

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF OLIVERA FUENTES V. PERU

JUDGMENT OF FEBRUARY 4, 2023

(Preliminary Objections, Merits, Reparations and Costs)

In the case of *Olivera Fuentes v. Peru*,

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

Ricardo C. Pérez Manrique, President,
Eduardo Ferrer Mac-Gregor Poisot, Vice President,
Humberto Antonio Sierra Porto,
Nancy Hernández López,
Verónica Gómez,
Patricia Pérez Goldberg, and
Rodrigo Mudrovitsch,

also present,

Pablo Saavedra Alessandri, Registrar,
Romina I. Sijniensky, Deputy Registrar

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, 62, 65 and 67 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), delivers this judgment, which is structured as follows:

TABLE OF CONTENTS

I INTRODUCTION OF THE CASE AND CAUSE OF THE ACTION	4
II PROCEEDINGS BEFORE THE COURT	5
III JURISDICTION	8
IV PRELIMINARY OBJECTIONS	8
A. Review of the legality of the procedure followed by the Commission and fourth instance objection	8
A.1 Arguments of the State and observations of the Commission and the representatives	8
A.2 Considerations of the Court.....	9
B. Failure to exhaust domestic remedies.....	10
B.1 Arguments of the State and observations of the Commission and the representatives	10
B.2 Considerations of the Court.....	10
V PRELIMINARY CONSIDERATIONS.....	12
A. Undue inclusion of facts that are not part of the factual framework of the case..	12
A.1 Arguments of the State and observations of the Commission and the representatives	12
A.2 Considerations of the Court.....	12
B. The alleged undue inclusion of rights allegedly violated in the pleadings and motions brief.....	13
B.1 Arguments of the State and observations of the Commission and the representatives	13
B.2 Considerations of the Court.....	14
VI EVIDENCE	14
A. Admissibility of documentary evidence	14
B. Admissibility of testimonial and expert evidence	16
VII FACTS	16
A. Events that occurred on August 11, 2004	16
B. Complaint to the Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Intellectual Property (INDECOPI).....	18
C. Appeal to the Tribunal for the Defense of Competition and Intellectual Property	21
D. Appeal for annulment before the Second Contentious-Administrative Chamber of the Superior Court of Justice of Lima	22
E. Appeal to the Permanent Civil Chamber of the Supreme Court of Justice	23
F. Cassation appeal before the Permanent Constitutional and Social Law Chamber of the Supreme Court of Justice	24
VIII MERITS	24
RIGHTS TO PERSONAL LIBERTY, PRIVACY, FREEDOM OF EXPRESSION, EQUALITY BEFORE THE LAW, JUDICIAL GUARANTEES AND JUDICIAL PROTECTION	24

A. Arguments of the parties and the Commission	25
B. Considerations of the Court.....	27
B.1 General considerations on the right to equality and non-discrimination	27
B.2 Sexual orientation under the American Convention on Human Rights	28
B.3 Human rights and business: standards on equality and non-discrimination based on sexual orientation, gender identity and gender expression	32
B.4 Application of standards to the specific case.....	35
IX REPARATIONS.....	48
A. Injured party	48
B. Measures of rehabilitation	49
C. Measures of satisfaction	50
D. Guarantees of non-repetition	51
E. Compensation	57
F. Costs and expenses.....	58
G. Reimbursement of expenses to the Victims' Legal Assistance Fund of the Court	59
H. Method of compliance with the payments ordered	60
X OPERATIVE PARAGRAPHS	61

I
INTRODUCTION OF THE CASE AND CAUSE OF THE ACTION

1. *The case submitted to the Court.* On June 4, 2021, 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 “*Crissthan Manuel Olivera Fuentes against Peru*” (hereinafter “the State” or “Peru”). According to the Commission, the case concerns the alleged international responsibility of the State for the violation of the rights to equality and non-discrimination, privacy, judicial guarantees and judicial protection, to the detriment of Crissthan Manuel Olivera Fuentes, due to alleged discrimination against him based on the expression of his sexual orientation.

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

- a) *Petition.* On November 29, 2011, the organization *Estudio para la Defensa de los Derechos de la Mujer* (DEMUS) (Study for the Defense of Women’s Rights) lodged the initial petition before the Commission.
- b) *Report on Admissibility.* On December 28, 2017, the Commission adopted Admissibility Report No. 172/17, in which it concluded that the petition was admissible.¹
- c) *Merits Report.* On October 29, 2020, the Commission adopted Merits Report No. 304/20, pursuant to Article 50 of the Convention (hereinafter “the Merits Report” or “Report No. 340/20”), in which it reached certain conclusions² and made several recommendations to the State.
- d) *Notification to the State.* On December 4, 2020, the Commission notified the Merits Report to the State, granting it two months to report on its compliance with the recommendations. After the Commission had agreed to an extension, on May 23, 2021, the State requested a second extension. Upon assessing this request, the Commission noted that, six months after having notified the Merits Report, there had been no real progress in compliance with the recommendations, and the State had not expressed its position on the report’s conclusions and recommendations, nor had it contacted the victim or his representatives.

3. *Submission to the Court.* On June 4, 2021, the Commission submitted to the jurisdiction of the Inter-American Court all the facts and human rights violations described in the Merits Report “given the need to obtain justice and reparation.”³

¹ The report was notified to the parties on February 23, 2018.

² The Commission concluded that the State was internationally responsible for the violation of the rights established in Articles 8(1) (judicial guarantees), 11 (privacy), 24 (equality before the law) and 25(1) (judicial protection) of the American Convention on Human Rights (hereinafter “the American Convention”), in relation to the obligations established in Article 1(1) of the same instrument.

³ The Commission appointed Commissioner Edgar Stuardo Ralón Orellana Panszi as its delegate before the Court. It also appointed the then Assistant Executive Secretary, Marisol Blanchard Vera, and the then lawyers of the Commission’s Executive Secretariat, Jorge Meza Flores and Christian González Chacón as its

4. *Requests of the Inter-American Commission.* Based on the foregoing, the Commission asked the Court to declare the international responsibility of the State for the violation of the rights established in Articles 8(1) (judicial guarantees), 11 (privacy), 24 (equality before the law) and 25(1) (judicial protection) of the American Convention, in relation to the obligations enshrined in Article 1(1) of the same instrument. The Commission also requested that the Court order the State to implement measures of reparation, which are described and analyzed in Chapter IX of this judgment.

II PROCEEDINGS BEFORE THE COURT

5. *Notification to the representatives and the State.* The Court notified the submission of the case by the Commission to the representatives of the alleged victim (hereinafter “the representatives”)⁴ and to the State on July 16, 2021.

6. *Brief with pleadings, motions and evidence.* On September 16, 2021, the representatives of the alleged victim submitted to the Court their brief with pleadings, motions and evidence (hereinafter “pleadings and motions brief”). The representatives agreed substantially with the arguments made by the Commission and asked the Court to declare the State’s international responsibility for the violation of the same articles indicated by the Commission and, in addition, for the violation of Articles 7 (right to free development of the personality) and 13(1) (right to freedom of expression) of the American Convention, in relation to Article 1(1) thereof.

7. *Answering brief.* On December 14, 2021, the State submitted to the Court its brief containing preliminary objections, its answer to the submission of the case by the Commission, and its observations on the pleadings and motions brief (hereinafter “the answering brief”). In this brief, the State raised five preliminary objections, denied responsibility for the alleged violations and dismissed the requests for measures of reparation made by the Commission and the representatives.

8. *Observations on the preliminary objections.* On February 9, 2022, the representatives and the Commission submitted their observations on the preliminary objections.

9. *Public hearing.* In an order dated June 30, 2022,⁵ the President of the Court called the State, the representatives and the Commission to a public hearing to receive their final oral arguments and observations on the preliminary objections and possible merits, reparations and costs, and to hear the statements of the alleged victim, an expert

legal advisers.

⁴ The alleged victim was represented by DEMUS - *Estudio para la Defensa de los Derechos de la Mujer* (Study for the Defense of Women’s Rights), *Synergia – Iniciativas para los Derechos Humanos* (Synergy – Initiatives for Human Rights) and *Líderes en Acción* (Leaders in Action)

⁵ *Cf. Case of Olivera Fuentes v. Peru.* Order of the President of the Inter-American Court of Human Rights of June 30, 2002. Available at:

www.corteidh.or.cr/docs/asuntos/olivera_fuentes_30_06_22.pdf

witness proposed by the representatives, an expert witness proposed by the State⁶ and an expert witness proposed by the Commission. The public hearing took place on August 24, 2022, during the Court's 150th Regular Session held in Brasilia, Brazil.⁷

10. *Amici Curiae*. The Court received twelve *amicus curiae* briefs submitted by: 1) José Benjamín González Mauricio;⁸ 2) students and staff of the human rights department of the Law and Social Sciences Faculty at the National University of Comahue;⁹ 3) the *Presente* organization;¹⁰ 4) Outright International organization;¹¹ 5) the Law Clinic on Freedom of Information and Transparency of the Law Faculty at Universidad del Pacífico;¹² 6) the Coalition of LGBTTTI and Sex Workers working within the framework of the OAS;¹³ 7) the International Human Rights Observatory of the National Lawyers'

⁶ On August 4, 2022 the State requested a change in the presentation of the testimony of expert witness Rafael Rodríguez Campos so that it could be given virtually. In a note from the Secretariat dated August 18, 2022, and having notified the representatives and the Commission of the State's request for observations, and after having granted the State the right to reply to said observations, the parties and the Commission were informed of the President's decision to modify the nature and modality of said expert's statement, ordering him to testify as a witness and by means of an affidavit. On August 20, 2022, the State requested a reconsideration of the President's decision. On August 22, 2022, the Plenary of the Court dismissed the application filed by the State and confirmed the President's decision. *Cf. Olivera Fuentes v. Peru*. Order of the Inter-American Court of Human Rights of August 22, 2022. Available at: https://www.corteidh.or.cr/docs/asuntos/olivera_fuentes_22_08_22.pdf

⁷ The following persons appeared at the hearing: a) for the Inter-American Commission; Esmeralda Arosemena de Troitiño, Commissioner, IACHR, Jorge Meza Flores, Assistant Executive Secretary and Carla Leiva, Adviser of the Commission; b) for the representatives of the alleged victim: Carlos Joel Zelada Acuña, Sayda Silvia Lucas Aguirre, Diego Alberto Quesada Nicoli and María Ysabel Cedano García, c) and for the State of Peru: Carlos Miguel Reaño Balarezo, Specialized Supranational Public Prosecutor, Judith Cateriny Córdova Alva, Lawyer of the Specialized Supranational Public Prosecutor's Office and José Carlos Vargas Soncco, Lawyer of the Specialized Supranational Public Prosecutor's Office.

⁸ The brief was signed by José Benjamín González Mauricio and relates to hate speech against sexually diverse populations in Latin America and the Caribbean.

⁹ The brief was signed by the lawyer Jorge Montes and students of the II Human Rights Seminar– 2022 of the National University of Comahue and contains considerations on (i) heteronormativity, (ii) principle of non-discrimination, (iii) the superior interest of the child, (iv) harm to fundamental rights, and (v) proposals for possible reparations in the specific case.

¹⁰ The brief was signed by Gabriel de la Cruz Soler, María Pía Bravo, Renato Velásquez Peláez, Kerli Solari Díaz and Mariela Noles Cotito and relates to (i) exclusion and violence that still persist: situation of structural discrimination against LGBTIQ+ people in Peru, (ii) demolishing the structures of discrimination: necessary measures of reparation in the face of discrimination against LGBTIQ+ persons in the private sphere, and (iii) businesses, human rights and LGBTIQ+ people: recommendations for transformational reparations.

¹¹ The brief was signed by Alberto Belaunde de Cárdenas and Arif Hyder Ali and relates to (i) statement of interest to the *amici curiae*, (ii) presentation of preliminary arguments, (iii) summary of facts and background (iv) proceedings before the Commission, (v) arguments and (vi) conclusion.

¹² The brief was signed by Andrés Calderón and relates to (i) discrimination and attacks on freedom of gender expression in the Peruvian context, (ii) scope of the right to freedom of expression, in particular, freedom to gender expression; (iii) analysis of the restriction of the right to freedom of expression in relation to State obligations to respect, guarantee and non-discrimination; (iv) omissions in the authorities' reasoning in the administrative and judicial proceedings on the right to freedom of expression, and (v) conclusions.

¹³ The brief was signed by Fanny Gómez-Lugo, Daisha Edmundson, Stephane Lustig and Juan Felipe Rivera and relates to the following arguments: (i) Crissthian suffered discrimination both for his sexual orientation and for his gender expression. Crissthian was a victim of discrimination for displaying affection toward his partner in public, which effectively constituted a violation of the right to freedom of expression; (ii) it is essential to understand the context of violence and systemic discrimination suffered by the LGBT community in Peru. What happened to Crissthian was not an isolated case, but forms part of a system that discriminates against people based on perceptions of their sexual orientation, gender identity and expression, both in Peru and throughout the Latin American region; (iii) heterosexual couples will never experience the discrimination suffered by Crissthian and his partner due to heterosexual privilege and heteronormativity. Due

Association of Mexico;¹⁴ 8) the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises;¹⁵ 9) the Unicx's Free Legal Clinic of the Law Faculty at the Pontificia Universidad Católica del Perú;¹⁶ 10) the National Coordinator of Human Rights of Peru;¹⁷ 11) the NGO *Colombia Diversa* in representation of the Network of LGBTI+ Litigants of the Americas and the Regional Network *Sin Violencia* LGBTI;¹⁸ and 12) Tatiana Cardoso Squeff, Fernanda de Almeida Rangel and Lucia Souza d'Aquino.¹⁹

11. *Final written arguments and observations.* On September 26, 2022, the representatives and the State forwarded their final written arguments, together with several annexes, while the Commission presented its final written observations. In a note of the Secretariat dated September 28, 2022, the parties and the Commission were granted a period of time to make observations on the aforementioned annexes. On October 6, 2022, the Commission indicated that it had observations to make. On October 7, 2022, the State and the representatives submitted their respective observations.

12. *Deliberation of the case.* The Court deliberated this judgment on February 4, 2023, during its 150th Regular Session.

to heteronormativity, it is usual for homosexual people to be treated differently from heterosexuals and that difference in treatment is discriminatory; (iv) discrimination, violence and micro-aggressions that continuously occur in Peru have greatly affected the mental health of the LGBT community; (v) the State has the positive obligation to guarantee the protection of individuals, not only against violations perpetrated by the State itself, but also against acts committed by private individuals or entities. Therefore, Peru must ensure that companies do not apply discriminatory practices against LGBT people, and (vi) the principle of the "best interests of the child" is often used by States and organizations to justify discrimination against the LGBT community.

¹⁴ The brief was signed by Arturo Pueblita Fernández, Isabel Davara de Marcos, Julieta Becerril Romero and Juan Francisco Diez Spelz and relates to (i) arguments concerning the case that address legislation on the right to equality, identity and free development of the personality, and (ii) arguments related to human rights and businesses.

¹⁵ The brief was signed by Fernanda Hopenhaym and relates to international standards on human rights and business enterprises, emphasizing their importance in order to determine the State's international responsibility in light of its duty to protect against human rights abuses committed by businesses, including guaranteeing access to effective mechanisms of reparation when such abuses occur.

¹⁶ The brief was signed by Renata Bregaglio Lazarete and Nicole Vásquez Lozada and relates to (i) the generalized or systematic context of discrimination against LGBTI people in Peru and (ii) the reversal of the burden of proof.

¹⁷ The brief was signed by Maria Jennie Dador Tozzini and Beatriz Ramírez Huaroto and relates to (i) the lack of public response to structural discrimination against LGBTI people in Peru, and (ii) the role of INDECOPI and its administrative process as a more efficient alternative to the *amparo*.

¹⁸ The brief was signed by Marcela Sánchez Buitrago, Juan Felipe Rivera Osorio, Beldys Hernández Albarracín, María Camila Arias, Carlos Mantilla, Natalia Briceño, Estefany León Ferreira, Melissa Fierro Cedeño, Katia Lázaro Vergel, Laura Valentina Rocha, Mateo Aguilera Ruíz, Ambar Sánchez Latorre and Karen Anaya Cortés and relates to (i) the public space as a common place of violence and punishment against non-hegemonic sexual orientations and gender identities in Latin America; (ii) violence due to prejudice, as an analytical tool, allows an understanding of violence and rejection of same-sex couples in the public space, as in the case under study; (iii) the national context of the case and the situation in Peru; (iv) freedom of expression (and association) includes expressions of affection between same-sex couples and is protected by the ACHR; (v) the dynamic burden of proof, its reversal or the use of presumptions as fundamental tools to analyze cases of discrimination in administrative and judicial proceedings, and as a guarantee of justice, and (vi) the impact of discrimination on the mental health of LGBTIQ+ persons.

¹⁹ The brief was signed by Tatiana Cardoso Squeff, Pedro Lucchetti Silva, Andréia Fernández de Almeida Rangel, Igor Mendinilla de Castilho, Lucia Souza d'Aquino and Daniel Ferrer Tavares Dembroz and relates to consumer protection in a business establishment and the protection derived from the State's obligations.

III JURISDICTION

13. The Court has jurisdiction to hear this case pursuant to Article 62(3) of the American Convention because Peru has been a State Party to said instrument since July 28, 1978, and accepted the contentious jurisdiction of the Court on January 21, 1981.

IV PRELIMINARY OBJECTIONS

14. The State filed five preliminary objections related to: a) review of the legality of the procedure followed by the Commission; b) the inability of the Commission to act as a fourth instance; c) failure to exhaust domestic remedies; d) the undue inclusion of facts that are not part of the factual framework of the case and e) the undue inclusion in the pleadings and motions brief of rights allegedly violated. Given the similarity of the arguments, the Court will analyze the first two objections jointly. With regard to points d) and e), the Court notes that, due to their nature, they do not qualify as preliminary objections, for which reason they will be analyzed in the next chapter entitled "Preliminary Considerations".

A. Review of the legality of the procedure followed by the Commission and fourth instance objection

A.1 Arguments of the State and observations of the Commission and the representatives

15. The **State** requested that the Court review the legality of the Commission's actions, considering that this body had "exceeded its functions" by assuming competencies that would pertain exclusively to the domestic courts, as it allegedly carried out "an examination and assessment of the evidence, which is not in keeping with its functions," thereby acting "as an appellate court." The State alleged that the Commission had reexamined the evidence presented in the administrative and judicial proceedings conducted by the domestic authorities "in the manner of a higher court, which reviews the actions of a lower court."

16. The **Commission**, for its part, argued that the State had not demonstrated that the Commission had committed errors, and even less those of a serious nature that would warrant a review of legality by the Court. It also pointed out that it had not acted as a fourth instance, but rather had ascertained whether the actions of the domestic authorities respected the rights protected by the American Convention and that, to this end, it had applied the evidentiary standard required in the inter-American human rights system and developed by the Court since the case of *Velásquez Rodríguez v. Honduras*. It added that, by examining the compatibility of the domestic proceedings, the Commission could determine whether the burden of proof imposed in the context of a case was compatible with the American Convention. It therefore considered that its actions were consistent with the case law of the Inter-American Court and requested

that this preliminary objection be dismissed.

17. The **representatives** recalled that the Court has “clearly” established in its constant case law that it is authorized to examine the actions of the domestic courts if the purpose is to determine the compatibility of domestic jurisdictional proceedings with the American Convention. Accordingly, the examination of the conformity of domestic proceedings with the inter-American framework is a matter pertaining to the merits of the dispute.

A.2 Considerations of the Court

18. First, the **Court** recalls that the Inter-American Commission has independence and autonomy to exercise its functions in accordance with the American Convention, especially as regards the procedure for analyzing individual petitions established in paragraphs 44 to 51 of the Convention. Nevertheless, the Court has established in its case law that it may review the legality of the Commission’s actions when one of the parties alleges the existence of a serious error that could impair its defense.²⁰ In this case, the Court notes that the State did not present any arguments or evidence to prove this point.

19. Secondly, the Court has held that the organs of the inter-American human rights system do not act as a fourth instance of judicial review and, therefore, cannot examine the assessment of evidence carried out by national judges to determine whether such evaluations were compatible with domestic law. However, when the alleged violations of the State’s international obligations are linked to the actions of jurisdictional bodies, this may lead it to examine the respective domestic proceedings, in order to establish whether or not they are compatible with the American Convention.²¹ In this regard, the State affirms that the Inter-American Commission exercised the functions of a fourth instance. The Court notes that the purpose of this case is not to examine and assess the evidence produced at the domestic level, but rather to determine whether there was a violation of various rights enshrined in the American Convention in the context of the decisions adopted by the national authorities, both in the administrative and judicial proceedings, as the Inter-American Commission did. Therefore, in order to establish whether said violations actually occurred, it is essential to analyze the decisions issued by the different administrative and jurisdictional authorities, in order to determine their compatibility with the State’s international obligations. Consequently, this preliminary objection is dismissed.

²⁰ Cf. *Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights (Arts. 41 and 44 of the American Convention on Human Rights)*. Advisory Opinion OC-19/05 of November 28, 2005. Series A No. 19, first and third operative paragraphs; *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2007. Series C No. 172, para. 32 and *Case of Moya Chacón et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of May 23, 2022. Series C. No. 451, para. 16.

²¹ Cf. *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 26, 2010. Series C No. 220, para. 18, and *Case of Digna Ochoa and Family v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2021. Series C No. 447, para. 38.

B. Failure to exhaust domestic remedies

B.1 Arguments of the State and observations of the Commission and the representatives

20. The **State** pointed out that Mr. Olivera opted to have recourse to an administrative disciplinary proceeding, pursuing a remedy that “was not the most appropriate for the State to settle the dispute at the domestic level.” It added that other suitable remedies were available to protect the right to equality and non-discrimination, honor and dignity, personal liberty and freedom of expression invoked, such as (i) the process of constitutional *amparo*, (ii) the filing of a parallel criminal complaint for discrimination, and (iii) the filing of a civil suit to demand compensation for damages.

21. The **Commission** argued that the alleged victim made use of the available administrative and judicial remedies to address his claim regarding the violation of consumer rights due to his unequal treatment based on the expression of his sexual orientation. It recalled that it is not the practice of the organs of the inter-American system to require the exhaustion of domestic remedies, separately and autonomously, for each of the effects derived from a main violation, since this would not meet the standards of reasonableness.

22. The **representatives** pointed out that (i) the preliminary objection was time-barred because the State used arguments that differed from those originally presented before the Commission; (ii) the State did not specify clearly which of the mechanisms that were not exhausted would be appropriate; (iii) the alleged victim exhausted the appropriate administrative and judicial remedies to sanction acts of discrimination against a consumer, and (iv) the State had ample opportunity, at various stages, to refer to and rectify the alleged violations of Mr. Olivera’s human rights.

B.2 Considerations of the Court

23. The **Court** recalls that Article 46(1)(a) of the American Convention establishes that in order to determine the admissibility of a petition or communication submitted to the Inter-American Commission in accordance with Articles 44 and 45 of the Convention, the remedies of the domestic jurisdiction must have been pursued and exhausted in accordance with generally recognized principles of international law.²² However, this means that such remedies must not only exist formally, but also that they must be adequate and effective and comply with the requirements set forth in Article 46(2) of the Convention.²³

24. Accordingly, the Court notes that the State filed the objection of failure to exhaust domestic remedies at the admissibility stage of the petition, through Report N° 113-2013-JUS/PPES of July 15, 2013, in which it indicated that the appropriate remedy was

²² Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 85, and *Case of Cortez Espinoza v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of October 18, 2022. Series C No. 468, para. 24.

²³ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 63, and *Case of Cortez Espinoza v. Ecuador, supra*, para. 24.

the constitutional *amparo* process.²⁴ Therefore, the preliminary objection was filed at the proper procedural moment, although at that time the State only referred to the *amparo* process as the appropriate remedy that should have been exhausted.

25. Based on the foregoing, the Court notes that, although the constitutional *amparo* could also have been a suitable remedy for the alleged violations suffered by Mr. Olivera, he made use of administrative and judicial proceedings to address his claim regarding the unequal treatment he allegedly received from a company due to his sexual orientation, until the cassation appeal filed before the Permanent Constitutional and Social Law Chamber of the Supreme Court of Justice was declared inadmissible. The Court recalls that it is not necessary to exhaust domestic remedies with respect to all or any of the available remedies but that, in accordance with this Court's jurisprudence, "the remedies that must be exhausted are those that are appropriate in the particular situation of the alleged human rights violation,"²⁵ as occurred in the present case.

26. The Court further notes that the violation of the right not to be discriminated against is closely connected to other rights invoked (honor and dignity, personal liberty and freedom of expression), and that it is unreasonable to require the exhaustion of domestic remedies separately and autonomously for each of the effects derived from the main violation. Thus, the remedy used by Mr. Olivera was appropriate to protect the legal situation allegedly infringed. Consequently, the Court dismisses this preliminary objection.

²⁴ Cf. Report No. 113-2013-JUS/PPES of the Specialized Public Prosecutor's Office of July 15, 2013 (evidence file, folio 234), Report No. 41-2014-JUS/PPES of the Specialized Public Prosecutor's Office of March 17, 2014 (evidence file, folios 604 to 605), and Report No. 059-2016-JUS/CDJE-PPES of the Specialized Public Prosecutor's Office of April 8, 2016 (evidence file, folios 645 to 647).

²⁵ Cf. *Case of Escher et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 6, 2009. Series C No. 200, para. 38, and *Case of Cortez Espinoza v. Ecuador, supra*, para. 24.

V
PRELIMINARY CONSIDERATIONS

A. The undue inclusion of facts that are not part of the factual framework of the case

A.1 Arguments of the State and observations of the Commission and the representatives

27. The **State** argued that the representatives, in their pleadings and motions brief, referred to facts that are outside the factual framework established by the Inter-American Commission in the Merits Report, namely: (i) facts related to Mr. Olivera's expulsion from a gym, which prompted a press release by the Homosexual Movement of Lima, on February 11, 2004, and (ii) the report aired on the television program *Reporte Semanal* of August 17, 2004, in which a journalist and his partner, of a different sex, deliberately engaged in amorous behavior in order to highlight the different treatment received by persons of diverse sexual orientation in Peru.

28. The **Commission** emphasized that the case law of the Inter-American Court has clearly established that the facts contained in the Merits Report constitute the factual framework of the case. In this regard, it argued that it was not admissible for the parties to allege new facts other than those included in the Merits Report, without prejudice to subsequently presenting facts that would clarify or refute those mentioned therein.

29. As regards the press report on the alleged act discrimination against Mr. Olivera at the premises of a gym, although the **representatives** acknowledged that the Merits Report did not explicitly refer to this document, they argued that this piece of evidence had been included in the international proceedings from the time the petition was submitted to the Commission. Similarly, with regard to the report of the television program *Reporte Semanal* on August 17, 2004, they indicated that the Commission mentions it in paragraphs 17, 20 and 22 of the Merits Report. Furthermore, the representatives emphasized that at no time was it argued that the events of August 17, 2004 constituted additional unlawful acts attributable to the State. On the contrary, they considered that the report in question was "an element that provided clear indications of the frequent discriminatory practices against homosexual couples on the premises of the accused company."

A.2 Considerations of the Court

30. The **Court** recalls that its case law has been clear in establishing that the factual framework of the proceeding is limited to the facts described in the Merits Report, even though the representatives may present facts that explain, clarify or reject those mentioned in the Commission's report.²⁶

²⁶ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C. no 298, para. 37, and *Casierra Quiñonez et al. v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of May 11, 2022. Series C No. 450, para. 22.

31. First, with regard to the press release by the Homosexual Movement of Lima on February 11, 2004, concerning Mr. Olivera's expulsion from a gym for expressing his sexual orientation, the Court notes that these facts were not mentioned by the Commission in its Merits Report. Therefore, this press report and the facts to which it refers have no direct link with the factual framework defined by the Commission and must be excluded from the analysis of the treaty violations alleged by the representatives.

32. Secondly, in relation to the *Reporte Semanal* television program of August 17, 2004, the Court notes that this did form part of the factual framework defined by the Commission, inasmuch as these facts were explicitly mentioned in paragraphs 16, 20 and 22 of the Merits Report.²⁷ Thus, in the section concerning the legal basis, the Inter-American Commission expressly alludes to this television program as an element of evidence to assess the violations alleged by Mr. Olivera Fuentes:

Finally, the Commission points out that on August 17, 2004, the alleged victim went to another commercial center of the same company, accompanied by a heterosexual couple and again engaged in affectionate behavior; however, only the alleged victim and his partner were reprimanded for expressing such behavior.²⁸

33. In view of the above, the Court will exclude the facts and evidence concerning Mr. Olivera's expulsion from a gym, which led to the publication of a press release by the Homosexual Movement of Lima on February 11, 2004. However, the Court will analyze the facts contained in the report of the *Reporte Semanal* television program of August 17, 2004.

B. The alleged undue inclusion in the pleadings and motions brief of rights allegedly violated

B.1 Arguments of the State and observations of the Commission and the representatives

34. The **State** argued that the representatives had included in their pleadings and motions brief claims for alleged violations of Articles 7 (Right to liberty) and 13 (Right to freedom of expression) of the American Convention, despite the fact that these alleged violations were not considered by the Commission in its Merits Report. It added that, although the representatives may invoke in their pleadings and motions brief human rights violations other than those included in the Merits Report, "this prerogative has a limitation that prevents them from invoking new facts" and that in the instant case they had sought to "accuse the Peruvian State of generalized acts of 'repression,' aimed at making invisible the gender expression of the LGBTI population."

²⁷ In those specific paragraphs the Commission describes the analysis carried out by the national authorities on the admissibility of said television program as evidence of discriminatory treatment.

²⁸ Cf. IACHR, *Case Crissthian Manuel Olivera Fuentes v. Peru*. Merits Report No. 304/20, of October 29, 2020, para.47.

35. The **Commission** pointed out that the Court's jurisprudence has been clear in establishing that the representatives may invoke the violation of rights other than those included in the Merits Report, as long as they are related to the factual framework defined by the Commission.

36. Similarly, the **representatives** indicated that their claims were based on the actions of the administrative and judicial authorities described in the factual framework of the Merits Report. They argued that the alleged violation of Articles 7 and 13 of the American Convention arose from the actions of the administrative and judicial authorities, which are described in the Merits Report.

B.2 Considerations of the Court

37. The **Court** reiterates that the representatives of the alleged victims may invoke the violation of rights other than those included in the Merits Report, as long as they remain within the factual framework defined by the Commission. Consequently, it is for the Court to decide on the appropriateness of arguments related to the factual framework, thereby safeguarding the procedural balance of the parties.²⁹

38. In the instant case, the Court notes that the representatives based the alleged violation of Articles 7 and 13 of the American Convention on the alleged failure to investigate, prosecute and punish the acts of discrimination claimed by Mr. Olivera Fuentes. Since the Commission has limited the facts of the case to the analysis of the domestic administrative and jurisdictional proceedings, the Court concludes that the inclusion in the pleadings and motions brief of other rights allegedly violated during those proceedings falls within the factual framework defined in the Merits Report.

VI EVIDENCE

A. Admissibility of the documentary evidence

39. The Court received various documents presented as evidence by the Commission and the representatives, which, as in other cases, are admitted on the understanding that they were submitted at the proper procedural opportunity (Article 57 of the Rules of Procedure).³⁰

40. The Court notes that the representatives submitted, together with their brief of

²⁹ Cf. *Case of "Five Pensioners" v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98, para. 155, and *Case of Casierra Quiñonez et al. v. Ecuador, supra*, para. 22.

³⁰ Documentary evidence may be presented, in general and in accordance with Article 57(2) of the Rules of Procedure, together with the briefs submitting the case, of pleadings and motions or the answering brief, as appropriate, and evidence submitted outside those procedural opportunities is not admissible, except in the exceptions established in Article 57(2) of the Rules of Procedure (namely, force majeure, serious impediment) or if it concerns a supervening fact, i.e., one that occurred after the aforementioned procedural moments. Cf. *Case of Velásquez Rodríguez v. Honduras, supra*, para. 140, and *Case of Leguizamón Zaván v. Paraguay. Merits, reparations and costs*. Judgment of November 15, 2022. Series C. No. 473, para. 28.

observations on the preliminary objections filed by the State, two annexes referring to two judicial rulings of July 24, 2017 and November 3, 2020.³¹ The Court confirms that these documents predate the pleadings and motions brief and that the representatives have not justified the reason why, pursuant to Article 57(2) of the Court's Rules of Procedure, they should be exceptionally admitted. Consequently, these documents are inadmissible because they are time-barred.

41. The Court also received documents attached to the final written arguments of the alleged victim's representatives³² and of the State.³³ In a note of the Secretariat dated September 28, 2022, the parties and the Commission were given a period of time to submit observations to the annexes presented by the representatives and the State in their final written arguments. On October 6, 2022, the Commission indicated that it had no observations to make. On October 7, 2022, the State and the representatives submitted their respective observations.

42. Regarding Annexes 1 and 2 submitted by the representatives, the State pointed out that they had not justified the "reasons, grounds or relevance" of said annexes. It added that these documents were not related to the facts that are the subject of this international dispute. With respect to Annex 3, the State noted that it was dated prior to the submission of the pleadings and motions brief, and was therefore time-barred. It also pointed out that it was not related to the facts of the case. Finally, with regard to Annexes 4 and 5, the State made assessments of their evidentiary value.

43. The Court notes that Annexes 1, 2, 4 and 5 attached by the representatives are documents issued after the filing of their main briefs and, therefore, are evidence of supervening facts related to the present case, regardless of the evidentiary value granted to them by this Court. Consequently, in accordance with Article 57(2) of the Rules of Procedure, the Court decides to admit them. With regard to Annex 3, the Court finds that this document is indeed dated prior to the pleadings and motions brief and that the representatives have not justified the reason why, under the terms of Article 57(2) of the Rules of Procedure, it should be exceptionally admitted. Consequently, said document is inadmissible because it is time-barred.

44. On the other hand, with regard to the document attached by the State, the representatives assessed it and requested that it be taken into account by the Court in its analysis of this case. The Court notes that although the document provided by the State is dated August 22, 2022 (that is, after the submission of the answering brief) it

³¹ Annex 1: Superior Court of Justice of Lima, Second Constitutional Court of Lima, File No. 10819-2017, Decision No. 1, of July 24, 2017, and Annex 2: Constitutional Court of Peru, File No. 1739-2018-PA/TC, Case of Oscar Ugarteche, Judgment of November 3, 2020, Individual vote of Judge Miranda Canales.

³² Annex 1: Constitutional Court of Peru, File No. 02653-2021-PA/TC, Case of Paredes Aljovín. Judgment of April 19, 2022; Annex 2: Constitutional Court of Peru, File No. 02743-2021-PA/TC, Case of Martinot Urbina, Judgment of April 5, 2022; Annex 3: Constitutional Court of Peru. File No. 1739-2018-PA/TC, Case of Oscar Ugarteche. Judgment of November 3, 2020; Annex 4: Receipt for payment made by *DEMUS* to the lawyer for the preparation of briefs, September 24, 2021, and Annex 5: Receipts for payments made by *DEMUS* after September 24, 2021, and for psychological treatment in the context of the litigation before the Inter-American Court on the following dates: February 9, 2022, March 16, 2022, May 17, 2022, May 25, 2022, June 27, 2022, July 19, 2022, July 27, 2022, August 10, 2022, August 18, 2022, August 19, 2022, August 27, 2022, August 31, 2022, and September 26, 2022.

³³ Annex 1: Information on activities carried out by the Directorate of Human Rights Policies and Management, regarding case No. 13.505 – Crissthian Manuel Olivera Fuentes.

refers to the implementation of the National Human Rights Plan during the years 2018 to 2021 (in other words, it refers to facts prior to the submission of the answering brief). Nevertheless, the Court will include said document as it considers it useful for the settlement of this case, in accordance with Article 58(a) of the Rules of Procedure.

B. Admissibility of the testimonial and expert evidence

45. The Court deems it appropriate to admit the statements provided by affidavit³⁴ and at the public hearing,³⁵ insofar as they comply with the purpose defined by the President in the order that required them.³⁶

VII FACTS

46. In this chapter, the Court will establish the facts of the case based on the factual framework submitted by the Inter-American Commission and the body of evidence, in relation to the following aspects: (a) events that occurred on August 11, 2004 (b) complaint to the Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Intellectual Property (INDECOPI), (c) appeal to the Tribunal for the Defense of Competition and Intellectual Property, (d) appeal for annulment before the Second Chamber for Contentious-Administrative Matters of the Superior Court of Justice of Lima, (e) appeal before the Permanent Civil Chamber of the Supreme Court of Justice, and (f) cassation appeal before the Permanent Constitutional and Social Law Chamber of the Supreme Court of Justice.

A. Events that occurred on August 11, 2004

47. On August 11, 2004, Crissthian Manuel Olivera Fuentes, a human rights defender with a long history of activism for the rights of LGBTIQ+ persons,³⁷ and his same-sex romantic partner, were in a cafeteria located in the Santa Isabel supermarket in San Miguel, Lima. While at this business establishment, Mr. Olivera and his partner engaged

³⁴ The Court received the statements rendered by affidavit of the witnesses Juan Francisco Rojas Leo and Elizabeth Mercedes Sante Beizaga and of the witness Rafael Rodríguez Campos, proposed by the State, as well as of the expert witness Gonzalo Meneses, proposed by the representatives.

³⁵ During the public hearing the Court received the statements of the alleged victim Crissthian Manuel Olivera Fuentes and of the expert witnesses Laura Clérico, proposed by the representatives, and Laura Otero, proposed by the Inter-American Commission.

³⁶ The purposes of all these statements are established in the Order of the President of the Inter-American Court of June 30, 2002. Available at:

www.corteidh.or.cr/docs/asuntos/olivera_fuentes_30_06_22.pdf

³⁷ Cf. For the purposes of this judgment, the Court will use the acronym "LGBTIQ+" to refer to lesbian, gay, bisexual, transgender, intersexual and queer persons. The "plus" sign represents persons with a diverse sexual orientation, gender identity, gender expression and sex characteristics that self-identify using other terms. Cf. International Labor Organization (ILO), Report "Inclusion of lesbian, gay, bisexual, transgender, intersexual and queer (LGBTIQ+) persons in the world of work: a learning guide," page 4, available at: https://www.ilo.org/global/publications/books/WCMS_852977/lang-es/index.htm. See also, United Nations High Commissioner for Refugees, "LGBTIQ+ refugees, 11. Terminology", available at: <https://www.unhcr.org/handbooks/ih/age-gender-diversity/lgbtiq-refugees>

in displays of affectionate behavior. According to Mr. Olivera, such behavior involved “physical contact and amorous gazes” as well as the reading of poems.³⁸ According to information provided by the supermarket in the context of the domestic proceedings, Mr. Olivera and his partner exchanged “caresses, hugs and kisses.”³⁹

48. Ms. G.M.P, the supermarket supervisor, received a complaint from a customer who said he felt “uncomfortable and annoyed” by the “attitude” of Mr. Olivera and his partner, who “were seated at the table next to the one he occupied with his daughter, who had just come from playing in the [play area].”⁴⁰ As a result of this complaint, the store supervisor, together with members of the security staff, approached the couple and asked them to “cease their amorous scenes out of respect for the other customers,” since one of them was complaining because “there were children who were passing by for the games.”⁴¹ Finally, the supermarket supervisor told them that they had to buy items from the cafeteria and refrain from their affectionate behavior so as not to disturb the clientele, or else they had to leave the establishment.⁴² At a certain point during this incident an agent of the National Police was present.⁴³

49. In response to the comments made by the store supervisor, Mr. Olivera expressed his disagreement with what he considered to be “discriminatory treatment,” pointing out that while homosexual couples could not show affection in the establishment, “heterosexual couples [can] express themselves publicly in the cafeteria.”⁴⁴ In response to Mr. Olivera and his partner’s complaint, the supermarket’s security staff approached them and asked them to comply with the supervisor’s instructions or leave the premises.⁴⁵ According to Mr. Olivera, the attitude of the supermarket staff placed him in an “embarrassing” and “humiliating” situation of discrimination.⁴⁶

³⁸ Cf. Complaint filed by Crissthian Manuel Olivera Fuentes before the National Institute for the Defense of the Consumer and Intellectual Property (INDECOPI), on October 1, 2004 (evidence file, folio 4), and Statement of Crissthian Manuel Olivera Fuentes rendered at the public hearing held on August 24, 2022, during the Court’s 150th Regular Session.

³⁹ Cf. Answering brief of *Supermercados Peruanos S.A.*, of October 19, 2004 (evidence file, folio 14). See also, Statement of G.M.P, manager of *Supermercado Santa Isabel - San Miguel*, of October 14, 2004 (evidence file, folio 21).

⁴⁰ Cf. Statement of G.M.P, manager of *Supermercado Santa Isabel - San Miguel*, of October 14, 2004 (evidence file, folio 21).

⁴¹ Cf. Statement of G.M.P, manager of *Supermercado Santa Isabel - San Miguel*, of October 14, 2004 (evidence file, folio 21).

⁴² Cf. Statement of Crissthian Manuel Olivera Fuentes at the public hearing held on August 24, 2022, during the Court’s 150th Regular Session.

⁴³ Cf. Tribunal for the Defense of Competition and Protection of Intellectual Property, Chamber for the Defense of the Jurisdiction, Decision no. 0665-2006/TDC-INDECOPI, of May 17, 2006 (evidence file, folio 49).

⁴⁴ Cf. Complaint of Mr. Olivera Fuentes to INDECOPI of September 29, 2004 (evidence file, folio 4).

⁴⁵ Cf. Complaint of Mr. Olivera Fuentes to INDECOPI of September 29, 2004 (evidence file, folio 4); and statement rendered by Crissthian Manuel Olivera Fuentes at the public hearing held on August 24, 2022, during the Court’s 150th Regular Session, who stated the following: “Yes, they tried to move us out, but they didn’t manage it because we refused, they wanted to take us by the arm and they told me ‘come with us’ [...] but I dodged that attempt.”

⁴⁶ Cf. Complaint filed by f Mr. Olivera Fuentes to INDECOPI on September 29, 2004 (evidence file, folio 4); and statement rendered by Crissthian Manuel Olivera Fuentes at the public hearing held on August 24, 2022, during the Court’s 150th Regular Session. Mr. Olivera stated the following: “The situation became very embarrassing, humiliating, because it went from a peaceful, romantic situation [...] and then abruptly to a humiliating situation. Suddenly, we had the security personnel surrounding us and treating us like criminals.”

50. Later, Mr. Olivera approached the cash register and asked to speak to the store manager. In response to his request, the store manager was called over to the cash register. Mr. Olivera handed the manager a card from the Homosexual Movement of Lima, telling her that that she would be hearing from him.⁴⁷

51. Several days later, on August 17, 2004, as part of a report on the *Reporte Semanal* television program, Mr. Olivera went to another branch of *Supermercado Santa Isabel* in the company of his partner, as well as with a journalist and his partner, of different sex. Both couples deliberately engaged in the same displays of affection. Mr. Olivera and his partner were reprimanded by the staff of the establishment, who told them that because of company policy they had to leave and that "outside in the street [they] could do whatever [they] want[ed], but not [here]."⁴⁸ For his part, the journalist and his partner did not receive any type of warning or reprimand.⁴⁹

B. Complaint to the Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Intellectual Property (INDECOPI)

52. On October 1, 2004, Mr. Olivera filed a complaint with the Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Intellectual Property (INDECOPI) against *Supermercados Peruanos S.A.*, alleging that he had received discriminatory treatment because of his sexual orientation on August 11, 2004, based on Article 2(2) of the Constitution,⁵⁰ as well as on Articles 5(d)⁵¹ and 7(b)⁵²

⁴⁷ Cf. Complaint filed by Mr. Olivera Fuentes before INDECOPI on September 29, 2004 (evidence file, folio 4); Statement of G.M.P, manager of *Supermercado Santa Isabel - San Miguel*, of October 14, 2004 (Evidence file, folio 21), and Report No. 056-J.P.P. of C.Q.D, head of Loss Prevention of *Supermercados Santa Isabel - San Miguel*, of August 12, 2004 (evidence file, folio 23).

⁴⁸ Cf. Complaint filed by Crissthian Manuel Olivera Fuentes before the National Institute for the Defense of the Consumer and Intellectual Property (INDECOPI), of October 1, 2004 (Evidence file, folio 5), and video of the program *Reporte Semanal* broadcast on August 22, 2004 (evidence file, audiovisual material file, minutes 5:00 to 14:00).

⁴⁹ Cf. Complaint filed by Crissthian Manuel Olivera Fuentes before the National Institute for the Defense of the Consumer and Intellectual Property (INDECOPI), on October 1, 2004 (Evidence file, folio 5), and video of the television program *Reporte Semanal* broadcast on August 22, 2004 (evidence file, audiovisual material file, minutes 5:00 to 14:00).

⁵⁰ This article establishes that "[e]very person has the right to equality before the law. No one shall be discriminated against on the basis of origin, race, sex, language, religion, opinion, economic or other status."

⁵¹ This article establishes the following:

d) The right to the protection of their economic interests, through equitable and fair treatment in all commercial transactions; and to protection against coercive commercial methods or those involving disinformation or misinformation about products or services; [...] It should be noted that Article 5(d) of Legislative Decree No. 716 establishes that all consumers have the right to protection of their economic interests, through equitable and fair treatment in all commercial transactions; it also establishes that consumers may not be discriminated against on the basis of race, sex, socioeconomic status, language, disability, political preferences, religious beliefs or any others, in the acquisition of products and the provision of services offered in premises open to the public.

⁵² This article establishes that:

Suppliers may not discriminate in any way with respect to customers seeking their products and services offered in premises open to the public. It is prohibited to select customers, exclude people or carry out other similar practices, except for reasons of the security of the establishment, the

of Legislative Decree No. 716, the Consumer Protection Law. The complainant included as his main evidence: (i) his own testimony, (ii) the television report of August 17, 2004, from the *Reporte Semanal* television program; and, (iii) another video of a report by the "Panorama" program about a discriminatory incident committed in *Supermercado Santa Isabel* against members of the *Raíz Diversidad Sexual* collective two days prior to the incident involving Mr. Olivera Fuentes.⁵³

53. On October 20, 2004, *Supermercados Peruanos S.A.* responded to the complaint, arguing that Mr. Olivera failed to prove the existence of an act of discrimination against him. The company stated that its staff had asked Mr. Olivera and his partner to "respect the rights of other customers to the quiet, peaceful and appropriate use of the facilities," due to the discomfort of other customers because of their behavior in front of their children. According to the company, the purpose of the intervention was to ensure "respect for morals and good manners"⁵⁴ and the best interests of the children who were playing in the area adjacent to the tables of the supermarket cafeteria,⁵⁵ concluding that the couple's behavior - given the circumstances in which they found themselves - was contrary to "public morality and decency."⁵⁶ Furthermore, in its defense briefs, *Supermercados Peruanos S.A.* attached letters of support in which customers expressed their disapproval of the displays of affection shown by Mr. Olivera and his partner.⁵⁷

54. The company also included, as an annex to the evidence, an expert report by the psychiatrist R.F. entitled "Medical-psychological report on the significance of limiting public displays of erotic behavior between same-sex couples and its effect on children who circumstantially witness such situation." The report emphasized the "importance," for the "normal psychosexual development of children," of a family environment composed of "a father and a mother as a reference for their sexual identification and understanding of complementary relationships between men and women."⁵⁸ According to the report, the effect on a child of "witnessing erotic scenes" consisting of "kissing, hugging, and caresses" between a same-sex couple "varies according to the child's age and the degree of understanding that he or she may have of a given situation, but it will never be neutral." The report also warned that "erotic homosexual relationships" could disrupt children's understanding of "affective relationships between a man and a woman, based on what they see in their own family," causing them "insecurity and anguish."⁵⁹ The report recommended that the CPC should, *inter alia*, "bear in mind the negative

tranquility of its customers or other objective and justified reasons.

⁵³ Cf. Complaint filed by Crissthian M. Olivera Fuentes before the National Institute for the Defense of the Consumer and Intellectual Property (INDECOPI), of October 1, 2004 (evidence file, folios 10 and 11).

⁵⁴ Cf. Response to the complaint of *Supermercados Peruanos S.A.* of October 19, 2004, para. 9 (evidence file, folio 16).

⁵⁵ Cf. Brief filed by *Supermercados Peruanos S.A.* on June 1, 2005 before the CPC of INDECOPI, p. 7 (evidence file, folio 1824); Brief filed by *Supermercados Peruanos S.A.* on August 2, 2005 before the CPC of INDECOPI, pages 4 to 6 (evidence file, folios 1837 to 1839).

⁵⁶ Cf. Response to the complaint of *Supermercados Peruanos S.A.* of October 19, 2004 (evidence file, folio 16).

⁵⁷ Cf. Letters signed by clients in support of *Supermercados Peruanos S.A.*, undated (evidence file, folios 1852 to 1856).

⁵⁸ Cf. Medical-psychological report prepared by Doctor R.F.A. before the Consumer Protection Commission of INDECOPI, undated (evidence file, folio 1864 and 1865).

⁵⁹ Cf. Medical-psychological report prepared by Doctor R.F.A. before the Consumer Protection Commission of INDECOPI, undated (evidence file, folio 1864 and 1865).

effects that exposure to gay lifestyles may have on children.”⁶⁰

55. On January 3, 2005, *Supermercados Peruanos S.A.* filed a brief reiterating the comments contained in its response of October 20, 2004, in which it emphasized that the complainant failed to prove the alleged facts.⁶¹ Likewise, on June 1, 2005, the company filed a new document expanding its defense statement and presenting new evidence and arguments. It stressed that Mr. Olivera had been unable to prove the truth of the facts that were the subject of his complaint and that, on the contrary, the intervention of its staff had been requested by a parent who was accompanied by his children; therefore, the best interests of the children obliged the authorities to take action to ensure their wellbeing and sound development.⁶² Reiterating the need to protect the best interests of the child, the expert report prepared - according to the company - by the “prestigious psychiatrist” R.F.A., emphasized the “negative impacts on children that may be caused by situations such as those under discussion in these proceedings.”⁶³

56. On August 31, 2005, the CPC declared Mr. Olivera’s complaint unfounded, considering that the discriminatory treatment had not been proven, since there was an evidentiary problem with the versions provided by both parties. Consequently, the CPC decided that it should adopt a “prudent attitude in the face of such contradictory facts.”⁶⁴ It also considered that it was not possible to evaluate as evidence the video of August 17, 2004, from the television program *Reporte Semanal*, since it “came from a hidden camera” and showed acts that “had been provoked by the complainant.”⁶⁵

57. Regarding the protection of the best interests of the child, the CPC questioned whether there was a “scientific consensus on the consequences of exposing children to homosexual behavior” but considered that they could be negatively affected by witnessing homosexual behavior. In this regard, it stated that:

[...] the causes of homosexuality (biological or social, or even a combination of both) do not find a consistent and uniform position in the scientific community, but what can be presumed is that the environment is not neutral; that if it does not determine, at least it conditions the psychosexual behavior of individuals, and that there may be a greater influence on children exposed to homosexual conduct.⁶⁶

⁶⁰ Cf. Presentation of the psychiatrist R.F. before the Consumer Protection Commission of INDECOPI, undated (evidence file, folio 1869).

⁶¹ Cf. Brief of *Supermercados Peruanos, S.A.*, of December 12, 2004, submitted to the CPC on January 3, 2005 (evidence file, folios 1808 and following).

⁶² Cf. Brief of *Supermercados Peruanos, S.A.*, of December 12, 2004, submitted to the CPC on May 31, 2005 (evidence file, folios 1818 and following).

⁶³ Cf. Brief of *Supermercados Peruanos, S.A.*, of December 12, 2004, submitted to the CPC on May 31, 2005 (evidence file, folio 1825).

⁶⁴ Cf. Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), Final Decision No. 1039-2005/CPC, of August 31, 2005, (evidence file, folio 1895).

⁶⁵ Cf. Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), Final Decision No. 1039-2005/CPC of August 31, 2005, (evidence file, folio 1896).

⁶⁶ Cf. Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition

58. The above position was endorsed by other reports, including a document provided by the defendant company and prepared by the psychiatrist R.F.A. (*supra* para. 55), emphasizing that it was necessary "to be aware of the negative impact that exposure to gay lifestyles may have on children or the unexpected sight of erotic exchanges between individuals of the same sex."⁶⁷ The CPC considered that, since "science has no defined or uniform and consistent position on what this may mean for children's health, a correct and prudent attitude on the part of those who must judge any case that could entail possible harm to third parties, would require avoidance of the conduct that generates the probability or risk of such harm, especially when dealing with a sensitive group that requires special protection from the State."⁶⁸ Accordingly, the CPC concluded that, "in the interest of protecting minors, the attitude of a parent is understandable when asking a business to require a homosexual couple to be prudent in expressing their affection for each other in places where their young children are present, since what is legitimately invoked is the higher protection that every child deserves."⁶⁹

59. Two members of the CPC presented "dissenting" opinions in which they argued that, from the evidence provided by the company, it was clear that the intervention by its staff was aimed at "preventing displays of affection between a homosexual couple" and that such evidence did not suggest that "the expressions of affection that prompted the request had been exaggerated or inappropriate."⁷⁰ They also pointed out that "it is not consistent with the recognition of the right not to be discriminated against on the basis of sexual orientation to demand that expressions of affection between homosexual couples be made strictly in private or without the possibility of being seen by children." Thus, they considered that in this case, there was indeed discrimination against the consumer.⁷¹

C. Appeal to the Tribunal for the Defense of Competition and Intellectual Property

60. On September 22, 2005, Mr. Olivera appealed the decision of the CPC before the Tribunal for the Defense of Competition and Intellectual Property of INDECOPI

and Protection of Intellectual Property (INDECOPI), Final Decision No. 1039-2005/CPC of August 31, 2005, (evidence file, folio 1878).

⁶⁷ Cf. Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), Final Decision No. 1039-2005/CPC, of August 31, 2005, (evidence file, folio 1878).

⁶⁸ Cf. Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), Final Decision No. 1039-2005/CPC, of August 31, 2005, (evidence file, folio 1884).

⁶⁹ Cf. Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), Final Decision No. 1039-2005/CPC, of August 31, 2005, (evidence file, folio 1887).

⁷⁰ Cf. Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), Final Decision No. 1039-2005/CPC of August 31, 2005, (evidence file, folio 1904).

⁷¹ Cf. Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), Final Decision No. 1039-2005/CPC of August 31, 2005, (evidence file, folio 1903).

(hereinafter "Tribunal for the Defense of Competition").⁷²

61. On May 17, 2006, the Tribunal for the Defense of Competition decided to dismiss the appeal and upheld the challenged decision. It considered that the facts in dispute were based "solely on the allegations of both parties", and that *Supermercados Peruanos S.A.* could not be sanctioned only on the basis of allegations made by one party, since it was necessary to have "certainty of the offense committed, either through evidence or indications that would provide a reasonable degree of certainty regarding the truth of the facts denounced."⁷³ Moreover, the Tribunal excluded from its review the video of the TV program *Reporte Semanal* provided by the alleged victim regarding the events of August 17, 2004, because it "referred to conduct that would have taken place at a later date" and did not refer "directly to the facts that are the subject of [this] proceeding."⁷⁴ On the other hand, the Tribunal considered that the arguments of *Supermercados Peruanos S.A.*, claiming that the behavior of the complainant and his partner had affected the children present in the cafeteria, "lack[ed] relevance," since if the conduct had been excessive "the effect would have been felt by all the other customers, whether adults or children."⁷⁵

62. Two members of the Tribunal presented a "dissenting opinion," affirming that "the record shows that Mr. Olivera was reprimanded for engaging in caresses with his partner and that he was harassed while he remained in the restaurant."⁷⁶ In addition, both members of the tribunal considered that the presence of security staff to request the couple to leave the premises was "excessive, and essentially denotes a differentiated, unfair, inequitable and, above all, discriminatory treatment, which even goes against the dignified treatment that every consumer deserves."⁷⁷

D. Appeal for annulment before the Second Contentious-Administrative Chamber of the Superior Court of Justice of Lima

63. On September 13, 2006, having exhausted the administrative process, Mr. Olivera filed a contentious-administrative action before the Second Contentious-Administrative Chamber of the Superior Court of Justice of Lima (hereinafter "Superior Court of Lima") to request the annulment of the ruling of May 17, 2006, issued by the Tribunal for the Defense of Competition.

⁷² Cf. Tribunal for the Defense of Competition and Protection of Intellectual Property, Defense of Competition Chamber, Decision No. 0665-2006/TDC-INDECOPI, of May 17, 2006 (evidence file, folio 39).

⁷³ Cf. Tribunal for the Defense of Competition and Protection of Intellectual Property, Defense of Competition Chamber, Decision No. 0665-2006/TDC-INDECOPI, of May 17, 2006 (evidence file, folio 48).

⁷⁴ Cf. Tribunal for the Defense of Competition and Protection of Intellectual Property, Defense of Competition Chamber, Decision No. 0665-2006/TDC-INDECOPI, of May 17, 2006 (evidence file, folio 48).

⁷⁵ Cf. Tribunal for the Defense of Competition and Protection of Intellectual Property, Defense of Competition Chamber, Decision No. 0665-2006/TDC-INDECOPI, of May 17, 2006 (evidence file, folio 49).

⁷⁶ Cf. Tribunal for the Defense of Competition and Protection of Intellectual Property, Defense of Competition Chamber. Final Decision No. 0665-2006/TDC-INDECOPI of May 17, 2006, (evidence file, folio 314).

⁷⁷ Cf. Tribunal for the Defense of Competition and Protection of Intellectual Property, Defense of Competition Chamber. Final Decision No. 0665-2006/TDC-INDECOPI of May 17, 2006, (evidence file, folio 309).

64. On June 10, 2008, the Superior Court of Lima delivered a ruling in which it declared the complaint unfounded,⁷⁸ arguing that “the evidence provided by the appellant [was] not sufficient because it was produced by the appellant himself.”⁷⁹

65. The Superior Court’s ruling also noted that Article 7B of Legislative Decree No. 716 required that the burden of proof rest with the party alleging discrimination, so that “if such an act were to occur, the burden of proof would fall on the appellant and, based on the evidence provided, the court has not been convinced,” as there is no evidence to show that the actions of the supermarket's employees were arbitrary.⁸⁰

66. In addition, it emphasized that the behavior of Mr. Olivera and his partner took place near the children’s play area and, given that such behavior “goes against the social norms” as do “excessive displays of affection in public between both heterosexual and homosexual couples,” it was important to prioritize the “best interest of the protection of the child” in order not to “disturb their sound psychological and mental development.”⁸¹

E. Appeal to the Permanent Civil Chamber of the Supreme Court of Justice of Peru

67. On October 1, 2008, Mr. Olivera filed an appeal before the Permanent Civil Chamber of the Supreme Court of Justice (hereinafter “Permanent Civil Chamber”) against the judgment of the Superior Court of Lima.

68. On June 14, 2010, the Permanent Civil Chamber dismissed his appeal and, as part of its reasoning, stated that “the burden of proof on the existence of unequal treatment corresponded to the affected consumer.”⁸² It also decided that “it was not proven” that the appellant was the victim of a discriminatory act and that *Supermercados Peruanos S.A.* could not be required to prove the existence of an objective and justified cause for the alleged discriminatory treatment, since there was no certainty about the alleged incident, and, moreover, “the constitutional right to the presumption of innocence of the accused establishment should prevail.”⁸³

⁷⁸ Cf. Superior Court of Justice of Lima, Second Specialized Chamber in Contentious-Administrative Matters, Decision No. 14, of June 10, 2008 (evidence file, folios 66 and subsq.).

⁷⁹ Cf. Superior Court of Justice of Lima, Second Specialized Chamber in Contentious-Administrative Matters, Decision No. 14, of June 10, 2008 (evidence file, folio 69).

⁸⁰ Cf. Superior Court of Justice of Lima, Second Specialized Chamber in Contentious-Administrative Matters, Decision No. 14, of June 10, 2008 (evidence file, folio 70).

⁸¹ Cf. Superior Court of Justice of Lima, Second Specialized Chamber in Contentious-Administrative Matters, Decision No. 14, of June 10, 2008 (evidence file, folios 68 and 69).

⁸² Cf. Supreme Court of Justice of Peru, Permanent Civil Chamber, Decision No. 2145-2009, of June 14, 2010, (evidence file, folio 74).

⁸³ Cf. Supreme Court of Justice of Peru, Permanent Civil Chamber, Decision No. 2145-2009, of June 14, 2010, (evidence file, folios 75 and 76).

F. Cassation appeal before the Permanent Constitutional and Social Law Chamber of the Supreme Court of Justice

69. On February 7, 2011, Mr. Olivera filed a cassation appeal before the Permanent Constitutional and Social Law Chamber of the Supreme Court of Justice (hereinafter "Permanent Constitutional and Social Law Chamber") against the decision of June 14, 2010, of the Permanent Civil Chamber.⁸⁴

70. However, on April 11, 2011, the Permanent Constitutional and Social Law Chamber ruled that the appeal was inadmissible, since to examine it would imply "a new evaluation of the evidence, which is incompatible with the purposes of an appeal in cassation."⁸⁵

**VIII
MERITS**

**RIGHTS TO PERSONAL FREEDOM, PRIVACY, FREEDOM OF EXPRESSION,
EQUALITY BEFORE THE LAW, JUDICIAL GUARANTEES AND JUDICIAL
PROTECTION⁸⁶**

71. In the instant case, the Court notes that the alleged initial discriminatory act was committed by a company (that is, by a non-State agent); the Court must therefore examine and, eventually, determine, whether the State was internationally responsible for the administrative and judicial responses provided by the national authorities to Mr. Olivera's complaint, in which he alleged that on August 11, 2004, he was subjected to discrimination by a company due to his sexual orientation and gender expression.

72. The Court also observes that Mr. Olivera initially had recourse to administrative proceedings, and subsequently went to the courts. In view of this, the Court will first consider the reasoning provided by both instances, analyzing the process as a whole. Furthermore, the Court considers that certain aspects of the reasoning given by the administrative authorities warrant a differentiated and additional analysis of the alleged discriminatory application of stereotypes on sexual orientation and gender expression in those decisions.⁸⁷

73. Taking into account the arguments of the parties and the Commission, the Court will proceed to consider the following points: (i) the right to equality and non-discrimination; (ii) sexual orientation under the American Convention; (iii) standards on

⁸⁴ Cf. Supreme Court of Justice of Peru, Permanent Constitutional and Social Law Chamber, decision on appeal CAS. 457-2011, of April 11, 2011 (evidence file, folio 78).

⁸⁵ Cf. Supreme Court of Justice of Peru, Permanent Constitutional and Social Law Chamber, decision on appeal CAS. 457-2011, of April 11, 2011 (evidence file, folio 79).

⁸⁶ Articles 7, 11, 13, 24, 8(1) and 25 of the American Convention on Human Rights.

⁸⁷ In this regard, the Court recalls that, when Article 8(1) of the Convention refers to the right of everyone to be heard by a competent judge or court to "determine his rights", this expression refers to any public authority, whether administrative, legislative or judicial, which, through its decisions determines individual rights and obligations. Cf. *Case of the Constitutional Court v. Peru. Merits, reparations and costs*. Judgment of January 31, 2001. Series C No. 71, para. 71, and *Case of Colindres Shonenberg v. El Salvador. Merits, reparations and costs*. Judgment of February 4, 2019. Series C No. 373, para. 64.

matters of equality and non-discrimination based on sexual orientation, gender identity and gender expression as applied to businesses; and finally, (iv) it will apply the standards mentioned to the specific case, where it will examine (a) the reasoning behind the decisions issued by the domestic administrative and judicial authorities and, in particular, the standard of evidence applied to the case, (b) the alleged discriminatory use of stereotypes on sexual orientation and gender expression in the administrative proceedings, (c) the alleged failure to comply with the reasonable time limit in the domestic proceedings, and, finally, (d) it will formulate the corresponding conclusions.

A. Arguments of the parties and the Commission

74. The **Commission** recalled that, according to the Court's case law, the fundamental principle of equality and non-discrimination has entered the domain of *ius cogens*. It pointed out that sexual orientation is a category protected under Article 1(1) of the Convention, and that States must therefore protect the right of all individuals to express their sexual orientation and gender identity, establishing strategies to allow for the full development of their personality and personal capacities in order to provide tools to combat the stigma, stereotypes and discrimination often faced by individuals when they express their personality and identity. Thus, States have the obligation to adopt measures, including provisions of domestic law, to protect human rights in the context of business activities, which includes both substantive and procedural guarantees, in order to ensure respect for the human rights at stake as regards corporate conduct.

75. The Commission added that, under the provisions of Articles 8 and 25 the American Convention, States are required to provide effective judicial remedies to the victims of human rights violations, which must be substantiated in accordance with the rules of due process.

76. Finally, the Commission considered that Article 8(1) of the Convention, which enshrines the guarantee of a reasonable time limit, had been violated, given that the complaint was filed on October 1, 2004 but the final decision on the cassation appeal was notified on April 11, 2011, more than six years later. In this regard, it stated that the time elapsed was disproportionate, considering (i) the complexity of the case, (ii) the procedural activity of the interested party, and (iii) the conduct of the judicial authorities.

77. Consequently, the Commission concluded that the State is responsible for the violation of Articles 8(1), 11, 24 and 25 of the Convention in relation to Article 1(1) of the same instrument, to the detriment of Mr. Olivera Fuentes.

78. The **representatives** argued that the jurisdictional authorities had failed in their duty to investigate, prosecute and punish the acts of discrimination against Mr. Olivera Fuentes. They also alleged that the authorities violated the American Convention: (i) by imposing a standard of evidence incompatible with national legislation and inter-American standards, and (ii) by using stereotypes on sexual orientation and gender expression to justify discriminatory treatment of Mr. Olivera, in violation of Articles 8(1), 24 and 25, in relation to Article 1(1) of the American Convention. They added that the failure to properly investigate, prosecute and punish the acts of discrimination suffered

by Mr. Olivera, together with the use of stereotypical arguments related to public morality and the best interests of the child to justify such discriminatory treatment, also violated his rights to privacy (Article 11(2)), to the free development of his personality (Article 7) and to freedom of expression protected by the American Convention (Article 13(1)).

79. Finally, the representatives added – along the same lines as the Commission - that the Peruvian State also violated the rights enshrined in Articles 8(1) (judicial guarantees) and 25 (judicial protection) of the American Convention by not respecting the guarantee of reasonable time. In their final written arguments, they asked the Court to declare that in this case the State also violated the right to psychological and moral integrity to the detriment of Mr. Olivera, protected by Article 5(1) of the American Convention.

80. For its part, the **State** pointed out that, in this case, it was not proven that there was a difference in treatment, much less that it was motivated by Mr. Olivera's sexual orientation, especially as the representatives of *Supermercados Peruanos S.A.* always maintained that a heterosexual couple would also have been asked to modify their behavior in such circumstances. It noted that, taking into account that the principle of presumption of innocence requires a certain standard of proof in order to determine a person's guilt, a defendant in an administrative disciplinary proceeding cannot be required to assume the burden of proof in order to demonstrate his innocence under penalty of being sanctioned.

81. Regarding the alleged violation of Article 11 of the American Convention, the State indicated that (a) it could not be affirmed that there had been an intervention by State agents, since this was not duly supported or accredited in the decisions of the domestic administrative and judicial proceedings and (b) the domestic courts denied using stereotyped arguments to justify their position, since the outcome of the proceedings was justified by the lack of evidence and, therefore, there was no interference in Mr. Olivera's private life. The State also argued that, according to the factual framework discussed in the merits stage before the Commission, it was not possible to analyze the violation of the right to free development of the personality after the facts that comprise the factual framework. As for the alleged violation of Article 24 of the American Convention, the State argued that (a) there was no structural discrimination in Peru, since the authorities, through legislative, administrative and case law measures, have proscribed discriminatory acts and have implemented positive measures aimed at achieving equality, (b) there was no *de facto* discrimination in the specific case, since there was no point of comparison and (c) there was no *de jure* discrimination, since the national courts applied the domestic legislation without discriminatory motives.

82. Regarding the alleged violation of Article 7 of the Convention, the State indicated that both the Inter-American Court and the European Court of Human Rights (hereinafter "ECHR") consider that there is an infringement of personal liberty when any restriction is imposed through measures of restraint, detention or any similar practice that prevents a person's physical movement, a situation dissimilar to that of this case, specifying further that this case differs from the cases of *I.V. v. Bolivia* and *Atala Riffo and Daughters v. Chile*.

83. In relation to the alleged violation of Article 13 of the American Convention, the

State argued that there was insufficient evidence to prove that the infringement of this right was arbitrary. It added that this right was neither invoked nor discussed in the administrative or judicial proceedings.

84. With respect to the guarantee of reasonable time, the State indicated that, in terms of the complexity of the matter, since a complaint was filed before the Consumer Protection Commission of INDECOPI and an administrative disciplinary proceeding had been activated, an extensive evidentiary stage was required in which the defendant company was given a reasonable period of time to present its arguments, as well as any evidence it considered pertinent in order to define responsibilities. Regarding the conduct of the authorities, it argued that in the instant case it was not apparent that they had caused excessive delays in the proceedings; on the contrary, Mr. Olivera's claims had been heard in five different instances, which had undoubtedly led to a lengthy processing time. It stressed that there had been no periods of inactivity on the part of the jurisdictional bodies, nor any failure to perform their functions that had resulted in an excessive prolongation of the judicial process. Finally, in relation to Mr. Olivera's legal situation, the State emphasized that his situation was not urgent or in danger of causing irreparable harm, and therefore there was no reason to give particularly prompt attention to this case.

B. Considerations of the Court

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

85. The notion of equality established in Articles 1(1) and 24 of the American Convention stems directly from the unique nature of the human being and is inseparable from the essential dignity of the individual. This principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority; or conversely, that a certain group can be characterized as inferior and treated with hostility or otherwise subjected to discrimination in the enjoyment of rights that are accorded to others not so classified.⁸⁸ The Court has pointed out that there is an indissoluble link between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination.⁸⁹ Moreover, in its case law the Court has established that, at the current stage of evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of *ius cogens*, because the whole legal structure of national and international public order rests upon it and permeates all laws.⁹⁰

86. The Court recalls that Article 24 of the Convention contains a mandate to guarantee material equality. Likewise, it recalls that the right to equality guaranteed by Article 24 of the Convention has two dimensions: the first is a formal dimension that establishes

⁸⁸ Cf. *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 55, and *Case of Guevara Díaz v. Costa Rica. Merits, reparations and costs*. Judgment of June 22, 2022. Series C No. 453, para. 46.

⁸⁹ Cf. *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 85, and *Case of Guevara Díaz v. Costa Rica, supra*, para. 47.

⁹⁰ Cf. Advisory Opinion OC-18/03, *supra*, para. 101, and *Case of Guevara Díaz v. Costa Rica, supra*, para. 46.

equality before the law; the second, is a material or substantial dimension that requires the adoption of positive measures of promotion in favor of groups that have been historically discriminated against or marginalized due to the factors referred to in Article 1(1) of the American Convention. This means that the right to equality entails the obligation to adopt measures to ensure that such equality is real and effective - in other words, to correct existing inequalities, to promote inclusion and participation of historically marginalized groups, and to guarantee to disadvantaged individuals or groups the effective enjoyment of their rights and, in short, to provide individuals with the real possibility of achieving material equality. To this end, States must actively combat situations of exclusion and marginalization.⁹¹

87. It is also important to recall that, while the general obligation of Article 1(1) refers to the State's duty to respect and guarantee "without any discrimination" the free and full exercise of the rights contained in the American Convention, Article 24 enshrines the right to "equal protection of the law."⁹² Thus, Article 24 of the American Convention prohibits discrimination in law, not only with respect to the rights contained in that treaty, but also with respect to all the laws adopted and applied by the State.⁹³ Therefore, if a State discriminates in respecting or guaranteeing a conventional right, it would be in breach of the obligation established in Article 1(1) and the substantive right in question. If, on the other hand, the discrimination refers to the unequal protection of domestic law or its application, this must be analyzed in light of Article 24 of the American Convention, in relation to the categories protected by Article 1(1) of the same instrument.⁹⁴

B.2 Sexual orientation under the American Convention on Human Rights

88. Since the judgment in the case of *Atala Riffo and Daughters v. Chile*,⁹⁵ in 2012, the Court has established that sexual orientation and gender identity are protected by the Convention under the term "any other social condition," set forth in Article 1(1).⁹⁶ Advisory Opinion OC-24/17 of November 24, 2017, also included gender expression as a protected category, a point that has been subsequently reiterated by this Court in its

⁹¹ Cf. *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil. Interpretation of the judgment on preliminary objections, merits, reparations and costs.* Judgment of June 21, 2021. Series C No. 427, para. 199, and *Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras.* Judgment of August 31, 2021. Series C No. 432, para. 108. See also, Advisory Opinion OC-27/21, *supra*, para. 157.

⁹² Cf. Advisory Opinion OC-4/84, *supra*, paras. 53 and 54, and *Case of Guevara Díaz v. Costa Rica, supra*, para. 47.

⁹³ 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 Guevara Díaz v. Costa Rica, supra*, para. 48.

⁹⁴ Cf. *Case of Apitz 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 Guevara Díaz v. Costa Rica, supra*, para. 48.

⁹⁵ Cf. *Case of Atala Riffo and Daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 91.

⁹⁶ Article 1(1) of the 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."

contentious cases.⁹⁷ Accordingly, no rule, decision or practice of domestic law, either by State authorities or by private individuals, may diminish or restrict, in any way, the rights of a person based on their sexual orientation, gender identity and/or gender expression.⁹⁸

89. Forms of discrimination against of LGBTIQ+ people manifest themselves in many ways, both in the public and the private spheres.⁹⁹ In this regard, the Court has recognized in its jurisprudence that LGBTIQ+ people have historically been victims of structural discrimination, stigmatization and various forms of violence and violations of their fundamental rights. This violence against LGBTIQ+ people is generally based on prejudices and negative perceptions of individuals or situations that are alien or different, and may be driven by “the desire to punish those who are seen as defying gender norms.”¹⁰⁰ On this point, the Court has indicated that violence exercised for discriminatory reasons has the effect or purpose of preventing or nullifying the recognition, enjoyment or exercise of the human rights and fundamental freedoms of the person who is the object of said discrimination, regardless of whether that person self-identifies with a particular category.¹⁰¹

90. In a previous case against Peru, the Court has highlighted the historical discrimination suffered by that country’s LGBTIQ+ population.¹⁰² Up until 2017, the Peruvian State had no statistical information on the LGBTIQ+ population. That year, the National Institute of Statistics and Informatics conducted the “First virtual survey of LGBTI persons,” to enable “the public authorities and civil society to implement policies, actions and strategies that would guarantee their recognition and protection in the

⁹⁷ This Court has explained that gender expression is understood as the external manifestation of a person’s gender through their physical aspect, which may include the way of dressing, hairstyle or use of cosmetics, or through mannerisms, way of speaking, patterns of personal behavior, social interaction, names or personal references, among others. A person’s gender expression may or not correspond to his or her self-perceived gender identity. *Cf. Gender identity, equality and non-discrimination of same-sex couples. State obligations concerning change of name, gender identity, and rights derived from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1 of the American Convention on Human Rights)*. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 32 (g) and para. 75. See also, *Case of Azul Rojas Marín et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 12, 2020. Series C No. 402, para. 90, and *Case of Vicky Hernández et al. v. Honduras. Merits, reparations and costs*. Judgment of March 26, 2021. Series C No. 422, para. 67.

⁹⁸ *Cf. Case of Atala Riffo and Daughters v. Chile, supra*, para. 91, and *Case of Vicky Hernández et al. v. Honduras, supra*, para. 123.

⁹⁹ *Cf. Advisory Opinion OC-24/17, supra*, para. 36, and *Case of Vicky Hernández et al. v. Honduras, supra*, para. 68.

¹⁰⁰ *Cf. Case of Azul Rojas Marín et al. v. Peru, supra*, para. 92, and *Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of Articles 1(1), 4(1), 5, 11(2), 12, 13, 17.1, 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments)*. Advisory Opinion OC-29/22 of May 30, 2022. Series A No. 29, para. 227. See also, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on sexual orientation and gender identity*, May 4, 2015, A/HRC/29/23, para. 21; Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, November 17, 2011, A/HRC/19/41, A/HRC/19/41, paras. 20 and 21; and Organization for Security and Cooperation in Europe – OSCE, *Hate Crimes in the OSCE Region – Incidents and Responses, Annual Report 2006, OSCE/ODIHR*, Warsaw, 2007, page 53.

¹⁰¹ *Cf. Case of Azul Rojas Marín et al. v. Peru, supra*, para. 93.

¹⁰² *Cf. Case of Azul Rojas Marín et al. v. Peru, supra*, paras. 47 a 49.

different public and private spheres.”¹⁰³ According to this survey of LGBTI persons, 62.7% had been victims of violence or discrimination, and of these 17.7% said that they had suffered sexual violence.¹⁰⁴ Only 4.4% of all those who had been attacked or discriminated against had reported the fact to the authorities, and, of these, 27.5% indicated that they had been treated badly and 24.4% said they had been treated very badly in the place where they had filed a complaint.¹⁰⁵ In addition, the survey conducted by the National Institute of Statistics and Informatics determined that “56.5% of LGBTI people are afraid to express their sexual orientation and/or gender identity, the main reason being the fear of discrimination and/or aggression (72%).”¹⁰⁶ According to information cited by the Office of the Peruvian Ombudsman, “45% of those [surveyed by the Ministry of Justice and Human Rights in 2013] believe that LGBTI+ people should not teach in schools and 59% consider that they should not have the right to a civil marriage.”¹⁰⁷ Also, data from the 2001 World Values Survey shows that 64.4% of those surveyed considered that “homosexuality is never justified” and 49.2% indicated that the neighbor they would least like to have is a homosexual neighbor;¹⁰⁸ in 2012, these percentages decreased to 41.8% and 44%, respectively.¹⁰⁹

91. With regard to the rights that may be affected by this type of discrimination, the Court has warned that sometimes the rights to life and/or personal integrity (as happened, for example, in the cases of *Azul Rojas Marín et al. v. Peru* and *Vicky Hernández et al. v. Honduras*) are undermined, along with the right to gender identity and/or gender expression, as well as all other rights connected with these.¹¹⁰

92. The Court has also indicated in other cases that recognition of sexual and gender identity is protected by Articles 7 and 11(2) of the American Convention, since gender and sexual identity are linked to the concept of liberty, the right to privacy and the right

¹⁰³ Cf. *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 47, and National Institute of Statistics and Informatics, First Virtual Survey of LGBTI people, 2017, page. 5. Available at: <https://www.inei.gob.pe/media/MenuRecursivo/boletines/lgbti.pdf>

¹⁰⁴ Cf. *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 47, and National Institute of Statistics and Informatics, First Virtual Survey of LGBTI people, 2017, pages 22 and 23. Available at: <https://www.inei.gob.pe/media/MenuRecursivo/boletines/lgbti.pdf>

¹⁰⁵ Cf. *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 47, and National Institute of Statistics and Informatics, First Virtual Survey of LGBTI people, 2017, page 25. Available at: <https://www.inei.gob.pe/media/MenuRecursivo/boletines/lgbti.pdf>

¹⁰⁶ Cf. *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 49, and National Institute of Statistics and Informatics, First Virtual Survey of LGBTI people, 2017, page 20. Available at: <https://www.inei.gob.pe/media/MenuRecursivo/boletines/lgbti.pdf>

¹⁰⁷ Cf. *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 49, and Ombudsman’s Office of Peru, Human Rights of LGBTI persons: Need for a public policy on equality in Peru, pages 16 and 17. Available at: <https://defensoria.gob.pe/modules/Downloads/informes/defensoriales/Report-175--derechos-humanos-de-personas-LGBTI.pdf>

¹⁰⁸ Cf. *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 49, and Institute of Public Opinion, Attitudes toward Homosexuality in Peru, February 2015, pages 18 and 19, citing the World Values Survey. Available at: <http://repositorio.pucp.edu.pe/index/bitstream/handle/123456789/47040/Cuadernos%20de%20investigaci%C3%B3n%2011.pdf?sequence=4>

¹⁰⁹ Cf. *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 49, and Institute of Public Opinion, Attitudes toward Homosexuality in Peru, February 2015, pages 20 and 21, citing the World Values Survey. Available at: <http://repositorio.pucp.edu.pe/index/bitstream/handle/123456789/47040/Cuadernos%20de%20investigaci%C3%B3n%2011.pdf?sequence=4>

¹¹⁰ Cf. *Advisory Opinion OC-24/17*, *supra*, paras. 113 and 114, and *Case of Vicky Hernández et al. v. Honduras*, *supra*, para. 119.

of all human beings to self-determination and to freely choose the options and circumstances that give meaning to their lives, in keeping with their personal convictions.¹¹¹

93. The Court has interpreted the liberty recognized in Article 7(1) of the American Convention in its broadest sense, as the ability to do or not do all that is lawfully allowed. In other words, it is the right of every person to organize his individual and social life in keeping with his own choices and beliefs, and in accordance with the law.¹¹²

94. In addition, the Court has established that the right to privacy protected by Article 11(2) of the American Convention covers aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world. In this sense, the Court has specified that the protection of the right to private life is not limited to the right to privacy: it also encompasses a series of factors related to personal dignity, including, for example, the capacity to develop one's own personality and aspirations, determine one's identity and define one's personal relationships. In relation to sexual orientation and sexual identity, "affective life with a spouse or permanent partner is one of the main aspects of this sphere or circle of intimacy connected with privacy."¹¹³ Private life also encompasses the way in which individuals see themselves and how they decide to project themselves towards others, this being an essential condition for the free development of the personality.¹¹⁴ This area of a person's private life has been characterized as a space of freedom, exempt and immune from abusive or arbitrary interference by third parties or public authorities.¹¹⁵

¹¹¹ Cf. *Case of Vicky Hernández et al. v. Honduras*, *supra*, para. 116, and *Case of Pavez Pavez v. Chile*, *supra*, para. 60.

¹¹² Cf. *Case of Chaparro Álvarez and Lapo Ñíguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 52, and *Case of Pavez Pavez v. Chile*, *supra*, para. 60.

¹¹³ Cf. *Case of Atala Riffo and Daughters v. Chile*, *supra*, para. 142, and *Case of Pavez Pavez v. Chile*, *supra*, para. 64.

¹¹⁴ Cf. Advisory Opinion OC-24/17, *supra*, para. 87, and *Case Pavez Pavez v. Chile*, *supra*, para. 58.

¹¹⁵ Cf. Advisory Opinion OC-24/17, *supra*, para. 86, and *Case Pavez Pavez v. Chile*, *supra*, para. 57.

B.3 Human rights and business: standards on equality and non-discrimination based on sexual orientation, gender identity and gender expression

95. This Court has established that the obligation to guarantee rights contained in Article 1(1) of the American Convention extends beyond the relationship between State agents and the persons subject to their jurisdiction, and encompasses the duty to prevent, in the private sphere, third parties from violating the protected legal interests.¹¹⁶ However, the Court has held that a State cannot be held liable for all human rights violations committed by private individuals within its jurisdiction. The *erga omnes* nature of the State's treaty obligations does not imply its unlimited liability for any act committed by private individuals. Thus, even if an action, omission or behavior of a private individual has the legal consequence of violating the rights of others, this is not automatically attributable to the State; rather, it is necessary to analyze the particular circumstances of the case and the specific nature of the obligations of guarantee.¹¹⁷

96. However, it is also important to remember that States must refrain from actions that in any way are aimed, directly or indirectly, at creating situations of *de jure* or *de facto* discrimination.¹¹⁸ Indeed, States are required to adopt positive measures to reverse or change discriminatory situations existing in their societies that prejudice a specific group of people. This means that the State must exercise a special duty of protection with regard to the actions and practices of third parties who, with its tolerance or acquiescence, create, maintain or facilitate discriminatory situations.¹¹⁹

97. Regarding the State's obligations in relation to business activities, in the case of *the Miskito Divers v. Honduras* the Court found it pertinent to refer to the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (hereinafter "Guiding Principles").¹²⁰ In particular, the Court highlighted the three pillars of the Guiding Principles, namely: (i) the State's duty to protect human rights, (ii) the corporate responsibility to respect human rights and (iii) access to remedies, as well as the foundational principles derived from these pillars, which are fundamental in determining the scope of the human rights obligations of States and business enterprises.¹²¹

¹¹⁶ Cf. *Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 111, and *Case of Vera Rojas et al. v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of October 1 2021. Series C No. 439, para. 83.

¹¹⁷ Cf. *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 123, and *Case of Vera Rojas et al. v. Chile, supra*, para. 83.

¹¹⁸ Cf. *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 103, and *Case of Pavez Pavez v. Chile, supra*, para. 65.

¹¹⁹ Cf. Advisory Opinion OC-18/03, *supra*, para. 104, and *Advisory Opinion OC-24/17, supra*, para. 65. Similarly, the UN Human Rights Committee concluded in General Comment No. 18 that "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant." Cf. UN Human Rights Committee, General Comment No. 18, "Non-discrimination," adopted at the 37th Session of the Human Rights Committee, on November 10, 1989, para. 10.

¹²⁰ Cf. Human Rights Council, "Human rights and transnational corporations and other business enterprises" - A/HRC/17/31, July 6, 2011, first operative paragraph, and Committee on Economic, Social and Cultural Rights. General Comment No. 24 on State obligations in the context of business activities and the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/24, August 10, 2017, para. 14.

¹²¹ Cf. *Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras*. Judgment of August 31, 2021. Series C No. 432, para. 47.

98. In the aforementioned case, the Court also established that companies are primarily responsible for behaving responsibly in the activities they carry out, since their active participation is essential to ensure respect for and observance of human rights.¹²² Accordingly, in the context of the obligation to guarantee rights and the duty to adopt provisions of domestic law derived from Articles 1(1) and 2 of the American Convention, the State has a duty to prevent human rights violations committed by private companies, and therefore must adopt legislative or other types of measures to prevent such violations, and to investigate, punish and provide reparation when they occur.¹²³ In short, this obligation must be assumed by companies and regulated by the State.¹²⁴

99. It is important to note that the UN Guiding Principles require that States provide, as part of their duty to protect against corporate human rights abuses, access to effective redress mechanisms– both judicial and non-judicial State mechanisms, as well as non-State mechanisms– and to this end they must eliminate any barriers to access to reparation for the affected persons.

100. Thus, in pursuit of these goals, States should take measures to ensure that businesses adopt: (i) appropriate policies for the protection of human rights; (ii) good corporate governance practices that focus on stakeholders, with actions aimed at guiding business activities toward compliance with standards and respect for human rights; (iii) due diligence processes for the identification, prevention and correction of human rights violations, and to ensure dignified and decent work; and (iv) procedures that allow businesses to remedy human rights violations resulting from their activities, especially when these affect people living in poverty or vulnerable groups.¹²⁵

101. With regard to the protection of members of the LGBTIQ+ community, the Court notes that the deep-rooted social stigma and negative stereotypes that currently affect the LGBTIQ+ community perpetuate acts of discrimination against them in the workplace, in the marketplace and in the community at large. In this regard, Yogyakarta Principle 2.f establishes that States must “take all appropriate actions, including education and training programs, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviors related to the idea of the inferiority or superiority of any sexual orientation, gender identity or gender expression.”¹²⁶

102. In order to eliminate all types of discriminatory practices and attitudes and achieve material equality–beyond formal equality– the involvement of the entire community is necessary, particularly the business sector. Indeed, the business sector not only has the possibility, but also the responsibility of promoting positive change for the LGBTIQ+ community. This means that companies must assume their responsibility to respect the rights of LGBTIQ+ people, not only in the workplace, but also in their commercial relationships through the supply of products or services. In this regard, the expert witness Laura Otero Norza stated that, in the context of the protection and promotion of

¹²² Cf. *Case of the Miskito Divers (Lemonth Morris et al.) v. Honduras, supra*, para. 51.

¹²³ Cf. *Case of the Miskito Divers (Lemonth Morris et al.) v. Honduras, supra*, para. 48.

¹²⁴ Cf. *Case of the Miskito Divers (Lemonth Morris et al.) v. Honduras, supra*, para. 51.

¹²⁵ Cf., *mutatis mutandis*, *Case of the Miskito Divers (Lemonth Morris et al.) v. Honduras, supra*, para. 49.

¹²⁶ Cf. Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, March 2007, Principle 2.f.

human rights, “not only do States play a vitally important role, but companies can also influence their development, either positively or negatively.”¹²⁷

103. Consequently, the Court believes that all companies have a responsibility to respect human rights - including the rights of LGBTIQ+ people - in their operations and business relationships. To this end, it is important to mention the standards of conduct for businesses in the fight against discrimination of LGBTIQ+ persons promoted by the Office of the United Nations High Commissioner for Human Rights since 2017. These guidelines highlight the ongoing responsibility of companies to respect the human rights of these groups, eliminate discrimination, support their LGBTIQ+ staff in the workplace, pay attention to the impacts and effects that their business relationships or their products or services have on LGBTIQ+ people, and contribute to eradicate such abuses through their role in the community and by acting publicly in support of these people.¹²⁸ Furthermore, companies must ensure that they do not discriminate against LGBTIQ+ suppliers, distributors, or customers in accessing their products and services. This not only implies avoiding discrimination, but also addressing issues of violence, harassment, intimidation, mistreatment, incitement to violence and other abuses against LGBTIQ+ people in which companies may be involved through their products, services or commercial relationships. Businesses must also ensure that LGBTIQ+ customers “are able to access their products and services.”¹²⁹

104. In view of the above, States should develop appropriate policies and carry out regulatory, monitoring and oversight activities so that business enterprises take steps to eliminate all types of discriminatory practices and attitudes against the LGBTIQ+ community. To this end they should (i) develop policies to address their responsibility to respect human rights and expressly include the rights of LGBTIQ+ people in these policies; (ii) exercise due diligence to detect, prevent and mitigate any potential or actual harm that they may have caused or contributed to on LGBTIQ+ people’s enjoyment of their human rights, or that is directly related to their operations, products, services and business relationships, and to be accountable for how they address them; and (iii) endeavor to address any adverse impact on human rights that they have caused or contributed to by implementing remedial mechanisms on their own, or by cooperating with other legitimate processes, including establishing and participating in effective operational-level grievance mechanisms for affected individuals or communities.¹³⁰

¹²⁷ Cf. Written version of the expert opinion of Laura Otero Norza rendered at the public hearing held on August 24, 2022, during the Court’s 150th Regular Session, page 31 (evidence file, folio 1331).

¹²⁸ Cf. IACHR, Business and Human Rights: Inter-American Standards. Report prepared by REDESCA. OEA/Ser.L/V/II/CIDH/REDESCA/INF.1/19 November 1, 2019, para. 385.

¹²⁹ Cf. United Nations High Commissioner for Human Rights, “Tackling discrimination against Lesbian, Gay, Bi, Trans and Intersex People” Standards of Conduct for Business, available at: <https://www.unfe.org/wp-content/uploads/2018/04/Principios-mundiales-para-las-empresas.pdf>

¹³⁰ Cf. Human Rights Council, “Human rights and transnational corporations and other business enterprises,” A/HRC/RES/17/4, July 6, 2011, paragraphs 1, 3, 11, 13, 15, 17, and 22; United Nations High Commissioner for Human Rights, “Tackling Discrimination against Lesbian, Gay, Bi, Trans and Intersex Persons”, Standards of Conduct for Business. See also, IACHR, Business and Human Rights: Inter-American Standards. Report by REDESCA. OEA/Ser.L/V/II/CIDH/REDESCA/INF.1/19 November 1, 2019, para. 414, Recommendations nos. 1, 3, 6, 9 and para. 414, Recommendations nos. 3, 4, 9, 11 and 22.

B.4 Application of standards to the specific case

105. With regard to the instant case, the Court will now examine (i) the grounds for the rulings issued in the domestic administrative and judicial proceedings and, in particular, the standard of proof applied to the case, (ii) the alleged use of discriminatory stereotypes related to sexual orientation and gender expression in administrative proceedings; (iii) the alleged failure to comply with the guarantee of reasonable time; and, finally, the Court will formulate the relevant (iv) conclusions on the alleged violation of Articles 7, 8(1), 11(2), 13(1), 24, and 25(1) of the American Convention, in relation to Article 1(1) of the same instrument. Regarding the alleged violation of Articles 8(1) and 25(1), the Court will examine two aspects: first, it will analyze the alleged violation of said articles based on the alleged lack of access to justice¹³¹ (sections B.4.1 and B.4.2) and, secondly it will consider the alleged violation of Article 8(1) due to the alleged failure to observe the guarantee of reasonable time¹³² (section B.4.3).

B.4.1 Standard of proof applied to the case in the administrative and judicial proceedings

106. In order to analyze the standard of proof applied in this case by the domestic administrative and judicial authorities, it is first necessary to recall that discrimination refers to any distinction, exclusion, restriction, preference or other differentiated treatment based directly or indirectly on prohibited grounds for discrimination, which has the intention or effect of annulling or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other sphere.¹³³ In terms of discrimination, victims of business-related violations face barriers associated with information and power asymmetries between victims and corporations. In this regard, the Committee on Economic, Social and Cultural Rights has indicated in its General Comment No. 24 that, among the obstacles to effective access to remedies for victims of human rights violations committed by business entities, is “the difficulty of accessing information and evidence to substantiate claims, which is often largely in the hands of the defendant company.”¹³⁴

¹³¹ Cf., *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 91, and *Case of Aroca Palma et al. v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of November 8, 2022. Series C No. 471, para. 103.

¹³² Cf., *Inter alia, Case of Genie Lacayo v. Nicaragua. Merits, reparations and costs*. Judgment of January 29, 1997. Series C No. 30, para. 77, and *Case of Cortez Espinoza v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of October 18, 2022. Series C No. 468, para. 96.

¹³³ Cf. International Convention on the Elimination of All Forms of Racial Discrimination, Article 1; Convention on the Elimination of All Forms of Discrimination against Women, Article 1 Convention on the Rights of Persons with Disabilities, Article 2; Human Rights Committee, General Comment No. 18, “Non-discrimination,” 37th Session, November 10, 1989, para. 6, and Committee on Economic, Social and Cultural Rights, General Comment No. 20, “Non-discrimination and Economic, Social and Cultural Rights” (Article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, July 2, 2009, para. 7.

¹³⁴ Cf. Committee on Economic, Social and Cultural Rights. General Comment No. 24 on the obligations of States under the International Covenant on Economic, Social and Cultural Rights, in the context of business activities, E/C.12/GC/24, August 10, 2017, para. 42.

107. The Court recalls that, by virtue of the obligation not to discriminate, States are required to adopt positive measures to reverse or change existing discriminatory situations in their societies that prejudice a certain group of people. This entails a special duty of protection on the part of the State with regard to the actions and practices of third parties who, with its tolerance or acquiescence, create, maintain or facilitate discriminatory situations.¹³⁵ As noted by the expert witness Laura Clérico, the State's obligation "is two-fold" given that "not only must it not perpetuate inequality, but it must also repair the harm caused and transform the factors that generate it so that it does not continue to occur."¹³⁶ This means that, without a rigorous review by national authorities of allegations of discrimination caused by a private company, it will be difficult or impossible for the State to comply with this special duty of protection.

108. The Court has indicated that with regard to the prohibition of discrimination based on sexual orientation, protected by Article 1(1) of the Convention, the possible restriction of a right requires a rigorous and weighty justification, and the burden of proof is reversed, which means that it is up to the authority to demonstrate that its decision did not have a discriminatory purpose or effect.¹³⁷ Indeed, the Court has accepted that because victims of discrimination do not control the evidence or the means to clarify *prima facie* acts of discrimination, the American Convention requires the reversal of the burden of proof to ensure the effectiveness of the principle of equality and non-discrimination. For example, in the case of *Nadege Dorzema et al. v. Dominican Republic*, the Court stated the following:

In this regard, the Court acknowledges the difficulty for those who are the object of discrimination to prove racial prejudice, so it agrees with the European Court that, in certain cases of human rights violations motivated by discrimination, the burden of proof falls on the State, which controls the means to clarify incidents that took place on its territory.¹³⁸

109. In the case of allegations of discrimination due to the acts of third parties, such as those occurring within the framework of a commercial relationship between a business and a consumer, this standard applies in a similar manner, with the administrative and/or judicial authorities being responsible for overseeing the actions of businesses in the context of their labor and commercial relations in accordance with inter-American and international standards. On this point, the Committee on Economic, Social and Cultural Rights has pointed out that when companies are involved in human rights violations, there are often barriers and "burdens of proof" that make it difficult to prove such violations before the State. The Committee has also pointed out that the means of

¹³⁵ Cf. Advisory Opinion OC-24/17, *supra*, paras. 91, 96, 101 and 104, and *Case of Pavez Pavez v. Chile*, *supra*, para. 37.

¹³⁶ Cf. Written version of the expert opinion of Laura Clérico rendered at the public hearing on August 24, 2022, in the context of the Court's 150th Regular Session, para. 23 (evidence file, folio 6029).

¹³⁷ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 257, and *Case of Guevara Díaz v. Costa Rica*, *supra*, para. 49.

¹³⁸ Cf. *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs*. Judgment of October 24, 2012. Series C No. 251, para. 229.

evidence are usually held by the companies themselves.¹³⁹ Thus, given the particularly disadvantageous conditions in which discriminatory incidents tend to occur, it is reasonable that the complainant is required to prove only what he/she is able to substantiate. This translates into the obligation of the complainant to provide evidence, and not only the simple assertion of the existence of discrimination, since it must be reflected in a set of facts from which a presumption or appearance of discrimination can be inferred.¹⁴⁰ Consequently, once the victim has presented a *prima facie* case in which differentiated and discriminatory treatment by a company is proven and such treatment is based on a category protected by Article 1(1) of the American Convention, the burden of proof shifts to the perpetrator - in this case, the company - which must demonstrate that it did not make such a distinction or that, if applicable, there was an objective and reasonable justification for this difference in treatment.

110. The foregoing is in complete harmony with Peruvian law at the time of the facts,¹⁴¹ as well as with international standards on the matter. The United Nations Committee on the Elimination of Racial Discrimination, for example, has also required that national courts reverse the burden of proof in cases of discrimination by third parties. For example, in the case of *Grigore Zapescu v. Republic of Moldova*, the Committee considered a case of racial discrimination brought before the national courts of the State against a private company, where it determined that, once “*prima facie* evidence of discrimination” has been established, “the burden of proof regarding the discriminatory intent of the defendant company fell disproportionately on [the plaintiff].”¹⁴² Moreover,

¹³⁹ Cf. Committee on Economic, Social and Cultural Rights. General Comment No. 24 on State obligations in the context of business activities under the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/24, August 10, 2017, para. 45.

¹⁴⁰ In this regard, the expert witness Laura Otero stated that the reversal of the burden of proof is probably the most important aspect in cases of discrimination, due to the “difficulty faced by victims in proving discrimination, not only because they do not have direct evidence, but also because discrimination may be an internal motive in the person who discriminates or the entity that establishes the discriminatory treatment.” Cf. Expert opinion of Laura Otero Norza rendered at the public hearing held on August 24, 2022 during the Court’s 150th Regular Session.

¹⁴¹ At the time of the events of this case, Legislative Decree No.716, Consumer Protection Law, was in force. Compiled as a single text under Supreme Decree 006-2009-ITINCI, Article 7(b), enacted on November 7, 1991, stated the following:

Suppliers may not discriminate in any way with respect to customers seeking their products and services offered in premises open to the public. It is prohibited to select customers, exclude people or carry out other similar practices, except for reasons of security of the establishment or the tranquility of its customers or other objective and justified reasons. The burden of proof as to the existence of unequal treatment lies with the consumer concerned or, as the case may be, with the person representing him in the proceedings or with the administration when it acts *ex officio*. It is up to the supplier of the goods or services to prove the existence of an objective and justified cause. If the supplier proves the existence of an objective and justified cause, it is up to the party alleging such fact to prove that it is in fact a pretext or a simulation to engage in discriminatory practices. For all these purposes, the use of indicia and other evidentiary substitutes will be valid. [emphasis added]

¹⁴² Cf. Committee on the Elimination of Racial Discrimination, *Grigore Zapescu v. Republic of Moldova*, Communication no. 60/2016, CERD/C/103/D/60/2016. Decision of May 31, 2021, paras. 5(3) and 8(1)0.

numerous national courts in the Americas region such as Argentina,¹⁴³ Canada,¹⁴⁴ Chile,¹⁴⁵ Colombia,¹⁴⁶ Costa Rica,¹⁴⁷ as well as international organizations such as the aforementioned Committee on the Elimination of Racial Discrimination,¹⁴⁸ the Committee on Economic, Social and Cultural Rights,¹⁴⁹ the International Labor Organization (ILO),¹⁵⁰ the Committee on the Rights of Persons with Disabilities,¹⁵¹ the European Court of Human Rights,¹⁵² the European Committee on Social Rights of the Council of Europe¹⁵³

¹⁴³ Cf. Supreme Court of Argentina, *Hooft, Pedro Cornelio Federico c/ Buenos Aires Province s/ action for declaration of unconstitutionality*. Buenos Aires, November 16, 2004, judgment of November 16, 2004 and Supreme Court of Argentina, *Pellicori, Liliana Silva c/ Lawyers' Association of the Federal Capital s/ amparo*, judgment of November 15, 2011, where it indicated that: "[i]t will be sufficient for the party asserting discriminatory treatment to prove facts that, *prima facie* evaluated, are suitable to establish its existence, in which case it will be up to the defendant who is reproached for committing the challenged treatment to prove that it was caused by an objective and reasonable motive unrelated to discrimination."

¹⁴⁴ Cf. Supreme Court of Justice, *Moore v. British Columbia* (Education). 2012 SCC 61, [2012] 3 S.C.R. 360, November 9, 2012, Dockets 34040, 34041. Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12680/index.do>; and Supreme Court of Justice, Quebec (*Commission des droits de la personne et des droits de la jeunesse*) v. *Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, Docket 35625. Available at: <https://www.canlii.org/en/ca/scc/doc/2015/2015scc39/2015scc39.html>

¹⁴⁵ Cf. Court of Appeals of Temuco. Judgment No. 297-2015, May 12, 2015.

¹⁴⁶ Cf. Third Review Chamber of the Constitutional Court of Colombia, Judgment No. T-098, of March 7, 1994, Third Review Chamber of the Constitutional Court of Colombia, Judgment No. T-596, of June 15, 2004, and Third Review Chamber of the Constitutional Court of Colombia, Judgment No. T-291 of 2016 and Judgment No. T-068, of March 21, 2021, which established that: "[i]n cases where the existence of treatment based on any of the suspected categories of discrimination is disputed, constitutional jurisprudence has developed the concept of "dynamic burden of proof", according to which the obligation to prove the absence of discrimination is transferred to the defendant, who, being in a situation of superiority, has a greater ability to provide the means of proof to demonstrate that its actions did not constitute a discriminatory act. Therefore, a simple denial of the facts by the person who is presumed to have committed them is insufficient for the judge."

¹⁴⁷ Cf. Constitutional Chamber of the Supreme Court of Justice of Costa Rica. Judgment No. 2018-010289, of June 26, 2018.

¹⁴⁸ Cf. Committee on the Elimination of Racial Discrimination (CERD), *Laurent Gabre Gabaroum v. France*, Communication No. 52/2012, CERD/C/89/D/52/2012. Decision of June 8, 2016, para. 7(2) and *V. S. v. Slovakia*, Communication No. 56/2014, 2015. Decision of December 4, 2015, para. 7.4. Furthermore, CERD recommends that States parties "regulate the burden of proof in civil proceedings concerning discrimination based on race, color, descent and national or ethnic origin so that once a non-citizen has established factual presumptions that he or she has been the victim of such discrimination, it is for the respondent to provide evidence of the objective and reasonable justification for the difference in treatment. Cf. Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 30 on discrimination against non-citizens, of October 5, 2004, paragraph 24.

¹⁴⁹ Cf. Committee on Economic, Social and Cultural Rights, Concluding observations on the fourth periodic report on Czechia, E/C.12/CHE/CO/4, of November 18, 2019, para. 35.

¹⁵⁰ Cf. ILO, "Freedom of Association – Compilation of decisions and principles of the Committee on Freedom of Association of the ILO Governing Body," Fifth Edition (revised), 2006, Decisions and principles of the Committee on Freedom of Association up to its 339th Report (November 2005), para. 830, which states that "in order to ensure effective protection for workers' representatives, it recommends among the measures to be adopted that, where it is alleged that the dismissal of a workers' representative or the modification of the conditions of employment to his or her detriment was discriminatory, provisions should be adopted imposing on the employer the obligation to prove that his or her act was justified."

¹⁵¹ Cf. Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the Russian Federation, CRPD/C/RUS/CO/1, April 9, 2018, para. 54, and Concluding observations on the initial report of Bosnia and Herzegovina, CRPD/C/BIH/CO/1, of May 2, 2017, para. 29.

¹⁵² Cf. ECHR, *Beizaras and Levickas v. Lithuania*, no. 41288/15, Judgment of January 14, 2020, para. 115, and *Zakharova and Others v. Russia*, no. 12736/10. Judgment of March 8, 2022, paras. 36 and 37.

¹⁵³ Cf. European Committee of Social Rights of the Council of Europe (ECSR), *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, Communication no. 41/2007. Decision of June 3, 2008, para. 52. and *Associazione Nazionale Giudici di Pace v. Italy*, Communication no. 102/2013. Decision of July 5, 2016, para. 73.

or the European Union, have ruled along the same lines.¹⁵⁴ Even the Peruvian Consumer Protection Commission (CPC) and the Specialized Consumer Protection Chamber of the Tribunal for the Defense of Competition and Intellectual Property have adopted the concept of the “dynamic burden of proof” in cases of discrimination.¹⁵⁵ According to the expert witness Laura Otero, this redistribution of the burden of proof stems from the fact that discrimination is not usually manifested in an open and clearly identifiable manner, since the reason for the difference in treatment is often not expressed or is concealed in another seemingly objective factor.¹⁵⁶ Finally, the Court notes that the *amicus* brief submitted by the United Nations Working Group on Business and Human Rights, stated the following:

In the universal system for the protection of human rights, there is a clear consensus that the burden of proof should not fall exclusively on the victims in cases of discrimination by non-State actors, such as businesses. For this reason, the rule of the dynamic burden of proof in favor of the victims has been recognized as a standard, whereby, depending on the specific case, the burden of proof is reversed, distributed or shifted to the companies against which the discriminatory act or fact is alleged, and a *prima facie* case of discrimination is presented.¹⁵⁷

111. Based on the foregoing, the Court will now analyze the response provided by the national authorities to the complaint of discriminatory treatment by a company against Mr. Olivera.

112. In the instant case, the Court finds that there are numerous indications that Mr. Olivera and his partner suffered unequal treatment based on their sexual orientation, of which the national authorities were aware. For example, in the response provided by *Supermercados Peruanos S.A.* to the CPC, the company considered that the behavior of Mr. Olivera and his partner should cease out of “respect for morality and good manners,” since one of its customers had felt “disturbed and uncomfortable” because of Mr. Olivera’s

¹⁵⁴ Cf. Council Directive 97/80/EC of December 15, 1997, concerning the burden of proof in cases of discrimination based on sex, OJEC No. 14, of January 20, 1998, Article 4. See also, Council Directive 2000/43/EC, related to the principle of equal treatment of persons irrespective of their racial or ethnic group, OJEC No. 180, of July 19, 2000, para. 21, which states that: “The rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.” Also see Council Directive 2004/113/EC, implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJEU No. 373, of December 21, 2004, Article 9.

¹⁵⁵ Cf. Consumer Protection Commission (CPC), of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI). Final Decision No. 0911 -2006/CPC, of May 23, 2006, pages 8 and 9 (evidence file, folios 2014 and 2015). By way of illustration, see the Specialized Consumer Protection Chamber of the Tribunal for the Defense of Competition and Protection of Intellectual Property, Decision 3255-2015-SPC-INDECOPI, of October 19, 2015, paras. 32 to 34; Decision No. 3167/2017-SPC-INDECOPI, of November 6, 2017, paras. 13 to 20, and Decision No. 2129-2018/SPC-INDECOPI, of August 20, 2018, paras. 16 to 19 (evidence file, folios 2269 to 2270, 2065 and 2238 to 2240, respectively).

¹⁵⁶ Cf. Written version of the expert opinion of Laura Otero Norza rendered at the public hearing held on August 24, 2022, in the context of the Court’s 150th Regular Session, page 48 (evidence file, folio 6104).

¹⁵⁷ Cf. *Amicus curiae* brief presented by the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, on September 6, 2022, para. 22 (file of merits, folio 1794).

behavior which, according to the supermarket, involved "kisses, caresses and hugs."¹⁵⁸ To this end, the company provided, *inter alia*, the statement of the supervisor, who reported that a customer had complained of being "uncomfortable and annoyed" by the "attitude of two gentlemen," thus highlighting the fact that it was a homosexual couple who were engaging in displays of affection.¹⁵⁹ This emphasis on the homosexual nature of the acts – an issue that would not have arisen in the case of a heterosexual couple – was also reinforced by another statement provided by the company, made by the supermarket's Head of Loss Prevention, who indicated that "when children passed by or left the play area, they witnessed two people of the same sex kissing and caressing each other," which made some customers feel "uncomfortable."¹⁶⁰

113. Furthermore, this Court is aware of the content of several letters written by customers to the supermarket, which were included in its answering brief and which contained openly discriminatory comments, such as:

- "as a mother, I don't agree with them doing these things in public places [...] they should have some respect and do them somewhere else, and avoid giving us an unpleasant time [...] and discrediting this place;"¹⁶¹
- "what I disagree with is that they do scandalous acts and displays in public [...] all these acts should be done in private; they should not be exhibiting themselves, causing rejection in people and astonishment in children, especially when there are underage children";¹⁶²
- "I would like to express my total disgust at the immoral behavior by couples in public places with large numbers of people and children, even more so if they are homosexuals [...] because [children] become confused and parents should demand respect and good manners;"¹⁶³
- "it is not possible for our children to witness absurd acts that go against the Law of God;"¹⁶⁴
- "I express my disapproval of the acts carried out by the gays of the MHOL (Homosexual Movement of Lima) which go against morals and decency [...] on

¹⁵⁸ Cf. Answering brief of *Supermercados Peruanos S.A.*, of October 19, 2004, paras. 2, 7 and 9 (evidence file, folios 14, 15 and 16).

¹⁵⁹ Cf. Statement of G.M.P, manager of *Supermercado Santa Isabel - San Miguel*, of October 14, 2004 (evidence file, folio 21).

¹⁶⁰ Cf. Report No. 056-J.P.P. of C.Q.D, Head of Loss Prevention, *Supermercados Santa Isabel - San Miguel*, of August 12, 2004 (evidence file, folio 23).

¹⁶¹ Cf. Letters provided by *Supermercados Peruanos S.A.* as annexes to the answering brief of October 19, 2004 (evidence file, folio 1852).

¹⁶² Cf. Letters provided by *Supermercados Peruanos S.A.* as annexes to the answering brief of October 19, 2004 (evidence file, folio 1853).

¹⁶³ Cf. Letters provided by *Supermercados Peruanos S.A.* as annexes to the answering brief of October 19, 2004 (evidence file, folio 1855).

¹⁶⁴ Cf. Letters provided by *Supermercados Peruanos S.A.* as annexes to the answering brief of October 19, 2004 (evidence file, folio 1856).

the day of the demonstration of this gay group I was present and it was horrible to see how they kissed each other.”¹⁶⁵

114. The Court notes that, in this case, the Peruvian administrative and judicial authorities were faced with strong indications of discrimination based on the sexual orientation of Mr. Olivera and his partner, not only in the complaint filed by Mr. Olivera and his testimony, but also in the statements made by employees of *Supermercados Peruanos S.A.*, as well as the supermarket’s own defense strategy. Therefore, given that the American Convention stipulates the prohibition of discrimination on the basis of sexual orientation, the possible restriction of a right required a rigorous and weighty justification.¹⁶⁶ Thus, it was up to the national authorities to require the accused company to demonstrate either that its actions did not have a discriminatory purpose or effect,¹⁶⁷ or that there was an objective and reasonable justification,¹⁶⁸ that is, that they pursued a legitimate aim and there was a reasonable proportionality between the means used and the end pursued.¹⁶⁹

115. However, this did not happen in the instant case, since the administrative and judicial authorities decided that Mr. Olivera had not provided sufficient proof of the alleged discriminatory treatment, without properly analyzing the numerous indications that existed and applying the principle of presumption of innocence in favor of the accused company.¹⁷⁰ For instance, at the administrative level, the CPC asked Mr. Olivera to prove that the treatment required of him was not “equally required of other consumers,” noting, as an example, that Mr. Olivera had to prove that “at the time of preventing the entry of a customer, persons of other racial characteristics were allowed to enter without such requirements.”¹⁷¹ For its part, the Chamber for the Defense of Competition also considered that since the facts were based solely on the allegations of both parties, the issue did not merit further analysis.¹⁷² It also added that there must be “certainty regarding the infraction committed.”¹⁷³ Likewise, at the judicial level, the Superior Court of Justice of Lima considered that the evidence provided by Mr. Olivera was not sufficient because it was only partial evidence, which meant that “the judge had

¹⁶⁵ Cf. Letters provided by *Supermercados Peruanos S.A.* as annexes to the answering brief of October 19, 2004 (evidence file, folio 1857).

¹⁶⁶ Cf. ECHR, *Karner v. Austria*, No. 40016/98, Judgment of July 24, 2003, para. 37, and *Kozak v. Poland*, no. 13102/02, Judgment of March 2, 2010, para. 92.

¹⁶⁷ See, *mutatis mutandis*, *Case of Atala Riffo and Daughters v. Chile, supra*, para. 124.

¹⁶⁸ Cf. *Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02* of August 28, 2002. Series A No. 17, para. 46, and *Case of Guevara Díaz v. Costa Rica, supra*, para. 49.

¹⁶⁹ 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 Guevara Díaz v. Costa Rica, supra*, para. 49.

¹⁷⁰ Cf. Tribunal for the Defense of Competition and Protection of Intellectual Property, Defense of Competition Chamber, Decision No. 0665-2006/TDC-INDECOPI, May 17, 2006 (evidence file, folio 46), and Supreme Court of Justice, Permanent Civil Chamber, Decision No. 2145-2009, June 14, 2010, (evidence file, folio 75).

¹⁷¹ Cf. Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), Decision of August 31, 2005 (evidence file, folio 1893).

¹⁷² Cf. Tribunal for the Defense of Competition and Protection of Intellectual Property, Defense of Competition Chamber, Decision No. 0665-2006/TDC-INDECOPI, May 17, 2006 (evidence file, folio 48).

¹⁷³ Cf. Tribunal for the Defense of Competition and Protection of Intellectual Property, Defense of Competition Chamber, Decision No. 0665-2006/TDC-INDECOPI, May 17, 2006 (evidence file, folio 1921).

no certainty” that discriminatory treatment had actually taken place.¹⁷⁴ This view was endorsed by the Supreme Court, which also ruled that the evidence was not sufficient because it was “partial” and did not provide “certainty of the facts that took place.”¹⁷⁵

116. This Court emphasizes that, in a context where prejudice and historical and structural discrimination against LGBTIQ+ persons still prevails, administrative bodies and the courts must be especially careful when dismissing or disregarding testimony, as this practice could be contrary to the American Convention. In no case may testimony be undervalued solely on the basis of a person’s sexual orientation, gender identity or gender expression.

117. Thus, as illustrated by Mr. Olivera at the public hearing before this Court, the decisions of the administrative and judicial authorities imposed a standard of proof whereby “the only thing that could prove the discrimination, or could have proven it, was a video of the exact moment in which the acts occurred,”¹⁷⁶ which is clearly a difficult standard of proof to achieve and is disproportionate. In view of this, the Court considers that, although its task is not to determine the factual circumstances of what took place on August 11, 2004, at the Santa Isabel supermarket during the encounter between Mr. Olivera, his partner and employees of said supermarket, the response of the national authorities to a complaint where there were indications of discriminatory treatment by a company, based on the sexual orientation of Mr. Olivera and his partner, implied the imposition of an evidentiary requirement contrary to the standards mentioned above (paras. 104 and 109). This constituted a failure to comply with the obligation to conduct the necessary oversight in order to eliminate possible discriminatory practices and attitudes against the LGBTIQ+ community.

B.4.2 Alleged use of discriminatory stereotypes regarding sexual orientation and gender expression in the administrative proceedings

118. With regard to the response of the national authorities in the administrative process, and beyond the considerations already made on the standard of proof applied in the domestic proceedings as a whole, the Court observes that, in its decision of August 31, 2005, the CPC analyzed for the first time the complaint filed by Mr. Olivera, questioning whether it was “justified to demand greater restraint from same-sex couples” in their affectionate behavior, especially when carried out in the presence of children, as occurred in the present case.¹⁷⁷ This approach reflects, *ab initio*, an unequal treatment when it comes to understanding the amorous conduct expressed by same-sex couples versus heterosexual couples. In this regard, the American Convention – viewed in the light of international standards on private companies and human rights– obliges States to require private companies to treat LGBTIQ+ persons on a strictly equal footing

¹⁷⁴ Cf. Superior Court of Justice of Lima, Second Specialized Chamber in Contentious-Administrative Matters, Decision No. 14, of June 10, 2008 (evidence file, folio 69).

¹⁷⁵ Cf. Supreme Court of Justice, Permanent Civil Chamber, Decision No. 2145-2009, of June 14, 2010, (evidence file, folio 76).

¹⁷⁶ Cf. Statement of Crissthian Manuel Olivera Fuentes rendered at the public hearing held on August 24, 2022, during the Court’s 150th Regular Session.

¹⁷⁷ Cf. Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), Decision of August 31, 2005 (evidence file, folio 1876).

with heterosexual persons in terms of public affection.

119. The unequal treatment was further aggravated by the CPC's subsequent considerations regarding the existence or not of a "scientific consensus" on the consequences of exposing children to "homosexual behavior," relying, among other things, on a report provided by *Supermercados Peruanos S.A.* and prepared by the psychiatrist R.F. This report stated that a family environment "with a father and a mother as a reference for [children's] sexual identification and understanding of marital relationships," was "very important for the normal psychosexual development of children."¹⁷⁸ Furthermore, according to the report, witnessing "kissing, hugging and caresses" between same-sex couples has an impact on a child's mental health,¹⁷⁹ disrupting his or her understanding of loving relationships between a man and a woman, "causing insecurity and anguish."¹⁸⁰

120. Far from rejecting such considerations as homophobic and characterizing homosexuality as pathological, the CPC made use of this report, highlighting the psychiatrist's comments that the environment can condition people's psychosexual behavior, "possibly with an even greater influence on children exposed to homosexual behavior," and emphasizing "the negative effects on the childhood of minors exposed to gay lifestyles or to the unexpected sight of erotic acts between persons of the same sex."¹⁸¹ In this regard, the Court recalls that the general objective to protect the principle of the best interests of the child is, in itself, a legitimate aim and is, moreover, imperative. However, it cannot be used as an argument to justify discriminatory acts based on sexual orientation.

121. The Court also notes that the report prepared by the psychiatrist R.F.A. and provided by *Supermercados Peruanos S.A.* described the acts between Mr. Olivera and his partner (characterized by the domestic authorities as "kisses, hugs and caresses") as "erotic scenes."¹⁸² Similarly, the CPC referred to them as "erotic displays."¹⁸³ This view was confirmed by the Chamber for the Defense of Competition, which referred to documentary evidence submitted by the accused company where reference was made to Mr. Olivera and his partner "kissing and caressing each other," engaging in "improper acts (fondling)" and behaving "in an immoral manner," thus endorsing the company's account that these "intimate acts" were "[too] excessive to be performed in public."¹⁸⁴ The Chamber also compared Mr. Olivera and his partner's behavior to acts such as "nudism, sexual relations, or displays of affection that are not in keeping with the public

¹⁷⁸ Cf. Medical-psychological report prepared by Doctor R.F. before the Consumer Protection Commission of INDECOPI, undated (evidence file, folios 1864 and 1865).

¹⁷⁹ Cf. Medical-psychological report prepared by Doctor R.F. before the Consumer Protection Commission of INDECOPI, undated (evidence file, folio 1865).

¹⁸⁰ Cf. Medical-psychological report prepared by Doctor R.F. before the Consumer Protection Commission of INDECOPI, undated (evidence file, folio 1865).

¹⁸¹ Cf. Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI). Decision of August 31, 2005 (evidence file, folio 1878).

¹⁸² Cf. Medical-psychological report prepared by Doctor R.F. before the Consumer Protection Commission of INDECOPI, undated (evidence file, folio 1865).

¹⁸³ Cf. Consumer Protection Commission (CPC) of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI). Decision of August 31, 2005 (evidence file, folio 1890).

¹⁸⁴ Cf. Tribunal for the Defense of Competition and Protection of Intellectual Property, Defense of Competition Chamber. Decision No. 0665-2006/TDC-INDECOPI, of May 17, 2006 (evidence file, folio 1921).

nature of the establishment and with the intimacy of such conduct.”¹⁸⁵

122. Based on the documentary evidence provided, the administrative rulings biasedly concluded that any expression of affection between same-sex couples could imply an erotic aspect. This interpretation implies a negative stereotype based on sexual orientation with a pejorative element that would not have been applied to a heterosexual couple,¹⁸⁶ at least not automatically and without a detailed analysis of what actually happened and of the specific acts of affection displayed by the couple. This tainted the weighing of rights carried out by the administrative bodies and constituted an act of discrimination based on sexual orientation. Indeed, this Court finds that the different domestic proceedings examined and evaluated expert opinions and testimonies with a significant stereotypical content. The assessment of the evidence cannot be guided by personal prejudices or preconceived ideas about a minority sector of the population. Evidence without a scientific basis and founded on prejudices, such as that assessed in the instant case, is discriminatory and contrary to the categories protected by Article 1(1) of the American Convention. Furthermore, the Court notes that this discriminatory attitude was not subsequently corrected or remedied by the domestic courts.

123. The Court reiterates that the right to be heard by an impartial judge or court is a fundamental guarantee of due process. In other words, the person on trial must have the guarantee that the judge or court presiding over his case brings to it the utmost objectivity.¹⁸⁷ The Court has established that impartiality requires that the judge who intervenes in a particular dispute should approach the facts of the case free of any personal prejudices and, likewise, offer sufficient objective guarantees to inspire the necessary confidence in the parties to the case, as well as in the citizens of a democratic society.¹⁸⁸ The Court has recognized that personal prejudices and gender stereotypes may affect the objectivity of the State officials responsible for investigating the complaints presented to them, influencing their perception of whether or not an act of violence has occurred, and their assessment of the credibility of witnesses and of the actual victim. In this sense, stereotypes “distort perceptions and lead to decisions based on preconceived beliefs and myths, rather than facts,” which in turn can result in the

¹⁸⁵ Cf. Tribunal for the Defense of Competition and Protection of Intellectual Property, Defense of Competition Chamber. Decision No. 0665-2006/TDC-INDECOPI, of May 17, 2006 (evidence file, folio 1918).

¹⁸⁶ In this regard, the expert witness Laura Clérico noted that use of adjectives in the administrative file and the judicial rulings describing Mr. Olivera and his partner’s conduct as “exaggerated”, “inappropriate”, or contrary to “morals and good manners” indicate the presence of stereotypes. She also considered that the characterization of homosexual men as “promiscuous, depraved, sexual predators and criminals by nature,” as well as “liars,” produces interactions that result in human rights violations. Cf. Expert opinion of Laura Clérico rendered at the public hearing on August 24, 2022, in the context of the Court’s 150th Regular Session and written version of said expert opinion, para. 52 (file of merits, folio 1284).

¹⁸⁷ Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 171, and *Case of Former Employees of the Judiciary v. Guatemala.* Judgment of November 17, 2021. Series C No. 445, para. 64. In this regard, the Court recalls that, when Article 8(1) of the Convention refers to the right of every person to be heard by a “competent judge or tribunal” for the “determination of his rights,” this expression refers to any public authority, whether administrative, legislative or judicial, that through its decisions determines individual rights and obligations. See *Case of the Constitutional Court v. Peru, supra*, para. 71, and *Case of Colindres Shonenberg v. El Salvador, supra*, para. 64.

¹⁸⁸ Cf. *Case of Herrera Ulloa v. Costa Rica, supra*, para. 171, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of June 22, 2015. Series C No. 293, para. 304.

denial of justice, including the re-victimization of the complainants.¹⁸⁹

124. Thus, in the instant case, the Court finds that the administrative decisions appealed to social prejudices about affectionate acts carried out by a homosexual couple and their alleged impact on other people (particularly children), thus shielding the supermarket's actions without further analysis of what really happened and the reasons that might have justified the company's behavior. In effect, the administrative decisions were motivated by discriminatory reasons based on the sexual orientation of Mr. Olivera and his partner, thus denying him access to an impartial body that would analyze his complaint in accordance with inter-American standards of due process. This also had an impact, necessarily, on the right to personal liberty and privacy, since it affected the right of Mr. Olivera and his partner to live their personal and social lives according to their own choices and convictions¹⁹⁰ and entailed an unjustified interference with their right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world.¹⁹¹

B.4.3 Reasonable time

125. The Court has indicated that the right of access to justice in cases of human rights violations must ensure, within a reasonable time, the right of the alleged victims or their next of kin to know the truth of what happened and to have the relevant authorities investigate, prosecute and, if appropriate, punish those found to be responsible.¹⁹² No less important is the Court's view that a prolonged delay in the proceedings may, in itself, constitute a violation of judicial guarantees.¹⁹³

126. The Court has established that an assessment of reasonable time must be carried out in each specific case, in relation to the total duration of the process, which could also include the execution of the final judgment. Thus, it has considered four elements to determine whether the guarantee of a reasonable time was met, namely: a) the complexity of the matter;¹⁹⁴ b) the procedural activity of the interested party;¹⁹⁵ c) the

¹⁸⁹ Cf. *Case of Vicky Hernández et al. v. Honduras*, *supra*, para. 114.

¹⁹⁰ Cf. *Mutatis mutandis, 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. 52, and *Case of Pavez Pavez v. Chile*, *supra*, para. 60.

¹⁹¹ Cf. *Case of Atala Riffo and Daughters v. Chile*, *supra*, para. 141, and *Case of Pavez Pavez v. Chile*, *supra*, para. 62.

¹⁹² Cf. *Case of Bulacio v. Argentina. Merits, reparations and costs*. Judgment of September 18, 2003. Series C No. 100, para. 114, and *Case of Vicky Hernández et al. v. Honduras*, para. 103.

¹⁹³ Cf. *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs*. Judgment of June 21, 2002. Series C No. 94, para. 145, and *Case of Leguizamón Zaván v. Paraguay*, *supra*, para. 68.

¹⁹⁴ In analyzing the complexity of the matter, the Court has considered, among other criteria, the complexity of the evidence, the plurality of procedural subjects or the number of victims, the time that has passed since the violation, the characteristics of the remedies provided by domestic legislation and the context in which the violation occurred. Cf. *Case of Genie Lacayo v. Nicaragua. Preliminary objections*. Judgment of January 27, 1995. Series C No. 21, para. 78, and *Case of Sales Pimenta v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of June 30, 2022. Series C No. 454, para. 107.

¹⁹⁵ Regarding the activity of the interested party to obtain justice, the Court has taken into account whether the latter's procedural conduct has contributed, to some extent, to unduly prolonging the duration of the proceedings. Cf. *Case of Cantos v. Argentina. Merits, reparations and costs*. Judgment of November 28, 2002. Series C No. 97, para. 57, and *Case of Sales Pimenta v. Brazil*, *supra*, para. 107.

conduct of the judicial authorities;¹⁹⁶ and d) the impact on the legal situation of the alleged victim.¹⁹⁷ The Court reiterates that it is up to the State to justify, based on these criteria, the reason why it has required the time elapsed to process the case and, if it does not do so, the Court has broad powers to draw its own conclusions in this regard.¹⁹⁸ The Court also reiterates that this analysis must consider the total duration of the process, from the first procedural act until the final judgment is delivered, including any appeals that may be filed.¹⁹⁹

127. In this case, the Court notes that Mr. Olivera's complaint was filed on October 1, 2004. The first administrative proceeding was exhausted on August 31, 2005, and the second on May 17, 2006. In addition, the first judicial proceeding was exhausted on June 10, 2008, the second on June 14, 2010, and finally, the third and last proceeding ended on April 11, 2011, that is, six and a half years after the filing of the initial complaint.

128. That said, although the Court notes that this case did not present major complexities and that no obstructive activity was apparent on the part of Mr. Olivera, it does not have sufficient evidence to determine negligent conduct on the part of the State, especially since five proceedings took place (both in administrative and judicial courts) over a period of six and a half years, from the filing of the complaint by Mr. Olivera until the last and final decision was handed down by the Supreme Court of Justice. Therefore, the Court concludes that the State did not violate Article 8(1) of the American Convention for the alleged failure to observe the guarantee of reasonable time.

B.4.4 Conclusions

129. The Court considers that the standards and requirements regarding the burden of proof imposed by the domestic administrative and judicial organs nullified Mr. Olivera's right to equal access to justice. Moreover, the particular reasoning provided by the administrative authorities - which was not remedied in the judicial proceedings - was based on stereotypes related to sexual orientation that affected the impartiality of these bodies. In view of the foregoing, the Court concludes that the State is responsible for the violation of Articles 7(1), 8(1), 11(2), 24 and 25(1) of the American Convention, in relation to Article 1(1) of the same instrument. However, the State is not responsible for the alleged violation of Article 8(1) of the American Convention related to the alleged

¹⁹⁶ The Court has understood that, in order for the judgment to be fully effective, the judicial authorities must act promptly and without delay, since the principle of effective judicial protection requires that the implementation procedures be accessible to the parties, without hindrance or undue delay in order to quickly, simply, and comprehensively satisfy their purpose. *Cf. Case of Mejía Idrovo v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of July 5, 2011. Series C No. 228, para. 106, and *Case of Sales Pimenta v. Brazil, supra*, para. 107.

¹⁹⁷ Regarding the impact on the legal situation of the alleged victim, the Court has stated that to determine whether the time was reasonable, the effects caused by the duration of the proceedings on the legal situation of the person concerned must be taken into account considering, among other factors, the matter in dispute. *Cf. Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394, para. 148, and *Case of Sales Pimenta v. Brazil, supra*, para. 107.

¹⁹⁸ *Cf. Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202, para. 156, and *Case of Sales Pimenta v. Brazil, supra*, para. 107.

¹⁹⁹ *Cf. Case of Suárez Rosero v. Ecuador. Reparations and costs.* Judgment of January 20, 1999. Series C No. 44, para. 71, and *Case of Sales Pimenta v. Brazil, supra*, para. 107.

failure to comply with the guarantee of reasonable time. Finally with respect to the alleged violation of psychological and moral integrity, as well as freedom of thought and expression, formulated by the representatives, the Court considers that an autonomous determination on this point is not appropriate, since its validity is analyzed under the principle of equality and non-discrimination, the right to personal liberty and the right to privacy.

IX REPARATIONS

130. Based on the provisions of Article 63(1) of the American Convention, the Court has held that any violation of an international obligation that has caused harm entails the duty to make adequate reparation, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.²⁰⁰

131. Reparation for the harm caused by the breach of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of reestablishing the situation prior to the violation. If this is not feasible, as occurs in the majority of cases of human rights violations, the Court may order measures to protect the rights that have been violated and repair the harm caused.²⁰¹ Accordingly, the Court has considered the need to provide different types of reparation in order to fully redress the damage; thus, in addition to pecuniary compensation, other types of measures such as satisfaction, restitution, rehabilitation, and guarantees of non-repetition have special relevance due to the severity of the harm caused.²⁰²

132. The Court has also established that reparations must have a causal nexus with the facts of the case, the violations declared, the damage proven, and the measures requested to redress the respective harm. Consequently, the Court must analyze the concurrence of these factors in order to rule appropriately and according to the law.²⁰³

133. Therefore, taking into account the violations declared in the previous chapter, and in light of the criteria established in its case law regarding the nature and scope of the obligation to make reparation,²⁰⁴ the Court will now examine the claims presented by the Commission and the representatives, as well as the arguments of the State, for the purpose of ordering measures to redress the harm caused to the victim.

A. Injured party

134. Pursuant to Article 63(1) of the Convention, the Court reiterates that it considers as injured party anyone who has been declared a victim of the violation of any right recognized therein. Therefore, this Court considers as “injured party” Mr. Crissthian Manuel Olivera Fuentes who, as the victim of the violations declared in Chapter VIII of

²⁰⁰ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Nissen Pessolani v. Paraguay. Merits, reparations and costs*. Judgment of November 21, 2022. Series C No. 477, para. 105.

²⁰¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, paras. 25 and 2, and *Case Nissen Pessolani v. Paraguay*, *supra*, para. 106.

²⁰² 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 Nissen Pessolani v. Paraguay*, *supra*, para. 92.

²⁰³ Cf. *Case of Ticona Estrada v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Nissen Pessolani v. Paraguay*, *supra*, para. 107.

²⁰⁴ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, paras. 25 to 27, and *Case of Nissen Pessolani v. Paraguay*, *supra*, para. 108.

this judgment, shall be the beneficiary of the reparations ordered by the Court.

B. Measures of rehabilitation

135. In its final written observations, the **Commission** argued that the State should provide the victim with “adequate treatment according to his needs, [...] by a person or institution with the expertise required to specifically treat persons who have suffered acts of discrimination.”

136. The **representatives** requested that the State provide Mr. Olivera with “adequate psychological or psychiatric treatment, as appropriate” free of charge, immediately and for the time necessary. They indicated that the State should also cover the cost of transportation and medications, as well as any other expenses arising from the treatment. They also requested that this treatment be provided by psychologists or psychiatrists with expertise in treating LGBTI Q+ people, by mutual agreement with Mr. Olivera. In the absence of such experts in the general psychological and psychiatric care service of the Integral Health System (hereinafter “SIS”) or the Social Health Service (hereinafter “EsSalud”), they requested that the State provide specialized treatment at a private health center.

137. The **State** argued that the body of evidence does not show a causal link between the alleged events of August 11, 2004 and the impairment of Mr. Olivera’s mental health. It pointed out that the expert opinion of Mr. Gonzalo Meneses would be time-barred, since the events occurred in 2004 and the psychological evaluation was conducted 17 years later. It also indicated that, despite the fact that the effects on Mr. Olivera Fuentes’ mental health have not been proven, he could still request psychological or psychiatric care through the free health care coverage provided by the State. On this point, it added that the Comprehensive Health Insurance to which Mr. Olivera is affiliated offers free coverage for patients with mental health disorders, such as anxiety and depression, which may be accessed by any citizen who presents his national identity document.

138. With regard to the expenses for the psychological support provided to Mr. Olivera Fuentes after the public hearing, the State indicated that the receipts should not be considered by the Court because: (i) they are not related to the facts in dispute, since Mr. Olivera’s mental health has not been the subject of discussion, and (ii) Mr. Olivera Fuentes has had access to SIS, through which he could have requested psychological treatment sessions and therapy if he had required it.

139. The **Court** notes that the expert opinion prepared by Mr. Meneses addressed, in general terms (i) the damage to mental health caused by structural and daily discrimination against LGBTI+ people, particularly gays, lesbians and bisexuals, and (ii) actions to eradicate, prevent and adequately repair this type of harm by the State. The Court also notes that Mr. Olivera stated that the entire proceeding before the domestic authorities was “very frustrating” for him, and that “no one knows how many tears and how much anger I had to go through, when I had to read all these things, all the allegations in the case,” because they constructed a story that “invalidat[ed]” him and discredited his word for being a homosexual. He added that his words had been “ignored” and “stripped of value” and “credibility,” which caused him “a lot of pain” and “emotional

distress” for more than 18 years.²⁰⁵

140. The Court therefore finds that Mr. Olivera experienced great suffering and anguish to the detriment of his psychological and moral integrity. In view of this, the Court orders the State to provide, free of charge, and as a priority, psychological and/or psychiatric treatment, as appropriate, for Mr. Olivera Fuentes. This must include the provision of medication and, if applicable, transportation and other directly related and necessary expenses.²⁰⁶ The psychological and/or psychiatric treatment must be provided by psychologists or psychiatrists, taking into account the specific circumstances and needs of the victim, as agreed with him and after an individual evaluation.²⁰⁷ In the event that such experts are not available through the general psychological and psychiatric care service of the Integral Health System or the Social Health Insurance service, the State must provide the specialized treatment at a private health center. The State will have a period of three months from the time it receives said request to effectively provide the psychological and/or psychiatric care requested.

C. Measures of satisfaction

141. The **Commission** did not make specific requests in this regard, although it stressed the need to provide “full” reparation to the victim.

142. The **representatives** requested that the Peruvian State be ordered to publish the official summary of the judgment in the main newspapers with wide national circulation. In addition, they requested publication of the judgment in its entirety for one year via a link on the websites of the Ministry of Justice and Human Rights, INDECOPI and the Judiciary.

143. They also requested that the Peruvian State be ordered to hold an act of acknowledgement of responsibility and to offer apologies for the violations committed to the detriment of Mr. Olivera Fuentes, “for the discrimination he suffered due to his sexual orientation and gender expression.” They indicated that the public act should take place within one year from notification of this judgment, and be broadcast on national radio and television, as well as on social media networks and it should be attended by senior representatives of the Peruvian State, including the presidency of the Republic, the presidency of the Council of Ministers, the head of the Ministry of Justice and Human Rights, the presidency of INDECOPI and the head of the Judiciary. In addition, they requested that Mr. Olivera and his representatives be fully consulted in advance about the details of the public act, such as the date and place, as well as the message of apology.

144. The **State** did not raise any objection to the publication of the judgment or the official summary. Regarding a possible public act to acknowledge its responsibility, it

²⁰⁵ Cf. Statement of Crissthian Manuel Olivera Fuentes at the public hearing held on August 24, 2022, during the Court’s 150th Regular Session.

²⁰⁶ Cf. *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 231, and *Case of Aroca Palma et al. v. Ecuador, supra*, para. 132.

²⁰⁷ Cf. *Case of the Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs*, Series C No. 211, para. 270, and *Case of Aroca Palma et al. v. Ecuador, supra*, para. 132.

argued that such acts of acknowledgement of international responsibility and public apologies are not necessary measures of satisfaction, given that the Court's judgement *per se* constitutes a form of reparation.

145. As it has done in other cases,²⁰⁸ the **Court** considers that the State should issue the following publications within six months from notification of this judgment: a) the official summary of this judgment prepared by the Court, once, in the Official Gazette in a legible and adequate font size; b) the official summary of this judgment prepared by the Court, once, in a newspaper with wide national circulation in a legible and adequate font size, c) this judgment in its entirety, made available for one year on the websites of the Ministry of Justice and Human Rights, INDECOPI and the Judiciary, in a manner accessible to the public and from the home page of the websites d) an infographic or information booklet on the judgment, in accessible language, available through the social networks of two public institutions designated by the State for that purpose. The State shall immediately inform this Court once it has issued each of the publications ordered, regardless of the one-year term for submitting its first report as ordered in the twelfth operative paragraph of the judgment.

146. In relation to the request for a public act of acknowledgement of responsibility, the Court considers that this judgment, as well as the other measures ordered, are sufficient and adequate to remedy the violations suffered by the victim and does not find it necessary to order this measure of satisfaction.

D. Guarantees of non-repetition

147. First of all, the **Commission** recognized that the State has been adopting cross-cutting policies that promote respect, promotion and protection of the rights of LGBTIQ+ people through instruments such as: (i) the National Human Rights Plan, (ii) the National Gender Equality Plan and (iii) the National Plan against Gender Violence.

148. Nevertheless, it recommended that the State adopt the following four measures as guarantees of non-repetition:

- (i) create and implement a public policy to promote respect for the rights of LGBTIQ+ people in society, through the design and implementation of information and awareness-raising campaigns in the public media;
- (ii) create or strengthen specialized training programs for all justice operators and State security forces on equality and non-discrimination, gender perspective and the human rights of LGBTIQ+ people;
- (iii) adopt measures to require, encourage and guide businesses to carry out due diligence in processes for consumer protection related to equality and non-discrimination of LGBTIQ+ people, and
- (iv) adopt the measures necessary to promote ratification of the Inter-American Convention Against all Forms of Discrimination and Intolerance.

²⁰⁸ Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Nissen Pessolani v. Paraguay*, *supra*, para. 115.

149. The **representatives**, for their part, requested as guarantees of non-repetition:

- (i) that the State develop a comprehensive education plan on sexual and gender diversity to be incorporated into the regular training courses for judges, administrative authorities (such as INDECOPI), police officers, prosecutors, members of the *serenazgo* as well as any other body responsible for ensuring compliance with domestic legislation;
- (ii) that INDECOPI and the Judiciary design, adopt and implement a legal reasoning manual on inter-American standards in cases of discrimination against LGBTIQ+ persons;
- (iii) that the State produce an audiovisual documentary on discrimination suffered by sexually diverse persons in public spaces in Peru;
- (iv) that the State adopt measures to require, encourage and guide businesses towards compliance with inter-American standards on due diligence in matters of equality and non-discrimination of LGBTIQ+ people;
- (v) that the State design and implement a public policy to promote respect for the rights of LGBTIQ+ people and their social acceptance, especially through education and general culture;
- (vi) that the State collect data and compile statistics on discrimination toward LGBTIQ+ consumers;
- (vii) that the State design, adopt and implement a public policy to address the mental health of LGBTIQ+ people, focusing on sexual and gender diversity;
- (viii) that the State appoint a governing body of the Executive Branch in charge of designing, implementing, monitoring and evaluating national policies on LGBTIQ+ people, and to facilitate intersectoral, sustainable and planned work with other State agencies;
- (ix) that the State adopt all necessary measures to promote ratification of the Inter-American Convention Against all Forms of Discrimination and Intolerance;
- (x) that it order the National Registry of Identification and Civil Status (“RENIEC”) to implement an administrative procedure for recognizing the gender identity of trans people according to the guidelines established in Advisory Opinion OC-24/17, and
- (xi) that the State be ordered to approve a law on same-sex marriage.

150. Additionally, in their final written arguments, the representatives requested that the State (i) create a Truth Commission on historical discrimination and violence against LGBTIQ+ persons in Peru; (ii) approve a framework law against all forms of discrimination that includes sexual orientation, gender identity, gender expression and sex characteristics; (iii) create public defender’s offices specializing in the rights of LGBTIQ+ people; (iv) guarantee that LGBTIQ+ people who are victims of discrimination or violence have access to timely psychological and/or psychiatric care; (v) prohibit so-

called “conversion therapies”; (vi) incorporate the teaching of the affirmative psycho-therapeutic approach in the university curricula of psychology and psychiatry at the national level; (vii) collect information and compile statistics on the mental health of LGBTIQ+ persons, and incorporate Integrated Sex Education (“ISE”) with an affirmative approach to sexual diversity in all public and private schools.

151. In response to the recommendations made by the Commission with regard to guarantees of non-repetition, the **State** indicated the following:

- (i) Regarding the design and implementation of a public policy to promote respect for the rights of LGBTIQ+ people in society, the State pointed out that for several years now it has been incorporating progressive cross-cutting policies to promote respect, promotion and protection of the rights of LGBTIQ+ people.
- (ii) Regarding the creation or strengthening of training programs for all justice operators and State security forces on equality and non-discrimination, gender perspective and human rights of LGBTIQ+ people, the State indicated that it has implemented in all its actions in the different sectors of the public administration the following approaches: (i) intercultural; (ii) gender; and, (iii) human rights. It added that the Ministry of Women and Vulnerable Populations has provided numerous training courses for State officials. In addition, the National Human Rights Plan for 2018-2021 includes strategic actions to promote a change of attitudes in public servants, national police and justice operators to ensure respect for LGBTIQ+ people. Furthermore, according to the Academy of the Judiciary (AMAG), numerous training courses were imparted to justice operators, including judges, prosecutors and justice auxiliaries on topics of equality and non-discrimination, gender perspective and the human rights of LGBTIQ+ people.
- (iii) Regarding the adoption of measures to require, encourage and guide businesses to carry out due diligence in consumer protection processes related to equality and non-discrimination of LGBTIQ+ people, the State explained that in 2011 it adopted the recommendations of the Council of the Organization for Economic Cooperation and Development (hereinafter “OECD”) contained in the “Due Diligence Guidance for the Mining Sector.” Subsequently, in 2017, it adopted the OECD “Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector.” In 2018, it adopted the OECD Council recommendations contained in its “Due Diligence Guidance for Responsible Business Conduct” and the National Human Rights Council approved the five strategic guidelines developed in the National Action Plan on Human Rights and Business, based on the “UN Guiding Principles on Businesses and Human Rights.” The State also established the Working Group of the Executive Branch for the National Action Plan on Business and Human Rights (GTPE-PNA). Finally, on June 11, 2021, the Peruvian State approved the “National Action Plan on Business and Human Rights for 2021-2025,” which identified 23 priority issues in order to develop mechanisms to measure progress in closing the existing gaps, including the protection of the rights of LGBTIQ+ persons.
- (iv) Regarding the adoption of measures necessary to promote the ratification of the Inter-American Convention Against all Forms of Discrimination and Intolerance, the Peruvian State indicated that on October 25, 2016, through its Permanent Representative to the OAS, it signed this international instrument. After accepting the international obligations, the Executive Branch initiated the pertinent

procedures for the internal process to finalize the treaty. On November 19, 2017, the Ministry of Foreign Affairs sent a request to the National Congress to proceed with the review and approval of the treaty. On September 6, 2018, a "Draft Legislative Resolution" was sent to Congress and is currently pending approval, in accordance with the Peruvian legal system. To this effect, the State specified that on August 17, 2021, it was decided that the Foreign Affairs Committee of the National Congress would continue to process the aforementioned Convention.

152. In relation to the reparations requested by the representatives as guarantees of non-repetition, the State indicated the following:

- (i) Regarding the training of state agents on respect for sexual and gender diversity, it indicated that the resolution of the dispute in the domestic courts did not reveal the use of stereotypes and prejudices regarding sexual orientation and gender expression by the Peruvian jurisdictional authorities. It also reiterated its arguments regarding the Commission's second recommendation.
- (ii) Regarding the drafting of legal reasoning manuals on discrimination against LGBTIQ+ people, the State highlighted certain documents prepared in the context of the training programs imparted on the rights of LGBTIQ+ people.²⁰⁹
- (iii) Regarding the possible production of a video on discrimination against sexually diverse people in Peru, the State noted that there is already extensive material related to the protection of LGBTIQ+ rights in the area of public administration. It added that the representatives did not duly substantiate the reason why they consider the production and dissemination of such audiovisual material to be indispensable.
- (iv) Regarding the due diligence measures of companies, the State referred to its arguments in relation to the Commission's third recommendation.
- (v) Regarding the development of a public policy to eliminate the stigma and discrimination against LGBTIQ+ people, the State referred to its arguments concerning the Commission's first recommendation.
- (vi) Regarding the compilation of data and statistics on discrimination against LGBTIQ+ consumers, the State referred to the training programs and other measures adopted by the Peruvian State to eradicate all forms of discrimination against LGBTIQ+ people, emphasizing that INDECOPI has developed a tool in the area of consumer relations known as "Diagnosis on gender stereotypes in consumption and advertising in Peru," dated December 9, 2020.
- (vii) Regarding the request for the implementation of a public policy on mental health for LGBTIQ+ people, the State pointed out that it already has the Mental Health

²⁰⁹ Such as: a) Manual of Human Rights Applied to Police Work of August 18, 2018, issued by the Interior Ministry; b) Book published by INDECOPI entitled "*Una Mirada Global a la Discriminación en el Consumo. Jurisprudencia de INDECOPI*," published on March 9, 2020; c) Document entitled "Diagnosis on gender stereotypes in consumption and advertising in Peru", of December 9, 2020, prepared by INDECOPI, in its role as the National Consumer Protection Authority, in strategic partnership with the United Nations Development Program (UNDP) and the Ministry of Women and Vulnerable Populations (MIMP); d) Eight modules of the training program on "Care and protection for victims of gender-based violence in the context of Law No. 30364 and related norms," prepared by the National School of Public Administration (ENAP) of SERVIR and the MIMP, and e) Module on the "Legal framework of the right to a life free from violence and discrimination for LGBTI people," prepared by the Public Prosecutor's Office for training its personnel.

Law (Law N.º 30947), of May 23, 2019, which guarantees the right “to enjoy the highest possible level of mental health” “without any discrimination,” taking into account the particular circumstances of each person and, in particular, those in “vulnerable situations, special protection groups, persons who are at risk, abandoned or unprotected and victims of violence.”

- (viii) Regarding the appointment of a governing body for LGBTIQ+ equality, the State argued that the Ministry of Women and Vulnerable Populations, as well as the Ministry of Justice and Human Rights have carried out diligent work aimed at protecting vulnerable groups in Peru, including the LGBTIQ+ population.
- (ix) Regarding the ratification of the Inter-American Convention Against all Forms of Discrimination and Intolerance, the State referred to the comments made in the Commission’s fourth recommendation and indicated that a legislative initiative is already underway to approve this instrument.
- (x) Finally, regarding the need to implement an administrative procedure for the recognition of the gender identity of trans people in line with the standards established in Advisory Opinion OC-24/17, the State pointed out that the case in question concerns an alleged act of discrimination based on sexual orientation, but is not directly related to gender identity.

153. In relation to the first recommendation made by the Commission (*supra* para. 148) and the fifth request for reparation made by the representatives (*supra* para. 149), this **Court** positively appreciates the efforts made by the State in recent years to design and implement public policies to promote respect for human rights in society. However, in light of the violations declared in this judgment, the Court finds that it is necessary to develop a specific public policy that expressly promotes respect for the rights of LGBTIQ+ people. To this end, the State must design and implement, within two years from notification of this judgment, an annual information and awareness-raising campaign at national level in the media, regarding the importance of promoting a culture of respect and non-discrimination to guarantee the rights of LGBTIQ+ people in society. To this end, the State must submit to the Court an annual report for five years following the implementation of the first campaign.

154. With regard to the second recommendation made by the Commission (*supra* para. 148) and the first and second requests for reparation made by the representatives (*supra* para. 149), the Court recalls that in the case of *Azul Rojas Marín et al. v. Peru* it ordered the State of Peru “to create and implement, within two years, a training plan for agents of the Peruvian National Police, the Public Prosecution Service, the Judiciary and the *serenazgo* aimed at raising the awareness of members of the law enforcement agencies and prosecutors with regard to: respect for sexual orientation and gender expression in their actions involving civilians; due diligence in conducting investigations and judicial proceedings related to discrimination, sexual violence and torture of LGBTIQ+ people; and the discriminatory nature of stereotypes concerning sexual orientation and gender expression and the negative impact that their use has on the LGBTIQ+ community.”²¹⁰

155. The Court considers, however, that this training plan is focused on cases of sexual violence and torture directed against LGBTIQ+ persons, whereas the instant case relates to

²¹⁰ Cf. *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 248.

acts of discrimination suffered by consumers in the sphere of private business. Consequently, the Court considers it appropriate to order the State to develop, within one year, a comprehensive educational plan on sexual and gender diversity, equality and non-discrimination, gender perspective and human rights of LGBTIQ+ persons in the area of consumer affairs, which should be incorporated into the regular training courses for administrative and judicial authorities, as well as any other body responsible for ensuring compliance with domestic regulations in this area. Also, in the context of said educational plan, the State must prepare, within one year, a legal reasoning manual on inter-American standards in cases of discrimination against LGBTIQ+ people.²¹¹ The State must submit to the Court an annual report for five years after the implementation of the comprehensive educational plan, describing the actions taken in that regard.

156. In relation to the third recommendation made by the Commission (*supra* para. 148) and the fourth request for reparation made by the representatives (*supra* para. 149), the Court considers that the measures adopted by the State in the area of human rights and business represent positive progress in the implementation of due diligence processes by businesses in order to guarantee and respect the rights of consumers. Nevertheless, the Court considers it necessary to adopt specific measures on equality and non-discrimination of LGBTIQ+ people in the area of relations between consumers and private companies. For this, the State must design and implement, within two years from notification of this judgment, a public policy for the purpose of monitoring and overseeing that businesses comply with national legislation, as well as with inter-American standards on equality and non-discrimination of LGBTIQ+ people. As part of this public policy, the State should require companies to train their workers and partners (including security personnel) in respect for LGBTIQ+ consumers. The State must submit an annual report to the Court for five years after the implementation of the public policy, indicating the actions carried out to that end.

157. Regarding the fourth recommendation made by the Commission (*supra* para. 148) and the ninth request for reparation made by the representatives (*supra* para. 149), the Court positively values all the measures adopted to date by the State to promote the ratification of the Inter-American Convention Against all Forms of Discrimination and Intolerance, the signing of which is currently pending congressional approval, in accordance with the Peruvian legal system. Therefore, the Court does not consider it necessary to order the aforementioned measure of reparation.

158. Regarding the third request for reparation by the representatives (*supra* para. 149) the Court considers that the issuance of this judgment, as well as the other measures ordered, are sufficient and adequate to remedy the violations suffered by the victim and does not deem it necessary to order this measure of reparation.

159. Regarding the sixth request for reparation by the representatives (*supra* para. 149), the Court notes that, in the case of *Azul Rojas Marín et al. v. Peru*, it ordered the State of Peru to design and implement “a system to compile data and statistics linked to cases of violence against LGBTI+ people, in order to be able to uniformly and accurately assess the type, prevalence, trends and patterns of violence and discrimination against

²¹¹ In this regard, the Court identifies as a good practice the “Protocol for Judicial Decision-Making with a Perspective of sexual orientation, gender identity and expression, and sex characteristics,” prepared by the Mexican Supreme Court.

LGBTI+ persons, disaggregating the data by community, race, ethnic origin, religion or belief, health status, age, class and migratory or economic situation.”²¹² Therefore, the Court does not consider it necessary to reiterate this measure of reparation to Peru, since compliance with it is currently being analyzed by the Court in the corresponding monitoring compliance stage.

160. With regard to the seventh, eighth, tenth and eleventh reparation measures requested by the representatives (*supra* para. 149), the Court does not find any causal link between the violations declared and the said reparations; therefore it is not appropriate to order them.

161. Finally, regarding the seven additional measures of reparation requested by the representatives in their final written arguments (*supra* para. 150), the Court considers, as it has done in other cases,²¹³ that it is not appropriate to grant these requests, since they were submitted extemporaneously.

E. Compensation

162. The ***Commission*** requested, in general terms, “full” reparation for the human rights violations declared in the Merits Report.

163. The ***representatives*** requested that the Court award the sum of USD\$ 75,000.00 (seventy-five thousand United States dollars) for the moral damage caused by the Peruvian authorities, in validating the discriminatory treatment suffered by Mr. Olivera Fuentes for publicly showing affection to his partner, and for the physical and psychological ailments resulting from the denial of justice for 17 years.

164. The ***State*** argued that there was no basis to justify the amount claimed by the representatives.

165. The ***Court*** has established in its case law that non-pecuniary damage “may include both the suffering and distress caused to the direct victims and their next of kin, the impairment of values that are very significant to them, as well as changes of a non-pecuniary nature in the living conditions of the victim or his family.” However, since it is not possible to assign a precise monetary value to non-pecuniary damage, this can only be compensated, for the purposes of comprehensive reparation to victims, through the payment of a sum of money or the delivery of goods or services that can be estimated in monetary terms, as prudently determined by the Court, in application of judicial discretion and the principle of equity.²¹⁴

166. The Court confirms that Mr. Olivera suffered discriminatory treatment on the part of the administrative and judicial authorities. Such treatment further intensified the

²¹² Cf. *Case of Azul Rojas Marín et al. v. Peru*, *supra*, para. 252.

²¹³ Cf. *Case of Sales Pimenta v. Brazil*, *supra*, para. 165 and *Case of Nissen Pessolani v. Paraguay*, *supra*, para. 128.

²¹⁴ Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Reparations and costs*, *supra*, para. 84, and *Case of Dial et al. v. Trinidad and Tobago. Merits and reparations*. Judgment of November 21, 2022. Series C No. 476, para. 99.

"homophobia, [...] discrimination [and] stigmatization"²¹⁵ he suffered. Mr. Olivera also stated that in the domestic proceedings he felt "humiliated once again," with "a lot of conflict" and that the process was "emotionally very exhausting," since his words were "ignored" and "stripped of value" and "credibility."²¹⁶ Added to the above is the fact that more than 18 years have passed since the events occurred, without Mr. Olivera having obtained any type of reparation.

167. Therefore, considering the circumstances of this case, the violations committed, the different degrees of suffering caused and experienced, and the time elapsed, the Court establishes, in equity, compensation for non-pecuniary damage in favor of the victim. Accordingly, the Court orders the payment of USD\$ 15,000.00 (fifteen thousand United States dollars) for non-pecuniary damage, in favor of Crissthian Olivera Fuentes.

F. Costs and expenses

168. The **representatives** indicated that the *DEMUS Association- Estudios para la defensa de los derechos de la mujer* (hereinafter "*DEMUS*") has represented the alleged victim since the beginning of the administrative proceeding in the domestic jurisdiction and up to the proceedings before the Inter-American Court of Human Rights. In spite of this, *DEMUS* indicated that it only seeks reimbursement for: (i) travel expenses incurred in the international proceedings, (ii) the salaries of the attorneys who have participated in preparing the briefs related to the case in question, and (iii) the psychological support provided to Mr. Olivera Fuentes after the public hearing, as well as expenses incurred after the presentation of the pleadings and motions brief for (iv) the legal defense before the Inter-American Court and (v) the psychological support for Mr. Olivera during this stage. Accordingly, they requested that the Court award them the sum of USD\$ 45,887.34.

169. In addition, the representatives indicated that members of *Synergía - Initiative for Human Rights* (hereinafter "*Synergía*"), have been part of the alleged victim's legal team since February 21, 2018. In the course of said representation, they have incurred expenses associated with the preparation of the legal briefs submitted during the processing of the case in the admissibility and merits stages before the Commission, and the preparation of the pleadings and motions brief. Accordingly, they requested that the Inter-American Court establish in equity the amount that the State should pay for this item and that said amount be reimbursed to *Synergía*.

170. Finally, the representatives pointed out that *Líderes en Acción* has represented the alleged victim in the international proceedings since March 26, 2014, but that despite its substantial contribution, it is not seeking reimbursement of any costs or expenses.

171. The **State** argued that the documents claiming to prove the amount owed to *DEMUS* were not convincing evidence that the expenses mentioned therein were

²¹⁵ Cf. Statement of Crissthian Manuel Olivera Fuentes at the public hearing held on August 24, 2022, during the Court's 150th Regular Session.

²¹⁶ Cf. Statement of Crissthian Manuel Olivera Fuentes at the public hearing held on August 24, 2022, during the Court's 150th Regular Session.

intended exclusively for the representation of Mr. Olivera Fuentes, given that *DEMUS* "is an institution that litigates different cases before the [Inter-American Human Rights System]" and no evidence was provided to show that the invoices for the expenses reported were specifically for the litigation in question. Regarding the claim for future expenses submitted by the representatives, the State recalled that, according to the Court's constant case law, the payment of costs and expenses is only appropriate if there is documentation proving that the disbursement was made during the proceeding.

172. The **Court** reiterates that in accordance with its case law,²¹⁷ costs and expenses form part of the concept of reparation, because the efforts made by the victims in order to obtain justice, both at the national and the international level, imply expenditures that must be compensated when the international responsibility of the State is declared in a judgment. Regarding the reimbursement of costs and expenses, it is for the Court to prudently assess their scope, including the expenses incurred before the authorities of the domestic jurisdiction, as well as those generated 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 that their *quantum* is reasonable.²¹⁸

173. Taking into account the amounts requested by each of the organizations and the receipts for expenses submitted, the Court orders in equity the payment of a total of USD \$15,000.00 (fifteen thousand United States dollars) for costs and expenses in favor of *DEMUS*, as well as a total amount of USD \$10,000.00 (ten thousand United States dollars) for costs and expenses in favor of *Synergía*. Said amounts shall be delivered directly to those organizations. During the stage of monitoring compliance with this judgment, the Court may order the State to reimburse the victims or their representatives for reasonable expenses incurred in that procedural stage.

G. Reimbursement of expenses to the Victims' Legal Assistance Fund of the Inter-American Court

174. In 2008, the General Assembly of the Organization of American States created the Victims' Legal Assistance Fund of the Inter-American System of Human Rights, in order to "facilitate access to the Inter-American Human Rights System to those persons who, at present, do not have the necessary resources to bring their case before the Court."²¹⁹

175. By means of a note from the Secretariat of the Court dated December 12, 2022, a report was sent to the State on the expenditures made in application of the Victims' Legal Assistance Fund in the present case, which amounted to the sum of USD\$ 5,560.07

²¹⁷ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Nissen Pessolani v. Paraguay, supra*, para. 133.

²¹⁸ Cf. *Case of Garrido and Baigorria v. Argentina, supra*, para. 82, and *Case of Nissen Pessolani v. Paraguay, supra*, para. 133.

²¹⁹ AG/RES. 2426 (XXXVIII-O/08), Decision adopted by the OAS General Assembly during the XXXVIII Regular Session, at the fourth plenary session, held on June 3, 2008, "*Creation of the Legal Assistance Fund of the Inter-American System of Human Rights*", operative paragraph 2(a), and CP/RES. 963 (1728/09), Decision adopted on November 11, 2009 by the Permanent Council of the OAS, "*Rules of Procedure for the Operation of the Legal Assistance Fund of the Inter-American System of Human Rights*", Article 1(1).

(five thousand, five hundred and sixty United States dollars and seven cents) and, in accordance with the provisions of Article 5 of the Court's Rules on the operation of said Fund, Peru was granted a period of time to submit any observations it deemed pertinent. On December 19, 2022, the State submitted a brief in which it pointed out that only receipts related to airfare expenses were presented, while no vouchers were submitted in relation to the lodging, transportation and subsistence expenses incurred to attend the public hearing on this case held in the city of Brasilia, Brazil, on August 24, 2022. In this regard, as stated in the aforementioned report of December 12, 2022, the Court notes that the per diem expenses were determined according to the per diem table of the Organization of American States applicable to the city of Brasilia, Brazil, in force in August 2022. Consequently, it was not necessary to submit any additional proof of such expenses.

176. In light of Article 5 of the Rules for the Operation of the Fund, and in view of the violations declared in this judgment and the fact that the requirements for access to the Fund were met, the Court orders the State to reimburse the Fund in the amount of USD\$ 5,560.07 (five thousand, five hundred and sixty United States dollars and seven cents) for the necessary expenses. Said amount shall be reimbursed within six months from notification of this judgment.

H. Method of compliance with the payments ordered

177. The State shall pay the compensation ordered for non-pecuniary damage and to reimburse costs and expenses as established in this judgment, directly to the victim indicated therein, within one year of notification of this judgment, or it may bring forward full payment in accordance with the following paragraphs.

178. In the event that the beneficiary has died or dies before he receives the respective compensation, this amount shall be delivered directly to his heirs, in accordance with the applicable domestic law.

179. The State shall comply with its monetary obligations through payment in United States dollars or the equivalent in national currency, using for the respective calculation the market exchange rate published or calculated by the relevant banking or financial authority on the date closest to the day of payment.

180. 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 period indicated, the State shall deposit said amounts in his favor in an account or certificate of deposit in a solvent Peruvian financial institution, in United States dollars, and on the most favorable financial terms permitted by banking law and practice. If the corresponding compensation is not claimed within ten years, the amounts shall be returned to the State with the accrued interest.

181. The amounts awarded in this judgment as compensation for non-pecuniary damage and to reimburse costs and expenses shall be paid in full directly to the person indicated, in accordance with the terms of this judgment, without any deductions arising from possible taxes or charges.

182. If the State should fall into arrears, including in 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 Peru.

X
OPERATIVE PARAGRAPHS

183. Therefore,

THE COURT

DECIDES,

Unanimously,

1. To dismiss the preliminary objection regarding the review of the legality of the Commission's actions and the fourth instance objection, pursuant to paragraphs 18 and 19 of this judgment.
2. To dismiss the preliminary objection of failure to exhaust domestic remedies, pursuant to paragraphs 23 to 26 of this judgment.

DECLARES,

Unanimously, that:

3. The State is responsible for the violation of Articles 7(1), 8(1), 11(2), 24 and 25(1) of the American Convention on Human Rights, in relation to Article 1(1) of the same instrument, to the detriment of Crissthian Manuel Olivera Fuentes, pursuant to paragraphs 105 to 129 of this judgment.

AND ESTABLISHES:

Unanimously, that:

4. This judgment constitutes, *per se*, a form of reparation.
5. The State shall provide free of charge, and immediately, timely, adequate and effective, psychological and/or psychiatric treatment for Crissthian Manuel Olivera Fuentes, in accordance with the provisions of paragraph 140 of this judgment.
6. The State shall issue the publications indicated in paragraph 145 of this judgment.
7. The State shall design and implement an annual information and awareness-raising campaign at national level in the media regarding the importance of promoting a

culture of respect and non-discrimination in society and guaranteeing the rights of LGBTIQ+ persons, pursuant to paragraph 153 of this judgment.

8. The State shall develop a comprehensive educational plan on sexual and gender diversity, equality and non-discrimination, gender perspective and the human rights of LGBTIQ+ people in the area of consumer affairs. This shall be incorporated into the regular training courses for administrative and judicial authorities and any other body responsible for ensuring compliance with the relevant domestic regulations, as well as a manual of legal reasoning on inter-American standards in cases of discrimination against LGBTIQ+ people, pursuant to paragraph 155 of this judgment.

9. The State shall develop and implement a public policy for the purpose of monitoring and overseeing compliance by companies and their workers and partners with national legislation, as well as with inter-American standards on equality and non-discrimination against LGBTIQ+ persons, pursuant to paragraph 156 of this judgment.

10. The State shall pay the amounts established in paragraphs 167 and 173 of this judgment as compensation for non-pecuniary damage and to reimburse costs and expenses, pursuant to paragraphs 177 to 181 of this judgment.

11. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights for the amount disbursed during the processing of this case, pursuant to paragraph 176 of this judgment.

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

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

DONE at San José, Costa Rica, on February 4, 2023, in the Spanish language

IACtHR. *Case of Olivera Fuentes v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of February 4, 2023.

Ricardo C. Pérez Manrique
President

Eduardo Ferrer Mac-Gregor Poisot

Humberto Antonio Sierra Porto

Nancy Hernández López

Verónica Gómez

Patricia Pérez Goldberg

Rodrigo Mudrovitsch

Pablo Saavedra Alessandri
Registrar

So ordered,

Ricardo C. Pérez Manrique
President

Pablo Saavedra Alessandri
Registrar