

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 32/05; Petition 642/03
Session: Hundred Twenty-Second Regular Session (23 February – 11 March 2005)
Title/Style of Cause: Luis Rolando Cuscul Pivaral, Francisco Sop Gueij, Corina Robledo, Petrona Lopez Gonzalez, Aracely Cinto, Olga Marina Castillo, Israel Perez Charal, Karen Judith Samayoa, Juana Aguilar, Darinel Lopez Montes de Oca, Luis Ruben Álvarez Flores, Audiencio Rodas, Luis Edwin Cruz Gramau, Martina Candelaria Alvarez Estrada, Maria Felipe Perez, Sayra Elisa Barrios, Felipe Ordonez, Santos Isacax Vasquez Barrio, Ismera Oliva Garcia Castanon, Guadalupe Cayaxon, Sandra Lisbeth Zepeda Herrera, Cesar Noe Cancinos Gomez, Santos Vasquez Oliveros, Maria Vail, Julia Aguilar, Sebastian Emilia Duenas, Zoila Perez Ruiz, Santiago Valdez, Pascula de Jesus Merida, Iris Carolina Vicente Baullas, Reina Lopez Mujica, Marta Alicia Maldonado Pac, Jose Cupertino Ramirez, Jose Ruben Delgado, Elsa Miriam Estrada, Ismar Ramirez Chajon, Felix Cabrera, Silvia Mirtala Álvarez and Facundo Gomez Reyes v. Guatemala

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Decided by: President: Clare K. Roberts;
First Vice-President: Susana Villaran;
Second Vice-President: Paulo Sergio Pinheiro;
Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett, Freddy Gutierrez, Florentin Melendez.

Dated: 7 March 2005
Citation: Cuscul Pivaral v. Guatemala, Petition 642/03, Inter-Am. C.H.R., Report No. 32/05, OEA/Ser.L/V/II.124, doc. 5 (2005)

Represented by: APPLICANTS: the Center for Justice and International Law, the National Network for Persons with HIV/AIDS, the Association for People United, Project Life, the Fernando Iturbide Foundation for the Prevention of AIDS, and the Comprehensive Health Association

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I. SUMMARY

1. On August 26, 2003, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition submitted by the Center for Justice and International Law (Centro por la Justicia y el Derecho Internacional "CEJIL"), the National Network for Persons with HIV/AIDS (Red Nacional de Personas que Viven con el VIH/SIDA) chaired by Félix Vagrera, the Association for People United (la Asociación Gente Unida), Project Life (El Proyecto Vida) represented by Dee Smith, the Fernando Iturbide Foundation for the Prevention of AIDS (La Fundación Preventiva del SIDA Fernando Iturbide) directed by Dr. Cristina Calderón, and the Comprehensive Health Association (Asociación de Salud Integral) represented

by Dr. Eduardo Arathoon (hereinafter "the petitioners"), alleging that the State of Guatemala (hereinafter "the State", "the Guatemalan State" or "Guatemala"), had failed to recognize the fundamental rights of Luis Rolando Cuscul Pivaral, Francisco Sop Gueij, Corina Robledo, Petrona López González, Aracely Cinto, Olga Marina Castillo, Israel Pérez Charal, Karen Judith Samayoa, Juana Aguilar, Darinel López Montes de Oca, Luis Rubén Álvarez Flores, Audiencio Rodas, Luis Edwin Cruz Gramau, Martina Candelaria Álvarez Estrada, Maria Felipe Pérez, Sayra Elisa Barrios, Felipe Ordóñez, Santos Isacax Vásquez Barrio, Ismera Oliva García Castañon, Guadalupe Cayaxon, Sandra Lisbeth Zepeda Herrera, Cesar Noe Cancinos Gómez, Santos Vásquez Oliveros, Maria Vail, Julia Aguilar, Sebastián Emilia Dueñas, Zoila Pérez Ruiz, Santiago Valdez, Pascuala de Jesús Mérida, Iris Carolina Vicente Baullas, Reina López Mújica, Marta Alicia Maldonado PAC, José Cupertino Ramírez, José Rubén Delgado, Elsa Miriam Estrada, Ismar Ramírez Chajón, Félix Cabrera, Silvia Mirtala Álvarez, Facundo Gómez Reyes (deceased February 27, 2003) by not making antiretroviral pharmaceuticals available to them. Additionally, the petitioners jointly requested that precautionary measures be taken on behalf of these 39 persons. Granted in two stages, they were extended initially to 12 persons, and subsequently to all 39.

2. The petitioners complain that the alleged acts set forth in this petition constitute a violation of several provisions of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"): the right to life (Article 4); the right to humane treatment (Article 5); the right to a fair trial (Article 8); the right to equal protection before the law (Article 24); the right to judicial protection (Article 25); and the right to progressive development of economic, social, and cultural rights (Article 26) in conjunction with the obligation to respect the rights referred to in Article 1(1) of the American Convention.

3. The State responded to these allegations by submitting a report on the implementation of precautionary measures granted by the Commission to the beneficiaries. The report argues that the State did act on the petitions put forth by the parties, and urges them to exhaust domestic legal and political remedies.

4. Having analyzed the positions of the parties in compliance with the requirements of Articles 46 and 47 of the Convention, and without prejudging the merits of the case, the Commission declares the petition admissible. The Commission further resolves to notify the parties of its decision, to publish it, and include it in the Annual Report of the OAS General Assembly.

II. PROCESSING BY THE COMMISSION

5. The IACHR registered the petition received on August 26, 2003 as docket number P 642/03. Following its preliminary analysis, on April 21, 2004 the Commission forwarded a copy in pertinent part to the State, giving it two months to submit the information as per Article 30(3) of the Rules of Procedure.

6. On June 22, 2004, the Commission received the State's response and on July 7, 2004 duly transmitted it to the petitioners, granting them one month to submit any pertinent observations on the matter. On August 9, 2004, the petitioners requested a seven day extension to

present their comments; it was granted that same day. On August 17, 2004, the petitioners submitted their observations to the State's response. In a note dated October 4, 2004, the petitioners requested the inclusion of ten persons infected with HIV/AIDS who also joined in filing an appeal for legal protection (amparo), arguing that by doing so they exhausted domestic remedies in the case. The note was forwarded to the State for comment, which was given to the Commission on March 4, 2005

Precautionary Measures

7. On 26 August, 2003, the petitioners lodged a request for precautionary measures on behalf of the presumed victims together with a complaint, which was registered in the IACHR as file No. 642. On October 3, 2003, the Commission asked for additional information regarding some of the petitioners and their state of health. On October 9, 2003 the petitioners advised the Commission that given the victims' whereabouts, they would need time to gather such information. On April 13, 2004 the information requested was presented to the Commission, except for certain tests like the determination of viral load which were deemed too expensive. On April 21, 2004, the Commission advised the State of its decision to grant the precautionary measures requested on behalf of the 39 persons named since they had not been dispensed appropriate medication by the Guatemalan public health system.

III. POSITION OF THE PARTIES

A. The Petitioners

The Facts

8. The presumed victims are carriers of HIV/AIDS. On November 23, 2001, they went, together with others infected with the same virus and organizations such as the Association for the Coordination of the Fight Against AIDS (Asociación Coordinadora de Lucha contra el SIDA), the Association for Comprehensive Health (la Asociación de Salud Integral), and the Foundation (la Fundación,) to the Ministry of Health as the entity responsible for dispensing their health care to request the provision of a comprehensive health plan for persons living with HIV. They did so pursuant to the General Law on the Fight Against the Human Immunodeficiency Virus and the Acquired Immunodeficiency Syndrome, and the Promotion, Protection, and Defense of Human Rights of Persons with HIV/AIDS, Decree 27-2000. The petition affirms that the foregoing organizations received no response from the Ministry of Health. The Ministry did issue a public statement announcing that it lacked the financial resources needed to fulfill the legal mandate ordering it to extend health services to persons living with HIV/AIDS.

9. In light of the Ministry of Health's negative response, on May 27, 2002, the nongovernmental organizations working on the issue of HIV/AIDS together with persons living with the disease, addressed a letter to Mr. Alfonso Portillo, President of Guatemala, requesting that he order the appropriate measures for comprehensive and universal health care to be made available to all persons in Guatemala requiring immediate medical attention. The patients signing the letter and the organizations accompanying them demanded that President Portillo comply

with their request as soon as possible "since the lives of 4,000 persons, who need care today, depend on your prompt intervention on our behalf." [FN1] The petitioners state that the President of the Republic ignored that communication.

[FN1] A copy of the letter to the President of the Republic dated May 27, 2002 is included in the file.

10. Based on the foregoing, on July 26, 2002, 17 of the petitioners filed an appeal for legal protection (amparo) against the President of the Republic before the Constitutional Court with a view to "restoring the constitutional right to health that is recognized for each and every one of us who lives with HIV/AIDS." [FN2] On August 20, 2002, President Portillo met with the petitioners and informed them that he would order an immediate special transfer of 500,000 quetzales to cover the cost of treating persons with HIV/AIDS through the last quarter of that year. The petition affirms that the transfer was indeed made but that by May 2003, pharmaceuticals had been purchased only for 24 persons being treated at the San Juan de Dios General Hospital and another 47 at Roosevelt Hospital, none of whom were among the presumed victims.

[FN2] A copy of the appeal for legal protection (amparo) brought before the Constitutional Court dated July 26, 2002 is included in the file.

11. On January 29, 2003, the Constitutional Court rejected the appeal (amparo) filed on July 26, 2002, holding that the President's invitation to meet with the petitioners and the order of a special budget transfer removed the basis for a claim of ongoing injury. In response, the petitioners argue that the Constitutional Court's ruling never referred to the appeal's (amparo) true goal which was to bring the President of the Republic, as Head of State, to frame a general and universal health policy guaranteeing the right to health care and therefore to life of persons living with HIV/AIDS. The appeal also aimed to protect the right to life and was filed to ensure observance of the rights enshrined in the Constitution of the Republic as well as in the HIV/AIDS Law.

12. In their complaint, petitioners indicate that as of its writing, and despite the exhaustion of remedies before domestic courts, 12 of the 39 alleged victims were receiving no treatment whatsoever. Nineteen persons receive medical attention and antiretroviral therapy extended by Doctors Without Borders, a nongovernmental organization. Four have not been tested to determine their viral load so have no way of knowing their need for such a treatment. Another two receive prophylactic treatment through Project Life ("Proyecto Vida"), while the remaining two see the doctor just once a month. Additionally, two of the presumed victims receive antiretroviral treatment on an irregular basis from the Guatemalan Institute of Social Security, and only one has undergone treatment at a State clinic. To date, three of the presumed victims have died: Facundo Gómez Reyes, petitioner before the IACHR and appellant before the

Constitutional Court; Ismar Ramírez Chajón, petitioner before the IACHR; and Reina López Mújica, petitioner before the IACHR. [FN3]

[FN3] Facundo Gómez died on February 26, 2003; Reina López Mújica died on November 6, 2003; Ismar Ramírez died on December 4, 2003.

The Law

13. The petitioners allege that despite such data, the Government of Guatemala makes no provision for comprehensive treatment, fails to carry out required laboratory tests, and does not supply medication to persons diagnosed with HIV. It is further alleged that only 27 persons benefit from antiretroviral pharmaceuticals dispensed by the Ministry of Health [FN4], allegedly because there are insufficient funds to broaden coverage of that drug. The petitioners argue that this state of affairs contradicts the substance of Guatemala's General Law on HIV/AIDS:

Article 35. On the care of persons. Any person diagnosed as infected by HIV/AIDS shall receive immediate comprehensive care in conditions of equal opportunity with other persons, to which end that person's will, dignity, individuality and confidentiality shall be respected. Health workers may not deny care to any person living with HIV/AIDS, and shall take the recommended bio-security measures in providing it.[FN5]

[FN4] "The Ministry of Public Health and Social Welfare (Ministerio de Salud Publica y Asistencia Social) of Guatemala apparently provides medication only to 27 persons who live with the illness." "The Guatemalan Institute of Social Security extends care to 1200 persons diagnosed with HIV/AIDS, but chronic interruptions in the flow of supplies are causing serious problems of resistance to the medication exacerbated by the lack of medical tests to ensure adequate follow-up." Communication provided by the petitioners on August 26, 2003.

[FN5] Decree 27-2000, The General Law on the Fight Against the Human Immunodeficiency Virus and the Acquired Immunodeficiency Syndrome and the Promotion, Protection, and Defense of Human Rights of Persons with HIV/AIDS, Guatemala City, July, 2000.

14. In the opinion of the petitioners, the failure of the State to comply with the cited legal provision is proof that it violated the right to life and physical integrity enshrined in the American Convention when it failed to provide appropriate medical care to the presumed victims, carriers of HIV/AIDS. As petitioners point out, the 39 persons included in the petition, given their medical status, "require comprehensive medical services in order to guarantee their survival and physical integrity... what they need, in other words, is appropriate antiretroviral medication and the medical tests necessary to track the progression of their illness." [FN6]

[FN6] Communication provided by the petitioners on August 26, 2003.

15. The petitioners maintain that antiretroviral drugs are capable of blocking the virus' reproduction in the body and therefore constitute the ideal treatment for preventing the advance of the disease. They also claim that their use helps prevent opportunistic infections as well as other general symptoms of AIDS.

16. The State has an obligation, the petitioners claim, to protect the alleged victims' right to life. The duty of the State to take positive measures is heightened with regard to protecting the life and health of vulnerable people like those diagnosed with HIV/AIDS. The petitioners allege that inadequate standards of medical care afforded to this vulnerable group constitutes a threat to the integrity of each member of the group. Specifically, the petitioners argue that the absence of appropriate medical care represents an imminent threat to life, as evidenced in the case of Facundo Gómez Reyes, one of the petitioners of the appeal for legal protection (amparo) whose death is directly attributable to the lack of antiretroviral drug therapy which would have prevented the opportunistic disease that killed him. On that precise point, the petitioners indicate a heightened responsibility on the part of the State to take positive steps to protect the life and health of persons at risk, such as those living with HIV/AIDS.

17. Regarding the physical integrity of individuals infected with the AIDS virus, petitioners allege that the inadequate care afforded them and the disregard of their specific needs result in an impairment of their general health. Petitioners likewise stress that many victims of this disease enjoy no support whatever from the State, obtaining their medical treatment through the offices of nongovernmental organizations like Doctors Without Borders. Assistance from that organization, however, will only be available for a limited time.

18. The petitioners call attention to the limited number of persons with access to State-subsidized antiretroviral drug therapy as evidence of the unequal protection extended to persons infected with the virus. They highlight the fact that a high percentage of the ill are denied their rights allegedly due to lack of financial resources.[FN7] That circumstance, in the judgment of the petitioners, results from the fact that the State spends US\$10,000 per year for each of these 27 patients because it buys brand pharmaceuticals at high cost rather than purchasing generic drugs, which would broaden coverage.[FN8]

[FN7] Doctor Mario Bolaños, Minister of Public Health, affirms that the Ministry could only extend coverage to 27 persons living with HIV/AIDS due to the lack of financial resources. Communication provided by the petitioners on August 26, 2003.

[FN8] In Brazil and Cuba, generic antiretroviral drugs are manufactured at a cost of \$340 per patient per year. Communication provided by the petitioners on August 26 2003.

19. Finally, petitioners argue that domestic legislation does not provide resources to ensure the effective implementation of laws which offer them protection, such as the HIV/AIDS Law which establishes that the Ministry of Public Health and Social Welfare shall be responsible for guaranteeing the provision of medical services to carriers of the virus through counseling, support, and up-to-date medical treatment. In that same vein, they add that:

the lack of an effective remedy against violations of the rights recognized by the Convention constitutes an infringement of the same by the State Party where that circumstance may prevail. For such a remedy to exist, it must be stressed that constitutional or legislative recognition of it, or its formal admissibility, are not enough: rather, the remedy must really be designed to establish whether a violation of human rights has taken place and to provide the necessary means of remedy.[FN9]

[FN9] I/A Court H.R., Ivcher Bronstein case, February 6, 2001 Resolution, para. 135.

20. The petitioners argue that the State's failure to protect the health of people who are carriers of the AIDS virus represents a step backwards in its commitment to ensure progressive development. To wit, petitioners point to the lack of any governmental policy with regard to HIV/AIDS and the dearth of positive advances to correct the situation; they note that by subscribing to various international conventions, the State has assumed a contractual obligation to respect and protect the right to health of its citizens.

21. In their response to observations submitted by the State, the petitioners affirmed that of the 39 persons afflicted by the disease who were covered by the precautionary measures, three--Reina López Mújica, Facundo Gómez Reyes and Petrona López González—had died; the remaining 26 beneficiaries were allegedly receiving medical care, while 10 received no health care whatsoever. They also accused the State of non-compliance with the precautionary measures in that it was delegating responsibility for the provision of medical care to third-party organizations, such as Doctors Without Borders, which are not public sector entities[FN10] and whose services are time-limited. Therefore, the petitioners reiterate their request that Guatemala's indifference and procrastination with respect to this situation not be allowed to continue.

[FN10] Coverage is mainly provided by institutions or organizations such as Doctors Without Borders. Communication received from the petitioners on August 17, 2004.

B. Position of the State

22. The State's initial response to the Commission was provided in the Report of the Government of the Republic of Guatemala on the implementation of precautionary measures and its answer to the petition drafted by the Presidential Commission for the Coordination of Executive Human Rights Policy. The document argues that the State has fulfilled its obligations towards the petitioners, as evidenced by the fact that 39 of them are said to be receiving appropriate medication. The State describes the following distribution of the drugs in question:

Antiretroviral Drug Project	Beneficiaries
Doctors Without Borders, "Project Life",	11

Coatepeque	
Doctors Without Borders, The Yaloc Clinic	5
Doctors Without Borders of Coatepeque	4
Infectious Disease Clinics of the Roosevelt Hospital	1
The Roosevelt Hospital Bristol Study	1
Guatemalan Institute of Social Security – IGSS	3
The Military Hospital	1
Without Access to Pharmaceuticals	11[FN11]

[FN11] The State declares that the names, addresses, and other details of the 11 persons who have not as yet received any treatment have been referred on a priority basis to the Ministry of Public Health and to the Director of the National AIDS Program.

23. The State maintains that the Ministry of Health did adopt specific support measures to aid this vulnerable group, such as the expediting of procedures affording access to an antiretroviral treatment; promotion of fund-raising through external cooperation agencies; and a lowering of the cost of drugs and viral load and CD4 testing. The Presidential Commission for the Coordination of Executive Human Rights Policy informed that total present coverage would provide comprehensive care for 111 adults and 110 children financed by the Public Ministry's own funds, while a further 940 patients would receive antiretroviral treatment through the support of Doctors Without Borders. The Guatemalan Institute for Social Security would offer antiretroviral therapy to more than 1100 adults and 300 children, and another 1,200 patients would be reached through cooperation and coordination efforts led by Doctors Without Borders, UNICEF, and other donor agencies.

24. The State alleges that from the date of communication with the Commission, urgent measures were attempted to implement Decree 27-2000, which includes the General Law on the Fight Against HIV/AIDS and the Promotion, Protection, and Defense of Human Rights; strengthening the budget of the National AIDS Program; coverage of antiretroviral medication; and carrying out medical tests to determine progression of the disease.

25. The State expresses its concern that some AIDS patients are unable to access treatment and reiterates that the Government provides free treatment within the limits of its ability to do so. In addition, the government supports civil society initiatives oriented towards establishing a budget to ensure implementation of State policies related to the law in force.

26. In sum, the State asks that due note be taken of its efforts to implement the Commission's precautionary measures, and that a written record reflect its compliance to that effect. Likewise, it urges the petitioners to continue resorting to existing domestic legal remedies.

IV. COMPETENCE AND ADMISSIBILITY

A. Competence

27. The Commission is competent *ratione loci* to hear the petition insasmuch as it alleges violations of rights protected in the American Convention which allegedly took place within national territory of Guatemala, a State Party to that treaty. The Commission is competent *ratione temporis* since the obligation to respect and to guarantee rights protected under the American Convention was already in effect for the State at the date on which the alleged acts occurred. Finally, the Commission is competent *ratione materiae* because the petition charges possible violations of human rights protected by the American Convention

28. As to the question of competence *ratione personae*, the Commission has explained that, in general, its competence to consider individual cases relates to facts that involve the rights of one specific person or persons.[FN12] As the Honorable Court has explained, in order to initiate proceedings under Articles 48 and 50 of the American Convention, the Commission requires that a petition include the charge of a specific violation against a specific person.[FN13]

[FN12] IACHR, *Emérita Montoya González Case*, Report 48/96, Case 11.553 (Costa Rica), March 14, 1997, paras. 28, 31; *María Eugenia Morales de Sierra Case*, Report 28/98 on Admissibility, Case 11.625 (Guatemala), para. 28.

[FN13] I/A Court. H.R., *Advisory Opinion OC-14/94, "International Responsibility for the Promulgation and Implementation of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention)"*, December 9, 1994, para. 45, see also, paras. 46-47

29. In the petition under consideration, the petitioners duly identified individual persons as alleged victims whose rights under the American Convention the State of Guatemala committed to respect and guarantee. Indeed, in their first communication of August 26, 2003, the petitioners listed the alleged victims as Luis Rolando Cuscul Pivaral, Francisco Sop Gueij, Corina Robledo, Petrona López González, Aracely Cinto, Olga Marina Castillo, Israel Pérez Charal, Karen Judith Samayoa, Juana Aguilar, Darinel López Montes de Oca, Luis Rubén Álvarez Flores, Audiencio Rodas, Luis Edwin Cruz Gramau, Martina Candelaria Álvarez Estrada, Maria Felipe Pérez, Sayra Elisa Barrios, Felipe Ordóñez, Santos Isacax Vásquez Barrio, Ismera Oliva García Castañon, Guadalupe Cayaxon, Sandra Lisbeth Zepeda Herrera, Cesar Noe Cancinos Gómez, Santos Vásquez Oliveros, Maria Vail, Julia Aguilar, Sebastián Emilia Dueñas, Zoila Pérez Ruiz, Santiago Valdez, Pascula de Jesús Mérida, Iris Carolina Vicente Baullas, Reina López Mújica, Marta Alicia Maldonado PAC, José Cupertino Ramírez, José Rubén Delgado, Elsa Miriam Estrada, Ismar Ramírez Chajón, Félix Cabrera, Silvia Mirtala Álvarez, Facundo Gómez Reyes. That communication was supplemented by a note dated October 4, 2004 which adds the names of Alberto Quiché Cuxeva, Dora Marina Martínez Sofoiija, Ingrid Janeth Barillas Martínez, Jorge Armando Tavares Barreno, Luis Armando Linares Ruano, Mardo Luis Hernández, Melvin Yovani Ajtun Escobar, Miguel Lucas Vail, Rita Mariana Dubon Orozco and Teresa Magdalena Ramírez Castro. They affirm that all 49 persons alleged to be victims are carriers of the HIV/AIDS virus and, as such, require comprehensive medical care to guarantee their survival and physical integrity—meaning medical attention and antiretroviral medication, as well as the appropriate medical tests to determine the state of progress of the disease—none of which the State has made available to them thus far.

30. As to the State, the Commission observed that Guatemala has been a State Party to the American Convention since 25 May, 1978, the date of deposit of its instrument of ratification. The Commission therefore has competence *ratione personae* to consider the petition.

B. Admissibility Requirements

1. Exhaustion of Domestic Remedies

31. According to the petition, on July 26, 2002 the organizations which joined in the petition together with a group of persons who live with HIV/AIDS, including Luis Ronaldo Cuscul Piraval, Facundo Gómez Reyes, and Marta Alicia Maldonado Pac, who were listed in the original petition, together with Alberto Quiché Cuxeve, Dora Marina Martínez Sofojja, Ingrid Janeth Barillas Martínez, Jorge Armando Tavares Barreno, Luis Armando Linares Ruano, Mardo Luis Hernández, Melvin Yovani Ajtun Escobar, Miguel Lucas Vail, Rita Mariana Dubon Orozco and Teresa Magdalena Ramírez Castro (alleged victims who were added to the petition at the request of the petitioners in their communication of October 4, 2004) filed an appeal for legal protection (*amparo*). Among other objectives, the appeal aimed to induce the Constitutional Court to order the Executive Branch to transfer the necessary funds to purchase and ensure the daily distribution of antiretroviral pharmaceuticals essential to the survival and health of the persons living with HIV/AIDS in Guatemala, as well as quality generic antiretroviral drugs to facilitate a massive rather than selective approach to the treatment of persons who live with HIV/AIDS.[FN14]

[FN14] A copy of the appeal for legal protection (*amparo*) brought before the Constitutional Court on July 26, 2002 is included in the file.

32. On January 29, 2003, the Constitutional Court rejected the appeal for legal protection (*amparo*) lodged by both the petitioners and the aforementioned alleged victims to safeguard their lives and health. That judgment was notified to the parties on February 25, 2003.

33. In its response, the State urges the petitioners to continue availing themselves of existing domestic remedies but it fails to specify which remedies they are to exhaust.[FN15] According to Inter-American Court of Human Rights case law, it is incumbent upon a State that argues nonexhaustion of domestic remedies to identify which domestic remedies are to be used and why. The IACHR thus considers that Article 46(2)(a) of the American Convention is applicable here.

[FN15] I/A Court H.R., Velásquez Rodríguez Case. Preliminary Exceptions. Judgment rendered June 26, 1987. Series C No. 1, para. 88.

34. In the instant case, petitioners sought to claim the judicial remedy contemplated in Guatemalan law for the protection of rights that were allegedly violated by bringing the case before the Constitutional Court which, in their judgment, is the competent judicial authority to consider the appeal for legal protection (amparo). The State has not argued that such a measure failed to constitute an adequate remedy under the terms of the Convention.

35. Consequently, without prejudging the merits of the case, the Commission considers that the requirements established under Articles 47(b) and (c) of the Convention have been met.

2. Period for Lodging a Petition

36. Article 46(1)(b) of the Convention establishes that a petition must be lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment. The present petition was lodged on August 26, 2003, within six months following the judgment of the Constitutional Court rendered on January 29, 2003, which overruled the appeal for legal protection (amparo) lodged by the petitioners to protect the rights to life and to health of persons infected with HIV/AIDS.

3. Duplication of Procedures and Res Judicata

37. The requirements of Articles 46(1)(c) and 47(d) of the Convention can be deemed satisfied, since the file shows that the subject of the petition is not pending in another international proceeding or settlement, nor does it duplicate a petition already considered by this or any other international body.

4. Description of the Facts Alleged

38. The petitioners maintain that the State is not fulfilling its responsibility to respect and to adequately protect the rights to life, physical integrity, and health of the 49 individuals identified as presumed victims. They indicate, furthermore, that the facts underpinning the present petition also constitute violations of other individual rights such as the right to a fair trial; the right to equal protection before the law; the right to judicial protection and to the progressive development of economic, social and cultural rights, all of which are subsumed in the precepts of the American Convention.

39. In this regard, the Commission will consider whether, under Article 1(1) and 26 of the American Convention, the State has a positive obligation to provide antiretroviral treatment, as the petitioners contend. Likewise, it will weigh whether the provision of medical treatment and pharmaceuticals to the alleged victims by private entities in fact relieves the State of the obligation to furnish them itself, assuming the first question is answered in the affirmative.

40. As to the alleged lack of effective judicial oversight, the Commission considers that it might well constitute a violation of the right enshrined in Article 25 of the American Convention if, upon weighing the merits of the case, it finds proof of the facts adduced. Regarding alleged violations of Article 8 of the American Convention, the Commission finds that they have not

been specifically substantiated by the petitioners and thus refrains from taking a position on the matter.

41. With regard to the alleged violation of article 5 of the American Convention, the Commission considers that in the present case, it is enshrined in article 4 of the American Convention, along with the right to life.

42. Regarding the alleged violation of article 26 of the American Convention, the Commission considers that since the present case involves the right to health, there is an obligation to provide the general population with a progressive fulfillment in both preventive and curative medical care. In that sense, the Commission agrees with what the Court has stated:

“Economic, social and cultural rights have both an individual and a collective dimension. This Court considers that their progressive development, about which the United Nations Committee on Economic, Social and Cultural Rights has already ruled[FN16], should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation.” [FN17]

[FN16] U.N. Doc. E/1991/23, United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States Parties obligations (paragraph 1 of article 2 of the Covenant), adopted at the Fifth Session, 1990, point 9.

[FN17] IA Court, Five Pensioners Case, Judgement of February 28, 2003, para. 147.

43. These thoughts also apply to the right to health. Independently of what was said earlier with respect to the progressive character of the right to health, there exist at least two situations that demand immediate attention. The first is that of non-discrimination, in the sense that the State cannot guarantee the right to health in a discriminatory manner. In the present case, the petitioners did not claim a discriminatory practice in this sense. In effect, the petitioners did not prove that the presumed victims had been denied medical attention or medication that had been given to other persons in the same situation. Nor did they present arguments or proof to show that the HIV/AIDS patients receive different treatment, without a rational justification, before persons that suffer from other illnesses. Therefore, the Commission must declare the inadmissibility with respect to Article 24 of the American Convention.

44. The second situation that must be addressed is the one concerning the cases where there is a serious or imminent risk of death. Regarding this last situation, the Commission observes that the facts described can characterize a violation of the right to life enshrined in Article 4 of the American Convention. In light of this, the Commission considers that, in the circumstances of the present case, with respect to admissibility, the allegations of the petitioners concerning the right to health are contained within the guidelines established in Articles 1(1) and 4 of the American Convention concerning the right to life, and not under Article 26.

45. Therefore, without prejudging the merits of the case, the Commission is satisfied that the requirements of Article 47(b) and (c) of the above-mentioned international instrument have been met.

V. CONCLUSIONS

46. The Commission concludes that in accordance with Articles 46 and 47 of the American Convention, it is competent to examine the claims presented by the petitioners regarding the right to life and effective judicial protection, in relation with the general obligation to respect all rights. The Commission found that in the circumstances of the present petition, the right of physical integrity, along with the economic, social and cultural rights are contained in the alleged violation of the right of life. Finally, the Commission declared the inadmissibility of the claims regarding an alleged violation of the right of equality before the law.

47. Based on the foregoing arguments of fact and of law, and without prejudice to its analysis of the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. That in conformity with Article 1(1), and pursuant to Articles 4 and 25 of the American Convention, the present case is hereby declared admissible.
2. That the Guatemalan State and the petitioner will be notified of this decision.
3. That it will pursue its analysis of the merits of the case.
4. That it will publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in Washington, D.C., on the 7th day of March 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez, and Florentín Meléndez, Commissioners.