

**INTER-AMERICAN COURT OF HUMAN RIGHTS**  
**CASE OF AZUL ROJAS MARÍN ET AL. V. PERU**  
**JUDGMENT OF MARCH 12, 2020**  
***(Preliminary objections merits, reparations and costs)***

In the case of *Azul Rojas Marín et al. v. Peru*,

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

Elizabeth Odio Benito, President  
L. Patricio Pazmiño Freire, Vice President  
Humberto Antonio Sierra Porto, Judge  
Eduardo Ferrer Mac-Gregor Poisot, Judge  
Eugenio Raúl Zaffaroni, Judge, and  
Ricardo Pérez Manrique, Judge,

also present,

Pablo Saavedra Alessandri, Secretary, and  
Romina I. Sijniensky, 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, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure” or “the Court’s Rules of Procedure”), delivers this judgment structured as follows:

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\* Judge Eduardo Vio Grossi did not take part in the deliberation and signature of this judgment for reasons beyond his control, accepted by the full Court.

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**I**  
**INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE**

1. *The case submitted to the Court.* On August 22, 2018, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the jurisdiction of the Court the case of *Azul Rojas Marín et al. v. the Republic of Peru* (hereinafter “the State” or “Peru”). The Commission indicated that the case related “to the illegal, arbitrary and discriminatory deprivation of liberty of Azul Rojas Marín [...] on February 25, 2008, supposedly for identification purposes.” The Commission also “considered that serious acts of physical and psychological violence had been proved” and that, owing to “the nature of this violence and the way in which it was inflicted, particular brutality was used based on the identification or perception of Azul Rojas Marín as a gay man at that time.” Lastly, the Commission “concluded that the facts of the case remain unpunished owing to various factors that include failure to comply with the obligation to conduct an investigation with due diligence from the very start of the investigation. [...] The Commission considered that the State had violated the obligations to provide care and protection to a victim who reports sexual violence, with the aggravating factor of the prejudice against LGBTI people. The Commission also determined that the right to personal integrity of Azul Rojas Marín’s mother[, Juana Rosa Tanta Marín,] had been violated.”

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

- a) *Petition.* On April 15, 2009, the National Human Rights Coordinator, the *Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos* (PROMSEX) and Redress Trust lodged the initial petition on behalf of the presumed victims.
- b) *Admissibility Report.* On November 6, 2014, the Commission adopted the Admissibility Report in which it concluded that the petition was admissible.
- c) *Merits Report.* On February 24, 2018, the Commission adopted Merits Report No. 24/18, in which it reached a series of conclusions<sup>1</sup> and made several recommendations to the State.

3. *Notification to the State.* The Merits Report was notified to the State on March 22, 2018, granting it two months to provide a report on compliance with the recommendations. The State “presented information on a series of measures taken to avoid the repetition of the violations that occurred in this case, as well as on the reopening of the criminal investigation.” However, “regarding the recommendation to provide full reparation to the victims, the Peruvian State indicated that this recommendation was related to the investigation into the facts in the domestic sphere [...] and indicated that, in any case, this was the function of the competent entities.” The Commission indicated that five months after this report, “the Peruvian State ha[d] not contacted the victims and their representatives to make a specific proposal on full reparation.”

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<sup>1</sup> The Commission concluded that the State was responsible for: the violation of the rights established in Articles 7(1), 7(2), 7(3), 11 and 24 of the American Convention, in relation to the obligations established in Article 1(1) of this instrument, to the detriment of Azul Rojas Marín; the violation of Articles 5(1), 5(2), 11(2) and 24 of the American Convention, and also non-compliance with Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture (ICPPT) to the detriment of Azul Rojas Marín; the violation of the rights established in Articles 5(1), 8(1), 11, 24, and 25(1) of the American Convention in relation to Article 1(1) of this instrument, and also the violation of its duty to investigate acts of torture established in Articles 1, 6 and 8 of the ICPPT, all to the detriment of Azul Rojas Marín; also, the violation of the right to mental and moral integrity established in Article 5(1) of the American Convention to the detriment of Juana Rosa Tanta Marín, the mother of Azul Rojas Marín.

4. *Submission to the Court.* On August 22, 2018, the Commission submitted this case to the Court owing to “the need to obtain justice for the victims.”<sup>2</sup>

5. *Requests of the Commission.* Based on the foregoing, the Inter-American Commission asked the Court to find and declare the international responsibility of the State for the violations contained in its Merits Report and to require the State, as measures of reparation, to execute the measures included in the said report.

## II PROCEEDINGS BEFORE THE COURT

6. *Notification to the State and to the representatives.* The submission of the case was notified to the State and to the representatives of the presumed victims on October 15, 2018.

7. *Brief with pleadings, motions and evidence.* On December 11, 2018, the National Human Rights Coordinator, the *Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos* (PROMSEX) and Redress Trust (hereinafter “the representatives”) submitted their brief with pleadings, motions and evidence (hereinafter “pleadings and motions brief”), pursuant to Articles 25 and 40 of the Court’s Rules of Procedure. The representatives agreed with the allegations made by the Commission and added that the State was also responsible for the violation of the obligation to adopt domestic legal provisions in light of Article 2 of the American Convention. In addition, it asked that the Court order the State to adopt various measures of reparation and to reimburse certain costs and expenses.

8. *Answering brief.* On April 5, 2019, the State submitted to the Court its brief with preliminary objections and in answer to the submission of the case by the Commission, together with its observations on the pleadings and motions brief (hereinafter “answering brief”). In this brief, the State filed three preliminary objections and contested the alleged violations and the requests for measures of reparation presented by the Commission and the representatives.

9. *Observations on the preliminary objections.* On May 24, 2019, the representatives and the Commission presented their observations on the preliminary objections.

10. *Public hearing.* On July 10, 2019, the President of the Court at the time issued an order in which he called the parties and of the Commission to a public hearing on the preliminary objections and eventual merits, reparations and costs.<sup>3</sup> Also, in this order, he called on the presumed victim, a witness and an expert witness proposed by the Commission to testify during the public hearing, and required two witnesses and six expert witnesses to submit their statements by affidavit and these were forwarded on August 12, 2019. On July 18, 2019, the representatives asked the Court to reconsider this decision because, for reasons beyond her control, the presumed victim would be unable to attend the hearing, and they requested that the Court call a witness. In an order of the Court of August 26, 2019, it was decided to admit the representatives’ request.<sup>4</sup> The public hearing took place on August 27, 2019, during the

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<sup>2</sup> The Commission appointed Commissioner Joel Hernández and Executive Secretary Paulo Abrão as its delegates, and Silvia Serrano Guzmán, lawyer of the Commission’s Executive Secretariat acted as Legal Adviser.

<sup>3</sup> *Cf. Case of Rojas Marín et al. v. Peru. Call to a hearing.* Order of the President of the Inter-American Court of Human Rights of July 10, 2019. Available at: [http://www.corteidh.or.cr/docs/asuntos/rojas\\_marin\\_10\\_07\\_19.pdf](http://www.corteidh.or.cr/docs/asuntos/rojas_marin_10_07_19.pdf)

<sup>4</sup> *Cf. Case of Rojas Marín et al. v. Peru.* Order of the Inter-American Court of Human Rights of August 26, 2019. Available at: [http://www.corteidh.or.cr/docs/asuntos/rojas\\_26\\_08\\_19.pdf](http://www.corteidh.or.cr/docs/asuntos/rojas_26_08_19.pdf)

62nd special session held in Barranquilla, Colombia.<sup>5</sup> During the hearing, the Court's judges asked the parties and of the Commission to provide certain information and explanations.

11. *Amici curiae*. The Court received eight *amicus curiae* briefs presented by: (1) the Únicxs Free Legal Clinic of the Faculty of Law at the Pontificia Universidad Católica del Perú;<sup>6</sup> (2) the Coalition of Lesbian, Gay, Bisexual, Transvesti, Transgender, Transsexual and Intersex Organizations of the Americas before the OAS (LGBTTTI Coalition);<sup>7</sup> (3) students and professors at Boston College Law School;<sup>8</sup> (4) European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe);<sup>9</sup> (5) the *No Tengo Miedo* organization;<sup>10</sup> (6) the Centre on Law and Social Transformation;<sup>11</sup> (7) the International Bar Association's Human Rights Institute (IBAHRI),<sup>12</sup> and (8) Juan Pablo Pérez León Acevedo.<sup>13</sup>

12. *Final written arguments and observations*. On September 30, 2019, the State, the representatives and the Commission, forwarded their final written arguments and observations, respectively, together with the annexes.<sup>14</sup>

13. *Supervening facts*. On May 24, 2019, and February 3, 2020, the representatives forwarded information on supervening facts concerning the actual situation of the presumed victim and the status of the investigation opened following the issue of the Merits Report. The State and the Commission presented their observations in this regard.

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<sup>5</sup> There appeared at this hearing: (a) for the Inter-American Commission; Luis Ernesto Vargas, Commissioner, and Jorge H. Meza Flores, Analía Banfi Vique and Piero Vásquez, IACHR Legal Advisers; (b) for the representatives of the presumed victims: Ana María Vidal Carrasco, Deputy Executive Secretary of the National Human Rights Coordinator, Gabriela Oporto Patroni, Coordinator of Strategic Litigation of the *Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos*, Clara Sandoval, REDRESS Consultant for this case, and Alejandra Vicente, Head of Law, REDRESS, and (c) for the State of Peru: Carlos Redaño Balarezo, Supranational Special Public Attorney and Agent in this case, Silvana Gómez and Carlos LLaja, lawyers of the Supranational Special Public Attorney's Office and Deputy Agents in this case.

<sup>6</sup> The brief was signed by Renata Bregaglio Lazarte, María Alejandra Espino and María Susana Barrenechea. The brief describes the situation of LGBTI people in Peru.

<sup>7</sup> The brief was signed by Fanny Gómez-Lugo, Juan Felipe Rivera Osorio, María Daniela Díaz Villamil, María Alejandra Medina Ubajoa and Robinson Sánchez Tamayo. The brief describes the situation of LGBTI people in Peru and includes legal considerations on the protection of gender expression.

<sup>8</sup> The brief was signed by Susan Simone Kang, Daniela Urosa, Milena Cuadra Seas and Liliana Mamani Condori. The brief refers to the facts of this case.

<sup>9</sup> The brief was signed by Evelyne Paradis. The brief refers to the State obligation to conduct investigations into acts of violence or abuse, especially in cases involving LGBTI people.

<sup>10</sup> The brief was signed by María Lucía Muchuca Rose. The brief describes the situation of LGBTI people in Peru.

<sup>11</sup> The brief was signed by Camila Gianella Malca. The brief refers to care for victims of torture, and the transgender population in Peru.

<sup>12</sup> The brief was signed by Baroness Helena Kennedy. The brief describes how discrimination may be used as an element of intent and purpose in torture, especially in cases of discrimination based on sexual orientation.

<sup>13</sup> The brief was signed by Juan Pablo Pérez León Acevedo. The brief refers to sexual violence as an act of torture, and uses case law of both the Inter-American Court and the European courts to establish that sexual violence may be an act of torture.

<sup>14</sup> The Court notes that the representatives' brief with final arguments was submitted unsigned on September 30, 2019. On October 1, 2019, the representatives forwarded a signed copy of this brief. The State argued that, according to Article 28 of the Court's Rules of Procedure, the representatives must provide their final written arguments not only by electronic means, but also send the original brief to the Court and the Court must receive this within 21 days of the expiry of the time frame for submission of these arguments. The Court considered that the presentation of the signed version of the brief by electronic means was sufficient, without it being necessary to send the original copy of the brief.

14. *Helpful information and evidence.* On February 7, 2020, the President of the Court asked the State to present helpful documentation. Peru presented this information on February 13 and 28, 2020.

15. *Observations on the helpful information and evidence.* On October 21, 2019, the Commission, the representatives and the State presented their observations on the annexes presented with the final written arguments. The representatives and the Commission also presented their observations on the helpful evidence presented by the State.

16. *Deliberation of this case.* The Court began to deliberate this judgment on March 12, 2020.

### **III JURISDICTION**

17. The Court has jurisdiction to hear this case, pursuant to Article 62(3) of the Convention, because Peru has been a State Party to this instrument since July 28, 1978, and accepted the contentious jurisdiction of the Court on January 21, 1981. In addition, the State ratified the Inter-American Convention to Prevent and Punish Torture on March 28, 1991.

### **IV PRELIMINARY OBJECTIONS**

18. In this case, the State filed three preliminary objections relating to: (a) the alleged failure to exhaust domestic remedies; (b) the subsidiary nature of the inter-American system, and (c) the "fourth instance" objection.

#### **A. Alleged failure to exhaust domestic remedies**

##### **A.1 Arguments of the parties and of the Commission**

19. The **State** argued that "the order to dismiss the proceedings [...] requiring the archive of the criminal investigation for the offenses of rape and abuse of authority could have been contested by the presumed victim and/or her representatives [...] pursuant to domestic law." In this regard, it indicated that the remedy was filed belatedly. Therefore, the State argued that the presumed victim had incurred in an "improper exhaustion of domestic remedies" and, consequently, the Commission should have declared the petition inadmissible.

20. The **Commission** reiterated the analysis made in the Admissibility Report. It also indicated that "in the case of acts of torture such as those denounced by Azul Rojas Marín, the domestic remedies should be provided by the State *ex officio*"; therefore, "an appeal against a specific procedural measure should not be understood as an appropriate and effective remedy in cases of serious human rights violations, because an appropriate and effective remedy would be the integrity of the investigation and criminal proceedings that [...] should be opened and conducted satisfactorily and, *ex officio*, by the State." It also asserted that, the analysis of admissibility revealed that "there were numerous indications that *prima facie* pointed to the ineffectiveness of the investigations that were conducted and that culminated in the dismissal of the proceedings" and that "[o]n this basis, the Commission made a preliminary decision on the lack of effectiveness of the domestic remedies which was amply confirmed in its analysis of the merits." The Commission asked the Court not to diverge from the analysis made in the Admissibility Report and to reject the preliminary objection filed by the State.

21. The **representatives** pointed out that “a careful reading of the Commission’s decision on admissibility reveals that it did not fail to consider the objection filed by the State or to include reasoned arguments on the obligation to exhaust domestic remedies and on the possible application of exceptions to this rule.” They indicated that the remedy of appeal referred to by the State was neither adequate nor effective in proceedings for rape and abuse of power because “it would not have protected [the presumed victim] in relation to the legal situation that was violated.” They stressed that “in Peru, there is no due process of law that guarantees access to effective remedies in cases such as that of Azul because the criminal definition of torture is inadequate and due to deficiencies in due process in the context of structural discrimination against the LGBTI community.”

## A.2 Considerations of the Court

22. The Court notes that there is no dispute that the petition in this case was lodged before the Commission on April 15, 2009, asserting that the domestic remedies had been exhausted and providing the relevant information. On June 5, 2013, the petition was forwarded to the State which sent its answering brief on March 24, 2014, in which it duly filed the objection of failure to exhaust domestic remedies for the reasons indicated.<sup>15</sup> Therefore, bearing in mind that it is not the task of either the Court or the Commission to identify *ex officio* which domestic remedies remain pending,<sup>16</sup> it is necessary to analyze whether the presumed victim exhausted the domestic remedies or whether one of the exceptions stipulated in Article 46 of the American Convention was applicable and, as appropriate, whether the State specified the remedies that remained to be exhausted and whether it proved that these were available and were adequate, suitable and effective.<sup>17</sup>

23. In this case, following the complaint filed by the presumed victim, an investigation into rape and abuse of authority was opened. On May 5, 2008, the presumed victim requested that the investigation be expanded to include torture, and this was rejected by the prosecution on June 16, 2008, indicating that there had not been criminal intent or evidence that the act had been committed for one of the purposes described in article 321 of the Criminal Code, which describes the elements that constitute torture.<sup>18</sup> The presumed victim appealed this decision, arguing that the presumed torture had been committed to punish her for her sexual orientation.<sup>19</sup> This appeal was declared without grounds by the prosecution on August 28,

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<sup>15</sup> The initial petition was forwarded to the State on June 5, 2013, granting it two months to presents its observations. The State asked for an extension on October 10, 2013, which the Commission denied. The State presented its observations on March 24, 2014. In this brief, the State indicated that the decision dismissing the case “could have been contested by the petitioner,” by the remedy of appeal. However, this remedy was filed belatedly, and was therefore declared inadmissible. *Cf.* Communication of the Commission addressed to the State of June 5, 2013 (evidence file, folio 887); the State’s request for an extension of October 10, 2013 (evidence file, folio 878); Communication of the Commission addressed to the State of October 18, 2013 (evidence file, folio 887), and the State’s report of March 24, 2014 (evidence file, folios 840 and 847).

<sup>16</sup> *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 23, and *Case of López et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2019. Series C No. 396, para. 22.

<sup>17</sup> *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, paras. 88 and 91, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 26.

<sup>18</sup> *Cf.* Request of Azul Rojas Marín filed before the Preliminary Investigation Judge of Ascope and Paiján on May 5, 2008 (evidence file, folios 2871 to 2873), and Public Prosecution Service. Second Provincial Corporate Criminal Prosecution Service of Ascope. Decision not to allow the expansion of the preliminary investigation of June 16, 2008 (evidence file, folios 2875 to 2878).

<sup>19</sup> *Cf.* Request of Azul Rojas Marín filed before the Second Provincial Corporate Criminal Prosecution Service of Ascope, of August 1 2008 (evidence file, folios 2880 to 2894).



2008, and, following the appeal presented by the presumed victim, the superior prosecutor confirmed that decision on October 15, 2008.<sup>20</sup>

24. Regarding the investigation into rape and abuse of authority, on January 9, 2009, the Ascope Criminal Judge of Preliminary Investigations of the Superior Court of Justice of La Libertad issued, at the request of the prosecution, an order to dismiss the proceedings.<sup>21</sup> The presumed victim, constituted as “civil actor” in the criminal proceedings, filed a time-barred remedy of appeal against this decision.<sup>22</sup>

25. This Court recalls that the State has an obligation to investigate, *ex officio*, acts of torture such as those alleged in the instant case.<sup>23</sup> To examine the proper exhaustion of domestic remedies, in each case it is necessary to evaluate whether the person concerned (or other persons or entities on his behalf) had the possibility – and exercised it – of enabling the State to settle the matter by its own means using available remedies.<sup>24</sup> The Court has also indicated that the obligation to exhaust domestic remedies does not signify the obligation to act as a special complainant or plaintiff in criminal proceedings.<sup>25</sup>

26. In this case, the presumed victim reported the facts, and this initiated the corresponding criminal investigation. The Court notes that the representatives and the Commission alleged various violations of due diligence in the investigation conducted in this case which led to the closure of the investigation owing to the dismissal of the case, and this allegedly resulted in the ineffectiveness of the remedies. An examination of these arguments involves an evaluation of the State’s actions in relation to its obligation to guarantee the rights recognized in the American Convention that are alleged to have been violated, and this is a matter that is closely related to the merits of the dispute.<sup>26</sup> Bearing in mind that the presumed victim reported the facts, which resulted in the State’s obligation to investigate them, *ex officio*, as well as the alleged violations of due process, the Court finds that the alleged failure to exhaust domestic remedies is inextricably linked to the examination of due diligence in the criminal investigation. Therefore, it is a matter that must be examined when analyzing the merits of the dispute. Consequently, this preliminary objection is rejected.

## **B. The subsidiary nature of the inter-American system**

### **B.1 Arguments of the parties and of the Commission**

27. The **State** argued that, in light of the recommendations made by the Commission in the Merits Report, a new investigation into the facts had been opened and, therefore, “there was

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<sup>20</sup> Cf. Public Prosecution Service. First Superior Criminal Prosecutor of La Libertad Judicial District . Decision of August 28, 2008 (evidence file, folios 2911 to 2912), and Public Prosecution Service. First Superior Criminal Prosecutor of La Libertad Judicial District . Decision of October 15, 2008 (evidence file, folio 636).

<sup>21</sup> Cf. Ascope First Preliminary Investigation Court. La Libertad Superior Court of Justice. Order to dismiss the proceedings of January 9, 2009 (evidence file, folios 22 to 28).

<sup>22</sup> Cf. Remedy of appeal filed by Azul Rojas Marín on January 22, 2009 (evidence file, folios 154 to 159).

<sup>23</sup> Cf. *Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 159, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of January 27, 2020. Series C No. 398, para. 151.

<sup>24</sup> Cf. *Case of Galindo Cárdenas et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of October 2, 2015. Series C No. 301, para. 41.

<sup>25</sup> *Mutatis mutandis, Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of August 12, 2008. Series C No. 186, para. 16.

<sup>26</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 96, and *Case of Jenkins v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 26, 2019. Series C No. 397, para. 23.

a real possibility that the State could respond to the presumed human right violations alleged by Azul Rojas Marín." Pursuant to the principle of subsidiarity, the State argued that it "should not be found internationally responsible while a process to address the violations alleged by the presumed victim was underway." **The Commission** pointed out that "in order for the Court, when examining the merits, not to declare the State's responsibility based on an argument of complementarity, the State must recognize the internationally wrongful act and assess whether this has ceased and whether it has made full reparation for the consequences of the measure or situation that constituted it." The Commission argued that the elements that would indicate the admissibility of the argument of complementarity did not exist in this case, and therefore asked the Court to reject the preliminary objection. The **representatives** argued that: "(i) the State has based itself on an erroneous interpretation of the principle of subsidiarity, and (ii) the State had already had the opportunity to investigate the facts and punish those who were responsible, but did not do so."

## **B.2 Considerations of the Court**

28. Owing to the complementary nature of the inter-American system, the Court has considered it pertinent not to declare the responsibility of the State if, when hearing the case, the State has put an end to the violation and redressed the consequences of the measure or situation that constituted it.<sup>27</sup> In this case, the State has opened a new investigation into the facts. However, the Court notes that, in the context of this new investigation, it was decided not to annul the dismissal that had been ordered, and the rights that were presumably violated have not been redressed. Therefore, the conditions required in order not to examine State responsibility have not been met.

29. Consequently, the Court declares the preliminary objection filed by the State inadmissible.

## **C. Preliminary objection of "fourth instance"**

### **C.1 Arguments of the parties and of the Commission**

30. The **State** argued that the Commission had acted as "a court of fourth instance when classifying the sexual violence suffered by Azul Rojas Marín as torture in its Merits Report, because this classification corresponds to the domestic authorities." It therefore asked the Court to conduct a control of the legality of the Commission's action. The **Commission** argued that "the Peruvian State has not proved that the minimum assumptions exist for [executing a possible control of the legality of its actions]." The **representatives** clarified that it was not asking the Court to review the ruling of a domestic court; rather they were arguing that a series of acts and omissions of the Peruvian State constituted violations of the rights contained in the Convention.

### **C.2 Considerations of the Court**

31. The Court has established that, when assessing compliance with certain international obligations, there may be an intrinsic interrelationship between the analysis of international law and domestic law. Therefore, the determination of whether or not the actions of judicial

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<sup>27</sup> Cf., *mutatis mutandis*, *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations*. Judgment of November 30, 2012. Series C No. 259, para. 171; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2016. Series C No. 310, para. 137, and *Case of Colindres Schonenberg v. El Salvador. Merits, reparations and costs*. Judgment of February 4, 2019. Series C No. 373, para. 75.

organs constitute a violation of the State's international obligations may result in the Court having to examine the respective domestic proceedings to establish their compatibility with the American Convention.<sup>28</sup> However, the Court has established that it does not have competence to rule on domestic judicial decisions if it has not been verified that they have violated due process and if they are not manifestly arbitrary or unreasonable. Thus, although this Court is not a fourth instance of judicial review and does not examine the assessment of the evidence made by the domestic judges, it does have competence, exceptionally, to decide on the content of judicial decisions that contravene the American Convention in an arbitrary manner.<sup>29</sup>

32. The Court considers that the determination of whether the alleged facts can be classified as torture does not represent a review of the decisions of the domestic courts. To the contrary, this determination falls within the competence of the organs of the inter-American system when establishing whether there has been a violation of the American Convention and, if appropriate, of the Inter-American Convention to Prevent and Punish Torture.

33. Accordingly, the Court declares the preliminary objection filed by the State inadmissible.

## V EVIDENCE

### **A. Admissibility of the documentary evidence**

34. The Court received diverse documents presented as evidence by the Commission, the representatives and the State, as well as those requested by the Court or its President as helpful evidence and, as in other cases, it admits them in the understanding that they were presented at the proper procedural opportunity (Article 57 of the Rules of Procedure)<sup>30</sup> and their admissibility was neither contested nor challenged.

35. The **Commission** indicated that annexes 1,<sup>31</sup> 3<sup>32</sup> and 4<sup>33</sup> provided by the State with its final written arguments "refer to information that was available when the State presented its answering brief and were not requested by the Court." The **representatives** indicated

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<sup>28</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 222, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 33.

<sup>29</sup> Cf. *Case of Rico v. Argentina. Preliminary objection and Merits*. Judgment of September 2, 2019. Series C No. 383, para. 82, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 33.

<sup>30</sup> In general and pursuant to 57(2) of the Rules of Procedure, documentary evidence may be presented with the briefs submitting the case or with pleadings and motions or in the answering brief, as applicable, and evidence provided outside these procedural opportunities is not admissible, unless this is pursuant to the exceptions established in Article 57(2) of the Rules of Procedure (namely, *force majeure* or grave impediment) or if it relates to a supervening fact, in other words one that has occurred following the said procedural occasions. Cf. *Case of the Barrios Family v. Venezuela. Merits, reparations and costs*. Judgment of November 24, 2011. Series C No. 237, paras. 17 and 18, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 42.

<sup>31</sup> Annex 1 corresponds to the document entitled "Report on six (6) training courses on human rights for the Peruvian National Police, offered between May 2015 and September 2018."

<sup>32</sup> Annex 3 corresponds to the document entitled "Administrative Decision No. 090-2016-CE-PJ, of April 7, 2016, adopting the "National Plan for Access to Justice by Persons in a Vulnerable Situation - Judiciary of Peru 2016-2021."

<sup>33</sup> Annex 4 corresponds to the document entitled "Administrative Decision No. 087-2019-CE-PJ, of February 20, 2019, adopting "The incorporation of a gender approach into the management tools of the Judiciary."

that, in annexes 1, 3, 4, 5,<sup>34</sup> 6<sup>35</sup> and 7,<sup>36</sup> the “State seeks to introduce evidence that is not supervening outside the proper procedural occasion.” They also indicated that annexes 2<sup>37</sup> and 4, “are unrelated to the arguments made by the IACHR or the victims’ representatives.” Regarding the documents presented by the State together with its final arguments, the Court notes that they respond to the request made by the Court during the public hearing under Article 58(b) of the Rules of Procedure, and therefore considers it appropriate to admit them.

36. The **State** indicated that most of the expenses included by the representatives “were inadmissible owing to late submission of the documentary support.”

37. The Court notes that the representatives presented vouchers for costs and expenses incurred prior to the presentation of the pleadings and motions brief with their final written arguments. The Court considers that, pursuant to Article 40(b) of the Rules of Procedure, this offer of evidence is time-barred and, consequently, when calculating the costs and expenses, it will not take it into consideration any voucher dated prior to the presentation of the pleadings and motions brief on December 11, 2018.

38. Lastly, the State contested the admissibility of the facts and evidence presented by the representatives on May 24, 2019, on the current situation of the presumed victim. The Court notes that these facts do not form part of the purpose of the case and are, therefore, not admissible.

#### **B. Admissibility of the testimonial and expert evidence**

39. The Court finds it pertinent to admit the statements made by affidavit<sup>38</sup> and at the public hearing,<sup>39</sup> insofar as they are in keeping with the purpose defined by the President in the order requiring them and the purpose of this case.

40. The **representatives** argued that the questions sent to the deponents offered by the State were disregarded or unanswered. They indicated that: (i) expert witness Víctor Manuel Cubas Villanueva failed to address the only question posed to him; (ii) while expert witness Moisés Valdemar Ponce Malaver did address the questions posed, he indicated that he did not have the information requested even though, in his expert opinion, he referred to the training courses that he was asked about, and (iii) expert witness Luís Alberto Naldos Blanco indicated that the question fell outside the purpose of his expert opinion, even though it was within this purpose and the expert witness referred to this aspect in the text of his expert opinion; also

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<sup>34</sup> Annex 5 corresponds to the document entitled “Legislative Decree No.1267, published in the official gazette *El Peruano* on December 16, 2016, adopting the Law of the Peruvian National Police.”

<sup>35</sup> Annex 6 corresponds to the document entitled “Decision of the Executive Directorate No.017-2016-MIMP-PNCVFS-DE, of March 31, 2016, adopting the “Guidelines for the care of LGTBI persons in the services of the PNCVFS of the MIMP,”

<sup>36</sup> Annex 7 corresponds to the document entitled “Ministerial Decision No.157-2016-MIMP, of July 22, 2016, adopting the “Manual on comprehensive care of the women’s emergency centers.”

<sup>37</sup> Annex 2 corresponds to the document entitled “Report of planned academic activities for 2019 by the Academy of the Judiciary on “issues of gender, violence and people trafficking.”

<sup>38</sup> Cf. Affidavit of Juan Ernesto Méndez of August 1, 2019 (evidence file, folios 3395 to 3414); affidavit of Nora Sveaass of August 5, 2019 (evidence file, folios 3414 to 3429); affidavit of Roger Mauricio Noguera Rojas of August 12, 2019 (evidence file, folios 3431 to 3446); affidavit of Moisés Valdemar Ponce Malaver of August 12, 2019 (evidence file, folios 3448 to 3462); affidavit of Luis Alberto Naldos Blanco of August 9, 2019 (evidence file, folios 3463 to 3481); affidavit of Victor Manuel Cubas Villanueva of August 12, 2019 (evidence file, folios 3482 to 3519), and affidavit of Nancy Rosalina Tolentino Gamarra of August 12, 2019 (evidence file, folios 3543 to 3571).

<sup>39</sup> Cf. Statement made by Víctor Manuel Álvarez at the public hearing held in this case; statement made by Ketty Garibay Mascco at the public hearing held in this case, and statement made by María Mercedes Gómez at the public hearing held in this case.

the answer was given in the plural and it was not clear whether the expert witness was answering the question directly. They therefore asked the Court to take these comments into account when assessing this evidence.

41. First, the Court notes that expert witness Cubas Villanueva did not explicitly answer the only question posed by the representatives, and reiterates the duty of the party that offers a statement to take the necessary steps to forward the questions to the deponents and to ensure that they provide the respective answers.<sup>40</sup> Nevertheless, the Court considers that the failure to answer the questions of the other party does not affect the admissibility of a statement and is an aspect that, according to the scope of a deponent's silence, may have an impact on the probative value of the statement or expert opinion, an aspect that will be assessed when examining the merits of the case.<sup>41</sup> Second, the Court notes that the comments made by the representatives on the expert opinions of Messrs. Ponce Malaver and Naldos Blanco relate to their content and probative value, but not to their admissibility.

42. Consequently, the Court finds it pertinent to admit the expert opinions of Víctor Manuel Cubas Villanueva, Moisés Valdemar Ponce Malaver and Luis Alberto Naldos Blanco offered by Peru, insofar as they are in keeping with their purpose, bearing in mind the relevant comments of the representatives when assessing their probative value.

43. The State made several comments on the statement by Víctor Álvarez. First, it indicated that the fact that Mr. Álvarez had been summoned to make his statement at the public hearing – in the order amending the order calling the public hearing – infringed the principle of the “equality of arms” and the Peruvian State's right of defense. It pointed out that, as of July 30, 2019, the representatives, and consequently the witness, were aware of the questions that the Peruvian State wished to ask him and, therefore, knew part of the Peruvian State's strategy with 28 days' advance notice.

44. Regarding the State's comment, the Court recalls that, at the proper procedural moment, it was advised that, it could pose other questions to the witness at the public hearing. Consequently, the Court does not find that the Peruvian State's defense was affected. Regarding the other comments made by the State, the Court will take them into account when assessing their probative value.

## **VI FACTS**

45. This case refers to the detention and alleged torture of Azul Rojas Marín. Based on the arguments submitted by the parties and the Commission, the Court will describe the main facts of the case in the following order: (a) the situation of the LGBTI population in Peru; (b) the detention and alleged torture of Azul Rojas Marín; (c) the investigation of the facts; (d) the complaint filed against the Ascope Prosecution Service; (e) the disciplinary administrative proceeding instituted against the members of the Peruvian National Police, and (f) the second investigation of the facts.

### **A. Situation of the LGBTI population in Peru**

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<sup>40</sup> Cf. *Case of Cantoral Benavides v. Peru. Preliminary objections*. Judgment of September 3, 1998. Series C No. 40, para. 30, and *Case of Galindo Cárdenas et al. v. Peru. Preliminary objections, merits, reparations and costs, supra*, para. 89.

<sup>41</sup> Cf. *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. 56, and *Case of Galindo Cárdenas et al. v. Peru. Preliminary objections, merits, reparations and costs, supra*, para. 89.

46. Since 2008, in different resolutions, the OAS General Assembly has stated that LGBTI persons are subject to various forms of violence and discrimination in the region based on the perception of their sexual orientation, gender identity or expression and [has] resolved to condemn all forms of discrimination, acts of violence, and human rights violations on the basis of sexual orientation and gender identity or expression.<sup>42</sup>

47. Up until 2017, the Peruvian State had no statistical information on the LGBTI population. That year, the National Institute of Statistics and Informatics conducted the "First virtual survey of LGBTI persons," to enable "the public authorities and civil society to implement policies, actions and strategies that guarantee their recognition and protection in different public and private spheres."<sup>43</sup> According to this survey of LGBTI persons, 62.7% indicated that they had been victims of violence or discrimination, and 17.7% that they had been victims of sexual violence.<sup>44</sup> Only 4.4% of all those who had been attacked or discriminated against had reported the fact to the authorities and, of these, 27.5% indicated that they had been treated badly and 24.4% that they had been treated very badly in the place where they had filed a complaint.<sup>45</sup>

48. These statistics reveal that the violence against the LGBTI community in Peru receives very little visibility. Given the structural nature and persistence of this phenomenon, it is pertinent to use subsequent information to establish the context in which the facts of this case occurred.

49. Significant prejudice exists against the LGBTI population in Peru. The survey conducted by the National Institute of Statistics and Informatics determined that "56.5% of the LGBTI population are afraid to express their sexual orientation and/or gender identity, the main reason being the fear of discrimination and/or aggression (72%)."<sup>46</sup> According to information cited by the Peruvian Ombudsman, "45% of those [surveyed by the Ministry of Justice and Human Rights in 2013] consider that LGBTI people should not teach in schools and 59% that they should not have the right to a civil marriage."<sup>47</sup> According to data from the 2001 World Values Survey, 64.4% of those surveyed considered that "homosexuality was never justified" and 49.2% indicated that

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<sup>42</sup> Cf. OAS, Resolutions of the General Assembly: AG/RES. 2928 (XLVIII-O/18), Human rights and prevention of discrimination and violence against LGBTI persons, adopted at the fourth plenary session held on June 5, 2018; AG/RES. 2908 (XLVII-O/17), Human rights, sexual orientation and gender identity and expression, June 21, 2017; AG/RES. 2887 (XLVI-O/16), Human rights, sexual orientation and gender identity and expression, June 14, 2016; AG/RES. 2863 (XLIV-O/14), Human rights, sexual orientation and gender identity and expression, June 5, 2014; AG/RES. 2807 (XLIII-O/13), Human rights, sexual orientation and gender identity and expression, June 6, 2013; AG/RES. 2721 (XLII-O/12), Human rights, sexual orientation and gender identity, June 4, 2012; AG/RES. 2653 (XLI-O/11), Human rights, sexual orientation and gender identity, June 7, 2011; AG/RES. 2600 (XL-O/10), Human rights, sexual orientation and gender identity, June 8, 2010; AG/RES. 2504 (XXXIX-O/09), Human rights, sexual orientation and gender identity, June 4, 2009, and AG/RES. 2435 (XXXVIII-O/08), Human rights, sexual orientation and gender identity, June 3, 2008.

<sup>43</sup> Cf. National Institute of Statistics and Informatics, First virtual survey of LGBTI persons, 2017, p. 5. Available at: <https://www.inei.gob.pe/media/MenuRecursivo/boletines/lgbti.pdf>

<sup>44</sup> Cf. National Institute of Statistics and Informatics, First virtual survey of LGBTI persons, 2017, pp. 22 and 23. Available at: <https://www.inei.gob.pe/media/MenuRecursivo/boletines/lgbti.pdf>

<sup>45</sup> Cf. National Institute of Statistics and Informatics, First virtual survey of LGBTI persons, 2017, p. 25. Available at: <https://www.inei.gob.pe/media/MenuRecursivo/boletines/lgbti.pdf>

<sup>46</sup> Cf. National Institute of Statistics and Informatics, First virtual survey of LGBTI persons, 2017, p. 20. Available at: <https://www.inei.gob.pe/media/MenuRecursivo/boletines/lgbti.pdf>

<sup>47</sup> Peruvian Ombudsman, *Derechos humanos de las personas LGBTI: Necesidad de una política pública para la igualdad en Perú*, pp. 16 and 17. Available at: <https://defensoria.gob.pe/modules/Downloads/informes/defensoriales/Informe-175--Derechos-humanos-de-personas-LGBTI.pdf>

the neighbor they would least like to have was a homosexual neighbor;<sup>48</sup> in 2012, these percentages decreased to 41.8% and 44%, respectively.<sup>49</sup> In this regard, local governments in Peru include in their public safety plans the “eradication of homosexuals,” which consists in eliminating them from local territory.<sup>50</sup>

50. Regarding acts of violence, in its Concluding observations on the combined fifth and sixth periodic reports of Peru, which include 2008 among the years reported, the Committee against Torture indicated that:

The Committee is seriously concerned at reports of harassment and violent attacks, some of which have resulted in deaths, against the LGBT community by members of the national police, armed forces, municipal security patrols (*serenos*) and prison officials and at arbitrary detention and physical abuse in police stations with denial of fundamental legal safeguards (arts. 2, 11, 12, 13 and 16).

The State party should take effective measures to protect the LGBT community from attacks, abuse and arbitrary detention and ensure that all acts of violence are promptly, effectively and impartially investigated and prosecuted, perpetrators brought to justice and victims provided with redress.<sup>51</sup>

51. In sum, the Court concludes that strong prejudices against the LGBTI population existed and continue to exist in Peruvian society and, in some cases, this results in violence. The Court notes that 62.7% of LGBTI people surveyed indicated that they had been victims of violence or discrimination, and 17.7% victims of sexual violence. At times, this violence is committed by state agents, including members of the national police, and the municipal security service (*serenazgo*), as it is alleged occurred in this case.

### **B. Detention of Azul Rojas Marín and alleged torture**

52. Azul Rojas Marín was born on November 30, 1981.<sup>52</sup> She raised pigs for a living.<sup>53</sup> At the time of her detention on February 25, 2008, she identified as a gay man.<sup>54</sup> Currently, she identifies as a woman and uses the name Azul.

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<sup>48</sup> Instituto de Opinión Pública, *Actitudes hacia la homosexualidad en Perú*, February 2015, pp. 18 and 19, citing the World Values Survey. Available at: <http://repositorio.pucp.edu.pe/index/bitstream/handle/123456789/47040/Cuadernos%20de%20investigaci%C3%B3n%2011.pdf?sequence=4>

<sup>49</sup> Instituto de Opinión Pública, *Actitudes hacia la homosexualidad en Perú*, February 2015, pp. 20 and 21, citing the World Values Survey. Available at: <http://repositorio.pucp.edu.pe/index/bitstream/handle/123456789/47040/Cuadernos%20de%20investigaci%C3%B3n%2011.pdf?sequence=4>

<sup>50</sup> Peruvian Ombudsman, *Derechos humanos de personas LGBTI: Necesidad de una política pública para la igualdad en Perú*, p. 17. Available at: <https://defensoria.gob.pe/modules/Downloads/informes/defensoriales/Informe-175--Derechos-humanos-de-personas-LGBTI.pdf>

<sup>51</sup> Committee against Torture, Concluding observations on the combined fifth and sixth periodic reports of Peru, adopted by the Committee at its forty-ninth session, January 21, 2013, CAT/C/PER/CO/5-6, para. 22 (evidence file, folio 4959).

<sup>52</sup> Cf. National identity document (evidence file, folio 2172). This identity document contains the name given to the presumed victim at birth. However, the Court notes that she identifies herself as a transgender woman. Consequently, the Court will refer to her as Azul Rojas Marín, as this is the name she uses and is identified by.

<sup>53</sup> Cf. La Libertad Superior Court of Justice, Ascope First Preliminary Investigation Court. Order to dismiss the proceedings of January 9, 2009 (evidence file, folio 28); Public Prosecution Service. Institute of Forensic Medicine. Ascope Forensic Medicine Division. Psychological expertise protocol (evidence file, folio 3), and Statement of witness Víctor Álvarez at the public hearing on August 27, 2019.

<sup>54</sup> Cf. Public Prosecution Service. Institute of Forensic Medicine. Ascope Forensic Medicine Division. Psychological expertise protocol (evidence file, folio 3), and Request presented by Azul Rojas Marín on August 1, 2008 (evidence file, 2277).

53. The Court notes that the dispute centers on the way in which the said detention was carried out, the reasons for it, and what happened at the Police Station. The representatives and the Commission argue that the presumed victim was detained by state agents in an unlawful, arbitrary and discriminatory manner. They also allege that she was subjected to serious acts of physical and mental violence, including rape, using particular brutality, owing to the identification or perception of Azul as a gay man at that time. Meanwhile, the State bases its defense on the argument that the presumed victim was detained for identification purposes, which is permitted by Peruvian law. In addition, it argued that it is the prerogative of the State to classify the facts and the prosecutor considered that they did not constitute torture pursuant to the legal definition of that crime at the time of the facts.

54. The Court will examine the different versions of what happened below in order to determine which of the alleged violations it considers have been proved (*infra* paras. 145 to 157).

### **C. Investigation of the facts**

55. According to the presumed victim, on February 25, 2008, she tried to report what had happened at the Casa Grande Police Station, but her complaint was not received.<sup>55</sup> The state agents deny that the presumed victim went to the Police Station to file a complaint on February 25.<sup>56</sup> That same day, she reported the facts to the media.<sup>57</sup>

56. On February 27, 2008, Azul Rojas Marín filed a complaint with the police station of the Peruvian National Police in Casa Grande, describing the acts of violence to which she had been subjected at the time of her detention.<sup>58</sup> At that time, Azul Rojas Marín identified three agents of the National Police and one agent of the *serenazgo* who had attacked her.<sup>59</sup> Azul Rojas Marín made a second statement about the facts on February 28, 2008, ratifying her previous description and adding that she was raped while she was detained.<sup>60</sup>

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<sup>55</sup> In her first statement, the presumed victim indicated that a police agent had refused to receive it because "the major had told him that he could not receive the complaint at the police station." Subsequently, when expanding her statement, she indicated that it was not received "because the major was not there." *Cf.* Statement made by Azul Rojas Marín before the Second Provincial Corporate Criminal Prosecution Service of Ascope on February 28, 2008 (evidence file, folios 2811 and 2812), and Statement made by Azul Rojas Marín before the investigating officer on March 6, 2008 (evidence file, folio 2213).

<sup>56</sup> In particular, the police major denied that he had given an order not to receive the presumed victim's complaint. DPP, another police agent, indicated that he was unaware of whether the presumed victim had filed a complaint, "but if she had, the agent on duty would have informed me that she wanted to file a complaint because I am in charge of investigations." Lastly, the police agent who had supposedly refused to receive the complaint indicated that Ms. Rojas Marín did not go to the Police State to file a complaint on either February 25 or 26, 2008. He also maintained that it was false that he told her that he would not receive the complaint. *Cf.* Statement by the major of the Peruvian National Police before the Second Provincial Corporate Criminal Prosecution Service of Ascope on April 18, 2008 (evidence file, folio 2785); Statement by DPP of March 8, 2008 (evidence file, folio 42), and Statement by JVP of April 22, 2008 (evidence file, folio 2781).

<sup>57</sup> *Cf.* Statement by an employee of Radio Ozono (evidence file, folio 2829); Statement by an employee of Cable Times channel (evidence file, folio 2915), and Press release published in the newspaper "Nuevo Norte" on February 27, 2008, entitled "Denuncia a serenazgo y a Policía por abuso de autoridad" [*Serenazgo* and police accused of abuse of authority] (evidence file, folio 2788).

<sup>58</sup> *Cf.* Oral report by Azul Rojas Marín on February 27, 2008 (evidence file, folio 2793).

<sup>59</sup> The Court will use the initials LQC, JLM and DPP to refer to the police agents identified in the complaint and the initials FFR to refer to the *serenazgo* agent. *Cf.* Identification procedure of February 27, 2008 (evidence file, folio 54).

<sup>60</sup> *Cf.* Statement made by Azul Rojas Marín before the Second Provincial Corporate Criminal Prosecution Service of Ascope on February 28, 2008 (evidence file, folio 2811).



57. On February 29, 2008, Ms. Rojas Marín underwent a forensic medical examination and a psychological assessment.<sup>61</sup> The medical examination determined that the presumed victim had: (i) recent extragenital traumatic injuries caused by someone else with a blunt instrument, and (ii) older anal fissures “with signs of a recent unnatural sexual act.”<sup>62</sup> While, the psychological assessment concluded that: (i) the presumed victim required psychotherapeutic support, and (ii) suggested that the presumed aggressors should undergo forensic psychological evaluation.<sup>63</sup>

58. On March 6, 2008, Ms. Rojas Marín made another statement at the Casa Grande Police Station.<sup>64</sup> On that occasion, she clarified that the complaint filed was for “rape and other violations,” and again described what had happened.<sup>65</sup>

59. On March 24, 2008, the prosecutor decided to open a preliminary investigation against the police agents of the Casa Grande Police Station for the offense “against sexual liberty by rape,” against Azul Rojas Marín.<sup>66</sup>

60. On March 31, 2008, the police authorities of the Casa Grande Police Station issued a report indicating that the different complaints made by the presumed victim contained contradictions because she had told the media that, at the Police State, “they took her mobile telephone and wallet, without mentioning a sum of money,” while in the complaint, she described the type of mobile telephone and that the wallet contained 150 soles. In addition, on one occasion, she had stressed that “a police agent tried to forcibly introduce a rubber baton in the anus,”<sup>67</sup> and in another statement she indicated that one of the police agents “forcibly introduced the rubber baton.”<sup>68</sup> The report indicated that, from the foregoing, “it is presumed that the complainant [...] injured [her]self in order to cause anal injuries, merely to harm the police agent who arrested [her] and the police agents who took [her] to task for behaving disrespectfully inside [the] police station where [s]he remained [...] [for four] hours.”<sup>69</sup> They also mentioned that it should be taken into account that one of the agents presumably involved “was in charge of police investigations relating to [Ms. Rojas Marín’s brothers] who were implicated in [a] murder.”<sup>70</sup>

61. On April 2, 2008, the prosecutor ordered the opening of the preliminary investigation for “the offense against sexual liberty by aggravated rape” and abuse of authority against the three police officers indicated by the presumed victim, considering that there were “indications

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<sup>61</sup> Cf. Forensic medical certificate of February 29, 2008 (evidence file, folio 2193), and protocol of psychological expertise conducted by the Ascope Forensic Medicine Division of the Institute of Forensic Medicine of the Public Prosecution Service on February 29, 2008 and March 4, 2008 (evidence file, folio 2).

<sup>62</sup> Cf. Forensic medical certificate of February 29, 2008 (evidence file, folio 2193).

<sup>63</sup> Cf. Protocol of the psychological expertise conducted by the Ascope Forensic Medicine Division of the Institute of Forensic Medicine of the Public Prosecution Service on February 29, 2008 and March 4, 2008 (evidence file, folio 2).

<sup>64</sup> Cf. Statement made by Azul Rojas Marín before the investigating officer on March 6, 2008 (evidence file, folios 69 to 75).

<sup>65</sup> Cf. Statement made by Azul Rojas Marín before the investigating officer on March 6, 2008 (evidence file, folio 69).

<sup>66</sup> Cf. Order for a preliminary investigation issued by the Second Provincial Corporate Criminal Prosecution Service of Ascope on March 24, 2008 (evidence file, folio 81).

<sup>67</sup> Cf. Police report of the Casa Grande Police Station of March 31, 2008 (evidence file, folio 15).

<sup>68</sup> Cf. Police report of the Casa Grande Police Station of March 31, 2008 (evidence file, folio 15).

<sup>69</sup> Cf. Police report of the Casa Grande Police Station of March 31, 2008 (evidence file, folio 16).

<sup>70</sup> Cf. Police report of the Casa Grande Police Station of March 31, 2008 (evidence file, folio 16).

that revealed the perpetration of the unlawful acts investigated.<sup>71</sup> The prosecutor also ordered that the Ascope preliminary investigation judge be informed of this preliminary investigation,<sup>72</sup> requesting him to order the preventive detention of the accused.<sup>73</sup>

62. During the investigation, the following procedures were conducted: a forensic biology expertise on the clothes that the presumed victim was wearing when she was detained;<sup>74</sup> an expert assessment of the police baton presumably used;<sup>75</sup> a test to determine the presumed victim's blood group;<sup>76</sup> a psychiatric assessment of Ms. Rojas Marín;<sup>77</sup> a psychiatric assessment of the three agents presumably responsible,<sup>78</sup> and a judicial inspection and reconstruction procedure.<sup>79</sup> Also, various statements were received, including from the four individuals presumably involved.<sup>80</sup>

63. On May 5, 2008, Ms. Rojas Marín requested "the expansion of the complaint and of the investigation into the crime of torture" pursuant to article 321 of the Peruvian Criminal Code and "[clarification of the] offense of rape [...] in order to define the offense appropriately and avoid future nullifications." She also requested the "disqualification of the representative of the Public Prosecution Service" because he was a colleague of the Ascope provincial prosecutors who were subject to a disciplinary administrative proceeding (*infra* paras. 68 to 71).<sup>81</sup>

64. On June 16, 2008, the prosecutor decided not to expand the preliminary investigation to include the crime of torture.<sup>82</sup> Ms. Rojas Marín appealed this refusal.<sup>83</sup> On August 28, 2008, the First Superior Criminal Prosecutor of La Libertad Judicial District declared the appeal without grounds, indicating that the element of the crime of torture relating to its purpose was not present.<sup>84</sup>

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<sup>71</sup> Cf. Decision of the Second Provincial Corporate Criminal Prosecution Service of Ascope of April 2, 2008 (evidence file, folio 110).

<sup>72</sup> Cf. Decision of the Second Provincial Corporate Criminal Prosecution Service of Ascope of April 2, 2008 (evidence file, folio 111).

<sup>73</sup> Cf. Decision of the Second Provincial Corporate Criminal Prosecution Service of Ascope of April 2, 2008 (evidence file, folio 112). They were confined in the Trujillo Prison on May 1, 2008, and released on May 5, 2008. Cf. Official note of May 5, 2008 (evidence file, folios 2847 to 2848).

<sup>74</sup> Cf. Expert report of March 12, 2008 (evidence file, folio 2236).

<sup>75</sup> Cf. Expert report of March 2008 (evidence file, folio 104).

<sup>76</sup> Cf. Expert report of March 11, 2008 (evidence file, folio 2238).

<sup>77</sup> Cf. Psychiatric assessment of August 13, 2008 (evidence file, folio 2733).

<sup>78</sup> Cf. Psychiatric assessment of May 23 and 26, 2008 (evidence file, folios 2857 to 2862); Psychiatric assessment of May 30, 2008 (evidence file folios 2850 to 2855), and Psychiatric assessment of August 19, 2008 (evidence file, folios 2864 to 2869).

<sup>79</sup> Cf. Videos 1 and 2 of the inspection and reconstruction procedure on August 15, 2008 (evidence file, folder of audiovisual material, "Annex 50" and "Annex 51") and Record of inspection and reconstruction procedure on August 15, 2008 (evidence file, folios 2896 to 2909).

<sup>80</sup> Cf. Police report of the Casa Grande Police Station of March 31, 2008 (evidence file, folio 14).

<sup>81</sup> Cf. Request filed by Azul Rojas Marín on May 5, 2008 (evidence file, folios 115, 116 and 117).

<sup>82</sup> Cf. Decision of the Second Provincial Corporate Criminal Prosecution Service of Ascope of June 16, 2008 (evidence file, folio 122).

<sup>83</sup> Cf. Request filed by Azul Rojas Marín with the Second Provincial Corporate Criminal Prosecution Service on August 1, 2008 (evidence file, folio 138).

<sup>84</sup> Cf. Decision of the First Superior Criminal Prosecutor of La Libertad Judicial District of August 28, 2008 (evidence file, folio 2912).

65. On October 21, 2008, the Second Provincial Corporate Criminal Prosecution Service requested the dismissal of the proceedings against the three police officers for the offenses of aggravated rape and abuse of authority to the detriment of Azul Rojas Marín.<sup>85</sup>

66. On January 9, 2009, the Ascope First Preliminary Investigation Court “declared the request of the Public Prosecution Service was substantiated” and “dismissed the proceedings for both offenses against the three accused,” ordering that the case be closed.<sup>86</sup> The court indicated that the presumed victim’s version was not credible because one of the accused was an important witness in the criminal proceedings underway against one of her brothers. It also indicated that the aggrieved party had varied her statement about the facts, and underscored that she had stated that she had continued her usual work on February 25, “activities for which she had to employ significant physical force and use motor-cycle taxis,” and she could not have done this if she had been as sore as she described after the supposed sexual abuse.<sup>87</sup> The court also indicated that “the facts occurred in the early morning hours of February [25 ... and] the forensic medical examination of the aggrieved party and [the examination of the clothing were performed on February 29], in other words almost four days after the events. This lack of immediacy in performing the said expert examinations gives rise to a reasonable doubt that [the injuries found] were caused on the day of the incident and by the accused, and it could be presumed that they occurred after the day of the incident.”<sup>88</sup>

67. On January 22, 2009, Ms. Rojas Marín filed a remedy of appeal against this decision.<sup>89</sup> On January 23, 2009, the Ascope First Preliminary Investigation Court unhesitatingly declared this inadmissible as being time-barred.<sup>90</sup>

#### ***D. The complaint filed against the Ascope Prosecution Service***

68. In parallel to the investigation process, Ms. Rojas Marín filed a complaint with the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad and Santa against the Prosecutor and Deputy Prosecutor of the province of Ascope in charge of the preliminary investigation into the acts of sexual violence perpetrated against her.<sup>91</sup> Ms. Rojas Marín alleged that the said prosecutors had committed the offenses of “abuse of authority, coercion [and] delay in the administration of justice.”<sup>92</sup> Among other arguments, she alleged that this was because “the Prosecutor [...], abusing of her position, prevented the petitioner from undergoing [the] forensic medical examination on [February 28, 2008,] by

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<sup>85</sup> Cf. Request for dismissal by the Second Provincial Corporate Criminal Prosecution Service of Ascope of October 21, 2008 (evidence file, folio 83).

<sup>86</sup> Cf. Order to dismiss the proceedings dated January 9, 2009, issued by the Ascope First Preliminary Investigation Court (evidence file, folios 2954 to 2969).

<sup>87</sup> Cf. Order to dismiss the proceedings dated January 9, 2009, issued by the Ascope First Preliminary Investigation Court (evidence file, folio 2960).

<sup>88</sup> Cf. Order to dismiss the proceedings dated January 9, 2009, issued by the Ascope First Preliminary Investigation Court (evidence file, folio 2962).

<sup>89</sup> Cf. Remedy of appeal filed by Azul Rojas Marín on January 22, 2009 (evidence file, folios 154 to 159).

<sup>90</sup> Cf. Decision of the Ascope First Preliminary Investigation Court of January 23, 2009 (evidence file, folios 3003 and 3004).

<sup>91</sup> Cf. Complaint filed by Azul Rojas Marín before the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad on March 28, 2008 (evidence file, folios 2248 to 2254).

<sup>92</sup> Cf. Complaint filed by Azul Rojas Marín before the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad on March 28, 2008 (evidence file, folio 2248).

retaining [her] in her office until late [...] so that the injuries and the traces of rape would not be noticeable.”<sup>93</sup>

69. Ms. Rojas Marín also stated that, during the “statement and identification” procedure, the prosecutor “coerced [her] to minimize the severity of the criminal acts committed by the accused and [...] on several occasions cast doubts on [her] complaint, saying: “I don’t believe anything; you’re probably lying because you are Tuco’s brother.”<sup>94</sup> Regarding the deputy prosecutor, Ms. Rojas Marín stated that “the prosecutor’s words [made her] feel humiliated [and] attacked because he very openly cast doubt on [her] words, as if it were not a serious offense.”<sup>95</sup> Also, “when reclaiming the clothing [she] was wearing on February 25, [the prosecutor] insinuated that, perhaps the clothes were stained with animal’s blood and, therefore, it was necessary to examine them.”<sup>96</sup> In addition, on February 29, while the forensic physician was examining her, the prosecutor entered the room, violently grabbed her hair and said “perhaps your little friends did this to you while you were playing” and, also, insisted to the physician that, although injuries were present, they were not the result of rape.<sup>97</sup> Lastly, Ms. Rojas Marín alleged that the Ascope Prosecution Service had been “violating [her] rights, offending [her], and humiliating [her] by psychological abuse, [and she was harassed by the police agents who] offered [her] money [...] to abandon the case there and then because, otherwise, they would kill [her].”<sup>98</sup>

70. On April 7, 2008, a preliminary investigation was opened against the provincial prosecutor and the deputy provincial prosecutor of the Second Provincial Corporate Criminal Prosecution Service of Ascope by the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad and Santa.<sup>99</sup> Both the provincial prosecutor and the deputy prosecutor submitted their exculpatory reports in relation to the complaint filed by Ms. Rojas Marín<sup>100</sup>.

71. The Decentralized Office of Internal Control of La Libertad and Santa found that the complaint filed for the presumed perpetration of the offense of abuse of authority should be declared substantiated.<sup>101</sup> However, on November 19, 2010, that is, after the petition had been lodged in this case, the Prosecutor General ruled that there were no grounds to decide

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<sup>93</sup> Cf. Complaint filed by Azul Rojas Marín before the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad on March 28, 2008 (evidence file, folio 2251).

<sup>94</sup> Cf. Complaint filed by Azul Rojas Marín before the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad on March 28, 2008 (evidence file, folio 2251).

<sup>95</sup> Cf. Complaint filed by Azul Rojas Marín before the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad on March 28, 2008 (evidence file, folio 2252).

<sup>96</sup> Cf. Complaint filed by Azul Rojas Marín before the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad on March 28, 2008 (evidence file, folio 2252).

<sup>97</sup> Cf. Complaint filed by Azul Rojas Marín before the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad on March 28, 2008 (evidence file, folio 2252).

<sup>98</sup> Cf. Complaint filed by Azul Rojas Marín before the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad on March 28, 2008 (evidence file, folio 2254).

<sup>99</sup> Cf. Decision of the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad and del Santa of April 7, 2008 (evidence file, folios 174 and 175).

<sup>100</sup> Cf. Official note of May 6, 2008, signed by the Deputy Provincial Prosecutor of the Second Provincial Corporate Criminal Prosecution Service of Ascope addressed to the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad and Santa (evidence file, folio 176); Report signed by the Provincial Prosecutor, Head of the Second Provincial Corporate Criminal Prosecution Service of Ascope addressed to the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad and Santa (evidence file, folios 178 to 182), and Report signed by the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad of July 24, 2009 (evidence file, folios 2800 and 2801).

<sup>101</sup> Cf. Report signed by the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad of July 24, 2009 (evidence file, folio 2806).

that a criminal action should be filed against the prosecutor and the deputy prosecutor of the Second Criminal Provincial Prosecution Service of Ascope.<sup>102</sup>

***E. The disciplinary administrative proceeding against the members of the Peruvian National Police***

72. On March 5, 2008, Ms. Rojas Marín filed a complaint with the Trujillo Regional Inspectorate of the Peruvian National Police against four agents presumably implicated in the acts of rape and sexual torture against her.<sup>103</sup>

73. On May 2, 2008, the Pacasmayo Provincial Inspectorate of the Peruvian National Police issued a report concluding that: (i) administrative responsibility had not been established because the complainant had been detained in compliance with the law and with police procedures, taking into account that the presumed victim was not carrying identification documents and that was with two individuals who fled the scene, and (ii) it had not been determined that the presumed victim had been physically assaulted in the Police Station by the agents who were accused of this, because “the forensic medical examination was performed on the complainant four days after the detention [and] it was possible that [s]he had injured [her]self in order to harm the police agents who detained h[er] on [February 25, 2008].”<sup>104</sup>

74. On June 6, 2008, the President of the Second Chamber of the Trujillo Disciplinary Administrative Tribunal issued an order to remove the disciplinary administrative case against the accused agents to a higher authority.<sup>105</sup>

75. On September 2, 2008, the Territorial Disciplinary Administrative Tribunal decided that “there were no grounds for imposing sanctions on the agents [...] as their disciplinary administrative responsibility in the events reported by [Azul Rojas Marín] had not been established; consequently, the closure of this case is ordered.”<sup>106</sup> The Administrative Court found that it was not possible to verify that Ms. Rojas Marín had been raped or tortured, because the minor bodily injuries and the older anal fissures were insufficient to prove that they had been caused by the police agents, and, “in addition to the forensic medical examination being performed [four] days later, it should be taken into account, with regard to the anal fissures, that [Ms. Rojas Marín] [...] practices unnatural sexual relations since the age of 14 and has sexual relations 3 or 4 times a day.”<sup>107</sup>

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<sup>102</sup> Initially, on December 31, 2008, the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad and Santa had declared that the complaint filed against the prosecutors by Ms. Rojas Marín was unfounded. *Cf.* Decision of the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad and Santa of December 31, 2008 (evidence file, folio 186); Remedy of appeal filed on February 13, 2009, by Ms. Rojas Marín against the decision of the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad and Santa of December 31, 2008 por (evidence file, folios 187 to 192); Decision of the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad and Santa of March 10, 2009 (evidence file, folio 193); Ruling issued by the Supreme Prosecutor for Internal Control on April 20, 2009 (evidence file, folio 195), and Decision of the Prosecutor General of November 19, 2010 (evidence file, folios 3023 to 3028).

<sup>103</sup> *Cf.* Complaint filed by Azul Rojas Marín with the Trujillo Regional Inspectorate of the Peruvian National Police on March 5, 2008 (evidence file, folios 3030 and 3031).

<sup>104</sup> *Cf.* Report of the Pacasmayo Provincial Inspectorate of the Peruvian National Police of May 2, 2008 (evidence file, folio 3056).

<sup>105</sup> *Cf.* Order to remove the case to a higher authority of June 6, 2008 (evidence file, folio 3059).

<sup>106</sup> *Cf.* Decision of the Territorial Disciplinary Administrative Tribunal of September 2, 2008 (evidence file, folio 3064).

<sup>107</sup> *Cf.* Decision of the Territorial Disciplinary Administrative Tribunal of September 2, 2008 (evidence file, folio 3063).

## **F. The second investigation into the facts**

76. On November 20, 2018, the Second Supraprovincial Prosecutor, in compliance with the Inter-American Commission's recommendations in the Merits Report in this case, "ordered the re-opening of the investigation into those presumably responsible" for the crime of torture established in article 321 of the Criminal Code perpetrated against Ms. Rojas Marín.<sup>108</sup> In this decision, the prosecutor ordered 13 investigative procedures.<sup>109</sup> Subsequently, on December 4, 2018, the Fifth Superior Prosecutor of La Libertad decided "to declare the order dismissing the case to be declared null and void as well as all actions taken since the order to open an investigation and up until the order to close the preliminary investigation."<sup>110</sup>

77. On January 16, 2019, the provincial prosecutor of the Ascope Provincial Corporate Criminal Prosecution Service asked the Ascope judge of preliminary criminal investigations to annul the actions in the proceedings underway against the three police officers for the offenses of rape and abuse of authority against Azul Rojas Marín.<sup>111</sup>

78. On August 14, 2019, the Ascope Preliminary Investigation Court decided to declare the request for annulment inadmissible, arguing that the case had become *res judicata* because, according to Peruvian criminal procedural law it was not possible to file a remedy against the decision ordering the dismissal of proceedings, and also that the Commission's recommendations did not have the same binding force as the decisions of the Court. In this regard, that court indicated that "since neither the Inter-American Court of Human Rights nor the Peruvian State have issued a final ruling, the annulment shall be declared inadmissible."<sup>112</sup>

79. The Ascope Provincial Corporate Criminal Prosecution Service filed a remedy of appeal, indicating that the State should make every effort to comply with the Commission's recommendations and pointing out that the judge had ignored the fact that the Commission had indicated that the State "may not argue that the ruling dismissing the case was based on the principle of *ne bis in idem*, *res judicata* or the statute of limitations in order to justify its failure to comply with this recommendation."<sup>113</sup>

80. On September 3, 2019, the Ascope Preliminary Investigation Court decided to declare the remedy of appeal inadmissible, considering that it did not meet the admissibility requirements of Peruvian criminal procedural law.<sup>114</sup>

## **VII MERITS**

81. This case relates to the alleged unlawful, arbitrary and discriminatory deprivation of liberty of Rojas Marín on February 25, 2008, owing to her sexual orientation or gender

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<sup>108</sup> Cf. Decision of the Deputy Provincial Prosecutor of November 20, 2018 (evidence file, folios 3067 and 3068).

<sup>109</sup> Cf. Decision of the Deputy Provincial Prosecutor of November 20, 2018 (evidence file, folio 3067 and 3068), and statement by Ketty Garibay Mascco during the public hearing held in this case.

<sup>110</sup> Cf. Decision of the Fifth Superior Prosecutor of La Libertad of December 4, 2018 (evidence file, folio 3085).

<sup>111</sup> Cf. Official note of January 16, 2019, signed by the Provincial Prosecutor of the Ascope Provincial Corporate Criminal Prosecution Service addressed to the Ascope judge of preliminary criminal investigations (evidence file, folios 3088 to 3094).

<sup>112</sup> Cf. Decision No. 8 of the Ascope Preliminary Investigation Court of August 14, 2019, paras. 11, 17, 19, and 21 (evidence file, folios 5426, 5428, 5429 and 5439).

<sup>113</sup> Cf. Remedy of appeal filed by the Ascope Provincial Corporate Criminal Prosecution Service of August 20, 2019 (evidence file, folios 5432 to 5440).

<sup>114</sup> Cf. Decision No. 9 of the Ascope Preliminary Investigation Court of September 3, 2019 (evidence file, folio 5444).

expression, as well as the alleged rape of which she was a victim while she was detained. The case is also related to the inadequate investigation of the incident and the violation of the right to personal integrity of Azul Rojas Marín's mother, Juana Rosa Tanta Marín, as a result of the said events.

82. On the basis of the arguments submitted by the parties and the Commission in this case, the Court will develop: (1) general considerations on the right to equality and non-discrimination, and will examine, (2) the right to personal liberty; (3) the right to personal integrity and privacy; (4) the right to judicial protection and judicial guarantees, and (5) the right to personal integrity of Ms. Rojas Marín's mother.

## **VII-1 GENERAL CONSIDERATIONS ON THE RIGHT TO EQUALITY <sup>115</sup> AND NON-DISCRIMINATION<sup>116</sup>**

### ***A. Arguments of the parties and of the Commission***

83. The **Commission** argued that what happened to Azul Rojas Marín "should be understood as violence based on prejudice," "because the violence was associated with the perception of Azul Rojas Marín as a gay man at that time." It indicated that the elements of violence based on prejudice could be identified at three key moments: "(i) in the initial detention; (ii) in the acts that took place in the Casa Grande Police Station, and (iii) in the absence of an effective investigation." With regard to the initial moment, the Commission stressed that "there were no objective facts that justified the detention; rather, this was based on subjective perceptions." Regarding the second and third moment, the Commission indicated that "the decision to dismiss the case based on the offense of rape and abuse of authority contests the occurrence of rape and its attribution to the police agents, based on two factors [...]; (i) supposed inconsistencies in the victim's statements," and "(ii) the lack of procedural immediacy in the medical examination performed on Azul," concluding that "the evidence available in the case file reveals that the delay can be directly attributed to the State."

84. The **representatives** indicated that "from the circumstances of the aggressions suffered by Azul, it can be established that the motive for all of them was the negative prejudice against her sexual orientation and non-normative gender expression." In this regard, they stressed: "(i) the characteristics of the detention; (ii) the characteristics of the physical aggression; (iii) the content of the verbal aggression, and (iv) the lack of investigation and the application of gender stereotyping by several judicial officials." They concluded, as had the Commission, that Azul was a victim of violence based on prejudice, arguing that "this aggression took place [...] in a context encouraged and legitimized because the Peruvian State did not and does not comply with the obligation to adopt domestic legal provisions [...] that prevent, punish and eradicate violence based on prejudice [...]." It argued that the State had violated the rights to the prohibition of discrimination and to equality before the law recognized in Articles 1(1) and 24 of the Convention, respectively.

85. The **State** argued that the reason for Ms. Rojas Marín's detention "was not her condition as a LGBTI person, but rather that she was in suspicious circumstances, without identity documents, and with the smell of alcohol on her breath." Consequently, the State denied the Commission's allegation that "from the moment Azul Rojas Marín was intercepted by State

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<sup>115</sup> Article 24 of the Convention.

<sup>116</sup> Article 1(1) of the Convention.

officials, they used physical violence against her and attacked her verbally with repeated references to her sexual orientation [...] thus the police actions [...] had been discriminatory.”

## **B. Considerations of the Court**

86. Article 1(1) of the Convention establishes that “[t]he 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.”

87. The Court recalls that the obligation to respect the human rights recognized in the Convention comprises all those who act in the State’s name, especially if they are acting as state agents; therefore, any eventual violation they commit can be directly attributed to the State. It also notes that the obligation to ensure the free and full exercise of these rights means that the State is responsible for their violation by third parties if it has failed to adopt the measures required to prevent their violation or to make this cease, redressing the harm caused. And, all this with regard to any person who is subject to its jurisdiction for any reason, circumstance or motive.

88. The Court also notes that real respect for human rights means that their possible violation constitutes, *per se*, an internationally wrongful act, whatever the condition of the presumed victim, a circumstance that can never be alleged to justify this. Therefore, the arbitrary detention or the torture of a person, whatsoever their condition, is always contrary to international law and, especially, to international human rights law.<sup>117</sup>

89. Consequently, based on the above and owing to the obligation not to discriminate, States are also obliged to adopt positive measures to revert or change discriminatory situations that exist in their societies which affect a determined group of persons. This involves the special duty of protection that States must exercise with regard to the acts and practices of third parties who, with their tolerance or acquiescence, create, maintain or promote discriminatory situations.<sup>118</sup> Thus, discrimination based on one of the categories indicated for illustrative purposes in Article 1(1) of the Convention warrants special or particular consideration because the respective offense occurs due to what the presumed victims represent or seem to represent and what distinguishes them from other people.

90. The Inter-American Court has recognized that LGBTI people have historically been victims of structural discrimination, stigmatization, and different forms of violence and violations of their fundamental rights.<sup>119</sup> In this regard, it has established that the sexual orientation, gender identity

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<sup>117</sup> *Mutatis mutandis*, *Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs*. Judgment of May 11, 2007. Series C No. 163, para. 132.

<sup>118</sup> *Cf. Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, September 17, 2003. Series A No. 18, para. 104; *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of August 24, 2010. Series C No. 241, para. 271; *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs*. Judgment of May 29, 2014. Series C No. 279, para. 201; *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2014. Series C No. 289, para. 220; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 80; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, *supra*, para. 92; *Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2016. Series C No. 315, para. 110, and *Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of October 20, 2016. Series C No.318, para. 336. Also, United Nations, Human Rights Committee, General Comment No. 18, Non-discrimination, November 10, 1989, CCPR/C/37, para. 5.

<sup>119</sup> *Cf. Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, *supra*, paras. 92 and 267, and *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples. State Obligations in relation to Change of Name, Gender Identity, and Rights deriving from a Relationship between Same-Sex Couples*



or gender expression of a person<sup>120</sup> are categories protected by the Convention.<sup>121</sup> Consequently, the State cannot act against a person based on their sexual orientation, their gender identity and/or their gender expression.<sup>122</sup>

91. Numerous forms of discrimination against LGBTI people are evident in the public and private sphere.<sup>123</sup> In the Court's opinion one of the most extreme forms of discrimination against LGBTI people occurs in violent situations.<sup>124</sup> In Advisory Opinion OC-24/17, this Court underlined that:

[T]he mechanisms for the protection of human rights of the United Nations<sup>125</sup> and the inter-American system<sup>126</sup> have recorded violent acts against LGBTI persons in many regions based on prejudices. The UNHCHR has noted that "such violence may be physical (including murder, beatings, kidnapping and sexual assault) or psychological (including threats, coercion and the arbitrary deprivation of liberty, including forced psychiatric incarceration)."<sup>127</sup>

92. Violence against LGBTI people is based on prejudices; that is, perceptions that are usually negative of individuals or situations that are alien or different.<sup>128</sup> In the case of LGBTI people this refers to prejudices based on sexual orientation and gender expression or identity. This type of violence may be driven by "the desire to punish those seen as defying gender norms."<sup>129</sup> In this regard, the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation or gender identity has indicated that:

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*(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. 33.

<sup>120</sup> This Court has explained that gender expression is understood to be the outward manifestation of a person's gender, by physical aspects, which may include dress, hair style, or the use of cosmetics, or by mannerisms, speech, personal behavior or social interaction, and names or personal references. A person's gender expression may or may not correspond to his or her self-perceived gender identity. Advisory Opinion OC-24/17, *supra*, para. 32(g).

<sup>121</sup> *Cf. Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs, supra*, para. 93, and Advisory Opinion OC-24/17, *supra*, para. 78.

<sup>122</sup> *Mutatis mutandis, Advisory Opinion OC-18/03, supra, paras. 100 and 101; Case of Servellón García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 95. 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. 129..

<sup>123</sup> *Cf. Advisory Opinion OC-24/17, supra*, para. 36, and United Nations, Report of the United Nations High Commissioner for Human Rights. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. November 17, 2011, A/HRC/19/41, para. 1.

<sup>124</sup> *Cf. Advisory Opinion OC-24/17, supra*, para. 36.

<sup>125</sup> *Cf. United Nations, Report of the United Nations High Commissioner for Human Rights. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, May 4, 2015, A/HRC/29/23, para. 21. See also, Report of the United Nations High Commissioner for Human Rights. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, November 17, 2011, A/HRC/19/41, para. 20.

<sup>126</sup> *Cf. Inter-American Commission on Human Rights, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OAS/Ser.L/V/II.rev.2, November 12, 2015, para. 24.

<sup>127</sup> *Cf. Advisory Opinion OC-24/17, supra*, para. 36, and United Nations, Report of the United Nations High Commissioner for Human Rights. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity May 4, 2015, A/HRC/29/23, para. 21.

<sup>128</sup> *Cf. Statement made by María Mercedes Gómez during the public hearing held in this case.*

<sup>129</sup> United Nations, Report of the United Nations High Commissioner for Human Rights. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, May 4, 2015, A/HRC/29/23, para. 21. Also, Report of the United Nations High Commissioner for Human Rights. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, November 17, 2011, A/HRC/19/41, paras. 20 and 21. See, similarly, Organization for Security and Cooperation in Europe

At the root of the acts of violence and discrimination [... based on sexual orientation or gender identity] lies the intent to punish based on preconceived notions of what the victim's sexual orientation or gender identity should be, with a binary understanding of what constitutes a male and a female or the masculine and the feminine, or with stereotypes of gender sexuality.<sup>130</sup>

93. Violence against LGBTI people has a symbolic purpose; the victim is chosen in order to communicate a message of exclusion or subordination. On this point, the Court has indicated that the use of violence for discriminatory reasons has the purpose or effect of preventing or annulling the recognition, enjoyment or exercise of the fundamental human rights and freedoms of the person who is the object of the discrimination, regardless of whether that person identifies themselves with a determined category.<sup>131</sup> This violence, fed by hate speech, can result in hate crimes.<sup>132</sup>

94. The Court notes also that, at times, it may be difficult to distinguish between discrimination due to sexual orientation and discrimination due to gender expression. Discrimination due to sexual orientation may be based on a real or perceived sexual orientation, so that it includes cases in which a person is discriminated against owing to the perception that others have of their sexual orientation.<sup>133</sup> This perception may be influenced, for example, by clothing, hairstyle, mannerisms or behavior that do not correspond to traditional or stereotypical gender standards or that constitute a non-normative gender expression. In this case, third parties could have associated the presumed victim's gender expression with a specific sexual orientation.

95. In the instant case, the arguments concerning discrimination crosscut the other alleged violations; consequently, the Court will take them into account throughout the judgment.

## **VII-2 RIGHT TO PERSONAL LIBERTY<sup>134</sup>**

### **A. Arguments of the parties and of the Commission**

96. The **Commission** argued that the deprivation of liberty of the presumed victim was unlawful because "the police intervention and detention of Azul Rojas Marín was not recorded in the logbook as required by article 205 of the Code of Criminal Procedure." In addition, the Commission considered that her retention for identification purposes "was based on subjective perceptions" that bore no relationship to the purposes established in the Code. It added that the police action "was discriminatory" because the state officials "not only used physical force against her, but also attacked her verbally with repeated references to her sexual orientation," so that the detention was also arbitrary.

97. The **representatives** argued that Azul Rojas Marín was detained owing to "discrimination based on sexual orientation and non-normative gender expression," because

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(OSCE), *Hate Crimes in the OSCE Region – Incidents and Responses, 2006 Annual Report, OSCE/ODIHR, Warsaw, 2007*, p. 53.

<sup>130</sup> Report of the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation or gender identity, Víctor Madrigal-Borloz, UN Doc. A/HRC/38/43, May 11, 2018, para. 48.

<sup>131</sup> *Cf. Case of Perozo et al. v. Venezuela, Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 195, para. 158, and Advisory Opinion OC-24/17, *supra*, para. 79.

<sup>132</sup> In this regard, the Court has stressed that "discriminatory speech and the resulting attitudes based on stereotypes of heteronormativity and cisnormativity with different degrees of radicalization, lead to the homophobia, lesbophobia and transphobia that encourage such hate crimes." Advisory Opinion OC-24/17, *supra*, para. 47.

<sup>133</sup> *Cf. Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs, supra*, para. 120.

<sup>134</sup> Article 7 of the Convention.

"the agents who detained and tortured Azul initiated the detention by insulting her and using language that clearly referred to the perceived sexual orientation." This constituted a discriminatory application of article 205 of the Code of Criminal Procedure. They considered that "there is no evident reason why the agents who detained and tortured Azul were in the area." They indicated that "the supposed reason for the detention (an identity check) was totally unjustified because, although it is true that Azul was not carrying her identity document at the time of the detention, at least one of the agents knew her and knew who she was." They also argued that the detention was unlawful because: (i) it was carried out due to calls with complaints by neighbors; (ii) "Azul was not given the possibility of being able to produce her identity document"; (iii) "she was not allowed to contact her family and her detention was not recorded in the logbook as required by article 205 [of the Code of Criminal Procedure]," and (iv) the intervention lasted more than the four hours permitted by law. They argued that the detention was also arbitrary and that Azul was not advised of the reasons for her detention. They also indicated that "no judicial control was exercised while she was detained, which is also indicative of the fact that her detention was arbitrary."

98. Lastly, they considered that article 205 of the Code of Criminal Procedure was contrary to the Convention. They indicated that: (i) the first paragraph of the article gives "broad discretion and can be used subjectively and indiscriminately by the police"; (ii) the third paragraph contradicts the first paragraph because it permits identity checks "even if there is no well-founded reason to believe that the person concerned is linked to an offense"; (iii) the fourth paragraph "does not authorize the police to accompany the person detained to another place where their identity can be verified," but merely establishes that the person be taken to a police station"(iv) the article does not establish that "as soon as the person's identity has been verified, that person shall be released, without having to wait until the four hours have elapsed," and (v) the article should include an "obligation to inform the Public Prosecution Service, because a police identity check is supposedly only carried out if, and only if, there are objective and well-founded reasons to connect the person detained to the perpetration of an offense."

99. The **State** argued that the detention of the presumed victim was in keeping with the provisions of Peruvian law. It stressed that the police agents and the member of the *serenazgo* service saw a person "lying down in the middle of Industrial Highway"; therefore, one of the agents got out of the patrol car and saw that it was Azul Rojas Marín. She was taken to the police station "considering that she was acting suspiciously and because she was not carrying her identification document and had alcohol on her breath." It indicated that following the identification and verification process she was released, and that there was no reliable evidence to support the fact that she was at the police station until 6 a.m. The State considered that the detention of Azul Rojas Marín was not arbitrary because "a series of elements were present that, when analyzed as a whole, allowed it to be determined that the detention was necessary, reasonable and proportionate." It argued that, since the detention of Azul Rojas Marín was justified, her right to privacy was not violated. The State also indicated that article 205 of the Code of Criminal Procedure was in keeping with the Convention; in this regard, it emphasized that the article complied with the criteria of reasonableness, appropriateness, necessity and proportionality.

## **B. Considerations of the Court**

100. The Court has maintained that the essential content of Article 7 of the American Convention is protection of a person's freedom from any arbitrary or unlawful interference by

the State.<sup>135</sup> This article includes two distinct provisions, one general and the other specific. The general provision is to be found in the first paragraph: “[e]very person has the right to personal liberty and security”; while the specific provision is composed of a series of guarantees that protect the right not to be deprived of liberty unlawfully (Article 7(2)) or arbitrarily (Article 7(3)), to be informed of the reasons for the detention and the charges against him (Article 7(4)), to judicial control of the deprivation of liberty and the reasonable time of the preventive detention (Article 7(5)), to contest the lawfulness of the detention (Article 7(6)) and not to be detained for debt (Article 7(7)). Any violation of paragraphs 2 to 7 of Article 7 of the Convention necessarily results in the violation of Article 7(1) thereof.<sup>136</sup>

101. Bearing in mind the factual dispute that exists, the Court finds it necessary: (1) to determine the facts and, then, based on the arguments submitted, it will analyze: (2) the lawfulness of the detention; (3) the arbitrary nature of the detention and the right to equality, and (4) notification of the reasons for the detention.

### **B.1 Determination of the facts**

102. In this case the circumstances of the detention are disputed. To determine what transpired, the Court will take into account the official records of the police action, the statements of the state agents who took part in the detention, and the statements of the presumed victim.

103. The initial detention of the presumed victim was documented in the police report. This established that, on February 25, 2008, agents of the Casa Grande Police Station of the Peruvian National Police, together with *serenazgo* agents went to the “Miguel Grau” housing estate, located in the Casa Grande district, because the neighbors had reported the presence of “three unknown subjects in the road.” When the police arrived, “one subject [...] tried to escape with two others.” The police report established that the agents “[were able to detain] one of them, who had alcohol on [her] breath and [...] was presumably in an advanced stage of inebriation. [...] when asked for] identification, [s]he said [s]he was called [Azul] Rojas Marín[, and] indicated that [s]he was not carrying any kind of document”; therefore, the agents proceeded to search her without finding any evidence.<sup>137</sup> The report establishes that the presumed victim refused to sign the report and was taken to the Casa Grande Police Station for the respective identification, taking in account that she had been detained “undocumented, in suspicious circumstances, and in a place frequented by miscreants.”<sup>138</sup>

104. Since the detention of Ms. Rojas Marín in the Casa Grande Police Station was not recorded, there is no direct evidence to prove its duration or the reasons for it.

105. A police agent who took part in the initial detention indicated that when they arrived on the scene, two people fled and the presumed victim threw herself on the ground.<sup>139</sup> In addition, three *serenazgo* agents who took part in the detention indicated that it took place because

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<sup>135</sup> Cf. *Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of June 7, 2003. Series C No. 99, para. 84, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 93.

<sup>136</sup> 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. 54, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 93.

<sup>137</sup> Cf. Police report of February 25, 2008 (evidence file, folio 2752).

<sup>138</sup> Cf. Police report of February 25, 2008 (evidence file, folio 2752), and Personal Search Record of February 25, 2008 (evidence file, folio 9). The record specifically establishes that the police did not find “drugs, firearms, jewelry and similar objects, cash and/or mobile telephone.”

<sup>139</sup> Cf. Statement made by LQC at the Casa Grande Police Station on March 4, 2008 (evidence file, folio 2759).

they were patrolling the area and “noticed someone lying down in the center of the Casa Grande-Industrial Highway.”<sup>140</sup> They also indicated that the presumed victim threatened to report them.<sup>141</sup> Three agents indicated that, when she had been taken to the police station, the presumed victim remained there for about an hour.<sup>142</sup>

106. The presumed victim indicated that the events described in the report were false.<sup>143</sup> Moreover, she has consistently stated that, on February 25, 2008, at the time of the detention, she was walking home alone at 00:30 hours when a police vehicle approached her and the agents said: “*Luchito*, where are you going?” and [Ms. Rojas Marín] answered that [she was on her way] home [...]; then the *serenazgo* said: “So late! Be careful because it’s very late.”<sup>144</sup> Twenty minutes later the vehicle approached her again, they hit her with a police baton, they made her get into the police vehicle and they shouted at her three times “*cabro concha de tu madre*” [queer, motherfucker].<sup>145</sup> While they were making her get into the police vehicle, Ms. Rojas Marín asked why they were detaining her and the State agent did not answer her.<sup>146</sup> She was taken to the Casa Grande Police Station where state agents forcibly undressed her, hit her, raped her with a police baton and subjected her to other mistreatment and insults concerning her sexual orientation (*infra* para. 157). The presumed victim indicated that she remained in the Police Station until 6 a.m., that is, around five hours.<sup>147</sup>

107. First, the Court notes that there are inconsistencies between the police report and the statements of the state agents as to whether the presumed victim was alone or with two other individuals, or whether or not the presumed victim had tried to flee when the state agents approached. There is no other evidence, including additional information on the telephone call from the neighbors noting the presence of suspicious individuals or a record of the detention that the State was obliged to prepare (*infra* para. 119), which would corroborate the version

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<sup>140</sup> Cf. Statement made by FFR at the Casa Grande Police Station on March 18, 2008 (evidence file, folio 2755); Statement made by HMN at the Casa Grande Police Station on March 18, 2008 (evidence file, folios 928 and 929), and Statement made by VRV at the Casa Grande Police Station on March 18, 2008 (evidence file, folio 943).

<sup>141</sup> Cf. Statement made by FFR at the Casa Grande Police Station on March 18, 2008 (evidence file, folio 2755); Statement made by HMN at the Casa Grande Police Station on March 18, 2008 (evidence file, folio 929), and Statement made by VRV at the Casa Grande Police Station on March 18, 2008 (evidence file, folio 943).

<sup>142</sup> Cf. Statement made by SAR ante the Pacasmayo Provincial Inspectorate on April 30, 2008 (evidence file, folio 2774); Statement made by DPP at the Casa Grande Police Station on March 7, 2008 (evidence file, folio 2768), and Statement by JLM at the Casa Grande Police Station on March 4, 2008 (evidence file, folio 2776).

<sup>143</sup> Cf. Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2816).

<sup>144</sup> Cf. Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793); Statement made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folio 2808), and Statement made by Azul Rojas Marín at the public hearing on merits before the Inter-American Commission on December 1, 2016.

<sup>145</sup> Cf. Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793); Statement made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folios 2808 and 2809), and Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2815).

<sup>146</sup> In this regard, the Court notes that, in her first statement, the presumed victim indicated that when she asked why she was being detained, they answered “Get into the van, *cabro concha de tu madre*.” The written report on the psychological assessment indicated that they answered: “the police have orders to detain you.” Cf. Statement of the facts by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folio 2809), and Report on the psychological assessment of Azul Rojas Marín on September 5, 6 and 7, 2008 (evidence file, folio 2396).

<sup>147</sup> Cf. Statement made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folio 2813); Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793); Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2816), and Statement made by Azul Rojas Marín at the public hearing on merits before the Inter-American Commission on December 1, 2016 (evidence file, folder of audiovisual material, minutes 06:48 to 06:50).

presented by the state agents. On the other hand, the statements of the presumed victim have been consistent as regards what happened. Her version on the circumstances of the detention is also in keeping with the acts of torture that took place at the Casa Grande Police Station which are analyzed and admitted as proven in the chapter on the right to personal integrity (*infra* paras. 145 to 165).

108. Based on the foregoing, the Court finds it proved that, on February 25, 2008, at 00:30 hours, Ms. Rojas Marín was walking home alone when a police vehicle approached her, a state agent asked her where she was going and said to her: "So late! Be careful because it's very late." Twenty minutes later the vehicle returned, they hit her, they made her get into the police vehicle and they shouted at her three times "*cabro concha de tu madre.*" While they were making her get into the police vehicle, Ms. Rojas Marín asked why they were detaining her and the state agent did not answer her. The presumed victim was taken to the Casa Grande Police Station where she remain until 6 a.m.; that is, around five hours. In the case of facts that were not mentioned by the presumed victim but included in the police report, this will be used as evidence.

109. The Court considers that, from the time the state agents detained Ms. Rojas Marín until she left the police station, she was deprived of her personal liberty.<sup>148</sup> Therefore, it will now analyze whether this deprivation of liberty was in keeping with the Convention.

## **B.2 Lawfulness of the detention**

110. The Court has indicated that the restriction of the right to personal liberty is only permissible "for the reasons and under the conditions established beforehand by the Constitution [...] or by a law established pursuant thereto" (substantive aspect), and also strictly adhering to the procedures objectively defined in them (formal aspect).<sup>149</sup> This is because the Convention itself refers to the domestic law of the State concerned. However, irrespective of this referral, the Court is able to rule in this regard,<sup>150</sup> precisely because it must rule in accordance with the Convention and not according to the said domestic law. Thus the Court is not carrying out a control of constitutionality or even of legality, but rather of conventionality.

111. This is precisely what happens regarding Article 7(2) of the American Convention, which establishes that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the Constitution of the State Party concerned or by a law established pursuant thereto." Thus, with regard to the requirement that a detention must be lawful, the Court has indicated that, since the Convention refers to the Constitution and laws established "pursuant thereto," the examination of compliance with the said Article 7(2) entails the analysis of compliance with the requirements established as specifically as possible and "beforehand" in these laws in relation to the "reasons" and "conditions" for deprivation of physical liberty. If domestic law – both the substantive and formal aspects – is

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<sup>148</sup> Cf. *Case of Torres Millacura et al. v. Argentina. Merits, reparations and costs.* Judgment of August 26, 2011. Series C No. 229, para. 76, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of November 14, 2014. Series C No. 287, para. 404.

<sup>149</sup> Cf. *Case of Gangaram Panday v. Suriname. Merits, reparations and costs.* Judgment of January 21, 1994. Series C No. 16, para. 47, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 94.

<sup>150</sup> Article 62(3) of the Convention.

not complied with when depriving a person of their liberty, this deprivation will be unlawful and contrary to the American Convention, in light of Article 7(2).<sup>151</sup>

112. The Peruvian Constitution establishes that “no form of restriction of personal liberty is permitted unless in the cases established by law,” and also that “[n]o one may be detained unless this is with a reasoned written order of a judge or by the police authorities *in flagrante delicto*.”<sup>152</sup>

113. Meanwhile, article 205 of the Code of Criminal Procedure on police identity checks establishes:

1. The police, in the context of their functions, without the need for an order by the prosecutor or the judge, may request anyone to identify themselves and make the necessary verification on the street or in the place where the request is made, when they consider this necessary to prevent an offense or to obtain useful information in the investigation of an offense. The person concerned has the right to require the police to provide proof of their identity and the unit to which they are attached.

2. The identification shall be carried out in the place where the person is by means of the corresponding identity document. The person concerned shall be provided with the necessary facilities to find it and show it. If, at this time, it is verified that the document is in order, the document shall be returned and the person concerned authorized to continue on his way.

3. If there are well-founded grounds to consider that the person concerned may be linked to the perpetration of an offense the police may search his clothing, bags or vehicle. If the result is positive, a record shall be made of this specific procedure indicating what was found, informing the Public Prosecution Service immediately.

4. If the person concerned is unable to show the identity document, based on the seriousness of the act investigated or the sphere of the police operation, this person shall be taken to the nearest police station exclusively in order to identify him. His fingerprints may be taken and verification made of whether there is any outstanding warrant against him. This procedure, calculated from the moment the police intervene, may not exceed four hours, following which the person shall be allowed to leave. In such cases, the person concerned may not be placed in a holding cell or a regular cell or held in contact with detainees, and shall have the right to communicate with a family member or with the person he indicates. In such cases, the police shall keep a logbook in which they record the identification procedures conducted, as well as the reasons for the procedures and their duration.

5. Whenever necessary, for the purposes of a trial or of identification, the accused may be photographed, even though his fingerprints may have been taken, and even against his will – in which case the explicit order of the Public Prosecution Service is required – and his measurements taken as well as similar actions. A record shall be made of this.<sup>153</sup>

114. This Court notes that the law regulates different situations, from the temporary restriction of personal liberty involved by a request for identification to the deprivation of liberty entailed by being taken to a police station. Whether the police request identification or take someone to the police station depends on compliance with slightly different circumstances that are interrelated. To request the identification document requires this measure to be

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<sup>151</sup> Cf. *Case of Chaparro Álvarez and Lapo Ñigüez v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 57, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 94.

<sup>152</sup> Cf. Constitution of the Republic of Peru, promulgated on December 29, 1993, articles 2.24(b) and 2.24(f) (evidence file, folio 5256).

<sup>153</sup> Code of Criminal Procedure of the Republic of Peru. Legislative Decree No, 957, promulgated on July 22, 2004, article 205 (evidence file, folios 5538 and 5539).

considered necessary “to prevent an offense or to obtain useful information in the investigation of an offense,” while taking them to a police station means that the person has been provided with “the necessary facilities to find and show” the identify document; and depends on “the seriousness of the act investigated or the sphere of the police operation.” The State indicated that providing the necessary facilities to find and show the identity document meant that “[t]he Police must provide the person concerned with facilities to find and show the document, and these include telephone calls, the use of electronic means or going to the place where the documents are, if possible.” In addition, article 205 establishes that the search of the clothing is only possible “if there are well-founded grounds to consider that the person concerned may be linked to the perpetration of an offense.” In this case, the presumed victim was asked for her identification, her clothes were searched and then she was taken to the police station; therefore, in order to determine the lawfulness of the detention the Court must analyze whether the different actions of the State authorities were in keeping with the provisions of article 205 of the Code of Criminal Procedure.

115. First, the police may ask someone for their identification documents when they “consider this necessary to prevent an offense or to obtain useful information in the investigation of an offense.” Ms. Rojas Marín was walking home alone when she was approached by state agents. It has not been proved that it was necessary to ask for her identification document in order to prevent an offense or to obtain useful information in the investigation of an offense. Also, once it was determined that the presumed victim was not carrying her identity document, she was not provided with the necessary facilities to find it and show it.<sup>154</sup> Both facts are contrary to domestic law.

116. Second, the search of a person’s clothing is admissible “if there are well-founded grounds to consider that the person concerned may be linked to the perpetration of an offense.” According to the police report, in this case, the search was conducted because the presumed victim did not have her identity document, “had alcohol on [her] breath and [...] presumably was in an advanced state of inebriation.”<sup>155</sup> In this regard, expert witness Luis Alberto Naldos Blanco, offered by the State, indicated that:

It is evident that the mere fact of being inebriated – without the intervention of acts against persons, public order or public or private property – does not justify a presumption of the perpetration of an offense and, especially, a police arrest. [...]

In the case of the detention of Azul Rojas Marín there is no objective element that would clearly establish the existence of well-founded grounds for conducting a personal search, or of compliance with the established legal procedure to conduct this. Consequently, it can be affirmed that the personal search of Azul Rojas Marín was not conducted in accordance with the provisions of article 205.<sup>156</sup>

117. The Court considers that the personal search of Ms. Rojas Marín was not conducted in accordance with domestic law, because it has not been proved that there were well-founded grounds linking her to the perpetration of an offense.

118. Third, regarding the fact that she was taken to the police station, the law establishes that the person concerned may be taken to the nearest police station exclusively for identification purposes, “[i]f the person concerned is unable to show the identity document, [and] based on the seriousness of the act investigated or the sphere of the police operation.” It has already been determined that Ms. Rojas Marín was not provided with the necessary facilities to find and show her identity document (*supra* para. 115), so that it has not been proved that it

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<sup>154</sup> Cf. Statement of witness Víctor Álvarez at the public hearing on August 27, 2019.

<sup>155</sup> Cf. Police report of February 25, 2008 (evidence file, folio 2752).

<sup>156</sup> Affidavit of Luis Alberto Naldos Blanco of August 9, 2019 (evidence file, folio 3473).



was not possible for her to show her identity document. In addition, the police report establishes that the presumed victim was taken to the police station for the respective identification because she was “undocumented, in suspicious circumstances, and in a place frequented by miscreants.”<sup>157</sup> The police report makes no mention of the investigation of an offense or that a police operation was being conducted. Consequently, the State has not proved compliance with the legal assumptions for taking the presumed victim to a police station.

119. Fourth, the law requires that: (i) the “procedure, calculated from the moment the police intervene, may not exceed four hours”; (ii) the person concerned must be guaranteed “the right to communicate with a family member or with the person he indicates,” and (iii) “[i]n such cases, the Police shall keep a logbook in which they record the identification procedures conducted, as well as the reasons for the procedures and their duration (*supra* para. 113). In this regard, the Court notes that the presumed victim was detained for at least five hours which exceeds the permitted time. In addition, there is no dispute that the procedure to identify Ms. Rojas Marín was not recorded.

120. Regarding the possibility for Ms. Rojas Marín to contact a family member or a person of her choice, the Court notes that it is the State that has the burden of proving that Ms. Rojas Marín was advised of this right. In this case, the State has not alleged that it complied with this obligation. Also, Ms. Rojas Marín’s statements do not show that she was advised that she could contact someone. Taking into account that it corresponded to the State to prove that, in this case, it had complied with the legal obligation to notify Ms. Rojas Marín of her right to contact a family member or friend, the Court considers that it failed to comply with this obligation.

121. Based on the foregoing, the Court find that the deprivation of liberty of Ms. Rojas Marín did not comply with the requirements established in its own domestic law, so that it constituted a violation of Article 7(2) of the Convention, to the detriment of Azul Rojas Marín.

122. In addition, the Court notes that, since there was no reason to take the presumed victim to the police station, it does not find it necessary to analyze the alleged violation of Article 7(5) of the Convention.

### **B.3 Arbitrary nature of the detention**

123. Even though the Court has already considered that the deprivation of liberty of Ms. Rojas Marín was unlawful, in this case it considers it necessary to examine its allegedly arbitrary nature.

124. The State argued that Ms. Rojas Marín was detained for identification purposes and, according to the police report, she was taken to the police station because she was “undocumented, in suspicious circumstances, and in a place frequented by miscreants.” The Court has already determined that, during the identity check of the presumed victim, the legal requirements were not met as regards the possible relationship of the person concerned to an offense. In addition, at the time of the events, one of the *serenazgo* agents nicknamed *Chimbotano* knew the presumed victim.<sup>158</sup> Therefore, it has not been proved that the identity

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<sup>157</sup> Cf. Police report of February 25, 2008 (evidence file, folio 2752), and Record of personal search dated February 25, (evidence file, folio 9). The record specifically establishes that the police did not find “drugs, firearms, jewelry and similar objects, cash and/or mobile telephone.”

<sup>158</sup> Cf. Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793), and Statement made by LQC before the Second Provincial Corporate Criminal Prosecution Service of Ascope on March 4, 2008 (evidence file, folio 2759). The *serenazgo* agent FFR declared that “I met [her] in December 2004, at the home of a friend [...], who played volleyball and with whom I have a distant friendship; I

check and the resulting detention were necessary, or what the grounds were for the measures taken in the case of the presumed victim.

125. Furthermore, twenty minutes before the presumed victim was detained, a police vehicle approached her and the agents said: “*Luchito*, where are you going?” and [Ms. Rojas Marín] answered that [she was on her way] home [...], so the *serenazgo* said: “So late! Be careful because it’s very late.”<sup>159</sup> The Court notes that it was entirely possible to interpret this comment as a possible threat and a demonstration of authority by the state agents and it is probable that this is how the presumed victim interpreted it.

126. At the time of the detention, a police agent shouted out at her on three occasions, “*cabro concha de tu madre*.”<sup>160</sup> Also, while they were making her get into the police vehicle, Ms. Rojas Marín asked why she was being detained and the answered “get in, *cabro concha de tu madre*.”<sup>161</sup> This type of insult and the derogatory terms that clearly referred to her sexual orientation or non-normative gender expression continued while she was detained (*infra para. 157*).<sup>162</sup>

127. The Working Group on Arbitrary Detention has indicated that deprivation of liberty is for discriminatory reasons “when it is apparent that persons have been deprived of their liberty specifically on the basis of their own or perceived distinguishing characteristics or because of their real or suspected membership of a distinct (and often minority) group.” The Working Group considered that one of the factors to take into account to determine the existence of discriminatory grounds was whether “the authorities have made statements to, or conducted themselves towards, the detained person in a manner that indicates a discriminatory attitude.”<sup>163</sup> In addition, expert witness María Mercedes Gómez indicated that “one of the essential elements [to establish that a person was detained based on prejudice] is that it is not possible to identify any other apparent grounds than the perception of the victim; in other words, there is no practical purpose for the detention. [And also] the expressions that were used.”<sup>164</sup>

128. In the absence of legal grounds for subjecting the presumed victim to an identity check and with the existence of elements that point towards discriminatory treatment based on sexual orientation or non-normative gender expression, the Court must presume that the detention of Ms. Rojas Marín was carried out for discriminatory reasons.

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feel no animosity towards him and I am not related to him in any way.” Statement made by FFR before the Second Provincial Corporate Criminal Prosecution Service of Ascope of March 18, 2008 (evidence file, folio 2754).

<sup>159</sup> Cf. Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793).

<sup>160</sup> Cf. Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793); Statement made by Azul Rojas at the Casa Grande Police Station on February 28, 2008 (evidence file, folio 2808), and Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2815).

<sup>161</sup> Cf. Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793).

<sup>162</sup> The word “*cabro*” “is generally understood as a pejorative term to refer to homosexuals.” Thus, it is said, “in Peru, homosexual men are called “*cabros*.” It is also used as a variant of “*marica*” or “*maricón*.” Ultimately, “*cabro*” is a little stronger than the latter. Cf. Amicus curiae presented by the Coalition of Lesbian, Gay, Bisexual, Transvesti, Transgender, Transsexual and Intersex Organizations of the Americas before the OAS (merits file, folio 820) [Note: “*concha de tu madre*” can be understood as “motherfucker.”]

<sup>163</sup> Report of the Working Group on Arbitrary Detention. A/HRC/36/37 of July 19, 2017, para. 48.

<sup>164</sup> Cf. Statement made by María Mercedes Gómez during the public hearing held in this case.

129. This Court has indicated that detentions for discriminatory motives are manifestly unreasonable and, therefore, arbitrary.<sup>165</sup> Since the deprivation of liberty was discriminatory, it is not necessary to examine its purpose, necessity and proportionality to determine that it was arbitrary.

130. Based on the preceding considerations, the Court finds that the State violated Article 7(3) of the Convention, in relation to the obligation to respect rights without discrimination, to the detriment of Azul Rojas Marín.

#### **B.4 Notification of the reasons for the detention**

131. Article 7(4) of the American Convention refers to two guarantees for the person who is being detained: (i) oral or written notice of the reasons for the detention, and (ii) written notification of the charges.<sup>166</sup> Information on the “grounds and reasons” for the detention must be provided “when this occurs,” and this constitutes a mechanism to avoid unlawful or arbitrary detentions at the very moment of the deprivation of liberty and, also, guarantees the person’s right of defense.<sup>167</sup> The Court has also indicated that the agent who carries out the detention must provide information in a simple, non-technical manner on the essential facts and the legal grounds for the detention, and that Article 7(4) of the Convention is not complied with if only the legal grounds are mentioned.<sup>168</sup> The State has not alleged that this obligation was met. The Court considers proved that, when she was being made to get into the official vehicle, Ms. Rojas Marín asked why she was being detained and the state agent did not answer telling her the reasons for the detention.

132. Therefore, the Court considers that the State violated Article 7(4) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Azul Rojas Marín.

#### **B.5 Conclusion**

133. Based on the preceding considerations, the Court concludes that the initial detention of Ms. Rojas Marín was unlawful because it was carried out without abiding by the causes and procedures established in domestic law, including the failure to record the detention. In addition, the detention was arbitrary because it was carried out on discriminatory grounds. The Court has also concluded that Ms. Rojas Marín was not advised of the reasons for her detention.

134. Consequently, due to actions of its agents acting in this capacity, the State violated the rights recognized in Articles 7(1), 7(2), 7(3) and 7(4) of the Convention, in relation to the obligation to respect these rights without discrimination established in Article 1(1) of this instrument, to the detriment of Azul Rojas Marín.

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<sup>165</sup> Cf. *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2014. Series C No. 282, para. 368. See also, Report of the Working Group on Arbitrary Detention. A/HRC/22/44 of December 24, 2012, para. 38.

<sup>166</sup> Cf. *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 26, 2010. Series C No. 220, para. 106, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, Preliminary objection, merits, reparations and costs*. Judgment of November 28, 2018. Series C No. 371, para. 246.

<sup>167</sup> Cf. *Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs, supra*, para. 82, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 96.

<sup>168</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 71, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 246.

135. In addition, regarding the alleged violation of Article 2 owing to the alleged non-conformity with the Convention of article 205 of the Code of Criminal Procedure, the Court notes that the proven facts reveal that the officials failed to comply with this provision. Consequently, a ruling on the conventionality of this would constitute a theoretical ruling, and it is not incumbent on this Court to make this type of ruling in a contentious case.<sup>169</sup> Based on all the above, the Court does not find it necessary to rule on the alleged violation of Article 2 of the Convention. However, the Court notes that it would be desirable to adapt this article to the actual technology for identification and verification of arrest warrant records.

### VII-3 RIGHTS TO PERSONAL INTEGRITY AND TO PRIVACY<sup>170</sup>

#### A. Arguments of the parties and of the Commission

136. The **Commission** argued that “the existence of serious acts of physical and psychological violence [...] against Azul Rojas Marín was proved” for three reasons: (i) Azul Rojas Marín “has made consistent statements” about the events that occurred during her detention. “The fact that, in her first statement, Azul Rojas Marín described some forms of sexual abuse and then supplemented her description” did not refute the credibility of her version of the facts; (ii) despite the deficiencies in the forensic medical examination, the report documented physical injuries “compatible with some of the acts that she reported,” and (iii) having already established that “the deprivation of liberty of Azul Rojas Marín was unlawful, arbitrary and discriminatory,” the State created the situation of risk for her personal safety. It also considered that the elements required to consider the said acts as torture were present.

137. The **representatives** argued that “discrimination on the basis of sexual orientation and gender expression was the reason for the sexual violence and [rape] of Azul, which signified a form of violation of her sexual liberty due, above all, to this prejudice.” They indicated that it was “fully proved that Azul Rojas Marín was a victim of sexual violence, including rape, by agents of the Peruvian State.” They characterized the acts as torture “in view of the severity of the violence suffered by Azul.” Regarding the intentionality of the acts, they argued that “the acts committed by the *serenazgo* agents and the police were deliberate, intentional and calculated.” With regard to the severity, they indicated that “severe physical and mental suffering is inherent in rape.” Regarding the purpose, they considered that “the torture and inhuman treatment to which Azul was subjected sought to humiliate and punish her owing to her sexual orientation.” They argued that an additional motive “had been to obtain information from the victim concerning the whereabouts of her brother.” In addition to constituting acts of torture, they considered that “all the forms of violence suffered by Azul (that is, the rape, the other forms of physical violence and the verbal aggression) involved a form of arbitrary and abusive interference in her privacy.” Lastly, they indicated that “the lack of due diligence in the investigation by the system of justice” in this case “constitute[d] cruel, inhuman or degrading treatment according to the American Convention.”

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<sup>169</sup> In this regard, the Court recalls that “[t]he contentious jurisdiction of the Court is not intended to review domestic laws in the abstract, but is exercised to decide concrete cases in which it is alleged that an act [or omission] of the State, executed against certain persons, is contrary to the Convention.” Cf. *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights)*. Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 48, and *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2019. Series C No. 394. 203.

<sup>170</sup> Articles 5 and 11 of the Convention.

138. The **State** argued that “the legal classification of the facts corresponds to the domestic authorities.” Nevertheless, it indicated that to constitute the crime of torture, a special intentionality must exist, which had not been proved in this case. It also indicated that “it cannot be affirmed that the legal definition of torture – as it was regulated at the time of the facts – had a decisive impact on the different decisions of the prosecution service that decided not to expand the investigation to include the crime of torture. On this basis, the State considered that it was not appropriate to declare that the legal definition of torture be amended.” It also clarified that the legal definition of torture had been amended in 2017.

## **B. Considerations of the Court**

139. Article 5(1) of the Convention establishes the right to personal integrity, both physical and also mental and moral, in general terms. While Article 5(2) establishes, more specifically, the absolute prohibition to subject someone to torture or to cruel, inhuman or degrading treatment or punishment, and also the right of all persons deprived of their liberty to be treated with respect for the inherent dignity of the human person. The Court understands that any violation of Article 5(2) of the American Convention necessarily entails the violation of Article 5(1) of this instrument.<sup>171</sup>

140. The Court has established that torture and cruel, inhuman or degrading treatment or punishment are absolutely and strictly prohibited by international human rights law. This prohibition is absolute and non-derogable, even in the most difficult circumstances, such as war, threat of war, actions to combat terrorism and any other crimes, state of siege or emergency, internal conflict or unrest, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes,<sup>172</sup> and now belongs to the domain of international *jus cogens*.<sup>173</sup> Both universal<sup>174</sup> and regional<sup>175</sup> treaties establish this prohibition and the non-derogable right not to be subjected to any form of torture.

141. Furthermore, in cases involving any form of sexual violence, the Court has indicated that violations of personal integrity entail a violation of a person’s privacy, protected by Article 11

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<sup>171</sup> Cf. *Case of Yvon Neptune v. Haiti. Merits, reparations and costs*. Judgment of May 6, 2008. Series C No. 180, para. 129, and *Case of López et al. v. Argentina. Preliminary objections, merits, reparations and costs, supra*, para. 179.

<sup>172</sup> Cf. *Case of Lori Berenson Mejía v. Peru. Merits, reparations and costs*. Judgment of November 25, 2004. Series C No. 119, para. 100, and *Case of López et al. v. Argentina. Preliminary objections, merits, reparations and costs, supra*, para. 180.

<sup>173</sup> Cf. *Case of Maritza Urrutia v. Guatemala. Merits, reparations and costs*. Judgment of November 27, 2003. Series C No. 103, para. 92, and *Case of Valenzuela Ávila v. Guatemala. Merits, reparations and costs*. Judgment of October 11, 2019. Series C No. 386, para. 180. In this regard, see, Article 53 of the Vienna Convention on the Law of Treaties, which establishes: “Treaties conflicting with a peremptory norm of general international law (*jus cogens*): A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

<sup>174</sup> Cf. International Covenant on Civil and Political Rights, Article 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2; Convention on the Rights of the Child, Article 37, and International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, Article 10.

<sup>175</sup> Cf. Inter-American Convention to Prevent and Punish Torture, Articles 1 and 5; African Charter of Human and Peoples’ Rights, Article 5; African Charter on the Rights and Welfare of the Child, Article 16; Convention of Belém do Pará, Article 4, and European Convention on Human Rights, Article 3.

of the Convention, which encompasses their sexual life or sexuality.<sup>176</sup> Sexual violence violates essential values and aspects of a person's private life, supposes interference in their sexual life, and annuls their right to take decisions freely about who they wish to have sexual relations with, causing them to lose complete control over their most personal and intimate decisions and over basic bodily functions.<sup>177</sup>

142. It has also considered that rape is any act of vaginal or anal penetration without the victim's consent using parts of the aggressor's body or objects, as well as oral penetration by the male organ.<sup>178</sup>

143. Additionally, the Court notes that, in this case, the general obligations derived from Articles 5 and 11 of the American Convention are reinforced by the specific obligations derived from the Inter-American Convention to Prevent and Punish Torture. Articles 1 and 6 of this inter-American convention reinforce the absolute prohibition of torture and the obligation of the States to prevent and to punish any act of torture or attempt to commit torture and other cruel, inhuman or degrading treatment within their jurisdiction.

144. In this case, the dispute centers on what happened to the presumed victim while she was detained. In order to analyze what happened to the presumed victim, the Court will take into account the different evidence that helps determine what happened, and will examine them in the following order: B.1) the statements made by Azul Rojas Marín; B.2) the forensic medical examination, and B.3) the expert appraisal of the presumed victim's clothing. Then, the Court will determine B.4) the ill-treatment that occurred, and B.5) the legal classification.

### **B.1 The statements made by Azul Rojas Marín**

145. The file in this case reveals that the presumed victim filed a verbal complaint about the facts with the police on February 27, 2008, at 4 p.m.;<sup>179</sup> a statement of the facts on February

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<sup>176</sup> Cf. *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of August 30, 2010. Series C No. 215, para. 129, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 179.

<sup>177</sup> Cf. *Case of J. v. Peru. Preliminary objection, merits, reparations and costs, supra*, para. 367, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 179.

<sup>178</sup> Cf. *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs*. Judgment of November 25, 2006. Series C No. 160, para. 306, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 182.

<sup>179</sup> Ms. Rojas Marín reported that, at the time of the detention, they shouted at her: "Get in, *cabro concha de tu madre*" and when she did not do so, they shouted the same insults three times and then hit her with the police baton in the solar plexus to make her get into the van. On arrival at the Casa Grande Police Station, they locked her in a room "and then three police agents entered; one of them began to say '*te gusta la pin... concha de tu madre*'; take your clothes off' and, as she did not want to do this, they slapped her, and as she did not undress, the police agents began to undress her forcibly and they tore her underwear. [...] then, a police agent tried to introduce the baton [in her] anus, and as he was unable to do this, they pushed [her] against the wall and took [her] clothes, leaving [her] naked. Then a tall police agent approached and began to caress [her] face and neck with his hands saying '*te gusta la p..., concha de tu madre*' to which [Ms. Rojas Marín] reacted by spitting in his face. The police then withdrew leaving [her] alone in the room. Later, a police agent threw [her] clothes at [her] so that [she] could get dressed and, on checking the pockets of her trousers, [she] could not find her mobile telephone [...] and [cash] so [she] proceeded to demand them back and they told [her] that there had been nothing in the trousers and they again undressed [her] and left [her] naked until 6 a.m. that day, when a police technician arrived [...] and on seeing her said '*What's this fucking fag doing here!*'. Then they gave [her] back [her] clothes so that [she] could get dressed and following this, [she] again asked the police technician [...] to return her things, and he answered: 'Leave *maricon concha de tu madre*, they should have put you in a cell so that everyone could fuck you.'" Cf. Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793).

28, 2008;<sup>180</sup> the expansion of the statement on March 6, 2008;<sup>181</sup> the statement made during the judicial inspection and reconstruction procedure,<sup>182</sup> and a statement at a hearing held during the procedure before the Inter-American Commission on December 1, 2016.<sup>183</sup> The analysis of these statements reveals that, in general, Ms. Rojas Marín indicated on at least three occasions that the state agents hit her with a baton to make her get into the police vehicle<sup>184</sup> and, on arriving at the police station, three police agents shut her in a room where:

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<sup>180</sup> Ms. Rojas Marín reported that, at the time of the detention, they shouted at her: "Get in, *cabro concha de tu madre*" and when she did not do so, they shouted the same insults three times and then hit her with the police baton in the solar plexus to make her get into the van. On arrival at the Casa Grande Police Station, three police agents made her go into a room and one of them said '*te gusta la pin... concha de tu madre*; take your clothes off' and, as she did not want to undress, they slapped [her], and as she did not undress, the police agents began to undress her forcibly and they tore her underwear." In answer to the questions of the Public Prosecution Service, she indicated that a police agent "ordered the agent [LQC] to take out his baton and he began to hit me, so I got down on the floor, leaning against the wall and the other younger agent lifted me up by the arms, and the tall police agent began to ram the baton into my genitals, while the other agent behind me held me by the arms (armpits) and had his back to the wall, and the tall agent rammed the baton into my testicles and then ordered the agent [LQC] to bring water and he brought a pitcher which he filled from a disposable plastic water bottle, and they wet the baton in the water, then [LQC together] with the agent who was holding my arms, turned me around and the tall police agent with the baton continued to hit me and tried to introduce the baton in my rectum, and as I was kicking trying to make them free me, I pushed [LQC] who fell and the other agent also fell and they let go of me, and then the tall police agent told them to get up; and because I was squatting they made me stand against the wall [...] and made me turn round, insulting me, and when I was against the wall he twice introduced the rubber baton in my rectum and I screamed because of the pain and I expelled it." Cf. Statement made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folios 2808 to 2811).

<sup>181</sup> She stated that she ratified the content of her statement of February 28, 2008. She indicated that, on arriving at the police station, "a police agent said to me '*te gusta la pinga, cabro concha de tu madre*' and then he came closer and asked me 'Where is your brother, *El Tuco*,' and then I said 'I don't know' and he grabbed me and slapped me and said 'Take your clothes off, *concha de tu madre*' and as I did not want to undress and asked him why they were doing this to me, he again asked about me about my brother '*Tuco*' and then he came closer and shouted 'Take your clothes off, take your clothes off, *concha de tu madre*' and then he came even closer and tried to undress me forcibly and I fell to the ground and the tall police agent sat on top of me [and] ordered two other agents to undress me; the pale-faced agent took off my shirt and the agent [LQC] took off my trousers and shoes, and then I was able to get up and, then, the tall police agent came up to me and said '*te gusta la pinga, cabro concha de tu madre*' and tore my underwear and ordered [LQC] to give him his baton." Then he asked for water, "he began to wet the baton in the water and rammed the baton into me rectum several times." Cf. Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2815).

<sup>182</sup> During this procedure, the presumed victim described: (i) how two police agents held her arms against a wall and another introduced a rubber baton in her rectum twice; (ii) while resisting this she was able to free her arms and LQC grabbed her by the hair, pushing her against the wall again; (iii) as she was screaming, LQC picked up her clothes and the three agents left the room, and (iv) after the three agents had left, DPP entered and began to caress her arms asking her "*cabro, te gusta la pinga?*" Cf. Video 1 of inspection and reconstruction procedure on August 15, 2008 (evidence file, folder of audiovisual material, minutes 00:00 to 00:22, 01:10 to 02:38, 4:02 to 4:38 and 11:11 to 12:48).

<sup>183</sup> She indicated that, at the time of her detention, they hit her in the stomach with the police baton and, in the Police Station, they undressed her "they began to hit me with a baton that they wet in a bucket, which I believe was so that it would not leave traces. Then they took off my pants and grabbed my buttocks, while shouting '*Te gusta la P*'; they pushed me against the wall and I felt sudden pain; they had introduced the baton in my rectum." Cf. Statement made by Azul Rojas Marín at the public hearing on merits before the Inter-American Commission on December 1, 2016.

<sup>184</sup> Cf. Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793); Statement of facts made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folio 2808), and Statement made by Azul Rojas Marín at the public hearing on merits before the Inter-American Commission on December 1, 2016 (evidence file, folder of audiovisual material, minutes 3:40 to 3:45).

(i) she was forcibly undressed;<sup>185</sup> (ii) asked about the whereabouts of her brother;<sup>186</sup> (iii) slapped;<sup>187</sup> (iv) comments were made about her sexual orientation,<sup>188</sup> and (vi) the police baton was twice introduced into her anus.<sup>189</sup>

146. First, the Court finds it evident that rape is a particular type of aggression that, in general, is characterized by occurring in the absence of people other than the victim and the aggressor or aggressors. Given the nature of this type of violence, the existence of graphic or documentary evidence cannot be expected and, therefore, the victim's statement constitutes fundamental evidence of the fact.<sup>190</sup>

147. The Court notes that the presumed victim did not mention the rape when reporting the facts to the press. Also, in the first complaint filed before the police, she indicated that "a police agent tried to put the baton [in her] anus, and as he was unable to do so, he pushed [her] against the wall."

148. This Court has indicated that the mention of some of the alleged ill-treatment only in some of the statements does not mean that they are false or that the facts described are untrue.<sup>191</sup> The Court takes into account that the facts described by Ms. Rojas Marín refer to a traumatic event that she suffered, the impact of which could lead to a certain lack of precision when recalling them.<sup>192</sup> Also, when analyzing the said statements, it must be taken into account that sexual aggression corresponds to a type of offense that, frequently, the victim

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<sup>185</sup> Cf. Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793); Statement made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folio 2809), and Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2815).

<sup>186</sup> Cf. Statement made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folio 2810); Expansion of the statement made by Azul Rojas Marín before the Second Provincial Corporate Criminal Prosecution Service of Ascope on March 6, 2008 (evidence file, folio 2815), and Statement made by Azul Rojas Marín at the public hearing on merits before the Inter-American Commission on December 1, 2016 (evidence file, folder of audiovisual material, minutes 4:11 to 4:13).

<sup>187</sup> Cf. Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793); Statement made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folios 2809 and 2810); Expansion of the statement made by Azul Rojas Marín the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2815), and Statement made by Azul Rojas Marín at the public hearing on merits before the Inter-American Commission on December 1, 2016 (evidence file, folder of audiovisual material, minutes 4:45 to 4:46).

<sup>188</sup> Cf. Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793); Statement made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folios 2809, 2810 and 2811); Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folios 2815 and 2816), and Statement made by Azul Rojas Marín at the public hearing on merits before the Inter-American Commission on December 1, 2016 (evidence file, folder of audiovisual material, minutes 3:36 to 3:39, 4:18 to 4:25, 5:03 to 5:07 and 5:49 to 5:51).

<sup>189</sup> Cf. Statement made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folio 2811); Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2816); Video 1 of the inspection and reconstruction procedure on August 15, 2008 (evidence file, folder of audiovisual material, annexes to the pleadings and motions brief, minutes 00:00 to 00:22), and Statement made by Azul Rojas Marín at the public hearing on merits before the Inter-American Commission on December 1, 2016 (evidence file, folder of audiovisual material, minutes 5:59 to 6:05).

<sup>190</sup> Cf. *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 100, and *Case of Valenzuela Ávila v. Guatemala. Merits, reparations and costs, supra*, para. 183.

<sup>191</sup> Cf. *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 113, and *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs, supra*, para. 150.

<sup>192</sup> Cf. *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 105, and *Case of Alvarado Espinoza et al. v. Mexico. Merits, reparations and costs. Judgment of November 28, 2018. Series C No. 370, para. 187.*



does not report owing to the stigma that this report usually entails.<sup>193</sup> Thus, it is reasonable that Ms. Rojas Marín did not mention the rape in the report made in the media or in the first oral complaint made at the police station.

149. In sum, the Court considers that, aside from some details, the different statements made by Ms. Rojas Marín before the domestic authorities are consistent, which reinforces their plausibility.

## **B.2 Forensic medical examination**

150. On February 29, 2008, at 12:30 p.m., the forensic medical examination requested by the prosecutor was performed. The report indicated that the presumed victim “walks with slight difficulty owing to the pain, sits down slowly and then seeks an antalgic position.” It describes swelling on the head, an injury to the lip and bruising on the arms. It also indicates:

Anus: folds present, presence of recent upper perianal fissure of +3 x 0.5 cm and recent inferior perianal fissure of +2 x 0.2 cm, painful to the touch. Presence of recent anal fissures [... and] presence of earlier anal fissures.

151. The report concluded that Ms. Rojas Marín had: “(1) recent extragenital traumatic injuries caused by someone else with a blunt instrument; (2) no recent para-genital traumatic injuries, and (3) anus: old anal fissures with signs of a recent unnatural act.” The report indicates that she required 8 disability days.<sup>194</sup> In a medical expertise to ratify those findings, the forensic physical indicated that the injuries described in the forensic medical certificate “cannot prove that [...] they were caused by a police baton, but owing to the form, this is probable.”<sup>195</sup>

152. In the course of the investigations conducted in 2019, the forensic physician indicated in a ratification procedure that, to determine whether the injuries were compatible with the attempt of forcible penetration of the rectum with a police baton, he would have to see the police baton and know the measurements of the said object.<sup>196</sup> Additionally, a forensic medical certificate issued on November 4, 2019, indicated that “[i]n a recent examination performed of the person evaluated, old injuries were found that are consistent with the act described (in other words, scars in the anal region located in the same place as indicated in the initial forensic medical certificate [...]).” In this regard, the report indicated that “the description of the facts made by the presumed victim, as well as the injuries produced are those that are generally found with this type of act.”<sup>197</sup>

153. It should be pointed out that the absence of physical signs does not mean that ill-treatment did not occur, because it is frequent that such acts of violence against an individual do not leave permanent traces or scars.<sup>198</sup> The same is true for cases of sexual violence and rape in which the occurrence is not necessarily reflected in marks or scars during a medical

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<sup>193</sup> 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. 95, and *Case of Espinoza González v. Peru. Preliminary objections, merits, reparations and costs, supra*, para. 150.

<sup>194</sup> Cf. Forensic Medical Certificate of February 29, 2008 (evidence file, folio 2193).

<sup>195</sup> Cf. Medical ratification procedure of April 22, 2008 (evidence file, folios 5473 and 5474).

<sup>196</sup> Cf. Medical ratification procedure of July 4, 2019 (evidence file, folio 5671).

<sup>197</sup> Cf. Forensic Medical Certificate of November 4, 2019 (evidence file, folios 5469 to 5471).

<sup>198</sup> Cf. *Case of J. v. Peru. Preliminary objection, merits, reparations and costs, supra*, para. 329, and *Case of Valenzuela Ávila v. Guatemala. Merits, reparations and costs, supra*, para. 192.

examination because not all cases of sexual violence and/or rape cause physical injuries or diseases that can be verified by a medical examination.<sup>199</sup>

154. Even though several of the alleged abuses did not leave physical traces, the Court notes that the injuries found in the extragenital and genital areas are consistent with the presumed victim's assertion that she was hit several times during her detention and that they introduced the police baton in her anus.

### **B.3 Expert appraisal of the presumed victim's clothing**

155. In the course of the investigation, the clothing that the presumed victim was wearing on the day of the incident was examined. The expert report indicated that, on the "outside back of [the trousers], at the level of the pockets, brownish contact stains can be observed. On the central part of the inside reddish-brown stains are impregnated." The analysis of the latter determined that this was type "O"<sup>200</sup> human blood, which coincides with the presumed victim's blood type.<sup>201</sup>

156. The correspondence between the blood type of the blood found on the back of the presumed victim's trousers and the blood type of the presumed victim is additional evidence to support the statements made by Ms. Rojas Marín.

### **B.4 Determination of the ill-treatment that occurred**

157. Based on all the preceding considerations, the Court finds that it has been sufficiently proved that, during her detention, Ms. Rojas Marín was forcibly undressed, hit on several occasions, the state agents made derogatory comments about her sexual orientation, and she was the victim of rape because a police baton was introduced into her anus twice. This determination is based on: (1) the statements made by Ms. Rojas Marín; (2) the medical examinations performed on Ms. Rojas Marín, and (3) the expert report on the presumed victim's clothing. In addition, the Court recalls that the detention of Ms. Rojas Marín was carried out without meeting the legal requirements, including the obligation to record the detention, and that this detention was carried out for discriminatory purposes (*supra* paras. 100 to 134). The conditions in which the detention was carried out support the conclusion that the ill-treatment alleged by the presumed victim occurred.

### **B.5 Legal classification**

158. The Court has indicated that any use of force that is not strictly necessary owing to the conduct of the person detained constitutes an attack on human dignity in violation of Article 5 of the American Convention.<sup>202</sup> In the instant case, the State has not shown that the force used at the time of the detention was necessary. In addition, the rape of which Ms. Rojas Marín was a victim also constituted a violation of her right to personal integrity.

159. The violation of the right to physical and mental integrity has different connotations of degree and ranges from torture to other types of abuse or cruel, inhuman or degrading

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<sup>199</sup> Cf. *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 124, and *Case of Valenzuela Ávila v. Guatemala. Merits, reparations and costs, supra*, para. 185.

<sup>200</sup> Cf. Expert report of March 12, 2008 (evidence file, folio 2236).

<sup>201</sup> Cf. Expert report of March 11, 2008 (evidence file, folio 2238).

<sup>202</sup> Cf. *Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C No. 33, para. 57, and *Case of Díaz Loreto et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of November 19, 2019. Series C No. 392, para. 91.

treatment, the physical and mental aftereffects of which vary in intensity based on factors that are exogenous and endogenous to the individual (such as, duration of the treatment, age, sex, health, context, and vulnerability) that must be analyzed in each specific situation.<sup>203</sup>

160. The Court has understood that, in light of Article 5(2) of the Convention, "torture" is any act of abuse that: (i) is intentional; (ii) causes severe physical or mental suffering, and (iii) is committed with any objective or purpose.<sup>204</sup> The Court has also recognized that threats and the real danger of subjecting a person to serious physical injuries produces, in certain circumstances, moral anguish of such intensity that it may be considered "psychological torture."<sup>205</sup> Similarly, the Court has reiterated that rape and other forms of sexual violence may constitute cruel, inhuman or degrading treatment and even acts of torture if the elements of the definition are met.<sup>206</sup> To classify a rape as torture, it is necessary to examine the intentionality, the severity of the suffering, and the purpose of the act, taking into consideration the specific circumstances of each case.<sup>207</sup> The Court will now examine whether these elements were present in the abuse of which Azul Rojas Marín was a victim.

161. Regarding the existence of an intentional act, the evidence in the case file proves that the abuse was inflicted on the presumed victim deliberately. Indeed, the statements reveal that the state agents hit Ms. Rojas Marín intentionally on several occasions and raped her by introducing the police baton in her anus.

162. Based on the evidence provided, the Court finds that the severity of the abuse suffered by the presumed victim has been proved. The Court has established that rape is an extremely traumatic experience that has severe consequences and causes great physical and psychological harm, leaving the victim "physically and emotionally humiliated."<sup>208</sup> On this point, the forensic medical examination ratified the presence of extragenital and anal injuries (*supra* para. 151), and the blood found on the back of the presumed victim's trousers reveals that, possibly following the rape, when putting the trousers back on, the bleeding continued. Also, Ms. Rojas Marín indicated that the "first four days the pain was most intense, she was even afraid to defecate because it hurt."<sup>209</sup> She also indicated that "it hurt her to sit down, she felt pressure, she had to find a comfortable position."<sup>210</sup>

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<sup>203</sup> Cf. *Case of Loayza Tamayo v. Peru. Merits, supra*, paras. 57 and 58, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 150.

<sup>204</sup> Cf. *Case of Bueno Alves v. Argentina. Merits, reparations and costs. Judgment of May 11, 2007. Series C No. 164*, para. 79, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs. Judgment of October 10, 2019. Series C No. 385*, para. 129.

<sup>205</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs. Judgment of December 3, 2001. Series C No. 88*, para. 102, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 192.

<sup>206</sup> Cf. *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs, supra*, paras. 110 and 112, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 193.

<sup>207</sup> Cf. *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 128, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 193.

<sup>208</sup> Cf. *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs, supra*, para. 311, and *Case of López Soto et al. v. Venezuela. Merits, reparations and costs. Judgment of September 26, 2018. Series C No. 362*, para. 187.

<sup>209</sup> Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2819).

<sup>210</sup> Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2819).

163. Lastly, regarding the purpose, the Court has considered, in general, that rape, like torture, seeks, among other objectives, to intimidate, degrade, humiliate, punish or control the person subjected to it.<sup>211</sup> The representatives argued that the abuse was inflicted for discriminatory purposes. In this regard, expert witness Juan Méndez indicated that “to determine whether a case of torture has been motivated by prejudice against LGBTI people,” the following indicators can be used: “the method and characteristics of the violence inspired by discrimination. For example, in cases of LGBTI people, anal rape or the use of other forms of sexual violence”; “discriminatory insults, comments or gestures by the perpetrators during the perpetration of the conduct or in its immediate context, referring to the sexual orientation or gender identity of the victim” or “the absence of other reasons.”<sup>212</sup> In this case, one of the aggressions suffered by the presumed victim was anal rape. On this point, expert witness María Mercedes Gómez indicated that rape carried out using “an instrument that symbolically represents authority [such as] the police baton, [...] sends the symbolic message [...] of restoring a masculinity that is threatened by the perception of the victim as not complying with the established order of masculinity.”<sup>213</sup>

164. In addition, the violence use by the state agents against Ms. Rojas Marín included stereotypical insults and threats of rape. Thus, the Court notes that on several occasions the agents said “*cabro*”, “*concha de tu madre*”, “*te gusta la pinga*” [you like cock], “*maricón de mierda*,” [fucking fag] and “they should have put you in a cell so that everyone could fuck you.”<sup>214</sup> The Court considers that the anal rape and the comments relating to sexual orientation also reveal a discriminatory purpose, so that this was an act of violence based on prejudice.

165. Furthermore, the Court notes that the case can be considered a “hate crime” because it is clear that the aggression against the victim was based on her sexual orientation; in other words, this crime not only damaged the rights of Azul Rojas Marín, but was also a message to the whole LGBTI community, a threat to the freedom and dignity of this entire social group.

166. Based on the foregoing, the Court concludes that the series of abuses and aggressions suffered by Azul Rojas Marín, including the rape, constituted an act of torture by state agents.

167. Consequently, the State violated the rights to personal integrity, privacy, and not to be subjected to torture established in Articles 5(1), 5(2) and 11 of the Convention, in relation to the obligations to respect and to ensure these rights without discrimination, established in Article 1(1) of this instrument and Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture.

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<sup>211</sup> Cf. *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 117, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 193.

<sup>212</sup> Cf. Affidavit of Juan Ernesto Méndez of August 1 2019 (evidence file, folios 3401 and 3402)

<sup>213</sup> Cf. Statement made by María Mercedes Gómez during the public hearing held in this case.

<sup>214</sup> Cf. Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793); Statement made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folio 2811); Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2815); Video 1 of the inspection and reconstruction procedure on August 15, 2008 (evidence file, folder of audiovisual material, minutes 00:00 to 00:22, 01:10 to 02:38, 4:02 to 4:38 and 11:11 to 12:48), and Statement made by Azul Rojas Marín at the public hearing on merits before the Inter-American Commission on December 1, 2016.

**VII-4**  
**RIGHTS TO JUDICIAL GUARANTEES AND JUDICIAL PROTECTION<sup>215</sup>**

**A. Arguments of the parties and of the Commission**

168. The **Commission** argued that the investigation and the criminal proceedings conducted in the domestic sphere “contravened the obligations to protect and to provide care for a victim who reports sexual violence, with the aggravating factor of the prejudice that exists with regard to LGBTI people.” It indicated that “initially, there was a delay in providing the appropriate means to obtain evidence to clarify what happened,” and that “in this type of case, a delay [...] may be significant.” It considered that the information provided by Azul Rojas Marín “should have been sufficient evidence for the State to activate its reinforced duty” to investigate possible acts of violence based on prejudice, and this did not occur. It stressed that the authorities performed a [forensic medical] examination without providing the victim with any kind of “counseling or support.” It observed that the forensic medical examination “made a superficial assessment” without “verifying, in the greatest possible detail, the specific aggressions that she described having suffered” and indicated that this examination report included “irrelevant statements about Azul Rojas Marín’s private life and negative gender stereotyping”; also, that the psychological assessment discredited “the victim and [...] her credibility,” constituting “an additional form of revictimization.” Lastly, the Commission considered that, the Ascope Prosecutor’s decisions not “to expand the investigation to include the crime of torture” and to dismiss the case “used an analysis methodology based on comparing the statements of the victim with those of the agents involved, and failed to make a comprehensive analysis.”

169. The **representatives** argued that there were “numerous acts and omissions of State officials in the investigation of the unlawful detention, sexual violence and torture.” They indicated that Azul “went to file a complaint with the Casa Grande Police Station, where the acts took place, the day after her release,” and they refused to receive the complaint because “the police agents alleged that their chief was not there at that time.” They added that the prosecutor “failed to order a forensic medical examination for the offense of rape immediately, or to require the custody of key evidence, such as the clothes that Azul was wearing on the day of the incident.” They argued that “the forensic medical examination was not performed by appropriate personnel, trained in cases of torture,” and that Azul received no medical or psychological care from the State. They indicated that “the procedure to obtain her statement [...] was not carried out privately and respecting the victim.”

170. They also argued that “the preliminary investigation was fraught with irregularities, deficiencies and gaps.” Therefore, “it was clear that the judicial authorities and the Public Prosecution Service acted in a discriminatory way, applying stereotypes. The representatives considered that the lack of an adequate investigation was discriminatory because “the prosecution’s file does not show that any procedures were conducted to clarify whether the facts” were related to the “sexual orientation and non-normative gender expression” of Azul Rojas Marín even though “these elements were mentioned from the start of the investigation.” They indicated that “in this case, Azul Rojas Marín faced discrimination and prejudices based on her sexual orientation and non-normative gender expression from the start of the investigation, reflected in the minimization of the facts, the discrediting of her statements, the disparaging references, and other actions by the agents of justice.” They considered that “her complaint was not handled by an impartial prosecutor owing to the presence of negative stereotypes about Azul.”

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<sup>215</sup> Articles 8 and 25 of the Convention.

171. In addition, they argued that the definition of torture in the Peruvian Criminal Code does not comply “with international standards” and that this was “not only a violation of Peru’s international obligations, but also a violation of the rights to a remedy and to reparation of every victim of torture.” They added that “the lack of due diligence in the investigation [...] and the discriminatory and offensive treatment to which she was subjected by different members of the system of justice owing to her sexual orientation, constituted cruel, inhuman or degrading treatment.” Furthermore, owing to the “inadequacy of the criminal definition [of torture], this was not investigated in this case.” In particular, they emphasized that the definition of torture “does not include the circumstance that the act is committed in order to discriminate against the victim.”

172. The **State** considered that, “during the criminal proceedings, Azul Rojas Marín [...] was heard with the due guarantees and within a reasonable time by a competent and independent court, previously established by law” and had access to “simple, prompt and effective remedies.” It indicated that it was false that Azul Rojas Marín had gone to the Casa Grande Police Station to file a criminal complaint on February 25 and 26, 2008. It underlined that “there is no reason to conclude that the rules established by the Convention and the case law of the Inter-American Court make it necessary to invalidate all the evidence obtained by the police in certain circumstances.” The State also provided information on the second investigation of the facts that the Second Supraprovincial Prosecutor ordered on November 20, 2018.

### **B. Considerations of the Court**

173. The Court has established that, pursuant to the American Convention, the States Parties are obliged to provide effective judicial remedies to the victims of human rights violations (Article 25), and these remedies must be substantiated in keeping with the rules of due process of law (Article 8(1)), all of this within the general obligation of the States to ensure the free and full exercise of the rights recognized in the Convention to all persons subject to their jurisdiction (Article 1(1)).<sup>216</sup> It has also indicated that the right of access to justice must ensure, within a reasonable time, the right of the presumed victims or their family members that everything necessary is done to discover the truth about what happened and to investigate, prosecute and punish, as appropriate, those found responsible.<sup>217</sup>

174. The Court has also indicated that Article 8 of the Inter-American Convention to Prevent and Punish Torture clearly establishes that, “if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed, *ex officio*, and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal proceedings.”<sup>218</sup>

175. Taking into account the arguments of the parties and of the Commission, the Court will proceed to examine: (1) the obligation to receive the complaint; (2) the due diligence in the investigation; (3) the failure to investigate torture, and (4) the dismissal decision.

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<sup>216</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 91, and *Case of Gómez Virula et al. v. Guatemala. Preliminary objection, merits, reparations and costs. Judgment of November 21, 2019. Series C No. 393*, para. 64.

<sup>217</sup> Cf. *Case of Bulacio v. Argentina. Merits, reparations and costs. Judgment of September 18, 2003. Series C No. 100*, para. 114, and *Case of Gómez Virula et al. v. Guatemala. Preliminary objection, merits, reparations and costs, supra*, para. 86.

<sup>218</sup> Cf. *Case of Gutiérrez Soler v. Colombia. Judgment of September 12, 2005. Series C No. 132*, para. 54, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 151.

## **B.1 Obligation to receive the complaint**

176. The Court finds it essential that police and jurisdictional agencies offer accessible mechanisms for filing complaints and that these are well publicized.<sup>219</sup> In this case, the presumed victim has stated that, on February 25, 2008, she went to the Police Station to report the facts, but her complaint was not received.<sup>220</sup> Meanwhile, three state agents denied that the presumed victim had come forward to file a complaint on February 25 or 26, 2008.<sup>221</sup> On this point, it is the representatives who must prove to the Court that the presumed victim went to file a complaint on February 25, which they could have done, for example, by presenting statements by persons who were with the presumed victim that day. Consequently, the Court considers that it has no evidence to conclude that the presumed victim went to the police station to report the facts before February 27, 2008.

177. Therefore, the State did not violate Articles 8(1) and 25 of the Convention based on the above.

## **B.2 Due diligence in the investigation**

178. The Court has indicated that the obligation to investigate established in the American Convention is reinforced by the provisions of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture which oblige the States to "take effective measures to prevent and punish torture within their jurisdiction," and also "to prevent and punish other cruel, inhuman or degrading treatment or punishment."

179. The Court has developed specific standards on how to investigate sexual violence in cases in which the victims have been women. These standards are based above all on the provisions of the Istanbul Protocol and the World Health Organization's Guidelines for medico-legal care for victims of sexual violence,<sup>222</sup> which describe measures that should be taken in cases of sexual violence, regardless of whether the victims are men or women. Therefore, these same standards are applicable in this case.

180. This Court has stipulated that, in a criminal investigation into sexual violence, it is necessary that: (i) the victim's statement is taken in a safe and comfortable environment that offers privacy and inspires confidence; (ii) the victim's statement is recorded to avoid or limit

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<sup>219</sup> Cf. *Case of Quispialaya Vilcapoma v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2015. Series C No. 308, para. 207.

<sup>220</sup> In her first statement, the presumed victim indicated that a police agent refused to receive it because "the major had told him that he could not receive the complaint at the police station." Subsequently, in the expansion of her statement, she indicated that he could not receive it "because the major was not there." Cf. Statement made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folios 2811 and 2812), and Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2817).

<sup>221</sup> In particular, the police major denied that he had given orders not to receive the presumed victim's complaint. Another police agent, DPP, indicated that he was unaware whether the presumed victim had come to the police station to file a complaint, "but, if that had been the case, the agent on guard would have advised me that [she] wanted to file a complaint because I am in charge of investigations." Lastly, the agent who supposedly had refused to receive the complaint indicated that Ms. Rojas Marín had not come to the police station to file a complaint on either February 25 or 26, 2008. He also affirmed that it was false that he had said that he could not receive the complaint. Cf. Statement made by the major of the Peruvian National Police before the Second Provincial Corporate Criminal Prosecution Service of Ascope on April 18, 2008 (evidence file, folio 2785); Statement made by DPP at the Casa Grande Police Station on March 7, 2008 (evidence file, folio 2770), and Statement made by JVP at the Casa Grande Police Station on April 22, 2008 (evidence file, folio 2781).

<sup>222</sup> Cf. *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 194, and *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 178.

the need to repeat it; (iii) the victim is provided with medical, psychological and hygienic care, both on an emergency basis and continuously if required, under a care protocol aimed at reducing the consequences of the rape; (iv) a complete and detailed medical and psychological examination is performed immediately by appropriate trained personnel, if possible of the sex preferred by the victim, advising the victim that they may be accompanied by a person of confidence if they so wish; (v) the investigative measures are coordinated and documented and the evidence is handled diligently, taking sufficient samples, performing tests to determine the possible perpetrator of the act, securing other evidence such as the victim's clothing, investigating the scene of the incident immediately, and guaranteeing the proper chain of custody, and (vi) the victim is provided with access to free legal assistance at all stages of the proceedings.<sup>223</sup>

181. Taking the above into account, the Court will now examine: (a) the statements made by Azul Rojas Marín; (b) the medical examination that was performed; (c) the omissions in the collection of evidence and in the investigation of possible discriminatory motives; (d) the use of discriminatory stereotyping during the investigation, and (e) the conclusion concerning due diligence.

#### B.2.a The statements made by Azul Rojas Marín

182. In interviews with someone who states that they have been subjected to acts of torture: (i) the person should be allowed to describe freely what they consider relevant; (ii) no one should be required to talk about any form of torture if they feel uncomfortable doing so; (iii) during the interview, the presumed victim's pre-arrest psycho-social history should be documented; and also a summary of the facts relating to the time and circumstances of the initial detention, the place and conditions of detention while in State custody, and the methods of ill-treatment and torture presumably suffered, and (iv) the detailed statement should be recorded and transcribed.<sup>224</sup> In addition, the interview with a presumed victim of acts of sexual violence or rape should be conducted in a comfortable and safe environment that offers privacy and inspires confidence and should be recorded to avoid the need to repeat it.<sup>225</sup>

183. In this case, the presumed victim had to make a statement about the rape on three occasions,<sup>226</sup> in addition to describing the facts during the medical examination,<sup>227</sup> the

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<sup>223</sup> Cf. *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 194, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, 272.

<sup>224</sup> Cf. *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs, supra*, para. 248, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 273. See also, United Nations, Office of the United Nations High Commissioner for Human Rights, Istanbul Protocol (Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), New York and Geneva, 2004, paras. 100, and 135 to 141.

<sup>225</sup> Cf. *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 194, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 273.

<sup>226</sup> Cf. Statement made by Azul Rojas at the Casa Grande Police Station on February 28, 2008 (evidence file, folio 2811); Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2815), and Video 1 of the inspection and reconstruction procedure on August 15, 2008 (evidence file, folder of audiovisual material, minutes 00:00 to 00:22, 01:10 to 02:38, 4:02 to 4:38 and 11:11 to 12:48).

<sup>227</sup> Cf. Forensic Medical Certificate of February 29, 2008 (evidence file, folio 2822).



psychological assessment,<sup>228</sup> and the psychiatric evaluation.<sup>229</sup> There is no evidence that the State took steps to limit the repetition of the statement.

184. Furthermore, the transcripts of the statements in the case file reveal that Ms. Rojas Marín was questioned without any effort being made to make her feel comfortable and free to describe what she considered relevant. To the contrary, the way in which she was questioned appears to show that, from the moment she began to make her statement, the participating officials were expressing doubts about the truth of what she was saying. For example, on March 6, 2008, the presumed victim was asked:

Whether on February 28, 2008, when your initial statement was received, your anus was still hurting when you sat down, because your statement took around three and a half hours and you remained seated all that time without revealing any problem and you were even sitting with your legs crossed?<sup>230</sup>

185. Similarly, in that same statement, when she had already freely narrated the details of the rape, she was asked “if you can specify whether the rubber baton used by the police was introduced into your rectum or was there merely an attempt to introduce it?”<sup>231</sup>

186. In addition, the judicial authorities carried out a judicial inspection and reconstruction procedure where the presumed victim again had to describe what had happened, but this time in front of those presumably responsible and in the place where the acts occurred.<sup>232</sup> During this procedure, several police agents, judicial officials and the lawyer of one of the accused laughed from time to time when listening to Ms. Rojas Marín’s statement.<sup>233</sup> Also, the lawyer of one of the accused constantly interrupted Ms. Rojas Marín’s statement mockingly, and once asking her to scream as she had screamed on the night of February 25, 2008;<sup>234</sup> also, at another time, he asked the presumed victim whether “at the time the baton was introduced in the rectum [she] could determine the depth of this penetration.”<sup>235</sup> Moreover, during most of the interrogation, this lawyer was holding a rubber baton, which he repeatedly hit against the palm of his other hand.<sup>236</sup> The Court notes that the judge in charge of the procedure never prohibited this conduct.

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<sup>228</sup> Cf. Psychological assessment protocol conducted by the Ascope Forensic Medicine Division of the Institute of Forensic Medicine of the Public Prosecution Service on February 29, 2008 and March 4, 2008 (evidence file, folio 2824).

<sup>229</sup> Cf. Psychiatric assessment of September 13, 2008 (evidence file, folios 2917 and 2918).

<sup>230</sup> Cf. Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2815).

<sup>231</sup> Cf. Expansion of the statement made by Azul Rojas Marín at the Casa Grande Police Station on March 6, 2008 (evidence file, folio 2818).

<sup>232</sup> Cf. Video 1 of the inspection and reconstruction procedure on August 15, 2008 (evidence file, folder of audiovisual material), and Record of the inspection and reconstruction procedure on August 15, 2008 (evidence file, folio 2896).

<sup>233</sup> Cf. Video 1 of the inspection and reconstruction procedure on August 15, 2008 (evidence file, folder of audiovisual material, minutes 00:45, 07:52, 12:05) and Video 2 of the inspection and reconstruction procedure on August 15, 2008 (evidence file, folder of audiovisual material, minutes 05:20 to 05:25).

<sup>234</sup> Cf. Video 1 of the inspection and reconstruction procedure on August 15, 2008 (evidence file, folder of audiovisual material, minutes 02:55 to 03:02).

<sup>235</sup> Cf. Video 1 of the inspection and reconstruction procedure on August 15, 2008 (evidence file, folder of audiovisual material, minutes 01:49 to 2:23) and Record of the inspection and reconstruction procedure on August 15, 2008 (evidence file, folio 2908).

<sup>236</sup> Cf. Video 2 of the inspection and reconstruction procedure on August 15, 2008 (evidence file, folder of audiovisual material, minutes 3:16 to 3:29).

## B.2.b The medical examination that was performed

187. In cases in which there are indications of torture, the medical examinations performed on the presumed victim should be conducted with prior informed consent, and without the presence of law enforcement or other state agents.<sup>237</sup> Also, on becoming aware of acts of rape, a complete and detailed medical and psychological examination should be performed by appropriate trained personnel, if possible of the sex preferred by the victim, advising the victim that they may be accompanied by a person of confidence if they so wish.<sup>238</sup> This examination should be performed in accordance with protocols specifically addressed at documenting evidence in cases of sexual violence.<sup>239</sup>

188. In this case, on February 27, 2008, at 2 p.m., the presumed victim reported the detention, the forced nudity, the comments on her sexual orientation, the beatings she received while detained, and that the agents had tried to introduce a police baton in her anus.<sup>240</sup> The obligation to perform a forensic medical examination immediately arose as a result of this first statement by the presumed victim on February 27, at 2 p.m., where she had already reported ill-treatment and sexual violence. The presumed victim reported the rape for the first time in her statement of February 28, 2008.<sup>241</sup> The medical examination was performed on February 29, 2008 at 12:30 p.m.<sup>242</sup>

189. The case file contains contradictory evidence on the reasons for this delay. On the one hand, according to the presumed victim, she had gone to the police station on February 27 at 3 p.m. and on February 28 at 4 p.m. and, on both days, owing to delays by the prosecution service it had been impossible to carry out the medical examination.<sup>243</sup> On the other hand, the presumed victim's statement of February 28 reveals that, up until that time she had not

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<sup>237</sup> Cf. *Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of October 30, 2008. Series C No, 187, para. 92, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 275.

<sup>238</sup> *Mutatis mutandis, Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs, supra*, para. 252, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 275.

<sup>239</sup> *Mutatis mutandis, Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs, supra*, para. 252, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 275. See, for example, World Health Organization, Guidelines for medico-legal care for victims of sexual violence, Geneva, 2003. Available at: <http://whqlibdoc.who.int/publications/2004/924154628X.pdf?ua=1>.

<sup>240</sup> Cf. Verbal complaint made by Azul Rojas Marín at the Casa Grande Police Station on February 27, 2008 (evidence file, folio 2793).

<sup>241</sup> Cf. Statement made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folio 2811).

<sup>242</sup> Cf. Forensic Medical Certificate of February 29, 2008 (evidence file, folio 2822).

<sup>243</sup> In this regard, the presumed victim stated "that the prosecutor knew about the incident on February 27, [2008], at around 3 p.m. when the major [...] called her on her mobile phone, and she arrived at the Casa Grande Police Station at around 6.30 p.m., taking my statement and organizing an identification procedure until after 9 p.m., and that same day the prosecutor gave me an official note for the forensic physician to examine the injuries." Regarding the delay in performing the medical examination from February 28, at 4.30 p.m. to February 29, at 12.30 p.m., the Court notes that, according to the complaint filed by the presumed victim against the prosecution service, "the prosecutor [...] abusing of her position prevent [the] plaintiff from undergoing the forensic medical examination [on February 28, 2008,] because she retained the plaintiff in her office until late, and the forensic physician was no longer in his office when [the plaintiff] left." The presumed victim indicated that this was "so that the injuries and the traces of rape would not be noticeable." Cf. Statement made by Azul Rojas Marín on May 25, 2009, before the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad and Santa (evidence file, folio 198), and Complaint filed by Azul Rojas Marín before the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad on March 28, 2008 (evidence file, folio 3009).

gone to be examined.<sup>244</sup> In addition, the prosecutor in charge of the case indicated that the statement made on February 28 was very detailed so that it was not possible to carry out the medical examination that day. Therefore, he ordered “that a detailed medical examination be conducted the following day at 7 a.m.” According to the prosecutor, the presumed victim came “to the prosecution offices after 11 a.m.”<sup>245</sup>

190. This Court has indicated that, in order to ensure the best preservation of evidence, the gynecological and anal examination, if this is considered appropriate, should be performed during the first 72 hours after the reported incident based on a specific protocol concerning care for victims of sexual violence.<sup>246</sup> Considering the time that had passed since the incident occurred, the State should have taken all possible steps to ensure that the examination was performed immediately, or at least before this 72-hour period had elapsed, and this did not happen in this case, even considering the delays that could be attributed to the presumed victim.

191. In addition, the Court notes that, the report of the medical examination did not include an interpretation of the probable relationship between the physical symptoms and the aggressions to which the presumed victim referred. In particular, the Court notes that the examination found recent injuries in the anus and observed that the presumed victim indicated that she had suffered some bleeding. However, the respective conclusion is extremely vague. Indeed, the conclusion indicates: “Anus: old anal fissures with signs of a recent unnatural act.”<sup>247</sup> There is no analysis of whether or not the injuries are compatible with an anal rape with a rubber baton. Also, there is no analysis of whether or not the signs of a recent sexual act reveal that it could have been caused by the use of force, or the amount of force that would have been needed to cause that type of injury. On this point, the World Health Organization has indicated that “anal and rectal injuries are seldom seen after consensual penetration.”<sup>248</sup> The Court also notes that there is no evidence that the forensic physician was provided with a police baton and/or information on its dimensions that would have allowed him to examine the compatibility of the alleged acts with the injuries found.<sup>249</sup>

192. These shortcomings were partially rectified on April 22, 2008, by a medical ratification procedure in which the forensic physician indicated that he “could not affirm that [the injuries] were caused by a regulatory police baton, but owing to the form, it is probable.”<sup>250</sup> However, the Court notes that these additional considerations were not taken into account in the request to dismiss the case or in the dismissal decision.<sup>251</sup>

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<sup>244</sup> When making this statement, the presumed victim was asked: “if you can specify whether, owing to the physical aggression you suffered from the police agents, at the present time you have any bodily injury because, to date, you have not gone to the forensic physician to undergo the respective medical examination?” To which she answered “that, I only have a small bruise on my right arm near the armpit.” Cf. Statement made by Azul Rojas Marín the Casa Grande Police Station on February 28, 2008 (evidence file, folio 2812).

<sup>245</sup> Cf. Report signed by the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad of July 24, 2009 (evidence file, folio 2801).

<sup>246</sup> Cf. *Case of Espinoza González v. Peru. Preliminary objections, merits, reparations and costs, supra*, para. 256.

<sup>247</sup> Cf. Forensic Medical Certificate of examination of Azul Rojas Marín on February 29, 2008 (evidence file, folio 2822).

<sup>248</sup> World Health Organization, *Guidelines for medico-legal care for victims of sexual violence*, Geneva, 2003, p. 49.

<sup>249</sup> Cf. Medical ratification procedure of July 4, 2019 (evidence file, folio 5671).

<sup>250</sup> Cf. Medical ratification procedure of April 22, 2008 (evidence file, folios 5473 and 5474).

<sup>251</sup> Cf. Dismissal request of the Second Provincial Corporate Criminal Prosecutor of Ascope of October 21, 2008 (evidence file, folios 83 to 100), and Order to dismiss the proceedings of January 9, 2009, issued by the Ascope First Preliminary Investigation Court (evidence file, folios 2954 to 2969).

193. This Court also notes that there is no record that Azul Rojas Marín was told that the medical examination could be performed by someone of the sex she preferred. Also, the deputy prosecutor was present during the examination,<sup>252</sup> with no record that the presumed victim had consented to this.<sup>253</sup>

B.2.c Omissions in obtaining evidence and in the investigation of possible discriminatory motives

194. To guarantee the effectiveness of investigations into human rights violations, it is necessary to avoid omissions in obtaining evidence and in following up on logical lines of investigation.<sup>254</sup> The Court has indicated the guidelines that must be observed in criminal investigations into human rights violations and these may include: recovering and preserving probative elements in order to aid any potential criminal investigation of those responsible; identifying possible witnesses and obtaining their statements, and determining the cause, manner, place and time of the act investigated. It is also necessary to conduct a thorough investigation of the scene of the crime, and ensure that rigorous analyses are conducted by competent professionals using the most appropriate procedures,<sup>255</sup> and this involves guaranteeing the proper chain of custody.

195. In the instant case, the Court notes that evidence was not secured in the areas where the presumed victim said she had been in the Casa Grande Police Station; nor was the immediate custody required of key evidence, including the clothing that Ms. Rojas Marín was wearing at the time and the rubber baton involved in the incident. Even though both items underwent biological testing, they were only handed in on February 29, 2008,<sup>256</sup> so that there is no certainty that evidence was preserved on them.

196. The Court also considers that when violent acts, such as torture, are investigated, the State authorities have the obligation to take all reasonable measures to discover whether there are possible discriminatory motives.<sup>257</sup> This obligation means that when there are specific indications or suspicions of violence based on discrimination, the State must do everything reasonable, according to the circumstances, to collect and secure the evidence, use all practical means to discover the truth, and issue fully reasoned, impartial and objective decisions, without omitting suspicious facts that could indicate violence based on discrimination.<sup>258</sup> The authorities' failure to investigate possible discriminatory motives may,

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<sup>252</sup> On this point, the prosecutor stated that he entered the doctor's office at the explicit invitation of the forensic physician. Cf. Report signed by the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad and Santa of July 24, 2009 (evidence file, folio 2801). See also, Statement made by Azul Rojas Marín at the public hearing on merits before the Inter-American Commission on December 1, 2016.

<sup>253</sup> Cf. Statement made by Azul Rojas Marín before the Superior Prosecutor, Head of the Decentralized Office of Internal Control of La Libertad and Santa on May 25, 2009 (evidence file, folio 199), and Statement of witness Víctor Álvarez at the public hearing on August 27, 2019.

<sup>254</sup> Cf. *Case of the Serrano Cruz Sisters v. El Salvador. Merits, reparations and costs*. Judgment of March 1, 2005. Series C No. 120, paras. 88 and 105, and *Case of Gómez Virula et al. v. Guatemala. Preliminary objection, merits, reparations and costs, supra*, para. 77.

<sup>255</sup> Cf. *Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs, supra*, para. 128, and *Case of Gómez Virula et al. v. Guatemala. Preliminary objection, merits, reparations and costs, supra*, para. 73.

<sup>256</sup> Cf. Record of reception dated February 29, 2008 (evidence file, folio 2195), and Report presented by the Peruvian State to the Commission on March 24, 2014 (evidence file, folio 354).

<sup>257</sup> Similarly see, ECHR, *Case of Identoba and Others v. Georgia*, No. 73235/12 [Fourth Section]. Judgment of October 7, 2014, para. 67. Similarly see, *Case of Véliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 19, 2014. Series C No. 277, para. 208.

<sup>258</sup> Similarly see, ECHR, *Case of Nachova and Others v. Bulgaria*, No. 43577/98 and 43579/98 [Grand Chamber]. Judgment of July 6, 2005, para. 160, and ECHR *Case of Identoba and Others v. Georgia*, No. 73235/12 [Fourth

in itself, constitute a form of discrimination, contrary to the prohibition established in Article 1(1) of the Convention.<sup>259</sup>

197. In addition, the Court notes that, during the investigation, the Public Prosecution Service never examined the possibility of whether the detention and subsequent torture of the presumed victim were motivated by Ms. Rojas Marín's sexual orientation or gender expression. The authorities did not conduct any investigative action in relation to the derogatory comments that Ms. Rojas Marín stated she had received concerning her sexual orientation. Also, during one of the psychiatric assessment, one of those possibly responsible made homophobic comments<sup>260</sup> which were not followed up on.

#### B.2.d Use of discriminatory stereotyping during the investigation

198. The Court recalls that stereotyping based on sexual orientation refers to a preconception of attributes, conducts or characteristics possessed by a person based on their sexual orientation,<sup>261</sup> in this case in particular, by homosexual men or men perceived as such.

199. In particular, the Court has recognized that personal prejudices and gender stereotypes affect the objectivity of State officials responsible for investigating complaints, influencing their perceptions when determining whether or not an act of violence occurred, and their evaluation of the credibility of witnesses and of the victims themselves. "Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts," "which can, in turn, lead to miscarriage of justice, including the revictimization of complainants."<sup>262</sup> The Court considers that the same may occur in cases of stereotyping based on sexual orientation<sup>263</sup>.

200. In this case, the Court notes that, during the investigation of the facts, the prosecutor allegedly said to the presumed victim: "but if you're a homosexual, how am I going to believe you."<sup>264</sup> Also, during the investigation conducted in this case, remarks were made with regard to the previous sexual conduct of the presumed victim.

201. The report of the forensic medical examination included unnecessary information on the frequency with which the presumed victim had sexual relations and the age at which she

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Section]. Judgment of May 12, 2015, para. 67. Similarly see, *Case of Véliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 19, 2014. Series C No. 277, para. 208.

<sup>259</sup> Similarly see, ECHR, *Case of Begheluri and Others v. Georgia*, No. 28490/02 [Fourth Section]. Judgment of January 7, 2015, paras. 141 and 142; ECHR, *Case of Identoba and Others v. Georgia*, No. 73235/12 [Fourth Section]. Judgment of August 12, 2015, para. 67. Similarly see, *Case of López Soto et al. v. Venezuela. Merits, reparations and costs, supra*, para. 223.

<sup>260</sup> Cf. Psychiatric assessment of JLM of August 19, 2008 (evidence file, folio 2744).

<sup>261</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs, supra*, para. 111, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, reparations and costs*. Judgment of March 9, 2018. Series C No. 351, para. 301.

<sup>262</sup> Cf. *Case of Gutiérrez Hernández et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of August 24, 2017. Series C No. 339, para. 173, and *Case of López Soto et al. v. Venezuela. Merits, reparations and costs, supra*, para. 326. Similarly see, Committee for the Elimination of Discrimination against Women, General recommendation 33 on women's access to justice by women, 2015, para. 26.

<sup>263</sup> Cf. United Nations Office on Drugs and Crime (UNODC), *Handbook on Prisoners with Special Needs: Lesbian, gay, bisexual and transgender (LGBT) prisoners*, 2009, p. 104, and Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 462.

<sup>264</sup> Cf. Statement made by Azul Rojas Marín at the public hearing on merits before the Inter-American Commission on December 1, 2016 (evidence file, folder of audiovisual material, minutes 10:10 to 10:23), and Statement of witness Víctor Álvarez at the public hearing on August 27, 2019.

became sexually active.<sup>265</sup> Also, during the psychiatric assessment, the presumed victim was asked whether she masturbated, the frequency with which she had sexual relations, at what age she had become sexually active, the number of sexual partners she had had, whether she practiced oral sex, whether she watched pornography, whether she had frequented brothels, whether she had had sexual contact with animals, and whether she had had sexual relations with minors.<sup>266</sup>

202. This Court notes that opening lines of investigation into the previous social or sexual behavior of victims in cases of gender-based violence is merely the expression of policies or attitudes based on gender stereotypes.<sup>267</sup> There is no reason why this is not applicable in cases of sexual violence against LGBTI people, or those perceived as such. In this regard, the Court considers that questions regarding the presumed victim's sexual life are unnecessary as well as revictimizing.

203. In addition, it should be noted that, during the forensic medical examination, during the interrogations, and in the decision of the Administrative Court, the expression "unnatural" is used to refer to anal penetration.<sup>268</sup> The use of this term stigmatizes those who perform this type of sexual act, branding them as "abnormal" because they do not conform to heteronormative social rules.<sup>269</sup>

204. The Court considers that these types of inquiries and the terms used in the investigation constitute stereotyping. Even though these stereotypes were not explicitly used in the decisions relating to the dismissal of the criminal investigation, their use reveals that the complaints filed by the presumed victim were not being considered objectively. Also, during the disciplinary administrative proceeding against the members of the Peruvian National Police, one of the arguments used to consider that the facts had not been proved was that Ms. Rojas Marín "has been practicing unnatural relations since the age of 14 and has sexual relations 3 or 4 times a day."<sup>270</sup>

#### B.2.e Conclusion concerning due diligence

205. Based on the foregoing considerations, the Court concludes that the State failed to act with due diligence to investigate the sexual torture of the presumed victim. The circumstances that surround the different statements made by Ms. Rojas Marín, especially the judicial inspection and reconstruction procedure, constituted acts of revictimization. In addition, the medical examination was performed more than 72 hours after the event and the report did not include an interpretation of the probable relationship between the physical symptoms and the aggressions narrated by the presumed victim. Added to this, there was a failure to collect evidence, and the presumed victim's clothing and the police baton possibly used were not

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<sup>265</sup> Cf. Forensic Medical Certificate of examination of Azul Rojas Marín on February 29, 2008 (evidence file, folio 2822).

<sup>266</sup> Cf. Psychiatric assessment of September 13, 2008 (evidence file, folios 2920 and 2921).

<sup>267</sup> Cf. *Case of Véliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 19, 2014. Series C No. 277, para. 209, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 316.

<sup>268</sup> Cf. Forensic Medical Certificate of examination of Azul Rojas Marín on February 29, 2008 (evidence file, folio 2822); Statement made by Azul Rojas Marín at the Casa Grande Police Station on February 28, 2008 (evidence file, folio 2812), and Decision of the Territorial Disciplinary Administrative Tribunal of September 2, 2008 (evidence file, folio 3062).

<sup>269</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 31.

<sup>270</sup> Cf. Decision of the Territorial Disciplinary Administrative Tribunal of September 2, 2008 (evidence file, folio 3062).

secured immediately to submit them to an expert appraisal. Furthermore, the investigation did not examine discrimination based on sexual orientation or gender expression as a possible motive for torture. Lastly, during the investigation, various state agents used discriminatory stereotyping that prevented an objective examination of the facts.

### **B.3 The absence of an investigation into the crime of torture**

206. This Court has established the ill-treatment to which the presumed victim was subjected constituted torture (*supra* para. 165). The criminal investigation was conducted based on the offenses of aggravated rape and abuse of authority.<sup>271</sup> The presumed victim requested that the investigation be expanded to include the crime of torture.<sup>272</sup> The prosecutor decided not to expand the investigation, indicating that the legal definition of the crime of torture “required the intention that the criminal conduct produce a result.” He noted that the presumed victim:

[N]ever mentioned that the police agents obliged [her] to provide information on the whereabouts of [her] brother, alias “*Tuco*”; therefore, since the additional third subjective element of the legal definition of the crime of torture (to obtain from the victim or a third party a confession or information) was not present, the conduct of the defendants did not fall within the definition of the aforementioned wrongful act.<sup>273</sup>

207. This decision was based on the legal definition of the offense in force at the time, which restricted the possible purposes of torture.<sup>274</sup> The Court recalls that, according to its case law, torture can be committed with any objective or purpose (*supra* para. 160), including for discriminatory purposes. The definition of torture in Article 2 of the Inter-American Convention to Prevent and Punish Torture establishes several objectives or purposes, but adds “or for any other purpose.” The Court considers that, in this case, the inadequate legal definition of torture<sup>275</sup> prevented the expansion of the investigation into the ill-treatment inflicted on Ms. Rojas Marín.

208. Therefore, this decision violated Articles 8(1) and 25(1) of the American Convention on Human Rights, in relation to the general obligations contained in Articles 1(1) and 2 of this instrument, and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

### **B.4 The dismissal decision**

209. On January 9, 2009, the Ascope First Preliminary Investigation Court declared that the request of the Public Prosecution Service was well-founded and dismissed the proceedings for

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<sup>271</sup> Cf. Order to dismiss the proceedings issued by the Ascope First Preliminary Investigation Court on January 9, 2009 (evidence file, folio 2954).

<sup>272</sup> Cf. Request filed by Azul Rojas Marín on May 5, 2008 (evidence file, folios 115, 116 and 117).

<sup>273</sup> Cf. Decision of the First Superior Criminal Prosecutor of La Libertad Judicial District of August 28, 2008 (evidence file, folio 2912).

<sup>274</sup> Article 321 of the Peruvian Criminal Code established: “The public official or servant or any other person, with the consent or acquiescence of the former, who inflicts on another severe pain or suffering, either physical or mental, or subjects that person to conditions or methods that annul their personality or diminish their physical or mental capacity, even though this does not cause physical pain or mental distress, in order to obtain from the victim or from a third person a confession or information, or to punish them for any act that they may have committed or be suspected of having committed, or to intimidate them or to coerce them, shall be punished by five to ten years’ imprisonment. If the torture causes the death of the aggrieved person or serious injury is produced and the agent could have foreseen this result, the imprisonment shall be, respectively, from eight to twenty years, and from six to twelve years. Cf. Peruvian Criminal Code, Legislative Decree No. 635 published on April 8, 1991, article 321 (evidence file, folio 5188).

<sup>275</sup> Cf. Affidavit of Juan Ernesto Méndez of August 1, 2019 (evidence file, folio 3398).

both offenses and against all three accused, ordering that the case be closed.<sup>276</sup> The judge based his decision on the following: (i) the statements of the presumed victim were not valid evidence because they lacked credibility and plausibility; (ii) the lack of immediacy of the medical examination and the expert appraisals that were performed, and (iii) the consistent and categorical rejection by the accused of the charges of rape and abuse of authority.<sup>277</sup>

210. The judge indicated that the presumed victim's version of the events was not credible because one of the accused was an important witness in the criminal proceedings underway against one of her brothers.<sup>278</sup>

211. This Court observes that this consideration reveals that the complaint of rape was automatically considered false on the basis of the procedural situation of the presumed victim's brother. This was a discretionary and discriminatory criterion that presumed the bad faith of Ms. Rojas Marín when filing the complaint.

212. The dismissal decision also emphasized that "the aggrieved party has not been consistent in her statement regarding the facts." Among the alleged incongruencies, the judge included the fact that:

In [her] complaint in the printed, spoken and televised media, [she] never mentioned that [she] had been subjected to rape, a fact that only recently arose in her version of the events when answering [a question] by the representative of the Public Prosecution Service [in the statement of February 28]; therefore, her words lacked spontaneity, uniformity and consistency in this regard.<sup>279</sup>

213. This Court recalls that the mention of some of the ill-treatment only in some statements does not mean that these are false or that the facts narrated are not true.<sup>280</sup> Also, when examining the said statements, it should be taken into account that sexual aggressions are a type of offense that victims do not usually report owing to the stigma that a complaint of this type may involve.<sup>281</sup> Thus, the Court notes that it is unreasonable to expect that the presumed victim would report such facts in the media and in all the statements she made on what occurred.

214. The judge also considered it incongruent that the presumed victim, "on February 25, after resting and having lunch, resumed [her] usual work (feeding the pigs, cleaning out the pigsties, visiting friends, the media), activities which required considerable physical energy and using motorcycle taxis to move around, as [she herself] states; and [she] would have been unable to do this in the painful condition that [she] described following the supposed sexual abuse."<sup>282</sup>

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<sup>276</sup> Cf. Order to dismiss the proceedings issued by the Ascope First Preliminary Investigation Court of January 9, 2009 (evidence file, folios 2969 and 2970).

<sup>277</sup> Cf. Order to dismiss the proceedings issued by the Ascope First Preliminary Investigation Court of January 9, 2009 (evidence file, folios 2961, 2962 and 2963).

<sup>278</sup> Cf. Order to dismiss the proceedings issued by the Ascope First Preliminary Investigation Court of January 9, 2009 (evidence file, folio 2960).

<sup>279</sup> Cf. Order to dismiss the proceedings issued by the Ascope First Preliminary Investigation Court of January 9, 2009 (evidence file, folio 2960).

<sup>280</sup> Cf. *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 113, and *Case of J. v. Peru. Preliminary objection, merits, reparations and costs, supra*, para. 325.

<sup>281</sup> Cf. *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 95, and *Case of Favela Nova Brasília v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of February 16, 2017. Series C No. 333, para. 248.

<sup>282</sup> Cf. Order to dismiss the proceedings issued by the Ascope First Preliminary Investigation Court of January 9, 2009 (evidence file, folio 2960).



215. The Court notes that the forensic medical examination conducted by the State established that the presumed victim required 8 disability days,<sup>283</sup> so that there can be no doubt that Ms. Rojas experienced physical consequences from the ill-treatment for several days. The considerations concerning the activities carried out by Ms. Rojas Marín represent a preconception by the authorities of how a rape victim should act.

216. The judge also indicated that “the facts took place in the early morning hours of February 25 [... and] the forensic medical examination of [the presumed victim] and [the examination of the clothing were carried out on February 29], that is, almost four days after the incident. This lack of immediacy in the implementation of the said expert appraisals raises a reasonable doubt that [the injuries found] were caused on the day of the event and by the accused, and it could be presumed that they may have been produced after the day of the event.”<sup>284</sup>

217. The Court has indicated that the failure to perform a medical examination of a person who is in the State’s custody, or implementing this without complying with the applicable standards, cannot be used to question the truth of the presumed victim’s allegations of ill-treatment.<sup>285</sup> The Court has already concluded that the delayed medical examination and the failure to secure the presumed victim’s clothing immediately can be attributed to the State (*supra* paras. 190 and 195). In this regard, the State authorities gave excessive importance to the possibility that the physical evidence was not related to the alleged rape, which was particularly serious taking into account that the injuries found during the medical examination, their ratification, and the evidence found on the presumed victim’s clothing are congruent with the occurrence of the rape of Ms. Rojas Marín with a police baton.

218. In sum, the judicial authorities failed to take into account the particularities of the investigation of torture and rape, unduly discrediting the presumed victim’s statements, failing to accord the necessary importance to the expert appraisals that were carried out, and assuming that the presumed victim’s injuries were self-inflicted.

## **B.5 Conclusion**

219. Based on the above, the Court concludes that the State violated the rights to judicial guarantees and judicial protection, recognized in Articles 8(1) and 25(1) of the American Convention on Human Rights, in relation to the obligations to respect and to ensure these rights without discrimination and to adopt domestic legal provisions, established in Articles 1(1) and 2 of this instrument, and to Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Azul Rojas Marín.

## **VII-5 RIGHT TO PERSONAL INTEGRITY OF AZUL ROJAS MARÍN’S MOTHER<sup>286</sup>**

### **A. Arguments of the parties and of the Commission**

220. The **Commission** considered it “reasonable to establish that the seriousness of the events that occurred, added to the absence of a prompt and adequate judicial response, had

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<sup>283</sup> Cf. Forensic Medical Certificate of examination of Azul Rojas Marín on February 29, 2008 (evidence file, folio 2822).

<sup>284</sup> Cf. Order to dismiss the proceedings issued by the Ascope First Preliminary Investigation Court of January 9, 2009 (evidence file, folio 2962).

<sup>285</sup> Cf. *Case of J. v. Peru. Preliminary objection, merits, reparations and costs, supra*, para. 333, and *Case of Espinoza González v. Peru. Preliminary objections, merits, reparations and costs, supra*, para. 152.

<sup>286</sup> Article 5 of the Convention.

effects that went beyond the direct victim," and included Ms. Rojas Marín's mother. The **representatives** argued that "the serious violations suffered by Azul Rojas Marín caused profound suffering to her mother," Juana Rosa Tanta Marín. They indicated that, in addition to being directly related, "she and Azul had a very close relationship." They also indicated that the failure of the Peruvian authorities to respond to the complaints filed by Ms. Rojas Marín, the lack of sensitivity and the indifference they revealed, and the failure to investigate, prosecute and punish those responsible for the violations adequately caused great anguish to Mrs. Tanta Marín, who died on May 12, 2017, without knowing that it was possible to obtain justice in her daughter's case. The **State** indicated that, although a presumption *iusuris tantum* is applicable to the next of kin of victims of torture, "the investigation into the crime of torture is underway," so that a final judicial decision was needed in order to apply this presumption.

## **B. Considerations of the Court**

221. The Court has considered that, in cases of serious human rights violations, such as forced disappearance,<sup>287</sup> extrajudicial execution,<sup>288</sup> rape and torture,<sup>289</sup> a *iusuris tantum* presumption is applicable with regard to the violation of the right to personal integrity of mothers and fathers, daughters and sons, spouses and permanent companions, and also the siblings of the presumed victims.<sup>290</sup> In this case, the Court has concluded that what happened to Ms. Rojas Marín constituted rape and torture (*supra* para. 165) and the State has not disproved the presumption of the violation of the right to personal integrity of Mrs. Tanta Marín.

222. The evidence provided to the Court reveals that the personal integrity of Juana Rosa Tanta Marín was significantly affected by the sexual torture of Azul Rojas Marín, and the failure to investigate this. According to the psychological appraisal, Mrs. Tanta Marín "had major chronic depression that had serious effects on her physical health and constituted a risk to her life."<sup>291</sup> The report indicates that "given the particular nature of the relationship that Juana had with her [daughter], the traumatic incident had a devastating impact on her psyche, clearly destroying one of her emotional supports in life."<sup>292</sup>

223. Based on the above, the Court finds that the State is responsible for the violation of the right to personal integrity recognized in Article 5(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Juana Rosa Tanta Marín.

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<sup>287</sup> Cf. *Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs. Judgment of November 27, 2008. Series C No. 192, para. 119, and Case of Munárriz Escobar et al. v. Peru. Preliminary objection, merits, reparations and costs. Judgment of August 20, 2018. Series C No. 355, para. 114.*

<sup>288</sup> Cf. *Case of La Cantuta v. Peru. Merits, reparations and costs. Judgment of November 29, 2006. Series C No. 162, para. 218, and Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs, supra, para. 191.*

<sup>289</sup> Cf. *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs, supra, paras. 137 to 139, and Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra, para. 321.*

<sup>290</sup> Cf. *Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs, supra, para. 119, and Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra, para. 320.*

<sup>291</sup> Cf. Report of psychological appraisal of Juana Rosa Tanta Marín on March 20, 2015 (evidence file, folio 2428).

<sup>292</sup> Cf. Report of psychological appraisal of Juana Rosa Tanta Marín on March 20, 2015 (evidence file, folio 2428).

## VIII REPARATIONS

224. Based on Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has caused harm entails the duty to repair it adequately and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.<sup>293</sup> The Court has also established that reparations must have a causal nexus with the facts of the case, the violations that have been declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must examine the concurrence of these elements to rule appropriately and in keeping with law.<sup>294</sup>

225. Consequently, notwithstanding any form of reparation that may subsequently be agreed between the State and the victim, and based on the foregoing considerations on the merits and the violations of the Convention declared in this judgment, the Court will proceed to examine the claims presented by the Commission and the victims' representatives, together with the corresponding observations of the State, in light of the criteria established in its case law on the nature and scope of the obligation to make reparation, in order to establish measures to redress the harm caused.<sup>295</sup>

### A. Injured party

226. The Court considers that, pursuant to Article 63(1) of the Convention, the injured party is anyone who has been declared a victim of the violation of any right recognized in this instrument. Therefore, the Court considers that Azul Rojas Marín and Juana Rosa Tanta Marín are the "injured parties" and, as victims of the violations declared in Chapter VII, they will be considered beneficiaries of the reparations ordered by the Court.

### B. Obligation to investigate

227. The **Commission** asked that the State investigate effectively, with due diligence and within a reasonable time, the rape suffered by Azul Rojas Marín, classifying it as torture. It also indicated that "taking into account the severity of the violations declared as well as inter-American standards in this regard, the Commission underscores that the State may not argue that the dismissal decision that was delivered is governed by *ne bis in idem*, *res judicata* or the statute of limitations to justify failing to comply with this recommendation." The **representatives** agreed with the Commission and asked that the investigations be conducted in an independent, diligent and effective manner. Also, that they be assigned to State organs trained in the investigation of cases of victims who have survived torture and cruel, inhuman or degrading treatment, and with experience in the investigation of cases of violence against LGBTI people. To this end, the relevant international standards for this type of investigation should be applied, such as those defined in the Istanbul Protocol. The **State** argued that it had already ordered, as a measure of reparation, the opening of a new investigation into the crime of torture committed against Azul Rojas Marín. Regarding the administrative

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<sup>293</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, paras. 24 and 25, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 217.

<sup>294</sup> 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 Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 219.

<sup>295</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, paras. 25 and 26, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 220.

investigations, the State argued that this measure of reparation had already been complied with in the context of the proceeding processed by the Internal Control Office of the Public Prosecution Service.

228. The Court assesses positively the progress made to date by the State in order to clarify the facts. However, it notes that, in the context of the second investigation into the facts, the proceedings against the three police officers for the offenses of rape and abuse of authority against Azul Rojas Marín had not been declared null and void (*supra* paras. 76 to 80).

229. In light of the conclusions in this judgment, the Court establishes that the State shall, within a reasonable time and by officials trained in dealing with victims of discrimination and violence based on sexual orientation, facilitate and continue the extensive, systematic and thorough investigations required to identify, prosecute and punish, as appropriate, those responsible for the sexual violence and torture suffered by Ms. Rojas Marín, avoiding the application of discriminatory stereotyping and any act that could revictimize her.<sup>296</sup>

### **C. Measures of satisfaction and rehabilitation**

#### **C.1 Measures of satisfaction**

##### C.1.a Publication of the judgment

230. The **representatives** asked the Court to order, as a measure of satisfaction, the publication of the entire judgment and the official summary on the website of the Ministry of Justice and Human Rights, to be easily accessible by the public and available for at least one year. The **State** did not oppose the eventual granting of this measure of reparation, but specified that “the publication of the official summary of the judgment in a newspaper with widespread circulation in the department of La Libertad would be included in the publication in the national newspaper.”

231. The Court establishes, as it has in other cases,<sup>297</sup> that the State must publish, within six months of notification of this judgment, in an adequate and legible font: (a) the official summary of this judgment prepared by the Court, once, in the Official Gazette; (b) the official summary of this judgment prepared by the Court, once, in a national newspaper with widespread circulation and in a newspaper of the department of La Libertad, and (c) this judgment, in its entirety, available for one year, on the official website of the Ministry of Justice and Human Rights. The State shall advise this Court immediately when it has implemented each of these publications, regardless of the one-year time frame to present its first report indicated in the nineteenth operative paragraph of this judgment.

##### C.1.b Public act to acknowledge international responsibility

232. The **Commission** asked that the State “hold a public act to acknowledge international responsibility” to apologize to the victims. The **representatives** asked the Court to order the State to organize “a public act to acknowledge international responsibility and to apologize” to Azul Rojas Marín and her mother, which should be “transmitted by local and national radio and television.” The **State** indicated that, if the Court found it internationally responsible for the acts of torture, “it would not contest the holding of a public act to acknowledge

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<sup>296</sup> Cf. *Case of López Soto et al. v. Venezuela. Merits, reparations and costs, supra*, para. 278, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 338.

<sup>297</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs, supra*, para. 79, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 226.

responsibility, provided the Court considered that the other measures of reparation ordered were not sufficient.”

233. The Court considers it necessary, in order to redress the harm caused to the victims and to avoid acts like those of this case being repeated, to order the State to hold a public act to acknowledge international responsibility for the facts of this case. During this act, reference must be made to the human rights violations declared in this judgment. Also, it must take place in a public ceremony in the presence of senior State officials and of Ms. Rojas Marín or her representatives.<sup>298</sup>

234. The State and the victim, and/or her representatives, shall reach agreement on how the public act is executed, as well as its particularities, such as the place and date.<sup>299</sup> Also, as it has in other cases,<sup>300</sup> the Court orders the State to publicize this act as widely as possible in the media, including by radio, television and social networks.

## C.2. Measures of rehabilitation

### C.2.a Medical and psychological care

235. The **Commission** asked that the State provide, free of charge, immediately and for as long as necessary, the medical and psychological or psychiatric treatment, as appropriate, to the victim in this case, if she so requests and in agreement with her. The **representatives** asked the Court to order the State to provide “appropriate, individualized and free medical and psychological care together with any necessary medication for as long as required” to the victim. In addition, the “psychological care must be provided by psychologists or psychiatrists specialized in the type of violence suffered by Azul” and, if there are no such specialists in the public health system, “the State must provide private specialized care.” The **State** indicated, regarding compliance with the Commission’s recommendation, that “this was conditional on the presumed victim’s request and, to date, it had not received the corresponding request.” Nevertheless, the State advised that Azul Rojas Marín “was affiliated with the Comprehensive Health Care System” and this allowed her to receive the recommended medical, psychological and psychiatric care.

236. The Court has verified the serious impact on personal integrity suffered by Ms. Rojas Marín as a result of the acts of sexual violence and torture in this case (*supra* paras. 145 to 165). Therefore, the Court considers it necessary to order a measure of reparation that provides appropriate treatment for the physical, psychological or psychiatric problems suffered by the victim based on her particularities and case history.<sup>301</sup> The Court orders the State to provide Azul Rojas Marín with medical care, free of charge and immediately, and this should include the provision of medication and, if applicable, transport and other directly related and

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<sup>298</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*, *supra*, para. 81, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs*, *supra*, para. 347.

<sup>299</sup> 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 Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs*, *supra*, para. 348.

<sup>300</sup> See, for example, *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs*, *supra*, para. 445, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs*, *supra*, para. 348.

<sup>301</sup> Cf. *Case of Barrios Altos v. Peru. Reparations and costs. Judgment of November 30, 2001. Series C No. 87*, para. 42 and 45, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs*, *supra*, para. 341.

necessary expenses.<sup>302</sup> Furthermore, this must be provided in the centers nearest to her place of residence,<sup>303</sup> for as long as necessary. The psychological and/or psychiatric care should also take into account the victim's particular circumstances and needs, as agreed with her and following an individual evaluation.<sup>304</sup>

237. The beneficiary of this measure has six months from notification of this judgment to confirm to the State that she agrees to receive psychological and/or psychiatric care.<sup>305</sup> And the State has three months from the reception of this request to provide the psychological and/or psychiatric care requested.

#### **D. Guarantees of non-repetition**

##### **D.1 Adoption of a protocol on investigation and administration of justice in cases of violence against LGBTI people**

238. The **Commission** asked the Court to order the State to adopt "legislative, administrative and any other measures to ensure access to justice in cases of violence against LGBTI people." The **representatives** requested, as a guarantee of non-repetition, that the Court order the State to implement investigation protocols and the services of experts and of justice to combat prejudice-based violence against LGBTI people, providing an annual report on the implementation of this measures for four years. They also requested implementation of specific guidelines for police personnel and members of the *serenazgo* on proper and non-discriminatory treatment of the LGBTI community.

239. The **State** advised "that it had been adopting measures in its different entities to prevent and eradicate discrimination and violence against LGBTI people." It highlighted the adoption of the National Gender Policy and "the Protocol of the Peruvian National Police for the protection and care of victims and witnesses of people trafficking" that had a gender-based approach that included the LGBTI population. Regarding the Peruvian National Police, the State had recently adopted the Manual of Human Rights applied to Police Work on August 13, 2018, which contained a "chapter on victims and vulnerable groups that describes factors that police personnel should take into account when dealing with situations that involve [...] the LGBTI community." In the area of the administration of justice, the State advised that it had established the Judiciary's Gender Justice Committee and had adopted the "National Plan for Access to Justice by Persons in a Situation of Vulnerability-Judiciary of Peru 2016-2021."

240. The State also indicated that the Institute of Forensic Medicine and Forensic Sciences attached to the Public Prosecution Service had two protocols that were applicable in cases of violence: (i) Guidelines for the comprehensive appraisal of bodily injuries by the forensic physician, and (ii) Guidelines for the appraisal of psychological harm in adults victims of intentional violence, which incorporates the Istanbul Protocol into the practice of forensic

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<sup>302</sup> Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 231, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 232.

<sup>303</sup> 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. 270, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 232.

<sup>304</sup> Cf. *Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs, supra*, para. 270, and *Case of Díaz Loreto et al. v. Venezuela. Preliminary objections, merits, reparations and costs, supra*, para. 153.

<sup>305</sup> Cf. *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs, supra*, para. 253, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 232.

physicians in Peru. In addition, the State indicated that, although Plenary Decision No. 1-2011/CJ-116 was not legally binding, "it provides rules for the classification of the offense of rape, the validity and assessment of the victim's statement (including situations when this is retracted or discontinued), and for general evidence in rape offenses." It underscored that this decision stipulated that, "when sexual offenses are evaluated in court, any gender stereotyping or prejudice must be rejected." The State also mentioned two other plenary decisions, one on "assessment of expert evidence in rape offenses" and the other on "rules for the assessment of the statements of co-defendants and aggrieved parties."

241. The Court considers that the general criteria established in the documentation cited by the State signifies an important step forward towards the adaptation of domestic laws and practices to international standards concerning the protection of LGBTI people. However, it notes that more specific standards are required that include the criteria established in this judgment and in other relevant international instruments. For example, witness Ketty Garibay Mascco testified before the Court that, at the present time, the Public Prosecution Service does not have precise investigation guidelines and protocols relating specifically to LGBTI people.<sup>306</sup>

242. Consequently, the Court finds it appropriate to order the State to adopt, within two years of notification of this judgment, a protocol on investigations and administration of justice in criminal proceedings involving members of the LGBTI community who are victims of violence. The protocol must be addressed at all the public officials who intervene in the investigation and processing of criminal proceedings in cases involving members of the LGBTI community who are victims of violence, as well as the public and private health care personnel who participate in such investigations. This protocol must include the obligation of State agents to refrain from using discriminatory presumptions and stereotyping when receiving, processing and investigating complaints.

243. When preparing the protocol, the State must take into account the criteria established in the international instruments on torture, as well as the standards developed in this judgment and in the Court's case law. This protocol must take into consideration that due diligence in cases of the rape and torture of LGBTI people entails the adoption of special measures and the development of a process designed to avoid their revictimization, so that it must include, as a minimum, the standards developed in paragraphs 178 to 204 of this judgment. In the case of public and private health care personnel, based on the standards developed in paragraphs 187 to 193 and 198 to 204 of this judgment, the protocol must include at least the following guidelines: (i) the medical examination of the presumed victim must be performed with prior informed consent, without the presence of law enforcement or other state agents, avoiding, insofar as possible, more than one physical assessment; (ii) as soon as a rape is reported, an immediate complete and detailed medical and psychological examination must be performed by trained and appropriate personnel, if possible of the sex preferred by the victim, advising the victim that they may be accompanied by a person of confidence if they so wish; (iii) this examination must be performed based on protocols specifically addressed at documenting evidence in cases of sexual violence, and (iv) during psychological and/or psychiatric evaluations, doctors must refrain from inquiring into the victim's sexual history and, in general, using stereotypes of sexual orientation or gender expression.

244. Lastly, in the case of public officials who are employed in the administration of justice, the protocol must include, pursuant to the standards developed in paragraphs 178 to 204 of this judgment, at least the following criteria: (i) agents of justice must not mistreat or exercise discrimination towards victims and must respect everyone's sexual orientation and gender

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<sup>306</sup> Cf. Statement made by Ketty Garibay Mascco during the public hearing held in this case.

expression; (ii) presumed victims and witnesses, especially those who are members of the LGBTI population, must be able to report offenses in spaces in which their privacy can be guaranteed, and (iii) methods should be designed to identify indications of whether the sexual violence and torture was committed based on prejudices involving sexual orientation or non-normative gender identity or expression.

## **D.2 Awareness-raising and training of state agents on violence against LGBTI people**

245. The **Commission** asked the Court to order the State: (i) “to ensure that article 205 of the Code [of Criminal Procedure] was not used in an abusive and discriminatory manner by the police authorities, including by establishing effective accountability measures”; (ii) “to train law enforcement agencies and, in general, officials responsible for the custody of persons deprived of liberty in the absolute prohibition of torture and sexual and other forms of violence against the LGBTI population, and also to send a clear message of condemnation of this type of act,” and (iii) “to design training and educational programs for all agents of justice who enter into contact with and/or are responsible for investigating cases of prejudice-based violence, including sexual violence.”

246. The **representatives** asked the Court to order the State to establish permanent and compulsory education and training programs for law enforcement agents and other public officials. They indicated that “these programs and courses should be addressed at police agents, prosecutors, judges, soldiers, and officials responsible for providing care and legal assistance to victims of violence (including those working in the area of forensic medicine).”

247. The **State** indicated that it had offered numerous courses “based on the Human Rights Manual as applicable to policing functions, and on human rights issues and the use of force.” It recalled “that the Academy of the Judiciary” had “developed a comprehensive and continuing system of training, updating, upgrading, certification and accreditation for judges of the Judiciary and for the Public Prosecution Service [...] with programs on issues of gender, violence and people trafficking,” and reported that “the National Mechanism for the Prevention of Torture will incorporate the LGBTI population deprived of liberty as a new cross-cutting line of action.”

248. The Court appreciates the efforts made by the State to train personnel in this way. However, it finds it pertinent to order the State to create and implement, within two years, a training plan for agents of the Peruvian National Police, the Public Prosecution Service, the Judiciary and the *serenazgo* aimed at raising the awareness of members of law enforcement agencies and prosecutors with regard to: (i) respect for sexual orientation and gender expression in their actions involving civilians, especially LGBTI people who report having suffered sexual violence or torture; (ii) due diligence in conducting investigations and judicial proceedings related to discrimination, sexual violence and torture of LGBTI people, and (iii) the discriminatory nature of stereotypes concerning sexual orientation and gender expression and the negative impact that their use has on LGBTI people. The training courses for the police forces should include information on the prohibition to base the measures included in article 205 of the Code of Criminal Procedure on discriminatory reasons, particularly against the LGBTI community.

249. This training plan should be incorporated into the regular training course of the Peruvian National Police, the Public Prosecution Service, the Judiciary and the *serenazgo*, as well as of any other organ that exercises functions relating to compliance with domestic law. This training must be accompanied by awareness-raising actions



### **D.3 Design and implementation of a system to produce and compile statistics on violence against LGBTI people**

250. The **representatives** asked the Court to order the State to implement a system to produce and compile statistics on prejudice-based violence against LGBTI people. According to the representatives, the database should include, at a minimum, statistical information on the number of reports of cases of violence against LGBTI people, type of perpetrator, procedures undertaken, and result of the investigations.

251. The **State** indicated that the 2018-2021 National Human Rights Plan had taken into consideration “strengthening the system for recording discrimination and violence (nationwide cases or reports), including cases involving LGBTI people owing to their gender identity or sexual orientation.” It also indicated that the Ministry of the Interior “has ensured that the Police Reports System (SIDPOL) now incorporates a checkbox that allows complaints of discrimination based on sexual orientation and gender identity to be recorded,” so that “it will be possible to know the exact number of complaints made in the police stations of the Peruvian National Police.” Peru also indicated that, under the National Program to combat Domestic and Sexual Violence of the Ministry for Women and Vulnerable Populations (MIMP), in 2015 and 2016, the form to record cases in the Women’s Emergency Centers (CEM) included information on users who identified as LGBTI. In 2017 and 2018, the form recorded information on vulnerability based on sexual orientation and gender identity as a risk factor for clients of the Centers. The State also reported that the National Mechanism to Prevent Torture and other cruel, inhuman and degrading treatment or punishment “has identified the LGBTI community as a particularly vulnerable group that merits a differentiated treated based on its specific needs.” In this regard, the State indicated that “when preparing the said [2018] Annual Report, it became clear that there was no formal data recording information on the number of people belonging to vulnerable groups; however, important findings were made on such individuals as a result of surveys, interviews and evaluations, in which adolescents, young people and adults were consulted on their self-identification as a member of an indigenous people or of the LGBTI community, and to find out whether they had suffered any act of physical, mental or moral aggression on this basis.”

252. The Court appreciates the progress made by the Peruvian State in the collection of data about violence against LGBTI people. However, the Court understands that comprehensive information on the violence suffered by LGBTI people must be collected in order to understand the true magnitude of this phenomenon and, on this basis, design strategies to prevent and to eliminate fresh acts of violence and discrimination. Therefore, the Court orders the State to design immediately and implement within one year, through the corresponding State entity, a system to compile data and figures linked to cases of violence against LGBTI people “in order to be able to uniformly and accurately assess the type, prevalence, trends and patterns of violence and discrimination against” LGBTI persons, disaggregating “the data by community, race, ethnicity, religion or belief, health status, age, class, and migration or economic status.”<sup>307</sup> The number of cases prosecuted should also be specified, identifying the number of indictments, convictions and acquittals. The State must publish this information each year in the corresponding report, ensuring that the general public have access to it, while keeping the identity of the victims confidential.<sup>308</sup> The State must present the Court with an annual report for three years following the implementation of the data collection system indicating the relevant actions taken.

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<sup>307</sup> Cf. Report of the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation or gender identity, Víctor Madrigal-Borloz, A/HRC/41/45, May 14, 2019, para. 78.

<sup>308</sup> Cf. *Case of López Soto et al. v. Venezuela. Merits, reparations and costs, supra*, para. 349.

#### **D.4 Eliminate the indicator of “eradication of homosexuals and transvestites” from the public safety plans of the regions and districts of Peru**

253. The **representatives** asked the Court to order the Peruvian State to eliminate from the “Public safety plans of the regions and districts of Peru,” which provide information on the incidence of crime in each jurisdiction, the indicator on the “eradication of homosexuals and transvestites [...] because this policy legitimizes the violation of the rights of LGBTI people in Peru since it increases their segregation and provides a legal framework to justify arbitrary detentions based on prejudices relating to sexual orientation and identity, and non-normative gender expression. This action falls within the competence of the Ministry of the Interior in coordination with local and regional governments.” The representatives explained that “eradication” consisted “in removing individuals from the territory of a district” owing to their perceived sexual orientation or gender identity.

254. The **State** indicated that although the representatives’ request “accorded with the transformational approach of the reparations,” it had no causal nexus with the facts of the case, and should therefore be rejected.

255. The Court considers that the inclusion of an indicator involving the “eradication of homosexuals and transvestites” in the public safety plans is a highly discriminatory element that exacerbates the prejudices against the LGBTI population and, therefore, promotes the possibility of violence based on prejudice occurring, as in this case. Consequently, the Court orders the State, in coordination with local and regional governments, to eliminate the indicator on “eradication of homosexuals and transvestites” from the public safety plans of the regions and districts of Peru within one year.

#### **E. Compensation**

##### **E.1 Pecuniary damage**

256. In its case law, the Court has developed the concept that pecuniary damage supposes the loss or detriment to the income of the victims, the expenses incurred owing to the facts and the consequences of a pecuniary nature that have a causal nexus with the facts of the case.<sup>309</sup>

257. The **Commission** asked that the State “provide comprehensive reparation to Azul Rojas Marín and Juana Rosa Tanta Marín for the violations of their human rights that have been established.” This should “include measures of pecuniary compensation and satisfaction to redress both the pecuniary and the non-pecuniary damage.”

258. The **representatives** asked the Court to order compensation for the pecuniary damage suffered by Azul and her mother. They indicated that, “before the events of February 25, 2008, [...] Azul worked in the Casa Grande Health Center, where they paid her the minimum living wage at the time (that is, S/.550.00 new soles to 2018).” In addition, she worked raising and selling pigs, and also prepared food for certain events [...] and had begun a university course in law.” They indicated that, as a result of the events of February 25, 2008, “Azul was unable to continue the said activities” and, currently, was engaged in “temporary informal employment.” They asked the Court to calculate the pecuniary damage from March 2008 to the date of the Court’s judgment,” and this amounted to US\$65,016. In the case of Azul’s

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<sup>309</sup> Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 233.

mother, before the events, "she worked selling food, and earned approximately the minimum wage at the time." They added that "after the complaint had been filed, Mrs. Tanta Marín was unable to continue her activities because she was afraid and had received threats." Therefore, the representatives asked that "pecuniary damage be calculated from March 2008 to the death of Doña Tanta on May 12, 2017," and requested the sum of US\$21,946.

259. The **State** argued that the representatives had not provided sufficient evidence to prove that Azul Rojas Marín worked at the Casa Grande Health Center, but if she had worked there "there is nothing to suggest that the reason why her work relationship ended was what happened in February 2008." The State also indicated that the threats referred to by the representatives had not been proved. Regarding the impossibility of Ms. Rojas Marín continuing her university studies, the State argued that the representatives "had been unable to prove that Azul Rojas Marín had studied law in Trujillo, and had not identified either the university or the level reached in her studies." The State also argued that "the Inter-American Court should not take the calculation made by the [representatives] into account based on the foregoing grounds." In the case of Azul Rojas Marín's mother, the State indicated that "the said situation has not been proved, especially as the [representatives] have not attached any request for personal protection by her mother [...] or any criminal complaint based on the presumed threats suffered."

260. In light of the circumstances of this case, the Court finds it reasonable to order the State to pay compensation for pecuniary damage to both victims. Since the information provided by the representatives does not allow the Court to ascertain the amount of the pecuniary damage caused by the facts examined in this case, the Court establishes, in equity, the sums of US\$10,000.00 (ten thousand United States dollars) in favor of Azul Rojas Marín and US\$5,000.00 (five thousand United States dollars) in favor of Juana Rosa Tanta Marín. The payment of the compensation to Azul Rojas Marín shall be made directly to her. The payment of the compensation to Juana Rosa Tanta Marín shall be made directly to her heirs, pursuant to applicable inheritance laws.

## E.2 Non-pecuniary damage

261. In its case law, the Court has developed the concept of non-pecuniary damage, and has established that this may include both the suffering and afflictions caused to the direct victim and his family, and also the impairment of values of great significance to the individual, as well as the alterations of a non-pecuniary nature in the living conditions of the victim or his family.<sup>310</sup>

262. The **Commission** asked that the State provide "comprehensive reparation to Azul Rojas Marín and Juana Rosa Tanta Marín for the violations of their human rights that have been established, and this should include measures of compensation" to redress the "non-pecuniary damage."

263. The **representatives** asked the Court to order the State to provide compensation "for non-pecuniary damage to Azul and her mother, Juana Rosa Tanta Marín," owing to the "suffering endured by Azul as a result of the discrimination against her, her unlawful detention, rape and torture, the violation of her privacy, the stigma she underwent owing to her sexual orientation, the impunity of the violations, the destruction of her life project, the alienation from her family and friends." They asked that "based on the standards of the inter-American

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<sup>310</sup> 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 Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra, para. 238.*

system of human rights and the particular circumstances of the case, Azul Rojas Marín be awarded US\$60,000 as reparation for non-pecuniary damage.”

264. The representatives also asked that the Court consider the “suffering of her mother,” which was not only “the result of the suffering of her daughter” but also owing to the “lack of justice” and “the discrimination and stigma that were always present” up until the day of her death. On this basis, the representatives requested “payment of US\$40,000 for non-pecuniary damage” in favor of Juana Rosa Tanta Marín.

265. The **State** argued that “in this case, the State’s responsibility for [the violation of the Convention] to the detriment of Azul Rojas Marín has not been proved, so that it is not appropriate [that the Court take into account the suffering caused by the alleged violations].” It also noted that the representatives had requested US\$40,000 for Juana Rosa Tanta Marín.” In this regard, it considered “that in the most recent case law, for example in the case of *Women Victims of Sexual Torture in Atenco v. Mexico*, the Court had established reparations for non-pecuniary damage in favor of the mothers of some of the victims that was considerably less than forty thousand dollars.” Therefore, the State asked the Court to take this situation into account.

266. In this judgment, the Court has considered proved that Ms. Rojas Marín and her mother suffered profound anguish (*supra* paras. 139 to 160 and 221 to 223). Also, the psychosocial appraisal of Ms. Rojas Marín determined that “following the acts of violence she reported, [Ms. Rojas Marín’s] life changed drastically. The fact that she had been detained, tortured and raped in a police station harmed her physical and mental health. The stressors are still present because, following the events, she started out on a long road to seek justice and, on the way, she has experienced situations of abuse, revictimization and discrimination owing to her sexual orientation.”<sup>311</sup> Also, the psychosocial appraisal of Juana Rosa Tanta Marín determined that she “had major chronic depression [...] given the particular nature of the relationship that Juana had with her [daughter], the traumatic incident had a devastating impact on her psyche, clearly destroying one of her emotional supports in life.”<sup>312</sup>

267. Taking these expert appraisals into account, the Court finds that both Ms. Rojas Marín and Mrs. Tanta Marín suffered serious moral harm. Consequently, based on the circumstances of this case and the violations declared, the Court finds it pertinent to establish, in equity, the sum of US\$60,000.00 (sixty thousand United States dollars) for non-pecuniary damage in favor of Azul Rojas Marín. In the case of Juana Rosa Tanta Marín, the Court establishes, in equity, as pecuniary reparation for the non-pecuniary damage, the sum of US\$15,000.00 (fifteen thousand United States dollars). The payment of Juana Rosa Tanta Marín’s compensation shall be made directly to her heirs, pursuant to applicable inheritance laws.

#### **F. Other measures requested**

268. The **Commission** asked the Court to require the State to ensure that article 205 of the Code of Criminal Procedure was not applied in an abusive and discriminatory manner by the police authorities. The **representatives** asked the Court to require the State: (i) to provide Ms. Rojas Marín with a “university grant to cover the costs of the professional career that Azul chooses”; (ii) to facilitate the change of identity of Azul Rojas Marín; (iii) to broadcast a radio and television program; (iv) to place a commemorative plaque in the Casa Grande Police Station; (v) to implement educational guidelines to prevent and eradicate discrimination and violence against LGBTI people through the Ministry of Education; (vi) to amend article 205 of

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<sup>311</sup> Cf. Psychological report of March 20 and 21, 2015 (evidence file, folio 2420).

<sup>312</sup> Cf. Psychological report of March 20, 2015 (evidence file, folio 2428).

the Code of Criminal Procedure; (vii) to ratify the Inter-American Convention against All Forms of Discrimination and Intolerance; (viii) to place informational leaflets or posters on the rights of persons deprived of liberty in police stations; (ix) to adapt the definition of torture in article 321 of the Criminal Code to the definition contained in Article 2(1) of the Inter-American Convention to Prevent and Punish Torture and Article 1 of the United Nations Convention against Torture.

269. With regard to the first and second requests of the representatives, the Court considers that they have no causal nexus with the violations determined in this case and, therefore, does not find it necessary to order them. Regarding the request to amend the legal definition of torture, the Court notes that the legal definition of torture now in force was not applied to the facts of this case. The Court recalls that it is not its task to make a theoretical review of norms that were not applied or that had no impact on the violations declared in a specific case. Therefore, the Court considers that it is not appropriate to issue a ruling on this request when ordering reparations in this case.<sup>313</sup> Nevertheless, the Court recalls that when a State is a party to an international treaty such as the American Convention, all its organs, including its judges, are subject to that treaty, and this obliges them to ensure that the effects of the provisions of the Convention are not impaired by the application of norms contrary to its object and purpose. Judges and organs involved in the administration of justice at all levels are obliged to exercise *ex officio* a “control of conventionality” between domestic laws and the American Convention, evidently within their respective terms of reference and the corresponding procedural rules. In this task, judges and organs involved in the administration of justice should take into account not only this treaty, but also its interpretation by the Inter-American Court, ultimate interpreter of the American Convention.<sup>314</sup> Therefore, when applying the new legal definition of torture,<sup>315</sup> the domestic authorities are obliged to take into account the interpretation of the American Convention made by the Inter-American Court in this and other cases, including the possibility that torture may be committed for discriminatory purposes.

270. Regarding the other measures requested by the Commission and the representatives, the Court considers that the delivery of this judgment and the reparations ordered in this chapter are sufficient and appropriate to redress the violations suffered by the victim. Therefore, it does not find it necessary to order those additional measures, without prejudice to the State deciding to adopt or grant them in the domestic sphere.

## **G. Costs and expenses**

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<sup>313</sup> Cf. *Case of Genie Lacayo v. Nicaragua. Preliminary objections*. Judgment of January 27, 1995. Series C No. 21, para. 50, and *Case of López Lone et al. v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of October 5, 2015. Series C No. 302, para. 307.

<sup>314</sup> Cf. *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 154, para. 124, and *Case of Colindres Schonenberg v. El Salvador. Merits, reparations and costs, supra*, para. 129.

<sup>315</sup> The Court notes that the new legal definition does not include specific purposes. According to expert witness Víctor Manuel Cubas Villanueva, since “the new legislation does not specifically restrict the purposes of the crime of torture, [...] the purposes of this offense could be interpreted broadly by the agents of justice” and in accordance with the State’s international obligations. The Court also notes that, in 2018, the Committee against Torture urged the State to modify this definition “so that it expressly covers acts of torture committed for such purposes as obtaining information or a confession from the victim or a third person, punishing the victim for an act that the victim or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind.” Cf. Affidavit of Víctor Manuel Cubas Villanueva of August 12, 2019 (evidence file, folio 3488), and Committee against Torture, Concluding observations on the seventh periodic report of Peru, CAT/C/PER/CO/7, December 18, 2018, paras. 10 and 11.

271. Promsex indicated that it had assumed the defense of Azul since 2008, incurring expenses relating to hiring psychologists and lawyers, travel between Casa Grande, Trujillo and Lima, and administrative procedures, including for the national and international litigation, that amounted to 344.637,40 soles and US\$17,701.69. The Human Rights Coordinator (CNDDHH) asked the Court to establish, in equity, the sum of US\$30,000.00. REDRESS asked the Inter-American Court to establish, in equity, the sum of US\$6,046.45 for costs and expenses.

272. Following the presentation of the pleadings and motions brief, Promsex advised the Court that it had incurred expenses totaling 35,982.50 soles and US\$1,428.96 for legal and psycho-social assistance and the expenses assumed during the public hearing in this case. The costs and expenses incurred by CNDDH include support to ensure adequate legal assistance, as well as the expenses assumed during the public hearing, which amount to 12,390.65 soles. The costs and expenses incurred by REDRESS include support for adequate assistance as well as expenses assumed during the public hearing, amounting to US\$2,749.39.

273. In summary, Promsex requested payment of 380,619.90 soles and US\$19,130.65, the CNDDHH requested payment of US\$30,000 and 12,390.65 soles, and REDRESS requested payment of US\$8,795.84.

274. The Court reiterates that, based on its case law,<sup>316</sup> costs and expenses form part of the concept of reparation, because the activities deployed by the victims in order to obtain justice, at both the national and the international level, entail disbursements that must be compensated when the international responsibility of a State has been declared in a judgment. Regarding the reimbursement of costs and expenses, it is for the Court to make a prudent assessment of their scope, which includes the expenses generated before the authorities of the domestic jurisdiction and those incurred during the process 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, provided their *quantum* is reasonable.<sup>317</sup>

275. This Court has indicated that "the claims of the victims or their representatives with regard to costs and expenses, and the evidence to support them, must be submitted to the Court at the first procedural opportunity granted to them; that is, in the pleadings and motions brief, without prejudice to these claims being updated subsequently in keeping with the new costs and expenses incurred under the proceedings before this Court."<sup>318</sup> The Court also reiterates that it not sufficient merely to forward probative documents; rather, the parties are required to include arguments that relate the evidence to the fact that it is considered to represent and, in the case of alleged financial disbursements, that the items and their justification are clearly established.<sup>319</sup>

276. Taking into account the amounts requested by each organization and the expense vouchers presented, the Court decides to establish, based on equity, the payment of: a total

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<sup>316</sup> 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 Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs*, *supra*, para. 244.

<sup>317</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*, *supra*, para. 82, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs*, *supra*, para. 244.

<sup>318</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*, *supra*, para. 79, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs*, *supra*, para. 245.

<sup>319</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*, *supra*, para. 277, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs*, *supra*, para. 245.

of US\$9,000.00 (nine thousand United States dollars) for costs and expenses in favor of REDRESS; a total of US\$3,000.00 (three thousand United States dollars) for costs and expenses in favor of CNDDHH, and a total of US\$14,000.00 (fourteen thousand United States dollars) for costs and expenses in favor of Promsex. These amounts shall be delivered directly to the said organizations. At the stage of monitoring compliance with this judgment, the Court may determine that the State reimburse the victims or their representatives any reasonable expenses incurred at that procedural stage.<sup>320</sup>

#### **H. Reimbursement of the Victims' Legal Assistance Fund**

277. In the instant case, in a note of August 7, 2019, the President of the Court declared that the request presented by the presumed victim, through her representatives, to access the Legal Assistance Fund was admissible. In an order of July 10, 2019, the Court's President at the time, established that the Fund would provide the financial assistance necessary to cover the expenses of the appearance of the presumed victim at the public hearing and the presentation of two statements by affidavit.

278. On July 18, 2019, the representatives asked the Court to reconsider this decision because, for reasons beyond her control, the presumed victim could not attend the hearing; therefore, they asked the Court to receive a witness. In an order of August 26, 2019, the Court decided to accept the representatives' request.<sup>321</sup> In light of the impossibility of the presumed victim attending the hearing, and the Court's reconsideration order in this regard (*supra* para. 10), on the instructions of the President, the parties and the Commission were notified that the Victim's Legal Assistance Fund would cover the travel and accommodation costs for Víctor Álvarez to appear before the Court.

279. On November 29, 2019, in keeping with article 5 of the Rules for the Operation of the said Fund, a disbursements report was sent to the State; thus, the State had the opportunity to present its observations on the disbursements made in this case which amount to US\$886.23 (eight hundred and eighty-six United States dollars and twenty-three cents).

280. The **State** argued that the purpose of the Court's reconsideration order was to modify how Víctor Álvarez would present his statement and, since this was not a substitution, it did not correspond to the Victim's Legal Assistance Fund to cover these expenses. In addition, it indicated that the representatives' request should have been forwarded to the State for the corresponding observations. Also, "regarding the reimbursement of the expenses incurred in the notarization of the expert opinion of Nora Sveaass, the State notes that the Court has not forwarded the documentation on the amounts that have been reimbursed to the representatives; thus, it does not have the necessary elements to make observations."

281. This Court notes, first that decisions on the admissibility of access to the Victims' Assistance Fund and determination of the expenses to be covered by the Fund correspond to the President of the Court. Therefore, it is not necessary to forward this information to the State so that it may submit observations. Also, in this case, following the change in the way in which the statement by Víctor Álvarez was presented, it was not necessary to forward the representatives' request to the State, nor was it relevant that the statement by Víctor Álvarez did not substitute the statement of the presumed victim. Second, the Court notes that the documentation relating to the expenditure for notarizing the expert opinion of Nora Sveaass

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<sup>320</sup> Cf. *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs*. Judgment of September 1, 2010. Series C No. 217, para. 29, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs, supra*, para. 246.

<sup>321</sup> Cf. *Case of Rojas Marín et al. v. Peru*. Order of the Inter-American Court of Human Rights of August 26, 2019. Available at: [http://www.corteidh.or.cr/docs/asuntos/rojas\\_26\\_08\\_19.pdf](http://www.corteidh.or.cr/docs/asuntos/rojas_26_08_19.pdf)

forms part of the annexes to the expense report forwarded to the State on November 29, 2019. Therefore, the Court rejects the State's objections.

282. Based on the violations declared in this judgment, the Court orders the State to reimburse the said Fund the sum of US\$886.23 (eight hundred and eighty-six United States dollars and twenty-three cents) for the expenses incurred. This amount must be reimbursed within six months of notification of this judgment.

***I. Method of compliance with the payments ordered***

283. The State shall make the payments for compensation of 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 judgment, or it may bring forward full payment, pursuant to the following paragraphs.

284. If the beneficiaries are deceased or die before they receive the respective amount, this shall be delivered directly to their heirs in accordance with the applicable domestic law.

285. The State shall comply with the monetary obligations by payment in United States dollars or the equivalent in national currency, using the exchange rate in force on the New York Stock Exchange (United States of America), the day before the payment to make the calculation.

286. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs, it should not be possible to pay the amounts established within the time frame indicated, the State shall deposit these amounts in a deposit account or certificate in their favor in a solvent Peruvian financial institution in United States dollars, and in the most favorable financial conditions permitted by banking law and practice. If the corresponding compensation is not claimed within ten years, the amounts shall be returned to the State with the interest accrued.

287. 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 and organizations indicated integrally, as established in this judgment, without any deductions arising from possible taxes or charges.

288. If the State should fall in arrears, including in the reimbursement of the Victims' Legal Assistance Fund, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Peru.

**IX  
OPERATIVE PARAGRAPHS**

289. Therefore,

**THE COURT**

**DECIDES,**

Unanimously:

1. To reject the preliminary objection relating to the alleged failure to exhaust domestic remedies, pursuant to paragraphs 22 to 26 of this judgment.
2. To reject the preliminary objection relating to the subsidiary nature of the inter-American system, pursuant to paragraphs 28 and 29 of this judgment.



3. To reject the preliminary objection relating to the fourth instance, pursuant to paragraphs 31 to 33 of this judgment.

**DECLARES,**

Unanimously, that:

4. The State is responsible for the violation of the rights recognized in Articles 7(1), 7(2), 7(3) and 7(4) of the American Convention on Human Rights, in relation to the obligations to respect and to ensure these rights without discrimination, established in Article 1(1) of this instrument, to the detriment of Azul Rojas Marín, pursuant to paragraphs 100 to 134 of this judgment.

5. The State is responsible for the violation of the rights recognized in Articles 5(1), 5(2) and 11 of the American Convention on Human Rights, in relation to the obligations to respect and to ensure these rights without discrimination, established in Article 1(1), and Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Azul Rojas Marín, pursuant to paragraphs 139 to 167 of this judgment.

6. The State is responsible for the violation of the rights recognized in Articles 8(1) and 25(1) of the American Convention on Human Rights, in relation to the obligations to respect and to ensure these rights without discrimination and to adopt domestic legal provisions, established in Articles 1(1) and 2 of this instrument and to Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Azul Rojas Marín, pursuant to paragraphs 178 to 219 of this judgment.

7. The State is responsible for the violation of the right recognized in Article 5(1) of the American Convention on Human Rights, to the detriment of Juana Rosa Tanta Marín, in relation to Article 1(1) of this instrument, pursuant to paragraphs 221 to 223 of this judgment.

**AND ESTABLISHES:**

Unanimously, that:

8. This judgment constitutes, *per se*, a form of reparation.

9. The State shall facilitate and shall continue the investigations required to identify, prosecute and punish, as appropriate, those responsible for the acts of torture perpetrated against Azul Rojas Marín, pursuant to paragraphs 228 and 229 of this judgment.

10. The State shall make the publications indicated in paragraph 231 of this judgment.

11. The State shall hold a public act to acknowledge international responsibility, as indicated in paragraphs 233 and 234 of this judgment.

12. The State shall provide, free of charge and immediately, opportune, adequate and effective medical and psychological and/or psychiatric treatment to Azul Rojas Marín, pursuant to paragraphs 236 and 237 of this judgment.

13. The State shall adopt a protocol on investigation and administration of justice in criminal proceedings involving LGBTI victims of violence, pursuant to paragraphs 241 to 244 of this judgment.

14. The State shall create and implement a training and awareness-raising plan, pursuant to paragraphs 248 and 249 of this judgment.

15. The State shall design and implement a system to compile data and figures linked to cases of violence against LGBTI people, pursuant to paragraph 252 of this judgment.

16. The State shall eliminate the indicator of “eradication of homosexuals and transvestites” from the public safety plans of the regions and districts of Peru, pursuant to paragraph 255 of this judgment.

17. The State shall pay the amounts established in paragraphs 260, 267 and 276 of this judgment as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses, pursuant to paragraphs 283 to 288 of this judgment.

18. The State shall reimburse the Victims’ Legal Assistance Fund of the Inter-American Court of Human Rights the sum disbursed during the processing of this case, pursuant to paragraphs 282 and 288 of this judgment.

19. The State, within one year of notification of this judgment, shall provide the Court with a report on the measures adopted to comply with it, notwithstanding the provisions of paragraph 231 of this judgment.

20. The Court will monitor full compliance with this judgment, in exercise of its authority and in fulfillment of its duties under the American Convention on Human Rights, and will close this case when the State has complied fully with all its provisions.

DONE, at San José, Costa Rica, on March 12, 2020, in the Spanish language

Corte IDH. *Case of Rojas Marín et al. v. Peru. Preliminary objections merits, reparations and costs.* Judgment of March 12, 2020.

Elizabeth Odio Benito  
President

L. Patricio Pazmiño Freire

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri  
Secretary

So ordered,

Elizabeth Odio Benito  
President

Pablo Saavedra Alessandri  
Secretary