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| Institution: | Inter-American Commission on Human Rights |
| File Number(s): | Report No. 02/09; Petitions 302-04, 386-04 |
| Title/Style of Cause: | J.S.C.H and M.G.S. v. Mexico<br>Due to a request from the petitioners received on March 17, 2009, the identity of the alleged victims shall not be revealed. Resolution No. 01/09 dated March 20, 2009, adopted by the Inter-American Commission on Human Rights, attached to this report. |
| Doc. Type: | Resolution |
| Decided by: | Second Vice-Chairman: Felipe Gonzalez;<br>Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Florentin Melendez, Paolo Carozza. |
| Dated: | 4 February 2009 |
| Citation: | J.S.C.H v. Mexico, Petition 302-04, Inter-Am. C.H.R., Report No. 02/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009) |
| Represented by: | APPLICANTS: Pedro Isabel Morales Ache, Ricardo Gonzalez Gutierrez and Cynthia Paola Lepe Gonzalez |
| Editor's Note: | The title of the case in the original contains footnote 1 saying " Due to a request from the petitioners received on March 17, 2009, the identity of the alleged victims shall not be revealed. Resolution No. 01/09 dated March 20, 2009, adopted by the Inter-American Commission on Human Rights, attached to this report." |
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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”): one on April 9, 2004,[FN2] on behalf of J.S.C.H., a former driver with the rank of Second Lieutenant in the Secretariat of National Defense; and the other on April 21, 2004,[FN3] on behalf of M.G.S., a former infantry corporal in the Secretariat of National Defense, (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.

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[FN2] Petition 302-04 was received by e-mail on April 9, 2004, and stamped on April 13, 2004.
[FN3] Petition 386-04 was received by e-mail on April 21, 2004, and stamped on April 23, 2004.

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2. The petitioners argue that the Mexican State is responsible for violation of the rights enshrined in Articles 4(1), 5(1), 8(1), 9, 11(2), 11(3), 24, 25(1), and 26 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), in connection with the general obligation contained in Article 1(1) of said international instrument. The petitioners also assert violation of Articles 3, 6(1), 9(1), 9(2), 10(1), and 10(2) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "the Protocol of San Salvador"). The petitioners hold that they exhausted domestic remedies in keeping with the provisions of Article 46 of the American Convention and that the discharge of the alleged victims by the Mexican Army because they have HIV is part of a policy of discrimination, which was confirmed by the administrative and judicial authorities that acted in the various domestic proceedings.

3. As regards admissibility requirements, the State has not contested the arguments of the petitioners with respect to exhaustion of domestic remedies. However, it maintains that the petitions should be found inadmissible because they do not state facts that tend to establish a violation of human rights. It adds, in this connection, that remedies provided by domestic law produced unfavorable results for the alleged victims, which does not mean that their human rights were violated. It also holds that in both cases the six-month deadline established in Article 46(1)(b) of the American Convention was not met.

4. In keeping with Article 29(d) of the Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter "the Rules of Procedure of the IACHR"), petitions 302-04 and 386-04 were joined because they address similar facts.

5. Without prejudging the merits of the matter, the Commission concludes in this report that the petitions are admissible under Articles 46 and 47 of the American Convention. Accordingly, the Inter-American Commission decides to notify the parties of the decision and continue with its analysis of merits with regard to alleged violations of Articles 2, 5(1), 8(1), 11, and 24 of the American Convention, in conjunction with the general obligation to observe and ensure rights provided at Article 1(1) of said international instrument. The Commission also decides to publish this report and include it in its Annual Report to the OAS General Assembly.

## II. PROCESSING BY THE COMMISSION

### 1. Petition 302-04 (J.S.C.H.)

6. On April 9, 2004 the Commission received the petition by electronic mail. It was stamped on April 13, 2004 and assigned case number 302-04. The petition requested precautionary measures in favor of Mr. J.S.C.H.

7. On April 21, 2005, the IACHR transmitted the pertinent portions of the petition to the Mexican State and requested it to submit its reply within two months, in accordance with Article 30(2) of the Rules of Procedure of the IACHR. The state's reply was received on July 22, 2005.

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8. The IACHR also received information from the petitioners on the following dates: June 17, 2004 and September 27, 2004. Said communications were duly relayed to the State.

9. Furthermore, the IACHR received comments from the State on the following dates: July 26, 2004, June 21, 2005, and August 29, 2005. Said communications were duly transmitted to the petitioners.

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

2. Petition 386-04 (M.G.S.)

11. On April 21, 2004 the Commission received the petition by electronic mail. It was stamped on April 23, 2004 and assigned case number 386-04. The petition requested precautionary measures in favor of Mr. M.G.S.

12. On May 4, 2005, the IACHR transmitted the pertinent portions of the petition to the Mexican State and requested it to submit its reply within two months, in accordance with Article 30(2) of the Rules of Procedure of the IACHR. The state's reply was received on August 5, 2005.

13. The IACHR also received information from the petitioners on the following dates: June 17, 2004 and September 27, 2004. Said communications were duly relayed to the State.

14. Furthermore, the IACHR received comments from the State on the following dates: July 15, 2004, July 26, 2004, July 5, 2005, August 5, 2005, September 9, 2005, and August 26, 2008. Said communications were duly transmitted to the petitioners.

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

III. POSITIONS OF THE PARTIES

A. Background

16. The dispute in this matter concerns the fact that the alleged victims were dismissed from the Mexican Army because they have HIV.

17. 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.

18. In view of the fact that there is no dispute between the parties over domestic proceedings, before it moves onto the positions of the parties, the Inter-American Commission will briefly summarize the administrative proceedings and the lawsuits brought before the judicial authorities by the alleged victims. To that end, it is necessary to bear in mind a number of provisions contained in the ISSFAM Law of June 29, 1976, which was in force at the time that the alleged victims were discharged from the Mexican Army:

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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.

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

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.

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

19. According to information provided by the parties, on September 19, 1998, J.S.C.H., who was a driver with the rank of Second Lieutenant attached to the Seventh Section of the Staff of the Secretariat of National Defense, with 19 years of service on his record, was informed by official letter AD-1-115420 XIII/III issued by the Secretariat of National Defense of: a) the notice of approval of retirement by reason of unfitness as a result of acts outside the line of duty (Official Letter SGB-V-32386 of September 4, 1998, signed by the Bureau of Military Justice), and; b) the request for the issue of a retirement approval notice (Official letter SGB-V-33561 of

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September 14, 1998 issued by the Bureau of Military Justice [Dirección General de Justicia Militar]).

20. 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. The alleged victim received notice of final approval of his retirement by official letter SGB-V-40209 of October 22, 1998, signed by the Bureau of Military Justice and enclosed in an official letter dated October 27, 1998.

- First Amparo Application

21. In response to official letter SGB-V-40209, on 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"), asserting the unconstitutionality of Article 183 of the Mexican Armed Forces Social Security Law and of the contents of official letter SGB-V-40209 of October 22, 1998, and its consequences.

22. In that proceeding, he was granted a precautionary measure so that he might continue to receive medical care and the drugs essential for adequate HIV treatment.

23. The judgment of February 9, 1999, issued by the Second District Judge for Administrative Matters in the Federal District, dismissed the amparo action on the grounds that: i) final approval of retirement is not an act that terminates administrative proceedings; and, ii) the amparo suit should have been filed against the first official letter that contained the retirement approval notice (SGB-V-33561 of September 14, 1998, served on September 19, 1998).

24. Disagreeing with the foregoing judgment, J.S.C.H. filed a motion to review with the District Court, which decided, on November 25, 1999, to refer the matter to the Supreme Court of Justice of the Nation.[FN4] The motion to review moved that: i) 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.; ii) 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; iii) Article 183 of the ISSFAM Law was unconstitutional; and, iv) the discontinuation of medical assistance to Mr. J.S.C.H. violated Article 4 of the Federal Constitution.

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[FN4] 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 because 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.

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25. The Supreme Court of Justice of the Nation settled the first alleged tort by declaring it impracticable 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." As to the second alleged tort, 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. With respect to the third alleged injury, the Supreme Court determined that Article 183 of the ISSFAM Law was constitutional. Finally, 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.

26. The Supreme Court determined that the Collegiate Tribunal for Administrative Matters had jurisdiction to decide on the legality of retirement approval notices. On November 22, 2002, 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 notice of final approval of retirement, lacked jurisdiction and the power to do so.

- Second Amparo Application

27. 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: i) Article 209 of the ISSFAM Law; ii) 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); iii) 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.; iv) the execution of the official letters mentioned in the preceding paragraphs; and, v) any act that might be an effect or consequence of the official letters mentioned in the preceding paragraphs.

28. 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. On November 3, 1999, the alleged victim entered a motion to review the aforesaid judgment with the Fourth Collegiate Tribunal for Administrative Matters of the First Circuit. 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. 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.

29. 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 "J.S.C.H. still has the disease, which is cause

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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."[FN5] On that same date, Mr. J.S.C.H. was notified of official letter J-AMPS-1-4761 by official letter AMP-II-4755/432.

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[FN5] Petition received on April 9, 2004, para. 11.

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- Third Amparo Application

30. On March 14, 2001, J.S.C.H. lodged amparo application with the Fifth Court of District A for Administrative Matters in the Federal District (Case 173/2001), in which he challenged: i) Articles 22(IV) and 197 of the ISSFAM Law; ii) official letter J-AMPS-1-4761 of February 12, 2001, which contained the final retirement approval notice; iii) the execution of official letter J-AMPS-1-4761 of February 12, 2001; iv) any act that might be a consequence of official letter J-AMPS-1-4761 of February 12, 2001; v) 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, vi) any act that might be an effect or consequence of official letter AMP-II-4755/432 of February 12, 2001.

31. In this proceeding, precautionary measures were granted to enable Mr. J.S.C.H. to receive medical treatment and the necessary drugs. 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.

32. 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 egalite des armes of the parties in the proceeding, since such evidence could benefit one party as much as the other.[FN6]

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[FN6] Case 141/2002-1797

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33. The expert examinations ordered by the Ninth Collegiate Tribunal for Administrative Matters of the First Circuit were carried out and 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" and that HIV

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treatment “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.”[FN7] Mr. J.S.C.H. filed a motion to review on June 11, 2003, with the District Courts for Administrative Matters in the Federal District, 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. On October 7, 2003, the Fifth District Judge ruled that amparo action 173/2001 was a fully concluded matter. J.S.C.H. was informed of that decision on October 9, 2003.

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[FN7] Amparo action 173/2001. Judgment of May 21, 2003.

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2. Proceedings in the case of M.G.S.

34. By official letter SGB-III-37787 of December 7, 2001, the Bureau of Military Justice informed M.G.S., who held the rank of Infantry Corporal in the Secretariat of National Defense with 12 years of service on his record, 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 of duty. On December 27, 2001, based on Article 197 of the ISSFAM Law then in force, M.G.S. expressed his dissent with the “notice of approval of retirement by reason of unfitness because of acts outside the line of duty” to the Secretary General of National Defense. Specifically, M.G.S. requested medical care and that he be provided with the necessary drugs, as well as the possibility that it be considered a retirement benefit.

35. By official letter SAMT-7573 of June 29, 2002, sent by the Administrative Infantry Office to the Commander of the First Military Region, and served to M.G.S. on July 10, 2002, his discharge was ordered from the Armed Forces on June 30, 2002 and his retirement as of July 1, 2002.

36. In response to official letter SAMT-7573 of June 29, 2002, 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 M.G.S.; 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. He was also granted a precautionary measure so that he might continue to receive medical care and the drugs essential for adequate HIV treatment.

37. 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. M.G.S. entered a motion

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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.

38. 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, 2003, the Ninth District Court, in keeping with Article 113 of the Amparo Law, set the case aside as a concluded matter. M.G.S. was informed of that ruling in a decision of October 22, 2003, which was published on that district court's list on October 23, 2003.

B. The petitioners

39. The petitioners allege that Messrs. J.S.C.H. and M.G.S. were discharged from the Mexican Army because they have HIV. In this respect, 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 the rights, as members of the armed forces, to receive medical care and drugs that are essential for adequate treatment of HIV.[FN8]

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[FN8] Petition received on April 9, 2004, par. 4.

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40. The petitioners allege that the state administrative and judicial authorities acted inappropriately because through their decisions they validated the discharge notices issued by the Mexican army to the detriment of the alleged victims.

41. As regards Mr. J.S.C.H., who served in the position of Second Lieutenant Conductor attached to the Seventh Section of the Staff of the Secretariat of National Defense, with 19 years of service on his record, the petitioners say that he was diagnosed with HIV on June 16, 1998. They claim that the health care service of the Secretariat for Family Protection failed to observe the appropriate confidentiality with respect to the health of Mr. J.S.C.H. and distributed copies of the medical results to various military authorities, naming Mr. J.S.C.H. as an HIV carrier. On June 20, 1998, J.S.C.H. was made, without prior, informed consent, to undergo a compulsory Western Blot test to screen for HIV antibodies.[FN9]

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[FN9] Petition received on April 9, 2004. Background section, paras. 1 and 2.

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42. The petitioners note that on September 19, 1998, J.S.C.H. was apprised of the "notice of approval of retirement by reason of unfitness as a result of acts outside the line of duty."[FN10] In their arguments they describe in detail the process mentioned in the preceding section of this

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report and say that the last decision in this process was issued on October 7, 2003. The alleged victim says that he was notified of this last decision on October 9, 2003.

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[FN10] Petition received on April 9, 2004.

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43. As regards Mr. M.G.S., who held the position of Infantry Corporal in the Secretariat of National Defense, with 12 years of service on his record, the petitioners note that he was diagnosed with HIV on July 18, 2001. They claim that the health service of the Secretariat for Family Protection failed to observe the appropriate discretion with respect to the health of Mr. M.G.S. and distributed copies of the medical results to various military authorities, naming Mr. M.G.S. as an HIV carrier. They hold that on July 28, 2001, Mr. M.G.S. was made, without prior, informed consent, to undergo a compulsory Western Blot test to screen for HIV antibodies.[FN11]

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[FN11] Petition received on April 21, 2004.

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44. The petitioners say that the notice of approval of retirement of M.G.S. by reason of unfitness as a result of acts outside the line of duty was issued on December 7, 2001. In their arguments they describe in detail the process mentioned in the preceding section of this report and say that the last decision in this process was issued on October 22, 2003, and published on the district court's list on October 23, 2003.

45. The petitioners argue that the facts denounced in the petition affected the rights to life, physical integrity, and health of the alleged victims given that the precautionary measures which they enjoyed at a number of stages of the domestic proceedings became inoperable when the decision went against their claims. According to the petitioners, this meant that they ceased to be provided with the drugs and medical treatment that people infected with HIV need, at a time when they lacked the means to support themselves and their families financially. The petitioners also add that on the occasions when they were permitted to request that they be supplied with drugs, in several instances the army medical services failed to provide them with the drugs they needed on time, citing a supply shortage.

46. The petitioners say that the State's affirmation that steps are taken to prevent persons with HIV/AIDS from being separated from their jobs is untrue since there is a "systematic practice" in the Mexican Armed Forces of discharging any serviceman or woman living with HIV, improperly invoking paragraph 117 of the first category of tables appended to the ISFAMM Law (published on June 29, 1976), which establishes as a cause of unfitness, "susceptibility to recurring infections attributable to untreatable conditions of cellular or humoral immunodeficiency of the organism."

47. They argue that at the time the alleged victims were discharged, Mexican law did not recognize HIV infection as a cause for retirement from the Army. However, they say that the

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ISSFAM Law of 1976 was repealed by the Mexican Armed Forces Social Security Law published on July 9, 2003, Article 226, Category One, Paragraph 83 of which provides as a cause for discharge "for unfitness" from the Mexican Armed Forces to test positive for human immunodeficiency virus antibodies, confirmed with supplementary tests in addition to infection with opportunistic germs and/or malignant neoplasia. In other words, the foregoing proves that the State has continued a policy of discrimination against servicemen infected with HIV.

48. As regards admissibility requirements, they maintain that domestic remedies were exhausted in accordance with the provisions contained in Article 46 of the American Convention, and that the discharge of the alleged victims from the Mexican Army because they have HIV is part of the application of a policy of discrimination, which was confirmed by the administrative and judicial authorities that acted in the various domestic proceedings.

C. The State

1. J.S.C.H.

49. The State holds that from July 13 to 17,1998, J.S.C.H. was admitted to the infectious diseases unit of the Central Military Hospital, where he was diagnosed positive in an ELISA test for human immunodeficiency virus antibodies, which diagnosis was confirmed by a Western Blot test. Upon being diagnosed with HIV, a medical certificate of unfitness was sent to the Bureau of Military Justice, which proceeded to initiate the retirement procedure. The State adds that the medical results for the retirement procedure were transmitted with the appropriate secrecy and protection used for all military documents in order to avoid an information leak.

50. The State says that on September 4, 1998, he was notified of the approval of his retirement due to unfitness because he had HIV, an ailment covered by paragraph 117 of the first category of tables appended to the Mexican Armed Forces Social Security Law. The State claims that the notice was communicated to J.S.C.H. and he was told that he had 15 days to express his assent or challenge it. That State says that in response to the challenge presented by the alleged victim on October 2, 1998, the Bureau of Military Justice found that the alleged victim's "objections [were] inadmissible" and, on October 22, 1998, issued the notice of final approval of retirement [due to unfitness resulting from] acts outside the line of duty.

51. The State argues that on November 11, 1998, the Executive Board of the ISSFAM awarded J.S.C.H. a lump-sum compensation payment of 76,849.44 Mexican pesos. The Secretariat of Finance and Public Credit adopted a resolution on November 13, 1998, in which it informed the ISSFAM of the decision.

52. The Mexican State says that the notice of final approval of his retirement makes no reference to discontinuation of medical care or the supply of drugs; on the contrary, it says that he would retire with all the rights recognized by the law. During the time that the amparo actions filed by the alleged victim were being heard, he continued to receive medical care and drugs from the Secretariat of National Defense, and at present continues to receive said care as a dependent of his wife, who serves in the Army and Air Force.

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53. The State holds that if the Inter-American Commission were to declare this petition admissible it would be acting as a court of fourth instance, since the facts on which the petitioners found their complaint have already been decided in the domestic jurisdiction, even if the outcome was adverse to the alleged victim's interests.

54. Accordingly, the State requests that the petition under analysis be declared inadmissible in accordance with Articles 47(b) and 47(c) of the American Convention and Articles 34(a) and 34(b) of the Rules of Procedure because the provisions contained in Articles 8 and 25 of the Convention have not been violated. The State also considers that the decisions of the various federal authorities were in accordance to law and that the judicial authorities did not stray from reason or the law in their interpretation thereof.[FN12]

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[FN12] Response of the Mexican State, note OEA-01667 of July 21, 2005.

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55. The Mexican State also argues that the petition under analysis should be declared inadmissible for failure to meet the six-month deadline set forth in Article 46(1)(b) of the Convention, given that the final decision of the Fifth Court for Administrative Matters was made on October 7, 2003, and the petition was lodged with the Inter-American Commission on September 4, 2004.[FN13]

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[FN13] Response of the Mexican State, note OEA-01667 of July 21, 2005.

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2. M.G.S.

56. The State holds that on July 23 and 24, 2001, M.G.S. voluntarily consented to laboratory studies to detect human immunodeficiency virus antibodies. On July 28, 2001, two specialists attached to the Central Military Hospital certified 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 any Western Blot test. The State says that said ailment is covered by paragraph 117 of the table of diseases appended to the Mexican Armed Forces Social Security Law in force.

57. The State notes that on August 2, 2001, the medical certificate of unfitness was sent to the Bureau of Military Justice, which proceeded to initiate the retirement procedure. On December 7, 2001, the Bureau of Military Justice issued the notice of approval of retirement by reason of unfitness (First Category) as a result of acts outside the line of duty. The notice was communicated to M.G.S. and he was told that he had 15 days to express his assent or challenge it.

58. The State claims that M.G.S. challenged the notice on December 27, 2001, and requested only that he and his dependent be granted medical care. On March 8, 2002, the Bureau of Military Justice informed M.G.S. that it was out of order to grant the benefit that he requested since, under Article 197 of the Mexican Armed Forces Social Security Law, challenges are only

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admitted against the propriety or impropriety of retirement, calculation of length of service, and the rank at which he would retire. Accordingly, the Bureau continued with the retirement procedure.

59. On March 8, 2002, the Bureau of Military Justice confirmed the retirement notice and made it final. On April 10, 2002, the Executive Board of the ISSFAM, granted M.G.S. a lump-sum compensation payment of 38,751.57 Mexican pesos. The State argues that M.G.S. did not receive his final discharge from the Secretariat of National Defense because he did not extinguish his right to claim the economic benefit generated by his services in the Armed Forces.

60. The State holds that from the moment he enlisted in the Armed Forces, M.G.S. has had access to the necessary medical services sufficient for the treatment of HIV/AIDS. The State points out that HIV is an untreatable humoral immunodeficiency; it is an incurable infection and the care that patients receive is "palliative, through control of opportunistic infections and delay in the untreatable deterioration of the immune system, for which there is no cure."

61. The State requests that the petition under analysis be declared inadmissible in accordance with Articles 47(b) and 47(c) of the American Convention and Articles 34(a) and 34(b) of the Rules of Procedure because the provisions contained in Articles 8 and 25 of the Convention have not been violated. The State also maintains that the fact that the outcomes of the remedies provided by domestic law were unfavorable does not mean that his human rights had been violated. The State holds that if the Inter-American Commission were to declare this petition admissible it would be acting as a court of fourth instance, since the facts on which the petitioners found their complaint have already been decided in the domestic jurisdiction, even if the outcome was adverse to the alleged victim's interests. The State says that none of the federal authorities that decided the amparo applications violated any procedural rules, nor did they stray from generally recognized principles for the appraisal of evidence.

62. The Mexican State also argues that the petition under analysis should be declared inadmissible for failure to meet the six-month deadline set forth in Article 46(1)(b) of the Convention, since Mr. M.G.S. was made aware of the final decision of the Ninth District Court on October 23, 2003, and the petition was lodged with the Inter-American Commission outside the deadline.[FN14]

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[FN14] Response of the Mexican State, note OEA-01667 of August 4, 2005.

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3. Response of the State with respect to HIV in both cases

63. The State holds that when they voluntarily enlisted in the Army and the Air Force, Messrs. J.S.C.H and M.G.S. agreed to abide by military laws and regulations. Furthermore, the Mexican Armed Forces Social Security Law sets out the causes and diseases that legally bar military personnel from continued active military service and, should a serviceman or woman contract any of the diseases listed in the Disease Tables, that circumstance is grounds to initiate the retirement for unfitness procedure.

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64. The State also notes that under Article 187 of the ISSFAM Law, it is mandatory for the Secretariats of National Defense and the Navy to carry out medical tests on all military personnel in the first few months of each year. It was precisely on the basis of the results of those tests that the retirement procedures of Mr. J.S.C.H. and Mr. M.G.S. were initiated, by reason of unfitness for causes outside the line of duty, due to their infection with HIV/AIDS.

65. The State maintains that the plight of the alleged victims is not an act of discrimination but of enforcement of the law. It also adds that they have not substantiated a practice of discrimination during the time that their ailments were known in the Armed Forces, nor did they demonstrate as much during their retirement procedure.

66. The State mentions that the alleged victims had access to all of the remedies provided by domestic law; however, the decisions under those remedies were unfavorable to them, which does not mean that their human rights have been violated. Throughout the administrative procedure for retirement and the amparo proceedings there was observance of the rights to a hearing, defense, present evidence, and challenge decisions, in accordance with the principle of legality and due process, and in keeping with the guarantees recognized by the Mexican system of laws as well as the American Convention.

67. As regards HIV, the Mexican State says that in both cases the Government adopted the following measures: First, it made contact with the representative of the petitioners as soon as the petitions were brought to its attention. As a result, the need to supply the alleged victims with the care and drugs that they urgently need was established. Second, it was determined that the Federal Government should immediately take charge of providing said care and control the HIV/AIDS, in particular with the necessary treatments and drugs. Finally, arrangements were made for the Secretariat of Health and National Defense to enter into agreement by which to ensure that persons discharged from the Mexican Army do not go without the drugs and treatment that HIV/AIDS requires.

68. The State adds that in keeping with the Constitution and the General Health Law, the National Health System, through the Secretariat of Health, created the National Center for HIV/AIDS Prevention and Control (CENSIDA – formerly CONASIDA). The institution has all the necessary medical infrastructure for treatment of this disease. There is also a Mexican Official Standard (NOM-010-SSA2-1993), which requires all health facilities to provide emergency medical care to HIV/AIDS patients, which must be delivered with responsibility, dignity, and respect.[FN15] The State says 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. The State says that in 2003, Mexico achieved universal supply coverage for all persons who needed antiretroviral drugs.[FN16]

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[FN15] Response of the Mexican State, received on July 26, 2004. paras. 9 and 10.
[FN16] Response of the Mexican State, received on July 26, 2004. paras. 9 and 10, par. 11.

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69. The Mexican Government says that it has placed the Condesa and Flora Specialized Clinics in the Federal District at the disposal of the alleged victims, so that they can go there to receive such immediate care and treatment as their condition requires. Furthermore, after obtaining the necessary consent from the representatives of the petitioners, the Ministry of Foreign Affairs undertook to accompany J.S.C.H. and M.G.S. to their first appointment to the above-mentioned clinics, in order to ensure that they receive the appropriate service and so as to be able to supply information first-hand to the Inter-American Commission.[FN17]

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[FN17] Response of the Mexican State, received on July 26, 2004. paras. 9 and 10, pars. 12 and 13.

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## IV. ANALYSIS

### A. Competence of the Commission ratione personæ, ratione loci, ratione temporis, and ratione materiæ

70. The petitioners have standing under Article 44 of the American Convention to lodge petitions with the Commission. The petition names as alleged victims two individuals on whose behalf the Mexican State undertook to observe and ensure the rights enshrined in the American Convention. Mexico has been a state party to the American Convention since March 24, 1981, when it deposited its instrument of ratification. Thus, the Commission has ratione personae competence to examine the petition.

71. The Commission is competent ratione loci to examine the petition because it alleges violations of rights protected in the American Convention that are purported to have occurred within the jurisdiction of a state party. The Commission is competent ratione temporis to examine the complaint because the obligation to observe and ensure the rights protected in the American Convention was already binding upon the State at the time the events described in the petition are alleged to have occurred. Finally, the Commission has ratione materiae competence because the petition alleges violations of human rights protected by the American Convention.

72. The IACHR is not competent ratione materiae under its individual petitions system to make a decision with respect to the petitioners' allegations with respect to violation of Articles 3, 6(1), 9(1), 9(2), 10(1), and 10(2) of the Protocol of San Salvador. Having said that, pursuant to Articles 26 and 29 of the American Convention, the IACHR may consider the provisions contained in said Protocol in the interpretation of other applicable provisions of the American Convention and other treaties over which it does have ratione materiae competence.[FN18] Accordingly, the Inter-American Commission shall rely on the articles of the Protocol of San Salvador to the extent relevant for its interpretation of the American Convention.[FN19]

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[FN18] See IACHR, Report 44/04, Inadmissibility, Laura Tena Colunga et al., Mexico, October 13, 2004. IACHR, Annual Report 2000, Jorge Odir Miranda Cortez et al., El Salvador, Case 12.249, Report 29/01, OEA/Ser.L/V/II.111 Doc. 20 rev., 284, para. 36.

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[FN19] Article 19(6) of the Protocol of San Salvador provides as follows: Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

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B. Other admissibility requirements

1. Exhaustion of domestic remedies

73. Article 46(1)(a) of the American Convention provides that admission of petitions lodged with the Inter-American Commission in keeping with Article 44 of the Convention shall be subject to the requirement that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. This rule is designed to allow national authorities to examine alleged violations of protected rights and, as appropriate, to resolve them before they are taken up in an international proceeding.

74. In the instant case, the petitioners and the State concur that the alleged victims have exhausted all domestic remedies available in the Mexican State to resolve their situation. The petitioners hold that the alleged victims invoked and exhausted the remedies under domestic law. The State, for its part, says that the alleged victims had access to all the remedies provided by domestic law but that the decisions under said remedies were unfavorable.[FN20]

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[FN20] Communication of the State of July 21, 2005 (Note OEA-01667), in reference to petition P-302-04, J.S.C.H.; and Communication of the State of August 4, 2005 (Note OEA-01761), in reference to petition P-386-04, M.G.S.

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75. With respect to the nature of domestic remedies that should be exhausted, the Inter-American Court has ruled:

Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted.[FN21]

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[FN21] See I/A Court H.R, Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, para. 64.

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76. The Commission finds, based on the information in the record, that domestic remedies have been exhausted. The alleged victims pursued administrative channels to demand their rights

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in accordance with Article 197 of the Mexican Armed Forces Social Security Law then in force, first through the presentation of a challenge of the decision and later, when their claims were denied, by filing for a writ of amparo.

77. The IACHR also notes that an amparo application may be brought against final decisions. Article 114 (II) of the Amparo Law of Mexico provides that amparo shall be sought before the district judge:

II.- Against decisions not issued by judicial, administrative, or labor tribunals;

In such cases, when the complained of act emanates from a proceeding conducted in the form of a trial, amparo may only be invoked against the final decision for violations committed in said decision or in the course of the proceeding, if, as a result of said violations, the complainant was left without a defense or deprived of the rights that the law in such matters grants them, unless the amparo action is brought by a person alien to the dispute.

78. The Commission notes that the Supreme Court of Justice of the Nation, in reviewing the amparo action in the case of J.S.C.H. (No. 494/99), held that the final notice of mandatory retirement from the Armed Forces concluded the administrative process and, therefore, it was appropriate to invoke amparo:

The mandatory retirement of the appellant from active service in the Army because it was found that he activated a cause for unfitness as result of acts outside the line of duty constitutes a final decision that may not be changed by the authorities that issued it. Accordingly, the admissibility requirement for the amparo action is met.[FN22].

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[FN22] Decision En Banc of the Supreme Court of Justice of the Nation, Review of Amparo in Case 494/99 of June 8, 2000, J.S.C.H.

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79. Indeed, three amparo and amparo review applications were submitted in the case of J.S.C.H.; of those, the decisions in the first two concerned questions of form. The ruling on the third amparo action brought before the Fifth District Court addressed the merits of the matter and rejected any violation of the alleged victim's rights. Said ruling was upheld by the decision on motion to review R.A. 314/2003-3973 adopted by the Ninth Collegiate Tribunal for Administrative Matters of the First Circuit. Thus, on October 7, 2003, the Fifth District Court found that the aforementioned amparo action was a fully concluded matter. Under Mexican law that ruling, which was communicated to the alleged victim on October 9, 2003, was final because it was not subject to judicial appeal.

80. However, in the case of M.G.S., the Commission notes that faced with a situation that dealt with the same facts, the competent authority, which in this instance was the Ninth Collegiate Tribunal, adopted a different verdict. The Ninth Collegiate Tribunal decided to dismiss the case on the grounds that the alleged victims should have filed the amparo application against the notice contained in official letter SGB-III-37787 of December 7, 2001, the first

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document that mentioned the decision to discharge him from the Armed Forces, not against the final decision adopted after the challenge was presented.

81. Furthermore, the IACHR finds that in the case of Mr. M.G.S. the final decision adopted by the Ninth District Court which set the case aside was issued on October 22, 2003, and communicated to the alleged victim on October 23, 2003, by means of its publication on said district court's list.

82. Accordingly, the Commission finds that M.G.S.'s exhaustion of domestic remedies was in keeping with Mexico's laws and the case law of the Supreme Court of Justice, which has held that the final notice of mandatory retirement from the Armed Forces, following the presentation of the challenge provided by law, concludes the administrative process. Consequently, the Commission finds that domestic remedies were suitably exhausted as far as this analysis of admissibility is concerned.

83. Therefore, the Inter-American Commission finds that the remedies provided by Mexican law have been exhausted and that the petition meets the requirement set forth at Article 46(1)(a) of the Convention.

2. Filing period

84. Article 46(1)(b) of the Convention provides that for a petition to be admitted it must have been lodged within a period of six months following the date on which the complainant was notified of the final judgment at the national level.

85. In the case of J.S.C.H., the Mexican State requests that the petition be declared inadmissible because in its opinion it was lodged after the deadline, given that the final decision of the Fifth Court for Administrative Matters was made on October 7, 2003, and the petition was lodged with the Inter-American Commission on September 4, 2004.[FN23] Accordingly, the State argues that the petitioners failed to comply with the six-month rule contained in Article 46(1)(b) of the American Convention.

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[FN23] Response of the Mexican State, note OEA-01667 of July 21, 2005.

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86. In this respect, it should be noted that the date on which the petition was lodged with the Commission was April 9, 2004, and that the alleged victim was notified of the final decision in the domestic jurisdiction on October 9, 2003. Therefore, the Commission concludes that the six-month rule has been met in the instant case.[FN24]

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[FN24] See IACHR, Report 95/01, Petition 12.203, Liliana Zambrano, Peru, para. 34.

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87. In the case of M.G.S., the Mexican State requests that the petition be declared inadmissible because it failed to meet the six-month deadline for its presentation. The State asserts that M.G.S. became aware of the final decision on the amparo action on October 23, 2003, and his petition was presented after the deadline provided in Article 46(1)(b) of the American Convention.

88. In this regard, the Commission finds that the decision that exhausted the domestic jurisdiction was the last ruling communicated to the alleged victim on October 23, 2003, which was issued by the Ninth District Court, and that the petition was lodged with the Commission on April 21, 2004; in other words, within the time limit set by Article 46(1)(b) of the Convention.

89. Accordingly, the Commission concludes that the six-month rule has been met in the instant case.[FN25]

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[FN25] See IACHR, Report 95/01, Petition 12.203, Liliana Zambrano, Peru, para. 34.

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3. Duplication of international proceedings and res judicata

90. The petitioners have stated -and there is nothing in the record to suggest otherwise- that the subject matter of the petition is not pending in another international proceeding for settlement (Article 46(1)(c) of the American Convention), or that it is substantially the same as one previously studied by the Commission or by another international organization (Article 47(d) of the Convention). Consequently, the commission finds that both of these requirements set out in the aforesaid instrument have been met.

4. Colorable claim

91. The State holds in the instant case that the petitions should be declared inadmissible because they do not describe facts that disclose a violation of human rights. For their part, the petitioners argue that the discharge of the alleged victims from the Mexican army because they have HIV is part of a policy of discrimination, which was confirmed by the administrative and judicial authorities that acted in the various domestic proceedings.

92. In this connection, the Commission considers that it is not appropriate for it at this stage of the proceedings to determine whether or not the alleged violations of the victims' right to a fair trial and the principle of legality did indeed occur. For the purposes of admissibility, the IACHR at this time must only decide, pursuant to Article 47(b) of the American Convention, whether facts have been put forward that, should they be proven, would constitute violations of same, and, pursuant to paragraph c of the same article, whether the petition is "manifestly groundless" or "obviously out of order."

93. The standard by which to assess these extremes is different from the one needed to decide the merits of a petition. The IACHR must perform a prima facie evaluation and determine if the complaint provides grounds for an apparent or potential violation of a right guaranteed by the

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American Convention, although not whether the violation has in fact occurred.[FN26] At the present stage what is appropriate is to make a concise analysis that does not entail a prejudgment or the advance of an opinion on the merits. The Inter-American Commission's Rules of Procedure, in establishing one stage for admissibility and another one for merits, reflects this distinction between the evaluation that the Inter-American Commission must carry out to declare a petition admissible, and the one required to establish whether a violation imputable to the State has been committed.[FN27]

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[FN26] See IACHR, Report 128/01, Case 12.367, Herrera and Vargas (La Nación), Costa Rica, December 3, 2001, para. 50; Report 4/04, Petition 12.324, Rubén Luis Godoy, Argentina, February 24, 2004, para. 43; Report 32/07, Petition 429-05, Juan Patricio Marileo Saravia et al., Chile, April 23 2007, para. 54.

[FN27] See IACHR, Report 31/03, Case 12.195, Mario Alberto Jara Oñate et al., Chile, March 7, 2003, para. 41; Report 4/04, Petition 12.324, Rubén Luis Godoy, Argentina, February 24, 2004, para. 43; Petition 429-05, Juan Patricio Marileo Saravia et al., Chile, April 23, 2007, para. 54; Petition 581-05, Víctor Manuel Ancalaf Llaupe, Chile, May 2, 2007, para. 46.

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94. The Commission finds that there is nothing in this case to suggest that the petition is unfounded or out of order. Furthermore, it notes that, prima facie, if proven, the facts concerning the purported discriminatory treatment of the alleged victims due to their status as carriers of the HIV virus,[FN28] and their resulting discharge from the Mexican Army by the administrative authorities, decisions which were subsequently confirmed by the judicial authorities, could constitute a violation of the rights enshrined at Articles 24 and 8 of the American Convention, in connection with the obligations set forth in Article 1(1) of that instrument.

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[FN28] Decision of the Judge of the Fifth Court of District 'A' for Administrative Matters in the Federal District, in a judgment of May 21, 2003, who decided to refuse the amparo application because he found that HIV treatment "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."

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95. The Commission finds that if a direct causal link is established between "the discharge from active duty and retirement" of J.S.C.H. and M.G.S., and the alleged suspension of timely and adequate medical treatment, then it would amount to a violation of the right to physical integrity recognized in Article 5(1) of the American Convention in connection with Article 1(1) of said instrument.

96. As to the allegations of the petitioners regarding the disclosure by state agents of the alleged victims' health condition without observing the necessary confidentiality, the IACHR finds that, if proven, they could constitute a violation of Article 11 of the American Convention in connection with Article 1(1) thereof.

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97. Furthermore, although the petitioners have not invoked Article 2 of the American Convention, by virtue of the principle of iura novit curia the Commission will examine arguments concerning alleged violations of that Article.

98. The IACHR finds that the information presented does not disclose a colorable claim of violation of the rights protected in Articles 4(1), 9, 25(1), and 26 of the American Convention.

## V. CONCLUSIONS

99. The Inter-American Commission concludes that it is competent to examine the merits of this case and that the petition is admissible pursuant to Articles 46 and 47 of the American Convention. Furthermore, the Commission has decided to continue its analysis of merits in relation to alleged violations of Articles 2, 5(1), 8(1), 11, and 24 of the American Convention, all in connection with the general obligations to observe and ensure rights provided at Article 1(1) of said international instrument. In addition, although it is not competent to establish violations of Articles 3, 6(1), 9(1), 9(2), 10(1), and 10(2) of the Protocol of San Salvador, the IACHR will give consideration to the provisions that refer to these rights in its analysis of merits in this case, in keeping with Article 29 of the American Convention.

100. Based on the factual and legal arguments given above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant petition admissible in relation to alleged violations of rights recognized in Articles 2, 5(1), 8(1), 11, and 24 of the American Convention in connection with Article 1(1) of said instrument.
2. To declare the instant petition inadmissible as regards alleged violations of rights recognized in Articles 4(1), 9, 25(1), and 26 of the American Convention.
3. To notify the parties of this decision.
4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Approved by the Inter-American Commission on Human Rights on February 4, 2009.