports are described below.

143. On January 18, 2012, the State reported that it had notified J.S.C. and M.G.S. of their reinstatement into active duty in the armed forces. Furthermore, in response to the petitioners' request related to the victims' immediate retirement after their reinstatement, the State indicated that the Office of the Director General of Human Rights of the SEDENA would accompany the victims in order to facilitate the necessary arrangements. The State reported that with this action it had complied with the second recommendation made in the merits report.

144. On February 7, 2012, the petitioners reported that as of that date the Mexican State had reinstated the victims into active duty with the Armed Forces, had paid the wages that the victims did not receive while they were discharged from the Army, and was processing the retirement applications submitted by the victims. Furthermore, J.S.C.H. and M.G.S. had started to receive the comprehensive medical care they were due as active-duty servicemen, which includes both medical and psychological care, from the Central Military Hospital, under the authority of the Office of the Director General of Health of the National Defense, and the Condesa Clinic of the Federal District, respectively.

145. On February 13, 2012, the petitioners informed the State of the need to guarantee the victims full reparation for the material damages suffered, emphasizing that the payment of unpaid wages and other financial benefits that the victims had not received does not fully satisfy this obligation.

146. In a work meeting held in the framework of the 144th period of sessions of the IACHR on March 24, 2012, the parties signed the "Agreement for adherence to Merits Report No. 139/11 passed by the IACHR in case 12,689 J.S.C.H and M.G.S."

147. The relevant part of this agreement establishes that:

> In order to fulfill the purpose of the agreement, the parties undertake the following:
>
> **ONE.-**To promote agreements that fully adhere to inter-American standards and favor the rights of the victims, for which reason an arrangement that fully complies with the recommendations of the Merits Report issued by the IACHR in this case has been designed and agreed upon.
>
> **TWO.-**The State commits to fulfilling the recommendations issued by the IACHR in Merits Report 139/11, in strict adherence to its international obligations and through an arrangement that will encourage dialogue and the victims' involvement in the actions undertaken to those ends.
>
> **THREE.-**The Mexican State will provide full redress for the damages suffered by the victims as a result of the violations of their human rights accredited in this case, through the following measures:
>
> a. The reinstatement of the victims into the Armed Forces;
> b. The provision of comprehensive medical and psychological care to the victims, automatically included with their reinstatement into the Armed Forces;
> c. The payment of monetary compensation for material damages;
> d. The payment of monetary compensation for non-material damages;
> e. A ceremony for the acknowledgement of responsibility as a satisfaction measure;
> f. The evaluation and amendment of the ISSFAM Law as a guarantee of non-repetition, as ordered by the IACHR; and
> g. The implementation of training programs within the Armed Forces to prevent discrimination against persons with HIV/AIDS.

VI. Guarantees of non-repetition. Implementation of a training program.
In order to promote equality within the Armed Forces and combat non-discrimination (sic) associated with the issue of HIV/AIDS, the Secretariat of National Defense, on the motion of the National Council to Prevent Discrimination, will launch a training program that will be included as part of the "Secretariat of National Defense Program to Promote and Strengthen Human Rights and International Humanitarian Law," which is currently being implemented within the Armed Forces.

148. On June 26, 2012, the State reported that on April 27, 2012, in compliance with clause three, section d) of the compliance agreement entered into with the petitioners, it delivered the respective monetary compensations for material damages.

149. On October 15, 2012, the petitioners reported that the Mexican State had provided full restitution for the material damages and pain and suffering experienced by the victims due to the human rights violations to which they had been subjected. J.S.C.H. was given the amount of MXN 1,548,660.01 (one million five hundred forty-eight thousand six hundred sixty and 01/100 pesos, national currency) and M.G.S. was given the amount of MXN 806,718.29 (eight hundred six thousand seven hundred eighteen and 29/100 pesos, national currency), for material damages, and they were each given the amount of MXN 1,400,000.00 (one million four hundred thousand and 00/100 pesos, national currency) for non-material damages.

150. On January 16, 2014, the State reported that on October 22, 2013, the Federal Executive presented a bill that amends, adds, and repeals various provisions of the ISSFAM Law to the Chamber of Deputies. The State reported on the applicable legislative procedure and on January 14, 2015, indicated that the Joint Commissions on Legislative Studies and National Defense had unanimously approved the bill on December 15, 2014. On April 14, 2015, the State reported that on January 27, 2015, the amendment was published by order of the head of the Federal Executive Branch. The State indicted that this regulation introduces an element of quantitative and qualitative differentiation to the text, so as to assess when infection with the immunodeficiency virus warrants discharge from military service. Likewise, the amendment ties in an enforcing authority for the express prohibition of discrimination and includes a provision to the effect that whenever medically possible, treatment, not just for HIV but for all ailments and motives for discharge established in the regulation, will be adapted to the serviceman's specific activities so as to not affect his duties.

151. In its last report to the Commission, the State informed that the public ceremony for the acknowledgement of international responsibility took place on July 24, 2015, at the Memory and Tolerance Museum (*Museo Memoria y Tolerancia*), was led by the Secretary of the Interior in representation of the Mexican State, and was attended by representatives of the victims in this case.

VII. ANALYSIS OF COMPLIANCE WITH RECOMMENDATIONS

152. Based on the foregoing information, the Commission will analyze compliance with the recommendations made in Merits Report 139/11.

153. With regard to the first recommendation to "provide the victims in the instant case with such comprehensive health care services as they may require" the petitioners reported that the Mexican State has guaranteed the victims access to comprehensive healthcare services that include both medical and psychological care, provided in the first case by the Central Military Hospital, under the authority of the Office of the Director General of Health of the National Defense, and in the second, by the Condesa Clinic of the Federal District.

154. Furthermore, in the text of the agreement, the State reported that as a logical consequence of the victims' reinstatement into the Armed Forces, they would receive comprehensive medical care from the Office of the Director General of Health of the Secretariat of National Defense, including hospital and pharmaceutical services. The State set forth that the victims' dependants who are registered with the ISSFAM are also entitled to comprehensive medical services. The State additionally reported that if the victims should require any kind of medical care that the ISSFAM is unable to provide, the Secretariat for Health agrees to make the necessary

arrangements for the victims to be cared for free of charge at the National Institute of Medical Sciences and Nutrition "Salvador Zubirán" or at any other highly specialized institute of the Secretariat for Health, pursuant to the legal framework in force. Finally, the State indicated that if the victims retire, the ISSFAM will continue to provide them with that care.

155. By virtue of the foregoing, the Commission considers the State to have complied with the first recommendation of Merits Report 139/11.

156. With regard to the second recommendation to "make complete reparation to the victims in the instant case, both moral and material, including measures to compensate the damages caused, as well as their reinstatement in the Armed Forces, should the victims so desire" the State reported that on January 16, 2012, the victims were notified of Agreements 968 and 967 of January 4, 2012, which ordered their reinstatement into the Mexican army as well as the payment of the unpaid wages and other remuneration they had not received from the date of their discharge until December 31, 2011, among other things.[141] They were also offered the opportunity to retire from the army. The petitioners reported that the Mexican State had indeed reinstated the victims into the armed forces and that the retirement process was under way.

157. With regard to the payment of material damages, consisting in the victims' unpaid wages from the date on which they were discharged until they were reinstated, the State reported that on January 25, 2012, Mr. J.S.C.H. received the amount of one million five hundred forty-eight thousand six hundred sixty thousand and 01/100 pesos, national currency (MXN 1,548,660.01) for wages and other remuneration, for the period between April 16, 1999 and December 31, 2011. On January 26, 2012, Mr. M.G.S. received the amount of eight hundred six thousand seven hundred eighteen and 29/100 pesos, national currency (MXN 806,718.29) for wages and other remuneration for the period between July 1, 2002 and December 31, 2011.

158. Furthermore, with regard to the pain and suffering caused, the State reported that on April 27, 2012, it provided each of the victims with monetary compensation in the amount of one million four hundred thousand pesos (MXN 1,400,000.00), which is the amount that had been proposed by the petitioners. These payments are documented in the administrative certificate attached to that statement, which contains the signatures of the two victims in this case. The petitioners acknowledged these payments and indicated that the Mexican State had provided the victims full redress for the material damages and non-material damages caused by the human rights violations to which they were subjected.

159. The Commission observes that the State reinstated the victims of this case and paid for the material damages suffered from the time of their discharge until their effective reinstatement. It also provided both victims with monetary compensation for the non-material damages experienced. Taking into account the foregoing, the Commission deems that the State also complied with the second recommendation made in the merits report.

160. With regard to the merits report's third recommendation to "ensure that the ISSFAM law in force is compatible with State's obligations in respect of the rights established in Articles 1.1, 11, and 24 of the Convention, as established throughout this report. In particular, that it clarifies that testing positive for HIV does not automatically restrict the ability to perform military functions," the State reported that by order of the head of the Federal Executive Branch the "Decree to amend, add, and repeal various provisions of the Mexican Armed Forces Social Security Law" was published in the Official Gazette of the Federation on January 27, 2015, and the changes went into effect on January 28, 2015, as established by the provisional single article of that decree.

[141] The State reported that the ministerial agreements that ordered the victims' reinstatement have the following effects: a. Consideration of their time served on active duty in the Mexican Army; b. Reinstatement to their positions under the authority of their respective divisions; c. The provision of comprehensive medical services to which they and their dependants registered with the ISSFAM are entitled, d. Payment of the unpaid wages and other remuneration that they did not receive from the time they were discharged until December 31, 2011; e. The reestablishment of their biweekly payments: and f. Transportation, food, clothing, and equipment support, academic scholarships for their descendants, mortgage loans, housing, and uniforms.

161. The Commission notes that this decree amended subsection IV of Article 24, to read as follows: The following are cause for retirement: IV. Being rendered unfit due to actions outside of the line of duty, pursuant to the provisions of Articles 174[142] and 183[143] of this law. It also amended numbered paragraph 83 of Article 226[144], adding a final sentence stipulating that Acquired Immune Deficiency Syndrome constitutes a category that provides grounds for discharge on the basis of unfitness whenever it results in the serviceman's loss of functionality for performing actions in the line of duty. The amended article read as follows:

> Article 226. To determine the categories and degrees of accidents and diseases that are cause for discharge for unfitness, the following Tables shall apply:
>
> Category One
> (…)
>
> 83. Acquired Immune Deficiency Syndrome, demonstrated by testing positive for immunodeficiency virus, confirmed with supplementary tests in addition to infection with opportunistic germs and/or malignant neoplasia, which entail the serviceman's loss of functionality for performing actions in the line of duty.

162. The decree also added Article 226 Bis, which establishes a list of ailments that because they cause functional impairment of less than 20% warrant a change of arm or service at the request of a medical board, and stipulates in numbered paragraph 19 that "infection with the human immunodeficiency virus confirmed with supplementary tests, the control and medical treatment of which restrict the performance of actions in the line of duty" is included in that list.[145]

163. The IACHR considers that the amendments to the ISSFAM Law resolve the issue identified in the merits report, as they establish that testing positive for HIV may only serve as grounds for discharge if it results in a loss of functionality for performing actions in the line of duty, and exclude all interpretations that would presume that the mere fact of living with HIV automatically entails such a loss. Taking the foregoing into account, the IACHR considers that with this amendment the State complied with the third recommendation made in Merits Report 139/11.

164. The Commission also noted that with the "Agreement for adherence to the Merits Report" the State also committed to holding an event for the "acknowledgement of responsibility as a satisfaction measure" as well as to implementing a training program within the Armed Forces, aimed at promoting equality and combating HIV/AIDS-related non-discrimination (sic) therein as a guarantee of non-repetition.

165. According to the State, the public ceremony for the acknowledgement of responsibility took place on July 24, 2015 at the Memory and Tolerance Museum, with the participation of high-level officials representing the Mexican State,[146] as well as the victims' representative Gabriela González Manzo and

[142] Article 174 establishes that "unfitness due to causes outside the line of duty shall be accredited solely with certificates issued by specialist military or naval doctors appointed by the Secretariats of National Defense or of the Navy."

[143] Article 183 stipulates that "for all cases in which medical reports and certificates must be presented, they must be signed by at least two military or naval doctors who are specialists in the serviceman's ailment."

[144] Said article established: Article 226: To determine the categories and degrees of accidents and diseases that are cause for discharge for unfitness, the following Tables shall apply:
Category One, paragraph 83**:** Testing positive for human immunodeficiency virus antibodies, confirmed with supplementary tests in addition to infection with opportunistic germs and/or malignant neoplasia, in the final stage for more than six months.

[145] http://www.diputados.gob.mx/LeyesBiblio/pdf/84_270115.pdf.

[146] Miguel Ángel Osorio Chong, Secretary of the Interior, Roberto Campa Cifrián, Deputy Secretary of Human Rights of the SEGOB, Felipe Solís Acero, Deputy Secretary of Legislative Liaison of the SEGOB, Eber Omar Betanzos Torres, Assistant Advocate for Human Rights, Crime Prevention, and Community Service of the Office of the Attorney General of the Republic, Alejandro Alday, Human Rights and Democracy Commissioner of the Secretariat for Foreign Affairs, Graciela Ortiz González, Senator and Chair of the Commission for Legislative Studies of the Senate of the Republic, Jaime Rochín Rochín, Commissioner Chair of the Executive Commission for Victim Services.

representative Pedro Morales Aché. The Director of Human Rights of the Secretariat of National Defense also participated. The Commission notes that several different media outlets covered this ceremony for the acknowledgment of responsibility.[147]

166. In addition, the State reported on April 10, 2013, that the training program for the Armed Forces had already been implemented, and was to be given in three stages: I) Online course ABCs of equality and non-discrimination for leaders and officials, II) In-person course on HIV non-discrimination, targeted at the legal advisors and support staff for high-ranking officials on health matters, III) Thematic unit on equality and non-discrimination of the training course for professors of human rights, given at the Army and Air Force Study Center.

VIII. FINAL CONCLUSIONS AND RECOMMENDATIONS

167. According to the provisions of Article 51 (3) of the Convention, at this stage of the process the IACHR must determine whether the State has complied with the recommendations issued. In this regard, and pursuant to the relevant considerations, the IACHR observes that the State fully complied with the recommendations set forth in Merits Report 139/11, as well as with the additional components of the agreement entered into by the parties. The Commission appreciates the efforts made by the parties towards compliance with the recommendations, as well as their efforts towards building dialogue and a constructive process to ensure compliance.

IX. PUBLICATION

168. Based on the considerations presented and taking into account that the State has fully complied with the recommendations of Merits Report 139/11, the Commission considers it unnecessary to continue evaluating the measures adopted by the State with regard to those recommendations in the terms of Article 47.2 of its Rules of Procedure, and therefore, pursuant to Article 51.3 of the American Convention and Article 47.3 of its Rules of Procedure, it decides to publish this report and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 28th day of the month of October, 2015. (Signed): Rose-Marie Belle Antoine, President; James L. Cavallaro, First Vice-President; Felipe González, Rosa María Ortiz, and Tracy Robinson, Commissioners.

[147] El Universal, *Se disculpa gobierno con miliares con VIH* [Government apologizes to soldiers with HIV], July 25, 2015, available at: http://www.eluniversal.com.mx/articulo/nacion/seguridad/2015/07/25/se-disculpa-gobierno-con-militares-con-vih; Globovision, *Gobierno mexicano se disculpa con militares despedidos por portar VIH* [Mexican government apologizes to soldiers fired for carrying HIV], July 25, 2015, available at: http://globovision.com/gobierno-mexicano-se-disculpa-con-militares-despedidos-por-portar-vih/; El diario de Chihuahua, *Se disculpa gobierno con militares cesados por VIH* [Government apologizes to soldiers discharged for HIV], July 25, 2015, available at: http://eldiariodechihuahua.mx/El_Pais/2015-07-25/Se-disculpa-gobierno-con-militares-cesados-por-VIH/ffae16f70ed6bd9ae3399912f6a88619; El Espectador, *Gobierno mexicano presenta disculpa a militares despedidos por portar VIH* [Mexican government presents apologies to soldiers fired for carrying HIV], available at: http://www.elespectador.com/noticias/elmundo/gobierno-mexicano-presenta-disculpa-militares-despedido-articulo-574877.