

OEA/Ser.L/V/II.  
Doc. 154  
8 July 2021  
Original: Spanish

**REPORT No. 146/21**  
**PETITION 292-15**  
REPORT ON ADMISSIBILITY

ALAN ROBERT MARTÍNEZ MARTÍNEZ  
PARAGUAY

Approved by the Commission electronically on July 8, 2021.

**Cite as:** IACHR, Report No. 145/20, Petition 292-15. Admissibility. Alan Robert Martinez.  
Paraguay. July 8, 2021.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Edgar Quintana
<b>Alleged victim:</b>	Alan Roberto Martínez Martínez
<b>Respondent State:</b>	Paraguay
<b>Rights invoked:</b>	Articles 5 (humane treatment), 8 (fair trial), 11 (right to privacy), 17 (rights of the family), 19 (rights of the child), 24 (equality before the law) and 25 (judicial protection) of the American Convention on Human Rights <sup>1</sup> in relation to its article 1.1 (obligation to respect rights) and 2 (obligation to abide by domestic legal effects) thereof

**II. PROCEEDINGS BEFORE THE IACHR<sup>2</sup>**

<b>Filing of the petition:</b>	January 31, 2015
<b>Additional information received at the stage of initial review:</b>	November 30, 2018
<b>Notification of the petition to the State:</b>	August 12, 2019
<b>State's first response:</b>	November 27, 2020
<b>Additional observations from the petitioner:</b>	January 11, 2021

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (instrument of accession deposited on August 24, 1989)

**IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	Articles 5 (humane treatment), 8 (fair trial), 11 (right to privacy), 17 (rights of the family), 19 (rights of the child), 24 (equality before the law), 25 (judicial protection) and 26 (progressive development) of the American Convention, in relation to its articles 1.1 (obligation to respect rights) and 2 (obligation to abide by domestic legal effects)
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, in the terms of section VI
<b>Timeliness of the petition:</b>	Yes, in the terms of section VI

<sup>1</sup> Hereinafter "the American Convention".<sup>2</sup> The observations submitted by each party were duly transmitted to the opposing party.

## V. FACTS ALLEGED

1. The petitioner claims that the State violated the rights of Mr. Martínez, by retiring him from the Armed Forces in a discriminatory manner and without due process, after contracting the Human Immunodeficiency Virus (hereinafter, HIV) as a consequence of his functions in said institution.

2. The petitioner narrates that on August 14, 2003 the alleged victim started to provide services in the Armed Forces of the Nation, as Sub-Official with the rank of First Lance Sergeant of Infantry. He explains that between 2004 and 2007 the military personnel were performing garbage disposal duties with no protection equipment; for which reason, in 2007, while Mr. Martínez was performing said duties he suffered stings and cuts on his hand. After not feeling well, he holds that the alleged victim attended a medical center, where he was told, after the performance of an exam, that he was a carrier of HIV in phase of acquired immunodeficiency syndrome (AIDS).

3. He argues that because the clinical chart of Mr. Martínez was accessible to anyone, the cited results were divulged within all of the Armed Forces, which caused the alleged victim to suffer different situations of discrimination. On this matter, the Juridical Director of the referred institution at the time, specifies that he ordered that Mr. Martínez not be allowed to have water from the drinker; and that *"he was accused of being homosexual"*, which is why he had to live with that stereotype even after his departure from the Armed Forces.

4. Upon this, the alleged victim filed a request at administrative level so it would be declared that he had contracted said disease in acts of service and he be recognized an indemnity and a special pension. On April 13, 2009 the Prevention Court of the Command of the Military Forces accepted said request and declared that Mr. Martínez had contracted HIV in acts of service. Based on this, he holds that on April 29, 2009 the Medical Recognition Board of the Armed Forces of the Nation recommended that the alleged victim resorts to the benefits foreseen in article 124 of the of the Military Personnel Statute <sup>3</sup>.

5. In spite of this, on June 16, 2009 the National Defense Ministry, by means of Executive Power Decree Nº 2254, passed the alleged victim to a Temporary Situation of Retirement from the Armed Forces, by virtue of articles 120, subsection A, and 125 of the Military Personnel Statute<sup>4</sup>, that, in essence, establish that the personnel of the Armed Forces must have flawless moral conditions so as to be promoted and that whomever does not make promotion twice either consecutively or alternately is to be discharged. It specifies that the referred rule stated as a foundation, among its considerations, a resolution from the Board of Assessment for Sub-officials Service of the Command-in-Chief of the Armed Forces of the Nation (hereinafter "Board of Assessment"), adopted on November 27, 2009 on its session Nº 20.

6. The petitioner claims that the cited decision, actually, responded to a scheme of corruption within said institution, and that deep down the aim was to discharge Mr. Martínez for being carrier of HIV. Along these lines, petitioner holds that there is no document signed by all the members of the abovementioned Board of Assessment, which would prove that there was no such decision. In addition, claims that although said decree cited norms which provide that member of the Armed Forces shall be discharged after twice missing promotion either consecutively or alternately, there is no documentation either that supports the application of said articles. On this matter, he holds that in 2007 the alleged victim was allowed to postpone his promotion reviews, while in 2008 he did not undergo the review for being sick, situation of which authorities were aware due to the divulgation of his health condition. Finally, claims that Mr. Martínez was never notified of said decree, so he would properly exercise his right to defense.

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<sup>3</sup> Law 1115/97, Of the Military Personnel Statute. "Article 124.- The Military Personnel that, because of an accident, disease or wound received in acts of service, were disabled for active duty or died as a consequence, prior report by the Medical Recognition Board may be promoted to the immediately above rank and transitioned to inactivity, or discharged for death with retirement assets or full pension corresponding to the new rank, regardless of the time served."

<sup>4</sup> Law 1115/97, Of the Military Personnel Statute. "Article 120.- Apart from the minimum time of service set forth in Annex "2" for promotion, it is necessary that the personnel have: a) flawless moral conditions; [...] Article 125.- The Military personnel shall pass from on duty to a situation of retirement when not promoted in two consecutive or alternate occasions".

7. Upon this, the alleged victim initiated a contentious administrative proceeding against Executive Power Decree Nº 2254, claiming that said decision affects the benefits he was to be granted pursuant to article 124 of the Military Personnel Statute, for having contracted HIV in acts of service. Nonetheless, on December 31, 2012, the Second Chamber of the Court of Auditors rejected the claim in considering that the claimant should have directly contested the decision of the Board of Assessment and that said decision abided by the legislation in force. The defense of Mr. Martínez filed an appeal against said decision, but on August 1, 2014 the Criminal Chamber of the Supreme Court of Justice declared said remedy inadmissible, arguing that the documentation required by the applicable norm was not attached in order to analyze its admissibility. In this regard, the petitioner holds that the alleged victim did not attach said documents, since the copies of the first instance proceedings were not duly notified to him.

8. In parallel, the petitioner claims that on June 14, 2011 Mr. Martínez filed an ordinary lawsuit for damages for extracontractual responsibility against the Command-in-Chief of the Armed Forces, claiming he contracted HIV due to the negligence of said institution. However, on March 19, 2014 the First Instance Civil and Commercial Judge declared itself incompetent to hear such remedy in considering that the allegations raised had to be heard via the contentious administrative path, which is exclusive of the Court of Auditors, pursuant to article 39 of the Judicial Organization Code.

9. In short, the petitioner denounces that the State violated the rights of the alleged victim by removing him from the Armed Forces after contracting HIV in acts of service and not granting him the benefits set forth in the domestic legislation. Although said domestic legislation protects the persons who live with HIV in the workplace<sup>5</sup>, Executive Power Decree Nº 2254 had been based on inexistent reports and had wrongfully applied the provisions of the Military Personnel Statute. Finally, argues that all that occurred is the result of the corruption which operates inside the Armed Forces.

10. The State, on its part, replies that the petition is inadmissible, since the reported facts do not characterize attributable human rights violations. It argues that the Board of Assessment decided to request the temporary retirement of Mr. Martínez before the Prevention Court of the Command of the Military Forces declared that the alleged victim contracted HIV in acts of service, for which reason it was not motivated in this last situation. On the contrary, it holds that the documentation provided proves that the alleged victim failed the promotion reviews in two consecutive years (2007 and 2008), for which reason according to the domestic norm he was supposed be retired. It adds that Mr. Martínez did not contest the resolved by said board and preferred to use other judicial paths. Therefore, it stresses that the cited decision only complied with domestic law and was not based on any discriminatory criterion.

11. Finally, it holds that Mr. Martínez had access to proper and effective judicial remedies, which were solved by competent authorities with duly motivated decisions. Consequently, the fact that his demands were not met does not mean that his rights were breached. For such reasons, requests that the petition be declared inadmissible based on article 47(b) of the American Convention, since it considers that the goal of the alleged victim is that the Commission act as a higher court, in contradiction to its complementary nature.

## **VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

12. The alleged victim holds that domestic remedies were exhausted with the decisions of the Criminal Chamber of the Supreme Court of Justice and of the First Instance Civil and Commercial Judge which rejected his demands. On its part, the State has not contested the exhaustion of domestic remedies nor has it referred to the date of filing of the petition. In consideration of the latter and of the information present in the

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<sup>5</sup> Law Nº 3940, Law that establishes rights, obligations and preventive measures concerning the effects produced by human immunodeficiency virus (HIV) and the acquired immunodeficiency syndrome (AIDS). "Article 21.- Pressures and Conditioning: It is forbidden to perform on the worker any arbitrary act, harassment, violation of confidentiality in regard to the serological status, layoffs or any other form of discrimination at work, as well as applying on the worker any sort of pressure or coercion so that he or she take the laboratorial test for the diagnose of infection by HIV, and conditioning access, promotion or permanence at the workplace to the test being taken or to its result. On these cases, the provisions of the Labor Code are applicable, notwithstanding other actions which the affected worker may undertake."

casefile, the Commission concludes that the present petition meets the requirement of exhaustion of domestic remedies pursuant to article 46.1.a) of the American Convention.

13. On the other hand, since the decision of the Criminal Chamber of the Supreme Court, which analyzed the validity of Executive Power Decree Nº 2254 was issued on August 1, 2014, and that the present petition was received by the Commission on January 31, 2015, it complies with article 46.1.b) of the American Convention.

## VII. ANALYSIS OF COLORABLE CLAIM

14. The petitioner claims that there is no document to prove that the Board of Assessment gathered in order to assess the situation of the alleged victim, which is why Executive Power Decree Nº 2254, by which Mr. Martínez was retired, along with other members of the Armed Forces, would lack foundation. In such sense, the IACHR understands that, given the alleged lack of said document, the alleged victim would not only not have a duly motivated decision, but he was also deprived from accessing the evidence which motivated his retirement and, eventually, contest it directly via the corresponding administrative channels. Likewise, considers that, should the lack of justification be verified, some elements could exist which show the presence of a discriminatory treatment to the detriment of a person who lives with HIV<sup>6</sup>. Finally, although the petitioner does not elaborate on this point, the IACHR observes that Mr. Martínez had contracted the cited disease in acts of service, due to a lack of prevention and protection within the Armed Forces.

15. In this context, the IACHR recalls that the stigma and discrimination associated with HIV frequently lead to the loss of employment and lack of access to credits, loss of family and social bonds, rejection in health assistance services, and violence from health suppliers, state agents, relatives or members of the community<sup>7</sup>. Along this line, the Commission highlights that, in many occasions, false assumptions are risen concerning the sexual orientation of the persons who live with HIV, generating other direct or indirect forms of discrimination based on this latter identity category.

16. In view of these considerations, and after examining the factual and legal elements set forth by the parties, the Commission deems that the allegations of the petitioner, concerning the lack of due process to retire the alleged victim, the situations of discrimination he suffered within the Armed Forces for living with HIV and the impact it had in his family, are not manifestly unfounded and require a study on the merits. In view of the IACHR, if corroborated, the alleged facts may characterize violations of rights established in articles 5 (humane treatment), 8 (fair trial), 11 (right to privacy), 17 (rights of the family), 19 (rights of the child) 24 (equality before the law), 25 (judicial protection) and 26 (progressive development) of the American Convention, in relation to article 1.1 (obligation to respect rights) thereof.

## VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 8, 11, 17, 19 24, 25 and 26 of the American Convention in connection to its Articles 1.1 and 2;

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 8th day of the month of July, 2021. (Signed): Antonia Urrejola Noguera, President; Julissa Mantilla Falcón, First Vice President; Flávia Piovesan, Second Vice President; Margarette May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, Joel Hernández, and Edgar Stuardo Ralón Orellana, Commissioners.

<sup>6</sup> The IACHR has recently learned, other situations of discrimination at the workplace of persons who live with HIV. In this regard see: IACHR, Report No. 184/20, Admissibility, Yssel Reyes Delgado, Mexico, July 6, 2020.

<sup>7</sup> IACHR. Press Release 142/12. "The IACHR, la CIM, ONUSIDA and the OPS call the States members of the OAS to eradicate the stigma and discrimination concerning HIV in the Americas".