

INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF CUSCUL PIVARAL ET AL. V. GUATEMALA
JUDGMENT OF AUGUST 23, 2018
(Preliminary objection, merits, reparations and costs)

In the *Case of Cuscul Pivaral et al. v. Guatemala*,

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), composed of the following judges:¹

Eduardo Ferrer Mac-Gregor Poisot, President
Humberto Antonio Sierra Porto, Judge
Elizabeth Odio Benito, Judge
Eugenio Raúl Zaffaroni, Judge, and
Patricio Pazmiño Freire, Judge

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter, “the American Convention” or “the Convention”) and Articles 31, 32, 65 and 67 of the Rules of Procedure of the Court (hereinafter also “the Rules of Procedure” or “the Court’s Rules of Procedure”), delivers this judgment, structured as follows:

¹ The Vice President of the Court, Judge Eduardo Vio Grossi, did not take part in the deliberation and signature of this judgment for reasons beyond his control.

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I.
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On December 3, 2016, pursuant to the provisions of Articles 51 and 61 of the American Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court the *case of Cuscul Pivaral et al.* against the Republic of Guatemala (hereinafter "the State" or "Guatemala"). According to the Commission, the case refers to the presumed international responsibility of the State for the violation of various rights established in the American Convention to the detriment of 49 presumed victims who were diagnosed with HIV between 1992 and 2003. The Commission established that, up until 2006 and 2007, there had been a total lack of public medical care for this group of individuals who were living with HIV and also in poverty, and determined that this failure had had a serious impact on their health, life and personal integrity. According to the Commission, starting in 2006-2007, the State implemented some treatment for people living with HIV, but the care provided was neither comprehensive nor adequate. The Commission therefore considered that these shortcomings continued to violate the rights to health, life and personal integrity of the surviving victims. The Commission also determined that the death of eight of the presumed victims occurred as a result of opportunistic illnesses, or during the time that they presumably did not receive the care they required from the State, or following deficient care. The Commission added that the application for amparo filed before the Constitutional Court on July 26, 2002, did not provide the presumed victims with effective judicial protection. Lastly, it concluded that the mental and moral integrity of the next of kin and/or those closest to the presumed victims had been violated. The names of the presumed victims can be found in Annex 1 to this judgment.

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

a. *Petition.* On August 26, 2003, a petition against Guatemala was lodged before the Commission by the Center for Justice and International Law (CEJIL), the *Red Nacional de Personas que Viven con el VIH/SIDA*, the *Gente Unida* Association, *Proyecto Vida*, the Fernando Iturbide AIDS Prevention Foundation, and the *Asociación de Salud Integral* (hereinafter "the petitioners").

b. *Admissibility Report.* On March 7, 2005, the Commission adopted Admissibility Report No. 32/05.²

c. *Merits Report.* On April 13, 2016, the Commission issued Merits Report No. 2/16, under Article 50 of the Convention (hereinafter "the Merits Report"), in which it reached a series of conclusions and made several recommendations:

i. *Conclusions.* The Commission concluded that Guatemala was responsible for violating the rights recognized in Articles 4(1), 5(1) and 25(1) of the Convention, in relation to the obligations established in Article 1(1) of this instrument, to the detriment of the presumed victims mentioned in the Merits Report.

² Cf. IACHR, Report No. 32/05, Petition 642/2003, Admissibility, *Luis Ronaldo Cuscul Pivaral et al. (Persons living with HIV/AIDS)*, Guatemala, March 7, 2005.

ii. *Recommendations.* Consequently, it made the following recommendations to the State:

1. Make full reparation to the surviving victims and to the next of kin and loved ones of all the victims for the human rights violations declared in the report, of both a material and moral nature.

2. Immediately adopt the necessary measures to ensure that all the surviving victims in this case receive comprehensive medical care, in keeping with international standards, including, among other requirements: (i) a thorough diagnosis and periodic follow-up testing; (ii) the permanent and uninterrupted provision of the required antiretroviral drugs and any others that they may need owing to their specific health situation; (iii) mental health care for the victims who so wish; (iv) the differentiated care required by the women victims in this case, giving special consideration to their reproductive capacity. The State must ensure that the victims do not face obstacles of accessibility or of any other nature to obtaining comprehensive treatment as provided for in this recommendation.

3. Provide non-repetition mechanisms to include: (i) free, comprehensive and uninterrupted health care and treatment for the people with HIV/AIDS who are unable to afford this; (ii) implementation of genuine and effective mechanisms for periodic monitoring and supervision of public hospitals in order to ensure that comprehensive health care is being provided to people living with HIV/AIDS, who cannot afford it, and (iii) implementation of public hospital staff training programs to ensure that their duties are performed in a way that is compatible with the internationally recognized standards described in the report.

d. *Notification to the State.* The Merits Report was notified to the State on June 2, 2016, and it was granted two months to provide information on compliance with the recommendations. The State of Guatemala presented a brief in which it advised that meetings had been held with the petitioners and asked for an extension of the time limit. The Commission granted an additional three months. Subsequently, the State presented a further report in which it referred to general measures taken for people living with HIV/AIDS in Guatemala.

3. *Submission to the Court.* On December 2, 2016, the Commission submitted all the facts and supposed human rights violations described in the Merits Report to the jurisdiction of the Inter-American Court.

4. *The Commission's requests.* Based on the foregoing, the Commission asked the Court to find and to declare the international responsibility of Guatemala for the violation of the rights indicated in the conclusions to the Merits Report. It also asked the Court to order the Estate to comply with specific measures of reparation.

II.

PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and the representatives.* The State and the representatives of the presumed victims were notified that the case had been submitted on January 27, 2017.

6. *Brief with motions, pleadings and evidence.* On March 30, 2017, Cristina Calderón, the *Asociación de Salud Integral* (ASI) and the Center for Justice and International Law (CEJIL) (hereinafter "the representatives") presented their brief with motions, pleadings and

evidence (hereinafter “motions and pleadings brief”), pursuant to Articles 25 and 40 of the Court’s Rules of Procedure. The representatives agreed with the considerations of the Commission and added that the State was also responsible for violating the right to health in light of Article 26 and in relation to Articles 1(1) and 2 of the Convention. In addition, the representatives asked the Court to order the State to adopt other measures of reparation and to reimburse certain costs and expenses. Lastly, the representatives asked to access the Victims’ Legal Assistance Fund of the Inter-American Court (hereinafter “the Legal Assistance Fund”).

7. *Answering brief.*³ On July 3, 2017, the State presented to the Court its brief filing a preliminary objection and answering the submission of the case and the motions and pleadings brief (hereinafter “answer” or “answering brief”), pursuant to Article 41 of the Court’s Rules of Procedure. The State filed a preliminary objection based on failure to exhaust domestic remedies and contested the violations that had been alleged.

8. *Legal Assistance Fund.* In an order of July 24, 2017, the President of the Court declared that the request for access to the Legal Assistance Fund presented by the representatives was admissible.⁴

9. *Observations on the preliminary objection.* On September 20, 2017, the representatives and the Inter-American Commission presented their observations on the preliminary objection filed by the State.

10. *Amici curiae.* The Court received three *amicus curiae* briefs presented by: (1) students of the Inter-American Human Rights Protection System Clinic at the Universidad Carlos III of Madrid;⁵ (2) the Human Rights Clinic of the School of Law and the Dell Medical School at the University of Texas at Austin,⁶ and (3) the Center for Human Rights Studies at the Universidad Autónoma de Yucatán.⁷

³ On February 21, 2017, the State advised that Victor Hugo Godoy Morales and María José Ortiz Samayoa would be its Agents. Subsequently, in a brief of November 3, 2017, Jorge Luis Borrayo Reyes, President of COPREDEH, advised that, in his absence, Felipe Sánchez González would sign the communications addressed to the Court.

⁴ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Victims’ Legal Assistance Fund.* Order of July 24, 2017. Available at: http://www.corteidh.or.cr/docs/asuntos/cuscul_fv_17.pdf.

⁵ The brief was signed by Denise Ciraudó, Javier Ruiz and Felipe Sautu. It analyzed the HIV situation in Guatemala and explained that the State had provided little or no medical care to people with HIV. Following an examination of Guatemala’s national and international legal framework, it concluded that the State had failed to comply with its commitments and obligations. The document also included an analysis of the right to life of the victims, to personal integrity of those involved, to personal integrity of their next of kin, and of the right to judicial protection in relation to the application for amparo that had been filed. It concluded that the State was responsible for violating the rights mentioned and proposed that the Court should take into consideration the following measures of reparation: reparation of pecuniary and non-pecuniary damage, measures to commemorate the deceased victims, measures of non-repetition, and a public act.

⁶ The brief was signed by Ariel Dulitzky on behalf of the authors. The document emphasized that, based on the rules of interpretation established in the American Convention and in the Vienna Convention, as well as criteria developed by the Court, Article 26 of the Convention protected the economic, social and cultural rights that derive from the OAS Charter, including the right to health, and that these rights are subject to the general obligations to respect and to ensure rights imposed by Articles 1(1) and 2 of the Convention. The brief differentiated between the right to health and the rights to life and to personal integrity, because the former is a right in itself that also imposes specific obligations. The document provided an overview of HIV and its situation in Guatemala, stressing the importance of implementing public health policies focused on the provision of care. It concluded that Guatemala’s response to the HIV crisis had been belated and well below standards for clinical care, and this had had a direct impact on each victim in this case.

⁷ The brief was signed by María de los Ángeles Cruz Rosel, Carlos Luis Escoffié Duarte, Jessy Guadalupe Cetz Ceils, Enrique de Jesús Gallegos Madrigal and Andrea Guadalupe Tejero Gamboa. First, the document

11. *Public hearing.* In the order of February 8, 2018,⁸ the President of the Court ordered that testimony be received by affidavit from four presumed victims, two deponents providing information proposed by the representatives, two expert witnesses proposed by the representatives, and one expert witness proposed by the Commission. In addition, in the order the President summoned the parties and the Commission to a public hearing that was held during the Court's 122nd regular session which took place at its seat.⁹ During the hearing, the Court received the statements of two presumed victims and one expert witness proposed by the representatives, as well as the final oral observations and arguments of the Commission, and the representatives and the State, respectively.

12. *Final written arguments and observations.* On April 9, 2018, the representatives and the State presented their respective final written arguments and various annexes, and the Inter-American Commission forwarded its final written observations.

13. *Supervening facts.* On March 2, 2018, the representatives presented information and documentation on facts that had allegedly occurred following the presentation of the brief with motions, pleadings and evidence. The Commission and the State did not present information in this regard.

14. *Helpful evidence.* On June 28, 2018, the representatives were asked to provide helpful evidence. On July 31, 2018, the representatives forwarded the information requested and, on the same date, the Court asked the State to provide specific information related to the evidence that the representatives had been asked to provide. On August 14, 2018, the State requested an extension of the time limit to send the information requested, and this was granted by the Court. On August 21, 2018, the State provided a final answer to the Court's request.

15. *Deliberation of the case.* The Court began deliberating this judgment on August 22, 2018.

III. JURISDICTION

16. The Inter-American Court has jurisdiction to hear this case pursuant to Article 62(3)¹⁰

analyzed the concept of the principle of progressivity in international law, particularly how it has been analyzed by the region's high courts. It emphasized the need for the Court to rule in order to produce the first inter-American standards in this regard and also on the corresponding State obligations. Second, the brief considered that it should be established as judicial criteria that the absence of indicators, information and statistics was, *per se*, a violation of the principle owing to the immediate minimum obligations derived from Article 26 in relation to Articles 1(1) and 2 of the Convention. The brief examined the regional experiences in limiting patents for reasons of public interest. It stressed the need to adopt alternate measures such as the obligatory licensing of pharmaceutical patents based on public interest.

⁸ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Summons to a hearing.* Order of the President of the Inter-American Court of Human Rights of February 8, 2018. Available at: http://www.corteidh.or.cr/docs/asuntos/cuscul_08_02_18.pdf.

⁹ Those present at this hearing were: (1) for the Inter-American Commission: Silvia Serrano Guzmán and Soledad García Muñoz; (b) for the representatives: Esteban Madrigal Brenes, Gisela De León, Marcia Aguiluz, Antonio Jaén, Mariana Brocca, Eduardo Arathoon and Cristina Calderón, and (c) for the State de Guatemala: Juan Carlos Orellana Juárez, Felipe Sánchez González, Lourdes Mylene Woolfolk Contreras, Briceida Aracely Hoenes Raquel, Mario Enrique Anthoon Urbina, Rafael Eduardo Bran Paz and Verónica Jiménez.

¹⁰ Article 62(3) of the Convention establishes that: "[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that

of the American Convention, because Guatemala has been a State Party to the American Convention since May 25, 1978, and accepted the contentious jurisdiction of the Court on March 9, 1987.

IV. PRELIMINARY OBJECTION

A. Objection based on failure to exhaust domestic remedies

A.1. Arguments of the parties and observations of the Commission

17. The **State** argued that the presumed victims had not filed or exhausted domestic remedies and, therefore, the Court should abstain from hearing the case pursuant to Article 46 of the American Convention. In this regard, it asserted that the representatives had not availed themselves of Articles 70 and 71 of the Law on Amparo, Habeas Corpus and Constitutionality. Consequently, the State alleged that the case was inadmissible, because at the time of the facts, procedural remedies existed that authorized the presumed victims to appeal for clarification or expansion of the amparo decision.

18. The **Commission** affirmed that the State had not filed the preliminary objection at the proper procedural moment, because it had merely urged the presumed victims to continue using the remedies that existed in the domestic jurisdiction, without indicating which remedies should be exhausted. Consequently, it alleged that the objection was not filed as required by the Convention and, therefore, was inadmissible. Furthermore, the Commission alleged that the State had not provided evidence as to the pertinence and effectiveness of the request for clarification or expansion of the amparo and, thus, the objection was substantially inadmissible.

19. The **representatives** affirmed that the preliminary objection filed by the State did not fulfill either the formal or the substantial aspects established by the Convention and the Court's case law. Regarding the formal aspect, they argued that the objection was not filed at the proper procedural moment – that is, at the time of the Commission's decision on admissibility. Regarding the substantial aspect, they indicated that the State had failed to prove that the available remedies were adequate, appropriate and effective. Consequently, they asked the Court to reject the preliminary objection filed by the State.

A.2. Considerations of the Court

20. Article 46(1)(a) of the Convention establishes that, for admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45, "it is necessary that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."¹¹

21. The Court has developed standards to analyze an objection based on presumed failure to comply with the requirement of exhaustion of domestic remedies. First, it has interpreted the objection as a means of defense available to the State and, as such, the State may waive it either expressly or tacitly. Second, the objection must be filed at the proper

the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

¹¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 63, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 39.

moment for the State to be able to exercise its right to defense. Third, the Court has maintained that the State that files this objection must specify the domestic remedies that remained to be exhausted, and prove that those remedies were available and effective.¹²

22. In this regard, the Court notes that the State, in its communication of June 18, 2004, responding to the petition lodged by the representatives before the Inter-American Commission, urged the presumed victims "to continue availing themselves of the existing legal and political remedies in the domestic jurisdiction until they had exhausted them."¹³ The Court also notes that the State had not given any other indication of the remedies that should be exhausted up until its answering brief of July 3, 2017; in other words, at the procedural stage before the Court. In that brief, the State advised that the presumed victims "had not availed themselves of Articles 70 and 71 in Chapter Nine of the Law on Amparo, Habeas Corpus and Constitutionality relating to clarification and expansion."

23. In this regard, the Court notes that, even though the State indicated, during the admissibility stage before the Commission, that the petitioners should continue making use of the legal and political remedies which existed in the domestic jurisdiction, this was a general indication that did not mention the remedies that had not been exhausted or their effectiveness. The Court recalls that it was not until its answering brief that the State, for the first time, indicated the remedies that the presumed victims should have exhausted before having recourse to the international jurisdiction. Accordingly, the Court considers that, at no time during the admissibility stage, which is the proper procedural moment for filing an objection based on failure to exhaust domestic remedies, had the State clearly cited which remedies should be exhausted or proved their effectiveness, as required by Article 46(1) of the Convention.

24. Consequently, the Court considers that the preliminary objection of failure to exhaust domestic remedies filed by Guatemala is inadmissible, due to its belated submission.

V. PRIOR CONSIDERATION

A. Determination of the presumed victims in this case

A.1. Arguments of the parties and observations of the Commission

25. The **representatives** indicated that Roberto Gómez García, L.A.L., María Elena Morales Villafuerte, Heidi Mariela Lucas González and Marvin Josué Lucas González, included as next of kin of the victims by the Commission in its Merits Report, are also people living with HIV who have endured the same violations described throughout the litigation and, therefore, should be considered direct victims who have not received comprehensive care as people living with HIV. They also argued that that Katherine Girón Zepeda should possibly be considered a victim in this case by application of Article 35(2) of the Rules of Procedure, because this is a collective case insofar as it relates to 49 presumed victims who have not received comprehensive care and who are in a vulnerable situation, and that Ms. Girón Zepeda became infected with HIV because the failure to provide adequate medical care to her mother led to her infection.

¹² Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 88, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 39.

¹³ Communication P-435-2004 of June 18, 2004, signed by Frank La Rue Lewy, President of COPREDEH, addressed to the Inter-American Commission on Human Rights (evidence file, folio 111).

26. The **Commission** stated during the public hearing that information that had come to light during the case could justify the application of Article 35(2) of the Rules of Procedure as regards the necessary flexibility to individualize the victims and, thus, some victims identified as next of kin in the Merits Report should be considered direct victims. The **State** did not refer to either of these requests.

A.2. Considerations of the Court

27. The Court recalls that, according to its case law and pursuant to Article 50 of the Convention and Article 35(1) of the Court's Rules of Procedure, it is for the Commission, and not the Court, to identify the presumed victims in a case before the Court precisely and at the proper procedural moment.¹⁴ Legal certainty requires, as a general rule, that all the presumed victims are duly identified in the Merits Report, and it is not possible to add new presumed victims during subsequent stages without this prejudicing the defendant State's right to defend itself.¹⁵ The Rules of Procedure establish the exception to this rule in Article 35(2), by stipulating that "[w]hen it has not been possible to identify one or more of the alleged victims who figure in the facts of the case because it concerns massive or collective violations, the Court shall decide whether to consider those individuals as victims."¹⁶

28. The Court recalls that it has evaluated the application of Article 35(2) of the Rules of Procedure on the basis of the particular characteristics of each case,¹⁷ and has applied it in massive or collective cases when difficulties existed to identify or contact all the presumed victims; for example, owing to the presence of an armed conflict or displacement, or when the bodies of the presumed victims have been reduced to ashes, or in cases in which whole families have been disappeared, so that there is no one who can speak for them. The Court has also taken into account difficulties in accessing the area where the facts occurred, the absence of records regarding the inhabitants of the place, and the passage of time, as well as specific characteristics of the presumed victims in the case; for example, when they are members of family clans with similar first and last names, or in the case of migrants. It has also considered the conduct of the State; for example, when it is argued that the failure to investigate contributed to the incomplete identification of the presumed victims, and in one case of slavery.

29. In the instant case, the Court notes that, in its Merits Report, the Commission did not include Roberto Gómez García, L.A.L., María Elena Morales Villafuerte, Heidi Mariela

¹⁴ Cf. *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of Favela Nova Brasília v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of February 16, 2017. Series C No. 333, para. 36.

¹⁵ Cf. *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 41.

¹⁶ Cf. *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012. Series C No. 250, para. 48, and *Case of Favela Nova Brasília v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of February 16, 2017. Series C No. 333, para. 36.

¹⁷ It should be noted that the Court has applied Article 35(2) of its Rules of Procedure in the following cases, among others: *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012. Series C No. 250; *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs*. Judgment of October 24, 2012. Series C No. 251; *Case of the Massacres of El Mozote and neighboring places v. El Salvador. Merits, reparations and costs*. Judgment of October 25, 2012. Series C No. 252, and *Case of the Afrodescendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2013. Series C No. 270.

Lucas González and Marvin Josué Lucas González as direct victims, but rather as next of kin of the presumed victims. In addition, the Court notes that the facts described by the Commission in its Merits Report make no reference to the health situation of the next of kin of the presumed victims, or to the medical care they may have received or failed to receive, but rather refers, in general, to the violations of their mental and moral integrity allegedly suffered by the next of kin and/or circle of those closest to the direct presumed victims. In this regard, the Court considers that, based on Article 35(1) of the Rules of Procedure, and in order to safeguard the procedural balance between the parties and the State's right to defend itself, which includes the State's right to express its opinion, at the appropriate procedural moment, on alleged violations of the rights of the presumed victims and on the facts that underlie these violations, the representatives' request to include the said next of kin of the presumed victims as direct victims is inadmissible.

30. Furthermore, the Court considers that the fact that this case relates to alleged violations of the rights of 49 individuals does not signify that it is a case of massive or collective violations in the terms of Article 35(2) of the Rules of Procedure, and did not exempt the representatives from identifying the presumed victims at the appropriate procedural moment. The Court notes that, since Katherine Alejandra Girón Zepeda was diagnosed with HIV in 2001, the representatives had ample time to collect the information related to her condition and present this to the Commission. Moreover, there is no evidence of any material or practical difficulties of such magnitude that they could have prevented the representatives from identifying Ms. Girón Zepeda as a presumed victim in the case. In this regard, the Court considers that, even in the hypothesis that a presumed victim is in a vulnerable situation, it is for the representatives to prove to the Court how this condition prevented the identification of a presumed victim, a situation that did not occur in this case. Consequently, the representatives' request to include Ms. Girón Zepeda as a presumed victim in the case is inadmissible.

VI. EVIDENCE

A. Admissibility of the documentary evidence

31. The Court received diverse documents presented as evidence by the Commission, the representatives and the State, or requested as helpful evidence by the Court or its President and, as in other cases, it admits those that were presented at the appropriate procedural moment (Article 57 of the Rules of Procedure)¹⁸ and the admissibility of which was neither contested nor disputed.¹⁹

¹⁸ The documentary evidence may be presented, in general, and according to Article 57(2) of the Rules of Procedure, together with the briefs submitting the case, with motions and pleadings, or answering the case, as appropriate, and evidence forwarded outside these procedural opportunities is inadmissible, unless the exceptions established in the said Article 57(2) of the Rules of Procedure apply (namely, *force majeure* or serious impediment) or it relates to a supervening fact; in other words one that occurs after the said procedural moments. *Cf. Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs.* Judgment of October 13, 2011. Series C No. 234, para. 22, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of April 25, 2018. Series C No. 354, para. 138.

¹⁹ *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No.4, para. 140, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of April 25, 2018. Series C No. 354, para. 137.

32. The representatives asked the Court to reject annexes 3, 4, 7 and 10 attached to the State's final written arguments.²⁰ In this regard, the Court notes that annex 10 had been submitted previously as annex 1 to the answering brief, so that both documents are part of the evidence in this case. Regarding annexes 3, 4 and 7 presented by the State and contested by the representatives, the Court notes that they contain pertinent information that is also useful to decide the case. Accordingly, the Court admits annexes 3, 4, 7 and 10.

B. Admissibility of the testimonial and expert evidence

33. The Court received affidavits prepared by expert witness Óscar A. Cabrera, and presumed victims Sandra Lisbeth Zepeda Herrera, Francisco Sop Quiej, Dora Marina Martínez Sofoiya, Carlos Fernando Coc Chajón, Luis Alberto Hernández Estrada, María Magdalena Rodas Mérida, Luis Rolando Cuscul Pivaral, Rocío Samayoa Bran and Olga Alicia Paz Bailey. Regarding the evidence provided during the public hearing, the Court received the statements of presumed victims Zoila Marina Pérez Ruíz and Felix de Jesús Cabrera Morales, and also the expert opinion of Ricardo Boza Cordero.²¹ In this regard, the Court finds it pertinent to admit the statements of the presumed victims and the expert opinions provided during the public hearing and by affidavit, insofar as they are in keeping with the purpose defined by the President in the order requiring them and the object and purpose of this case.

VII. FACTS

34. This case refers to 34 individuals who are currently living with the human immunodeficiency virus (hereinafter also "HIV") in Guatemala, 15 individuals who lived with this condition but who are now deceased, and their next of kin.²² The violations alleged by the Commission in its Merits Report occurred owing to the total absence of medical care for this group of people prior to 2006-2007, to the deficient medical care they received following those years, and to the lack of judicial protection. In this section, the main facts of the case will be described in the following order: (a) the HIV/AIDS situation in Guatemala; (b) the individualization of the presumed victims and their next of kin, and (c) the remedies and actions filed by the presumed victims.

A. The HIV/AIDS situation in Guatemala

A.1. General information on HIV/AIDS

35. The human immunodeficiency virus attacks the human body's immune system (defense system), specifically destroying the CD4 or T lymphocytes, which are the most important defense cells of the immune system. HIV may be active for years without any symptom, so that people who are infected may not know this and, even if they seem and feel completely healthy, they can transmit the disease to other people. Pregnant women can

²⁰ These annexes relate to the following: No. 3: Photographic record of the medical centers that have HIV/AIDS clinics; No. 4: Information on the care provided by the San José Hospice Association to people with HIV/AIDS; No. 7: Copy of press release 002 of the International Commission against Impunity in Guatemala (CICIG) and Newspaper article from "El Periódico" of February 14, 2018, by the journalist Cindy Espina; Article entitled "El Ministerio de Salud finaliza Convenio Anticorrupción con CICIG" [Ministry of Health ends Anti-corruption Agreement with CICIG]; No. 10: Government Decree No. 266 of September 22, 2016.

²¹ The purpose of the statements was established in the order of the President of the Court of February 8, 2018 (*supra* footnote 8).

²² See Annex I to this judgment.

transmit HIV during pregnancy, while giving birth and, following the birth, through their breast milk. Acquired immunodeficiency syndrome (hereinafter also "AIDS") is the final stage of the HIV infection. It is a medical condition that occurs 7 to 10 years after a person has become an "asymptomatic carrier of HIV." It is characterized by a significant weakening of the body's defense system, which causes a series of severe illnesses that may result in death. The infections that accompany AIDS are known as "opportunistic" infections because the pathogens that cause them take advantage of the opportunity offered by a weakened immune system.²³

36. The most common opportunistic diseases and infections include bacterial diseases such as tuberculosis; protozoal diseases such as pneumonia; fungal diseases such as candidiasis; viral diseases such as herpes, and HIV-associated malignancies such as Kaposi sarcoma, lymphoma and squamous cell carcinoma. HIV is transmitted through blood or products derived from contaminated blood, through sexual relations, vertically (mother-to-child) and by workplace accidents or accidental perforation with medical instruments or contaminated needles. The natural course of an HIV infection is divided into four stages: (a) eclipse period (1-2 weeks); (b) primary or acute infection (2-4 weeks); (c) chronic infection or clinical, but not virological or immunological, latency (2-20 years), and (d) AIDS stage (1-2 years).²⁴

37. Antiretroviral therapy (ART) suppresses viral replication and may greatly improve quality of life, but does not eliminate HIV disease. The first treatment with antiretroviral drugs offers the best chance of effectively suppressing the virus, immune recovery and clinical benefit. However, for the treatment to be successful, the drugs must be taken as prescribed. One of the main characteristics of the HIV virus is its genetic diversity, in view of its high replication, the tendency for errors in the reverse transcriptase, and the large number of people infected. This characteristic results in high rates of mutation of the virus. Thus, patients with HIV must adhere to their treatment strictly because, to the contrary, the virus can mutate making it resistant to the antiretroviral drugs.²⁵

38. According to the World Health Organization (hereinafter also "WHO"), the early use of ART for people living with HIV reduces the risk of transmitting the virus to their sexual partners and to individuals with whom they share drugs. It has also been established that treatment of HIV/AIDS requires not only the treatment of those living with the virus, but also of their partners, even if the latter do not have the virus, and other key populations. In this regard, WHO has recommended that, in partnerships where one of the partners does not have HIV, both partners should be given ART to reduce the risk of transmission of the

²³ Cf. Joint United Nations Program on HIV and AIDS (UNAIDS), *Comunicar en VIH y SIDA, Manual de capacitación en VIH y SIDA para comunicadores sociales*, STATOIL, 1ra. Edición, Caracas, 2006, p. 4; World Health Organization (WHO), *Elimination of mother-to-child transmission (EMTCT) of HIV and syphilis: Global guidance on criteria and processes for validation*, 2015, p. 3, and Joint United Nations Program on HIV and AIDS (UNAIDS), *HIV-related opportunistic diseases*, 1999, p. 3. Available at: http://data.unaids.org/publications/irc-pub05/opportu_en.pdf

²⁴ Cf. Joint United Nations Program on HIV and AIDS (UNAIDS), *HIV-related opportunistic diseases*, 1999, p. 2. Available at: http://data.unaids.org/publications/irc-pub05/opportu_en.pdf, and expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folios 1459 and 1460).

²⁵ Cf. Joint United Nations Program on HIV and AIDS (UNAIDS), *UNAIDS Terminology Guidelines* (evidence file, folio 8456); World Health Organization, *Consolidated guidelines on the use of antiretroviral drugs for treating and preventing HIV infection. Recommendations for a public health approach* (evidence file, folios 14346 and 14461), and expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folios 1458 and 1467).

virus from the infected partner. Universal access to ART is a matter of public health because it is a mechanism that reduces transmission of the virus among the population.²⁶

39. The Court notes that the preceding concepts have been taken from different reliable sources, but medical science is continually making progress in this area and, consequently, the references cited here as an illustration are without prejudice to more recent discoveries, and do not call them into question. In addition, the Court takes no position in technical discussions and questions relating to the medical and biological sciences.

40. According to data from the Joint United Nations Program on HIV and AIDS (hereinafter also "UNAIDS"), since 1981, 76.1 million people have become infected by HIV, 35 million people have died from AIDS-related illnesses since the start of the epidemic; 36.7 million people were living with HIV in 2016; 20.9 million people had access to antiretroviral therapy in June 2017; 1.8 million people became newly infected with HIV in 2016, and one million people died from AIDS-related illnesses in 2016. In Guatemala, UNAIDS estimated that 46,000 people were living with HIV in 2016 and, of these, 36% had access to antiretroviral therapy. Among pregnant women, 19% had access to treatment or prophylaxis to prevent the transmission of HIV to their babies. According to figures from the Pan-American Health Organization (hereinafter "PAHO") for 2013, the HIV epidemic in Guatemala was classified as concentrated because there was a prevalence of less than 1% in the general population; also, it was estimated that each year there were 7,557 new cases, which situated Guatemala as the country with the greatest number of people living with HIV in Central America.²⁷

A.2. Laws enacted to treat HIV/AIDS in Guatemala

41. The Guatemalan legal framework contains various provisions on protection of the right to health and on the State's obligations with regard to providing care for people living with HIV/AIDS. Article 93 of the 1985 Constitution of the Republic of Guatemala (hereinafter "the Guatemalan Constitution") establishes that "[t]he enjoyment of health is a fundamental right of the individual, without discrimination of any kind."²⁸ Regarding the State's obligations in relation to health and social assistance, article 94 of this instrument indicates that "the State shall ensure health and social assistance for all the inhabitants," and that it "shall implement, through its institutions, prevention, promotion, curative, rehabilitation, coordination and other pertinent actions in order to ensure the most complete physical, mental and social well-being." In addition, article 95 recognizes that "[t]he health of the inhabitants of the Nation is a public right," and that "[e]very person and institution is obliged to safeguard its conservation and restoration."

42. With regard to social security, article 100 of the Guatemalan Constitution indicates that "[t]he State recognizes and guarantees the right to social security for the benefit of the inhabitants of the Nation," and that "[t]he system is established as a national, standardized

²⁶ The World Health Organization has mentioned the following as key populations: "sex workers, men who have sex with men, transgender people, and those who inject drugs." Cf. World Health Organization, Guidance on couples HIV testing and counselling including antiretroviral therapy for treatment and prevention in serodiscordant couples, 2012, pp. 5 and 31.

²⁷ Cf. Joint United Nations Program on HIV and AIDS (UNAIDS), Fact sheet – World AIDS Day: Global HIV statistics 2017. Available at: <http://www.unaids.org/es/resources/fact-sheet>; Pan-American Health Organization, Annual Report 2012-2013 (evidence file, folio 9581); Joint United Nations Program on HIV and AIDS (UNAIDS), UNAIDS Terminology Guidelines ONUAIDS (evidence file, folio 8460), and Joint United Nations Program on HIV and AIDS (UNAIDS), Guatemala. Available at: <http://www.unaids.org/es/regionscountries/countries/guatemala>.

²⁸ Cf. 1985 Constitution of the Republic of Guatemala (evidence file, folio 9738).

and obligatory public function." This article of the Constitution also establishes that "[t]he implementation of the social security system corresponds to the Guatemalan Social Security Institute, which is an autonomous entity with legal personality, and its own assets and functions. The Organic Law of the Guatemalan Social Security Institute of October 30, 1946, created the Guatemalan Social Security Institute (hereinafter "IGSS"), as an autonomous institution with the mandate "to apply, for the benefit of the people of Guatemala, a national, standardized and obligatory social security regime, in keeping with the minimum protection system."

43. On October 2, 1997, the Guatemalan Health Code was published (hereinafter "Health Code"). Article 4 of the Code establishes that the State "shall implement, through the Ministry of Public Health and Social Assistance and in coordination with state institutions, decentralized and autonomous entities, organized and private communities, health promotion, prevention, curative and rehabilitation actions, as well as the pertinent complementary actions, in order to ensure that Guatemalans may have the most complete physical, mental and social well-being." To this end, the same article indicates that "the State, through the Ministry of Public Health and other public institutions, shall ensure that the provision of health services free of charge to all Guatemalans is guaranteed." Regarding the allocation of resources and access to services, articles 21 and 55 of the Health Code stipulate the following:

ARTICLE 21. ALLOCATION OF RESOURCES. The State shall allocate the necessary resources for the public funding of the provision of health services for the general public and, obligatorily and as a priority, for that segment whose social and economic development has been most neglected.

ARTICLE 55. ACCESS TO SERVICES. The public and private establishments in the sector must provide patients with communicable diseases and their contacts, with access to an etiological diagnosis and health care in conditions that respect their personal integrity and the confidential nature of the case, without detriment to the provisions of article 54.

44. Regarding the treatment of sexually transmitted diseases and AIDS, article 62 of the Health Code establishes that the Ministry of Health is responsible for devising, evaluating and supervising actions aimed at the control of sexually transmitted diseases. The same article establishes that "[g]iven the magnitude, importance and epidemiological characteristics of sexually transmitted diseases (STD) and the acquired immunodeficiency syndrome (HIV/AIDS), the Ministry of Health shall support the specific implementation of STD and HIV/AIDS education, detection, prevention and control programs with the participation of different sectors."²⁹ Similarly, on June 2, 2000, Congress adopted Decree No. 27-2000, the "General Law to combat the human immunodeficiency virus (HIV) and the acquired immunodeficiency syndrome (AIDS) and for the promotion, protection and defense of human rights in relation to HIV/AIDS" (hereinafter also "General Law to combat HIV/AIDS").³⁰

45. The General Law to combat HIV/AIDS recognizes HIV/AIDS as an urgent national social problem. The law's purpose was to create a legal framework to implement the necessary mechanisms for education, prevention, epidemiological surveillance, research, care and monitoring of sexually transmitted infections (hereinafter also "STI"), HIV and

²⁹ Cf. Decree 90-97 of October 2, 1997, Health Code of Guatemala, articles 1, 2, 4, 21, 55 and 62 (evidence file, folios 9850, 9851, 9856, 9864 and 9865).

³⁰ Cf. Decree 27-2000 of June 2, 2000, General Law to combat the human immunodeficiency virus (HIV) and the acquired immunodeficiency syndrome (AIDS) and for the promotion, protection and defense of human rights in relation to HIV/AIDS (evidence file, folios 9914-9928).

AIDS, as well as to guarantee the respect, promotion, protection and defense of the human rights of those suffering from such infections. Thus, article 35 established that any person diagnosed with HIV/AIDS must receive immediate comprehensive care, in the same conditions as others, respecting their wishes, dignity, individuality and confidentiality; and that no health worker may refuse to provide the care required by a person living with HIV/AIDS, and should take the recommended biosafety measures. Regarding the provision of health services, article 48 of the General Law to combat HIV/AIDS stipulates:

The Ministry of Public Health and Social Assistance shall provide health care services to people living with HIV/AIDS that ensure them counselling, support and the most recent medical treatment, individually or in group. This care may be provided in the home or as an outpatient and shall be designed to respond to their physical psychological and social needs. Also, through the Program for the Accessibility of Medicines (PROAM), the Ministry of Public Finance and Economy shall implement a program that allows access to quality antiretroviral drugs at the national and international level, at a cost accessible to people living with HIV/AIDS.

46. On September 6, 2002, the President of Guatemala ratified the "Regulations to the General Law to Combat the Human Immunodeficiency Virus (HIV) and the Acquired Immunodeficiency Syndrome (AIDS) and for the Promotion, Protection and Defense of Human Rights in the presence of HIV/AIDS" (hereinafter also "Regulations to the General Law to combat HIV/AIDS"), which reiterated that HIV/AIDS was an urgent national problem and that the Ministry of Public Health and Social Assistance (hereinafter also "Ministry of Public Health") should ensure that all its health units had the necessary basic equipment and inputs to provide quality comprehensive care and that a lack of equipment or inputs could never be used as an excuse not to provide care to a person with HIV/AIDS.³¹ Regarding access to medication, article 32 of the Regulations established:

Pursuant to articles 35 and 48 of the Law, the MINISTRY OF PUBLIC HEALTH AND SOCIAL ASSISTANCE shall provide, in units that have the minimum capacity, quality comprehensive care, including access to antiretroviral drugs in keeping with the national protocols to treat HIV/AIDS. [...] To obtain a better quality and price for antiretroviral drugs, a committee shall be established coordinated by the NATIONAL AIDS PROGRAM with delegates from the Ministries of Public Finance and of Economy, and from the Program for the Accessibility of Medicines (PROAM) for the purposes of purchases on the domestic and international markets [...].
The Program for the Accessibility of Medicines (PROAM) may distribute the antiretroviral drugs to affiliated pharmacies that have qualified pharmaceutical-chemical staff, under the responsibility and supervision of a treating physician who must provide the corresponding prescription for the drugs to be supplied. The Program referred to in this paragraph does not conduct direct individual sales.

47. Regarding the allocation of funds, article 35 of the Regulations to the General Law to Combat HIV/AIDS established that the Ministry of Public Health would transfer the funds allocated to the exclusive use and implementation of the strategies and actions established in the Law to the National AIDS Program, which would promote their decentralized use at the level of health regions, health districts, and the community. It also established that the Ministry of Public Finance would allocate and include the specific financial envelope in the State's General Income and Expenditure Budget so that the National AIDS Program could

³¹ Cf. Government Decree No. 317-2002 of September 6, 2002, Regulations to the General Law to Combat the Human Immunodeficiency Virus (HIV) and the Acquired Immunodeficiency Syndrome (AIDS) and for the Promotion, Protection and Defense of Human Rights in the presence of HIV/AIDS, article 31 (evidence file, folio 9938).

implement the programs established for education, prevention, epidemiological surveillance, research, care and monitoring of STI/HIV/AIDS.³²

48. The State has enacted other provisions related to care for people living with HIV. They include the issue of Ministerial Decree No. 472-2012 of August 13, 2012, which ensured the supply of Lopinavir/Ritonavir for patients of the National Program for the Prevention and Control of STI/HIV/AIDS (hereinafter also "PNPC"), and of Ministerial Decree No. 871-2012 of September 26, 2012, approving an international cooperation framework for the supply of and access to the antiretroviral drugs used by the PNPC.³³

A.3. Other measures adopted to treat HIV/AIDS in Guatemala

49. Starting in 1985, the State adopted public policies to prevent and treat the HIV/AIDS epidemic following identification of the first cases of the infection. In 1996, the first national strategic plan to respond to HIV was drawn up. In 1999, at the request of the Ministry of Public Health and in close collaboration with the *Asociación Coordinadora de Sectores de Lucha contra el SIDA* (Association to Coordinate the Sectors combatting AIDS), the 1999-2003 STI/HIV/AIDS National Strategic Plan was prepared. In 2000, the General Law to combat HIV/AIDS established the creation of the National Program for the Prevention and Control of STI/HIV/AIDS. In 2002, the Population and Social Development Policy was published establishing the goal of "a 20% decrease in sexually transmitted infections, HIV and AIDS in the long term."³⁴

50. In 2005, the President of the Republic, by Government Decree No. 638-2005, ratified the Public Policy for the Prevention of Sexually Transmitted Infections (STI) and Acquired Immunodeficiency Syndrome (AIDS). The same year, the PNPC published the Guatemalan Guidelines for Antiretroviral Treatment and Treatment of Opportunistic Infections, and the Ministry of Public Health published the Guidance Manual on STI/HIV/AIDS. In March 2006, a new National Strategic Plan for the Prevention, Care and Control of STI, HIV and AIDS was adopted for the period 2006-2010. In 2007, the National Information, Education and Communication Strategy to change behavior was launched – Information, Education Communication/behavioral change (IEC/bc) for the prevention of STI, HIV and AIDS in Guatemala. The same year, the Ministry of Public Health, together with the PNPC, published the Manual on the comprehensive treatment of sexually transmitted infections emphasizing syndrome management and, in 2008, it published the Manual on the feeding of infants whose mothers are living with HIV.³⁵

³² Cf. Government Decree No. 317-2002 of September 6, 2002, Regulations to the General Law to Combat the Human Immunodeficiency Virus (HIV) and the Acquired Immunodeficiency Syndrome (AIDS) and for the Promotion, Protection and Defense of Human Rights in the presence of HIV/AIDS, Articles 2, 31, 32 and 35 (evidence file, folios 9931, 9938 and 9939).

³³ Cf. Communication M12-OAS-F.9.2.1 No. 1330-2012 of November 26, 2012, signed by the Permanent Representative to the Organization of American States, Ambassador Rodrigo Viemann, and addressed to the Executive Secretary of the Inter-American Commission on Human Rights, Emilio Álvarez Icaza (merits file, folio 210).

³⁴ Cf. National Program for the Prevention and Control of Sexually Transmitted Infections (STI), the Human Immunodeficiency Virus (HIV) and the Acquired Immunodeficiency Syndrome (AIDS) (evidence file, folio 8750); Decree 27-2000 of June 2, 2000, General Law to Combat the Human Immunodeficiency Virus (HIV) and the Acquired Immunodeficiency Syndrome (AIDS) and for the Promotion, Protection and Defense of Human Rights in the presence of HIV/AIDS, article 4 (evidence file, folio 9915), and the Population and Social Development Policy established as a goal the "a 20% decrease in sexually transmitted infections and HIV and AIDS in the long term" [...] emphasizing that, "[it was] important to reinforce comprehensive care for STI, HIV and AIDS, and inform and educate the population in order to enhance prevention" (evidence file, folio 9132).

³⁵ Cf. Government Decree No. 638-2005 of November 30, 2005, ratifying the Public Policy for the Prevention of Sexually Transmitted Infections (STI) and of Acquired Immunodeficiency Syndrome (AIDS) (evidence file, folio

51. In 2011, the 2011-2015 National Strategic Plan for the Prevention, Care and Control of STI, HIV and AIDS was adopted and the Guidelines on nutritional care for people living with HIV was published. In 2012, the PNCP, together with the National Reproductive Health Program, published the Manual on Sexual and Reproductive Health Care for Women living with advanced HIV (AIDS), and also the Guidelines for Facilitators on gender and interculturality: sharing information on the prevention of STI, with emphasis on HIV, syphilis and hepatitis B. Also, in 2013, the Ministry of Public Health adopted the 2013-2016 National Plan for the Elimination of Mother-to-Child Transmission of HIV and Congenital Syphilis, and published Guidelines for antiretroviral treatment and treatment of opportunistic infections in Guatemala.³⁶

52. In 2014, the 2015-2019 National Plan on Positive Prevention, Dignity and Health was adopted. In June 2016, an inter-institutional cooperation agreement on "Prevention through Education" was signed by the Ministry of Education and the Ministry of Public Health.³⁷ According to information forwarded by the representatives, a new strategic plan for 2016-2020 is under discussion at the present time.

53. Additionally, various civil society organizations and international agencies have provided financial assistance or treatment for people living with HIV/AIDS in Guatemala. The United States Agency for International Development (hereinafter "USAID"), under the Program for Strengthening the Central American Response to HIV/AIDS (PASCA), UNAIDS, the United Nations Children's Fund (UNICEF) and the United Nations Development Programme (UNDP) have provided international aid to respond to the HIV/AIDS epidemic in the country. Likewise, in 2003, the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter "the Global Fund") undertook to provide a total of US\$40,921,917 over five years.³⁸ State actions to protect people living with HIV/AIDS have been complemented by the work of non-governmental organizations.³⁹

9942-9944); Public Policy for the Prevention of Sexually Transmitted Infections (STI) and Response to the Epidemic of Acquired Immunodeficiency Syndrome (AIDS) (evidence file, folios 10064-10094); Guatemalan Guidelines for Antiretroviral Treatment and Treatment of Opportunistic Infections, 2005 (evidence file, folio 9946-10049); Guidance Manual on STI/HIV/AIDS, 2005 (evidence file, folio 16171-16229); National Program for the Prevention and Control of Sexually transmitted infections (STI), the Human Immunodeficiency Virus (HIV) and the Acquired Immunodeficiency Syndrome (AIDS) (evidence file, folios 8739-8797); National Information, Education and Communication Strategy to change behavior - Information, Education Communication/behavioral change (IEC/bc) for the prevention of STI, HIV and AIDS in Guatemala, 2007 (evidence file, folio 15134-15457); Manual on the comprehensive treatment of sexually transmitted infections emphasizing syndrome management, 2007 (evidence file, folio 16092-16169), and Manual on feeding babies whose mothers are living with HIV, 2008 (evidence file, folio 15682-15749).

³⁶ Cf. 2011-2015 National Strategic Plan for the Prevention, Care and Control of STI, HIV and AIDS (evidence file, folio 14982-15079); Guidelines on nutritional care for people living with HIV, 2011 (evidence file, folios 13961-14072); Manual on Sexual and Reproductive Health Care for Women living with advanced HIV (AIDS), 2012 (evidence file, folio 14120-14161); Guidelines for Facilitators on gender and interculturality: sharing information on the prevention of STI, with emphasis on HIV, syphilis and hepatitis B, 2013 (evidence file, folio 15776-15844); 2013-2016 National Plan for the Elimination of Mother-to-Child Transmission of HIV and Congenital Syphilis (evidence file, folios 14936-14974), and Guidelines for antiretroviral treatment and treatment of opportunistic infections in Guatemala, 2013 (evidence file, folios 14074-14118).

³⁷ Cf. 2015-2019 National Plan on Positive Prevention, Dignity and Health, 2014 (evidence file, folios 15081-15132), and Inter-institutional cooperation agreement on "Prevention through Education" signed by the Ministry of Education and the Ministry of Public Health and Social Assistance, June 2016 (evidence file, folios 14173-14183).

³⁸ Cf. Public Policy for the Prevention of Sexually Transmitted Infections (STI) and Response to the Epidemic of Acquired Immunodeficiency Syndrome (AIDS) (evidence file, folios 10069 and 10070).

³⁹ Cf. National Program for the Prevention and Control of Sexually Transmitted Infections (STI), the Human Immunodeficiency Virus (HIV) and the Acquired Immunodeficiency Syndrome (AIDS) (evidence file, folios 8750, 8753 and 8757).

54. In relation to health care, the Ministry of Health began to provide antiretroviral drugs in 1999. According to information provided to the Court, in 2007 and 2008, with financing from the Global Fund, the coverage of antiretroviral treatment in Guatemala was 43%. In 2013, the Planning Secretariat of the Office of the President of the Republic of Guatemala indicated that approximately 50% of the estimated population (adults and children) living with HIV were receiving antiretroviral treatment. In this regard, the Ministry of Health has stressed the need to reposition the goal of universal access at the political level and cover a greater percentage of those needing antiretroviral treatment in Guatemala.⁴⁰

B. The presumed victims and their next of kin

55. The Court recalls that this case refers to 49 presumed victims living with HIV in Guatemala and their next of kin, who are divided into three groups:⁴¹ those who are already deceased, those who are still alive, and their next of kin. Owing to the importance of evaluating the specific circumstances of each of the 49 presumed victims in order to analyze the medical treatment provided by the State after 2004, Annex 3 to this judgment contains a description of the proven facts in relation to each of them, and lists their next of kin. In this regard, the Court notes that, due to the number of presumed victims, the time that has elapsed since they were diagnosed with HIV, the remoteness of the place of residence of some of them, their socio-economic situation, the absence of their medical records, and since the State has not contested the facts presented by the Commission and the representatives, the Court finds it pertinent to accord greater probative value to the statements of the presumed victims and to the information submitted by the doctors who have accompanied them throughout their illness and the proceedings before the Commission and the Court. Consequently, the Court has considered as accepted the facts that were not expressly denied by the State, while the contrary has not appeared in the case file and, if this is so, it has described the facts that are consistent with the evidence provided by the Commission, the representatives and the State, including the corresponding citation.⁴²

C. Actions and appeals filed by the presumed victims

C.1. Letters addressed to the President and other authorities

⁴⁰ Cf. National Program for the Prevention and Control of Sexually Transmitted Infections (STI), the Human Immunodeficiency Virus (HIV) and the Acquired Immunodeficiency Syndrome (AIDS) (evidence file, folio 8750); Dra. Laura León Noriega, *Diagnóstico de Situación y Respuesta al VIH-SIDA. Análisis y Conclusiones*, Guatemala, January 2008 (evidence file, folio 9050); Planning Secretariat of the Office of the President of the Republic of Guatemala, Progress Report 2013. Population and Social Development Policy (evidence file, folios 9133 and 9189), and National Report on advances in the fight against HIV and AIDS, 2004 (evidence file, folio 8827).

⁴¹ See table in annex 1 to this judgment.

⁴² Cf. *Case of the Members of the village of Chichupac and neighboring communities of the Municipality of Rabinal v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 328, para. 75. The Court considered that the information forwarded by the Commission and the representatives with the regard to the presumed victims who are now deceased was provided in good faith. The Court also took into consideration that the State did not expressly deny that those individuals had died or provide any evidence in this regard. Moreover, on August 8, 2018, the Court requested the State, as helpful evidence, to forward information and/or documentation relating to the death certificates of: 1) Alberto Quiché Cuxevea, 2) Facundo Gómez Reyes, 3) Juana Aguilar, 4) Marvin Josué Lucas González, 5) Rita Mariana Dubón Orozco, 6) Roberto Gómez García, 7) José Rubén Delgado López, 8) Petrona López, and 9) Reina López Mujica. The State, in a brief of August 21, 2018, indicated that it was unable to forward the evidence requested by the Court. Consequently, the Court considered proved that the said presumed victims were deceased.

56. On November 23, 2001, the *Asociación Coordinadora de Sectores de Lucha contra el SIDA* (hereinafter also "ACSLCS") sent a letter to the Minister of Health requesting a meeting to discuss: (i) the Regulations to the HIV/AIDS Law; (ii) the HIV/AIDS comprehensive care unit, and (iii) the short-, medium- and long-term situation of antiretroviral treatment.⁴³ On May 27, 2002, ACSLCS and other organizations representing people living with HIV/AIDS in Guatemala sent a letter to the President of the Republic.⁴⁴ In this letter, they indicated that the State only provided antiretroviral treatment with brand-name drugs to 27 individuals, when it could provide treatment to 300 people by using generic drugs, and that this was a violation of article 4 of the Constitution. On June 10, 2002, the Ombudsman sent a letter to the President of the Republic indicating his unconditional support for the letter of May 27, 2002. He indicated that only a limited number of people were receiving antiretroviral treatment through an international agency – and this for only three years. He also asserted that, according to estimates, 4,000 people required this treatment.⁴⁵ Neither of the two letters received a reply.⁴⁶

C.2. Application for amparo before the Constitutional Court

57. Owing to the lack of a response to the said letters by the President and the Ministry of Health, on July 26, 2002, 22 people, including 13 of the presumed victims⁴⁷ and civil society organizations, filed an appeal before the Constitutional Court. In this appeal they asserted the following:

The negative and omissive reaction of the President to the letter dated May 27 this year, in which his immediate intervention was clearly and forcefully requested in order to ensure compliance with the constitutional obligation of the State of Guatemala, and the failure to comply with the provisions of the Constitution, which was equivalent to non-compliance with a constitutional mandate, mean that the action requested, in addition to being legitimate, should entail the obligation of the responsible authority to respect the neglected constitutional guarantee by granting a provisional amparo and, following exhaustion of the respective instances, the final amparo.⁴⁸

58. The applicants argued that the said refusal or omission by the President violated the right to protection, the right to life, the right of petition, the rights inherent to the individual, and the right to health. They also argued that the violations of these rights arose because the State had not provided any type of social assistance to counteract the gravity of their situation as people living with HIV/AIDS; that, in Guatemala, at least 4,000 people had been diagnosed with AIDS and urgently required treatment, which would not only help them to survive, but also improve their quality of life; that, since 1996, the so called "highly active antiretroviral therapy (HAART), which consisted in the combination of at least three

⁴³ Cf. Letter of the *Asociación Coordinadora de Sectores de Lucha contra el SIDA* of November 23, 2001 (evidence file, folio 8).

⁴⁴ Cf. Letter of the Ombudsman of June 10, 2002 (evidence file, folios 10 and 11).

⁴⁵ Cf. Letter of the Ombudsman of June 10, 2002 (evidence file, folios 10 and 11).

⁴⁶ Cf. Initial petition lodged before the Inter-American Commission on Human Rights by the Center for Justice and International Law on August 25, 2003 (evidence file, folio 469).

⁴⁷ The appeal was filed, *inter alia*, by the following presumed victims in this case: Luis Rolando Cuscul Pivaral, Luis Armando Linares Ruano, Facundo Gómez Reyes, Marta Alicia Maldonado Paz, Miguel Lucas Vaíl, Ingrid Barillas Martínez, Jorge Armando Tavares Barreno, Melvin Yovani Ajtun, Mardo Luis Hernández and Hernández, Alberto Quiché Cuxeve, Teresa Magdalena Ramírez Castro, Rita Dubón Orozco and Dora Marina Martínez Sofoifa. Cf. Application for amparo filed before the Constitutional Court on July 26, 2002 (evidence file, folio 13).

⁴⁸ Application for amparo filed before the Constitutional Court on July 26, 2002 (evidence file, folio 29).

antiretroviral drugs, which must be taken life-long by people with HIV/AIDS," had been available, and that the use of generic antiretroviral drugs could increase the coverage of the medical treatment for people living with HIV/AIDS in Guatemala.⁴⁹

59. Consequently, they asked the Constitutional Court to decide the application for amparo as soon as possible; to declare that the State was obliged to guarantee the life of the presumed victims by a policy of procurement and non-discriminatory, systematic and daily distribution of the antiretroviral treatment, preferably high quality generic drugs that were available on the market, and to re-establish the legal situation of the applicants, ordering their immediate access to health and to life by immediate care under emergency policies.⁵⁰ In response to the application, on August 1, 2002, the President of the Republic at the time submitted a brief to the Constitutional Court. He indicated that, in the case, "there was no evidence of any links between the applicants and the grievance denounced [...] in which it appears that a popular cause is being invoked that can never be debated by means of an application for amparo," and requested that the constitutional application for amparo be declared inadmissible and the applicants be required to pay the legal costs.⁵¹

60. On October 10, 2002, the General Directorate for Health Regulation, Monitoring and Control (hereinafter "DGRVC"), sent a communication to the Constitutional Court advising that, on August 20, 2002, the President of the Republic had held a meeting with the Minister of Health and the President of ACSLCS, during which he authorized a special appropriation of 500,000.00 quetzals "to meet the requirements of people living with HIV/AIDS." The DGRVC advised that this appropriation had been transferred by the Ministry of Finance to the Ministry of Health on September 2, 2002, for the treatment of 80 adults and 80 children.⁵² In this regard, on October 29, 2002, the applicants indicated, as arguments during a hearing, that it was true that the President of Guatemala had been willing to respond to the requests made in the initial application, owing to which 500,000.00 quetzals had been allocated to treat people with HIV/AIDS. Nevertheless, they asserted that "the reasons why the application for amparo was filed subsist because, although it is true that the money has been deposited, for one reason or another it has not been possible to start the antiretroviral treatment for the people living with HIV/AIDS" and, therefore, the State had not complied with its constitutional obligation to treat all those living with that diagnosis, because it was only providing treatment to 27 of them.⁵³

61. In this regard, the applicants indicated that the State had accepted that it was unable to provide antiretroviral treatment to the approximately 4,000 persons living with HIV or who had developed AIDS, because this treatment cost between eight thousand and ten thousand quetzals (Q.8,000.00 and Q.10,000.00) a month, without including the

⁴⁹ Cf. Application for amparo filed before the Constitutional Court on July 26, 2002 (evidence file, folios 20-24).

⁵⁰ Cf. Application for amparo filed before the Constitutional Court on July 26, 2002 (evidence file, folios 39 and 41).

⁵¹ Cf. Brief of Alfonso Portillo submitted to the Constitutional Court on August 1, 2002 (evidence file, folios 44-47).

⁵² The DGRVC provided the following information: (1) it had been decided to provide treatment to 80 adults and 80 children; (2) the terms of reference had been prepared for the procurement of the antiretroviral drugs, which was subject to tender; (3) the 500,000 quetzals had been deposited with UNDP to expedite and ensure the transparency of the procurement process, and (4) the human resources required for treating these people were being hired. Cf. Brief of the General Directorate for Health Regulation, Monitoring and Control of October 10, 2002 (evidence file, folio 57).

⁵³ Cf. Brief of October 29, 2002, outlining the arguments of the applicants during the hearing (evidence file, folios 60 and 61).

expenses arising from the recurrent illnesses, which would result in an expenditure of around four hundred and eighty million quetzals (Q.480,000.000.00) each year to provide treatment to these people. They also asked the Constitutional Court to issue an order requesting useful evidence to ratify the connection that existed between the violation of the human rights in question and the applicants for amparo, because all of them were affected by the deficient medical care and the absence of antiretroviral treatment in their capacity as people living with HIV/AIDS. Lastly, they asked the Constitutional Court to declare the application for amparo admissible and to order the State to enact public policies that guaranteed the collective right to life of people living with HIV/AIDS and the distribution of antiretroviral drugs, without any discrimination, in the country's hospitals and health centers.⁵⁴

62. In a ruling of January 29, 2003, the Constitutional Court considered that the applicants had accepted that the Constitutional President of the Republic of Guatemala, at a meeting on August 20, 2002, had received the applicants' representatives and had ordered the immediate transfer of a special appropriation of five hundred thousand quetzals (Q.500,000.00) for the treatment of people in need living with HIV/AIDS for, at least, the last quarter of that year while the State developed a serious and committed policy in relation to the future situation of the applicants, and that the said transfer had been made from the Ministry of Public Finance to the Ministry of Public Health on September 2, 2002. Consequently, it argued that the grievance had ceased and, therefore, the application filed was unsubstantiated. Accordingly, it declared that the application was without merit.⁵⁵

VIII. MERITS

63. The Court recalls that this case refers to 49 people who are or were living with HIV in Guatemala, and their next of kin. Of these people, 15 were deceased, 34 were still alive, and, in its Merits Report, the Commission had considered some of their next of kin as presumed victims. It is a proven fact that the 49 presumed victims were diagnosed with HIV between 1992 and 2004, and that most of them had not received public medical care prior to 2004. In addition, it has been proved that some of them suffered from one or several of the following conditions: they had contracted opportunistic infections and, in some cases, they had died due to such infections; they were people with limited resources; they were mothers or fathers who provided their families with financial and/or moral support; they were poorly educated; the effects of their condition as people living with HIV did not allow them to continue the activities they had carried out before becoming infected; they lived in areas located far from the clinics where they should receive medical care, and some of them were pregnant women. Taking the foregoing into consideration, the Court will examine and decide the merits of the dispute.

64. Consequently, the Court will proceed to examine: (i) whether the State is responsible for violating the right to health owing to the medical care – or lack of it – provided by the State to the 49 presumed victims as people living with HIV, and also (ii) whether the State violated the principle of progressivity owing to the alleged retrogressive measures it adopted that prejudiced the full realization of the right to health in Guatemala. In addition, the Court will assess whether the State (iii) violated the rights to personal integrity and to life of the 49 presumed victims, and (iv) owing to the ruling of the Constitutional Court, it

⁵⁴ Cf. Brief of October 29, 2002, outlining the arguments of the applicants during the hearing (evidence file, folios 61-66).

⁵⁵ Cf. Ruling of the Constitutional Court of January 29, 2003 (evidence file, folio 82).

violated the rights to judicial guarantees and to effective judicial protection of 13 presumed victims. Lastly, (v) the Court will determine whether the State violated the right to personal integrity of the next of kin of the presumed victims as a result of the suffering that may have been caused by the medical care received by their family members.

VIII-1
RIGHT TO HEALTH, TO PERSONAL INTEGRITY AND TO LIFE IN RELATION TO THE
OBLIGATIONS TO RESPECT AND ENSURE RIGHTS (ARTICLES 26,⁵⁶ 4,⁵⁷ 5⁵⁸ AND
1(1)⁵⁹ OF THE AMERICAN CONVENTION)

A. Arguments of the Commission and the parties

65. The *Commission* examined the merits on two different occasions: first, with regard to the situation prior to 2006/2007, when it alleged that the State had not provided any kind of medical care to the presumed victims, and had not performed the required tests or delivered antiretroviral drugs, which had a serious impact of their health and, consequently, resulted in a violation of their right to life, in some cases in both dimensions of this right (Article 4(1) in relation to Article 1(1)), and to personal integrity (Article 5(1) in relation to Article 1(1)). In this regard, the Commission alleged that the State was responsible for violating the right to life (Article 4(1) in relation to Article 1(1)), because some presumed victims had died due to opportunistic infections as a result of the lack of comprehensive treatment of their HIV, and responsible for violating the right to personal integrity (Article 5(1) in relation to Article 1(1)), owing to the suffering experienced by the presumed victims.

66. Second, the Commission examined the situation after 2006/2007, concluding that, even though the State had implemented some treatment in the public sector for people living with HIV, this treatment had not met the minimum standards to be considered

⁵⁶ Article 26 of the Convention stipulates: "Progressive Development. 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."

⁵⁷ Article 4 of the Convention establishes: "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. 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply. 3. The death penalty shall not be reestablished in states that have abolished it. 4. In no case shall capital punishment be inflicted for political offenses or related common crimes. 5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women. 6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority."

⁵⁸ Article 5 of the Convention stipulates: "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. 3. Punishment shall not be extended to any person other than the criminal. 4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons. 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors. 6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners."

⁵⁹ Article 1(1) of the Convention establishes: "1. 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."

comprehensive and adequate, because there were periods when there were no medicines, no CD4 counts and viral load testing, problems of accessibility because very few public health centers provided the service, lack of the implements required to perform tests, absence of genotyping studies, failure to make timely diagnoses, and absence of psychological support, thus continuing the violation of the rights to life (Article 4(1) in relation to Article 1(1)) and to personal integrity (Article 5(1) in relation to Article 1(1)) of the surviving presumed victims. Furthermore, the Commission took into account that the State had not provided differentiated treatment for women of child-bearing age, or adopted the necessary measures to eliminate the barriers erected by the situation of poverty and extreme poverty of the presumed victims, or in relation to the indigenous population or those with diverse sexual orientations.

67. In relation to Article 26, the Commission considered that the human rights violations alleged in this case should be analyzed in the context of the evolution reflected in the judgments in the cases of *Acevedo Buendía et al.*, *Lagos del Campo* and *the Dismissed Employees of PetroPeru et al.*, which entailed analyzing the right to health under Article 26.

68. The **representatives** considered that the analysis of the alleged violations in this case should be made as a whole, given the interdependence and indivisibility of the rights in question, as well as considering the particular situation of vulnerability of the presumed victims. Thus, they contended that the Court should consider the right to health as an autonomous right, which would allow it to define the measures that the State should take to guarantee the progressive development of this right. The representatives indicated that the recognition of the State's obligations in relation to the right to health was based on what had already been acknowledged in light of the obligations in relation to the rights to life and to personal integrity. In addition, they reiterated that, when analyzing the violations in this case, the Court should consider the existence of enhanced obligations to respect and to guarantee rights based on the presumed victims' situation of structural and intersectional discrimination owing to their condition as people living with HIV, in poverty or extreme poverty, and based on gender and other factors.

69. In this regard, the representatives argued that the State had violated the rights to life, a decent life, integrity and health (Articles 4, 5 and 26 in relation to Articles 1(1) and 2 of the American Convention), because it had failed to adopt positive and concrete measures to provide good quality, acceptable, accessible and comprehensive medical care to the victims, bearing in mind that it was aware of their condition as people living with HIV. In relation to the right to life, they argued that the State was responsible for the death of 13 people owing to the lack of adequate medical care, including the lack of access to antiretroviral drugs and the necessary tests to monitor the evolution of the infection, in addition to other components of comprehensive care. Regarding the right to personal integrity and to a decent life, the representatives argued that the State was responsible for the detrimental effects on the physical and psychological health of the presumed victims over the time during which they did not receive any medical treatment or during which the medical treatment was inadequate. In addition, they indicated that the State discriminated against the presumed victims by not guaranteeing them comprehensive medical care taking into account their different factors of vulnerability added to their HIV-positive status. Moreover, they argued that the State was responsible for failing to put in place measures to avoid vertical transmission in the case of pregnant women.

70. In relation to Article 26, the representatives argued that the State was responsible for violating the right to health of the victims because, even though it was aware of the existence of an HIV epidemic in its territory, it adopted retrogressive measures and did not make as many resources as possible available to prevent the propagation of the virus and to

ensure the right to health. Those measures included legal barriers concerning patents that prevented a permanent supply of low-cost drugs in the health system by not allowing the State to use its financial resources effectively. Specifically, they asserted that Guatemala had adopted regulations that made it impossible to access the drugs required by people living with HIV on a permanent basis, and this had had a direct impact on the presumed victims. In this regard, the Industrial Property Law established a limitation on the legitimate trade of generic drugs, with an impact on access to treatment for people living with HIV. They also argued that such measures have been accompanied by laws and practices in relation to administrative contracts that had prevented an adequate distribution of available resources in order to access drugs. The representatives also argued that corruption had been an obstacle to the available resources being used effectively to guarantee the right to health.

71. The **State** indicated that it had taken all possible steps, including advising patients what they should and should not do, and therefore, strictly speaking, it could not be found responsible if patients did not follow its recommendations. The State asserted that, without prejudice to the eventual responsibility that could be attributed to it owing to the lack of drugs, the psychological effects or habits of a person living with HIV that would help the State comply with its international obligations should be taken into consideration. Regarding the arguments concerning Article 26, the State agreed with the Commission's decision and considered that, in the case of the right to health, there was an obligation of progressive compliance, and this referred to the right to health in general, both preventive and curative, that should be provided to the whole population. However, it argued that the realization of the social and economic rights depended on the situation of each State and, above all, on their financial situation and, therefore, such rights could not be realized in the short-term.

B. Considerations of the Court

72. Based on the positions of the parties and the proven facts, the Court notes that, in this case, the central dispute refers to whether the State is responsible for: (i) the violation of Article 26 of the American Convention, owing to the violation of the right to health of the presumed victims as people living with HIV; (ii) the violation of Articles 4 and 5 of the Convention, owing to the impact that the medical care – or lack of it – could have had on the personal integrity and life of the presumed victims; (iii) the violation of the principle of non-discrimination, in cases where the presumed victims had not been ensured comprehensive medical care that took into account their different factors of vulnerability such as being people living with HIV, especially in the case of pregnant women, and (iv) the violation of the principle of progressivity contained in Article 26 of the American Convention, owing to the alleged retrogressive measures adopted that prejudiced the full realization of the right to health of people living with HIV in Guatemala.

73. In this regard, the Court notes that the main legal problem set forth by the parties to this case relates to the scope of the right to health, understood as an autonomous right derived from Article 26 of the American Convention, and to the competence of this Court to rule on violations of this rights based on Articles 62⁶⁰ and 63⁶¹ of the Convention. In this

⁶⁰ Article 62 of the Convention establishes: "1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention. 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court. 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

regard, the arguments of the Commission and of the representatives follow the approach adopted by the Court since the case of *Lagos del Campo v. Peru*,⁶² which has subsisted in subsequent rulings.⁶³ Indeed, this approach represented a change in the Court's case law in relation to previous cases where the Commission or the representatives had argued violations of the economic, social, cultural and environmental rights (ESCER), which were analyzed based on their connectivity with a civil or political right.⁶⁴ In this regard, the Court recalls that already in the case of *Poblete Vilches et al. v. Chile*, it had indicated the following:

Thus, it is clear that it can be interpreted that the American Convention incorporated into its list of protected rights the so-called economic, social, cultural and environmental rights (ESCER), by derivation from the norms recognized in the Charter of the Organization of American States (OAS), as well as from the rules of interpretation established in Article 29 of the Convention; particularly, that this prevents limitations or exclusions to the enjoyment of the rights established in the American Declaration and even those recognized in the domestic sphere. Also, based on a systematic, teleological and evolutive interpretation, the Court has had recourse to the national and international *corpus iuris* on this matter to provide specific content to the scope of the rights protected by the Convention in order to define the scope of the specific obligations relating to each right.⁶⁵

74. Based on the above, and owing to the importance of this matter for the legal certainty of the inter-American system, the Court finds it pertinent to clarify the change in its case law in this area by an interpretation of Article 26 of the Convention and of its relationship to Articles 1(1), 2, 62 and 63 of this instrument. Consequently, in this section, the Court will rule as follows: (a) on the justiciability of the ESCER; (b) on the right to health as an autonomous and justiciable right; (c) on the violation of the right to health in this case, and (d) on the violation of the rights to personal integrity and to life in this case.

⁶¹ Article 63 of the Convention stipulates: "1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party. 2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."

⁶² Cf. *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, paras. 141 to 150 and 154.

⁶³ Cf. *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 57; *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017. Series C No. 344, para. 192; *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348, para. 220, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 100.

⁶⁴ Cf. *Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs*. Judgment of November 22, 2007. Series C No. 171, para. 117; *Case of Vera Vera et al. v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of May 19, 2011. Series C No. 226, para. 43; *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21 2013. Series C No. 261, para. 130, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 171.

⁶⁵ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 103.

B.1. The justiciability of economic, social, cultural and environmental rights

75. The Court will proceed to interpret Article 26 of the Convention and its relationship to Articles 1(1), 2, 62 and 63 of the American Convention, in order to decide the following: (i) whether Article 26 recognizes rights; (ii) the scope of State obligations in relation to these rights, and (iii) whether the Court has competence to examine violations of such rights. To this end, the Court will have recourse to the Vienna Convention on the Law of Treaties (hereinafter "the Vienna Convention"), which contains the general and customary rules for the interpretation of international treaties which call for the simultaneous and joint application of good faith and the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Thus, in keeping with its consistent jurisprudence, the Court will use the interpretation methods stipulated in Articles 31 and 32 of the Vienna Convention to make this interpretation.⁶⁶ The Court will also use, as appropriate, the rules of interpretation that can be understood from Article 29 of the American Convention.⁶⁷

B.1.1. Literal interpretation

76. First, the Court must make an interpretation based on the ordinary meaning of the terms set out in Article 26 of the Convention which stipulates the following:

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, subject to available resources, 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. The Court recalls that, according to the Vienna Convention, treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁶⁸ Likewise, the Court has established that this method of interpretation adheres to the principle of the

⁶⁶ Cf. *Gender Identity, and Equality and Non-Discrimination with regard to Same-sex Couples (State obligations concerning change of name, gender identity, and rights derived from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 55; *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 40; *Case of the Workers of Hacienda Brasil Verde v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of October 20, 2016. Series C No. 318, para. 246; *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2012. Series C No. 257, para. 173, and *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 32.

⁶⁷ Article 29 of the Convention establishes: "Restrictions Regarding Interpretation: 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."

⁶⁸ Vienna Convention on the Law of Treaties, Article 31.1.

primacy of the text; in other words, the application of objective interpretation criteria.⁶⁹ Thus, in a text concerning human rights, the appropriate method involves an interpretation based on objective criteria related to the text itself, as opposed to subjective criteria relating merely to the intention of the parties, because such treaties are not traditional multilateral treaties concluded on the basis of a reciprocal exchange of rights for the benefit of the contracting parties; rather, their object and purpose are the protection of human rights before the State and before other States.⁷⁰

78. In this regard, the Court considers that the ordinary meaning that should be given to the rule established in Article 26 of the Convention is that the States undertook to realize "rights" derived from the economic, social, educational, scientific and cultural rights set forth in the Charter of the Organization of American States (hereinafter "the OAS Charter"). Accordingly, the Court notes that, even though the OAS Charter establishes "principles" and "goals" aimed at comprehensive development, it also refers to certain "rights" both explicitly and implicitly. In this way, from a literal interpretation of the text of Article 26, it can be affirmed that it refers precisely to the obligation of the States to achieve the realization of the "rights" that it is possible to derive from the OAS Charter. The text of the provision should be interpreted in such a way that its terms acquire meaning and a specific significance, which, in the case of Article 26, means understanding that the States agreed to adopt measures in order to fully realize the "rights" recognized in the OAS Charter.

79. Furthermore, the Court considers that the mention in Article 26 that the States undertake "to adopt measures," "with a view to achieving progressively [...] the full realization of the rights" derived from the OAS Charter should be understood as a formulation referring to the nature of the obligation that emanates from this norm, and not to the inexistence of State obligations, strictly speaking. The Court recalls that obligations exist – worded in similar terms to Article 26 – that are recognized in other articles of the Convention, without any dispute as to whether these impose obligations that can be enforced at the international level. In particular, the Court recalls that Article 2 of the Convention recognizes the existence of the programmatic commitment of the States to adopt "such legislative or other measures as may be necessary to give effect to th[e] rights and freedoms" recognized by the Convention, which has led the Court to assess in its case law whether the State has complied with the adoption of such "measures."⁷¹

80. In this regard, the Court agrees with the interpretation made by the Committee on Economic, Social and Cultural Rights (hereinafter "the CESCR") of the scope and nature of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR"). This article establishes the undertaking of each State Party "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."⁷² The CESCR has interpreted that, while the ICESCR "provides for progressive realization of the

⁶⁹ Cf. *Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)*. Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 50.

⁷⁰ Cf. *Case of Ivcher Bronstein v. Peru. Jurisdiction. Judgment of September 24, 1999*. Series C No. 54, para. 42, and *Case of the Mapiripán Massacre v. Colombia. Merits, reparations and costs*. Judgment of September 15, 2005. Series C No. 134, para. 104.

⁷¹ Cf. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs*. Judgment of February 5, 2001. Series C No. 73, para. 90, and *Case of Tarazona Arrieta et al. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of October 15, 2014. Series C No. 286, para. 169.

⁷² International Covenant on Economic, Social and Cultural Rights, Article 2(1).

rights recognized by this treaty, and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.”⁷³ Likewise, this Committee established that the concept of “progressive realization” constituted a recognition of the fact that full realization of the said rights would be achieved over time. Nevertheless, it also indicated that:

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.⁷⁴

81. The Court reiterates its case law⁷⁵ in the sense that the flexibility regarding the time frame and methods for complying with the obligations of progressivity under Article 26 entails, essentially although not exclusively, an obligation to act; that is, to take measures and provide the necessary means and elements to respond to the requirements of the realization of the rights involved, always to the extent permitted by the economic and financial resources available to comply with the respective international commitment. Thus, the progressive implementation of such measures may be subject to accountability and, if appropriate, compliance with the respective commitment made by the State may be claimed before the courts called on to decide eventual human rights violations.⁷⁶

B.1.2. Internal context - systematic interpretation

82. Second, the Court finds it pertinent to refer to the context of Article 26 of the Convention. In this regard, the Court underlines that, according to the systematic criterion, norms must be interpreted as part of a whole, the meaning and scope of which must be established based on the legal system to which they belong.⁷⁷ In this regard, the Court has considered that, when interpreting a treaty, it should take into account not only the agreements and instruments formally related to it (Article 31.2 of the Vienna Convention), but also the system of which it forms part (Article 31.3); that is, the inter-American system for the protection of human rights.⁷⁸ When making a systematic interpretation of the

⁷³ Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) December 14, 1990, U.N. Doc. E/1991/23, para. 1.

⁷⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) December 14, 1990, U.N. Doc. E/1991/23, para. 9.

⁷⁵ Cf. *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 102, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 104.

⁷⁶ Cf. *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 102.

⁷⁷ Cf. *Case of González et al. (“Cotton Field”) v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 43, and *Gender Identity, and Equality and Non-Discrimination with regard to Same-sex Couples (State obligations concerning change of name, gender identity, and rights derived from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights).* Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 59.

⁷⁸ Cf. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 113, and *Entitlement of legal entities to hold rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador.* Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 44.

Convention, it is necessary to take into account all the provisions of which it is composed and the agreements and instruments that are formally related to it, such as the American Declaration of the Rights and Duties of Man (hereinafter "the American Declaration"), because they permit verification of whether the interpretation given to a specific norm or term is coherent with the meaning of the other provisions.⁷⁹

83. In this regard, the Court underscores that the scope of the rights derived from Article 26 of the Convention should be understood in relation to the other articles of the American Convention and other instruments that are relevant for its interpretation. Accordingly, the Court has noted that, although Article 26 is located in Chapter III of the Convention entitled "Economic, Social and Cultural Rights," it is also placed in Part I of this instrument entitled "State Obligations and Rights Protected" and, consequently, it is subject to the general obligations contained in Articles 1(1) and 2 in Chapter I (entitled "General Obligations"), as are Articles 3 to 25 contained in Chapter II (entitled "Civil and Political Rights"). Thus, the Court considers that the general obligations "to respect" and "to ensure" rights, together with the obligation relating to "domestic legal effects" of Article 2 of the Convention, apply to all rights, whether civil and political, or economic, social, cultural and environmental.⁸⁰

84. Consequently, since States have an obligation to respect and ensure the rights indicated in Article 26, in the terms of Article 1(1) of the Convention, the Court is competent to assess whether there has been a violation of a right derived from Article 26 in the terms of Articles 62 and 63 of the Convention. The latter article establishes that when there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated and that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied. In addition, the Court has indicated on numerous occasions that, under Article 1(1), any violation of the human rights recognized in the Convention that can be attributed, pursuant to the rules of international law, to the act or omission of any public authority, constitutes an act that can be attributed to the State and that engages its responsibility in the terms established in the Convention.⁸¹ Thus, the Court considers that, where it is possible to identify an act or omission that can be attributed to the State which violates a right protected by Article 26, the Court may determine the State's responsibility for this act and establish the appropriate remedy.

85. The Court notes that the fact that the rights derived from Article 26 are subject to the general obligations of the American Convention results not only from formal matters, but also from the reciprocal indivisibility and interdependence of the civil and political rights and the economic, social, cultural and environmental rights.⁸² In this regard, the Court has

⁷⁹ Cf. *Entitlement of legal entities to hold rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador)*. Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 45.

⁸⁰ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No 198, para. 100, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 100.

⁸¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 164, and *Case of Vereda La Esperanza v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 341, para. 18.

⁸² Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No. 198, para. 101, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 100; *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment

recognized that both categories of rights should be understood integrally and indivisibly as human rights, without any hierarchy between them, enforceable in all cases before the competent authorities.⁸³ Similarly, the Court notes that the Preamble to the Convention,⁸⁴ as well as various articles of the American Declaration, reveal that both civil and political rights, and ESCER were recognized by the States in the region as essential rights of the individual. Likewise, the Preamble to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (hereinafter "Protocol of San Salvador") recognizes:

the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified.

86. In this Court's opinion, the interdependence and indivisibility of the rights recognized by the American Convention denies any separation, categorization or hierarchy between rights for the effects of their respect, protection and guarantee. This condition refers not only to the recognition of the ESCER as human rights protected by Article 26, but also to aspects relating to the competence of this Court to examine violations of such rights based on this article. In this regard, the Court recalls that, based on Articles 62 and 63 of the Convention, it exercises full jurisdiction over all its articles and provisions and these include Article 26. Also, complementing this, the Court recalls that, as any other organ with jurisdictional functions, it has the inherent authority to determine the scope of its own competence (*compétence de la compétence*) and, also, "that the Court must take into account that the instruments accepting the optional clause on obligatory jurisdiction (Article 62(1) of the Convention) presuppose the acceptance by the States that present them of the right of the Court to decide any dispute relating to its jurisdiction."⁸⁵

87. Despite the foregoing, the Court recognizes that a systematic interpretation of Article 26 of the Convention signifies respecting the limits of the Court's jurisdiction in relation to other instruments of the inter-American system that refer to the ESCER. In this regard, the Court notes the tensions that may exist as regards the Court's competence to examine violations of rights derived from the OAS Charter, by application of Articles 26, 1(1), 2, 62 and 63 of the Convention, and the competence recognized by Article 19(6) of the Protocol of

of May 21, 2013. Series C No. 261, para. 131, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 172.

⁸³ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No. 198, para. 101, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 100.

⁸⁴ The Preamble to the Convention establishes: "Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man; [...] Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters."

⁸⁵ *Case of Ivcher Bronstein v. Peru. Jurisdiction*. Judgment of September 24, 1999. Series C No. 54, paras. 32 and 34, and *Case of García Prieto et al. v. El Salvador. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2007. Series C No. 168, para. 38.

San Salvador.⁸⁶ Indeed, the latter instrument stipulates that “any instance in which the rights established in paragraph (a) of Article 8 and in Article 13 [of the Protocol] are violated by action directly attributable to a State Party [...] may give rise [...] to application of the system of individual petitions governed by Articles 44 to 51 and 61 through 69 of the American Convention.” There can be no doubt that the intention of the States as regards the Court’s competence to rule on violations of the Protocol of San Salvador are restricted to trade union rights and the right to education.

88. Nevertheless, the Court considers that the fact that Article 19(6) of the Protocol of San Salvador restricts the competence of this Court exclusively to examine violations of certain rights by means of the system of individual petitions, should not be interpreted as a precept that limits the scope of the rights protected by the Convention, or the possibility of the Court examining violations of those rights. To the contrary, the Court notes that a systematic interpretation of both treaties, made in good faith, leads to the conclusion that, since there is no express restriction in the Protocol of San Salvador that limits the Court’s competence to examine violations of the Convention, the Court should not assume this limitation. Moreover, the Court recalls that the fact that States adopt protocols or treaties on specific matters, and define the competence of this Court to examine predefined aspects of such treaties, does not entail a limitation of the Court’s competence to examine violations of the American Convention in relation to substantive aspects regulated in the two treaties.⁸⁷ In this regard, the Court recalls that Article 77 of the Convention establishes the possibility that any State Party or the Commission may submit proposed protocols to the Convention “with a view to gradually including other rights and freedoms within its system of protection.”

89. Accordingly, the Court considers that there are no indications that, with the adoption of the Protocol of San Salvador, the States sought to limit the Court’s competence to examine violations of Article 26 of the American Convention. In this regard, the Court notes that if the American Convention is not expressly amended by a subsequent act of the States, the corresponding interpretation should be less restrictive as regards its scope in relation to the protection of human rights. Furthermore, the Court recalls that Article 76 of the American Convention establishes a specific procedure for amendments, which require the ratification of two-thirds of the States Parties to the Convention. Thus, it would be contradictory to consider that the adoption of the Additional Protocol, which did not require such a high margin of ratification as an amendment to the American Convention, could modify the content and scope of the latter’s effects. Consequently, the Court finds that the mere existence of Article 19(6) of the Protocol of San Salvador does not allow conclusions to be inferred that would establish restrictions to the relationship between Articles 26, 1(1), 2, 62 and 63 of the Convention.

B.1.3. Teleological interpretation

90. Third, the Court must make a teleological interpretation of Article 26 of the Convention. The Court recalls that a teleological interpretation examines the purpose of the

⁸⁶ Article 19(6) of the Protocol of San Salvador establishes: “[a]ny instance in which the rights established in paragraph (a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Articles 44 through 51 and 61 through 69 of the American Convention on Human Rights.”

⁸⁷ *Mutatis mutandi*, *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs*. Judgment of November 25, 2006. Series C No. 160, para. 276, and *Case of González et al. (“Cotton Field”) v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 225.

norms involved and, to this end, it is pertinent to analyze the object and purpose of the treaty itself and, if appropriate, the purposes of the regional system of protection.⁸⁸

91. The Preamble to the American Convention contains several references that establish the object and purpose of the treaty:

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states; [...]

Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters (underlining added).

92. Based on the above, the Court has asserted that the object and purpose of the Convention is "the protection of the fundamental rights of the human being."⁸⁹ In this regard, Article 29 of the American Convention expressly establishes certain interpretation standards, including the *pro persona* principle, which signifies that no provision of this treaty may be interpreted as suppressing the enjoyment or exercise of any right or freedom that may be recognized by virtue of the laws of any State Party, or by virtue of any other convention to which the said State is a party, or excluding or limiting the effect that the American Declaration and other international instruments of the same nature may have.⁹⁰

93. As previously indicated, the object and purpose of the treaty is "the protection of the fundamental rights of the human being." A teleological interpretation of the treaty would be similar to the conclusion reached by means of the literal and the systematic interpretation,

⁸⁸ Cf. *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 59, and *Entitlement of legal entities to hold rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador)*. Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 40.

⁸⁹ Cf. *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*. Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29, and *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*. Advisory Opinion OC-25/18 of May 30, 2018. Series A No. 25, para. 58.

⁹⁰ Cf. *Entitlement of legal entities to hold rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador)*. Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 42.

in the sense that Article 26 recognizes the existence of “rights” that must be ensured by the State to all persons subject to their jurisdiction in the terms established by the American Convention. The purpose of the recognition of those rights and of the Court’s competence to decide disputes regarding them is to consolidate a regime of personal liberty and social justice based on respect for the essential human rights recognized in the OAS Charter, which is clearly compatible with the object and purpose of the American Convention.

B.1.4. Supplementary means of interpretation

94. Fourth, the Court recalls that, according to Article 32 of the Vienna Convention, supplementary means of interpretation, especially the preparatory work of a treaty, may be used “in order to confirm the meaning resulting from the application of Article 31.” This signifies that they are used in a supplementary manner.

95. In this regard, the Court recalls that the content of Article 26 of the Convention was the subject of intense debate during the preparatory work for the Convention. This arose due to the interest of the States in including a “direct mention” of the economic, social and cultural “rights”; “a provision that makes their application and compliance with them [...] legally binding to a certain extent”; and also “the [respective] mechanisms [for their] promotion and protection,” because the draft treaty prepared by the Inter-American Commission referred to them in two articles that, according to some States, only “reflected conclusions reached at the Buenos Aires Conference in a text that is merely declarative.”⁹¹

96. A review of the preparatory work of the Convention reveals also that the main considerations based on which it was adopted placed special emphasis on “giving the economic, social and cultural rights the maximum protection compatible with the specific conditions of most of the States of the Americas.” Thus, in the discussions during the course of the preparatory work, it was also proposed to “enable the implementation [of those rights] by the action of the courts.” The Court considers that these declarations by the States do not contradict the thesis that Article 26 does, indeed, recognize “rights” that are subject to the general obligations of the States by virtue of Articles 1(1) and 2 of the American Convention and that, consequently, they are justiciable.

B.1.5. Conclusion

97. The Court notes that a literal, systematic and teleological interpretation leads to the conclusion that Article 26 of the Convention protects the rights derived from the economic, social, educational, scientific and cultural standards set forth in the OAS Charter. The scope of such rights should be understood in relation to the other articles of the American Convention and they are therefore subject to the general obligations contained in Article 1(1) and 2 of the Convention and may be supervised by the Court in the terms of Articles 62 and 63 of this instrument. This conclusion is based not only on formal issues, but results from the interdependence and indivisibility of civil and political rights and economic, social, cultural and environmental rights, as well as their compatibility with the object and purpose of the Convention, which is the protection of the fundamental rights of the human being. In each specific case that calls for an analysis of the ESCER, it will be necessary to determine whether a human right protected by Article 26 of the American Convention can be explicitly derived from the OAS Charter, and also the scope of this protection.

⁹¹ Cf. *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 99, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 101.

B.2. The right to health as an autonomous and justiciable right

98. The Court reiterates that the right to health is derived from the economic, social, educational, scientific and cultural standards set forth in the OAS Charter.⁹² It also reiterates the nature and scope of the obligations that derive from the protection of this right, as regards both those aspects that may be enforced immediately and those that are of a progressive nature.⁹³ In this regard, the Court recalls that, in the case of the former (obligations that are enforceable immediately), States must take effective measures to ensure access without discrimination to the services necessary for the right to health.⁹⁴ In the case of the latter (obligations of a progressive nature), progressive realization means that States Parties have the concrete and constant obligation to make the most effective and rapid progress possible towards the full realization of the right,⁹⁵ insofar as their available resources permit, by legislative or other appropriate means.⁹⁶

99. Consequently, first, the Court notes that Article 34(i)⁹⁷ and 34(l)⁹⁸ of the OAS Charter establishes, among the basic objectives of integral development, “[p]rotection of man’s potential through the extension and application of modern medical science,” as well as “[c]onditions that offer the opportunity for a healthful, productive, and full life.” Meanwhile, Article 45(h)⁹⁹ stresses that “man can only achieve the full realization of his aspirations within a just social order,” so that the States agree to dedicate every effort to the application of principles such as: “(h) development of an efficient social security policy.”

⁹² Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 106.

⁹³ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 104.

⁹⁴ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 104; Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant). December 14, 1990, U.N. Doc. E/1991/23, para. 3, and Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable. Standard of Health, August 11, 2000, U.N. Doc. E/C.12/2000/4, para. 30.

⁹⁵ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 104, and Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant). December 14, 1990, U.N. Doc. E/1991/23, para. 9.

⁹⁶ Article 26 of the Convention establishes: “Progressive Development. 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.”

⁹⁷ Article 34(i) of the OAS Charter establishes: “[t]he Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: [...] (i) Protection of man’s potential through the extension and application of modern medical science.”

⁹⁸ Article 34(l) of the OAS Charter establishes: “[t]he Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: [...] (l) Urban conditions that offer the opportunity for a healthful, productive, and full life.”

⁹⁹ Article 45(h) of the OAS Charter stipulates “[t]he Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: [...] (h) Development of an efficient social security policy.”

The Court notes the existence of an interrelationship between the undertaking of States to ensure an efficient social security policy and their obligation to ensure health care, especially in the context of endemic diseases.¹⁰⁰ Accordingly, the Court reiterates that the reference is sufficiently specific to consider that the OAS Charter implicitly recognizes the right to health.¹⁰¹

100. Second, the Court must determine the scope of the right to health in light of the international *corpus juris* on the matter. The Court recalls that the obligations contained in Articles 1(1) and 2 of the American Convention constitute, in essence, the basis for determining the international responsibility of a State for violations of the rights recognized in the Convention,¹⁰² including those recognized by virtue of Article 26. However, the Convention itself refers expressly to the norms of general international law for its interpretation and application, specifically in Article 29, which establishes the *pro persona* principle.¹⁰³ Thus, as has been the Court's consistent practice,¹⁰⁴ when determining the compatibility of the acts and omissions of the State or its laws with the Convention or other treaties regarding which the Court has jurisdiction, the Court may interpret the obligations and rights they contain in light of other pertinent treaties and norms.

101. Consequently, the Court will use the sources, principles and criteria of the international *corpus juris* as special norms applicable to determine the content of the right to health.¹⁰⁵ The Court indicates that it will use these norms as supplements to the Convention-based provisions in order to determine the right to health, and the corresponding rights for people living with HIV. In this regard, the Court indicates that it is not assuming a competence that it does not have over some treaties; neither is it according

¹⁰⁰ Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 19: The right to social security (Article 9), November 23, 2007, U.N. Doc. E/C.12/GC/19, para. 13.

¹⁰¹ The Court considers that the right to health is an essential component of the right to social security, because health protection is of fundamental importance to ensure to every individual their human dignity when they are faced with circumstances that deprive them of their capacity to fully exercise their rights. In this regard, General Comment No. 19 of the CESCR indicates that: "States parties have an obligation to guarantee that health systems are established to provide adequate access to health services for all." It also indicates "the particular importance of the right to social security in the context of endemic diseases such as HIV/AIDS [...]." Furthermore, the Committee indicated that States parties were required "[t]o ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families." Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 19: The right to social security (Article 9), November 23, 2007, U.N. Doc. E/C.12/GC/19, para.13 and 59(a).

¹⁰² Cf. *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 107, and *Case of the Pacheco Tineo family v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2013. Series C No. 272, para. 143.

¹⁰³ Cf. *Case of the Pacheco Tineo family v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2013. Series C No. 272, para. 143, and *Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of January 30, 2014. Series C No. 276, para. 26.

¹⁰⁴ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 103; *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, para. 145; *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 168; *Case of the Pacheco Tineo family v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2013. Series C No. 272, para. 129; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 83, and *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 78 and 121.

¹⁰⁵ Cf. *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261, paras. 131 and 135, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 114.

a treaty-based hierarchy to norms contained in other national and international instruments related to the ESCER.¹⁰⁶ To the contrary, the Court is making an interpretation pursuant to the standards established by Article 29, and in keeping with its judicial practice, that allows it to update the meaning of the rights derived from the OAS Charter that are recognized by Article 26 of the Convention. Determination of the right to health will give special emphasis to the American Declaration, because, as this Court has established:

[...] [T]he Member States of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.¹⁰⁷

102. Moreover, the Court has indicated on other occasions that human rights treaties are living instruments, and their interpretation must evolve over time in line with current conditions. This evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention, as well as in the Vienna Convention.¹⁰⁸ In addition, the third paragraph of Article 31 of the Vienna Convention authorizes the use of means of interpretation such as agreements or practices or relevant rules of international law indicated by the States regarding the subject matter of the treaty, which are some of the means that relate to an evolutive vision of the treaty. In this way, in order to determine the scope of the right to health for people living with HIV, as derived from the economic, social, education, scientific and cultural standards of the OAS Charter, the Court will refer to the relevant instrument of the international *corpus juris*.

B.3. The content of the right to health

103. Based on the foregoing, the Court notes, first, that Article XI of the American Declaration recognizes that “[e]very person has the right to the preservation of his health through sanitary and social measures relating to medical care, to the extent permitted by public and community resources.” Similarly, Article 10 of the Protocol of San Salvador establishes that “everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being” and indicates that health is a “public good.”¹⁰⁹ The same article establishes that, among other measures to ensure the right to health, States must ensure “[u]niversal immunization against the principal infectious diseases,” “[p]revention and treatment of endemic, occupational and

¹⁰⁶ Cf. *Case of the Pacheco Tineo family v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2013. Series C No. 272, para.143.

¹⁰⁷ Cf. *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10. para. 43, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 107.

¹⁰⁸ Cf. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114, and *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*. Advisory Opinion OC-25/18 of May 30, 2018. Series A No. 25, para. 137.

¹⁰⁹ Article 10(1) of the Protocol of San Salvador establishes: “[e]veryone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. 2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right: a. Primary health care, that is, essential health care made available to all individuals and families in the community; [and] b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction.”

other diseases,” and “[s]atisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.”

104. As in the case of the obligations established by the OAS Charter, the American Declaration and the Protocol of San Salvador, in the universal sphere the ICESCR understands the right to health as “the enjoyment of the highest attainable standard of physical and mental health,” and recognizes the State obligation to adopt measures for “[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases.”¹¹⁰

105. In this regard, the Court has recognized that health is a fundamental human right essential for the adequate exercise of the other human rights, and that every individual has the right to enjoy the highest attainable standard of health that allows him or her to live a full life, understanding health not only as the absence of disease or illness, but also as a state of complete physical, mental and social well-being, derived from a lifestyle that allows the individual to achieve an overall balance. The Court has specified that the general obligation to protect health results in the State obligation to ensure access to essential health services, guaranteeing good quality and efficient medical care, and to promote the improvement of the health of the population as a whole.¹¹¹

106. The Court has also established that implementation of this obligation begins with a duty of regulation and, therefore, has indicated that States are responsible for regulating the provision of services (both public and private) and executing national programs to achieve good quality services on a permanent basis.¹¹² The Court has taken into account General Comment No. 14 of the CESCR on the right to the highest attainable standard of health.¹¹³ In particular, in this document the Committee underlined that the right extended not only to timely and appropriate health care, but also the following interrelated and essential elements of availability, accessibility, acceptability and quality, the precise application of which would depend on the conditions prevailing in each State:

(a) Availability. Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party’s developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries and essential drugs, as defined by the WHO Action Programme on Essential Drugs.

(b) Accessibility. Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

¹¹⁰ Cf. International Covenant on Economic, Social and Cultural Rights, Article 12, adopted by the United Nations General Assembly by Resolution 2200A (XXI), of December 16, 1966, and in force since January 3, 1976.

¹¹¹ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 118.

¹¹² Cf. *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261, para. 134, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 119.

¹¹³ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 118, and General Comment No. 14: The Right to the Highest Attainable Standard of Health, August 11, 2000, U.N. Doc. E/C.12/2000/4, para. 1.

(i) Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.

(ii) Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities.

(iii) Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer family units should not be disproportionately burdened with health expenses as compared to richer family units.

(iv) Information accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

(c) Acceptability. All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

(d) Quality. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.¹¹⁴

107. Based on the foregoing, the Court concludes that the right to health refers to the right of every human being to enjoy the highest attainable standard of physical, mental and social well-being. This right encompasses prompt and appropriate health care provided in keeping with the principles of availability, accessibility, acceptability and quality. The State's compliance with its obligation to respect and ensure this right should include special care for vulnerable and marginalized groups, and should be provided progressively in accordance with available resources and applicable domestic law. The Court will now refer to the specific obligations that arise in the case of health care for people living with HIV.

¹¹⁴ Cf. *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261, para. 152; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, paras. 120 and 121, and Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, August 11, 2000. U.N. Doc. E/C.12/2000/4, para. 12.

B.3.1. Standards relating to the right to health applicable to people living with HIV

108. Access to drugs is an essential part of the right to enjoy the highest attainable standard of health.¹¹⁵ In this regard, the Court reiterates the criteria that access to drugs in the context of pandemics, such as HIV, tuberculosis and malaria, is one of the essential elements for the progressive achievement of the full exercise of the right of every person to enjoy the highest attainable standard of physical and mental health.¹¹⁶ In this regard, the Court has considered that States must take steps to provide for the regulation of HIV-related goods, services and information, so as to ensure that there are sufficient services for HIV prevention and care. It has also indicated that States must take the necessary measures to ensure for all persons the availability and accessibility of quality goods, services and information for HIV prevention, treatment, care and support, including antiretroviral therapy and other safe and effective medicines, diagnostics and related technologies for preventive, curative and palliative care of HIV, and related opportunistic infections, and conditions.¹¹⁷

109. In this regard, the Court notes that, in the 2030 Agenda for Sustainable Development (hereinafter “the 2030 Agenda”), the United Nations General Assembly established the goal of ensuring healthy lives and promoting well-being for all at all ages, taking into account the vulnerability of different persons, such as those living with HIV/AIDS. Accordingly, the States, including Guatemala, agreed to take the necessary steps in order, by 2030, to end the epidemics of AIDS and other communicable diseases such as HIV. In addition, the States undertook to achieve universal health coverage, including access to essential medicines and vaccines for all.¹¹⁸

110. The Court has also indicated that an effective response to HIV requires a comprehensive approach that includes a sustained sequence of prevention, treatment, care and support.¹¹⁹ First, this obligation requires the availability of sufficient quantities of antiretroviral drugs and other pharmaceutical products to treat HIV and opportunistic infections. On this point, expert witness Ricardo Boza Cordero explained that antiretroviral treatment controls the virus in the different bodily fluids, but does not eliminate it. Accordingly, antiretroviral treatment must be strictly monitored and provided for life once

¹¹⁵ Cf. *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2016. Series C No. 310, para. 174, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 194. Similarly, according to General Comment No. 14 of the Committee on ESCR, the right to the highest attainable standard of health gives rise to minimum obligations, which include to “provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs.” Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, August 11, 2000. U.N. Doc. E/C.12/2000/4, para. 43(d).

¹¹⁶ Cf. *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2016. Series C No. 310, para. 174, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 169.

¹¹⁷ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 195, and Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint United Nations Program on HIV and AIDS (UNAIDS), International Guidelines on HIV/AIDS and Human Rights. Consolidated version, 2006, sixth guideline.

¹¹⁸ UN, General Assembly Resolution “Transforming our World: the 2030 Agenda for Sustainable Development,” A/70/L.1 adopted on September 25, 2015, paras. 23, 55 and 66, Goal 3, 3.3 and 3.8, Available at: <https://undocs.org/A/RES/70/1>.

¹¹⁹ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 196, and *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2016. Series C No. 310, para. 176.

the infection has been diagnosed, because discontinuance of treatment could cause viral rebound with the aggravating factor that the new viral strains would be resistant to the drugs a patient was taking.¹²⁰ Consequently, antiretroviral treatment must be permanent and constant based on the situation of the patients' health and their medical and clinical requirements.

111. Second, the Court recalls that the State obligation to ensure the right to health of people living with HIV requires diagnostic tests to treat the infection, and also the diagnosis and treatment of any related opportunistic infections and conditions that may occur.¹²¹ Performing laboratory tests that quantify the TCD4+ and TCD8+ lymphocytes in peripheral blood, and also the amount of HIV in plasma is essential for appropriate antiretroviral treatment.¹²² Accordingly, blood tests measuring CD4 counts and HIV viral load should be performed every six months or every year for patients living with HIV,¹²³ and genotype testing is necessary when a patient is being treated with drugs in order to control possible resistance to antiretroviral drugs.¹²⁴ In addition, treatment should extend to the related opportunistic infections and conditions¹²⁵ that may appear when a patient's defenses are very low.¹²⁶

112. Third, the Court reiterates that care for people living with HIV includes a healthy diet and social and psychological support, as well as family, community and home-based care.¹²⁷ Indeed, the care and support for people living with HIV extends beyond medicines and formal health-care systems, and requires the different needs of people living with HIV to be taken into account.¹²⁸ In particular, social support that includes actions such as food provision, emotional support, and psychosocial counselling can improve adherence to antiretroviral therapy and the quality of life of people living with HIV.¹²⁹ In addition, nutrition support helps to maintain the immune system, manage HIV-related infections,

¹²⁰ Cf. Expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folio 1467).

¹²¹ Cf. Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint United Nations Program on HIV and AIDS (UNAIDS), International Guidelines on HIV/AIDS and Human Rights. Consolidated version, 2006, sixth guideline, para. 24.

¹²² Cf. Expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folio 1468).

¹²³ Cf. Expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folio 1473).

¹²⁴ Cf. Expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folio 1473).

¹²⁵ Cf. Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint United Nations Program on HIV and AIDS (UNAIDS), International Guidelines on HIV/AIDS and Human Rights. Consolidated version, 2006, sixth guideline, para. 24.

¹²⁶ Cf. Expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folio 1460).

¹²⁷ Cf. Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint United Nations Program on HIV and AIDS (UNAIDS), International Guidelines on HIV/AIDS and Human Rights. Consolidated version, 2006, sixth guideline, para. 26.

¹²⁸ Cf. Joint United Nations Program on HIV and AIDS (UNAIDS). HIV care and support taking into account the 2016 WHO consolidated guidelines, p. 12.

¹²⁹ Cf. Joint United Nations Program on HIV and AIDS (UNAIDS). HIV care and support taking into account the 2016 WHO consolidated guidelines, p. 22.

enhance the effectiveness of HIV treatment, sustain healthy levels of physical activity and support an optimal quality of life.¹³⁰

113. The Court has also reiterated that HIV prevention technologies include condoms, lubricants, sterile injection material, antiretroviral drugs (for example, to prevent vertical transmission or as post-exposure prophylaxis) and, once HIV is diagnosed, safe and effective vaccines and microbicides. Universal access, based on human rights principles, requires that all these goods, services and information are not only available, acceptable and of good quality, but also that they are within physical reach and accessible to all.¹³¹ Similarly, the Court considers that access to medical treatment should take into account the technical advances in medical science.

114. Accordingly, the right to health of people living with HIV includes access to good quality goods, services and information for the prevention, treatment, care and support of the infection, including antiretroviral therapy and other drugs, diagnostic tests and related safe and effective technologies for the preventive, curative and palliative care of HIV, related opportunistic infections and diseases, as well as social and psychological support, family and community care, and access to prevention technologies.

115. Consequently, the first duty that results from the obligation to ensure the right to health is the duty to regulate protection of the right to health for people living with HIV. In this regard, the Court notes that the Guatemalan Constitution recognizes that the enjoyment of health is a fundamental human right, and that the State has the obligation to ensure health and social assistance for all its inhabitants (*supra* para. 41). In addition, the Court notes that the Health Code establishes the obligation of the State, through the Ministry of Public Health, to take steps to ensure the provision of free health services to Guatemalans, and establishes that the State must allocate the resources needed for the public funding of health services (*supra* para. 43). Regarding the treatment of sexually transmitted diseases and AIDS, the Court notes that the Health Code establishes that the Ministry of Health will support the development of specific STD and HIV/AIDS education, detection, prevention and control programs (*supra* para. 43).

116. In particular, the Court notes that the General Law to combat HIV/AIDS (*supra* para. 45) recognizes HIV as an urgent national social problem. The law establishes that “[a]ny person diagnosed with HIV/AIDS shall receive immediate comprehensive care”; that the Ministry of Public Health must provide health care services to people living with HIV, and that such services must respond to their physical, psychological and social needs. Furthermore, this law establishes that the Ministry of Economy and Finance will implement a program that provides access to good quality antiretroviral drugs, at an accessible cost, to people living with HIV. Likewise, the Court notes that the Regulations to the General Law to combat HIV/AIDS (*supra* para. 46) establish that the Ministry of Health must ensure that it has the basic equipment and inputs required to provide good quality comprehensive care, and this requires the Ministry to provide good quality care in its health centers, including access to antiretroviral drugs for the treatment of HIV/AIDS in accordance with national protocols (*supra* para. 46).

¹³⁰ Cf. Joint United Nations Program on HIV and AIDS (UNAIDS). HIV care and support taking into account the 2016 WHO consolidated guidelines, p. 26.

¹³¹ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 195, and *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2016. Series C No. 310, para. 176.

117. Based on the above, the Court observes that the laws cited have established, at least since 1985, the right to health as a right protected by the Constitution, and since 1997, the Health Code has established the State's obligation to provide HIV education, detection, prevention and control services. The Court also notes that, in 2000, a specific law was enacted on the care and monitoring of HIV/AIDS. Consequently, the Court considers that the State adequately regulated the protection of the right to health for people living with HIV in Guatemala. The Court must now verify whether the State complied with its obligation to ensure the right to health of the presumed victims in this case. To this end, it will divide its analysis into two periods: (i) before 2004, and (ii) after 2004.

B.4. The violation of the right to health

B.4.1. Analysis of the medical treatment received by the presumed victims prior to 2004

118. In this chapter, the dispute focuses on whether the State is internationally responsible for the violation of the right to health as a result of the medical care – or lack of it – provided to the presumed victims as people living with HIV. It also refers to whether the State should have adopted differentiated measures for the treatment of individuals in a situation of vulnerability or risk. Lastly, it refers to whether the State is responsible for the violation of the principle of progressivity with regard to the right to health. The Court will examine the facts of the case in light of the State's obligation to ensure the right to health of the presumed victims. To this end, the Court finds it necessary to differentiate two periods in the medical care provided to the presumed victims and the legal consequences of this care: (i) before 2004, and (ii) after 2004.

119. In this regard, in its brief answering the allegations, the State ratified the position it had assumed during the proceeding before the Commission.¹³² It indicated that, prior to 2004, most of the medical treatment in Guatemala was carried out by the Swiss organization Doctors Without Borders, and that the State only financed the treatment of 373 individuals.¹³³ It also offered to take steps to assume the care in state hospitals of the presumed victims in this case who were being treated by Doctors Without Borders.¹³⁴ In this regard, the Court notes that 48 of the presumed victims in this case had not received medical treatment by the State prior to 2004.¹³⁵ Therefore, the Court finds it proved that, before 2004, these presumed victims had not received any kind of state medical treatment or that such treatment was ineffective to treat their condition as people living with HIV. Mr. Cabrera Morales was diagnosed in October 2001 and began receiving antiretroviral treatment provided by the IGSS in December 2001. However, the Court notes that his access to antiretroviral drugs, CD4 counts and viral load testing was irregular, that he did not receive genotype and phenotype testing, and that he had not received either social or psychological support, or family, community and home care in accordance with the standards established in this judgment (*supra* paras. 103 to 114). Thus, the medical treatment he received prior to 2004 lacked the elements of health care availability, accessibility and quality. Consequently, the Court concludes that the State is responsible for

¹³² Cf. The State's answering brief (merits file, folio 853).

¹³³ Cf. Report on actions taken by the State to follow up on and comply with the precautionary measures ordered (evidence file, folio 231).

¹³⁴ Cf. Observations of the State of Guatemala on the observations on Admissibility Report No. 32/05 (evidence file, folios 347 and 348).

¹³⁵ The persons indicated as victims in annex 2 to this judgment fall into this category, with the exception of Felix de Jesús Cabrera Morales.

violating the obligation to ensure the right to health pursuant to Article 26 of the American Convention, in relation to Article 1(1) of this instrument, of the 49 people named as victims in Annex 2 to this judgment.

120. The Court will now analyze whether the medical treatment received after 2004 was adequate according to the standards established for the right to health.

B.4.2. Analysis of the medical treatment received by the presumed victims after 2004

121. First, in this case, the Court recalls that medical treatment for people living with HIV requires the availability of sufficient quantities of antiretroviral drugs and other pharmaceutical products for the treatment of opportunistic infections. In this regard, the evidence reveals that 31 of the presumed victims had irregular, inadequate or non-existent access to antiretroviral drugs provided by the State. The Court therefore notes the following: (i) some presumed victims had no access to antiretroviral drugs, either for a prolonged period between the first HIV diagnosis and the start of treatment or because the treatment was insufficient once they obtained access to it;¹³⁶ (ii) in other cases, the patients suffered from shortages or lack of consistency in the supply of their medication;¹³⁷ (iii) lastly, in the case of some presumed victims, therapeutical problems were detected because they developed resistance to the antiretroviral treatment or it was shown that they required a change in their treatment program and this was not provided.¹³⁸ Regarding the other presumed victims, the Court has insufficient information to determine their situation with regard to the antiretroviral treatment.

122. Second, the Court recalls that the State obligation to ensure the right to health of people living with HIV calls for the performance of diagnostic testing to treat the infection and the opportunistic diseases, and that this is essential for prescribing the appropriate antiretroviral treatment. Also, the lack of periodic testing engenders a risk that the patient will receive inadequate treatment or that the virus will develop resistance to the antiretroviral drugs, increasing the risk of opportunistic infections. In the instant case, the Court notes that 39 of the presumed victims did not have access to periodic CD4 counts viral load, phenotype and genotype testing and, in some cases, the patients had undergone no tests whatsoever.¹³⁹ Specifically, the Court notes that in some cases, CD4 counts and/or viral load tests had not been performed,¹⁴⁰ in other cases, the presumed victims had not

¹³⁶ The following persons fall into this category: José Cupertino Ramírez, Sebastián Emilio Dueñas, Julia Aguilar, Luis Rubén Isabel Alvarez Flores, Saira Elisa Barrios, Felix de Jesús Cabrera Morales, César Noé Cancinos Gómez, Aracely Cinto, Luis Rolando Cuscul Pivaral, María Felipe Pérez, Mardo Luis Hernández and Hernández, Luis Armando Linares Ruano, Darinel López Montes de Oca, Audencio Rodas Rodríguez, Zoila Marina Pérez Ruíz, Santiago Francisco Valdéz Aguilar, Karen Judith Samayoa Vásquez, Francisco Sop Quiej, Miguel Lucas Vail, Sandra Lisbeth Zepeda Herrera, Petrona López Robledo, Juana Aguilar, Ismerai Olibia García Castañon, Dora Marina Martínez Sofoifa, Teresa Magdalena Ramírez Castro and Iris Carolina Vicente Baullas.

¹³⁷ The following persons fall into this category: Guadalupe Herminia Cayaxon García, Juana Aguilar, Felix de Jesús Cabrera Morales, César Noé Cancinos Gómez, Pascuala de Jesús Mérida Rodríguez, Dora Marina Martínez Sofoifa, Sandra Lisbeth Zepeda Herrera, Luis Armando Linares Ruano, Marta Alicia Maldonado Paz, Zoila Marina Pérez Ruíz, Miguel Lucas Vail and Silvia Mirtala Alvarez Villatoro.

¹³⁸ The following persons fall into this category: José Rubén Delgado López, Guadalupe Herminia Cayaxon García and Silvia Mirtala Alvarez Villatoro.

¹³⁹ The following persons fall into this category: Rita Mariana Dubón Orozco and Petrona López Robledo, who never had access to any type of medical testing and are now deceased.

¹⁴⁰ The following persons fall into this category: Elsa Miriam Estrada Ruiz and Sebastián Emilio Dueñas, who have never undergone CD4 and/or viral load testing.

undergone genotype and/or phenotype testing,¹⁴¹ and most presumed victims had not undergone periodic tests¹⁴² in keeping with the standards established for the adequate care and monitoring required to ensure comprehensive medical treatment for people living with HIV or, at one time, they themselves had had to cover the cost of such tests.¹⁴³ In addition, the Court notes that, as a result of the foregoing, numerous victims had contracted opportunistic infections which were not treated (*infra*, paras. 159 and 164).

123. Third, the Court recalls that care for people living with HIV includes good quality nutrition, social and psychological support, and social, community and home-based care. In this case, the Court notes that 22 of the presumed victims received no social support during their treatment, or this was insufficient,¹⁴⁴ or it was only provided by a non-governmental organization or support group.¹⁴⁵ This included deficiencies in the nutritional, psychological, community and home-based support. Regarding the other presumed victims, the Court has insufficient information to determine their situation in relation to the social support received.

124. Fourth, the Court recalls that one of the elements of the right to health is that the most vulnerable or marginalized sectors of the population should have access to health care facilities, goods and services, which should be within their geographical and financial reach (*supra* para. 106). In this case, the Court notes that: (i) Corina Dianeth Robledo Alvarado had to go into debt due to the expenses arising from a five-hour journey between her home and the Roosevelt Clinic; (ii) Dora Marina Martínez Sofoifa had to travel in the early morning hours from her home to the clinic for her appointments and then wait in the emergency ward, due to the distance, costs and dangers of the area where she lived; (iii) Francisco Sop Quiej declared that he had had to ask for loans from his family and friends to cover the cost of his two-hour journey to the clinic which cost 60 quetzals, and he could not always afford this; (iv) Zoila Marina Pérez Ruíz had to travel five hours to the clinic, and stopped attending her appointments due to lack of financial resources, and (v) the journey to the clinic took Miguel Lucas Vaíl five hours and cost 150 quetzals.

¹⁴¹ The following persons fall into this category: Luis Edwin Cruz Gramajo, Felipe Tebalan Ordoñez, Felix de Jesus Cabrera Morales, César Noé Cancinos Gómez, Luis Rolando Cuscul Pivaral, María Felipe Pérez, Mardo Luis Hernández and Hernández, Pascuala de Jesús Mérida Rodríguez, Ismerai Olibia García Castañon and Audencio Rodas Rodríguez, who have never undergone genotype and/or phenotype testing.

¹⁴² The following persons fall into this category: María Blanca Vaíl López, José Rubén Delgado López, Silvia Mirtala Alvarez Villatoro, Melvin Yovani Ajtun Escobar, José Cupertino Ramírez, Julia Aguilar, Felipe Tebalan Ordoñez, Luis Rubén Isabel Alvarez Flores, Felix de Jesús Cabrera Morales, César Noé Cancinos Gómez, Aracely Cinto, María Felipe Pérez, Santos Isacar Vásquez Barrios, Luis Armando Linares Ruano, Marta Alicia Maldonado Paz, Dora Marina Martínez Sofoifa, Pascuala de Jesús Mérida Rodríguez, Darinel López Montes de Oca, Israel Pérez Charal, Audencio Rodas Rodríguez, Zoila Marina Pérez Ruíz, Santiago Francisco Valdéz Aguilar, Teresa Magdalena Ramírez Castro, Karen Judith Samayoa Vásquez, Francisco Sop Quiej, Jorge Armando Tavares Barreno, Miguel Lucas Vaíl, Santos Vásquez Oliveros, Sandra Lisbeth Zepeda Herrera, Guadalupe Herminia Cayaxon García and Martina Candelaria Álvarez Estrada, who suffered from deficient or irregular access to viral load, CD4, genotype or phenotype testing, or indicated that they had had to cover the costs themselves.

¹⁴³ Regarding Ingrid Janeth Barillas Martínez, Olga Marina Castillo, Juana Aguilar, Iris Carolina Vicente Baullas and Saira Elisa Barrios, the Court has insufficient information to determine their situation in relation to access to the said tests. However, with regard to Corina Dianeth Robledo Alvarado, the Court notes that she indicated that she had periodically undergone the said tests.

¹⁴⁴ The following persons fall into this category: Melvin Yovani Ajtun Escobar, Julia Aguilar, Felipe Tebalan Ordoñez, Saira Elisa Barrios, César Noé Cancinos Gómez, Luis Rolando Cuscul Pivaral, María Felipe Pérez, Ismerai Olibia García Castañon, Santos Isacar Vásquez Barrios, Luis Armando Linares Ruano, Pascuala de Jesús Mérida Rodríguez, Darinel López Montes de Oca, Corina Dianeth Robledo Alvarado, Audencio Rodas Rodríguez, Francisco Sop Quiej and Santos Vásquez Oliveros.

¹⁴⁵ The following persons fall into this category: María Blanca Vaíl López, Silvia Mirtala Alvarez Villatoro, Sebastián Emilio Dueñas, Luis Rubén Isabel Alvarez Flores, Santiago Francisco Valdéz Aguilar and Zoila Marina Pérez Ruíz.

125. The Court considers that, in the case of the five presumed victims, the distance to the health clinic and their precarious financial situation constituted a barrier to their access to the health centers, and this had an impact on their possibility of receiving medical care and, therefore, on their possibility of beginning or continuing their treatment satisfactorily. The Court notes that the financial situation of the presumed victims was a determinant factor in their possibility of accessing the health care facilities, goods and services and that the State failed to take steps to mitigate this impact. Consequently, the Court considers that Corina Dianeth Robledo Alvarado, Dora Marina Martínez Sofoifa, Zoila Marina Pérez Ruíz, Francisco Sop Quiej and Miguel Lucas Vaíl did not have adequate access to medical care owing to their financial situation and the remoteness of their place of residence. Regarding the other presumed victims, the Court lacks sufficient information to determine whether their financial situation or the geographical location of their homes constituted obstacle to receiving medical care.

126. The Court considers that, since the irregular, inadequate or total lack of access to antiretroviral drugs (*supra* para. 121), the lack of access to periodic CD4 counts, and viral load, phenotype and genotype testing (*supra* para. 122), the inadequate or total lack of social support (*supra* para. 123), and the impossibility of access to the health centers for financial reasons or the location of the homes of some of the presumed victims (*supra* para. 125) has been proved, the State failed to comply with its obligation to guarantee the right to health because its omissions are incompatible with the elements of the availability, accessibility and quality of health care. The elements of availability and quality require the existence of a sufficient quantity of the goods, services and medicines needed for health care, which should also be of a good quality and appropriate from the medical perspective, which did not occur in this case. The element of accessibility requires that the health care facilities, goods and services are accessible, in law and in fact, for the most vulnerable and marginalized sectors, and that they are located at a reasonable geographical distance, a situation that did not occur in this case.

127. Consequently, the Court concludes that the State failed to ensure the right to health of Rita Mariana Dubón Orozco, Luis Edwin Cruz Gramajo, Petrona López Robledo, Maria Blanca Vaíl López, Guadalupe Herminia Cayaxon García, José Rubén Delgado López, Elsa Miriam Estrada Ruíz, Silvia Mirtala Álvarez Villatoro, Juana Aguilar, Melvin Yovani Ajtun Escobar, José Cupertino Ramírez, Sebastián Emilio Dueñas, Julia Aguilar, Felipe Tebalan Ordoñez, Martina Candelaria Alvarez Estrada, Luis Rubén Isabel Alvarez Flores, Saira Elisa Barrios, Felix de Jesús Cabrera Morales, César Noé Cancinos Gómez, Aracely Cinto, Luis Rolando Cuscul Pivaral, María Felipe Pérez, Ismerai Olibia García Castañon, Santos Isacar Vásquez Barrios, Mardo Luis Hernández and Hernández, Luis Armando Linares Ruano, Marta Alicia Maldonado Paz, Dora Marina Martínez Sofoifa, Pascuala de Jesús Mérida Rodríguez, Darinel López Montes de Oca, Israel Perez Charal, Corina Dianeth Robledo Alvarado, Audencio Rodas Rodríguez, Zoila Marina Pérez Ruíz, Santiago Francisco Valdéz Aguilar, Teresa Magdalena Ramírez Castro, Karen Judith Samayoa Vásquez, Francisco Sop Quiej, Jorge Armando Tavares Barreno, Miguel Lucas Vaíl, Santos Vásquez Oliveros, Iris Carolina Vicente Baullas and Sandra Lisbeth Zepeda Herrera. Therefore, the State is responsible for the violation of the obligation to ensure the right to health in accordance with Article 26 of the American Convention, in relation to Article 1(1) of this instrument.

B.4.3. Analysis of the scope of the discrimination that occurred in this case

128. The representatives argued that the State had discriminated against the presumed victims in this case by failing to ensure them comprehensive, accessible, acceptable and good quality care, taking into account the diverse situations of vulnerability they faced. They

also argued that the State had failed to adopt measures to provide comprehensive care to the presumed victims that took into account the different factors of vulnerability that coalesced and resulted in a specific form of discrimination owing to their intersection. Consequently, the Court will analyze whether discrimination existed in this case. Also, bearing in mind that, in this case, it has been alleged that several individuals were victims of discrimination for similar reasons, the Court will analyze each reason for which they were discriminated against separately, as appropriate. This is notwithstanding the fact that the Court understands that the combination of factors of discrimination in an intersectional manner resulted in a discriminatory experience that differs from the simple accumulation of different reasons for the discrimination against a person.¹⁴⁶

129. In this regard, the Court recalls that, as a cross-cutting condition for the accessibility of its health services,¹⁴⁷ the State is obliged to guarantee equal treatment to all. Thus, pursuant to Article 1(1) of the American Convention, discriminatory treatment is prohibited,¹⁴⁸ “for reasons of race, color, sex, [...] economic status, birth, or any other social condition.”¹⁴⁹ The Court recalls that the list of elements by virtue of which discrimination is prohibited under Article 1(1) of the American Convention is neither exhaustive nor restrictive, merely indicative. Thus, the wording of this article leaves the criteria open with the inclusion of the phrase “any other social condition” in order to incorporate other categories that were not explicitly indicated.¹⁵⁰

130. In this regard, the Court indicates that, within the Convention’s sphere of protection, HIV is a factor based on which discrimination is prohibited under the phrase “any other social condition” in Article 1(1) of the Convention.¹⁵¹ The Court underscores that the right to equality and non-discrimination has two aspects: a negative one related to the prohibition of arbitrary differences in treatment, and a positive one related to the State obligation to create conditions of real equality for groups that have historically been excluded or that are at greater risk of being discriminated against,¹⁵² as in the case of people living with HIV.¹⁵³ The obligation to adopt positive measures is increased with regard to the protection of

¹⁴⁶ Cf. *Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 351, para. 277.

¹⁴⁷ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 122. Cf. General Comment No. 14: The Right to the Highest Attainable Standard of Health, August 11, 2000, U.N. Doc. E/C.12/2000/4, para. 12. In this regard, the General Comment indicates that accessibility has four overlapping dimensions, one of them is that of non-discrimination, which means that “health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.”

¹⁴⁸ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 122.

¹⁴⁹ Cf. *Case of Veliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of May 19, 2014. Series C No. 277, para. 204, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 122.

¹⁵⁰ Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239 para. 85, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 122.

¹⁵¹ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 255.

¹⁵² Cf. *Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 267, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 123.

¹⁵³ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 236.

people who are at risk or in a vulnerable situation, and they should be guaranteed access to medical health services on an equal footing.¹⁵⁴

131. Accordingly, the State obligation to respect and to ensure the right to health acquires a special dimension in relation to the protection of people in a situation of vulnerability. The Court recognizes that people living in poverty often have unequal access to health services and information, which exposes them to a greater risk of infection and of receiving inadequate or incomplete medical care.¹⁵⁵ The Court also notes the vulnerable situation of women living with HIV, especially those of child-bearing age.

132. That said, the Court has indicated that extreme poverty and the lack of adequate medical care for women during pregnancy and postpartum are causes of high maternal mortality and morbidity. Therefore, States must implement appropriate health policies that allow it to provide assistance with suitably qualified personnel during births; policies to prevent maternal mortality by providing adequate prenatal and postpartum controls, and legal and administrative instruments relating to health policies that record cases of maternal mortality adequately.¹⁵⁶ The Court has also recognized that, under Article 19 of the Convention, the State must assume its special position of guarantor with greater care and responsibility and take special measures focused on the principle of the best interest of the child.¹⁵⁷

133. In this regard, the Court notes that the Committee for the Elimination of Discrimination against Women recommended "that programmes to combat AIDS should give special attention to the rights and needs of women and children, and to the factors relating to the reproductive role of women and their subordinate position in some societies which make them especially vulnerable to HIV infection."¹⁵⁸ Furthermore, the CESCR has indicated that "States should aim to ensure universal access without discrimination for all individuals, including those from disadvantaged and marginalized groups, to a full range of quality sexual and reproductive health care, including maternal health care, [...] and the prevention, diagnosis and treatment of [...] sexually transmitted infections and HIV/AIDS."¹⁵⁹

134. The Court also notes that, in the eighth international guideline on HIV/AIDS and human rights, OHCHR and UNAIDS indicated that States "should promote a supportive and enabling environment for women, children and other vulnerable groups by addressing

¹⁵⁴ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 123.

¹⁵⁵ *Mutatis mutandi, Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of August 24, 2010. Series C No. 214, para. 233.

¹⁵⁶ Cf. *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of August 24, 2010. Series C No. 214, para. 233.

¹⁵⁷ Cf. *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 152 and *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of March 29, 2006. Series C No. 146, para. 177.

¹⁵⁸ Cf. United Nations. Committee for the Elimination of Discrimination against Women. General Recommendation No. 15: Avoidance of Discrimination against Women in National Strategies for the Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS), 9th session, 1990, U.N. Doc. A/45/38, paragraph (b).

¹⁵⁹ Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), May 2, 2016, U.N. Doc. EC.12/GC/22, para. 45.

underlying prejudices and inequalities.”¹⁶⁰ This guideline has been interpreted to mean that States should support the development of adequate, accessible and effective HIV-related prevention and care services by and for vulnerable communities, and that they should ensure that all women of child-bearing age have access to accurate and comprehensive information and counselling on the prevention of HIV transmission and the risk of vertical transmission of HIV, as well as to resources available to minimize that risk.¹⁶¹

135. In this regard, the Court notes that 25 of the presumed victims in this case are women, of whom five were pregnant when they were diagnosed with HIV or became pregnant after their diagnosis.¹⁶²

136. In this regard, the Court notes the following: (i) Sandra Lisbeth Zepeda Herrera was diagnosed with HIV when she was seven months pregnant, but did not receive adequate treatment to avoid the vertical transmission of the virus that occurred;¹⁶³ (ii) Pascuala de Jesús Mérida Rodríguez was five months pregnant when she was diagnosed with HIV, and although she received antiretroviral treatment from MSF during her pregnancy, the medical staff of the hospital where she gave birth to her son refused to perform the planned cesarean section, which meant that she risked transmitting the virus to her son,¹⁶⁴ and (iii) regarding the care received by Saira Elisa Barrios, Corina Dianeth Robledo Alvarado and Dora Marina Martínez Sofoifa, the Court has insufficient information to determine any State acts or omissions related to their care as pregnant women living with HIV.

137. Consequently, the Court considers that the failure to provide antiretroviral treatment to Mrs. Zepeda Herrera when she was pregnant, and to perform a cesarean section in the case of Mrs. Jesús Mérida when this had been programmed as a preventive measure constituted a form of gender-based discrimination, because the State failed to provide adequate medical care to pregnant women living with HIV, and this had a differentiated impact and resulted in a risk of vertical transmission of HIV to their offspring. The Court notes that, according to information submitted by expert witness Oscar Cabrera, preventing mother-to-child transmission of HIV is a priority for eliminating HIV in children, because more than 90% of children with HIV are infected through their mothers during pregnancy, labor, birth, and breast-feeding and, without treatment, more than half the children with HIV will die within their first two years of life.¹⁶⁵

138. Furthermore, the Court considers that the conditions of being women living with HIV and being pregnant coalesced in an intersectional manner for Mrs. Zepeda Herrera and Mrs. Jesús Mérida who, owing to their situation, formed part of a vulnerable group so that the discrimination against them was the result of several factors that intersected and

¹⁶⁰ Cf. Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint United Nations Program on HIV and AIDS (UNAIDS), *International Guidelines on HIV/AIDS and Human Rights*. Consolidated version, 2006, eighth guideline.

¹⁶¹ Cf. Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint United Nations Program on HIV and AIDS (UNAIDS), *International Guidelines on HIV/AIDS and Human Rights*. Consolidated version, 2006, eighth guideline, pp. 52 to 54.

¹⁶² The following persons fall within this category: Sandra Lisbeth Zepeda Herrera, Pascuala de Jesús Mérida, Saira Elisa Barrios, Corina Dianeth Robledo and Dora Marina Martínez.

¹⁶³ Cf. Affidavit prepared by Sandra Lisbeth Zepeda Herrera on December 15, 2016 (evidence file, folio 11544).

¹⁶⁴ Cf. Affidavit prepared by Pascuala De Jesús Mérida Rodríguez de Maldonado on January 11, 2017 (evidence file, folio 11763).

¹⁶⁵ Cf. Expert opinion provided by Oscar Cabrera on March 6, 2018 (merits file, folio 1707).

conditioned each other. In this regard, the Court recalls that intersectional discrimination is the result of the confluence of different factors of vulnerability or sources of discrimination associated with certain conditions of an individual. Thus, as the Court has indicated, discrimination against women based on sex and gender is indivisibly combined with other factors that affect women, and this type of discrimination may affect women from some groups to a different degree or in a different way than it affects men. Consequently, in their legal instruments, States should recognize and prohibit these intersecting forms of discrimination and their combined negative impact on the women concerned, as well as adopt and implement policies and programs to eliminate such situations.¹⁶⁶

139. Consequently, the Court concludes that the State is responsible for the violation of the prohibition of discrimination in relation to the obligation to ensure the right to health, recognized in Article 26 of the Convention, in relation to Article 1(1), to the detriment of Sandra Lisbeth Zepeda Herrera and Pascuala de Jesús Mérida Rodríguez.

B.4.4. The violation of the principle of progressivity in relation to the right to health

140. The Court recalls that one of the disputes in this case refers to whether the State violated the principle of progressivity contained in Article 26 of the Convention, owing to the alleged retrogressive measures it adopted that prejudiced the full realization of the right to health of people living with HIV in Guatemala. In this regard, the representatives asserted that, despite being aware of the existence of an HIV epidemic in its territory, the State adopted retrogressive measures and did not use the maximum of its available resources to prevent the propagation of the virus and to ensure the right to health. Specifically, the representatives referred to the legal barriers concerning patents that had prevented a permanent supply of low-cost drugs under the public health system. They also referred to obstacles in relation to administrative contracting and to acts of corruption.

B.4.1.1. Standards for the right to health applicable to the principle of progressivity

141. The Court finds it pertinent to reiterate that, by virtue of Article 26 of the Convention, it has full competence to examine violations of the rights derived from the economic, social, educational, scientific and cultural standards of the OAS Charter (*supra* para. 97). The Court also reiterates that two types of obligations arise from these provisions: those that can be claimed immediately, and those of a progressive nature. Regarding the latter, the Court considers that, in general, it will not be possible to achieve the progressive development of economic, social, cultural and environmental rights in the short-term and, therefore, "a necessary flexibility device is required reflecting the realities of the real world and the difficulties involved for any country in ensuring their full realization."¹⁶⁷

¹⁶⁶ Cf. *Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs*. Judgment of March 9, 2018. Series C No. 351, para. 276, and Committee for the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, December 16, 2010, U.N. Doc. CEDAW/C/GC/28, para. 18.

¹⁶⁷ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2009. Series C No. 198, para. 102, and Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), December 14, 1990, U.N. Doc. E/1991/23, para. 9.

142. The Court has also determined that, in the context of this flexibility regarding the realization time frame and methods, the State has essentially, although not exclusively, an obligation to act; in other words, an obligation to take measures and provide the necessary means and elements to respond to the requirements for the realization of the rights involved, always to the extent permitted by the economic and financial resources available to comply with its respective international commitment.¹⁶⁸ Thus, the progressive implementation of the said measures may be subject to accountability and, if appropriate, compliance with the respective commitment assumed by the State may be claimed before the courts called on to decide eventual human rights violations.¹⁶⁹

143. In correlation to the above, the Court has considered that it revealed an obligation – although a conditioned obligation – of non-retrogressivity, which should not always be understood as a prohibition of measures that restrict the exercise of a right. In this regard, the Court referred to the opinion of the CESCR that “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 [International Covenant on Economic, Social and Cultural Rights] and in the context of the full use of the maximum available resources.”¹⁷⁰ Similarly, the Inter-American Commission has considered that to evaluate whether a retrogressive measure is compatible with the American Convention, it is necessary “to determine whether it is justified by reasons of sufficient importance.”¹⁷¹ Based on the foregoing, it can be asserted that this aspect of the principle of progressivity is justiciable when economic, social, cultural and environmental rights are involved.

B.4.1.2. Analysis of compliance with the obligation of progressivity prior to 2004

¹⁶⁸ Cf. *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 102, and Committee on Economic, Social and Cultural Rights, Statement on “An evaluation of the obligation to take steps to the “Maximum of available resources” under an optional protocol to the Covenant,” September 21, 2007, U.N. Doc. E/C.12/2007/1, paras. 8 and 9.

¹⁶⁹ Cf. *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 102.

¹⁷⁰ Cf. *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 103; Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) December 14, 1990, U.N. Doc. E/1991/23. According to the Committee on Economic, Social and Cultural Rights, “[s]hould a State party use “resource constraints” as an explanation for any retrogressive steps taken, the Committee would consider such information on a country-by-country basis in the light of objective criteria such as: (a) The country’s level of development; (b) The severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant; (c) The country’s current economic situation, in particular whether the country was undergoing a period of economic recession; (d) The existence of other serious claims on the State party’s limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict; (e) Whether the State party had sought to identify low-cost options; and (f) Whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.” Cf. Committee on Economic, Social and Cultural Rights, Statement on “An evaluation of the obligation to take steps to the “maximum of available resources” under an optional protocol to the Covenant,” September 21, 2007, U.N. Doc. E/C.12/2007/1, para. 10.

¹⁷¹ Cf. *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller’s Office”) v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 103, Admissibility and Merits Report No. 38/09, Case 12,670, National Association of Former Employees of the Peruvian Social Security Institute *et al. v. Peru*, issued by the Inter-American Commission on Human Rights on March 27, 2009, paras. 140 to 147.

144. In this judgment (*supra* paras. 118 to 127), the Court has already found that the State violated the right to health of 49 victims by failing to ensure them adequate medical treatment as people living with HIV. The Court will now examine the allegation that the State violated the commitment established in Article 26 concerning compliance with its obligation of progressivity. This obligation consists in the adoption of provisions, especially of an economic and technical nature – to the extent of available resources and by either legislative or other appropriate means – to achieve progressively the full realization of certain economic, social, cultural and environmental rights. In addition, the Court recalls that the progressive realization of the ESCER means that the States Parties have the specific and constant obligation to advance as rapidly and effectively as possible towards the full realization of the ESCER.¹⁷² In this regard, the Court reiterates that the obligation of progressivity:

(...) should not be interpreted to mean that, during their implementation, these obligations become deprived of specific content, which also does not mean that States may postpone indefinitely the adoption of measures to make the rights in question effective, especially almost forty years after the entry into force of the inter-American treaty. Therefore, the obligation of non-retrogressivity applies with regard to any realization of the rights that has been achieved."¹⁷³

145. Bearing in mind that the matter analyzed refers to the specific measures that, in the opinion of the Commission and of the representatives, were retrogressive for the prevention and combat of HIV in Guatemala, the Court clarifies that, in this case, it does not have to assess whether the State's current public policy for combating HIV is insufficient in relation to the obligations established in Article 26 of the Convention. Indeed, the Court notes that the State has promoted a series of actions to combat the HIV epidemic in Guatemala. The State has described these actions to the Court on different occasions and they include the promulgation of laws and decrees, government decisions, care protocols, cooperation agreements and manuals (*supra* paras. 41 to 54). Further, the Court notes that, from 2004 to 2017, the State progressively increased the budget allocated to combat HIV, and that it has adopted other public policy measures aimed at achieving a greater protection for the population.

146. Nevertheless, the Court reiterates that the obligations regarding the progressive realization of the ESCER require the continual execution of actions to achieve the full enjoyment of these rights. Thus, the progressive dimension of the protection of ESCER, although acknowledging the gradual nature of their realization, also includes a sense of progress, which calls for an effective improvement of the enjoyment and exercise of these rights, so that social inequalities are corrected and the inclusion of vulnerable groups is facilitated. Accordingly, the obligation of progressive realization prohibits State inactivity in the task of implementing actions to achieve the comprehensive protection of these rights, especially when the total absence of State protection places the individual at risk of suffering harm to his or her life or personal integrity. This risk occurs for people living with HIV who do not receive adequate medical care. Consequently, the Court considers that the State failed to comply with its treaty-based obligation to ensure progressive realization because it did not have public policies or programs that *de facto* – and not only *de jure* – allowed it to make progress in complying with its obligation to achieve the full realization of the right to health.

¹⁷² Cf. *Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 104 and Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, August 11, 2000, U.N. Doc. E/C.12/2000/4, para. 31.

¹⁷³ Cf. *Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 104.

147. Indeed, determination of when a State has failed to comply with the obligation should be made on the basis of the particularities of its laws and the available resources. However, the Court recognizes that the leeway enjoyed by States for the effective realization of the ESCER does not justify inaction in protecting them. Thus, in this case, the Court recalls that it has been demonstrated that the State, despite having a series of laws and programs aimed at caring for people living with HIV, failed to provide medical treatment before 2004 to ensure the right to health of these individuals, with the exception of treating a limited number of them; rather it entrusted this task to non-governmental organizations. The State acknowledged this situation before the Court on several occasions and sought to justify the lack of progressive medical care before 2004 despite the existence of domestic laws that established an obligation of protection for different authorities. Consequently, the Court considers that the State's inaction, prior to 2004, constituted non-compliance with the State obligations in relation to progressive protection of the right to health, in violation of Article 26 of the American Convention.

148. Consequently, owing to the State inaction with regard to protection of the right to health of the population of people living with HIV, despite the existence of an international obligation and State regulations, the Court concludes that the State is responsible for violating the principle of progressivity contained in Article 26 of the Convention, in relation to Article 1(1) of this instrument.

B.4.1.3. Analysis of compliance with the obligations of progressivity in relation to the alleged legal barriers concerning intellectual property and administrative contracting

149. The Court notes that the representatives' petition refers specifically to the legal barriers concerning intellectual property and administrative contracting practices that allegedly constituted retrogressive measures because they had prevented the health system from having a permanent supply of antiretroviral drugs. In the representatives' opinion, these barriers had prevented the State from using the maximum resources available to prevent the propagation of the virus and to ensure the right to health. In this regard, the Court notes that the Commission did not refer directly to the Law on Industrial Property in its Merits Report as an obstacle to compliance with the State's obligation to respond to HIV, but it did mention some commitments made by the Government during a meeting held by the President of Guatemala, the Ministry of Public Health, the Executive Director of the AIDS Prevention Foundation, and the Director of the *Asociación de Salud Integral (ASI)*.¹⁷⁴ The meeting was held following the Constitutional Court's ruling of January 29, 2003.

150. The Court considers that the facts contained in the Merits Report concerning the commitments made by the President following the ruling of the Constitutional Court; namely, those related to the adoption of various measures: (i) to annul Decree No. 9-2003, (ii) to promulgate Decree No. 34-2004, and (iii) to promulgate Decree 30-2005, are of a contextual nature for the effects of this case. In other words, these facts are relevant "to provide a framework for the facts that are alleged to have led to violations [of human rights] in the context of the specific circumstances in which they took place."¹⁷⁵ Thus, the facts mentioned by the Commission as some of the commitments made by the Government

¹⁷⁴ Cf. IACHR, Merits Report No. 2/16, *Luis Ronaldo Cuscul Pivaral and other persons living with HIV/AIDS*, Guatemala, April 13, 2016 (merits file, folio 30).

¹⁷⁵ Cf. *Case of J. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of November 27, 2013. Series C No. 275, para. 53, and *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017. Series C No. 344, para. 67.

of Guatemala following the ruling of the Constitutional Court will be considered, as pertinent, in order to define the scope of the State obligation to ensure access to effective judicial remedies to the presumed victims in this case.

151. The Court also notes that the Commission did not refer in its Merits Report to administrative contracting laws and practice or to acts of corruption that could have represented an obstacle to the effective use of the available resources.

152. In this regard, the Court recalls that the factual framework of the proceedings before it is constituted by the facts contained in the Merits Report. Consequently, it is not admissible for the parties to allege new facts that differ from those contained in that report, without prejudice to presenting those that explain, clarify or reject the facts that have been submitted to the Court's consideration. The exception to this principle are facts classified as supervening or when facts come to light or there is access to evidence about them subsequently, provided that such facts are related to the facts of the proceedings.¹⁷⁶ These considerations include the context presented by the Commission in its Merits Report, which forms part of the factual framework of a case before this Court.¹⁷⁷ Ultimately, it corresponds to the Court to decide, in each case, on the admissibility of arguments concerning the factual framework in order to safeguard the procedural balance between the parties.¹⁷⁸

153. Bearing in mind that some of the facts that are the purpose of the dispute – for example, those that presumably constitute a violation of the principle of progressivity owing to the alleged legal barriers concerning intellectual property, administrative contracting laws and practice, and alleged corruption – are not included in the factual framework submitted by the Commission, the Court considers that, in this case, it is not admissible to rule on whether they constitute the basis for a violation of the principle of progressivity contained in Article 26 of the Convention.

B.5. The violation of the rights to life and to personal integrity

154. The Court recalls that one of the disputes in this case relates to whether the State is responsible for the effects that the medical care provided by the State – or the lack of it – may have had on the personal integrity and life of the presumed victims in the case. The Commission argued that the lack of adequate and comprehensive medical care had a serious impact on their personal integrity and on their life, in violation of Articles 5(1) and 4(1) of the Convention. The representatives argued that the State had violated the rights to life, to a decent life, and to personal integrity based on the death of 13 persons as a result of opportunistic infections, and the harm to the physical and psychological health of the presumed victims owing to the inadequate medical treatment, in violation of Articles 5(1) and 4(1) of the Convention. The Court will proceed to examine these two allegations.

B.5.1. Analysis of the right to life

¹⁷⁶ Cf. *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 153, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of April 25, 2018. Series C No. 354, para. 148.

¹⁷⁷ Cf. *Case of García Ibarra et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 17, 2015. Series C No. 306., para. 48, and *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, para. 65.

¹⁷⁸ Cf. *Case of the Mapiripán Massacre v. Colombia. Judgment of September 15, 2005.* Series C No. 134, para. 59, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of April 25, 2018. Series C No. 354, para. 148.

155. This Court has established that the right to life plays a fundamental role in the American Convention, because it is essential for the exercise of the other rights.¹⁷⁹ Compliance with Article 4, related to Article 1(1) of the American Convention, supposes not only that no one may be arbitrarily deprived of their life (negative obligation), but also requires States to take all appropriate steps to protect and preserve the right to life (positive obligation), in keeping with the obligation to ensure the full and free exercise of the rights of all persons subject to their jurisdiction.¹⁸⁰ Consequently, States have the obligation to create the required conditions to ensure that no violations of this inalienable right occur and, in particular, the duty to prevent their agents from violating it.¹⁸¹

156. The Court has indicated that in order to determine the international responsibility of a State in cases of death in a medical context, the following elements must be proved: (a) that, by act or omission, a patient is denied access to health care in situations of medical emergency, or to essential medical treatment, even though the risk to the patient's life entailed by this denial is foreseeable; (b) serious medical negligence,¹⁸² and (c) the existence of a causal nexus between the act that has been proved and the harm suffered by the patient.¹⁸³ When the attribution of responsibility stems from an omission, it is necessary to verify the probability that the omitted conduct would have ended the causal process that resulted in the harm. Such verifications must take into consideration whether the person concerned may be in a situation of special vulnerability¹⁸⁴ and, if so, the measures taken to respond to this situation.¹⁸⁵

157. In this case, first, the Court notes that, of the 49 presumed victims, 12 are now deceased from opportunistic diseases. The Court recalls that opportunistic diseases are those infections or neoplasm that take advantage of a weakened immune system, and can cause the death of the person who contracts them. As mentioned previously (*supra* para. 37), antiretroviral therapy offers the best chance for effective suppression of the virus, recovery of the immune system and clinical benefits. Expert witness Boza Cordero stated that, when a patient is taking antiretroviral drugs appropriately, there is no reason for opportunistic diseases to occur; thus, if an opportunistic disease appears, it is because the patient is not taking the necessary medication, which constitutes a therapeutic failure.¹⁸⁶

¹⁷⁹ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 144, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 145.

¹⁸⁰ Cf. *Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of June 7, 2003. Series C No. 99, para. 110, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 146.

¹⁸¹ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 144, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 148.

¹⁸² Cf. *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, paras. 120 to 122, 146 and 150, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 148.

¹⁸³ *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 148.

¹⁸⁴ Cf. *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of August 24, 2010. Series C No. 214, para. 227, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 148.

¹⁸⁵ Cf. *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 125, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 148.

¹⁸⁶ Expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folio 1458).

158. The Court has verified various omissions in the medical care provided to the presumed victims who are deceased. Specifically, the State failed to comply with its obligation to provide antiretroviral therapy, to perform diagnostic tests for the care and treatment of HIV and opportunistic diseases, and to provide social support. These omissions constitute therapeutic failures and, if they had not occurred, this would have reduced the probability of the opportunistic diseases occurring that led to the death of the presumed victims. The Court therefore considers that the existence of a causal nexus has been proved in these cases.

159. In this regard, the Court notes that: (i) Facundo Gómez Reyes died from tuberculosis; (ii) Reina López Mujica died from tuberculosis and anemia; (iii) Petrona López Robledo, (iv) Rita Mariana Dubón Orozco and (v) Alberto Quiché Cuxeva died from pneumonia; (vi) Silvia Mirtala Alvarez Villatoro died from bacterial meningitis, and (vii) Ismar Ramírez Chajón died from disseminated mycosis. The Court also notes that: (viii) Guadalupe Herminia Cayaxon García is deceased and, among other diseases and illnesses, had suffered from herpes, enlarged liver and bronchial hyperreactivity; (ix) Elsa Miriam Estrada Ruíz is deceased and had suffered from oral candidiasis, herpes zoster and neuropathy; (x) Juana Aguilar is deceased and, among other diseases, had suffered from herpes zoster and sarcoidosis; (xi) María Blanca Vaíl López is deceased and, among other diseases, had suffered from, herpes and candidiasis, and (xii) José Rubén Delgado López is deceased and, among other diseases, had suffered from candidiasis, cryptococcus, sarcoidosis and herpes. Consequently, with regard to the persons mentioned in this paragraph, the State is responsible for the violation of the obligation to ensure the right to life recognized in Article 4(1) of the American Convention in relation to Article 1(1) of this instrument. However, the Court does not have sufficient information to determine the cause of death of (xiii) Luis Edwin Cruz Gramajo, so that, in this regard, the State is not responsible for violating the obligation to ensure the right to life recognized in Article 4(1) of the American Convention in relation to Article 1(1) of this instrument.

160. Second, the Court notes that the representatives' arguments concerning the violation of the right to a decent life refer to the State's failure to comply with its obligation to adopt positive measures to ensure comprehensive, accessible and acceptable medical care to the presumed victims. In this regard, the Court notes that these arguments have been analyzed in the section on the right to health; therefore, it will not examine them in this section.

B.5.2. Analysis of the right to personal integrity

161. The American Convention expressly recognizes a person's right to physical and mental integrity, and the violation of this right "is a type of violation that has different degrees and [...] its physical and mental effects vary in intensity according to endogenous and exogenous factors that must be proved in each specific situation."¹⁸⁷ The Court has established that personal integrity is directly and immediately connected to health care,¹⁸⁸ and that the lack of adequate medical care may entail the violation of Article 5(1) of the

¹⁸⁷ Cf. *Case of Loayza Tamayo v. Peru. Merits. Judgment of September 17, 1997*. Series C No. 33, para. 57, and *Case of the Xucuru Indigenous People and its members v. Brazil. Preliminary objections, merits, reparations and costs. Judgment of February 5, 2018*. Series C No. 346, para. 171.

¹⁸⁸ Cf. *Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs. Judgment of November 22, 2007*. Series C No. 171, para. 117, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs. Judgment of March 8, 2018*. Series C No. 349, para. 152.

Convention.¹⁸⁹ In this regard, the Court has asserted that protection of the right to personal integrity supposes the regulation of health services within the domestic sphere, as well as implementation of a series of mechanisms to ensure that this regulation is effective.¹⁹⁰

162. In the instant case, the Court notes that patients living with HIV may experience severe suffering as a result of the physical and mental effects of the opportunistic diseases, and from social factors resulting from their condition. As mentioned previously, adequate medical treatment and social support can mitigate both the physical and psychological aspects of this suffering. In this regard, expert witness Olga Alicia Paz Bailey explained that the illnesses caused by HIV/AIDS cause physical pain and prevent the realization of daily activities, and this results in the person being stigmatized and an object of social prejudices.¹⁹¹ In this way:

The physical ailments suffered by the individual: numbness in arms and legs, cramping, the affected parts of the body do not respond when the person wishes to move them, nausea, headaches, fever, diarrhea, tiredness, lack of physical strength, and the series of opportunistic diseases that take advantage of the clinical conditions, are the signs of an ailing body, which the patient will try and hide, because the stigma associated with HIV/AIDS condemns him to marginalization, exclusion and discrimination. At this stage, the physical suffering becomes psychological suffering: anguish, depression, guilt, shame.¹⁹²

163. Accordingly, the Court finds it proved that 46 presumed victims suffered physical and mental effects as a result of their condition as people living with HIV. Therefore, for the reasons mentioned in the preceding section (*supra* paras. 119 and 126), the Court notes the existence of a causal nexus between the lack of adequate medical treatment for the presumed victims, and the physical and mental effects they suffered as people living with HIV. Indeed, the State, by failing to ensure antiretroviral therapy, perform the corresponding diagnostic tests, and provide social support, which could have allowed the presumed victims to mitigate or eliminate the endogenous and exogenous factors that were the cause of their physical and mental suffering arising from their condition as people living with HIV, is responsible for violating their right to personal integrity. Consequently, the State is responsible for the violation of the obligation to ensure the right to personal integrity recognized in Article 5(1) of the American Convention to the detriment of 46 presumed victims in this case.¹⁹³ Regarding the other presumed victims, the Court lacks

¹⁸⁹ Cf. *Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 7, 2004. Series C No. 114, para. 156 and 157, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 152.

¹⁹⁰ Cf. *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, paras. 89 and 90, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 152.

¹⁹¹ Cf. Expert opinion of Dr. Olga Alicia Paz Bailey provided on December 17, 2017 (merits file, folios 1412 and 1419).

¹⁹² Expert opinion of Dr. Olga Alicia Paz Bailey provided on December 17, 2017 (merits file, folio 1436).

¹⁹³ The following fall within this category: i) Ismar Ramírez Chajón, ii) José Cupertino Ramírez, iii) Sebastián Emilio Dueñas, iv) Julia Aguilar, v) Luis Rubén Isabel Alvarez Flores, vi) Saira Elisa Barrios, vii) Felix de Jesús Cabrera Morales, viii) César Noé Cancinos Gómez, ix) Aracely Cinto, x) Luis Rolando Cuscul Pivaral, xi) María Felipe Pérez, xii) Mardo Luis Hernández and Hernández, xiii) Luis Armando Linares Ruano, xiv) Pascuala de Jesús Mérida Rodríguez, xv) Darinel López Montes de Oca, xvi) Audencio Rodas Rodríguez, xvii) Zoila Marina Pérez Ruíz, xviii) Santiago Francisco Valdéz Aguilar, xix) Karen Judith Samayoa Vásquez, xx) Francisco Sop Quiej, xxi) Miguel Lucas Vaíl, xxii) Sandra Lisbeth Zepeda Herrera, xxiii) Petrona López Robledo, xxiv) Rita Mariana Dubón Orozco, xxv) María Blanca Vaíl López, xxvi) José Rubén Delgado López, xxvii) Elsa Miriam Estrada Ruíz, xxviii) Guadalupe Herminia Cayaxon García, xxix) Juana Aguilar, xxx) Melvin Yovani Ajtun Escobar, xxxi) Felipe Tebalan Ordoñez, xxxii) Martina Candelaria Álvarez Estrada, xxxiii) Ismerai Olibia García Castañon, xxxiv) Santos Isacar Vásquez Barrios, xxxv) Marta Alicia Maldonado Paz, xxxvi) Dora Marina Martínez Sofoifa, xxxvii) Israel Pérez Charal, xxxviii)

sufficient information to determine whether they suffered physical or mental effects as people living with HIV.¹⁹⁴

164. Consequently, the State is responsible for the violation of the obligation to ensure the right to personal integrity recognized in Article 5(1) of the American Convention to the detriment of: Ismar Ramírez Chajón, José Cupertino Ramírez, Sebastián Emilio Dueñas, Julia Aguilar, Luis Rubén Isabel Alvarez Flores, Saira Elisa Barrios, Felix de Jesús Cabrera Morales, César Noé Cancinos Gómez, Aracely Cinto, Luis Rolando Cuscul Pivaral, María Felipe Pérez, Mardo Luis Hernández and Hernández, Luis Armando Linares Ruano, Pascuala de Jesús Mérida Rodríguez, Darinel López Montes de Oca, Audencio Rodas Rodríguez, Zoila Marina Pérez Ruíz, Santiago Francisco Valdéz Aguilar, Karen Judith Samayoa Vásquez, Francisco Sop Quiej, Miguel Lucas Vaíl, Sandra Lisbeth Zepeda Herrera, Petrona López Robledo, Rita Mariana Dubón Orozco, María Blanca Vaíl López, José Rubén Delgado López, Elsa Miriam Estrada Ruíz, Guadalupe Herminia Cayaxon García, Juana Aguilar, Melvin Yovani Ajtun Escobar, Felipe Tebalan Ordoñez, Martina Candelaria Alvarez Estrada, Ismerai Olibia García Castañon, Santos Isacar Vásquez Barrios, Marta Alicia Maldonado Paz, Dora Marina Martínez Sofoifa, Israel Perez Charal, Teresa Magdalena Ramírez Castro, Jorge Armando Tavares Barreno, Santos Vásquez Oliveros, Iris Carolina Vicente Baullas, Facundo Gómez Reyes, Reina López Mujica, Alberto Quiché Cuxeva, Silvia Mirtala Alvarez Villatoro and Corina Dianeth Robledo Alvarado.

Teresa Magdalena Ramírez Castro, xxxix) Jorge Armando Tavares Barreno, xl) Santos Vásquez Oliveros xli) Iris Carolina Vicente Baullas, xlii) Facundo Gómez Reyes, xliii) Reina López Mujica, xliv) Alberto Quiché Cuxeva, xlv) Silvia Mirtala Álvarez Villatoro and xlvi) Corina Dianeth Robledo Alvarado.

¹⁹⁴ With regard to i) Luis Edwin Cruz Gramajo, ii) Ingrid Janeth Barillas Martínez, iii) Olga Marina Castillo, the Court notes that it has insufficient information to determine their situation.

VIII-2
**RIGHT TO JUDICIAL GUARANTEES AND TO JUDICIAL PROTECTION IN RELATION
TO THE OBLIGATIONS TO RESPECT AND TO ENSURE THE RIGHTS (ARTICLES 8,¹⁹⁵
25¹⁹⁶ AND 1(1)¹⁹⁷ OF THE AMERICAN CONVENTION)**

A. Arguments of the Commission and the parties

165. The *Commission* asserted that the result of the application for amparo filed before the Constitutional Court affected not only the 13 victims who signed it, but also all the victims in this case. In addition, it indicated that the Guatemalan State had not explained the six-month delay in deciding a remedy that, owing to its nature, should be expeditious; moreover, in its decision, the Constitutional Court failed to rule on the merits of the matter. The Commission also considered that the substantive content of the Constitutional Court's decision was inconsistent with standards for the right to judicial protection, because that court failed to rule on the merits of the matter and justified the declaration of inadmissibility of the application for amparo based on a special temporary measure adopted by the Government, which was unrelated to the general situation in question. On this basis, the Commission concluded that the State had violated the right to judicial protection recognized in Article 25(1) of the American Convention, in relation to Article 1(1) of this instrument to the detriment of all the victims, with the exception of Alberto Quiché Cuxeva, who had died before the application for amparo was filed.

166. The *representatives* indicated that the decision of the Constitutional Court resulted in two different violations of the victims' rights: first, it violated their right to obtain a decision by a competent court on their rights, within a reasonable time, and with exceptional diligence, because that court took six months to adopt a decision, without the State having justified this delay to date. Second, they argued that this decision resulted in

¹⁹⁵ Article 8 of the Convention establishes: "1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: (a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court; (b) prior notification in detail to the accused of the charges against him; (c) adequate time and means for the preparation of his defense; (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; (e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; (f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; (g) the right not to be compelled to be a witness against himself or to plead guilty; and (h) the right to appeal the judgment to a higher court. 3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind. 4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause. 5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice."

¹⁹⁶ Article 25 of the Convention stipulates: "1. 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. 2. The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy, and (c) to ensure that the competent authorities shall enforce such remedies when granted."

¹⁹⁷ Article 1(1) of the Convention establishes: 1. 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."

the remedy being ineffective, because the Constitutional Court did not refer to the merits of the matter: namely, the obligation of the Guatemalan State to take sustainable steps to ensure that people living with HIV received comprehensive treatment. On this basis, the representatives argued that the State was responsible for violating the rights contained in Articles 8 and 25 of the Convention, in relation to Article 1(1) of this instrument.

167. The **State** argued that the ruling on the application for amparo complied with the judicial elements of simplicity, promptness and effectiveness, and it was decided on the basis of due process of law and the evidence provided by the parties. It also indicated that, if the presumed victims did not agree with the Constitutional Court's decision, they should have had recourse to the pertinent procedural remedies. Regarding the assertion that the Constitutional Court's ruling had not decided the merits of the matter, the State argued that it had adopted an exceptional measure by allocating a special appropriation of 500,000.00 quetzals to the Ministry of Public Health and Social Assistances to respond to the request. The State also argued that, according to the Inter-American Court's criteria, the obligation to provide the reasoning for a ruling does not require a detailed answer to each and every argument of the parties, but can vary according to the nature of the decision and that, in each case, it is necessary to analyze whether the said guarantee has been met; also, the requirement that the ruling should be reasoned, does not mean that the merits of the matter must be analyzed

B. Considerations of the Court

168. The Court has indicated that Article 25(1) of the Convention establishes the obligation of the States Parties to ensure, to all persons subject to their jurisdiction, an effective judicial remedy against acts that violate their fundamental rights.¹⁹⁸ This effectiveness supposes that, in addition to the formal existence of the remedy, it leads to results or responses to the violation of the rights recognized in either the Convention, or their Constitution and laws.¹⁹⁹ Accordingly, those remedies that, owing to the general situation in the country or even due to the particular circumstances of a specific case, are illusory cannot be considered effective.²⁰⁰ This may occur, for example, when their ineffectiveness has been revealed by practice, because the Judiciary lacks the necessary independence to decide with impartiality, or owing to any other situation that constitutes a denial of justice.²⁰¹ Thus, proceedings should be aimed at implementation of the protection of the right recognized in the legal ruling by the appropriate application of that ruling.²⁰²

¹⁹⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 91, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs*. Judgment of March 9, 2018. Series C No. 351, para. 251.

¹⁹⁹ Cf. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*. *Advisory Opinion OC-9/87 of October 6, 1987*. Series A No. 9, para. 24, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 257.

²⁰⁰ Cf. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*. *Advisory Opinion OC-9/87 of October 6, 1987*. Series A No. 9, para. 24, and *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348, para. 208.

²⁰¹ Cf. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*. *Advisory Opinion OC-9/87 of October 6, 1987*. Series A No. 9, para. 24, and *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348, para. 208.

²⁰² Cf. *Case of Baena Ricardo et al. v. Panama. Jurisdiction*. Judgment of November 28, 2003. Series C No. 104, para. 73, and *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017. Series C No. 344, para. 154.

169. The Court has established that, for an effective remedy to exist, it is not sufficient that it exists formally.²⁰³ This means that the remedy should be appropriate to contest the violation and that its application by the competent authority be effective.²⁰⁴ In addition, the Court has established that an effective judicial remedy implies that the analysis of a judicial remedy by the competent authority cannot be reduced to a mere formality, but rather the said authority must examine the reasons cited by the plaintiff and rule on them expressly.²⁰⁵ This does not mean that the Court assesses the effectiveness of a remedy based on whether it has produced a favorable result for the plaintiff.²⁰⁶ The Court has indicated that, by virtue of Article 25(2)(c) of the Convention, State responsibility does not end when the competent authorities issue a decision or judgment, but also requires the State to ensure the means to execute the final decisions, so that the rights declared are protected effectively.²⁰⁷

170. The Court has also indicated that, in light of Article 8(1) of the Convention, everyone has the right to a hearing by a competent and impartial court with due procedural guarantees, which include the possibility of presenting arguments and providing evidence. The Court has indicated that this provision of the Convention means that the State must ensure that the decision resulting from the proceedings satisfies the purpose for which it was conceived. This does not mean that it must always be accepted, but that its ability to produce the result for which it was conceived must be guaranteed.²⁰⁸ In addition, the Court recalls that the right of access to justice requires that a dispute must be decided in a reasonable time because, in certain cases, a prolonged delay may, in itself, constitute a violation of judicial guarantees.²⁰⁹

171. Furthermore, the Court has asserted that the obligation to provide the reasons for a ruling is one of the guarantees included in Article 8(1) to safeguard the right to due process of law.²¹⁰ The reasoning is the exteriorization of the justification allowing a conclusion to be

²⁰³ Cf. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24, and *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348, para. 188.

²⁰⁴ Cf. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs*. Judgment of March 9, 2018. Series C No. 351, paras. 251 and 252.

²⁰⁵ Cf. *Case of López Álvarez v. Honduras. Merits, reparations and costs*. Judgment of February 1, 2006. Series C No. 141, para. 96, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 267.

²⁰⁶ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 67, and *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017. Series C No. 344, para. 34.

²⁰⁷ Cf. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24, and *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348, para. 208.

²⁰⁸ Cf. *Case of Barbiani Duarte et al. v. Uruguay. Merits, reparations and costs*. Judgment of October 13, 2011. Series C No. 234, para. 122, and *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017. Series C No. 344, para. 153.

²⁰⁹ Cf. *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs*. Judgment of June 21, 2002. Series C No. 94, para. 145, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 421.

²¹⁰ Cf. *Case of Apitz Barbera et al. ("First Administrative Contentious Court") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 78, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 268.

reached.²¹¹ The obligation to provide the reasons for a ruling is a guarantee related to the proper administration of justice that ensures to citizens their right to be tried for the reasons established by law, while providing credibility to judicial decisions in a democratic society.²¹² Based on the foregoing, the rulings adopted by the States' domestic courts that may affect human rights must be reasoned; to the contrary, they would be arbitrary.²¹³ The reasoning of a ruling should provide information on the facts, grounds and laws on which the court has based itself to take its decision, so that any indication of arbitrariness can be dismissed, while demonstrating to the parties that they have been heard during the proceedings.²¹⁴ Also, it should show that the arguments of the parties have been duly taken into account and that all the evidence has been analyzed.²¹⁵

172. Regarding this case, the Court recalls that, on November 23, 2001, May 27, and June 10, 2002, the *Asociación Coordinadora de Sectores de Lucha Contra el SIDA* (ACSLCS), the Ombudsman, and other organizations that represent people living with HIV/AIDS, sent three letters in which they asked the State of Guatemala, through the President of the Republic and the Ministry of Health, to provide medical care and antiretroviral treatment to everyone diagnosed with HIV/AIDS, without receiving any response (*supra* para. 56). Due to the lack of response from the President and the Minister of Health, on July 26, 2002, 22 people, including 13 of the presumed victims, filed an application for amparo before the Constitutional Court (*supra* para. 57). The applicants indicated that, as a result of this refusal or omission by the President, the right to personal protection, the right to life, the right of petition, the rights inherent to the individual, and the right to health had been violated, and asked the Constitutional Court to decide the application for amparo promptly. They also indicated that the State had the obligation to guarantee their right to life by a policy of procurement and non-discriminatory, systematic and daily distribution of antiretroviral drugs, preferably good quality generic drugs available on the market.

173. In response to the request the President authorized a special appropriation of five hundred thousand quetzals (Q.500,000.00) to meet the requirements of people living with HIV (*supra* para. 60). On October 29, 2002, the applicants acknowledged the willingness of the President of Guatemala to respond to the requests made in the initial application by allocating five hundred thousand quetzals for the care of people living with HIV. However, they asserted that the reasons for filing the application for amparo subsisted, because the antiretroviral treatment had not been initiated for everyone living with this diagnosis, as treatment was only being provided to 27 of them (*supra* para. 60). To prove the connection between the human rights violation claimed and the applicants for amparo, the applicants

²¹¹ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 107, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of April 25, 2018. Series C No. 354, para. 268.

²¹² Cf. *Case of Aritz Barbera et al. ("First Administrative Contentious Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 77, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of April 25, 2018. Series C No. 354, para. 268.

²¹³ Cf. *Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs.* Judgment of June 23, 2005. Series C No. 127, para. 152, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs.* Judgment of March 9, 2018. Series C No. 351, para. 187.

²¹⁴ Cf. *Case of Claude Reyes et al. v. Chile. Merits, reparations and costs.* Judgment of September 19, 2006. Series C No. 151, para. 122, and *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, para. 168.

²¹⁵ Cf. *Case of Aritz Barbera et al. ("First Administrative Contentious Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 78, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs.* Judgment of March 9, 2018. Series C No. 351, para. 187.

asked the Constitutional Court to issue a request for helpful information in order to obtain the applicants' medical records because they were all living with HIV, and to declare the application for amparo admissible, ordering the State to enact public policies that ensured the collective right to life of people living with HIV and the distribution of antiretroviral drugs, without any discrimination, in the country's hospitals and health centers (*supra* para. 61).

174. Finally, on January 29, 2003, the Constitutional Court decided that the remedy filed by the applicants was unsubstantiated, because the conduct described in the application had ceased, and therefore declared that the application was "simply inadmissible." The Constitutional Court noted that, in a memorandum of October 30, 2002, the applicants had stated that the resources offered by the President had been transferred (*supra* para. 62).

175. Based on the above, the Court will proceed to assess whether the proceedings of the Constitutional Court constituted a violation of the right to judicial guarantees and judicial protection of the presumed victims. Specifically, the Court will determine whether the remedy filed before the Constitutional Court: (i) complied with the requirements of appropriateness and effectiveness, and (ii) was decided within a reasonable time.

B.1. Appropriateness and effectiveness of the application for amparo

176. First, the Court must determine whether the Constitutional Court's ruling met the requirements of appropriateness and effectiveness in keeping with the Convention's standards. In this regard, the Court recalls that the right to an effective remedy results in the obligation of the competent authority to examine the reasons cited by a plaintiff, to rule expressly on them, and to verify the execution of its decisions. However, this obligation does not mean that the effectiveness of a remedy is measured by virtue of it producing a favorable result for the plaintiff. The State obligation to ensure this right is an obligation of means or conduct, so that, in this case, the fact that the Constitutional Court did not arrive at the legal conclusion desired by the plaintiffs does not constitute *per se* a violation of the right of access to justice. Nevertheless, the Court recalls that, under Article 8(1) of the Convention, the competent authorities are obliged to provide the reasons for their decisions (*supra* para. 171).

177. The Court notes that, in its ruling of January 29, 2003, the Constitutional Court merely analyzed whether it could be considered that the agreement of October 30, 2002, had put an end to the contested act, insofar as it had constituted a response by the President to the plaintiffs' request. In this regard, this Court notes that the Constitutional Court did not take into consideration that, even though the act contested by the presumed victims consisted in the omissive conduct of the President in relation to their petition, the plaintiffs also claimed that the absence of medical treatment jeopardized their right to life and to health owing to the lack of access to antiretroviral drugs. Accordingly, this Court notes the inadequacy of the Constitutional Court's ruling, because it was not sufficient that it merely rule on the President's failure to respond to the plaintiffs' request; it was also necessary that it rule on the central aspect that led to the filing of the application for amparo, which was the risk that existed to the plaintiffs' right to health and life owing to the lack of access to medical treatment.

178. The Court also notes that the Constitutional Court did not justify why it considered that the measure taken by the President to allocate five hundred thousand quetzals for the medical care of people living with HIV was sufficient to consider that the underlying constitutional question raised had ceased. As mentioned previously, the presumed victims were not only dissatisfied with the President's failure to answer their letter, but,

furthermore, in that letter they had requested medical care and antiretroviral treatment for people diagnosed with HIV, and this should have been examined by the Constitutional Court. Specifically, that Court should have analyzed whether the measure taken by the President was effective to ensure the rights at stake.

179. Based on the above, the Court recalls that the requirement that the reasons should be provided for any decision is not the same as there being an analysis of the merits of the matter, an examination that is not essential to determine the effectiveness of the remedy.²¹⁶ However, the reasoning behind a ruling should allow the facts, grounds and laws on which the authority based itself to take its decision to be known clearly and expressly, in order to rule out any indication of arbitrariness; a situation that did not occur in this case. The European Court has considered that a remedy "is effective if there had been a sufficient judicial review, even when the jurisdiction [of the judicial organ] over the facts was limited, [...if] it could have annulled the decision on a number of grounds, including if the decision had been reached on the basis of a misconception of fact or law."²¹⁷

B.2. Reasonable time

180. The Commission and the representatives argued that the State had violated the reasonable time established in Article 8(1). In this regard, the Court has reiterated that the reasonable time should be examined in each specific case, in relation to the total duration of the proceedings, from the first procedural act up until the final judgment is handed down.²¹⁸ Thus, it has considered four elements in order to analyze whether the guarantee of a reasonable times has been respected; namely: (i) the complexity of the matter; (ii) the procedural activity of the interested party; (iii) the conduct of the judicial authorities, and (iv) the effects on the legal situation of the person involved in the proceedings. The Court recalls that it is incumbent on the State to justify, on the basis of these criteria, the reason why it has required the time that has elapsed to process cases and, in the absence of such justification, the Court has broad powers to reach its own conclusions in this regard.²¹⁹

181. In this case, the Court notes that the application for amparo was filed on July 26, 2002, and the proceedings concluded with the decision on inadmissibility on January 29, 2003, so that the duration of the proceedings was approximately six months. Accordingly, the Court will determine whether this length of time was reasonable pursuant to the criteria established in its case law.

182. The Court has taken into account different criteria to determine the complexity of a proceeding. These include the complexity of the evidence, the plurality of procedural subjects or the number of victims, the time elapsed since the violation, the characteristics of

²¹⁶ Cf. *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 94, and *Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, para. 171.

²¹⁷ Cf. *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs.* Judgment of October 13, 2011. Series C No. 234, para. 210, and *ECHR, Case of Sigma Radio Television Ltd. v. Cyprus*, No. 32181/04 and 35122/05. Judgment of July 21, 2016, para. 159.

²¹⁸ Cf. *Case of Suárez Rosero v. Ecuador. Merits.* Judgment of November 12, 1997. Series C No. 35, para. 71, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of April 25, 2018. Series C No. 354, para. 268.

²¹⁹ Cf. *Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202, para. 156, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of April 25, 2018. Series C No. 354, para. 422.

the remedy established in domestic law, and the context in which the violation occurred.²²⁰ In this case, the Court observes that, under the application for amparo, a certain degree of complexity existed as regards the plurality of applicants and owing to the context in which this remedy was filed, because it related to people living with HIV, and therefore their rights to health and to life were involved. The Court considers that these characteristics made the analysis of the merits of the matter and the processing of the application more complex.

183. Regarding the procedural activity of the interested parties, the Court notes that the presumed victims promoted procedural momentum and that there is no information of activities aimed at obstructing the application for amparo. Accordingly, it is not possible to conclude that there was any delay on the part of the applicants for amparo.

184. In relation to the conduct of the judicial authorities, the Court notes that the application for amparo was filed on July 26, 2002. Subsequently, in an order of October 18, the Constitutional Court granted the parties 48 hours to present their arguments at a hearing. Then, in a ruling on January 29, 2003, it merely declared that the application for amparo was inadmissible. In this regard, the Court notes that there is no evidence of procedural inactivity on the part of the authorities, or that they took steps that could have delayed the proceeding.

185. With regard to the fourth element, the Court has indicated that, to determine the reasonableness of the time, it is necessary to take into account the effect caused by the duration of the proceedings on the legal situation of the person involved, considering, among other aspects, the matter in dispute. Thus, the Court has established that, if the passage of time has a relevant impact on the legal situation of the individual, the proceeding must be conducted more promptly in order to decide the case rapidly. In the instant case, the Court finds it relevant to recall that the application for amparo filed by the presumed victims involved people living with HIV who depended on medical care to avoid adverse effects on their health, their personal integrity and their life, and this involved an enhanced obligation to respect and to ensure their rights. The Court considers that, when deciding the remedy that was filed, the authorities took into account the vulnerability of the presumed victims and the risk of affecting the rights in question.

186. Based on the above, the Court finds that it has been proved sufficiently that the prolongation of the proceedings in this case, given its characteristics, had an impact on the legal situation of the applicants, because owing to the delay in the settlement of the case, the possibility of the delivery of antiretroviral drugs was delayed, which resulted in a risk to their rights to health, personal integrity and life. Consequently, based on the duration and the characteristics of the proceedings, as well as on the actions of the presumed victims and of the authorities, the Court concludes that the delay of approximately six months in deciding the application for amparo filed by the 13 presumed victims constituted a violation of the reasonable time established in Article 8(1) of the American Convention.

B.3. Conclusion

187. The Court has established that the competent authority's examination of a judicial remedy in which constitutional rights are in dispute cannot be reduced to a mere formality and ignore the arguments of the parties, because it must examine their reasons and rule on

²²⁰ Cf. *Inter alia*, *Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs*. Judgment of January 29, 1997. Series C No. 30, para. 78, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 424.

them according to the standards established by the American Convention.²²¹ In this case, the Court concludes that the State violated the right to an effective judicial remedy because it failed to rule on the merits of the issue raised by the 13 presumed victims and because it did not verify whether the measure taken by the President was adequate to respond to the action required. In addition, the Court considers that the Constitutional Court failed to comply with its duty to provide the reasons for its ruling. Consequently, the State is responsible for the violation of Articles 8(1) and 25 of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Luis Rolando Cuscul Pivaral, Luis Armando Linares Ruano, Facundo Gómez Reyes, Marta Alicia Maldonado Paz, Miguel Lucas Vaíl, Ingrid Barillas Martínez, Jorge Armando Tavares Barreno, Melvin Yovani Ajtun Escobar, Mardo Luis Hernández and Hernández, Alberto Quiché Cuxeva, Teresa Magdalena Ramírez Castro, Rita Dubón Orozco and Dora Marina Martínez Sofoifa.

VIII-3 RIGHT TO PERSONAL INTEGRITY OF THE NEXT OF KIN OF THE VICTIMS (ARTICLES 5 AND 1(1) OF THE AMERICAN CONVENTION)

A. Arguments of the parties and of the Commission

188. The **Commission** indicated that the State had violated the right to mental and moral integrity recognized in Article 5(1) of the Convention to the detriment of the next of kin and/or closest circle of the victims in this case, owing to the additional suffering they underwent as a result of the specific circumstances of the violations perpetrated against their loved ones, and based on the acts and omissions of the State authorities in relation to these facts.

189. The **representatives** added that the next of kin and those close to the victims experienced profound suffering on observing that, owing to the State's failure to provide comprehensive care to the patients living with HIV, the latter's health deteriorated and some of them eventually died. They also indicated that, among other effects, both the next of kin and those close to the victims had experienced different types of discrimination, and changes to their life projects, their family ties, and their financial situation. In addition, the representatives emphasized that, in view of the stigma that has traditionally accompanied people living with HIV, the close circle who support people suffering from this disease goes beyond the members of the victims' biological family. They therefore concluded that the State of Guatemala was responsible for the violation of the right to personal integrity, recognized in Article 5 of the Convention, in relation to Article 1(1) of this instrument, to the detriment of the next of kin and/or the circle of those closest to the victims in this case.

190. The **State** did not contest the arguments of the Commission and of the representatives, because it only referred to the alleged violation of Article 5 of the Convention in relation to the effects on the victims in the case, not on the next of kin.

B. Considerations of the Court

191. The Court has considered that the next of kin of victims of human rights violations may, in turn, be victims.²²² The Court has considered that the right to mental and moral

²²¹ Cf. *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, para. 184.

²²² Cf. *Case of Castillo Páez v. Peru. Merits*. Judgment of November 3, 1997. Series C No. 34, fourth operative paragraph, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of March 15, 2018. Series C No. 353, para. 351.

integrity of the victims' next of kin has been violated based on the additional suffering they have experienced as a result of the specific circumstances of the violations perpetrated against their loved ones, and owing to the subsequent acts or omissions of the State authorities in relation to the facts,²²³ taking into account, among other matters, the steps taken to obtain justice and the existence of close family ties.²²⁴ It has also declared the violation of this right based on the suffering resulting from the acts perpetrated against their loved ones.²²⁵ Furthermore, the Court has indicated that the State's contribution to creating or aggravating the situation of vulnerability of a person has a significant impact on the integrity of those around them, especially the close family members who are faced with the uncertainty and insecurity arising from the violation of the rights of their direct or close family member.²²⁶

192. In this regard, the Court notes that the evidence reveals that the physical and psychological suffering experienced by the presumed victims in this case owing to the absence of medical treatment also affected some of their family members, and this was aggravated by the stigmatization suffered by the next of kin of people living with HIV. Specifically, the Court notes that the next of kin have experienced pain, anguish and uncertainty owing to the lack of opportune medical care, especially the lack of access to drugs, as well as frustration and helplessness because they did not have the financial resources to provide their next of kin with the needed treatment.²²⁷ Also, some of them have witnessed the deterioration in the health of their loved ones, and some of them have even had to confront the death of some of them.²²⁸

193. The Court also observes that the lack of medical care also affected the family dynamics of the victims, because some of their family members were obliged to change their working hours,²²⁹ abandon or suspend their studies and/or migrate to the United

²²³ Cf. *Case of Blake v. Guatemala. Merits*. Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of March 15, 2018. Series C No. 353, para. 351.

²²⁴ Cf. *Case of Blake v. Guatemala. Merits*. Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 208.

²²⁵ Cf. *Case of Bámaca Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000. Series C No. 70, paras. 162 and 163, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 208.

²²⁶ Cf. *Case of the Yean and Bosico Girls v. Dominican Republic*. Judgment of September 8, 2005. Series C No. 130, para. 205, and *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 205.

²²⁷ María de Jesús Chajón de León, Carlos Fernando Coc Chajón, Cruz García Ramos, Luis Alberto Hernández Estrada, Estuardo Edison Hernández Estrada, Osma Vinicio Hernández Estrada, Karen Herlinda Hernández Estrada, Miriam Lisbeth Hernández Estrada and María Magdalena Rodas Mérida, Victoria Ramírez Ramos, Sandra Judith Pérez Cayaxon, Guadalupe Pérez Cayaxon, Yensi Nohemi Pérez Cayaxon, Braulio Adán Rodas Mérida, Andy Alberto Rodas Mérida, Anibal Leonel Rodas Mérida, Clara Verónica Rodas Mérida, Sonia Maribel Rodas Mérida, Walter Audencio Rodas Mérida, Flor de María Rodas Mérida and Leonel Celestino Mazariegos Cinto.

²²⁸ María Elena Morales Villafuerte, Brandon David Adalberto Gómez Morales, María de Jesús Chacón de León, Carlos Fernando Coc Chajón, Antonio Vail Molina, Lexana Rosbetty Pérez Vail, Cruz García Ramos, Sandra Judith Pérez Cayaxon, Guadalupe Pérez Cayaxon, Yensi Nohemí Pérez Cayaxon, Luis Alberto Hernández Estrada, Estuardo Edison Hernández Estrada, Osma Vinicio Hernández Estrada, Karen Herlinda Hernández Estrada and Miriam Lisbeth Hernández Estrada, Leonel Celestino Mazariegos Cinto, Antonio Miranda Méndez and Victoria Ramírez Ramos.

²²⁹ Anibal Leonel Rodas Mérida, Clara Verónica Rodas Mérida, Sonia Maribel Rodas Mérida, Braulio Adán Rodas Mérida, Andy Alberto Rodas Mérida, Walter Audencio Rodas Mérida, Flor de María Rodas Mérida and María Magdalena Rodas Mérida.

States in order to assume the financial burden²³⁰ and the maintenance²³¹ of their family member living with HIV, leading to a break-up of the family,²³² harm to its finances and adverse effects on their life project. The Court also underlines the transmission of HIV to L.A.L., which could have been prevented if his mother had received adequate medical treatment. Likewise, the Court notes the suffering experienced by the victims' next of kin due to the stigmatization of people living with HIV, which created feelings of shame and fear,²³³ together with exclusion from their family circle and loss of their employment.²³⁴ In this regard, the Court reiterates that the right to health of people living with HIV includes interdisciplinary medical care, to which their next of kin should also have access to help them deal with these feelings, and this did not happen in the instant case.

194. Regarding the suffering experienced by the next of kin of people living with HIV, it can be inferred from the expert opinion of Olga Alicia Paz Bailey that the diseases suffered by people living with HIV transcend the individual sphere. Thus, the members of the family may also suffer adverse effects that materialize in situations in which children have to assume the role of their parents' carers or providers; grandparents take on the role of mothers or fathers, and the personal life projects of the members of a family are altered. And these consequences may be attributed to the State insofar as, due to its failure to comply with the obligation to ensure the right to health, the capabilities of people living with HIV are affected and also the lives of their next of kin.

195. Both the Commission and the representatives argued that the stigma that traditionally accompanies HIV/AIDS affects not only the next of kin but also those who form part of the closest circle, and therefore they should also be considered victims. The State did not submit arguments in this regard. The Court has recognized that someone who is not a direct family member, or who does not have a legal relationship, may be considered a victim of violations of their personal integrity owing to the suffering and pain that the human rights violations have caused their loved ones.²³⁵ In addition, the Court notes that, usually, it is the parents and close friends who provide most support for the care of people

²³⁰ Lexana Rosbetty Pérez Vaíl, Sandra Judith Pérez Cayaxon, Guadalupe Pérez Cayaxon, Yensi Nohemí Pérez Cayaxon, Jhony Francisco Valdéz Pérez, Boni Kennedy Valdéz Pérez, Nancy Beatríz Valdéz Pérez, Glendi Betsaida Valdéz Pérez, Mildred Odalis Valdéz Pérez, Zolia Argentina Valdéz Pérez, Nelson Gudiel Valdéz Pérez, Rocael Gómez Felipe, Jaime Gómez Felipe, Miguel Gómez Felipe, Carlos Gómez Felipe, Francisco Gómez Felipe, Margarita Gómez Felipe, Ana Patricia Gómez Felipe, Carlos Fernando Coc Chajón, Luis Alberto Hernández Estrada, Clara Verónica Rodas Mérida, Sonia Maribel Rodas Mérida, Braulio Adán Rodas Mérida, Andy Alberto Rodas Mérida, Aníbal Leonel Rodas Mérida, Walter Audencio Rodas Mérida, Flor de María Rodas Mérida and María Magdalena Rodas Mérida.

²³¹ María Elena Morales Villafuerte, Brandon David Adalberto Gómez Morales, Antonio Miranda Méndez, Nancy Beatríz Valdéz Pérez, Glendi Betsaida Valdéz Pérez, Mildred Odalis Valdéz Pérez, Zoila Argentina Valdéz Pérez, Jhony Francisco Valdéz Pérez, Nelson Gudiel Valdéz Pérez, Boni Kennedy Valdéz Pérez, Candelaria Ordoñez Alvarez, Argentina Ordoñez Alvarez, Honoria Ordoñez Alvarez, Cecilia Ordoñez Alvarez, Daria Ordoñez Alvarez, Juan Carlos Ordoñez Alvarez, Edilma Evelina Barrios, Darlin Sureima Barrios, Kendi Liserli Barrios, Noret Adali Barrios, Sixto Mérida Mendoza, Hermina Rodríguez Coculista, Alejo Ranferi Maldonado Oxlaj, Ana Castillo López, Aracely Méndez Castillo and Carmen Mérida Coronado.

²³² Nancy Beatríz Valdéz Pérez, Glendi Betsaida Valdéz Pérez, Mildred Odalis Valdéz Pérez, Zoila Argentina Valdéz Pérez, Jhony Francisco Valdéz Pérez, Nelson Gudiel Valdéz Pérez and Boni Kennedy Valdéz Pérez and Alejo Ranferi Maldonado Oxlaj.

²³³ Lexana Rosbetty Pérez Vaíl, L.A.L., Rocael Gómez Felipe, Jaime Gómez Felipe, Miguel Gómez Felipe, Carlos Gómez Felipe, Francisco Gómez Felipe, Margarita Gómez Felipe, Ana Patricia Gómez Felipe, Karla de Jesús Coronado Mérida, Benita del Rosario Soto Mérida, Erick Alexander Maldonado Mérida, Luis Alberto Hernández Estrada, Estuardo Edison Hernández Estrada, Osma Vinicio Hernández Estrada, Karen Herlinda Hernández Estrada, Miriam Lisbeth Hernández Estrada, Nidya Roxana Zapet Gómez and Mardo Kleiber Hernández Zapet.

²³⁴ María Elena Morales Villafuerte, Brandon David Adalberto Gómez Morales and Cruz García Ramos.

²³⁵ Cf. *Case of Servellón García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152., paras. 137 and 138.

living with HIV, which is also essential for their physical and mental well-being.²³⁶ In this regard, the Court considers that, in this case, those close friends who have accompanied the presumed victims, and regarding whom it has been proved that they suffered owing to the violations committed against their loved ones, may be considered victims.

196. In this case, the Court notes that Luz Imelda Lucas de León, who the Commission named as a friend of Rita Dubón Orozco, accompanied Mrs. Dubón on different occasions during her illness up until she died. In particular, the Court notes Mrs. Lucas de León's suffering owing to the stigma and discrimination experienced by Mrs. Dubón and the effects of the lack of drugs and comprehensive medical care on the latter's health. The omissions of the State were the cause of the negative effects suffered by Mrs. Dubón, and the Court therefore concludes that the State is responsible for violating the personal integrity of Mrs. Lucas de León. Furthermore, regarding the next of kin who have already been declared victims in this case, the Court notes that the effects they may have suffered have been subsumed in the analysis of the right to personal integrity; consequently, it does not find it pertinent to rule on them.

197. Consequently, taking into consideration the circumstances of this case and that the State has not contested the arguments and evidence presented by the Commission and the representatives in relation to the effects suffered by the victims' next of kin, the Court concludes that the State is responsible for the violation of Article 5(1) of the American Convention in relation to Article 1(1) to the detriment of the victims' next of kin mentioned in Annex 2 to this judgment.

IX. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)

198. Based on the provisions of Article 63(1) of the American Convention,²³⁷ the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to make adequate redress,²³⁸ and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.²³⁹

199. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the restoration of the previous situation. If this is not feasible, which occurs in most cases of human rights violations, the Court will determine measures to ensure the rights that have

²³⁶ World Health Organization, What is the impact of HIV on families? 2005, p. 13. Available at: http://www.euro.who.int/__data/assets/pdf_file/0009/74664/E87762.pdf

²³⁷ Article 63(1) of the Convention establishes: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

²³⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 466.

²³⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 24, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 466.

been infringed and to redress the consequences of the violations that have occurred.²⁴⁰ Therefore, the Court has found it necessary to grant diverse measures of reparation in order to repair the harm fully, so that in addition to pecuniary compensation, measures of restitution, rehabilitation and satisfaction and also guarantees of non-repetition have special relevance for the harm caused.²⁴¹

200. The Court has established that reparations should have a causal nexus to the facts of the case, the violations declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must analyze whether these elements are present in order to rule appropriately and in accordance with law.²⁴²

201. Based on the violations declared in the preceding chapters, the Court will proceed to examine the claims presented by the Commission and the representatives, together with the arguments of the State, in light of the criteria established in its case law concerning the nature and scope of the obligation to make reparation, in order to establish the measures aimed at redressing the harm caused to the victims.²⁴³

202. International case law and, in particular, that of the Court, has established repeatedly that the judgment constitutes, in itself, a form of reparation.²⁴⁴ Nevertheless, considering the circumstances of this case and the suffering that the violations committed caused to the victims, the Court finds it pertinent to establish other measures.

A. Injured party

203. The Court considers that “injured party,” in the terms of Article 63(1) of the American Convention, refers to those who have been declared victims of the violation of any right recognized therein.²⁴⁵ Therefore, the Court considers that the victims and their next of kin are the “injured party”²⁴⁶ and, in their capacity as victims of the violations declared in this judgement, they will be considered the beneficiaries of the reparations ordered by the Court.

B. Measures of rehabilitation and satisfaction and guarantees of non-repetition

²⁴⁰ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 26, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 467.

²⁴¹ Cf. *Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs*. Judgment of March 9, 2018. Series C No. 351, para. 266.

²⁴² Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 468.

²⁴³ Cf. *Case of Andrade Salmón v. Bolivia. Merits, reparations and costs*. Judgment of December 1, 2016. Series C No. 330, para. 189, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 469.

²⁴⁴ Cf. *Case of Neira Alegría et al. v. Peru. Reparations and costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 474.

²⁴⁵ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 233, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 470.

²⁴⁶ Both the direct victims and their next of kin are listed in Annex 2 to the judgment.

B.1. Measures of rehabilitation

B.1.1. Arguments of the Commission and the parties

204. The **Commission** asked that the State make full reparation to the surviving victims, and to the next of kin and loved ones of all the victims, by immediately adopting the necessary measures to ensure that they received comprehensive medical treatment, in keeping with international standards, including, among other requirements: (i) conducting complete diagnoses and periodic follow-up tests; (ii) ensuring the permanent and uninterrupted provision of the required antiretroviral drugs and any others they may need arising from their specific health situation; (iii) mental health care for the victims who so wish, and (iv) the differentiated care required by the women victims in this case, with special consideration for their reproductive capacity. In this regard, the Commission reiterated the importance that the State ensure that the victims do not face obstacles to accessibility or of any other nature, in order to obtain comprehensive treatment as provided for in this recommendation.

205. The **representatives** asked the Court to order the State to guarantee comprehensive and accessible medical care for the surviving victims. Accordingly, they asked that Guatemala adopt the necessary measures to provide comprehensive medical care for any medical condition, together with any other action needed to remedy the harm caused to the victims, which should include the elements of prevention, treatment, care and support that they require. The representatives asked that the State be ordered to ensure, immediately, promptly, adequately, effectively, permanently and free of charge, through its public health facilities, the medical, psychological or psychiatric treatment required by the surviving victims in this case, which should include the free supply of antiretroviral drugs, as well as those necessary for the treatment of HIV-related opportunistic diseases and infections.²⁴⁷ They also asked that the medical care be provided, insofar as possible, in the center nearest to their place of residence, and that the State assume the expenses of food and transport so that the victims may attend the Comprehensive Care Units, without this causing them additional expenses. In this regard, the representatives underlined that, when it might be necessary to resort to care in private clinics, the State must assume the necessary expenses. They also asked that the State guarantee good quality nutrition and psychological, spiritual and social support to all the victims, as well as gender-based family, community and home-based care.

206. The representatives also considered that the State should provide condoms, lubricants, sterile injection equipment, antiretroviral drugs and the necessary treatment to prevent vertical transmission permanently and free of charge. Added to this, they asked that the comprehensive care be culturally appropriate for the victims in this case; in particular, for those who speak an indigenous language. Lastly, in this regard, they argued that, in view of the effects of lipodystrophy on the integrity of the individual, the State should provide immediately the necessary care to treat this illness for all the victims suffering from it, including the surgery required, within no more than six months of delivery of the judgment.

207. Second, the representatives asked the Court to require the State to guarantee psychological and medical care to the surviving next of kin of the victims who are deceased. They requested that the State provide adequate care for the physical and psychological

²⁴⁷ In this regard, they asked that this measure include conducting CD4 counts, and viral load and genotype testing and any other test required, as well as other technologies related to the treatment of HIV, opportunistic infections, and other illnesses (merits file, folio 1837).

conditions suffered by the next of kin of the victims, which should be provided by reliable and qualified personnel and that it cover all the expenses arising from such treatment, including transport and other needs that could arise. In particular, they stressed the importance of the State providing the medical and psychological treatment required by the next of kin who are declared victims immediately and free of charge through its specialized health care institutions.

208. In this regard, the **State** indicated that, if the Court decided that it was internationally responsible for failing to ensure any of the rights recognized in the Convention, it should take into account that, with the exception of reparation for pecuniary and non-pecuniary damage, it had already taken the necessary measures to insure all the surviving victims in this case, as well as all the other people who are infected and who live in Guatemala. In addition, the State indicated that, regarding the reparation requested by the representatives for the possible harm caused by the alleged violation of Article 19 of the Convention, it was unable to refer to this, because the legal grounds included in the representatives' brief with motions, pleadings and evidence did not include arguments on this point. The State therefore asked the Court to find that this request for reparation had not been submitted.

B.1.2. Considerations of the Court

209. In this judgment, the Court has declared that the State is responsible for the violation of the obligation to ensure the right to health owing to the State's omissions concerning the medical treatment of the 49 victims in the case, and for violating the personal integrity of 46 victims and 63 of their next of kin. Consequently, the Court finds it necessary to establish a measure of reparation that provides adequate medical care in keeping with the standards set out in this judgment.

210. Accordingly, the Court establishes the obligation of the State to provide, free of charge, and immediately, promptly, adequately and effectively through its specialized public health institutions or specialized health personnel, medical and psychological or psychiatric treatment to the direct victims of violations of the right to health and to personal integrity. This treatment must include the following: (i) the free supply, for life, of the drugs they may eventually require, both those necessary to combat HIV, and those required to combat opportunistic diseases (*supra* para. 110); (ii) diagnostic tests for treating HIV and for the diagnosis and treatment of other diseases that may occur (*supra* para. 111); (iii) social support, including providing the food required for the treatment, emotional support, psycho-social counseling, and nutritional support (*supra* para. 112), and (iv) condoms, lubricants, sterile injection equipment and technologies for the prevention of HIV (*supra* para.113). If the State does not have these inputs, it must have recourse to private institutions or specialized institutions of civil society. In addition, the State must provide immediate medical care to the victims who suffer from lipodystrophy, including the surgery required to treat this condition.

211. Furthermore, in this judgment, the Court has declared that the State failed to comply with its obligation to ensure the right to health of Corina Dianeth Robledo Alvarado, Dora Marina Martínez Sofoifa, Zoila Marina Pérez Ruíz, Francisco Sop Quiej and Miguel Lucas Vaíl because it did not adopt positive measures to provide them with access to health care centers. Consequently, the Court finds it opportune to order that the medical treatment be provided in the medical center nearest to the place of residence of the victims in this case for the time necessary. The State must assume their food and transport expenses on the day they attend the medical center.

212. Additionally, the Court observes that, in this judgment, it declared that the right to personal integrity of 63 of the victims' next of kin had been violated owing to their feelings of pain, anguish and uncertainty as a result of the lack of opportune medical care for their next of kin (*supra* para. 192). Consequently, the Court establishes the State's obligation to provide, free of charge and immediately, adequately, comprehensively and effectively, through its specialized health institutions, psychological or psychiatric treatment for the victims' next of kin who request this, following their informed consent, and including the free supply of any medication they may eventually require, taking into consideration the needs of each of them. Also, the respective treatments must be provided, insofar as possible, in the centers nearest to their places of residence for all the time necessary. The victims who request this measure of reparation, or their legal representatives, have six months from notification of this judgment to advise the State of their intention to receive psychological or psychiatric care.

213. The Court recalls the need for the State to act with special promptness to comply with the measures ordered in the preceding paragraphs, because the preservation of the health, personal integrity and life of the victims in this case depends on compliance with them. The State must confirm to the Court that it is complying with the measures indicated in the preceding paragraphs on a permanent basis.

B.2 Measures of satisfaction

B.2.1. Public act to acknowledge international responsibility

B.2.1.1. Argumentos of the Commission and of the parties

214. The **representatives** asked the Court to order Guatemala to organize a public act at which the State would acknowledge its international responsibility for the human rights violations for which it had been sentenced, and at which it would make a public apology to make amends to the victims. In particular, the representatives asked that the most senior State authorities attend the act. Lastly, they asked that, in order to organize such an act, the State should be required to reach an agreement with the victims or their representatives regarding its characteristics, and that the Court order that the event be broadcast by radio and television. Neither the **State** nor the **Commission** referred to this request.

B.2.1.2. Considerations of the Court

215. The Court finds it necessary that the State organize a public act to acknowledge its international responsibility for the facts of this case to make amends to the victims. During this act it must refer to the human rights violations declared in this judgment. Also, the act must take place during a public ceremony in the presence of senior State officials and the victims. The State and the victims and/or their representatives must reach agreement on the method of complying with this public act, as well as on its characteristics, such as the date and place.²⁴⁸

B.2.2. Publication and dissemination of the judgment

B.2.2.1. Argumentos of the Commission and of the parties

²⁴⁸ Cf. *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 353, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of March 15, 2018. Series C No. 353, para. 380.

216. The **representatives** asked that the State publish, at least, the sections on the context and summary of the proven facts, together with the operative paragraphs of the judgment, in the official gazette and in at least two national newspapers. They also asked that this publication be made on the websites of the Ministry of Public Health and Social Assistance and of the IGSS, and in the different Comprehensive Care Units (UAI), and maintained until the judgment had been fully executed. The representatives also argued that, owing to the stigmatization associated with HIV/AIDS, prior to publication, the State must consult the victims regarding whether they wished their name to be included in this publication or if, to the contrary, they would like it to be excluded. Neither the **State** nor the **Commission** referred to this request.

B.2.2.2. Considerations of the Court

217. International case law has established that the judgment constitutes, *per se*, a form of reparation.²⁴⁹ Nevertheless, the Court finds it pertinent to order, as it has in other cases,²⁵⁰ that the State make the following publications within six months of notification of this judgment: (i) the official summary of the judgment prepared by the Court, once, in the official gazette and in a national newspaper with widespread circulation, in an appropriate and legible letter size, and (ii) this judgment in its entirety, available for at least one year on the official websites of the Ministry of Public Health and of the Guatemalan Social Security Institute, in a way that the public can access from the home page of these websites.

218. The victims must advise, within three months of notification of this judgment, whether they wish their names to be included in the publications indicated in the preceding paragraph. The State must advise the Court immediately when it has made each of the publications ordered, regardless of the one year time frame for presenting its first report ordered in the operative paragraphs of this judgment.

B.2.3. Scholarships

B.2.3.1. Argumentos of the Commission and of the parties

219. The **representatives** asked the Court to order the State to grant a scholarship to the victims who so wish, which should cover all the expenses until they have completed their studies. Neither the **State** nor the **Commission** referred to this request.

B.2.3.2. Considerations of the Court

220. The Court has considered it appropriate to order as a measure of satisfaction that the State grant scholarships in public establishments to those victims whose personal development has suffered as a result of human rights violations.²⁵¹ Based on the financial situation of the victims and their next of kin, the Court finds it opportune to order the State

²⁴⁹ Cf. *Case of Neira Alegría et al. v. Peru. Reparations and costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 474.

²⁵⁰ Cf., *inter alia*, *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of March 15, 2018. Series C No. 353, para. 383.

²⁵¹ Cf. *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2010. Series C No. 216, para. 257, and *Case of V.R.P., V.P.C. et al. v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 350, para. 427.

to grant scholarships for university studies in public education establishments in Guatemala to the daughters and sons of the direct victims who request this. These scholarships should also cover the payment of the material required to carry out these studies. The victims must advise whether they wish to access these scholarships within three months of notification of this judgment. This measure must be complied with within one year of notification of the judgment.

B.3. Guarantees of non-repetition

B.3.1. Arguments of the Commission and the parties

221. The **Commission** asked the Court to order the State: (i) to provide free, comprehensive and uninterrupted health care and treatment to people living with HIV/AIDS who are unable to afford it; (ii) to implement genuine and effective mechanisms of supervision and periodic monitoring of public hospitals to ensure that comprehensive health care is being provided to people with HIV/AIDS, who cannot afford it, and (iii) to implement training programs for public hospital staff to ensure that they perform their duties in a way that is compatible with internationally recognized standards and those described in the Merits Report.

222. Meanwhile, the **representatives** asked the Court to order the State, first, to take measures to ensure adequate and comprehensive care to people living with HIV in Guatemala. Such measures should include: (i) the creation of a database and consolidated information system on the HIV epidemic; (ii) diagnosis of the legal and administrative barriers that prevent a permanent supply of antiretroviral drugs, and the adoption of measures based on this diagnosis, and (iii) reinforcement of the Comprehensive Care Units so that the right to health can be ensured in an effective manner. They also asked that health officials be given training on the human rights of people living with HIV, and that the State ensure the early diagnosis of all pregnant women, effectively and universally, by testing to prevent mother-to-child transmission of HIV. Lastly, they asked that an HIV/AIDS awareness-raising campaign be organized in the departments where the victims live.

223. The **State** indicated that, if the Court decided that it was internationally responsible for failing to ensure any of the rights recognized in the Convention, it should take into account that, with the exception of reparation for pecuniary and non-pecuniary damage, it had already adopted the necessary measures to insure all the surviving victims in this case, as well as all the other people who are infected and who live in Guatemala, and had implemented mechanisms of non-repetition.

B.3.1. Considerations of the Court

224. The Court takes note of and assesses positively the legislative measures and public policies that the State has adopted to combat the HIV epidemic in Guatemala. Nevertheless, and taking into consideration the violations that occurred in this case, the information available concerning the lack of medical treatment for a sector of the population living with HIV in Guatemala, and the Goals and targets assumed by the States under the 2030 Agenda (*supra* para. 109), the Court finds it pertinent to order the following measures of reparation as guarantees of non-repetition.²⁵²

²⁵² The Court notes that, in the Agenda 2030, the UN General Assembly adopted a plan of action with Goals and targets to be specified by each Member State, in order to take into account inequalities among the countries and to realize the human rights of all human beings on the planet more rapidly. To this end, it indicated that it is essential to “ensure healthy lives and promote well-being for all at all ages.” Also, to achieve the Goals, the different levels of development and capacities of the States must be taken into account, and effective measures

225. First, the Court considers that the State should implement effective mechanisms for periodic supervision and monitoring of its public hospitals to ensure that they are providing comprehensive health care to people living with HIV, in keeping with domestic law and the provisions of this judgment (*supra* paras. 103 to 114). To this end, the State must set up an information system on the scope of the HIV epidemic in the country, which should contain statistical information on the people attended by the public health system, as well as statistical information on the sex, age, ethnicity, language and socio-economic status of patients. It must also establish a system that allows a diagnosis to be made of the care provided to the population living with HIV and, to this end, it must establish the number of establishments that treat this population, their geographical location and infrastructure. This diagnosis will provide the basis for the elaboration of the mechanism to improve the accessibility, availability and quality of the health care services for people living with HIV referred to in the following paragraph.

226. The State must design a mechanism to ensure the accessibility, availability and quality of antiretroviral drugs, diagnostic tests, and health services for people living with HIV. This mechanism must achieve the following minimum objectives, which must be reached by actions taken by State entities and its goals will be measured based on indicators established under a participative public policy: (i) to increase the availability, accessibility and quality of antiretroviral drugs, diagnostic tests for the HIV detection, and tests for the diagnosis and treatment of opportunistic diseases; (ii) to improve programs for the care of people living with HIV and to increase the coverage of care; (iii) to increase and improve urgent and immediate measures relating to health care for people living with HIV, and (iv) to improve the information available for decision making by all the competent authorities. In addition, to ensure that the design and implementation of this mechanism are effective, the State must invite the medical community, people living with HIV who are users of the health system and the organizations that represent them, and the Guatemalan Ombudsman, to take part in establishing care priorities, taking decisions, and the planning and evaluation of strategies to improve health care.

227. Second, the Court finds that the State must implement a training program for health system officials who work in hospitals and health care centers that treat people with HIV in Guatemala on international standards and domestic laws regarding comprehensive treatment for people living with HIV. This training must include information on best care practices, patients' rights, and the obligations of the authorities. In addition, this training must be provided by medical and legal experts for a reasonable time and must be implemented with a gender perspective.

228. Third, the State must guarantee that pregnant women have access to HIV testing, and undergo this if they so wish. The State must provide periodic monitoring for pregnant women living with HIV, as well as adequate medical treatment to avoid vertical transmission of the virus, without prejudice to the provisions of paragraph 226 of this judgement. To this end, as it has in other cases, the Court orders the State to design a publication or a booklet with a clear and accessible summary of the ways to prevent HIV transmission and on the risk of vertical transmission of the virus, as well as on the resources available to minimize this risk. This publication should be made available in all public and private hospitals in

and actions established to empower people who are vulnerable, including those living with infections such as HIV/AIDS, added to a commitment to end such epidemics by 2030. UN, General Assembly Resolution "Transforming our World: the 2030 Agenda for Sustainable Development," A/70/L.1 adopted on September 25, 2015, Preamble, paras. 3, 23, 26, 55 and 66, Goal 3, 3.3 and 3.8. Available at: <https://undocs.org/A/RES/70/1>.

Guatemala to both patients and medical personnel. Also, access to this publication or booklet should be provided through civil society organizations that work in this area.

229. Fourth, as a way of contributing to non-repetition of facts such as those of this case, the Court finds it appropriate to order the State to conduct a national awareness-raising campaign addressed at people living with HIV, public officials, and the general public, on the rights of people living with HIV, on the obligations that the authorities have to provide care to them, and about the need to respect people living with this condition. This campaign must be aimed at combating the stigma and lack of information about the causes of HIV and the consequences for the health of people living with HIV. In addition, the campaign must have a gender perspective and be comprehensible for the whole population.

230. The State must report every year, for three years, on the progress made on the above guarantees of non-repetition (*supra* paras. 225 to 229). The Court will assess this information when monitoring compliance with the judgment and will rule in this regard.

C. Compensation

C.1. Pecuniary damage

C.1.1. Arguments of the Commission and the parties

231. The **Commission** asked the Court to order the State to make full reparation to the surviving victims and to their next of kin and loved ones, including the pecuniary aspects.

232. The **representatives** asked that, when ordering the payment of pecuniary damages, the Court take into account: (i) the time that has elapsed since the victims were diagnosed, and (ii) that most of them are in a precarious financial situation, so that the expenses they incurred signified an important financial outlay²⁵³ and that, in some cases, the victims had to go into debt to be able to pay them and, in others, they were unable to access treatment because they did not have the necessary resources. Furthermore, they alleged that the women who had children at that time incurred in the additional expense of having to buy formula milk so that their babies would not become infected, because this was not provided or was insufficient to ensure the alimentation of the newborns. Lastly, the representatives indicated that, due to the passage of time, the victims do not have vouchers for the said expenses; they therefore asked the Court to determine, in equity, the amount corresponding to pecuniary damage that should be given to each of them.

233. The **State** indicated that, regarding reparation for pecuniary damage, it would submit a proposal based on an actuarial study. However, this was not submitted to the Court.

C.1.2. Considerations of the Court

234. In its case law, the Court has developed the criteria that pecuniary damage supposes “the loss or detriment to the income of the victims, the expenses incurred based on the

²⁵³ In this regard, the representatives alleged that, owing to the lack of comprehensive health care for the victims, they have had to assume extra financial expenses. In particular, the representatives indicated that they had to buy the inputs required to perform CD4 counts and viral load and genotype testing, or to purchase some of the drugs needed for their treatment, and at least seven of the victims had to pay for their own treatment of the HIV/AIDS related diseases with which they became infected. They also indicated that, owing to the distance of the health care centers from the victims’ homes, at least 20 of them incurred transport expenses (merits file, folio 740).

facts, and the consequences of a pecuniary nature that have a causal nexus to the facts of the case.”²⁵⁴ In this regard, the Court observes that, in the absence of evidentiary support, it is unable to quantify the exact amounts that the victims expended due to the facts. Nevertheless, the Court recognizes that the victims have incurred diverse expenses for medical treatment and care as a result of their health situation, and therefore establishes, in equity, the sum of US\$5,000.00 (five thousand United States dollars) for each of the 49 direct victims indicated in Annex 2 to this judgement for pecuniary damage.

C.2. Non-pecuniary or moral damage

C.2.1. Arguments of the Commission and the parties

235. The **Commission** asked the Court to order the State to provide full redress to the surviving victims and the next of kin and loved ones of all the victims, including the pecuniary aspect. In addition, it asked the Court to take into account that: (i) the adverse effects on the victims included both their own life projects and those of their next of kin; (ii) the facts of this case have broken up families, left children without either father or mother, and cut short educational and professional projects, all as a result of the severe impact of the State’s acts and omissions, and (iii) most of the victims currently live in conditions of poverty or extreme poverty

236. The **representatives** asked the Court, based on the facts of this case, the violations committed, the adverse effects of the life projects, and the other consequences of a non-pecuniary nature suffered by the victims in this case, to order the State to pay compensation for non-pecuniary damage, to be determined in equity.

237. The **State** indicated that, with regard to reparation for non-pecuniary damage, it would submit a proposal based on an actuarial study. However, this proposal was not submitted to the Court.

C.2.1. Considerations of the Court

238. International case law has established that the judgment *per se* a form of reparation.²⁵⁵ However, this Court has developed the concept of non-pecuniary damage and has established that this may include both the pain and suffering caused to the direct victims and their close family members, the impairment of values that are very significant for the individual, and also changes of a non-pecuniary nature in the living conditions of the victims or their next of kin.²⁵⁶

239. Accordingly, bearing in mind the circumstances of this case, the suffering that the violations committed caused to the victims, as well as the other consequences of a non-pecuniary nature that they experienced, the Court finds it pertinent to establish, in equity, for non-pecuniary damage, compensation equivalent to US\$60,000 (sixty thousand United

²⁵⁴ *Case of Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of April 25, 2018. Series C No. 354, para. 487.

²⁵⁵ *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs.* Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of April 25, 2018. Series C No. 354, para. 474.

²⁵⁶ *Cf. Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of April 25, 2018. Series C No. 354, para. 482.

States dollars) for each deceased victim, US\$30,000 (thirty thousand United States dollars) for each surviving victim, and US\$10,000 (ten thousand United States dollars) for each of the next of kin declared victims in this case.

C.3. Costs and expenses

C.3.1. Arguments of the parties

240. The **representatives** asked that Dr. María Cristina Calderón be paid US\$2,794.44 for her services in monitoring the situation of the victims in this case, to cover travel expenses from December 2016 to date. They also asked that the Court determine, in equity, the value of 14 additional trips made by Dr. Calderón starting in 2000, and the expenses of two trips she made to Washington D.C., during the processing of the case before the Commission. Lastly, they indicated that Dr. Calderón had incurred expenses amounting to US\$327.80 for legal procedures related to this case. In addition, they asked the Court to determine, in equity, the amount that should be paid to the *Asociación de Salud Integral*, which has acted as the victims' representative and incurred expenses for their food and transport. Lastly, they indicated that CEJIL had acted as a representative of the victims in the international proceedings since August 2002 and, for the exercise of this representation, they asked that the State of Guatemala recognize the sum of US\$27,170.08 for this concept and for salaries and notarial expenses. Regarding future expenditure, they asked that the judgment anticipate an amount for the expenses at the stage of monitoring compliance.

241. The **State** indicated that only those expenses relating to claims for costs and expenses that complied with the criteria identified by the Court should be reimbursed, taking into account that the items were adequate and reasonable for the proceedings that had been conducted. Regarding future expenses, it indicated that the representatives' request in this regard was not justified because, for the Court to grant it, such expenses would have to be measurable and sustainable in advance, which, in the State's opinion, was not possible in this case, because they responded to conditionalities and there were no grounds for them; therefore they did not fall within the Court's parameters. Lastly, Guatemala asserted that future expenses run counter to legal certainty and should be proportionate to the rights that have been violated.

C.3.2. Considerations of the Court

242. The Court reiterated that, based on its case law,²⁵⁷ costs and expenses form part of the concept of reparation, because the actions undertaken by the victims to obtain justice, at both the domestic and the international level, entail expenditure that must be compensated when the international responsibility of the State has been declared in a judgment. Regarding reimbursement of costs and expenses, the Court must make a prudent assessment of their scope, which includes the expenses originating before the authorities of the domestic jurisdiction, and also those arising during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the equity principle and taking into account the expenses indicated by the parties, provide their *quantum* is reasonable.²⁵⁸

²⁵⁷ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 42, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of March 15, 2018. Series C No. 353, para. 401.

²⁵⁸ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Herzog et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of March 15, 2018. Series C No. 353, para. 401.

243. In this case, the file does not contain sufficient supporting evidence on the costs and expenses incurred by the victims and their representatives. However, the representatives have indicated some amounts calculated based on a few vouchers and tables they themselves prepared. On this basis, and in the absence of all the official vouchers for the expenses incurred by the victims and their representatives, the Court establishes, in equity, that the State should pay a total of US\$3,000 (three thousand United States dollars) for the costs and expenses incurred in the litigation of this case by the representative María Cristina Calderón; US\$10,000 (ten thousand United States dollars) for the costs and expenses incurred in the litigation of this case by the *Asociación de Salud Integral*, and US\$25,000 (twenty-five thousand United States dollars) for the costs and expenses incurred in the litigation of this case by CEJIL. These sums must be paid directly to each of the representatives of the presumed victims in this case.

D. Reimbursement of expenses to the Legal Assistance Fund

244. In this case, in an order of July 24, 2017, the President of the Court granted financial support from the Victims' Legal Assistance Fund of the Court for the presentation of five statements, either at the hearing or by affidavit.

245. On the basis of the violations declared in this judgment and compliance with the requirements to access the Court's Assistance Fund, the Court orders the State to reimburse the sum of US\$2,176.36 (two thousand one hundred and seventy-six United States dollars and thirty-six cents) to the Fund for the expenses incurred. This amount must be reimbursed within six months of notification of this judgement.

E. Method of compliance with the payments ordered

246. The State shall make the payment of the compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses established in this judgment directly to the persons indicated herein, within one year of notification of this judgement.

247. Should any beneficiary be deceased or die before they receive the respective amount, this shall be delivered directly to their heirs, in keeping with the applicable domestic law.

248. The State shall comply with its pecuniary obligations by payment in United States dollars or the equivalent in domestic currency, using the exchange rate on the New York Stock Exchange (United States of America) on the day before payment to make the respective calculation.

249. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs it is not possible to pay the amounts established within the said time frame, the State shall deposit the said amounts in their favor in a deposit account or certificate in a solvent Guatemalan financial institution, in United States dollars, and in the most favorable conditions allowed by banking law and practice. If the corresponding compensation remains unclaimed after ten years, the amount shall be returned to the State with the accrued interest.

250. The amounts allocated in this judgment as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses shall be delivered to the persons indicated in full, as established in this judgment, without any reductions due to eventual taxes and charges.

251. If the State falls into arrears, including with reimbursement of expenses to the Victims' Legal Assistance Fund, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Guatemala.

**X.
OPERATIVE PARAGRAPHS**

Therefore,

THE COURT

DECIDES,

By four votes to one that:

1. The State is responsible for the violation of the right to health, pursuant to Article 26 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the 49 persons listed as victims in Annex 2 to this judgment, in the terms of paragraphs 75 to 119 of this judgement.
2. The State is responsible for the violation of the right to health, pursuant to Article 26 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of 43 persons listed as victims in Annex 2 to this judgment, in the terms of paragraphs 75 to 117 and 120 to 127 of this judgement.
3. The State is responsible for the violation of the prohibition of discrimination in relation to the obligation to ensure the right to health recognized in Article 26 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of two persons listed as victims in Annex 2 to this judgment, in the terms of paragraphs 128 to 139 of this judgement.
4. The State is responsible for the violation of the principle of progressivity, pursuant to Article 26 of the American Convention, in relation to Article 1(1) of this instrument, in the terms of paragraphs 140 to 148 of this judgement.

Unanimously that:

5. The State is responsible for the violation of the right to life, recognized in Article 4 of the American Convention, in relation to Articles 26 and 1(1) of this instrument, to the detriment of 12 persons listed as victims in Annex 2 to this judgment, in the terms of paragraphs 155 to 159 of this judgment.
6. The State is responsible for the violation of the right to personal integrity, recognized in Article 5 of the American Convention, in relation to Articles 26 and 1(1) of this instrument, to the detriment of 46 persons listed as victims in Annex 2 to this judgment, in the terms of paragraphs 161 to 164 of this judgment.

By four votes to one that:

7. The State is responsible for the violation of the right to judicial guarantees and judicial protection recognized in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of 13 persons listed as victims in Annex 2 to

this judgment, in the terms of paragraphs 168 to 179 and 187 of this judgement.

8. The State is responsible for the violation of the guarantee of a reasonable time recognized in Article 8 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of 13 persons listed as victims in Annex 2 to this judgment, in the terms of paragraphs 180 a 187 of this judgement.

Unanimously that:

9. The State is responsible for the violation of personal integrity, recognized in Article 5(1) of the American Convention, to the detriment of the victims' next of kin listed as next of kin in Annex 2 to this judgment, in the terms of paragraphs 191 to 197 of this judgement.

AND DECLARES:

Unanimously that:

10. This judgment constitutes, in itself, a form of reparation.

11. The State shall, within six months of notification of this judgment, make the publications indicated in paragraphs 217 and 218 of the judgement and, within one year of notification of this judgment, shall organize a public act to acknowledge international responsibility, and shall grant the scholarships, in the terms of paragraphs 215 and 220 of this judgement.

12. The State shall provide immediately, through its health care institutions, free psychological and medical care to the victims and their next of kin, in the manner and within the time frame established in 210, 212 and 213 of this judgement.

13. The State shall guarantee, through its health care institutions, that the medical care is provided in the clinic nearest to the victims' place of residence, and assume the travel costs of those who live far from the clinic, in the terms of paragraph 211 of this judgement.

14. The State shall implement mechanisms to supervise and monitor health care services, improve the accessibility, availability and quality of health care services for people living with HIV, guarantee the provision of antiretroviral drugs and any other medication required by all those affected, offer the population HIV diagnostic tests, implement a training program for health system officials, guarantee adequate medical care for pregnant women living with HIV, and organize a national awareness-raising campaign, in the terms of paragraphs 225 to 230 of this judgment.

15. The State shall pay the amounts established in paragraphs 234, 239 and 243 of this judgement, as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses.

16. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights for the amount disbursed during the processing of this case, in the terms of paragraph 245 of this judgment.

17. The State shall, within one year of notification of this judgment, provide the Court with a report on the measures adopted to comply with it.

18. The Court will monitor full compliance with this judgment, in exercise of its authority

and in fulfillment of its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with it.

Judge Eduardo Ferrer Mac-Gregor Poisot informed the Court of his concurring opinion, to which Judge Elizabeth Odio Benito and Judge Patricio Pazmiño Freire adhered. Judge Humberto Antonio Sierra Porto informed the Court of his partially dissenting opinion.

Done, at San José, Costa Rica, on August 23, 2018, in the Spanish language.

ANNEX 1. LIST OF PRESUMED VICTIMS SUBMITTED BY IACHR

A. PRESUMED VICTIMS WHO ARE DECEASED

No.	PRESUMED VICTIM	No.	NEXT OF KIN
1	Facundo Gómez Reyes	1	María Elena Morales Villafuerte (Wife)
		2	Brandon David Adalberto Gómez Morales (Son)
2	Reina López Mujica		No information available.
3	Ismar Ramírez Chajón	1	María de Jesús Chajón de León (Mother)
		2	Edna Yolanda Ramírez Chajón (Sister)
		3	Carlos Fernando Coc Chajón (Brother)
		4	Ariel Coc Chajón (Brother)
		5	Abner Antonio Ramírez Mejía (Nephew)
		6	Karla Susely Ramírez Mejía (Niece)
		7	Luis Rolando Cuscul Pivaral (Partner)
4	Petrona López Robledo	1	Marelyn Damaisa Xum López (Daughter)
		2	Juana Sugeidi Xum López (Daughter)
		3	Marcela Xum Basilio (Aunt)
5	Rita Mariana Dubón Orozco	1	Rina Haydeé Landaverde (Friend)
		2	Luz Imelda Lucas de León (Friend)
		3	Gladys Minerba Chávez Juárez (Friend)
6	Luis Edwin Cruz Gramajo		No information available.
7	María Blanca Vaíl López	1	Javier Pérez (Husband)
		2	Antonio Vaíl Molina (Father)
		3	Lexana Rosbety Pérez Vaíl (Daughter)
		4	Alba Azucena Vaíl López (Sister)
		5	América Leticia Vaíl López (Sister)
		6	Marvin Antonio Vaíl López (Brother)
		7	Krizia Vanessa Vaíl Aguilar (Niece)
8	Alberto Quiché Cuxeve	1	Marisela Quiché Gualip (Daughter)
		2	Víctor Quiché Ramírez (Father)
		3	Manuela Cuxeve García (Mother)
		4	Lucía Quiché Cuxeve (Sister)

B. SURVIVING PRESUMED VICTIMS

No.	PRESUMED VICTIM	No.	NEXT OF KIN
9	Guadalupe Herminia Cayaxon García	1	Rafael de León (died of HIV)
		2	Sandra Judith Pérez Cayaxon (Daughter)
		3	Guadalupe Pérez Cayaxon (Daughter)
		4	Yensi Pérez Cayaxon (Daughter)
		5	Neftalí Cayaxon Pérez (Father)
		6	Cruz García Ramos (Mother)
10	José Rubén Delgado López	1	Antonio Miranda Méndez (Brother)
		2	Magdalena López de Miranda (Sister-in-law)
		3	Héctor Delgado Pérez (Son)
		4	Francisco Delgado Pérez (Son)
		5	Lidia Mirtala Miranda López (Niece)
11	Elsa Miriam Estrada Ruíz	1	José Luis Hernández (Husband, deceased)
		2	María Herlinda Ruíz (Mother)
		3	Luis Alberto Hernández Estrada (Brother)
		4	Estuardo Edison Hernández Estrada (Brother)
		5	Osma Vinicio Hernández Estrada (Brother)
		6	Karen Herlinda Hernández Estrada (Sister)
		7	Miriam Lisbeth Hernández Estrada (Sister)
12	Silvia Mirtala Alvarez Villatoro	1	Mayra Aideé Mejía Martínez (Partner)
		2	María José Mejía Martínez (Daughter)
		3	Layonel Ismar Josué Mejía Martínez (Son)
		4	Lilián Janethe Alvarez Villatoro (Sister)
		5	Víctor Manuel Alvarez Alvisures (Father)
		6	Nibia Matilde Villatoro García de Alvarez (Mother, deceased)
13	Juana Aguilar Gómez	1	Felipe de Jesús Hernández (Partner, deceased)
		2	Jessenia Carolina Guzmán (Daughter)

		3	Julio César Guzmán Aguilar (Son)
		4	Felipe Guillermo Guzmán Aguilar (Son)
		5	Julián Cabrera Aguilar (Father)
		6	Gerber Gudiel Guzmán Aguilar (Grandson)
		7	Andi Enrique Sales Guzmán (Grandson)
14	Melvin Yovani Ajtun Escobar	1	Heidy Mariela Lucas González (Wife)
		2	Elías Emmanuel Ajtun Lucas (Son)
		3	Marvin Josué Lucas González (Son, deceased)
		4	Bertha Luz Escobar (Mother)
15	José Cupertino Ramírez	1	Victoria Ramírez Sabat (Cousin)
		2	Valvino Ramírez Sabat (Cousin)
		3	Valvino Ramírez Ramos (Uncle)
16	Sebastián Emilio Dueñas	1	Julia Aguilar (Wife)
		2	Fredy Dueñas Aguilar (Son)
		3	Lucrecia Isabel Dueñas Aguilar (Daughter)
		4	Eva Dueñas Aguilar (Daughter)
17	Julia Aguilar	1	Sebastián Emilio Dueñas (Husband)
		2	María Dueñas Aguilar (Mother)
		3	Fredy Dueñas Aguilar (Son)
		4	Lucrecia Isabel Dueñas Aguilar (Daughter)
		5	Eva Dueñas Aguilar (Daughter)
18	Felipe Tebalan Ordoñez	1	Martina Candelaria Alvarez Estrada (Wife)
		2	Candelaria Ordoñez Alvarez (Daughter)
		3	Argentina Ordoñez Alvarez (Daughter)
		4	Honorina Ordoñez Alvarez (Daughter)
		5	Cecilia Ordoñez Alvarez (Daughter)
		6	Daria Ordoñez Alvarez (Daughter)
		7	Juan Carlos Ordoñez Alvarez (Son)
		8	Luis Emiliano Ordoñez Alvarez (Grandson)
		9	Martín Gildardo Ordoñez Alvarez (Grandson)
		10	Ivan Juárez Ordoñez (Grandson)
		11	Lauris Ernestina Juárez Ordoñez (Granddaughter)
		12	Yeslin Janeth Juárez Ordoñez (Granddaughter)
19	Martina Candelaria Alvarez Estrada	1	Felipe Tebalan Ordoñez (Husband)
		2	Candelaria Ordoñez Alvarez (Daughter)
		3	Argentina Ordoñez Alvarez (Daughter)
		4	Honorina Ordoñez Alvarez (Daughter)
		5	Cecilia Ordoñez Alvarez (Daughter)
		6	Daria Ordoñez Alvarez (Daughter)
		7	Juan Carlos Ordoñez Alvarez (Son)
		8	Luis Emiliano Ordoñez Alvarez (Grandson)
		9	Martín Gildardo Ordoñez Alvarez (Grandson)
		10	Lauris Ernestina Juárez Ordoñez (Granddaughter)
		11	Yeslin Janeth Juárez Ordoñez (Granddaughter)
		12	Ivan Juárez Ordoñez (Grandson)
20	Luis Rubén Isabel Alvarez Flores	1	Julio Rubén Alvarez Chinchila (Father)
		2	Margarita Flores Cuiza (Mother, deceased)
		3	Atilio Sabas Alvarez Flores (Brother)
		4	Lileana Alvarez Flores (sister)
		5	Victoriano Estanislao Alvarez Flores (Brother)
		6	Julio Antonio Alvarez Flores (Brother)
		7	Samuel Gonzalo Alvarez Flores (Brother)
21	Ingrid Janeth Barillas Martínez		No information available
22	Saira Elisa Barrios	1	Guillermo Donis (Current husband)
		2	Erick Jonás Sánchez (Father of her daughters, deceased)
		3	Moisés Israel Rodas López (Father)
		4	Eiselda de Jesús Mazariegos de Rodas (Mother)
		5	Edilma Evelina Barrios (Daughter)
		6	Darlin Sureima Barrios (Daughter)
		7	Kendi Liserli Barrios (Daughter)
		8	Noret Adali Barrios (Daughter)
23	Felix de Jesús Cabrera Morales	1	Mavilla Ester Morales Agustín (Mother)
		2	Juan Pablo Cabrera Gatica (Father)

		3	Jesús Alberto González Cabrera (Son)
24	César Noé Cancinos Gómez	1	Irma Leticia Vicente Morales (Wife)
		2	César Antonio Cancinos Vicente (Son)
		3	Leticia Yamilet Cancinos Vicente (Daughter)
		4	Demecio Rogelio Cancinos Díaz (Father)
		5	Macedonia Gómez Oxlaj (Mother)
25	Aracely Cinto	1	María Teresa de Maldonado Cinto (Mother)
		2	Leonel Celestino Mazariegos Cinto (Son)
		3	Gladys Francisca Mazariegos Cinto (Daughter, deceased)
		4	Edwin Amílcar Maldonado Cinto (Son)
26	Luis Rolando Cuscul Pivaral	1	María de la Cruz Mundo Zelaya (Step-mother)
		2	Partner (Deceased)
		3	Isaías Cuscul Mundo (Brother)
		4	Raúl Cuscul Mundo (Brother)
		5	Manuel Antonio Cuscul Mundo (Brother)
		6	Adolfo Cuscul Mundo (Brother)
		7	Etelvina Cuscul Mundo (Sister)
		8	Eduardo Isaías Cuscul Antonio (Nephew)
		9	Patricia Judith Cuscul Antonio (Niece)
		10	Luis Pablo Cuscul Antonio (Nephew)
		11	Bryan Alexander Adolfo Cuscul Quiñonez (Nephew)
		12	Andy Joe Cuscul Quiñonez (Nephew)
		13	Manuel Cuscul Álvarez (Nephew)
		14	Kevin Raúl Cuscul Flores (Nephew)
		15	Andrea Etelvina Sánchez Cuscul (Niece)
		16	Roxana Pamela Sánchez Cuscul (Niece)
		17	Marlon Daniel Cuscul Flores (Nephew)
		18	Ángel Gabriel Cuscul Flores (Nephew)
27	Olga Marina Castillo		No information available.
28	María Felipe Pérez	1	Rocael Gómez Felipe (Son)
		2	Jaime Gómez Felipe (Son)
		3	Miguel Gómez Felipe (Son)
		4	Carlos Gómez Felipe (Son)
		5	Francisco Gómez Felipe (Son)
		6	Margarita Gómez Felipe (Daughter)
		7	Ana Patricia Gómez Felipe (Daughter)
		8	Roberto Gómez García (Father of her sons, deceased)
29	Ismerai Olibia García Castañon	1	Leonidas Alberto Cifuentes García (Son)
		2	Guillermo Neemias Cifuentes García (Son)
		3	Elder Neftali Cifuentes García (Son)
		4	Ingrid Olivia Cifuentes García (Daughter)
		5	Juan Antonio Cifuentes García (Son, deceased)
		6	Juan Guillermo Cifuentes Orozco (Father of her sons)
		7	Leodora Castañon Cruz (Mother)
		8	Santos Isacar Vásquez Barrios (Current partner)
30	Santos Isacar Vásquez Barrios	1	Ismerai Olibia García Castañon (Partner)
		2	Irma Noelia Vásquez Barrios (Daughter)
		3	Juana de Jesús Vásquez (Grandmother)
		4	Rogelio Saturnino Vásquez (Father)
		5	Margarita Barrios Hernández (Mother)
31	Mardo Luis Hernández and Hernández	1	Nidya Roxana Zapet Gómez (Wife)
		2	Mardo Kleiber Hernández Zapet (Son)
		3	Irma Erminia Hernández Mérida (Mother)
		4	Francisco Luis Hernández Ramírez (Father)
		5	Menfil Elsidio Hernández Hernández (Brother)
		6	Jessica Isenia Hernández Hernández (Sister)
32	Luis Armando Linares Ruano		No information available
33	Marta Alicia Maldonado Paz	1	Carlos Humberto Vásquez Pérez (Husband)
		2	Telma Maldonado Andrade (Sister)
		3	Delia Marlenee Pérez Maldonado (Daughter)
		4	Adela Nohemí Pérez Maldonado (Daughter, deceased)
34	Dora Marina Martinez Sofoifa		No information available
35	Pascuala de Jesús Mérida	1	Sixto Mérida Mendoza (Father, deceased 5 years ago)

	Rodríguez	2	Herminia Rodríguez Coculista (Mother)
		3	Karla de Jesús Coronado Mérida (Daughter)
		4	Benita del Rosario Soto Mérida (Daughter)
		5	Erick Alexander Maldonado Mérida (Son)
		6	Alejo Ranferí Maldonado Oxlaj (Current partner)
		7	Mercedes Patricia Mérida Rodríguez (Sister)
		8	Baudillo Soto de León (Father of her sons, deceased)
36	Darinel López Montes de Oca	1	Ana Castillo López (Cousin)
		2	Aracely Méndez Castillo (Niece)
37	Israel Perez Charal		No information available
		1	Luis de León (Husband)
		2	L.A.L. ²⁵⁹
		3	Virgilio Ladislao Robledo Rodríguez (Father)
		4	Katarina Alvarado Mazariegos (Mother, deceased)
		5	Osvaldo Romeo Robledo Alvarado (Brother)
38	Corina Dianeth Robledo Alvarado	6	Bertha Luz Robledo Alvarado (Sister)
		7	Gelber Manuel Robledo Alvarado (Brother)
		8	Leticia Robledo Alvarado (Sister)
		9	Kener Guilfredo Robledo Alvarado (Brother)
		10	Boanerges Onelio Robledo Alvarado (Brother)
		11	Edvin Otoniel Gómez Robledo Alvarado (Nephew)
		1	Carmen Mérida Coronado (Wife)
		2	Aníbal Leonel Rodas Mérida (Son)
		3	Clara Verónica Rodas Mérida (Daughter)
		4	Sonia Maribel Rodas Mérida (Daughter)
		5	Braulio Adán Rodas Mérida (Son)
		6	Andy Alberto Rodas Mérida (Son)
		7	Walter Audencio Rodas Mérida (Son)
		8	Flor de María Rodas Mérida (Daughter)
		9	María Magdalena Rodas Mérida (Daughter)
		10	Abni Eliezer Barrios Rodas (Grandson)
		11	Cecia Verónica Barrios Rodas (Granddaughter)
		12	Christian Obdulio Barrios Rodas (Grandson)
		13	Susely Berenice Rodas Mérida (Granddaughter)
		14	Brandon Isaac Rodas Mus (Grandson)
		15	Nehemias Audencio Rodas Chilel (Grandson)
		16	Tania Briseidy Velasco Rodas (Granddaughter)
		17	Esdras Avisai Rodas Chilel (Grandson)
		1	Santiago Francisco Valdéz Aguilar (Husband)
		2	Jhony Francisco Valdéz Pérez (Son)
		3	Boni Kennedy Valdéz Pérez (Daughter)
		4	Nancy Beatríz Valdéz Pérez (Daughter)
		5	Glendi Betsaida Valdéz Pérez (Daughter)
		6	Mildred Odalis Valdéz Pérez (Daughter)
		7	Zolia Argentina Valdéz Pérez (Daughter)
		8	Nelson Gudiel Valdéz Pérez (Son)
		9	Rosario Ruiz (Mother)
		10	Edgar Gilberto Pérez Ruiz (Brother)
		1	Jhony Francisco Valdéz Pérez
		2	Boni Kennedy Valdéz Pérez (Daughter)
		3	Nancy Beatríz Valdéz Pérez (Daughter)
		4	Glendi Betsaida Valdéz Pérez (Daughter)
		5	Mildred Odalis Valdéz Pérez (Daughter)
		6	Zolia Argentina Valdéz Pérez (Daughter)
		1	Sayda Analy Paz Ramírez (Daughter)
		2	Oscar Oswaldo Paz Ramírez (Son)
		3	Lucrecia Paola Paz Ramírez (Daughter)
		4	Fredy Ramírez Castro (Son)
		5	Evelyn Gabriela Paz Ramírez (Granddaughter)
41	Santiago Francisco Valdéz Aguilar		
42	Teresa Magdalena Ramírez Castro		

²⁵⁹ The name of the presumed victim has been kept confidential following a specific request, and the initials L.A.L. are used to refer to this person.

		6	Carlos Timoteo Paz Ramírez (Grandson)
		7	Alfonso Ramírez (Father)
		8	Justa Rufina Castro (Mother)
		9	Luis Alfonso Ramírez Castro (Brother)
		10	Mardoqueo Ramírez Castro (Brother)
		11	César Augusto Ramírez Castro (Brother)
		12	Carlos Isaías Martínez (Partner)
43	Karen Judith Samayoa Vásquez		No information available
44	Francisco Sop Quiej	1	Paula Quiej (Mother)
		2	Antonio Sop Quiej (Brother)
		3	Dominga Sop Quiej (Sister)
		4	Rony Sixta Sop (Nephew)
45	Jorge Armando Tavares Barreno	1	Brenda Magaly Cardona Rodríguez (Wife)
		2	Jimmy Armando Tavares Cardona (Son)
		3	Loidy Nohemí Tavares Cardona (Daughter)
		4	Sara Barreno Arrango (Mother)
		5	Francisco Tavares García (Father)
		6	Rosaura Tavares de León (Sister)
		7	Clarisa Eberatriz Rodríguez (Mother-in-law)
		8	Mario Eduardo Tavares de León (Brother)
		9	Jose Francisco Tavares de León (Brother)
46	Miguel Lucas Vaíl	1	María Dominga Miranda Bámac (Wife, deceased)
		2	Ramón Lucas Miranda (Son)
		3	Romeo Lucas Miranda (Son)
		4	Mario Romeo Lucas Miranda (Son)
		5	Miguel Lucas Miranda (Son)
		6	Silvia Marleny Lucas Miranda (Daughter)
		7	Jorge Luis Lucas Miranda (Son)
		8	Adán Lucas Miranda (Son)
		9	Juan Carlos Lucas Miranda (Son)
		10	Ana Patricia Lucas Miranda (Daughter)
		11	María Dominga Lucas Miranda (Granddaughter)
		12	Uri Miguel Lucas Miranda (Granddaughter)
47	Santos Vásquez Oliveros	1	María Elena Moreno (Wife)
		2	Viviana Mercedes Vásquez Moreno (Daughter)
		3	María Elena Vásquez Moreno (Daughter)
		4	Rafael Vásquez Gómez (Father)
		5	Francisca Oliveros de Vásquez (Mother)
		6	Josefina Izabel Miranda (Mother-in-law)
48	Iris Carolina Vicente Baullas	1	Christian Alexander Chij Vicente (Son)
		2	Emma Elizabeth Chij Vicente (Daughter)
		3	Iris Carolina Chij Vicente (Daughter)
		4	Olivia Barillas de Sánchez (Maternal aunt)
		5	Olivia Aguilar Ambrosio de Barillas (Grandmother)
		6	Balbino Barillas Barreno (Grandfather)
		7	Héctor Barillas (Uncle)
49	Sandra Lisbeth Zepeda Herrera		No information available

ANNEX 2. LIST OF VICTIMS AND THEIR NEXT OF KIN

A. DECEASED VICTIMS			
No.	VICTIMS	No.	NEXT OF KIN
1	Facundo Gómez Reyes	1	María Elena Morales Villafuerte (Companion)
		2	Brandon David Adalberto Gómez Morales (Son)
2	Reina López Mujica		
3	Ismar Ramírez Chajón	3	María de Jesús Chajón de León (Mother)
		4	Carlos Fernando Coc Chajón (Brother)
4	Petrona López Robledo		
5	Rita Mariana Dubón Orozco	5	Luz Imelda Lucas de León
6	Luis Edwin Cruz Gramajo		
7	María Blanca Vaíl López	6	Lexana Rosberty Pérez Vaíl
		7	Antonio Vaíl Molina
8	Guadalupe Herminia Cayaxon García	8	Sandra Judith Pérez Cayaxon (Daughter)
		9	Guadalupe Pérez Cayaxon (Daughter)
		10	Yensi Nohemí Pérez Cayaxon (Daughter)
		11	Cruz García Ramos (Mother)
9	José Rubén Delgado López	12	Antonio Miranda Méndez (Brother)
10	Elsa Miriam Estrada Ruíz	13	Luis Alberto Hernández Estrada (Son)
		14	Estuardo Edison Hernández Estrada (Son)
		15	Osma Vinicio Hernández Estrada (Son)
		16	Karen Herlinda Hernández Estrada (Daughter)
		17	Miriam Lisbeth Hernández Estrada (Daughter)
11	Alberto Quiché Cuxeve		
12	Silvia Mirtala Alvarez Villatoro		
13	Juana Aguilar		
14	Melvin Yovani Ajtun Escobar		
15	José Cupertino Ramírez	18	Victoria Ramírez Ramos (Cousin)
B. SURVIVING VICTIMS			
	VICTIMS		NEXT OF KIN
16	Sebastián Emilio Dueñas		
17	Julia Aguilar		
18	Felipe Tebalan Ordoñez	19	Candelaria Ordoñez Alvarez (Daughter)
		20	Argentina Ordoñez Alvarez (Daughter)
		21	Honorina Ordoñez Alvarez (Daughter)
		22	Cecilia Ordoñez Alvarez (Daughter)
		23	Daria Ordoñez Alvarez (Daughter)
24	Juan Carlos Ordoñez Alvarez (Son)		
19	Martina Candelaria Alvarez Estrada		
20	Luis Rubén Isabel Alvarez Flores		
21	Ingrid Janeth Barillas Martínez		
22	Saira Elisa Barrios	25	Edilma Evelina Barrios (Daughter)
		26	Darlin Sureima Barrios (Daughter)
		27	Kendi Liserli Barrios (Daughter)
		28	Noret Adali Barrios (Daughter)
23	Felix de Jesús Cabrera Morales		
24	César Noé Cancinos Gómez		
25	Aracely Cinto	29	Leonel Celestino Mazariegos Cinto (Son)
26	Luis Rolando Cuscul Pivaral		
27	Olga Marina Castillo		
28	María Felipe Pérez	30	Rocael Gómez Felipe (Son)
		31	Jaime Gómez Felipe (Son)
		32	Miguel Gómez Felipe (Son)
		33	Carlos Gómez Felipe (Son)
		34	Francisco Gómez Felipe (Son)
		35	Margarita Gómez Felipe (Daughter)
36	Ana Patricia Gómez Felipe (Daughter)		
29	Ismerai Olibia García Castañon		
30	Santos Isacar Vásquez Barrios		
31	Mardo Luis Hernández and	37	Nidya Roxana Zapet Gómez (Wife)

	Hernández	38	Mardo Kleiber Hernández Zapet (Son)
32	Luis Armando Linares Ruano		
33	Marta Alicia Maldonado Paz		
34	Dora Marina Martínez Sofoifa		
35	Pascuala de Jesús Mérida Rodríguez	39	Sixto Mérida Mendoza (Father)
		40	Hermína Rodríguez Coculista (Mother)
		41	Karla de Jesús Coronado Mérida (Daughter)
		42	Benita del Rosario Soto Mérida (Daughter)
		43	Erick Alexander Maldonado Mérida (Son)
		44	Alejo Ranferí Maldonado Oxlañ (Husband)
36	Darinel López Montes de Oca	45	Ana Castillo López (Cousin)
		46	Aracely Méndez Castillo (Niece)
37	Israel Perez Charal		
38	Corina Dianeth Robledo Alvarado	47	L.A.L.
39	Audencio Rodas Rodríguez	48	Carmen Mérida Coronado (Wife)
		49	Aníbal Leonel Rodas Mérida (Son)
		50	Clara Verónica Rodas Mérida (Daughter)
		51	Sonia Maribel Rodas Mérida (Daughter)
		52	Braulio Adán Rodas Mérida (Son)
		53	Andy Alberto Rodas Mérida (Son)
		54	Walter Audencio Rodas Mérida (Son)
		55	Flor de María Rodas Mérida (Daughter)
		56	María Magdalena Rodas Mérida (Daughter)
40	Zoila Marina Pérez Ruíz	57	Jhony Francisco Valdéz Pérez (Son)
		58	Boni Kennedy Valdéz Pérez (Daughter)
		59	Zoila Argentina Valdéz Pérez (Daughter)
		60	Nelson Gudiel Valdéz Pérez (Son)
		61	Nancy Beatriz Valdéz Pérez (Daughter)
		62	Glendi Betsaida Valdéz Pérez (Daughter)
		63	Mildred Odalis Valdéz Pérez (Daughter)
41	Santiago Francisco Valdéz Aguilar		
42	Teresa Magdalena Ramírez Castro		
43	Karen Judith Samayoa Vásquez		
44	Francisco Sop Quiej		
45	Jorge Armando Tavares Barreno		
46	Miguel Lucas Vaíl		
47	Santos Vásquez Oliveros		
48	Iris Carolina Vicente Baullas		
49	Sandra Lisbeth Zepeda Herrera		

ANNEX 3. INDIVIDUALIZATION OF THE VICTIMS AND THEIR NEXT OF KIN

A. Persons Deceased

A.1. Facundo Gómez Reyes

1. Mr. Gómez Reyes was born on November 27, 1975. He was diagnosed with HIV in April 2002, through the “*Proyecto Vida*” of the non-governmental organization “*Médecins Sans Frontières/Doctors Without Borders* (hereinafter “MSF”). He was a carpenter and did not know how to read or write. He lived in the municipality of Retalhuleu, department of Retalhuleu, Guatemala. Mr. Gómez Reyes did not have access to timely antiretroviral treatment or to CD4 counts and viral load, genotype and phenotype tests. As a result of his condition, he suffered multidrug-resistant lymph node tuberculosis. His last medical appointment was on February 18, 2005. He died on February 27, 2003, due to tuberculosis.²⁶⁰

2. His family unit consisted of his companion, María Elena Morales Villafuerte (diagnosed with HIV), and his sons Brandon David Adalberto and Gerson Facundo, both Gómez Morales.²⁶¹

A.2. Reina López Mujica

3. Ms. López Mujica was born in 1962. She lived in the municipality of Coatepeque, department of Quetzaltenango, Guatemala. She had received no schooling; she was a housewife and depended financially on her husband’s work as a laborer. She was diagnosed on April 15, 2002, in the Coatepeque National Hospital. She began to receive antiretroviral treatment in June 2003 through MSF’s *Proyecto Vida*. She did not undergo genotype and phenotype testing, and her health was not monitored. She suffered from tuberculosis and acute anemia. She died on November 6, 2003, owing to tuberculosis and acute anemia.²⁶²

A.3. Ismar Ramírez Chajón

4. Mr. Ramírez Chajón lived in the municipality of Villanueva, department of Guatemala, Guatemala. He was diagnosed at the age of 22 in a private clinic in which he was interned because of bad health. Following his diagnosis, he received treatment in the Guatemalan Social Security Institute (hereinafter “IGSS”). He was transferred to the Roosevelt Hospital,

²⁶⁰ Obligatory notification of a case of AIDS No. 005454 of February 27, 2003, signed by the Ministry of Public Health and Social Assistance, corresponding to Facundo Gómez Reyes (evidence file, folio 112089); application for amparo dated July 26, 2002 (evidence file, folio 13); the Guatemalan State’s report to the IACHR of August 26, 2010 (evidence file, folio 1461); Affidavit prepared by María Elena Morales Villafuerte on January 17, 2017 (evidence file, folios 11715 and 11716); initial petition of August 14, 2003 (evidence file, folio 466); the petitioners’ brief of August 7, 2009 (evidence file, folio 818), and the petitioners’ brief of December 10, 2010, which included data collected by Dr. Cristina Calderón (co-petitioner) from the medical records of the presumed victims and from interviews (evidence file, folio 1399).

²⁶¹ Affidavit prepared by María Elena Morales Villafuerte on February 10, 2017 (evidence file, folios 11719 and 11721), and the petitioners’ brief of September 30, 2011, containing a list of the next of kin or closest circle of each of them (evidence file, folio 1360).

²⁶² Sheet with confidential data on HIV patients dated April 22, 2002, signed by *Proyecto Vida* corresponding to Reina López Mujica (evidence file, folio 11188); the petitioners’ brief of April 2, 2004, advising of the death of Reina López Mujica, and the petitioners’ brief of December 10, 2010, which included data collected by Dr. Cristina Calderón (co-petitioner) from the medical records of the presumed victims and from interviews (evidence file, folio 1399).

where his medication was changed and he developed resistance to the drugs. He did not undergo phenotype and genotype testing. He suffered from tuberculosis, herpes and the human papilloma virus. He lost his sight and developed sores. He was interned in the San José Hospice for 22 days and died there on December 5, 2003, owing to cardiac arrest, mycosis, and AIDS.²⁶³

5. Ismar Ramírez Chajón's family unit consisted of his mother, María de Jesús Chajón de León, his sister Edna Yolanda Ramírez de Roche, his brothers Carlos Fernando and Ariel, both Coc Chajón, his nephew Abner Antonio and his niece Karla Susely, both Ramírez Mejía, and his partner.²⁶⁴

A.4. Petrona López Robledo²⁶⁵

6. Mrs. López Robledo was born on March 20, 1980. She had received no schooling and she was a laundress. She lived in the department of Suchitepéquez, in Guatemala, with her partner, Miguel Álvarez, who was also a person living with HIV. She was diagnosed on February 26, 2001, in the Mazatenango Hospital. She received medical monitoring in the San Bernardino Public Health Center, department of Suchitepéquez. However, she did not receive treatment to combat the HIV, and did not have access to CD4 counts and viral load testing to start antiretroviral treatment. She began antiretroviral treatment in mid-2003. She died from pneumonia in January 2004.²⁶⁶

7. Her family unit consisted of her two young daughters Marelyn Damaisa and Juana Sugeidi, both Xum López, who were cared for by their aunt, Marcela Xum Basilio, following their mother's death.²⁶⁷

A.5. Rita Mariana Dubón Orozco

8. Ms. Dubón Orozco was born on March 29, 1979. She began to receive treatment in 2002 in the Coatepeque National Hospital. She received antiretroviral treatment through MSF starting in mid-2003. She did not undergo CD4, viral load, phenotype and genotype testing which would have allowed her infections to be treated in time. She suffered from generalized sepsis, diabetes mellitus, arterial hypertension, chronic renal failure and pneumonia. She died on June 27, 2006.²⁶⁸

²⁶³ Affidavit prepared by María de Jesús Chajón De León on January 5, 2017 (evidence file, folio 11712); the petitioners' brief of December 10, 2010, which included data collected by Dr. Cristina Calderón (co-petitioner) from the medical records of the presumed victims and from interviews (evidence file, folio 1401), and death certificate of Ismar Ramírez Chajón dated December 15, 2003 (evidence file, folio 12762).

²⁶⁴ The petitioners' brief of September 30, 2011 (evidence file, folio 1360), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12766).

²⁶⁵ Clarification by the petitioners in the brief on precautionary measures of August 16, 2004 (evidence file, folio 11111), and State's report of June 18, 2004, on the clarification of the name of Petrona López Robledo (evidence file, folio 11134).

²⁶⁶ Sheet with confidential data on HIV patients dated March 8, 2001, signed by *Proyecto Vida* corresponding to Petrona López Robledo (evidence file, folio 11189), and the petitioners' brief of December 10, 2010, which included data collected by Dr. Cristina Calderón (co-petitioner) from the medical records of the presumed victims and from interviews (evidence file, folios 1400 and 1401).

²⁶⁷ The petitioners' brief of August 7, 2009 (evidence file, folio 818); the petitioners' brief of September 30, 2011 (evidence file, folio 1360), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12766).

²⁶⁸ The petitioners' brief of December 10, 2010, which included data collected by Dr. Cristina Calderón (co-petitioner) from the medical records of the presumed victims and from interviews (evidence file, folios 1401 and 1402); the Guatemalan State's report of October 1, 2010 (evidence file, folio 1433), and table with updated

9. Rita Mariana's close circle consisted of her friends Luz Imelda Lucas de León, Rina Haydée Landaverde and Gladys Minerva Chávez Juárez.²⁶⁹

A.6. Luis Edwin Cruz Gramajo

10. Mr. Cruz Gramajo was born on July 29, 1961. He lived in Guatemala City. He began to receive antiretroviral treatment in 2002 through MSF, and the treatment continued until 2004. Subsequently, the Marco Antonio Foundation provided him with treatment. He did not have access to either phenotype or genotype testing. He died from respiratory arrest on January 29, 2008.²⁷⁰

11. His family unit consisted of his sister María del Rosario Cruz Gramajo and his nephew José Andrés Cruz Gramajo, and also his brother Carlos Cruz Gramajo.²⁷¹

A.7. María Blanca Vaíl López

12. Mrs. Vaíl López was born on May 20, 1974. She spoke Mam and Spanish. She lived in the Colmena Sector, Sibaná village, in the municipality of El Asintal, department of Retalhuleu, Guatemala. She was diagnosed with HIV on November 20, 2001, under MSF's *Proyecto Vida*. This organization began to treat her in 2003 and provided her with prophylactic and nutritional support. Starting in 2004, MSF treated her in the Coatepeque National Hospital, where she received antiretroviral treatment. She had irregular access to CD4 counts (4 times) and viral load tests (once). She suffered from genital herpes, vaginal candidiasis, dermatitis, otitis and histoplasmosis. She had no financial resources. She died from respiratory and cardiac arrest and dehydration on March 27, 2011.²⁷²

13. Her family unit consisted of her husband Javier Pérez (deceased), her daughter Lexana Rosbetty Pérez Vaíl, her sisters Alba Azucena and América Leticia, both Vaíl López, her brother Marvin Antonio Vaíl López, her father Antonio Vaíl Molina and her niece Krizia Vanessa Vaíl Aguilar²⁷³.

A.8. Guadalupe Herminia Cayaxon García

information collected by Dr. Cristina Calderón, as an annex to the petitioners' brief of June 27, 2008 (evidence file, folio 12777), and Affidavit prepared by Luz Imelda Lucas de León on December 21, 2016 (evidence file, folio 22702).

²⁶⁹ The petitioners' brief of September 30, 2011 (evidence file, folio 1359), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12766).

²⁷⁰ Initial petition of August 14, 2003 (evidence file, folio 464); the petitioners' brief of August 7, 2009, with information on some of the victims (evidence file, folio 818); the petitioners' brief of December 10, 2010, which included data collected by Dr. Cristina Calderón (co-petitioner) from the medical records of the presumed victims and from interviews (evidence file, folio 1399).

²⁷¹ The petitioners' brief of September 30, 2011 (evidence file, folio 1360); list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12766), and the representatives' brief of October 20, 2011 (evidence file, folio 1358).

²⁷² Information dated May 30, 2003, provided by *Proyecto Vida*, Coatepeque, updating the data of those who filed a petition against Guatemala before the Court (evidence file, folio 11218); the petitioners' brief of August 7, 2009, with information on some of the victims (evidence file, folio 830), and the petitioners' brief of December 10, 2010, which included data collected by Dr. Cristina Calderón (co-petitioner) from the medical records of the presumed victims and from interviews (evidence file, folio 1411).

²⁷³ The petitioners' brief of September 30, 2011 (evidence file, folio 1360), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12766).

14. Mrs. Cayaxon García was born on December 12, 1976. She lived in Retalhuleu, Guatemala. Her schooling ended after she had completed third year of primary education. She was diagnosed with HIV in 2002 in the Retalhuleu Hospital. MSF began to treat her in May 2002 in the Coatepeque National Hospital where she started antiretroviral treatment in November that year. She did not have regular access to CD4 counts and viral load testing, and her medication was not provided on a regular basis. The absence of the drugs resulted in resistance to the antiretroviral treatment, which led to her developing several opportunistic diseases. She suffered from enlarged liver, herpes, severe sciatica, bronchial hyperresponsiveness and pharyngitis. She died on October 9, 2012, from chronic kidney failure.²⁷⁴

15. Her family unit consisted of her partner, Rafael de León (deceased), her daughters Sandra Judith, Guadalupe and Yensi Nohemí, all Pérez Cayaxon; her father Neftalí Cayaxon Pérez and her mother Cruz García Ramos²⁷⁵.

A.9. José Rubén Delgado López

16. Mr. Delgado López was born on July 21, 1956, in the village of Xab, in the department of Retalhuleu, Guatemala. He carried out farming activities. He was diagnosed in 2002, in a private clinic. The same year he received treatment from MSF and, later, in the Coatepeque National Hospital, and he began his antiretroviral treatment in 2003. He was tested intermittently for viral load (3 times) and CD4 count (6 times), without being informed of the results. In 2008, the State reported that Mr. Delgado López had a respiratory tract infection and oral candidiasis. He suffered from cutaneous cryptococcus, sarcoidosis, eye trauma, papular pruritic eruptions, herpes, second-degree malnutrition, lipomas, diarrhea, dizziness, otitis and cephalaea. He was tested for resistance to the antiretroviral drugs and this showed therapeutic failure due to resistance to lamivudine, efavirenz and nevirapine. Due to his illness, he was unable to work and he died on May 14, 2010. For 15 days before he died, he had been in an acute condition, unable to eat or urinate and with vomits.²⁷⁶

17. His family unit consisted of his brother Antonio Miranda Méndez, his sister-in-law Magdalena López de Miranda, his sons Héctor and Francisco, both Delgado Pérez, and his niece Lidia Mirtala Miranda López.²⁷⁷

A.10. Elsa Miriam Estrada Ruíz

²⁷⁴ Statements made by Noelia Elizabeth Cayaxon García and Cruz García Ramos on January 13 and February 11, 2017 (evidence file, folio 11754); the petitioners' brief of August 7, 2009 (evidence file, folios 830 and 831); report of the Administrative Director of the Coatepeque Hospital dated February 5, 2008, on the medical care provided to Guadalupe Cayaxon (evidence file, folio 1079), and statements made by Cruz García Ramos on January 11 and February 11, 2017 (evidence file, folio 11597).

²⁷⁵ The petitioners' brief of September 30, 2011 (evidence file, folio 1365), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12766).

²⁷⁶ Affidavit prepared by Antonio Miranda Méndez on February 12, 2017 (evidence file, folio 11557); the petitioners' brief of December 10, 2010, which included data collected by Dr. Cristina Calderón (co-petitioner) from the medical records of the presumed victims and from interviews (evidence file, folios 1405 and 1406); the petitioners' brief of August 7, 2009 (evidence file, folio 825), and Report of the Administrative Director of the Coatepeque Hospital dated February 5, 2008, on the medical care provided to Rubén Delgado (evidence file, folio 1071).

²⁷⁷ The petitioners' brief of September 30, 2011 (evidence file, folio 1362), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12768).

18. Mrs. Estrada Ruíz was born on March 2, 1948. Her schooling ended after she had completed third year of primary education and she was a housewife. She was diagnosed with HIV in 2001. MSF treated her in 2001 but she did not start antiretroviral treatment until 2006. She did not undergo CD4 counts or viral load testing. She suffered from oral candidiasis, herpes zoster and neuropathy. She was registered at the Coatepeque National Hospital and died there from a common illness on July 26, 2016.²⁷⁸

19. Her family unit consisted of her husband José Luis Hernández (deceased), her mother María Herlinda Ruíz, her sons José Luis Alberto, Estuardo Edison and Osma Vinicio, all Hernández Estrada, and her sisters, Karen Herlinda and Miriam Lisbeth, both Hernández Estrada.²⁷⁹

A.11. Alberto Quiché Cuxeva

20. Mr. Quiché Cuxeva lived in the municipality of Retalhuleu, department of Retalhuleu, Guatemala. He was monitored by the Roosevelt Hospital. Mr. Quiché did not have access to CD4 counts or viral load testing that would have determined whether the treatment he received was appropriate. He died from pneumonia on January 4, 2001.²⁸⁰

21. Alberto Quiché Cuxeva's family unit consisted of his daughter Marisela Quiché Gualip, his father Víctor Quiché Ramírez, his mother Manuela Cuxeva García and his sister, Lucía Quiché Cuxeva.²⁸¹

A.12. Silvia Mirtala Alvarez Villatoro

22. Mrs. Alvarez Villatoro was born in the municipality of Guatemala, department of Guatemala, Guatemala, on October 13, 1978. She was diagnosed with HIV in 2002, in the Psychiatric Department of the IGGS and, that year, began irregular antiretroviral treatment. She underwent CD4 counts and viral load testing irregularly. She suffered from fungus infections. She did not receive either psychological or nutritional support; she merely received talks on the recommended use of condoms from an NGO. Before her diagnosis, she worked in a printing shop, but was dismissed owing to her health status. The journey to the hospital took her 75 minutes. She died on March 13, 2016, from bacterial meningitis and drug resistance.²⁸²

23. Her family unit consisted of her partner Mayra Aidee Mejía Martínez, her daughter María José Mejía Martínez and her son Layonel Ismar Josué Mejía Martínez, her sister Lilián

²⁷⁸ Updated table of information collected by Dr. Cristina Calderón, as an annex to the petitioners' brief of June 27, 2008 (evidence file, folio 12776); Updated table of information collected by Dr. Cristina Calderón in interviews conducted in November 2010 (evidence file, folios 12803 and 12804); the petitioners' brief of August 7, 2009 (evidence file, folio 831), and the State's report of August 26, 2010 (evidence file, folio 1460).

²⁷⁹ The petitioners' brief of September 30, 2011 (evidence file, folio 1365), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12770).

²⁸⁰ Updated table of information collected by Dr. Cristina Calderón, as an annex to the petitioners' brief of June 27, 2008 (evidence file, folio 12777); the petitioners' brief of December 10, 2010, which included data collected by Dr. Cristina Calderón (co-petitioner) from the medical records of the presumed victims and from interviews (evidence file, folio 1401), and the petitioners' brief of August 7, 2009 (evidence file, folio 818).

²⁸¹ The representatives' brief of September 30, 2011 (evidence file, folio 1359); list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12766), and updated table of information of December 10, 2010 signed by Dr. Cristina Calderón (evidence file, folio 12801).

²⁸² Birth certificate of Silvia Mirtala Alvarez Villatoro (evidence file, folio 12870), and updated table of information collected by Dr. Cristina Calderón and interviews conducted in November 2010 (evidence file, folio 12801).

Janethe Alvarez Villatoro, her father Víctor Manuel Alvarez Alvisures, and her mother Nibia Matilde Villatoro Galicia de Alvarez (deceased).²⁸³

A.13. Juana Aguilar

24. Mrs. Aguilar was born in the municipality of Génova, department of Quetzaltenango, Guatemala, on July 13, 1967. She lived in Caserío Guadalupe, Génova, Costa Cuca, Guatemala. She was diagnosed with HIV on January 18, 2000, in the Guadalupe Red Cross Health Center. In March 2002 she began to receive support from MSF. She began her antiretroviral treatment in November 2005. She suffered from herpes zoster, recurrent infection of the respiratory tract, viral tonsillitis, severe infections and sarcoidosis. Her last appointment was on April 30, 2014. According to information provided by Dr. Calderón, Mrs. Aguilar is deceased. However, owing to a lack of communication with her next of kin, the precise details of her death are unknown.²⁸⁴

25. Her family unit consisted of her partner Felipe de Jesús Hernández (deceased), her daughter Jessenia Carolina and her sons Julio César and Felipe Guillermo, all Guzmán Aguilar, her father Julián Cabrera Aguilar, and her grandsons Gerber Gudiel Guzmán Aguilar and Andi Enrique Sales Guzmán.²⁸⁵

A.14. Melvin Yovani Ajtun Escobar

26. Mr. Ajtun Escobar was born on July 31, 1981. He was diagnosed in the Retalhieu Hospital in 2001. He began treatment in 2004, through MSF. He did not undergo regular CD4 counts and viral load testing. He suffered from dermatomycosis, constant fever for more than a month, fungal skin infections, atypical pneumonia, oral candidiasis, pharyngitis, oral papillomatosis and oral hairy leukoplakia. He did not have the financial resources to acquire medicines. Before his diagnosis he worked in a welding workshop. In 2006, he attended Clinic No. 12 of the Coatepeque National Hospital, where he also received antiretroviral drugs. He attended talks on the use of the condom and the prevention of reinfection. He died on June 17, 2016, from causes unrelated to HIV.²⁸⁶

27. His family unit consisted of his wife Heidy Mariela Lucas González, his sons Elías Emmanuel Ajtun Lucas and Marvin Josué Lucas González (deceased) and his mother Bertha Luz Escobar.²⁸⁷

A.15. José Cupertino Ramírez

²⁸³ The petitioners' brief of September 30, 2011 (evidence file, folio 1363), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12769).

²⁸⁴ Information provided by *Proyecto Vida*, Coatepeque, on the updating of the data of the persons who filed a petition against Guatemala before the Court (evidence file, folio 11215); the petitioners' brief of April 2, 2004 (evidence file, folio 455); the petitioners' brief of August 7, 2009 (evidence file, folios 830 and 831); table with information collected by Dr. Cristina Calderón, through interviews in November 2010 (evidence file, folio 12788), and Report on the medical care provided to Juana Aguilar dated February 5, 2008, signed by the Administrative Director of the Coatepeque Hospital (evidence file, folio 168).

²⁸⁵ The petitioners' brief of September 30, 2011 (evidence file, folios 1364 and 1365), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12782).

²⁸⁶ The petitioners' brief of August 7, 2009 (evidence file, folios 825 and 826); table with information collected by Dr. Cristina Calderón through interviews in November 2010 (evidence file, folios 12782, 12795 and 12796), and birth certificate of Melvin Yovani Ajtun Escobar (evidence file, folio 12898).

²⁸⁷ The petitioners' brief of September 30, 2011 (evidence file, folios 1359 to 1366), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folios 12765 – 12771).

28. Mr. Cupertino Ramírez was born on April 6, 1970, in Suchitepequez, Guatemala. He lived in the Buena Vista Sector. He was a farmer and did not know how to read and write. He was diagnosed in the Mazatenango Hospital in 2003. He was registered with the Coatepeque National Hospital, with the MSF project, under which he began to receive antiretroviral treatment on June 9, 2004. He suffered from anorexia, pharyngitis, mycosis, syphilis and genital herpes. He did not undergo CD4 counts regularly and he was not tested for viral load. His partner left him owing to his illness; his four children also left him, and when he went out people on the street called him “*sidoso*” [Note: SIDA is the Spanish for HIV]. He died of asphyxiation due to drowning on January 8, 2013.²⁸⁸

29. His family unit consisted of his cousins Victoria Ramírez Ramos and Valvino Ramírez Sabat and his uncle Valvino Ramírez Ramos.²⁸⁹

B. Presumed victims who are alive

B.1. Sebastián Emilio Dueñas

30. Mr. Dueñas was born in the municipality of Retalhuleu, department of Retalhuleu, Guatemala, on January 18, 1955. He lives in the village of Xab del Asintal, Retalhuleu. His schooling ended after third year of primary education. He was diagnosed with HIV in 2002 by a private laboratory. Before his diagnosis he was a farmer and now he is a tradesman. He began his antiretroviral treatment with MSF’s *Proyecto Vida* on December 12, 2002. Subsequently, he was transferred to Clinic No. 12 of the Coatepeque Hospital. He has not had regular access to CD4 counts, viral load tests or treatment for opportunistic diseases, which is revealed by his oral fungal infection. He has suffered from recurrent oral candidiasis, upper respiratory infection and diarrhea.²⁹⁰ He indicated that he had been pointed out by others attending Clinic No. 12, who had referred to people living with HIV as “the AIDS people over there.” He received psychological support every three months, and also from a self-help group on treatment adherence, as well as talks to avoid reinfection, using condoms.²⁹¹

31. His family unit consists of his wife Julia Aguilar, his daughters Lucrecia Izabel and Eva, both Dueñas Aguilar and his son Fredy Dueñas Aguilar or José Alfredo Ramón Aguilar²⁹².

B.2. Julia Aguilar

²⁸⁸ Table with updated information collected by Dr. Cristina Calderón, as an annex to the petitioners’ brief of June 27, 2008 (evidence file, folio 12776); the petitioners’ brief of August 7, 2009 (evidence file, folio 829); table with information collected by Dr. Cristina Calderón through interviews in November 2010 (evidence file, folio 12786), and Affidavit prepared by Victoria Ramírez Ramos on February 11, 2017 (evidence file, folio 11812).

²⁸⁹ The petitioners’ brief of September 30, 2011 (evidence file, folio 1363), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12769).

²⁹⁰ Birth certificate of Sebastián Emilio Dueñas (evidence file, folio 12866); Affidavit prepared by Julia Aguilar on December 20, 2016 (evidence file, folio 11648); the petitioners’ brief of August 7, 2009 (evidence file, folio 823); table with information collected by Dr. Cristina Calderón through interviews in November 2010 (evidence file, folio 12791), and Affidavit prepared by Sebastián Emilio Dueñas on February 9, 2017 (evidence file, folio 11809).

²⁹¹ Affidavit prepared by Sebastián Emilio Dueñas on February 9, 2017 (evidence file, folios 11807 to 11809), and table with information collected by Dr. Cristina Calderón through interviews in November 2010 (evidence file, folio 12791).

²⁹² The petitioners’ brief of September 30, 2011 (evidence file, folio 1361), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12767).

32. Mrs. Aguilar was born in the municipality of El Asintal, department of Retalhuleu, Guatemala on July 28, 1955. She lives in the village of Xab del Asintal, Retalhuleu, Guatemala. She speaks Mam and Spanish, has never received schooling, and is illiterate. She is a trader. She was diagnosed with HIV in 2002, in a private laboratory. She began antiretroviral treatment with MSF and then with the Global Fund to Fight AIDS. She was transferred to Clinic No. 12 of the Coatepeque National Hospital in 2006, and began antiretroviral treatment there on April 26, 2007, through MSF. After MSF left, she continued receiving medical treatment in that hospital. She has undergone CD4 counts and viral load testing from time to time and has not been able to access all the drugs that she has been prescribed owing to their high cost. Also, she has not had genotype and phenotype tests. She has suffered from acute tonsillitis, parasites, pharyngitis, sarcoidosis, neuropathy, moderate cervicitis, urinary infection, sinusitis, diarrhea, calcaneal spur, peptic disease, postherpetic neuropathy and obesity. She does not receive either psychological or nutritional support, merely medication. Moreover, she does not receive family or community assistance. It takes her an hour to travel from her home to the clinic and the fare costs between 8 and 15 quetzals each way.²⁹³

33. As in the case of her husband, Sebastián Emilio Dueñas, Mrs. Aguilar indicated that she has been pointed out owing to her condition of being a person living with HIV, in particular by her neighbors who have identified both her and her husband as “*sidosos*” which, she indicated, hurt her, as did the comments made against her in the Coatepeque National Hospital.²⁹⁴

34. Her family unit consists of her husband Sebastián Emilio Dueñas, their daughters Lucrecia Izabel and Eva, both Dueñas Aguilar, their son Fredy Dueñas Aguilar or José Alfredo Ramón Aguilar, and her mother María Dueñas Aguilar²⁹⁵.

B.3. Felipe Tebalan Ordoñez

35. Mr. Tebalan Ordoñez was born in the municipality of Coatepeque, department of Quetzaltenango, Guatemala on August 23, 1942. He lives in the San Vicente Champerico Multicultural Agrarian Community, Retalhuleu, Guatemala. His schooling consisted of first year of primary education and he was enlisted in the army for three years. He speaks k'iche and Spanish. Before becoming infected, he planted and harvested corn; however, he had to sell his plot because, due to his illness, he was unable to continue. Once he started treatment, he sold chickens and, subsequently, on the advice of his children he stopped working.²⁹⁶ He was diagnosed with HIV in 2002, under MSF's *Proyecto Vida*. He began his antiretroviral treatment with MSF in June 2003, and in around 2004, he was transferred to Clinic No. 12 of the Coatepeque National Hospital, where he underwent liver function tests and, irregularly, CD4 counts (4) and viral load testing (1). He has not undergone genotype and phenotype tests, but he has been given the drugs that are prescribed. He has suffered from liver problems, slight deafness, level II malnutrition, acute diarrhea, allergies and mouth sores. He receives no nutritional or social support, or family, community and home-

²⁹³ Statements by Julia Aguilar on December 20, 2016, and February 11, 2017 (evidence file, folios 11648, 11649 and 11651), and the petitioners' brief of August 7, 2009 (evidence file, folios 824 and 825).

²⁹⁴ Birth certificate of Julia Aguilar (evidence file, folio 12868), and statements made by Julia Aguilar on December 20, 2016 and February 11, 2017 (evidence file, folios 11648 – 11650).

²⁹⁵ The petitioners' brief of September 30, 2011 (evidence file, folio 1361), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12767).

²⁹⁶ Statements made by Felipe Tebalan Ordoñez on January 11 and February 9, 2017 (evidence file, folios 11618, 11621, 11622, 11623 and 11624).

based care. He has an appointment with the psychologist once a year and has been given condoms.²⁹⁷

36. His family unit consists of his partner Martina Candelaria Alvarez Estrada, his daughters Candelaria, Argentina, Honoria, Cecilia, Daria and his son Juan Carlos, all Ordoñez Alvarez, his grandsons Luis Emiliano Ordoñez Álvarez, Martín Gildardo Ordoñez Álvarez, Ivan Juárez Ordoñez and his granddaughters Lauris Ernestina and Yeslin Janeth, both Juárez Ordoñez²⁹⁸.

B.4. Martina Candelaria Alvarez Estrada

37. Mrs. Alvarez Estrada was born on August 20, 1947, in the municipality of Coatepeque, department of Quetzaltenango, Guatemala. She lives in the San Vicente Champerico Multicultural Agrarian Community, Retalhuleu. She had no schooling and is illiterate. She was diagnosed with HIV in 2001 by MSF's *Proyecto Vida*. She began her antiretroviral treatment in this organization. Subsequently, she was transferred to Clinic No. 12 of the Coatepeque National Hospital. She has undergone CD4 counts (4) and viral load tests (2). She has suffered from neuropathy, arthralgia, diarrhea, a very hot tongue, and tiredness. She finds it difficult to go to the hospital because, like her husband, Felipe Tebalan Ordoñez, it is far from her home and she does not have the financial resources required.²⁹⁹

38. Her family unit consists of her husband Felipe Tebalan Ordoñez, their daughters Candelaria, Argentina, Honoria, Cecilia, Daria and their son Juan Carlos, all Ordoñez Alvarez, their grandsons Luis Emiliano Ordoñez Álvarez, Martín Gildardo Ordoñez Alvarez, Iván Juárez Ordoñez and their granddaughters Lauris Ernestina and Yeslin Janeth, both Juárez Ordoñez.³⁰⁰

B.5 Luis Rubén Isabel Alvarez Flores

39. Mr. Alvarez Flores was born on November 19, 1962, in the municipality of Mixco, department of Guatemala, Guatemala. He lives in Mixco, Guatemala. He is a marketing and publicity expert and middle school teacher, specialized in pedagogy. He studied to be a teacher and worked in a college in 2001. He was diagnosed with HIV on October 18, 2002, in the Pedro de Bethancourt National Hospital as the result of an opportunistic infection known as fungal pneumonia. He was then transferred to the San José Hospice. Subsequently, he was transferred to MSF where he began antiretroviral treatment in February 2003. After this, he was treated by the Marco Antonio Foundation, where he received psychological and nutritional care, and was assisted by a social worker. Since 2008, he has been receiving medical care in a public hospital in Antigua. This medical care was interrupted from 2011 to 2013 because he was living in Honduras, and he reincorporated the treatment on his return. Currently, he is treated at the hospital in

²⁹⁷ Birth certificate of Felipe Tebalan Ordoñez (evidence file, folio 12828); statements made by Felipe Tebalan Ordoñez on January 11 and February 9, 2017 (evidence file, folios 11618, 11619, 11620, 11621 and 11624), and the petitioners' brief of August 7, 2009 (evidence file, folio 823).

²⁹⁸ The petitioners' brief of September 30, 2011 (evidence file, folio 1361), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12767).

²⁹⁹ Birth certificate of Martina Candelaria Álvarez Estrada (evidence file, folio 12896); statements made by Martina Candelaria Álvarez Estrada on March 25, 2017 (evidence file, folio 11734), and the petitioners' brief of August 7, 2009 (evidence file, folio 824).

³⁰⁰ The petitioners' brief of September 30, 2011 (evidence file, folio 1361), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12767).he was

Antigua, where he receives antiretroviral drugs and has undergone CD4 counts, and viral load and genotype testing, although he has paid for some tests personally. His treatment plan has not been changed and he has not received nutritional, family or community assistance, but he does receive psychological care every three months.³⁰¹

40. Mr. Alvarez Flores indicated that he had had to give up working when he was diagnosed and then faced obstacles to enter the labor market owing to his condition as a person with HIV. He also stated that he had incurred expenses of around 2,000 quetzals a year to travel to the clinic. He does not work, but his siblings support him, although his parents are unaware of his illness.³⁰²

41. His family unit consists of his father Julio Ruben Alvarez Chinchila, his mother Margarita Flores Cuiza (deceased), his sister Lileana, and his brothers Atilio Sabas, Victoriano Estanislao, Julio Antonio and Samuel Gonzalo, all Alvarez Flores.³⁰³

B.6. Ingrid Janeth Barillas Martínez

42. Ms. Barillas Martínez was born on March 18, 1973, in the municipality of Tiquisate, department of Escuintla, Guatemala. She is unmarried and is a domestic worker. She lives in the municipality of Tecún Umán, department of San Marcos, Guatemala, and she is registered in the Coatepeque National Hospital.³⁰⁴

B.7. Saira Elisa Barrios

43. Mrs. Barrios was born on August 30, 1972, in the municipality of Nuevo San Carlos, department of Retalhuleu, Guatemala, where she now resides. She completed fifth year of primary education. She was diagnosed with HIV in 2002, when she was seven months pregnant. She began her antiretroviral treatment the same year, under MSF's *Proyecto Vida*. Subsequently, she was transferred to the Coatepeque National Hospital and then, at her request, transferred to the Retalhuleu Hospital, where she received irregular testing for CD4 count and viral load. She has suffered from various opportunistic diseases, such as intestinal parasites, muco-cutaneous lesions, respiratory infections and severe bacterial infection. She has not received nutritional and social support or family, community and home-based care. However, every three months she receives psychological support and she is provided with condoms. She only receives HIV drugs, and not those for the related or opportunistic infections. Mrs. Barrios indicated that, before being diagnosed with HIV, she worked cleaning houses, cooking, washing and ironing, activities she has had to suspend because of the physical problems she suffered due to the deterioration in her health. She also indicated that it took her 90 minutes to travel from her home to the Retalhuleu hospital.³⁰⁵

³⁰¹ Birth certificate of Luis Rubén Isabel Alvarez Flores (evidence file, folio 12884), and statements made by Luis Rubén Isabel Alvarez Flores on March 29, 2017 (evidence file, folios 11690, 11691 and 11696).

³⁰² Statements made by Luis Rubén Isabel Alvarez Flores of March 29, 2017 (evidence file, folios 11690 and 11692).

³⁰³ The petitioners' brief of September 30, 2011 (evidence file, folio 1361), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folios 12770 and 12771).

³⁰⁴ New application for amparo filed before the Constitutional Court on July 26, 2002 (evidence file, folio 14), and 2008 Updated table of information on each victim, collected by Dr. Cristina Calderón, which was attached to the petitioners' brief with motions, pleadings and evidence (evidence file, folio 12777).

³⁰⁵ Statements made by Saira Elisa Barrios on January 16 and February 9, 2017 (evidence file, folios 11772, 11773, 11774 and 11777); birth certificate of Saira Elisa Barrios (evidence file, folio 12858), and the petitioners' brief of August 7, 2009 (evidence file, folios 823, 824 and 825).

44. Her family unit consists of the father of her daughters Erick Jonás Sánchez (deceased), her actual husband Guillermo Donis, her daughters Edilma Evelina, Darlin Sureima, Kendi Liserli and Noret Adali, all Barrios, her father Moisés Israel Rodas López, and her mother Eiselda de Jesús Mazariegos de Rodas³⁰⁶.

B.8. Felix de Jesús Cabrera Morales

45. Mr. Cabrera Morales was born on November 20, 1978, in the municipality of Rio Hondo, department of Zacapa, Guatemala. He did not complete his schooling. He was diagnosed in October 2001 in the Casa Central laboratory. He began his antiretroviral treatment in December 2001 in the IGSS, which lacked a supply of drugs. He has undergone CD4 counts and viral load tests irregularly, but not genotype and phenotype testing, even though his treatment has been changed several times, and he has not had regular access to medication owing to shortages, nor to comprehensive care. Regarding the shortages of medicines, Mr. Cabrera Morales mentioned the anxiety he felt, which was specifically caused by the fear of contracting opportunistic diseases and becoming resistant to his medication.³⁰⁷

46. Mr. Cabrera Morales suffered consequences when he learned that he was a person living with HIV, because he was pointed out by his colleagues and dismissed from his place of work. Based on his dismissal, he filed a complaint against his employer, with evidence that he had been subject to work-related discrimination. He works as an actor and does not receive a fixed income. He tried to commit suicide with pills and was admitted to the emergency department of the IGSS. He is not receiving medical care for illnesses that are not derived from HIV, or care for opportunistic diseases, because to date he has not contracted them.³⁰⁸

47. His family unit consists of his mother Mavilla Ester Morales Agustín, his father Juan Pablo Cabrera Gatica, and his son Jesús Alberto González Cabrera.³⁰⁹

B.9. César Noé Cancinos Gómez

48. Mr. Cancinos Gómez was born on June 21, 1980, in the municipality of Coatepeque, department of Quetzaltenango, Guatemala. He lives in the village of San Rafael Pacaya, Quetzaltenango. He attended school until the sixth year of primary. He was diagnosed with HIV on June 18, 2002, and on June 12, 2003, he began antiretroviral treatment under the MSF program *Proyecto Vida*. Subsequently, he was transferred to Clinic No. 12 of the Coatepeque National Hospital where he underwent some CD4 counts and viral load tests. At the present time, he is regularly undergoing CD4 counts and viral load testing, although on the most recent occasions he has been asked to make a financial "collaboration" of 5 or 10

³⁰⁶ The petitioners' brief of September 30, 2011 (evidence file, folio 1362), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12767).

³⁰⁷ Birth certificate of Felix de Jesús Cabrera Morales (evidence file, folio 12872); statements made by Felix de Jesús Cabrera Morales on March 28, 2017 (evidence file, folios 11627, 11629 and 11636); the petitioners' brief of August 7, 2009 (evidence file, folio 831), and Affidavit prepared by Felix de Jesús Cabrera Morales during the public hearing held before the Court.

³⁰⁸ Affidavit prepared by Felix de Jesús Cabrera Morales on March 28, 2017 (evidence file, folios 11627, 11628 and 11631), and Affidavit prepared by Felix de Jesús Cabrera Morales during the public hearing held before the Court.

³⁰⁹ The petitioners' brief of September 30, 2011 (evidence file, folio 1365), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12770).

quetzals. He has not suffered from opportunistic diseases, and has not undergone genotype and phenotype testing. He does not receive nutritional support. He used to take one hour to travel from his home to Coatepeque. At times, there are insufficient drugs for three months and he is only given one month's supply. He worked in a factory in the capital, but stopped working owing to his physical deterioration due to the infection. He subsequently returned to Coatepeque and works in agriculture.³¹⁰

49. His family unit consists of his wife Irma Leticia Vicente Morales, his daughter Leticia Yamilet Cancinos Vicente, his son César Antonio Cancinos Vicente, his father Demecio Rogelio Cancinos Díaz, and his mother Macedonia Gómez Oxlaj³¹¹.

B.10. Aracely Cinto

50. Mrs. Cinto was born on March 31, 1970, in the municipality of Pajapita, department of San Marcos, Guatemala, where she currently resides. She attended first year of primary school. She was diagnosed with HIV in 1994 in the Tecún Umán Health Center, department of San Marcos, but her condition as a person with HIV was confirmed in Coatepeque. From 1994 to 2005 she was treated by the Red Cross. Afterwards, MSF's *Proyecto Vida* provided her with medical care, and finally she was transferred to Clinic No. 12 of the Coatepeque National Hospital, where she began to receive antiretroviral treatment in 2009. At that time there was a sufficient supply of drugs. She has undergone CD4 counts (3) and viral load tests irregularly, but has not been given the results. Mrs. Cinto indicated that she had not suffered from any opportunistic infections. She works washing clothes and selling ice cream and attends self-help groups. She also indicated that, because the clinic she attends is very small, all the people who go to it point them out and refer to them as the "*sidosos*" which upset her.³¹²

51. Her family unit consists of her mother María Teresa de Maldonado Cinto, her sons Leonel Celestino Mazariegos Cinto and Edwin Amílcar Maldonado Cinto, and her daughter Gladys Francisca Mazariegos Cinto (deceased).³¹³

B.11. Luis Rolando Cuscul Pivaral

52. Mr. Cuscul Pivaral was born on January 12, 1968, in the municipality of Guatemala, department of Guatemala, Guatemala. He lives in Villa Canales, department of Guatemala. He was diagnosed on October 31, 1993, in the IGSS, where he indicated he had been pointed out and made fun of by the medical personnel and his records indicated that he was a "patient with AIDS." He began antiretroviral treatment under MSF's *Proyecto Vida*, in the Roosevelt Hospital, in September 2000. He has undergone CD4 counts and viral load, triglyceride, kidney and liver function tests. He has suffered from lipodystrophy, because he was submitted to an experimental treatment before starting the antiretroviral treatment. He has not contracted related or opportunistic diseases. He has not undergone genotype

³¹⁰ Birth certificate of César Noé Cancinos Gómez (evidence file, folio 12816); Affidavit prepared by César Noé Cancinos Gómez on March 25, 2017 (evidence file, folios 11581, 11582 and 11583), and the petitioners' brief of August 7, 2009 (evidence file, folio 827).

³¹¹ The petitioners' brief of September 30, 2011 (evidence file, folio 1363), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folios 12768 and 12769).

³¹² Birth certificate of Aracely Cinto (evidence file, folio 12806); Affidavit prepared by Aracely Cinto on March 25, 2017 (evidence file, folios 11562, 11564, 11566, 11567 and 11569), and the petitioners' brief of August 7, 2009 (evidence file, folio 828).

³¹³ The petitioners' brief of September 30, 2011 (evidence file, folio 1363); and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12769).

testing. On receiving his diagnosis, he became depressed, lost interest in everything, and tried to commit suicide on several occasions. He has not received social, family, community and home-based care.³¹⁴

53. His family unit consists of his adoptive mother María de la Cruz Mundo Zelaya, his brothers Isaias, Manuel Antonio, Adolfo and Raúl, all Cuscul Mundo, his sister Etelvina Cuscul Mundo, his nephews and nieces Eduardo Isaías Cuscul Antonio, Patricia Judith Cuscul Antonio, Luis Pablo Cuscul Antonio, Bryan Alexander Adolfo Cuscul Quiñonez, Andy Joe Cuscul Quiñonez, Manuel Cuscul Álvarez, Kevin Raul Cuscul Flores, Marlon Daniel Cuscul Flores, Ángel Gabriel Cuscul Flores, Andrea Etelvina Sanchez Cuscul, Roxana Pamela Sanchez Cuscul, and his partner.³¹⁵

B.12. Olga Marina Castillo

54. Ms. Marina Castillo was born on October 27, 1976, in the municipality of Guatemala, department of Guatemala, Guatemala. In 2003, she received antiretroviral treatment from MSF.³¹⁶

B.13. María Felipe Pérez

55. Mrs. Felipe Pérez was born on August 20, 1964, in the municipality of San Ildefonso Ixtahuacán, department of Huehuetenango, Guatemala. She lives in the village of Monte Cristo, Sector Santa Rosa, Champerico, Retalhuleu, Guatemala. She speaks Mam and Spanish. She completed second year of primary education. She was diagnosed in 1999, under MSF's *Proyecto Vida*. She started treatment in 2001. She was transferred to the Coatepeque National Hospital, but due to the distance and her financial possibilities, she was transferred to the Retalhuleu Hospital. She has undergone CD4 counts (6)) and viral load tests (2), irregularly. She has not received genotype or phenotype testing. She indicated that she has not received treatment for HIV-related diseases. She does not work. Her children support her financially, because she has no resources. She has not received nutritional or social support, or family, community and home-based care. She receives psychological support and condoms. Mrs. Felipe Pérez indicated that her children's friends and also people in the street tell her children "you have AIDS because your mother has AIDS." She sold some land to help herself financially.³¹⁷

56. Her family unit consists of the father of her sons, Roberto Gómez García (deceased), her daughters Margarita and Ana Patricia, both Gómez Felipe, and her sons Rocael, Jaime, Miguel, Carlos and Francisco, all Gómez Felipe.³¹⁸

B.14. Ismerai Olibia García Castañon

³¹⁴ Birth certificate of Luis Rolando Cuscul Pivaral (evidence file, folio 1880); statements made by Luis Rolando Cuscul Pivaral on March 29, 2017 (evidence file, folios 11676, 11677, 11678, 11679, 11684, 11685 and 11686).

³¹⁵ The petitioners' brief of September 30, 2011 (evidence file, folios 1360 and 1361), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12766).

³¹⁶ Initial petition of August 14, 2003, lodged with IACHR (evidence file, folio 463).

³¹⁷ Birth certificate of María Felipe Pérez (evidence file, folio 12892); statements made by María Felipe Pérez on March 25, 2017 (evidence file, folios 11726, 11727, 11728 and 11730), and the petitioners' brief of August 7, 2009 (evidence file, folio 827).

³¹⁸ The petitioners' brief of September 30, 2011 (evidence file, folio 1364), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12769).

57. Mrs. García Castañon was born on January 14, 1964, in the municipality of Pajapita, department of San Marcos, Guatemala. She lives in La Ceiba, Pajapita, San Marcos. She was diagnosed in 2003 by MSF's *Proyecto Vida* and began to receive medical care from MSF that same year. She was transferred to Clinic No. 12 of the Coatepeque National Hospital, and began her antiretroviral treatment in 2007. She has not undergone regular CD4 counts or viral load tests. She has suffered from opportunistic diseases such as vulvovaginal candidiasis and chronic diarrhea. She has received talks in the hospital, and information on condoms and reinfection.³¹⁹

58. Her family unit consists of the father of her sons Juan Guillermo Cifuentes Orozco, her sons Leonidas Alberto, Guillermo Neemias, Elder Neftalí and Juan Antonio (deceased), all Cifuentes García, and her daughter Ingrid Olivia Cifuentes García, her mother Leodora Castañon, and her current partner Santos Isacar Vásquez Barrios.³²⁰

B.15. Santos Isacar Vásquez Barrios

59. Mr. Vásquez Barrios was born on November 3, 1968, in the municipality of Ocos, department of San Marcos, Guatemala. He lives in Tecum, Guatemala. He completed second year of primary education and can read and write. He works collecting and selling coconuts. He was diagnosed with HIV in 2003 by MSF's *Proyecto Vida*, where he was treated with trimethoprim for approximately nine months, and then they gave him efavirenz with lopinavir and ritonavir. Subsequently, he was transferred to Clinic No. 12 of the Coatepeque National Hospital, which was around 40 minutes from his home and the journey costs approximately 45 quetzals on the days he has an appointment. He began antiretroviral treatment in 2004. He has undergone CD4 counts (4) and viral load testing (1). He has suffered from syphilis, neurosyphilis, herpes zoster, recurrent cutaneous mycosis, parasites, fever, diarrhea with blood, vomits with white phlegm, slight aphonia and pharyngitis. He has received talks on treatment adherence, and nutritional and psychological support from *Proyecto Vida*, and psychological care in Clinic No. 12.³²¹

60. His family unit consists of his daughter Irma Noelia Vásquez Barrios, his mother Margarita Barrios Hernández, his father Rogelio Saturnino Vásquez, his grandmother Juana de Jesús Vásquez, and his current partner Ismerai Olibia García Castañon.³²²

B.16. Mardo Luis Hernández y Hernández

61. Mr. Hernández y Hernández was born on July 3, 1983, in the municipality of Ocos, department of San Marcos, Guatemala. He lives in Colonia San Julián, La Blanca municipality, San Marcos, Guatemala. He completed third year of primary education. He

³¹⁹ Birth certificate of Ismerai Olibia García Castañon (evidence file, folio 12848); table with information collected by Dr. Cristina Calderón, during meetings and review of the petitioners' medical records in November 2010, which was attached to the brief with motions, pleadings and evidence (evidence file, folios 12795 and 12796), and the petitioners' brief of August 7, 2009 (evidence file, folio 825).

³²⁰ The petitioners' brief of September 30, 2011 (evidence file, folio 1362), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12768).

³²¹ Birth certificate of Santos Isacar Vásquez Barrios (evidence file, folio 12840); Affidavit prepared by Santos Isacar Vásquez Barrios on February 12, 2017 (evidence file, folios 11802, 11803 and 11804); table with information collected by Dr. Cristina Calderón, during meetings and review of the petitioners' medical records in November 2010, which was attached to the brief with motions, pleadings and evidence (evidence file, folio 12797), and the petitioners' brief of August 7, 2009 (evidence file, folio 827).

³²² The petitioners' brief of September 30, 2011 (evidence file, folio 1362), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12768).

worked farming a small plot, but had to abandon this activity owing to exhaustion resulting from his illness. He now works in a packing plant. He was diagnosed with HIV in 2001, by MSF's *Proyecto Vida*. Subsequently, he was transferred to Clinic No. 12 of the Coatepeque National Hospital but, ultimately, he has been treated in Malacatán. He has undergone CD4 counts and viral load tests, but not genotype and phenotype testing. He has suffered from pneumonia, tuberculosis and cryptococcus. He has not received either nutritional or social support. A nurse indicated that his son was a person living with HIV even though he does not have the infection and this made Mr. Hernández y Hernández feel very guilty.³²³

62. His family unit consists of his wife, Nidya Roxana Zapet Gómez, his son Mardo Kleiber Hernández Zapet, his mother Irma Erminia Hernández Mérida, his father Francisco Luis Hernández Ramírez, his brother Menfil Elsidio Hernández Hernández, and his sister Jessica Isenia Hernández Hernández.³²⁴

B.17. Luis Armando Linares Ruano

63. Mr. Linares Ruano was born on November 10, 1969, in the municipality of Jalpatagua, department of Jutiapa, Guatemala. He lives in Guatemala City, Guatemala. He was diagnosed in 1984, by the Guatemalan Sexual Health Care Association. He did not receive medical treatment for around 14 years. He started treatment for the first time in the San Juan de Dios Hospital, then in the Roosevelt Hospital and finally in the IGSS. His treatment included receiving antiretroviral drugs. He has undergone CD4 counts and viral load tests. On one occasion, in the Roosevelt Hospital, he underwent genotype testing. He has suffered from pneumonia and other ailments such as general weakness, diarrhea, very intense headaches, dizziness and lipomas in different parts of his body (arms, legs and waist). He has not received nutritional, social or psychological support or family, community and home-based care. He is provided with condoms on demand. Mr. Linares Ruano indicated that he has not been able to obtain several jobs due to his sexual orientation and because he has to have checkups.³²⁵

B.18. Marta Alicia Maldonado Paz

64. Mrs. Maldonado Paz was born on April 27, 1980. She was diagnosed on December 4, 2001, by MSF's *Proyecto Vida*. She began antiretroviral treatment in 2003, through this organization. Subsequently, she was transferred to Clinic No. 12 of the Coatepeque National Hospital. She has undergone some CD4 counts and viral load tests. She has suffered from anal and vulvar papillomatosis, vaginal and oral candidiasis, oral papillomatosis, tinea pedis, level II malnutrition and histoplasmosis. She worked in a store before being diagnosed and, subsequently, as a receptionist with *Proyecto Vida*.³²⁶

³²³ Birth certificate of Mardo Luis Hernández y Hernández (evidence file, folio 12886), and statements made by Mardo Luis Hernández y Hernández on March 25, 2017 (evidence file, folios 11705 to 11709).

³²⁴ The petitioners' brief of September 30, 2011 (evidence file, folio 1365), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12777).

³²⁵ Birth certificate of Luis Armando Linares Ruano (evidence file, folio 12876), and Affidavit prepared by Luis Armando Linares Ruano on March 28, 2017 (evidence file, folios 11672, 11673 and 11674).

³²⁶ Updated table of information (2008) with regard to each victim prepared by Dr. Cristina Calderón, which was attached to the brief with motions, pleadings and evidence of the petitioners (evidence file, folio 12774); Diagnosis record of Mrs. Marta Alicia Maldonado Paz (evidence file, folio 11193); the petitioners' brief of August 7, 2009 (evidence file, folio 826), and table with information collected by Dr. Cristina Calderón during meetings and review of the petitioners' medical records in November 2010, which was attached to the brief with motions, pleadings and evidence (evidence file, folios 12795 and 12796).

65. Her family unit consists of her husband Carlos Humberto Vásquez Pérez, her daughters Delia Marlenee and Adela Nohemí (deceased), both Pérez Maldonado, and her sister Telma Maldonado Andrade.³²⁷

B.19. Dora Marina Martínez Sofoifa

66. Mrs. Martínez Sofoifa was born on September 10, 1971, in the municipality of Ocos, department of San Marcos, Guatemala. She lives in Caserío Silencio, municipality of Coatepeque, department of Quetzaltenango, Guatemala. She does domestic work. She was diagnosed in 1998 in the Coatepeque National Hospital, where she went because she was suffering from a fever and malnutrition. She did not receive medical treatment for HIV for the first few years after her diagnosis because, in the hospital, they told her that they did not have the drugs required to treat her. In 2004, she was treated by MSF, where she underwent CD4 counts and was prescribed antiretroviral treatment. In 2010, she was again transferred to the Coatepeque National Hospital. CD4 counts and viral load tests are irregular. In 2014, there were no antiretroviral drugs for several months. She has suffered from high cholesterol and lipodystrophy.³²⁸

67. Mrs. Martínez Sofoifa indicated that the way she was treated by the hospital personnel changed after her diagnosis became known. She also indicated that the clinic where she is treated is four kilometers from her home and that, due to the distance, transport costs, and the dangers of the area where she lives, she has to travel to her appointments in the early morning hours and wait outside the emergency ward.³²⁹

B.20. Pascuala de Jesús Mérida Rodríguez

68. Mrs. Mérida Rodríguez was born on April 25, 1975, in the municipality of San Sebastián, department of Retalhuleu, Guatemala. She lives in the village of Granados, Sector 2, Nuevo San Carlos, Retalhuleu, Guatemala. She completed third year of primary education. When she was diagnosed with HIV she was not employed. She was diagnosed in 2001 by MSF's *Proyecto Vida*, when she was five months pregnant. MSF provided her with trimethoprim and she received antiretroviral treatment for four months until her son was born. She has undergone CD4 counts and viral load tests irregularly. She was transferred to the Coatepeque National Hospital, and subsequently to the Retalhuleu Hospital. She has not undergone genotype testing. She has suffered from diarrhea and cephalaea. She indicated that antiretroviral drugs were unavailable at times and sometimes she was given children's medicines. When MSF was treating her, she received nutritional support and she attends a self-help group, where she is given condoms. She does not receive social or psychological support or family, community and home-based care. She indicated that her mother-in-law "turned her out" of the house in which she lived with her children and her husband, before he died. Her daughters had problems in primary school, because they were told that "they also had AIDS," until she went to speak to the head of the school.³³⁰

³²⁷ The petitioners' brief of September 30, 2011 (evidence file, folio 1363), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12768).

³²⁸ Birth certificate of Dora Marina Martínez Sofoifa (evidence file, folio 12874), and Affidavit prepared by Dora Marina Martínez Sofoifa on December 16, 2016 (evidence file, folios 11522 and 11523).

³²⁹ Affidavit prepared by Dora Marina Martínez Sofoifa on December 16, 2016 (evidence file, folios 11523 and 11524).

³³⁰ Birth certificate of Pascuala de Jesús Mérida Rodríguez (evidence file, folio 12902); Affidavit prepared by Pascuala De Jesús Mérida Rodríguez de Maldonado on March 25, 2017 (evidence file, folios 11760, 11761, 11762, 11763, 11764 and 11769), and the petitioners' brief of August 7, 2009 (evidence file, folio 828).

69. Her family unit consists of the father of her children Baudillo Soto de León (deceased), her daughters Karla de Jesús Coronado Mérida and Benita del Rosario Soto Mérida and her son Erick Alexander Maldonado Mérida, her father Sixto Mérida Mendoza (deceased), her mother Herminia Rodríguez Coculista, her sister Mercedes Patricia Mérida Rodríguez, and her current partner Alejo Ranferí Maldonado Oxlaj³³¹.

B.21. Darinel López Montes de Oca

70. Mr. López Montes de Oca was born on July 14, 1964, in the municipality of Ocos, department of San Marcos, Guatemala. He lives in the village of Dolores Ocos San Marcos, Guatemala. He completed fifth year of secondary education. Before his diagnosis, he sold plantains, and now he works selling shoes, clothes, perfumery products, snacks and street food. He was diagnosed in 2002 by MSF's *Proyecto Vida* and began antiretroviral treatment in 2004. Later, he was transferred to the Coatepeque National Hospital and received treatment from MSF's *Proyecto Vida*. He indicated that there were insufficient medicines in the Coatepeque Hospital and CD4 counts, viral load and genotype tests were performed irregularly; as a result, he contracted opportunistic diseases. He has suffered from skin allergies, chronic malnutrition, anemia due to the antiretroviral drugs, and cryptococcal meningitis. He has received psychological care. He only received nutritional support in MSF. He has not been provided with social support or family, community and home-based care. He has been given condoms. Mr. Montes de Oca asserted that he has felt discriminated against by his family, his friends and society, and that he has to sell food in other villages, because if people know that he is a person living with HIV, they do not buy from him.³³²

71. His family unit consists of his cousin Ana Castillo López and his niece Aracely Méndez Castillo³³³.

B.22. Israel Perez Charal

72. Mr. Pérez Charal was born in the municipality of San Juan Alotenango, department of Sacatepéquez, Guatemala, on January 23, 1953. He lives in Antigua Guatemala, department of Sacatepéquez, Guatemala. He went to night school. He is a truck driver. He was diagnosed in 2002 at the San Juan de Dios Hospital, because he was going to donate blood and was told that he was a carrier of HIV and referred to MSF. In 2003, he began antiretroviral treatment. In 2004 and 2005 he attended the Luis Ángel García Family Clinic of the *Asociación de Salud Integral* (hereinafter "the Luis Ángel García Clinic") where he received testing and medicines. Then, for work-related reasons, he asked to be transferred to the IGSS from 2006 to 2010. He suffered from herpes, but did not receive treatment. From 2010 to 2016 he returned to the Luis Ángel García Clinic, where he is currently being treated. He has undergone CD4 counts and viral load tests irregularly. He has suffered from obesity and herpes. He stated that there were insufficient drugs for everyone. He also

³³¹ The petitioners' brief of September 30, 2011 (evidence file, folio 1363), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12769).

³³² Birth certificate of Darinel López Montes de Oca (evidence file, folio 12822); Affidavit prepared by Darinel López Montes de Oca on January 11, 2017 (evidence file, folios 11606, 11607, 11608 and 11609); the petitioners' brief of August 7, 2009 (evidence file, folio 823); table with information collected by Dr. Cristina Calderón, during meetings and review of the petitioners' medical records in November 2010, which was attached to the brief with motions, pleadings and evidence (evidence file, folio 12791), and expert opinion provided by Ricardo Boza Cordero at the hearing held before the Court and written report on this opinion (merits file, folio 1471).

³³³ The petitioners' brief of September 30, 2011 (evidence file, folio 1361), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12767).

indicated that he had been rejected by the family of his former partner, Judith Samayoa Vásquez³³⁴.

B.23. Corina Dianeth Robledo Alvarado

73. Mrs. Robledo Alvarado was born on November 4, 1973, in the municipality of Pajapita, department of San Marcos, Guatemala, and lives there now. She is a primary school teacher in the village of San Antonio Las Flores, Pajapita. She became infected through sexual transmission by her husband and, in turn, her son L.A.L. was infected by vertical transmission, being diagnosed with HIV at the age of 3. Mrs. Robledo Álvarez was diagnosed in 2001 in the Malacatán Hospital. She was treated for the first time by the MSF's *Proyecto Vida*. Subsequently, she was transferred to Clinic No. 12 of the Coatepeque National Hospital. She has had permanent regular access to antiretroviral treatment and undergone CD4 counts and viral load tests. She has not received nutritional or psychological support. Mrs. Robledo and her son L.A.L. were pointed at by people outside Clinic No. 12 because they consider that this health center is for "sidosos." It took her five hours to travel from her home to the Roosevelt Clinic, which resulted in expenses that obliged her to go into debt.³³⁵

74. Her family unit consists of her husband Luis de León, her son L.A.L., her father Virgilio Ladislao Robledo Rodríguez and her mother Katarina Alvarado Mazariegos (deceased), her brothers Osvaldo Romeo, Gelber Manuel, Kener Guilfredo, Boanerges Onelio, and her sisters Bertha Luz and Leticia, all Robledo Alvarado, and her nephew Edwin Otoniel Gómez Robledo Alvarado.³³⁶

B.24. Audencio Rodas Rodríguez

75. Mr. Rodas Rodríguez was born on May 22, 1942, in the municipality of Malacatán, department of San Marcos, Guatemala, and lives there now. He completed the first year of primary education. He worked in carpentry. He was diagnosed with HIV in 1998. He abandoned his job owing to the diarrhea, fevers and fungi caused by the infection. In 2001, he began treatment with MSF's *Proyecto Vida*, where he was provided with antiretroviral treatment, medication for the fungal infections and CD4 counts, but not viral load testing. Subsequently, he was transferred to Clinic No. 12 of the Coatepeque National Hospital, and finally to the Malacatán Hospital. He has undergone CD4 counts and viral load tests irregularly, but not genotype or phenotype testing. He has suffered from oral hairy leukoplakia, severe bacterial pneumonia, herpes zoster and diarrhea. He has not received nutritional or psychological support, or family, community and home-based care. He has been provided with condoms and lubricants. Owing to the deterioration of the health of Mr. Rodas Rodríguez, his wife and his daughters were obliged to work to maintain the family, which, in the words of Mr. Rodas Rodríguez, caused him: "a lot of sadness and worry, because we had to change our way of life; I could not pay for my young daughters schooling, and they and my wife had to work to maintain our home."³³⁷

³³⁴ Identity card of Israel Pérez Charal (evidence file, folios 12387 and 12388), and Affidavit prepared by Israel Pérez Charal on December 16, 2016 (evidence file, folios 11528, 11529, 11530 and 11531).

³³⁵ Birth certificate of Corina Dianeth Robledo Alvarado (evidence file, folio 12818), and Affidavit prepared by Corina Dianeth Robledo Alvarado on February 12, 2017 (evidence file, folios 11585, 11586 and 11587).

³³⁶ The petitioners' brief of September 30, 2011 (evidence file, folio 1365), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12770).

³³⁷ Birth certificate of Audencio Rodas Rodríguez (evidence file, folio 12812); Affidavit prepared by Audencio Rodas Rodríguez on December 26, 2017 (evidence file, folios 11573, 11574, 11575 and 11576), and the petitioners' brief of August 7, 2009 (evidence file, folios 823 and 824).

76. His family unit consists of his wife Carmen Mérida Coronado, his daughters Flor de María, Clara Verónica, Sonia Maribel and Maria Magdalena, and his sons Aníbal Leonel, Braulio Adán, Andy Alberto and Walter Audencio, all Rodas Mérida, his granddaughters Cecilia Verónica Barrios Rodas, Susely Berenice Rodas Mérida, Tania Briseidy Velasco Rodas, and his grandsons Abni Eliezer Barrios Rodas, Christian Obdulio Barrios Rodas, Brandon Isaac Rodas Mus, Nehemias Audencio Rodas Chilel and Esdras Avisai Rodas Chilel.³³⁸

B.25. Zoila Marina Pérez Ruíz

77. Mrs. Pérez Ruíz was born in the municipality of El Quetzal, department of San Marcos, Guatemala, on October 20, 1960. She lives in the village of Cintaná, municipality of El Quetzal, department of San Marcos, Guatemala. She has no schooling, is illiterate, and is a housewife. Before being diagnosed, she worked selling fruit. She was diagnosed with HIV in 2002, but did not receive medical treatment until 2004; however, without access to CD4 counts and viral load testing. Initially, she received medical care from MSF, and later was transferred to the Coatepeque National Hospital. By 2009, she had undergone CD4 counts on four occasions and viral load testing twice. By 2015, she had had five more viral load tests and five more CD4 counts. She has suffered from the following opportunistic diseases: cervical lymphadenopathy, vaginal candidiasis, sarcoidosis, disseminated tuberculosis, tonsillitis, backpain, herpes, pneumonia, peripheral neuropathy, growth in the neck, and mycosis in both feet. She has received talks on HIV/AIDS by MSF's *Proyecto Vida* that have helped her move forward.³³⁹

78. Mrs. Pérez Ruíz indicated that she had been discriminated against in the Roosevelt Hospital because the nurses avoiding coming near her when they left her food; they said that "it was a contagious disease and they did not want to be contaminated." Her financial situation is precarious and, consequently, two of her sons abandoned their studies to obtain work in order to help her obtain her treatments and to pay for the schooling of their younger siblings. She stated that the journey from her home to the hospital cost approximately 500 quetzals for each trip, because she had to take one of her sons with her; this was why she had not followed up on the plastic surgery she required to correct the lipodystrophy in her neck.³⁴⁰

79. Her family unit consists of her husband, Santiago Francisco Valdéz Aguilar her sons and daughters, Jhony Francisco, Boni Kennedy, Nancy Beatriz, Glendi Betsaida, Mildred Odalis, Zoila Argentina and Nelson Gudiel, all Valdéz Pérez, her mother Rosario Ruíz, and her brother Edgar Gilberto Pérez Ruíz.³⁴¹

³³⁸ The petitioners' brief of September 30, 2011 (evidence file, folio 1362), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folios 12767 and 12768).

³³⁹ Birth certificate of Zoila Marina Pérez Ruíz (evidence file, folio 12862); Statement made by Zoila Marina Pérez Ruíz during the public hearing held before the Court; Affidavit prepared by Zoila Marina Pérez Ruíz on February 9, 2017 (evidence file, folios 11548 and 11554); Table of information collected by Dr. Cristina Calderón, as an annex to the petitioners' brief of June 27, 2008 (evidence file, folio 12774); the State's report of March 23, 2009 (evidence file, folio 917); table with information collected by Dr. Cristina Calderón, through interviews in November 2010 (evidence file, folios 12787 and 12801); expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folio 1490), and petitioners' brief with observations dated August 7, 2009 (evidence file, folio 829).

³⁴⁰ Statement made by Zoila Marina Pérez Ruíz during the public hearing held before the Court, and Affidavit prepared by Zoila Marina Pérez Ruíz on February 9, 2017 (evidence file, folios 11549, 11550 and 11552).

³⁴¹ List annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12769).

B.26. Santiago Francisco Valdéz Aguilar

80. Mr. Valdéz Aguilar was born in the municipality of El Quetzal, department of San Marcos, Guatemala, on July 25, 1961. He is the husband of Zoila Marina Pérez Ruíz. He lives in the village of Sintamá, municipality of El Quetzal, department of San Marcos, Guatemala. He completed sixth year of primary education. He was diagnosed with HIV in 2001 in the Coatepeque National Hospital. He began antiretroviral treatment in December 2002 with MSF. He has undergone CD4 counts (6-8) and viral load tests (2-4) irregularly. Initially, he was treated by MSF and was transferred to the Coatepeque National Hospital in 2002. He has suffered from the opportunistic diseases of oral candidiasis, dermatomycosis and minor mucocutaneous lesions. At times he has had to purchase the treatment for the opportunistic infections. He has not received nutritional, psychological or social support, but has received support from self-help groups. Before his diagnosis he worked in agriculture; however, owing to the deterioration in his health, he had to give up this work because he could not go out in the sun. Consequently, two of his sons went to the United States to be able to support his wife and him financially.³⁴²

81. His family unit consists of his wife Zoila Marina Pérez Ruíz, his sons and daughters Jhony Francisco, Boni Kennedy, Nancy Beatríz, Glendi Betsaida, Mildred Odalis, Zoila Argentina and Nelson Gudiel, all Valdéz Pérez³⁴³.

B.27. Teresa Magdalena Ramírez Castro

82. Mrs. Ramírez Castro was born on November 10, 1974. She lives in Campo Santo Magnolia, Guatemala. She was diagnosed with HIV in 2002 by MSF's *Proyecto Vida*. She began antiretroviral treatment on February 17, 2004. Initially, she received medical treatment from MSF and, subsequently, she was transferred to the Coatepeque National Hospital. She has undergone CD4 counts (5-9) and viral load tests (4) irregularly. She has suffered from the opportunistic diseases of cryptococcus, toxoplasmosis, fibromatosis and hyperglycemia. She is a housewife.³⁴⁴

83. Her family unit consists of her partner Carlos Isaías Martínez, her four sons and daughters Sayda Analy, Oscar Oswaldo and Lucrecia Paola, all Paz Ramírez, and Fredy Ramírez Castro, her granddaughter Evelyn Gabriela and her grandson Carlos Timoteo, both Paz Ramírez, her father Alfonso Ramírez, her mother Justa Rufina Castro, and her brothers Luis Alfonso, Mardoqueo and César Augusto, all Ramírez Castro.³⁴⁵

³⁴² Birth certificate of Santiago Francisco Valdéz Aguilar (evidence file, folio 12860); Affidavit prepared by Santiago Francisco Valdéz Aguilar on December 21, 2016 (evidence file, folios 11790, 11791 and 11792); Table of information collected by Dr. Cristina Calderón, as an annex to the petitioners' brief of June 27, 2008 (evidence file, folio 12774); table with information collected by Dr. Cristina Calderón, through interviews in November 2010 (evidence file, folios 12789 and 12803); report of the Administrative Director of the Coatepeque Hospital dated February 5, 2008, on the medical care provided to Santiago Francisco Valdez (evidence file, folio 1075); expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folios 1491 and 1492), and original petition of August 25, 2003 (evidence file, folio 465).

³⁴³ Affidavit prepared by Santiago Francisco Valdéz Aguilar on December 21, 2016 (evidence file, folio 11790), and list annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12769).

³⁴⁴ Table of information collected by Dr. Cristina Calderón, as an annex to the petitioners' brief of June 27, 2008 (evidence file, folio 12777); table with information collected by Dr. Cristina Calderón, through interviews in November 2010 (evidence file, folios 12787 12801); expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folio 1504), and power of attorney granted by the victims a the representatives by a deed of January 23, 2017 (merits file, folio 111).

³⁴⁵ List annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folios 12769 and 12770).

B.28. Karen Judith Samayoa Vásquez

84. Mrs. Samayoa Vásquez was born in the municipality of Guatemala, department of Guatemala, Guatemala, on May 6, 1974. She lives in Guatemala City. She is a commercial secretary. She was diagnosed with HIV in 2002 in the San Juan de Dios Hospital and was immediately referred to MSF. She did not receive medical treatment at the time because there was a scarcity of drugs and they were only provided to those who were in the final stages of the disease. She began antiretroviral treatment in 2005 because, owing to her pregnancy, it became necessary to provide her with the drugs required to avoid vertical transmission to her daughter. The medical care and the antiretroviral treatment were provided by the Luis Ángel García Clinic, which she attends at the present time. This clinic is approximately five kilometers from her home. Mrs. Samayoa Vásquez indicated that when she was asked if she wanted to be transferred to the IGSS, because she was eligible for this benefit through her former partner, she refused because “the care is bad.” As a result of HIV, she has suffered from lymph node problems and depression. Following her diagnosis, her employment situation changed. Up until 2016, she worked as a receptionist in a restaurant. She also receives financial support from her former partner to cover their daughter’s schooling.³⁴⁶

85. Her family unit consists of her daughters Beverly Analucía Samayoa Vásquez and Karen Gabriela Perez Samayoa, and her former partner Israel Pérez Charal.³⁴⁷

B.29. Francisco Sop Quiej

86. Mr. Sop Quiej was born in the municipality of Pueblo Nuevo, department of Suchitepéquez, Guatemala, on October 4, 1962. He lives in the department of Suchitepéquez, Guatemala. He has a diploma in arts and sciences. He speaks Spanish and Quiché. Currently, he works as a farmer. He was diagnosed with HIV in August 2000 in the Military Medical Center. Initially, he received medical care in the Military Hospital and in MSF and, subsequently, he was transferred to the Coatepeque National Hospital in around 2005. He has undergone CD4 counts and viral load testing irregularly, and he has had at least one genotype test. At times, he has had to cover the cost of the CD4 counts and viral load tests. He has not received either nutritional or social support, or family care, but he has been given condoms as a method of prevention. He has suffered from the opportunistic infection of moniliasis. Before the diagnosis, he worked for the Guatemalan National Army. Subsequently, and owing to the discrimination he suffered from some of the officers and his colleagues, he left the Army and began to grow *maxán* leaves [Note: used for wrapping tamales] with bananas and coffee on a plot belonging to his mother. He indicated that it takes him two hours to travel from his home to Coatepeque and costs 60 quetzals each way. At times he is unable to pay this and has to resort to loans from his family and friends.³⁴⁸

³⁴⁶ Birth certificate of Karen Judith Samayoa Vásquez (evidence file, folio 12908); Affidavit prepared by Karen Judith Samayoa Vásquez on December 19, 2016 (evidence file, folios 11536, 11537 and 11538); expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folios 1480 and 1481); and the State’s report of October 1, 2010 (evidence file, folio 1430).

³⁴⁷ Affidavit prepared by Karen Judith Samayoa Vásquez of December 19, 2016 (evidence file, folio 11536).

³⁴⁸ Birth certificate of Francisco Sop Quiej (evidence file, folio 12830); statements made by Francisco Sop Quiej on January 11 and February 11, 2017 (evidence file, folios 11639, 11640, 11641, 11643, 11644 and 11645); Table of information collected by Dr. Cristina Calderón as an annex to the petitioners’ brief of June 27, 2008 (evidence file, folio 12775); table with information collected by Dr. Cristina Calderón, through interviews in November 2010 (evidence file, folios 12803 and 12804); the State’s report of February 14, 2012 (evidence file, folio 1323), and expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folio 1474).

87. His family unit consists of his mother Paula Quiej, his brother Antonio, his sister Dominga, both Sop Quiej, and his nephew Rony Sixta Sop.³⁴⁹

B.30. Jorge Armando Tavares Barreno

88. Mr. Tavares Barreno was born on November 6, 1980, in the municipality of Coatepeque, department of Quetzaltenango, Guatemala, and lives there now. He was diagnosed with HIV in 2001 in Clinic No. 12 of the Coatepeque National Hospital. Before his diagnosis he worked in a carpenter's shop and, subsequently, he has worked independently. He began antiretroviral treatment in 2002 through MSF and was later transferred to the Coatepeque National Hospital. He has undergone one CD4 count and one viral load test. He has suffered from opportunistic diseases such as cryptococcal meningitis, pulmonary tuberculosis, blurred vision, oral candidiasis, acute exhaustion syndrome, oral hairy leukoplakia, genital ulcer, pneumocystis pneumonia, herpes, malaria, peripheral neuropathy and sexual impotence. He has received talks on the use of condoms to avoid reinfection, as well as the need for strict adherence to treatment.³⁵⁰

89. His family unit consists of his wife Brenda Magaly Cardona Rodríguez, his two sons Jimmy Armando and Loidy Nohemí, both Tavares Cardona, his mother Sara Barreno Arrango, his father Francisco Tavares García, his sister Rosaura, his brothers Mario Eduardo and José Francisco, all Tavares de León, and his mother-in-law Clarisa Eberatriz Rodríguez.³⁵¹

B.31. Miguel Lucas Vaíl

90. Mr. Lucas Vaíl was born on September 23, 1946, in the municipality of Huitán, department of Quetzaltenango. He lives in the department of Quetzaltenango, Guatemala. He did not go to school and is illiterate. He was diagnosed with HIV in 2001 in a private clinic in Guatemala City. For a year he attended the San Juan de Dios General Hospital because he was working in the capital. He did not receive antiretroviral treatment. In 2004, he began antiretroviral treatment through MSF and was later transferred to Clinic No. 12 of the Coatepeque National Hospital. Initially, he did not receive antiretroviral treatment because it was unavailable. It takes him 30 minutes to travel from his present home to the hospital. He has undergone CD4 counts (5) and viral load testing (1) irregularly. He has suffered from oral candidiasis, upper respiratory tract infections and diarrhea. He has received talks on how to use a condom and about treatment adherence at Clinic No. 12 of the Coatepeque National Hospital. He worked as a gardener before and after his diagnosis. At times he has had to pay for some of the tests. Also, the journey to the hospital takes him five hours and costs 150 quetzals. However, he usually receives help to pay this from the people he works for.³⁵²

³⁴⁹ Birth certificate of Francisco Sop Quiej (evidence file, folio 12830), and Affidavit prepared by Francisco Sop Quiej on January 11, 2017 (evidence file, folio 11639).

³⁵⁰ Birth certificate of Jorge Armando Tavares Barreno (evidence file, folio 12846); power of attorney granted by the victims and the representatives by a deed of January 23, 2017 (merits file, folios 111 and 169); table with information collected by Dr. Cristina Calderón, through interviews in November 2010 (evidence file, folios 12783, 12797 and 12798); petitioners' brief with observations dated August 7, 2009 (evidence file, folio 826); the State's report of October 1, 2010 (evidence file, folio 1431); Table of information collected by Dr. Cristina Calderón, as an annex to the petitioners' brief of June 27, 2008 (evidence file, folio 12777), and the State's report of March 23, 2009 (evidence file, folio 917).

³⁵¹ List annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12768).

³⁵² Birth certificate of Miguel Lucas Vaíl (evidence file, folio 12900); Affidavit prepared by Miguel Lucas Vaíl on February 14, 2017 (evidence file, folios 11742, 11743, 11745 and 11746); Table of information collected by Dr.

91. His family unit consists of his sons and daughters, Ramón, Romeo, Mario Romeo, Miguel, Silvia Marleny, Adán, Ana Patricia and Juan Carlos, all Lucas Miranda, and his granddaughter María Dominga and grandson Uri Miguel, both Lucas Miranda. He lives with his daughter Ana Patricia Lucas Miranda and his two grandsons. He has a third grandson, who he recognizes as a son. His wife, María Dominga Miranda, died on November 29, 2001, due to causes related to her condition as a person living with HIV.³⁵³

B.32. Santos Vásquez Oliveros

92. Mr. Vásquez Oliveros lives in the Pital Parcel, municipality of Coatepeque, department of Quetzaltenango, Guatemala. He was diagnosed with HIV in 2002 in a private clinic. He began antiretroviral treatment in 2003 with MSF and, currently, this is provided by Clinic No. 12 of the Coatepeque National Hospital. He has undergone CD4 counts and viral load testing irregularly. He has suffered from the opportunistic diseases of oral candidiasis, level I malnutrition, lumbago and tonsillitis. He has received talks on treatment adherence and on the use of condoms to avoid reinfection from *Proyecto Vida* and Clinic No. 12 psychologists. Before his diagnosis, he was unemployed; subsequently he worked as a day laborer. It takes him one hour to travel to the Clinic and the journey costs 25 quetzals.³⁵⁴

93. His family unit consists of his wife María Elena Moreno, his two daughters Viviana Mercedes and María Elena, both Vásquez Moreno, his father Rafael Vásquez Gómez, his mother Francisca Oliveros de Vásquez and his mother-in-law Josefina Izabel Miranda.³⁵⁵

B.33. Iris Carolina Vicente Baullas

94. Mrs. Vicente Baullas was born on December 19, 1981. She lives in the department of Retalhuleu, Guatemala. She was diagnosed with HIV in 2003. Initially, she was treated by MSF and, subsequently, transferred to the Coatepeque National Hospital. She began antiretroviral treatment in November 2006. In 2007, she went to live in the United States. She has suffered from various opportunistic diseases such as pharyngitis, cutaneous rash, sarcoidosis, bacterial pneumonia, lumbago, vaginal candidiasis, conjunctivitis, vaginal discharge, osteopenia, colitis, insomnia, peripheral neuropathy, moderate cervicitis and peptic disease.³⁵⁶

Cristina Calderón, as an annex to the petitioners' brief of June 27, 2008 (evidence file, folio 12777); petitioners' brief with observations of August 7, 2009 (evidence file, folio 826); the State's report of March 23, 2009 (evidence file, folio 918); the State's report of October 1, 2010 (evidence file, folio 1432), and table with information collected by Dr. Cristina Calderón, through interviews in November 2010 (evidence file, folios 12797 and 12798).

³⁵³ Affidavit prepared by Miguel Lucas Vail on February 14, 2017 (evidence file, folios 11742 and 11745).

³⁵⁴ Information provided by *Proyecto Vida*, Coatepeque, updating the data of the persons who filed a petition against Guatemala before the Court (evidence file, folio 11215); Table of information collected by Dr. Cristina Calderón, as an annex to the petitioners' brief of June 27, 2008 (evidence file, folio 12776); table with information collected by Dr. Cristina Calderón, through interviews in November 2010 (evidence file, folios 12791 and 12792); original petition of August 25, 2003 (evidence file, folio 465); report of the Administrative Director of the Coatepeque Hospital dated February 5, 2008, on the medical care provided to Mr. Santos Vásquez (evidence file, folio 1081); the State's report of October 1, 2010 (evidence file, folio 1431), and the petitioners' brief of August 7, 2009 (evidence file, folio 822).

³⁵⁵ List annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12767).

³⁵⁶ Table of information collected by Dr. Cristina Calderón as an annex to the petitioners' brief of June 27, 2008 (evidence file, folio 12774); information provided by *Proyecto Vida*, Coatepeque, on the updating of the data of the persons who filed a petition against Guatemala before the Court (evidence file, folio 11216); original petition of August 25, 2003 (evidence file, folio 465); the State's report of March 23, 2009 (evidence file, folio 912); the State's report of October 1, 2010 (evidence file, folio 1433); table with information collected by Dr. Cristina

95. Her family unit consists of her son and daughters Christian Alexander, Emma Elizabeth and Iris Carolina, all Chij Vicente, her grandmother Olivia Aguilar Ambrosio de Barillas and her grandfather Balbino Barillas Barreno, her uncle Héctor Barrillas and her maternal aunt Olivia Barillas de Sánchez³⁵⁷.

B.34. Sandra Lisbeth Zepeda Herrera

96. Mrs. Zepeda Herrera lives in the municipality of Guatemala, department of Guatemala, Guatemala. She was born on September 30, 1968. She completed second year of basic education. She worked as a street vendor in the markets. She was diagnosed with HIV on January 6, 2000, in the San Juan de Dios General Hospital, when she was seven months pregnant and transmitted the virus to her daughter. In 2002, she was referred to MSF, where she received treatment, but there was a scarcity of antiretroviral drugs and she did not undergo CD4 counts. On May 13, 2004, she began antiretroviral treatment again in MSF's Yaloc Clinic, and she was tested periodically for viral load and CD4 count. In 2007, she was referred to the Marco Antonio Foundation where she continued to receive antiretroviral treatment. In 2009, she was transferred to the Luis Ángel García Clinic, where both she and her daughter continued to receive antiretroviral treatment and she has undergone CD4 counts and viral load tests, although, at times, this has not been possible; moreover, they have not been provided with medicines for other illnesses. She has suffered from the opportunistic disease of lipodystrophy.³⁵⁸

97. Mrs. Zepeda Herrera indicated that the treatment she received from the health personnel of the San Juan de Dios Hospital was not very friendly and that, at times, there were no drugs, so that she had to buy them. She stated that, in the Luis Ángel García Clinic, the medical staff showed an interest in her health and provided her with satisfactory treatment. Before being diagnosed, she was employed in the "Fashion" maquila plant, but was dismissed when she reported her diagnosis. Currently she finds it difficult to obtain employment because she is asked to provide her health card and undergo testing; she also has to request leave to attend her medical check-ups and companies find this difficult, "they ask a lot of question, which even results in harassment." She therefore makes a living selling various products in the markets of Guatemala City. Her family also rejected her, so that she has lacked financial support, and is unable to pay for the schooling of her daughter, who has had to work with her so that they can both eat.³⁵⁹

98. Her family unit consists of her sons Jorge Eduardo, Josué David, Brandon and Antonio, all Zepeda, her daughter Katherine Alejandra Girón Zepeda, and her partner José Luis Girón (deceased).³⁶⁰

Calderón through interviews in November 2010 (evidence file, folio 12786), and the State's report of February 14, 2012 (evidence file, folio 1325).

³⁵⁷ List annexed to the IACHR Merits Report of April 13, 2016 (evidence file, folio 12771).

³⁵⁸ Affidavit prepared by Sandra Lisbeth Zepeda Herrera on December 15, 2016 (evidence file, folios 11543 and 11544); power of attorney granted by the victims to the representatives by a deed of January 23, 2017 (merits file, folio 225); expert opinion provided by Ricardo Boza Cordero at the public hearing held before the Court and written report on this opinion (merits file, folios 1486 and 1487); IACHR file on precautionary measures (evidence file, folio 11219); report del Dr. Mario García, from the Marco Antonio Foundation of January 29, 2008, on the medical care provided to Sandra Elizabeth Herrera Zepeda (evidence file, folio 1063), and The State's report of March 23, 2009 (evidence file, folio 915).

³⁵⁹ Affidavit prepared by Sandra Lisbeth Zepeda Herrera on December 15, 2016 (evidence file, folios 11543, 11544, 11545 and 11546).

³⁶⁰ Affidavit prepared by Sandra Lisbeth Zepeda Herrera on December 15, 2016 (evidence file, folio 11543).

I/A CourtHR. Case of Cuscúl Pivaral *et al.* v. Guatemala. Preliminary objection, merits, reparations and costs. Judgment of August 23, 2018.

Eduardo Ferrer Mac-Gregor Poisot
President

Humberto A. Sierra Porto

Elizabeth Odio Benito

Eugenio Raúl Zaffaroni

L. Patricio Pazmiño Freire

Pablo Saavedra Alessandri
Secretary

So ordered,

Eduardo Ferrer Mac-Gregor Poisot
President

Pablo Saavedra Alessandri
Secretary

**SEPARATE OPINION OF
JUDGE EDUARDO FERRER MAC-GREGOR POISOT**

CASE OF CUSCUL PIVARAL ET AL. V. GUATEMALA

JUDGMENT OF AUGUST 23, 2018
(Preliminary objection, merits, reparations and costs)

Judge Elizabeth Odio Benito and Judge Patricio Pazmiño Freire adhered to this opinion of Judge Eduardo Ferrer Mac-Gregor Poisot.

**INTRODUCTION: THE DIRECT JUSTICIABILITY OF THE RIGHT TO HEALTH AND THE
OBLIGATION OF PROGRESSIVITY AND NON-RETROGRESSIVITY**

1. The judgment in the case of *Cuscul Pivaral et al. v. Guatemala* (hereinafter “the judgment” or “*Cuscul Pivaral*”)¹ makes an important contribution to jurisprudence in the area of economic, social, cultural and environmental rights (hereinafter “ESCER”). The judgment adds to the approach followed by the Inter-American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”), in the cases of *Acevedo Buendía et al. (Dismissed and Retired Employees of the Comptroller’s Office) v. Peru*,² *Lagos del Campo v. Peru*,³ *Dismissed Employees of Petroperú et al. v. Peru*,⁴ *San Miguel Sosa et al. v. Venezuela*,⁵ *Poblete Vilches et al. v. Chile*,⁶ as well as in Advisory Opinion OC-23/2017 on *the Environment and Human Rights*,⁷ as regards the direct justiciability of the ESCER and the interpretive scope of Article 26 of the American Convention on Human Rights (hereinafter “the American Convention,” “the Convention” or “the Pact of San José”).

2. The judgment reaffirms that the right to health is derived from the economic, social, educational, scientific and cultural norms contained in the Charter of the Organization of American States (hereinafter “the OAS Charter”) and that, by virtue of Article 26 of the American Convention, this right is justiciable autonomously before the Inter-American Court

¹ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359.

² Cf. *Case of Acevedo Buendía et al. (Dismissed and Retired Employees of the Comptroller’s Office) v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198.

³ Cf. *Case of Lagos del Campo v. Peru. Preliminary objections merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340.

⁴ Cf. *Case of the Dismissed Employees of Petroperú et al. v. Peru. Preliminary objections merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344.

⁵ Cf. *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348.

⁶ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349.

⁷ Cf. *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights).* Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23.

of Human Rights.⁸ It also refers back to and develops an important distinction that is equally important for the substance of the judgment and for future analyses of this matter: that some aspects of the right to health are immediately enforceable (such as that of non-discrimination), and that others are of a progressive nature (entailing the State obligation to move forward in the general protection of that right).

3. In *Cuscul Pivaral*, the Court reiterated the advances that have been made in the Inter-American Court's jurisprudence in the area of ESCER and protection of the right to health,⁹ introducing important considerations that it is relevant to underline. The first is that the judgment elaborates on the reasons that justify the direct justiciability of the ESCER in general,¹⁰ and of the right to health in particular.¹¹ The second is that it develops standards for the right to health applicable to people living with HIV,¹² thus expanding what it had indicated in the cases of *González Lluy v. Ecuador*¹³ and *Duque v. Colombia*.¹⁴ The third is that it examines the scope of the prohibition of discrimination in relation to groups that are at greater risk of being discriminated against, such as pregnant women living with HIV.¹⁵ The fourth is that, for the first time in its history, the Court determined the responsibility of a State for the violation of the obligation of progressivity contained in Article 26 of the American Convention.¹⁶ Lastly, the Court established measures of reparation that respond to the two aspects of the right to health mentioned above to make reparation to the victims in the case and to address the State's systemic deficiencies in order to ensure that it provided comprehensive health care.¹⁷

⁸ In the case of *Poblete Vilches et al. v. Chile*, the Court ruled for the first time in the sense of establishing that the right to health can be derived – via Article 26 of the American Convention – from the provisions of the OAS Charter. In this regard, the Inter-American Court indicated that: “116. [...] the Court considers that various applicable standards may be derived from the consolidation of the right to health [...], relating to specific basic health services [...]. Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 116.

⁹ It should be noted that, in principle, the justiciability of the right to health was realized indirectly, by connectivity with civil and political rights, such as the right to life or to personal integrity in particular, see: *Case of I.V. v. Bolivia. Preliminary objections merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329; *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016. Series C No. 312; *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, and *Case of Suárez Peralta v. Ecuador. Preliminary objections merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261.

¹⁰ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, paras. 75 to 97.

¹¹ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, paras. 98 to 107.

¹² Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, paras. 42 to 45.

¹³ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, paras. 197 to 205.

¹⁴ Cf. *Case of Duque v. Colombia. Preliminary objections merits, reparations and costs*. Judgment of February 26, 2016. Series C No. 310, paras. 177 to 192.

¹⁵ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, paras. 128 to 139.

¹⁶ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, paras. 140 to 148.

¹⁷ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, paras. 198 to 213 and 224 to 230.

4. Based on the above, as well as on reasons outlined on other occasions in this regard,¹⁸ I am issuing this separate opinion in order to reflect on some of the relevant aspects that arise from this judgment: (I) the principle of progressivity and the regional experience in this area (*paras. 5-30*); (II) the intersectional discrimination against two pregnant women living with HIV (*paras. 31-34*); (III) the measures of reparation ordered to rehabilitate the victims in the case and to avoid future violations of the right to health of people living with HIV in Guatemala (*paras. 35-43*), and (IV) conclusions (*paras. 44-47*).

I. THE PRINCIPLE OF PROGRESSIVITY

A. The international responsibility of the State for violating the principle of progressivity in this case

5. The scope of the principle of progressivity — on which the determination of the international responsibility of the State in this case is founded — is based on the line of jurisprudence that began in the case of *Acevedo Buendía et al.*¹⁹ In that case, the Court recognized that the realization of the ESCER could not be achieved in the short term and that, therefore, a flexibility mechanism was required, reflecting the realities of the real world and the difficulties involved for any country in ensuring their full realization. The Court also asserted that, in the context of this flexibility, as regards the time frame and the methods of compliance, the State had an obligation to act; that is to take steps and adopt the necessary measures to respond to the requirements for the realization of the rights involved, always to the extent of the economic and financial resources available for compliance with its international commitments.²⁰ In *Acevedo Buendía*, the Court established that, in correlation to progressivity there is an obligation — although a conditioned one — of non-retrogressivity, that should not always be understood as a prohibition of measures that restrict the exercise of a right.²¹

¹⁸ See the opinions I have issued on this matter in relation to the following judgments: *Case of Suárez Peralta v. Ecuador. Preliminary objections merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261; *Case of Canales Huapaya et al. v. Peru. Preliminary objections merits, reparations and costs.* Judgment of June 24, 2015. Series C No. 296; *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298; *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312; *Case of I.V. v. Bolivia. Preliminary objections merits, reparations and costs.* Judgment of November 30, 2016. Series C No. 329; *Case of Yarce et al. v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2016. Series C No. 325; *Case of Lagos del Campo v. Peru. Preliminary objections merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340; *Case of Vereda La Esperanza v. Colombia. Preliminary objections merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 341, and *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348.

¹⁹ Cf. *Case of Acevedo Buendía et al. (Dismissed and Retired Employees of the Comptroller's Office)* v. Peru. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009. Series C No. 198, para. 102. In addition to the case of *Acevedo Buendía et al.*, the case law of the Inter-American Court has addressed the content of the obligation of progressivity in the cases of *Poblete Vilches et al. v. Chile* and in the present case. See: *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 103.

²⁰ Cf. *Case of Acevedo Buendía et al. (Dismissed and Retired Employees of the Comptroller's Office)* v. Peru. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009. Series C No. 198, para. 102.

²¹ Cf. *Case of Acevedo Buendía et al. (Dismissed and Retired Employees of the Comptroller's Office)* v. Peru. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2009. Series C No. 198, para. 103. In *Acevedo Buendía*, the Court referred to General Comment No. 3 to indicate that “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 [International] Covenant [on Economic, Social and Cultural Rights] and in the context of the full use of the maximum available resources.” In this regard, it should be noted that United Nations Committee on Economic, Social and Cultural Rights (hereinafter, “the CESCR”) has modified the standard for the evaluation of retrogressive measures, so that States must demonstrate, among other matters, that the measures are: (a) provisional; (b) necessary; (c) non-discriminatory or that they do not disproportionately

6. In the judgment, the Court concluded that the State had violated the principle of progressivity contained in Article 26 of the American Convention, in relation to Article 1(1) of this instrument, as a result of the State's failure to act to protect the right to health of people living with HIV in Guatemala, despite the existence of an international obligation and State regulations.²² It asserted that the progressive dimension of the ESCER, while allowing a certain gradualness for their realization based on the legislative characteristics and available resources of each State, also included a sense of progress that called for an effective and continuing improvement of the rights, so that social inequalities were remedied and the inclusion of vulnerable groups facilitated.²³ In the analysis of the case, the Court noted that, despite having a series of laws and public policies for the medical care of people with HIV in force before 2004, Guatemala had only provided direct medical care to a limited number of people, which did not include 48 of the 49 victims in this case.²⁴ This *State inactivity*, prior to 2004, in the face of the HIV epidemic, resulted in the State's international responsibility for the violation of the principle of progressivity in relation to health protection.

7. The judgment refers specifically to the State's failure to comply with its obligation to act, in the sense mentioned in the case of *Acevedo Buendía*. The central thesis of the majority opinion in *Cuscul Pivaral* is that, although the State enjoys a certain leeway to comply with its obligations of progressivity in the area of ESCER, this cannot be interpreted as a blank cheque in order not to adopt any measure of protection, or to adopt measures that are so limited in scope that they leave vulnerable people unprotected, and at risk of suffering serious violations of their integrity or their life. This is the situation of people living with HIV, who are clearly at risk of contracting opportunistic diseases and, therefore, suffering violations of their personal integrity or their life, and it is on this basis that, in this case, the State of Guatemala has been convicted of *State inaction* as regards effective protection prior to 2004. In *Cuscul Pivaral* the Court did not identify the existence of measures that had been retrogressive in the protection of people living with HIV in Guatemala. Indeed, it recognized the existence of a series of laws, government plans, and budgetary increases, above all after 2004, aimed at ensuring adequate health care. However, despite their existence after 2004, they failed to ensure this right effectively.²⁵

8. That said, the criteria expressed in the judgment, in addition to its value in relation to care for people living with HIV in Guatemala, open an important door so that, in future, the Commission and the victims' representatives may submit arguments to the Inter-American Court concerning either State inactivity as regards protection of the ESCER, or the existence of retrogressive measures in their protection that can be attributed to the State. However, this must be done respecting the methodological challenges involved in evaluating State

affect disadvantaged or marginalized people or groups, and (d) that they respect at least the basic obligations of the social right in question and that they are applicable to the specific group of people concerned. *Mutatis mutandis*, CESCR, General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights). E/C.12/GC/22, May 2, 2016, para. 38 and General Comment No. 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights). E/C.12/GC/23, April 27, 2016, para. 53.

²² Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 148.

²³ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 146.

²⁴ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 119.

²⁵ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 41 to 54.

policy in the area of the protection of the social rights in a democratic society. For the Commission and the victims' representatives the challenge lies in being able to prove that the State effectively adopted retrogressive measures that affected the realization of one or several ESCER protected by Article 26 of the American Convention. This will involve formulating arguments that demonstrate the explicit or implicit recognition of a right protected under Article 26 of the Pact of San José, as well as the submission of the necessary evidence to prove that the State's actions truly involved an unjustified lack of action and/or a retrogression in the realization of that right. Meanwhile, the State must justify that its actions have tended towards the full realization of the right or that they were not retrogressive, and if they were retrogressive, prove that this retrogressivity was justified based on the standards recognized in international law.

9. In any case, States must continue their efforts to ensure the transparency of the way in which the ESCER are protected in their territory. Here, it is worth underlining the June 4, 2012, resolution of the General Assembly of the Organization of American States in which the States adopted the document "Progress Indicators for Measuring Rights under the Protocol of San Salvador," which contains the standards and criteria adopted by the States Parties to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador") to measure compliance with the rights established in the Protocol.²⁶

10. These criteria form the basis for the States to present information on compliance with their obligations in the area of the rights contained in the Protocol of San Salvador,²⁷ and can also be important elements to evaluate State compliance with the ESCER in relation to Article 26 of the Convention. Evidently, as the judgment asserts,²⁸ the competence of the Court to examine violations of the Protocol of San Salvador is limited by the provisions of Article 19(6) of that instrument. But this does not mean that the information presented by the States in their national reports cannot be used as evidence, either by the Commission, the victims' representatives, or the State. The important point – for the purposes of this opinion – is that the allegations concerning the failure to realize the ESCER are formulated as solid legal arguments, and based on the data and other evidentiary material that proves the way in which the State has complied – or failed to comply – with the effective realization of the rights in the terms of Article 26 of the American Convention.

B. Some decisions of high national jurisdictions related to the mandate of progressivity and the protection of the right to health of people living with HIV

²⁶ Cf. OAS, "Adoption of Progress Indicators for Measuring Rights under the Protocol of San Salvador", Resolution AG/RES. 2713 (XLII-O/12) adopted at the second plenary session on June 4, 2012, Point 1 of the resolution is available at: <http://www.oas.org/en/sare/social-inclusion/protocol-ssv/docs/pss-res-2713-en.doc>. GTPSS, "Progress Indicators for Measuring Rights under the Protocol of San Salvador," December 12, 2011, OEA/Ser.L/XXV.2.1, paras. 15, 67 and 68. In the case of *Gonzales Lluy*, the Court considered that the Protocol of San Salvador referred to the realization of the rights in a context of the development of the health system, and also that health goods and services should be appropriate from a medical and scientific perspective. Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 172 and footnote 202. In *Poblete Vilches*, the Court used these indicators in light of Article 26 of the American Convention and to establish the existence of a prohibition of retrogressivity in relation to the realization achieved in these rights. Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, paras. 104 and footnote 133.

²⁷ *Op. cit.* AG/RES. 2713 (XLII-O/12), point 5.

²⁸ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 89.

11. The approach taken by the Inter-American Court in this case is not new in our region. The high national jurisdictions have developed important standards to achieve the full realization of the right to health within the framework of the obligation of progressivity and the prohibition of retrogressivity.²⁹ In some cases they have considered the particular circumstances of people with HIV/AIDS and their situation of vulnerability. I will now refer to some of these standards in order to provide a general overview of the matter.

a. The constitutionalization of the obligation of progressivity

12. Various Constitutions in the region have recognized, either expressly or implicitly, the obligation or progressivity (principle of progressivity with regard to human rights).

13. In this regard, some fundamental texts expressly state, in general, that this obligation or principle encompasses all human rights and not only the ESCER. Countries such as Bolivia,³⁰ Ecuador,³¹ Mexico³², Dominican Republic³³ and Venezuela³⁴ fall within this scenario. A second variant includes those Constitutions that – exclusively – have recognized the programmatic nature of certain rights that, in general, are ESCER. Countries such as Colombia,³⁵ Guatemala,³⁶ Honduras³⁷ and Peru employ this model.³⁸ A third block of

²⁹ In this regard, when examining the general obligation of progressivity in its General Comment No. 3 (1991), the CESCR indicated that: “[...] any *deliberately retrogressive measures* [...] 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.” This interpretation by the CESCR has been reiterated in recent comments, such as General Comment No. 23 (2016) when it indicated that: “State parties should avoid taking any deliberately retrogressive measure without careful consideration and justification.” See, CESCR, General Comment No. 3, *The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, January 1, 1990, para. 9, and CESCR, General Comment No. 23 *on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/23, April 26, 2016, para. 52.

³⁰ “Article 13. I. The rights recognized by the Constitution are inviolable, universal, interdependent, indivisible and progressive. The State has the obligation to promote them, protect them and respect them. [...]” Constitution of the State, promulgated on February 7, 2009. Constituent Assembly of Bolivia.

³¹ “Article 11. The exercise of the rights shall be governed by the following principles: [...] 8. The content of the rights shall be developed progressively through laws, jurisprudence and public policies. The State shall create and guarantee the necessary conditions for their full recognition and exercise. Any act or omission of a retrogressive nature that unjustifiably reduces, impairs or annuls the exercise of the rights shall be unconstitutional [...]” Constitution of the Republic of Ecuador, published in the official gazette on October 20, 2008.

³² “Article 1. [...] All the authorities, within their area of competence, have the obligation to promote, respect, protect and guarantee the human rights in accordance with the principles of universality, interdependence, indivisibility and progressivity. Consequently, the State shall prevent, investigate, punish and repair human rights violations as established by law. [...]” Constitution of the United Mexican States. Published in the federal official gazette on September 15, 2017.

³³ “Article 8. Essential function of the State. An essential function of the State is: the effective protection of the rights of the individual, respect for his or her dignity and creation of means that allow the rights to be realized in an egalitarian, equitable and progressive manner, within a framework of individual liberty and social justice, compatible with public order, general well-being and the rights of everyone.” Constitution of the Dominican Republic. Published in the official gazette on July 10, 2015.

³⁴ “Article 19. The State shall guarantee to everyone, pursuant to the principle of progressivity and with no discrimination, the irrevocable, indivisible and interdependent enjoyment and exercise of human rights. Their respect and guarantee are obligatory for all the organs of Government pursuant to this Constitution, the human rights treaties signed and ratified by the Republic and the laws that develop them.” Constitution of the Bolivarian Republic of Venezuela, amended on February 15, 2009.

³⁵ The principle of progressivity is established in articles 48, 64, 262, 334 and 363 of the Constitution of Colombia, especially the right to social security (article 48) and to land ownership (article 64). See, Constitution of Colombia, updated by Legislative Act 2 of 2017.

Constitutions is characterized because, although they do not refer expressly to the principle of progressivity with regard to human rights, in some ways they establish duties that the State must comply with to realize the rights contained in these fundamental instruments – and, in some case, with real equality criteria – of the persons subject to its jurisdiction. In this category we find countries such as Argentina,³⁹ Brazil,⁴⁰ Costa Rica⁴¹ and Paraguay.⁴²

b. Judicial decisions on progressivity of the high courts of the region

14. The result of the constitutionalization of social rights and the principle of their progressive realization (by any of the three methods mentioned) has been that complaints are filed before the courts in which, in addition to citing the specific violation of an ESCER, the high constitutional jurisdictions are asked to decide whether any aspect of their progressivity/retrogressivity has been violated. In this regard, various courts have developed standards to assess when the progressivity of a right has not been complied with, or whether measures of a retrogressive nature have been adopted. Each constitutional jurisdiction has developed this issue in its own way, although in accordance with these standards.

³⁶ Article 100 of the Constitution of the Republic of Guatemala establishes the principle of progressivity in relation to the right to social security. "Article 100. Social security. The State recognizes and guarantees the right to social security for the benefit of the inhabitants of the Nation. Its regime is established as a public function of a national, unitary and obligatory nature. The State, the employers, and the workers covered by the system, with the sole exception of the provisions of article 88 of this Constitution, are obliged to contribute to funding this system and have the right to participate in its management, seeking its progressive improvement. [...]". Constitution of the Republic of Guatemala. Amended by legislative act No. 18-93 of November 17, 1993.

³⁷ Article 143 of the Constitution of the Republic of Honduras recognizes the progressive implementation of the social security regime. Indirectly, article 179 establishes that the State will promote, support and regulate the creation of systems and mechanisms "for the use of internal and external resources to be channeled towards the solution of the housing problem." Meanwhile, article 260 establishes as one of the purposes of the decentralized institutions, "social progress and general well-being." Constitution of Honduras. Updated to Decree 36 of May 4, 2005.

³⁸ "Article 10. The State recognizes the universal and progressive right of everyone to social security for their protection in the face of the contingencies established by law and to improve their quality of life." "Article 23. [...] The State shall promote conditions for social and economic progress, especially by policies that stimulate productive employment and work-oriented education for the workplace." Constitution of Peru.

³⁹ "Article 75. It is the function of Congress: [...] 19. To provide conditions conducive to human development economic progress with social justice, the productivity of the national economy, employment generation, professional training for workers, defense of the value of the currency, and technological and scientific research and development, its dissemination and use. To provide conditions for the harmonious growth of the Nation and the settlement of its territory; to promote differentiated policies aimed at balancing unequal development between provinces and regions." Constitution of the Argentine Nation. Law No. 24,430, adopted on December 15, 1994, and promulgated on January 3, 1995.

⁴⁰ "Article 3. The following constitute fundamental goals of the Federative Republic of Brazil: 1. to build a free, fair and caring society; 2. To ensure national development; 3. To eradicate poverty and marginalization and reduce social and regional inequalities; 4. To promote the well-being of all, without discrimination on the basis of origin, race, sex, color, age or any other condition." Constitution of the Federative Republic of Brazil.

⁴¹ "Article 65. The State shall promote the construction of low-cost housing and shall create family property for workers." "Article 83. The State shall sponsor and shall organize adult education to combat illiteracy and to provide cultural opportunities to those who wish to improve their intellectual, social and economic situation." Constitution of the Republic of Costa Rica, published on November 7, 1949.

⁴² "Article 176. Economic Policy and Development Promotion. The essential objective of the economic policy shall be the promotion of economic, social and cultural development. The State shall promote economic development by the rational use of available resources in order to promote the orderly and sustained growth of the economy, create new sources of employment and wealth, increase the national wealth, and ensure the well-being of the population. Development will be promoted by global programs that coordinate and guide national economic activities." Constitution of the Republic of Paraguay, promulgated on June 20, 1992.

15. The Constitutional Court of Colombia (hereinafter “the CCC”) is an important source in relation to developments on the scope of progressivity. On this point, the CCC has understood that social benefit content is not for immediate application, but is subject to the principle of progressivity, and that, under the rule of law, court decisions are not sufficient; rather the construction of rights within the democratic process calls for both a legal and a budgetary framework.⁴³ According to the CCC, the principle of progressivity has at least three specific consequences for the effects of the judicial enforceability of the social rights: (i) the existence of a public policy aimed at the effective enjoyment of the rights; (ii) if the public policy exists, that its content is protected by means of a judicial remedy, and (iii) the limitation of the discretionary powers of the authority to implement retrogressive measures.⁴⁴

16. Furthermore, the CCC has indicated that a measure is understood to be retrogressive when: (i) the substantive sphere of protection of the right in question is reduced or limited; (ii) it substantially increases the requirements to access the respective right, and (iii) when it significantly reduces or diverts the public resources allocated to satisfying it.⁴⁵ It has also considered that the judgment should be especially strict when the retrogressive measure affects the social rights of people or groups who have special protection owing to their situation of marginalization or vulnerability.⁴⁶ In this way, the CCC has indicated that, when a retrogressive measure is subject to constitutional control, it is for the State to prove with sufficient and pertinent information: (i) that the measure seeks to meet the peremptory constitutional purpose; (ii) that, following prudent assessment, it is demonstrated that the measure is truly conducive to achieving the objective sought; (iii) that, following an analysis of the different alternatives, the measure appears necessary to achieve the proposed purpose; (iv) that it does not affect the unavailable minimum content of the social right in question, and (v) that the benefit achieved is clearly superior to the cost involved.⁴⁷ In addition to these conditions, the CCC has recently determined that, in order to implement a retrogressive measure, it is necessary: (vi) to identify the constitutionality of the measure, and (vii) to consider the inclusion of a deliberative procedure in which the sectors affected by the retrogression are included, even when the measure is issued by an administrative authority.⁴⁸

⁴³ Cf. Constitutional Court of Colombia. Judgment T-302/2017, Rapporteur: Justice Aquiles Arrieta Gómez, May 8, 2017, paragraph 8.1.5.

⁴⁴ Cf. Constitutional Court of Colombia. Judgment T-302/2017, Rapporteur: Justice Aquiles Arrieta Gómez, May 8, 2017, paragraphs 8.1.6., 8.1.7. and 8.1.8.

⁴⁵ Cf. Constitutional Court of Colombia, Judgment C-313/14, Rapporteur: Justice Gabriel Eduardo Mendoza Martelo. Judgment of May 29, 2014, pp. 7 and 8, and Cf. Constitutional Court of Colombia, Judgment C-556/09, Rapporteur: Justice Nilson Pinilla Pinilla. Judgment of August 20, 2009.

⁴⁶ Cf. Constitutional Court of Colombia, Judgment C-991 of 2004. Rapporteur: Justice Marco Gerardo Monroy Cabra. Judgment of October 12, 2004.

⁴⁷ Cf. Constitutional Court of Colombia, Judgment C -313/14, Rapporteur: Justice Gabriel Eduardo Mendoza Martelo, May 29, 2014. See, similarly: Cf. Judgment C-1064/01, Rapporteurs: Justices Manuel José Cepeda Esonisa and Jaime Cordova Triviño, October 10, 2001; Cf. Judgment C-671/02, Rapporteur: Justice Eduardo Montealegre Lynett, August 20, 2002 and Cf. Judgment C-931/04, Rapporteur: Justice Marco Gerardo Monroy Cabra, September 29, 2004.

⁴⁸ Cf. Constitutional Court of Colombia. Judgment T-302/2017, Rapporteur: Justice Aquiles Arrieta Gómez, May 8, 2017, paragraphs 8.1.9., 8.1.10., 8.1.11. and 8.1.12.

17. The Supreme Court of Justice of the Argentine Nation proposes an abstract analysis in which it assesses whether the retrogressive measure in question is justified,⁴⁹ considering a special protection for the most vulnerable groups.⁵⁰

18. The Constitutional Court of Ecuador has recognized that the principle is not exhausted by the abstention from adopting retrogressive measures, but rather the failure to take positive steps, such as legislative measures. Regarding the principle of non-retrogressivity in the analysis of legislative measures, it has considered that a provision is retrogressive, and therefore unconstitutional and non-conventional, when two elements have been verified: (i) the real reduction of the constitutional content of the rights, and (ii) that the measure has not been adopted based on the “most careful consideration.”⁵¹ Regarding the “most careful consideration” of the restrictions and of retrogressive legislative measures, it has determined the need for their justification in function of the satisfaction of another constitutional right and of their proportionality.⁵²

19. Meanwhile, the Constitutional Court of Peru, even though, initially, it merely made an imprecise examination of the principle of retrogressivity in which the measure could be justified by reasons of the common good,⁵³ in recent years it has opted for criteria that could be the starting point for a more detailed test for the analysis of retrogressive measures. For example, in order to analyze the constitutionality of a reduction in remuneration, it has noted whether: (i) it is justified for reasons of social interest or, which is the same, provided that there is a legal or objective cause that justifies it; (ii) it is a special measure; (iii) it is a measure to meet certain circumstances, and (iv) its effect is for a limited time.⁵⁴

20. The Constitutional Court of Guatemala has established that a measure may be retrogressive: (i) when it cuts or limits the substantive sphere of protection of the respective right to a social benefit; (ii) when it substantially increases the requirements to access the right in question, and (iii) when it decreases or deviates, effectively and significantly, the public resources allocated to satisfy the right, before compliance with the respective social benefit has been verified.⁵⁵ Notwithstanding the foregoing, it has also considered that retrogression could be justified at a specific moment in time, provided that the principles of reasonableness and proportionality were respected.⁵⁶

⁴⁹ Cf. Argentine Supreme Court of Justice of the Nation, *García Cancino, María Angélica v. Máxima A.F.J.P. S.A. ref. various submissions*, S.C.G. 2.033 L. XXXIX. Judgment of February 16, 2010, and Cf. Argentine Supreme Court of Justice of the Nation, *National Register of Rural Workers and Employers v. National Executive and Others/application for amparo*. CSJ 906/2012 (48-R) /CS1. Appeal. Judgment of November 24, 2015, paragraph 6.

⁵⁰ Cf. Argentine Supreme Court of Justice of the Nation, *State Workers Association ref. action on unconstitutionality*. A. 59B. XLIII. Appeal. Judgment of June 18, 2013, paragraph 11.

⁵¹ Cf. Constitutional Court of Ecuador, Judgment No. 002-18-SIN-CC, Cases No. 0035-15-IN and accumulated, June 7, 2017, pp. 78 and 79, March 21, 2018.

⁵² Cf. Constitutional Court of Ecuador, Judgment No. 017-17-SIN-CC, Case No. 0071-15-IN, June 7, 2017, pp. 15 and 16; Judgment No. 0006-15-SCN-CC, Case No. 0005-13-CN, May 27, 2015, pp. 15 and 16.

⁵³ Cf. Constitutional Court of Peru, *Lawyers’ Professional Associations of Cusco and Callao and more than five thousand citizens v. Congress of the Republic*. Unconstitutionality proceedings. File No. 00050-2004-AI/TC, June 3, 2005, p. 60.

⁵⁴ Cf. Constitutional Court of Peru, *Case of Educational Reform Law 2*, SCT-01.014-PI, File 0020-2012-PI/TC, April 16, 2014, p. 20.

⁵⁵ Cf. Constitutional Court of Guatemala, General and partial unconstitutionality. Accumulated files 3-2011, 4-2011 and 52-2011, p. 25 and ff.

⁵⁶ Thus, the examination of retrogressivity by the Constitutional Court of Guatemala consists in determining whether: (i) the measure adopted seeks to satisfy a constitutional purpose; (ii) is valid to achieve the objective sought; (iii) the different alternatives have been assessed and the measure is necessary to achieve the proposed

21. In general, the Mexican Supreme Court of Justice of the Nation (hereinafter, "SCJN") has used different criteria with regard to the elements required to analyze the constitutionality of a retrogressive measure.⁵⁷ In addition, it can be noted that its two chambers have established different tests to analyze the constitutionality of measures that are allegedly retrogressive. According to the First Chamber of the SCJN, a retrogressive measure is constitutional, when any issue relating to budgetary resources is involved, if: (i) a lack of resources is proved; (ii) it is demonstrated that every necessary effort was made to obtain them, unsuccessfully, and (iii) it is proved that the maximum of available resources were applied, or that the resources available were applied to protect another human right (and not any social purpose), and that the relative importance of fulfilling that right first and foremost was greater.⁵⁸ Meanwhile, the Second Chamber of the SCJN has indicated that to conclude that a retrogressive measure is justified, it is necessary to analyze whether: (i) the essential purpose of this reversion is to increase the level of protection of a human right, and (ii) it creates a reasonable balance between the fundamental rights in play, without having too great effect on the realization of one of them.⁵⁹

22. As can be appreciated, different national constitutional jurisdictions have assessed whether there has been a failure to comply with the gradual realization of the ESCER in the context of the principle of progressivity. It should be noted that, even though the Constitutions in the region do not expressly recognize the prohibition of retrogression, the high national jurisdictions have addressed the issue. Thus, as in the case of the CESCR, a prohibition of retrogression exists implicitly within the content of progressivity.⁶⁰

c. Decisions concerning the right to health of people living with HIV

objective; (iv) it does not affect the essential content of the fundamental right involved, and (v) the benefit achieved is proportionate to the cost. *Ibidem*, pp. 32 and 33.

⁵⁷ For example, the SCJN has used a *generic analysis* with regard to the validity of a measure that is supposedly retrogressive, in function of its social purpose (*cf.* SCJN, First Chamber, Amparo in review 304/2015, Judgment of May 31, 2017, pp. 25 to 28), as well as a test consisting in proving the existence of a *general restriction* and a *causal relationship* between the measure and adverse effects on the applicants for amparo (*cf.* SCJN, Amparo in review 566/2015, Judgment of February 15, 2017, pp. 32 and 33).

⁵⁸ *Cf.* SCJN, First Chamber, Amparo in review 750/2015, *The Board and treasurer of the Universidad Michoacana de San Nicolás de Hidalgo*, Judgment of April 20, 2016, pp. 84 and 85; *Cf.* SCJN, First Chamber, Amparo in review 1374/2015, Judgment of May 18, 2016, pp. 84 and 85; *Cf.* SCJN, First Chamber, Amparo in review 1356/2015, Judgment of July 6, 2016, pp. 30 and 31; *Cf.* SCJN, First Chamber, Amparo in review 100/2016, Judgment of August 10, 2016; *Cf.* SCJN, First Chamber, Amparo in review 306/2016, Judgment of March 8, 2017, pp. 67 and 68.

⁵⁹ *Cf.* SCJN, Second Chamber, Amparo in review 2425/2015, August 12, 2015, p. 16; *Cf.* SCJN, Second Chamber, Contestation of ruling 291/2015, January 20, 2016, pp. 61 and 62; *Cf.* SCJN, Second Chamber, Amparo in review 559/2015, February 17, 2016, pp. 21 and 22; *Cf.* SCJN, Second Chamber, Amparo in review 11/2016, May 18, 2016, p. 25; *Cf.* SCJN, Second Chamber, Amparo in review 7153/2016, April 5, 2017, pp. 32 and 33.

⁶⁰ In this regard, in its General Comment No. 3 (1991), the CESCR stated, when analyzing the general obligation of progressivity, that: "[...] any *deliberately retrogressive* measures [...] 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." This line of interpretation by the Committee on Economic, Social and Cultural Rights has been reiterated in recent Comments, such as General Comment No. 23 (2016) which indicated that: "State parties should avoid taking any deliberately retrogressive measure without careful consideration and justification. [...] States parties facing considerable difficulties in achieving progressive realization of that right due to a lack of national resources have an obligation to seek international cooperation and assistance." CESCR, General Comment No. 3, *The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, January 1, 1990, para. 9, and General Comment No. 23 *on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/23, April 26, 2016, para. 52.

23. In this context, the right to health of people living with HIV is not an issue that is entirely foreign to the jurisprudence of the high courts and they have had occasion to rule in this regard. This is of fundamental importance, because many of the advances made in jurisprudence with regard to protection of the right to health have been jurisprudential developments at the national level.

24. The Argentine Supreme Court of Justice of the Nation determined that the Ministry of Health and Social Action was obliged to provide assistance, treatment and the special provision of drugs to people living with HIV/AIDS under the premise that health is included in the right to life. It considered that adequate treatment included the provision of drugs, and that they should therefore be supplied on a regular, prompt and continuing basis to avoid the risks related to their interruption. In addition, it indicated that, to ensure adequate assistance, programs aimed at detection, research, diagnosis, treatment, prevention and rehabilitation should be implemented, with the provision of the necessary financial resources.⁶¹

25. The Plurinational Constitutional Court of Bolivia determined that, given the failure to provide drugs regularly to a minor living with HIV/AIDS, the rights to life and to health had been violated, considering the special protection called for in the case of children, especially if they do not have sufficient resources.⁶² In addition, it recognized that this disease was "catastrophic" in view of its impact on the patient's personal and family relations and financial resources. It also deliberated on the continuity of the treatment owing to the imminent risk for the life of the person living with the disease, due both to the occurrence of opportunistic infections and to the development of drug resistance.⁶³ It further indicated that it corresponded to the authorities to develop policies of prevention, care and rehabilitation.⁶⁴

26. The Constitutional Court of Colombia has decided that people living with HIV/AIDS form part of a group that requires special constitutional protection, so that the protection of their right to health is reinforced by developing the right to equality. It has also considered that, in the provision of health services, the "principle of continuity" should be observed, which included the constant and uninterrupted supply of the medical services governed by the "principle of comprehensiveness" (drugs, surgical procedures, and diagnostic and other tests).⁶⁵

27. The Constitutional Court of Ecuador has also determined that people living with HIV are part of a group requiring priority care, and that it therefore corresponded to the State to implement reinforced mechanisms of protection, by either legislation or public policies, to this end.⁶⁶ Accordingly, the State should guarantee their right to comprehensive health

⁶¹ Cf. Argentine Supreme Court of Justice of the Nation, *Asociación Benghalensis et al. c/ Estado Nacional*, ref. Amparo Law 16,986, A. 186. XXXIV, June 1, 2000, *consideranda* 9, 13 and 14.

⁶² Cf. Plurinational Constitutional Court of Bolivia, Constitutional judgment 0108/2010-R, File No. 2006-14391-29-RAC. Judgment of May 10, 2010. Rapporteur: Justice Dr. Ernesto Félix Mur, p. 10.

⁶³ Cf. Plurinational Constitutional Court of Bolivia, Judgment SC 0026/2003-R, File No. 2002-05354-10-RAC, Rapporteur: Justice Elizabeth Iñiguez de Salinas. Judgment of January 8, 2003, pp. 6 and 7.

⁶⁴ Cf. Plurinational Constitutional Court of Bolivia, Constitutional judgment 0108/2010-R, File No. 2006-14391-29-RAC. Judgment of May 10, 2010. Rapporteur: Justice Dr. Ernesto Félix Mur, p. 8.

⁶⁵ Cf. Constitutional Court of Colombia, Judgment T-599/15, *AA v. COMFAMILIAR E.P.S-S (...)*, September 15, 2015, File T-4.936.041, Rapporteur: Justice Alberto Rojas Ríos, pp. 21, 24 and 27.

⁶⁶ Constitutional Court of Ecuador, Judgment N. 068-18-SEP-CC, Case 1529-16-EP. Judgment of February 21, 2018, p. 50. Judgment No. 016-16-SEP-CC, Case 2014-12-EP. Judgment of January 13, 2016, p. 35. Judgment No. 080-13-SEP-CC, Case of 0445-11-EP. Judgment of October 9, 2013, p. 19.

through treatment and prompt access to drugs free of charge. That Court also referred to the need for the health authorities to develop mechanisms for education on HIV/AIDS and its prevention.⁶⁷

28. The Constitutional Court of Peru has determined that comprehensive care for a person living with HIV is not limited to mitigating the effects of the disease with the provision of drugs and regular testing, but requires more actions at the stage of disease prevention.⁶⁸ In addition, it has deliberated on the special circumstances of extreme poverty of some of those living with the infection, finding that providing them with care was a priority.⁶⁹

29. The SCJN studied the shortcomings in the facilities of the public health services that resulted in the infection with opportunistic diseases of people living with HIV, who were treated in a certain hospital. It considered that the lack of adequate facilities was sufficient to constitute a violation of the right to health and ordered the authorities to ensure to people living with HIV/AIDS the broadest possible enjoyment of the right to health by investing in facilities – based on existing financial circumstances – and established that the respective new investment should be made from a medical and scientific perspective.⁷⁰

30. As can be seen, high national jurisdictions have developed important standards in this area, under which people living with HIV are a group requiring priority care in which one of the essential components to safeguard their rights (to health, life and personal integrity) is the continuous and uninterrupted provision of antiretroviral drugs. However, for the treatment to be comprehensive, it is also necessary to provide medical care for opportunistic infections, using the maximum available resources. This series of obligations is in keeping with the obligations that the Inter-American Court has incorporated into this judgment.⁷¹ Consequently, the provisions that the Inter-American Court has incorporated into this case constitute a minimum threshold as regard the right to health of people living with HIV.

II. THE INTERSECTIONAL DISCRIMINATION AGAINST TWO PREGNANT WOMEN LIVING WITH HIV

31. The judgment also addressed the allegations concerning the discrimination that some pregnant women had presumably suffered, who had not received medical treatment that took into consideration the intersectional form of discrimination they faced. In this regard, the judgment concluded that the State had failed to comply with the prohibition of discrimination in relation to the obligation to ensure the right to health recognized in Article 26 of the Convention, to the detriment of two victims in the case.⁷² This conclusion was

⁶⁷ Constitutional Court of Ecuador, Judgment No. 364-16-SEP-CC, Case 1470-14-EP. Judgment of November 15, 2016, p. 35.

⁶⁸ Cf. Constitutional Court of Peru, File No. 2016-2004-AA/TC, Justice José Luis Correa Condori. Judgment of October 5, 2004, paras. 44 and 47.

⁶⁹ Cf. Constitutional Court of Peru, File No. 2945-2003-AA/TC. Judgment of April 20, 2004, para. 48, and Cf. Constitutional Court of Peru, File No. 2016-2004-AA/TC, Justice José Luis Correa Condori. Judgment of October 5, 2004, para. 47.

⁷⁰ Cf. SCJN, Second Chamber, Amparo in review 378/2014, Rapporteur: Justice Alberto Pérez Dayán, Mexico, 2014, pp. 61 and 63.

⁷¹ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 108 to 117.

⁷² Cf. *Case of Acevedo Buendía et al. (Dismissed and Retired Employees of the Comptroller's Office) v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 102, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 139.

based on the fact that the State failed to provide antiretroviral treatment for one victim when she was pregnant, and did not practice a cesarean birth for the other victim when this constituted a preventive measure to avoid vertical transmission of HIV. These omissions by the State constituted a form of gender-based discrimination because they had a differentiated impact on the two women who are living with HIV, and gave rise to a risk of mother-to-child transmission of the virus.⁷³ Added to this, the majority considered that an intersectional discrimination existed because the two victims are women living with HIV, who were pregnant, so that the discrimination was the result of several factors that intersected and conditioned each other.⁷⁴

32. The jurisprudential precedent for the Court's analysis can be found in the case of *González Lluy et al.*, where the Court determined that Talía Gabriela suffered discrimination on the basis of her condition as a person living with HIV, and being a child, female, and living in poverty.⁷⁵ These factors made the victim more vulnerable and increased the harm she suffered.⁷⁶ On that occasion, the Court reflected on how certain groups of women suffer lifelong discrimination based on more than one factor combined with their sex, which increased their risk of becoming a victim of violence and other violations of their human rights.⁷⁷ It also emphasized that the stigmatization related to HIV does not have the same impact on everyone and the impact on groups that are already marginalized is more severe.⁷⁸ It has taken this position in the cases of *I.V. v. Bolivia*,⁷⁹ *Ramírez Escobar et al. v. Guatemala*⁸⁰ and *V.R.P., V.P.C. et al. v. Nicaragua*.⁸¹

33. In the said cases – and in *Cuscul Pivaral*⁸²– the Court has maintained that, when there is a confluence of factors of intersectional discrimination, this produces a specific discriminatory experience that is different from other forms of discrimination. This position that the Court has been developing progressively in its case law for the protection of vulnerable groups gives rise to certain challenges that must be addressed in future. The Inter-American Commission and the victims' representatives must argue more clearly and precisely: (i) that the factors of risk or vulnerability that are alleged are categories protected

⁷³ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 137.

⁷⁴ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 138.

⁷⁵ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 291.

⁷⁶ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 285.

⁷⁷ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 288.

⁷⁸ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 290.

⁷⁹ Cf. *Case of I.V. v. Bolivia. Preliminary objections merits, reparations and costs.* Judgment of November 30, 2016. Series C No. 329, para. 318.

⁸⁰ Cf. *Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs.* Judgment of March 9, 2018. Series C No. 351, para. 276.

⁸¹ Cf. *Case of V.R.P., V.P.C. et al. v. Nicaragua. Preliminary objections merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 350, para. 154. In this regard, in this judgment the Inter-American Court chose to make its analysis with "an intersectional approach"; in this case, between gender and the age of the victim (who was a girl child).

⁸² Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 138.

by the American Convention; (ii) that these factors interact or concur with each other, giving rise to a particular type of discrimination, and (iii) that this truly affects the victims in the specific case. In other words, it is not sufficient to argue that different elements exist that coalesce in an individual, but rather it should be proved that the combination of these elements resulted in a new increased form of discrimination with specific characteristics.

34. The judgment is particularly relevant on this issue, because it gives visibility to the confrontation between gender and maternity, factors that are usually concealed by the condition of a person living with HIV. The majority considered that a new type of increased discrimination existed based on the interaction of the said circumstances, recognizing that the State needed to provide a differentiated protection on the basis of the particular needs faced by pregnant women living with HIV. This approach has dual merits: on the one hand, it gives visibility to a group that has historically been discriminated against and establishes legal consequences for the State for failing to provide protection with a differentiated approach⁸³ and, on the other hand, it opens the way for the State to adopt measures in the future that provide a more effective and much more specific protection for the right to health of pregnant women living with HIV. Thus, the judgment — in both its analysis of the merits, and with regard to reparations — adheres to what has already been defined by UNAIDS concerning the need to promote a supportive and enabling environment for women, addressing the underlying prejudices and inequalities that lead to this vulnerability.⁸⁴

III. THE MEASURES OF REPARATION ORDERD IN THIS CASE

35. In the judgment, the Court also established a series of measures aimed at redressing the violations suffered by the victims in the case and to avoid their repetition in the future, as it has in its consistent case law on reparations. First, the Court ordered the State to provide medical and psychological or psychiatric treatment for the victims of violations of the right to health through its public institutions and in keeping with standards of medical care for people living with HIV.

36. This treatment should include crucial elements such as the free and lifelong provision of the drugs required to combat HIV and opportunistic infections, diagnostic tests, social support including aspects such as nutritional and psychological assistance, and access to technologies to prevent infection.⁸⁵ All these aspects have a causal nexus with the type of treatment that the State failed to provide to the victims and which is necessary for the medical treatment of people living with HIV according to the standards defined in the

⁸³ For example, in Colombia, this approach has been understood as: “[The one that] expresses the State’s recognition and actions to counteract or minimize the different way, which is even disproportionate at times, in which violence and threats affect certain social groups in relation to their specific characteristics of age, gender, ethnicity, health, disabilities or sexual orientation. These differences, determined culturally, socially and historically, are decisive in the application of all the prevention and protection mechanisms [...] and in the way in which the entities must establish their treatment of the said sectors in order to avoid increasing the discrimination and the harm caused.” Ministry of the Interior and Justice, Decree 1737 of May 19, 2010, amending the Victims’ and Witnesses’ Protection Program of Law 975 of 2005, created by Decree 3570 of 2007, art. 4. Similarly, Guideline for comprehensive care for the displaced population with a differentiated gender perspective, Office of the Presidential Adviser on Equality for Women/UNHCR, Colombia. Available at: <http://www.acnur.org/fileadmin/Documentos/BDL/2010/7394.pdf>.

⁸⁴ Cf. Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint United Nations Program on HIV and AIDS (UNAIDS), *International Guidelines on HIV/AIDS and Human Rights*. Consolidated version, 2006, eighth guideline, pp. 52 to 54, cited in *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 134.

⁸⁵ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 210.

judgment. These standards are based – as regards the medical aspects – on the expert opinion of institutions such as UNAIDS and the World Health Organization.

37. In addition to the above, the judgment⁸⁶ ordered certain guarantees of non-repetition the purpose of which is for the State to improve the care for people living with HIV in Guatemala, whether or not they are victims in the case.⁸⁷ This is an aspect that should be stressed because it seeks to promote those systemic changes required for the State to comply more effectively with its obligations in relation to protection of the right to health.

38. From this perspective, the judgment ordered the implementation of mechanisms of periodic monitoring and supervision of public hospitals to ensure that they provide comprehensive health care to people living with HIV.⁸⁸ In addition, and of special relevance, it ordered that the State design a mechanism to ensure the accessibility, availability and quality of antiretroviral drugs, diagnostic tests, and health services for people living with HIV, with the participation of the medical community and other sectors.⁸⁹ These are measures that seek to encourage the State institutions, based on discussions and dialogue with other sectors involved in medical care, to design strategies and actions. These types of mechanisms resulting from discussion and dialogue are not unknown in the constitutionalization of social rights⁹⁰ that seeks to create effective ways to convert the ESCER into a reality, so that they are not only enshrined in judicial rulings⁹¹ and are, also, a

⁸⁶ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 224 to 230.

⁸⁷ The inter-American judgment – by its very nature and by the form in which the inter-American system is designed – fulfills a dual function: on the one hand it provides measures of reparation for the specific situation (restitution, satisfaction, investigation, and of a financial nature), but it also has a function of providing reparations to ensure that the facts do not occur again (guarantees of non-repetition). This broad concept covering the measures of non-repetition is what leads to the *restitutio in integrum*, unique in international law. Evidently, in a national jurisdiction, the inter-American judgment has more general effects than those involved in each specific case; the purpose of measures of non-repetition that are ordered in each case is to provide the authorities with parameters to make redress to the possible victims, in similar circumstances to those that the Inter-American Court is able to examine.

⁸⁸ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 225.

⁸⁹ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 226.

⁹⁰ SEE, IN THIS REGARD, THE FOLLOWING DECISIONS: CONSTITUTIONAL COURT OF SOUTH AFRICA: *GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS V GROOTBOOM & OTHERS* 2000 (11) BCLR 1169; SUPREME COURT OF JUSTICE OF THE NATION OF ARGENTINA: *MENDOZA, BEATRIZ SILVIA ET AL. V. THE STATE ET AL. REF. DAMAGES (HARM ARISING FROM ENVIRONMENTAL POLLUTION OF THE MATANZA RIACHUELO RIVER)*, FILE NO. CSJ 1569/2004 (40-M)/CS2; SUPREME COURT OF INDIA: *PEOPLE'S UNION FOR CIVIL LIBERTIES V. UNION OF INDIA AND OTHER*, PETITION (CIVIL) NO. 196 OF 2001; CONSTITUTIONAL COURT OF COLOMBIA: *JUDGMENT T-025*, RAPPOREUR: JUSTICE MANUEL JOSÉ CEPEDA ESPINOSA, JANUARY 22, 2004; *JUDGMENT T-760/08*, RAPPOREUR: JUSTICE MANUEL JOSÉ CEPEDA ESPINOSA, JULY 31, 2008; *JUDGMENT T-762/15*, RAPPOREUR: JUSTICE GLORIA STELLA ORTIZ DELGADO, DECEMBER 16, 2015; *JUDGMENT T-622/16*, RAPPOREUR: JUSTICE JORGE IVÁN PALACIO PALACIO, NOVEMBER 10, 2016; *JUDGMENT T-302/17*, RAPPOREUR: JUSTICE AQUILES ARRIETA GÓMEZ, MAY 8, 2017, AND *JUDGMENT T-080/18*, RAPPOREUR: JUSTICE CARLOS LIBARDO BERNAL PULIDO, MARCH 2, 2018.

⁹¹ It should be noted that the fact that the courts ruled on the violation or the possible violation of social rights does not signify that the judiciary is attempting to establish public policies or supplant any of the domestic powers (for example, the legislature); it is clear that the purpose of the judiciary is not to legislate; however, its purpose as a power is to ensure that the rights contained in the Constitution or in domestic laws – to which it is committed – are effective. This has been ruled on by the Constitutional Court of Colombia (*Judgment T-025*, Rapporteur: Justice Manuel José Cepeda Espinosa, January 22, 2004) and the Mexican Supreme Court of Justice of the Nation (Amparo review 378/2014, Rapporteur: Justice Alberto Pérez Dayán, Secretary: Georgina Laso de la Vega Romero, p. 58).

way in which the principal interested parties can be part of the decision-making that will have an impact on them.⁹²

39. In this regard, it is important to underline that the judgment pays special attention to women who have been victims of discrimination. Thus, the Court ordered guarantees of non-repetition aimed at ensuring that pregnant women living with HIV have a series of minimum conditions that allow them to confront the different forms of discrimination that collectively affect them.

40. The Court opted to require the State to take steps in the area of health with an intersectional approach as a result of the discrimination declared in the judgment, taking into account the urgency of the needs of pregnant women living with HIV in Guatemala. This signifies a step forward in the development of the Court's case law, because the Inter-American Court recognized the relevance of adopting different measures for the treatment of intersectional discrimination for all the women in Guatemala. In other words, the Court indicated that the adoption of measures with a unitary approach may not be sufficient to alleviate these forms of discrimination, because it perpetuates the inequalities that coalesce in a single social sector.

41. Without doubt, the reparations ordered in *Cuscul Pivaral*, as regards measures of rehabilitation and guarantees of non-repetition, have the dual purpose of redressing the omissions that led to the violations of the rights to health, life and personal integrity of the victims, and serving as a way of urging the State to comply with its obligation of progressive protection of the right to health of people living with HIV in Guatemala. This dual dimension has been a constant throughout the Court's case law and, doubtless, will play a central role in those cases in which – as this one – the actions aimed at making systemic changes in the States are essential for the effective protection of an ESCER in a specific context.

42. In this regard, it is important to reflect on how the judgment, by ordering guarantees of non-repetition, took into consideration the Goals and targets established by the United Nations General Assembly in the 2030 Agenda for Sustainable Development.⁹³ One of these Goals is that the States ensure healthy lives and promote well-being for all at all ages, taking into consideration the vulnerability of people living with HIV.⁹⁴ The States undertook to take the necessary steps to end, by 2030, epidemics such as AIDS and other communicable diseases such as HIV,⁹⁵ in the same sense in which the judgment ordered the

⁹² On this issue, General Comment No. 14 of the CESCR has specified that: "54. The formulation and implementation of national health strategies and plans of action should respect, *inter alia*, the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12. Promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people's participation is secured by States." CESCR, General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, August 11, 2000, para. 54. Similarly, the former Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, in the right to participation of people living in poverty. See: Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, A/HRC/23/36, March 11, 2013, paras. 21, 22 and 23.

⁹³ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 224.

⁹⁴ UN, General Assembly Resolution "Transforming our world: the 2030 Agenda for Sustainable Development." A/70/L.1 adopted on September 25, 2015, paras. 23, 55 and 66, Goal 3, targets 3.3 and 3.8, Available at <https://undocs.org/en/A/RES/70/1>

⁹⁵ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 109.

State to take a series of measures to ensure treatment for people living with HIV in Guatemala.

43. The Court knows – as does the General Assembly – that achievement of the target of eradicating HIV/AIDS depends to a certain extent on the different levels of development of the States, but one of the most important considerations that arises in this case is that the progressive realization of the ESCER cannot mean the failure to adopt effective measures to achieve the full realization of the right to health. This is especially urgent in cases in which the personal integrity and the life of the individual is at risk. The measures of reparation ordered, as well as the Goals of the 2030 Agenda, point precisely in that direction aimed at the full realization of the right to health of people living with HIV.

IV. CONCLUSION

44. The judgment represents a key development in the jurisprudential line that addresses a crucial issue in our region: the need for States to comply with their obligations to respect and ensure the economic, social, cultural and environmental rights. The case of *Cuscul Pivara* addresses the specific issue of the obligation to ensure the right to health of people living with HIV, and also the content of the obligation of progressivity in ensuring this right.

45. This case is important if we consider that, forty years after the entry into force of the American Convention, it is the first time that the Court has addressed both dimensions of an ESCER (immediate enforceability and progressivity) and established measures of reparation in relation to both dimensions. This will be the path to follow in the future and, even though it involves both normative and methodological challenges, the Court cannot stand on the sidelines in the face of the serious problems of inequality, inequity, and social exclusion that subsist in the region together with the lack of protection of the ESCER, especially for the most vulnerable groups.

46. Regarding the above, it should be recalled that the Economic Commission for Latin American and the Caribbean (“ECLAC”) has remarked that, “in spite of the progress made over the past decade, [Latin America and the Caribbean] is still the world’s most unequal region in terms of the distribution of income.”⁹⁶ And that “equality of rights” is “the basic axis of equality, covering the *full realization for economic, social and cultural [and environmental] rights* as the regulatory and practical horizon for all persons (without distinctions on the grounds of sex, race, ethnicity, age, religion, origin, socioeconomic situation or any other condition) and the inclusion of all citizens in the dynamics of development, which implies a genuine belonging to society and full exercise of citizenship.”⁹⁷ It cannot be overlooked that poverty and extreme poverty continue to be factors of special concern in the region, “that affect children, adolescents and young people more than other age groups” together with, especially, the increase in the “feminization of poverty in the youth and adult population.”⁹⁸

47. The Court cannot ignore this regional inequality – and its consequences on the protection of human rights – in its jurisprudence, or the regional challenges for achieving the

⁹⁶ ECLAC, *Social Panorama of Latin America 2016*, United Nations (LC/PUB.2017/12-P), Santiago, 2017, p. 44. Available at: https://repositorio.cepal.org/bitstream/handle/11362/41599/4/S1700566_en.pdf

⁹⁷ *Ibidem*, p. 45.

⁹⁸ Cf. ECLAC, *Social Panorama of Latin America 2017*, United Nations (LC/PUB.2018/1-P), Santiago, 2018, p. 14.

Goals of the UN 2030 Agenda for Sustainable Development.⁹⁹ This judgment adheres to this regional tendency, both in its analysis and in its results and, in this way, becomes one more element for the construction of a common Latin American law on the protection of economic, social, cultural and environmental rights.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Secretary

⁹⁹ Goal 3 (Health and well-being) of the UN 2030 Agenda in its target 3.3 states: "3.3 By 2030, end the epidemics of AIDS, tuberculosis, malaria and neglected tropical diseases and combat hepatitis, water-borne diseases and other communicable diseases." See, UN, General Assembly Resolution "Transforming our world: the 2030 Agenda for Sustainable Development." A/70/L.1 adopted on September 25, 2015.

**PARTIALLY DISSENTING OPINION OF
JUDGE HUMBERTO ANTONIO SIERRA PORTO**

CASE OF CUSCUL PIVARAL ET AL. V. GUATEMALA

**JUDGMENT OF AUGUST 23, 2018
(Preliminary objection, merits, reparations and costs)**

1. With my usual respect for the decisions of the Inter-American Court of Human Rights (hereinafter also “the Court” or “the Inter-American Court”), allow me to present this partially dissenting opinion. The opinion focuses on the Court’s analysis of the merits relating to the international responsibility of the State (hereinafter “the State,” “the State of Guatemala” or “Guatemala”) for the violation of the right to health and the principle of progressivity. Specifically, I will explain my discrepancy with the position adopted in operative paragraphs 1, 2 and 4 of the judgment in which it was determined that, in this case, those rights had been violated. In this regard, I note that my considerations supplement what I have already indicated in my partially dissenting opinions in the cases of *Lagos del Campo v. Peru*,¹ *Dismissed Employees of Petroperú et al. v. Peru*,² and *San Miguel Sosa et al. v. Venezuela*;³ as well as in my concurring opinions in the cases of *Gonzales Lluy et al. v. Ecuador*⁴ and *Poblete Vilches et al. v. Chile*.⁵ I will make my analysis in the following order: A. The fundamental, or social benefit, nature of the right to health in the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”), and B. Guarantees of non-repetition and public health policies in this case.

I. THE FUNDAMENTAL, OR SOCIAL BENEFIT, NATURE OF THE RIGHT TO HEALTH IN THE AMERICAN CONVENTION

2. In the judgment in this case, the Court recalled that “the right to health refers to the right of every human being to enjoy the highest attainable standard of physical, mental and social well-being. This right encompasses prompt and appropriate health care provided in keeping with the principles of availability, accessibility, acceptability and quality.”⁶ In addition, the Court reiterated that it had recognized health as “a fundamental human right, essential for the adequate exercise of the other human rights, and that every individual has the right to enjoy the highest attainable standard of health that allows him or her to live a full life, understanding health not only as the absence of disease or illness, but also as a state of complete physical, mental and social well-being, derived from a lifestyle that allows the individual to achieve an overall balance.” In addition, the Court has specified that “the general obligation to protect health results in the State

¹ Cf. *Case of Lagos del Campo v. Peru. Preliminary objections merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Antonio Antonio Humberto Sierra Porto.

² Cf. *Case of the Dismissed Employees of Petroperú et al. v. Peru. Preliminary objections merits, reparations and costs*. Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Antonio Humberto Sierra Porto.

³ Cf. *Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs*. Judgment of February 8, 2018. Series C No. 348. Partially dissenting opinion of Judge Antonio Humberto Antonio Sierra Porto.

⁴ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

⁵ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

⁶ *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 107.

obligation to ensure access to essential health services, guaranteeing good quality and efficient medical care, and to promote the improvement of the health of the population as a whole.”⁷ In addition, the Court recalled that the dual scope of the economic, social, cultural and environmental rights (hereinafter “the ESCER”), and of the right to health, contained in Article 26 of the American Convention, may result in obligations that are enforceable immediately or in obligations of a progressive nature.⁸

3. In this case, and in relation to the obligations of immediate enforceability, the judgment concluded that the Court found it proved that, prior to 2004, the presumed victims “had not received any kind of State medical treatment or that such treatment was ineffective to treat their condition as people living with HIV.”⁹ Consequently, it asserted that the State was responsible for “violating the obligation to ensure the right to health, pursuant to Article 26 of the American Convention, in relation to Article 1(1) of this instrument, of the 49 people named as victims in Annex 2 to this judgment.”¹⁰ In addition, the Court’s judgment concluded that, “since the irregular, inadequate or total lack of access to antiretroviral drugs, the lack of access to periodic CD4 counts, and viral load, phenotype and genotype testing, the inadequate or total lack of social support, and the impossibility of access to the health centers for financial reasons or the location of the homes of some of the presumed victims has been proved, the State failed to comply with its obligation to guarantee the right to health because its omissions are incompatible with the elements of the availability, accessibility and quality of health care.”¹¹

4. In addition to declaring the violation of Article 26 for the said reasons, the Court concluded that the State was responsible for the violation of the rights to life and to personal integrity recognized in Articles 4 and 5 of the American Convention. In this regard, the Court verified diverse omissions in the medical care provided to the presumed victims who had died and considered that the State had failed to comply with its obligation to ensure antiretroviral therapy, perform the necessary diagnostic tests for the care and treatment of HIV and opportunistic infections, and provide social support.¹² Accordingly, the Court found it proved that a causal nexus existed between the State’s omissions in relation to the medical treatment and the cause of death of the presumed victims, when death had been caused by an opportunistic infection, and therefore concluded that the State was responsible for violating the obligation to ensure the right to life contained in Article 4(1) of the Convention.¹³ Furthermore, it found that 46 presumed victims have suffered adverse physical and mental effects as a result of their condition as people living with HIV and noted the existence of a causal nexus between the lack of adequate medical treatment for the presumed victims and the physical and mental effects they suffered as people

⁷ *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 118, and *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 105.

⁸ *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 104, and judgment, para. 98.

⁹ *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 119.

¹⁰ *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 119.

¹¹ *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 126.

¹² *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 158.

¹³ *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 159.

living with HIV. The Court therefore concluded that the State was responsible for the violation of the right to personal integrity of these individuals.¹⁴

5. From reading these different parts of the judgment, it is possible to observe, as in previous cases before the Court,¹⁵ that the analysis of the violation of the right to health is closely linked to the violations of the rights to life and to personal integrity of the victims in this case. In reality, it is quite difficult, if not impossible, to discern where the internationally wrongful act begins and where it ends in relation to each of the rights that the Court has declared violated. Thus, it can be claimed that the considerations on the State's obligations in the area of health that appear in the judgment make practical sense when they are reflected in the analysis of Articles 4(1) and 5(1) of the Convention. In my opinion, as in the case of *Poblete Vilches et al. v. Chile*, it was unnecessary to analyze Article 26 understood autonomously, even though it has great relevance when it is considered in connection with the rights to life and to personal integrity.¹⁶ Indeed, in this specific case, such an analysis involved an unnecessary duplication as regards the declaration of the treaty-based rights that have been violated, as revealed by the fact that the acts and omissions attributed to the State as violating the rights to health, life and personal integrity are, in essence, the same.

6. This underlines the prudence of the thesis that maintains that the right to health should be analyzed, in its "individual" aspect, in relation to the connected fundamental rights that may be affected; in this case the rights to personal integrity and to life, and in its "progressive" aspect, in relation to the sufficiency of the health services provided by the State. Approaching the analysis in this way would allow the Court, on the one hand, to identify when the State's actions in the area of health services can be linked to the violation of the personal integrity or the life of an individual and, on the other hand, to evaluate when the State's public policy in the area of the ESCER is, *per se*, a violation of the obligations of progressivity established in Article 26 of the Convention. In the former hypothesis, the analysis would be made based on Article 4 and/or 5 in relation to Articles 26 and 1(1) of the Convention and, in the second, it would be made directly on the basis of Article 26 in relation to Article 1(1) of this instrument.¹⁷

7. In addition, as I have already indicated in other cases, the use of connectivity as a mechanism for the indirect protection of the ESCER can be an effective mechanism for the protection and guarantee of the rights of the victims, while it has not been demonstrated that this type of protection does not guarantee rights.¹⁸ This line of argument does not prevent the Court from making important progress concerning the requirements of the availability, accessibility, acceptability and quality of the provision of health services, and the obligation to regulate, monitor and supervise the provision of services in private health care centers. This does not entail the creation of a new right, but rather gives content and scope to rights such as to life and to integrity which are recognized in the Convention and, therefore, accepted by the States Parties.¹⁹

¹⁴ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 163.

¹⁵ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 6.

¹⁶ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, Concurring opinion of Judge Humberto Antonio Sierra Porto para. 6.

¹⁷ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 12.

¹⁸ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 30.

¹⁹ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto, para. 31.

8. Furthermore, I find that the considerations developed in the judgment refer back to, or may be understood in the context of, the existing debate on the characteristics and nature of the right to health. On this issue, I share the opinion of the Constitutional Court of Colombia that the nature of the right to health may be understood in several ways. A first way would consist in analyzing it as a right of a “social benefit” nature, that it will be viable to protect provided it is closely and inseparably linked to rights such as to life and to personal integrity or embodied in a right of a subjective nature when the services included in the different health care plans are unknown. The right to health can also be understood as an autonomous fundamental right when it is materialized in a subjective or individual guarantee derived from human dignity.²⁰ On this point, I would like to underline the most recent case law of the Colombian Constitutional Court which has consolidated around the latter position after having asserted, at a previous stage, that the nature of this right was essentially that of a social benefit.²¹

9. The judgment of the Inter-American Court in this case advances, precisely, a similar idea when, based on the provisions of the American Convention, and of Article 26 of this instrument, it assigns to this right the characteristics of a fundamental right that would also be essential and instrumental for the exercise of the other human rights (*supra* para. 1). This means that the said right is peremptory for the States that signed this international instrument, which results in their duty to guarantee access to essential health services for everyone. Even though it could be found that this interpretation by the Inter-American Court is in line with or corresponds to the most recent developments of one of the region’s States, as in the case of Colombia, it is not clear whether the same conclusion could be reached for the other States. I find that the Court’s assertion is not reasonable because it is overly general and does not take into consideration the different contexts, their peculiarities, the reality of the discussions that have been held in each of those States, the different designs of the national legal and constitutional systems, or simply the real possibility of implementing such declarations. All this acquires greater relevance when it is considered that Article 26 only refers to an objective of achieving progressively the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards to the extent of available resources, and does not allude to any obligation of an instantaneous nature under which it would be considered that each State had the same possibility of complying fully and instantaneously with the ESCER. Specifically, the idea and spirit that underly this provision of the Convention is that not all States are in the same position to comply with those rights and that the particular domestic circumstances and effective possibilities should be taken into account when requiring their implementation.

10. The judgment in this case refers to the progressive obligation contained in Article 26 of the Convention, specifically regarding the right to health²² and, in this particular case, indicates that “owing to the State inaction with regard to protection of the right to health of the population of people living with HIV, despite the existence of an international obligation and State regulations, the Court concludes that the State is responsible for violating the principle of progressivity contained in Article 26 of the Convention, in relation to Article 1(1) of this instrument.”²³ On this point, I would like to state that I do not share the Court’s conclusion because the arguments concerning the “State inaction” to determine whether the content of Article 26 of the Convention

²⁰ Cf. Constitutional Court of Colombia. Judgment T-650/09. Judgment of September 17, 2009, section 3.

²¹ Cf. Constitutional Court of Colombia. Judgment T-650/09. Judgment of September 17, 2009, section 3.

²² Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 144 and 146.

²³ *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 148.

had been prejudiced do not infer a notion of retrogressivity. According to the judgment, the right to health is not being violated due to retrogression, because the violation of the international standard arises from State inaction when implementing the ESCER progressively; that is, from a failure to implement the right to health effectively. I consider that, if that reasoning were to be accepted as valid, it would change the nature of the obligation of progressivity into another very different one which would be the obligation to comply with the implementation of an ESCER, such as the right to health, within a reasonable time.

II. GUARANTEES OF NON-REPETITION AND PUBLIC HEALTH POLICIES IN THIS CASE

11. In this case, after determining that the State had violated Article 26 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the individuals named as victims in Annex 2 to the judgment, the Court ordered the State to “implement mechanisms to supervise and monitor health care services, improve the accessibility, availability and quality of health care services for people living with HIV, *guarantee the provision of antiretroviral drugs and any other medication required by all those affected*, offer the population HIV diagnostic tests, implement a training program for health system officials, guarantee adequate medical care for pregnant women living with HIV, and organize a national awareness-raising campaign, in the terms of paragraphs 225 to 230 of this judgment.”²⁴

12. My first observation in this regard, is that there are two possible interpretations of the scope of the said measure. One possible interpretation – that I consider would be the most appropriate for reasons that I will explain in this section – is that the obligation to guarantee the provision of antiretroviral drugs and other medicines to all those living with HIV should be read in light of the stipulations made by the Court in paragraphs 225 to 230. There, the obligation to “design a mechanism to ensure the accessibility, availability and quality of antiretroviral drugs, diagnostic tests, and health services for the population living with HIV” is inserted within the broader obligation to “implement effective mechanisms for periodic supervision and monitoring of its public hospitals to ensure that they are providing comprehensive health care to people living with HIV.”²⁵ In other words, under this interpretation, the State has an obligation to put in place measures that consist in implementing information systems and diagnostic mechanisms that allow it to ensure access to antiretroviral drugs for the whole population. However, a second possible interpretation is to consider that the obligation to ensure the provision of antiretroviral drugs is an obligation independent of the one that requires the implementation of mechanisms to monitor and supervise the health service. That is, it could be interpreted that the Court is placing on the State the obligation to provide antiretroviral drugs and other prescribed medicines to all those living with HIV as an obligation of result, regardless of any consideration relating to the availability of resources or of reasonableness, from a public policy perspective.

13. In addition, as can be seen, the reparations ordered are not only addressed at redressing the harm suffered by the victims, but are also aimed at the creation of a public health policy for all those living with HIV. Even though this practice of ordering diverse administrative or public policy measures, with an impact that goes beyond the victims of the case in question, is not new in the Court’s case law, I consider that there are reasons that require, at least, a cautious approach to this type of measure when rights of a social benefit nature are at stake, such as the right to health. This is because, as the Constitutional Court of Colombia has stated in other cases,

²⁴ *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, fourteenth operative paragraph.

²⁵ *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, paras. 225 to 226.

the social benefit aspect of the right to health obliges the State to “rationalize the allocation of investment adequately to ensure that its guarantee has a comprehensive scope *vis-à-vis* the need for sustainability of the guarantee of other rights.”²⁶ Indeed, although this case relates to the right to health, specifically in relation to people living with HIV, it is necessary to remember that people who need access to housing, food, water, employment opportunities and social security, among other matters, live side by side with them. Consequently, States have the obligation “to manage their resources in order to address all these claims.”²⁷

14. This does not mean making a judgment on the justiciability of the right to health; rather, it relates to the analysis of the reasonableness of the measure ordered. In a context of scarce resources, as is the case of most countries in the region, it is essential to analyze how the introduction of a specific measure – with regard to health services, for example – may affect the State’s capacity to guarantee other rights the content of which also relates to the provision of social benefits. This analysis may lead to the conclusion that, in certain cases, it is necessary to adopt an approach that takes into account the needs of society as a whole, instead of focusing on the particular needs of a specific group.

15. Furthermore, the entity that is in the best position to analyze the reasonableness of the measure should be taken into account. Although judges can and should use their powers to order measures that affect both domestic law and public policies, it is essential that such orders are made paying due regard to the role of the Legislature and the Executive in a democracy. Thus, it should be recalled that public policy should, of necessity, have a certain degree of flexibility that allows the Executive to make the necessary changes and adjustments when appropriate, in response to material possibilities, social demand, and the particular context of the country. It is not the role of the courts to analyze which is the best option, or to elaborate detailed public policies to be implemented in a specific country, but rather to analyze whether such policies comply with the Constitution and internal laws in the case of domestic courts, and with the American Convention in the case of this Court. In other words, the orders issued by the judges should not, therefore, be formulated in ways that preclude the Executive from making such legitimate public policy choices, insofar as these are aligned with the requirements and provisions of domestic law and the American Convention.²⁸

16. In this regard, ordering measures aimed at affecting public policy in the area of health should take into account the country’s context, the resources available, and the effect that the prioritization of a certain right or group may have on the other economic, social and cultural rights of the population as a whole. In light of these particularities, I consider that it is the States themselves, through their competent organs as provided for in domestic law, that are in the best position to decide how to invest available resources in order to ensure both the right to health, and other rights recognized in their domestic law and in the American Convention. In the words of the Constitutional Court of South Africa, courts should be aware that “[i]mportant though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious.”²⁹ Indeed, public policy choices often “involve

²⁶ Constitutional Court of Colombia, File T-1080/07. Judgment of December 13, 2007. Rapporteur: Justice Humberto Antonio Sierra Porto, p. 10.

²⁷ Cf. Constitutional Court of South Africa, Thiagraj Soobramoney v. Minister of Health (Kwaxulu-Natal). Judgment of November 27, 1997, para. 31.

²⁸ Cf. Constitutional Court of South Africa, Minister of Health and Others v. Treatment Action Campaign and Others. Case CCT 8/02. Judgment of July 5, 2002, paras. 113 and 114.

²⁹ Constitutional Court of South Africa, Thiagraj Soobramoney v. Minister of Health (Kwaxulu-Natal). Judgment of November 27, 1997, para. 58.

difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met.”³⁰ The courts should not interfere in the decisions of those organs that are better equipped to take them, unless such decisions violate the rights recognized in domestic law or the American Convention. It should also be noted that this is consistent with the judgment when it asserts that “[t]he State’s compliance with its obligation to respect and ensure this right should include special care for vulnerable and marginalized groups, and should be provided progressively in accordance with available resources and applicable domestic law.”³¹

17. All these issues should be adequately taken into account by this Court when ordering reparations, which need to achieve a balance between the objective pursued – that is, full redress for the violations suffered by the victims – and the need to accord the State the necessary margin of flexibility and action when rights of a social benefit nature, such as the right to health, are involved. Accordingly, in a region where resources are limited and, moreover, where there are significant disparities within the region as regards available resources, the role of a regional human rights court such as the Inter-American Court cannot be to order inflexible measures. This is because, this could jeopardize not only the possibility of complying with the measures ordered, but also have a negative effect on the allocation of resources to other rights that it is equally or more urgent to satisfy.

18. Based on the above, I consider that the measure ordered by the Court, if it is interpreted in the sense of establishing an obligation to guarantee the provision of antiretroviral drugs and the other medication prescribed to those living with HIV as an obligation of results, and irrespective of any consideration concerning the reasonableness of the allocation of resources, is contrary to the social benefit nature of the right to health, and to the role entrusted to this Court by the American Convention.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Secretary

³⁰ Cf. Constitutional Court of South Africa, *Thiagraj Soobramoney v. Minister of Health (Kwaxulu-Natal)*. Judgment of November 27, 1997, para. 29.

³¹ *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 107.