

INTER-AMERICAN COURT OF HUMAN RIGHTS*

CASE OF FLOR FREIRE V. ECUADOR

JUDGMENT OF AUGUST 31, 2016

(Preliminary objection, merits, reparations and costs)

In the case of *Flor Freire*,

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

Roberto F. Caldas, President
Eduardo Ferrer Mac-Gregor Poisot, Vice President
Eduardo Vio Grossi, Judge
Humberto Antonio Sierra Porto, Judge
Elizabeth Odio Benito, Judge, and
Eugenio Raúl Zaffaroni, Judge

also present,

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

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 31, 32, 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:

* Judge Patricio Pazmiño Freire, an Ecuadorian national, did not take part in the hearing or the deliberation of this case in accordance with the provisions of Article 19(1) the Court's Rules of Procedure.

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On December 11, 2014, pursuant to Articles 51 and 61 of the American Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court the case of *Homero Flor Freire against the Republic of Ecuador* (hereinafter "the State" or "Ecuador"). According to the Commission, this case relates to the alleged international responsibility of the State as a result of decisions that resulted in the discharge of Homero Flor Freire, a military officer of the Ecuadorian Ground Force, based on the Military Discipline Regulations in force at the time; specifically, the rule that punished sexual acts between persons of the same sex with discharge from the service. The Commission found that, according to the Regulations in force at the time, the punishment for "unlawful sexual acts" was less harmful than for "acts of homosexuality," and therefore argued that this difference in treatment was discriminatory. It also determined that "during the corresponding proceedings, both the presentation of evidence and the legal reasoning, [presumably] revealed bias and discriminatory prejudices concerning a person's ability to exercise their functions within a military institution based on their actual or perceived sexual orientation." Lastly, the Commission alleged that the proceedings against Homero Flor Freire had presumably violated the guarantee of impartiality and that the application for amparo had not constituted an effective remedy to protect his rights.

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

a) *Petition.* On August 30, 2002, Alejandro Ponce Villacís and Juan Manuel Marchán lodged the initial petition.

b) *Admissibility Report.* On March 15, 2010, the Commission adopted Admissibility Report No. 1/10.¹

c) *Merits Report.* On November 4, 2013, the Commission adopted Merits Report No. 81/13,² pursuant to Article 50 of the Convention (hereinafter also "the Merits Report"), in which it reached a series of conclusions and made several recommendations to the State:

i) *Conclusions.* The Commission concluded that "the State of Ecuador had violated the rights established in Articles 24, 8(1) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Homero Flor Freire."

ii) *Recommendations.* Consequently, the Commission made a series of recommendations to the State:

1. Make full reparation to Homero Flor Freire in the terms indicated in th[e Merits] report, both pecuniary and non-pecuniary, including measures of satisfaction for the harm caused.

2. Publicly recognize that Homero Flor Freire was discharged from the Ecuadorian Army in a discriminatory manner.

3. Adopt the state measures needed to ensure that persons who work within the Ecuadorian Ground Force or any other part of the Ecuadorian Army are not subject to discrimination based on their actual or perceived sexual orientation.

¹ Admissibility Report No. 1/10, *Case of Homero Flor Freire v. Ecuador*, March 15, 2010 (evidence file, folios 204 to 215).

² Merits Report No. 81/13, *Case of Homero Flor Freire v. Ecuador*, November 4, 2013 (merits file, folios 5 to 53).

4. Take the necessary state measures to ensure that the personnel of the Ecuadorian Ground Force or any other unit of the Ecuadorian Army, as well as the courts of law in the military jurisdiction, are aware of the inter-American standards, and Ecuador's domestic laws in relation to non-discrimination based on actual or perceived sexual orientation.

5. Adopt the necessary state measures to guarantee the right to due process to members of the military tried by courts in disciplinary proceedings, including the right to an impartial judge or court.

d) *Notification of the State.* The Merits Report was notified to the State on December 11, 2013, granting it two months to report on compliance with the recommendations. The Commission indicated that "[f]rom that time and up until [the case was submitted to the Court], it granted the Ecuadorian State a series of extensions." The State sent three reports on compliance and both parties took different steps to reach a compliance agreement.³ The Commission indicated that "despite this, the parties were unable to reach agreement on the scope, content, and method of implementing the reparation in favor of Homero Flor Freire."

3. *Submission to the Court.* On December 11, 2014 the Commission submitted this case to the Court indicating that, even though the Ecuadorian State had carried out an act of public apology on July 28, 2014, "considering the disagreement between the parties on the remaining reparations and the consequent lack of full reparation, the Commission decided to submit all the facts and human rights violations described in Merits Report 81/13 to the jurisdiction of the Court, given the need to obtain justice for the [presumed] victim in this case. "The Commission appointed Commissioner Rose Marie B. Antoine and Executive Secretary Emilio Álvarez Icaza as delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, Fanny Gómez Lugo and Selene Soto Rodríguez, Executive Secretariat lawyers, as legal advisers.

4. *Requests of the Inter-American Commission.* Based on the above, the Inter-American Commission asked this Court to find and declare the international responsibility of Ecuador for the violations contained in its Merits Report and to require the State, as measures of reparation, to comply with the recommendations included in that report (*supra* para. 2).

II PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and to the representative.* The submission of the case was notified to the State and to the representative of the presumed victim⁴ (hereinafter "the representative") on January 12, 2015.

6. *Brief with pleadings, motions and evidence.* On February 11, 2015, the representative presented his brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief"), pursuant to Articles 25 and 40 of the Court's Rules of Procedure. In this brief, he agreed with the allegations made by the Commission and added arguments on the presumed violation of Articles 9 and 11 of the American Convention. Also, through his representative, the presumed victim requested access to the Victim's Legal Assistance Fund of the Inter-American Court (hereinafter "the Legal Assistance Fund").

7. *Answering brief.* On May 23, 2015, the State submitted to the Court its brief with preliminary

³ Cf. Brief of the State of March 14, 2014 (evidence file, folios 2045 to 2059); brief of the State of June 25, 2014 (evidence file, folios 1816 to 1819); brief of the State of October 9, 2014 (evidence file, folios 1589 to 1601), and proposed compliance agreement presented by the representative on August 21, 2014 (evidence file, folios 1695 and 1723 to 1727).

⁴ The presumed victim in this case is represented by Alejandro Ponce Villacís.

objections, answering the submission of the case by the Commission, and with observations on the pleadings and motions brief (hereinafter "answering brief"). In this brief, the State filed two preliminary objections, one relating to the "factual framework" of the case, and the other to the presumed "failure to exhaust domestic remedies." The State appointed Ricardo Velasco as its Agent for this case, and the lawyers, Carlos Espín and Daniela Ulloa, as deputy agents.

8. *Legal Assistance Fund.* In an order of July 3, 2015,⁵ the President of the Court admitted the request submitted by the presumed victim, through his representative, to access the Legal Assistance Fund, and approved the financial assistance required for the presentation of the presumed victim's statement and the opinion of an expert witness, as well as their appearance and that of the representative at the public hearing.

9. *Observations on the preliminary objections.* On July 29 and 30, 2015, the Inter-American Commission and the representative, respectively, presented their observations on the preliminary objections filed by the State.

10. *Public hearing.* In an order of December 16, 2015,⁶ the President called the parties and the Commission to a public hearing to receive the final oral arguments of the representative and the State, and the final oral observations of the Commission on the preliminary objections and eventual merits, reparations and costs. In addition, in this order, the President required the statements of five witnesses proposed by the representative and a joint opinion of two expert witnesses proposed by the State, to be presented by affidavit, and the parties submitted these on February 3, 2016. The representative and the State were able to make observations and pose questions to the deponents offered by the other party. In addition, in the said order, the presumed victim, Homero Flor Freire, and three expert witnesses proposed by the State, the representative and the Commission, respectively, were called to declare at the public hearing. This hearing took place on February 17, 2016, during the 113th regular session of the Court held at its seat.⁷ During the hearing, the Court's judges requested the parties and the Commission to provide certain information and explanations.

11. *Amicus curiae.* On March 3, 2016, the Court received an *amicus curiae* brief from the *Fundación Ecuatoriana Equidad*.⁸

12. *Final written arguments and observations.* On March 17, 2016, the representative and the State presented their final written arguments and the Commission presented its final written observations. Together with their final written arguments the parties submitted information, explanations and helpful evidence requested by the Court's judges (*supra* para. 10) and the State presented certain additional documentation. On April 8, 2016, the Secretary of the Court, on the instructions of the President, asked the representative and the Commission to submit any observations they deemed pertinent on the said documentation.

13. *Helpful information and evidence.* On February 8 and May 20, 2016, the President of the Court asked the State to present helpful information and evidence. The State presented this information

⁵ Cf. *Case of Flor Freire v. Ecuador*. Order of the President of the Court of July 3, 2015. Available at: http://www.corteidh.or.cr/docs/asuntos/freire_fv_15.pdf.

⁶ Cf. *Case of Flor Freire v. Ecuador*. Order of the President of the Court of December 16, 2015. Available at: http://www.corteidh.or.cr/docs/asuntos/freire_16_12_15.pdf.

⁷ There appeared at this hearing: (a) for the Inter-American Commission: Commissioner Francisco Eguiguren Praeli and Silvia Serrano Guzmán, Adviser; (b) for the presumed victim: Alejandro Ponce Villacís, legal representative, and (c) for the State: Ricardo Velasco, National Director for Human Rights, Agent; Carlos Espín Arias, Assistant National Director for Human Rights, Deputy Agent, and Alonso Fonseca, Deputy Agent.

⁸ This brief was signed by Alex Esparza Sarango, President of the Foundation; Bernarda Freire Barrera, Coordinator of the Foundation's Human Rights Clinic, and by the lawyers, Christian Paula Aguirre and Jorge Fernández Yépez.

and documentation on February 12, May 30 and June 7, 2016.

14. *Observations on the helpful information and evidence.* On April 15, 2016, the representative and the Commission submitted their observations on the documentation presented by the State together with its final written arguments. On June 9 and 15, 2016, the representative and the Commission submitted their observations on the helpful information and documentation presented by the State.

15. *Disbursements in application of the Legal Assistance Fund.* On April 8, 2016, the Court forwarded to the State the report on the disbursements made from the Court's Legal Assistance Fund in this case. The State did not present observations in this regard within the time frame it was granted.

16. *Deliberation of the case.* The Court began deliberating this judgment on August 30, 2016.

III JURISDICTION

17. The Court has jurisdiction to hear this case pursuant to Article 62(3) of the Convention because Ecuador has been a State Party to the American Convention since December 28, 1977, and accepted the compulsory jurisdiction of the Court on July 24, 1984.

IV PRELIMINARY OBJECTION EXHAUSTION OF DOMESTIC REMEDIES

18. The State submitted two arguments as preliminary objections: (i) the presumed modification of the "factual framework", and (ii) the presumed failure to exhaust domestic remedies. Since the supposed modification of the factual framework is not related to a question of admissibility or to the jurisdiction of this Court,⁹ the arguments will be analyzed in the following chapter on preliminary considerations. In that chapter, the Court will also examine the arguments concerning the effects of the State's supposed acknowledgement of responsibility at the stage of compliance with the recommendations contained in the Merits Report of the Commission.

A. Arguments of the State and observations of the Commission and the representative

19. The **State** emphasized that it had presented the preliminary objection of failure to exhaust domestic remedies at the appropriate moment before the Commission in its brief of August 11, 2003. It argued that "when the administrative act [that] discharged [the presumed victim] from the Army was issued, he failed to file the corresponding full jurisdiction subjective remedy before the Contentious Administrative Court," to which a person may have recourse "when an administrative act has allegedly disregarded or partially denied his rights." In addition, the State argued that "following the judgment of the Contentious Court, the law established the possibility of appealing to the highest ordinary jurisdictional instance, the former Supreme Court of Justice, by a remedy of cassation." It indicated that article 6(c) of the Law on the Contentious Administrative Jurisdiction "in no way prevented filing legal actions, under the contentious administrative jurisdiction to contest acts related to "the organization of the security forces.'" It explained that this article "establishes the lack of jurisdiction of the Contentious Administrative Court to examine "matters that arise in relation

⁹ Cf. *Case of Tarazona Arrieta et al. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of October 15, 2014. Series C No. 286, para. 18, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015, para. 19.

to political acts of the Government, such as those that affect [...] the organization of the security forces," and this precludes administrative acts such as a discharge, which has no effects on the organization of the security forces."

20. Furthermore, regarding the application for amparo filed by Mr. Flor Freire, the State indicated that: (i) the ruling of January 17, 2001, [against which the amparo was filed] was not the administrative act that ordered the separation of Mr. Flor from the Armed Forces"; (ii) the administrative act that led to the separation of Mr. Flor was that of his discharge"; (iii) when Mr. Flor filed the application for constitutional amparo, he had not yet been discharged from the Armed Forces so that its effects could never have been his reinstatement," and (iv) owing to the preventive nature of the constitutional amparo, if it had been admitted, it could not have ordered any compensation in favor of the applicant."

21. The **Commission** indicated that "although the objection was presented at the proper procedural moment, that is at the admissibility stage before the Inter-American Commission, [...] the State's arguments in relation to the admissibility of the contentious administrative remedy were substantially less detailed than the ones submitted to the Inter-American Court." In addition, reiterating what it had established in its Admissibility Report, the Commission argued that "the domestic remedies were exhausted by: (i) the appeal against the decision of January 17, 2001, of the Court of Law of the Fourth Military Zone, and (ii) the application for constitutional amparo decided in second instance on February 4, 2002." The Commission also indicated that "the contentious administrative remedy was not the appropriate remedy to annul the disciplinary responsibility and the sanction imposed on Homer Flor and, consequently, it was not necessary to exhaust it." It also argued that "the State [...] had] merely reiterated briefly that it was the contentious administrative remedy that should be exhausted, without providing specific arguments proving that it was appropriate and effective." Consequently, the Commission asked the Court to declare the preliminary objection inadmissible because "there is no reason to diverge from what was decided at the admissibility stage."

22. The **representative** indicated, with regard to the contentious administrative jurisdiction, that, when the facts occurred, the Law on the Contentious Administrative Jurisdiction did not allow "actions to be filed against administrative acts of the Armed Forces." This was because article 6(c) of the said law "expressly establishes [that] the organization of the security services does not correspond to [that jurisdiction]." The representative mentioned several cases of the Supreme Court of Justice of Ecuador in which that court had ratified that "the contestation of acts of the security forces does not correspond to the contentious administrative jurisdiction." He concluded that "Mr. Flor Freire was prevented from filing a subjective remedy [...] before the District Contentious Administrative Court because a law that expressly prevented this existed and was in force." Therefore, he argued that the application for amparo was the only "adequate [mechanism] that could be effective."

B. Considerations of the Court

23. Article 46(1)(a) of the Convention establishes that admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 of the Convention requires that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.¹⁰ The rule of prior exhaustion of domestic remedies was conceived in the interests of the State because it seek to exempt it from responding before an international organ for acts of which it is accused before it has had the opportunity to remedy them

¹⁰ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 85, and *Case of Tenorio Roca et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of June 22, 2016. Series C No. 314, para. 20.

with its own means.¹¹ However, the Court has maintained that an objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be presented at the proper procedural moment; that is, during the admissibility procedure before the Commission.¹²

24. When arguing the failure to exhaust domestic remedies, the State must specify at that time the domestic remedies that remain to be exhausted and prove that those remedies were available, and were appropriate and effective.¹³ It is not the task of the Court or of the Commission, to identify, *ex officio*, the domestic remedies that remain to be exhausted. The Court underlines that it is not for the international organs to rectify the lack of precision of the State's arguments.¹⁴ Thus, when a State cites the existence of a domestic remedy that has not been exhausted, this must not only be at the proper moment but also be clear, identifying the remedy in question and also how, in the specific case, it would be adequate and effective to protect the persons in the situation denounced.¹⁵ Accordingly, it is not sufficient to merely indicate the existence of a remedy; rather, its availability must be proved.¹⁶

25. The admissibility procedure before the Commission began with the forwarding of "the pertinent parts of [the] petition" to the State on March 20, 2003, when it was granted two months to present observations.¹⁷ On August 25, 2003, the State presented its brief with observations arguing that the presumed victim should exhaust the contentious administrative remedy because it was the appropriate remedy against "the discharge imposed on a soldier in active service, [which] is an administrative act" and, subsequently, the remedy of cassation.¹⁸ In response, the representative submitted a brief on April 12, 2004, in which he indicated, *inter alia*, that the said remedy was not available because article 6(c) of the Law on the Contentious-Administrative Jurisdiction established that "matters that arise in relation to political acts of the Government, such as those that affect [...] the organization of the security services do not correspond to the contentious-administrative jurisdiction."¹⁹ The representative also referred to an opinion of the Ecuadorian Supreme Court that ratified this position and provided a copy of the respective domestic decision.²⁰ This information was forwarded to the State on April 30, 2004, so that it could present its observations.²¹ However, the State never responded to this allegation;²² therefore, the State failed to present evidence that would allow the Court to reject the representative's disagreement about the availability of the said remedy.

¹¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 61, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 20.

¹² Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 88, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 21.

¹³ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, paras. 88 and 91, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 21.

¹⁴ 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 Tenorio Roca et al. v. Peru, supra*, para. 21.

¹⁵ 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. 30, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 21.

¹⁶ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 88, 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. 21.

¹⁷ Cf. Letter of the Inter-American Commission of March 20, 2003 (evidence file, folio 449).

¹⁸ Cf. Brief of the State of Ecuador dated August 25, 2003, submitted to the Inter-American Commission (evidence file, folios 443 to 445).

¹⁹ Brief of the representative of April 12, 2004 (evidence file, folios 413 and 414).

²⁰ Cf. Brief of the representative of April 12, 2004 (evidence file, folios 413 to 415), and decision of the Administrative Chamber of the Supreme Court of March 11, 1994 (evidence file, folios 421 to 426).

²¹ Cf. Letter of the Inter-American Commission of April 30, 2004 (evidence file, folio 409).

²² On December 10 and 30, 2008, the State indicated that "[t]he Ecuadorian State has sent the Inter-American Commission all the relevant information on this petition; therefore, the State's opinion is reconfirmed in the sense that this

26. The Court recalls that, when arguing the failure to exhaust domestic remedies, the State must not only specify at the proper moment the domestic remedies that have not been exhausted, but must also prove that those remedies were available, and were appropriate and effective. The State did not provide this evidence. Owing to the representative's argument, which the State failed to contest, the Commission did not have sufficient evidence to verify the availability of the contentious administrative remedy in the case of the presumed victim. Therefore, the Court rejects the preliminary objection filed by Ecuador.

V

PRELIMINARY CONSIDERATIONS

A. *The factual framework*

A.1 Arguments of the parties and of the Commission

27. The *State* contested what it considered was a modification of the factual framework of the case. In this regard, it argued that the pleadings and motions brief "trie[d] to introduce allegations that are not part of the inter-American proceedings, thus exceeding the scope of the facts to be examined by the Court and evidently affecting the legal certainty [of the proceedings]." It argued that the Court should not analyze "any of the circumstances described [...] in the introductory section of the [pleadings and motions brief]; specifically, the issues relating to equal marriage, [and the] possibility of exercising the rights of the family completely and comprehensively (adoption of children) by those whose sexual orientation is not heterosexual."

28. The *Commission* indicated that the State's discrepancies were not of a preliminary nature, but related to certain references made by the representative that were not part of the factual framework defined by the Commission in its Merits Report. It indicated that it "agree[d] with the State that [...] issues relating to equal marriage, as well as the exercise of the rights of the family and the possibility of adoption by same-sex couples are not part of this case and do not appear in the Merits Report." However, it indicated that "the purpose of those considerations [...] is not to present them as facts of the case or derive legal consequences from them, but merely to offer general contextual information to the Court." The representative did not refer to these objections by the State.

A.2 Considerations of the Court

29. The Court reiterates that the factual framework of proceedings before it is constituted by the facts contained in the Merits Report submitted to its consideration.²³ Therefore, the parties are not authorized to allege new facts that differ from those contained in the said report, although they may present facts that explain, clarify or reject the facts mentioned in the Merits Report that have been submitted to the Court's consideration.²⁴ The exception to this principle are facts characterized as supervening, or when facts become known or there is access to evidence about them subsequently, provided that they are related to the facts of the proceedings.²⁵ Moreover, in each case, it

complaint should be declared inadmissible." Cf. Briefs of the State of Ecuador of December 10 and 30, 2008, before the Inter-American Commission (evidence file, folios 287 and 230).

²³ Cf. *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala. Merits, reparations and costs*. Judgment of November 20, 2012. Series C No. 253, para. 34, and *Case of the Punta Piedra Garifuna Community and its members v. Honduras. Preliminary objections, merits, reparations and costs*. Judgment of October 8, 2015. Series C No. 304, para. 67.

²⁴ Cf. *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98, para. 153, and *Case of the Punta Piedra Garifuna Community and its members v. Honduras, supra*, para. 67.

²⁵ Cf. *Case of the "Five Pensioners" v. Peru, supra*, para. 154, and *Case of the Punta Piedra Garifuna Community and its members v. Honduras, supra*, para. 67.

corresponds to this Court to decide on the admissibility of arguments on the factual framework in order to safeguard the procedural balance between the parties.²⁶

30. The Court notes that Ecuador requested the exclusion of facts described in the introductory chapter of the pleadings and motions brief concerning equal marriage and adoptions by same-sex couples. In this regard, it notes that the purpose of the representative's introductory considerations was not to present them as facts of the case or to derive legal consequences from them. Consequently, the Court repeats that the facts of the case are circumscribed to those described by the Commission in its Merits Report and admits the State's request that it not consider the facts described by the representative in the introductory section of his brief as part of the factual framework of this case.

B. Identification of the presumed victim

31. In his pleadings and motions brief, the **representative** asked that, in addition to Mr. Flor Freire, the Court consider as presumed victims "his direct family circle and, specifically, his daughter, Paola Flor Lasso, a minor." The **State** contested the inclusion of Mr. Flor Freire's family as presumed victims, because only Mr. Flor Freire had been identified as such in the Merits Report of the Commission.

32. The Court recalls that the presumed victims must be indicated in the Commission's Merits Report issued pursuant to Article 50 of the Convention.²⁷ Article 35(1) of the Court's Rules of Procedure establishes that the case shall be submitted to the Court by the presentation of this report which shall contain "the identification of the presumed victims." According to this rule, it is the Commission and not this Court that must identify the presumed victims precisely and at the proper procedural moment in a case before the Court.²⁸ Legal certainty requires, as a general rule, that all the presumed victims are duly identified in the Merits Report, and it is not possible to add new presumed victims after this, save in the exceptional circumstances established in Article 35(2) of the Rules of Court's Procedure,²⁹ which are not applicable in this case.

33. Homero Flor Freire was the only person identified as a presumed victim in the Merits Report of the Commission. Therefore, based on the above and in application of Article 35(1) of its Rules of Procedure, the Court declares that it will only consider Mr. Flor Freire as a presumed victim and eventual beneficiary of any reparations that are applicable in this case.

C. The alleged acknowledgement of responsibility by the State

C.1 Arguments of the parties and of the Commission

34. The **representative** argued that, "following the issue of Merits report, the State [...] repeatedly expressed its intention to comply with it"; therefore, "it renounced any claim or defense" of a

²⁶ Cf. *Case of the "Mapiripán Massacre" v. Colombia. Merits, reparations and costs.* Judgment of September 15, 2005, para. 58, 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. 47.

²⁷ Cf. *Case of the Barrios Family v. Venezuela. Merits, reparations and costs.* Judgment of November 24, 2011. Series C No. 237, footnote 214, and *Case of the Human Rights Defender et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 283, para. 47.

²⁸ Cf. *Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of the Human Rights Defender et al. v. Guatemala, supra*, para. 47.

²⁹ *Mutatis mutandis*, under the Court's previous Rules of Procedure, *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009. Series C No. 209, para. 110, and *Case of the Human Rights Defender et al. v. Guatemala, supra*, para. 47.

preliminary nature or with regard to the merits. He also indicated that “[t]he State, through the Ministry of National Defense, had placed a plaque in the Armed Forces General Command recognizing the existence of violations of the rights of Homero Flor Freire.” Consequently, he argued that the State had acknowledged its international responsibility and the principle of estoppel applied. Furthermore, he indicated that “[t]he State obligated itself owing to its own previous conduct and, therefore, tacitly renounced the preliminary objection of failure to exhaust domestic remedies and other means of defense.”

35. The **Commission** recalled that, after the Merits Report had been notified to Ecuador, the State organized an act of apology and unveiled a plaque. The wording on the plaque indicated that Homero Flor Freire had been discharged from the Ground Forces in a discriminatory manner. Therefore, it alleged that the Court should analyze the case “in light of the principle of *estoppel*.”

36. The **State** indicated that “Under international law, [...] compliance with the Commission’s recommendations merely signifies acts performed in good faith,” and “does not mean an acknowledgement of the State’s international responsibility.” It also indicated that, if the contrary were true, “the effect would be that no State would try to implement the recommendations established in the merits reports.” Therefore, it considered that any allegation “suggesting an acknowledgement of responsibility by Ecuador would be groundless and should be rejected by the Court.”

C.2 Considerations of the Court

37. The Court notes that following the issue of the Merits Report, the State, in compliance with the recommendations made in this report, carried out an act of public apology on July 28, 2014, during which it unveiled a plaque located in the main entry hall of the Army’s General Command building.³⁰ The “act was presided by the [...] Deputy Minister of National Defense; and was attended by delegations from the Ministry of Justice, Human Rights and Worship, the Office of the Attorney General, the Ministry of National Defense, the Ground Forces, and guests of Homero Flor Freire.”³¹ The plaque reads:

This plaque records the apology of the Ecuadorian State, through the Ministry of National Defense, to Lt. *Homero Fabián Flor Freire* for his discriminatory and unsubstantiated discharge from the Ecuadorian Ground Forces in 2001, in violation of his constitutional rights.³²

38. This text was published “on the website of the Ministry of National Defense.”³³

39. In addition, during the procedure before the Commission, the State offered to make other publications, conduct negotiations on compensation for Mr. Flor Freire, and mentioned the adoption of other measures, as guarantees of non-repetition, investigation actions, and the elimination of the proceedings against him from Mr. Flor Freire military record.³⁴ However, there is no record in the case file that these measures have been taken.

³⁰ Cf. Brief of the State of October 1, 2014 (evidence file, folios 1614 and 1615); brief of the State of July 22, 2014 (evidence file, folio 1671), and photographs of the unveiling of the plaque (evidence file, folio 1725).

³¹ Brief of the State of September 29, 2014 (evidence file, folio 1608).

³² Copy of the photograph of the plaque (evidence file, folio 1602).

³³ The communiqué indicated that: “[t]he Ecuadorian State, sovereignly decides to accept the observations and recommendations of Merits Report No. 81/13, of the Inter-American Commission on Human Rights, adopted in session No. 1961 of November 4, 2013, and records in this communiqué its public apology to Lt. Homero Flor,” and copied the text of the plaque. Cf. Communiqué of the Ministry of National Defense of August 13, 2013 (evidence file, folio 1602).

³⁴ Regarding the publications offered, see: brief of the State of July 28, 2014 (evidence file, folio 1750), brief of the State of June 25, 2014 (evidence file, folio 1820), and brief of the State of August 18, 2014 (evidence file, folio 1689). Regarding possible compensation, during a working meeting, the State advised that “the parties have agreed on the two items of the

40. That said, during the stage of compliance with the Commission's recommendations, the State clarified that, if no agreement was reached on compliance with the Merits Report, "the information provided by the State could not be considered an acknowledgement of acceptance of international responsibility before the Inter-American Court of Human Rights."³⁵

41. The Court recalls that Article 62 of its Rules of Procedure regulate the "acceptance of the facts or the total or partial acquiescence" made before the Court.³⁶ However, it has considered that acts of acquiescence made during the procedure before the Commission are necessarily relevant to determine whether the application of the *estoppel* principle is in order with regard to contrary positions alleged during the proceedings in the case before the Court.³⁷ The Court has also established that the acts of acknowledgment of responsibility are analyzed in each specific case.³⁸

42. Furthermore, the Court's case law reveals that, in order to consider that an act of the State is an acquiescence or acknowledgement of responsibility, its intention in this regard must be clear.³⁹

43. The inter-American system was designed to ensure that, following the issue of the Merits Report, the State would have the opportunity to comply with the recommendations made by the Commission before the case was submitted to the Court.⁴⁰ This opportunity, as in the case of friendly

State's proposal of July 25, 2014, equivalent to the payment of two amounts: (1) for pecuniary damage the sum of US\$330,169.25, and (2) for non-pecuniary damage US\$339,221.20; amounting to a total of US\$659,380.45." Brief of the State of February 11, 2014 (evidence file, folio 2046); brief of the State of June 9, 2014 (evidence file, folio 1966); brief of the State of July 25, 2014 (evidence file, folios 1757 and 1758); brief of the State of August 11, 2014 (evidence file, folio 1734); brief of the State of September 9, 2014 (evidence file, folio 1652), and minutes of working meeting of July 30, 2014 (evidence file, folio 1567). The State also forwarded calculations made by Army authorities on the loss of earnings and proposals for compensation. Cf. Brief of the Ecuadorian Army of September 18, 2013, to the General Coordinator of the Legal Services Department of the Ministry of National Defense (evidence file, folios 2022 and 1981). Regarding the guarantees of non-repetition, it referred to measures "to ensure that individuals employed in the Armed Forces or any other department of the Ecuadorian Army are not discriminated against based on their actual or perceived sexual orientation"; "to provide human rights training to the Armed Forces on human rights law, regulations and international standards," and "to guarantee the right to due process of soldiers tried by courts in disciplinary proceedings, including the right to an impartial judge or court." Brief of the State of January 17, 2014 (evidence file, folios 2009 to 2020); brief of the State of February 11, 2014 (evidence file, folios 2051 to 2059); brief of the State of June 25, 2014 (evidence file, folio 1818); brief of the State of October 1, 2014 (evidence file, folios 1616 and 1617), and brief of the State of September 29, 2014 (evidence file, folio 1606). Regarding the measures to investigate the facts and to eliminate the military proceedings against Mr. Flor Freire from his military record, see, brief of the State of June 9, 2014 (evidence file, folio 1969).

³⁵ Brief of the State of June 9, 2014 (evidence file, folio 1970).

³⁶ This article establishes that "[I]f the respondent informs the Court of its acquiescence, in whole or in part, to the claims made in the submission of the case or in the brief of the presumed victims or their representatives, the Court shall decide at the appropriate procedural moment, after hearing the opinions of the other parties to the case, whether to accept such acquiescence, and rule upon its juridical effects."

³⁷ Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller's Office") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 59.

³⁸ Cf. *Case of Myrna Mack Chang v. Guatemala. Merits, reparations and costs.* Judgment of November 25, 2003. Series C No. 101, para. 105, and *Case of Argüelles et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2014. Series C No. 288, para. 53.

³⁹ Cf. *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011 Series C No.221, para. 28, and *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of February 26, 2016. Series C No. 310, para. 61.

⁴⁰ Article 50 of the American Convention authorizes the Commission to make "such proposals and recommendations as it sees fit" in the Merits Report, while Article 51 establishes a period of three months for the Commission to evaluate, *inter alia*, whether the matter has been settled or whether to submit it to the Court. In addition, the Commission's Rules of Procedure establish that when transmitting the report to the State "it shall set a deadline by which the State in question must report on the measures adopted to comply with the recommendations." Also, Article 45 of those Rules of Procedure establishes that "[i]f the State in question has accepted the jurisdiction of the Inter-American Court in accordance with Article 62 of the American Convention, and the Commission considers that the State has not complied with the recommendations of the report approved in accordance with Article 50 of the American Convention, it shall refer the case to the Court, unless there is a

settlement agreements, contributes to the purposes of the inter-American system of human rights, especially in order to find just solutions to the structural and particular problems of a case.⁴¹ Therefore, the Court considers that the measures addressed at implementing the Commission's recommendations should be understood as compliance in good faith with the purposes of the Convention and not as an acknowledgement of jurisdiction or the admissibility of the case before the Court,⁴² or an acquiescence or acknowledgement of the violations that have been alleged. To suppose the contrary, would discourage States from taking part in dispute resolution procedures before recourse is had to the Court.

44. In the instant case, the Court appreciates the actions taken by the State to comply with the recommendations made in the Merits Report (*supra* paras. 37 to 39). However, it notes that these and other subsequent actions do not reveal a clear intention of the State to acquiesce to the claims of the Commission and the representative. To the contrary, in one of its briefs at the stage of compliance with recommendations before the Commission, the State expressly indicated that its actions to comply with those recommendations could not be considered an acknowledgement of international responsibility before the Inter-American Court (*supra* para. 40).

45. In sum, the Court is aware that the act of the State referred to above was not implemented pursuant to Article 62 of the Court's Rules of Procedure;⁴³ in other words, its purpose was not for the Court, when deciding on its admissibility and legal effects, to end the case and sentence the State based on its terms. Rather, it was implemented based on the provisions of Articles 50 and 51 of the Convention; that is, in order to comply with one of the Commission's recommendations. Thus, this act was implemented in the context of the procedure before the Commission to avoid the case being submitted to the Court. Consequently, it was not a unilateral juridical act of the State implemented without any act being executed by another subject of international law and with the unequivocal intention of being obligated by the latter; rather, to the contrary, it was implemented with the purpose of persuading the Commission to consider that the matter had been settled because the State had taken adequate measures to remedy the situation submitted to the Commission.

46. Therefore, since the objective established in Article 51 of the Convention was not achieved, it is not admissible to attribute to the said act of the State the consequences established in Article 62 of the Court's Rules of Procedure, without prejudice to the respective acts of the State being taken into account in the eventual chapter on reparations.

VI EVIDENCE

A. Documentary, testimonial and expert evidence

reasoned decision by an absolute majority of the members of the Commission to the contrary." Rules of Procedure of the Inter-American Commission adopted by the Commission at its 137th regular session held from October 28 to November 13, 2009, and amended on September 2, 2011, and during the 147th regular session held from March 8 to 22, 2013, for entry into force on August 1, 2013, Arts. 44(2) and 45(1).

⁴¹ Cf. *Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs*. Judgment of April 27, 2012 Series C No. 241, paras. 18 and 19, and *Case of García Cruz and Sánchez Silvestre v. Mexico. Merits, reparations and costs*. Judgment of November 26, 2013. Series C No. 273, para. 22.

⁴² Cf. *Case of Argüelles et al. v. Argentina, supra*, para. 56.

⁴³ This article establishes that "[I]f the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the submission of the case or in the brief submitted by the alleged victims or their representatives, the Court shall decide, having heard the opinions of the other parties to the proceedings, and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects."

47. The Court received diverse documents presented as evidence by the Commission and the parties attached to their principal briefs (*supra* paras. 3, 6 and 7). The Court also received from the parties documents requested by the Court's judges as helpful evidence under Article 58 of the Rules of Procedure. In addition, the Court received the affidavits prepared by the witnesses Germania Freire Silva, Lino Flor Cruz, Alejandro Flor Freire, Ximena Flor Freire and Diego Vallejo Cevallos, as well as the joint expert opinion of Fernando Casado and Leonardo Jaramillo.⁴⁴ Regarding the evidence presented during the public hearing, the Court received the statement of the presumed victim, Homero Flor Freire, and the expert opinions of Leonardo Jaramillo, Ramiro Ávila Santamaría and Robert Warren Wintemute.

B. Admission of the evidence

B.1 Admission of the documentary evidence

48. In this case, as in others, the Court admits those documents submitted at the appropriate moment by the parties and the Commission or requested as helpful evidence by the Court or its President the admissibility of which was not contested or challenged.⁴⁵

49. In its answering brief, the State objected to the admission of the report on the formula for calculating the harm to the life project signed by Maria de los Ángeles Aguirre and submitted as annex 10 to the representative's pleadings and motions brief. Ecuador argued that technical reports should be requested and dealt with as expert evidence by the Court, so that attaching them to a brief, as in this case, violated legal certainty and the State's right to defend itself. The Court notes that it is the Court or its President that establishes the pertinence of a statement offered in a case by the parties or the Commission, and defines its purpose. However, this does not restrict the possibility of the parties presenting documentary evidence to support their arguments and claims. The report forwarded by the representative corresponds to documentary evidence and will be assessed as such in the context of the existing body of evidence.⁴⁶ The State had the opportunity to exercise its right to defense in its answering brief and subsequent interventions before this Court; therefore, the Court rejects Ecuador's objection.

50. In response to the request for helpful evidence, the State forwarded a document signed by expert witness Leonardo Jaramillo with the information requested. According to the State, this document sought to respond to the President's request for domestic case law on reincorporation of personnel into the Armed Forces.⁴⁷ The representative objected to the admissibility of this document. In this regard, the Court notes that the document does not have the probative value of an expert opinion and will not be considered an extension of the expert opinion provided by Leonardo Jaramillo at the public hearing. However, insofar as it was received in response to a request for helpful evidence, it will be considered part of the information and clarifications provided by the State to

⁴⁴ The purpose of these statements was established in the order of the President of December 16, 2015 (*supra* nota 6).

⁴⁵ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 140, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 36.

⁴⁶ Similarly, see, *Case of Abrill Alosilla et al. v. Peru. Merits, reparations and costs*, Judgment of March 4, 2011. Series C No. 223, para. 39, and *Case of Quispialaya Vilcapoma v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2015. Series C No. 308, para. 40.

⁴⁷ Specifically, the President asked the State to forward: "Domestic case law from the constitutional and/or the contentious administrative jurisdiction on the reincorporation of personnel into the Armed Forces a long time after they have been discharged from this institution, as well as any other pertinent information or relevant clarifications. In this regard, the Secretariat stressed that Leonardo Jaramillo, the expert witness proposed by the State, indicated that there are 'cases of reincorporation into the forces after different periods of time, including some fairly extended periods.' However, he did not provide details or explain the circumstances. However, the State was particularly asked to forward a copy of [specific domestic] judicial decisions."

address the request made by the President of the Court.

B.2 Admission of the testimonial and expert evidence

51. The Court also finds it pertinent to admit the statements of the presumed victim, the witnesses, and the expert opinions provided during the public hearing and by affidavit, insofar as they are in keeping with the purpose defined by the President in the order requiring them and the purpose of this case.

C. Assessment of the evidence

52. Pursuant to Articles 46, 47, 48, 50, 51, 57 and 58 of the Rules of Procedure, as well as its consistent case law regarding evidence and its assessment,⁴⁸ the Court will examine and assess the documentary probative evidence provided by the parties and the Commission, the statements, testimony and expert opinions, and the helpful evidence requested and incorporated by this Court to establish the facts of the case and to rule on the merits. To this end, it will abide by the principles of sound judicial discretion within the corresponding legal framework, taking into account the whole body of evidence and the arguments submitted in this case.⁴⁹

53. Furthermore, in accordance with the case law of the Inter-American Court, the statement made by the presumed victim cannot be assessed in isolation, but rather in the context of all the evidence in the proceedings, insofar as it may provide further information on the presumed violations and their consequences.⁵⁰

VII FACTS

54. This case relates to the discharge of Mr. Flor Freire from the Ecuadorian Ground Forces for reasons that are alleged to have been discriminatory owing to a perceived sexual orientation. In this chapter, the Court will describe the relevant facts with regard to: (A) the affiliation of Homero Flor Freire with the Ecuadorian Ground Forces and the events of November 19, 2000; (B) the domestic norms applied in this case; (C) the summary inquiry disciplinary procedure (*proceso disciplinario de información sumaria*) followed owing to the events, and (D) the application for constitutional amparo filed by Mr. Flor Freire in January 2001.

A. Affiliation of Homero Flor Freire with the Ecuadorian Ground Forces and the events of November 19, 2000

55. Homero Flor Freire entered the Ecuadorian Ground Forces with the rank of Second Lieutenant of the Armored Cavalry on August 7, 1992.⁵¹ At the time of his discharge from the Ground Forces he had the rank of Lieutenant and was serving in the Fourth Military Zone.⁵²

⁴⁸ Cf. *Case of the White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No 37, para. 69 al 76, and *Case of Maldonado Ordoñez v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of May 3, 2016. Series C No. 311, para. 31.

⁴⁹ Cf. *Case of the White Van" (Paniagua Morales et al.) v. Guatemala. Merits, supra*, para. 69 to 76, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 45.

⁵⁰ Cf. *Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No 33, para. 43, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 46.

⁵¹ Cf. Certificate issued by the Personnel Manager of the Ground Forces dated February 5, 2001 (evidence file, folio 2); General Command of the Ground Forces, record of Homero Flor Freire (evidence file, folio 2539).

⁵² Cf. Certificate issued by the Personnel Manager of the Ground Forces dated February 5, 2001 (evidence file, folio 2);

56. It is alleged that the events that resulted in the procedure under the military disciplinary jurisdiction took place on November 19, 2000, on the premises of the Amazonas Military Base, located in the city of Shell, in the province of Pastaza. Two versions of what happened on that date have been presented. The Court will describe both versions in this judgment because it does not have the necessary evidence to reject either of them. On the one hand, several military officers affirm that they saw Lieutenant Homero Flor Freire and a soldier having sexual relations in the Lieutenant's room at the Military Base on November 19, 2000. This version was admitted in the decisions that were subsequently adopted by the different organs that heard the case (*infra* paras. 68 to 82).

57. On the other hand, Mr. Flor Freire has denied the accusation made against him. According to his version, on November 19, 2000, he was performing his duties as a Military Police Officer, which included "ensuring the well-being of the members of the Armed Forces of his brigade."⁵³ According to his version, at around 5.20 a.m. that day, he was outside the Coliseum of the city of Shell Mera when he saw a soldier who was inebriated and in a problematic situation with some individuals who had attended a dance there, "endangering his physical integrity and also the honor and prestige of his military functions."⁵⁴ Mr. Flor Freire therefore decided to take the soldier back to the Amazonas Base. On entering the military premises, Mr. Flor Freire proceeded to leave him in the Guardhouse in the hands of the duty officers. However, at that moment, the soldier had tried to return to the place where the party was being held; Mr. Flor Freire had therefore opted to take the soldier to his own room where there was an additional bed so that he could sleep there.⁵⁵ Mr. Flor Freire stated that, shortly after he entered his room, a Major entered without authorization, "arbitrarily and violently,"⁵⁶ to inform him that he "was in serious trouble" and ordered him to surrender his weapon. On requesting an explanation, the Major informed him that there were "witnesses who had seen [him] in a 'situation of homosexuality.'"⁵⁷ According to Mr. Flor Freire, his discharge could be in retaliation for actions he had taken to reduce unnecessary expenditure and combat corruption in the unit, because he was responsible for purchasing food and other commodities for the military base where he worked.⁵⁸

58. Owing to the accusations made, Mr. Flor Freire gave an unsworn statement on November 19, 2000, before Intelligence Group No. 4 on what had happened,⁵⁹ when his versions of the facts was

General Command of the Ground Forces, record of Homero Flor Freire (evidence file, folio 2539).

⁵³ Statement of Mr. Flor Freire during the public hearing held before the Court in this case.

⁵⁴ Statement of Mr. Flor Freire during the public hearing held before the Court in this case.

⁵⁵ Cf. Statement of Mr. Flor Freire during the public hearing held before the Court in this case. Despite the foregoing, in his statement during the summary procedure, Mr. Flor Freire explained that he "did not leave the [soldier] in the Guardhouse because the guards in the Guardhouse were of a lower rank; therefore, [he had taken] him in order to supervise him fully." Ruling of the Court of Law (evidence file, folio 2585).

⁵⁶ Statement of Mr. Flor Freire during the public hearing held before the Court in this case.

⁵⁷ Statement of Mr. Flor Freire during the public hearing held before the Court in this case, and application for constitutional amparo filed by Homero Flor Freire with the Civil Judge on January 23, 2001 (evidence file, folio 12). Also, cf. ruling issued by the Sixth Civil Court of Pichincha on July 18, 2001 (evidence file, folio 2608), and report provided by Homero Flor to Intelligence Group No. 4 on the events that occurred during the night of November 18 and the early morning hours of November 19, 2000 (evidence file, folio 3422).

⁵⁸ Cf. Statement of Mr. Flor Freire during the public hearing held before the Court in this case.

⁵⁹ Cf. Ruling issued by the Sixth Civil Court of Pichincha on July 18, 2001 (evidence file, folio 2608).

recorded⁶⁰ (*supra* para. 57). According to the presumed victim, shortly afterwards he began to receive pressure to request his discharge or voluntary retirement.⁶¹

B. Provisions of Ecuador's domestic law applicable to the case

59. The Constitution of Ecuador in force at the time of the facts recognized the right to equality before the law, without discrimination on the basis, among other reasons, of a person's sexual orientation.⁶² Articles 273 and 274 of the Constitution established:

Article 273. The courts, tribunals, judges and administrative authorities shall be obliged to apply the pertinent provisions of the Constitution even if the interested party does not expressly invoke them.

Article 274. Any judge or court, in the cases heard, may declare inapplicable, *ex officio*, or at the request of a party, a legal precept contrary to the provisions of the Constitution or of international treaties or conventions, without prejudice to ruling on the disputed matter. That declaration shall not have binding force except in the cases in which it is indicated. The judge, court or chamber shall present a report on the declaration of unconstitutionality, for the Constitutional Court to take a general and binding decision.⁶³

60. In addition, at the time of the facts of this case, the 1998 Military Discipline Regulations were in force. These regulations established that offenses against military discipline could be light, severe and with criminal intent (*atentorios*). Article 67(a) of these regulations included as an offense with criminal intent "against morality": "[t]o execute unlawful sexual acts on military premises."⁶⁴ According to Article 72 of the regulations, offenses with criminal intent committed by officers should be punished by: "(a) Strict arrest for ten to fifteen days"; "(b) Strict arrest on another base for three to ten days," and "(c) Suspension from functions for ten to thirty days."⁶⁵

61. Meanwhile Title XI of these regulations also established in its "General Provisions" that:

Article 117. The members of the Armed Forces who are surprised committing acts of homosexuality or acts related to the possession, unlawful use, trafficking or sale of drugs or narcotics within or outside the service, shall be subject to the provisions of article 87(i) of the Law on Armed Forces Personnel [which establishes that the soldier will be discharged "for the good of the service, due either to his misconduct or professional incompetence⁶⁶], without prejudice to

⁶⁰ Cf. Report on the events that occurred during the night of November 18 and the early morning hours of November 19, 2000, provided by Homero Flor to Intelligence Group No. 4 (evidence file, folios 3420 to 3429), and Unsworn statement of Homero Flor Freire before the First Criminal Court of the Fourth Military Zone, November 24, 2000 (evidence file, folio 2551).

⁶¹ Cf. Unsworn statement of Homero Flor Freire before the First Criminal Court of the Fourth Military Zone, November 24, 2000 (evidence file, folios 2555 to 2557). In particular, Mr. Flor Freire indicated that the second day after the events, the Commander of the Fourth Military Zone said to him, *inter alia*: "it would be better for him and his family if he asked to be placed on paid leave," which he had subsequently repeated to his parents. Also, according to Mr. Flor Freire, the Commander of the Fourth Military Zone had informed him "of his decision to separate him from his functions." Ruling issued by the Sixth Civil Court of Pichincha on July 18, 2001 (evidence file, folio 2608).

⁶² Article 23(3) of the 1998 Ecuadorian Constitution established that: "Everyone shall be considered equal and shall enjoy the same rights, freedoms and opportunities, without discrimination for reasons of birth, age, sex, race, color, social origin, language, religion, political opinion, economic position, sexual orientation, health status, disability, or difference of any other kind." Article 23(3) of the 1998 Ecuadorian Constitution. Legislative Decree 0, published in Official Record No. 1 of August 11, 1998 (hereinafter "1998 Ecuadorian Constitution") (evidence file, folio 2675).

⁶³ 1998 Ecuadorian Constitution (evidence file, folios 2706 and 2707).

⁶⁴ Article 67 of the 1998 Military Discipline Regulations, Ministry of National Defense, Ministerial Order No. 144 (hereinafter "1998 Military Discipline Regulations") (merits file, folio 667).

⁶⁵ Article 72 of the 1998 Military Discipline Regulations (merits file, folio 669).

⁶⁶ Article 87(i) of the Law on Armed Forces Personnel establishes that: "A soldier shall be discharged for one of the

being brought before an ordinary judge for trial in accordance with the relevant law. [...]

If the degree of participation in the said acts of the member of the Armed Forces has not been fully proved, the competent authorities shall order the processing of a summary inquiry.⁶⁷

C. Summary inquiry disciplinary procedure

C.1 The summary inquiry procedure and the organs that intervene in its processing

62. In keeping with the above-mentioned Military Discipline Regulations, offenses with criminal intent were sanctioned by Disciplinary Boards or by summary inquiries. These regulations also established that when an officer became aware of the perpetration of an offense with criminal intent, he should take his report to the Commander of the unit to which the offender belonged, so that the Commander could order the immediate creation of a Disciplinary Board. However, "based on the nature of the offense, the Commander could request, through the respective channels, that the investigating judge of the jurisdictional region open the corresponding summary inquiry."⁶⁸ The summary inquiry is an administrative procedure regulated by the Regulations for Processing Summary Inquiries in the Armed Forces.⁶⁹ Article 2 of these Regulations indicates that:

Art. 2. Purpose of the summary inquiry. The summary inquiry is an administrative procedure to establish the truth about an act and to determine its legal consequences, to establish either the circumstances and responsibilities of an incident, loss or disposal of State property, disciplinary or professional conduct of Armed Forces personnel or, in general, to justify facts that affect the Armed Forces. The facts shall be substantiated using the evidentiary measures established by law.⁷⁰

63. According to the Organic Law of the Armed Forces Justice Service, the military investigating judges are responsible for processing the summary inquiries entrusted to them by the Commander of the Zone corresponding to their jurisdiction.⁷¹ However, "under the chain of command, the administrative decision-maker is the Zone or Brigade Commanders of the respective jurisdiction,"⁷² who will be known as "judges of law" in the context of the proceeding.

following reasons: [...] (i) for the good of the service, due to either the misconduct or professional incompetence of the soldier, characterized as such by the respective Board, pursuant to the provisions of the corresponding regulations, when he does not have a right to be placed on paid leave." Official Record 660, Law on Armed Forces Personnel, published on April 10, 1991 (hereinafter "1991 Law on Armed Forces Personnel") (evidence file, folio 2665).

⁶⁷ 1998 Military Discipline Regulations (merits file, folio 676).

⁶⁸ Articles 78 and 87 of the 1998 Military Discipline Regulations (merits file, folios 671 and 672).

⁶⁹ Cf. Ruling of the Court of Law of the Fourth Military Zone of January 19, 2001 (evidence file, folio 2581). According to the information available and the date on which the summary inquiry to investigate Mr. Flore Freire was conducted, it is clear that the norm applied in this case was the Regulations for Processing Summary Inquiries of the Armed Forces, contained in Ministerial Decision 1046, published in Ministerial Order No. 01 of January 1, 1994 (hereinafter "1994 Regulations for Processing Summary Inquiries") (evidence file, folio 1443). These Regulations were subsequently substituted by new Regulations for Processing Summary Inquiries adopted by Decision No. 1088 of the Minister of National Defense and published in Ministerial Order No. 200 of October 20, 2002 (evidence file, folios 1430 to 1432).

⁷⁰ Article 2 of the 1994 Regulations for Processing Summary Inquiries (evidence file, folio 1443).

⁷¹ Article 36(b) of the Organic Law of the Armed Forces Justice Service established: "The following are the attributes and obligations of the investigating judges within their respective territorial circumscription: [...] (b) To process the summary inquiries entrusted to them by the Zone Commander and the preliminary investigations, procedures and other legal tasks required by the military superior officer." Organic Law of the Armed Forces Justice Service (evidence file, folios 2484 and 2485). See also, Article 3 of the 1994 Regulations for Processing Summary Inquiries (evidence file, folios 1443 and 1444).

⁷² Article 3 of the 1994 Regulations for Processing Summary Inquiries (evidence file, folio 1444).

64. The summary inquiry procedure commences with an initial order, which can be preceded by, *inter alia*, a memorandum from a superior military authority requesting the opening of the investigation.⁷³ There are three stages to the procedure: (i) investigation, (ii) intermediary, and (iii) decision.⁷⁴ The purpose of the investigation stage is to take "the necessary procedural actions to prove the material fact of the summary inquiry and also [...] to establish the circumstances and the disciplinary, economic or administrative responsibilities."⁷⁵ The investigation stage concludes when the evidence has been gathered, and when the investigating judge declares the file closed and orders the prosecutor to issue an opinion.⁷⁶

65. At the intermediary stage, the prosecutor issues his opinion, in which he should resume all the actions taken in the case file, describe the competence and the validity of the actions taken by the military judges, analyze the proven facts and the norms that were applicable, and specify the consequences and recommendations, among which he must state "clearly whether charges should be brought and the reasons for this."⁷⁷ When the opinion has been issued, the investigating judge will prepare a draft decision and will refer to proceedings to the Zone Commander in order to continue the process. This ends the intermediary stage and the decision stage begins.⁷⁸

66. At the decision stage, the Zone Commander, acting as "Judge of Law" assumes the hearing of the proceeding. The Zone Commander is not bound by the draft decision prepared by the military investigating judge, but it appears in the case file and, if appropriate, the Commander must explain the reasons why he diverged from the draft.⁷⁹ The decision of the Zone Commander "must be reasoned and will conclude by establishing how the facts that were investigated occurred and the context; the ruling on whether the individuals involved should be discharged, whether responsibilities are involved, the legal and regulatory provisions on which these are founded and, in general, the decision required in the interests of justice, according to the subject-matter of the investigation."⁸⁰ The decisions issued by the Zone Commanders that contain recommendations to discharge, place on paid leave, or dismiss the individuals involved, must be examined by the respective Board and may be appealed.⁸¹

67. According to Articles 76(i) and 87(i) of the Law on Armed Forces Personnel, a soldier can be placed on paid leave or discharged⁸² for misconduct. This misconduct must be determined as such

⁷³ Article 8 of the 1994 Regulations for Processing Summary Inquiries (evidence file, folio 1445).

⁷⁴ Article 12 of the 1994 Regulations for Processing Summary Inquiries (evidence file, folio 1446).

⁷⁵ Article 13 of the 1994 Regulations for Processing Summary Inquiries (evidence file, folio 1446).

⁷⁶ Article 21 of the 1994 Regulations for Processing Summary Inquiries (evidence file, folio 1448).

⁷⁷ Article 22.4 of the 1994 Regulations for Processing Summary Inquiries (evidence file, folio 1448).

⁷⁸ Article 23 of the 1994 Regulations for Processing Summary Inquiries (evidence file, folio 1448).

⁷⁹ Article 24 of the 1994 Regulations for Processing Summary Inquiries (evidence file, folio 1449).

⁸⁰ Article 25 of the 1994 Regulations for Processing Summary Inquiries (evidence file, folio 1449).

⁸¹ Article 29 of the 1994 Regulations for Processing Summary Inquiries established that "[t]he decision issued by the Zone or Brigade Commander may be appealed by the interested party, within thirty days of its issue." Also, Article 4 of these regulations established that when "the content [of these decisions] is strictly disciplinary for sanctions corresponding to offenses with criminal intent or that signify a change in the professional situation of the member of the Armed Forces, such as those that contain discharge, paid leave, or dismissals recommendations, that must be examined by the respective Boards, they may be contested, following the procedures indicated in Art. 200 of the Law on Armed Forces Personnel." 1994 Regulations for Processing Summary Inquiries (evidence file, folios 1444 and 1449). Article 201 of the 1991 Law on Armed Forces Personnel established that "[t]he soldier who is placed on paid leave or passive service or discharged, and considers that this decision is unlawful, may file his complaint before the respective Board within forty-five calendar days of the decision being published in the corresponding general order, decree or resolution. The boards shall decide the complaints filed within thirty days." 1991 Law on Armed Forces Personnel (evidence file, folio 2670).

⁸² Article 74 of the Law on Armed Forces Personnel: "Being placed on paid leave (*disponibilidad*) is the transitory situation in which a soldier is placed, without a command and without any effective position, but without excluding him from the ranks

by the respective Board.⁸³ Therefore, when the Zone Commander decides to request the discharge or placing on paid leave of a lieutenant,⁸⁴ as in the case of Mr. Flor Freire (*infra* para. 77), the procedure goes to the Junior Officers Board to determine the misconduct. The decision may be subject to review by the same Junior Officers Board and then appealed before the Senior Officers Board, and its decision ends the disciplinary procedure by which a junior officer is separated from the Armed Forces.⁸⁵

C.2 Initiation of the proceedings against Mr. Flor Freire

68. The day after the events of November 19, 2000 (*supra* paras. 56 and 57), the Commander of the Fourth Military Zone asked Mr. Flor Freire to surrender his functions and responsibilities in the Ecuadorian Ground Forces.⁸⁶

69. On November 22, Mr. Flor Freire was brought before the First Criminal Court of the Fourth Military Zone, Amazonas Division, (hereinafter "the First Criminal Court"),⁸⁷ which acted as an investigating judge (*supra* para. 63). That same day, the court issued the initial order in the proceedings and began the summary inquiry procedure.⁸⁸ Mr. Flor Freire asked for several procedures to be conducted,⁸⁹ and the court responded to him the same day.⁹⁰ Among the procedures ordered, the First Criminal Court summoned Mr. Flor Freire to make an unsworn statement,⁹¹ which he did on November 24, 2000.⁹² On that occasion, Mr. Flor Freire indicated that the statements of the officers

of the permanent Armed Forces, until his discharge is published. This situation means that there is a vacancy in the institution." Article 86: "Discharge (*baja*) is the administrative act ordered by the competent authority requiring the soldier's separation from the permanent Armed Forces, placing him on passive service." Article 84: "Passive service is the situation of the soldier, owing to his discharge, who does not lose his rank but ceases to belong to the units of the permanent Armed Forces and enters the reserve ranks of the respective Force." 1991 Law on Armed Forces Personnel (evidence file, folio 2665).

⁸³ The Junior and Senior Officers Boards are responsible for regulating the career and professional situation of the junior and senior officers of each Force, subject to the Law on Armed Forces Personnel and the regulatory provisions. In addition, it is for each Board to classify the misconduct, so that the junior or senior officer is either placed on paid leave or discharged for the good of the service. *Cf.* Articles 1 and 6(r) of the Regulations for the Junior and Senior Army Officers Boards, as amended in the temporal framework applicable to this case by Ministerial Decision No. 796, published in Ministerial General Order No. 141 of July 29, 1991 (hereinafter "1991 Regulations for the Junior and Senior Army Officers Boards") (merits file, folios 695 and 696). See also, Article 127(2) of the 1998 Military Discipline Regulations (merits file, folio 677).

⁸⁴ According to article 18 of the Law on Armed Forces Personnel, a lieutenant is a junior officer (evidence file, folios 2662 and 2663).

⁸⁵ *Cf.* Articles 7, 74 and 81 of the 1991 Regulations for the Junior and Senior Army Officers Boards (merits file, folios 696, 703 and 704).

⁸⁶ *Cf.* Memorandum No. 200159-IV-DE-1 of November 20, 2001, of the Commander of the Fourth Military Zone, "Amazonas" Division (evidence file, folio 1452).

⁸⁷ *Cf.* Memorandum No. 200070-IV-DE-JM-1 issued on November 22, 2000, by the Commander of the Fourth Zone and addressed to the First Criminal Judge of the Fourth Military Zone (evidence file, folio 1291).

⁸⁸ *Cf.* Order to open the summary inquiry No. 20-2000-IV-DE-JM-1 issued by the First Criminal Court of the Fourth Military Zone on November 22, 2000 (evidence file, folios 1453 and 1454).

⁸⁹ *Cf.* Briefs addressed to the First Criminal Judge of the Court of the Fourth Zone of Amazonas by Mr. Flor Freire (evidence file, folios 1455 to 1459).

⁹⁰ *Cf.* Decision of November 22, 2000, issued by the First Criminal Court of the Fourth Military Zone (evidence file, folio 1461).

⁹¹ *Cf.* First Criminal Court of the Fourth Military Zone, Notification to Mr. Flor Freire of November 22, 2000 (evidence file, folio 2547), and Order issued by the First Criminal Court of the Fourth Military Zone on November 23, 2000 (evidence file, folio 2549).

⁹² *Cf.* Unsworn statement of Homero Flor Freire before the First Criminal Judge of the Fourth Military Zone on November 24, 2000 (evidence file, folios 2551 to 2557).

who reported him for "acts of homosexuality" were "totally false" and ratified his version of what had happened⁹³ (*supra* para. 56).

70. On December 13, 2000, the Commander of the Fourth Military Zone required Mr. Flor Freire to "surrender his responsibilities and to present himself at the HD-IV to provide his services," and also to surrender "the room [...] in the residence for unmarried officers" that he occupied.⁹⁴

71. On December 21, 2000, after "the essential procedural actions to clarify the facts had been executed," the First Criminal Court declared that the investigation had concluded and referred the case file to the Prosecutor of the Zone for him to issue his opinion.⁹⁵ On December 28, 2000, the Prosecutor of the Zone issued his opinion, in which he indicated that "based on the evidence in the file, [the] Public Prosecution Service consider[ed] that Lt. Homero Flor was liable to disciplinary action [...] and should be sanctioned pursuant to the provisions of article 117 of the Military Discipline Regulations."⁹⁶ Following this, the First Criminal Court, accepted this opinion and prepared a draft decision proposing that the Mr. Flor Freire be held liable to disciplinary action and that he should be brought before the court, prior to his discharge, based on article 117 of the Military Discipline Regulations.⁹⁷ Subsequently, the matter was referred to the Commander of the Fourth Military Zone,⁹⁸ whose duty it was to acts a Court of Law.

C.3 Decision of the Court of Law of the Fourth Military Zone

72. On January 17, 2001, the Commander of the Fourth Military Zone, in his capacity as "Judge of Law" in the summary inquiry procedure, decided to accept the opinion of the Military Public Prosecutor and the draft decision prepared by the First Criminal Court and ruled that Lieutenant Homero Flor Freire and another soldier "were "liable to disciplinary action."⁹⁹

73. The decision described the evidence obtained during the processing of the proceedings, which included: (i) the testimony of several military officers on what they had observed in the room in which Lieutenant Homero Flor Freire and another soldier were on November 19, 2000; (ii) the unsworn statement of Mr. Flor Freire, in which he gave his versions of the events and referred to the actions of the officers who came to his room to verify what had taken place; (iii) the unsworn statement of the other soldier involved in the events with his version of what happened, and (iv) the documentary and material evidence obtained during the investigation conducted during the proceedings. Regarding the evidence obtained during the investigation stage, the decision referred, *inter alia*, to: (i) a report of the Psychology Department of the 17-BS "PASTAZA" with the psychological profile of the other soldier, and indicating that it had not been possible to conduct the psychological examination of Lieutenant Homero Flor Freire because he had not come to the Department; (ii) certificates attesting to the "good conduct and honorability" of Lieutenant Homero Flor Freire and of the other soldier, as well as their resumé; (iii) the report on the judicial examination of the scene of the events, and (iv) a communication of the Commander of the Military

⁹³ Cf. Unsworn statement of Homero Flor Freire before the First Criminal Judge of the Fourth Military Zone on November 24, 2000 (evidence file, folios 2551 to 2557).

⁹⁴ Cf. Memorandum 200187-IV-DE-1 of the Commander of the Fourth Military Zone of Amazonas, of December 13, 2000 (evidence file, folio 19).

⁹⁵ Cf. Order issued by the First Criminal Court of the Fourth Military Zone on December 21, 2000 (evidence file, folio 2559).

⁹⁶ Opinion of the Military Prosecutor of December 28, 2000 (evidence file, folio 2570).

⁹⁷ Cf. Draft ruling signed by the First Criminal Judge on January 9, 2001 (evidence file, folio 2579)

⁹⁸ Cf. Decision of the Court of Law of the Fourth Military Zone on January 19, 2001 (evidence file, folios 2581 to 2588)

⁹⁹ Cf. Decision of the Court of Law of the Fourth Military Zone on January 19, 2001 (evidence file, folio 2588).

Police of the Fourth Zone indicating that "there had never been any problem in [Mr. Flor Freire's] technical and professional work, and he had conducted himself appropriately."¹⁰⁰

74. On the basis of this evidence, on January 17, 2001, the Court of Law found that it had been established that, in the early morning hours of November 19, 2000, Mr. Flor Freire and the other soldier entered the former's bedroom located in the Unmarried Officers Residence of the Amazonas Military Base, and that they were seen having sexual relations inside this room.¹⁰¹

75. The court then determined that, having "investigated the acts of homosexuality committed," their perpetration was proved by the testimonial evidence provided;¹⁰² therefore, Mr. Flor Freire had committed the offense established in article 117 of the Military Discipline Regulations (*supra* para. 60). The court affirmed that this article was not incompatible with the Ecuadorian Constitution owing to the "special nature" of military law and indicated that:

Article 23.25 of the Constitution of Ecuador, which refers to the civil rights of citizens, guarantees a person's 'right to take free and responsible decisions about his/her sexual life.' However, art. 117 of the Military Discipline Regulations is in force in the Armed Forces [...] and it sanctions acts of homosexuality, owing precisely to the special nature of military law, to the philosophy and constitutional mission [of the Armed Forces] because, in their institutions and units, they cultivate and uphold values such as honor, dignity, discipline, loyalty, civility, [promoting] respect for patriotic symbols and the Ecuadorian nationality; owing to the values of an ethical and moral nature that they practice and that are the fundamental pillars of the firm and unwavering character of their members, which are essential elements of the integral training of the soldier, all of which is not compatible with the conduct and behavior adopted by the individuals under investigation because these are contrary to the compulsory principles and standards of conduct in force for all members of the Armed Forces, an institution that prides itself on being the moral reserve of society, and being composed of men who are upright, capable, responsible and possessing impeccable moral authority that allows them to guide and lead their subordinates in operations [and] activities inherent in the military career.¹⁰³

76. On this basis, the Court concluded that:

In these proceedings, it has been proved, by testimonial evidence and in light of sound judicial discretion, that acts of homosexuality were committed; that is the practice of oral sex between [Lieutenant] Homero Fabián Flor Freire and the [other soldier], soldiers on active duty, on military premises, and this has caused subjective offense to the Armed Forces as such, and has affected its image and prestige, and has caused a scandal and given a bad example for both the military forces and the civilian population.¹⁰⁴

77. Consequently, that court decided that, as both the Junior Officers Board and the Senior Officers Board had defined their acts as "misconduct," Lieutenant Flor Freire and the other soldier should "be sanctioned in keeping with the provisions of article 117 of the Military Discipline Regulations; that is, the [soldier] should be discharged and Lieutenant Flor Homero should be placed on paid leave due to misconduct," pursuant to the provisions of Articles 76(i) and 87(i) of the Law on Armed Forces Personnel.¹⁰⁵

¹⁰⁰ Decision of the Court of Law of the Fourth Military Zone on January 19, 2001 (evidence file, folios 2181 to 2586).

¹⁰¹ Cf. Decision of the Court of Law of the Fourth Military Zone on January 19, 2001 (evidence file, folios 2587 and 2588).

¹⁰² The Court indicated that it had proved that the said act had been committed owing to the testimony of a Colonel, a Lieutenant and a Second Lieutenant, who gave "their statements [...] unequivocally and consistently." Decision of the Court of Law of the Fourth Military Zone on January 19, 2001 (evidence file, folios 2586 and 2587).

¹⁰³ Decision of the Court of Law of the Fourth Military Zone on January 19, 2001 (evidence file, folios 2587 and 2588).

¹⁰⁴ Decision of the Court of Law of the Fourth Military Zone on January 19, 2001 (evidence file, folio 2588).

¹⁰⁵ Cf. Decision of the Court of Law of the Fourth Military Zone on January 19, 2001 (evidence file, folio 2588).

78. On January 18, 2001, Mr. Flor Freire filed an appeal against the decision of the Court of Law of the Fourth Military Zone.¹⁰⁶ On January 19, the Court admitted the appeal and referred the case file to the General Command of the Ground Forces,¹⁰⁷ for a decision by the Junior Officers Board¹⁰⁸.

C.4 Decisions of the Junior and Senior Officers Boards

79. On May 3, 2001, the Junior Officers Board decided that it "lack[ed] legal grounds that [would] allow it to rule to the contrary," and therefore "accepted the request of the Court of Law of the Fourth Military Zone" and established that Mr. Flor Freire should be "placed on paid leave before being discharged from active service with the Ground Forces," as stipulated in the Law on Armed Forces Personnel.¹⁰⁹ This decision was notified to Mr. Flor Freire on May 7, 2001.¹¹⁰

80. On May 8, 2001, Mr. Flor Freire submitted a request to the Commander of the Ground Forces that he "declare the nullity of all the actions of the Officers Board [and] also, review and revoke [his] decision."¹¹¹ In his request, he indicated that, after receiving the notification of May 7, 2001, his defense counsel had approached the Ministry of National Defense requesting a review of the case file of the summary inquiry and discovered that it did not contain his brief of January 25, 2001, addressed to that authority, in which he had requested that procedures be conducted to clarify the events investigated in the said proceeding. He affirmed that, consequently, he had been unable to exercise his right of defense before the Junior Officers Board. He also asked that an investigation be opened into the reported irregularity and that the Commander of the Ground Forces grant his defense counsel a personal interview so that his counsel could explain to the Commander the supposed violations of the law of which he was a victim.¹¹²

81. The Junior Officers Board refused the request to review its decision in a session of June 4, 2001, because "the legal and factual grounds underpinning [the decision subject to review] had not varied."¹¹³ Mr. Flor Freire filed an appeal with the Senior Officers Board.¹¹⁴

¹⁰⁶ Cf. Appeal filed by Mr. Flor Freire before the Judge of the Fourth Military Zone on January 18, 2001 (evidence file, folio 1486).

¹⁰⁷ Cf. Decision of the Court of Law of the Fourth Military Zone of January 19, 2001 (evidence file, folio 1415).

¹⁰⁸ Cf. Communication No. 16-E1-KO-t-COSBFT-148 of June 7, 2016, of the Secretary of the Junior Officers Board addressed to the Commander General of the Armed Forces (evidence file, folios 3514 and 3515).

¹⁰⁹ Cf. Memorandum No. 2001-06-COSB of the Junior Officers Board of May 7, 2001 (evidence file, folio 21). According to the Regulations for the Officers Boards, minutes must be kept of the meetings of these boards. However, these minutes do not form part of the summary inquiry procedure; rather the decisions taken are notified by memorandum as verified in this case. Cf. Communication No. 16-E1-KO-t-COSBFT-148 of June 7, 2016, of the Secretary of the Junior Officers Board addressed to the Commander General of the Armed Forces (evidence file, folio 3515), and 1991 Regulations for the Junior and Senior Army Officers Boards (merits file, folios 700 and 701). Furthermore, according to the Law on Armed Forces Personnel, being placed on paid leave "is the transitory situation in which a soldier is placed, without a command and without any effective position, but without excluding him from the ranks of the permanent Armed Forces, until his discharge is published." The said law also established that "the soldier shall have the right to up to six months on paid leave, if he has been on uninterrupted active service for at least five years, and may renounce either all or part of this time and request his immediate discharge." Articles 74 and 75 of the 1991 Law on Armed Forces Personnel (evidence file, folio 2665).

¹¹⁰ Cf. Memorandum No. 2001-06-COSB of the Junior Officers Board of the Ground Forces of May 7, 2001 (evidence file, folio 21).

¹¹¹ Request for reconsideration filed by Mr. Flor Freire before the Commander of the Ground Forces, of May 8, 2001 (evidence file, folio 23).

¹¹² Cf. Request for reconsideration filed by Mr. Flor Freire before the Commander of the Ground Forces, of May 8, 2001 (evidence file, folio 23).

¹¹³ This decision was notified to Mr. Flor Freire on June 5, 2001. Cf. Memorandum No. 2001-10-COSB of the Junior Officers Board of the Ground Forces, of June 5, 2001 (evidence file, folio 26).

¹¹⁴ Cf. Decision of the Senior Officers Board deciding the appeal. Memorandum No. 210090-COSFT, of July 18, 2001

82. On July 17, 2001, the Senior Officers Board received Mr. Flor Freire at an "open meeting," so that he could present his request.¹¹⁵ On July 18, 2001, the Senior Officers Board decided to reject the appeal filed, "owing to lack of legal arguments that would allow it to rule to the contrary" and confirmed all aspects of the decision adopted by the Junior Officers Board.¹¹⁶

D. Constitutional amparo proceeding

D.1 Application for constitutional amparo and hearing

83. In parallel, following the decision of the Court of Law on January 17, 2001 (*supra* paras. 72 to 77), Mr. Flor Freire filed an application for constitutional amparo on January 23, 2001.¹¹⁷

84. The application was filed against the President of the Republic, in his capacity as Commander in Chief of the Armed Forces of Ecuador, the Minister of National Defense, the Commander General of the Army's Ground Forces and the Attorney General.¹¹⁸ Mr. Flor Freire's representative also requested the suspension of the summary inquiry procedure which, at that time, was being examined by the Commander of the Ground Forces (*supra* para. 78), and also of the effects of the decision of the Court of Law of January 19, 2001.¹¹⁹

85. In his application, Mr. Flor Freire alleged that the proceedings conducted by the First Criminal Court had been initiated for "supposed homosexuality" based on a norm that should be understood to have been revoked, because the "offense of homosexuality" had been declared unconstitutional by ruling 106-1-97 of the Constitutional Court of November 27, 1997. On this basis, he alleged that he could not be punished for a conduct that was not penalized under the laws in force.¹²⁰

86. In his application for amparo Mr. Flor Freire also indicated that a series of irregularities had been committed during the summary inquiry procedure that had infringed his right of defense and due process. In particular, he stressed that, during the procedure to receive testimonial evidence the day before the hearing was held, an "agent of the Division's Personnel Department had handed [him] the order of the Division Commander" to perform certain duties in the city of Ambato. Thus, Mr. Flor Freire affirmed that "on the day [of the hearing he had] to make a considerable fuss for that order to be amended" so that he could attend the hearing with his defense counsel.¹²¹

(evidence file, folio 28).

¹¹⁵ Cf. Memorandum No. 210087-COSFT of the Secretary of the Senior Officers Board summoning Homero Flor Freire to appear before the General Committee, and Text of the statement made by Mr. Flor Freire on July 17, 2001 (evidence file, folios 2153 to 2161).

¹¹⁶ Cf. Decision of the Senior Officers Board deciding the appeal. Memorandum No. 210090-COSFT, of July 18, 2001 (evidence file, folio 28). This decision was notified to Mr. Flor Freire the same day.

¹¹⁷ Cf. Application for constitutional amparo filed by Mr. Flor Freire with the Sixth Civil Court of Pichincha on January 23, 2001 (evidence file, folios 12 to 17).

¹¹⁸ Cf. Application for constitutional amparo filed by Mr. Flor Freire with the Sixth Civil Court of Pichincha on January 23, 2001 (evidence file, folios 15 and 16), and Order of the Sixth Civil Court of Pichincha of January 29, 2001 (evidence file, folio 36).

¹¹⁹ Cf. Application for constitutional amparo filed by Mr. Flor Freire with the Sixth Civil Court of Pichincha on January 23, 2001 (evidence file, folio 15).

¹²⁰ Cf. Application for constitutional amparo filed by Mr. Flor Freire with the Sixth Civil Court of Pichincha on January 23, 2001 (evidence file, folios 12 and 15).

¹²¹ Cf. Application for constitutional amparo filed by Mr. Flor Freire with the Sixth Civil Court of Pichincha on January 23, 2001 (evidence file, folio 14).

87. He also alleged that his defense counsel had filed a recusal against the Prosecutor of the Military Zone because the latter had acted in a "biased and evasive way" because it was at the Prosecutor's request that Mr. Flor Freire had not been allowed to be present while the witnesses testified against him. Mr. Flor Freire argued that this recusal had been rejected by the First Investigating Court, which had merely issued a "public caution" to the Prosecutor.¹²² He argued also that "at the pre-procedural stage, the (Intelligence Unit)" was not assisted by a "legal adviser and the prosecutor [...]" as established in the Constitution."¹²³

88. By an order of January 29, 2001,¹²⁴ the Sixth Civil Court of Pichincha admitted the application for constitutional amparo and called the parties to a hearing held on February 5, 2001.¹²⁵

89. During this amparo proceeding, the Sixth Civil Court of Pichincha received briefs from the Legal Adviser to the President of Ecuador, the Attorney General, the Legal Services Department of the General Command of the Ground Forces, and the Minister of National Defense.¹²⁶ These entities submitted different arguments related to the inadmissibility of the application for amparo including: (i) non-compliance with the requirements established in the Constitution and the Law on Constitutional Control; (ii) that it was not possible to file an application for amparo against the summary inquiry procedure; (iii) that the said procedure was still pending a final decision,¹²⁷ and (iv) that the purpose of the said procedure was not to punish him for the offense of "homosexuality," but rather for "misconduct" because the said sexual behavior had taken place on military premises.¹²⁸

90. In a brief of February 6, 2001, presented to the Sixth Civil Court, Mr. Flor Freire ratified all aspects of his application for amparo and asked the Sixth Court to order the Commander of the Ground Forces to forward a certified copy of the case file of the summary inquiry procedure opened against him.¹²⁹ On February 15, 2001, Mr. Flor Freire reiterated this request and forwarded a copy of memorandum No. 200187-IV-DE-1 of December 13, 2000, based on which he alleged that his

¹²² Cf. Application for constitutional amparo filed by Mr. Flor Freire with the Sixth Civil Court of Pichincha on January 23, 2001 (evidence file, folios 14 and 15).

¹²³ Brief filed by Homero Flor with the Sixth Civil Court of Pichincha of February 6, 2001 (evidence file, folio 32).

¹²⁴ Cf. Order of the Sixth Civil Court of Pichincha of January 29, 2001 (evidence file, folio 36).

¹²⁵ Cf. Order of the Sixth Civil Court of Pichincha of January 29, 2001 (evidence file, folio 36), and minutes of hearing before the Sixth Civil Court of Pichincha of February 5, 2001 (evidence file, folios 38 and 39).

¹²⁶ Cf. Minutes of hearing before the Sixth Civil Court of Pichincha, of February 5, 2001 (evidence file, folios 38 and 39); brief addressed to the Sixth Civil Court of Pichincha by the Minister of National Defense dated February 8, 2001 (evidence file, folio 41); brief addressed to the Sixth Civil Court of Pichincha by the Legal Adviser to the President dated February 6, 2001 (evidence file, folios 44 to 48); brief addressed to the Sixth Civil Court of Pichincha by the delegate of the Attorney General dated February 6, 2001 (evidence file, folios 49 to 51), and brief addressed to the Sixth Civil Court of Pichincha by the lawyer of the Legal Services Department of the General Command of the Ground Forces (evidence file, folios 523 to 527).

¹²⁷ Cf. Brief addressed to the Sixth Civil Court of Pichincha by the Legal Adviser to the President dated February 6, 2001 (evidence file, folios 44 to 46). The Legal Adviser to the President of the Republic also argued that the fact that, at that time, Homero Flor Freire had been placed on paid leave, pursuant to article 86 of the Law on Armed Forces Personnel, "did not deprive him of either his rank or salary, [but] placed him in a transitory situation until the pertinent decision was taken." Brief addressed to the Sixth Civil Court of Pichincha by the Legal Adviser to the President dated February 6, 2001 (evidence file, folio 46).

¹²⁸ Cf. Brief addressed to the Sixth Civil Court of Pichincha by the Legal Adviser to the President dated February 6, 2001 (evidence file, folio 47); brief addressed to the Sixth Civil Court of Pichincha by the delegate of the Attorney General of February 6, 2001 (evidence file, folio 49), and brief addressed to the Sixth Civil Court of Pichincha by the lawyer of the Legal Services Department of the General Command of the Ground Forces (evidence file, folio 525).

¹²⁹ Cf. Brief filed by Homero Flor with the Sixth Civil Court of Pichincha on February 6, 2001 (evidence file, folios 32 and 33). This request was also made during the hearing held before the Sixth Civil Court, as recorded in the minutes of the hearing before the Sixth Civil Court of Pichincha of February 5, 2001 (evidence file, folio 39).

functions had been changed and, consequently, his guard duties had been eliminated¹³⁰ (*supra* para. 70).

91. In an order of February 23, 2001, the Sixth Civil Court of Pichincha admitted the interventions in the hearing of February 5, 2001, and established that the case should pass to "the decision stage."¹³¹ On March 1, 2001, Mr. Flor Freire filed a request with the Sixth Civil Court for the annulment of this order based, principally, on the fact that, to be able to take a decision, the Court needed to examine the content of the file of the summary inquiry. He therefore reiterated his request that Commander of the Ground Forces be notified that he should forward a certified copy of the said file.¹³²

92. On March 25, 2001, the Sixth Civil Court refused the annulment request considering it inadmissible and "reserve[d] the right [of Mr. Flor Freire] to present all the documents [mentioned] in his petition of March 1."¹³³

93. On May 15, 2001, Mr. Flor Freire advised the Sixth Civil Court that the Junior Officers Board had issued its decision in a session to which he had not been invited and that he had been unable to exercise his right of defense (*supra* paras. 79 and 80). He therefore asked the Sixth Court to issue urgent measures so that, pursuant to article 46 of the Law on Constitutional Control, the legal effects of this decision of the Junior Officers Board would be suspended.¹³⁴ On June 12, 2001, Mr. Flor Freire advised the Sixth Court that the Junior Officers Board had ratified its decision, thus rejecting the requested review (*supra* para. 81), and again asked for the suspension of its legal effects.¹³⁵

D.2 Decision on the application for amparo

94. On July 18, 2001, the Sixth Civil Court of Pichincha decided to deny the application for amparo filed by Mr. Flor Freire.¹³⁶ In its analysis of why the amparo procedure was inadmissible, the court indicated that the application had requested the suspension of the summary inquiry procedure. However, since that was an investigative procedure and not an administrative act, the application for amparo was inappropriate because it was not requesting protection with regard to an act on which the court could rule on whether or not it was unlawful.¹³⁷

95. Regarding the decision of the Court of Law of the Fourth Military Zone of January 19, 2001 (*supra* para. 72), the Sixth Court considered that, since this was a judicial decision issued by the military criminal jurisdiction, it could be contested before other instances pursuant to the provisions of the Organic Law of the Armed Forces Justice Service. Consequently, it established that the contested ruling "was not final"; therefore, based on the subsidiary nature of the application for amparo, this was not appropriate. The Sixth Court also underscored that, according to the

¹³⁰ Cf. Brief filed by Homero Flor with the Sixth Civil Court of Pichincha on February 15, 2001 (evidence file, folio 53), and memorandum 2000187-IV-DE-1 of the Commander of the Fourth Military Zone of December 13, 2000 (evidence file, folio 19).

¹³¹ Order of the Sixth Civil Court of Pichincha of February 23, 2001 (evidence file, folio 56).

¹³² Cf. Request to annul the order of February 23, 2001, of the Sixth Civil Court of Pichincha, filed by Homero Flor on March 1, 2001 (evidence file, folio 58).

¹³³ Order of the Sixth Civil Court of Pichincha of March 25, 2001 (evidence file, folio 61).

¹³⁴ Cf. Request for urgent measures in the application for constitutional amparo before the Sixth Civil Court of Pichincha, filed by Homero Flor Freire on May 15, 2001 (evidence file, folio 63).

¹³⁵ Cf. Request filed by Homero Flor with the Sixth Civil Court of Pichincha, dated June 10, 2001 (evidence file, folio 65).

¹³⁶ Cf. Decision of the Sixth Civil Court of Pichincha of July 18, 2001 (evidence file, folio 2611).

¹³⁷ Cf. Decision of the Sixth Civil Court of Pichincha of July 18, 2001 (evidence file, folio 2610).

Constitution, "judicial decisions adopted in proceedings shall not be eligible for an application for amparo."¹³⁸

96. The decision also took into account that Mr. Flor Freire "ha[d] been placed on paid leave at the time; however, this [was] not due to the determination [...] of his superior officers, but rather owing to a legal and regulatory order – without having been deprived of his rank or his salary – because the ruling [was] not yet final, a circumstances that eliminate[d] the possibility of grave and imminent danger that was required for filing an application [for amparo]."¹³⁹

97. On July 20, 2001 Mr. Flor Freire filed an appeal against the decision of the Sixth Civil Court of Pichincha.¹⁴⁰ In his brief, he argued that this court had not ruled on some of the grounds that substantiated the application for constitutional amparo, particularly with regard to the fact that "the offense of homosexuality" had been decriminalized in Ecuador.¹⁴¹ He also argued that, while the Sixth Civil Court was hearing the case and at the time it issued its decision, "the military administrative procedure" had been exhausted and he had been "definitively separated from the Ground Forces."¹⁴² The appeal was admitted on August 30, 2001, and the matter was referred to the Constitutional Court.¹⁴³

D.3 Decision on the application for constitutional amparo

98. On February 4, 2002, the Second Chamber of the Constitutional Court declared the application for constitutional amparo inadmissible.¹⁴⁴ In its analysis, the Court took into account the arguments submitted by the parties in the substantiation of the remedy before the Sixth Civil Court. In this regard, it considered that the decision of the Court of Law in the summary inquiry procedure was based on the principle of legality established in article 119 of the Ecuadorian Constitution, in conformity with its article 187 on the special jurisdiction established "for prosecuting offenses [by members of the security forces] in the exercise of their professional duties."¹⁴⁵ It also pointed out that those provisions of the Constitution were supplemented by: (i) article 1 of the Organic Law of the Armed Forces Justice Service on the jurisdiction of military courts; (ii) article 69(g) of the Organic Law of the Armed Forces, which indicated that "military criminal courts are military jurisdictional organs," and (iii) article 76(i) of the Law on Armed Forces Personnel, which established "paid leave prior to discharge from active service with the Ground Forces due to misconduct, for the good of the service."¹⁴⁶

99. Consequently, the Constitutional Court concluded that the Court of Law had not committed an unlawful act when it delivered the decision of January 17, 2001, and that since that decision was the "administrative act" that was contested, no violation of the Constitution to the detriment of Mr. Flor

¹³⁸ Decision of the Sixth Civil Court of Pichincha of July 18, 2001 (evidence file, folios 2610 and 2611).

¹³⁹ Decision of the Sixth Civil Court of Pichincha of July 18, 2001 (evidence file, folio 2611).

¹⁴⁰ Cf. Appeal against the decision of July 18, 2001, of the Sixth Civil Court of Pichincha of July 20, 2001 (evidence file, folio 73).

¹⁴¹ Cf. Appeal against the decision of July 18, 2001, of the Sixth Civil Court of Pichincha of July 20, 2001 (evidence file, folio 73).

¹⁴² Appeal against the decision of July 18, 2001, of the Sixth Civil Court of Pichincha of July 20, 2001 (evidence file, folio 73).

¹⁴³ Cf. Decision of the Sixth Civil Court of Pichincha of August 30, 2001 (evidence file, folio 75).

¹⁴⁴ Cf. Decision of the Constitutional Court, Second Chamber, of February 4, 2002. Published in Official Record No. 546 of April 2, 2002 (hereinafter "Decision of the Constitutional Court of February 4, 2002") (evidence file, folio 79).

¹⁴⁵ Decision of the Constitutional Court of February 4, 2002 (evidence file, folio 79).

¹⁴⁶ Decision of the Constitutional Court of February 4, 2002 (evidence file, folio 79).

Freire had been proved that would allow that Court to admit the application for amparo. Furthermore, it indicated that "in addition, the requirements established in the Law on Constitutional Control had not been [met]."¹⁴⁷

100. Mr. Flor Freire remained on active service within the Ecuadorian Ground Forces until January 18, 2002, the date on which he was discharged following six month in a situation of paid leave.¹⁴⁸ Since that date, Mr. Flor Freire has been in passive service pursuant to the Law on Armed Forces Personnel.¹⁴⁹

VIII MERITS

101. Based on the violations of the human rights protected by the Convention that have been alleged in this case, the Court will examine the following: (1) the right to equality before the law and the prohibition of discrimination; (2) the principle of legality and the protection of honor and dignity, and (3) the rights to judicial guarantees and judicial protection.

VIII-1 RIGHT TO EQUALITY BEFORE THE LAW AND PROHIBITION OF DISCRIMINATION IN RELATION TO THE OBLIGATION TO RESPECT AND TO ENSURE RIGHTS AND THE OBLIGATION TO ADOPT DOMESTIC LEGAL PROVISIONS

102. In this chapter, the Court will examine the arguments of the Commission and the parties with regard to the presumed violation of the prohibition of discrimination¹⁵⁰ and of the principle of equality before the law,¹⁵¹ to the detriment of Mr. Flor Freire, owing to his separation from the Ecuadorian Armed Forces based on a perceived sexual orientation.

103. The Court notes that Mr. Flor Freire denies that a sexual act with another man occurred and has stated consistently that he does not identify himself as homosexual. In this regard, the Court recalls that a person's sexual orientation is linked to the concept of liberty and the possibility of self-determination and freely choosing the circumstances that give a meaning to their existence, in keeping with their own choices and convictions.¹⁵² Thus, a person's sexual orientation will depend on how they identify themselves.¹⁵³ Therefore, for this Court, the way in which Mr. Flor Freire identifies

¹⁴⁷ Decision of the Constitutional Court of February 4, 2002 (evidence file, folios 78 and 79).

¹⁴⁸ According to the certificate of the liquidation for length of service issued by the Ministry of National Defense, Mr. Flor Freire was placed on paid leave on July 18, 2001, and, in October 2014, was in a situation of passive service. Cf. Liquidation for Length of Service, No. 0042690, issued on October 17, 2014 (evidence file, folio 1544), and articles 74 and 75 of the 1991 Law on Armed Forces Personnel (evidence file, folio 2665).

¹⁴⁹ The Law on Armed Forces Personnel defines "passive service" as "the situation of a soldier, following his discharge, without losing his rank but ceasing to belong to the ranks of the Permanent Armed Forces." Article 84 of the 1991 Law on Armed Forces Personnel (evidence file, folio 2665).

¹⁵⁰ Article 1(1) of the American Convention establishes that; "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

¹⁵¹ Article 24 of the American Convention stipulates that: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

¹⁵² Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 136.

¹⁵³ See, similarly: Inter-American Commission on Human Rights. Sexual orientation, gender identity and gender expression: key terms and standards and Permanent Council of the Organization of American States, CP/CAJP/INF.166/12, 2012, Available at: http://www.oas.org/en/sla/dil/docs/cp-cajp-inf_166-12_eng.pdf, and Judgment C-098/96 of the Colombian Constitutional Court of March 7, 1996, para. 4.

himself is the only relevant factor when defining his sexual orientation. However, the Court notes that, to arrive at a decision in this case, it must determine whether the presumed victim was discriminated against in the process of his separation from the Armed Forces based on a different sexual orientation, either actual or perceived. What the Court has to determine is whether the measures and actions taken by the State to address this fact engage its international responsibility owing to the alleged discriminatory nature of the norm applied to Mr. Flor Freire.

A. Arguments of the parties and of the Commission

104. The **Commission** argued that “the sanction imposed on Mr. Flor Freire constituted discrimination based on his perceived sexual orientation.” In general, it argued that “provisions that punish a given group of persons for engaging in a consensual sexual act or practice with another person of the same sex are not permissible, because this is directly at odds with the prohibition of discrimination based on sexual orientation.” It indicated that the regulations applied in this case included “a difference in treatment” because “acts of homosexuality” were punished by discharge because they were considered acts of misconduct or professional incompetence, while “unlawful sexual acts” were punished with strict arrest or suspension from functions for a maximum of thirty days. It also stressed that “sexual orientation and gender identity constitute suspect categories for discrimination under the concept of ‘any other social condition’ of Article 1(1) of the Convention,” so that distinctions “should be subject to strict scrutiny.”

105. When examining this aspect, the Commission considered that the norm under which Mr. Flor Freire was punished had a legitimate purpose, which was “to establish a disciplinary regime in the Armed Forces that prevented the perpetration of acts that violated the values of the institution, such as sexual acts.” Regarding its appropriateness, the Commission indicated that “the criterion used by the military authorities was based on an apparent incompatibility between homosexuality and the military discipline regime and the military institution itself, without providing reasonable and objective reasons to justify that distinction.” Consequently, the Commission determined that the measure was not appropriate. It called attention to the assertion of the Court of Law that “while the Constitution in force at the time recognized the right to make free decisions on sexual life, the provisions of the Military Discipline Regulations that punished “acts of homosexuality” were justified by the ‘special nature’ of military law and the institution itself, which had to maintain and cultivate values such as honor, dignity, discipline, and civic-mindedness.” Based on this assertion, the Commission underlined that “considering that a homosexual sexual orientation is *per se* contrary to those values constitutes, above all, a reflection of the discriminatory and unfounded stereotypes historically assigned to this social group.”

106. The **representative** argued that “actual or perceived sexual orientation has no effect on the way in which a person should conduct themselves in the exercise of a profession.” He pointed out that article 117 of the Military Discipline Regulations “imposed an unequal and discriminatory treatment based on an actual or perceived sexual orientation.” He indicated that, in the case of Mr. Flor Freire, the said article “was used to declare, without any grounds, a supposed professional misconduct and, ultimately, on this basis, [to separate Mr. Flor Freire] from the military career.” Therefore, he argued that “the State established a situation of clear inequality before the law founded on the perception of Mr. Flor Freire’s sexual orientation and, on this basis, he received a punishment.” The representative also stressed that “the proceeding under which he was prosecuted was already biased owing to the discrimination that existed within the armed forces.” Lastly, he indicated that the “right to equality before the law and non-discrimination [...] is a right of immediate application and is not subject to the principle of progressivity.”

107. The **State** argued that “a supposed discrimination in relation to sexual orientation should be analyzed in light of the doctrine of the national margin of appreciation, which is understood to be an area of freedom for the State to develop certain rights by establishing requirements, limitations or

conditions for their exercise, based on the specific social and historic circumstances of a particular State. It indicated that it should be "borne in mind that at the time of the facts (2000), in the State, the legal institution was beginning to adapt better standards for protecting rights in the area of discrimination for reasons of sex, and this materialized in two paradigmatic events: in 1997, the annulment of the first paragraph of article 516 of the Criminal Code that penalized homosexuality and, in 1998, the inclusion in the Constitution of article 23 which contained a provision that prohibited discrimination based on sexual orientation." It indicated that, in 2008, article 117 of the Military Discipline Regulations, under which Mr. Flor Freire had been sanctioned, had been annulled; thus, "the standard of enforceability on which the arguments of the presumed discrimination against Homero Flor are founded, cannot be measured against the actual standard, but rather against the progressive context of implementation of guarantees and rights by the State." In this regard, it stressed that "today, discrimination of any kind, including sexual discrimination, is absolutely prohibited." It also indicated that the difference between discrimination based on perception and other types of discrimination was unclear.

B. Considerations of the Court

108. The Court will now make its analysis as follows: (1) general considerations on the right to equality before the law and the prohibition of discrimination; (2) specific considerations on the right to equality before the law in this case, and (3) conclusion.

B.1 General considerations on the right to equality and non-discrimination

109. The notion of equality springs directly from the oneness of the human family and is inseparable from the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.¹⁵⁴ The Court's case law has indicated that, at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*. It forms the basis for the legal structure of national and international public order and permeates the whole legal order.¹⁵⁵

110. This Court has also established that States must refrain from carrying out actions that, in any way, are aimed directly or indirectly at creating situations of *de jure* or *de facto* discrimination.¹⁵⁶ States are obliged to adopt positive measures to revert or change any discriminatory situations that exist in their societies to the detriment of any specific group of individuals. This entails the special duty of protection that the State must exercise with regard to the acts and practices of third parties that, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.¹⁵⁷

111. Article 1(1) of the Convention is a general norm the content of which extends to all the provisions of this treaty, and establishes the obligation of the States Parties to respect and to ensure the free and full exercise of the rights and freedoms recognized therein "without any discrimination." In other words, whatever its origin or form, any treatment that may be considered discriminatory in

¹⁵⁴ Cf. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 55, and *Case of Duque v. Colombia*, *supra*, para. 91.

¹⁵⁵ Cf. *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 101, and *Case of Duque v. Colombia*, *supra*, para. 91.

¹⁵⁶ Cf. Advisory Opinion OC-18/03, *supra*, para. 104, and *Case of Duque v. Colombia*, *supra*, para. 92. See also, UN, Human Rights Committee. General Comment No. 18, Non-discrimination, CCPR/C/37, November 10, 1989, para. 6.

¹⁵⁷ Cf. Advisory Opinion OC-4/84, *supra*, para. 53, and *Case of Duque v. Colombia*, *supra*, para. 93.

relation to the exercise of any of the rights guaranteed in the Convention is *per se* incompatible with it.¹⁵⁸ Non-compliance by the State of the general obligation to respect and to ensure the human rights owing to any discriminatory treatment entails its international responsibility.¹⁵⁹ This is why there is an indissoluble connection between the obligation to respect and to ensure human rights and the principle of equality and non-discrimination.¹⁶⁰

112. While the general obligation under Article 1(1) refers to the duty of the States to respect and to guarantee "without discrimination" the rights contained in the American Convention, Article 24 protects the right to "equal protection of the law."¹⁶¹ That is, Article 24 of the American Convention prohibits *de jure* discrimination, not only with regard to the rights contained in this treaty, but with regard to all the laws enacted by the State and their enforcement.¹⁶² In other words, if a State discriminates in the respect and guarantee of a Convention right, it will be in non-compliance with the obligation established in Article 1(1) and the substantive right in question. If, to the contrary, the discrimination refers to an unequal protection of the domestic law or its enforcement, the fact must be examined in light of Article 24 of the American Convention¹⁶³ in relation to the categories protected by Article 1(1) of the Convention.

113. In the instant case, the representative and the Commission have argued that the State allegedly violated the principle of equality and non-discrimination owing to the existence and enforcement of articles 117 of the Military Discipline Regulations and 87 (i) of the Law on Armed Forces Personnel, which imposed an unequal and discriminatory treatment by reason of an actual or perceived sexual orientation, compared to article 67 of the same regulations that was applicable to non-homosexual sexual acts. Considering that the alleged discrimination refers to a presumed unequal treatment based on a domestic law, the Court must examine the facts in light of the right to equality before the law recognized in Article 24 of the American Convention.

B.2 Right to equality before the law in this case

114. The Court will now examine whether the said norms (articles 67 and 117 of the Military Discipline Regulations and article 87(i) of the Law on Armed Forces Personnel) were discriminatory in light of Article 24 of the Convention in relation to Articles 1(1) and 2 of this instrument. To make this analysis, the Court will determine: (a) whether these articles established a difference in treatment; (b) whether that difference in treatment referred to categories protected by Article 1(1) of the American Convention, and (c) whether that difference in treatment was discriminatory.

B.2.a The difference in treatment in articles 67 and 117 of the Military Discipline Regulations and Article 87(i) of the Law on Armed Forces Personnel

115. The Military Discipline Regulations in force at the time of the facts regulated sexual acts in two different ways. On the one hand, under article 67, "unlawful sexual acts on a military base" were punished as an "offense with criminal intent."¹⁶⁴ This offense with criminal intent entailed a penalty

¹⁵⁸ Cf. Advisory Opinion OC-4/84, *supra*, para. 53, and *Case of Duque v. Colombia*, *supra*, para. 93.

¹⁵⁹ Cf. Advisory Opinion OC-18/03, *supra*, para. 85, and *Case of Duque v. Colombia*, *supra*, para. 93.

¹⁶⁰ Cf. Advisory Opinion OC-18/03, *supra*, para. 85, and *Case of Duque v. Colombia*, *supra*, para. 93.

¹⁶¹ Cf. Advisory Opinion OC-4/84, *supra*, paras. 53 and 54, and *Case of Duque v. Colombia*, *supra*, para. 94.

¹⁶² Cf. *Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of June 23, 2005. Series C No. 127, para. 186, and *Case of Duque v. Colombia*, *supra*, para. 94.

¹⁶³ Cf. *Case of Aritz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of Duque v. Colombia*, *supra*, para. 94.

¹⁶⁴ 1998 Military Discipline Regulations, Ministry of National Defense, Ministerial General Order No. 144 (merits file, folio

of "strict arrest of [10 to 15] days," "strict arrest in another base for [3 to 10 days]," or "suspension of functions for [10 to 30] days."¹⁶⁵ On the other hand, article 117 of these regulations indicated that "members of the Armed Forces who are surprised committing acts of homosexuality [...] within or outside the service, shall be subject to the provisions of article 87(i) of the Law on Armed Forces Personnel" which stipulated discharge from the service as the penalty.¹⁶⁶

116. The circumstances established in articles 67 and 117 of the Military Discipline Regulations are comparable in that both regulated and established disciplinary penalties for sexual acts within the framework of the Armed Forces. Although these regulations did not specify what type of sexual acts were considered unlawful under article 67,¹⁶⁷ there is no dispute that sexual acts between persons of the same sex, within or outside the service, were regulated by article 117 of the regulations.¹⁶⁸ However, the Court notes that, while article 67 of the Military Discipline Regulations refers expressly to "sexual acts," the text of Article 117 refers to "acts of homosexuality." This is not necessarily restricted to sexual acts between persons of the same sex because the wording of the article is sufficiently broad to allow a disciplinary sanction for other expressions of "homosexuality" under this norm. Moreover, the meaning and scope accorded internally to the term "acts of homosexuality" is unclear. However, in this case, there is no dispute between the parties that article 117 was a special norm that regulated homosexual sexual acts, while article 67 regulated non-homosexual sexual acts. Therefore, the Court finds it appropriate to compare the disciplinary treatment given to homosexual sexual acts based on the said article 117, with the treatment given to non-homosexual sexual acts based on article 67 of the same Military Discipline Regulations.

117. The Court notes that, in addition to the possible difference mentioned above, there was a difference in treatment in the regulation of "unlawful sexual acts" and "acts of homosexuality" in two ways: (i) with regard to the severity of the sanction, because the sanction for "unlawful sexual acts" ranged from 10 days of arrest and 30 days of suspension, while the sanction for "acts of homosexuality" was the officer's discharge, and (ii) with regard to the scope of the conduct penalized, because unlawful sexual acts were penalized if they were committed "within military bases," while "acts of homosexuality" were penalized even if they were committed outside the service.

B.2.b Sexual orientation as a category protected by Article 1(1) of the American Convention

118. The Inter-American Court has already established that a person's sexual orientation is a category protected by the Convention.¹⁶⁹ Consequently, no domestic legal norm, decision or practice whether by state authorities or private individuals may, in any way, reduce or restrict the rights of a person based on their sexual orientation,¹⁷⁰ whether this is actual or perceived, because this would be contrary to Article 1(1) of the American Convention.

667).

¹⁶⁵ 1998 Military Discipline Regulations, Ministry of National Defense, Ministerial General Order No. 144, art. 72 (merits file, folio 669).

¹⁶⁶ Cf. 1998 Military Discipline Regulations, Ministry of National Defense, Ministerial General Order No. 144, art. 117 (merits file, folio 676). Article 87(i) of the Law on Armed Forces Personnel establishes that: "A soldier shall be discharged for one of the following reasons: [...] (i) for the good of the service, due either to the misconduct or professional incompetence of the soldier, characterized as such by the respective Board, pursuant to the provisions of the corresponding regulations, when he does not have a right to paid leave." 1991 Law on Armed Forces Personnel (evidence file, folio 2665).

¹⁶⁷ According to the representative "unlawful sexual acts" refer to heterosexual sexual relations outside of marriage." Brief of June 5, 2008, submitted to the Commission (evidence file, folio 333).

¹⁶⁸ Cf. Merits Report (merits file, folio 38); pleadings and motions brief (merits file, folios 91 and 92), and answering brief (merits file, folios 178 and 179).

¹⁶⁹ Cf. *Case of Atala Riffo and daughters v. Chile*, supra, para. 93, and *Case of Duque v. Colombia*, supra, para. 104.

¹⁷⁰ Cf. *Case of Atala Riffo and daughters v. Chile*, supra, paras. 83 to 91, and *Case of Duque v. Colombia*, supra, para.

119. The Court has also established that the scope of the right to non-discrimination based on sexual orientation is not restricted to the condition of homosexuality as such, but includes its expression and the necessary consequences on a person's life project.¹⁷¹ Thus, sexual acts are a way in which the sexual orientation of the individual is expressed and are therefore protected by the right to non-discrimination based on sexual orientation.

120. The Court notes that discrimination may be based on an actual or perceived sexual orientation, and it has indicated that "a person may be discriminated against owing to the perception that others have concerning his relationship with a group or social sector, irrespective of whether this corresponds to the reality or to the victim's self-identification."¹⁷² Discrimination based on perception has the effect or purpose of preventing or annulling the recognition, enjoyment and exercise of the fundamental human rights and freedoms of the person subject to this discrimination, regardless of whether or not that person identifies himself with a specific category.¹⁷³ As with other forms of discrimination, the individual is reduced to the single characteristic attributed to him, without taking other personal conditions into consideration. This reduction of the identity results in a differentiated treatment and thus, in the violation of the victim's rights.¹⁷⁴

121. In this regard, the Committee on Economic, Social and Cultural Rights has indicated that:

In determining whether a person is distinguished by one or more of the prohibited grounds, identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned. Membership also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group)¹⁷⁵ (italics and underlining added).

122. Additionally, the concept of "discrimination based on perception" is referred to in various international instruments such as the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities and the Resolution of the African Commission on Human and Peoples' Rights on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity of May 12,

104.

¹⁷¹ Cf. *Case of Atala Riffo and daughters v. Chile*, *supra*, para.133.

¹⁷² *Case of Perozo et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 195, para. 380, and *Case of Ríos et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 194, para. 349.

¹⁷³ *Mutatis mutandis*, *Case of Perozo et al. v. Venezuela*, *supra*, para. 158, and *Case of Ríos et al. v. Venezuela*, *supra*, para. 146.

¹⁷⁴ *Mutatis mutandis*, *Case of Perozo et al. v. Venezuela*, *supra*, para. 158, and *Case of Ríos et al. v. Venezuela*, *supra*, para. 146.

¹⁷⁵ Cf. Committee on Economic, Social and Cultural Rights, *General Comment No. 20. Non-discrimination and economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)*, para. 16, E/C.12/GC/20. Available at: <https://undocs.org/E/C.12/GC/20>.

2014.¹⁷⁶ It has also been included in the laws of several countries and/or indicated in their case law.¹⁷⁷

123. International recognition of the right to non-discrimination due to actual or perceived sexual orientation has been accompanied by the gradual prohibition of the criminalization of consensual sexual acts between adults of the same sex. Since 1981, the European Court of Human Rights has considered that the criminalization of homosexuality is not proportionate to its intended purposes.¹⁷⁸ The Human Rights Committee has concluded the same since 1994.¹⁷⁹ Recently, in 2015, twelve United Nations entities¹⁸⁰ published a joint statement calling on States to end violence and discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) adults, adolescents and children by repealing laws that criminalize same-sex conduct between consenting adults and transgender people on the basis of their gender expression, and laws used to arrest, punish or discriminate against people on the basis of their sexual orientation, gender identity or gender expression.¹⁸¹ According to the United Nations High Commissioner for Human Rights, “[w]hat these laws have in common is their use to harass and prosecute individuals because of their actual or perceived sexuality or gender identity.”¹⁸²

124. The State has argued that, at the time of the facts, the international obligation to consider sexual orientation as a category based on which discrimination was prohibited did not exist. The Court recalls that the obligations established in the American Convention, such as the prohibition of discrimination, must be respected by the States Parties from the moment they ratify this treaty.¹⁸³ The human rights obligations derived from the prohibition of discrimination and the principle of

¹⁷⁶ See, for example, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, Article I; Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity of the African Commission on Human and Peoples’ Rights, para. 4, May 12, 2014. Available at: <http://www.achpr.org/sessions/55th/resolutions/275/>. The concept was also included in the Report of the United Nations High Commissioner for Human Rights, “Discrimination and violence against individuals based on their sexual orientation and gender identity,” A/HRC/C/29/23, of May 4, 2015, para. 17. Available at: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Pages/ListReports.aspx>.

¹⁷⁷ See, for example, Canada, *Case of Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*. No. 2000 SCC 27, Supreme Court of Canada, May 3, 2000, para. 56; United States of America, The Americans with Disabilities Act (ADA) 1990, section 12102; France, 1994 Criminal Code of France, articles 132-77 and 225-1, and the United Kingdom: 1995 Disability Discrimination Act, amended in 2003, section 3B.

¹⁷⁸ Cf. ECHR, *Case of Dudgeon v. The United Kingdom*, Application No. 7525/76, Judgment of October 22, 1981, paras. 60 and 61. See also, *Case of A.D.T. v. The United Kingdom*, Application No. 35765/97, Judgment of July 31, 2000, paras. 37 and 38.

¹⁷⁹ Cf. Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992. Decision of March 31, 1994, paras. 8.3 to 8.6. See also, Constitutional Court of South Africa, *Case of the National Coalition for Gay and Lesbian Equality and Another v. Ministry of Justice and Others*, Case of CCT11/98, Judgment of October 9, 1998, para. 26(b).

¹⁸⁰ The International Labour Organization (ILO), the United Nations High Commissioner for Human Rights (UNHCHR), the United Nations Development Programme (UNDP), the United Nations Education, Scientific and Cultural Organization (UNESCO), the United Nations Population Fund (UNFPA), the United Nations High Commissioner for Refugees (UNHCR), the United Nations International Children’s Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC), the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), the World Food Programme (WFP), the World Health Organization (WHO), and the Joint United Nations Programme on HIV and AIDS (UNAIDS).

¹⁸¹ Cf. United Nations entities call on States to act urgently to end violence and discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) adults, adolescents and children (September 2015). Available at: http://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF

¹⁸² United Nations High Commissioner for Human Rights, “Discrimination and violence against individuals based on their sexual orientation and gender identity,” A/HRC/19/41, November 17, 2011, para. 40.

¹⁸³ Cf. *Case of Vélez Restrepo and family members v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of September 3, 2012. Series C No. 248, para. 241, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia, supra*, para. 444.

equality before the law require immediate compliance.¹⁸⁴ In particular, regarding sexual orientation, this Court has indicated that the presumed lack of a consensus in some countries at the time of the facts as regards full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered.¹⁸⁵ The Court also emphasizes that, at the time of the events of this case, this type of discrimination was prohibited by the Ecuadorian Constitution.¹⁸⁶ Therefore, there is no doubt that, at the time of the facts of this case, the State was obliged not to discriminate based on a person's sexual orientation.

B.2.c The discriminatory nature of the difference in treatment in articles 67 and 117 of the Military Discipline Regulations and article 87(i) of the Law on Armed Forces Personnel

125. The Court has determined that a difference in treatment is discriminatory when it has no objective and reasonable justification;¹⁸⁷ that is, when it does not seek a legitimate purpose and there is no reasonable relationship of proportionality between the means employed and the objective sought.¹⁸⁸ This Court has also established that in the case of a prohibition by reason of one of the protected categories indicated in Article 1(1) of the Convention, the possible restriction of a right requires rigorous justification, which means that the reasons used by the State to differentiate treatment must be particularly serious and supported by comprehensive arguments.¹⁸⁹ It is the State that has the burden of proof to demonstrate that the difference in treatment between homosexual sexual acts and the so-called "unlawful sexual acts" is justified, without founding its decision on stereotypes.¹⁹⁰

126. In the instant case, the differences in the disciplinary regulations reveal a distinction related to sexual orientation, a category protected by Article 1(1) of the Convention. However, Ecuador has not provided an explanation on the essential social need or the purpose of the difference in treatment, or a reason to justify that difference as a less harmful method to achieve the purpose sought.

127. This Court emphasizes that, in order to maintain military discipline, it could be reasonable and admissible to impose restrictions on sexual relations on military premises or during military service. However, the absence of adequate justification for the harsher penalty for homosexual sexual acts leads to a presumption that this measure is discriminatory. Furthermore, the difference in regulation

¹⁸⁴ See, for example, Human Rights Committee. General Comment No. 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant," CCPR/C/21/Rev.1/Add.13, May 26, 2004, para. 5; Committee on Economic, Social and Cultural Rights for the International Covenant on Economic, Social and Cultural Rights, General Comment No. 20, "Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, July 2, 2009, paras. 7 and 17, and Committee on Economic, Social and Cultural Rights, General Comment 13, "The right to education (art. 13 of the Covenant)", E/C.12/1999/10, December 8, 1999, para. 31.

¹⁸⁵ *Case of Atala Riffo and daughters v. Chile*, *supra*, para. 92, and *Case of Duque v. Colombia*, *supra*, para. 123.

¹⁸⁶ In this regard, article 23.25 of the Constitution established "[t]he right to take free and responsible decisions on sexual life," while article 23.3 of this instrument established that: "Without prejudice to the rights established in this Constitution and in the international instruments in force, the State shall recognize and shall guarantee the following rights to everyone: [...] Equality before the law. Everyone shall be considered equal and shall enjoy the same rights, freedom and opportunities, without discrimination for reasons of birth, age, sex, race, color, social origin, language, religion, political opinion, economic position, sexual orientation, health status, disability, or difference of any other kind" (underlining and italics added). 1998 Constitution of the Republic of Ecuador, Article 23, paras. 3 and 25 (evidence file, folios 2675 and 2676).

¹⁸⁷ *Cf. Juridical Status and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 46, and *Case of Duque v. Colombia*, *supra*, para. 106.

¹⁸⁸ *Cf. Case of Norín Catrimán (Leaders, members and activist of the Mapuche Indigenous People) et al. v. Chile. Merits, reparations and costs*. Judgment of May 29, 2014. Series C No. 279, para. 200, and *Case of Duque v. Colombia*, *supra*, para. 106.

¹⁸⁹ *Cf. Case of Gonzales Lluy et al. v. Ecuador*, *supra*, para. 257, and *Case of Duque v. Colombia*, *supra*, para. 106.

¹⁹⁰ *Cf. Case of Atala Riffo and daughters v. Chile*, *supra*, para. 125.

that existed in this case with regard to homosexual acts had the effect of excluding homosexual individuals from the Armed Forces. In this regard, the Court recalls that the prohibition of discrimination based on a person's sexual orientation includes the protection of the expression of this sexual orientation (*supra* para. 119). By penalizing "acts of homosexuality" within or outside the service, article 117 of the Military Discipline Regulations punished all forms of expression of this sexual orientation, restricting the participation of homosexual persons in the Ecuadorian Armed Forces.

128. The Court underscores that the prohibition of discrimination based on sexual orientation in the Armed Forces has been recognized in international instruments, and also by human rights bodies and the European Court of Human Rights.

129. Within the Organization of American States (hereinafter "the OAS"), even though there have been no specific statements on the protection of the rights of people with diverse sexual orientation in the Armed Forces, resolutions have been adopted that reveal a general prohibition of discrimination based on a person's sexual orientation, which would include participation in the Armed Forces. These resolutions condemn:

[A]ll forms of discrimination against persons by reason of their sexual orientation and gender identity or expression, and [...] urge the states within the parameters of the legal institutions of their domestic systems to eliminate, where they exist, barriers faced by lesbians, gays, and bisexual, transsexual, and intersex (LGBTI) persons in equal access to political participation and in other areas of public life, and to avoid interferences in their private life.¹⁹¹

130. The European Court of Human Rights has pointed out that discharge from the Army based on the fact of being homosexual constitutes interference in the rights of a person that is contrary to the European Convention on Human Rights. Therefore, the State must provide convincing and weighty reasons to justify a policy against homosexuals in the armed forces and the decision to discharge a soldier based on this policy.¹⁹² The European Committee on Social Rights, the Committee of Ministers of the Council of Europe, and the Steering Committee for Human Rights of the Council of Europe

¹⁹¹ OAS, General Assembly. Resolution on human rights, sexual orientation and gender identity and expression, OAS AG/Res 2807, June 6, 2013, operative paragraph 1. Available at: http://www.oas.org/es/sla/ddi/docs/AG-RES_2807_XLIII-O-13.pdf, and Resolution on human rights, sexual orientation and gender identity and expression, OAS AG/Res 2863, June 5, 2014, operative paragraph 1. Available at: <https://www.oas.org/es/cidh/lgtbi/docs/AG-RES2863-XLIV-O-14esp.pdf>. In 2012, the General Assembly adopted another resolution with the same text without including the phrase "gender expression" as a category protected against acts of discrimination. Cf. OAS, General Assembly. Resolution on human rights, sexual orientation and gender identity. OAS AG/RES 2721, June 4, 2012. Available at: http://www.oas.org/es/sla/ddi/docs/AG-RES_2721_XLII-O-12_esp.pdf. These resolutions of the General Assembly were the result of an evolution that began in 2008 with Resolution 2435 in which the States indicated "concern due to acts of violence and related human rights violations committed against individuals owing to their sexual orientation and gender identity." The following year, the Assembly issued Resolution 2504 in which it expressly condemned "acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity." In 2010, in Resolution 2600, it reiterated the condemnation of the previous year and also urged States "to investigate such acts and violations and to ensure that the perpetrators are brought to justice." Subsequently, Resolution 2653 of 2011 added to the precedents established, urging States, "within the parameters of the legal institutions of their domestic systems, to adopt the necessary measures to prevent, punish and eradicate such discrimination." Cf. OAS, General Assembly. Resolution on human rights, sexual orientation and gender identity. OAS AG/RES 2435, June 3, 2008. Available at: http://www.oas.org/es/sla/ddi/docs/AG-RES_2435_XXXVIII-O-08.pdf; Resolution on human rights, sexual orientation and gender identity, OAS AG/RES 2504, June 4, 2009. Available at: http://www.oas.org/es/sla/ddi/docs/AG-RES_2504_XXXIX-O-09.pdf; Resolution on human rights, sexual orientation and gender identity, OAS AG/RES 2600, June 8, 2010. Available at: http://www.oas.org/es/sla/ddi/docs/AG-RES_2600_XL-O-10_esp.pdf; Resolution on human rights, sexual orientation and gender identity, OAS AG/RES 2653, June 7, 2011. Available at: http://www.oas.org/es/sla/ddi/docs/AG-RES_2653_XLI-O-11_esp.pdf.

¹⁹² Cf. ECHR, *Lustig-Prean and Beckett v. The United Kingdom*. Nos. 31417/96 and 32377/96. Judgment of September 27, 1999, paras. 64 and 98; *Smith and Grady v. The United Kingdom*. Nos. 33985/96 and 33986/96. Judgment September 27, 1999, paras. 71 and 105; *Perkins and R. v. The United Kingdom*. Nos. 43208/98 and 44875/98. Judgment of October 22, 2002, paras. 38 to 41, and *Beck, Copp and Bazeley v. The United Kingdom*. Nos. 48535/99, 48536/99 and 48537/99. Judgment of October 22, 2002, paras. 51 to 53.

have ruled against discrimination based on sexual orientation in the armed forces¹⁹³. In addition, the European Union has issued a directive to combat discrimination based on sexual orientation in employment in the public and private sector, applicable to the armed forces.¹⁹⁴ Meanwhile, the North Atlantic Treaty Organization (NATO) operates under an "Equal opportunity and diversity policy" for international staff and military personnel, under which it expresses its "firm aim to maintain a work environment that is free from discrimination or harassment and provides equality of opportunity regardless of sex, race or ethnic origin, nationality, disability, age or sexual orientation."¹⁹⁵

131. In addition, the right to non-discrimination based on sexual orientation in the Armed Forces has also been recognized in the laws and case law of several countries of the region. Thus, for example: in Argentina, in 2008, the law that penalized members of the Army for committing homosexual acts was repealed;¹⁹⁶ in Chile, in 2013, the inclusion of homosexuality and lesbianism as psychiatric reasons for denying entry into the armed forces was amended¹⁹⁷ and, in the United States of America, in 2010, the policy of "Don't ask, don't tell" applied to the United States Armed Forces was annulled; this policy established that LGBTI persons were forbidden from revealing their sexual orientation and questions on their sexual orientation were prohibited.¹⁹⁸

132. The Court also highlights the rulings of high courts of Colombia, Brazil and Peru. In Colombia, the Constitutional Court has decided several cases on the issue.¹⁹⁹ In particular, in judgment C-507/99, it analyzed an article of the armed forces' disciplinary regulations that established as an "offense against military honor" "[t]o carry out acts of homosexuality or to practice or encourage prostitution." In this regard, the Colombian Constitutional Court indicated that this article "stigmatizes the homosexual option and, at the same time, ignores aspects that correspond to an individual's most intimate sphere, which, if they are exercised responsibly and strictly in private, have no reason to interfere in his condition as a soldier."²⁰⁰ It also indicated that:

¹⁹³ Cf. European Committee on Social Rights, Conclusion 2012 – Turkey – Article 1-2, December 7, 2012. Available at: <http://hudoc.esc.coe.int/eng/?i=2012/def/TUR/1/2/FR>; Council of Europe: "Recommendation CM/Rec (2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces", February 24, 2010. Available at: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_Committees/DH-DEV-FA_docs/CM_Rec_20104_Armed_forces_en.pdf, and Steering Committee for Human Rights, Explanatory memorandum on the Recommendation CM/Rec (2010)4 of the Committee of Ministers to member states on human rights of members of the armed forces. February 24, 2010. Available at: https://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_Committees/DH-DEV-FA_docs/EM_rec_2010_4_Armedforces_en.pdf.

¹⁹⁴ Cf. Council of Europe. Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0078&from=EN>.

¹⁹⁵ NATO, Equal opportunity and diversity policy, 2003, article 2(2). Available at: http://www.nato.int/nato_static/assets/pdf/pdf_topics/20100625_IS_IMS_EqualOpportunitiesPolicy.pdf.

¹⁹⁶ This penalty was established in the Argentine Code of Military Justice. Law No. 14,029, which was derogated by Law No. 26,394 of 2008.

¹⁹⁷ Cf. Preventive Medicine Regulations of the Armed Forces of Chile of July 14, 1982, article 101, and Decree No. 554 of September 12, 2012, which derogated provisions that it indicated were contrary to Law 20,609 establishing measures against discrimination.

¹⁹⁸ Cf. The White House, *The President Signs Repeal of "Don't Ask Don't Tell": "Out of Many, We Are One"*, 2010, Available at: <https://www.whitehouse.gov/blog/2010/12/22/president-signs-repeal-dont-ask-dont-tell-out-many-we-are-one>

¹⁹⁹ Thus, for example, judgment T-097/94 indicated that "the condition of homosexual, in itself, cannot be a motive for exclusion from the armed forces." Colombian Constitution Court. Judgment T-097 of March 7, 1994.

²⁰⁰ The Constitutional Court also indicated that "[r]egarding the former, that is the stigmatization of the homosexual, the article includes a clear discrimination because it penalizes only and exclusively those who fall within this condition, as if the sexual option, whatever it is, may be considered a reason to penalize someone. Regarding the latter – the violation of the individual's most intimate sphere – it is evident that the breadth and lack of precision of the verb "to exercise," added to the fact that the disciplinary regime extends offenses against military honor to activities carried out outside the service [...], leads to the assumption that the said prohibition encompasses all expressions of the homosexual option, even the most private or

In reality, what it is sought to penalize by the contested expression – to carry out acts of homosexuality – [is] the human condition of homosexual and the legitimate exercise of this preference, which has severe effects on the right of the individual to manage freely something that is so intrinsic, which is his sexuality. [...]

That said, it is fairly clear that the sexuality of the individual and, particularly their homosexual behavior, cannot be subjected to private or institutional stigmatization and, therefore, the participation that the individual, as a social being, may have in the life of the State, cannot in any way be conditioned by his sexual development and preference. As already indicated, the Constitution, by considering that those rights that protect the private sphere of the individual are fundamental, is admitting that anyone who plays an active role in the community life of the country – including in the military – is not renouncing the right to have a private life and, therefore, to enjoy full autonomy to act in his private life in accordance with his personal preferences provided that, objectively, he does not prejudice society.²⁰¹

133. The Colombian Constitutional Court clarified that this did not mean that “sexual acts, whether homosexual or heterosexual, performed publicly, or when executing activities of the service, or on military premises and that, therefore, compromise the basic objectives of the military activity and discipline [are permitted], because it is evident that they must be subject to the corresponding penalties.”²⁰²

134. Similarly, according to the Brazilian Military Criminal Code to engage in or permit soldiers to engage in lewd acts, whether homosexual or not, in a place subject to military administration was penalized with detention of six months to a year, under the heading of “pederasty or other lewd acts.”²⁰³ In 2015, the Federal Supreme Court declared that the expression “homosexual or not” was unconstitutional.²⁰⁴ In this regard, the opinion of the Justice Rapporteur established that:

The law cannot be allowed to use pejorative and discriminatory expressions when recognizing the right to freedom of sexual orientation as an existential freedom of the individual; an inadmissible manifestation of intolerance that affects groups that have traditionally been marginalized. [...]

The inclusion of the *nomen iuris* “pederasty or other lewd acts” and the expression “homosexual or not” [...] reveal, unequivocally, the purpose [...] of the norm; to prohibit access to and expel homosexual men from the Armed Forces. [...]

Prohibiting access to or expelling homosexual men from the Armed Forces based on a supposed “physiological or moral degeneration,” or even on contravening “God’s law,” belongs to a discourse that cannot be accepted in the public sphere, at the risk even of violating the secular nature of the State. The supposed absence of energy or of virility is another argument that lacks empirical proof, and is based on a preconceived image of the “ideal warrior.”²⁰⁵

135. Additionally, in Peru in 2004, the Constitutional Court declared unconstitutional an article of the Code of Military Justice which established that “[t]he soldier who performs indecent or unnatural acts with persons of the same sex, within or outside military premises, shall be punished by expulsion

discreet in which an officer or junior officer may engage in private.” Colombian Constitution Court. Judgment C-507/99 of July 14, 1999.

²⁰¹ Colombian Constitution Court. Judgment C-507/99 of July 14, 1999.

²⁰² Colombian Constitution Court. Judgment C-507/99 of July 14, 1999.

²⁰³ Decree Law No. 23214 adopting the “Code of Military Justice” of July 24, 1980, art. 269.

²⁰⁴ Federal Supreme Court of Brazil. ‘ADPF 291 – Action on non-compliance with a fundamental precept, Judgment of October 28, 2015.

²⁰⁵ Federal Supreme Court of Brazil. Action on non-compliance with a fundamental precept, Federal District 291. Opinion of the Rapporteur Justice Roberto Barroso. Entire contents of the agreement. October 28, 2015, pp. 2, 19, and 30.

from the armed forces if he is an officer and with prison if he is an ordinary soldier.”²⁰⁶ Among other arguments, the Peruvian Constitutional Court indicated that:

[I]t is unconstitutional, because it affects the principle of equality that only the practice of an indecent act against a person of the same sex has been established as an unlawful conduct and not, to the contrary, and with equal justification, indecent conduct against a person of a different sex. If the unlawful act is the practice of an indecent act, there is no objective reason or reasonable basis for only indecent acts between persons of the same sex to be penalized.²⁰⁷

136. This Court considers that the prohibition of discrimination by reason of sexual orientation, as it has interpreted in the past, encompasses and extends to all spheres of the personal development of those subject to the jurisdiction of a State Party to the Convention. Therefore, the exclusion of an individual from the Armed Forces based on his sexual orientation, whether actual or perceived, is contrary to the American Convention.

137. In the instant case, the Court has noted that there was an evident difference between the regulations applicable to “unlawful sexual acts” and “acts of homosexuality,” owing to the disparity in the punishments applicable to the two types of acts, as well as to the fact that the “acts of homosexuality” were punished, even if they were committed outside the service. Owing to the presumed homosexual nature of the acts for which Mr. Flor Freire was disciplined, he was a victim of a difference in treatment. Committing non-homosexual sexual acts on military premises would not have led to the discharge of Mr. Flor Freire. If this had been the case, he would have received the maximum penalty of 15 days’ arrest or 30 days’ suspension (*supra* para. 115). However, owing to the sexual orientation attributed to him, Mr. Flor Freire was separated from the Ecuadorian Armed Forces without the State providing the required arguments and evidence to establish objective and reasonable justification to support this difference in treatment.

138. Therefore, this Court considers that the greater penalty for homosexual sexual acts that was applied to Mr. Flor Freire and the fact that such acts were punished even if committed outside the service constitute discriminatory distinctions and denote the objective of excluding homosexuals from the Armed Forces.

139. Furthermore, Article 2²⁰⁸ of the Convention obliges States Parties to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to the rights or freedoms protected by the Convention.²⁰⁹ The Court takes note that, on December 15, 2008, Ecuador adopted new Military Discipline Regulations that eliminated the distinction between homosexual and non-homosexual sexual relations.²¹⁰ However, it also notes that, at the time of the facts, the 1998 Military Discipline Regulations were in force. It was these regulations that were applied to Mr. Flor Freire and they established this distinction, as analyzed above. Even though it appreciates the changes that Ecuador has made to these regulations, it considers that it is not incumbent on the Court to analyze the law introduced subsequently when determining the international responsibility of the State in this case, because this change did not

²⁰⁶ Article 269 of Decree Law No. 23214, Peruvian Code of Military Justice.

²⁰⁷ Constitutional Court of Peru. Judgment of June 9, 2004. File No. 0023-2003-AI/TC, para. 87.

²⁰⁸ Article 2 of the Convention establishes that: “[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

²⁰⁹ *Cf. Case of Gangaram Panday v. Suriname. Preliminary objections.* Judgment of December 4, 1991. Series C No. 12, para. 50, and *Case of Quispialaya Vilcapoma v. Peru, supra*, para. 219.

²¹⁰ *Cf.* 2008 Military Discipline Regulations, Ministry of National Defense, Ministerial General Order No. 243 (evidence file, folios 2505 and 2800).

affect the specific case of Mr. Flor Freire. Given that the discriminatory treatment in this case occurred as a result of the application of article 117 of the 1998 Military Discipline Regulations, in force at the time of the facts, the Court finds that the State also failed to comply with its obligation to adapt its legislation to ensure equality before the law.

B.3 Conclusion

140. Based on the above, the Court concludes that the application to Mr. Flor Freire of article 117 of the Military Discipline Regulations that penalized “acts of homosexuality” in the most severe manner constituted a discriminatory act. Therefore, the State is responsible for the violation of the right to equality before the law and the prohibition of discrimination recognized in Article 24 of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Mr. Flor Freire, owing to the discrimination suffered based on perceived sexual orientation.

VIII-2

PRINCIPLE OF LEGALITY AND PROTECTION OF HONOR AND DIGNITY, IN RELATION TO THE OBLIGATION TO RESPECT AND TO ENSURE RIGHTS

141. In this chapter, the Court will examine the violations alleged by the representative in relation to the principle of legality²¹¹ and the protection of honor and dignity,²¹² as well as the arguments of the State and the Commission in this regard.

A. Alleged violation of the principle of legality

A.1 Arguments of the parties and of the Commission

142. The **representative** argued that, at the time of the facts, a legal reserve existed for the establishment of offenses and penalties in Ecuador, referring to the 1998 Constitution of Ecuador. He argued that, despite this, “[t]he offense for which Mr. Flor was tried and convicted [was] established in the Regulations adopted by the Minister of National Defense.” Consequently, he affirmed that the “sentence, founded on both the discriminatory norm and on the existing tolerated practice of discrimination based on the perception of sexual orientation, [was] so arbitrary that even the norm that imposed the penalty was not included in a law [...], but rather in a secondary regulation, so that even the penalty [was] arbitrary because it was not legal.” He also argued that, if homosexuality were not a crime or offense of any kind according to the Constitution and the law, Mr. Flor Freire could not be tried and convicted as occurred.

143. The **Commission** did not examine the alleged violation of the principle of legality in its Merits Report, because, in its Admissibility Report on the case, it had indicated: “[r]egarding the petitioners’ claim concerning the presumed violation of Articles 9 and 11 of the Convention [...] it is observed that the petitioners did not provide sufficient evidence on their presumed violation; therefore, these claims cannot be declared admissible.” The **State** did not refer to the alleged violation of this right considering that it fell outside the factual framework.

A.2 Considerations of the Court

²¹¹ Article 9 of the American Convention establishes that: “No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.”

²¹² Article 11 of the American Convention stipulates: “1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks.”

144. The Court recalls its consistent case law, that the presumed victims and their representatives may cite the violation of rights other than those included in the Merits Report, provided these relate to the facts contained in that document, because the presumed victims are holders of all the rights established in the Convention.²¹³

145. In the instant case, the representative has alleged a violation of the principle of legality based on two arguments: (i) that the norm applied to Mr. Flor Freire was not legal because it did not comply with the principle of legal reserve established in the domestic sphere for administrative offenses, and (ii) that Mr. Flor Freire should not have been penalized administratively for a conduct that had been decriminalized in Ecuador.²¹⁴

146. The principle of legality constitutes one of the central elements of criminal prosecution in a democratic society and presides over the actions of all the organs of the State, in their respective jurisdictions, particularly when exercising punitive powers.²¹⁵ This Court has also established that the principle of legality is applicable in disciplinary matters.²¹⁶ In this regard, it is necessary to take into account that, as in the case of criminal sanctions, disciplinary sanctions are an expression of the punitive powers of the State and, at times, they are similar to the former because they both entail impairment, deprivation or alteration of an individual's rights.²¹⁷ Consequently, in a democratic system, it is necessary to take special care to ensure that such measures are adopted with strict respect for the basic rights of the individual and to verify carefully the effective existence of the unlawful conduct.²¹⁸ Also, to ensure legal certainty, it is essential that the disciplinary norm exists and is known, or can be known, before the occurrence of the act or omission that contravenes it and that it is intended to punish.²¹⁹ Nevertheless, although the Court considers that the principle of legality is valid in disciplinary matters, its scope will depend to a great extent on the matter regulated.²²⁰ The precision of a disciplinary norm may be different from that required by the principle of legality in criminal matters, owing to the nature of the disputes that each of them is designed to resolve.²²¹

²¹³ Cf. *Case of the "Five Pensioners" v. Peru*, *supra*, para. 155, and *Case of Wong Ho Wing v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2015. Series C No. 297, para. 35.

²¹⁴ Article 516 of the Ecuadorian Criminal Code stipulates that: "[Para. 1] In cases of homosexuality, which do not constitute a violation, the two co-defendants shall be penalized with four to eight years' imprisonment. [Para. 2] When the homosexuality is committed by the father or other ascendant on the son or other descendant, the punishment shall be eight to twelve years' imprisonment and deprivation of the rights and prerogatives that the Civil Code grants over the person and possessions of the son. [Para. 3] If the act has been committed by ministers of religion, schoolteachers, professors of colleges or other institutions on persons entrusted to their care and guidance, the punishment shall be eight to twelve years' imprisonment." A judgment of the Constitutional Court of November 26, 1997, declared the first paragraph of this article unconstitutional (merits file, folios 713 to 715).

²¹⁵ Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment of February 2, 2001. Series C No. 72, para. 107, and *Case of Mohamed v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of November 23, 2012. Series C No. 255, para. 130.

²¹⁶ Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs, supra*, para. 106, and *Case of López Lone et al. v. Honduras, supra*, para. 257.

²¹⁷ Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs, supra*, para. 106, and *Case of López Lone et al. v. Honduras, supra*, para. 257.

²¹⁸ Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs, supra*, para. 106, and *Case of López Lone et al. v. Honduras, supra*, para. 257.

²¹⁹ Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs, supra*, para. 106, and *Case of López Lone et al. v. Honduras, supra*, para. 257.

²²⁰ Cf. *Case of López Lone et al. v. Honduras, supra*, para. 257, and *mutatis mutandis, Case of Fontevecchia and D'Amico v. Argentina. Merits, reparations and costs*. Judgment of November 29, 2011. Series C No. 238, para. 89.

²²¹ Cf. *Case of López Lone et al. v. Honduras, supra*, para. 257.

147. In the instant case, the specific conduct for which Mr. Flor Freire was punished was defined as an offense in an *infra* legal norm contained in the Military Discipline Regulations (*supra* paras. 60 and 75). However, this norm and the punishment consequently imposed were established based on a more general legal norm contained in articles 76 and 87 of the Law on Armed Forces Personnel, which regulated discharge and paid leave due to "misconduct" when "this was for the good of the service," expressly delegating the determination of those circumstances to the "corresponding regulations"²²² (*supra* para. 67). Therefore, contrary to the arguments of the representative, Mr. Flor Freire was not punished based exclusively on a regulatory norm. Mr. Flor Freire was punished based on article 117 of the Military Discipline Regulations, combined with articles 76 and 87 of the Law on Armed Forces Personnel, among other norms, as revealed by the decision of the Court of Law (*supra* para. 77).

148. This Court has established that, in the case of disciplinary sanctions, the interpretation or content of certain open or indeterminate conducts, such as "misconduct," may be specified by regulations or case law in order to avoid excessive discretionality in the use of such concepts.²²³ Consequently, the Court does not find that the mere fact that the conduct penalized was defined in the Military Discipline Regulations infringed the principle of legality.

149. That said, according to Article 29(b) of the Convention, no provision of the Convention may be interpreted as "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party" to the Convention. According to the representative, article 24(1)²²⁴ of the Ecuadorian Constitution requires the offense established in article 117 of the Military Discipline Regulations to be formally defined in a law. However, this Court notes that the representative has not provided evidence other than the text of this article as grounds for his assertion. The Court recalls that the international jurisdiction is complementary and auxiliary in nature,²²⁵ and it is not incumbent on this Court to rule on the legal effects of domestic laws in the domestic or national sphere,²²⁶ or to interpret them. That is the exclusive role of the domestic courts and must be decided pursuant to their own laws.²²⁷ Consequently, the burden of proof corresponded to the representative to substantiate that the interpretation corresponding to article 24(1) of the 1998 Ecuadorian Constitution, as it was applied under the domestic legal system, is the one that he has argued before this Court. However, the representative did not provide this substantiation.

150. Regarding the representative's second argument, according to which Mr. Flor Freire should not have received a disciplinary sanction for a conduct that had been decriminalized, the Court notes that there is no Convention-based obligation establishing that it is not possible to issue a disciplinary sanction for conducts that are not criminal offenses. The purpose of disciplinary control is to assess

²²² Article 87(i) of the Law on Armed Forces Personnel established that: "A soldier shall be discharged for one of the following reasons: [...] i) for the good of the service, due either to the misconduct or professional incompetence of the soldier, characterized as such by the respective Board, pursuant to the provisions of the corresponding regulations, when he does not have a right to paid leave. 1991 Law on Armed Forces Personnel (evidence file, folio 2665).

²²³ Cf. *Case of López Lone et al. v. Honduras*, *supra*, para. 272.

²²⁴ Article 24(1) of the 1998 Constitution of Ecuador established that: "[n]o one may be prosecuted for an act or omission that, when it was committed, was not legally defined as an offense of a criminal, administrative or other nature, and no sanction shall be applied that is not established in the Constitution or by law." 1998 Ecuadorian Constitution (evidence file, folio 2676).

²²⁵ See, *inter alia*, the Preamble to the American Convention on Human Rights and the *Case of García Ibarra et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 17, 2015. Series C No. 306, para. 17.

²²⁶ Cf. *International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94, December 9, 1994. Series A No. 14, para. 34.

²²⁷ Cf. Advisory Opinion OC-14/94, *supra*, para. 34.

a person's conduct, suitability and performance for a position or function as a public official.²²⁸ The purpose of criminal control is to punish conducts that harm legal rights and interests and that the legislator finds it reasonable and proportionate to condemn in the interest of the proper functioning of society. Although they are both an expression of the State's punitive powers,²²⁹ they do not necessarily coincide, nor do they have to coincide. Therefore, the Court does not consider that the decriminalization of the "offense of homosexuality" in Ecuador means that Mr. Flor Freire could not receive a disciplinary sanction for presumably executing homosexual sexual acts on military premises, without prejudice to this Court's conclusions on the discriminatory nature of the sanction due to the greater gravity associated with homosexual sexual acts (*supra* paras. 108 to 140).

151. Based on the above, the Court concludes that the Ecuadorian regulations on which the punishment of Mr. Flor Freire was based do not infringe the Convention-based standards for the principle of legality in disciplinary matters. Moreover, the Court does not have sufficient evidence to consider that the Ecuadorian Constitution establishes a right of legal reserve for all aspects of a disciplinary offense. Therefore, the State did not violate Article 9 of the American Convention to the detriment of Homero Flor Freire. This is without prejudice to the discriminatory nature of the said norms that were examined in Chapter VIII-1 of this judgment.

B. Right to honor and dignity

152. The **representative** argued that "the opening and conclusion of a procedure with a sanction [...] causes harm to honor."²³⁰ The **Commission** did not analyze this right in the Merits Report because it had declared it inadmissible in its Admissibility Report for the reasons mentioned in relation to the alleged violation of the principle of legality (*supra* para. 143). The **State** did not refer to the alleged violation of this right, because it considered that it exceeded the factual framework.

153. The Court has indicated that Article 11 of the Convention recognizes that everyone has the right to have his honor respected, prohibits any unlawful attack on a person's honor or reputation, and imposes on the States the obligation to provide the protection of the law against such attacks. In general, this Court has indicated that the right to honor is related to self-esteem and self-worth, while reputation refers to the opinion that others have of a person.²³¹

154. Accordingly, the right to honor is related to the esteem or deference with which each person should be treated by the other members of the collectivity who know him and interact with him, based on his human dignity. It is a right that should be protected so as not to impair the intrinsic value of the individual in relation to society and in relation to himself, and to ensure the adequate consideration and appraisal of the individual within the collectivity.

155. Meanwhile, reputation may be harmed as a result of false or erroneous information that is disseminated without justification and that distorts the public opinion of an individual. Therefore, it is closely related to human dignity insofar as it protects the individual against attacks that restrict the individual's status in the public or collective sphere.

²²⁸ Cf. *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2011. Series C No. 227, para. 120, and *Case of López Lone et al. v. Honduras, supra*, paras. 267 and 273.

²²⁹ Cf. *Case of López Lone et al. v. Honduras, supra*, paras. 257.

²³⁰ Among the reasons for the alleged violation of Article 11 of the Convention, the representative also argued that the disciplinary sanction had led to Mr. Flor Freire's divorce and the rupture of his ties to his daughter, and had affected him personally. However, these arguments do not form part of the factual framework described by the Commission in its Merits Report, so the Court will not take them into consideration.

²³¹ Cf. *Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs*. Judgment of January 27, 2009. Series C No. 193, para. 57, and *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations*. Judgment of November 30, 2012. Series C No. 259, para. 286.

156. Based on the facts of the case and his statement during the public hearing,²³² the Court concludes that, as a result of the disciplinary procedure against him, Mr. Flor Freire's right to honor was harmed because, owing to the social context in which he moved and the specific circumstances that resulted in his discharge from the Ground Forces, his self-esteem and self-worth were violated.

157. His reputation was also harmed because he received a disciplinary sanction that was based on a discriminatory norm by reason of sexual orientation, which distorted the general opinion that people had of him.

158. Therefore, this Court concludes that the State is responsible for a violation of the right to honor and dignity established in Article 11(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Mr. Flor Freire.

VIII-3

RIGHTS TO JUDICIAL GUARANTEES AND TO JUDICIAL PROTECTION IN RELATION TO THE OBLIGATION TO RESPECT AND TO ENSURE RIGHTS AND THE OBLIGATION TO ADOPT DOMESTIC LEGAL PROVISIONS

159. In this chapter, the Court will examine the arguments of the Commission and of the parties concerning the presumed absence of impartiality and lack of reasoning of the rulings in the disciplinary summary inquiry procedure, as well as the alleged absence of an effective remedy, in violation of judicial guarantees²³³ and the right to judicial protection.²³⁴

A. The guarantee of impartiality and the obligation to provide reasoning

A.1 Arguments of the parties and of the Commission

160. The **Commission** determined that the decision of the Court of Law, which was the only instance that examined the evidence during the disciplinary proceedings, violated the guarantee of impartiality contained in Article 8(1) of the Convention. In this regard, it indicated that the "Judge of Law who handed down the judgment against Mr. Flor, had been involved in an initial phase of the investigation procedure when, in his capacity as Zone Commander, [and as Mr. Flor Freire's ranking superior] he

²³² During the public hearing, Mr. Flor Freire stated the following: "[a]s a result of my discharge from the army for misconduct, I went to look for work [...]. But when I went for interviews, I was asked why I had left the Ecuadorian army; that was the crucial part of my life because, on the one hand, I had to tell the truth of what had happened and, on the other, I knew that if I told the truth I would not get the job, because mentioning issues of security and that a lieutenant had been discharged for misconduct, everyone understood that the misconduct referred to the fact that I was supposedly an arms-trafficker, sold weapons, was insubordinate, arrogant, a nuisance, or any other situation, anything rather than that I was falsely accused of being gay. When they called the Armed Forces – and the Ecuadorian State can confirm this – and asked the Human Resources Department why Lieutenant Homero Flor had left the army, they were told that it was due to misconduct, they did not even say that owing to a supposed sexual orientation other than heterosexual, but rather for misconduct. This destroyed my professional aspirations; meant that I only remained in the job for one month, two months [...] I became a burden for my family; I used to support my mother and was proud to give her my salary, because they say that a good son gives his first salary to his mother and the other salaries he administers to procure benefits." Statement of Mr. Flor Freire during the public hearing held before the Court in this case.

²³³ Article 8(1) of the American Convention establishes that: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

²³⁴ Article 25(1) of the American Convention establishes that: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

had required [him] to surrender his responsibilities and his room." Based on this, the Commission argued that "the decision of the Court of Law was influenced by the judge having had a preconceived opinion of the matter in relation to Mr. Flor's responsibility." The Commission also indicated that neither the decision on the request for review decided by the Junior Officers Board, nor the appeal decided by the Senior Officers Board contained the reasoning, because they merely "referred briefly to what had been established previously by the Court of Law," so that there was no ruling on the merits of the matter. According to the Commission, this failure to set out the reasoning had "had a negative effect on Mr. Flor's exercise of his right to defend himself." Based on the authority vested in the respected Officers' Boards, it argued that this "demanded a pronouncement that would autonomously determine whether it was in order to apply the sanction called for based on the facts established by the Court of Law." It mentioned that this "was also required by domestic law, pursuant to the provisions of article 24.13 of the Constitution then in force, which established the duty to state the reasoning for resolutions of the public authorities that affect persons as a guarantee of the right to due process." It also argued that the reasoning was absent from the decision taken on Mr. Flor Freire's application for amparo by the two courts that intervened in the proceeding.²³⁵

161. The **representative** argued that "Mr. Flor Freire never had an independent and impartial judge to decide on whether his rights had been violated." According to the representative, owing to the hierarchic nature of the military institution, "the inappropriately named 'Judge of Law'" did not meet the conditions of independence and impartiality required by the Convention. He argued that "owing to the discriminatory practices that existed, [Mr. Flor Freire] was condemned [...] from the very moment in which [...] it was decided to open the disciplinary proceeding." On that basis, he argued a violation of the right to judicial guarantees recognized in Article 8 of the Convention.

162. The **State** indicated that it had not been proved that "the judge who decided the summary inquiry had been subject to internal pressures within the Army"; also, it had "not been proved that any other state function had influenced the judge; therefore, this dispensed with the arguments of violation of the principle of independence." According to the State, the two elements required to establish the existence of impartiality had not been proved either, namely: (i) the anticipated knowledge or appraisal of the matter, and (ii) an interest in the situation to be decided. It indicated that the military disciplinary procedure is conducted in compliance with all the guarantees of due process. On this point, the State argued that, "when the events occurred, the presumed victim belonged and was an active member of the Ecuadorian Ground Forces, and for this reason he was subject to a special jurisdiction pursuant to article 187 of the Ecuadorian Constitution and to the provisions of the Law on Armed Forced Personnel; thus, his competent judge corresponded to the military jurisdiction." In addition, regarding the processing of the summary inquiry, the State indicated that Mr. Flor Freire was heard by different military authorities, and by the presentation of different reports relating to the determination of the facts. It also argued that the principle of immediacy had been guaranteed because his unsworn statement was given before the Court of the Fourth Military Zone, in the presence of his legal counsel, among other actions to which he had access during the proceedings.

A.2 Considerations of the Court

163. Mr. Flor Freire was subject to a disciplinary summary inquiry procedure as a result of the events that occurred on November 19, 2000 (*supra* paras. 62 to 82). This procedure had three stages. The first investigation stage, conducted by a military criminal judge, when all the necessary evidence was gathered to establish the circumstances and any possible disciplinary responsibility. Then, an

²³⁵ In its Merits Report, the Commission related the alleged violation of the obligation to provide reasoning established in Article 8(1) of the Convention to Article 2 (Domestic Legal Effects) of this instrument. However, it did not provide specific arguments in this regard or reiterate this claim in its final written observations. Therefore, in this judgment, the Court will not refer to an alleged violation of Article 2 of the Convention in relation to the obligation to provide reasoning.

intermediary stage when the military prosecutor issued an opinion, following which the military criminal judge prepared a draft decision. This was followed by the stage when the decision is taken, when the Zone Commander acted as Judge of Law and issued the decision, which assessed the evidence gathered at the investigation stage, established the facts and determined the disciplinary responsibility of the officer under investigation. In cases such as this one, when an officer is put on paid leave prior to his discharge, the procedure was referred to the Officers' Boards, which characterized the misconduct and took the final decision on whether the respective officer was left on paid leave or discharged (*supra* paras. 64 to 67).

164. This Court has indicated that the application of the guarantees contained in Article 8 of the American Convention, although entitled judicial guarantees, are not limited to judicial remedies *stricto sensu*, but rather to the series of requirements that should be observed in procedural instances to ensure that the individual is able to defend his rights adequately *vis-à-vis* any type of act of the State that could infringe them. In other words, any act or omission of the state organs in the course of proceedings, whether these are punitive administrative, disciplinary, or jurisdictional, must respect due process of law.²³⁶

165. The Court has also established that, pursuant to Article 8(1) of the Convention, when determining an individual's rights or obligations of a criminal, civil, labor, financial or any other nature, it is necessary to observe "the due guarantees" that, whatsoever the respective procedure, ensure the right to due process, and the failure to comply with one of these guarantees results in a violation of this article of the Convention.²³⁷ Moreover, the Court has indicated that the guarantees established in Article 8(1) of the Convention are also applicable if a non-judicial authority adopts decisions that determine the rights of an individual,²³⁸ taking into account that such an authority cannot be required to comply with the guarantees demanded of a jurisdictional organ, but must comply with those designed to ensure that the decision taken is not arbitrary.²³⁹

166. The Court considers that, in the case of a disciplinary procedure, the organs of military discipline that intervened in the procedure against Mr. Flor Freire were required to take decisions based on full respect for the guarantees of due process established in Article 8(1) of the American Convention.

167. In the instant case, the Commission and the representative alleged two violations of judicial guarantees: (a) a presumed lack of impartiality of the Judge of Law in the summary inquiry procedure, and (b) a presumed violation of the duty to provide reasoning, in both the decisions of the Officers Boards, during the summary inquiry procedure, and those of the Sixth Civil Court and of the Constitutional Court, in the context of the amparo proceeding. The Court will now examine these presumed violations, taking into account the considerations presented.

A.2.a The guarantee of impartiality

168. Impartiality requires that the official with competence to intervene in a specific dispute with decision-making authority approach the facts of the case without any subjective prejudice and, also, offering sufficient guarantees of an objective nature to eliminate any doubt that the defendant or the community might have about an absence of impartiality.²⁴⁰ Personal or subjective impartiality is

²³⁶ Cf. *Case of the Constitutional Court v. Peru. Merits, reparations and costs*. Judgment of January 31, 2001. Series C No. 71, para. 69, and *Case of Maldonado Ordoñez v. Guatemala, supra*, para. 71.

²³⁷ Cf. *Case of Claude Reyes et al. v. Chile. Merits, reparations and costs*. Judgment of September 19, 2006. Series C No. 151, para. 117, and *Case of Maldonado Ordoñez v. Guatemala, supra*, para. 72.

²³⁸ Cf. *Case of the Constitutional Court v. Peru, supra*, para. 71, and *Case of Maldonado Ordoñez v. Guatemala, supra*, para. 23.

²³⁹ Cf. *Case of Claude Reyes et al. v. Chile, supra*, para. 119, and *Case of López Lone et al. v. Honduras, supra*, para. 207.

²⁴⁰ *Mutatis Mutandis, Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, supra*, para. 56, and

presumed unless there is proof to the contrary.²⁴¹ The so-called objective impartiality consists in determining whether the official queried has provided convincing evidence that excludes any legitimate or well-grounded suspicion of his partiality.²⁴² This is so because whoever decides on a person's rights must appear to act without any influences, inducements, pressures, threats or interferences, direct or indirect,²⁴³ but only and exclusively pursuant to – and on the basis of – the law.²⁴⁴

169. The Court has recognized that the guarantee of impartiality is applicable to administrative proceedings, pursuant to Article 8(1) of the Convention. In the instant case, the Commander of the Fourth Military Zone, who was not a judicial official, was the appropriate person to act as "Judge of Law" in the disciplinary procedure against Mr. Flor Freire (*supra* paras. 63, 66, 71 and 72). Based on the arguments of the parties and of the Commission, the Court must examine the actions of the Judge of Law in the summary inquiry procedure in order to determine whether there was a lack of impartiality in the determination of the disciplinary responsibility of Mr. Flor Freire.

170. The Court notes that the Commander of the Fourth Military Zone was Mr. Flor Freire's superior officer. As the superior officer, he had command authority over the position and functions of the presumed victim within the hierarchy of the Ecuadorian Ground Forces. In addition, according to the norms that regulated the disciplinary summary inquiry procedure, it corresponded to the Zone Commander to act as Judge of Law in the said procedure and to decide on the possible disciplinary responsibility of the officers under his command (*supra* paras. 63 and 66).

171. In his capacity as Mr. Flor Freire's superior, on November 20, 2000, one day after the incident and before the disciplinary procedure commenced, the Commander of the Fourth Military Zone ordered Mr. Flor Freire "to surrender his functions and responsibilities" (*supra* para. 68). On November 22, that year, he referred the incident to the First Criminal Court of the Fourth Military Zone, in a memorandum in which he asked the First Criminal Court to open the summary inquiry procedure (*supra* paras. 62 and 69). Then, on December 13, 2000, the same Commander of the Fourth Military Zone requested Mr. Flor Freire "to surrender his responsibilities and to present himself at the HD-IV to provide his services," and also to give up "the room [...] in the residence for unmarried officers" that he occupied (*supra* para. 70). All these actions by the Commander of the Fourth Military Zone were taken before the conclusion of the investigation stage of the summary inquiry procedure into the events that occurred in the Amazonas Military Base on November 19, 2000 (*supra* paras. 56, 57 and 71).

172. The case file contains no justification or grounds for these actions by the Commander of the Fourth Military Zone. The only document in the case file that precedes the said decisions is the preliminary report of the Intelligence Group of the Amazonas Fourth Command, which concluded, *inter alia*, that Mr. Flor Freire had been "seen in his room" having sexual relations with the soldier

Case of *López Lone et al. v. Honduras*, *supra*, para. 233.

²⁴¹ *Mutatis mutandis*, Case of *Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, *supra*, para. 56, and Case of *López Lone et al. v. Honduras*, *supra*, para. 233.

²⁴² *Mutatis mutandis*, Case of *Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, *supra*, para. 56, and Case of *López Lone et al. v. Honduras*, *supra*, para. 233, citing: ECHR, *Case of Piersack v. Belgium*, No. 8692/79. Judgment of October 1, 1982, and *Case of De Cubber v. Belgium*, No. 9186/80. Judgment of October 26, 1984.

²⁴³ Principle 2 of the United Nations Basic Principles on the Independence of the Judiciary (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from August 26 to September 6, 1985, and endorsed by General Assembly resolutions 40/32 of November 29, 1985, and 40/146 of December 13, 1985).

²⁴⁴ *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, *supra*, para. 56, and *Case of Duque v. Colombia*, *supra*, para. 162.

and recommended continuing the investigations "to verify [illegible] any sexual deviations that Lieutenant Flor, Homer might reveal."²⁴⁵

173. Despite this, in answer to a specific question by the President of the Court,²⁴⁶ the State explained that the Commander of the Fourth Military Zone asked Mr. Flor Freire to surrender his functions and responsibilities on November 20, 2000, before the start or the conclusion of the summary inquiry procedure, "based on his command authority" under article 32 of the Law on Armed Forces Personnel²⁴⁷ and the hierarchy of the military institution.²⁴⁸ According to the State, these actions taken by the Commander of the Fourth Military Zone were not part of the summary inquiry procedure, and should not be understood as a sanction, "because the presumed victim continued to have the rank of lieutenant and the functions that corresponded to this rank; that is, Mr. Flor was an active member of the Armed Forces, received his salary and the emoluments attached to his rank, as any other soldier with his rank." Ecuador also stressed that the administrative act that separated him from his functions in the Armed Forces was "the discharge."²⁴⁹

174. Furthermore, regarding the requirement issued by the Commander of the Fourth Military Zone on December 13, 2000, that Mr. Flor Freire "surrender his responsibilities and present himself at the HD-IV to provide his services," the State indicated that, since he was a members of an institution with a hierarchic structure, Mr. Flor Freire "was subordinated to the orders of his superior officer, in this case the Commander of the Fourth Military Zona who, based on his authority, required Mr. Flor to surrender certain responsibilities, which did not alter his rank or military status." According to the State, "[t]his circumstance should in no way be seen as a sanction prior to the summary inquiry procedure, because it bore no relationship to the disciplinary procedure."²⁵⁰

175. The Court understands that the surrender of functions, responsibilities and position did not constitute a disciplinary sanction, and were not the reason why Mr. Flor Freire was separated from the Ecuadorian Armed Forces.²⁵¹ As indicated by the State and revealed by the pertinent internal regulations, these actions were not included in the regulations as part of the disciplinary summary inquiry procedure. However, the Court underlines that the decision to separate the presumed victim from his usual functions was taken by the Commander of the Fourth Military Zone, in his capacity as Mr. Flor Freire's superior officer, in response to the events that took place on November 19, 2000. Therefore, although these actions did not form part of the disciplinary procedure, they constituted a prejudging of the events by the Commander of the Fourth Military Zone.

²⁴⁵ Preliminary report presented by GIM-4 "Amazonas" to the Commander of the Fourth Military Zone on the incident in Lieutenant Homero Flor's room on November 19, 2000 (evidence file, folios 1298 and 1299).

²⁴⁶ Among the questions posed to the State in order to obtain helpful information, it was specifically asked the following: (i) "On November 20, 2000, Mr. Flor Freire was separated from his functions in the Ecuadorian Ground Forces by the Commander of the Fourth Military Zone, Amazonas Division (by Memorandum No. 200159-IV-DE-1 provided as part of the file of the procedure before the Commission): What were the legal grounds or the norm on which this initial action of the Commander of the Fourth Military Zone was based? Was this the normal procedure, even before the conclusion of the summary inquiry procedure?" and (ii) What were the legal grounds for the Commander of the Fourth Military Zone, Amazonas Division, to require Mr. Flor Freire "to surrender his responsibilities and to present himself at the HD-IV to provide his services," on December 13, 2000 (in Memorandum 2000187-IV-DE-1, provided as annex 4 to the Merits Report of the Inter-American Commission), since the summary inquiry procedure against him had not yet been concluded? Was this the normal procedure?"

²⁴⁷ This article established that "[c]ommand is the power that allows a soldier to exercise authority over his junior officers pursuant to the norms established in the pertinent laws and regulations." 1991 Law on Armed Forces Personnel (evidence file, folio 2663).

²⁴⁸ Cf. Brief of the State of May 30, 2016, in response to the request for helpful information (merits file, folio 976).

²⁴⁹ Brief of the State of May 30, 2016, in response to the request for helpful information (merits file, folios 976 and 977)

²⁵⁰ Brief of the State of May 30, 2016, in response to the request for helpful information (merits file, folios 977 and 978)

²⁵¹ According to the State, Mr. Flor Freire remained on active service until January 18, 2002, when his discharge went into effect as a result of the final decision of the Senior Officers Board (*supra* para. 100).

176. To the extent that the said superior officer subsequently acted as Judge of Law in the disciplinary procedure, these previous actions were relevant to evaluate the impartiality of the Commander of the Fourth Military Zone when determining the disciplinary responsibility of Mr. Flor Freire in the summary inquiry procedure.

177. The State argued that the Commander of the Fourth Military Zone, acting as Judge of Law, "was impartial because he approached the facts objectively and he also had the support of legal counsel during the first two procedural stages who also had neither a subjective or objective interest in the case." However, even though the investigation was conducted by a military investigating judge, in accordance with the norms that regulated the summary inquiry procedure, the decision-making part of this procedure corresponded to the Zone Commander (*supra* para. 63). The Judge of Law was not bound by the opinion of the investigating judge and could diverge from the draft decision that the latter forwarded to him (*supra* para. 66). Therefore, ultimately, the decision corresponded to the Judge of Law. It was the decision of the Commander of the Fourth Military Zone, in his capacity as Judge of Law in the summary inquiry procedure, that established the facts based on the evidence collected by the investigating judge, and determined the disciplinary responsibility and the norms that were violated (*supra* paras. 66 and 72 to 77).

178. The State also argued that "the Judge of Law had no influence on the discharge"; that his decision "was referred to the corresponding regulatory Board," which "had no prior knowledge of the events." However, although it corresponded to the Officers' Boards to order the placing on paid leave or the discharge, the decision was taken based on the facts and the disciplinary responsibility previously established by the Judge of Law, who, in the case of Mr. Flor Freire, was the Commander of the Fourth Military Zone. Therefore, contrary to the State's assertion, an absence of impartiality in the Judge of Law did infringe this guarantee in the disciplinary procedure.

179. Based on the foregoing, it cannot be affirmed that the Commander of the Fourth Military Zone approached the facts without any subjective prejudice in relation to the events. To the contrary, when the investigative stage culminated and he had to rule on the disciplinary responsibility of Mr. Flor Freire, he had already acted in response to the events of November 19 in his capacity as Mr. Flor Freire's commanding officer, separately from and independently of the disciplinary procedure. The Court considers that those actions were sufficiently significant to jeopardize his subsequent impartiality. Moreover, neither the case file, nor the procedure or the State's arguments reveal that sufficient objective guarantees of his impartiality were provided. In addition, the decisions of the Officers' Boards do not reveal that they made a new and objective analysis of the facts, based on which it could be considered that the absence of impartiality of the Court of Law had been rectified.

180. The Court notes that the mere fact that Mr. Flor Freire's superior officer was the person who exercised disciplinary powers over him is not contrary to the Convention. In certain circumstances, and particularly in the military sphere, it is logical and reasonable. The problem does not lie in the design of the norms under which Mr. Flor Freire's superior officer was the person in charge of establishing his disciplinary responsibility. It is also not contrary to the Convention that, in the context of a disciplinary procedure, the officer is suspended from his functions as a precautionary measure until a decision is taken based on the applicable regulations. The problem is that, in the specific case of Mr. Flor Freire, the said superior officer acted and took decisions, exercising his command authority, prior to and outside the disciplinary procedure, in relation to facts that, subsequently, he was called on to adjudicate in the said procedure. Therefore, it is not possible to affirm that his approach to the facts, in his capacity as the disciplinary judge was free of any preconceived idea of what had happened so that he could form an opinion of the events based only on the evidence and arguments submitted during the procedure.

181. Consequently, the Court finds that the Commander of the Fourth Military Zone did not meet either the subjective or the objective criteria of impartiality in order to act as Judge of Law in Mr. Flor Freire's summary inquiry procedure which culminated in establishing his disciplinary responsibility. Therefore, the State violated the guarantee of impartiality recognized in Article 8(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Homero Flor Freire.

A.2.b The obligation to provide the reasoning

182. The reasoning is the exteriorization of the reasoned justification that allows a conclusion to be reached.²⁵² The duty to provide the reasoning for decisions is a guarantee related to the proper administration of justice, that ensures that the citizen has the right to be tried for reasons established by law, while providing credibility to judicial decisions in a democratic society.²⁵³ Consequently, decisions adopted by the domestic organs of the States that may affect human rights must be justified, to the contrary such decisions would be arbitrary.²⁵⁴ The reasoning of a ruling and certain administrative acts should reveal the facts, reasons and norms on which the organ that issued them based itself in order to take its decision so that any indication of arbitrariness can be dismissed, while proving to the parties that they have been heard during the proceedings.²⁵⁵ In addition, it should show that the arguments of the parties have been duly taken into account and that all the evidence has been examined.²⁵⁶ Consequently, the Court has concluded that the obligation to provide the reasoning for decisions is one of the necessary "guarantees" of the due process of law included in Article 8(1).²⁵⁷

183. The Commission and the representative argued that no reasoning had been provided in: (i) the decisions of the Junior and Senior Officers Boards, which characterized the misconduct committed and accepted the recommendation of the Court of Law that the punishment should be discharge from the service, as well as in (ii) the decisions of the Sixth Civil Court and the Constitutional Court in the context of the amparo proceeding. The Court will refer, first, to the decisions of the Officers' Boards, and then, as pertinent, to the decisions in the amparo proceeding.

184. In the case of disciplinary sanctions, the requirement of justification is greater than in any other administrative act, owing to the purpose of disciplinary control (*supra* para. 150) and, consequently, it is necessary to analyze the gravity of the conduct and the proportionality of the sanction.²⁵⁸ In the disciplinary sphere, it is essential that the act that constituted an offense is indicated precisely and that arguments are developed that allow it to be concluded that the conduct of which the person concerned is accused is sufficiently important to justify his separation from his post.²⁵⁹

²⁵² Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 107, and *Case of the Landaeta Mejías Brothers et al. v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of August 27, 2014. Series C No. 281, footnote 313.

²⁵³ Cf. *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, supra*, para. 77, and *Case of Maldonado Ordoñez v. Guatemala, supra*, para. 87.

²⁵⁴ Cf. *Case of Yatama v. Nicaragua, supra*, para. 152, and *Case of Maldonado Ordoñez v. Guatemala, supra*, para. 87.

²⁵⁵ Cf. *Case of Claude Reyes et al. v. Chile, supra*, para. 122, and *Case of Maldonado Ordoñez v. Guatemala, supra*, para. 87.

²⁵⁶ Cf. *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, supra*, para. 78, and *Case of Chocrón Chocrón v. Venezuela, supra*, para. 118.

²⁵⁷ Cf. *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela, supra*, para. 78, and *Case of Maldonado Ordoñez v. Guatemala, supra*, para. 87.

²⁵⁸ *Mutatis mutandis, Case of Chocrón Chocrón v. Venezuela, supra*, para. 120, and *Case of López Lone et al. v. Honduras, supra*, para. 267.

²⁵⁹ *Mutatis mutandis, Case of Chocrón Chocrón v. Venezuela, supra*, para. 120, and *Case of López Lone et al. v. Honduras, supra*, para. 267.

185. In addition, in the case of supposed disciplinary offenses, the reasons why the norm or norms in question have been violated must be indicated expressly, precisely, clearly and without ambiguity, to allow the person concerned to exercise his right of defense fully,²⁶⁰ when appealing the decision. The Court underscores that the absence of adequate reasoning in disciplinary decisions may have a direct effect on the ability of the victims to exercise an adequate defense in any subsequent appeals.

186. That said, the Court holds that, for the purposes of the guarantees established in Article 8(1) of the Convention, the proceedings must be examined as a whole; that is, analyzing all their stages, and not by an isolated evaluation of a single deficient phase, unless its effects permeate the whole proceedings and were not rectified at a subsequent stage. The Court has also recognized that the scope of the guarantees established in Article 8(1) of the Convention, such as the obligation to provide the reasoning, will depend on the nature of the proceedings and the subject matter on which rulings are made.²⁶¹ The obligation to provide the reasoning does not require a detailed response to each and every argument of the parties,²⁶² but rather a response to the main and essential arguments on the purpose of the dispute that guarantees to the parties that they have been heard during the proceedings.

187. Regarding the facts of this case, the Court notes that the decisions of the Officers' Boards were notified to Mr. Flor Freire by memorandums containing the decision (*supra* paras. 79 and 82). The text of the decision of the Junior Officers Board consists exclusively of the following:

By decision of the Junior Officers Board of the Ground Forces, the present memorandum informs you, Lieutenant Flor Freire, that in the session held on Thursday, May 3 of this year, this body decided: That, lacking legal grounds that would permit a contrary ruling, the recommendation of the Court of Law of the Fourth Military Zone, issued in the decision in Summary inquiry No. 20-2000-IV-DE-JM-1 is accepted; that is, that you shall be placed on paid leave prior to your discharge from active service with the Ground Forces, in application of the provisions of art.76(i) of the Law on Armed Forces Personnel in force²⁶³ (*italics and underlining added*).

188. Similarly, the text of the decision of the Senior Officers Board consists exclusively of the following:

This memorandum is to inform you, Lieutenant Flor Freire, that the Senior Officers Board of the Ground Forces, in the session held on July 18, 2001, in application of art. 200(c) (amended) of the Law on Armed Forces Personnel, in conformity with art. 7 of the rules of procedure for Junior and Senior Officers Boards of the Armed Forces, DECIDES, that rejecting the appeal filed, lacking legal grounds that would permit a contrary ruling, it confirms all aspects of the decision adopted by the Junior Officers Board of the Ground Forces; that is, it accepts the recommendation of the Court of Law of the Fourth Military Zone, issued by the decision in Summary inquiry No. 20-2000-IV-DE-JM-1, that the misconduct be confirmed and you be placed on paid leave, in application of the provisions of art. 76(i) of the Law on Armed Forces Personnel in force²⁶⁴ (*italics and underlining added*).

²⁶⁰ Cf. *Case of Chocrón Chocrón v. Venezuela*, *supra*, para. 121, and *mutatis mutandis*, *Case of Barreto Leiva v. Venezuela*. Merits, reparations and costs. Judgment of November 17, 2009. Series C No. 206, para. 28.

²⁶¹ Cf. *Case of Maldonado Ordoñez v. Guatemala*, *supra*, paras. 75 and 80.

²⁶² Cf. *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, *supra*, para. 90, and *Case of Mémoli v. Argentina*. Preliminary objections, merits, reparations and costs. Judgment of August 22, 2013. Series C No. 265, para. 40.

²⁶³ Memorandum No. 2001-06-COSB of the Junior Officers Board of the Ground Forces of May 7, 2001 (evidence file, folio 21).

²⁶⁴ Memorandum No. 210090-COSFT of July 18, 2001 (evidence file, folio 28). This decision was notified to Mr. Flor Freire that same day.

189. These decisions were adopted by the respective Boards in sessions held on May 3 and July 18, 2001, respectively; minutes were kept for the two meetings²⁶⁵ and the decision was taken based on a report prepared by Claims and Miscellaneous Affairs Committees of each Board, pursuant to articles 22, 23 and 24 of the rules of procedure for the Junior and Senior Officers Boards of the Armed Forces.²⁶⁶ The Commission and the representative have argued that Mr. Flor Freire was not notified of the complete decisions taken by these bodies or their justification, but merely received memorandums that contained the decision. According to information provided by the State as helpful evidence, the minutes or decisions established in Chapter IV of the Rules of procedure for the Junior and Senior Officers Boards of the Armed Forces “do not form part of the summary inquiry”, because they are considered to be “purely administrative procedures that deal with the military and professional situation of the officers.” The decisions adopted are notified by memorandums that set out the decision, as in the case on May 7 and on July 18, 2001 (*supra* paras. 79 and 82). However, Ecuador indicated that “when [an officer] requests this, personally or through his lawyer, certified copies are handed over of the part corresponding to them [in the minutes of the Boards, but] in this case, there is no information that Homero Flor requested this documentation”;²⁶⁷ also, there is no evidence of this in the file of the instant case.

190. That said, this Court points out that both decisions refer to and cite the decision of the Court of Law, “lacking legal grounds that would permit a contrary ruling.” In his ruling, the Judge of Law examined the evidence, established the facts and offered a justification for the application of the norms cited to those facts (*supra* paras. 72 to 77). Also, contrary to the arguments of the Commission and the representative, this ruling did respond to the presumed victims’ allegation that the sanction was unconstitutional owing to the decriminalization of the offense of homosexuality in Ecuador. In this regard, it indicated the “special nature” of military regulations (*supra* para. 75). The fact that the presumed victim did not find the justification satisfactory does not mean that the ruling lacked a reasoning, notwithstanding the violations of the principle of equality before the law and the prohibition of discrimination already established (*supra* Chapter VIII-1). Consequently, the Court finds that the decision of the Court of Law was sufficiently reasoned.

191. The Court recalls that the same guarantees cannot be required in the disciplinary sphere as in a judicial proceeding (*supra* para. 165). Although the duty to provide reasoning is a guarantee that is due in the case of the former (*supra* para. 182), the Court considers that its scope will depend considerably on the matter being examined. The level of reasoning that can be required in a disciplinary matter is different from that required in a criminal matter owing to the nature of the proceedings and the facts that each must decide, as well as due to the greater speed that should characterize disciplinary procedures, the standard of evidence required in each type of proceedings, the rights involved, and the severity of the punishment (*supra* para. 186).

192. In the instant case, the Court considers that the reference to, and the adoption of, the factual and legal considerations of the Court of Law in the decisions of the Junior Officers Board and the Senior Officers Board complies with the guarantee of sufficient reasoning required by the American Convention. In the briefs of the appeal before both Boards, the presumed victim did not submit any additional or essential argument that required a specific response, separate from the decision of the Court of Law.²⁶⁸ Since they did not diverge from the reasoning of the Court of Law, the two Boards

²⁶⁵ Cf. Title IV, Chapter IV of the 1991 Rules of procedure for the Junior and Senior Officers Boards of the Armed Forces (merits file, folios 702 and 703).

²⁶⁶ Cf. 1991 Rules of procedure for the Junior and Senior Army Officers Boards (merits file, folio 699).

²⁶⁷ Communication No. 16-E1-KO-t-COSBFT-148 of June 7, 2016, of the Secretary of the Junior Officers Board addressed to the Commander General of the Armed Forces (evidence file, folio 3515), and *cf.* article 42 of the 1991 Rules of procedure for the Junior and Senior Officers Boards of the Armed Forces (merits file, folios 700 and 701).

²⁶⁸ Cf. Appeal filed by Mr. Flor Freire before the Judge of Law of the Fourth Military Zone on January 18, 2001 (evidence

adopted its considerations as their own. Consequently, the presumed victim's exercise of his right of defense in the case of the two administrative acts was guaranteed by the considerations of the Court of Law.

193. Therefore, the Court concludes that the absence of a new analysis of the facts and the applicable law in the decisions of the Junior and Senior Officers Boards did not constitute a violation of the obligation to provide the reasoning, insofar as those bodies adopted the factual and legal considerations of the Court of Law as their own. Consequently, the State is not responsible for violating Article 8(1) of the Convention, in relation to Article 1(1) of this instrument, for this reason.

194. Lastly, regarding the alleged absence of justification for the decisions in the context of the amparo proceeding, the Court notes that these arguments are substantially identical to the arguments on the presumed ineffectiveness of that remedy. Consequently, the arguments will be examined in the following section when deciding on the alleged violation of Article 25 of the American Convention.

B. Right to an effective remedy

B.1 Arguments of the parties and of the Commission

195. The **Commission** argued that neither the decision of the Sixth Civil Court nor that of the Constitutional Court included a ruling on the merits of the matters submitted by Mr. Flor Freire – that is, the possible breach of constitutional rights. Consequently, it argued that the application for amparo did not constitute an effective mechanism. The Commission asked the Court to declare that Article 25 of the Convention had been violated considering that “the failure to state the reasoning in the decisions on the application for amparo filed by Homero Flor kept him from having effective access to judicial protection that would protect the rights affected by the action of the military authorities aimed at punishing the alleged victim's perceived sexual orientation.”

196. The **representative** argued that the Sixth Civil Court of Pichincha and the Constitutional Court had decided not to rule on the merits of the case based on the argument that the matter was under the military jurisdiction and that, presumably, the Judge of Law had not committed any unlawful act. According to the representative, “the State failed in its obligation to provide an effective remedy to protect the rights established in both the Constitution and the law.” He indicated that, although Mr. Flor Freire was able to file a remedy, this has no effect. According to the representative, in this case, “no authority of a judicial nature ruled on whether or not Mr. Flor's rights had been violated,” so that there had not been a true control of conventionality and Mr. Flor Freire did not have an adequate and effective remedy to protect him from the infringement of his rights, in violation of Article 25(1) of the Convention. Furthermore, the representative argued that, for the same reasons, the State had also failed to comply with the obligation derived from Article 2 of the Convention because it had not adopted the “measures of an administrative nature to avoid the continuation of the legal effects [of article 117 of the Military Discipline Regulations].” He indicated that Mr. Flor Freire had filed a series of requests with the national authorities to obtain adequate protection of his rights, but “he never obtained a favorable result and, to the contrary, [...] all the authorities have preferred to uphold the legal effects of the ruling on his discharge from the ranks of the military.”

197. The **State** argued that both the application for constitutional amparo and the full contentious administrative jurisdiction remedy were available to the presumed victim. However, the first remedy was filed incorrectly, and the second was not filed before the domestic courts. It indicated that the application for amparo was not adequate in this case; therefore, the judges, in compliance with

file, folio 1486), and text of the statement made by Mr. Flor Freire on July 17, 2001, before the Senior Officers Board (evidence file, folios 2155 to 2161).

domestic requirements on jurisdiction, did not rule on the substantive merits and had to reject the application for amparo as inadmissible. Ecuador also indicated that, even though the application for amparo was not appropriate, the judicial authorities had decided it within a reasonable time and pursuant to the laws then in force. Added to this, it argued that “the action for constitutional amparo allowed the applicant to have extensive participation by submitting briefs and probative documents, and also to take part in the public hearing held by the Sixth Civil Court of Pichincha, which shows that Mr. Flor was always accorded due legal process.” According to the State, “the Inter-American Commission [...] failed to make a detailed analysis of this international obligation and merely indicated the presumed existence of a lack of reasoning in the decisions on the application for constitutional amparo, without considering that the rulings issued responded to the fact that the presumed victim had erroneously filed an action that was inappropriate, and failed to refer to the analysis of the contentious administrative proceeding that should have been filed and meets inter-American standards.”

B.2 Considerations of the Court

198. The Court has indicated that Article 25(1) of the Convention establishes the obligation of the States Parties to guarantee, to all persons subject to their jurisdiction, a simple, prompt and effective remedy before a competent judge or court. The Court recalls its consistent case law establishing that this remedy must be adequate and effective.²⁶⁹ Regarding the effectiveness of the remedy, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.²⁷⁰ Thus, the proceedings must be addressed at materializing the protection of the right recognized in the judicial ruling by the appropriate application of this ruling,²⁷¹

199. The Court has indicated that, pursuant to Article 25 of the Convention, it is possible to identify two specific obligations of the State. The first, to establish by law and ensure due application of effective remedies before the competent authorities that protect everyone subject to their jurisdiction against acts that violate their fundamental rights or that result in the determination of their rights and obligations. The second, to guarantee the means of executing the respective decisions and final judgments issued by those competent authorities in order to provide effective protection to the rights declared or recognized.²⁷² The right established in Article 25 is closely linked to the general obligation of Article 1(1) of the Convention by attributing functions of protection to the domestic law of the States Parties.²⁷³ Consequently, the State is responsible not only for designing and enacting an effective remedy, but also for ensuring the appropriate application of this remedy by its judicial authorities.²⁷⁴

²⁶⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 63, and *Case of Duque v. Colombia*, *supra*, para. 35.

²⁷⁰ Cf. *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24, and *Case of Duque v. Colombia*, *supra*, para. 149.

²⁷¹ Cf. *Case of Baena Ricardo et al. v. Panama. Jurisdiction*. Judgment of November 28, 2003. Series C No. 104, para. 73, and *Case of Furlan and family v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 209.

²⁷² Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 237, and *Case of Maldonado Ordoñez v. Guatemala*, *supra*, para. 110.

²⁷³ Cf. *Case of Castillo Páez v. Peru. Merits*. Judgment of November 3, 1997. Series C No. 34, para. 83, and *Case of Maldonado Ordoñez v. Guatemala*, *supra*, para. 110.

²⁷⁴ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, *supra*, para. 237, and *Case of Maldonado Ordoñez v. Guatemala*, *supra*, para. 110.

200. In the instant case, the Commission and the representative argued the absence of an effective remedy because the hearing on the application for amparo did not respond to the substantive arguments of Mr. Flor Freire. The State argued principally that the application for amparo was not the appropriate remedy against the decisions of the summary inquiry procedure; rather, a full contentious administrative jurisdiction remedy should have been filed and the presumed victim did not do this. However, in its final written arguments, Ecuador argued that both remedies were available to Mr. Flor Freire, and that the application for amparo had been filed incorrectly, while it reiterated that the contentious administrative remedy had never been filed. In this regard, the Court deems it pertinent to rule, first, on the alleged availability of the full contentious administrative jurisdiction remedy, its appropriateness and effectiveness, and will then rule, as pertinent, on the effectiveness of the remedy of amparo.

201. In this regard, the Law on the Contentious Administrative Jurisdiction establishes that:

Art. 1. The contentious administrative remedy may be filed by natural or legal persons against the regulations, acts and decisions of the Public Administration or of semi-public legal persons that are final²⁷⁵ and violate a direct right or interest of the plaintiff. [...]

Art. 3. There are two types of contentious administrative remedy: of full jurisdiction or subjective, and of annulment or objective. The full jurisdiction or subjective remedy protects a subjective right of the plaintiff, presumably denied, ignored or not recognized, totally or partially, by the administrative act in question.²⁷⁶ [...]

202. The representative has argued that this remedy was not admissible in the case of administrative acts of the military authorities based on article 6(c) of the Law on the Contentious Administrative Jurisdiction. This establishes that:

The following do not correspond to the contentious administrative jurisdiction: [...] (c) The matters that arise in relation to political acts of the Government, such as those that affect the defense of national territory, international relations, internal security of the State and the organization of the security services, without prejudice to any compensation that might be admissible, the determination of which corresponds to the contentious administrative jurisdiction. [...] ²⁷⁷ (*italics and underlining added*).

203. The representative referred to a 1994 jurisprudential opinion of the Ecuadorian Supreme Court²⁷⁸ (*supra* para. 25). However, Ecuador has indicated repeatedly that the decision to discharge Mr. Flor Freire, "constituted an administrative act of sanction and not an act that affected the

²⁷⁵ Article 5 of this law establishes that: "Administrative decisions are final when they are not subject to any administrative remedy, whether such decision are definitive or a mere formality, if they decide, directly or indirectly, the merits of the matter, so that they end it or make its continuation impossible [...]." Law on the Contentious Administrative Jurisdiction. Published in Official Record No. 338 of March 18, 1968 (hereinafter "1968 Law on the Contentious Administrative Jurisdiction") (evidence file, folio 2640).

²⁷⁶ 1968 Law on the Contentious Administrative Jurisdiction (evidence file, folio 2640). According to the joint opinion of Leonardo Jaramillo and Fernando Casado, based on article 3 of the Law on the Contentious Administrative Jurisdiction, "all decisions taken in the sphere of the military disciplinary regime may be contested by this remedy before the contentious administrative jurisdiction if the person subject to a disciplinary sanction wishes." Expert opinion of Leonardo Jaramillo and Fernando Casado, provided by affidavit dated February 2, 2016 (merits file, folio 573).

²⁷⁷ 1968 Law on the Contentious Administrative Jurisdiction (evidence file, folio 2641).

²⁷⁸ In this decision, the Administrative Chamber of the Supreme Court indicated that: "the contested administrative act containing the refusal of the Minister of Defense to consider the party's request favorably, relates to the organization of the Armed Forces, components of the security services, and pursuant to art. 6(c) of the Contentious Administrative Law, among others, matters that arise in relation to the organization of the security services do not correspond to the contentious administrative jurisdiction. Consequently, the remedy of cassation is rejected owing to lack of legal grounds." Ruling of March 11, 1994, of the Administrative Chamber of the Supreme Court (evidence file, folios 421 to 26), and brief of the representative of April 12, 2004 (evidence file, folio 414).

structure or the organization of the security services." The Court recalls that, even though at the admissibility stage before the Commission the State did not prove that this remedy was available or that it was appropriate with regard to the violations alleged by Mr. Flor Freire (*supra* paras. 25 and 26), before the Court, both the State and the representative have provided specific evidence that relates to this dispute. In this regard, contradictory expert opinions have been submitted on the interpretation of the said article 6(c) of the Law on the Contentious Administrative Jurisdiction. On the one hand, the joint opinion of Leonardo Jaramillo and Fernando Casado, provided by the State, indicates that "a reading of the text of the article reveals that it does not expressly prevent filing judicial actions using the contentious administrative jurisdiction."²⁷⁹ On the other hand, expert witness Ramiro Ávila, offered by the representative, indicated at the public hearing that this article prevented the contentious administrative jurisdiction from reviewing "matters that arise in relation to the organization of the security services," based on "a 1994 ruling of the Supreme Court of Justice in the case of an Admiral, [... who] claimed recognition of seniority when military justice had denied him this recognition; it was a contentious administrative matter and the Supreme Court of Justice established that military matters or those relating to article 6(c) could not be heard by the contentious administrative justice; rather, the military disciplinary jurisdiction had total autonomy."²⁸⁰

204. Owing to this dispute on the interpretation of a domestic law, Ecuador provided this Court with information on several cases admitted by the contentious administrative jurisdiction that, according to the State, prove that Mr. Flor Freire "was authorized to file a full contentious administrative jurisdiction remedy with regard to the administrative act of his discharge." According to the representative, most of these "are cases subsequent to the time at which the events occurred." In this regard, the Court notes that the State forwarded the orders admitting fifteen cases in which full contentious administrative jurisdiction remedies had been filed in relation to members of the security services (Armed Forces or National Police), presumably prejudiced by procedures to charge them or that denied promotions.²⁸¹ According to the information provided the fifteen remedies were filed in 1999, 2004, 2006, 2007, 2008 and 2009.²⁸²

205. Of the cases provided to the Court by the State, only two them were not admitted based on article 6(c) of the Law on the Contentious Administrative Jurisdiction, and this was subsequently reversed in final instance by the Administrative Chamber of the Supreme Court of Justice by remedies of cassation decided on February 8 and June 20, 2007. In the first of these decisions, the Supreme

²⁷⁹ Expert opinion of Leonardo Jaramillo and Fernando Casado, provided by affidavit dated February 2, 2016 (merits file, folio 579)

²⁸⁰ Expert opinion provided by Ramiro Ávila during the public hearing held before the Court in this case.

²⁸¹ (1) *Case of Luis Enrique Montalvo González*. Contentious Administrative Court of Quito (evidence file, folios 3090 to 3097); (2) *Case of Haro Ayerve Eduardo Patricio*. District Contentious Administrative Court No. 1 of Quito (evidence file, folios 3098 to 3106); (3) *Case of Washington Alfredo Medina Suárez*. Judges Chamber of the District Contentious Administrative Court No. 2 of the Provincial Court of Justice of Guayas (evidence file, folios 3107 to 3112); (4) *Case of Jesús Mendoza Sornoza*. District Contentious Administrative Court No. 2 of Guayaquil (evidence file, folios 3113 to 3119); (5) *Case of Miguel Euclides Obando Aguirre*. District Contentious Administrative Court of Quito (evidence file, folios 3120 to 3126); (6) *Case of Rubén Basantes Cabrera*. District Contentious Administrative Court of Quito (evidence file, folios 3127 to 3161); (7) *Case of Marco Orlando Rea Valverde*. District Contentious Administrative Court No. 1 of Quito (evidence file, folios 3162 to 3172) (*continued in the following footnote ...*)

²⁸² (... continued from the previous footnote) (8) *Case of Raúl Samaniego Granja*. Supreme Court of Justice, Contentious Administrative Chamber (evidence file, folios 3173 to 3184); (9) *Case of Marco Salinas Calero*. Supreme Court of Justice, Contentious Administrative Chamber (evidence file, folios 3185 to 3187); (10) *Case of Edwin Wilfrido Romero Yacelga*. District Contentious Administrative Court of Quito (evidence file, folios 3188 to 3201); (11) *Case of Patricio Geovanny Cevallos Altamirano*. District Contentious Administrative Court of Quito (evidence file, folios 3202 to 3208); (12) *Case of Luis Alberto Beltrán Betancourt*. District Contentious Administrative Court No. 1 of Quito (evidence file, folios 3290 to 3215); (13) *Case of Gil Homero Moncayo Bravo*. District Contentious Administrative Court No. 1 of Quito (evidence file, folios 3216 to 3222); (14) *Case of Juan Rafael Pesantes Rendón*. District Contentious Administrative Court No. 2 of Guayaquil (evidence file, folios 3223 to 3229), and (15) *Case of Sergio Enrique Torres Morejón*. District Contentious Administrative Court No. 1 of Quito (evidence file, folios 3230 to 3239).

Court stipulated that the expression "organization of the security services" referred to the "general concept of its structure" and that it was "evident that the word 'organization' [...] was not applicable to details such as the promotion of a specific official." It added that article 196 of the Constitution established the possibility of contesting the administrative acts of any authority of the State, such as the denial of a promotion that was contested in that case, before the judicial authorities.²⁸³ This Court also notes that, in at least three cases, the respondents argued the supposed lack of material competence of the contentious administrative jurisdiction to hear cases involving the security forces. However, the respective contentious administrative courts confirmed their competence based on constitutional supremacy and the provision contained in article 196 of the 1998 Constitution.²⁸⁴

206. The Court notes that, according to the representative, most of the cases provided by the State were filed subsequent to the time of the events of this case. However, he stressed that at least one of these cases was filed and admitted in 1999, prior to Mr. Flor Freire's proceedings, despite the fact that article 6(c) of the Law on the Contentious Administrative Jurisdiction was in force.²⁸⁵ Also, the interpretations made by the Supreme Court of Justice of Ecuador and by the contentious administrative courts reveal that the said provision of the Law on the Contentious Administrative Jurisdiction did not prevent the filing of these remedies against administrative acts of the armed forces at least following the 1998 Constitution, which, in its article 196, established the possibility of contesting administrative acts of all the State authorities before the judicial authorities.²⁸⁶

207. Additionally, the Court underscores that the representative has failed to prove that, at the time of the events of this case, a contrary interpretation of the norms in force existed. Expert witness Ramiro Ávila indicated that, in 1994, it was understood that applications for amparo were admissible against disciplinary decisions,²⁸⁷ but this does not exclude or contradict that it was possible to file a contentious administrative remedy. Both the expert witness and the representative mentioned a 1994 case concerning a claim for recognition of seniority, where the Supreme Court of Justice determined "that military matters, or those relating to article 6(c) c[ould] not be heard by contentious administrative justice; instead, the military disciplinary jurisdiction had total autonomy."²⁸⁸ However,

²⁸³ (8) *Case of Raúl Samaniego Granja*. Judgment of February 8, 2007, of the Administrative Chamber of the Supreme Court deciding remedy of cassation (evidence file, folios 3182 and 3183), and (9) *Case of Marco Salinas Calero*. Judgment of June 20, 2007, of the Administrative Chamber of the Supreme Court deciding remedy of cassation (evidence file, folio 3187).

²⁸⁴ (1) *Case of Luis Enrique Montalvo González*. Judgment of September 22, 2011, of District Contentious Administrative Court No. 1 (evidence file, folios 3266 and 3267); (2) *Case of Haro Ayerve Eduardo Patricio*. Judgment of September 20, 2011, of District Contentious Administrative Court No. 1 (evidence file, folios 3271 and 3272), and (13) *Case of Gil Homero Moncayo Bravo*. Judgment of January 23, 2012, of District Contentious Administrative Court No. 1 (evidence file, folios 3325 and 3326).

²⁸⁵ (4) *Case of Jesús Mendoza Sornoza*. Order to admit the contentious administrative complaint of the District Contentious Administrative Court No. 2 of Guayaquil of October 6, 1999 (evidence file, folios 3113 to 3119).

²⁸⁶ Article 196 of the Constitution establishes: "Administrative acts of any authority of the other functions and institutions of the State may be contested before the corresponding organs of the Judiciary as determined by law." 1998 Ecuadorian Constitution (evidence file, folio 2698).

²⁸⁷ According to expert witness Ramiro Ávila, the appropriate and effective remedy in the case of an alleged violation of fundamental rights was the remedy of constitutional amparo. In this regard, he indicated that judgments existed where constitutional justice had recognized the constitutional competence to review disciplinary rulings. However, he indicated that, although this could be "the appropriate channel," owing to "the criteria at that time," the applications for amparo were usually decided unfavorably owing to the application of "the presumption of the legality of the acts." Expert opinion provided by Ramiro Ávila during the public hearing held before the Court in this case.

²⁸⁸ Expert opinion provided by Ramiro Ávila during the public hearing held before the Court in this case. The representative submitted a copy of this ruling during the procedure before the Commission. Cf. Brief of the representative of April 12, 2004 (evidence file, folio 421). In the said ruling, the Supreme Court of Justice rejected a remedy of cassation against the admissibility of a full contentious administrative jurisdiction remedy owing to "lack of legal grounds," based on article 6(c) of the Law on the Contentious Administrative Jurisdiction. In this ruling, the Supreme Court considered that "the request of the plaintiffs [...] that their 'right be recognized' [...] and] they should be accorded the posts of Vice Admiral and of Air Force General, respectively, thus recovering their seniority and rank," "undoubtedly, relates to the organization of the Armed Forces, constituents of the security services, according to the Constitution of the Republic." Ruling of the Administrative Chamber of

this Court stresses that, contrary to any case decided in 1994, at the time of the facts of this case, the 1998 Constitution was in force and, based on its article 196, the Supreme Court established the full jurisdiction of the contentious administrative courts to hear this type of case, even though article 6(c) of the Law on the Contentious Administrative Jurisdiction was in force (*supra* para. 205).

208. Based on the foregoing, the Court considers that the State has proved before this Court that the presumed victim had the possibility of filing a full contentious administrative jurisdiction remedy to contest the disciplinary decisions that culminated in his discharge from the Army. In addition, according to the case law provided to this Court by Ecuador, this remedy could have been appropriate to obtain effective judicial protection in this case.

209. That said, in this case the presumed victim did not file the said contentious administrative remedy. The Court considers that an analysis, in the abstract, of the norms that regulate the said remedy would not allow it to determine adequately its appropriateness and effectiveness for the specific case of Mr. Flor Freire, because much of the analysis would depend on the factual and legal arguments submitted to the judicial organ, as well as on the application of the respective norms that the corresponding court would have made if the remedy had been filed.

210. Since the Court is unable to verify the suitability of the contentious administrative remedy because Mr. Flor Freire did not file it, it is not incumbent on it to analyze the possible effectiveness or ineffectiveness of the remedy of amparo, because even if the application for amparo was not effective in the case of Mr. Flor Freire, this did not exclude the possibility that the contentious administrative remedy could have been. Therefore, Ecuador cannot be held internationally responsible for the absence of an effective remedy when, for reasons that can be attributed to the presumed victim, the Court is unable to evaluate the appropriateness and effectiveness of the remedy that it has been proved was available.

211. Consequently, as it has decided in other cases,²⁸⁹ the Court finds that the State is not responsible for the violation of Article 25(1) of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Mr. Flor Freire.

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

212. Based on the provisions of Article 63(1) of the American Convention,²⁹⁰ the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to make adequate reparation,²⁹¹ and that this provisions reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.²⁹²

the Supreme Court of March 11, 1994 (evidence file, folios 421 to 426).

²⁸⁹ Cf. *Case of García Lucero et al. v. Chile. Preliminary objection, merits and reparations*. Judgment of August 28, 2013. Series C No. 267, para. 206, and *Case of Duque v. Colombia, supra*, para. 158.

²⁹⁰ Article 63(1) of the American Convention establishes that: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

²⁹¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 259.

²⁹² Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, para. 25, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 259.

213. The reparation of the harm caused by the breach of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the re-establishment of the situation. If this is not feasible, as in most cases of human rights violations, the Court will determine measures to guarantee the violated rights and to redress the consequences of the violations.²⁹³ Accordingly, the Court has found it necessary to grant different measures of reparation in order to repair the harm integrally; thus, in addition to pecuniary compensation, measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition have special relevance for the harm caused.²⁹⁴

214. This Court has established that reparations must have a causal nexus with the facts of the case, the violations declared, the damage proved, and the measures requested to redress the respective harm. Consequently, the Court must observe the concurrence of these factors to rule appropriately and pursuant to law.²⁹⁵

215. Based on the violations declared in the previous chapter, the Court will proceed to analyze the claims submitted by the Commission and the representative, together with the arguments of the State, in light of the criteria established in its case law concerning the nature and scope of the obligation to make reparation,²⁹⁶ in order to establish measures aimed at redressing the harm caused to the victims.

216. International case law and, in particular, that of the Court has established repeatedly that the judgment constitutes, *per se*, a form of reparation.²⁹⁷ However, considering the circumstances of the case *sub judice*, the suffering that the violations committed caused to the victim, and the change in the living conditions and other consequences of a non-pecuniary nature that the Mr. Flor Freire experienced as a result of the violations declared to his detriment, the Court finds it pertinent to establish other measures.

A. Injured party

217. This Court reiterates that, in the terms of Article 63(1) of the Convention, it considers that an "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 Homero Flor Freire is an injured party and, in his capacity as a victim of the violations declared in Chapter VIII he will be the beneficiary of the following measures ordered by the Court.

B. Measures of integral reparation: restitution, satisfaction and guarantees of non-repetition

B.1 Reincorporation of the victim into the Ground Forces

B.1.a Arguments of the parties and of the Commission

²⁹³ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, para. 26, and *Case of Tenorio Roca et al. v. Peru*, *supra*, para. 260.

²⁹⁴ Cf. *Case of the Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Tenorio Roca et al. v. Peru*, *supra*, para. 260.

²⁹⁵ 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 Tenorio Roca et al. v. Peru*, *supra*, para. 261.

²⁹⁶ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, paras. 25 to 27, and *Case of Tenorio Roca et al. v. Peru*, *supra*, para. 262.

²⁹⁷ Cf. *Case of Neira Alegría et al. v. Peru. Reparations and costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Tenorio Roca et al. v. Peru*, *supra*, para. 334.

218. The **Commission** asked that Mr. Flor Freire be reincorporated into the Ground Forces, and stressed that, contrary to most of the cases that the Court hears, "re-establishment of the previous situation is possible and, therefore, is appropriate as the principal measure of full restitution." It also stressed that the victim had indicated that "the most important reparation for him [was] [...] reinstatement in his post." However, the Commission recognized that "certain objective circumstances existed that could make [the said] reincorporation impossible." In this case, it argued that "[a]lthough the State referred to the existence of a risk to national security and presented expert opinions in this regard, those arguments are theoretical."

219. The **representative** asked that Mr. Flor Freire be reincorporated into the Ground Forces with the rank that would correspond to his cohort. In this regard, the representative indicated that "he should be reinstated in the post he would have occupied if the discriminatory act had not existed." He also asked for the "annulment of the record and the penalty imposed for the supposed misconduct that led to [Mr. Flor Freire] being placed on paid leave and then discharged from the Ecuadorian Ground Forces." Additionally, he requested "[p]ayment of the amount corresponding to the Armed Forces for social security contributions to future termination of employment and retirement payments from the date of separation until his reincorporation into the Ground Forces" as well as maintaining "all the contributions made for social security to the Social Security Institute of the Armed Forces in favor of Mr. Flor Freire from 1992 to 2002, as well as [...] all the rights for severance and other benefits, even contingency funds."

220. The **State** argued that it was impossible to reinstate Mr. Flor Freire in the Armed Forces, based on a legal and technical analysis it had made, which proved that such an action was not viable. It also argued the "existence of risks" to the unit and to public security. Regarding the contributions to social security requested by the representative, the State argued that Mr. Flor Freire had received an income from his remuneration as a private employee, "with access to employment benefits and to the social security system."

B.1.b Considerations of the Court

221. This Court has determined that the separation of Homero Flor Freire from his post as a military officer of the Ecuadorian Ground Forces was the result of a disciplinary procedure that violated the right to equality before the law and the prohibition of discrimination and, during which, the guarantee of impartiality was also violated (*supra* paras. 108 to 140 and 168 to 181). In cases of arbitrary dismissals, the Court has considered that the immediate reincorporation of the victim to the post he would have occupied if he had not been arbitrarily removed from the institution is, in principle, the most appropriate measure of reparation²⁹⁸ and the one that best accords with the full restitution that the reparation of the harm caused should seek (*supra* para. 213). However, the Court has recognized that there are objective circumstances why this might not be possible.²⁹⁹

222. In the instant case, the State has argued that it is not viable to reincorporate Mr. Flor Freire into the Armed Forces. To support this argument, it provided a technical and legal analysis and proposed an expert witness. Meanwhile, the representative and the Commission insisted on the importance of reincorporation as a measure of full reparation and argued that the State had not

²⁹⁸ See, for example, *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, *supra*, para. 246; *Case of Reverón Trujillo v. Venezuela*, *supra*, para. 163, and *Case of López Lone et al. v. Honduras*, *supra*, paras. 297 and 298.

²⁹⁹ Thus, for example, in the case of *Camba and Campos et al.*, the Court determined that the reincorporation of the judges who had been arbitrarily dismissed from the Constitutional Tribunal was not appropriate because, owing to an amendment to the Constitution, the Tribunal no longer existed and insufficient evidence had been provided regarding the existence of a comparable organ. *Cf. Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2013. Series C No. 268, paras. 255 to 263.

proved the legal impossibility of reincorporation or the existence of a real risk associated with this. The Court will now analyze whether the State has proved the existence of circumstances that stand in the way of this obligation or convert it into an excessive burden for the State and that, consequently, would justify relieving the State of its obligation to reinstate Mr. Flor Freire. In its analysis, the Court will bear in mind the importance accorded by the victim to his reincorporation into the Ground Forces.

223. The State provided a specific analysis of the possibility of reincorporating a member of the Armed Forces prepared by the General Coordinator of the Legal Services Department of the Ministry of National Defense, to prove that it was legally impossible to reincorporate Mr. Flor Freire.³⁰⁰ According to this analysis, reincorporation was impossible because: (i) the Constitutional Court of Ecuador had established that it was not possible to reincorporate a person into the Armed Forces after he had been placed on passive service because this would create “legal chaos” and “a conflict within [its] structure and functioning”; and (ii) requirements other than the passage of time had to be met for promotion and Mr. Flor Freire had not met them.³⁰¹

224. In this regard, an analysis of the judgment of the Constitutional Court to which the State had referred reveals that, although it ruled against the reincorporation of the claimants recognizing the “legal chaos” that this decision would create, the reason why that Court considered it impossible to order the return to the ranks was that the parties concerned did not fit the age group established for the post and not because reincorporation was impossible in all cases.³⁰²

225. This Court also notes that, as admitted by both parties, the laws of Ecuador permit the reincorporation of members of the Armed Forces in the case of an acquittal, imprisonment of less than 90 days, and other circumstances established by law.³⁰³ Additionally, the representative referred to precedents of other cases where Ecuador’s domestic courts had ordered reincorporation into the Armed Forces.³⁰⁴ Nevertheless, the Court takes note of the opinion of expert witness Jaramillo in the sense that this reincorporation only occurred in exceptional cases, following a specific analysis of the case in which it was considered, among other matters, that the person concerned had only been

³⁰⁰ Cf. Legal report on reincorporation of members of the Armed Forces (undated), prepared by the General Coordinator of the Legal Services Department of the Ministry of National Defense (evidence file, folios 2865 to 2868).

³⁰¹ Cf. Legal report on reincorporation of members of the Armed Forces (undated), prepared by the General Coordinator of the Legal Services Department of the Ministry of National Defense (evidence file, folios 2865 to 2868).

³⁰² Cf. Constitutional Court for the Transition Period. Judgment No. 001-12-SIS-CC of January 5, 2012 (evidence file folios 3500 and 3501).

³⁰³ Cf. Law on Armed Forces Personnel, arts. 88 and 89 (evidence file, folio 2661).

³⁰⁴ During the hearing, the representative referred to the case of José Burgos Solís, a sergeant second-class of the Ecuadorian Navy who was reincorporated in 2012 with promotion to the rank of sergeant first-class more than 17 years after he had been discharged, considering that the administrative acts that had separated him from the Navy had violated his human rights. Cf. Sixth Children and Adolescents of Guayas, Amparo action No. 0412-2012/0719-2012. Judgment of August 28, 2012 (evidence file, folios 3452 to 3461); Provincial Court of Justice of Guayas, Third Criminal Chamber, Collusion and Trafficking Offenses. Judgment of October 31, 2012 (evidence file, folios 3463 to 3469); Constitutional Court of Ecuador. Case of No. 0267-13-EP. Judgment No. 215-15-SEP-CC of July 1, 2015 (evidence file, folio 3471 to 3492). The representative also referred to the case of Colonel Mejía Idrovo in which the Inter-American Court was able to corroborate that the Constitutional Court of Ecuador had ordered his reincorporation into the Ground Forces with the rank he held before his separation from the institution almost 10 years after this occurred. Cf. *Case of Mejía Idrovo v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of July 5, 2011. Series C No. 22. During the public hearing, the expert witness proposed by the State recognized that, as the representative had argued, there were precedents of cases in Ecuador where members of the Armed Forces had been reinstated following long periods of absence, even when, according to the expert witness these reinstatements had been carried out “to the same post held by the person when he left.” Opinion of expert witness Leonardo Jaramillo during the public hearing held before the Court in this case. Similarly, as argued by the representative, in a case recently examined by the Inter-American Commission, it was observed that, in the context of complying with a recommendation of the Merits Report that ordered full reparation, Mexico had proposed and carried out the reincorporation of a member of the Armed Forces, 12 years and 3 months after his separation from the ranks. Cf. Inter-American Commission, *J.S.C.H and M.G.S. v. Mexico. Merits Report No. 80/15*, Case of 12,689, October 28, 2015.

separated from the institution for a short time and, in any case, had been reincorporated with the rank held at the time of separation from the Armed Forces.³⁰⁵

226. Furthermore, the Court observes that articles 117 and 122 of the Law on Armed Forces Personnel establish a series of common requirements that a soldier must meet to accede to a promotion at all levels,³⁰⁶ as well as specific requirements based on the level.³⁰⁷ These requirements relate not only to time, but also to performance evaluations, experience in the post, studies and exams. On this point, the Court finds that, as the State has argued – and the expert witness corroborated during the public hearing in this case – it is not certain that, if Mr. Flor Freire had not been separated from the Ground Forces, he would have continued his military career and been promoted, because to continue he would have had to meet certain requirements and it cannot be stated with certainty that he would have met them.³⁰⁸

227. Owing to the exceedingly individual and specific nature of the evaluation required to determine the possibility of reincorporating Mr. Flor Freire and the difficulties that this could entail more than 14 years after his discharge from the Ground Forces, the Court concludes that it is not materially possible to order his reincorporation into active service. However, the Court considers that the State should, within one year of notification of this judgment, grant Mr. Flor Freire the rank corresponding to his cohort when this measure is executed and place him in the situation of a soldier who has taken voluntary retirement or is on passive service, as well as granting him all the social rights and benefits that correspond to that rank.

228. The State must also recognize to Mr. Flor Freire and pay the amounts corresponding to the social security contributions (for future end of employment and retirement payments) to which he would have had the right if he had voluntarily retired from the institution at the time the State makes this payment, based on the rank of his cohort at the time of this payment. To this end, the State shall pay the respective sums directly to the corresponding state entities within one year of notification of this judgment.

229. Furthermore, the State must adopt all necessary legal measures to ensure that no administrative act or decision taken in the disciplinary procedure, which this Court has declared violated the rights recognized in the American Convention, has any legal effect on the social rights and/or benefits that would have corresponded to Mr. Flor Freire if he had retired voluntarily from the Ecuadorian Armed Forces. Lastly, the State must eliminate the reference to this procedure from his military record. The State must comply with these measures within one year of notification of this judgment.

B.2 Measures of satisfaction: publication of the judgment

³⁰⁵ Cf. Opinion provided by expert witness Leonardo Jaramillo during the public hearing before the Court in this case.

³⁰⁶ The said article establishes: "Art. 117. The common requirements that a soldier must meet for promotion at all levels are as follows: (a) Accumulate the minimum points that this law determines for each level; (b) Take and pass the corresponding course; (c) Have exercised functions in units corresponding to his classification for at least one year in the rank for senior officers, junior officers and sergeants first class, and two years for the other ranks; (d) Have been declared apt for service based on the medical record, and (e) Have held his rank for the required time." 1991 Law on Armed Forces Personnel (evidence file, folio 2666).

³⁰⁷ The said article establishes: "Art. 122. Officers bearing arms or providing services, or technical officers, in addition to the requirements for promotion, must meet the following, according to the level: (a) For promotion to Lieutenant, Captain and Major [...] take and pass the respective course of military studies, established in the pertinent regulations of each branch of the Armed Forces; (b) For promotion to Lieutenant Colonel or Naval Commander, have taken and passed the General Staff course in the respective military academies; [...]." 1991 Law on Armed Forces Personnel (evidence file, folio 2667).

³⁰⁸ Cf. Opinion provided by expert witness Leonardo Jaramillo during the public hearing before the Court in this case.

230. The **representative** asked the Court to order “publication of the judgment [...] in a private national newspaper with widespread circulation in Ecuador, and in the Official Record of Ecuador.” The **State** did not refer to this request by the representative and the **Commission** did not explicitly request publication of the judgment.

231. The Court orders, as it has in other cases,³⁰⁹ that the State must publish, within six months of notification of this judgment: (a) the official summary of the judgment prepared by the Court, once, in the official gazette; (b) the official summary of the judgment prepared by the Court, once, in a national newspaper with widespread circulation, and (c) the judgment in its entirety, available for one year, on an official website.

232. The State must inform this Court immediately when it has made each of the said publications, regardless of the one-year time frame to present its first report established in the sixteenth operative paragraph of this judgment.

B.3 Guarantees of non-repetition: training activities for state authorities on the prohibition of discrimination owing to sexual orientation

233. The **Commission** asked the Court to order measures of non-repetition that included the adoption of “the state measures necessary for the personnel of the Ecuadorian Ground Forces or any branch of the Ecuadorian Army, as well as the courts of law in the military jurisdiction to be apprised of the inter-American standards, and those of Ecuador’s domestic law, regarding non-discrimination based on actual or perceived sexual orientation.”

234. The **representative** asked the Court to order the “adoption of affirmative action measures within the Armed Forces of Ecuador in order to protect the right of all LGBTI persons.”

235. The **State** indicated that the Ministry of Defense “had implemented gender policies,” and that, since 2010, “instruments had been created with human rights as their key element: the Defense Department’s political agenda (2014-2017) which has as a cross-cutting element: human rights, with an equality approach emphasizing gender and interculturality, and international humanitarian law.” It also stressed that, “in 2013, the Ministry of Defense published a document entitled: ‘Gender Policy of the Armed Forces of Ecuador’; this instrument promoted the inclusion of women in the military and outlined the transformation of the military institution, guaranteeing the decorous, respectful, equal and professional coexistence of men and women in the military.”³¹⁰

236. The State also argued that “the organic structure of the Armed Forces has been modified [and] currently the Ministry of Defense has a Human Rights and International Humanitarian Law Directorate whose mandate is: ‘To manage the implementation of the human rights policy in order to instill in the members of the Armed Forces an awareness of the need to protect and respect human rights.’” It added that “this department is responsible for supervising and evaluating the effective management of human rights in the Armed Forces.” It also described the scope of existing training programs³¹¹ and provided information on future projects. Therefore, it considered that it already had

³⁰⁹ Cf., *inter alia*, *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79; *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of June 22, 2015. Series C No. 293, para. 386, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 288.

³¹⁰ The case file reveals that “[i]n coordination with the Human Rights Directorate of the Ministry of Justice, methodologies and timetables had been established for [training on a gender-based approach and on actual or perceived sexual orientation]”; in this regard, two training sessions had been held, on September 24 and 25 and on October 1 and 2, 2014, in the Air Force Military Academy, Quito, and in the Naval Military Academy, Guayaquil, for 90 officers.

³¹¹ The State indicated that “[t]he purpose of the training activities is to provide members of the Armed Forces with theoretical and conceptual elements and practices that allow them to perform their activities while respecting human rights; to this end, inter-American standards for the principle of equality and non-discrimination have been used and the paradigmatic judgment

a body of law that contributed to compliance with legal guarantees and “also, it was providing training to Armed Forces personnel on issues directly related to human rights.”

237. The Court notes that the State has implemented some training programs that include issues such as the prohibition of discrimination based on sexual orientation. Although the Court appreciates the State’s efforts in this regard, it notes that these programs have only reached a limited number of officials and that the case file does not reveal whether they are permanent and compulsory. It also notes that the policies described by the State refer to the general protection of human rights emphasizing the areas of gender and interculturality, on the one hand, and international humanitarian law, on the other. However, these policies do not have the primary purpose of protection against discrimination based on sexual orientation in the military.

238. Based on the proven facts and the violations declared in this case, the Court finds it essential that members of the Armed Forces and agents responsible for military disciplinary procedures receive training on the prohibition of discrimination based on sexual orientation to avoid a repetition of facts such as those that occurred in this case. To this end, the Court finds it necessary that the State put in practice, within a reasonable time, continuing and permanent training programs for members of the Armed Forces on the prohibition of discrimination based on sexual orientation to ensure that actual or perceived sexual orientation never constitutes a reason to justify discriminatory treatment. These programs must form part of the training received by military officers.

239. The said training programs and courses must make special mention of this judgment and the different precedents in the human rights *corpus iuris* on the prohibition of discrimination based on sexual orientation and of the obligation of all authorities and officials to ensure that individuals may enjoy each and every one of the rights established in the Convention.³¹²

C. Other measures requested

240. In addition to the above-mentioned measures, the **representative** asked: (i) that the Court order the “investigation and punishment of those responsible,” insisting that this should include “civil, criminal and administrative aspects”; (ii) that the State offer a public apology “by a publication in the media, the Official Record, and a Ministerial Order (Ministry of National Defense)” and keep “a permanent institutional acknowledgement on the premises of the Army’s General Command, by a plaque placed there, and (iii) that the State “adapt its domestic law to the provisions of the American Convention [and that] it include norms and policies aimed at eliminating all forms of discrimination based on sexual orientation, whether actual or perceived, by political and legislative affirmative action mechanisms.” He also asked for (iv) the elimination from Ecuador’s laws of the norms, detailed in his brief, that contravene the provisions of the Convention,” and (v) that “the State adapt its laws to ensure that infractions of a disciplinary nature within the Armed Forces are examined and decided by independent and impartial judges.”

241. The **State** indicated that the request to investigate and punish those responsible was unsubstantiated and that “in this case, a grave or systematic violation of human rights had not been verified” that would justify the obligation to investigate. It also emphasized that “inter-American case law ha[d] established that the delivery of a judgment and its publication were, *per se*, a sufficient measure of reparation, so that it would be unnecessary to order additional measures.” Furthermore, it indicated that it had complied with “providing a public apology by unveiling a plaque placed in the Ministry of National Defense in the presence of Mr. Flor and senior authorities of the Ecuadorian

‘Atala Riffo and daughters v. Chile’ of the Inter-American Court of Human Rights.”

³¹² Cf. *Case of Atala Riffo and daughters v. Chile*, *supra*, para. 272.

State,³¹³ and affirmed that this act had been disseminated "on the website of the Ministry of National Defense." Regarding the requests to take domestic legal measures, the State argued that Ecuador "has a policy of the defense and guarantee of the human rights of everyone, [and] consequently, this includes the Armed Forces personnel." In particular, it pointed to actions taken on June 4, 2012, when "the 'Protocols for processing and monitoring the files of human rights and gender-related cases in the Armed Forces of Ecuador' were published," the purpose of which was to process the complaints filed by both civilian and active personnel on possible human rights violations, which contributed to the possibility of preventive and corrective measures being taken to address conducts contrary to human rights."

242. Regarding the requests to adapt domestic law, the Court recalls that article 117 of the 1988 Military Discipline Regulations, which this Court considered violated the American Convention, was amended in 2008 (*supra* para. 139); thus, article 117 under which Mr. Flor Freire was sanctioned was annulled.³¹⁴ The Court appreciates the measures taken by the State to ensure that individuals serving in the Ecuadorian Armed Forces are not subject to discriminatory differences based on their actual or perceived sexual orientation, as in this case. Therefore, it finds that, in the circumstances of this case, it is not appropriate to order the adoption, amendment or adaptation of other norms of Ecuador's domestic law.

243. Regarding the other measures requested by the representative, the Court considers that the delivery of this judgment and the reparations already ordered are sufficient and adequate to redress the violations suffered. Consequently, the Court does not find it appropriate to order additional measures.

D. Compensation

244. The **Commission** asked the Court to order "[f]ull reparation to Homero Flor Freire in the terms indicated in the report [on merits], both pecuniary and non-pecuniary, including measures of satisfaction for the harm caused."

D.1 Pecuniary damage

D.1.a Arguments of the parties

245. The **representative** indicated that "[a]lthough the State has not denied the existence of the violations, it has resisted offering full reparation." Regarding the pecuniary damage, he asked that the State pay "all the remunerations and other benefits that would have corresponded, by law, to [Mr. Flor Freire] from the date of his separation from the Ground Forces and up until the date of his reincorporation into active service."

246. Regarding the calculation of the amounts, he indicated that this calculation should be made based on the time of service at each military rank that the presumed victim should have held. He recalled that, in July 2014, during the procedure on compliance with the recommendations before the Commission, the parties had agreed on pecuniary compensation of US\$330,169.25. He added that to this should be added the difference up until the date the payment was made effective and

³¹³ The State indicated that "[t]he act was transmitted directly online to the [IACHR]" and sent photographs of the plaque that had been unveiled and of the act, the invitations, the list of participants in the act to unveil the plaque and to present a public apology, and a video of the act. In addition, regarding the representative's allegation about the media's absence from the event, the State argued that "prior to the event, the Ministry of Defense and Homero Flor spoke and agreed that the act should be carried out in the way that it was."

³¹⁴ Cf. 2008 Military Discipline Regulations, Ministry of National Defense, Ministerial General Order No. 243 (evidence file, folios 2799 to 2822).

asked for “the payment of the interest on the abovementioned concepts, which should also be considered from the date on which each payment should have been made until the date on which it was paid.”

247. The representative also asked that the State pay: (i) “the bonuses that were paid in the Armed Forces up until 2010 for promotions and length of service”; (ii) compensations corresponding to 2011 and 2012, based on the military rank that Mr. Flor Freire would have had at that time – that is, Major in the Armed Cavalry,” and (iii) the salary equalizations that were granted with the entry into force of the Organic Law of Public Service, based on the military rank that Mr. Flor Freire would have had at that time: that is, the sum of US\$18,003.00” (eighteen thousand and three dollars).

248. The **State** argued that “Homero Flor has not provided any type of voucher relating to loss of earnings or detriment related to the facts of the case.” It recalled that the nature and amount of the reparations depended on the harm caused and should not entail either the enrichment or the impoverishment of the victim.

249. In particular, it indicated that the records of the Ecuadorian Social Security Institute (IESS) revealed that Mr. Flor Freire had received a monthly salary of US\$758.00 the year in which he was discharged and, currently, for his work as a private employee he receives a remuneration of US\$1,000.00 and has access to employment benefits and the social security system. The State also argued that, from the information provided by the tax authorities (SRI), in 2012, Mr. Flor Freire declared an income from professional services amounting to US\$6,000.00 and, in 2013, his declaration reflected US\$8,446.00. Similarly, the State argued that “the information provided by both the IESS and the SRI reveals that, during the time he has been a soldier on passive service, Mr. [...] Flor Freire has received, to date, the sum of US\$65,018.86 [...]; an amount that, in the eventuality that the judgment is unfavorable to the State, should be deducted from the amount that the Court establishes as reparation in favor of Mr. Flor.”

250. Regarding the additional items requested by the representative, the State argued that these related to “numerous unsubstantiated claims.” It considered that the “items relating to bonuses, promotions [and] compensations” could not be assessed objectively because the State could not verify whether the presumed victim would have been promoted or if he would have merited the alleged bonuses. Therefore, it argued that this type of item could not be considered in the evaluation of the pecuniary damage and concluded that it was “for the Court to assess the lack of substantiation when considering a possible reparation, [but] the rank of lieutenant held by Homero Flor could never be exceeded as a basis for making the calculation.”

D.1.b Considerations of the Court

251. This Court has established that the concept of pecuniary damage encompasses the loss of 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 acts of the case *sub judice*.³¹⁵ In cases in which the wrongful acts committed by the State result in dismissal and the consequent loss of the victim’s employment, in the context of pecuniary damage, it is necessary to recognize the salaries and social benefits that the victim failed to receive from the time of his arbitrary removal until the date of the delivery of the judgment, including pertinent interest and other related concepts.³¹⁶

³¹⁵ Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Maldonado Ordoñez v. Guatemala, supra*, para. 142

³¹⁶ Cf. *Case of Chocrón Chocrón v. Venezuela, supra*, para. 184, and *Case of López Lone et al. v. Honduras, supra*, para. 318.

252. The Court considers that the reparation for pecuniary damage, in the context of the circumstances of this case, requires the payment of the salaries Mr. Flor Freire failed to receive from the time he was discharged on January 18, 2002, taking into account that, while he was on paid leave, he retained his rank and salary.³¹⁷ Considering the decision taken with regard to the victim's reincorporation into the Armed Forces (*supra* paras. 221 to 229), the Court establishes that the State must pay Homero Flor Freire, in equity, the sum of US\$385,000.00 (three hundred and eighty-five thousand United States dollars).

253. Lastly, contrary to the State's arguments, the Court considers that it is not appropriate to deduct from this sum the remuneration that the victim may have received as a result of his private work-related activities during the time in which he has remained in passive service. This income does not form part of or substitute for Mr. Flor Freire's loss of earnings as a result of his arbitrary separation from the Armed Forces.

D.2 Non-pecuniary damage

D.2.a Arguments of the parties

254. The **representative** argued that "[t]he lack of protection provided by the State and the false accusation made against the petitioner have entailed failure to respect Mr. Flor Freire's right to honor. Also, the false accusation and the State's unlawful interference has had far-reaching effects on the petitioner's family life because these led to his divorce and to a rupture in his relationship with his daughter." He therefore requested reparation for non-pecuniary damage indicating that "the sum that the parties had agreed on [...] amounted to US\$329,221.20." In addition, the representative argued damage to Mr. Flor Freire's life project owing to the interruption of his military career. In this regard, he requested payment of compensation of at least US\$521,600.20. He added that if, "for any reason, he is not reincorporated into active service, the amount corresponding to damage to the life project should be calculated based on Mr. Flor Freire's life expectancy, which is currently 72 years, which would result in a total of US\$1,075,200.00"

255. The **State** argued that the amounts requested by Mr. Flor Freire "distort the purpose that the [Inter-American] Court has developed for reparations." It also indicated that "the concept of 'life project' has not been determined clearly in inter-American case law. It argued that the sum agreed before the Inter-American Commission formed part of "the actions addressed at complying with Merits Report No. 81/13 issued by the [Commission, and] were not part of the instant case," so that "they could not be considered by the Court." Consequently, it asked the Court to rule, in equity, on the non-pecuniary damage.

D.2.b Considerations of the Court

256. The Court has established that the concept of non-pecuniary damage may include both the suffering and affliction caused to the direct victim and his family, the impairment of values of great significance for the individual, and the changes of a non-pecuniary nature in the living conditions of the victim or his family.³¹⁸

³¹⁷ In this regard, article 82 of the Law on Armed Forces Personnel establishes that: "In no case may the paid leave last more than six months, and the soldier placed in that situation shall receive all the salaries, emoluments, allocations and benefits; he will also retain all the considerations corresponding to his rank in active service." 1991 Law on Armed Forces Personnel (evidence file, folio 2665). Also, the decision of the Sixth Court clarifies that "[t]he plaintiff has, for the time being, be placed on paid leave, but not due to the final decision of his superiors, but rather to a legal and regulatory order, without being deprived of his rank, or his salary, because the decision is not yet final." Ruling of the Sixth Civil Court of Pichincha of July 18, 2001 (evidence files, folio 71).

³¹⁸ Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs, supra*, para. 56, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 334.

257. According to the representatives, at the working meeting of July 30, 2014, the parties reached consensus on the sum of US\$329,221.20 (three hundred and twenty-nine thousand two hundred and twenty-one United States dollars and twenty cents) for non-pecuniary damage. However, an examination of the document provided by the State on the supposed non-pecuniary damage reveals that the sum of US\$329,221.20 does not constitute the amount corresponding to non-pecuniary damage, but rather corresponds to the "liquidation of remunerations based on the respective payments made to [Mr. Flor Freire's] cohort for the period August 2001 to June 2014, considering his promotion to Captain and Major with contributions." Therefore, the Court will not take into account the sum mentioned by the representative when calculating non-pecuniary damage.

258. Nevertheless, the Court finds that the partiality in the disciplinary procedure and the discriminatory discharge resulted in substantial changes to the victim's private and professional life, and affected his honor and reputation. In particular, in this case the discrimination based on perceived sexual orientation and the other consequences of a non-pecuniary nature have caused moral harm to the victim. Consequently, the Court finds it pertinent to establish, in equity, the sum of US\$10,000.00 (ten thousand United States dollars) for Mr. Flor Freire for non-pecuniary damage.

E. Costs and expenses

259. The **representative** argued that the presumed victim had incurred numerous expenses owing to the steps taken at the domestic level and during the proceedings before the inter-American system. Regarding the calculation of the expenses corresponding to the payment of professional fees, he asked the Court to consider "the agreement made between the defense counsel [Alejandro Ponce Villacís] and Mr. Flor Freire, an agreement that has been submitted to substantiate the fee based on the table established by the Law of the Ecuadorian Lawyers Federation. Regarding the costs and expenses incurred in the domestic proceedings exclusively, since there was no evidence, [the representative asked] that these should be established, in equity."

260. The **State** argued that "the contract between Homero Flor and Alejandro Ponce Villacís is a private instrument that has legal effect for its parties; therefore, the Ecuadorian State cannot cover any type of item for this concept." It indicated that "since there is no supporting documentation for the costs incurred in the litigation, this item should be established in equity, and the maximum parameter could not exceed US\$5,000.00."

261. The Court reiterates that, pursuant to its case law,³¹⁹ costs and expenses form part of the concept of reparation, because the activity deployed by the victims in order to obtain justice at both the national and international level entails expenditure that must be compensated when the international responsibility of the State has been declared in a judgment. Also, the eventual reimbursement of costs and expenses is made based on expenditure that has been duly proved before this Court.

262. The Court recalls that it must prudently assess their scope, which includes the expenses incurred before the authorities of the domestic jurisdiction, as well as those arising during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the principle of equity and taking into account the expenses indicated by the parties, provided the *quantum* is reasonable.³²⁰

³¹⁹ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 342.

³²⁰ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs, supra*, para. 82, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 342.

263. In the instant case, the Court notes that the representative did not submit vouchers authenticating the expenditure incurred by the victim during the processing of the case at the domestic level or procedural expense. However, the Court finds that it is reasonable to suppose that during the years that this case was processed before the domestic jurisdiction the victim incurred financial expenditure. The Court also considers it reasonable to suppose that Mr. Flor Freire and his representative have incurred different expenses relating to fees, collection of evidence, transportation and communications, among others, in the international processing of this case.

264. Consequently, the Court orders the State to reimburse Mr. Flor Freire the sum of US\$5,000.00 (five thousand United States dollars) for costs and expenses incurred at the domestic level. If he deems it pertinent, Mr. Flor Freire shall deliver the sum he considers appropriate to those who represented him in the domestic jurisdiction. The Court also orders the State to reimburse the representative the sum of US\$10,000.00 (ten thousand United States dollars) for costs and expenses incurred in the procedure before the inter-American system. These amounts shall be paid within one year of notification of this judgment. During the procedure on monitoring compliance with this judgment, the Court may order the State to reimburse the victim or his representatives any reasonable and duly authenticated expenses at that procedural stage.

F. Reimbursement of expenses to the Victims' Legal Assistance Fund

265. The representative had requested access to the Victims' Legal Assistance Fund of the Court to cover costs related to the litigation before the Court. In an order of the President of July 3, 2015, this request was admitted and authorization was given to grant the necessary financial assistance for the presentation of the statements of Mr. Flor Freire and of an expert witness, and also for the presence of the representative and of the victim at the public hearing.

266. On April 8, 2016, a report on the disbursements was forwarded to the State as established in Article 5 of the Rules for the Operation of the Fund. Thus, the State had the opportunity to present its observations on the disbursements made in this case, which amounted to US\$4,788.25 (four thousand seven hundred and eighty-eight United States dollars and twenty-five cents).

267. Based on the violations declared in this judgment, the Court orders the State to reimburse the sum of US\$4,788.25 (four thousand seven hundred and eighty-eight United States dollars and twenty-five cents) to the Fund for the expenses incurred. This amount must be paid to the Inter-American Court within ninety days of notification of this judgment.

G. Method of complying with the payments ordered

268. The State shall make the payments of the compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses established in this judgment directly to the persons indicated herein, within one year of notification of this judgment, without prejudice to making the complete payment before that date.

269. If the beneficiary is deceased or dies before he receives the respective sum, this shall be delivered directly to his heirs, pursuant to the applicable domestic law.

270. The State shall comply with the monetary obligations by payment in United States dollars.

271. If, for reasons that can be attributed to the beneficiary of the compensation or his heirs, it is not possible to pay the amounts established within the time frame indicated, the State shall deposit the said amounts in his favor in a deposit account or certificate in a solvent Ecuadorian financial institution, in United States dollars, and in the most favorable financial conditions permitted by the

State's banking laws and practice. If the corresponding compensation is not claimed within ten years, the sums shall be returned to the State with the interest accrued.

272. The amounts allocated in this judgment as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses shall be delivered to the persons indicated integrally, as established in this judgment, without any deductions arising from possible taxes or charges.

273. In case the State should fall into arrears, including with the reimbursement of expenses to the Victims' Legal Assistance Fund, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Ecuador.

X
OPERATIVE PARAGRAPHS

Therefore,

THE COURT

DECIDES,

unanimously:

1. To reject the preliminary objection of failure to exhaust domestic remedies filed by the State, pursuant to paragraphs 23 to 26 of this judgment.

DECLARES,

unanimously, that:

2. The State is responsible for the violation of the right to equality before the law and the prohibition of discrimination recognized in Article 24 of the Convention, in relation to Articles 1(1) and 2 of this instrument, pursuant to paragraphs 109 to 140 of this judgment.

3. The State is responsible for the violation of the right to honor and dignity, recognized in Article 11(1) of the Convention, in relation to Article 1(1) of this instrument, pursuant to paragraphs 153 to 158 of this judgment.

4. The State is responsible for the violation of the guarantee of impartiality recognized in Article 8(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Homero Flor Freire, pursuant to paragraphs 168 to 181 of this judgment.

5. The State is not responsible for the violation of the principle of legality, recognized in Article 9 of the American Convention, in relation to Article 1(1) of this instrument, pursuant to paragraphs 144 to 151 of this judgment.

6. The State is not responsible for the violation of the guarantee of the duty to provide the reasoning for decisions recognized in Article 8(1) of the Convention, in relation to Article 1(1) of this instrument, pursuant to paragraphs 182 to 194 of this judgment.

7. The State is not responsible for the violation of the right to an effective remedy recognized in Article 25(1) of the Convention, in relation to Articles 1(1) and 2 of this instrument, pursuant to paragraphs 198 to 211 of this judgment.

AND ESTABLISHES,

unanimously, that:

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

9. The State shall, within one year of notification of this judgment, accord Mr. Flor Freire the rank corresponding to his cohort at the time this measure is complied with and place him in the situation of a soldier who has taken voluntary retirement or is on passive service, and shall grant him all the social rights and benefits that correspond to that rank, as established in paragraph 227 of this judgment.

10. The State shall, within one year of notification of this judgment, recognize to Mr. Flor Freire and pay the amounts corresponding to the social security contributions (for future end of employment and retirement payments) to which he would have had the right if he had taken voluntary retirement from the institution at the time the State makes the said payment, based on the rank of his cohort at the time of this payment, pursuant to paragraph 228 of this judgment.

11. The State shall, within one year of notification of this judgment, adopt all the measures required under domestic law to ensure that no administrative act or decision taken in the disciplinary procedure, which the Court has declared violated rights recognized in the American Convention, produce any legal effect on the social rights and/or benefits that would correspond to Mr. Flor Freire if he had taken voluntary retirement from the Ecuadorian Armed Forces. The State shall also eliminate the references to this procedure from his military record, as established in paragraph 229 of this judgment.

12. The State shall make the publications indicated in paragraph 231 of this judgment, as established in that paragraph.

13. The State shall, within a reasonable time, implement continuing and permanent training programs for members of the Armed Forces on the prohibition of discrimination based on sexual orientation, pursuant to paragraphs 238 and 239 of this judgment.

14. The State shall, within one year of notification of this judgment, pay the amounts established in paragraphs 252, 258 and 264 as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses, pursuant to those paragraphs and paragraphs 268 to 273 of this judgment.

15. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the amount disbursed during the processing of this case, pursuant to paragraphs 267 and 273 of this judgment.

16. The State shall, within one year of notification of this judgment, provide the Court with a report on the measures taken to comply with it, without prejudice to the provisions of paragraph 232 of this judgment.

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

DONE, at Mexico City, Mexico, on August 31, 2016, in the Spanish language

Judgment of the Inter-American Court of Human Rights. Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs.

Roberto F. Caldas
President

Eduardo Ferrer Mac-Gregor Poisot

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Elizabeth Odio Benito

Eugenio Raúl Zaffaroni

Pablo Saavedra Alessandri
Secretary

So ordered,

Roberto F. Caldas
President

Pablo Saavedra Alessandri
Secretary