

# The Fundamental Role of Regional Human Rights Courts in Inciting Social and Health Policy Change

Lucile Thirard\*

## Introduction

The Inter-American Commission on Human Rights (hereinafter the 'IACHR' or 'Commission'), an institution under the authority of the Organisation of American States (OAS) publishes annual, country and thematic reports as well as reports on petitions and cases. Each category of report enables a thorough evaluation of human rights compliance at different levels over time and across different regions within the Americas. Bearing in mind these reports are simply advisory, States have no legal obligation to comply with the IACHR's decisions. Nevertheless, through moral obligation, States may decide to change their practices and policies, as in Mexico in 2015 following an IACHR case report.

In *J.S.C.H and M.G.S v Mexico*<sup>1</sup> (the 'case' or 'report'), joined petitions were brought before the Inter-American Commission on Human Rights. The Commission held that the State had violated the victims' rights under the American Convention on Human Rights (hereinafter the 'ACHR') to non-discrimination,<sup>2</sup> a fair trial<sup>3</sup> and privacy.<sup>4</sup> J.S.C.H and M.G.S were servicemen in the Mexican Armed Forces who were discharged for being HIV-carriers. These decisions were not deemed illegal at

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\* LLB. Graduate University of Kent 2017.

<sup>1</sup> Inter American Court on Human Rights, Report No.80/15, Case 12.689 (Merits) J.S.C.H and M.G.S vs. Mexico, 28 October 2015.

<sup>2</sup> Article 1.1 American Convention on Human Rights.

<sup>3</sup> Article 8 American Convention on Human Rights, Article 11 American Convention on Human Rights.

<sup>4</sup> Article 22 of ISSFAM Law promulgated on June 29, 1976 as repealed in 2003.

<sup>5</sup> Joint United Nations programme on HIV/AIDS.

<sup>3</sup> UNAIDS, 'Global Aids Update 2016' [http://www.who.int/hiv/pub/arv/global-AIDS-update-2016\\_en.pdf?ua=1](http://www.who.int/hiv/pub/arv/global-AIDS-update-2016_en.pdf?ua=1).

<sup>4</sup> Article 11 American Convention on Human Rights.

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national level since in 2003, the Mexican Congress passed a law allowing such a practice.<sup>5</sup> However, this law is in direct conflict with the principles and values set out in article 1(1) of the ACHR whereby:

The States Parties (...) 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, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

The *J.S.C.H and M.G.S v Mexico* report<sup>6</sup> accurately illustrates the current international context in which the rights of vulnerable groups such as HIV/AIDS (Active Immunodeficiency Syndrome) carriers are being increasingly recognised and protected against the arbitrariness of States.

Protecting the rights of people infected with HIV has become urgent for human rights bodies across the globe. According to UNAIDS,<sup>7</sup> at the end of 2015, 36.7 million people in the world were living with Human Immunodeficiency Virus (hereinafter “HIV”), including 2.1 million new HIV infections. Yet, only 17 million of them receive antiretroviral therapy.<sup>8</sup> UNAIDS, in its 2016 Update Report, asserted its commitment to ending the AIDS epidemic by 2030. However, such staggering numbers demonstrate that this disease is still spreading despite the extensive

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<sup>5</sup> Article 22 of ISSFAM Law promulgated on June 29, 1976 as repealed in 2003.

<sup>6</sup> Inter American Commission on Human Rights, Report No.80/15, Case 12.689 (Merits) *J.S.C.H and M.G.S vs. Mexico*, 28 October 2015.

<sup>7</sup> Joint United Nations programme on HIV/AIDS.

<sup>8</sup> UNAIDS, ‘Global Aids Update 2016’ <[http://www.who.int/hiv/pub/arv/global-AIDS-update-2016\\_en.pdf?ua=1](http://www.who.int/hiv/pub/arv/global-AIDS-update-2016_en.pdf?ua=1)>

information and prevention campaigns. This is linked to the fact that individuals suffering from HIV/AIDS are also victim of permanent stigmatisation, discrimination and other human rights violations, as noted in the facts of the case. Consequently, there is a pressing need to change or implement national health and social policies, which can be attained through the work carried out by human rights bodies and especially regional human rights courts and commissions.

I will demonstrate how this report shows a shift in the way in which States respond to regional bodies' recommendations. I will subsequently establish, through the example of its 2015 report, how the IACHR has the (soft) power to instigate the development of human rights-based health and social policies.

### **Compliance with the IACHR's recommendations: growing recognition of the importance of human rights protection**

Following the Commission's finding that there had been violations of the servicemen's rights, Mexico signed the agreement for adherence to the Merits Report.<sup>9</sup> In this report, the IACHR issued a list of recommendations for the State to comply with. The list contained the obligation to restore the rights of the victims and "provide full redress for the damages suffered by the victim",<sup>10</sup> to amend the legal dispositions which are contrary to human rights, to implement new policies to prevent future violations of human rights, and to restrict the proliferation of HIV/AIDS in the country.<sup>11</sup>

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<sup>9</sup> *J.S.C.H and M.G.S vs. Mexico*, 28 October 2015 [146].

<sup>10</sup> *ibid* [147].

<sup>11</sup> *ibid* [147(g)].

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By virtue of article 1(1) of the ACHR, State parties are under an obligation to “comply with the recommendations made by the Commission”,<sup>12</sup> in its 2003 annual report, the IACHR found that only five cases out of sixty observed full compliance by concerned States.<sup>13</sup> Authors have argued that ‘most Latin democracies (...) recognise the importance of human rights principles, but when confronted with a case before the IACHR (...), they question the necessity of the system and sometimes even work to undermine its effectiveness’.<sup>14</sup>

This behaviour prevents human rights bodies from fully exercising their role. When States comply with human rights bodies’ decisions and treaty provisions, it is assumed to ‘derive from the need to maintain one’s status within a highly interrelated community of States’.<sup>15</sup> This could explain Mexico’s full compliance with the recommendations. Human rights bodies and institutions do not have any power to enforce their decisions, which is consequently soft-law.<sup>16</sup> However, in an increasingly interrelated international community, and with the booming of social media activity, the practice of naming and shaming non-complying states stands as a subtle enforcement power.<sup>17</sup>

Contrary to the apparent trend, the IACHR found that Mexico had fulfilled all of the recommendations. The most unexpected compliance was the amendment of a national law provision, which the IACHR deemed to be arbitrary since it allowed the discharge of persons with HIV from the Armed Forces with no regard as to the effect

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<sup>12</sup> Dinah Shelton, ‘Enforcement of Judgments’ in *Remedies in International Human Rights Law*, (2<sup>nd</sup> ed, OUP 2005), 381.

<sup>13</sup> *ibid.*

<sup>14</sup> David J.Harris and Stephen Livingstone, *The Inter-American System of Human Rights*, (OUP 2004).

<sup>15</sup> David H. Moore, ‘A Signaling Theory of Human Rights Compliance’, 97 *Nw. U. L. Rev.*, 879 (2003).

<sup>16</sup> Dinah Shelton ‘Commitment and Compliance: The Role of Non-binding Norms in the International Legal System’, (Oxford Scholarship Online 2010).

<sup>17</sup> Leonard S.Rubenstein, ‘How International Human Rights Organizations Can Advance Economic, Social and Cultural Rights: A Response to Kenneth Roth.’ *Human Rights Quarterly*, vol. 26 no. 4, 2004, 845-865.

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of the disease on the individual's capacity to work.<sup>18</sup> The amendment 'introduces an element of quantitative and qualitative differentiation to the text, so as to assess when infection with the immunodeficiency virus warrants discharge from military service'.<sup>19</sup> The incorporation of the concept of proportionality will prevent arbitrary decisions being made in the future since medical expertise will establish whether the individual is unfit to work or whether despite his condition he is still able to perform his duties. We can therefore link the work of the Commission – and human rights bodies in general – with the progressive consolidation of human rights into national law, initiating and developing more comprehensive social and health policies. Through symbolic processes such as ceremonies recognising the States' responsibility to training programmes dedicated to preventing discrimination, the Commission has managed to prompt social change and ensure further human rights compliance. As argued earlier, the lack of human rights enforcement is closely associated with the spread of diseases, and particularly HIV/AIDS. This amendment of national law has the potential to eradicate the disease from the country within the next 15 years.<sup>20</sup> Consequently, Mexico's compliance with the recommendations shows a progressive recognition of the importance of human rights law.

The conclusions to this report are in line with other regional human rights bodies' jurisprudence. The European Court of Human Rights, in *Kiyutin v Russia*<sup>21</sup> set the path for an increased recognition of HIV/AIDS carriers' rights as well as the fundamental principle of prohibition of discrimination. In 2013, this jurisprudence was confirmed.<sup>22</sup> This line of thought seems to have even influenced national courts. In 2007, the Mexican Supreme Court ruled that the discharge of HIV-infected soldiers

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<sup>18</sup> *J.S.C.H and M.G.S vs. Mexico*, 28 October 2015 [70].

<sup>19</sup> *ibid* [150].

<sup>20</sup> UNAIDS, 'Global Aids Update 2016'.

<sup>21</sup> *Kiyutin v Russia* App No. 2700/10 (ECHR, 15 September 2011).

<sup>22</sup> *I.B v Greece* App No.552/10 (ECHR, 3 October 2013).

from the military and the denial of access to military health services was unconstitutional.<sup>23</sup> There is this idea that the more a principle is affirmed worldwide, the more substance and value it acquires in the eyes of States.

The fact that international human rights are not constrained to one jurisdiction allows different regional institutions and bodies to cooperate, exchange views and inspire each other on the way human rights must be implemented. It is a prized asset enabling the continued promotion, development and protection of human rights around the world.

### **The power of international human rights bodies to initiate and develop social and health policies in regards to HIV**

The HIV/AIDS statistics<sup>24</sup> show that the disease is still spreading. The first finding of the IACHR on the case was that there was a violation of the victims' right to non-discrimination. Due to the lack of precise definition of this principle, the IACHR developed one which was construed from various conventions' interpretations, as permitted by 'the *pro homine* principle, whereby a law must be interpreted in the manner most advantageous to the human being'.<sup>25</sup> The Commission asserted that discrimination is:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the

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<sup>23</sup> Alejandro Madrazo and Estefanía Vela, 'The Mexican Supreme Court's (Sexual) Revolution?' (2011), *Texas Law Review*, 89, 7, 1863-1893.

<sup>24</sup> UNAIDS, 'Global Aids Update 2016'.

<sup>25</sup> Organization of American States, 'What is the IACHR?' (2011) <<http://www.oas.org/en/iachr/mandate/what.asp>> Accessed November 6 2016.

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recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>26</sup>

Once again, thanks to the interaction between the different regional human rights bodies and instruments, the Commission is able to deliver a more appropriate and comprehensive decision.

Although most human rights conventions and instruments do not expressly include discrimination on grounds of health status (including but not limited to HIV/AIDS), it has been increasingly understood throughout the human rights bodies that such a provision is to be implied from the words 'other status'.<sup>27</sup> This power of interpretation is fundamental in promoting and protecting said rights. Indeed, through this wide interpretation of 'discrimination' and 'other status', human rights bodies encompass many different situations which would otherwise be left unaddressed and susceptible of allowing further human rights violations.

It has been recognised that, 'HIV-related stigma and discrimination have restricted the success of HIV prevention, care and treatment programmes and reduced the willingness of people with HIV to disclose their status or to seek out sexual and reproductive health services'.<sup>28</sup> This unwillingness to seek medical assistance can be explained through the consequences suffered by the servicemen following the revealing of their disease to the Mexican Armed Forces.<sup>29</sup> The effects included 'cessation of payment of their salaries (...), loss of the right to receive a

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<sup>26</sup> United Nations, Human Rights Committee, General Comment 18, Non-discrimination, 10/11/89, CCPR/C/37, [7].  
<http://www.equalrightstrust.org/ertdocumentbank//Human%20Rights%20Committee%2C%20General%20Comment%2018.pdf> Accessed November 6 2016.

<sup>27</sup> United Nations Commission on Human Rights, Resolution 49/1999  
<[http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=4660](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=4660)> Accessed November 6 2016.

<sup>28</sup> Sofia Gruskin, Laura Ferguson and Jefferey O'Malley 'Ensuring Sexual and Reproductive Health for People Living with HIV: An Overview of Key Human Rights, Policy and Health Systems Issues' (2007), Reproductive Health Matters.

<sup>29</sup> *J.S.C.H and M.G.S vs. Mexico*, 28 October 2015.

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pension in accordance with military laws, and loss of the right, as members of the Armed Forces to receive medical care and drugs needed to treat HIV'.<sup>30</sup>

This fear of becoming unemployed and being denied essential rights and benefits is counterproductive to the aim of stopping the spread of HIV/AIDS and other stigmatised diseases. According to Article 12(1) of the International Covenant on Economic, Social and Cultural Rights, 'the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Mexico ratified the Convention in 1981 and thus has an obligation to implement this right. To achieve the goal of eliminating the disease by 2030,<sup>31</sup> the promotion of human rights is essential to prevent discrimination in both law and practice. Undeniably, defective law and practice is at the source of the spread of HIV/AIDS as it fails to prohibit discrimination. It has been affirmed that 'although international treaties, enriched by declarations and related documents, have legal implications, they importantly can also inform the development of policies and programmes in all states'.<sup>32</sup> This is called the rights-based approach to health policy whereby:

human rights standards and principles - such as participation, equality and non discrimination (...) are to be integrated into all stages of the health programming process: assessment and analysis, priority setting,

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<sup>30</sup> *ibid* [4].

<sup>31</sup> UNAIDS, 'Global Aids Update 2016'.

<sup>32</sup> Sofia Gruskin, Edward J.Mills, Daniel Tarantola 'History, principles, and practice of health and human rights' (2007) *The Lancet*.

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programme planning and design, implementation, and monitoring and evaluation.<sup>33</sup>

Thus, the Commission, through its recommendations may have an important part to play in the process of eliminating HIV/AIDS in the country.

Despite many States refusing to comply with human rights bodies' recommendations or decisions, the IACHR's report analysed shows that there is yet a growing recognition of the importance of human rights by States. The effects of Mexico's compliance with the recommendations will need to be assessed over time to affirm such a change in States' attitude towards the Commission's non-enforceable reports. Nevertheless, we can already observe a positive outcome not only for the concerned individuals but also for society as a whole. In this case, the report enabled the victims to obtain reparations for the harm suffered and, via the application of a rights-based approach to policies, will assuredly have a substantial influence on stopping the spread of HIV/AIDS in the country.

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<sup>33</sup> OHCHR, 'A Human Rights-Based Approach to Health' <[http://www.ohchr.org/Documents/Issues/ESCR/Health/HRBA\\_HealthInformationSheet.pdf](http://www.ohchr.org/Documents/Issues/ESCR/Health/HRBA_HealthInformationSheet.pdf)> Accessed November 5<sup>th</sup> 2016.