

**REPORT No. 81/13**  
CASE 12,743  
MERITS  
HOMERO FLOR FREIRE  
ECUADOR  
November 4, 2013

**I. SUMMARY**

1. On August 30, 2002, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a petition submitted by Alejandro Ponce Villacís and Juan Manuel Marchán (hereinafter “the petitioners”) alleging the responsibility of the Republic of Ecuador (hereinafter “the State” or “the Ecuadorian State”) for the discharge of Homero Flor Freire (hereinafter “Homero Flor,” “Mr. Flor,” “the alleged victim” or “the co-petitioner”), a Military Police Officer of the Ecuadorian Terrestrial Force (hereinafter “the Terrestrial Force” or “the Army”) due to an alleged disciplinary infraction.

2. On March 15, 2010, the Commission adopted Report No. 1/10, in which, without prejudging on the merits, it decided to continue with the analysis of the merits in relation to the alleged violation of Articles 8(1), 24, and 25 of the American Convention, all in conjunction with the general obligation to respect and ensure the rights, set forth at Articles 1(1) and 2 thereof, to the detriment of Homero Flor Freire.

3. The petitioners argue that several rights of Homero Flor were violated beginning with the disciplinary proceeding instituted against him, which culminated in the decision to order his discharge from the Ecuadorian Army. They allege that this decision was based on alleged discriminatory practices, and the arbitrary and unwarranted distinction established in the military legislation to punish sexual conduct in a military facility, when involving homosexual practices. The petitioners also allege violations of the rights to due process and judicial protection because in the course of the proceedings that led to his discharge, Homero Flor did not have an opportunity to controvert the testimonial evidence taken, and did not have adequate or effective remedies to challenge that decision.

4. The State, for its part, argues that the instant case is related to the application of normative provisions that have already been derogated from the Ecuadorian legal order, thus it is a matter that was already resolved domestically, and also that the guarantees of due process and judicial protection were observed in the case of Mr. Flor. In addition, and given that it was not possible to reach a friendly settlement, it considers it appropriate for the IACHR to proceed to analyze the merits and to issue the respective report.

5. After analyzing the parties’ positions, the facts established, and the applicable human rights framework, the Inter-American Commission concluded that the Ecuadorian State is responsible for violating the rights enshrined in Articles 8(1), 24, and 25 of the American Convention in relation to its Articles 1(1) and 2, to the detriment of Homero Flor Freire. Based on the conclusions of this report, the IACHR makes the following recommendations to the Ecuadorian State: (1) make full reparation to Mr. Homero Flor Freire in the terms indicated in this report, both materially and morally, including measures of satisfaction for the harm caused; (2) publicly recognize that Mr. Homero Flor Freire was discharged from the Ecuadorian Army in a discriminatory fashion; (3) adopt the state measures necessary to ensure

that the persons who work in the Ecuadorian Army or any office or section of the Ecuadorian army are not discriminated against based on their actual or perceived sexual orientation; (4) adopt the necessary state measures for the personnel of the Ecuadorian Army or any office or section of the Ecuadorian army, as well as the judges at law in the military jurisdiction, to become familiar with the inter-American standards and with the provisions of Ecuadorian domestic law regarding non-discrimination on the grounds of sexual orientation, actual or perceived; and (5) adopt the necessary state measures to guarantee the right to due process for members of the military tried by courts in disciplinary proceedings, including the right to an impartial judge or court.

## **II. PROCEDURE BEFORE THE IACHR AFTER THE ADMISSIBILITY REPORT**

6. On March 15, 2010, the IACHR issued Admissibility Report No. 1/10.<sup>1</sup> On March 29, 2010, the Commission notified the parties of that report, indicating that the case had been registered with number 12,743 and, pursuant to Article 37(1) of its Rules of Procedure, set a period of three months for the petitioners to submit additional observations on the merits. In addition, in keeping with Article 48(1)(f) of the Convention, the Commission placed itself at the disposal of the parties to pursue a friendly settlement.

7. By communication of April 5, 2010, the petitioners expressed their interest in pursuing a friendly settlement. The Commission forwarded the pertinent parts of that brief to the State, and asked that it submit its observations within one month. The State submitted its response by brief of May 27, 2010, and expressed its interest in pursuing the friendly settlement procedure. The IACHR forwarded the State's response to the petitioner.

8. On June 17, 2010, the State submitted information related to the efforts made by the parties to reach a friendly settlement agreement, which was forwarded to the petitioners for their observations. On October 29, 2010, the petitioners reported that they had resolved to conclude the friendly settlement process, and to continue with the procedure on the merits. On December 21, 2010, the Commission informed the State that it was considering the friendly settlement process concluded. On that same date, it asked that the petitioners submit their observations on the merits, in keeping with Article 37(1) of its Rules of Procedure. On January 12 and 19, 2011, the State presented additional information on the friendly settlement process, which was forwarded to the petitioners for their observations.

9. By brief of February 7, 2011, the petitioners submitted information on the friendly settlement process and reiterated their interest in continuing with the procedure on the merits. This communication was forwarded to the State on February 23, 2011; it was asked to submit its observations on the merits. On February 14 and 17, 2011, the State submitted supplemental information on the friendly settlement process, which was forwarded to the petitioners for their observations.

10. On October 7, 2011, the Commission reiterated to the petitioners that they should submit their observations on the merits. The petitioners filed their response on January 4, 2012; it was forwarded to the State for observations. On April 9, 2012, the Commission reiterated to the State that it should submit its observations on the merits. The State filed its response on June 7, 2012, which was

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<sup>1</sup> IACHR, Report No. 1/10 (Admissibility), Petition 2723-02, Homero Flor Freire, Ecuador, March 15, 2010.

forwarded to the petitioner. On July 10, 12, and 20, 2012, the State submitted additional information, which was forwarded to the petitioners for their observations. On July 25 and August 14, 2012, the petitioners submitted additional information and observations, communications that were forwarded to the State. On September 12, 2012, the State filed its response, which was forwarded to the petitioners.

11. By communication of September 7, 2012, the Commission asked the parties to submit an uncertified copy of the record on the administrative procedure known as a summary information proceeding (*información sumaria de investigación*) that was instituted against Mr. Flor in November 2000, and the Rules of Procedure for summary information proceedings in the Armed Forces, issued by Ministerial Decree 1046, published in General Ministerial Order 240 of December 22, 1993. On September 24, 2012, the petitioners forwarded a partial copy of the administrative record of the summary information proceeding and an uncertified copy of the Rules of Procedure for summary information proceedings in the Armed Forces. On October 11, 2012, the State forwarded uncertified copies of the record and of the Rules of Procedure mentioned above to the petitioners for their information; subsequently, on October 17, 2012, it forwarded them in digital format. On May 10, 2013, Mr. Flor sent a new document in which he alleged a series of impacts on himself and his family stemming from the proceedings conducted by the Ecuadorian Army. On May 13, 2013, the IACHR forwarded this information to the State, and requested that it submit its observations within one month. On August 27, 2013, the petitioner sent additional information, which was forwarded to the State, which was given one month to respond, by communication of September 5, 2013. As of the date of the approval of this report, observations have yet to be received by the State in relation to this new communication from the petitioner. The alleged victim and co-petitioner, Mr. Homero Flor, has reiterated in different communications throughout the proceeding that he would like the IACHR to rule on the merits of the petition. The State also asked the IACHR to rule on the merits.

### **III. THE PARTIES' POSITIONS**

#### **A. The petitioners' position**

12. The petitioners indicate that Homero Flor Freire was a Military Police official, reached the rank of lieutenant, and remained an active-duty member of the Ecuadorian Army until 2002. They argue that the Ecuadorian military justice authorities brought a disciplinary proceeding against him in which his liability was established for committing an act characterized as professional misconduct, as a result of which he was put on leave for six months, and subsequently discharged and definitively separated from the Ecuadorian Army. The petitioners adduce that the decision that led to the discharge of Homero Flor was based on prejudices that reflect a discriminatory practice or policy enshrined in the military legislation and applied by its authorities, based on the sexual orientation of its members. The petitioners note that Mr. Flor asserts that he is not homosexual, nonetheless they adduce that this discriminatory policy had the effect of violating several of his rights on occasion of the proceeding brought against him.

13. By way of background, the petitioners state that in the early morning hours of November 19, 2000, according to Homero Flor, he went to the Amazonas Military Fort (Fuerte Militar Amazonas), in the city of Shell, province of Pastaza, accompanied by another military officer, after they attended a party held outside the military base. According to them, the person who accompanied him was drunk, which is why Homero Flor decided to move him to his room. Soon after he entered the room, Homero Flor answered the knocking at the door by Major Jaime Suasnavas, who warned him that he was in "serious trouble" and who asked him to turn over his standard-issue weapon. On requesting

an explanation, Mr. Flor was informed by Major Suasnavas that he had been seen in a “situation of homosexuality” (“*situación de homosexualismo*”). They allege that in the face of this situation Homero Flor was pressured by other military officials to voluntarily request his retirement from the Army, given that they told him that there were videos and photos that proved the occurrence of “homosexual practices.” They indicate that Homero Flor submitted a report to the military authorities about what happened, and rejected the accusation against him.

14. The petitioners note that a proceeding was brought called an *información sumaria de investigación* (hereinafter “summary information proceeding”) that was aimed at establishing the existence of a disciplinary infraction and the liability of Homero Flor.<sup>2</sup> They indicate that the summary information proceeding is administrative in nature, yet it is conducted before a military authority vested with judicial powers, as established in the Rules of Procedure for Summary Information Proceedings in the Armed Forces (hereinafter “Rules of Procedure for Summary Information Proceedings”)<sup>3</sup> then in force. They indicate that the proceeding culminated with the decision of the Court of Law of the Fourth Military Zone (hereinafter “Court of Law”) of January 17, 2001, by which it was concluded that Homero Flor had committed a disciplinary infraction for having engaged in professional misconduct. They argue that based on that decision, on May 7, 2001, the Council of Subaltern Officers of the Army (hereinafter “Council of Subaltern Officers”) placed Mr. Flor on leave prior to his discharge from the active service of the Army.

15. The petitioners adduce that Homero Flor challenged the summary information proceeding, the decision of the Court of Law, and the Resolution of the Council of Subaltern Officers, through the following remedies: (i) request for reconsideration challenging the decision by the Council of Subaltern Officers, which was rejected by decision of the same Council of June 5, 2001; (ii) motion of appeal against the decision of June 5, 2001, dismissed by the Council of Superior Officers of the Army on July 18, 2001;<sup>4</sup> (iii) constitutional *amparo* motion against the summary information proceeding and the resolution of the Court of Law, which was found inadmissible on procedural grounds decision of the Sixth Court for Civil Matters of Pichincha (hereinafter also “Sixth Court”) of July 18, 2001; and (iv) motion of appeal against the ruling by the Sixth Court, which was found inadmissible on procedural grounds by decision of the Constitutional Court of February 4, 2002.

16. The petitioners present a series of arguments on the merits. First they argue that the proceeding that led to Homero Flor’s discharge from the Army was based on two assumptions, the first Mr. Flor’s alleged homosexual orientation, and the second, engaging in sexual acts within the confines of a military establishment, but with a special emphasis on such acts involving two officers of the same sex. Accordingly, the petitioners raised arguments, first, that go to violations of due process guarantees during the summary information proceeding, and second to the alleged discrimination suffered by Homero Flor, for having been accused of having engaged in sexual conduct with respect to which the military legislation provides for differentiated treatment, incompatible with Article 24 of the American Convention.

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<sup>2</sup> As indicated, the proceeding was initiated against both Homero Flor and the other military officer involved in the facts. Original petition received at the IACHR on August 30, 2002.

<sup>3</sup> Issued by Ministerial Decree No. 1046 and published in General Ministerial Order 240 dated December 22, 1993. Original petition received at the IACHR on August 30, 2002.

<sup>4</sup> The petitioners note that according to Article 200 of the Law on Armed Forces Personnel then in force, this resolution had become final and binding. Petitioners’ brief dated April 12, 2004.

17. As regards the first point, the petitioners argue that a series of due process violations were committed in the course of the summary information proceeding compromising the rights enshrined at Articles 8(1) and 25 of the American Convention. Specifically they note that the summary investigation proceeding was based on witness statements given by several officers who said they had seen Homero Flor engaging in the alleged disciplinary infraction. In this respect, they argue that during that proceeding Homero Flor was not allowed to confront witnesses who testified against him, nor was his defense afforded the opportunity to question them.

18. On the second point, the petitioners allege that the provision under which Mr. Flor was dismissed –that is, the Regulations of Military Discipline in force at the time– established unequal treatment with a substantial impact on the type of sanction that is applied, when it is found that one has engaged in sexual acts within a military facility. Thus, they argue that when an “illegitimate sexual act” is involved –characterized as an severe infraction (*falta atentatoria*)– the maximum sanction possible is a 30-day suspension. In this regard, the petitioners state that the notion of “illegitimate sexual acts” apparently refers to heterosexual sexual relations in the absence of marriage, or outside of marriage. They argue that in cases of “acts of homosexuality” –characterized as acts of professional misconduct (Article 117 of the Rules of Procedure)– the sanction to be imposed was to discharge the officer, as in the instant case. On these considerations, the petitioners argued that this distinction is discriminatory since it is based exclusively on the sexual orientation as sufficient grounds for ordering the discharge of a member from the Army.<sup>5</sup>

19. The petitioners note that the Ecuadorian Constitution then in force established at Article 23(5) the right to free development of the personality, which includes “sexual liberty and equality,” and that the “crime of homosexuality” had been decriminalized in Ecuador by a judgment of unconstitutionality by the Constitutional Court in 1997. They argue that despite this legal framework being in force at the time the summary information proceeding was being conducted, the military legislation punished homosexuality as conduct itself considered an act of professional misconduct and by virtue of which one could deprive a person of being able to exercise his or her functions as a member of the Ecuadorian Army. They adduce that the decision by the Court of Law stands out for its focus on the type of sexual conduct Mr. Flor is accused of, beyond actually showing that it occurred. They emphasize that in its decision the Court of Law said that the “Rules of Military Discipline ... punish acts of homosexuality, precisely because of the special nature of the military legislation.”

20. The petitioners argue that the remedies available in the domestic legal order to challenge the process and the decision that led to the discharge of Homero Flor from the Army were ineffective for remedying the legal situation allegedly infringed, and that they were rejected for reasons that held little weight. They argue that neither the decision of the Sixth Court of July 18, 2001, nor that of the Constitutional Court of February 4, 2002, took a hard look at the application of a discriminatory provision that had substantive effects on the characterization of the conduct of which he had been accused in the summary information proceeding, and whose effect was apparently his termination as a member of the Army. They reiterated that under the legal order in place it was not possible to impose a sanction for the type of sexual conduct Mr. Flor had allegedly engaged in, as it is conduct that: (i) is

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<sup>5</sup> In addition, the petitioners adduce that according to the Constitution then in force, there was a legal reservation for the establishment of infractions and sanctions; nonetheless, they argue that the Rules of Military Discipline, despite including provisions for punishment, were adopted by the Ministry of National Defense through a Ministerial Decree that is under seal, that was not published in the Official Registry, and which therefore was not available to all citizens.

related to the right to sexual liberty, guaranteed by the Constitution; and that (ii) it did not constitute a crime or a breach under the Ecuadorian Criminal Code.

21. Therefore, they argue that it was imperative that these bodies rule on the legality of the sanction that had been imposed, mindful of the facts that gave rise to the proceeding and the possibility of the State exercising its punitive power over acts related to the exercise of a right protected by the legal order in place. They also argue that this was the only means available to Mr. Flor to challenge the decision that led to his discharge since, as established in the Law on the Contentious-Administrative Jurisdiction, this jurisdiction is not competent to sit in judgment of matters regarding the organization of the Armed Forces, which would apply in this case as it is a proceeding before a Military Court of Law. They argue that the Supreme Court of Justice of Ecuador has ruled in this regard that “the issues that arise in relation to the organization of the Armed Forces do not correspond to the contentious-administrative jurisdiction.” Thus, they argue that no regular judicial remedy could be brought against the decision of the Court of Law that would allow for a ruling on the merits of the dispute in a District Court of the Contentious-Administrative jurisdiction, accordingly it would not have been possible to secure a judgment of last resort, nor to file a motion for cassation.

22. The petitioners allege that the Rules of Military Discipline applied in this case constitute a legal instrument which while containing provisions aimed at regulating the sexual conduct of the members of the Armed Forces within the confines of a military facility, established differentiated and discriminatory treatment on grounds of sexual orientation, which suggests that the Ecuadorian military legislation then in force criminalized homosexuality. In that regard, they argue that Article 117 of said Rules equated homosexuality with conduct criminalized by Ecuadorian legislation, such as the unlawful use, trafficking, and sale of drugs or narcotics. They argue that in the instant case the military justice system justified the application of the provisions called into question based on the “special nature of the military legislation,” which is based on discriminatory arguments that prejudge the capacity or aptitude of a member of the Army to perform his or her functions based on his or her sexual orientation. They adduce that the provision contained in said article, being a secondary provision, should have been trumped by the Constitution in force at the time, which recognized, as does the current Constitution, the right to equality before the law and the right of a person not to suffer discrimination on grounds of his or her sexual orientation.

23. During the processing of the case in the merits phase the petitioners have continued to present arguments related to an alleged violation of Article 11 of the Convention, which was found inadmissible by the IACHR. The petitioners argue that the decision by the Court of Law constitutes an arbitrary interference that violated the alleged victim’s rights to honor and to privacy. In that regard, they allege that the circumstances under which Homero Flor was discharged from the Army had a particularly harmful impact on his professional, family, and personal life, as he was exposed to a social stigma due to his alleged “homosexual orientation,” with which, even though he does not so identify, has resulted in discriminatory treatment that caused the loss of his job and his divorce<sup>6</sup>. He indicates that in particular it has been impossible for him to find work for the last 12 years, and that it has been impossible for him to make child support payments for his daughter. He attaches a certificate of judicial withholding from the payroll system issued by the Social Security Institute of the Armed Forces, which he indicates show that the monthly child support payments for the daughter of the alleged victim and

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<sup>6</sup> The IACHR will make no reference to Article 11 in the instant report, as it was already declared inadmissible in the Commission’s admissibility report.

co-petitioner have been withdrawn directly from the alleged victim's father, Lt. Col. Lino Homero Flor Cruz, since 2009.

24. In addition, the petitioners allege that the family members of the alleged victim – some of whom are said to work for the Army or other state organs have been subject to offenses and insults, mainly in the workplace, due to the circumstances in which Mr. Flor was discharged, and also in retaliation for having decided not to continue pursuing a friendly settlement, a process that had been initiated in country. In particular, they indicate that his family members were subject to discrimination and harassment when their ties to Mr. Flor became known, considering that the reasons why Mr. Flor was discharged were generally known. They mention that his family members affected by these events are his father (Lino Homero Flor Cruz), his mother (Germania Freire Silva), his sister (Ximena Flor), his brother (Alejandro Flor), his aunt (Ivonne Freire Silva), and his daughter (Paola de los Ángeles Flor).

25. Based on the foregoing, the petitioners argue that on having adopted “a discriminatory military legal regime,” the State breached its general obligations contained in Articles 1(1) and 2 of the American Convention, in relation to the right contained in Article 24 of the same instrument. They argue that the States cannot limit the rights of a person based on sexual orientation. In that regard they allege that in the instant case the restriction on the alleged victim's rights occurred due to the application of a legal regime that was inherently discriminatory and that left Mr. Flor without equal protection before the law. Accordingly, the petitioners asked the IACHR to proceed to issue its decision on the merits, pursuant to Article 50 of the American Convention.

#### **B. The State's position**

26. The State adduces that the petitioners' arguments address the application of a provision that is no longer in force in the Ecuadorian legal order, thus it is a matter that has already been resolved in the domestic legal system. Specifically, the State forwarded a copy of the Rules of Military Discipline in force since 2008, by which the 1998 Rules, applied in the instant case, were derogated. In this respect, the State controverts the petitioners' argument on the effects that the decision by which Mr. Flor was separated from the Ecuadorian Army continue to have, indicating that the amended Rules apply to the future, and that the State cannot bear objective liability for the effects of the rules applied prior to the amendment.

27. In the instant case, the State has also argued that the separation or discharge of an active member from the Armed Forces is an administrative act, in keeping with Article 86 of the Law on Armed Forces Personnel. It adduced that if there is a claim related to the illegality of this act, it could be challenged before the respective Council of Officers, or also that it was possible to turn to the contentious-administrative jurisdiction to present a challenge before the District Courts with jurisdiction, and, if appropriate, in the context of the contentious-administrative proceeding, the motion of cassation was also available and could be adequate for challenging the judgment handed down by the District Courts.

28. The State has also held that the constitutional *amparo* proceeding was resolved lawfully and in keeping with the requirements of due process, thus the State has not violated Article 8(1) of the Convention, and that the alleged victim had free access to the judicial apparatus and to all available remedies to bring his claims for alleged violations of rights established in the Convention. It added that in the domestic proceedings Homero Flor was able to exercise his right to defense at all times, and was

heard in equal conditions by the competent organs. Finally, the State holds that it has not accepted the truth of the facts, contrary to what the petitioners argue.

29. Finally, the State holds that in a show of good faith it has pursued a friendly settlement in respect of this petition. As the negotiation with a view to reaching a friendly settlement was not fruitful, the State asked the IACHR to proceed to issue the report provided for in Article 50 of the American Convention.

#### **IV. ANALYSIS ON THE MERITS**

##### **A. Facts proven**

##### **1. Association of Homero Flor Freire with the Ecuadorian Army and the events of November 19, 2000**

30. Homero Flor Freire entered the Ecuadorian Army with the rank of Second Cavalry Lieutenant on August 7, 1992.<sup>7</sup> In January 2001, he was on active duty with the Army, with the rank of lieutenant; he had been a member of the military institution for approximately 12 years.<sup>8</sup>

31. Bearing in mind that the parties' arguments and the documentary evidence produced address a proceeding brought by the military authorities by which the discharge of Homero Flor from the Ecuadorian Army was ordered, the Commission observes first that there is no debate among the parties—and this is deduced from the decisions adopted domestically—that the events of November 19, 2000, at the Amazonas Military Fort, situated in the city of Shell, province of Pastaza, gave rise to the proceeding in the military disciplinary jurisdiction.

32. Second, it observes that the dispute between the parties domestically revolved around the existence of two versions as to what happened that day. Accordingly, on the one hand several military officers stated they had seen Lieutenant Homero Flor and a male soldier having sexual relations in the lieutenant's room at the Military Fort. Mr. Flor denied the accusation and argued that the soldier had stayed in his room due to his drunken state, there having been no interaction between them.

33. In this respect, the Commission wishes to clarify that it is not a purpose of this report to issue a pronouncement on the truth of these facts as a matter of domestic law. It is up to the IACHR to elucidate whether there was discrimination against the alleged victim in the process of his separation from the armed forces, and to examine whether the summary information proceeding and the subsequent judicial decisions of the domestic authorities triggered the international responsibility of the Ecuadorian State for having applied standards incompatible with the American Convention. Based on these considerations, the Commission proceeds to summarize the relevant judicial decisions, as well as the relevant aspects of the domestic laws and regulations.

##### **2. Summary Information Proceeding brought on November 22, 2000**

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<sup>7</sup> Annex 1. Certificate issued by the Director of Personnel of the Army, February 5, 2001. Annex to the initial petition of August 30, 2002.

<sup>8</sup> Annex 2. Resolution of the Court of Law of the Fourth Military Zone, January 17, 2001. Annex to the initial petition of August 30, 2002.



34. The information available indicates that on November 20, 2000 Homero Flor was separated from his duties in the Ecuadorian Army and brought before the First Court of Investigation of the Fourth Military Zone (Amazonas Division) (hereinafter “First Court of Investigation”); notice of this decision was given to Homero Flor the same day by Memorandum No. 200159-IV-DE-1.<sup>9</sup> On November 22, 2000, the First Court of Investigation ordered that the summary information proceeding begin and issued the Initial Order in that proceeding.<sup>10</sup> The proceeding was conducted in keeping with the provisions of the Rules of Procedure for Summary Information Proceedings of the Armed Forces for the purpose of establishing the existence of infractions as well as the liability of those investigated.<sup>11</sup>

35. On December 13, 2000, Homero Flor was required by the Commander of the Fourth Military Zone (Amazonas Division), Brigadier General Víctor Zabala, to “hand over responsibilities in your charge and report to HD-IV to render services,” and also to relinquish “the room ... of the Residence of unmarried officers” that he occupied.<sup>12</sup>

36. Once the investigative phase of the proceeding was concluded, the Military Prosecutor of the Zone issued his report on January 17, 2001, and the Court of Law of the Fourth Military Zone, under Brigadier General Víctor Zabala, took cognizance of the matter.<sup>13</sup>

**a. Resolution of the Court of Law of the Fourth Military Zone in the Summary Information Proceeding**

37. By decision of January 17, 2001, the Court of Law (Judge Víctor Zabala) endorsed the report of the Military Public Prosecutor and established that “there is disciplinary liability” in the case of Lt. Homero Flor and the other soldier.<sup>14</sup>

38. In its text, the decision details the evidence produced during the proceeding, including: (i) statements made by several military officers about what they had observed in the room where Lt. Homero Flor and other soldier were on November 19, 2000<sup>15</sup>; (ii) the statement by Homero Flor in which he gave his version of the facts and referring to the activity of the officials who went to his room to

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<sup>9</sup> Cited in the decisions of the Sixth Court for Civil Matters of July 18, 2001, and the Constitutional Court of February 4, 2002 (see *infra*).

<sup>10</sup> Initial order in proceeding No. 20-2000-IV-DE-JM-1 of November 22, 2000. Cited in Annex 2. Resolution of the Court of Law of the Fourth Military Zone of January 17, 2001. See also: Annex 3. Constitutional *amparo* motion filed by Homero Flor Freire with the Judge for Civil Matters, January 23, 2001. Annexes to the initial petition of August 30, 2002.

<sup>11</sup> Annex 2. Resolution of the Court of Law of the Fourth Military Zone of January 17, 2001. Annex to the initial petition of August 20, 2002.

<sup>12</sup> Annex 4. Memorandum 2000187-IV-DE-1 from the Commander of the Fourth Zone “Amazonas,” December 13, 2000. Annex to the initial petition of August 20, 2002.

<sup>13</sup> Annex 2. Resolution of the Court of Law of the Fourth Military Zone, January 17, 2001. Annex to the initial petition of August 20, 2002.

<sup>14</sup> Annex 2. Resolution of the Court of Law of the Fourth Military Zone of January 17, 2001. Annex to the initial petition of August 20, 2002.

<sup>15</sup> According to the decision, the following officers gave testimony on what happened on November 19, 2000: Second Lieutenant Ronny Jativa (Officer of Guard Force at the Amazonas Military Fort on November 18, 2000), Captain Colonel Néstor Maldonado, Lieutenant César Bracero, and the Chief Commanding Officer (Jefe de Plaza Mayor) Jaime Suasnavas. In addition, it was indicated that a lieutenant and an infantry sergeant gave testimony asserting that they had not “found homosexual tendencies” in Mr. Flor.

verify what had happened; and (iii) the documentary and physical evidence produced during the investigation carried out in the context of the proceeding. As regards the evidence produced during the investigative stage, the decision refers, among other things, to: (i) a Report from the Psychology Department of the 17-BS “PASTAZA” by which an analysis of the other soldier’s psychological profile was performed, and indicating that it was not possible to perform the psychological exam of Lt. Homero Flor given that he did not go to that department; (ii) certificates that attest to the “good conduct and honorability” of Lt. Homero Flor and the other soldier, as well as the résumés of both; and (iii) the report of the judicial inspection of the place where the events allegedly unfolded.

39. Based on that evidence, the decision of January 17, 2001 by the Court of Law established that on November 19, 2000, in the early morning hours, the other soldier and Lt. Homero Flor entered the latter’s sleeping quarters, located in the Villa for Unmarried Officers of the Amazonas Military Fort, and that they were seen “practicing oral sex” (*“practicando sexo oral”*) in that room.<sup>16</sup>

40. The Court went on to determine whether the infraction referred to in Article 117 of the Rules of Military Discipline—in force at the time of the facts—i.e. “committing acts of homosexuality” had actually taken place. The Court held that after having “investigated the acts of homosexuality committed,” it was shown that they were committed based on the testimonial evidence produced. In its analysis, the Court decided that such provision was not incompatible with the right enshrined in the Constitution of Ecuador of every person to make free and responsible decisions about his or her sexual life, highlighting the “special nature” of the military legislation, and appealing to military values such as honor, dignity, and extolling civic-mindedness. In its own words, the Court notes:

The Constitution of Ecuador at Article 23(25), on the civil rights of citizens, guarantees the right to make free and responsible decisions about their sexual life. Nonetheless, in the armed forces, Article 117 of the Rules of Military Discipline is in force; it punishes acts of homosexuality, precisely because of the special nature of the military legislation, its philosophy and constitutional mission, to cultivate and keep intact and unified values such as honor, dignity, discipline ... extolling civic-mindedness, exalting respect for the national symbols and the Ecuadorian nation, in view of the ethical and moral values it practices, and which are the essential elements of the integral training of the soldier, all of which is not compatible [with the] conduct and behavior adopted by the persons investigated since they are contrary to principles and norms of conduct that all members of the Armed Forces are obligated to observe, the Armed Forces being proud to be the moral reservoir of society, and to have in its ranks men of integrity, capable, responsible, and with unblemished moral authority that enables them to guide and lead their subordinates in operations [and] activities particular to the military career.<sup>17</sup>

41. In that context, the Court concluded:

It has been shown procedurally by testimonial evidence and in light of reasoned analysis that acts of homosexuality were committed, i.e. oral sex between [LIEUTENANT] HOMERO FABIÁN FLOR FREIRE and [the other soldier], active-duty members of the military, within a military facility, with which the Armed Institution as such as been subjectively offended, and its image and prestige

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<sup>16</sup> The Court notes that it was established that this act had been committed with the testimony of Captain Colonel Néstor Maldonado, Lieutenant César Bracero, and Second Lieutenant Ronny Jativa, who gave “statements ... that were unanimous and consistent with one another.” Annex 2. Resolution of the Court of Law of the Fourth Military Zone of January 17, 2001. Annex to the initial petition of August 20, 2002.

<sup>17</sup> Annex 2. Resolution of the Court of Law of the Fourth Military Zone of January 17, 2001. Annex to the initial petition, August 20, 2002.

have been detrimentally affected, a scandal and a bad example have been caused both in the Military Fort and in the civilian population.<sup>18</sup>

42. Accordingly it was ordered that in keeping with the Rules of Procedure for Summary Information Proceedings, the record should be forwarded for its consideration to the General Command of the Army so that the Councils of Subaltern Officers and of Troops could proceed to characterize the acts of “misconduct” established, and to impose the sanction established at Article 117 of the Rules of Military Discipline, in keeping with Articles 87(i) and 76(j) of the Law on Armed Forces Personnel, namely that Lt. Homero Flor be placed on leave prior to being discharged, and that the other soldier be discharged.<sup>19</sup>

**b. Resolutions of the Council of Subaltern Officers of May 7, 2001 and of the Council of Superior Officers of the Army of July 18, 2001**

43. In a session held May 3, 2001, the Council of Subaltern Officers of the Army agreed to accept the request by the Court of Law of the Fourth Military Zone, and ordered that Homero Flor be placed on leave prior to his discharge from active service in the Army, in keeping with Article 76(j) of the Law on Armed Forces Personnel.<sup>20</sup> Homero Flor was notified of the decision on May 7, 2001.<sup>21</sup>

44. On May 8, 2001, Homero Flor presented a request to the Commander of the Army to have declared the “nullity of the entire procedure before the Council of Officers [and] instead ... the reconsideration and reversal of [its] decisions.”<sup>22</sup> In his request he noted that after receiving notice on May 7, 2001, his defense counsel addressed the Ministry of National Defense to review the record of the summary information proceeding and verified that his brief of January 25, 2001, filed with that authority, by which he had requested that investigative steps be taken to clarify the facts that were investigated in that procedure, was not there.<sup>23</sup> He argued that accordingly, he had not been able to exercise his right to defense before the Council of Subaltern Officers.<sup>24</sup> He also asked that an investigation be initiated into the irregularity alleged, and that his defense counsel be heard personally.<sup>25</sup> There is no information in the record before the IACHR that would allow it to determine whether the brief said to have been filed on January 25, 2001, was actually included in the domestic

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<sup>18</sup> Annex 2. Resolution of the Court of Law of the Fourth Military Zone of January 17, 2001. Annex to the initial petition, August 20, 2002.

<sup>19</sup> Annex 2. Resolution of the Court of Law of the Fourth Military Zone, January 17, 2001. Annex to the initial petition of August 20, 2002.

<sup>20</sup> Annex 5. Memorandum No. 2001-06-COSB of the Council of Subaltern Officers of the Army, May 7, 2001. Annex to the initial petition of August 20, 2002.

<sup>21</sup> Annex 5. Memorandum No. 2001-06-COSB of the Council of Subaltern Officers of the Army, May 7, 2001. Annex to the initial petition of August 20, 2002.

<sup>22</sup> Annex 6. Request for reconsideration filed by Homero Flor with the Commander of the Army, May 8, 2001. Annex to the initial petition of August 20, 2002.

<sup>23</sup> Annex 6. Request for reconsideration filed by Homero Flor with the Commander of the Army, May 8, 2001. Annex to the initial petition of August 20, 2002.

<sup>24</sup> Annex 6. Request for reconsideration filed by Homero Flor with the Commander of the Army, May 8, 2001. Annex to the initial petition of August 20, 2002.

<sup>25</sup> Annex 6. Request for reconsideration filed by Homero Flor with the Commander of the Army, May 8, 2001. Annex to the initial petition of August 20, 2002.

record, as Mr. Flor alleges. Nonetheless, the IACHR notes that these allegations on due process were aired within the mechanisms pursued by the alleged victim to claim his right to defense and due process at the stage of the proceeding where it was decided to discharge him from the Armed Forces.

45. In a session held June 4, 2001, the Council of Subaltern Officers denied the motion for reconsideration, considering that the “factual and legal grounds that motivated [the resolution whose reconsideration was sought] were still in place.”<sup>26</sup> Notice of the decision was given to Homero Flor on June 5, 2001.<sup>27</sup> The information available indicates that Homero Flor filed a motion for appeal with the Council of Superior Officers of the Armed Forces to challenge the decision by the Council of Subaltern Officers.<sup>28</sup>

46. In a session held July 18, 2001, the Council of Superior Officers of the Army decided to dismiss the appeal and affirmed in all its terms the resolution adopted by the Council of Subaltern Officers.<sup>29</sup> Homero Flor was notified of that decision the same day.<sup>30</sup>

### **3. Constitutional *amparo* action No. 74-2001**

47. After the Resolution by the Court of Law of January 17, 2001, that decided to support the report of the prosecutor indicating that there was disciplinary liability, Mr. Homero Flor filed a constitutional *amparo* action before the Superior Court of Justice of Quito on January 23, 2001.<sup>31</sup> On January 24, 2001, the case was assigned to the Sixth Court for Civil Matters of Pichincha under case No. 74-2001.<sup>32</sup>

48. The action was brought against the President of the Republic in his capacity as Chief of the Armed Forces of Ecuador; the Minister of National Defense, the Commanding General of the Army, and the General Prosecutor of the State (*Procurador General del Estado*). In addition, Homero Flor’s representative requested suspension of the summary information proceeding, which at that time was before the Commander of the Army, as well as suspension of the effects of the ruling by the Court of Law of January 17, 2001.<sup>33</sup>

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<sup>26</sup> Annex 7. Memorandum No. 2001-10-COSB of the Council of Subaltern Officers of the Army, June 5, 2001. Annex to the initial petition of August 20, 2002.

<sup>27</sup> Annex 7. Memorandum No. 2001-10-COSB of the Council of Subaltern Officers of the Army, June 5, 2001. Annex to the initial petition of August 20, 2002.

<sup>28</sup> The Commission does not have a copy of this document. Nonetheless, the record before the IACHR does include the decision that resolved that appeal. In this respect, see: Annex 8. Resolution of the Council of Superior Officers. Memorandum No. 210090-COSFT, July 18, 2001. Annex to the petitioners’ brief of April 12, 2004.

<sup>29</sup> Annex 8. Resolution of the Council of Superior Officers. Memorandum No. 210090-COSFT, July 18, 2001. Annex to the petitioners’ brief of April 12, 2004.

<sup>30</sup> Annex 8. Resolution of the Council of Superior Officers. Memorandum No. 210090-COSFT, July 18, 2001. Annex to the petitioners’ brief of April 12, 2004.

<sup>31</sup> Annex 3. Constitutional *amparo* action filed by Homero Flor Freire before the Judge for Civil Matters, January 23, 2001. Annex to the initial petition of August 20, 2002.

<sup>32</sup> Annex 9. Official note from the Superior Court of Justice of Quito, Office of Assignments and of Drawings and Judicial Mailboxes, January 24, 2001. Annex to the initial petition of August 20, 2002.

<sup>33</sup> Annex 3. Constitutional *amparo* action filed by Homero Flor Freire before the Judge for Civil Matters, January 23, 2001. Annex to the initial petition of August 20, 2002.

49. In his action Homero Flor alleged that the proceeding before the First Court of Investigation of the Fourth Military Zone had been brought for “alleged homosexuality” based on Article 117 of the Rules of Military Discipline. In this respect, it held that this provision should be understood as derogated, since the “crime of homosexuality” had been declared unconstitutional by resolution 106-1-97 of the Constitutional Court of November 27, 1997, thus he could not be punished for conduct which, according to the legal order in place, was not criminalized.

50. In his *amparo* action Mr. Flor also argued that a series of irregularities were committed during the summary information proceeding that violated his right to defense and due process. He noted in particular that in receiving testimonial evidence, one day before the hearing was held, “an auxiliary of the Division’s personnel transmitted the order from [his] General Zabala, Commander of the Division,” for certain activities to be carried out in the city of Ambato. Mr. Flor argued in this regard that “the day [of the hearing he had] to go through a great deal to have that order rectified” to be able to be present with his defense counsel at the hearing.

51. Similarly, he adduced that his defense had presented a recusal against the prosecutor of the Military Zone for having acted in a “biased manner and against his professional obligations,” it having been by petition of the prosecutor that Mr. Flor was not allowed to be present at the statements of the witnesses who testified against him.<sup>34</sup> Mr. Flor argues that said recusal had been rejected by the First Court of Investigation, which had limited itself to “publicly admonishing” the representative of the prosecution.<sup>35</sup> He also argued that when he went to the GIM-4 to give a report about what had happened, he did not have “the advice of legal counsel.”<sup>36</sup>

52. By decision of January 29, 2001<sup>37</sup>, the Sixth Court for Civil Matters of Pichincha admitted the constitutional *amparo* action and called the parties to a hearing on February 5, 2001.<sup>38</sup>

53. As appears in the record of the hearing held on February 5, 2001<sup>39</sup> and the briefs filed by the parties with the Sixth Court for Civil Matters of Pichincha<sup>40</sup>, the representative of the respondents raised different arguments related to the *amparo* action being inadmissible, including that: (i) the

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<sup>34</sup> Annex 3. Constitutional *amparo* action filed by Homero Flor Freire before the Judge for Civil Matters, January 23, 2001. Annex to the initial petition of August 20, 2002.

<sup>35</sup> Annex 3. Constitutional *amparo* action filed by Homero Flor Freire before the Judge for Civil Matters, January 23, 2001. Annex to the initial petition of August 20, 2002.

<sup>36</sup> Annex 10. Brief filed by Homero Flor with the Sixth Court for Civil Matters of Pichincha, February 6, 2001. Annex to the initial petition of August 20, 2002.

<sup>37</sup> Annex 11. Ruling by the Sixth Court for Civil Matters of Pichincha, January 29, 2001. Annex to the initial petition of August 20, 2002.

<sup>38</sup> Annex 12. Record of Hearing before the Sixth Court of Pichincha, February 5, 2001. Annex to the initial petition of August 20, 2002.

<sup>39</sup> Annex 12. Record of Hearing before the Sixth Court for Civil Matters of Pichincha, February 5, 2001. Annex to the initial petition of August 20, 2002.

<sup>40</sup> Annex 13. Briefs filed with the Sixth Court for Civil Matters of Pichincha within constitutional *amparo* action No. 74-2001, by the Ministry of National Defense, February 8, 2001; by the General Commander of the Army and his legal counsel, February 5, 2001; by the Legal Representative of the Presidency of the Republic, February 6, 2001; and the Director of Legal Representation, delegate of the Chief Defense Counsel of the State, February 6, 2001. Annexes to the initial petition of August 30, 2001.

requirements of established in the Constitution and in the Law on Constitutional Review were not met; (ii) the procedure being challenged was not susceptible to an *amparo* action; and (iii) that procedure had not concluded, as it was pending before the Council of Subaltern Officers of the Army, which was to issue a pronouncement on the ruling by the Court of Law of January 17, 2001, a decision that Homero Flor would still be able to appeal before the Council of Superior Officers of the Army and, if necessary, to the contentious-administrative jurisdiction.<sup>41</sup> The respondents' representative also put forth arguments related to the nature of the summary information proceeding and whether it could be used to address the facts at issue.

54. Next the Commission summarizes the pertinent parts of the position presented by the Office of the General Prosecutor of the State (*Procuraduría General del Estado*), the Commanding General of the Army, the Minister of National Defense, and the Presidency of the Republic, regarding the justification for bringing the summary information proceeding against Lt. Homero Flor. In a subsequent section the Commission will refer to the arguments invoked regarding the nature of that proceeding.

55. In briefs directed to the Sixth Court for Civil Matters of Pichincha, the representative of the Office of the Chief Defense Counsel of the State argued that the summary information proceeding brought against Homero Flor was not aimed at punishing him for a crime that had already been struck from the books, the crime of "*homosexuality*," but rather that the sanction was applicable since said sexual conduct was said to have taken place within the military facility, thereby affecting order and good customs within the Institution.<sup>42</sup> The Legal Representative of the Presidency of the Republic argued that Article 76(i) of the Law on Armed Forces Personnel provided that one of the grounds for placing one of its members on leave was misconduct, and that in the case of Mr. Flor it was applicable due to having engaged in "immoral and scandalous conduct" that represented an attack on morality and good customs.<sup>43</sup> The Minister of National Defense stated that he stuck to the arguments put forth by the Commander in Chief of the Armed Forces, the Commanding General of the Army, and the Office of the Chief Defense Counsel of the State.<sup>44</sup>

56. For his part, the Office of the Legal Adviser of the General Command of the Army indicated that the misconduct by Mr. Flor consisted of having been seen having oral sex with a soldier after having attended a social gathering, not accompanied by his wife, and in general having interacted showing "excessive informality with the subaltern personnel" ("*excesiva confianza con el personal*").

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<sup>41</sup> In particular, the Legal Representative of the Presidency of the Republic also alleged that the situation of leave in which Homero Flor found himself at that moment, according to Article 86 of the Law on Armed Forces Personnel, "[did] not deprive him of rank or salary, [but that it] put him in a transitory situation until the matter [was] resolved." See in Annex 13. Brief filed with the Sixth Court for Civil Matters of Pichincha within constitutional *amparo* action No. 74-2001 by the Legal Representative of the Presidency of the Republic, February 6, 2001. Annex to the initial petition of August 20, 2002.

<sup>42</sup> See in Annex 13. Brief filed with the Sixth Court for Civil Matters of Pichincha in constitutional *amparo* action No. 74-2001, by the Director of Legal Representation, delegate of the Chief Defense Counsel of the State, February 6, 2001, and of the Legal Representative of the Presidency of the Republic), February 6, 2001. Annexes to the initial petition of August 30, 2002.

<sup>43</sup> See in Annex 13. Brief filed with the Sixth Court for Civil Matters of Pichincha in constitutional *amparo* action No. 74-2001, by the Legal Representative of the Presidency of the Republic, February 6, 2001). Annex to the initial petition of August 20, 2002.

<sup>44</sup> See in Annex 13. Brief filed with the Sixth Court for Civil Matters of Pichincha in constitutional *amparo* action No. 74-2001, from the Minister of National Defense, February 8, 2001. Annex to the initial petition of August 20, 2002.

*subalterno*”), which corroborated his poor behavior and was also in violation of the military disciplinary regime.<sup>45</sup>

57. By brief of February 6, 2001, filed with the Sixth Court for Civil Matters, Homero Flor ratified in all its terms the *amparo* action filed and asked that the Sixth Court order the Commander of the Army to forward a certified copy of the record containing the summary information proceeding brought against him.<sup>46</sup> On February 15, 2001, Homero Flor reiterated that request and sent a copy of memorandum No. 200187-IV-DE-1 of December 13, 2000, referred to *supra*, according to which he alleged that he was switched in terms of his “functions and consequently ... [stripped of his] duties.”<sup>47</sup>

58. By decision of February 23, 2001, the Sixth Court for Civil Matters of Pichincha accepted the presentations made in the hearing of February 5, 2001, and ordered that the case be filed in “the files to be resolved.”<sup>48</sup> On March 1, 2001, Homero Flor filed a motion for reconsideration with the Sixth Court for Civil Matters against this measure, primarily based on the fact that the Court should have been apprised of the record in the summary information proceeding in order to be able to decide, thus he reiterated his request for the Commander of the Army to be ordered to submit a certified copy of the record in that proceeding.<sup>49</sup>

59. On March 25, 2001, the Sixth Court for Civil Matters denied the reconsideration requested, finding it to be out of order and “left intact the right of [Homero Flor and his defense] to submit to the court all the documents [referred to] in their petition of March 1.”<sup>50</sup>

60. On May 15 and June 12, 2001, Homero Flor informed the Sixth Court for Civil Matters, of the decisions adopted by the Council of Subaltern Officers and the Council of Superior Officers that placed him on leave prior to the discharge. In both cases he asked that “urgent measures” be taken to order the suspension of the legal effects of these resolutions, in keeping with Article 46 of the Law on Constitutional Review.<sup>51</sup>

**a. Decision of the Sixth Court for Civil Matters of Pichincha**

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<sup>45</sup> Annex 13. Brief presented by the attorney from the Office of Legal Counsel of the General Command of the Army before the Sixth Court for Civil Matters of Pichincha, in *amparo* action No. 74-2001. Annex to the initial petition of August 20, 2002.

<sup>46</sup> Annex 10. Brief filed by Homero Flor with the Sixth Court for Civil Matters of Pichincha, February 6, 2001. Annex to the initial petition of August 20, 2002. This request was also made in the hearing held before the Sixth Court for Civil Matters, as appears in Annex 12. Record of Hearing before the Sixth Court for Civil Matters of Pichincha, February 5, 2001. Annex to the initial petition of August 20, 2002.

<sup>47</sup> Annex 14. Brief filed by Homero Flor with the Sixth Court for Civil Matters of Pichincha, February 15, 2001. Annex to the initial petition of August 20, 2002.

<sup>48</sup> Annex 15. Ruling of the Sixth Court for Civil Matters of Pichincha, February 23, 2001. Annex to the initial petition of August 20, 2002.

<sup>49</sup> Annex 16. Request to overturn the ruling of February 23, 2001, of the Sixth Court for Civil Matters of Pichincha, filed by Homero Flor on March 1, 2001. Annex to the initial petition of August 20, 2002.

<sup>50</sup> Annex 17. Ruling by the Sixth Court for Civil Matters of Pichincha, March 25, 2001. Annex to the initial petition of August 20, 2002.

<sup>51</sup> Annex 18. Request for urgent measures in the constitutional *amparo* action before the Sixth Court for Civil Matters of Pichincha, May 15, 2001. See also: Annex 19. Request by Homero Flor before the Sixth Court for Civil Matters of Pichincha, June 12, 2001. Annexes to the initial petition of August 30, 2002.

61. On July 18, 2001, the Sixth Court for Civil Matters of Pichincha denied the *amparo* action brought by Homero Flor.<sup>52</sup> In its analysis of why it denied the *amparo* sought, the Sixth Court for Civil Matters noted that in the matter suspension of the summary information proceeding was sought, and that as this is an investigative process, the *amparo* action is out of order, because it was not directed against an act itself with respect to which the Court could make a finding of its illegitimacy.<sup>53</sup>

62. As for the January 17, 2001 resolution of the Court of Law by which it endorsed the report of the military prosecutor and established the disciplinary liability of Mr. Flor and the other soldier, the Court considered that as it was a decision emanating from the military criminal judicial authority it could be challenged at higher levels in keeping with the provisions of the Organic Law of the Judicial Service of the Armed Forces. Accordingly, it established that the resolution challenged “ha[d] not become final and binding,” thus in light of the subsidiary nature of the *amparo* action, it was out of order.<sup>54</sup> The Court also noted that according to the Constitution, “judicial decisions adopted in a proceeding are not susceptible to an *amparo* action.”<sup>55</sup>

63. The decision also took into account that Homero Flor “ha[d] been at that time placed on leave, but not by the will ... of his superiors, but by statutory and regulatory mandate, without [having] been stripped of his rank, his salary, because the resolution [was] not yet final, which remove[d] the requirement of grave and imminent harm that is required for filing this action.”<sup>56</sup>

#### **b. Appeal of the decision of the Sixth Court for Civil Matters of Pichincha**

64. On July 20, 2001, Homero Flor filed a motion to appeal the decision of July 18, 2001 of the Sixth Court for Civil Matters of Pichincha.<sup>57</sup> In his appellate brief he argued that the court had not ruled on some of the grounds set forth in support of the constitutional *amparo* action. For example, he argued that no consideration was offered on the decriminalization of the “crime of homosexuality” in Ecuador, and whether “the decriminalization of the infraction in question [was] equally applicable to civilians and members of the military.”<sup>58</sup> He also argued that during the time the case was before the Sixth Court for Civil Matters and when its decision was issued, the “administrative-military” remedy had

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<sup>52</sup> Annex 20. Decision of the Sixth Court for Civil Matters of Pichincha, July 18, 2001. Annex to the initial petition of August 20, 2002.

<sup>53</sup> Annex 20. Decision of the Sixth Court for Civil Matters of Pichincha, July 18, 2001. Annex to the initial petition of August 20, 2002.

<sup>54</sup> Annex 20. Decision of the Sixth Court for Civil Matters of Pichincha, July 18, 2001. Annex to the initial petition of August 20, 2002.

<sup>55</sup> Annex 20. Decision of the Sixth Court for Civil Matters of Pichincha, July 18, 2001. Annex to the initial petition of August 20, 2002.

<sup>56</sup> Annex 20. Decision of the Sixth Court for Civil Matters of Pichincha, July 18, 2001. Annex to the initial petition of August 20, 2002.

<sup>57</sup> Annex 21. Motion of appeal against the decision of July 18, 2001 of the Sixth Court for Civil Matters of Pichincha in constitutional *amparo* action No. 74-2001, of July 20, 2001. Annex to the initial petition of August 20, 2002.

<sup>58</sup> Annex 21. Motion of appeal against the decision of July 18, 2001 of the Sixth Court for Civil Matters of Pichincha in constitutional *amparo* action No. 74-2001, of July 20, 2001. Annex to the initial petition of August 20, 2002.



been exhausted, and by then he was “definitively separated from the Army.” The appeal was admitted on August 30, 2001, and the matter went before the Constitutional Court.<sup>59</sup>

### c. Decision of the Constitutional Court

65. On February 4, 2002, the Second Chamber of the Constitutional Court found the constitutional *amparo* action inadmissible.<sup>60</sup> In its analysis the Court took into account the arguments raised by the parties when the motion was before the Sixth Court for Civil Matters. In that respect, it considered that the decision of the Court of Law within the summary information proceeding was based on the principle of legality established in Article 119 of the Ecuadorian Constitution, in conjunction with Article 187, on the special jurisdiction provided for “judging infractions [by members of the Armed Forces] in the performance of their professional duties.”<sup>61</sup> Moreover, it indicated that these constitutional provisions supplemented Article 1 of the Organic Law of the Armed Forces Justice Service on the jurisdiction of military courts; and Article 60(g) of the Organic Law of the Armed Forces, on the power attributed to the Military Criminal Courts to determine “leave prior to discharge from active duty in the Army, in the interest of good service, due to misconduct.”<sup>62</sup>

66. In this way the Constitutional Court concluded that the Court of Law did not act unlawfully in issuing its decision of January 17, 2001, and that as it was this “administrative act” that was challenged, one had not shown a constitutional violation to the detriment of Homero Flor that would make it possible to rule favorably on the *amparo* action filed. The Court noted that “additionally the requirements noted by the Law on Constitutional Review were not [satisfied].”<sup>63</sup>

### 4. Nature of the summary information proceeding

67. This procedure is regulated in the Rules of Procedure for Summary Information Proceedings in the Armed Forces.<sup>64</sup> According to the information available at the time when the summary information proceeding that involved Homero Flor was conducted, it appears that the instrument applied in the instant case was the Rules of Procedure issued by Ministerial Decree 1046, published in General Ministerial Order 240 of December 22, 1993.<sup>65</sup> Article 2 of those Rules of Procedure indicates that:

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<sup>59</sup> Annex 22. Resolution of the Sixth Court for Civil Matters of Pichincha, August 30, 2000. Annex to the initial petition of August 20, 2002.

<sup>60</sup> Annex 23. Decision of the Constitutional Court, Second Chamber, February 4, 2002. Published in Official Registry No. 546, April 2, 2002. Annex to the initial petition of August 30, 2002, and annex to the petitioners’ brief of March 17, 2008.

<sup>61</sup> Annex 23. Decision of the Constitutional Court, Second Chamber, February 4, 2002. Published in Official Registry No. 546, April 2, 2002. Annex to the initial petition of August 30, 2002, and annex to the petitioners’ brief of March 17, 2008.

<sup>62</sup> Annex 23. Decision of the Constitutional Court, Second Chamber, February 4, 2002. Published in Official Registry No. 546, April 2, 2002. Annex to the initial petition of August 30, 2002, and annex to the petitioners’ brief of March 17, 2008.

<sup>63</sup> Annex 23. Decision of the Constitutional Court, Second Chamber, February 4, 2002. Published in Official Registry No. 546, April 2, 2002. Annex to the initial petition of August 30, 2002, and annex to the petitioners’ brief of March 17, 2008.

<sup>64</sup> In this respect see: Annex 2. Resolution of the Court of Law of the Fourth Military Zone of January 17, 2001. Annex to the initial petition of August 20, 2002.

<sup>65</sup> These Rules of Procedure were subsequently replaced by new Rules of Procedure for summary information proceedings approved by Decision No. 1088 of the Ministry of National Defense, and published in General Ministerial Order No. 200 of October 30, 2002.

**Art. 2.- Purpose of the summary information proceeding.-** The summary information proceeding is an administrative procedure aimed at establishing the truth of a given occurrence and to determine its legal consequences, whether that involves establishing the circumstances and responsibilities of a harm, loss, or cessation of activity of government property, professional or disciplinary conduct of Armed Forces personnel, or in general justifying acts whose results may have effects of interest to the Armed institution. The justification for the acts shall be made by the evidentiary means indicated in the law.<sup>66</sup>

68. One must note that the Sixth Court for Civil Matters held that “the summary information proceeding is not a mere administrative act, but a whole investigative proceeding; and being a proceeding, there are parties, third persons, and an authority.”<sup>67</sup> It was thus adduced that the procedure provided for in the Rules of Military Discipline was invoked “to determine the degree of liability in the commission of disciplinary infractions that [would] merit the imposition of the sanctions provided for in the Law on Armed Forces Personnel,”<sup>68</sup> and that this was an “investigative proceeding analogous to the preliminary investigative phase (*etapa sumarial*) of a criminal trial, after which a resolution [would be] adopted” which in turn could be reviewed at two levels: the Council of Subaltern Officers of the Army, which should characterize the act of professional misconduct based on the facts proven by the Court of Law; and then before the Council of Superior Officers of the Army, which has jurisdiction to hear a challenge against a resolution handed down by the Council of Subaltern Officers.<sup>69</sup>

## 5. The provisions of Ecuadorian domestic law applicable to the case

69. The Commission now offers some considerations on the legal regime applicable at the time of the facts in the instant case.

70. Article 23 of the Constitution of Ecuador in force at the time of the facts under consideration provided for the recognition and guarantee by the State of the civil rights of persons, including the right to equality before the law, in the following terms:

Art. 23(3). Equality before the law. All persons shall be considered equal and shall enjoy the same rights, freedom, and opportunities without any discrimination on grounds of birth, age, sex, ethnicity, color, social origin, language; religion, political affiliation, economic position, sexual orientation; health condition, disability, or different of any kind.<sup>70</sup>

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<sup>66</sup> Annex 23. Rules of Procedure for Summary Information Proceedings in the Armed Forces. Ministerial Decree 1046, published in General Ministerial Order 240 of December 22, 1993. Brief by petitioners filed September 24, 2012.

<sup>67</sup> Annex 20. Decision of the Sixth Court for Civil Matters of Pichincha, July 18, 2001. Annex to the initial petition of August 20, 2002.

<sup>68</sup> See in Annex 13. Brief filed with Sixth Court for Civil Matters of Pichincha in constitutional *amparo* action No. 74-2001, by the Legal Representative of the Presidency of the Republic, February 6, 2001. Annex to the initial petition of August 30, 2001.

<sup>69</sup> See Annex 13. Briefs filed with the Sixth Court for Civil Matters of Pichincha in constitutional *amparo* action No. 74-2001, by the General Commander of the Army and his legal counsel, February 5, 2001. Annexes to the initial petition of August 30, 2001. See also Annex 13. Brief filed with Sixth Court for Civil Matters of Pichincha within constitutional *amparo* action No. 74-2001, by the Legal Representative of the Presidency of the Republic, February 6, 2001. Annex to the initial petition of August 30, 2001.

<sup>70</sup> Constitution of Ecuador of 1998.

71. Article 24 established as follows:

Article 24.- To ensure due process, the following basic guarantees must be observed, without detriment to others that are established in the Constitution, international instruments, the laws, or the case-law:

...

13. The resolutions of the governmental authorities that affect persons must state their grounds. Such grounds shall not be found to exist if the resolution does not state the legal provisions or principles on which it is based, or if the application thereof to the facts is not explained. On ruling on a challenge to a sanction, one may not leave the appellant in a worse situation.<sup>71</sup>

72. In addition, by virtue of the principle of constitutional supremacy, Articles 273 and 274 of the Constitution established:

Article 273.- The courts, tribunals, judges, and administrative authorities shall have the obligation to apply the provisions of the Constitution as relevant, even if the interested party does not expressly invoke them.

Article 274.- Any judge or court, in the cases he, she, or it takes cognizance of, may declare inapplicable, *sua sponte* or upon petition by a party, a rule of law contrary to the provisions of the Constitution or international treaties and agreements without detriment to ruling on the matter controverted. This declaration will not be binding for any case other than that in which it is issued. The judge, court, or chamber shall present a report on the declaration of unconstitutionality so that the Constitutional Court may rule with general and binding effect.<sup>72</sup>

73. In addition, as appears from the information contained in the record, the Rules of Military Discipline of 1998<sup>73</sup> were replaced by the Rules of Military Discipline issued by General Ministerial Order No. 243 of December 15, 2008.<sup>74</sup> The Commission observes that it was the 1998 Rules that were applied in the instant case. Accordingly, in this section the IACHR will take into account the provisions in force at the time of the events under study, and in the analysis section it will set forth the relevant considerations on the entry into force of the new Rules.

74. The 1998 Rules of Military Discipline established that infractions could be moderate (*leves*), serious (*graves*), and severe (*atentatorias*). Included under infractions “against morality” was:

Art. 67.- Severe infractions:

(a) Perform illegitimate sexual acts inside the confines of military facilities.....

75. According to Article 72, a severe infraction committed by an officer is to be met with a sanction of arrest for 10 to 15 days; strict arrest (*arresto de rigor*) at another military facility for 3 to 10 days; and suspension from duties of 10 to 30 days.

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<sup>71</sup> Constitution of Ecuador of 1998.

<sup>72</sup> Constitution of Ecuador of 1998.

<sup>73</sup> Rules of Military Discipline. Ministerial Decree 831 Authentic Registry 1998 of August 7, 1998.

<sup>74</sup> A copy of the new Rules of Military Discipline was produced by the State as an annex to its brief of observations on the merits, received June 7, 2012.

76. Title XI of the same Rules (general provisions) established that:

Art. 117.- The members of the Armed Forces who are **surprised in acts or homosexuality** or in acts related to the possession, illicit use, trafficking, and sale of drugs or narcotics within or outside of the service shall be subject to the provisions of Article 87(i) of the Law on Armed Forces Personnel, without prejudice to being brought before the regular judges to be tried in keeping with the relevant statute.

Citizens who are doing Compulsory Military Service in the Armed Forces and who engage in the acts indicated in the previous paragraph shall be separated from active duty.

If the degree of participation of the member of the Armed Forces in said acts is not fully shown, the competent authorities shall order a Summary Information Proceeding. [Emphasis added.]

77. As for the situations in which an active member of the Armed Forces could be discharged, the Law on Armed Forces Personnel (Law 118 of 1991)<sup>75</sup> established that:

Art. 87.- A member of the military shall be discharged on one of the following grounds:

...

(i) When in the interest of good service, whether due to the misconduct or professional incompetence of the member of the military, so characterized by the respective Council, in keeping with what was established in the corresponding Rules, when he does not have the right to leave.

## **B. Legal analysis**

### **1. Preliminary Considerations**

#### **a. On the modification of the Rules of Military Discipline**

78. The State argues that the provisions of the Rules of Military Discipline that justified the discharge of Mr. Homero Flor from the Ecuadorian Army have already been derogated. The petitioners allege that the effects of the decision that led to Mr. Homero Flor's discharge have not been overcome for there has been no pronouncement annulling the discharge, and it has resulted in several violations of the human rights of Mr. Flor.

79. Mindful of the foregoing, the Commission clarifies that what was raised by the State refers to a subsequent modification to the provisions in force at the time of the facts. In similar circumstances, the Inter-American Court has established that

... the international responsibility of the State arises immediately when the internationally illegal act attributed to it is committed.... Possible subsequent reparation under domestic legal venue does not inhibit the Commission or the Court from hearing the case that has already begun under the American Convention.<sup>76</sup>

80. Accordingly, the IACHR recognizes the gains made by the State in the legislative arena. Without prejudice to that, the IACHR will analyze the legal instrument in question in relation to its applicability to the facts of the case, and if appropriate it will take into account the subsequent change.

<sup>75</sup> Law of Armed Forces Personnel. Law 118. Published in the Official Registry Supplement 660, April 10, 1991.

<sup>76</sup> I/A Court H.R. *Case of the Gómez Paquiyauri Brothers v. Peru*. Judgment of July 8, 2004. Series C No. 110, para. 75.

In this way, in the instant case the Commission will analyze whether the decisions that led to the discharge of Mr. Homero Flor triggered the international responsibility of the State, determining whether standards were applied that are incompatible with the American Convention.

**b. On perceived sexual orientation**

81. The Commission observes that in the instant case the petitioners have argued that the alleged victim was separated from his activities as a military officer because he was accused of engaging in a sexual act with another man. In that regard, they argue that Mr. Flor has no information about the occurrence of such facts and that he does not self-identify as homosexual.<sup>77</sup>

82. In this respect, the Commission emphasizes what was noted by the Inter-American Court when it said: “It is possible for a person to feel discriminated by the way other people think about its relation to a group or social sector, independently of whether such perception corresponds to reality or to the victim’s self-identification.”<sup>78</sup> In that regard, it has been indicated that “homosexuals can be within the ambit of a social group category, either as a group sharing a common characteristic or because they are perceived as a cognizable group in the society.”<sup>79</sup> Accordingly, in certain contexts not so much whether a person recognizes himself or herself as homosexual, but rather whether he or she is “perceived” as such by third persons or is identified as a member of a given social group may take on special importance.<sup>80</sup> This has been noted by the United Nations High Commissioner on Human Rights on referring to situations of discrimination based on actual sexual orientation and “perceived” sexual orientation.<sup>81</sup>

83. In this respect, the Commission understands that the fact that a person may be perceived as having a sexual orientation other than heterosexual does not necessarily mean that this person identifies with that orientation; yet it does not rule out the possibility of being exposed to the discrimination to which persons have historically been subjected due to their sexual orientation or their

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<sup>77</sup> Sexual orientation has been defined as “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.” Yogyakarta Principles. Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006, p. 6, footnote 1.

<sup>78</sup> I/A Court H.R. *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, para. 380.

<sup>79</sup> UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, para. 3; *Advisory opinion on claims for sexual orientation (Tokyo Bar Association)*, September 3, 2004, para. 8.

<sup>80</sup> Such has been established for example by the Asylum and Immigration Tribunal of the United Kingdom in a matter regarding an asylum application from Jamaica. See: *DW (Homosexual Men - Persecution - Sufficiency of Protection) Jamaica v. Secretary of State for the Home Department*, CG [2005] UKAIT 00168, United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, 28 November 2005. Along the same lines, the Commission has also ruled on matters in which certain persons were exposed to acts of violence for being perceived as homosexuals. See: *IACHR Condemns Attack and Murder Based on Perceived Sexual Orientation in Brazil*. Washington D.C., July 11, 2012. In addition, the UN Rapporteur against Torture has noted, for example, the situation of vulnerability in which persons deprived of liberty who are perceived as LGBTBI may find themselves, as they are exposed to acts of violence and victimization by police or prison authorities. See: United Nations, General Assembly, *Question of torture and other cruel, inhuman or degrading treatment or punishment*, A/56/156, 3 July 2001, para. 21.

<sup>81</sup> United Nations, General Assembly, *Report of the High Commissioner for Human Rights: Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, A/HRC/19/41, November 17, 2011, paras. 1, 25, 31, 40, 67.

gender identity or expression. Based on these considerations the Commission understands that the prohibition of discrimination on grounds of sexual orientation implies that the protection offered with this prohibition seeks to impede any discriminatory difference in treatment based on this aspect, understanding that its scope is independent of whether a person's sexual orientation corresponds to how the person self-identifies, that is, his or her actual sexual orientation, or whether it has to do only with the perception of his or her sexual orientation (*perceived* sexual orientation).

84. In any event, the IACHR understands that this case does not address the sexual orientation of the alleged victim, but rather the application of a military disciplinary provision that punished sexual acts between persons of the same sex.

## **2. The right to equality before the law and non-discrimination (Articles 24, 1(1) and 2 of the American Convention)**

### **a. Preliminary considerations on these provisions of the Convention**

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

86. Article 1(1) of the American Convention establishes:

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.

87. Article 2 of the American Convention establishes that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

88. The case-law of the Inter-American Court and the decisions of the Commission have indicated time and again that the right to equality and non-discrimination "is the central, basic axis of the inter-American human rights system,"<sup>82</sup> and that it entails "obligations *erga omnes* of protection that bind all States...."<sup>83</sup> Similarly, the Court has indicated that any discriminatory treatment outside of the general obligation to respect and ensure human rights gives rise to the international responsibility of

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<sup>82</sup> IACHR, Application to the Inter-American Court of Human Rights, Karen Atala and daughters, September 17, 2000, para. 74; I/A Court H.R. *Legal Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 173.5.

<sup>83</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc. 68, January 20, 2007; I/A Court H.R. *Legal Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 173.5; IACHR, Application to the Inter-American Court of Human Rights, Karen Atala and daughters, September 17, 2010, para. 74.

the State<sup>84</sup> for there is an “inseparable connection” between that obligation and the principle of equality and non-discrimination.<sup>85</sup>

89. On the principle of equality, the Inter-American Court has noted:

The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.<sup>86</sup>

90. On the concept of discrimination, the Court has held that it constitutes:

... any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>87</sup>

91. As regards the scope of the principle of non-discrimination in the inter-American system, the Court has distinguished between autonomous and subordinate clauses of the American Convention, establishing from its early case-law that Article 1(1) incorporates a prohibition on discrimination in the exercise and application of the rights enshrined in that instrument, whereas Article 24 prohibits such discrimination as regards not only the rights established in the Convention, but “all the laws approved by the State and their application.”<sup>88</sup> This distinction has been reiterated by the Inter-American Court in the case *Apitz Barbera et al. v. Venezuela*, in the following terms:

The difference between the two articles lies in that the general obligation contained in Article 1(1) refers to the State’s duty to respect and guarantee “non-discrimination” in the enjoyment of the rights enshrined in the American Convention, while Article 24 protects the right to “equal treatment before the law.” In other words, if the State discriminates upon the enforcement of conventional rights containing no separate non-discrimination clause a violation of Article 1(1)

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<sup>84</sup> I/A Court H.R. *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010 Series C No. 214, para. 268; I/A Court H.R. *Legal Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 85.

<sup>85</sup> I/A Court H.R. *Legal Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 85.

<sup>86</sup> I/A Court H.R. *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*. Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 55.

<sup>87</sup> I/A Court H.R. *Legal Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 92; *Fourth Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere*, OEA/Ser.L/V/II.117, Doc. 1 rev. 1, Annual Report IACHR 2002, March 7, 2003, para. 87; IACHR, Report on the Merits No. 4/01, Case 11,626, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001. See also: United Nations, Human Rights Committee, General Comment 18, Non-discrimination, 10/11/89, CCPR/C/37, para. 7.

<sup>88</sup> I/A Court H.R. *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*. Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4., para. 54. I/A Court H.R. *Yatama Case*. Judgment of June 23, 2005. Series C No. 127, para. 186.

and the substantial right involved would arise. If, on the contrary, discrimination refers to unequal protection by domestic law, a violation of Article 24 would occur.<sup>89</sup>

92. Without prejudice to that, the development of the right to equality and non-discrimination makes it possible to identify several conceptions of it. For example, one conception is related to the prohibition of an arbitrary difference in treatment —understanding difference of treatment to mean a distinction, exclusion, restriction, or preference<sup>90</sup>— and another is that related to the obligation to create conditions of actual equality vis-à-vis groups that have historically been excluded and are at greater risk of suffering discrimination. Although in certain cases both perspectives may also be present, each merits a different state response and different treatment in light of the American Convention. To this is added that in the different conceptions of the right to equality the acts or omissions of the State may be related to rights enshrined in the American Convention or may refer to any state action that does not have effects on the exercise of the rights established in the Convention.<sup>91</sup>

93. The various facets of the right to equality are reflected in what has been indicated by the Inter-American Court in several cases and advisory opinions, namely that in order to give useful effect to the right to equality and non-discrimination states must “abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights,” to “combat discriminatory practices at all levels, particularly in public bodies,” and, finally, “must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals.”<sup>92</sup>

94. In that regard, even though one can take certain criteria as the basis, the determination as to which provisions of the Convention apply should be done in each specific case under an analysis that involves the person or group of persons affected, the reasons behind the alleged discrimination, the rights or interests involved, and the means or omissions by which it materialized, among other aspects.<sup>93</sup>

95. Article 1(1) of the American Convention has been used to interpret the word “discrimination” contained in Article 24 of the same instrument. In particular, in the analysis of reasonableness that is generally used to evaluate whether a State is internationally responsible for

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<sup>89</sup> I/A Court H.R. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 209.

<sup>90</sup> United Nations, Human Rights Committee, General Comment 18, Non-discrimination, 10/11/89, CCPR/C/37, para. 7; I/A Court H.R. *Legal Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 92; Fourth Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, OEA/Ser.L/V/II.117, Doc. 1 rev. 1, Annual Report IACHR 2002, March 7, 2003, para. 87.

<sup>91</sup> IACHR, Application to the Inter-American Court of Human Rights, Karen Atala and daughters, September 17, 2010, para. 80.

<sup>92</sup> I/A Court H.R. *Case of the Girls Yean and Bosico v. República Dominicana*. Judgment of September 8, 2005. Series C No. 130, para. 141; I/A Court H.R. *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 170; I/A Court H.R. *Yatama Case vs. Nicaragua*. Judgment of June 23, 2005. Series C No. 127, para. 185; I/A Court H.R. *Legal Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 88; I/A Court H.R. *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02, August 28, 2002. Series A No. 17, para. 44; I/A Court H.R. *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*. Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 54.

<sup>93</sup> IACHR, Application to the Inter-American Court of Human Rights, Karen Atala and daughters, September 17, 2010, para. 82.



violating Article 24 of the American Convention, invoking the categories expressly mentioned in Article 1(1) has certain effects.<sup>94</sup>

96. Now, as the Inter-American Court has stated, not every difference in treatment is discriminatory. The Court has differentiated between “distinctions” and “discriminations” such that the first constitute differences compatible with the American Convention as they are “reasonable and objective,” whereas the second constitute arbitrary differences that redound to the detriment of human rights.<sup>95</sup>

97. Bearing in mind that the evaluation of whether a distinction is “reasonable and objective” is done on a case-by-case basis, the Commission, the Court, and other international tribunals and organs have turned to the use of a scaled proportionality test that includes the following elements of analysis: (i) the existence of a legitimate aim; (ii) its suitability, that is, the determination of whether there is a logical relationship of causality from means to end as between the distinction and the end pursued; (iii) the existence of less restrictive and equally suitable alternatives; and (iv) proportionality in the strict sense, that is, the balance of the interests at stake and the degree of sacrifice of one with respect to the other.<sup>96</sup>

98. When distinctions are based on certain categories expressly mentioned in the non-discrimination clauses of international human rights treaties there is a consensus that the analysis that is used to measure the reasonableness of the difference in treatment is especially strict. This is because, by their nature, such categories are considered “suspect” and therefore it is presumed that the distinction is incompatible with the American Convention. In that regard, only “overriding or urgent” considerations that must be analyzed in detail may be invoked as a justification.<sup>97</sup> This strict analysis is precisely the guarantee that the distinction is not based on prejudices and/or stereotypes that generally surround suspect categories of distinctions.<sup>98</sup>

99. In practical terms this means that after having presented a distinction of this nature, the burden of proof is on the state and the general criteria referred to are evaluated carefully such that it is not sufficient for a state to argue the existence of a legitimate end, but the objective pursued with the

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<sup>94</sup> IACHR, Application to the Inter-American Court of Human Rights, Karen Atala and daughters, September 17, 2010, para. 78.

<sup>95</sup> I/A Court H.R. *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184, para. 211; I/A Court H.R. *Legal Status and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, September 17, 2003, Series A. No. 18, para. 84.

<sup>96</sup> IACHR, Application to the Inter-American Court of Human Rights, Karen Atala and daughters, September 17, 2010, para. 86.

<sup>97</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc. 68, January 20, 2007, paras. 80 and 83; IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., October 22, 2002, para. 338; IACHR, Report No. 4/01, Case 11.625, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, para. 36; IACHR, *Annual Report 1999*, Considerations regarding the compatibility of affirmative action measures designed to promote the political participation of women with the principles of equality and non-discrimination, chapter VI; IACHR, Report No. 38/96, Case 10.056, X and Y (Argentina), October 15, 1996, paras. 73 and 74. In this report the Commission characterized the aim pursued as an “absolute necessity.”

<sup>98</sup> IACHR, Application to the Inter-American Court of Human Rights, Karen Atala and daughters, September 17, 2010, para. 88.

distinction must be particularly important or an pressing social need.<sup>99</sup> In addition, it is not enough for the measure to be suitable or for there to be a logical relationship of causality between it and the objective pursued, but rather it should be strictly necessary to achieve that aim, in that there is no other less harmful alternative.<sup>100</sup> Finally, to meet the requirement of proportionality one must argue the existence of an adequate balance of interests in terms of the degree of sacrifice and the degree of benefit.<sup>101</sup>

100. Based on the evolutionary interpretation of treaties as “living instruments” whose interpretation has to accompany the evolution of the current times and living conditions<sup>102</sup>, and also considering international standards, case-law of the European Court of Human Rights and comparative law, the IACHR already established that sexual orientation is a suspect category of discrimination under the criteria of non-discrimination contained in Article 1(1) of the American Convention and as such any distinction based on it should be examined with strict scrutiny.<sup>103</sup> In addition, the Inter-American Court has indicated that the expression “any other social condition” of Article 1(1) of the Convention should be interpreted in the manner most favorable to the person and to the evolution of the fundamental rights in contemporary international law.<sup>104</sup> Accordingly, the Inter-American Court established in its recent judgment in the case of *Karen Atala Riffo and daughters v. Chile* that

the sexual orientation of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person’s sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state

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<sup>99</sup> IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc. 68, January 20, 2007, paras. 80 and 83; IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., October 22, 2002, para. 338; IACHR, Report No. 4/01, Case 11.625, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, para. 36; IACHR, *Annual Report 1999*, Considerations regarding the compatibility of affirmative action measures designed to promote the political participation of women with the principles of equality and non-discrimination, chapter VI; European Court of Human Rights, *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, December 21, 1999, para. 29; European Court of Human Rights, *Belgian Linguistics Case (Merits)*, Judgment of July 23, 1968, p. 34; European Court of Human Rights, *Case of Lustig-Prean and Beckett v. United Kingdom*, Applications 31417/96 and 32377/96, Judgment of September 27, 1999, final decision of December 27, 1999; para. 80; European Court of Human Rights, *Case of Smith and Grady*, Applications Nos. 33985/96 and 33986/96, Judgment of September 27, 1999, para. 87.

<sup>100</sup> IACHR, Report No. 38/96, X and Y (Argentina), October 15, 1996, para. 74; IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc. 68, January 20, 2007, para. 83. Along similar lines see: European Court of Human Rights, *Karner v. Austria*, Application no. 40016/98, Judgment of July 24, 2003, para. 41; European Court of Human Rights, *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, Judgment of December 21, 1999, para. 29; European Court of Human Rights, *Belgian Linguistics Case (Merits)*, Judgment of July 23, 1968, p. 34.

<sup>101</sup> IACHR, Application to the Inter-American Court of Human Rights, *Karen Atala and daughters*, September 17, 2010, para. 89.

<sup>102</sup> I/A Court H.R. *Case of Karen Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 83; I/A Court H.R. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99, October 1, 1999. Series A No. 16, para. 114; I/A Court H.R. *Case of the “Mapiripán Massacre” v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, para. 106; European Court of Human Rights, *Tyrer v. United Kingdom* (No. 5856/72), Judgment of April 25, 1978, para. 31.

<sup>103</sup> IACHR, Application to the Inter-American Court of Human Rights, *Karen Atala and daughters*, September 17, 2010, paras. 90-95.

<sup>104</sup> I/A Court H.R. *Case of Karen Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, para. 85; I/A Court H.R. *The Right to Information on Consular Assistance in the Framework of the Due Process of Law*. Advisory Opinion OC-16/99, October 1, 1999. Series A No. 16, para. 115.

authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.

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A right granted to all persons cannot be denied or restricted under any circumstances based on their sexual orientation. This would violate Article 1.1 of the American Convention. This inter-American instrument proscribes discrimination, in general, including categories such as sexual orientation, which cannot be used as grounds for denying or restricting any of the rights established in the Convention.<sup>105</sup>

## **b. Analysis of the facts of the instant case**

101. In the instant case the petitioners argued that the alleged victim was subject to a discriminatory difference in treatment on having been subjected to an investigation aimed at establishing the occurrence of an alleged sexual act with another man, which resulted in him being separated from his duties and discharged from the Ecuadorian Army, all of which is said to have caused a negative impact on his human rights. Similarly, the petitioners adduced that the facts fit in a context of discrimination against military officers due to their real or perceived sexual orientation, based on which an effort was made to punish that orientation and not to regulate their sexual conduct through the disciplinary regime imposed. Based on these considerations, the Commission considers that the matter under study involves aspects that are within the scope of both Article 1(1) of the American Convention and Article 24 of the same instrument, thus the respective analysis will be done in light of both provisions.

102. In the instant case, considering the parties' arguments, the IACHR will analyze first the right to equality before the law contained in Article 24 of the American Convention, to determine whether the existence of a sanction for sexual acts between persons of the same sex in the domestic military regulations—at the time of the facts—and the application of those provisions to Mr. Homero Flor, which lead to his discharge from military service, triggered the international responsibility of the State. The IACHR will then analyze whether the international responsibility of the State was triggered in relation to the guarantees of due process and judicial protection of Mr. Flor, in view of the obligations to respect and ensure the rights protected in the Convention without any discrimination set forth in Article 1(1).

### **i. The Rules of Military Discipline: Sanction for sexual conduct between persons of the same sex**

103. In this respect, the Commission notes first that in general terms, and in keeping with the provisions in force at the time, the conduct of the members of the Ecuadorian Army was subject to a special regulation that required verifying compliance with certain minimal requirements to maintain discipline and order in the institution. Accordingly, the Rules of Military Discipline then in force established that their objective was "to constitute a moral and legal instrument that covers the activities generally of the members of the Armed Forces, to achieve a coordinated multiplication of their energies and obtain, as a result, an institution truly apt for National Defense."<sup>106</sup> Those Rules provided for applying the summary information procedure as a mechanism from which one could determine the

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<sup>105</sup> I/A Court H.R. *Case of Karen Atala Riffo and daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, paras. 91, 93.

<sup>106</sup> Rules of Military Discipline of the Armed Forces of 1998, Prologue.

application of the respective sanction, according to the result they yield in terms of to the conduct of the officer subject to the proceeding.

104. It is now up to the IACHR to determine whether the punishment of sexual acts between persons of the same sex in the military regime in force at the time of the events meets the tiered proportionality test referred to *supra*, and thereby to determine whether there is of state responsibility.

105. As regards the first element of the analysis, i.e. the existence of a legitimate end, which in terms of strict scrutiny implies that the objective pursued with the distinction should be a particularly important objective or an imperious social need, the IACHR observes that the Court of Law established that while the Constitution then in force recognized the right to make free decisions on sexual life, the provision of the Rules of Military Discipline that punished “acts of homosexuality” was justified by the “special nature” of the military legislation and the institution, which should be maintained and cultivate values such as honor, dignity, discipline, and extolling civic-mindedness.

106. In this respect, the European Court has reiterated that the restrictions imposed by the regime of military discipline may pursue a legitimate end to safeguard, for example, “national security interests” and “the defense of order,” and that the action of the military authorities must be geared to in that regard to ensuring the operational capacity of the armed forces and “maintaining the morale of the service personnel.”<sup>107</sup>

107. The IACHR considers that the State has the power to take measures to preserve discipline and order within its armed forces and that maintaining discipline within an armed institution is a legitimate end of the state. The IACHR considers it legitimate, in general, to establish a disciplinary regime in the armed forces that avoids the commission of acts that are an affront to the values of the institution, such as sexual acts.

108. Next, the IACHR will analyze whether the next step of the proportionality test is satisfied, that is, the suitability of the measure to attain the end pursued. For this purpose, it must be examined whether the measure of establishing a sanction of discharge in the legislation and applying it to Mr. Flor for his alleged responsibility in committing “acts of homosexuality” was strictly necessary to attain the end of preserving the values of the armed forces. In this respect it must be observed first that the action of the military authorities was in keeping with the military legislation, which established a sexual act between persons of the same sex as a sufficient condition in itself to separate a member of the institution from his duties and his position.

109. In that regard, the Commission would like to highlight the reasons given by the decision of the Court of Law to assess the application of the Rules of Military Discipline, despite the provision of the National Constitution. The Commission notes as well that the sanction was imposed to Mr. Homero Flor for having “subjectively offended the Armed Institution as such” and having “caused detriment to its reputation and prestige,” bearing in mind that it is made up of “integral, capable, responsible men vested with unblemished moral authority.” Thus, the Court concluded that Mr. Flor had subjectively offended the Armed Institution, tarnishing its image and prestige, and causing a scandal and a bad example both in the military and in the civilian population.

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<sup>107</sup> European Court of Human Rights, *Case of Perkins and R v. United Kingdom*, Applications Nos. 43208/98 and 44875/98, October 22, 2002, final decision of January 22, 2003, para. 67 (free translation by the IACHR).

110. In this respect, the IACHR notes the decisions of the European Court when it affirms that the risk or harm generated by the presence of homosexuals in the armed forces must be demonstrated convincingly.<sup>108</sup> In this regard, the European Court has stated that the supposed threat to the institutional operational capacity of the armed forces is based on stereotyped conceptions against homosexual persons that far from justifying the restriction in question constitutes an attitude comparable to prejudicial treatment on grounds of color or origin of persons.<sup>109</sup>

111. Thus the Commission considers that the criterion used by the military authorities was based on an apparent incompatibility between homosexuality and the regime of military discipline and the military institution itself, without providing reasonable and objective reasons to justify that distinction. The Commission does not find the relationship between means and ends, as between punishing “acts of homosexuality” in the armed forces and upholding the military values sought to be protected, such as honor, dignity, discipline, and extolling civic-mindedness. Stating otherwise would imply ascribing a negative moral value to the sexual act between persons of the same sex itself, in addition to promoting the stigmatization of gay, lesbian or bisexual persons, those perceived as such, or those who maintain relations with persons of the same sex inside and outside the armed forces.

112. Accordingly, that decision was translated into an act of the State that did not meet the requirement of suitability and, therefore, constituted an arbitrary distinction, incompatible with the Convention. Accordingly, the Commission can dispense with any reference to the other aspects of the analysis.

113. In relation to the subject matter of the instant case, the IACHR takes note of the various pronouncements of the European Court and the Human Rights Committee on the incompatibility of sanctions provisions —be they criminal or disciplinary— regarding sexual practices between persons of the same sex with international human rights law.<sup>110</sup> In addition, the United Nations High Commissioner on Human Rights has noted that, in general, such laws are used to “to harass and prosecute individuals because of their actual or perceived sexuality or gender identity.”<sup>111</sup> In addition, in comparative law it has been noted that such provisions have “no other purpose than to criminalize conduct which fails to

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<sup>108</sup> See in general: European Court of Human Rights, *Case of Perkins and R v. United Kingdom*, Applications Nos. 43208/98 and 44875/98, October 22, 2002, final decision of January 22, 2003; European Court of Human Rights, *Case of Beck, Copp and Bazeley v. United Kingdom*, Applications Nos. 48535/99, 48536/99 and 48537/99, Judgment of October 22, 2002, final decision of January 22, 2003; European Court of Human Rights, *Case of Lustig-Prean and Beckett v. United Kingdom*, Applications 31417/96 and 32377/96, Judgment of September 27, 1999, final decision of December 27, 1999; European Court of Human Rights, *Case of Smith and Grady v. United Kingdom*, Applications Nos. 33985/96 and 33986/96, judgment of September 27, 1999, final decision of December 27, 1999.

<sup>109</sup> European Court of Human Rights, *Case of Perkins and R v. United Kingdom*, Applications Nos. 43208/98 and 44875/98, October 22, 2002, final decision of January 22, 2003, para. 90.

<sup>110</sup> European Court of Human Rights, *Case of Dudgeon v. United Kingdom*, Judgment of October 22, 1981, para. 60, European Court of Human Rights, *Case of Norris v. Ireland*, Application No. 10581/83, Judgment of October 26, 1988, para. 46; European Court of Human Rights, *Case of A.D.T. v. United Kingdom*, Application No. 35765/97, Judgment of July 31, 2000, paras. 37-38. United Nations, Human Rights Committee *Toonen v. Australia*, Communication No. 488/1992 (1994), paras. 8.5 and 8.6.

<sup>111</sup> United Nations, *General Assembly, Report of the High Commissioner for Human Rights: Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, A/HRC/19/41, November 17, 2011, para. 40.

conform with the moral or religious views of a section of society.”<sup>112</sup> It has also been established that sexual orientation cannot itself be considered a basis for punishment, thus the provisions that “punish solely and exclusively those with that status [homosexual]” entail clear discrimination that promotes the stigmatization of homosexual persons.<sup>113</sup>

114. In summary, the Commission deems that the considerations set forth in the case-law indicated make it possible to establish that provisions that punish a given group of persons for engaging in a consensual sexual act or practice with another person of the same sex are not admissible, for this is directly at odds with the prohibition on discrimination based on sexual orientation. This prohibition should be understood as described above, i.e. that such provisions ought not be used to repress or sanction a person due to his or her actual or perceived sexual orientation.

115. In addition, the IACHR observes that the Rules establish a difference in treatment and punishment in cases of “illegitimate sexual acts” and “acts of homosexuality.” The IACHR observes that the Rules do not define “illegitimate sexual acts.” The petitioners note that the notion of “illegitimate sexual acts” apparently refers to sexual relations between persons of different sex in the absence of marriage or outside of marriage. The State does not refute this argument. Independent of the meaning ascribed to “illegitimate sexual acts,” the IACHR notes that at the time of the facts that are the subject of the instant case, the internal military regulations included separate provisions with differentiated sanctions for “illegitimate sexual acts” on the one hand, and “acts of homosexuality” on the other.

116. The Rules of Military Discipline, at Article 117, established that if an officer of the Armed Forces engaged in “acts of homosexuality”, Article 87(i) of the Law on Armed Forces Personnel would have been applicable, i.e. discharge in the interest of good service, whether due to “misconduct or professional incompetence.” This sanction was differentiated from that applied in cases in which an officer committed “illegitimate sexual acts,” as these were considered a “severe infraction”.<sup>114</sup>

117. The IACHR notes that the Rules established three distinct types of infractions with different sanctions depending on the seriousness of the infraction. Accordingly, moderate infractions (*faltas leves*) (such as “appearing in uniform with persons of ill repute or poor conduct”) were sanctioned by simple censure or reprimand (*llamado de atención*), and simple arrest (*arresto simple*) of one to three days. Serious infractions (*faltas graves*) (such as “bringing women into military facilities with dishonorable aims”) would be sanctioned by solemn censure (*censura solemne*); simple arrest for four to eight days, and “strict arrest” (*arresto de rigor*) for one to nine days. Finally, severe infractions (*faltas atentatorias*) (such as committing “illegitimate sexual acts,” “insistent sexual harassment of military or civilian personnel or family members” or working with and administering houses of prostitution), entailed as disciplinary measures strict arrest of 10 to 15 days, strict arrest at another facility for three to 10 days, and suspension of 10 to 30 days.<sup>115</sup>

118. And so the Rules of Military Discipline, in addition to establishing a sanction for sexual acts by persons of the same sex, which the IACHR already concluded does not satisfy the requirement of

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<sup>112</sup> Constitutional Court of South Africa, Case CCT 11/98, *The National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, October 9, 1998, para. 26.b.

<sup>113</sup> Constitutional Court of Colombia, Judgment C-507, July 14, 1999, para. 5.11.

<sup>114</sup> Rules of Military Discipline of the Armed Forces of 1998, Article 67.

<sup>115</sup> Rules of Military Discipline of the Armed Forces of 1998, Articles 65 and 73.

suitability between the means (the sanction) and the end pursued (preserving order in the armed forces), established differentiated sanctions for sexual acts between persons of the same sex and other sexual acts, differences that the IACHR does not find justified or reasonable, and which are therefore discriminatory.

119. In addition, the Commission notes that the prohibition on discrimination based on actual or perceived sexual orientation requires that no one be discriminated against in accessing and keeping his or her employment based on this aspect.<sup>116</sup> Along these lines, the Committee on Economic, Social and Cultural Rights has indicated that any discriminatory treatment based on a person's sexual orientation in "access to the labour market or to means and entitlements for obtaining employment" constitutes a violation of the international obligations of the State on these matters.<sup>117</sup> In this respect, the international doctrine has established:

Every citizen has the right to take part in the conduct of public affairs, including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, including serving in the police and military, without discrimination on the basis of sexual orientation or gender identity.<sup>118</sup>

## ii. Proceeding brought against Mr. Flor and the application of the penalty of discharge

120. The IACHR also observes that the petitioners adduce that the decision that led to the discharge of Homero Flor was based on prejudices that reveal a discriminatory practice or policy enshrined in the military legislation and applied by the military authorities, based on the actual or perceived sexual orientation of its members.

121. The IACHR also notes that the sanction imposed was implemented in keeping with the military provisions regarding sexual acts between persons of the same sex. The Commission considers that said regulation was not only incompatible with the obligations of the State to respect and ensure the fundamental rights of persons without discrimination and to adapt its domestic legislation in this regard, but that through this regulation the military legal order institutionalized a discriminatory treatment that is of particular important in the realm of the armed institutions, for the deeply-rooted view that homosexuality has a negative impact on the very existence of the military institutions in a state<sup>119</sup> is reinforced in such provisions, consolidating the stigma that attributes a supposed lack of

<sup>116</sup> United Nations, Committee on Economic, Social and Cultural Rights, *General Comment No. 18: Non-discrimination*, E/C.12/GC/18, February 6, 2006, para. 12(b)(i).

<sup>117</sup> United Nations, Committee on Economic, Social and Cultural Rights, *General Comment No. 18: Non-discrimination*, E/C.12/GC/18, February 6, 2006, para. 12(b)(i).

<sup>118</sup> *Yogyakarta Principles*. Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006, principle 25.

<sup>119</sup> For example, in 1981 the United States Defense Department established a regulation that justified the expulsion of a member of the Army for being homosexual. Hence, Directive DOD 1332.14 on that policy was based on the argument: "Homosexuality is incompatible with military service. The presence of such members adversely affects the ability of the Armed Forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among the members; to ensure integrity of rank and command; to facilitate assignment and worldwide deployment of members who frequently must live and work in close conditions affording minimal privacy; to recruit and retain members of the military services; and in certain circumstances, to prevent breaches of security." Subsequently, this directive gave way to the federal regulation approved by Congress in 1993 known as "Don't ask, Don't tell," which prohibited any member of the armed forces from revealing his or her homosexual or bisexual orientation while serving in that institution.

capacity or aptitude of a person to belong to the Armed Forces due to the fact that he or she is gay, lesbian or bisexual or perceived as such. The IACHR notes in particular that the provision of the Rules of Military Discipline that provided for discharge as a sanction for engaging in “acts of homosexuality” equated that same sanction to other conduct that was considered punishable in the Ecuadorian legal order, such as narcotics trafficking, even though homosexuality had already been removed as an offense from Ecuador’s criminal law.<sup>120</sup>

122. The Commission notes the considerations made by said judicial authority on the nature of the Rules of Military Discipline that “sanction[ed] acts of homosexuality precisely due to the special nature of the military legislation,” arguing that the conduct which it was established that Mr. Flor engaged in was incompatible with the “principles and norms of conduct” of the Armed Forces, on being an “institution that prides itself on being the moral reservoir of society and being constituted by men who are integral, capable, responsible, and with unblemished moral authority.”<sup>121</sup>

123. In that sense, the IACHR considers that even though it was the Rules of Military Discipline which established a sanction with respect to sexual acts between persons of the same sex, the decision of the Court of Law evidences the existence of discriminatory prejudices by which the aptitude of a person to perform his or her functions within a military institution has traditionally been called into question, on the bases of his or her actual or perceived sexual orientation.

124. Additionally, the Commission considers it important to note that evidence was requested in the disciplinary proceeding to determine whether there was the infraction of the prohibition on engaging in an act of homosexuality, mainly certificates of good conduct of the members of the military involved. The Commission considers that it finds a discriminatory bias in the proceeding itself on attempting to deter a sexual act between persons of the same sex with a certification that appeals to the military officer’s “good conduct” or “bad conduct.”

125. The Commission already referred in the preceding sections to the reasons why it considers that this decision by the Court of Law was incompatible with the American Convention. It only remains to point out, at this stage of the analysis, the determinant effect that a decision had that was adopted without heeding due process guarantees and in a manner incompatible with the right to equality and non-discrimination in the proceeding before the military jurisdiction to order the definitive separation of the alleged victim from his labor activities and in the mechanisms used by him in this jurisdiction to controvert that decision. The Commission notes moreover the importance of the provision of the Rules of Military Discipline that was applied in the instant case, for once the facts were considered shown by the Court of Law, the disciplinary sanction was imposed practically by operation of law, particularly when one considers that it involved the definitive separation of the alleged victim from his functions in the Ecuadorian Air Force.

126. Finally, the IACHR wishes to note that on repeated occasions since 2006 the Inter-American Court has ruled on the *ex officio* obligation to review domestic judicial decisions for compliance with the obligations arising under the American Convention, often referred to as “control of conformity with the Convention” (*control de convencionalidad*). Accordingly, the Court has established:

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<sup>120</sup> By Judgment No. 111/97, November 27, 1997, the Constitutional Court of Ecuador found article 516 of the Criminal Code on the crime of “homosexuality” to be unconstitutional.

<sup>121</sup> Annex 2. Resolution of the Court of Law of the Fourth Military Zone of January 17, 2001. Annex to the initial petition of August 20, 2002.



When a State has ratified an international treaty such as the American Convention, all of its bodies, including its judges, are also subject to such a treaty, and this obligates them to ensure that the effects of the provisions of the Convention are not diminished by the application of norms contrary to its object and purpose. The Judicial Branch must exercise “control of conformity with the Convention” *ex officio* of the harmonization of the domestic norms with the American Convention, evidently within the framework of their respective jurisdictions and the corresponding procedural rules. In this task, the Judicial Branch should bear in mind not only the treaty, but also the corresponding interpretation made by the Inter-American Court, the final interpreter of the American Convention.<sup>122</sup>

127. In this respect, the Inter-American Commission observes that in the instant case the domestic courts breached their obligation to bring the provisions of domestic law into line with the requirements of the American Convention, in particular in relation to the right to equality before the law, when they examined the domestic provisions related to the punishment of acts of homosexuality in the Ecuadorian Armed Forces.

128. In view of the foregoing considerations, the Commission concludes that the Ecuadorian State violated the right enshrined in Article 24 of the American Convention in relation to the general obligations established in Articles 1(1) and 2 of the same instrument to the detriment of Mr. Homero Flor.

### **3. Right to a Fair Trial and Judicial Protection (Articles 8(1) and 25(1) of the American Convention)**

#### **a. Preliminary considerations on the application of judicial guarantees to disciplinary proceedings against members of the military**

129. Article 8(1) of the American Convention establishes that:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

130. Article 25(1) of the American Convention provides:

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

131. The Inter-American Court has held:

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<sup>122</sup> I/A Court H.R. *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221, para. 193; I/A Court H.R. *Case of Almonacid Arellano et al. v. Chile*. Judgment of September 26, 2006. Series C No. 154, para. 124; I/A Court H.R. *Case of Gomes Lund et al. (Araguaia guerrilla movement) v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2010. Series C No. 219, para. 176; I/A Court H.R. *Case of Cabrera García and Montiel Flores v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, para. 225.

The right to obtain all the guarantees through which it may be possible to arrive at fair decisions is a human right, and the administration is not exempt from its duty to comply with it. The minimum guarantees must be observed in the administrative process and in any other procedure whose decisions may affect the rights of persons.<sup>123</sup>

132. In the instant case, and as established in the section on facts proven, the discharge of Mr. Flor from the Ecuadorian Army was the result of the sanction imposed by the military authorities based on the disciplinary responsibility shown in the context of the summary information proceeding.

133. In this respect, and in relation to the exercise of the punitive power of the State through its authorities, the Court has said that

any form of exercising public power that violates the rights recognized in the Convention is unlawful. This is even more important when the State exercises its power to sanction, because this not only presumes that the authorities act with total respect for the legal system, but it also involves granting the minimum guarantees of due process to all persons who are subject to its jurisdiction, as established in the Convention.<sup>124</sup>

134. Based on these considerations, certain precedents established in the inter-American system indicate that in those cases in which the military jurisdiction is competent, the proceedings conducted by those authorities must respect the guarantees of due process established in Article 8(1) of the American Convention.<sup>125</sup> Article 8(2) is also understood to apply to such situations, mindful that as the Court has said:

... the range of minimum guarantees established in section 2 of Article 8 of the Convention is applied to the realms to which reference is made in section 1 of the same Article, that is, “the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.” This reveals the broad scope of the due process; the individual has the right to the due process as construed under the terms of Articles 8(1) and 8(2) in both, penal matters, as in all of these other domains.<sup>126</sup>

135. The Inter-American Court has also stated that “any public authority, whether administrative, legislative or judicial, which, through its decisions determines individual rights and

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<sup>123</sup> I/A Court H.R. *Case of Baena Ricardo et al. v. Panama*. Judgment of February 2, 2001, paras. 126 and 127.

<sup>124</sup> I/A Court H.R. *Case of the Constitutional Court v. Peru*. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C. No. 71, para. 68.

<sup>125</sup> See I/A Court H.R. *Case of Mejía Idrovo v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs, Judgment of July 5, 2011, Series C, No. 228, para. 64. On the military criminal jurisdiction, the Court has noted that “its use should be minimal, as strictly necessary, and shall be inspired by the principles and guarantees governing modern criminal law.” See: I/A Court H.R. *Case of Usón Ramírez v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2009, para. 108; and *Case of Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005, para. 132. The Human Rights Committee has done likewise on noting that military justice is not *per se* incompatible with the International Covenant on Civil and Political Rights, but it must afford “the full guarantees stipulated in Article 14.” See: United Nations. Human Rights Committee. General Comment No. 13 on Article 14 of the International Covenant on Civil and Political Rights, April 13, 1984. Equality before the courts and the right of every person to be heard in public by a competent court established by law, considering paragraph 4.

<sup>126</sup> I/A Court H.R. *Case of Baena Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C, No. 72, para. 125.

obligations ... has the obligation to adopt decisions that are in consonance with the guarantees of due legal process in the terms of Article 8 of the American Convention.”<sup>127</sup>

136. The IACHR has ruled similarly in a case related to the administrative proceeding against a member of the Peruvian Army, indicating that all the judicial guarantees established in Article 8(2) of the American Convention applied to the case.<sup>128</sup> Finally, the Inter-American Court and the IACHR have heard several cases in which it was established that the judicial guarantees set forth in Article 8 apply to proceedings in military courts against members of the military for criminal offenses or disciplinary infractions which by their very nature have constituted an attack on legal values particular to the military order.<sup>129</sup>

137. In the instant case the IACHR observes that the petitioners make a series of arguments related to the alleged violations of due process in the case of Mr. Flor, which will be analyzed separately by this Commission. The State argues in general terms that the procedure was carried out with respect for Mr. Flor’s due process guarantees.

**b. Alleged impossibility of being present at witness statements**

138. In light of the foregoing considerations, the Commission observes that in the instant case the petitioners have argued that in the course of the summary information proceeding Mr. Flor’s defense did not have an opportunity to be present during the delivery of the statements by the witnesses who declared against him, or to question them.

139. In this respect, and having already determined that the guarantees established at Article 8(2) of the American Convention apply to disciplinary proceedings such as that brought against Mr. Flor, the IACHR takes note of the guarantee established at Article 8(2)(f), which notes the “the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts.” Thus, if this allegation is corroborated, the IACHR would find a violation of that guarantee set forth in the Convention.

140. Nonetheless, the IACHR notes that from the documentary evidence in the record it is not possible to show that in effect Mr. Flor did not have an opportunity to be present at the witness statements, which were the basis for determining his disciplinary liability and his discharge. Accordingly, the Commission does not have sufficient information to analyze a possible violation of Article 8(2)(f) of the Convention on this particular aspect of the arguments with respect to the summary information proceeding. The IACHR also observes that the Rules of Procedure for Summary Information Proceedings in force at the time of the facts, beyond containing a general provision to the effect that the judge shall receive the statements after witnesses have taken the oath, does not make any mention of the right to examine witnesses.

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<sup>127</sup> I/A Court H.R. *Case of the Constitutional Tribunal v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 104.

<sup>128</sup> IACHR, Report No. 20/99, Case 11.317, Rodolfo Robles Espinoza and Sons (Peru), February 23, 1999, para. 97.

<sup>129</sup> I/A Court H.R. *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135; I/A Court H.R. *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207. See also, IACHR, Report No. 135/11, Case 12.167, Merits, Hugo Oscar Argüelles et al. (Argentina), October 31, 2011.

141. Nonetheless, the Commission observes that this argument was raised in the *amparo* action brought by Mr. Homero Flor that was decided subsequently, thus this aspect will be taken into account in the analysis of respect for the Article 8 guarantees in connection with Article 25 of the Convention, with respect to that action.

**c. Alleged lack of impartiality of the Judge of Law**

142. In relation to the right of every person to be tried by an impartial judge, the petitioners indicate that the judge of law who presided over the summary information proceeding in the case of Mr. Flor had also been his superior.

**- The Judge of Law and Mr. Flor's superior were one and the same person**

143. The IACHR observes first that as was shown in the section on facts proven, the decision of the Court of Law in the summary information proceeding was made by the Brigadier General of the Fourth Military Zone, Víctor Zabala, who at the same time was the Commander of the Fourth Military Zone and the Judge of Law of the Fourth Military Zone.

144. The Rules of Procedure for Summary Information Proceedings in force at the time of the facts established that once the investigative phase had culminated, with the issuance of the report by the military prosecutor, the "investigative Judge shall draw up the proposed resolution and will forward the proceeding to the Zone or Brigade Commander to continue the process." Then, having "received the proceeding, the Zone or Brigade Commander shall take over the case and order that notice be given first for judgment...." Finally, it establishes that "the draft ruling does not ... bind the Zone or Brigade Commander to abide by it, but it shall appear in the record that said authority will explain in his resolution the reasons for departing from the draft."<sup>130</sup>

145. So while the Rules of Procedure for Summary Information Proceedings indicated that it was the investigative judge who drew up the draft ruling, it was not binding on the judge of law, Zone Commander Víctor Zabala, Mr. Flor's superior. At the end of the day, it was the Zone Commander and Judge of Law Víctor Zabala who issued the decision that declares the responsibility of Mr. Flor. The Commission observes that the considerations of this decision, as well as the assessment made therein on the facts investigated and the evidence produced during the substantiation of the summary information proceeding, determined that Homero Flor was subsequently removed from his functions within the Ecuadorian Army. The rulings of the Council of Subaltern Officers and the Council of Superior Officers that ordered that Mr. Flor be placed on leave prior to his discharge were adopted by referring to the decision of the Court of Law. In that regard, the Commission considers it appropriate to highlight at this point that this was the only decision that examined the evidence to determine the disciplinary liability of Mr. Flor.

146. The Inter-American Court has reiterated that the right to be tried by an impartial judge or court is a fundamental due process guarantee, and that to that end one should ensure that the trier

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<sup>130</sup> See Articles 23 and 24 of the Rules of Procedure for Summary Information Proceedings in the Armed Forces. Annex 23. Rules of Procedure for Summary Information Proceedings in the Armed Forces. Ministerial Decree 1046, published in General Ministerial Order 240 of December 22, 1993. Petitioners' brief filed September 24, 2012.

have the utmost objectivity in the proceeding.<sup>131</sup> In this respect, the Inter-American Court and the IACHR have established that the guarantee of impartiality has a subjective aspect and an objective aspect.<sup>132</sup> The Human Rights Committee of the United Nations has issued decisions in similar terms.<sup>133</sup> More specifically, the Inter-American Court has indicated:

impartiality demands that the judge acting in a specific dispute approach the facts of the case subjectively free of all prejudice and also offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality.<sup>134</sup>

147. In more detail, the Inter-American Court has indicated that the impartiality of the court implies that its members not have a direct interest, a position taken, and that they not be involved in the dispute, among others.<sup>135</sup> The Court has found that “In order to safeguard the administration of justice, it must be assured that a judge is free from any prejudice and there is no fear at all raising any doubts about the exercise of his jurisdictional functions.”<sup>136</sup>

148. In this regard, the European Court has ruled in particular cases related to the application of the system of military discipline, indicating that while the organization of that system corresponds to the internal order of each state<sup>137</sup>, the activity of the military authorities in the judicial function can trigger the international responsibility of the State to the extent that their decisions not satisfy the guarantee of impartiality. In the precedents established by the European Court, that guarantee was violated since the very structuring of the system established in the military jurisdiction allowed an officer to be vested with authority in the proceeding even when he was also the superior of the person subject to it.<sup>138</sup>

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<sup>131</sup> I/A Court H.R. *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 117; I/A Court H.R. *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 171; I/A Court H.R. *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 145.

<sup>132</sup> IACHR, Report No. 176/10, Case 12,576 and others, Segundo Aniceto Norin Catrیمان et al., Merits, Chile, November 5, 2010, para. 280; IACHR, Case 11,139, Report No. 57/96, William Andrews (United States), IACHR Annual Report 1997, paras. 159-161. See also European Court of Human Rights, case of Findlay v. United Kingdom, February 25, 1997, para. 73. IACHR, Report on Terrorism and Human Rights, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002, para. 229.

<sup>133</sup> United Nations, Human Rights Committee, Communication No. 387/1989, *Karttunen v. Finland*, para. 7.2.

<sup>134</sup> See: I/A Court H.R. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 56, citing, European Court of Human Rights, *Case of Piersack v. Belgium*, Judgment of October 1, 1982, Series A no. 53; European Court of Human Rights, *Case of De Cubber v. Belgium*, Judgment of October 26, 1984, Series A no. 86; European Court of Human Rights, *Case of Pullar v. United Kingdom*, Judgment of June 10, 1996; European Court of Human Rights, *Case of Fey v. Austria*, Judgment of February 24, 1993, Series A no. 255-A p. 8, § 28.

<sup>135</sup> I/A Court H.R. *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 118; I/A Court H.R. *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 147.

<sup>136</sup> I/A Court H.R. *Case of Usón Ramírez v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207, para. 118; I/A Court H.R. *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 147.

<sup>137</sup> European Court of Human Rights, *Case of Engel et al. v. Netherlands*. Judgment of June 8, 1976, para. 59.

<sup>138</sup> European Court of Human Rights, *Case of Findlay v. United Kingdom*. Judgment of February 25, 1997, paras. 73-80; European Court of Human Rights, *Case of Thompson v. United Kingdom*. Judgment of June 15, 2004, paras. 46 to 48.

149. In the instant case, from the facts proven it was shown that the Judge of Law who handed down the judgment against Mr. Flor had been involved in an initial phase of the investigation process, when in his capacity as Zone Commander, one month before he issued that decision, it was he who had required Mr. Flor to hand over his responsibilities and his room in light of the investigation that was being carried out concerning him. In this regard, the IACHR considers that the decision of the court of law was influenced by the judge having had a preconceived notion of the matter in relation to Mr. Flor's liability.

150. Based on the foregoing considerations, and mindful of the nature of the decision reached by the Court of Law and the importance of that decision on the imposition of the sanction of discharge to Homero Flor, the Commission considers that the guarantee of impartiality was violated and that accordingly there was a violation of Article 8(1) of the American Convention in relation to the right of every person to be heard by an impartial judge or court.

**d. Alleged failure to set forth the reasoning of the decision**

151. In this respect, the Commission takes into account that the duty to set forth the reasoning is included in the framework of the "due guarantees" established in Article 8(1) of the American Convention, and based on which it is demanded that the decisions reached by domestic organs must state their grounds as a guarantee that the parties involved have been duly heard and that if appealable, that they can have "such decision reviewed by an appellate body,"<sup>139</sup> so that those decisions do not turn out to be arbitrary, especially when they result in the impairment of fundamental rights.<sup>140</sup> The Inter-American Court has indicated that the grounds are "the exteriorization of the reasoned justification that allows a conclusion to be reached."<sup>141</sup>

152. The Inter-American Court has developed standards on this aspect following the case-law of the European Court, which has indicated that Article 6 of the European Convention requires domestic courts to state the reasoning of their judgments, yet it cannot necessarily be understood as an obligation to give a detailed response to each of the arguments raised by the parties; rather one should analyze the various arguments put forth before the decision-making body and the domestic legislation, among other considerations, in each specific case, mindful of the nature of the decision.<sup>142</sup> In particular, the Inter-American Court has recognized this obligation vis-à-vis the decisions made by military organs, for example in cases referring to the denial of a promotion of an Army officer, by a resolution of the

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<sup>139</sup> I/A Court H.R. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008, para. 78; I/A Court H.R. *Case of Tristán Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C. No. 193, para. 153; I/A Court H.R. *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C. No. 227, para. 118.

<sup>140</sup> I/A Court H.R. *Yatama Case v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C. No. 127, para. 152; I/A Court H.R. *Case of López Mendoza v. Venezuela*. Merits, Reparations and Costs. Judgment of September 1, 2011. Series C. No. 233, para. 141.

<sup>141</sup> I/A Court H.R. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008, para. 77.

<sup>142</sup> European Court of Human Rights, *Case of Hiro Balani v. Spain*. Judgment of December 9, 1994, para. 27; European Court of Human Rights, *Case of Hurk v. Netherlands*. Judgment of April 19, 1994, para. 61.

Council of General Officers of the Army, which did not fulfill the duty to state the grounds in the terms required by the domestic legal order and the American Convention.<sup>143</sup>

153. The Court has also noted that the exercise of the disciplinary power has the objective of evaluating the conduct and performance of a public official.<sup>144</sup> This means that the duty to state grounds is all the greater for the organ entrusted with exercising that power<sup>145</sup>, thus it is required that it analyze autonomously “how serious the conduct is and whether the penalty is proportionate.”<sup>146</sup>

154. Finally, equally relevant for the instant case, it should be noted that the Inter-American Court has also argued that the reasoning used to make a decision “must also show that it has duly taken into account the arguments of the parties and that the evidence has been analyzed.”<sup>147</sup>

155. In this respect, the decision of May 7, 2001, of the Council of Subaltern Officers, indicates that after that body held a session to address the matter it was decided that there were no “legal grounds” that would make it possible to overturn what was decided by the Court of Law, and so one had to accept its request regarding the imposition of said disciplinary sanction. The facts of the case make it possible to establish that in the proceeding before this body Homero Flor did not have a mechanism for adequate participation by which he could exercise his right to defense. In effect, Mr. Flor argued in the motion for reconsideration filed against that decision that during the proceeding before that authority he had asked investigative steps be taken to clarify the facts, but that the request had not been heeded and was not to be found in the record before the Ministry of National Defense, as his defense counsel had proven. The Commission observes that in the same motion for reconsideration Mr. Flor forwarded a series of requests: (i) to begin an investigation into the alleged irregularities committed in that proceeding; (ii) to declare null and void the decision by the Council of Subaltern Officers; and (iii) that his attorney be granted a hearing.

156. The Commission notes that the resolution by the Council of Subaltern Officers of June 5, 2001, by which Mr. Flor was notified that his request for reconsideration had been denied, only indicated that it was based on there having been no “change in the factual and legal bases” of the resolution challenged. Nonetheless, there was no ruling on the merits as to the admissibility of the other requests filed by Mr. Flor, nor on the irregularities alleged to have plagued that stage of the proceeding.

157. As regards the appeal decided by the Council of Superior Officers of the Armed Forces by resolution of July 18, 2001, the Commission notes that this decision did not include a pronouncement

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<sup>143</sup> I/A Court H.R. *Case of Mejía Idrovo v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs, Judgment of July 5, 2011, Series C, No. 228, para. 64. In this case the Inter-American Court determined that the Constitutional Court of Ecuador had cured an omission by the Council of General Officers of the Ecuadorian Army by setting forth the reasoning behind a decision.

<sup>144</sup> I/A Court H.R. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008, para. 86.

<sup>145</sup> I/A Court H.R. *Case of Chocrón Chocrón v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2011. Series C. No. 227, para. 120.

<sup>146</sup> I/A Court H.R. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008, para. 86.

<sup>147</sup> I/A Court H.R. *Case of López Mendoza v. Venezuela*. Merits, Reparations and Costs. Judgment of September 1, 2011. Series C. No. 233, para. 141.

on the merits either. The sanction imposed to Homero Flor was confirmed by the Council on no other basis than a reference to what had been decided by the Court of Law.

158. In light of the foregoing, the Commission considers that the elements of fact described allow one to establish that the resolutions of the Councils of Subaltern and Superior Officers, respectively, referred very succinctly to what was previously established by the Court of Law. The Commission understands that according to the procedure of the summary information proceeding, once the existence of disciplinary liability was established by the Court of Law that heard the matter, it was up to the respective Councils of Officers to characterize the conduct shown and to impose the sanctions established in the Law on Armed Forces Personnel.

159. It appears from the facts of the case that the authority attributed to the respective Councils of Officers in the context of the proceeding that concluded with the discharge of Homero Flor was different in nature from that attributed to the judicial authority that should have taken cognizance of the outcome of the administrative investigation, and show the truth of the facts alleged. In that regard, the Commission considers that the nature of that authority, i.e. carrying out disciplinary control on behalf of the military authorities, and deciding on challenges brought against the summary information proceeding, demanded a pronouncement that would autonomously determine whether it is in order to apply the sanction called for based on the facts established by the Court of Law. And so it was also required by the domestic legal order, in keeping with the provision in Article 24(13) of the Constitution then in force, which establishes the duty to state the reasoning of the resolutions of public authorities that affect persons as a guarantee of the right to due process.<sup>148</sup>

160. Accordingly, the procedure followed against the Council of Officers in the context of which it was determined to proceed to discharge Mr. Homero Flor from the Army, after he was placed on leave, constituted, in practice, a mere procedural formality. Under these circumstances and mindful of the significance of that procedure, the Commission considers that the failure to state the reasoning of the decisions of the Councils of Subaltern and Superior Officers also had negative repercussions for the exercise of Mr. Flor's right to defense in that proceeding. And one must bear in mind that Mr. Flor never obtained a pronouncement on the requests related to supposed irregularities committed in that procedure, and that even though it was possible to appeal the decision of the Council of Subaltern Officers, the decision of the higher body did not examine the merits of the issue posed. Accordingly, the Commission considers that the alleged victim was not duly heard and was not afforded the due guarantees for the exercise of his right to defense.

161. Mindful of the foregoing considerations, the Commission observes that neither the decision of the Sixth Court for Civil Matters or of the Constitutional Court ruled on the merits of the issues raised by Homero Flor in the action filed, considering that they were related to the possible impairment of constitutional rights, specifically the right to equality and the guarantees of due process, and that the mechanism in question was aimed at protecting those rights.

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<sup>148</sup> Article 24.13 of the Constitution of Ecuador then in force (the 1998 Constitution) established: "To ensure due process, the following basic guarantees must be observed, without detriment to others established in the Constitution, international instruments, the laws, or the case-law: ... 13. The resolutions of the governmental authorities that affect persons must state their grounds. Such grounds shall not be considered to be stated if the resolution does not spell out legal provisions or principles on which they are based, and if their application to the factual antecedents is not explained. When ruling on the challenge to a sanction, the appellant's situation may not be worsened."



162. The Commission considers that the grounds stated in both decisions were based solely on a qualitative analysis of the law applicable to the matter heard by both judicial bodies, without getting into a substantive analysis of the central purpose of the action brought by the alleged victim claiming protection for his constitutional rights. In particular, the IACHR is of the view that the decision to protect should respond to the position on the compatibility of the sanction provided for in the Rules of Military Discipline and the legal order in force. The formulation of the specific reasons and grounds on this aspect was a requirement provided for by the domestic legal order itself, in keeping with Articles 273 and 274 of the National Constitution, and in light of Article 23 of the same Constitution.

163. The Commission also observes that in the *amparo* action decided upon in first and second instance by the Sixth Court for Civil Matters and the Constitutional Court, respectively, one of the main arguments raised by Mr. Flor was that the decisions adopted as of the summary information proceeding were based on the application of a discriminatory provision that punished conduct that had been derogated from the criminal legislation, namely, consensual relations between persons of the same sex. Mr. Flor also proposed that in the course of that proceeding a series of irregularities had been committed related to due process guarantees. The IACHR also notes that in processing the *amparo* in the first instance Mr. Flor asked the Sixth Court for Civil Matters, on several occasions, to order the respective military authority to forward a copy of the record in the summary information proceeding. As established in the section on facts proven, that request was denied, indicating that Mr. Flor had the right to file the documentation he considered relevant to that judicial authority.

164. In that regard, the IACHR observes in particular that while the argument on alleged discrimination was before the Constitutional Court, it did not analyze it, and determined that the sanction imposed for misconduct was in order. The Constitutional Court did not state reasons for determining whether the conduct sanctioned did or did not fit within a criminal statute that by then had been derogated, and if appropriate analyze the legal consequences of that determination. The IACHR reiterates once again the considerations made in previous sections on the discriminatory treatment to which Mr. Flor was subjected in determining his labor situation in the Ecuadorian Army.

165. In this respect, the Inter-American Court of Human Rights has established: "A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective."<sup>149</sup> The IACHR considers that the failure to state the reasoning in the decisions on the action for protection filed by Mr. Homero Flor kept him from having effective access to judicial protection that would protect the rights affected by the action of the military authorities aimed at punishing the alleged victim's perceived sexual orientation. Consequently, the standards applied domestically to resolve the *amparo* action filed by the respective judicial authorities were incompatible with Article 8(1) of the American Convention, and therefore constitute a violation of his right to access justice.

166. Based on the considerations set forth in this section, the Commission concludes that the Ecuadorian State violated, to the detriment of Homero Flor, the rights to judicial guarantees and judicial protection enshrined in Articles 8(1) and 25(1) of the American Convention, in conjunction with Articles 1(1) and 2 of the same instrument.

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<sup>149</sup> I/A Court H.R. *Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87 of October 6, 1987. Series A. No. 9, para. 24.

## **V. CONCLUSIONS**

167. In view of the considerations of fact and law set forth throughout this report, the Inter-American Commission concludes that the State of Ecuador violated the rights enshrined in articles 24, 8(1) and 25(1) of the American Convention, in conjunction with Articles 1(1) and 2 of the same instrument to the detriment of Homero Flor Freire.

## **VI. RECOMMENDATIONS**

168. Accordingly, the Inter-American Commission on Human Rights recommends that the Ecuadorian State:

1. Make full reparation to Mr. Homero Flor Freire in the terms indicated in this report, both material and moral, including measures of satisfaction for the harm caused.

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

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

4. Take the state measures necessary for the personnel of the Ecuadorian Terrestrial Force or any part of the Ecuadorian Army, as well as the courts of law in the military jurisdiction, be apprised of the inter-American standards, and those of Ecuadorian domestic law, regarding non-discrimination based on actual or perceived sexual orientation.

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

*Signed in the original*

Mario López-Garelli

Por autorización del Secretario Ejecutivo