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| Institution:          | Inter-American Commission on Human Rights  |
| File Number(s):       | Report No. 27/09; Case 12.249  |
| Session:              | Hundred Thirty-Fourth Regular Session (16 – 27 March 2009)   |
| Title/Style of Cause: | Jorge Odír Miranda Cortez et. al. v. El Salvador   |
| Doc. Type:            | Report   |
| Decided by:           | First Vice President: Victor Abramovich;<br>Second Vice President: Felipe Gonzalez;<br>Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Paolo G. Carozza.                         |
|                       | In accordance with Article 17.2.a of the Rules of Procedure, Commissioner Florentin Meléndez, a Salvadoran national, did not participate in the review or the voting.                        |
| Dated:                | 20 March 2009  |
| Citation:             | Miranda Cortez v. El Salvador, Case 12.249, Inter-Am. C.H.R., Report No. 27/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)   |
| Represented by:       | APPLICANT: Carlos Rafael Urquilla Bonilla  |
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## I. SUMMARY

1. On January 24, 2000, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the IACtHR") received a petition filed by Carlos Rafael Urquilla Bonilla ("the petitioner")<sup>[FN2]</sup>, alleging the international responsibility of the Republic of El Salvador ("the State") to the detriment of Jorge Odír Miranda Cortez and 26 other persons who are carriers of the Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome ("HIV/AIDS") and are members of the Atlacatl Association.<sup>[FN3]</sup> The petitioners allege that the acts reported constitute a violation of several provisions contained in the American Convention on Human Rights (hereinafter "the American Convention"): the right to life (Article 4); humane treatment (Article 5); equal protection of the law (Article 24); judicial protection (Article 25); and economic, social, and cultural rights (Article 26), in accordance with the general obligation set forth in Article 1(1) and the duty set forth in Article 2 of the aforementioned international instrument. They also allege violation of Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights ("Protocol of San Salvador"), as well as other related provisions in the American Declaration on the Rights and Duties of Man ("the American Declaration") and other human rights instruments. In light of the gravity and urgency of the situation, the petitioners requested precautionary measures on behalf of the aforementioned 27 persons, which were granted by the IACtHR when it began to process the case.<sup>[FN4]</sup>

[FN2] The petition was presented by Carlos Urquilla Bonilla on behalf of the Fundación de Estudios para la Aplicación del Derecho – FESPAD (Foundation for Research on Application of the Law), an organization which subsequently withdrew as petitioner. Mr. Urquilla Bonilla is continuing to represent Mr. Jorge Odir Miranda Cortez and the others in this case as petitioner.

[FN3] The petitioners have requested that the names of the other alleged victims not be disclosed; the Salvadoran State is informed of those names, which are also in the IACtHR file. According to the information available to the Inter-American Commission, three of these persons died after Case 12.249 was opened.

[FN4] The petitioners allude to Jorge Odir Miranda and 36 other persons, since they include all 27 persons in Case 12.249 and a further 10 who were mentioned in an earlier communication sent on September 25, 1999 to the IACtHR by Mr. Richard Stern. That earlier communication was processed by the Inter-American Commission as a request for information to the Salvadoran State. However, when it opened Case 12.249 and granted the request for precautionary measures, the IACtHR included Jorge Odir Miranda and 26 other persons, who are those included in Report on Admissibility No. 29/01 in this case.

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2. The petitioners allege that the State violated the right to life, health, and well being of the alleged victims in this case, inasmuch as it has not provided them with the triple therapy medication needed to prevent them from dying and to improve their quality of life. The petitioners maintain that the situation of these persons, which they also attribute to negligence on the part of the State, constitutes cruel, inhumane, and degrading treatment. They further allege that the Salvadoran Social Security Institute (ISSS) has discriminated against Mr. Jorge Odir Miranda Cortez and the alleged victims because they are carriers of HIV/AIDS. In April 1999, the petitioners instituted amparo proceedings in the Constitutional Division of the Supreme Court of El Salvador, claiming violation of the rights outlined in their petition to the Inter-American Commission. A decision on the amparo case was issued on April 4, 2001. The petitioners hold that the delay on the part of this Salvadoran jurisdictional organ is unreasonable and constitutes a further violation of the right to a fair trial and judicial protection.

3. For its part, the State maintains that the care provided to the persons identified in this report in the framework of the precautionary measures demonstrates compliance with its international commitments, and it draws attention to the efforts of the authorities to reach a friendly settlement of the instant case. In its additional observations on merits the State says that it has not engaged in discriminatory practices against the persons mentioned in the record in Case 12.249. It further asserts that amparo petition 348-99 lodged by Jorge Odir Miranda Cortez was delayed owing to the procedural structure of that country, the complexity of the case, and the judicial activity of the petitioners, for which reason it refutes the arguments of the petitioners regarding violation of the right to effective judicial protection. It considers that the measures adopted in respect of persons infected with HIV/AIDS in El Salvador constitute compliance with its international obligations as regards to the right to health. In light of the foregoing, the Salvadoran State requests the IACtHR to close the instant case and undertakes to continue to provide information on its initiatives with the respect to the right to health of the inhabitants of that country.

4. The IACtHR concludes in this report that the processing of amparo case 348-99 did not meet the necessary conditions of simplicity and effectiveness in the circumstances of the instant case, which constitutes a denial of effective judicial protection to the detriment of Jorge Odir Miranda Cortez and the other 26 persons identified in record 12.249. At the date of adoption of the instant report the State has not amended its amparo law in order to provide it with the simplicity and effectiveness necessary to protect the fundamental rights of the persons subject, to its jurisdiction, for which reason the Inter-American Commission further concludes that it has failed its duty to make its domestic laws consistent with its international obligations in the area of human rights. Such acts constitute a violation of article 25 of the American Convention, as well as a breach of article 2 of said international instrument. The State is also responsible for the violation of article 24 (right to equal protection of the law) to the detriment of Jorge Odir Miranda Cortez; however, the violation of that provision was not demonstrated in respect of the other 26 persons. The Inter-American Commission further concludes that the Salvadoran State has not violated in this case article 26 (economic, social, and cultural rights). The IACtHR decided not to render a decision with respect to the arguments on Article 4 (right to life) or Article 5 (right to humane treatment) of the American Convention because of the subsidiary nature of the corresponding arguments in this case.

## II. PROCESSING SUBSEQUENT TO THE REPORT ON ADMISSIBILITY

5. On March 7, 2001 the IACtHR adopted Report No. 29/01 in which it declared Case 12.249 admissible “with respect to alleged violations of the rights protected under Articles 2, 24, 25, 26 of the American Convention”. The decision was communicated to the parties by a note of March 9, 2001, in which the Inter-American Commission also placed itself at the disposal of the parties with a view to initiating a friendly settlement procedure, and set a deadline of 30 days for both to present their opinion in that respect.

### A. Friendly settlement procedure

6. On March 15, 2001 the petitioners transmitted a communication in which they proposed a system of identification of the alleged victims in the case, in order to protect their identity. The following day they sent a note in which they expressed the “wholehearted interest” of the latter to reach a friendly settlement and at the same time that they were of the “firm decision” that the case be submitted to the Inter-American Court of Human Rights should no such agreement be reached.

7. On March 19, 2001, the IACtHR informed the petitioners and the Salvadoran State that the footnote at the beginning of report on admissibility No. 29/01 had been amended, in order only to use the name of Jorge Odir Miranda Cortez and to protect the identities of the other 26 persons included in the record.[FN5] The Salvadoran State conveyed information on April 9, 2001 concerning the initiatives adopted with a view to the friendly settlement of the case. The IACtHR confirmed its receipt of that letter and, at the same time, expressed to both parties that it valued the efforts made to that end and reiterated its disposal to lend impetus to the mechanism contained in article 48(1)(f) of the American Convention.

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[FN5] See footnote No. 1 of the instant report.

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8. The petitioners supplied additional information on May 3, 2001, which consisted of the documents agreed on by the parties at the friendly settlement meetings held, respectively, on April 5 and 24, 2001 in San Salvador. On June 27, 2001 the State sent a communication informing the Inter-American Commission of the official publication in El Salvador of guides on “Standards and procedures of care for sexually transmitted infections” y “Protocols of care for persons infected with HIV/AIDS”, and drawing attention to the importance of those documents for dealing with the problems in question.

9. On July 13, 2001 the Commission received a communication from the petitioners in which they stated their intention to withdraw from the friendly settlement procedure because, having taken into consideration “a wide range of circumstances”, they considered that it had “failed as a possibility for reaching a settlement of the case.” In the communication, the petitioners request the IACtHR to “proceed with the appraisal of the facts and preparation of a report under Article 50 of the American Convention” and, as appropriate, to refer the case to the Inter-American Court in the event of noncompliance with the relevant recommendations.

10. On July 26, 2001, the IACtHR informed the Salvadoran State of the pertinent portions of the aforementioned communication from the petitioners. The State submitted a note on August 28, 2001 in which it expressed its discrepancy with the decision of the petitioners to terminate the friendly settlement, and, at the same time, provided an account of the activities carried out in the framework of that procedure.[FN6] Attached to the note, the State submitted a short report from the Salvadoran Social Security Institute on the situation of Mr. Jorge Odir Miranda Cortez, as well as a list of “Relevant activities of the Program on STI/HIV/AIDS in El Salvador for 2001”.

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[FN6] The above-cited letter says:

The State of El Salvador sincerely regrets the decision adopted by the petitioners to conclude on their own initiative the friendly settlement process that the Salvadoran authorities had encouraged by opening the doors to dialogue as the Honorable Commission had requested. Furthermore, it considers groundless the allegation that they have acted as they did because of the way the State of El Salvador behaved with respect to the agreements reached during the aforementioned process and due to the impossibility of reaching any other agreement that might help the friendly settlement process.

El Salvador wishes to draw the attention of the Honorable Commission to the dedicated efforts that have been made in the endeavor to reach a friendly settlement on the basis of respect for human rights and in the framework of goodwill and responsibility... Communication of the State of August 28, 2001, p. 1.

The communication from the Salvadoran State continues with arguments disputing the version of the petitioners regarding the measures adopted by the authorities. It mentions, for example, that five meetings were held between April 5 and June 25, four of which took place at the Ministry of Foreign Affairs, and one at the Ministry of Public Health and Social Assistance; moreover it

blames the petitioners for the failure to keep the schedule drawn up by common consent. After several observations, it concludes:

Finally, the State of El Salvador has strong reasons to believe that the activity of the petitioners in the aforementioned process constituted a bare minimum of effort that lacked sincerity and any genuine will to reach agreement, and showed no apparent intention to consider the proposals that it presented to them in due course. For that reason, it respectfully requests the Honorable Commission to examine and evaluate the foregoing information in formulating its conclusions. Communication of the State of August 28, 2001, p. 5.

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B. Procedure on merits

11. The Inter-American Commission forwarded the above-mentioned letter of the State to the petitioners on September 5, 2001. At the same time it requested the petitioners to submit additional observations on the merits of the matter, setting them the period of two months provided in the Rules of Procedure of the IACtHR.

12. The petitioners sent a communication on November 5, 2001 asking for an extension of one week to present their observations. The reason given was “that El Salvador has recently adopted legislation on HIV/AIDS, an examination of which reveals it to have a direct and immediate impact on how those additional arguments should be formulated.”

13. The petitioners’ additional observations were submitted on November 21, 2001, and the IACtHR transmitted them to the Salvadoran State on November 29, 2001, giving it a two-month deadline to make the appropriate comments. On February 15, 2002 the State presented the communication that contains the observations provided for at article 38(1) of the Rules of Procedure of the IACtHR, which were brought to the attention of the petitioners on February 21, 2002.

14. On August 12, 2002 the IACtHR received a request for a hearing from the petitioners. On September 13, 2002 the Inter-American Commission invited the parties to a hearing on the merits of Case 12.249, which was held on October 14, 2002.

C. Request for provisional measures

15. On January 14, 2002 the petitioners presented a further request for provisional measures, this time on behalf of Jorge Odir Miranda Cortez alone. The reason for the request was that the document (carnet) granted to Mr. Miranda Cortez in order to continue to receive medicines from the ISSS was issued in January 2002 and was of a provisional nature, in addition to which he was allegedly not issued one of the medicines necessary for his therapy.[FN7] In light of the foregoing, the petitioners said that there was a “justified fear” that the State might not ensure for Jorge Odir Miranda Cortez his rights to health and life, and they asked the IACtHR to request the Inter-American Court to order provisional measures, requiring “the State of El Salvador to ensure the timely, complete and ongoing delivery of all the medicines prescribed by a medical doctor for the treatment of HIV/AIDS.

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[FN7] The petitioners say that in the wake of the ruling of the Supreme Court of Justice in favor of Mr. Miranda Cortez, the latter presented himself at the ISSS but did not receive the required medicines in a timely manner. After an exchange of telegrams, the aforesaid patient again presented himself at the ISSS. The petitioners add:

The medical evaluation prescribed the following three drugs to be issued to him on May 17, 2001: Abacavir, Efavirenz and 3TC. On that occasion the ISSS admitted that it only had one (3TC) of the required drugs and said that it would later include the Efavirenz. Moreover, a document of the ISSS mentions that the drug Abacavir “does not exist in El Salvador, nor is it included in the national protocols of care for persons living with HIV/AIDS.” It must be concluded that there were no plans to provide that drug and, therefore, complete Mr. Miranda Cortez’s therapy.

This has led Mr. Miranda Cortez, for justifiable reasons, not to come forward to receive his drugs and, instead, to continue to receive the drugs that he obtains privately. In reality, delivery of only part of the drugs would affect his immunological status.

By prescription from his doctor, Mr. Miranda Cortez has recently modified the scheme of treatment, substituting the drug Abacavir with Zerit. At this time, the ISSS has only delivered to Mr. Miranda Cortez the drugs called Zerit and 3TC, not Efavirenz.

Communication of the petitioners of January 14, 2002, p. 1.

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16. On January 22, 2002, the Inter-American Commission sent a communication to the Salvadoran State requesting it for information in accordance with article 25(4) of its Rules of Procedure. The State was given five days in which to submit the information it considered pertinent.

17. The State replied on January 31, 2002 and informed that Mr. Jorge Odir Miranda Cortez was indeed receiving medical and treatment at ISSS facilities.[FN8] The State also said that there remained a “wholehearted disposition to deal with the case of Mr. Jorge Odir Miranda Cortez” and mentioned the importance of encouraging a “direct exchange” with him in order to ensure his timely care. The Inter-American Commission transmitted said information to the petitioners on February 5, 2002 and granted them 15 days to present such observations as they deemed appropriate. On February 8, 2002 the IACtHR received an additional communication from the Salvadoran State, which enclosed a report of the ISSS on the situation of Jorge Odir Miranda Cortez and the treatment he had received.[FN9] This last communication was brought to the attention of the petitioners on February 22, 2002 and with that the request for provisional measures was closed without further processing.

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[FN8] In its reply to the request for information on Jorge Odir Miranda Cortez, the Salvadoran State said:

He is currently receiving the following antiretroviral drugs: Lamiduvina (3TC), Estaduvina (D4T) and Efavirenz. According to the treating physician his immunological and clinical status is very good, and, as with all HIV/AIDS sufferers his susceptible organism is prone to the frequent onset of opportunistic diseases, which are combated with the prophylactic drugs being provided to him.

The Salvadoran State attached to its note a report of the costs of all the medicines provided to Mr. Miranda Cortez between 1996 and 2001, which amounted to US\$14,944.63. It added that, the aforesaid person "has been receiving antiretroviral drugs separately, donated by international associations", including "treatment with drugs such as Abacavir, in addition to the drugs that he receives from the ISSS. Communication of the State of January 31, 2002, p. 2.

[FN9] The report of the ISSS enclosed in the letter of the State provides a background summary of the treatment administered to Mr. Miranda Cortez:

On July 5, 2001, the case of Mr. Miranda Cortez was again presented to the Multidisciplinary Committee, which was informed that the aforesaid patient had displayed symptoms consistent with hypersensitivity to Abacavir, for which reason that medicine was replaced with D4T, and a prescription for this drug was issued to him, in addition to the one that he was already being given. The change of treatment had to do with the particular condition of the patient, who had an anaphylactic reaction to the Abacavir. From January 16, 2002 onwards, Mr. Miranda Cortez was given prescriptions to be issued three drugs: D4T, 3TC and Efavirenz; accordingly, his antiretroviral therapy may be considered complete and optimal.

The ISSS has made qualitative and quantitative progress in the treatment of HIV/AIDS in its patients, among them the petitioner, which is satisfactory for them, particularly since we have received the medico-technical and budget appropriation for this year, which guarantees the sustainability of the treatment (as demonstrated in an earlier communication of January 23, 2002. Communication of the State of February 8, 2002, Report of the Chief of the Legal Advisory Unit of the ISSS of February 6, 2002, pp.1 and 2.

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### III. POSITIONS OF THE PARTIES ON MERITS

#### A. The petitioners

18. The petitioners argue that the Salvadoran State is responsible for violation, to the detriment of Jorge Odír Miranda Cortez and the other persons mentioned in the instant case,[FN10] of the following rights protected by the American Convention: to life, to humane treatment, to equal protection of the law, to judicial protection; and that it has failed its duties to ensure and observe rights, as well as to adopt domestic legal provisions. They further allege that the State has violated the right to health of the aforesaid persons, in contravention of various international standards. The conclusions of the petitioners' brief on merits are transcribed in full as follows:

By failing to provide free of charge antiretroviral drugs essential for the treatment of HIV/AIDS, the State of El Salvador has violated the provisions contained in article 26 of the American Convention on Human Rights, together with the provisions of article XI of the American Declaration of the Rights and Duties of Man, clause "i" of the Charter of the Organization of American States (as reformed by the Protocols of Buenos Aires, Cartagena de Indias, Washington, and Managua), and Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador". In consequence, it has violated the right to health of Jorge Odír Miranda Cortez and the [other persons] referred to in the instant case. Based on the precedent set down at paragraph 162 of the Judgment on merits in the Velásquez Rodríguez Case (Series C, No. 4 of

July 29, 1988), it is also concluded that the State of El Salvador has violated to their detriment Article 1 (1) of the American Convention on Human Rights.

By failing to provide free of charge antiretroviral drugs essential for the treatment of HIV/AIDS, the State of El Salvador has violated the provisions contained in article 4.1 of the American Convention on Human Rights and article 1 of the American Declaration of the Rights and Duties of Man. In consequence, it has violated the right to life of Jorge Odir Miranda and the 36 other persons referred to in the instant case. Based on the precedent set down at paragraph 162 of the Judgment on merits in the Velásquez Rodríguez Case (Series C, No. 4 of July 29, 1988), it is also concluded that the State of El Salvador has violated to their detriment Article 1 (1) of the American Convention on Human Rights.

By failing to provide free of charge antiretroviral drugs essential for the treatment of HIV/AIDS, the State of El Salvador has violated the provisions contained in article 5 of the American Convention on Human Rights and article I of the American Declaration of the Rights and Duties of Man. In consequence it has treated inhumanely Jorge Odir Miranda Cortez and the other 36 persons referred to in the instant case, thus violating the right to humane treatment. Based on the precedent set down at paragraph 162 of the Judgment on merits in the Velásquez Rodríguez Case (Series C, No. 4 of July 29, 1988), it is also concluded that the State of El Salvador has violated to their detriment Article 1 (1) of the American Convention on Human Rights.

By its demonstrated hospital practices used on persons living with HIV/AIDS, the State of El Salvador has violated the provisions contained in article 24 of the American Convention on Human Rights article II of the American Declaration of the Rights and Duties of Man. In consequence, it has violated the right of Jorge Odir Miranda Cortez and the 36 other persons referred to in the instant case not to be subjected to discriminatory treatment. Based on the precedent set down at paragraph 162 of the Judgment on merits in the Velásquez Rodríguez Case (Series C, No. 4 of July 29, 1988), it is also concluded that the State of El Salvador has violated to their detriment Article 1 (1) of the American Convention on Human Rights.

As a result of the delay in the processing of amparo case 348-99, the State of El Salvador has violated the provisions contained in article 25 of the American Convention on Human Rights and article XVIII of the American Declaration of the Rights and Duties of Man. In consequence it has violated the right to effective judicial protection of Jorge Odir Miranda Cortez and the 36 other persons referred to in the instant case. Based on the precedent set down at paragraph 162 of the Judgment on merits in the Velásquez Rodríguez Case (Series C, No. 4 of July 29, 1988), it is also concluded that the State of El Salvador has violated to their detriment Article 1 (1) of the American Convention on Human Rights.

By the circumstance of refusing broad and generalized protection for all persons, present and future, living with HIV/AIDS --an obligation erga omnes, inasmuch as the claim represented their diffuse interests-- as noted in the final judgment rendered in amparo case 348-99, forcing them to file amparo petitions to ensure access to essential antiretroviral drugs, the State of El Salvador has violated the provisions contained in article 25 of the American Convention on Human Rights and article XVIII of the American Declaration of the Rights and Duties of Man. In consequence it has violated the right to effective judicial protection of Jorge Odir Miranda

Cortez and the 36 other persons referred to in the instant case. Based on the precedent set down at paragraph 162 of the Judgment on merits in the Velásquez Rodríguez Case (Series C, No. 4 of July 29, 1988), it is also concluded that the State of El Salvador has violated to their detriment Article 1 (1) of the American Convention on Human Rights.

By adopting the Law on Prevention, Care and Control of Infection Caused by the Human Immunodeficiency Virus (AIDS Law) and, in particular, by including in article 16 (d) thereof the provision that in the workplace an HIV/AIDS test is obligatory when required by the employer or by an administrative authority, the State of El Salvador is in breach of articles 2 and 11 of the American Convention on Human Rights, article V of the American Declaration of the Rights and Duties of Man, and articles 2 and 7 of the Protocol of San Salvador. In consequence it has violated or created conditions that facilitate violations of the right to privacy and the right to work, to the detriment of all non-employers subject to the jurisdiction of the State of El Salvador, and thus infringes its duty to adapt its domestic laws.

Based on the contents of the Law on Constitutional Procedures, in particular, the contents of articles 19 (suspension of the alleged act of infringement as the only precautionary measure) and 35 (which makes a civil suit admissible only when the violation of human rights is irreversible), and for failure to set a maximum deadline to ensure a reasonable duration for amparo proceedings, the State of El Salvador is in breach of articles 2 and 25 of the American Convention on Human Rights, and article XVIII of the American Declaration of the Rights and Duties of Man, and thus infringes its duty to make its domestic laws consistent with its international obligations.[FN11]

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[FN10] See footnote No. 2 supra.

[FN11] Communication of the petitioners of November 21, 2001, pp. 52-54.

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19. Based on the foregoing arguments, the petitioners request the IACtHR to adopt a report on merits in Case 12.249, making the appropriate recommendations to the Salvadoran State. They further request the IACtHR to set a deadline for compliance with those recommendations and, if those recommendations are “essentially not complied with”, to submit the case to the contentious jurisdiction of the Inter-American Court.

B. The State

20. For its part, in its additional submissions, the Salvadoran State devotes several pages to describing the steps taken by the authorities to apply the precautionary measures granted on February 29, 2000 on behalf of Jorge Odir Miranda Cortez and the other 26 persons,[FN12] and a longer section to the initiatives of a general nature that it adopted during the processing of this case on behalf of all persons infected with HIV/AIDS.[FN13]

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[FN12] Communication of the State of February 15, 2002, pp. 1-3.

[FN13] Idem, pp. 5-15.

21. Furthermore, the State draws attention to the efforts of its representatives with a view to reaching a friendly settlement of the instant case and mentions “the full willingness of the State to strive for a friendly settlement and, to that end, to discuss publicly with the petitioners their demands and attempt to reach a reasonable agreement to meet them.” It reiterates its surprise and disappointment at the decision of the petitioners to withdraw from the friendly settlement procedure.

22. Finally, the State sets out its arguments regarding the rights that were declared admissible by the IACtHR in its Report No. 29/01. The conclusions in the brief of the Salvadoran State containing its observations on merits in the instant case are reproduced in full as follows:

The State of El Salvador has provided medical, hospital, pharmacological, nutritional, and psychological care, as well as supplying antiretroviral drugs free of charge to each of the persons mentioned in case 12.249, and to others who have sought and seek assistance from the national public health system’s network. Considerable progress has been made and the conditions are far different to those that existed when Case 12.249 came to its attention.

The State of El Salvador has adopted the measures requested by the Honorable Inter-American Commission on Human Rights and has provided ample information whenever it has been asked to do so.

The State of El Salvador has made efforts to secure the sustainability of the antiretroviral treatment required by patients living with HIV/AIDS, by ensuring a budget for that treatment that guarantees permanent, regular, universal and free access to essential antiretroviral drugs; performance of CD4 and viral load monitoring tests; prevention promotion; access to laboratory diagnostic tests, and prevention of mother-to-child transmission.

The State of El Salvador has not engaged in practices that discriminate against patients living with HIV/AIDS, and the general standards in force are the same as those applied at hospitals in various countries and are in accordance with WHO/PAHO guidelines.

The State of El Salvador, through the Supreme Court, processed and pronounced a decision on amparo petition 348-99 filed by Mr. Jorge Odir Miranda Cortez. In the course of the case several factors came together to affect its processing: problems arising from the procedural structure, on which there is agreement in the Constitutional Chamber, which has prepared a new Constitutional Procedure Bill; the parties involved in the proceedings were very active, which prevented rendering all manner of decisions in the course of the case, causing it to be delayed, particularly since many of the motions presented had to do with merits; the complexity of the case, since, on one hand there was no case law precedent and, on the other, the technical and medical nature of many aspects discussed required the assistance of experts; that said, in a recent case, based on the case law set down in this proceeding, groundbreaking precautionary measures were ordered that were designed to ensure that the party that filed the amparo petition received the necessary medical care during the process itself; and finally, the number of cases on the Court’s docket has risen in recent years, which forces the Constitutional Chamber to treat each

case submitted to it with particular diligence, and to keep ever in mind the effects of jurisprudence on a system in which diffuse and centralized control of constitutionality coexist.

The State of El Salvador adopted on October 24, 2001 the Law on Prevention, Care and Control of Infection Caused by the Human Immunodeficiency Virus (HIV/AIDS), which is designed to prevent, control, and regulate care for the infection, sets down the rights and obligations of persons who are carriers of the virus, and defines in broad terms National Policy on Comprehensive Care for HIV/AIDS.

The State of El Salvador considers that with the here-described measures which it has implemented with regard to the right to health, pursuant to Article 1(2) of the Constitution, and with respect to observance of the international instruments to which it is a party, it has complied with the international standards contained in the American Declaration of the Rights and Duties of Man (Art. XI, Right to the preservation of health and to well-being); the Universal Declaration of Human Rights (Art. 25, medical care and necessary social services); the International Covenant on Economic, Social, and Cultural Rights (Art. 12 (2)(d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness); and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (Art. 10, Right to health).

23. Based on the foregoing conclusions, the State requests the IACtHR to "consider closing the case and permit the State to continue to deal with the matter by its own means." Finally, the Salvadoran State offers "to keep the Inter-American Commission on Human Rights regularly and systematically informed about the health care that it provides to its nationals in keeping with its duties and its international undertakings, in particular under the American Convention on Human Rights".

#### IV. FACTS

A. Situation of Jorge Odir Miranda Cortez and the other 26 persons included in the instant case

24. Jorge Odir Miranda Cortez is a person living with HIV/AIDS, with which he was diagnosed by the ISSS toward the end of 1997. At the time he was in the terminal stages of the disease. However, thanks to a private donation he managed to obtain triple therapy drugs, which were administered to him by a private physician, with evident benefits for his clinical status. Accordingly, he decided to found the Atlacatl Association together with other persons who were living with the virus and their families.

25. As mentioned in report on admissibility 29/01, the identity of Mr. Jorge Odir Miranda Cortez was made public and the names of the other 26 persons included in case 12.249 have not been disclosed. The identities of those persons, which are contained in the record of the Inter-American Commission, are known to the Salvadoran State and the petitioners. For practical purposes, a list has been drawn up of the names of those persons in alphabetical order and a letter of the alphabet assigned to each. The appropriate letter will be used whenever it is necessary in the instant report to identify a particular individual.

26. Three persons died between the opening of this case and the granting of precautionary measures. The first was Mrs. "G", who passed away on February 29, 2000, the day that the Inter-American Commission initiated the aforementioned proceedings. The death certificate submitted by the petitioners states that "G" was a single woman aged 42 and records Acquired Immunodeficiency Syndrome as the cause of death; she was not receiving medical care.[FN14]

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[FN14] Civil Register of the Municipality of San Salvador, Book 007, Folio 286, March 1, 2000. In their communication of April 3, 2000, the petitioners also mention the death on March 19, 2000 of another woman, whose death certificate they enclose. That said, the latter woman was not included in the request for precautionary measures, nor is she part of Case 12.249; however, she is included on the list of 37 persons presented in September 1999 by Richard Stern.

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27. Mr. "A" died on May 5, 2000. According to the information obtained for Case 12.249, Mr. "A" was first treated at Zacamil Hospital on December 6, 1996, referred to the Psychiatric and General Hospital, and was treated for the last time on April 11, 1998.

28. For his part, Mr. "Y" died on May 11, 2000. He was admitted to Rosales National Hospital on January 7, 2000 where he was diagnosed with AIDS, miliary tuberculosis, late latent syphilis, and oral candidiasis. Mr. "Y" was readmitted in early May 2000 to that hospital, from where he was referred to the Pneumological Hospital, which informed that he had abandoned the anti-tuberculosis treatment. The doctors noted a "frank decline in his clinical and radiological condition" and reinitiated his anti-tuberculosis treatment as well as treating him for pneumonia; however, Mr. "Y" died on May 11, 2000.[FN15]

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[FN15] As the communications included in the record of Case 12.249 show, officials of the Salvadoran State tried to locate Messrs. "A" and "Y" through the Atlacatl Association. As mentioned above, they were able to locate Mr. "Y" but not Mr. "A" before his death.

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29. Mr. Jorge Odír Miranda Cortez and the other 23 persons who remained alive received medical care from the Salvadoran health authorities. The record in Case 12.249 shows that Mr. "Q" decided to travel with this family to the United States, from which point forward he ceased to receive treatment from Salvadoran State.[FN16] The dates on which care and treatment were provided to each person were received during the period that the precautionary measures were in effect and in the course of processing of Case 12.249; they are examined in greater detail in the section on "Analysis" infra.

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[FN16] Although they do not specify the date of travel, the petitioners informed the liaison officer at the Ministry of Foreign Affairs that Mr. "Q" opted to go to the United States in order to "work and secure a better future" for his family, as he was afraid that he would die for failure to receive the antiretroviral drugs from the ISSS. Communication of May 30, 2000 transmitted by

the representative of FESPAD to the Coordinator for International Issues of the Ministry of Foreign Affairs of El Salvador, enclosed in the communication of the petitioners of June 27, 2000.

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B. Judicial actions

30. Based on the right of petition recognized in article 18 of the Salvadoran Constitution, Jorge Odir Miranda Cortez presented on July 9, 1998 a note to the Office of the Director of the ISSS in which he requested the procurement and administration of the treatments that comprise the triple therapy. On August 10, 1998 the Deputy Chief of the Health Division of the ISSS advised him that he would not be able to comply with the request. However, the Atlacatl Association, in collaboration with other similar organizations, persisted with the request.

31. On April 28, 1999, Mr. Miranda Cortez filed an amparo petition with the Constitutional Chamber of the Supreme Court of Justice of El Salvador, in which he sued the Office of the Director of the ISSS for violation of the rights to life and to health, and for infringement of the principle of equality. In so doing he invoked relevant articles contained in the Constitution of El Salvador, the American Convention, the Protocol of San Salvador, and the International Covenant on Economic, Social, and Cultural Rights. Mr. Miranda Cortez specifically proposed that the effects of the petition should extend to all persons who carried the HIV/AIDS virus in El Salvador.[FN17] In its final judgment on amparo case 348-99, adopted on April 4, 2001, the Constitutional Chamber ruled the Constitution had been violated, upheld the petition for amparo, and ordered the therapy to be provided to Jorge Odir Miranda Cortez. However, it did not extend the order to other persons who carried the virus as had been requested.

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[FN17] In this regard, the petitioners explain:

The amparo suit was filed together with observations concerning standing to sue, in which the attempt was made to establish that the amparo action was not being filed for the sole and exclusive benefit of Jorge Odir Miranda Cortez; rather, the petition was presented in the context of a situation of diffuse interests; not the classic examples of the environment or of consumers, but a situation in which there was an indeterminate number of victims who do not make use of their right to petition (for lack of means, legal assistance, etc.) the courts to seek effective judicial protection. Simply put, the population living with HIV/AIDS may be one number today and another tomorrow, due to the persons who become infected and those who die. It is not a static and fixed population, but entirely dynamic and, consequently, difficult to determine over time. Communication of the petitioners of January 24, 2000, p. 3.

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C. Measures adopted by the State

32. The Salvadoran State expressed its willingness to comply in its first response, of March 15, 2000, to the precautionary measures granted by the IACtHR. In particular, it initiated a review of the clinical records of Jorge Odir Miranda Cortez and the 26 persons who were still alive as of that date, in order to evaluate the applicable therapy in each case. The State also began to take

the necessary steps to secure funds for the purchase of drugs and assembled a team of professionals to draw up protocols of care for persons living with HIV/AIDS.

33. During the period that the precautionary measures were in effect --from February 29 to August 29, 2000-- the State supplied the IACtHR with the information available on the clinical status of the persons included in the instant case. The communications of the parties show, furthermore, that lines of communication were established and the health authorities were in contact with the patients, in some cases directly and in others through their legal representatives and those of the Atlacatl Association. The section on "Analysis" infra describes in greater detail the measures that the Salvadoran State adopted for the medical care of the persons included in this case.

## V. ANALYSIS

### 1. Right to judicial protection (article 25 of the American Convention)

34. The right to effective judicial protection is guaranteed by the American Convention. Article 25(1) of the aforesaid instrument provides:

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

35. As mentioned supra, on April 28, 1999, Mr. Miranda Cortez filed an amparo petition with the Constitutional Chamber of the Supreme Court of Justice of El Salvador against the ISSS for violation of the rights to life and to health, and for infringement of the principle of equality. It was expressly requested that the decision have an erga omnes effect in order to ensure that it extend to all persons who were carriers of the HIV/AIDS virus in El Salvador. Amparo petition 348-99 was upheld by a decision of the President of the Constitutional Chamber of the Supreme Court of Justice of May 7, 1999. However, the petitioners claim that that decision was adopted later, based on a statement made to the press by the Clerk of the aforesaid Constitutional Chamber.[FN18] The final judgment on the aforementioned amparo petition was adopted on April 4, 2001, which means that the process lasted one year, eleven months and six days.

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[FN18] In that connection the petitioners cite an article in the Salvadoran newspaper El Diario de Hoy of Friday, June 11, 1999, which, on page 24, reports the judiciary official as saying that the above-mentioned amparo petition was still under examination, and that "next week there might be something forthcoming in that regard." Communication of the petitioners of November 21, 2001, p. 36.

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36. The petitioners assert that there was "clearly an unreasonable delay in its resolution," since there was nothing in the petitioners' attitude to obstruct the processing of the remedy and even though the respondent authority requested an extension, it was refused one. The petitioners

further argue that the complexity of the matter “cannot be invoked in any circumstances when the subject of the court dispute involves a situation such as that faced by persons with reduced life expectancy due to a terminal illness, like HIV/AIDS.

37. The 1960 Law of Constitutional Procedures contains the provisions governing amparo petitions; however, it does not provide a maximum duration for processing such remedies. In this connection, the petitioners argue:

An amparo petition must be processed quickly, regardless whether domestic law expressly provides that its duration shall not exceed one, two, three or five years. The foregoing is all the more valid in states such as El Salvador, where the law has not expressly determined such a deadline, which cannot be taken as carte blanche for the process to last however long might seem appropriate to the Constitutional Chamber. In light of its excessive duration and bearing in mind the special diligence that the circumstances called for, amparo case 348-99 constitutes a breach of the state’s obligation to ensure effective judicial protection.

Further to the foregoing, it should be mentioned that when Jorge Odir Miranda Cortez filed the amparo petition, he said that in doing so he was seeking protection for diffuse interests, which he identified as the interests shared by the community of people living with HIV/AIDS, a group of indeterminate size owing to different factors, such as under-registration and the high level of mobility entailed by the fact that someone living with HIV/AIDS might die at any second, or because in that same second someone new might be infected. Strictly speaking, then, the petition sought to ensure the implementation of access to essential antiretroviral drugs for all persons who are in the same situation as the principal petitioner.

38. In amparo case 348-99, the Constitutional Chamber of the Supreme Court of Justice of El Salvador found that the situation did not concern “the protection of diffuse or supra-individual interests as the petitioner argued in his petition, due to the very nature of the rights to life and to health allegedly violated by the omission against which the petition has been filed”.<sup>[FN19]</sup> Therefore, the Salvadoran Supreme Court clarified that the effect of the judgment was to order the therapy to be provided exclusively to Mr. Miranda Cortez.

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[FN19] The aforementioned decision also found:

Having determined that a constitutional violation occurred with the omission to provide the necessary treatment to the petitioner in this amparo proceeding, it is necessary to consider the collective interest that the petitioner alleges is involved and, consequently, the possible effect that the ruling to be delivered ought to have.

The amparo proceeding has unique characteristics among the so-called constitutional procedures (...) In the case sub lite the petitioner, invoking the collective interests of every single HIV sufferer, has requested this Tribunal to deliver a ruling on the effects that this judgment might have on the diverse cases --or the community, to use his words-- in the same situation.

Inasmuch as they share the same plight, HIV sufferers are indeed in a category such that they may be placed in a particular group. However, what this gives rise to or makes possible is that any of the aforementioned can have access to protection for any of their rights when that right is being similarly and collectively violated. The interests are commonly held and, therefore, any

one of them is entitled to request a change of venue; however, that does not mean that the effects of the judgment delivered in the proceedings instituted are necessarily generally applicable, even though that might indeed be the case.

Supreme Court of Justice of El Salvador, Constitutional Chamber, Amparo Case 348-99, Judgment of April 4, 2001, cited by the petitioners.

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39. The petitioners say that the effect of the aforementioned decision of the Salvadoran Supreme Court is that every person living with HIV/AIDS in El Salvador would have to file and win an amparo petition in order to receive triple therapy. They also consider that it discriminates in favor of those who have access to an attorney interested in helping them to pursue their claim. The petitioners accuse the Constitutional Chamber of a “reductionist vision” and consider that the plight of persons living with HIV/AIDS requires the courts to adopt “much more flexible criteria with respect to the effects over time”; they conclude that the absence of erga omnes effects from the judgment in amparo case 348-99 “constitutes a breach of the state’s obligation to ensure effective judicial protection”.[FN20]

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[FN20] Communication of the petitioners of November 21, 2001, p. 39.

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40. Finally, the petitioners include in their observations on merits a series of statistics on the judgments of the Constitutional Chamber between 1997 and 2000, which leads them to conclude that there is a “downward trend in judgments on questions of law, and an upward trend in those that do not concern questions of law.”[FN21] They draw attention to the fact that one of the recommendations of the Commission on Truth set up in the framework of the Peace Agreements that brought an end to the armed conflict was to “adopt measures to make the remedies of amparo and habeas corpus truly effective”.[FN22] The petitioners add:

After 10 years since the signing of the peace agreements the effectiveness of the amparo procedure remains essentially the same as it was at the end of the armed conflict. And in no circumstances has that effectiveness been considered to meet the requisite standards for the protection of human rights. Thus, as in the past, the amparo procedure continues to be a symbol of futility, which, in accordance with the case law of the Inter-American Court...represents a clear and patent infringement of the State’s obligation to ensure effective judicial protection for all persons who regard themselves as victims of human rights violations.[FN23]

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[FN21] Idem, p. 40.

[FN22] From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador, United Nations, 1993.

[FN23] Communication of the petitioners of November 21, 2001, p. 43.

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41. The Salvadoran State contested the position of the petitioners regarding effective judicial protection in the instant case. In the brief containing its observations on merits, the Salvadoran State argues:

The Constitutional Chamber of the Supreme Court of Justice examined and issued a decision on the amparo petition presented by Mr. Jorge Odir Miranda Cortez. The aforesaid Chamber was required to abide by the provisions of the Law on Constitutional Procedures, which dates from January 14, 1960, and which, in all the years it has been in force, has only undergone five reforms.

In light of the nature of the rights and the procedural situation presented in the petition, the characteristics of the alleged matter under cognizance in the aforementioned case made it unique from other proceedings, in particular given the absence of any jurisprudential precedents and the very little doctrinal research on the issue in the country. In spite of that, the petition was admitted by a decision rendered on May 7, 1999; that is, nine calendar days after it was filed.

The structure of an amparo proceeding in El Salvador entails a procedure in which the respondent authority presents two briefs, adduces evidence and evaluates forwarded pleadings. For their part, petitioners, in addition to lodging the petition, are entitled to two pleadings and have the opportunity to present evidence. Finally, a Court Prosecutor, who participates as *amicus curiae*, also intervenes in the proceeding; he or she holds a hearing and may submit two pleadings; his or her opinions are not binding.

The foregoing means that one is faced with an extremely long proceeding, which is additionally delayed by difficulties that hamper procedural communications, particularly those that have to be sent via post. In the case of this particular proceeding, in addition to the aforementioned factors, two other aspects also came into play: one of a technical nature --as mentioned-- and the other relating to the intervention of the parties. (underlined in the original)

The technical aspect was particularly burdensome since in El Salvador at the time there were no jurisprudential and doctrinal precedents on protection of the rights allegedly violated. This meant a particular effort since the Tribunal was obliged to seek --abroad-- information on the issue. It was also necessary to retain the advisory services of experts to clarify medical issues, since in each of their interventions the parties used not only legal, but also medical arguments.

The active role of the parties in the process was also determinant, since they made full use of every stage of the proceedings; in other words, each intervention --be it hearings of the submission of briefs and pleadings-- involved the consideration of questions of law, some of which required the immediate response of the Tribunal.

Among other aspects that had to be assessed in pronouncing judgment was the question of why the respondent authority did not supply patients who were infected with HIV or who had already developed AIDS with any drugs other than AZR, which was administered to pregnant women to prevent the onset of the virus in the child, in spite of the fact that, as was stated, that alone was not enough to combat the disease. All of this required specialized medical expertise.

Then there was the legal analysis of the possible violation by the respondent authority of the rights to health and to life as fundamental legal issues under constitutional protection. This constituted the crux of the petition since it was necessary to weigh up the capacity of the state and the need of the governed individual. To that effect, it was necessary, therefore, to conduct a thorough review of the possible capacity to provide sufferers with triple therapy or associated antiretroviral therapy, which was not so much a medical or legal question as a financial one.

The idea, as with any constitutional court in the world, was to carry out the mandate contained in any constitution founded on the democratic rule of law: to deliver prompt and fair justice. This principle must always be interpreted in the sense that, in the worst of cases and only in exceptional circumstances, compliance with the delivery of justice must always come first. (sic)

Such factors led to the sacrifice of quantitative considerations relating to time for qualitative ones pertaining to the law. Therefore the judgment was rendered, ordering the Salvadoran Social Security Institute to supply the drugs to the sick individuals, in particular the cocktail because at the time the decision was issued it was scientifically the best thing for the treatment of HIV. (underlined in the original)

Finally, it should be clarified that the statistical considerations raised by the petitioner on the actions of the Tribunal in the processing of constitutional cases are speculative and inconclusive, since the number of petitions received, abnormal conclusions of proceedings, and the duration thereof are not necessarily determined by the reasons the petitioner alleges.[FN24]

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[FN24] Communication of the State of February 15, 2002, pp. 17-19.

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42. It is worth recalling the analysis on compliance with the requirement of exhaustion of domestic remedies in the report on admissibility of the instant case:

In the view of the IACtHR, the petitioners had access to amparo proceedings, the remedy offered by the domestic legal system in this case, and they filed for these proceedings within the time period and in the manner required. However, to date, this remedy has not proven effective in responding to the claims of alleged violation of human rights. Almost two years have elapsed since the petition was filed and no final decision has been handed down by the Salvadoran Supreme Court. These matters will be analyzed during the procedural phase, together with the other allegations pertaining to the right to a fair trial and to effective judicial protection.

The Inter-American Commission decides to apply the exception provided for in the second part of Article 46(2)(b) of the American Convention to this case. The reasons that prevented the exhaustion of domestic remedies will be analyzed in the report to be adopted by the IACtHR on the merits of the case, in order to determine whether the American Convention was violated.[FN25]

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[FN25] IACtHR, Report on Admissibility No. 29/01, Case 12.249, March 7, 2001, paras. 40 and 41.

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43. The Inter-American Court of Human Rights has interpreted article 25(1) of the American Convention as a general provision "that gives expression to the procedural institution known as "amparo," which is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention".[FN26] The Inter-American Court has issued a further opinion in which it confirms the foregoing concept and adds that the guarantee recognized in article 25 of the American Convention applies "not only to the rights contained in the Convention, but also to those recognized by the Constitution or laws".[FN27]

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[FN26] I/A Court H.R., "Habeas Corpus in Emergency Situations", Advisory Opinion OC-8/87 of January 30, 1987, (Ser. A) No. 8, para. 32.

[FN27] I/A Court H.R., "Judicial Guarantees in States of Emergency", Advisory Opinion OC-9/87 of October 6, 1987, (Ser. A) No. 9, para. 23

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44. The Inter-American Court has also found:

Article 25(1) incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights (...) According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.[FN28]

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[FN28] Idem, para. 24.

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45. Furthermore, the Court has reiterated that the right of everyone to a simple and prompt recourse or any other recourse to a competent judge or tribunal for protection against acts that violate his fundamental rights is "one of the basic pillars, not only of the American Convention but also of the rule of law itself in a democratic society, within the meaning of the Convention." [FN29] In that connection the Inter-American Court has held that "for the State to

comply with the provisions of this article, it is not enough that the recourses exist formally, but that they must be effective".[FN30]

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[FN29] I/A Court H.R., Ivcher Bronstein Case. Judgment of February 6, 2001, (Ser. C) No. 74, para. 135; Constitutional Court Case, Judgment of January 31, 2001, (Ser. C) No. 71, para. 90; and Bámaca Velásquez Case, Judgment of 25 November, 2000, (Ser. C) No. 70, para. 191.

[FN30]. I/A Court H.R., Constitutional Court Case, supra, para. 90; Bámaca Velásquez Case, supra, para. 191; and Cesti Hurtado Case, Judgment of September 29, 1999, (Ser. C) No. 56, para. 125.

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46. In the instant case, Jorge Odir Miranda Cortez turned to the Salvadoran Supreme Court in order to seek effective judicial protection for several fundamental rights protected both by the Salvadoran Constitution and by international treaties. Indeed, the head of the Atlacatl Association sought protection for the rights to health, to life, and to nondiscrimination. In its analysis in the instant report, the Inter-American Commission must determine if the actions of the Salvadoran Supreme Court in processing and delivering its decision on amparo case 348-99 are consistent with the parameters of the right to effective judicial protection recognized by the inter-American system for protection of human rights.

47. At the time the IACHR declared Case 12.249 admissible the Constitutional Chamber of the Supreme Court of Justice of El Salvador had not rendered a decision on the amparo petition, even though nearly two years has already passed since it was lodged. We have seen that the Salvadoran Supreme Court issued its decision on that amparo petition on April 4, 2001, a little under a month after the Inter-American Commission adopted Report 29/01, and days before the second year elapsed since Mr. Jorge Odir Miranda Cortez sought judicial protection.

48. The Inter-American Commission finds that, in the instant case, the effectiveness of the remedy is inextricably linked to promptness, given the nature of the petition presented to the Salvadoran Supreme Court of Justice. Indeed, it concerned a decision on the provision of drugs that could determine the survival of Mr. Jorge Odir Miranda Cortez and --if diffuse control were acceded to-- everyone with the HIV/AIDS virus in that country. The IACHR considers that the arguments of the petitioners in this matter are full justified with respect to the urgency of the case brought before the supreme judicial organ of El Salvador. The Commission finds that the State of El Salvador did not submit convincing pleadings against those arguments to justify the length of time taken to process the amparo petition. On the contrary, the State not only expressly recognizes, but also underscores in its observations on merits, that the amparo proceeding was "extremely long" due to the legal structure of the remedy in said country.

49. As noted *supra*, the Salvadoran State further recognizes that there was a "sacrifice of quantitative considerations relating to time for qualitative ones pertaining to the law". However, it should be stressed that the guarantee contained in article 25 of the American Convention is indivisible, that is all the elements that comprise it are obligatory.

50. The IACtHR recognizes that the instant case is somewhat complex, and that at the time it was taken up in court the issue it concerned was new from a legal and medical point of view. Nevertheless, the mere affirmation of the State to that effect --in the absence of other concrete and specific elements-- is not enough to justify the length of time taken to process the amparo petition. The complexity of a matter alone does not absolve a state from its duty to protect the fundamental rights of the persons under its jurisdiction by means of a prompt, simple and effective recourse, particularly in a case such as this one, in which Mr. Jorge Odir Miranda Cortez demonstrated the urgency of his situation. The Salvadoran State has also failed to provide information that tends to show that the petitioner delayed the processing of amparo petition 348-99 with his conduct.

51. The Inter-American Court has previously examined the duration of amparo proceedings in the light of the guarantee of effective judicial protection contained in the American Convention. In one particular case, the Court determined that the period of 11 months and seven days to decide an amparo petition constituted a breach of article 25 of the above-cited international instrument.[FN31] In light of the criteria established on the subject by this Court, and bearing in mind the scope of reasonable terms in judicial proceedings, [FN32] the IACtHR finds that in examining amparo case 348-99 the justices did not respect the principle of a reasonable term protected by the American Convention. In the facts in the instant case the IACtHR has seen, moreover, that the Supreme Court of Justice adopted the decision on the amparo petition several months after the Salvadoran authorities had adopted measures designed to provide antiretroviral treatment to HIV/AIDS carriers.

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[FN31] I/A Court H.R., The Mayagna (Sumo) Awas Tingni Community Case. Judgment of August 31, 2001, (Ser. C) No. 79, para.133.

[FN32] I/A Court H.R., Constitutional Court Case, *supra*, para. 93; Paniagua Morales et al. Case, Judgment of March 8, 1998, (Ser. C) No. 37, para. 152; and Genie Lacayo Case, Judgment of January 29, 1997, (Ser. C) No. 30, para. 77.

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52. One should not lose sight of the nature of the rights whose protection Mr. Jorge Odir Miranda Cortez claimed when he resorted to the institution of amparo proceedings against the ISSS. Inasmuch as the Salvadoran authorities had refused to supply antiretroviral therapy to him, the issue under discussion was not only the health but also the survival of the petitioner and the other persons for whom the amparo petition was filed. In that connection, international jurisprudence has determined that local tribunals should act with particular diligence in processing and resolving cases brought by petitioners living with HIV/AIDS:

Like the Commission, the Court takes the view that what was at stake in the contested proceedings was of crucial importance for the applicant, having regard to the incurable disease from which he was suffering and his reduced life expectancy. He was HIV positive when he lodged his preliminary application with the Minister and instituted proceedings in the administrative court and he had subsequently developed full AIDS (see paragraphs 11 and 18 above). There was a risk that any delay might render the question to be resolved by the court devoid of purpose. In short, exceptional diligence was called for in this instance, notwithstanding

the number of cases which were pending, in particular as it was a controversy the facts of which the Government had been familiar with for some months and the seriousness of which must have been obvious to them.[FN33]

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[FN33] European Court of Human Rights, Case of X v. France, Judgment of 31 March, 1992, para. 47. Mr X, a French national born in 1963, died on 2 February 1992 after several stays in hospital. He lived in Paris with his parents. He received a State allowance of 3,000 French francs per month as a disabled adult. Mr X was a hemophiliac and had undergone several blood transfusions, in particular between September 1984 and January 1985 at the Saint-Antoine hospital in Paris. On 21 June 1985 it was discovered that he was HIV (Human Immunodeficiency Virus) positive. As other haemophiliacs had been infected by HIV, the French Association of Hemophiliacs tried to obtain compensation from the State for the damage suffered by its members who had been so infected.

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53. In sum, amparo case 348-99 was neither prompt nor simple, which denied it the effectiveness required under the obligations in the area of human rights freely adopted by El Salvador. Based on the foregoing, the Inter-American Commission concludes that the Salvadoran State is responsible for violation of the right to effective judicial protection to the detriment of the 27 persons included in Case 12.249.

#### B. Domestic legal effects (article 2 of the American Convention)

54. All states that have ratified the American Convention adopt the following general obligation:

##### Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

55. In the instant case, the petitioners have submitted specific pleadings regarding the lack of consistency of Salvadoran domestic law with the aforementioned provision, particularly in light of effect of the 1960 Law on Constitutional Procedures, which governs the amparo process. They further argue that 16 (d) of the “Law on Prevention, Care and Control of Infection Caused by the Human Immunodeficiency Virus (AIDS Law)” violates articles 2 and 11 of the American Convention

56. On the question of the so-called “AIDS Law”, the Inter-American Commission should mention that it is a norm that was adopted on October 24, 2001 by the Legislative Assembly of El Salvador; in other words, after the petition was lodged and also after the decision on admissibility in Case 12.249. The petitioners make no allegation whatever that the aforesaid law was applied to Mr. Jorge Odir Miranda Cortez or to the other 26 persons included in the case.

Nor is it appropriate to examine article 11 of the American Convention in this case, since the right to privacy was not invoked in the petition nor considered in the analysis of admissibility. Accordingly, the admissibility requirements clearly have not been met in order for the Inter-American Commission to express an opinion in respect of the “AIDS Law” in the framework of this particular case.

57. As regards the rules governing amparo in the 1960 Law on Constitutional Procedures, in their observations on merits in this case the petitioners say:

That body of rules provides for procedural stages and circumstances that do not offer adequate judicial protection. For example, it does not set a maximum deadline on the duration of amparo proceedings; the only precautionary measures it provides is the possibility to suspend alleged acts of infringement, but there is no possibility to apply for procedural mechanisms for provisional protection against omissions by the state, which was made patently obvious in the processing of amparo case 348-99, where the absence of precautionary measures led to the death of many people; and, finally, under article 35, reparation for violation of human rights is only admissible when the alleged act of infringement is irremediable.

The first of the foregoing circumstances reveals that a risk in the processing of an amparo case is that it may take many years after court proceedings are instituted before a decision is forthcoming. Therefore, such an omission in the law represents a serious risk to the detriment of the right to effective judicial protection.

The second circumstance stems from a classic conception of the function of amparo proceedings, whereby this guarantee only applies to cases concerning civil and political rights, out of the misplaced notion that such rights can only be infringed by state actions, and that, conversely, economic, social, and cultural rights, can only be impaired by state omissions. Indeed, article 19 of the LCP provides that suspension of the alleged act of infringement --which is the only legally recognized precautionary measure-- is only applicable in respect of acts that produce positive effects, in other words, actions in the strict sense, and not the omissions of an authority.

Many cases can be cited --and it is not the purpose of this document to do so-- in which human rights, whether one classes them as civil and political rights, or as economic, social, and cultural rights, can be violated both by action and by omission. The distinction whereby civil and political rights can only be violated by action, and economic, social and cultural rights by omission, constitutes a denial of the concept of the indivisibility and interdependence of human rights. By that token, when article 19 of the LCP recognizes suspension of the alleged act of infringement as the only precautionary measure, which is only applicable when such an act produces positive effects (actions in the strict sense), it withdraws protection from all victims of human rights violations who are in that situation as a result of state omissions. That rule, as was shown in amparo case 348-99, enables violations of human rights to reach irreparable points or situations --in the above-cited case it entailed the deaths of many people, and the result would have been different had the Constitutional Chamber ordered a precautionary measure such as the one the Inter-American Commission issued in due course-- and, consequently, justice can never be effective.

Finally, the fact that civil compensation is only possible when the act against which the amparo proceeding is instituted has been fully or partially consummated in an irreparable manner (article 35 of the LCP), only hinders the right to reparation which victims of human rights violations possess, inasmuch as the right to civil compensation --as one of the many manifestations of the right to reparation-- should apply as a consequence of the violation and not depend on the possibility that it might be reversible. For matters to return to the status quo ante as a result of an amparo judgment is a desirable aspect that is an integral part of the right to reparation, but that circumstance does not mean that no violation existed; however, it certainly does mean that the violation will cease and that its violating effects will be eliminated, but it cannot deny that the violation took place. Accordingly, article 35 of the LCP acts as a restriction or obstacle to the realization of the right of all victims of violation to comprehensive reparation in full.

In conclusion, therefore, it is necessary to draw attention to the fact that, by failing to set a maximum deadline on the processing of amparo cases --a deadline that must be reasonable--, the Law on Constitutional Procedures enables the processing of these cases to become a violation of the right to effective judicial protection provided at article 25 of the American Convention. Therefore, the State, by legislative omission, is in breach of its duty to amend its domestic laws in order to ensure the rights recognized by the American Convention, thereby violating article 2 of the aforesaid Convention. Furthermore, to the extent that it only provides for the suspension of alleged acts of infringement as a precautionary measure, which, in any case, is only possible with respect to positive actions (acts in the strict sense) and excludes the possibility of applying precautionary measures to state omissions, the provision contained in article 19 of the Law on Constitutional Procedures creates the possibility for human rights violations caused by omissions, whose remedy is sought by means of an amparo proceeding, to become permanent and irreparable, as was plainly demonstrated in case 348-99, which resulted in the death of many persons because they were not granted precautionary measures. The foregoing poses the risk that some violations of human rights could lead to inalterable circumstances, rendering judicial protection materially ineffective, in disavowal, therefore, of article 25 of the American Convention. Consequently, that legal provision runs contrary to the duty of the State to adapt its domestic law, in violation of article 2 of the aforementioned Convention. Finally, the circumstance provided in article 35 of the LCP to the effect that the possibility of reparation by civil compensation is only and exclusively possible when the alleged acts of infringement --again acts in the strict sense-- have been wholly or partially consummated in an irremediable manner, materially limits the right of victims of human rights violation to comprehensive reparation, thus contradicting the scope of the obligation to ensure rights contained in article 1.1 of the American Convention. Accordingly, the aforesaid provision of the Law on Constitutional Procedures represents a breach of the duty to adapt domestic laws.[FN34]

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[FN34] Communication of the petitioners of November 21, 2001, pp. 44 to 46.

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58. The Salvadoran State, for its part, recognizes that the legal provisions governing amparo in that country provide for an “extremely long proceeding”. It further adds that the 1960 law had only been reformed five times,[FN35] although it failed to specify what those reforms entailed; be that as it may, it did not argue that the law had been reformed so as to expedite the amparo

procedure. On the contrary, the Salvadoran State expressly mentions that the amparo proceeding instituted by Jorge Odir Miranda Cortez was affected, *inter alia*, by “problems arising from the procedural structure”.<sup>[FN36]</sup> In its observations on merits, the State further admits that those problems have also been noted by the Constitutional Chamber of the Supreme Court of Justice, which has prepared a new “Constitutional Procedure Bill”.<sup>[FN37]</sup>

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[FN35] Communication of the State of February 15, 2002, p. 18.

[FN36] *Idem*, p. 20.

[FN37] *Idem*.

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59. In first place, the Inter-American Commission considers that to set a maximum deadline for amparo proceedings would unquestionably be a significant contribution to the legal certainty of proceedings, particularly in light of the value that the jurisprudence of the inter-American system has placed on amparo. Indeed, amparo should be designed as a simple, prompt and effective recourse to guarantee fundamental human rights. However, a deadline does not, in itself, guarantee the effectiveness of the recourse, which must be determined bearing in mind the particular circumstances of each case.<sup>[FN38]</sup> The IACtHR has found in this case that the delay of almost two years to reach a decision on amparo petition 348-99 is unreasonable, given that the petition was filed precisely to safeguard against an urgent situation of irreversible consequences. Finally, the Inter-American Commission considers that any amendment to El Salvador’s legal provisions on amparo should take into account all of the elements that comprise effective judicial protection: simplicity, promptness and effectiveness.

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[FN38] The IACtHR has examined the issue of legally prescribed deadlines for the maximum duration of preventive detention in several cases. Although it concerns a different situation to the one that the IACtHR is analyzing in the instant case, it is worth mentioning what it has said with regard to the fixing of deadlines in laws and the importance of case-by-case analysis:

The Commission considers that a "reasonable length of time" for incarceration before conviction cannot be established in the abstract and thus belies the Government's contention that the 2-year period stipulated in Article 379(6) provides a criteria [sic] of reasonableness which corresponds to the guarantees found in Article 7(5) of the Convention. A period of pre-trial detention cannot be considered *per se* "reasonable" simply because it is prescribed by law.

(...)

The Commission has always held that the determination of whether or not a detention is unreasonable inevitably must be analyzed on a case by case basis. However, this does not preclude the possibility of a norm that establishes a general term limit beyond which a detention is considered *prima facie* illegal no matter the crime charged or the complexity of the case. This would be consonant with the principle of presumption of innocence as well as all other rights associated with due process.

IACtHR, 1995 Annual Report, Report No. 12/96, Case 11.245 – Jorge Alberto Jiménez, Argentina, paras. 67 and 70.

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60. The IACtHR considers that the foregoing also has to do with the absence of a mechanism to provide precautionary measures in the Salvadoran domestic law governing amparo, which would be indispensable in situations such as those presented by Jorge Odir Miranda Cortez. In this connection, the State itself says that "in a recent case, based on the case law set down in this proceeding, groundbreaking precautionary measures were ordered that were designed to ensure that the party that filed the amparo petition received the necessary medical care during the process itself". [FN39] The recent practice of its courts has become geared to the application of precautionary measures, even if it is only on an interpretative basis. The facts in the record, however, show that neither Mr. Jorge Odir Miranda Cortez nor the other 26 persons included in this case benefited from such a judicial initiative. In order to give effect to the guarantee recognized in article 25 of the American Convention, the IACtHR considers it necessary to adopt legislative measures to make El Salvador's body of laws consistent with its international obligations in the area of human rights.[FN40]

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[FN39] Communication of the State of February 15, 2002, pp. 20 and 21.

[FN40] In that connection, the IACtHR has previously mentioned the importance of consolidation jurisprudence through legal reform:

The Commission takes note of the recent jurisprudential thesis upheld by Mexico's Supreme Court of Justice which determines the applicability of an amparo to combat the abstentions or delays of the Public Prosecutor's Office, as discussed in the present report. That step by the Judiciary constitutes welcome progress toward full efficacy of the rights enshrined in Articles 8 and 25 of the American Convention, and may very well constitute an alternative means of compliance with the Commission's recommendation. However, the Commission notes that the above mentioned jurisprudence has not been applied to the instant case, and therefore decides to confirm its recommendation, until such remedy is proven to be "adequate and effective" in the terms of Article 25 of the Convention. To that end, the Commission notes that Article 197-A of the Ley de Amparo in effect in that country establishes:

The decision handed down shall not affect the juridical situations resulting from those trials in which the sentences have been issued.

Based on the reasons stated and developed in the present report, and in order to achieve a firm juridical foundation, as required by the right in question, as well as the verification and proof from the State, of a remedy that is adequate and effective, the IACtHR reaffirms its recommendation contained in the aforementioned Section D, to the effect that Article 21 of the Mexican Constitution be regulated by law.

IACtHR, Report No. 48/97, Mexico, Case 11.411 - Severiano and Hermelindo Santiz Gómez, and Sebastián Santiz López (Ejido Morelia), February 18, 1998, paras. 113 and 114. In this connection, see also IACtHR, Report No. 49/97, Mexico, Case 11.520 - Tomás Porfirio Rondin et al. (Aguas Blancas Case), February 18, 1998, paras. 134 and 135; and Report No. 1/98, Case 11.543 – Rolando and Atanasio Hernández Hernández, 5 May, 1998, paras. 82 and 83;

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61. Based on the foregoing analysis, the IACtHR concludes that in its current structure and form, the amparo proceeding in El Salvador does not meet the requirements of article 25 of the American Convention, inasmuch as it does not constitute a simple, prompt or effective recourse.

Therefore, the aforesaid State has broken its obligation to bring its domestic laws into line with the American Convention, in violation of article 2 of said instrument.

C. Obligation to respect and ensure rights (article 1(1) of the American Convention)

62. Article 1(1) of the American Convention provides:

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.

63. The Inter-American Court has held:

It is a basic principle of law on the international responsibility of the State, embodied in international human rights law, that every State is internationally responsible for any or all act or omission of any of its powers or organs in violation of internationally enshrined rights. Article 1.1 of the American Convention is of fundamental importance in this regard.

Regarding acts or omissions of domestic judicial bodies, Articles 25 and 8 of the Convention define the scope of the above-mentioned principle of generation of responsibility for the acts of all State organs.[FN41]

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[FN41] I/A Court H.R., The “Street Children” Case (Villagrán Morales et al.). Judgment of November 19, 1999, Series C No. 63, para. 220.

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64. In the instant case, the Inter-American Commission has found that there was a violation of the right to effective judicial protection due to the failure to ensure simplicity and promptness in the processing of amparo case 348-99. Therefore, the Salvadoran State has violated article 1(1) of the American Convention by its failure to fulfill its obligation to ensure and respect the right to judicial protection to the detriment of Mr. Jorge Odir Miranda Cortez and the other 26 persons mentioned in the record of Case 12.249.

D. Right to equal protection of the law (article 24 of the American Convention)

65. Article 24 of the American Convention provides that “all persons are equal before the law” and that “consequently, they are entitled, without discrimination, to equal protection of the law.” Article 1(1) of that international instrument further establishes the obligation to respect the rights of all persons and to ensure their free and full exercise “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.”

66. In their initial communication the petitioners allege:

The discriminatory and stigmatizing forms of treatment include:

Placed at the foot of the patient's bed would be a red plastic bag in which the bed linen and pajamas used by the patient would be placed. The bed linen and pajamas of other interned patients who were seropositive for HIV were not placed in this bag but collected altogether and mixed.

A small, glass or plastic vessel containing a green liquid in which a thermometer was put would be left at the bedside. This thermometer would be used only for that patient. No such vessel or thermometer were used for other interned patients.

The dishwares used to serve food to patients are also examples of discriminatory and stigmatizing forms of treatment. Enclosed in the appendices to this petition is a photostatic copy of a newspaper article in which there is a photograph of JORGE ODIR MIRANDA drinking a glass of water at the ISSS. The glass, as the photograph shows, has a label stuck to it displaying a row of three X's ('XXX'). [It is] obvious that this symbol is used to indicate that this item of dishware belongs to a patient who is infected with HIV or has developed AIDS.

The nursing treatment was also discriminatory. Nurses and care providers would warn one another of a patient's seropositive status with a word in the ear or glances aimed at the [face] of the patient. This situation shows that a practice did indeed exist that [stigmatizes] patients by reason of their clinical status.

Furthermore, as a general rule, doctors do not respect the minimum standards of care for persons with HIV/AIDS, since they have delivered the news of the infection directly to patients as they lay in bed without any prior therapy or counseling and without advising relatives. Furthermore, this information delivered aloud to the patient has on occasion been overheard by other persons sharing the patients' room, who quickly adopt attitudes of revulsion.[FN42]

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[FN42] Communication of the petitioners of January 24, 2000, para. 104.

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67. In the merits phase of Case 12.249, the petitioners said that "the State of El Salvador has been unable to refute any of these assertions and, consequently, from a procedural point of view, they may be regarded as truthful unchallenged affirmations".[FN43]

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[FN43] Communication of the petitioners of November 21, 2001, p. 34.

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68. The Salvadoran State, for its part, contested the argument of the petitioners regarding alleged violation of article 24 of the American Convention. It says that the hospitals in that country apply general standards "to avoid discrimination against patients with HIV/AIDS" and

that said standards “are also applied in other countries” for “preventive purposes and to control the disease”.[FN44] In its observations on merits, the State holds:

There has not been an institutional policy of discrimination against patients living with HIV/AIDS in consulting room and hospital care practices. In the specific case of the Salvadoran Social Security Institute (ISSS) glasses with marked labels have not been (sic) for use with patients with HIV/AIDS.

Institutional rules and regulations have always adhered to the framework of the “Universal Precautions” that the Centers for Disease Control and Prevention first published in 1987, which the country officially adopted in the “Manual on Standards and Procedures: AIDS” published in 1995.

(...)

The “Standard Precautions for Contact, Droplet and Airborne Transmission”, were adopted in 2000 and have been circulated among all hospital medical staff. Also distributed have been newsletters on biosafety, management of hospital solid waste and disinfection, sterilization of medical equipment, and skin antisepsis.

An institutional protocol has been instituted and adopted on “Management of Accidents or Exposure to Blood, Bloody Fluids or other Potentially Infectious Materials, or Instruments Contaminated with one of these Substances in the ISSS”, which provides guidelines on steps to take in the event of accidents in the workplace while providing care to persons living with HIV/AIDS.

The use of red bags continues to be provided for in institutional standards on handling of bioinfectious solid waste of all patients, and not just HIV/AIDS patients, as the petitioner has mentioned. It should be mentioned that their use is not deliberately insensitive, much less discriminatory, but corresponds, rather, to the biosafety standards set down by the Regional Programme for Collection and Treatment of Hazardous Hospital (Agreement ALA 91/33 between the European Union and the Governments of Central America).

The care provided to patients living with HIV/AIDS is discrimination-free, and the State, through the national hospitals has provided care to the group of people involved in Case 12.249, and to other patients who are also receiving triple therapy. The Honorable Commission has received the information supplied by the State on this situation. It should be mentioned that triple therapy --antiretroviral drugs-- is delivered to all patients that meet the requirements to that effect in accordance with the Protocols of Care for Persons infected with HIV/AIDS.[FN45]

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[FN44] Communication of the Salvadoran State of February 15, 2002, p. 15.

[FN45] Idem, pp. 15 y 16.

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69. The principle of nondiscrimination is part of the very essence of the inter-American system of human rights. In this regard, the Inter-American Court has ruled:

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.

Precisely because equality and nondiscrimination are inherent in the idea of the oneness in dignity and worth of all human beings, it follows that not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity. The European Court of Human Rights, "following the principles which may be extracted from the legal practice of a large number of democratic States," has held that a difference in treatment is only discriminatory when it "has no objective and reasonable justification." [Eur.Court H.R., Case relating to " Certain Aspects of the Laws on the Use of languages in Education in Belgium ( Merits ), Judgment of 23rd July 1968, p. 34.] There may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position. For example, it cannot be deemed discrimination on the grounds of age or social status for the law to impose limits on the legal capacity of minors or mentally incompetent persons who lack the capacity to protect their interests.

Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.[FN46]

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[FN46] I/A Court H.R., Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, (Ser. A) No. 4, paras. 55-57.

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70. Generally speaking, it should be mentioned that persons living with HIV/AIDS very often suffer discrimination in a variety of forms. This circumstance magnifies the negative impact of the disease on their lives and leads to other problems, such as restrictions on access to employment, housing, health care, and social support systems. There can be no doubt that the principle of nondiscrimination must be very strictly observed to ensure the human rights of

persons affected by HIV/AIDS. Public health considerations must also be taken into account since the stigmatization of, or discrimination against, a person who carries the virus can lead to reluctance to go for medical controls, which creates difficulties for preventing infection.[FN47]

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[FN47] See in this regard, United Nations, "Further Promotion and Protection of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of the Work of the Commission", Report of the Secretary-General on International and Domestic Measures Taken to Protect Human Rights and Prevent Discrimination in the Context of HIV/AIDS, E/CN.4/1995/45, 22 December, 1994.

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71. The Salvadoran State says that the health authorities in that country apply a procedure that includes the use of red plastic bags for handling the bioinfectious solid waste of any patient, not only those who suffer from HIV/AIDS; in other words, that there is no discrimination between the latter and other interned persons. To substantiate the foregoing, the State has supplied information and documentation that tends to attest to the observance of international rules in the area of hospital hygiene, as well as various practices and initiatives designed to ensure respect for the dignity of hospitalized persons. As to the alleged comments of doctors and nurses, as well as the use of thermometers different to those of other patients, the Inter-American Commission considers that the petitioners have not provided enough evidence to substantiate those assertions.

72. The Inter-American Commission must determine in the case under review if there was dissimilarity in treatment with respect to Jorge Odir Miranda Cortez and the other 26 persons identified in the record; if the aim of such dissimilarity was legitimate; and, finally, if the means used are reasonable.

73. As to the first point, the IACtHR considers that there was dissimilarity in the treatment of the 27 persons, but only insofar as they were suffering from an infectious illness and not necessarily for the fact that they were HIV/AIDS carriers. The explanation and documentation provided by the Salvadoran State are sufficient to conclude that this distinction is not discriminatory in the meaning of the right protected by article 24 of the American Convention because it pursued the legitimate purpose of preventing the propagation of the immunodeficiency virus to other people. As far as the Inter-American Commission can ascertain from the evidence available in the record, the means used are reasonable. The IACtHR does not have the necessary evidence to determine a situation of discrimination against persons who carry the HIV/AIDS virus in El Salvador, including those identified in the record of Case 12.249.

74. It is necessary to refer separately to the situation of Mr. Jorge Odir Miranda Cortez. The IACtHR considers demonstrated the use of the marked glass that appears in the photograph of Mr. Miranda Cortez when he was admitted. This fact, which is also confirmed by a photograph published in a newspaper, was not refuted by the Salvadoran State. The Inter-American Commission finds that dissimilarity in treatment has indeed been demonstrated with respect to Jorge Odir Miranda Cortez. Beyond question, the State not only has the right to adopt the measures necessary to avert the propagation of the virus, but also the duty to do so as part of its

obligation to protect the health of the persons subject to its jurisdiction. However, the means used are utterly unreasonable and demeaning for Mr. Jorge Odir Miranda Cortez and constitute unnecessary stigmatization.

75. In sum, the Inter-American Commission concludes that the Salvadoran State is responsible for violation of the right to equal protection of the law of Jorge Odir Miranda Cortez. By contrast, the violation of this right has not been demonstrated with respect to the other 26 persons included in the record of Case 12.249.

E. Progressive development of economic, social, and cultural rights (article 26 of the American Convention)

76. Article 26 of the American Convention provides:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

77. In the instant case, the petitioners have alleged violation of article 26 of the American Convention to the detriment of Jorge Odir Miranda Cortez and the other persons identified in Case 12.249, as regards the provisions that protect the right to health. The petitioners also invoke article 25 of the Universal Declaration of Human Rights; article 12 of the International Covenant on Economic, Social, and Cultural Rights; article XI of the American Declaration of the Rights and Duties of Man; article 34 of the Charter of the OAS, and article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights ("Protocol of San Salvador"). In respect of this last provision, it is worth recalling what the IACtHR found in its report on admissibility of the instant case:

The IACtHR is not competent ratione materiae to determine independently, violations of Article 10 of the Protocol of San Salvador through the system of individual petitions. However, the Inter-American Commission can consider this Protocol in the interpretation of other applicable provisions, in light of the provisions of Articles 26 and 29 of the American Convention.[FN48]

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[FN48] IACtHR, Report on Admissibility 29/01 of March 7, 2001, para. 36.

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78. The restrictions regarding interpretation contained in article 29 of the American Convention provide:

No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

79. In the aforementioned legal framework, the Inter-American Commission will determine in the instant case if the behavior of the Salvadoran State is consistent with the obligation of progressive development of the right to health on behalf of Mr. Jorge Odir Miranda Cortez and the other 26 persons included in Case 12.249.[FN49]

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[FN49] The measures implemented by the Salvadoran State to protect the rights claimed by the petitioners were mainly adopted in the framework of the precautionary measures granted by the Inter-American Commission as follows:

Without prejudice to other actions that your Government deems necessary, the Commission holds the view that urgent measures should be adopted in order to provide the medical care capable of safeguarding the life and health of Jorge Odir Miranda Cortez and the other persons listed above. In particular, the IACtHR asks that your Government provide the anti-retroviral treatment and medication necessary to avert the death of the aforementioned persons, as well as the hospital, pharmacological, and nutritional care needed to strengthen their immune systems and to prevent the onset of diseases and infections.

IACtHR, Communication to the Salvadoran State, February 29, 2000.

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80. On March 15, 2000 the Salvadoran State sent a communication to the IACtHR in which it expresses its interest to "provide the medical care necessary to protect the health of Mr. Jorge Odir Miranda and other persons who are HIV/AIDS carriers and need assistance from the institutions of the State for their treatment, as well as access to the necessary drugs." The State continues with a description of the initiatives adopted thereupon in compliance with the requests of the Inter-American Commission.[FN50]

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[FN50] The communication of the State says:

A review is under way of their clinical records and laboratory tests in order to determine what therapy, antiretroviral or otherwise, might be necessary in each case, together with their nutritional needs and the appropriate hospital care, pharmacological treatment, and drugs.

The State has determined that antiretroviral therapy (three drugs) for each person living with HIV/AIDS costs around US\$ 1,000.00 a month, and this is a lifelong treatment. Particular attention should be given to this point because additional financing efforts are required. In that

connection, further to efforts at the national level, steps have been initiated to raise extra-budgetary funds from international cooperation agencies in order to purchase the drugs.

The Ministry of Public Health currently has a team of experts designing the National Protocols of care for persons living with HIV/AIDS, in order to standardize the comprehensive care delivered to these persons, with a view to meeting all their care needs, such as health education, nutritional management, preventive measures, patient controls and evaluations, the necessary and appropriate drugs to treat the various opportunistic diseases that occur; psychological support for them and their families, as well as handling of special drugs, such as antiretrovirals, whose use requires periodic detailed evaluation by experts appointed by different institutions.

In order to coordinate possible measures with the Salvadoran institutions required to provide the necessary services, a framework for dialogue has been established between the interested parties, through their representative Mr. Carlos Rafael Urquilla, and the State of El Salvador, through Mr. Roberto Mejía Trabanino of the Ministry of Foreign Affairs. The aforesaid representatives have already made initial contact.

In light of the significance of this matter contact has been made with the El Salvador office of the Pan American Health Organization/World Health Organization (PAHO/WHO), in order to seek support in obtaining the drugs and so that a group of HIV/AIDS specialists led Dr. Fernando Zacarías, Regional Chief of the AIDS Program, which analyzes the problem across Latin America and the Caribbean, might advise the Government of El Salvador. To that effect, the Ministry of Foreign Affairs is making the necessary arrangements with PAHO/WHO, the results of which will be transmitted to the IACHR.

The Government of El Salvador wishes, finally, to mention to the Commission that the illegal strike at the Salvadoran Social Security Institute, which lasted nearly four months, ended on March 10 last. The strike disrupted delivery of care and normal services to the public as well as the institution's normal administrative procedures. This problem and the effects it caused to the national health system, having recently concluded, the climate is now more conducive to devoting to this case the attention it deserves.

Communication of the Salvadoran State of March 15, 2000, pp. 1 and 2.

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81. The petitioners said in several communications that the State was not meeting its obligations. In particular, on March 20, 2000, they requested, *inter alia*, that the medical records and laboratory tests be reviewed in the presence of a doctor that the patients trusted. Furthermore, they questioned why the State had failed to adopt concrete steps to implement the precautionary measures within the original 15-day time limit; they also disputed the State's estimate of the cost of the treatment and said that in reality it was less. Furthermore, they analyzed the alleged public and private sector debt to the Salvadoran Social Security Institute of US\$ 86,256,880.73 and concluded that with such an amount it would be possible to finance the precautionary measures for 3,083.59 months. The petitioners acknowledged that a team of experts was designing the protocols mentioned by the State; however, they mentioned that it was a task that had been initiated in August 1999 and, therefore, asked the IACHR not to consider it as compliance with the measures granted in February 2000. After disputing other aspects of the communication of the Salvadoran State, the petitioners ask the Inter-American Commission to deem the precautionary measures not fulfilled and to request the Inter-American Court to order provisional measures in favor of Jorge Odír Miranda Cortez and the other persons included in the record.

82. The IACHR wrote to the petitioners on March 24, 2000 and asked them to provide information regarding the names of the two persons who had died since the processing of the case began and the precautionary measures were granted. The information was delivered on April 4, 2000, with the clarification that only one of the two persons --Mrs. "G", who died the day the Case 12.249 was opened-- was actually included among the 26 persons in the record. The aforesaid communication also reiterates the observations of the petitioners on the measures adopted by the State, and requests the IACHR to submit a request for provisional measures to the Inter-American Court; that same request was reiterated in the communication of April 7, 2000.

83. On April 20, 2000, the Inter-American Commission transmitted the most recent information from the petitioners to the Salvadoran State and requested it to submit its comments. In that letter, the IACHR underscored the importance of assigning "the greatest possible urgency to the dialogue with the petitioners through the official appointed to that effect by the Salvadoran State, or by such means as the latter deemed most appropriate".

84. The State submitted a communication on April 28, 2000, in which it provided information on the measures adopted, in particular the formation of a medical team appointed by the Ministry of Public Health and Social Assistance and the Salvadoran Social Security Institute. According to the aforesaid communication, that team was composed of "recognized specialists in infectious diseases and experts on the problem of HIV/AIDS, together with some of the patients". The medical team set up to address the precautionary measures met on April 4, 2000 and decided to review each of the 27 records on the persons included in the precautionary measures. On April 6, 2000 they met with the petitioners, on which occasion the State says it reaffirmed to them "the serious commitment and good will of the State institutions to provide the care requested", and also that it described to them "considerations of a medical nature for the care and treatment of persons infected with HIV/AIDS, and regarding the advisability of seeking a harmonious and responsible solution to the problem that had arisen." The State includes in the same communication the proceedings of the meeting with the petitioners and expresses its intention to keep the Inter-American Commission informed.[FN51]

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[FN51] The State says:

A joint --State and petitioner-- review was conducted of the list of the 27 persons in respect of whom the application of precautionary measures has been requested, in order to determine if they are covered by the Salvadoran Social Security Institute or if their care is a matter for the Ministry of Public Health. Mr. Jorge Odir Miranda confirmed that each person was a member of one or other of the two aforementioned institutions and undertook to send Dr. de Bonilla the membership numbers and other data of the patients, which would help to review the records of each and in that way proceed with the delivery of the appropriate treatment and care in each case. Mr. Mirando [sic] was asked --and he consented-- to give the doctors leave to examine the contents of the records and, if necessary, to make them public before the Honorable Inter-American Commission on Human Rights.

The team of doctors appointed by the State promised to review the records and, in response to a proposal by the petitioner to include a doctor whom they trusted in this process, considered that this aspect was their purview. In spite of the foregoing, it was mentioned that the collaborating

doctor acting on behalf of the petitioner could stay in contact with the aforesaid team whenever necessary and assist with the information that would be transmitted to Mr. Miranda.

At the meeting it was also mentioned that the Ministry of Public Health and Social Assistance is in the process of designing Additional Standards and Protocols of Care for persons living with HIV/AIDS, with the aim of standardizing the comprehensive care delivered to these persons, in order to meet all their care needs.

Communication of the State of April 28, 2000, pp. 2 and 3.

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85. The Salvadoran State transmitted additional information in its communication of May 4, 2000, in response to the earlier request for information from the IACtHR. In particular, it informed about the problems of locating two of the 27 patients and that it had requested help from the Atlacatl Association to that end. It also forwarded a medical report on each of the patients. In respect of the reiterated request from the petitioners to refer the matter to the Inter-American Court for provisional measures, the State considers that "such a request is both formally inappropriate and unjustified, given the will of the State, the information provided, and the ongoing dialogue established with the IACtHR on the application of precautionary measures and the disposition to continue collaborating" with said organ. The state said that "a dialogue exists based on good faith and material compliance with the precautionary measures in the proceeding between the Salvadoran State and the IACtHR" and in view of the aforementioned reasons there are no grounds at all to refer the matter to the Inter-American Court.

86. The petitioners responded in a note of May 16, 2000, in which they insist that there was noncompliance with the precautionary measures, since they consider that the terms of the communication from the Inter-American Commission of February 29, 2000 were not met. They mentioned that two more people died (Mr. "A" on May 5, 2000 and Mr. "Y" on May 11, 2000) since the meeting on April 6, 2000, which made a total of three persons included in the precautionary measures who had died as of then. They again asked the IACtHR to request the Inter-American Court to order provisional measures.[FN52]

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[FN52] The petitioners add:

The latter shows that the purpose of the protection provided in the request for precautionary measures is not being fulfilled. The precautionary measures adopted do not comply in form and content with those requested by the illustrious Inter-American Commission on Human Rights; furthermore, the situation is extremely serious and urgent and represents irreparable harm that is placing at risk the life, health and well being of the victims in this case, which, based on the procedural rules that govern the inter-American system for protection of human rights, warrants... provisional measures to be requested from the Honorable Inter-American Court...

Communication of the petitioners of May 16, 2000, p. 3.

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87. For its part, the State transmitted additional information in a note of May 23, 2000, in which it enclosed copies of the medical summaries on five of the patients included in the precautionary measures. According to the summaries, those persons received care from ISSS doctors and in each case treatment was recommended that corresponded to their clinical status.

In one case it was recommended to continue the antiretroviral treatment; in another, the recommendation says that the “at this time the patient is not a candidate for initiating antiretroviral treatment... CD4 monitoring with greater frequency and as appropriate to the patient’s clinical evaluation.” In the clinical summary of another patient, the doctor recommends “respecting the opinion of the patient regarding initiation of antiretroviral treatment, provided he has been explained the risks and benefits of the treatment.” In the two other cases, the available information is not sufficient to make recommendations.

88. On May 26, 2000 the IACtHR requested the Salvadoran State to supply the following specific information:

The list of the 27 persons identified in the request for precautionary measures... together with detailed and updated information on medical care, treatment, hospitalization, and any other information relevant to the instant proceeding.

In the case of persons deceased since [February 29, 2000], the circumstances of their deaths and any other information relevant to the instant proceeding.

89. The State responded on June 9, 2000 in a communication that, among other considerations, says:

According to the medical report requested from Rosales National Hospital, the first consultation of Mr. [“Y”] was on January 7, 2000, when he was admitted to Male Medicine, Service 2 diagnosed with AIDS, miliary tuberculosis, late latent syphilis, and oral candidiasis. The patient was readmitted in early May to Rosales National Hospital, from where he was referred to the Pneumological Hospital, where it was reported that he had abandoned the anti-tuberculosis treatment. On his admission to Rosales National Hospital doctors noted a frank decline in his clinical and radiological condition. His anti-tuberculosis treatment was reinitiated. He was also treated for pneumonia caused by pneumocystis carinii. Despite the treatment the patient died at the hospital on May 11, 2000.

As regards Mr. [“A”], his first consultation was on December 6, 1998 at Zacamil Hospital, from where he was referred to the Psychiatric and General Hospital. The last consultation appears dated April 22, 1998. According to information provided by “Atlacatl December 1st Association” of which Mr. Jorge Odír Miranda is president, that person passed away on May 5, 2000. The aforementioned person did not go for regular medical consultations.[FN53]

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[FN53] Communication of the State of June 9, 2000, pp. 1 and 2.

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90. In the same communication the State adds that it took steps to provide immediate care for Mr. Jorge Odír Miranda Cortez, who allegedly had renal complications. The State further reports that Mr. “H” was located with the assistance of the petitioners and notes that Mr. “Q” had apparently decided to move to the United States. The Salvadoran State says “that the patients’ records and tests are being reviewed in consultation with the infectologist Dr. Jorge Alberto

Panameño as the petitioner requested,” and that the aforesaid professional met earlier with members of the ISSS Infectology Service. Enclosed in the communication of the Salvadoran State is a list of the persons identified in the request for precautionary measures, together with “updated detailed information on medical care, treatment, medical recommendations, and other relevant information”. The communication explains that “the progress of the disease varies and, for that reason, decisions on its treatment must be on a case-by-case basis and, consequently, the care and drugs also vary in each case”. As to another person who could not be located, the State says that it sought the assistance of the “Atlacatl Association” to that end.

91. The petitioners replied on June 27, 2000, posing fresh questions about the measures adopted by the Salvadoran State. Inter alia, they refute that the doctors gave the patient who died on May 11, 2000 the option of receiving treatment. Therefore, they consider that the “risk or situation that objectively led to the death of that person were created” and on that basis they argue that “El Salvador has completely failed to comply with the precautionary measures”. As to the person who died on May 5, 2000, the petitioners say that “he was unable any longer to keep the appointments mentioned by the government because of his weakened state of health, weight loss, and serious condition, which prevented him from leaving his bed”. Accordingly, they consider that the State had the obligation “to go and fetch him in order to provide him with the care demanded in the request for precautionary measures”.

92. They add that medical care was only provided at the request of the petitioners, and “that the State of El Salvador does not keep a comprehensive record of the clinical status of all the persons mentioned in the request for precautionary measures, that it acts at the request or petition of the interested party,” and by that token it is not complying with those measures. They draw attention to the fact that the State “off-loads the task of locating the victims on to the petitioners, when it is its duty to do so” and, furthermore, they consider that it also has the obligation to provide treatment, via its consular offices, to those who have left the country. They also question the delay of the State in collecting all the information necessary to provide care to the persons included in the request for precautionary measures. Based on the foregoing, they reiterate that it is necessary to request provisional measures from the Inter-American Court.

93. The State informed on July 12, 2000 that the Executive Board of the ISSS had adopted a decision on July 4, 2000, the contents of which they describe as follows:

Authorizes the purchase of drugs used in the application of antiretroviral triple therapy for insured parties with HIV/AIDS and, accordingly a fund of 13,610.516.00 colones is allocated for this fiscal year. Furthermore, other measures are adopted for the care of the sick.

The contents of the Decision represent a major stride that comes in the framework of the request for precautionary measures of the IACtHR, and, therefore, is in full compliance therewith, reiterating once more the spirit of collaboration of the Government of El Salvador in the instant case.[FN54]

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[FN54] Communication of the State of July 12, 2000.

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94. On July 20, 2000, the Salvadoran State sent a copy of a newspaper article published the previous day “regarding the improvement in the care that the Salvadoran Social Security Institute provides for AIDS sufferers”, which contains declarations by Mr. Jorge Odir Miranda Cortez on the improvement in his quality of life achieved thanks to the treatment provided by the aforesaid Institute. The State says that this is “conclusive proof of the disposition and good will” that it has shown “for reaching a favorable settlement of the instant case, in which there is demonstrable compliance with the precautionary measures”.

95. In reply to the aforesaid communication, the Inter-American Commission sent a note on July 24, 2000, which says:

The IACtHR found extremely encouraging the information regarding the measures for the administration of so-called “triple therapy” with antiretroviral drugs for persons infected with HIV, in the framework of the precautionary measures granted by the Commission on February 29, 2000 and applied by your Illustrious Government.[FN55]

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[FN55] IACtHR, communication of July 24, 2000.

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96. For its part, the State wrote to the Inter-American Commission on July 28, 2000 and provided a summary of the steps taken in the framework of the precautionary measures. *Inter alia*, it said:

An array of resources and inter-institutional efforts were mobilized, directly involving high-ranking officials and specialized technical personnel of the Salvadoran Social Security Institute and Ministry of Public Health and Social Assistance; a government liaison office was created to coordinate the measures to adopt; and, convinced that a climate of confrontation with the petitioner was not advisable, and that instead ways should be sought to implement with the petitioner measures to provide protection and care to the persons infected with HIV/AIDS, a direct line of communication was established to look for a harmonious and responsible solution to the problem that has arisen.

The procedures followed had clearly defined aims: to provide, in consultation with the interested parties, the medical, hospital, pharmacological and nutritional care requested for the patients. All of the foregoing took place in due course and the Honorable Commission was kept duly informed and updated.

(...)

The Government of El Salvador considers that the steps taken to provide the antiretroviral drugs that will make it possible to strengthen the immunological systems and health of the persons, comprehensively comply with the contents of the precautionary measures requested by the Honorable Commission and, accordingly, kindly requests it to close Case No. 12.249.[FN56]

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[FN56] Communication of the State of July 28, 2000, pp. 1 and 2.

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97. The additional information presented by the State on August 8, 2000 contains a press release from the ISSS on the treatment that would be delivered to patients infected with HIV/AIDS. The press release explains that additional initiatives would be implemented for prevention of AIDS transmission through education measures and promotion of preventive health and hygiene measures for the sectors at greatest risk of contracting the disease. The ISSS also announces in that document that it would set up a fund for the purchase of antiretroviral drugs to administer triple therapy to patients infected with HIV. The Salvadoran State describes such initiatives as evidence of its “disposition and good will to reach a favorable resolution of the instant case”

98. The petitioners, for their part, reply in a communication of August 25, 2000 and say that the liaison office created by the State “is a fallacy” and that “that line of communication is a failure”. They add that the State “has neither purchased any drugs nor delivered any drugs to victims in this case; nor has it provided them either medical or hospital care as a consequence of the request for precautionary measures”. They hold that the persons protected are in a very serious state of health and that “some of them are in danger of dying, including Mr. Odir Miranda, who suffers constant relapses that manifest themselves in bouts of diarrhea, fever, and sweating.”

99. The petitioners further argue that the Salvadoran State “litigates in bad faith” since it should present the receipts of purchase rather than the ISSS decision. They also question that decision because it is limited to that institution and does not affect persons not covered.[FN57] They also deny that the presence of Mr. Jorge Odir Miranda Cortez at a press conference together with senior ISSS officials “endorses or legitimizes” the work of that institution. While they consider that the decision “constitutes a great forward stride, an advance,” they clarify that the fact that Mr. Miranda Cortez pinned a red ribbon on the Director of the ISSS “was not a congratulatory gesture” as the Salvadoran State claimed. They conclude their brief with a request to the IACtHR that it declare the precautionary measures unfulfilled and that it request provisional measures from the Inter-American Court.

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[FN57] The petitioners say:

In El Salvador only persons who make a monthly contribution of a percentage of their salary have access to care from the Salvadoran Social Security Institute; in other words, those who belong to the structures of the formal sector of the economy. Therefore, any of the victims required to receive the drugs and care mentioned in the request for precautionary measures could only actually have their requirements met if they remain in the formal economic and productive sectors. If, for instance, they were dismissed from their jobs for some reason they would no longer have even that option. Therefore, even assuming that the State of El Salvador were to comply fully and faithfully with Decision No 2000-0558.JUN, that would mean that only some persons would be able to receive the drugs, and all those who were not part of the formal system of the economy would be forever condemned to death by reason of their poverty and joblessness,

which is an instance of arbitrary and unreasonable discrimination that cannot be justified in the light of the American Convention on Human Rights.

Communication of the petitioners of August 25, 2000, p. 2.

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100. As mentioned at the beginning of this section, the precautionary measures expired on August 29, 2000 when the six-month deadline set by the IACtHR concluded. Although it continued to receive communications from both parties, the Inter-American Commission deemed that the information on the precautionary measures contained in the record was sufficient not to renew them. The ensuing processing was summarized in the decision on admissibility in Case 12.249:

On November 24, 2000, the petitioners submitted correspondence in which they once again asked the Inter-American Commission to declare that the Salvadoran State had failed to comply with the precautionary measures and to seek provisional measures from the Inter-American Court. On December 6, 2000, they submitted additional correspondence to that effect. On that same date, the State submitted a communication providing a summary of the activities conducted in order to comply with the precautionary measures and containing comments on the merits of the petition.

At its 109th special session, the IACtHR decided not to grant the request for provisional measures. In making this decision, the Inter-American Commission considered the information received from both parties, and evaluated the different actions taken by the Salvadoran State to provide medical treatment not only to the members of the Atlacatl Association but also to other persons infected with HIV/AIDS in that country. These actions had continued even after expiration of the deadline for precautionary measures on August 29, 2000. [FN58]

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[FN58] IACtHR, Report on Admissibility 29/01 of March 7, 2001, paras. 19 and 20.

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101. The foregoing information shows that during the processing of Case 12.249 both parties set out their positions and submitted all the information that each considered appropriate. It has been seen that in each of their communications the petitioners challenged the information supplied by the Salvadoran State, in particular as regards the effectiveness of the protection measures; and that on each of those occasions they requested the IACtHR to seek provisional measures from the Inter-American Court. Furthermore, as shown supra, the Inter-American Commission examined all the information provided in the appropriate procedural stage and decided not to renew the precautionary measures; it also decided at a plenary session that it would not request provisional measures from the Inter-American Court.

102. The IACtHR notes that the Salvadoran State replied to each of the requests with information regarding concrete steps taken to provide the medical care and drugs that the persons included in this case needed. While it is true that three of these persons died while the precautionary measures were in effect, the Inter-American Commission finds that it has not been demonstrated in the instant report that this was due to negligence imputable to the Salvadoran

State, as the petitioners charged. On the contrary, the information shows that antiretroviral treatment cannot be administered indiscriminately to all persons infected with the AIDS virus, but that it depends on a medical evaluation.

103. In that connection the Pan American Health Organization (PAHO) explains that antiretroviral treatment is not indiscriminately applicable to all persons infected with HIV/AIDS, nor is there a single treatment for them all:

The therapeutic approach for HIV infection is increasingly complex. The appearance of viral resistance, the medium-and long-term toxicity of available drugs, as well as the need for strict adherence to the treatment, make it necessary to carefully weigh up its risks and benefits when it comes to making a decision on therapy.

Monotherapy and bitherapy are no longer acceptable for initiating antiretroviral therapy. The current therapy of choice for HIV infection is antiretroviral treatment with combinations of at least three drugs.

Evaluation of clinical status and a CD4 lymphocyte count are the basic elements for therapeutic decision making. In countries where it is possible, quantification of the plasmatic viral load will help in making the decision when to commence treatment. Viral load will also become the desirable instrument for monitoring the effectiveness of the antiretroviral treatment.

The treatment objectives include improving the quality and quantity of life of patients while avoiding as much as possible causing any harm. The beneficial effects are monitored by clinical evaluation: stabilization or improvement of the CD4 response and virological control as measured by the viral load when such a determination is possible.

Short-, medium-, and long-term toxicity are a limiting factor for antiretroviral treatment. This makes it necessary to share decision making with patients, particularly if they are asymptomatic; to be cautious in the choice of treatment model, and to reduce, prevent and resolve the toxicity of the drugs.

Adherence to HAART is essential for treatment initiation, scheme selection, durability of the response to treatment, and to avoid the development of resistant strains. Therefore, adherence must be evaluated, monitored and supported at all times and is a core issue of the therapeutic decision.

There may be various similar treatment models from the point of view of antiretroviral potency (...). The complexity of HAART requires that the care of patients infected with HIV 4 be provided by trained staff with basic health infrastructure available to them.[FN59]

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[FN59] PAHO, "HIV/AIDS: PAHO prepares guide to increase use of antiretrovirals in Latin America and the Caribbean", Press Release of January 10, 2003. The general parameters in use at the time the petition from Mr. Miranda Cortez was received can be found in a document published by the World Health Organization in 1998, which contains a list of steps that all

doctors should follow when considering antiretroviral treatment. Those steps include analysis of medical history, physical examination, STD screening, routine hematological and biochemical tests, other tests for detecting opportunistic infections, pregnancy test, and CD4 count. WHO/UNAIDS, Document WHO/ASD/98.1/ UNAIDS/98.7, 1998, Module 4, Table 2, p. 12.

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104. Therefore, treatment with antiretroviral drugs improves and increases the quality of life of persons infected with HIV. The treatment is delicate, and both its initiation and follow-up must be carried out by suitably qualified staff, bearing in mind the personal circumstances of the person infected with HIV. PAHO has established certain parameters that should be followed prior to the initiation of antiretroviral treatment.[FN60]

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[FN60] In this connection PAHO says:

Before initiating antiretroviral therapy, clinicians should satisfy themselves that the following has been done: Clinical history and physical examination; confirmation of the HIV/AIDS infection diagnosis (in accordance with local protocols), it being desirable that this be carried out, if possible, with two Elisa tests that use different techniques on two different samples, together with a confirming test on one of the two samples; complete blood count; biochemical profile, including glucose, bilirubin, transaminases, amylase (when DDI is used), creatinine or BUN, cholesterol, triglycerides, and partial urine analysis; CD4 cell count by flow cytometry or another equally reliable technique; if available, viral load when the CD4 count is below 350 cells/mm<sup>3</sup>; nutritional status and eating habits; evaluation of the patient's mental, psychological, emotional, family, work-related and social circumstances that may have a positive or negative effect on future adherence to both care services and possible treatments they receive, in particular antiretroviral treatment."

PAHO, *Idem*.

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105. It should be mentioned that the progressive development of economic, social, and cultural rights (ESCR) entails the obligation for States parties to the American Convention not to adopt retrogressive measures in connection with such rights. In this regard, the United Nations Committee on Economic, Social, and Cultural Rights (CESCR) has said that retrogressive measures adopted in connection with the right to health are not permissible. It explained that "any deliberately retrogressive measures in that regard would require the most careful consideration" by the States parties of all possible alternatives.[FN61] Likewise, the Committee maintained that the State in question was obliged to demonstrate that those measures were "fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources." [FN62] The Inter-American Commission has previously cited considerations on the ICESCR as applicable to the obligations mentioned in article 26 of the American Convention; for instance:

The undertaking in article 2 (1) "to take steps", which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is "to take steps", in French it is "to act" ("s'engager ... agir") and in Spanish it is "to adopt measures" ("a adoptar medidas"). Thus while

the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources. [FN63]

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[FN61] United Nations, Committee on Economic, Social and Cultural Rights, General Comment 3: The nature of States parties obligations (Art. 2, par. 1 of the Covenant), adopted at the Fifth Plenary Session, 1990, E/1991/23.

[FN62] Idem.

[FN63] UN Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties obligations (Art. 2, para.1 of the Covenant), adopted at the Fifth session, 1990, E/1991/23. (Underlining added).

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106. In keeping with the foregoing, article 26 of the American Convention creates for the states parties the general obligation to strive constantly for the realization of economic, social, and cultural rights. That obligation, in turn, entails the obligation not to adopt regressive measures in respect of the level of development achieved.[FN64]

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[FN64] The foregoing notwithstanding that in exceptional circumstances and by analogous application of article 5 of the Protocol of San Salvador laws might be justified that impose restrictions and limitations on economic, social, and cultural rights, provided their adoption is designed to preserve the general well-being in a democratic society and they do not contradict the purpose and rationale of such rights.

107. In a recent case the Inter-American Court found:

Economic, social, and cultural rights have both an individual and a collective dimension. Their progressive development, on which the UN Committee for the International Covenant on Economic, Social, and Cultural rights has pronounced its position, should be measured, in the opinion of this Court, by the increasing coverage in the overall population of economic, social, and cultural rights in general, and of the right to social security and a pension, in particular, bearing in mind the imperatives of social equity, and not by the circumstances of a very limited group of pensioners who are not necessarily representative of the prevailing overall situation.[FN65]

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[FN65] I/A Court H.R., Five Pensioners Case. Judgment of February 28, 2003, para. 147. In that case the IACtHR argued that the State had violated article 26 of the American Convention as a result of a reduction in the pensions of the victims, inasmuch as it failed to ensure for them the progressive development of the right to a pension. In his reasoned opinion, Judge Carlos Vicente De Roux Rengifo found:

The rationale whereby it is only appropriate to submit to the article 26 test the actions of states that affect the population as a whole appears to have no basis in the Convention, *inter alia*, because the Inter-American Court -unlike the Commission- cannot perform a monitoring role of the overall situation of human rights, be they civil and political, or economic, social and cultural in nature. The Court can only act in cases that concern violation of human rights of certain persons; however, the Convention does not require them to reach a certain number.

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108. In the instant case, the State demonstrated --to the satisfaction of the Inter-American Commission-- that it took what steps it reasonably could to provide medical treatment to the persons included in the record. The IACtHR finds that, in the circumstances, the measures of the State were sufficiently expeditious to accomplish that aim effectively. It is not possible, therefore, to speak of any direct violation of the right to health of Jorge Odir Miranda Cortez or the other 26 persons identified in Case 12.249, as would have been the case if, for instance, it were shown that the State refused to provide care to any of them. Moreover, during the processing of the instant case the Salvadoran health services progressively broadened free coverage to other persons infected with HIV/AIDS, subject to medical screening. Furthermore, the petitioners have not alleged any backtracking in the sense of suspension of benefits that any of them were already receiving.

109. Based on the foregoing, the IACtHR concludes that the Salvadoran State did not violate the right to health of either Jorge Odir Miranda Cortez or the other 26 persons included in the record. The Inter-American Commission concludes, therefore, that the Salvadoran State has not violated article 26 of the American Convention to the detriment of said persons, in the light of article 29 of the above-cited international instrument.

F. Right to life (article 4 of the American Convention) and right to humane treatment (article 5 of the American Convention)

110. The rights to life and to humane treatment are guaranteed by the following provisions of the American Convention:

Article 4. Right to life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

Article 5. Right to humane treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

111. In this case the petitioners argue that the conduct of the Salvadoran State with respect to Jorge Odír Miranda Cortez and the other 26 persons included in the record is in breach of their right to life:

A significant stride has been made in the conceptualization of the right to life to the extent that it is currently regarded as a right that is not exhausted or violated only when agents of the State act deliberately to deprive a person of life (call it extrajudicial execution, summary execution, etc.); the abovementioned stride in the area of human rights with respect to the right to life is precisely that of understanding that the right to life is also a positive right --and not simply a right of freedom-- consequently it may also be violated by state omissions. In sum, therefore, there are also State omissions that lead to the death of a person.

(...)

The failure by the State to deliver free antiretroviral drugs to persons living with HIV/AIDS, whose need for them is based on objective and scientific considerations but who are unable to buy them owing to financial or other constraints, represents a violation of the right to life, without prejudice to the violation that such an omission might represent with respect to the right to health, in view of the necessary inter-dependence and indivisibility of human rights.[FN66]

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[FN66] Communication of the petitioners of November 21, 2001, p. 27.

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112. The petitioners use the same reasoning regarding the right to humane treatment, which leads them to conclude that the failure to deliver the drugs "entails a state omission that causes physical and emotional suffering, which constitutes inhumane treatment that violates and infringes the right to physical integrity.

113. The IACtHR found as follows in the report on admissibility in Case 12.249:

The Inter-American Commission considers the allegations made with respect to Articles 4 and 5 of the American Convention to be secondary in nature and to be contingent on the conclusion reached with respect to the merits of the allegations [on articles 2, 24, 25 and 26 of the American Convention] mentioned in the foregoing paragraph. Consideration of the admissibility of the allegations of the petitioners regarding respect of the right to life and humane treatment will therefore be deferred to the phase involving examination of the merits of this case.[FN67]

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[FN67] IACtHR, Report on Admissibility 29/01 of March 7, 2001, para. 46.

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114. In the instant report the Inter-American Commission has determined that the Salvadoran State violated the right to effective judicial protection, and that it failed in its duty to align its domestic law with the American Convention. On the other hand, the IACtHR found that the conduct of the Salvadoran State was compatible with its international obligations as regards progressive development of the right to health. In consequence it concluded that the alleged violation of article 26 of the American Convention to the detriment of Jorge Odir Miranda Cortez and the other 26 persons mentioned in this case has not been demonstrated.

115. Based on foregoing considerations and on the subsidiary nature of the arguments on articles 4 and 5 of the American Convention in this case, the IACtHR decides not to issue an opinion in that respect.

## VI. PROCEEDINGS SUBSEQUENT TO REPORT 47/03

116. The Commission approved Report No. 47/03 on the merits of the instant case on October 8, 2003, at its 118th session. Said report was transmitted, with the Commission's recommendations, to the Salvadoran State on December 16, 2003, and the State was given two months, as of the date of transmittal of the report, to report on the measures taken to comply with said recommendations. Likewise, the Commission notified the petitioners of the adoption of the report on the merits and asked for their opinion on the possible referral of the case to the Inter-American Court of Human Rights. On January 16, 2004, the petitioners replied and requested that the IACtHR submit the case to the Inter-American Court of Human Rights for consideration on the basis of the grounds that they had set forth in that regard.

117. On February 17, 2004, the Salvadoran State replied concerning the measures it had taken to comply with the Commission's recommendations:

a. In connection with the first, i.e., that “[l]egislative measures be implemented to amend the provisions governing amparo, in order to make it a simple, prompt and effective remedy as required by the American Convention,” the State reported that the Supreme Court had presented to the Legislative Assembly on November 25, 2002, a preliminary draft constitutional procedural law seeking to incorporate the principles of promptness, simplicity, and effectiveness established

in Article 25 of the Convention. The State reported that, in light of the IACtHR report, the President of the Supreme Court of Justice had, on February 10 of the present year, urged the Legislative Assembly to consider the preliminary draft at the earliest possible date.

With regard to this point, the IACtHR considers that, although presentation of the draft law and insistence that the matter be dealt with urgently are a positive sign, the draft law's adoption is still required for the Commission's recommendation to be complied with. In addition, the Commission notes that the draft law was presented prior to the notification of Report 47/03 and cannot therefore be considered as compliance with its recommendations.

b. In connection with the second recommendation, i.e., that “[a]dequate reparation be provided to Jorge Odir Miranda Cortez and the other 26 victims mentioned in the record of Case 12.249 --or their beneficiaries, as appropriate-- for the human rights violations here found,” the State indicated that, given the complexity of the case, the delay in ruling on the appeal was not excessive and, in any event, the ruling found for the petitioner. Further, the State reiterated that “through the STI/HIV/AIDS Program it had been carrying out in a timely fashion a series of measures and policies aimed at prevention and care of HIV/AIDS carriers in need. A Law on the Prevention and Control of the Infection caused by the Human Immunodeficiency Virus, with its own Regulations, had been adopted, and the National Strategic Plan for the Prevention, Care, and Control of STI/HIV/AIDS was being implemented.” The State also reported that it was considering appropriate measures to help implement the recommendations that had been made.

118. On March 25, the State reported once again on the National STI/HIV/AIDS Program, providing a report of the Ministry of Public Health and Social Assistance, which provided information on implementation of the Program.

119. With regard to the information provided by the State on compliance with this recommendation, the IACtHR notes:

120. First, the IACtHR has already examined the delay in settling the appeal and the State's arguments for that delay and concluded that the justices had failed to respect the principle of a reasonable term in its examination of amparo case 348-99, which was neither prompt nor simple, and that the Salvadoran State was therefore responsible for violation of the right to judicial protection to the detriment of the 27 persons included in the case.

121. Second, the IACtHR welcomes the launching of implementation of the National Strategic Plan for the Prevention, Care, and Control of STI/HIV/AIDS. However, it wishes to point out that the program predated the issuance of Report 47/03 and cannot therefore be considered as reparation for the established violations.

122. Lastly, the IACtHR reiterates that reparation should be provided to Jorge Odir Miranda Cortez and the 26 other individual victims, specifically and for the established violations. The State's report, according to which said measures are under consideration, is an encouraging sign but does not mean that the recommendation has been carried out. In particular, the IACtHR has not received information that the State has publicly acknowledged its international liability for all the human rights violations established by the IACtHR in the present report, as reparation for

Jorge Odir Miranda and the other 26 victims in this case, or that it has published the present report at least once in the Official Gazette (Diario Oficial) and in another national daily newspaper. Nor has the IACtHR learned that Jorge Odir Miranda and the other 26 victims and, in the event of their deaths, their family members have been compensated for the material and moral damages they suffered because of the absence of effective judicial protection or that Jorge Odir Miranda has been compensated for violation of his right not to be discriminated against. This indemnity to be paid by the Salvadoran state must be calculated according to international parameters and must be sufficient to compensate for both the material and the moral damages suffered by the victims and their family members as a result of the human rights violations referred to in the present report. Payment of the indemnity may not be subject to the obligation of the family members of victims to file any petition or legal action under Salvadoran law, nor may it be subject to any tax. Nor has the IACtHR been informed regarding the payment of reasonable costs and expenses incurred by the victims and their family members in the domestic proceedings and in the present international proceedings before the inter-American system for the protection of human rights.

123. On September 29, 2004, the petitioners informed the IACtHR that the State had failed to comply with the Commission's two recommendations. They based their assertion on the following:

a. With regard to legislative measures to amend the provisions governing amparo in order to make it a simple, prompt, and effective remedy, as required by the American Convention, the Preliminary Constitutional Procedure Bill was drafted in 1994 and 1995 in the context of implementation of draft Judicial Reform II, generated as part of the reconstruction process in El Salvador following the signing of the Peace Agreements. Since then, the preliminary bill has undergone minor modifications and was before the Supreme Court of Justice until its recent submission to the Legislative Assembly. The petitioners added that there had been a "total lack of progress in the parliamentary debate for its adoption."

b. In connection with reparations to Jorge Odir Miranda Cortez and the other 26 individuals mentioned in the record of Case 12.249—or their beneficiaries, as appropriate—for the human rights violations committed, the Salvadoran State is obligated to comply with the IACtHR recommendations and cannot, as justification for evading its obligation, base its arguments on the separation of powers, which is simply application of domestic law, like the Constitution. The petitioners added that the "alleged government explanation for refusing to admit to any type of compensation for damages suffered as a result of delays in the workings of the Constitutional Chamber cannot be accepted since it is groundless, in view of the specificity of the international proceeding."

124. Pursuant to the provisions of Article 51.1 of the Convention, it is incumbent on the IACtHR at this stage to determine whether or not the State has settled the matter. In this regard and in keeping with the foregoing observations, the IACtHR notes that its recommendations have not been fully complied with.

125. Lastly, the IACtHR wishes to point out that, given the specific circumstances of the present case, which include the measures taken by the State of El Salvador, the Inter-American Commission, at its 119th regular session, decided, pursuant to its Rules of Procedure, by a

majority of its members, not to submit the present case to the Inter-American Court for consideration.

## VII. CONCLUSIONS

126. The Commission, based on the foregoing considerations of fact and law, ratifies its conclusion that the Salvadoran State, in particular the Constitutional Chamber of the Supreme Court of Justice, excessively prolonged the processing of amparo case 348-99, as a result of which that remedy lacked the promptness, simplicity, and effectiveness required by Article 25 of the American Convention. Therefore, that jurisdictional organ has given rise to the international responsibility of the Salvadoran State due to failure to provide judicial protection for Jorge Odir Miranda Cortez and the other 26 persons included in the instant case.

127. The Inter-American Commission further concludes that the amparo procedure contained in the Law on Constitutional Procedures in El Salvador does not meet the requirements of article 25 of the American Convention because it does not constitute a simple, prompt or effective remedy. The existence of that domestic law constitutes a breach of the duty to make its domestic laws consistent with the American Convention, in violation of article 2 of said instrument. Furthermore, the Salvadoran State is responsible for violation of article 1(1) of the American Convention for having failed its obligation to respect and ensure the right to judicial protection of Jorge Odir Miranda Cortez and the other 26 persons included in this case.

128. In addition, the analysis contained in the instant report has led to the conclusion that the Salvadoran State violated the right to equal protection of the law for Jorge Odir Miranda Cortez; however, it has not been shown that the said State has engaged in generalized discriminatory practices to the detriment of the other 26 persons included in Case 12.249.

129. In the opinion of the IACtHR, the response of the Salvadoran State in this case is consistent with progressive development of the right to health. Therefore, while the Commission has determined violation of article 25 of the American Convention based on the conduct of the judicial authorities, the measures of the administrative authorities have accorded with the international obligations provided at 26 of the aforesaid international instrument.

130. The analysis of the alleged violations of the rights to life and human treatment was performed as a subsidiary exercise in this case. As a result, the Inter-American Commission determined that there is insufficient evidence to indicate the responsibility of the Salvadoran State under articles 4 and 5 of the American Convention.

## VIII. RECOMMENDATIONS

131. Based upon the analysis and conclusions of the present report, the Inter-American Commission on Human Rights reiterates to the Salvadoran State the following recommendations:

1. Legislative measures be implemented to amend the provisions governing amparo, in order to make it a simple, prompt and effective remedy as required by the American Convention.

2. Adequate reparation be provided to Jorge Odír Miranda Cortez and the other 26 victims mentioned in the record of Case 12.249 --or their beneficiaries, as appropriate-- for the human rights violations here found.

**DISSENTING OPINION OF COMMISSIONERS ZALAQUETT AND GOLDMAN  
ON REPORT No. 47/03**

We consider that the line of reasoning developed in paragraph 74 *supra* does not lead to the conclusion expressed at the end of said paragraph and in the first sentence of paragraph 75, whereby the Salvadoran State would be responsible for violating the right to equality before the law to the detriment of Jorge Odír Miranda Cortez. We are of the view that it is not possible to demonstrate, based on the information in the file of the present case, a violation of the right to equality before the law—in terms of Article 24 of the American Convention—to the detriment of any of the 27 people included in the instant case. Consequently, we concur in the adoption of the present report, with the exception of the considerations and conclusions referring to the violation of Article 24 contained in paragraphs 74 and 75, as well as the corresponding references in paragraphs 4 and 118 of the same report. (Signed) José Zalaquett and Robert K. Goldman.

**IX. PUBLICATION**

**A. Proceedings subsequent to report 42/04**

132. On October 12, 2004, the Commission approved report 42/04, the text of which is reproduced above, in accordance with article 51 of the American Convention. On November 2, 2004, the Commission transmitted the report to the State of El Salvador and to the petitioners, pursuant to article 51.1 of the American Convention, giving the State a period of one month to report on its compliance with the recommendations indicated above.

133. In a note dated November 30, 2004, received at the IACtHR on December 2, 2004, the State presented a report on its compliance with the recommendations issued by the IACtHR in merits report 42/04. On December 3, 2004,[FN68] the Commission also received additional information supplied by the State. Both communications were transmitted to the petitioners on December 15, 2004. On December 20, 2004, the Commission received additional information from the State, which was transmitted to the petitioners on February 14, 2005. On January 13, 2005, the Commission received the observations of the petitioners, and transmitted them to the State on February 14, 2005. On March 17 and 24, 2005, the Commission received supplementary information from the State, and transmitted it to the petitioners on April 1, 2005. In a communication of March 14, 2005, the Commission received the State's observations to the response of the petitioners, and these were transmitted to the petitioners by means of a note dated April 21, 2005. In a note received on May 20, 2005, the petitioners reported that the parties had considered initiating an agreement procedure for fulfilling the recommendations in this case. On August 4, 2005, the petitioners reported that, in the context of discussions held with the Salvadoran State, they were preparing a proposed agreement that would be submitted in due course to the IACtHR. On October 19, 2005, during the 123<sup>□</sup> regular session, the IACtHR convened a working meeting with the parties.

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[FN68] In its note of December 3, 2004, the State remitted the following documents: -Book entitled "Alcances y Logros de la Lucha contra el VIH/SIDA en El Salvador, 1999-2004" ["Scope and Achievements of the Struggle against HIV/AIDS in El Salvador, 1999-2004"], published by the Ministry of Public Health and Social Assistance; -CD "Situación de la Epidemia del SIDA" ["Status of the AIDS Epidemic"] published by UNAIDS/Ministry of Public Health and Social Assistance; -Brochure, "Ley y Reglamento de Prevención y Control de la Infección Provocada por el Virus de Inmunodeficiencia Humana" ["Law and regulations for prevention and control of infection caused by the human immunodeficiency virus"], published by the Ministry of Public Health and Social Assistance, National SYD/HIV/AIDS Program; - Brochure, "Compendio de Cifras del Financiamiento y Gastos Nacional en VIH/SIDA 1999-2003 El Salvador" ["Compendium of figures on financing and national expenditures on HIV/AIDS 1999-2003, El Salvador"], published by the Ministry of Public Health and Social Assistance; -Pin with red ribbon; Bookmark "What the red ribbon means"; -Brochures published by the Ministry of Public Health and Social Assistance 1: - ¿Cómo sé si tengo VIH ó SIDA? ["How do I know if I have HIV or AIDS?]; - Situación Epidemiológica el VIH/SIDA en El Salvador años 1984-2004 ["HIV/AIDS epidemiological situation in El Salvador in 1984-2004"]; - Mujer, que el SIDA no decida en nuestra vida ["Women, don't let AIDS rule your life"]; - Por favor abrázame aunque tenga SIDA ["Please hug me even if I have AIDS"].

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134. On May 3, 2006, the Center for Justice and International Law[FN69] and Carlos Rafael Urquillo Bonilla informed the IACtHR that, as of that date, Mr. Odir Miranda would be reporting to the Commission "directly, or through a person designated by him, on progress in the negotiations relating to fulfillment of the recommendations in the case at hand, because those negotiations are being conducted directly between the victim and Salvadoran State."

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[FN69] CEJII participated in a series of working meetings as an advisor to the petitioner.

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135. On July 19, 2007, during the Commission's 128th regular session, the IACtHR convened a working meeting with the parties.

136. On September 8, 2007, a communication was received from the State, declaring that "with respect to progress in this case, we must ascertain whether the settlement being negotiated with Jorge Odir Miranda, as representative of the Foundacián Atlacatl, will be extended to the other persons covered therein." That note was transmitted to the petitioners on September 19, 2007.

137. On September 26, 2007, Mr. Jorge Odir Miranda Cortez, Director President of "Asociación Atlacatl Vivo Positivo el Salvador", asked the IACtHR that any notification should be made directly to the Asociación Atlacatl "Vivo Positivo". At that time he also reported on progress with the agreement for fulfilling the recommendations and on the efforts made to contact the relatives of the victims. Those notes were transmitted to the State on October 3, 2007.

138. On December 27, 2007, the petitioner reported that on November 30, 2007 an Agreement on Compliance with Recommendations had been signed with the State, and the petitioner submitted the following documents: Copy of the proposed Acuerdo [Agreement] on compliance with recommendations under case 12,249; a press clipping from La Prensa Gráfica de El Salvador, dated December 1, 2007, with the headline: ISSS admite debilidad en atención VIH/Sida ("ISSS admits shortcomings in HIV/AIDS care"), and a photograph of the signing of the friendly settlement; a press clipping from the newspaper La Prensa Gráfica de El Salvador, dated December 1, 2007, with the headline: Un "Cierre Amistoso" pone fin a la lucha por obtener medicinas ("Friendly Settlement ends the battle to obtain medicines"); a press clipping from the newspaper La Prensa Gráfica de El Salvador, dated 1 December 2007, with the headline: Sociedad civil y Estado se reconcilan ("Civil society and the State are reconciled"); press clipping from the newspaper El Diario de Hoy de El Salvador, dated December 2, 2007, with the headline: Inauguran el Jardín de la Solidaridad en la Capital, como parte de los acuerdos planteados en la propuesta con el fin de recordar a las victimas fallecidas por la epidemia del sida ("Garden of Solidarity inaugurated in the Capital, as part of the proposed agreements to commemorate the victims who have died from the AIDS epidemic"); newspaper clipping from La Prensa Gráfica de El Salvador, of December 2, 2007, with the headline: Inauguran el Jardín de la Solidaridad contra el sida; como una de las cinco peticiones incluidas en el acuerdo que se firmó "Garden of Solidarity against AIDS inaugurated; as one of the five petitions included in the signed agreement"); copy of the notarized document confirming the signed agreement; copy of the notarized document confirming payment of the procedural costs involved.

139. The documents supplied by the petitioner were transmitted to the State on January 17, 2008. On February 26, 2008, the State presented its response to the Commission, and this was transmitted to the petitioner on April 14, 2008. In its communication, the State reported that the agreement signed on November 30, 2007 with the petitioner, addressed various aspects relating to the right to reparations both of an economic nature and of a symbolic nature, and guarantees of non-repetition. It also asked that the present case be closed "in light of the friendly settlement reached between the parties, and the complete satisfaction of the petitioners' claims".

B. Agreement on Compliance with Recommendations signed between the parties on November 30, 2007

140. In the present case, on November 30, 2007, an Agreement on Compliance with Recommendations was signed between the State, represented by Mr. Eduardo Calix Lopez, Vice Minister of External Relations, and Mr. Jorge Odir Miranda Cortez, Director President of the Asociación Atlacatl "Vivo Positivo," representing themselves, "recognizing that on January 24, 2000, Mr. Jorge Odir Miranda Cortez and twenty six other persons carriers of HIV/AIDS lodged a complaint before the Inter-American Commission on Human Rights against the Salvadoran State, in the case subsequently recorded by that Commission as 12,248 Jorge Odir Miranda Cortez et al., The other persons who are parties to this case but who have requested that their names and identities be withheld, are known to the Salvadoran State and are cited in the file of the Inter-American Commission on Human Rights." The Agreement established the following:

BACKGROUND:

1. El Salvador is a State Party to the American Convention on Human Rights, having ratified it through the Legislative Assembly of El Salvador by means of Legislative Decree NO. 5 of June 15, 1978, published in the Official Gazette No. 113, volume 278, and having deposited its instrument of ratification with the General Secretariat of the Organization of American States, which instrument remains valid, and is therefore binding on the Salvadoran State.

2. On January 24, 2000 the Inter-American Commission on Human Rights received a complaint against the Salvadoran State in relation to alleged violations by the State of articles 2, 24, 25 and 26, taken in connection with article 1.1 of the American Convention on Human Rights, referring respectively to the duty to adopt provisions of domestic law, equality before the law, judicial protection, progressive development and the obligation to respect rights, to the detriment of Mr. Jorge Odir Miranda Cortez and 26 other persons cited earlier.

## II. LEGAL BASIS

The State of El Salvador, in strict compliance with the obligations acquired through its signature, ratification and validity of the American Convention on Human Rights and other instruments of international law in the same area, and recognizing that the health of the inhabitants of the Republic constitutes a public good and that both the State and individuals are obliged to see to its preservation and reestablishment, as prescribed in article 65 of the Constitution.

2. In light of the foregoing, the Salvadoran State has been successfully pursuing developments in the health area, in specific relation to HIV/AIDS, and has made significant progress in the prevention and the comprehensive care of HIV/AIDS. In recent years it has reduced the mother-to-child transmission of HIV, and has improved access to antiretroviral therapy, it has instituted regulatory instruments and action plans for dealing with HIV/AIDS, and has greatly increased the number of HIV screening tests for the general population, free of charge, among other important achievements.

3. The Vice Minister of External Relations, who is responsible for this portfolio on behalf of the Salvadoran State, together with Mr. Jorge Odir Miranda Cortez, acting on his own behalf and as the Director President of the Asociación Atlacatl "Vivo Positivo", have reached an agreement of mutual benefit that will allow for termination of the proceedings before the Inter-American Commission on Human Rights, in the procedural stage in which they currently stand. This solution has been reached in the course of a friendly dialogue between the parties, and on the basis of the decision rendered by the Inter-American Court of Human Rights in its judgment on preliminary objections issued in the case of Caballero Delgado y Santana versus Colombia of January 21, 1994, which reads: "If one of the parties is interested in a friendly settlement, it is free to propose it. In the case of the Government and keeping in mind the object and purpose of the treaty - that is, the defense of the human rights protected therein - such a proposal could not be interpreted as an admission of responsibility but, rather, as good faith compliance with the Convention's purposes." It is also consistent with international doctrine in this area, in evidence of which may be cited Dijk, P. van and Hoof, G.J.H. van, Kluwer Theory and Practice of the European Convention on Human Rights, second edition, Netherlands, Law and Taxation Publishers, 1990, note 15, page 119, which establishes that "with respect to the petitioner, a citizen of a State, the benefit could consist in having certainty about the matter under dispute

and, as early as possible, about any reparations to be paid. In addition, friendly settlement ensures a positive outcome that would otherwise depend on time-consuming procedures that would not guarantee a favorable ruling".

4. The parties confirm that these agreements are signed, among other reasons, because of the policy of the State of El Salvador for the prevention, protection, preservation and restoration of the health of the inhabitants of the Republic.

### III. TERMS OF THE SOLUTION OF FRIENDLY SETTLEMENT:

In light of the above considerations, and in accordance with international standards in this matter,

1. The parties to this agreement confirm their desire to terminate the proceedings before the Inter-American Commission on Human Rights, in recognition of the progress made by the Salvadoran State in the prevention and treatment of HIV/AIDS. Nevertheless, and despite repeated calls that the Asociación Atlacatl "Vivo Positivo" has made through the media and by telephone to the petitioners concerned by the present case, for the purpose of including them in decisions relating to the dialogue that has been maintained between Mr. Jorge Odir Miranda Cortez and officials of the Salvadoran State, it has been impossible to make contact with most of those persons, and this has been reported to the Inter-American Commission on Human Rights. Included as an integral part of this notarized deed are certified copies of announcements that were published in the newspaper La Prensa Gráfica on September 22 and 23, 2006. Because it has been impossible to contact most of the persons concerned by the proceedings before the Inter-American Commission on Human Rights, the persons present here have reached agreements of general benefit that will also be brought to the attention of the Inter-American Commission on Human Rights.

2. The State of El Salvador, through the Vice Minister of External Relations, will deliver a lump-sum payment, within 15 working days after the date of this notarized deed, in the amount of two thousand United States dollars, in compensation to 23 persons who are parties to the proceedings before the Inter-American Commission on Human Rights, for a total of forty six thousand United States dollars, as a charge to the General Budget of the State, within the envelope of the Ministry of External Relations, which funds will be consigned in bank accounts opened by the Ministry of External Relations in the name of each of the beneficiaries, for a period of two years. If at the end of that time the beneficiaries of the accounts, or their next of kin pursuant to applicable legislation, have not claimed the funds, those reparations shall be awarded to the National Commission against AIDS, so that, together with the Asociación Atlacatl "Vivo Positivo", they may be used in activities for the prevention of HIV, and to help reduce stigmatization and discrimination. The parties hereby also confirm that Mr. Jorge Odir Miranda Cortez together with three persons who are parties to the proceedings before the Inter-American Commission on Human Rights have decided to renounce their claim to compensation referred to above, and they will report this to the Inter-American Commission. The amount of fifty five thousand United States dollars will also be delivered to the Asociación Atlacatl "Vivo Positivo", as a one-time reimbursement of outlays made with respect to this case, within 15 days after the date of this notarized deed.

3. Consistent with the extensive jurisprudence of the Inter-American Court of Human Rights, the payment that the State of El Salvador makes to the persons mentioned in this notarized deed is not subject to any taxes currently existing or that may be decreed in the future.

4. The parties also declare that these agreements constitute a demonstration of solidarity and of recognition by the Salvadoran State of reparations for damages caused.

5. As a consequence of the cited agreements, Mr. Jorge Odir Miranda Cortez, in his capacity as indicated above, declares that the damages that the situation may have caused are hereby satisfied, and he declares that, in that same capacity, he releases the Salvadoran State from any present or future claim or liability that may flow from the proceedings in question.

6. Additionally, the State of El Salvador, in faithful compliance with its duty to adapt the provisions of domestic law to the Inter-American Convention on Human Rights, undertakes to take the steps necessary for prompt adoption of the new Law of Constitutional Procedures.

7. As well, the parties agree to hold a public ceremony of recognition and solidarity about the events of this case, which will be attended by officials of the State institutions involved in the case, as well as by entities devoted to the prevention and comprehensive treatment of HIV/AIDS, as well as the communications media, as parties to the promotion of human rights and as witness to the commitment to continue measures of prevention and of care for persons living with HIV/AIDS.

8. The parties also agree to build a commemorative park dedicated to persons who have died as a result of AIDS during this process, to be located at kilometer 10 of the Highway from San Salvador to Comalapa.

9. Both the public ceremony and the inauguration of the commemorative park will be held jointly on December 1 of this year.

10. Finally, the State of El Salvador and Mr. Jorge Odir Miranda Cortez, in the capacity in which he appears, with a view to helping consolidate a climate of social reconciliation in the country and to publicize the issue of respect for human rights, specifically in relation to HIV/AIDS, have reached agreement on additional reparations, as detailed below:

Within the framework of friendly dialogue, the parties consider:

1. The establishment of training programs for public officials with respect to non-discrimination against persons with HIV/AIDS, and the parties hereby recognize the effective existence of programs of this kind provided by the Ministry of Public Health and Social Assistance;

2. The monitoring of hospitals under State administration by recognized nongovernmental organizations working with persons living with HIV/AIDS, and the parties hereby note that NGOs such as the Asociación Atlacatl “Vivo Positivo” are already performing this type of monitoring;

3. Training for medical personnel who provide care to persons with HIV/AIDS; the parties also declare that such training is already being provided by the Ministry of Public Health and Social Assistance; and

4. Strengthening the Asociación Atlacatl “Vivo Positivo” as the institution devoted to working on human rights and HIV/AIDS, and the parties recognize that said institution is the recipient of grants from the Ministry of Public Health and Social Assistance, as are other NGOs working on the HIV/AIDS issue.

#### IV. ACCEPTANCE

The parties to the signature of this notarized deed freely and voluntarily declare their agreement and acceptance of the contents of all the preceding clauses, which have been drafted and inserted without any coercion, and they confirm that they hereby terminate the dispute over the international responsibility of the State of El Salvador with respect to the rights of Mr. Jorge Odir Miranda Cortez and the 26 persons whose names are withheld at the request of the petitioners, and that consequently Mr. Jorge Odir Miranda Cortez, in his own behalf and in his capacity as President of the Asociación Atlacatl “Vivo Positivo”, declares that the claims advanced in the proceedings before the Inter-American Commission on Human Rights have been satisfied.

#### V. NOTIFICATION AND CONFIRMATION

Mr Jorge Odir Miranda Cortez, who appears on his own behalf and as Director President of the Asociación Atlacatl “Vivo Positivo”: (i) expressly authorizes the State of El Salvador to bring this Notarized Deed to the attention of the Inter-American Commission on Human Rights, so that the Commission may confirm it; and by virtue of all the agreements reached by the Parties, they agree that this deed terminates and closes the case definitively, and releases the Salvadoran State from any present or future claim or liability flowing from this international proceeding.

#### C. Compliance with the recommendations

141. In its Report 47/03, Merits, of October 8, 2003, the IACtHR made the following recommendations to the Salvadoran State:

a) To promote measures for legislative amendment of provisions relating to Amparo, in order to make that remedy simple, prompt and effective as required by the American Convention.

b) To pay adequate reparations to Jorge Odir Miranda Cortez and the other 26 victims identified in the documentation for case 12,249, or to their successors, for the human rights violations herein established.

142. In its Report 42/04, Merits, of October 12, 2004, the IACtHR reiterated the above recommendations to the Salvadoran State.

143. According to information supplied by the parties subsequent to Report 42/04, the IACtHR observes the following with respect to compliance with its recommendations:

144. With respect to the first recommendation, the State reiterated in its note of March 14, 2005 that the Supreme Court had presented a draft Constitutional Procedures Law to the Legislative Assembly on November 25, 2002, recognizing the principles of promptness, simplicity and effectiveness established in article 25 of the Convention. It added that, following the submission of that draft, “there have been various consultations with the legal community and observations have been solicited to ensure that the new law would be as complete as possible and would meet the requirements established in the American Convention with respect to the recourse of Amparo”.

145. On this point, the State also reported that the Legislative Assembly had held a public competition to select a professional expert to advise the Committee on Legislation and Constitutional Points of the Legislative Assembly in reviewing the draft law on constitutional procedures, so that the draft could be subjected to a comprehensive review on the basis of modern doctrine and comparative law, and to analyze whether the draft was compatible with national legislation and the national Constitution, in order to ensure that its contents will contribute to modernizing existing legislation, as the country's circumstances require.

146. In the Agreement on Compliance with Recommendations signed between the parties on November 30, 2007, the State of El Salvador undertook to take the steps necessary for prompt adoption of the new Law on Constitutional Procedures.

147. On this point, the IACtHR welcomes the State's actions to approve a new Constitutional Procedures Law that would amend the provisions relating to Amparo, in order to make it a simple, prompt and effective remedy as required by the American Convention. The Commission notes however that the draft must still be approved in order to comply fully with its recommendation.

148. With respect to the second recommendation, on making adequate reparations to Jorge Odir Miranda Cortez and the other 26[FN70] victims identified in the case 12,249, or to their successors, for the human rights violations established therein, according to the information supplied by the parties subsequent to Report 42/04, the Commission notes the following with respect to compliance with its recommendations:

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[FN70] In its merits report No. 47/03, dated October 8, 2003, it was determined that the victims of the case were Jorge Odir Miranda Cortez and 26 persons carrying the human immunodeficiency virus/ acquired immune deficiency syndrome (“HIV/AIDS”), members of Asociación Atlacatl. The names and identities of the 26 persons have been withheld at the petitioners’ request. These names are known by the Salvadoran State and are cited in the file of the IACtHR. The Inter-American Commission on Human Rights was informed that three of the 26 persons died after Case 12.249 process was initiated.

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149. The Salvadoran State has promised to pay US\$2000 as compensation to each of the victims of case 12,249.

150. Because it was not possible to locate 23 victims or their successors, the State undertook to deposit the amount of US\$46,000 in bank accounts opened by the Ministry of External Relations in the name of each of those 23 victims, for a period of two years. If at the end of that time those funds have not been claimed, they will be awarded to the National Commission against AIDS, so that, together with the Asociación Atlacatl “Vivo Positivo”, they may be used in activities for the prevention of HIV, and to help reduce stigmatization and discrimination.

151. Jorge Odir Miranda Cortez, Director President of the Asociación Atlacatl “Vivo Positivo” and three other beneficiaries have decided to renounce their right to the compensation referred to above.

152. The State also delivered US\$55,000 to the Asociación Atlacatl “Vivo Positivo”, through its president Mr. Jorge Odir Miranda Cortez, in recognition of outlays related to processing the case.

153. With respect to symbolic reparations and guarantees of non-repetition, according to information supplied by the parties, on December 1, 2007 a public ceremony of recognition and solidarity was held, relating to the events covered by this case, and a commemorative park was inaugurated, called the Garden of Solidarity, dedicated to the persons who died during these proceedings as a result of Acquired Immunodeficiency Syndrome (AIDS) and in homage to the persons who have struggled to survive with HIV/AIDS. That park is located at kilometer 10 of the Highway from San Salvador to Comalapa.

154. The public ceremony was attended by the First Lady of the Republic, Msgr. Richard Antall, the Minister of Public Health and Social Assistance, authorities of the National Commission against AIDS, the Vice Minister of External Relations, Mr. Jorge Odir Miranda Cortez, and organizations devoted to prevention and comprehensive care in the struggle against HIV/AIDS. According to information supplied by the State, the Minister of Public Health and Social Assistance declared that for eight years the State has been pursuing comprehensive policies of HIV/AIDS prevention and treatment, following international criteria for dealing with the epidemic; he noted that in the past the State had lacked the resources, medications, knowledge and sensitivity to address the scourge, a situation which he claimed had now changed significantly.

155. The agreement also recognizes that the Salvadoran State has allowed the monitoring of State-administered hospitals by nongovernmental organizations, such as the Asociación Atlacatl “Vivo Positivo”. It has also established training programs for public officials for avoiding discrimination against persons with HIV/AIDS, and it has trained medical personnel in caring for persons with HIV/AIDS.

#### D. Conclusions

156. From the foregoing, the Commission concludes that in this case the State of El Salvador has complied with the second recommendation contained in Report 47/03 and reiterated in Report 42/04 with respect to making reparations to the victims, and it has also fulfilled its commitments under the Friendly Settlement signed by the parties on November 30, 2007.

157. The Commission also concludes that compliance is still pending with respect to the recommendation to amend by legislation the current provisions governing Amparo, in order to make it the simple, prompt and effective remedy required by the American Convention.

#### E. Recommendations

158. In light of the foregoing considerations, and in accordance with articles 51.3 of the American Convention and article 45 of its Rules of Procedure, the Commission welcomes and recognizes once again the actions taken by the State of El Salvador to amend its public policies relating to HIV/AIDS, with a view to developing comprehensive policies for HIV/AIDS prevention and care, based on international criteria for dealing with the epidemic and on the principles of respect and nondiscrimination for persons living with HIV or afflicted with AIDS. The Commission also wishes to reiterate its satisfaction at the compliance with the recommendation on reparations to the victims in this case.

159. The Commission also decides:

1. To reiterate its recommendation to take measures for the legislative amendment of the provisions relating to Amparo, in order to give that recourse the simplicity, promptness and effectiveness required by the American Convention.

160. Finally, the Commission decides to publish this report and to include it in its annual report to the OAS General Assembly. Pursuant to its mandate, the Commission will continue to assess the measures taken by the Salvadoran State with respect to the recommendation pending compliance, until it has been fully implemented.

Done and signed in the city of Washington, D.C., on March 20, 2009. (Signed): Víctor E. Abramovich, First Vice-president; Felipe González, Second Vice-president; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, and Paolo G. Carozza, members of the Commission.