INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF ANGULO LOSADA *V.* BOLIVIA

JUDGMENT OF 18 NOVEMBER 2022

(Preliminary objections, Merits and Reparations)

In the case of *Angulo Losada v. Bolivia*,

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

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

Also present,

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

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 31, 32, 65 and 67 of the Court's Rules of Procedure (hereinafter "the Rules of Procedure"), delivers this judgment, structured as follows:

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I

INTRODUCTION TO THE CASE AND PURPOSE OF THE DISPUTE

1. *Proceedings before the Court.* – On July 17, 2020, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted the case Brisa Liliana De Angulo Losada against the Plurinational State of Bolivia (in hereinafter "the State" or "Bolivia") to the jurisdiction of the Inter-American Court. According to the Commission, the case refers to the alleged responsibility of Bolivia for the violation of its duty to guarantee, without gender or age-based discrimination, the right of access to justice following the sexual violence allegedly suffered by the then 16-year-old girl, Brisa De Angulo Losada, at the hands of her 26-year-old cousin. The case also deals with the alleged violation of the girl's rights to humane treatment and privacy.[1] The Commission noted that the Public Prosecutor's Office did not undertake a diligent investigation, aimed at determining the truth, with enhanced due diligence on the allegations of sexual abuse, violence, and rape, nor did it properly pursue criminal proceedings based on the available evidence, therefore the alleged victim did not have an adequate remedy. The Commission also indicated that the criminal proceedings were not decided within a reasonable period of time and established that, during the investigation and prosecution, the necessary measures were not taken to avoid Brisa's revictimization. Finally, the Commission highlighted that, during the criminal proceedings, the alleged victim was subjected to unnecessary, abusive and degrading physical examinations that violated her privacy. Consequently, the Commission established that Bolivia is responsible for the violation of its duty to guarantee, without gender and age-based discrimination, the right of access to justice and for the violation of the rights to humane treatment and a private life, to the detriment of Brisa.

2. *Proceedings before the Commission.* – The proceedings before the Commission were as follows:

a) *Petition.* – On January 20, 2012, the Child and Family Advocacy Clinic at Rutgers University, the International Humans Rights Law Clinic at American University, the Women's Law Office, and María Leonor Oviedo Bellot filed the initial petition with the Commission.

b) *Admissibility Report.* – On March 18, 2017, the Commission approved Admissibility Report No. 25/17, in which it concluded that the petition was admissible[2].

c) *Merits Report.* – On September 28, 2019, the Commission approved Merits Report No. 141/19, in accordance with Article 50 of the Convention (hereinafter also "the Merits Report" or "Report No. 141/19"), in which it reached a series of conclusions, and made several recommendations to the State.

d) *Notification to the State.* – The Merits Report was notified to the State on January 17, 2020, with a period of two months to report on compliance with the recommendations. After the Commission granted a three-month extension, the State of Bolivia presented a report alleging the existence of some progress in compliance with the recommendations. However, as indicated by the Commission, the State did not request an extension of the deadline provided for in Article 51(1) of the Convention in the terms established in Article 46 of the Commission's Rules of Procedure.

[1] The Court recalls that Article 1 of the Convention on the Rights of the Child defines that children are human beings under 18 years of age. Taking into account that Brisa De Angulo Losada was 16 years old on the date of the events in this case, the Court will refer to her throughout this judgment as "girl" or "Brisa." However, it is also worth remembering that the events related to the sexual violence suffered by the alleged victim occurred between September 2001 and May 2002, so, although Brisa was a girl at that time, on September 14, 2003, she became a legal adult.

[2] This was notified to the parties on April 7, 2017.

3. *Submission of the case to the Court.* – On July 17, 2020, the Commission submitted to the jurisdiction of the Inter-American Court all of the facts and violations of rights contained in Articles 8(1) and 25(1) of the American Convention, in conjunction with the obligations established in Articles 1(1), 19 and 24 thereof and Articles 7(b) and 7(f) of the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women (hereinafter "Convention of Belém do Pará"), and for the violation of the rights established in Articles 5(1) and 11(2) of the American Convention, read in conjunction with the obligations established in Article 1(1) thereof, "in the face of the need to obtain justice for the [alleged] victim."[3] This Court notes that, between the presentation of the initial petition before the Commission and the submission of the case before the Court, more than eight years have passed.

4. *Requests of the Inter-American Commission.* – The Commission asked the Court to declare the international responsibility of the State for the same violations indicated in its Merits Report. It also asked the Court to order the State to order reparation measures, which are detailed and analyzed in Chapter VIII of this judgment.

II
PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and the representatives.* – The Court notified the State and the alleged victims' representatives (hereinafter "the representatives") of the submission of the case by the Commission, on September 21, 2020.

6. *Brief with pleadings, motions and evidence.* – On November 20, 2020, the representatives presented their brief with pleadings, motions and evidence (hereinafter "brief of pleadings and motions") to the Court, in accordance with Articles 25 and 40 of the Rules of Procedure.[4] The representatives substantially agreed with the arguments of the Commission and asked the Court to declare the State's international responsibility for the violation of the same articles indicated by the Commission, and, additionally, the violation of Articles 2[5] and 5(2) of the American Convention and Articles 6 and 9 of the Convention of Belém do Pará.[6]

7. *Answering brief.* – On February 17, 2021, the State presented to the Court its brief of preliminary objections and response to the submission and Merits Report of the Inter-American Commission and the brief with pleadings, motions and evidence (hereinafter "answering brief"), under the terms of article 41 of the Court's Rules of Procedure.[7] In said brief, the State filed two

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[3] The Commission appointed, as its delegates to the Court, the then Commissioner Flávia Piovesan and the then Executive Secretary Paulo Abrão. In addition, it appointed as legal advisors Marisol Blanchard Vera, then Deputy Executive Secretary, and Jorge Humberto Meza Flores, current Deputy Executive Secretary.

[4] The alleged victim in this case is represented by Elizabeth C. Solander, Diego F. Durán de la Vega, Alyssa M. Johnson, Shayda Vance and Alexander Bedrosyan, of Hughes Hubbard & Reed LLP; Parker Palmer, of A Breeze of Hope Foundation; Rosa Celorio, of International And Comparative Legal Studies at George Washington University Law Center; Bárbara Jiménez-Santiago, from Equality Now; Shelby R. Quast, of Quast & Associates, LLC; Beth Stephens, Child And Family Advocacy Clinic at Rutgers School Of Law – Camden; Carmen Arispe, from the Una Brisa de Esperanza Center, and Jinky Irusta, from the Women's Legal Office.

[5] In their brief of requests and arguments, the representatives requested that the Court declare that Bolivia is responsible for the violation of "[a]rticle 1(2) of the American Convention, which requires States to adopt the laws necessary to give effect to the rights or freedoms referred to in Article 1(1)." Considering the description of the aforementioned provisions of the Convention and the arguments presented by the representatives in this regard, the Court warns that the mention of "Article 1(2) of the American Convention" is a material error and should be read as "Article 2 of the American Convention."

[6] However, in their written observations on the preliminary objections, the representatives "withdrew their formal claims for reparation under" Articles 6 and 9 of the Convention of Belém do Pará.

[7] The State appointed Alberto Javier Morales Vargas, then State Attorney General, as its representative in the case. On December 22, 2022, the State requested the update of its representatives in the case, appointing Wilfredo Franz David Chávez Serrano as State Attorney General; Patricia Guzmán Meneses, Deputy Attorney for Defense and State Legal Representative, and Jhauneth del Rosio Bustillos Bustillos, Director General for Protection of Human Rights and the Environment.

preliminary objections and opposed the alleged violations and the reparation measures proposed by the Commission and the representatives.

8. *Public Hearing.* – By order of February 17, 2022[8] the President summoned the State, the representatives and the Inter-American Commission to a public hearing to receive their oral arguments and final observations on the preliminary objections and possible merits, reparations and costs, as well as to receive the statements of the alleged victim, a witness and an expert proposed by the representatives and of an expert offered by the Inter-American Commission. The virtual public hearing was held on March 29 and 30, 2022, during the Court's 147th Regular Session, via a videoconferencing platform.[9]

9. *Amici Curiae*. – The Court received seven *amicus curiae* briefs presented by: 1) the Human Rights Community, Catholics for the Right to Decide/Bolivia, the Women's Coordinator, the Construir Foundation and the Latin American and Caribbean Committee for Defense of Women's Rights;[10] 2) the legal firm Víctor Mosquera Marín Abogados;[11] 3) the Allard K. Lowenstein International Human Rights Law Clinic and Reproductive Rights Center at Yale Law School;[12] 4) the Illustrious and National Bar Association of Mexico – INCAM, through its International Human Rights Observatory;[13] 5) the Legal Gender Observatory of the Faculty of Law of the National Autonomous University of Mexico;[14] 6) the Seedbed for Litigation before International Systems for the Protection of Human Rights (SELIDH) in association with the Center for Attention to Gender and Sexual Diversity (CAG) of the Faculty of Law and Political Sciences of the University of Antioquía,[15] and 7) The Global Women's

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[8] *Cf. Case of Angulo Losada v. Bolivia*. Call to hearing. Order of the President of the Inter-American Court of Human Rights of February 17, 2022. Available in Spanish at: https://www.corteidh.or.cr/docs/asuntos/angulo_losada_17_02_22.pdf.

[9] Appearing at this hearing were: (a) for the Inter-American Commission: Joel Hernández Garcia, Commissioner; Marisol Blanchard, then Deputy Executive Secretary; Jorge Meza Flores, then advisor and current Deputy Executive Secretary, and Analía Banfi Vique, advisor; (b) for the representatives: Rosa Celorio, lawyer at the George Washington University Law Center; Bárbara Jiménez-Santiago, lawyer at Equality Now; Shelby Quast, lawyer at Robertson, Quast & Associates, LLC; Carmen Arispe, lawyer at the Una Brisa de Esperanza Center; Parker Palmer, CFO of the Breeze of Hope Foundation; Elizabeth Solander, lawyer at Hughes Hubbard & Reed LLP; Diego Durán de la Vega, lawyer at Hughes Hubbard & Reed LLP; Alyssa Johnson, attorney at Hughes Hubbard & Reed LLP, and Shayda Vance, lawyer at Hughes Hubbard & Reed LLP, and (c) for the State of Bolivia: Wilfredo Franz David Chávez Serrano, lawyer for the Plurinational State of Bolivia; Patricia Guzmán Meneses, Deputy Attorney General for Defense and Legal Representation for the State; Jhanneth del Rosio Bustillos Bustillos, Director General for Protection of Human Rights and the Environment, and Cynthia Fernández Torrez, Head of the Cases Unit in the Admissibility Stage.

[10] The brief, signed by Mónica Bayá Camargo, Tania Nava Burgoa, Patricia Brañez, Mónica Novillo and Susana Saavedra, refers to: (i) the State's duty to judge with a gender perspective and its implications in practice; (ii) obstacles in the legal system related to gender bias; (iii) a duty to assess facts and evidence in cases of crimes of rape and statutory rape with a gender perspective; (iv) the existence of a structural pattern of revictimization, and (v) reparation measures.

[11] The brief, signed by Víctor Mosquera Marín, refers to the duty of the Inter-American Court to focus the purpose of the litigation exclusively on determining the international responsibility of the State of Bolivia.

[12] The brief, signed by Catalina Martínez Coral, Carmen Cecilia Martínez, Edward Pérez, Milagro Valverde Jiménez, James J. Silk and Ryan Thoreson, refers to: (i) the obligations of States to combat sexual violence against children; (ii) the obligations of States to adopt the necessary measures so that girls and adolescents can develop their ability to exercise their autonomy, and (iii) structural reform measures in Bolivia.

[13] The brief, signed by Arturo Pueblita Fernández, Isabel Davara F. De Marcos, Valentina Fix Martínez, Julio J. Copo Terrés, Esmeralda del Carmen Chávez Olvera, Daniela Shoshana Memun Urinowsky, Noemí García José, Anel Rodríguez Hernández, Víctor Oswaldo Ramírez Ortiz, Cassandra Michelle Salazar Navarro and Jose Antonio Sosa Reyna, refers to: (i) sexual violence against girls and adolescents from the point of view of health and education, the enforceability of Economic, Social, Cultural and Environmental Rights (DESCA), and the obligations that States have regarding such issues, and (ii) the importance and need for comprehensive sexual education that is preventive in nature.

[14] The brief, signed by Andrea Arabella Montes de Oca, Samantha Rodríguez Santillán, Erick Octavio Moreno Zúñiga, Jorge Uriel Ortiz Valois and Karina Contreras Valdez, refers to: (i) the duty of States to guarantee and protect the appropriate development of childhood and adolescence, and act to prevent sexual abuse of minors, and (ii) measures related to guarantees of non-repetition.

[15] The brief, signed by Alejandro Gómez Restrepo, María Camila Vega Salazar, Nathalia Rodríguez Cabrera and Mónica Liliana Torres Pidiache, refers to (i) the inter-American standards regarding violence against women and girls; (ii) the intersectionality of gender and age that occurred in the case; (iii) sexual violence as torture, and (iv) the alleged breach of

Institute, Together for Girls, Futures Without Violence, The Equality Institute, Prevention Collaborative, Children's Institute at the University of Cape Town in South Africa, Sexual Violence Research Initiative (SVRI), Raising Voices, BRAVE Movement, MenEngage Alliance, Natasha Stott Despoja, Lauren Fite, Raúl R. Herrera and Charlotte Bunch[16].

10. *Final written arguments and observations.* – On April 29, 2022, the State sent its final written arguments and on May 2, 2022, the representatives sent their respective final written arguments, and the Commission presented its final written observations. The State sent 15 annexes along with its final arguments brief and the representatives submitted two annexes.

11. *Observations on the annexes to the final arguments.* – On May 19, 2022, the State declared that it had no observations regarding the representatives' annexes to the final written arguments. On May 20, 2022, the Commission formulated its observations on the annexes sent by the State together with its final arguments and indicated that it had no observations on the representatives' annexes. The representatives did not submit observations.

12. *Information on Supervening facts.* – On October 7, 2022, the State presented a brief to the Court to inform that "the Criminal Cassation Chamber of the Supreme Court of Justice of Colombia canceled the arrest warrant for extradition [of E.G.A.], under the argument of the expiry of criminal action under that statute of limitations, under Colombian regulations." On October 14, 2022, the representatives presented a communication of similar content, through which they reported that on September 2, 2022 "the Supreme Court of Justice of Colombia issued a decision rejecting the extradition request of [E.G.A.] due to the requirements of the 'Agreement on Extradition' adopted in Caracas, on July 18, 1911."

13. *Deliberation of the case.* – The Court deliberated this judgment, in a virtual session, on November 17 and 18, 2022, during the 154th Regular Session.

III
JURISDICTION

14. The Inter-American Court has jurisdiction to hear this case, pursuant to Article 62(3) of the American Convention, because Bolivia has been a State Party to the Convention since July 19, 1979 and accepted the contentious jurisdiction of the Court on July 27, 1993. In addition, Bolivia deposited the instrument of ratification of the Convention of Belém do Pará on December 5, 1994.

IV
PRELIMINARY OBJECTIONS

15. The State filed two preliminary objections, which will be analyzed below in the following order: a) the alleged failure to exhaust domestic remedies, and b) the alleged incompetence *ratione materiae* of the Court over Articles 6 and 9 of the Convention of Belém do Pará.

A. Alleged failure to exhaust domestic remedies

A.1 Arguments of the parties and the Commission

the enhanced duty of due diligence, presence of gender stereotypes in the investigation and revictimization in this specific case.

[16] The brief, signed by Mary Ellsberg, Daniela Ligiero, Esta Soler, Emma Fulu, Lori Heise, Shanaaz Mathews, Elizabeth Dartnall, Lori S. Michau, Paul Zeitz, Laxman Belbase, Natasha Stott Despoja, Lauren Fite, Raúl R. Herrera, Charlotte Bunch, Lina Abirafeh and Jannifer McCleary Sills, refers to: (i) the obligations of States to prevent and punish sexual violence against children, and (ii) measures of structural reform in Bolivia.

16. The ***State*** reported that it raised the exception of failure to exhaust domestic remedies during the admissibility stage of the case through its brief of March 5, 2014, in which it emphasized that the criminal proceedings against E.G.A. had to be exhausted in all its instances. It added that this process was ongoing and the accused was in contempt of court. It highlighted that, until the accused's escape, the process was undertaken with due diligence and the judicial remedies filed by the parties were effectively addressed. It pointed out that, on the contrary, the representatives, Brisa and her parents "obstructed the State's work, taking into account that they requested actions undertaken to apprehend the accused and did not return them to the Court as appropriate**,**[17] and instead, decided to withdraw from the process to go directly before the [Inter-American] System [...], despite [the fact that] domestic law has an ideal remedy to protect the infringed legal situation, such as the extradition of the accused, as is being managed ex officio."[18]

17. Bolivia stated that the alleged victim, her parents or her legal representatives, as appropriate, (i) "dismissed" the medical and psychological assistance of the State's specialized institutions, going "directly" to private doctors and psychologists; (ii) they did not report the medical personnel to the Public Prosecutor's Office or the competent judicial body for the alleged impacts on Brisa's legal rights; (ii) they did not request a change[19] or recusal of the Prosecutor, nor did they file a disciplinary or criminal complaint against her, and (iii) they did not report the alleged threats and harassment for investigation or disciplinary measures despite the "extensive body of resources that could be effective to correct the alleged legal infringement upon Brisa, in the face of the alleged interrogations and threats of the [P]rosecutor.

18. The ***Commission*** observed that the State presented the aforementioned objection in the admissibility stage, however, it recalled that it had concluded that the objection provided for in Article 46(2)(c) of the American Convention was applicable. Given the above and that (i) the sexual violence was reported in July 2002 and, on the date of issue of the Admissibility Report, there was no conviction and, (ii) although the accused was declared in contempt of court on October 28, 2008, it was not until February 28, 2014, that the Public Prosecutor's Office requested a report from INTERPOL on the actions taken to capture him. The Commission considered that the reiteration of said preliminary objection before the Court is not appropriate for the following reasons: (i) the unjustified delay in the domestic proceedings that makes the exception provided for in Article 46(2)(c) of the American Convention applicable;[20] (ii) the excessive delay of the criminal proceedings is not attributable to the complexity of the matter or to the procedural activity of the alleged victim or her representatives, but to the conduct of the state authorities, and (iii) it is the duty of the State, and not of the victim, to investigate with due diligence and adopt measures to ensure that the investigation is completed within a reasonable timeframe and that the person responsible effectively serves their sentence.

19. The ***representatives*** agreed with the arguments presented by the Commission and indicated that the fact that the third trial against E.G.A. is in progress, but suspended due to his being a fugitive, proves

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[17] The State reported that the arrest warrant issued against E.G.A on November 6, 2008, was "voluntarily" picked up by the "private prosecutors" for execution, however, it was not returned to the Court. On August 18, 2009, the legal representative of the alleged victim in the domestic process, Leonor Oviedo, requested the extension of an updated arrest warrant in three copies, to which the Court requested that the original arrest warrant, expedited on November 6, 2008, be attached. Subsequent to the Court's request, the State indicated that the "private prosecutors" stopped promoting and appearing at the criminal proceedings, and "they also did not activate the search and capture mechanisms."

[18] The State indicated that, in accordance with Article 90 of the Code of Criminal Procedure, "no calculation" of prescription is applicable, guaranteeing the continuity of the trial once the extradition of the accused is achieved, which is in progress through the diplomatic channel.

[19] The State indicated that the Organic Law of the Public Prosecution (Law No. 2175) establishes in its article 68 the possibility for the "victim" to request before the hierarchical Prosecutor, the replacement of the Prosecutor in charge of the investigation when it is considered that they have not carried out their duties correctly.

[20] The Commission noted that, to date, 19 years have passed since the facts were reported and 12 years since the accused's escape.

the unreasonable delays in domestic remedies. They added that the alleged victim was not responsible for following up on the arrest warrants, since the State "cannot delegate its obligation of due diligence to investigate and prosecute the violations to the victim and her family." Furthermore, they indicated that, during the proceedings before the Commission, Bolivia did not mention that Brisa's alleged conduct hindered the apprehension of E.G.A. Finally, they stated that the alleged harm suffered by Brisa from State agents, while she was using domestic remedies, demonstrate their inadequacy.

A.2 Considerations of the Court

20. Taking into account the statements made by the parties and the Commission, the Court recalls, in the first instance, that Article 46(1)(a) of the American Convention provides that, to determine the admissibility of a petition or communication presented before the Inter-American Commission in accordance with Articles 44 or 45 of the Convention, it is necessary that the remedies in the domestic jurisdiction have been filed and exhausted, in accordance with the generally recognized principles of International Law,[21] or that one of the exceptional circumstances of Article 46(2) of the Convention is proven.

21. On various occasions, this Court has specified that the appropriate procedural moment for the State to present a possible objection related to the lack of exhaustion of domestic remedies is the admissibility procedure before the Commission.[22] It has also stated that the State presenting this exception must specify the domestic remedies that have not yet been exhausted and demonstrate that these remedies are suitable and effective.[23] Similarly, the arguments that give substance to the preliminary objection filed by the State before the Commission during the admissibility stage must correspond to those put forward before the Court.[24] It is also necessary that the opposing objection can be analyzed in a preliminary manner, which does not occur if it concerns an issue inseparably linked to the substance of the dispute.[25]

22. In the *sub judice* case, it comes to light that the State filed the preliminary objection in question during the proceedings before the Commission, through its briefs of March 5, 2014[26] and October 17, 2014.[27] On those occasions, it indicated that the case was inadmissible, since domestic remedies had not been exhausted, since the criminal proceedings established to examine the same facts that had been submitted to the Inter-American Commission were still underway. Furthermore, it argued that the process had been prolonged by the parties in the criminal process filing various appeals. According to the case Admissibility Report, on March 18, 2017, the Commission decided to admit it based on the exception to the exhaustion of domestic remedies contemplated in Article 46(2)(c) of the American Convention, considering that there was an unjustified delay in the decision regarding

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[21] *Cf. Case of Velásquez Rodríguez v. Honduras*. *Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 85, and *Case of Sales Pimenta v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 30, 2022. Series C No. 454, para. 26.

[22] *Cf. Case of Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 81, and *Case of Sales Pimenta v. Brazil*, *supra*, para. 27.

[23] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections, supra*, para. 88, and *Case of Barbosa de Souza et al. v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 7, 2021. Series C No. 435, para. 28.

[24] *Cf. Case of Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2012, Series C No. 246, para. 29, and *Case of the Former Employees of the Judiciary v. Guatemala. Preliminary Objections, Merits and Reparations*. Judgment of November 17, 2021. Series C No. 445, para. 25

[25] *Cf. Case of Cortez Espinoza v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of October 18, 2022. Series C No. 468, para. 24. Similarly, *Case of Velásquez Rodríguez v. Honduras. Preliminary Objections, supra*, para. 96, and *Case of the Teachers of Chañaral and other municipalities v. Chile. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 10, 2021. Series C No. 443, para. 27.

[26] *Cf.* Brief presented by the State during the proceedings before the Commission on March 5, 2014 (evidence file, folios 765 and 766).

[27] *Cf.* Brief presented by the State during the proceedings before the Commission on October 17, 2014 (evidence file, folios 1372 and 1373).

criminal action.

23. The Court recalls that one of the disputes in this case consists of the alleged international responsibility of the State for the violation of the guarantee of a reasonable timeframe due to the duration of the criminal process for the alleged sexual violence suffered by Brisa, as well as by virtue of the alleged lack of necessary safeguards to prevent the suspect from fleeing. In this regard, the Court considers that determining whether the time elapsed between the beginning of the criminal process and the Admissibility Report constituted an unjustified delay, in terms of Article 46(2)(c) of the Convention, is a debate that is directly related to the substantive dispute relating to Articles 8 and 25 of the Convention. Consequently, since there is an intimate relationship between the State's preliminary objection and the substantive analysis of the dispute, the Court rejects this preliminary objection.

B. Alleged incompetence ratione materiae

B.1 Arguments of the Parties and the Commission

24. The ***State*** argued that the Court does not have the power to rule on Articles 6 and 9 of the Convention of Belém do Pará, with the understanding that it is limited only to facts related to Article 7 of the same instrument, by virtue of the restriction contained in Article 12 of said Convention. The ***Commission*** noted that, in paragraphs 42 and 43 of its Merits Report, it declared a violation of the obligations established in Articles 7(b) and (f) of the Belém do Pará Convention. The ***representatives*** accepted the preliminary objection filed by the State and withdrew the "formal claims for reparation" raised under Articles 6 and 9 of the Convention of Belém do Pará. Additionally, they clarified that the aforementioned articles have "a useful persuasive authority to guide the interpretation of Articles 8, 19, 24 and 25 of the American Convention."

B.2 Considerations of the Court

25. The Court recalls that the alleged victims and their representatives may invoke the violation of rights other than those included in the Merits Report, as long as they remain within the factual framework defined by the Commission, since the alleged victims are the holders of all the rights enshrined in the American Convention.[28] In these cases, it is up to the Court to decide on the admissibility of allegations relating to the factual framework, safeguarding the procedural balance of the parties.

26. Although the representatives abandoned their claim for the Court to rule directly on Articles 6 and 9 of the Convention of Belém do Pará, the Court recalls that it may take said articles into account on interpreting the content of Article 7 of the aforementioned international instrument and the provisions of the American Convention. Therefore, the preliminary objection raised by Bolivia became devoid of purpose.

V
EVIDENCE

A. Admissibility of documentary evidence

27. The Court received various documents presented as evidence by the Commission, the representatives and the State, which, as in other cases, are admitted on the understanding that they were presented at the due procedural opportunity (Article 57 of the Rules of Procedure).[29]

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[28] *Cf. Case of "Five Pensioners" v. Peru. Merits, Reparations and Costs*. Judgment of February 28, 2003. Series C No. 98, para. 155, and *Case of Casierra Quiñonez et al. v. Ecuador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of May 11, 2022. Series C No. 450, para. 22.

[29] Documentary evidence may be presented, in general and in accordance with Article 57(2) of the Rules of Procedure,

28. The Court also received documents attached to the final written arguments presented by the State [30] and the representatives.[31] The Commission objected to part of the annexes to the State's final written arguments and indicated that it had no observations on the annexes of the alleged victim's representatives. The State noted that it had no objection to the documents that accompanied the representatives' final arguments. The latter did not submit observations.

29. In relation to the documents attached as annexes A and B to the representatives' final written arguments, the Court notes that they are documents issued after the presentation of the brief of pleadings and motions and, therefore, constitute evidence of supervening facts. Furthermore, it considers them useful for understanding part of the reparation measures requested by the representatives. In view of the above, said documents are admissible under the terms of Article 57(2) of the Rules of Procedure.

30. Regarding the annexes to the final written arguments of Bolivia, the Commission argued that annexes 1 to 6 were available prior to the date of presentation of the State's answering brief and requested that said documentation not be admitted. The Court agrees with the Commission, since the documents that correspond to annexes 1 to 6, presented by the State, are dated prior to the answering brief, and are therefore inadmissible. The other annexes constitute evidence of supervening facts as they were issued after the presentation of the answering brief. Additionally, some contain information requested by the judges in the public hearing, therefore, the Court admits them.

B. Admissibility of witness and expert evidence

31. The Court considers it pertinent to admit the statements made in public hearing,[32], as well as the statements made before a notary public[33] as long as they conform to the purpose defined by the President in the order for their receipt.[34]

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together with the briefs submitted in the case, pleadings and motions or answering, as appropriate, and evidence submitted outside of these procedural opportunities is not admissible, except for the objections established in the aforementioned article 57(2) of the Rules of Procedure (namely, force majeure, serious impediment) or unless it were a supervening event, that is, one that occurred after the aforementioned procedural moments. Cf. *Case of Barrios Family v. Venezuela. Merits, Reparations and Costs*. Judgment of November 24, 2011. Series C No. 237, paras. 17 and 18, and *Case of Aroca Palma et al. v. Ecuador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 8, 2022. Series C No. 471, para. 26.

[30] Annex 1: Note dated November 2, 2020, signed by Dr. M.R.C.; Annex 2: Certificate as a speaker at the Forum on Sexual Violence from a Public Health Perspective, held on June 5, 2009; Annex 3: Certificate for having been part of the Participatory Action Research process "Building together a route for the integrated and systematized management of cases of sexual violence against children and adolescents"; Annex 4: Note dated October 8, 2010, signed by the Director of the Legal Office for Women; Annex 5: Note FGE/.JN.RRHH. No. 073/2021 of February 1, 2021; Annex 6: CITE:FGE/IDIF/AFN00114/2021 of January 29 of 2021; Annex 7: CITEJDN Report N' 438/2022 of March 21, 2022, issued by the Office of the Ombudsman for Children and Adolescents of the Autonomous Municipal Government of Cochabamba; Annex 8: Report FGE/DRGYJ348 N'035/2022 of 29 March 2022; Annex 9: MJTI Report - VIO N' 13/2022 of March 14, 2022; Annex 10: FEG/DRGYJ348 Report N' 22/2022 of March 14, 2022; Annex 11: Report N' 19 /2022, issued by the Crime-Statistics Analysis Division of the Bolivian Police; Annex 12: Curriculum of the School of Judges of the State of Bolivia; Annex 13: Detail of the instruments used by the different actors who deal with cases of violence against children and adolescents; Annex 14: Document titled "Information regarding the Case of Angulo Losada v. Bolivia processed before the Inter-American Court of Human Rights", prepared by the Ministry of Education, and Annex 15: Note GM-DGAJ-UAJI-Cs-970/2022 of April 7, 2022.

[31] Annex A: Book: "Proposal for the Plurinational State of Bolivia to generate safe spaces that allow Children and Adolescents to grow and develop without the risk of experiencing sexual violence and to improve access to justice", and Annex B: Book: "The culture of incest and the crime of incestuous rape by adults in the family of children and adolescents."

[32] In a public hearing, the Court received the statements of the alleged victim, Brisa De Angulo Losada, the witness Luz Stella Losada and the expert Sylvia Mesa Peluffo, proposed by the representatives, and of the expert Miguel Cillero Bruñol, proposed by the Inter-American Commission.

[33] The Court received the statements made before a notary public (affidavit) from the witness José Miguel de Angulo and the witness María Leonor Oviedo Bellott, and from the experts Dubravka Šimonović and María Elena Attard Bellido, proposed by the representatives, and from the prosecutor N.T.A, proposed by the state.

[34] The purpose of these declarations is established in the Order of the President of the Inter-American Court issued on February 17, 2022. Available in Spanish at:https://www.corteidh.or.cr/docs/asuntos/angulo_losada_17_02_22.pdf.

VI
FACTS

32. In this chapter the Court will establish the facts that will be considered proven in this case, in accordance with the body of evidence that has been admitted and according to the factual framework established in the Merits Report. In addition, the facts presented by the parties that allow the factual framework to be explained, clarified or dismissed will be included. Thus, the chapter is divided as follows: a) the sexual violence suffered by Brisa De Angulo Losada; b) the main regulatory framework; c) steps taken by the family of Brisa De Angulo Losada prior to the complaint filed with the state authorities, and d) the investigation and criminal proceedings.

A. The sexual violence suffered by Brisa De Angulo Losada

33. Brisa De Angulo Losada was born on September 14, 1985 in the city of Baltimore, state of Maryland, United States of America.[35] At the time of the events, her family was made up of her mother Luz Stella Losada, her father José Miguel De Angulo[36] and 4 siblings.[37] In 1990, Brisa and her family moved to the city of Cochabamba, Bolivia, because her parents were developing community health projects for the International Medical Assistance Program[38] (hereinafter "MAP International").[39] Brisa's parents opted for a lifestyle maintaining "rich family relationships and learning activities at home", so that within the family dynamic it was common for the older brothers to facilitate the learning processes at home for the younger sisters. Years after their arrival in Cochabamba, Brisa's older brothers traveled to the United States to complete their primary and secondary studies. Days after their departure, in 2001, E.G.A., Brisa's older cousin, 26 years of age, arrived in Bolivia to undertake a veterinary internship.[40]

34. E.G.A. was seen as a son and brother by Brisa's family and was received with the "hope that [with his arrival] the [younger] daughters would suffer a little less from the absence of their [older] brothers."[41] During his stay at the De Angulo Losada family home, E.G.A. supported Brisa in her studies and was in charge of caring for her and her younger sisters. Additionally, he accompanied Brisa to do her chores in the city; in her terms: "he took the place of [her] brothers" and she "blindly trusted" him.[42] On different occasions, E.G.A. slept in her room under the pretext that "something

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35 *Cf.* Brisa's birth certificate, issued on September 25, 1985 (evidence file, folio 7224).

36 Mr. José Miguel De Angulo is a surgeon. He worked as head of health service for the Dragados company. Later, he was hired by MAP International "to manage public health programs in Latin America from the regional office in Quito, Ecuador." From this office he traveled on several occasions to countries such as Bolivia. In 1990, MAP International "made an agreement with the Ministry of Health of Bolivia" and opened a national office in Cochabamba. From this office, Mr. Angulo carried out various projects in the area of maternal and child health. Cf. Statement of José Miguel De Angulo of March 21, 2022 (evidence file, folio 11433).

37 *Cf.* Statement of José Miguel De Angulo, *supra* (evidence file, folio 11433), and Social Report of the Defense of Children International, Bolivia Section of August 21, 2008 (evidence file, folio 8455).

38 *Cf.* Statement given by José Miguel De Angulo, *supra* (evidence file, folio 11433).

39 *Cf.* MAP International is a Christian organization in charge of providing medical assistance to people with limited economic resources. *Cf*. Official website of the MAP International. Available at: https://www.map.org/#our-mission.

40 *Cf.* Statement of José Miguel De Angulo, *supra* (evidence file, folios 11433 to 11434), and judgment issued by Sentencing Court No. 4, *supra* (evidence file, folios 7665 to 7666).

41 *Cf.* Private prosecution presented by José Miguel De Angulo and Luz Stella Losada on November 15, 2002 (evidence file, folios 7387 to 7388); Information statement of Brisa De Angulo Losada of August 1, 2002 (evidence file, folio 10624); Statement of José Miguel De Angulo, *supra* (evidence file, folios 11433 to 11434), and Letter from Brisa De Angulo Losada of December 9, 2011 (evidence file, folio 7240).

42 During E.G.A's stay, Brisa stopped participating in activities that she previously carried out in order to "avoid hearing [the] criticisms and insults" that he made against her; In particular, she stopped her studies at home and extracurricular activities, she also exhibited aggressive and withdrawn behaviors. *Cf*. Information statement of Brisa De Angulo Losada, supra (evidence file, folio 10624); Letter from Brisa De Angulo Losada, *supra* (evidence file, folios 7240 to 7241); Statement of Brisa De Angulo Losada during the public hearing of this case, and Statement of José Miguel De Angulo, *supra* (evidence file,

could happen" to Brisa due to her history of asthma.[43]

35. Brisa, who at the time was a 16-year-old girl, testified that on several occasions between October 2001 and May 2002, she suffered acts of sexual violence, including sexual abuse and rape, at the hands of her cousin E.G.A., who was ten years older than her.[44] In this regard, during the public hearing before the Court, the alleged victim expressed the following:

> I was raped repeatedly, tortured dozens of times, but it never occurred to me to tell anyone about any of this or ask for help. What's more, I thought it was better for me to take my own life before sharing this; I tried to commit suicide twice, and there are several reasons why I didn't tell anyone. That question is one of the most difficult for me […]. I didn't understand at that time, […] now I understand, I know what was happening to me. I didn't know that what was happening to me was a crime, I had a wrong idea: that [if] rape happens, it is something that happens in a dark alley by a stranger. My parents didn't know that incestuous rape was a crime, we had never heard of this type of crime. The aggressor, like other aggressors, is very clever at keeping the victim silent. He was an adult, part of my family, he had to guide me, he had to protect me, he was the person who had to show me and that I had to see the world through his eyes. I never thought about what he was doing to me... I hated it, but I couldn't give it a name, I couldn't understand that it was a crime. Furthermore, he filled me with fear. He did not use physical violence during the act of rape, but he did worse at other times; He hit me, threw me to the ground, kicked me, and tortured the animals. I knew what he was capable of, I knew what he could do to me if I didn't do what he wanted. I was full of fear. I didn't even dare to confront him or question what he was doing.[45]

36. During the period referred to above, Brisa reported having also suffered physical violence from her cousin E.G.A., as well as having experienced fear, confusion and concern about what E.G.A. could do to her younger sisters, and for causing suffering to her parents if she told them what was happening.[46] Additionally, she indicated that she became "quite aggressive" toward her parents, sisters, and her dog "because she knew that the more she pushed them away," the less her cousin would hurt them. Similarly, she stopped eating, cried, vomited and "thought about [...] death."[47] In this regard, Brisa also pointed out: "I stopped going swimming, I stopped playing music, I no longer went to school, I developed bulimia, anorexia, I began to mutilate myself, I became depressed, I spent hours in my room sleeping, crying and sleeping. On a trip to the United States I tried to commit suicide twice."[48] Furthermore, her mother, Luz Stella Losada, stated that "Brisa's character began to enter a level of depression, pessimism, of isolating herself, [...] she was also very irritable, very aggressive at times and slammed doors. […]Brisa started biting her nails, […] she was shaking when she was sitting."[49]

37. When Brisa was about to start her fifth year of high school, she suspended her studies due to "the sexual assaults and […] the multiple problems she was having with [E.G.A.]" and "the rest of [her] family."[50]

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folios 11433 to 11434).

43 *Cf.* Information statement of Brisa De Angulo Losada, *supra* (evidence file, folio 10624), and Private prosecution presented by José Miguel De Angulo and Luz Stella Losada, *supra* (evidence file, folio 7387).

44 *Cf.* Information and Complaints Form signed by José Miguel De Angulo and the investigator assigned to the case on August 1, 2002 (evidence file, folios 9512 to 9513); Statement of Brisa De Angulo Losada given during the public hearing of this case; Letter from Brisa De Angulo Losada, *supra* (evidence file, folios 7243 to 7245); Information statement of Brisa De Angulo Losada, *supra* (evidence file, folio 10624 to 10625), and Statement of Clementina Mamani during the second oral trial, contained in the record of the oral trial of September 15, 2005 (evidence file , folios 9844 to 9845).

45 *Cf.* Statement of Brisa De Angulo Losada given during the public hearing, *supra*.

46 *Cf.* Information statement of Brisa De Angulo Losada, *supra* (evidence file, folio 10624 to 10625); Letter from Brisa De Angulo Losada, *supra* (evidence file, folios 7243 to 7245), and Statement from Brisa De Angulo Losada during the public hearing, *supra*.

47 *Cf.* Letter from Brisa De Angulo Losada, *supra* (evidence file, folio 7245).

48 *Cf.* Statement of Brisa De Angulo Losada during the public hearing, *supra*.

49 *Cf.* Statement of Luz Stella Losada during the public hearing of this case.

50 *Cf.* Statement of José Miguel De Angulo, *supra* (evidence file, folio 11447).

B. Main Regulatory Framework

38. At the time of the events, the criminal law in force was the Bolivian Criminal Code of 1972,[51] with the modifications introduced by Law No. 2033, called the Law for the Protection of Victims of Crimes against Sexual Freedom of October 29, 1999.[52] Article 308 criminalized rape and stipulated:

> Article 308.- (Rape) Whoever, using physical violence or intimidation, has sexual intercourse with a person of either sex; anal or vaginal penetration or introducing objects for libidinous purposes, will incur imprisonment from five (5) to fifteen (15) years.
>
> Anyone who, under the same circumstances as in the previous paragraph, even if there was no physical violence or intimidation, taking advantage of the victim's mental illness, serious psychological disturbance or severe intellectual impairment, or who was incapable of resisting for any other reason, will incur imprisonment of fifteen (15) to twenty (20) years.

39. Additionally, this law introduced the criminal offense of rape of children and adolescents:

> Article 308.- Bis (Rape of a child or adolescent) Whoever has sexual intercourse with a person of either sex under fourteen years of age, anal or vaginal penetration or introduces objects for libidinous purposes, will be punished with imprisonment of fifteen (15) to twenty (20) years, without the right to pardon, even if there is no use of force or intimidation and consent is alleged. Consensual relationships between adolescents over twelve years of age are exempt from this punishment, as long as there is no age difference of greater than three (3) years between them, and no violence or intimidation has occurred.

40. Furthermore, Article 309 of the Bolivian Penal Code, with the modifications introduced by Article 5 of Law No. 2033, at the time of the events of the case prescribed the criminal offense of statutory rape in the following terms:

> Article 309.- (Statutory Rape) Whoever, through seduction or deception, has sexual intercourse with a person of either sex, over fourteen (14) years of age and under eighteen (18), will be punished with imprisonment of two (2) to six (6) years.

41. Article 310 of the Penal Code then in force established among the aggravating factors for the criminal offences of sexual violence the following:

> Article 310.- The sentence will be aggravated in cases of the above crimes, with five years:
> 1. If as a result of the rape any of the circumstances provided for in Arts. 270 and 271 of the Criminal Code occur [(minor, serious and very serious injuries)];
> 2. If the victim suffers serious trauma or psychological damage;
> 3. If the perpetrator was an ancestor, descendant or relative within the fourth degree of kinship or second degree of family relationship;
> 4. If the perpetrator is in charge of the education or custody of the victim, or if the victim is in a situation of dependency or authority; […]
> 7. If the perpetrator subjected the victim to humiliating or degrading conditions […]

42. Subsequent to the facts of the case, after the entry into force of the 2009 Constitution, through Law No. 054 of November 8, 2010, called the Law of Legal Protection of Children and Adolescents,[53] the penalty for the criminal offence of statutory rape was modified from 3 to 6 years.

43. Subsequently, Law No. 348 of March 9, 2013, called the Comprehensive Law to Guarantee Women a Life Free from Violence, modified the crime of rape, increasing the penalty and including the expression "non-consensual sexual acts" in the criminal offence, and the inability to resist in the definition of the crime, as follows:

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51 Available in Spanish at: http://www.silep.gob.bo/norma/4368/texto_ordenado

52 Available in Spanish at: http://www.silep.gob.bo/norma/3936/ley_actualizada

53 Available in Spanish at: www.silep.gob.bo/norma/4169/leyes#910865674

> ARTICLE 308. (Rape). Anyone who, through intimidation, physical or psychological violence, performs, with a person of either sex, non-consensual sexual acts that involve carnal access, through penetration of the virile member, or any other part of the body, or any object, vaginally, anal or orally, for libidinous purposes; and who, under the same circumstances, even if there was no physical violence or intimidation, takes advantage of the victim's serious mental illness or intellectual disability or who was incapable of resisting for any other reason, will be punished with deprivation of liberty for a period of fifteen (15) to twenty (20) years..

44. Furthermore, this law modified the crime of rape of an infant, girl, boy or adolescent in the following terms:

> Article 308 bis. (Rape of an infant, child or adolescent). If the crime of rape is committed against a person of either sex under fourteen (14) years of age, it will be punished with imprisonment of twenty (20) to twenty-five (25) years, even if there is no use of force or intimidation and consent is alleged.
>
> If any of the aggravating circumstances provided in Article 310 of the Penal Code are evident, and the sentence reaches thirty (30) years, the sentence will be without the right to pardon.
>
> Consensual relationships between adolescents over twelve (12) years of age are exempt from this punishment, as long as there is no age difference of more than three (3) years between them and no violence or intimidation has occurred.

45. Current criminal legislation - with the modifications noted - also considers incest[54] as an aggravating factor for crimes of sexual violence. It also provides for other aggravating factors as set out below:

> a) Any of the circumstances provided for in Articles 270 and 271 of this Code [(minor, serious and very serious injuries)] occur as a result of the rape;
> b) The event occurs in front of children or adolescents; […]
> g) The perpetrator is in charge of the education or custody of the victim, or if the victim is in a situation of dependence on them or under their authority; […]
> l) In the case of the crime of rape, the victim is over fourteen (14) and under eighteen (18) years of age;
> m) The perpetrator has committed the act on more than one occasion against the victim; […]
> o) The perpetrator was an ancestor, descendant or relative within the fourth degree of kinship or second degree of family relationship; […]

C. Steps taken by the family of Brisa De Angulo Losada prior to the complaint filed with the state authorities

46. Brisa's parents became aware of the sexual violence that their daughter was suffering when, during a trip to the United States, one of her older brothers, after having noticed negative changes in her behavior, read her diary and discovered that something was happening.[55] After learning about the acts of sexual violence, Brisa's father had to return to Bolivia for a few days for work reasons. During his stay in Bolivia, he sought "advice from friends" about the events that occurred, to which they recommended that he go to the Defense for Children International[56] (hereinafter "DCI"). Thus, on July 15, 2002, he reported the facts to DCI[57] in Cochabamba, where they advised him that the girl should receive therapy.[58] On July 18, 2002, after his return to the United States, Brisa's father and her mother decided to take her to a therapist who recommended they go to the

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[54] Reference is made to incest here according to the definition contained in the Bolivian Penal Code, that is, in cases of sexual violence committed by "an ancestor, descendant or relative within the fourth degree of consanguinity or second degree of affinity."

[55] *Cf.* Statement of José Miguel De Angulo, *supra* (evidence file, folio 11445); Social Report of the Defense of Children International, Bolivia Section of August 21, 2008 (evidence file, folio 7233); Letter from Brisa De Angulo Losada, *supra* (evidence file, folio 7246), and Statement from Luz Stella Losada during the public hearing, *supra*.

[56] *Cf.* Statement of José Miguel De Angulo, *supra* (evidence file, folio 11445).

[57] The DNI is a non-governmental organization that is responsible for the protection of children and adolescents. Cf. Website of the Defense of Children International. Available at: https://defenceforchildren.org/about-us/

[58] *Cf.* Statement of José Miguel De Angulo, *supra* (evidence file, folio 11445), and psychological certification carried out by the DNI psychologist on August 7, 2002 (evidence file, folio 7850).

"Morningstar" Family Resource Center.[59] On July 24, 2002, the psychology professional from the "Morningstar" center treated Brisa, concluding that, based on what was indicated by the alleged victim, it was a relationship between a "minor being seduced by an adult man for the purpose of sexually exploiting her."[60] According to the professional, E.G.A. used their "relationship […] based on trust, family relationship and service to God" to "sexually exploit [her] […]and manipulate her […] into believing that she had done something wrong".[61] On July 25, 2002, she was treated by a second medical professional, who indicated that Brisa "was involved in a sexual relationship with a 26-year-old man […] who lived with her family in Bolivia," and she appeared depressed and did not want to discuss a lot about what happened. She also stated that she "was seduced" into having sexual relations, a situation in which she "was confused and very frustrated." The professional interpretation of the medical examination was that Brisa was "in a state of having been sexually abused."[62]

47. On July 30, 2002, Brisa and her parents returned to Bolivia.[63] On July 31, 2002, Ms. Oviedo Bellot, a lawyer for the DCI, requested a medical examination of Brisa by letter addressed to a doctor from the forensic medical area of the Public Prosecutor's Office,[64] Ms. M.R.C.[65] On the same day, the doctor signed a certificate in which she indicated "having performed [the] medical-legal examination" of Brisa, stating that she had an old tear in her hymen and, due to "the late complaint," she did not proceed to perform medical laboratory examinations.[66] According to the National Director of the Forensic Research Institute, based on a review of Dr. M.R.C.'s files, it was she who in fact carried out the forensic medical evaluation of the alleged victim.[67] According to Brisa, this forensic examination was carried out by a male doctor, with the assistance of five medical students, all men, and without the presence of her parents; in particular, her mother, who was not allowed to enter.[68] During such examination, Brisa reported that she asked the doctor if the students could leave, to which the doctor laughed and said that she was being "ridiculous." The students also laughed and proceeded to spread her legs while the doctor performed the examination. Brisa said she had cried without anyone paying attention to her.[69] Regarding this aspect, evidence in the case indicates that "at that time there were two male forensic doctors and a female forensic doctor,[70] who dealt with cases of sexual violence." Furthermore, "as a common practice," the doctors were accompanied by

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59 *Cf.* Statement of José Miguel De Angulo, *supra* (evidence file, folio 11445).

60 *Cf.* Certificate produced by Terri S. Gilsson, LP.C., regional coordinator of the Morningstar Family Resource Center, on August 8, 2002 (evidence file, folio 7860), and Statement of Brisa De Angulo Losada during the public hearing, *supra*.

61 *Cf.* Certificate produced by Terri S. Gilsson, *supra* (evidence file, folio 7860).

62 *Cf.* Certificate produced by Lourdes de Armas, M.D. on July 25, 2002 (evidence file, folio 7855).

63 *Cf.* Statement of José Miguel De Angulo, *supra* (evidence file, folio 11445).

64 At that time, it was a daily practice of the DNI that, in cases of sexual violence against children and adolescents, the institution requested a forensic medicine review by letter. The District Attorney's Office put its seal on the request letter filed by the DNI in Brisa's case after the request for endorsement made by the lawyer from this institution. Cf. Statement of María Leonor Oviedo Bellot of March 21, 2022 (evidence file, folios 11452, 11453 and 11459).

65 *Cf.* Request for medical review of July 31, 2002 (evidence file, folio 7258).

66 *Cf.* Forensic medical certificate signed by M.R.C., forensic medical doctor of the Public Prosecutor's Office of Cochabamba, on July 31, 2022 (evidence file, folio 9500).

67 *Cf.* Letter signed by the National Director of the Forensic Investigations Institute of the State Attorney General's Office on January 29, 2001 (evidence file, folio 10447).

68 In this regard, Brisa recounted that this forensic medical examination was "one of the worst experiences of [her] life," stating: "I entered, and I saw many men, there were five I think, all dressed in white, and they looked at me and told me, take off your pants, and […] they left my mom outside." (Cf. Statement of Brisa De Angulo Losada during the public hearing, *supra*). The alleged victim's mother testified that she had not been present in the examination room. Cf. Statement given by Luz Stella Losada during the public hearing, *supra*.

69 *Cf.* Letter from Brisa De Angulo Losada, *supra* (evidence file, folios 7246 to 7247); Statement of Brisa de Angulo Losada during the public hearing, *supra*, and Statement of Luz Stella Losada during the public hearing, *supra*.

70 *Cf.* Statement of María Leonor Oviedo Bellot, *supra* (evidence file, folio 11453 and 11459).

student practitioners.[71]

D. Investigation and Criminal Proceedings

48. On August 1, 2002, Brisa's father filed a complaint against E.G.A. before the Technical Judicial Police (hereinafter "TJP"), for the crime of rape to the detriment of his daughter.[72] That same day, the girl testified before the Office on Child and Adolescent Protection and Adoptions of the Departmental Social Management Service (hereinafter "SEDEGES" according to its initials in Spanish).[73]

49. During the public hearing before the Court, Brisa indicated that she had reported the acts of sexual violence at different times to Prosecutor N.T.A.,[74] which had also already been mentioned in the brief of pleadings and motions, and in the Merits Report. It is known that, at least during a first informal interview, her mother was not allowed to enter with her, so she remained in the waiting room.[75] On that occasion, according to the alleged victim, the Prosecutor had repeatedly interrupted her with expressions such as: "you didn't tell anyone after he raped you the first time, correct? Are you sure you didn't want to? Because it would be very strange not to tell someone that he raped you," "[i]f you keep saying this you're going to destroy your family and his," and "[i]f you're lying, I'm going to make sure you go to prison. What you are doing is very dangerous."[76] According to Brisa's mother, at the end of the interview, Brisa came out upset and told her what had happened.[77]

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[71] *Cf.* Statement of María Leonor Oviedo Bellot, *supra* (evidence file, folios 11453 and 11459). Ms. Oviedo Bellot also pointed out "[i]m aware that in a case in which I accompanied a girl who was the victim of sexual violence, [after Brisa's medical examination] the student-practitioners were in the office with the forensic examiner. Upon seeing this, she verbally complained, explaining the right that the victims had to privacy and confidentiality" (evidence file, folio 11453).

[72] *Cf.* Information and Complaints Form signed by José Miguel De Angulo and the investigator assigned to the case on August 1, 2002 (evidence file, folios 9512 to 9513).

[73] *Cf.* Information statement of Brisa de Angulo Losada, *supra* (evidence file, folios 7266 to 7267).

[74] *Cf.* Statement of Brisa De Angulo Losada during the public hearing, *supra*. In the same sense, see the letter from Brisa De Angulo Losada, *supra* (evidence file, folio 7247).

[75] *Cf.* Statement of Luz Stella Losada during the public hearing, *supra*.

[76] *Cf.* Letter from Brisa De Angulo Losada, *supra* (evidence file, folio 7247).

[77] During the public hearing of this case, Luz Stella Losada indicated that after the interview she wrote down in a diary the phrases that the Prosecutor uttered, according to what Brisa told her, right after the interview. What was said at the hearing is set out below:

> Be aware of what you are getting into, whatever it was it was going to be your fault, if you lose they will pay for damages, and there is a lawsuit for slander and defamation, if you win between 20 to 25 years without the right to reduction, and it will also be your fault, there is still time for a negotiation, it depends on you and no one else, your aunt and uncle came, did you ever see [E.G.A.] as a man? Did you have sexual relations before [E.G.A.]? Did you have relationships after [E.G.A.]? Did you ever enjoy it? Don't lie to me, you're talking 'woman to woman'. The phrases continue: 'What did you tell Sandra, at the trial, what? Say it now! Tell the truth' the Prosecutor said, 'I don't know I don't know', Brisa asks, what do you not know? You are not sure? 'No, I'm not sure because of what I spoke yesterday with witnesses, people who know you, and your relatives' like what? 'That your father forbids you to wear makeup, to wear a miniskirt, but when he is not there, many people have seen you well made up and dressed up until late at night' and she takes a photo out and says: 'who is it?' Brisa says: 'it's me', and 'why are you dressed up?' Brisa answers, 'because I didn't want anyone to recognize me' and she yells 'liar'. 'It's going to be used and don't tell anyone, what we're talking about here no one has to know' 'you're not going to tell your parents because you know what they are like' 'they're going to hurt you, they're going to put you down and you are going to see how they are going to crush you because there is a law that defends minors and you are already grown up, don't lie to me, don't lie to me, don't lie to me.' Those were the phrases that Brisa repeated. Cf. Statement of Luz Stella Losada during the public hearing, *supra*.

Furthermore, Brisa's father pointed out: "[t]here are many events that have happened in the treatment that our daughter, my wife and I received from the government prosecutors, and they were highly intimidating so that we would desist from the legal action. For example, our initial contact with the first prosecutor was deeply traumatic and revictimizing because of the way she treated our daughter (always doubting her character as a victim)." Cf. Statement of José Miguel De Angulo, *supra* (evidence file, folio 11435).

50. On August 5, 2002, Prosecutor N.T.A. issued an arrest warrant against E.G.A.,[78] who was arrested on August 7, 2002.[79] In this regard, the TJP certification states that there "was awareness he was a flight risk to his country of origin" and indicates that, once arrested, he "fully admitted to the events reported."[80]

51. In the interview record of August 7, 2002 before the TJP, E.G.A. stated, inter alia, that "everything was by mutual agreement since he never used physical violence," and that "he intended to serve [his] sentence for what happened."[81] That same day, a formal indictment was issued against E.G.A. before the Criminal Trial Judge for the crime of rape and his arrest was requested as a precautionary measure, because he had no known address and there were "sufficient indications" that he would flee "as he is of Colombian nationality."[82]

52. On August 7, 2002, it was confirmed that Brisa received a psychological evaluation by DCI professionals due to the complaint that her father had filed on July 15 (*supra* para. 46). In the assessment it was determined that E.G.A. used mechanisms of "psychological manipulation, based on emotional persuasion" and that Brisa presented "a high rate of anxiety and anguish" as a consequence of "sexual abuse", the disclosure of the fact and facing the corresponding legal process." It was also determined that Brisa "kept [the situation of sexual abuse] silent due to the emotional conflict due to the ambivalence she felt" towards him: on the one hand, "there was affection" when considering him as a brother, and on the other, she had "feelings." of rejection and hatred for sexual assaults." Furthermore, his trust and affection caused her to feel guilt because they made it difficult for her to become aware of and inform her parents about the sexual violence.[83]

53. The first ruling on precautionary measures was issued on August 8, 2002, when the preventive detention of E.G.A. was ordered in the public jail.[84] Subsequently, in a hearing to apply an alternative measure on August 31, 2002, the Tiquipaya Investigative Court decided to end the preventive detention ordered on August 8, 2022, considering that, given the documents presented by the accused, including a rental contract and an employment contract, the requirements for such a precautionary measure, in particular the risk of flight, were no longer present. Thus, in the alternative measures it ordered he was prohibited from leaving the country and the department of Cochabamba, or from communicating with the alleged victim and her family.[85] Given the appeals filed against the aforementioned decision of August 31, 2002, at a hearing on September 16, 2002, it was revoked, maintaining preventive detention of the accused. Subsequently, the accused made a second request for cessation of preventive detention, which was considered at a hearing on October 23, 2002, where the Investigating Judge of Tiquipaya rejected the request, pointing out inter alia that, although the accused provided evidence of an address and a future job, there was neither sufficient cause nor evidence in relation to the accused's exact length of stay in Bolivia.[86]

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78 The arrest warrant was issued after the issuance of 2 summonses in which it was not possible to find E.G.A. because he had been "maliciously hiding" *Cf*. Citations and certifications of compliance in records of August 2, 3 and 5, 2002 (evidence file, folios 7269 to 7273).

79 *Cf.* Arrest warrant of August 5, 2002, and certifications of compliance in evidence of August 7, 2002 (evidence file, folios 7273 to 7274).

80 *Cf.* Preliminary Circumstantiated Investigation Report of the TJP of August 7, 2002 (evidence file, folio 7275).

81 *Cf.* Record of interview conducted by the Departmental Office of the TJP of Quillacollo on August 7, 2002 (evidence file, folio 7278).

82 *Cf.* Record of formal accusation of August 7, 2002 (evidence file, folio 7279).

83 *Cf.* Psychological certification carried out by the DNI psychologist, *supra* (evidence file, folios 7260 to 7261).

84 *Cf.* Record of hearing on the application of precautionary measures issued by the Investigative Court of Tiquipaya, *supra* (evidence file, folios 10663 to 10665).

85 *Cf.* Record of hearing on the application of a substitute measure issued by the Investigative Court of Tiquipaya on August 31, 2002 (evidence file, folios 7299 to 7301).

86 *Cf.* Appeal filed by Luz Stella Losada on September 3, 2002 (evidence file, folios 7314 to 7316); Order admitting the appeal issued by the Investigative Court of Tiquipaya on September 3, 2002 (evidence file, folio 9566); Record of hearing of

54. Pursuant to the appeal presented by E.G.A. in response to the decision of October 23, 2002, in a hearing on precautionary measures and an order at the level of appeal, the Second Criminal Chamber of Cochabamba (hereinafter "Second Criminal Chamber"), ruled on November 1, 2002, to replace preventive detention with the following measures: (i) the obligation to appear weekly before the Prosecutor, in order to sign the corresponding register; (ii) a prohibition on leaving the department and the country, without express authorization, for which it was decided to proceed to order his preventative detention should he do so, and (iii) the imposition of a financial bond for the sum of Bs. 50,000 (fifty thousand bolivars).[87]

55. On November 5, 2002, the Public Prosecutor's Office presented formal charges against E.G.A. for the crime of rape, pursuant to Articles 308 and 310, paragraphs 1 and 2 of the Criminal Code.[88] In turn, on November 15, 2002, Brisa and her parents filed a private prosecution for the crime of aggravated rape, pursuant to Articles 308 and 310, subparagraphs 1, 2, 3 and 7 of the Criminal Code.[89] That same day, after payment of the bond by E.G.A. (*supra* para. 54), his release was ordered on November 1, 2002, under the condition of continuing to comply with the other measures imposed.[90]

56. On December 30, 2002, the Quillacollo Sentencing Court scheduled a hearing to select the citizen judges who would participate in the trial. Since the required number of judges was not obtained, the case was sent to the Sentencing Court No. 4 of Cochabamba (hereinafter "Sentencing Court No. 4"), and the trial was set for March 17, 2003.[91]

D.1 First Oral Trial

57. On March 17, 2003, the first trial began. At its opening, the Public Prosecution requested a conviction for aggravated rape, pursuant to Articles 308 and 310, subsections 1 to 3, of the Criminal Code.[92] For their part, the complainants adhered to the accusation of the crime of rape, clarifying that the accusation had not been made under the crime of statutory rape because in the case there was no seduction or deception but rather a lack of consent.[93] In

precautionary measure and order on appeal of September 16, 2002 (evidence file, folio 10898), and Record of hearing of cessation of preventive detention of October 23, 2002 (evidence file, folio 10902). and Record of hearing of precautionary measure and order on appeal of November 1, 2002 (evidence file, folio 7326).

87 The decision was made after considering that it had been proven when: (i) the passport and documentation regarding the defendant's stay in Bolivia and, (ii) his residence. The Second Criminal Chamber considered "the principle by which every person has the right to defend themself while free." *Cf*. Record of hearing of precautionary measure and order on appeal of November 1, 2002 (evidence file, folios 7324 to 7327).

88 *Cf.* Record of formal accusation issued by the Public Prosecutor's Office on November 5, 2002 (evidence file, folios 7328 to 7331).

89 *Cf.* Private prosecution presented by José Miguel De Angulo and Luz Stella Losada on November 15, 2002 (evidence file, folio 7390).

90 On November 13, 2003, the defendant's request to modify said conditions was denied: (i) replacing the financial bond with a personal bond; (ii) replacing the departmental preventative detention with national one, and (iii) modifying the periodic presentation from 7 days to 15 days. *Cf*. Record of posting of bail of November 15, 2002 (evidence file, folios 10910 to 10911), and Record of public hearing of modification of the precautionary measures of November 13, 2003 (evidence file, folios 10916 to 10919).

91 *Cf.* Order to open an oral trial issued by the Quillacollo Sentencing Court on December 30, 2002 (evidence file, folios 9628 to 9629), and Order to reschedule a public hearing issued by Sentencing Court No. 4 of Cochabamba on January 28, 2003 (evidence file, folio 9634).

92 The initial complaint was made only for the crime of aggravated rape, however, at the oral trial hearing on March 17, 2003, the Public Prosecution, based on recently obtained evidence, requested the extension of the accusation to the crime of "indecent abuse" (Article 312 of the Penal Code) allegedly committed against other minors in the complainants' family. *Cf*. Record of oral trial hearing from March 17 to 25, 2003 (evidence file, folios 7618 to 7619).

93 *Cf.* Record of oral trial hearing from March 17 to 25, 2003 (evidence file, folios 7619 to 7620).

addition, it was ordered[94] that the parties to the proceedings not be present, including the accused and his defense, during Brisa's statement.[95]

58. On March 20, 2003, the complainant requested the reading at hearing of the medical certificate dated July 31, 2002, issued by Dr. M.R.C. However, the defense requested the exclusion of evidence, under Article 172 of the Code of Criminal Procedure, because it was issued before the complaint of August 1, 2001, was made and because it was not made at the request of the Public Prosecutor's Office, but at the request of DCI. After evaluating the arguments of the parties, the President of the Court decided that the forensic medical certificate could not be incorporated into the trial because it required a prior request from the Public Prosecution. Despite this, the expert was allowed to make oral statements.[96]

59. In this first trial, a total of eight hearings were held with a duration of between 1 hour and 45 minutes to 7 hours and 25 minutes, and with testimony from E.G.A., Brisa, José Miguel De Angulo, Luz Stella Losada, five prosecution witnesses, nine defense witnesses, six experts from the complainants and/or the Public Prosecutor's Office, and two experts from the defense.[97]

60. On March 28, 2003, Sentencing Court No. 4 unanimously decided that the accused was the perpetrator of the crime of aggravated statutory rape,[98] in accordance with Articles 309 and 310, subparagraph 3 of the Criminal Code, sentencing him to seven years of imprisonment. Among the reasons for the ruling, the aforementioned Court noted that "deceptive psychological manipulations have undermined the volition of the minor Brisa […] to resist the sexual abuse to which she was subjected." The Court considered that, in the case, the elements of the criminal offense of rape were not established since "it had not been convincingly demonstrated that the element of 'physical violence' had occurred in the successive sexual abuses" and nor was intimidation "indubitably" demonstrated. Similarly, the Court claimed to have glimpsed "certain personality traits of […] Brisa," such as her "strong personality," from which "it is not possible to conceive that Brisa has been intimidated by [the accused]."[99]

61. On April 14, 2003, the complainants and the accused appealed the sentence.[100].
On June 5, 2003, the First Criminal Chamber of the Superior Court of Justice of Cochabamba (hereinafter "First Criminal Chamber") annulled said sentence in its entirety because an irremediable procedural defect had been committed when receiving the statement of the alleged victim in private

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[94] Sentencing Court No. 4 ordered that Brisa's testimony be carried out in private with the help of family members or a psychologist and that all the acts of the oral trial be carried out in a confidential manner. *Cf*. Record of oral trial hearing from March 17 to 25, 2003 (evidence file, folios 7618, 7629 and 7630); Judgment issued by the Sentencing Court No. 4, *supra* (evidence file, folio 7664); Record of hearing of oral reasoning for a restricted appeal issued by the First Criminal Chamber on May 13, 2003 (evidence file, folio 9715); Order issued by the Third Chamber of the Superior Court of the Judicial District of Cochabamba on December 2, 2003 (evidence file, folio 9750), and Judgment issued by the Second Civil Chamber of the Superior Court of Justice on April 2, 2004 (evidence file, folio 9801).

[95] Brisa reported that during her statement a psychologist, whom she did not know, was assigned to accompany her. She also stated that, during her testimony, two of the judges fell asleep and one of them asked if she screamed when she suffered sexual violence. *Cf*. Letter signed by Brisa De Angulo Losada, *supra* (evidence file, folios 7251 to 7252); Record of oral trial hearing from March 17 to 25, 2003 (evidence file, folios 7629 to 7630), and order issued by the First Criminal Chamber on June 5, 2003 (evidence file, folio 9721).

[96] *Cf.* Record of oral trial hearing from March 17 to 25, 2003 (evidence file, folios 10359 to 10360).

[97] *Cf.* Record of oral trial hearing from March 17 to 25, 2003 (evidence file, folios 10341 to 10383).

[98] The Court considered that the only aggravating circumstance proven was that enshrined in paragraph (3) of Article 310 of the Criminal Code because the author was within the fourth degree of consanguinity. The Court considered that the aggravating circumstances of paragraphs (1), (2) and (7) of the same article were not established, because the victim did not have minor, serious or very serious injuries; There was doubt about the extent of the harm that Brisa suffered, because the existence of humiliating or degrading conditions had not been proven. *Cf*. Judgment issued by the Sentencing Court No. 4, *supra* (evidence file, folio 7669).

[99] *Cf.* Judgment issued by the Sentencing Court No. 4, *supra* (evidence file, folios 7667, 7668 and 7673).

[100] *Cf.* Restricted appeal filed by José Miguel De Angulo and Luz Stella Losada on April 14, 2003 (evidence file, folios 7697 to 7712), and appeal filed by E.G.A. on April 14, 2003 (evidence file, folios 7743 to 7752).

session without intervention and assistance of the parties to the proceedings, mainly the accused (*supra* para. 57).[101] On June 23, 2003, said ruling was appealed in cassation by the complainants and, on June 24, 2003, the Public Prosecutor's Office joined the appeal. However, on July 24, 2003, the Criminal Chamber of the Supreme Court of Justice of the Nation declared the appeal inadmissible on the grounds that it did not meet the legal requirements for its admissibility because contradictory precedents had not been cited.[102]

62. After the filing of various appeals,[103] finally on April 11, 2005, the First Criminal Chamber completely annulled the sentence of Sentencing Court No. 4 of March 28, 2003, and ordered a retrial by another court in which the victim's statement was given only in the presence of the accused's defense attorney.[104]

63. On March 19, 2004, Sentencing Court No. 1 modified the precautionary measures imposed on E.G.A. replacing the measure of departmental preventative detention with the measure of national preventative detention and changing the period of presentation of the accused before the Court Registrar's Office from 7 to 15 days.[105]

D.2 Second oral trial

64. The second trial began on September 15, 2005, before the Sentencing Court No. 2 of Cochabamba (hereinafter "Sentencing Court No. 2").[106] During the trial, testimony was given by the accused,[107] the alleged victim, without the presence of the accused,[108] the psychologist who treated Brisa after the complaint made on July 15, 2002 (*supra* para. 52),[109] the domestic worker at the

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101 *Cf.* Order issued by the First Criminal Chamber, *supra* (evidence file, folios 9720 to 9722).

102 *Cf* Cassation Appeal on the form filed by José Miguel De Angulo and Luz Stella Losada on June 23, 2003 (evidence file, folios 9729 to 9734), and order issued by the Criminal Chamber of the Supreme Court of Justice of the Nation on July 24, 2003 (evidence file, folios 9738 to 9739).

103 *Cf.* Appeal for constitutional protection in execution of sentence presented by José Miguel De Angulo and Luz Stella Losada on November 21, 2003 (evidence file, folios 7895 to 7924); Order issued by the Third Chamber, *supra* (evidence file, folios 9744 to 9753); Constitutional Ruling 0295/2004-R issued by the Constitutional Court on March 3, 2004 (evidence file, folios 7980 to 7986); Judgment issued by the Second Civil Chamber, *supra* (evidence file, folios 8050 to 8052), and Constitutional Ruling 1015/2004-R issued by the Constitutional Court on July 2, 2004 (evidence file, folios 8058 to 8069).

104 *Cf.* Judgment issued by the First Criminal Chamber on April 11, 2005 (evidence file, folios 8123 to 8124).

105 *Cf.* Record of public hearing to modify the precautionary measures imposed on March 19, 2004 (evidence file, folios 10921 to 10922).

106 *Cf.* Record of oral trial hearing from September 15 to 20, 2005 (evidence file, folios 9826 to 9871).

107 E.G.A. described, inter alia, that the sexual relations were consensual; that there was no violence, threats or intimidation between him and Brisa, and at the end of the trial, he indicated that he had been subjected to this process for three years, complying punctually with attendance, he did not escape, even when his own family asked him to do so." *Cf*. Record of oral trial hearing from September 15 to 20, 2005 (evidence file, folios 9836 and 9870).

108 Brisa explained that E.G.A. hit her when she didn't do what he wanted; She referred to the sexual assaults, and the first time they started; she indicated that she had confused feelings: she loved him, but she also felt "disgusted," and she indicated that after 3 months she denied pregnancy and told the accused that she had had an abortion. She also indicated that in the United States of America she went to at least ten psychologists. *Cf*. Record of oral trial hearing from September 15 to 20, 2005 (evidence file, folios 9839 to 9840). As she reported, one of the judges told Brisa that he would "throw her out of the [Court]" if she did not stop crying. *Cf*. Letter from Brisa De Angulo, *supra* (evidence file, folio 7254).

109 Among her expressions are: having indicated that "there was a lot of guilt" and psychological violence; that Brisa expressed that the first time it happened she felt very uncomfortable and to avoid a repetition of the events she invented a pregnancy, and that Brisa presented indicators common in victims of sexual assault. *Cf*. Record of oral trial hearing from September 15 to 20, 2005 (evidence file, folios 9841 to 9842).

family's house,[110] another psychologist, [111] José Miguel de Angulo[112] and the mother of the accused[113]. A total of five hearings were held with a duration of between 21 minutes and 7 hours and 16 minutes, and five prosecution witnesses, one defense witness and two experts from the complainants and/or the Public Prosecutor's Office testified.[114]

65. In a hearing on September 15, 2005, the Sentencing Court No. 2 of Cochabamba decided to exclude evidence from the forensic medical certificate of July 31, 2002, at the request of the accused's defense.[115] On conclusion of the trial, on September 23, 2005,[116] the aforementioned Court unanimously acquitted E.G.A. The ruling indicated, among other aspects, that (i) there was no efficient investigation attributing elements of the conviction; (ii) due to "evidentiary weakness" it could not conclude whether the sexual intercourse "constituted consensual sexual intercourse or sexual assault or whether there was actually sexual intercourse, because there is no forensic medical certificate that confirms such a situation"; (iii) it took as a proven fact that there were behavioral changes in the alleged victim "resulting from traumatic situations," but found no evidence that linked them to E.G.A., and (iv) there was no evidence that E.G.A.'s behavior had invalidated Brisa's sexual freedom. Furthermore, it concluded that "it had not been possible to identify guilt or intent in the conduct of the accused because sexual relations between cousins causes discomfort in society, but it is not a crime, and that the aggravating circumstance applicable to rape between relatives requires violence and "in this case, no violence or intimidation was observed."[117]

66. The issuance of the acquittal ruling provided for the cessation of all personal precautionary measures that had been imposed on E.G.A. to date.[118] On September 28, 2005, Sentencing Court No. 2 ordered the removal of precautionary measures against E.G.A.[119]

67. On October 8 and 11, 2005, the complainants and the Public Prosecutor's Office, respectively, appealed the sentence.[120] On March 1, 2006, the oral arguments hearing in support of the appeals was held.[121] On March 6, 2006, the First Criminal Chamber confirmed the appealed sentence, considering, inter alia, that it had not been proven that the victim had been "frightened in such a way as to constrain her will and ability to resist."[122] This ruling was appealed in cassation by the complainants on March 22, 2006. On November 16, 2006, the First Criminal Chamber annulled the

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110 Ms. C.M. highlighted the change in Brisa's attitude after the arrival of the accused. *Cf*. Record of oral trial hearing from September 15 to 20, 2005 (evidence file, folios 9844 to 9845).

111 R.M.Q. pointed out that the tests carried out on Brisa showed traces of sexual violence and signs of post-traumatic stress. *Cf*. Record of oral trial hearing from September 15 to 20, 2005 (evidence file, folios 9849 to 9850).

112 In his testimony, José Miguel De Angulo indicated that Brisa began to change and became aggressive after the arrival of the accused. In addition, he narrated her trip to the United States of America and the discovery of the sexual assaults. The statement was interrupted because the witness was "very nervous." *Cf*. Record of oral trial hearing from September 15 to 20, 2005 (evidence file, folios 9851 to 9852).

113 M.C.A. indicated that it was very common to see Brisa show "attention" towards the accused, she caressed him and put her hand under his shirt. *Cf*. Record of oral trial hearing from September 15 to 20, 2005 (evidence file, folio 9863).

114 *Cf.* Record of oral trial hearing from September 15 to 20, 2005 (evidence file, folios 9826 to 9871).

115 *Cf.* Record of oral trial hearing from September 15 to 20, 2005 (evidence file, folio 9854).

116 Mr. De Angulo stated that the deliberation of the sentence lasted 45 minutes. *Cf*. Statement of José Miguel De Angulo, *supra* (evidence file, folio 11441).

117 *Cf.* Judgment issued by Sentencing Court No. 2 on September 16, 2005 (evidence file, folios 10737 to 10738).

118 *Cf.* Judgment issued by the Sentencing Court No. 2, *supra* (evidence file, folio 10738).

119 *Cf.* Decision issued by Sentencing Court No. 2 on September 28, 2005 (evidence file, folio 8334).

120 *Cf.* Appeal filed by the Public Prosecution on October 11, 2005 (evidence file 8558 to 8566) and brief of appeal presented by Filiberto Camargo and María Leonor Oviedo Bellot, representing Brisa De Angulo Losada, on October 8, 2005 (evidence file, folios 11025 to 11047).

121 *Cf.* Record of hearing of oral reasoning for a restricted appeal issued by the First Criminal Chamber on March 1, 2006 (evidence file, folios 8621 to 8626).

122 *Cf.* Restricted appeal ruling issued by the First Criminal Chamber on March 6, 2006 (evidence file, folios 8629 and 8631).

contested hearing order.[123] On May 10, 2007, the First Criminal Chamber decided the restricted appeals, annulling the appealed sentence of September 2005 and ordering the remand of the case for a new trial by another sentencing court. On December 3, 2007, the Second Criminal Chamber declared the appeal filed by E.G.A. 6 months earlier, against the decision that annulled the acquittal judgment, as inadmissible.[124]

D.3 Third oral trial

68. On July 15, 2008, the Sentencing Court No. 3 of Cochabamba (hereinafter "Sentencing Court No. 3") ordered a trial be held on September 8, 2008, after the Sentencing Courts No. 1 and No. 2, both from Cochabamba, excused themselves from hearing the case due to having already taken part in it.[125]

69. On August 1, 2008, Sentencing Court No. 3 ordered an "expert opinion on the points indicated in the accusation."[126] On August 20 of the same year, a new gynecological forensic examination was carried out.[127].

70. On September 3, 2008, the Court scheduled a hearing to be held on September 22, 2008, however, E.G.A. did not appear. The Court set a new hearing for October 28, 2008, and again E.G.A. did not appear. That same day the Court declared his contempt of court, ordered that an arrest warrant and other precautionary measures be issued against him, in addition to declaring the trial suspended.[128] The arrest warrant was issued on November 6, 2008.[129]

71. Since then, it is known that essentially the following procedures were carried out between 2008 and 2020: on May 27, 2009, the Cochabamba District Prosecutor's Office requested a "report" from Interpol on E.G.A.'s criminal or judicial record in Colombia and Ecuador, his "migratory trajectory" and if the person referred to was in Colombia and their address.[130] On August 18, 2009, the Subject Matter Prosecutor assigned to the Minors and Family Division requested "a copy of the security video of entries and exits on July 23 and 24, 2009".[131] In 2014, the Subject Matter Prosecutor made a request to the Departmental Commander of the Cochabamba Police to "order that Interpol

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123 *Cf.* Brief of cassation appeal filed by the complainant lawyers on March 22, 2006 (evidence file, folios 8669 to 8687), and Decision issued by the First Criminal Chamber on November 16, 2006 (evidence file, folio 8731).

124 *Cf.* Judgment issued by the First Criminal Chamber, Superior Court of Justice Cochabamba on May 10, 2007 (evidence file, folio 8827); Cassation appeal filed by E.G.A. on June 22, 2007 (evidence file, folios 8902 to 8913), and Judgment issued by the Second Criminal Chamber on December 3, 2007 (evidence file, folios 8931 to 8932).

125 *Cf.* Order issued by the Sentencing Court No. 1 on June 11, 2008 (evidence file, folio 8976) Order to forward the file issued by the Sentencing Court No. 2 on June 18, 2008 (evidence file, folio 8983), and Order issued by the Sentencing Court No. 3 on July 15, 2008 (evidence file, folios 9000 to 9005).

126 *Cf.* Decision of August 1, 2008, issued by the Sentencing Court No.3 (evidence file, folio 10545), and Brief of the Public Prosecution, of July 29, 2008 (evidence file, folio 10543).

127 *Cf.* Forensic medical expert report issued by Dr. M.R.C. on August 20, 2008 (evidence file, folio 9195).

128 *Cf.* The accused sent a letter dated September 16, 2008, to the Court, stating that for 6 years he had undergone 2 annulled trials, that he had granted power to his lawyers to represent him, and that he had not been notified of the trial at his previous address in Bolivia. He reported his address in Colombia and sent certifications from a travel agency stating that it had not been possible to obtain tickets from Cali (Colombia) to La Paz (Bolivia) to attend the hearing scheduled for September 22, 2008. *Cf*. Letter signed by E.G.A. on September 16, 2008 (evidence file, folios 9176 to 9179); Record of court constitution of September 3, 2008 (evidence file, folios 9143 to 9144); Record of suspension of oral trial issued by Sentencing Court No. 3 on September 22, 2008 (evidence file, folios 9174 to 9175), and Record of suspension of registration of oral trial and declaration of default issued by the Sentencing Court No. 3 on October 28, 2008 (evidence file, folios 9946 to 9949).

129 *Cf.* Arrest warrant issued by Sentencing Court No. 3 against E.G.A. on November 6, 2008 (evidence file, folio 9428).

130 Official letter issued by the Prosecutor for matters of record of the Cochabamba District Prosecutor's Office on May 27, 2009 (evidence file, folio 10647).

131 *Cf.* Request issued by the Prosecutor for matters of record assigned to the Minors and Family Division on August 18, 2009 (evidence file, folio 10654).

issue a report regarding the search and capture [of E.G.A.].[132] On February 8, 2018, Sentencing Court No. 3 issued a new arrest warrant;[133] on March 5, 2018, the Public Prosecutor's Office required the National Director of Interpol to escalate the international notification of search, location and detention in the system, for the purposes of extradition of the accused who was in contempt of court.[134] On July 23, 2018, Interpol Colombia informed Interpol in Bolivia that the accused in contempt of court, was in Colombian territory, and a supplementary report was issued to begin the process of requesting an arrest warrant for extradition purposes.[135]

72. Regarding the extradition process through diplomatic channels, on April 25, 2018, the Bolivian Ministry of Foreign Affairs (hereinafter "MFA Bolivia") transmitted the request for international legal cooperation and an invitation to a meeting on May 8, 2018, to the Colombian Embassy.[136] In response, on July 4, 2018, the Bolivian Embassy in Colombia reported that the International Affairs Directorate of the Attorney General's Office of Colombia sent a letter to Interpol in order to carry out proceedings to search for the absconded defendant.[137] On March 14, 2019, the MFA Bolivia went to the Colombian Embassy and requested a meeting, with no known response.[138].

73. On May 6, 2019, the Public Prosecutor's Office requested Sentencing Court No. 3 issue a provisional arrest warrant for extradition purposes, and within the framework of the Extradition Agreement signed by the Republics of Ecuador, Bolivia, Peru, Colombia and Venezuela on July 18, 1911, the extradition process begin through diplomatic channels.[139] On May 20, 2019, Sentencing Court No. 3 admitted E.G.A.'s extradition request, ordering on May 24, 2019, that the order be communicated to the Supreme Court of Justice along with photocopies of the criminal proceedings against E.G.A.[140] In response to this, on May 29, 2019, the Supreme Court of Justice ordered the return of the aforementioned order of May 20, 2019 and other attached documents, considering that, according to Instruction No. 8/2017 of March 28, 2017, active extradition requests must be made directly with the MFA Bolivia.[141] Thus, on July 10, 2019, the Sentencing Court No. 3 ordered the referral of the relevant proceedings, including the order of May 20, 2019, to the Public Prosecutor's Office so that the processing of the aforementioned request for extradition before the MFA Bolivia could be made "viable".[142] On December 30, 2019, the Directorate of International Legal Affairs of

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132 *Cf.* Request issued by the Prosecutor to the Departmental Commander of the Cochabamba Police on February 28, 2014 (evidence file, folio 11194).

133 *Cf.* Request for a new arrest warrant signed by the assigned Prosecutors on February 5, 2018 (evidence file, folio 11196), and Arrest Warrant issued by the Sentencing Court No. 3 on February 8, 2018 (evidence file, evidence, folios 11198 to 11199).

134 *Cf.* Request issued by the Prosecutor on February 28, 2018, presented on March 5, 2018 (evidence file, folio 11201), and Publication of red notice in Interpol on March 9, 2018 (evidence file, folio 11202 to 11203).

135 *Cf.* Mail sent by Interpol Colombia on July 23, 2018 (evidence file, folio 11208); Report DNI-DDI-DN TRTF-607/2018, issued by the Interpol Chief of Investigators, La Paz on July 23, 2018 (evidence file, folios 11209 to 11210), and CITE Note No. 925/2018/ ERM signed by the Departmental Director of Interpol La Paz on July 23, 2018 (evidence file, folio 11211).

136 *Cf.* Note PGE-DESP-SPDRLE-DGDDHMA No. 224/2018 issued by the Attorney General of Bolivia on March 26, 2018 (evidence file, folios 11213 to 11215); Note GM-DGAJ-UAJI-ND-5/2018 issued by the MFA of Bolivia on April 25, 2018 (evidence file, folio 11217), and Note GMDGAJ-UAJI-Cs 797/2018 issued by the National Directorate of Legal Affairs of the MFA, Bolivia on April 25, 2018 (evidence file, folio 11218).

137 *Cf.* Note SC Cite EB.CO.-NSC-204/2018 signed by the Ambassador of Bolivia in Colombia on July 4, 2018 (evidence file, folio 11220), and Official Letter No. 2018170041891 signed by the Director of the Directorate of International Affairs of the Attorney General's Office on May 30, 2018 (evidence file, folio 11221).

138 *Cf.* Official Letter signed by the Legal Affairs Directorate of the MFA of Bolivia on March 14, 2019 (evidence file, folios 11223 to 11224).

139 *Cf.* Brief presented by the Public Prosecution on May 6, 2019 (evidence file, folios 11239 to 11244).

140 *Cf.* Order issued by Court No. 3 on May 20, 2019 (evidence file, folios 11247 to 11249), and Note of transmission of the procedural file issued by Court No. 3 on May 2, 2019 (file of evidence, folio 11250).

141 *Cf.* Order issued by Judge Semanero of the Plenary Chamber of the Supreme Court of Justice on May 29, 2019, and Note of FULL CHAMBER OF. No. 490/2019 of May 29, 2019 (evidence file, folios 11252 to 11253).

142 On October 8, 2019, the Prosecutor's Office required that the relevant proceedings be sent to the MFA of Bolivia *Cf*.

the MFA Colombia requested additional information from Bolivia.[143] On February 18, 2020, Sentencing Court No. 3, at the request of the Office of the Public Prosecutor, reiterated the Preventive Detention Order for the purposes of Extradition and Letter Rogatory Request to the Republic of Colombia.[144] On March 5, 2020, a letter rogatory was issued with a formal request for extradition to the competent authority in Colombia.[145]

74. Upon receipt of a letter from E.G.A., the MFA Colombia requested information including on the prescription of the criminal proceedings, so that National Attorney General's Office could rule on the capture of E.G.A.[146] Sentencing Court No. 3 issued a report responding to said request, which was sent to the Colombian Embassy in Bolivia on September 10, 2020.[147]

75. On February 21, 2022, E.G.A. was captured for extradition purposes in Colombian territory. However, on September 7, 2022, the Deputy Attorney General of the Nation assigned by the Office of the Attorney General of the Nation decided to cancel the arrest warrant against E.G.A. due to "the criminal action being expired under the statute of limitations in view of Colombian regulations,"[148] and his immediate release was ordered "by virtue of the unfavorable opinion issued by the Cassation Chamber of the Supreme Court of Justice [of Colombia]."[149]

VII
MERITS

76. This case deals with the criminal process instituted following the complaint of sexual violence and rape committed against a girl in the family environment. Taking into account the arguments of the parties and the Commission, the Court is called upon in the *sub judice* case to analyze the alleged international responsibility of Bolivia, based on its international obligations arising from the American Convention, and in particular from the Convention of Belém do Pará, for a series of state actions and omissions within the framework of the aforementioned criminal process, since the duty of enhanced due diligence and special protection had not been respected, and the alleged victim had been revictimized, among other alleged effects. The Court recalls that it is not within its remit to rule on the individual criminal responsibility of E.G.A.

Brief presented by the Public Prosecution on July 5, 2019 (evidence file, folio 11255); Order issued by Court No. 3 on July 10, 2019 (evidence file, folio 11256); Brief presented by the Public Prosecution on October 3, 2019 (evidence file, folio 11258); Order issued by the Sentencing Court No. 3 on October 9, 2019 (evidence file, folio 11259), and Note of transmission of the procedural file issued by the Sentencing Court on October 16, 2019 (evidence file, folio 11260).

143 *Cf.* Note signed by the Director of the Directorate of International Affairs of the Attorney General's Office on December 13, 2019 (evidence file, folio 11262).

144 *Cf.* Brief presented by the Public Prosecution on February 14, 2020 (evidence file, folios 11269 to 11278) and Order issued by the Sentencing Court No. 3 on February 18, 2020 (evidence file, folio 11279).

145 *Cf.* Request for Preventive Detention for the Purposes of Extradition, Note of March 5, 2020, Remittance Notes of September 2, 2020, CITE: GM-DGAJ-UAJI-NSE-338/2020 H.R. 41141.20 of September 10, 2020, and Note GM-DGAJ-UAJI-Cs-1006/2020 of March 11, 2020 (evidence file, folios 11285 to 11322).

146 *Cf.* Note DIAJI No. 0994 of April 7, 2020, and annexes (evidence file, folios 11324 to 11345).

147 *Cf.* Note Cite GM-DGAJ-UAJI-NSE.338/2020 (H.R.: 41141.20) signed by the Director of Legal Affairs of the MFA, Bolivia on September 10, 2020 (evidence file, folio 11350); Remittance Note dated September 2, 2020 (evidence file, folio 11351), and Report prepared by Sentencing Court No. 3 on April 29, 2020 (evidence file, folio 11352).

148 *Cf.* Cancellation of the arrest warrant for extradition purposes signed by the Deputy Attorney General of the Nation with Assignment of Functions of the Office of the Attorney General of the Nation, Colombia on September 7 (evidence file, folios 12080 to 12086).

149 *Cf.* Official letter issued by the Directorate of Legal Affairs of the Ministry of Foreign Affairs, Colombia on September 16, 2022 (evidence file, folio 12078).

VII-1
RIGHTS TO HUMANE TREATMENT, TO PRIVATE AND FAMILY LIFE, TO THE RIGHTS OF THE CHILD, TO EQUALITY BEFORE THE LAW, TO A FAIR TRIAL AND JUDICIAL PROTECTION, IN RELATION TO THE OBLIGATIONS TO RESPECT AND GUARANTEE RIGHTS AND NOT TO DISCRIMINATE, AND ADOPT PROVISIONS IN DOMESTIC LAW[150], AND ARTICLES 7(B), 7(C), 7(E) AND 7(F) OF THE CONVENTION OF BELÉM DO PARÁ

A. Arguments of the parties and the Commission

77. Regarding the duty of special protection and enhanced due diligence in the investigation, the ***Commission*** indicated that, in this case, a serious, impartial and effective investigation aimed at determining the truth was not carried out through all available legal means, with the enhanced due diligence required by Articles 7(b) and (f) of the Convention of Belém do Pará and Article 19 of the American Convention. The Commission indicated that this lack of investigation led to the dismissal and remand of the case for a new criminal trial, violating the alleged victim's right to an effective judicial remedy. Furthermore, it noted that during the investigation and prosecutions, the necessary measures were not adopted to avoid Brisa's revictimization, and the procedures were not conducted with a gender and childhood perspective or in accordance with the duty of strict and enhanced due diligence, and special protection that cases of sexual violence against an "adolescent woman" require. The above is due to the fact that (i) the State did not provide her with immediate medical and psychological assistance; (ii) the Prosecutor "subjected" her to traumatic interviews in a hostile and inappropriate environment, and (iii) Brisa was subjected to an abusive and humiliating forensic examination degrading her privacy, among other alleged acts of violation. Additionally, the Commission noted that, during said examination, there was excessive presence of health personnel, use of force and disrespect for the alleged victim's requirements and expressions of anguish and pain,[151] and that, seven years after the events occurred, she was subjected to a new gynecological examination, "which was absolutely unnecessary."

78. Regarding the reasonable period of time, the Commission stated that, due to the errors and shortcomings in the investigation and prosecution, there was an excessive delay in the criminal process, since, almost 18 years after the occurrence of the events, there is no final judgment. It explained that such delay is not attributable to the complexity of the matter or to the procedural activity of the interested parties, but to the conduct of the authorities that "caused significant delays in the processing of various appeals, the revocation of two final sentences and the resubmission of the case for new prosecution on two occasions." Furthermore, "they did not take the necessary safeguards to prevent the suspect from fleeing, even though there was sufficient evidence of said risk in the process, nor have they taken the necessary measures to conclude the proceedings against him."

79. Regarding the duty to respect rights without discrimination, the Commission indicated that judicial ineffectiveness and inefficiency in cases of violence against women, as happened in the case under examination, constitute in themselves discrimination against women in access to justice and foster an environment of impunity, which facilitates and promotes the repetition of events.

80. The ***representatives*** noted that the investigation and prosecution of Brisa's case lacked a gender perspective and sensitivity to children.

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[150] Articles 5(1), 5(2), 11(2), 19, 24, 8 and 25 of the American Convention on Human Rights, read in conjunction with Articles 1(1) and 2 thereof.

[151] The Commission stated that circumstances such as these constitute an arbitrary interference in the private life of the alleged victim and, since there was force and absence of consent to continue with the expert examination, it constitutes "serious" institutional violence of a sexual nature.

81. Regarding gender and age-based discrimination, the representatives pointed out that discrimination manifested itself in aspects such as: (i) the unequal treatment provided by government officials, who treated Brisa in an "unequal and unfair manner because she was a teenager, a woman and a victim of incest, which is culturally accepted in Bolivian society; (ii) "inherently discriminatory" laws; (iii) the lack of legislation that classifies incest as a separate offense; (iv) the conversion of the criminal offense charged, from rape to statutory rape, by the Court of First Instance;[152] (v) the questioning in the case by the officials in charge, of Brisa for being "too 'strong' and not "scream[ing] when she was raped"; (vi) the admission of "irrelevant" evidence that allowed statements about whether Brisa liked to wear makeup and stand around street corners "looking for men," and (vii) the position of the Court of First Instance in interpreting that proof of an imminent threat was required for the "intimidation" element of the criminal offense, which the alleged victim, having a "'strong personality', could not experience."

82. Regarding the right to a fair trial and judicial protection, the representatives alleged that, from the beginning of the criminal process to the present, the judicial system has deprived Brisa of her right to a fair trial and timely and effective judicial protection. They indicated that the conduct of the police, forensic doctors, and judicial authorities was partial and ineffective, and at each stage of the proceedings, there was a lack of both gender perspective and intersectional approach.

83. Regarding the right to humane treatment, they indicated that Bolivia did not respect the physical and mental integrity, nor the dignity of Brisa during the handling of her case and the judicial process. In addition, they indicated that the Bolivian judicial system also subjected Brisa to institutional violence by not guaranteeing her right to integrity and humane treatment. Specifically, the representatives stated that Brisa was subjected to two gynecological examinations: the first, "abusive"[153] and the second, "unnecessary"; she endured hours of "harsh interrogations" and the "skepticism of the Prosecutor"; she had been threatened and pressured by the Prosecutor, and forced to repeat her story; she had to pay the transportation costs for the execution of E.G.A.'s arrest warrant, and she had to sit together with the witnesses for the defendant.

84. Regarding the duty to protect honor and dignity, the representatives alleged that the Bolivian judicial system subjected the alleged victim to arbitrary and abusive interference in her private life and did not respect or acknowledge her dignity, in violation of articles 11(1), 11(2) and 11(3) of the American Convention. They specified that, throughout the judicial process, the courts "systematically" focused on Brisa's behavior and personality and did not protect her from the threats and attacks from E.G.A. and his family. They added that she was subjected to multiple medical examinations while being ridiculed; she was treated as if she were guilty; she was forced to sit in a narrow room with the defendant's "hostile witnesses," and "deeply hurtful, despicable, and irrelevant" statements were allowed to be made about Brisa […] and her family."

85. The ***State*** first indicated that, at the time of the reported events, between 2001 and 2002, it had adopted legislative, administrative and structural measures to combat all forms of discrimination against women and of sexual violence, which proves that Bolivia did not consent or tolerate, nor did it have a culture of impunity for such acts of violence.

86. Second, the State indicated that neither the Commission nor the representatives provided reliable evidence to demonstrate the existence of violations of Articles 5(1) and 11(2) of the American Convention. He added that the "medical examinations and the criminal process were conducted with protection for the humane treatment, private life and intimacy of the alleged victim." It maintained

[152] The representatives explained that the sentences for the crime of statutory rape are lower than those for the crime of rape and implicitly imply consent. In that sense, they pointed out that the Court relied on stereotypes of adolescent girls and focused on Brisa's alleged "strong personality" to conclude that she was not raped by E.G.A.

[153] The representatives indicated that during the examination "Brisa burst into tears and asked them to stop the examination [to which,] the students [assisting the forensic doctor] laughed at her, called her ridiculous and forced her to open her legs for the exam. Brisa cried throughout the exam."

that both the medical examination of July 31, 2002, and that of August 20, 2008, were carried out by Dr. M.R.C., who was duly trained to perform medical examinations in cases of sexual violence against children and adolescents. It highlighted that the examinations were requested by the legal representative of the alleged victim and her then defense. It clarified that the expert medical certificate of July 31, 2002, was excluded from the documentary evidence because the medical-legal review was carried out following the request of Brisa's then legal advisor and not due to a prosecution requirement. Moreover, it noted that the alleged victim did not report any violation in the domestic sphere of her right to humane treatment or privacy due to the medical examinations of 2002 and 2008.

87. Third, it stated that the alleged victim's statement was made in a safe, adequate and friendly environment, by specialized professional persons. It added that the actions carried out by the Prosecutor were in accordance with demands for due diligence and protection for Brisa, and that she carried out a serious, impartial and immediate preliminary and preparatory investigation. Furthermore, it pointed out that the alleged victim did not give a statement to the aforementioned Prosecutor and did not have direct contact with her, so the facts presented against said Prosecutor lack logic and objectivity. Finally, it rejected that Bolivia had concentrated on investigating the private life of the alleged victim, and that Brisa was for several weeks or days in the waiting room and alone with E.G.A.'s witnesses. It also argued that there is no element of conviction to prove the alleged threats and intimidation by E.G.A., and, on the contrary, on the only record of alleged threats, she was told which were the appropriate and relevant steps, which, however, she did not take.

88. Fourth, the State maintained that it guaranteed access to justice, carried out a serious and impartial investigation and acted with enhanced due diligence and special protection during the investigation. It added that the judicial body conducted the trials in compliance with the judicial guarantees of the parties, and they made use of the effective judicial remedies provided for in the legal system. Furthermore, it specified that the evidentiary exclusions made in the trials were not due to an alleged deficiency in the investigation, but rather to the actions of Brisa's parents and her lawyers, who "did not manage the legal collection of evidence in accordance with criminal procedure." Nor was the annulment of the second sentence due to alleged shortcomings or partiality in the investigation.

89. It also explained that the courts' actions regarding the non-application of the crime of rape cannot be considered discriminatory treatment, since Brisa was not denied access to justice and the criminal proceedings have not yet concluded. Regarding the safety and enhanced protection measures, it maintained that, in order to safeguard and protect Brisa's identity and dignity, all the acts of the hearing were carried out "in a confidential manner."

90. Finally, it pointed out that the accused's escape and failure to appear are not attributable to the State. It indicated that "the continuity of the process against [E.G.A.] is guaranteed and is currently subject to the authorization of his extradition from Colombia." It added that Bolivia established in its national regulations the appropriate, suitable and effective legal mechanisms for the investigation and punishment of the events affecting the legal situation of the alleged victim.

B. Considerations of the Court

91. Taking into consideration the arguments of the parties and the Commission, the Court will next examine in a single chapter: 1) enhanced due diligence and the duty of special protection in investigations and criminal proceedings related to sexual violence committed against children and the duty of non-revictimization; 2) the reasonable timeframe and speed of the process; 3) consent in crimes of sexual violence and alleged discrimination in Bolivian criminal legislation; 4) discrimination in access to justice based on reasons of gender and age, as well as the status of the alleged victim as a developing individual, and 5) conclusion.

B.1 Enhanced due diligence and the duty of special protection in investigations and criminal proceedings related to sexual violence committed against children and the duty of non-revictimization

B.1.(a) The essential components of the duty of enhanced due diligence and the special protection of children

92. The Court has reiterated that, in accordance with the American Convention, the States Parties are obliged to provide effective judicial remedies to victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of the due process of law (Article 8(1)), all within the general obligation, carried out by the States themselves, to guarantee the free and full exercise of the rights recognized by the Convention to all persons under their jurisdiction (Article 1(1)).[154]

93. Similarly, the Court has consistently indicated that the duty to investigate is an obligation of means and not of results, which must be assumed by the State as its own legal duty and not as a simple formality condemned in advance to be fruitless.[155] The aforementioned obligation remains "regardless of the agent to whom the violation may be attributed, even individuals, since if their actions are not seriously investigated they would be, in a certain way, aided by public power, which would compromise the international responsibility of the State."[156] Furthermore, the investigation must be serious, objective and effective, and be aimed at determining the truth, and the persecution, capture, and possible prosecution and punishment of the perpetrators of the events.[157]

94. It should be remembered that, in cases of violence against women, the general obligations provided for in Articles 8 and 25 of the American Convention are complemented and reinforced by the obligations arising from the Convention of Belém do Pará.[158] In its Article 7(b), said Convention specifically obliges States Parties to use "due diligence to prevent, investigate and eradicate violence against women."[159] In turn, Article 7(f) provides that States must "establish fair and effective legal procedures for women who have been subjected to violence, which include, among others, protective measures, a timely hearing and effective access to such procedures."[160] Thus, in the event of an act

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154 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*, *supra*, para. 91, and *Case of Aroca Palma et al. v. Ecuador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 8, 2022. Series C No. 471, para. 103.

155 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 177, and *Case of Sales Pimenta v. Brazil, supra*, para. 85.

156 *Cf. Case of Velásquez Paiz et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 19, 2015. Series C No. 307, para. 143, and *Case V.R.P., V.P.C. et al. v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs*. Judgment of March 8, 2018. Series C No. 350, para. 151.

157 *Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary Objection, Merits, Reparations and Costs*. Judgment of June 7, 2003. Series C No. 99, para. 127, and *Case of Sales Pimenta v. Brazil, supra*, para. 85.

158 In relation to the investigation of acts committed against women, the application of the Convention of Belém do Pará does not depend on an absolute degree of certainty as to whether or not the act to be investigated constituted violence against women in the terms of said Convention. In this regard, it should be highlighted that it is through compliance with the duty to investigate established in Article 7 of the Convention of Belém do Pará that, in various cases, certainty can be reached as to whether or not the act investigated constituted violence against women. The fulfillment of such a duty cannot, therefore, be made dependent on said certainty. It is then sufficient, in order to trigger the obligation to investigate under the terms of the Convention of Belém do Pará, that the fact in question presents material characteristics that, reasonably examined, indicate the possibility that it is an act of violence against women. *Cf. Case of Véliz Franco et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 19, 2014. Series C No. 277, footnote 254, and *Case of Barbosa de Souza et al. v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 7, 2021. Series C No. 435, footnote 288.

159 *Cf. Case of Fernández Ortega et al. v. Mexico. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 30, 2010. Series C No. 215, para. 193, and *Case of Maidanik et al. v. Uruguay*. *Merits and Reparations*. Judgment of November 15, 2021. Series C No. 444, para. 156.

160 *Cf. Case of Fernández Ortega et al. v. Mexico, supra*, para. 193, and *Case of Guzmán Albarracín et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of June 24, 2020. Series C No. 405, para. 117.

of violence against a woman, it is particularly important that the authorities in charge of the investigation carry it out with determination and effectiveness, taking into account the duty of society to reject violence against women and the obligations of the State to eradicate it and to give victims confidence in state institutions for their protection.[161]

95. For cases of rape and violence against adult women, the Court has established a series of criteria that States must follow so that the investigations and criminal proceedings initiated are substantiated with the enhanced due diligence that is required.[162] Similarly, in the case of *V.R.P., V.P.C. et al. v. Nicaragua*, the Court had the opportunity to develop its case law regarding a State's obligations when the investigations and criminal proceedings take place in the framework of a case of rape committed against a girl. Similarly, the Court emphasizes that the *sub judice* case deals with sexual violence committed against a 16-year-old girl, therefore, it is also necessary that the case be studied in light of this intersectionality between gender and childhood.[163] This is because the fact that Brisa is a woman and was a child at the time of the events placed her in a situation of double vulnerability, not only in regard to the perpetrator of the crime, but also in regard to the judicial process that would be carried out against them.

96. The Court has indicated that children[164] are holders of the human rights that correspond to all human beings and also enjoy special rights derived from their status, to which the family, society,

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[161] *Cf. Case of Fernández Ortega and others v. Mexico, supra*, para. 193, and C*ase of Maidanik et al. v. Uruguay, supra*, para.156.

[162] In a criminal investigation for sexual violence, the Court has established that it is necessary, inter alia, that: (i) the victim's statement be made in a comfortable and safe environment, which provides privacy and trust; (ii) the victim's statement is recorded in such a way as to avoid or limit the need to repeat it; (iii) medical, health and psychological care is provided to the victim, both on an emergency basis and on an ongoing basis if required, through a care protocol that aims to reduce the consequences of the rape; (iv) a complete and detailed medical and psychological examination is immediately carried out by suitable and trained personnel, if possible of the sex indicated by the victim, offering that she be accompanied by someone she trusts if she so wishes; (v) the investigative acts are documented and coordinated and the evidence is diligently handled, taking sufficient samples, carrying out studies to determine the possible authorship of the incident, securing other evidence such as the victim's clothing, immediately investigating the scene of the events and guaranteeing the correct chain of custody, and (vi) access to free legal assistance is provided to the victim during all stages of the process. Furthermore, in cases of alleged acts of violence against women, the criminal investigation must include a gender perspective and be carried out by officers trained in similar cases and in caring for victims of gender-based discrimination and violence. *Cf. Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 16, 2009. Series C No. 205, para. 455; *Case of Fernández Ortega et al. v. Mexico, supra*, paras. 194, 251 and 252; *Case of Espinoza Gonzáles v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 20, 2014. Series C No. 289, paras. 242 and 252; *Case of Favela Nova Brasilia v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of February 16, 2017. Series C No. 333, para. 254, and *Case of Azul Rojas Marín et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of March 12, 2020. Series C No. 402, para. 180.

[163] The Court has already heard of circumstances in which "multiple factors of vulnerability and risk of discrimination associated with [the] condition of a person as a girl [and] woman" converged in an intersectional manner, among other factors, and has indicated that "certain groups of women suffer discrimination throughout their lives based on more than one factor combined with their sex." Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 1, 2015. Series C No. 298, paras. 288 and 290, and *Case of Manuela et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 2, 2021. Series C No. 441, para. 12. In this sense, expert witness Cillero Bruñol indicated that "to evaluate cases like the present one, a double focus is required – gender and childhood – that allows us to recognize the position of inequality and structural subordination of women, girls and adolescents, due to their gender and age. Specifically, it must be evaluated whether a gender- and age-sensitive approach was adopted in the judicial proceedings carried out by the State, considering that it was a judicial process for the crime of rape. Age is noted as the first potential factor of intersectional discrimination, placing girls and adolescents at a much higher risk of suffering gender violence." Written version of the expert opinion of Miguel Cillero Bruñol given during the public hearing of this case (evidence file, folio 11686).

[164] Recently in Advisory Opinion OC-29/02, the Court reiterated that, by girl or boy, it must be understood "any person who has not reached the age of 18, unless he or she had reached adulthood earlier by mandate of law." *Cf. Differentiated approaches with respect to certain groups of persons deprived of liberty (Interpretation and scope of articles 1(1), 4(1), 5, 11(2), 12, 13, 17(1), 19, 24 and 26 of the American Convention on Human Rights and other human rights instruments*). *Advisory Opinion OC-29/22* of May 30, 2022. Series A No. 29, para. 170.

and the state specific duties.[165] This Court has repeatedly emphasized the existence of a "very comprehensive *corpus juris* of international law for the protection of the rights of children [and girls]," which must be used as a source of law by the Court to establish "the content and scope" of the obligations that the States have assumed through Article 19 of the American Convention with respect to children, particularly when specifying the "protection measures" referred to in the aforementioned provision.[166] The Court has already highlighted that, when it comes to the protection of the rights of children and the adoption of measures to achieve such protection, the following four guiding principles of the Convention on the Rights of the Child must be seen as cross-cutting in their focus and be implemented in every comprehensive protection system: the principle of non-discrimination, the principle of the best interest of the child, the principle of respect for the right to life, survival and development, and the principle of respect for the child's opinion in any procedure that affects them, in order to guarantee their participation.[167]

97. Furthermore, the status of being a child requires special protection that must be understood as an additional and supplementary right to the other rights recognized in the American Convention for every person. The prevalence of the child's best interests must be understood as the need to satisfy all the rights of children and adolescents, creating an obligation for the State and effects that influence the interpretation of all the other rights of the Convention for cases involving children.[168] The best interest of the child constitutes a mandated priority that applies both at the time of interpretation and when making necessary decisions in situations where the rights are in conflict.[169] The best interest of the child will be shaped by listening to them and weighing the rights involved, through an argument that gives preponderance to the rights of the child in the specific case.[170]

98. This Court has understood that, in accordance with Article 19 of the American Convention, the State is obliged to promote special protection measures guided by the principle of the best interest of the child, undertaking its position of guarantor with greater care and responsibility considering their especially vulnerable condition.[171] Children's best interest is based on human dignity itself, on their own characteristics, and on the need to promote their development.[172] In turn, Article 3 of the Convention on the Rights of the Child establishes that in all measures concerning children taken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the child's best interests will be a primary consideration taken into account. In relation to this principle, the Committee on the Rights of the Child has noted that "every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children."[173]

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165 *Cf. Juridical condition and human rights of the child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 54, and *Advisory Opinion OC-29/22, supra*, paras. 171 and 190.

166 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, paras. 192 to 194, and *Advisory Opinion OC-29/22, supra*, para. 171.

167 *Cf. Advisory Opinion OC-29/22, supra*, para. 172.

168 *Cf. Case of Río Negro Massacres v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 4, 2012, para. 120, and *Advisory Opinion OC-29/22, supra*, para. 190.

169 *Cf. Advisory Opinion OC-29/22, supra*, para. 192.

170 *Cf. Advisory Opinion OC-29/22, supra*, para. 192.

171 *Cf. Case of Vera Rojas et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of October 1, 2021. Series C No. 439, para. 104, and *Advisory Opinion OC-29/22, supra*, para. 187.

172 *Cf. Advisory Opinion OC-17/02, supra*, para. 56, and Advisory Opinion OC-29/22, supra, para. 187.

173 *Cf.* Committee on the Rights of the Child. General Comment No. 5: General measures for the implementation of the Convention on the Rights of the Child (Articles 4, 42 and Article 44, paragraph 6), CRC/GC/2003/5, November 27, 2003, para. 12; *Advisory Opinion OC-17/02, supra*, para. 56, and *Advisory Opinion OC-29/22, supra*, para. 188.

99. The guarantees enshrined in Articles 8 and 25 of the Convention are recognized for all people equally, and must correlate with the specific rights it establishes and with Article 19, in such a way that they are reflected in any administrative or judicial processes in which children's rights are discussed.[174] In this regard, in compliance with Article 19 of the American Convention, States must adopt specific, special measures in cases where the victim is a child or adolescent, especially in the event of an act of sexual violence and, more so, in cases of rape, without prejudice to the standards established in cases of violence and rape against adult women.[175] Consequently, in the framework of this case, the Court will analyze the alleged violations of rights to the detriment of a girl, not only based on international instruments related to violence against women, but will also examine them in light of the international *corpus juris* for the protection of children,[176] which must serve to define the content and scope of the obligations assumed by the State when analyzing the rights of persons under 18 years of age,[177] and in this particular case, of the enhanced state obligation of due diligence.

100. Thus, it should be emphasized that the special protection measures that the State must adopt are based on the fact that children and adolescents are considered more vulnerable to human rights violations, which will also be determined by different factors such as, inter alia, age, the particular conditions of each individual, their degree of development and maturity.[178] As stated by expert witness Cillero, age is a potential factor of discrimination because "girls and adolescents, due to their age, do not have the social or legal legitimacy to make important decisions in matters of education, health and in relation to their sexual and reproductive rights."[179] Furthermore, as has already been pointed out by the Court, in the case of girls, said vulnerability to human rights violations can be framed and enhanced by factors of historical discrimination that have contributed to women and girls suffering higher rates of sexual violence, especially in the family environment.[180]

101. As the Court has pointed out, the duty to guarantee takes on special intensity when girls are victims of a crime of sexual violence and participate in investigations and criminal proceedings,[181] as in this case.

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174 *Cf. Advisory Opinion OC-17/02, supra*, para. 95.

175 *Cf. Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 156.

176 This Court has established in reiterated case law that both the American Convention and the Convention on the Rights of the Child, as well as other international instruments of varied content and legal effects that serve as a guide to interpretation, are part of a very comprehensive international *corpus juris* of protection of children and adolescents. This must serve to establish the content and scope of the general provision defined in Article 19 of the American Convention, read in conjunction with other rights contained therein, when the holder of rights is a person under 18 years of age. *Cf. Rights and guarantees of children in the context of migration and/or in need of international protection*. *Advisory Opinion OC-21/14* of August 19, 2014. Series A No. 21, para. 60; *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, para. 194, and *Case of V.R.P., V.P.C. et al. Vs. Nicaragua, supra*, para. 42.

177 *Cf. Case of the Pacheco Tineo Family v. the Plurinational State of Bolivia*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 25, 2013. Series C No. 272, para. 217, and *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 155.

178 *Cf.* Cf. *Advisory Opinion OC-17/02, supra*, para. 61; *Advisory Opinion OC-21/14, supra*, para. 71, and *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 156.

179 Written version of the expert opinion of Miguel Cillero Bruñol, *supra* (evidence file, folio 11686). In a similar vein, UN Women, UNDP, UNODC and OHCHR. "A Practitioner's Toolkit on Women's Access to Justice Programming." 2018. Available at:https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2018/WA2J-Complete-toolkit-en.pdf.

180 *Cf. Case of V.R.P., V.P.C. et al. v. Nicaragua, supra,* para. 156.

181 The Convention of Belém do Pará itself considered it pertinent to highlight that state policies aimed at preventing, punishing and eradicating violence against women had to take into account a girl or adolescent's vulnerability to violence. Said Convention establishes in its Article 9 that the States Parties will take special account of the vulnerability of women to violence due to being a person under 18 years of age, so that in cases in which a girl or adolescent is a victim of violence against women, in particular sexual violence or rape, state authorities must take particular care in the development of investigations and processes at the domestic level, as well as when adopting protection and support measures during and after the process, in order to achieve the victim's rehabilitation and reintegration. Cf. *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, paras. 156 and 157.

102. The Court has indicated that, although due process and its corresponding guarantees are applicable to all persons, in the case of children and adolescents, by force of the special protection derived from Article 19 of the Convention, the exercise of those guarantees implies, due to their special conditions, the adoption of certain specific measures for the purpose of ensuring access to justice under conditions of equality, guaranteeing effective due process and ensuring that the best interest is established as a primary consideration in all administrative or judicial decisions adopted.[182].

103. As the Court has already held, the participation of children and adolescents who are victims of crimes in criminal proceedings may be necessary to contribute to the effective progress of said process,[183] however, it is necessary to provide them with information relating to the procedure, as well as the legal assistance, physical and mental health services and other protection measures available, from the beginning of and throughout the entire process.[184]

104. The Court has warned that children and adolescents who are victims of crimes, particularly sexual violence, may experience serious physical, psychological and emotional consequences caused by the violation of their rights, as well as new victimization at the hands of state bodies through their participation in a criminal process, whose function is precisely the protection of their rights. If it is considered that the participation of the child or adolescent is necessary and can contribute to the collection of evidentiary material, re-victimization must be avoided at all times and participation will be limited to the procedures and actions where their participation is deemed strictly necessary. Their interaction and contact with their aggressor during the proceedings ordered will be avoided.[185]. Thus, all officials and authorities involved in investigations and criminal proceedings related to sexual violence must be especially vigilant to prevent victims from suffering even more harm during these procedures. In the course of the investigation and judicial process, child and adolescent victims must not only be treated in a manner adapted to their needs, but also with sensitivity, "taking into account their personal situation, their needs, their age, their sex, their disability and their degree of maturity and fully respecting their physical, mental and moral integrity."[186]. In this regard, the Court agrees with the statement of expert witness Cillero in the hearing that "women who are victims of sexual crimes, and girls or adolescents who are victims of sexual crimes, are very strongly disadvantaged in the criminal process, as a result of the trauma they have suffered", so it is necessary that there be an "empathic neutrality" towards the victims of sexual violence by the officers of the justice system.[187]

105. This Court has already highlighted that rape is an extremely traumatic experience that can have severe consequences and causes great physical and psychological damage, which leaves the victim "physically and emotionally humiliated," a situation that is difficult to overcome over time, in contrast to the situation with other traumatic experiences.[188] In the case of children and adolescents who are victims of sexual violence, this impact could be severely aggravated, causing them to suffer emotional trauma different from that of adults and an extremely profound impact, particularly when there is a bond of trust and authority between the victim and the aggressor, such as a parent or other adult in the family who has a caring and supervisory relationship with the victim. Consequently, the Court

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182 *Cf. Advisory Opinion OC-17/02*, *supra*, paras. 96 and 98, and *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 158.

183 *Cf. Advisory Opinion OC-17/02*, *supra*, para. 99, and *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 160.

184 *Cf. Case of V.R.P., V.P.C. and others Vs. Nicaragua, supra*, para. 160.

185 *Cf. Case of Rosendo Cantú et al. v. Mexico. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2010. Series C No. 216, para. 201, and *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 163.

186 *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 165.

187 *Cf.* Expert opinion of Miguel Cillero Bruñol during the public hearing of this case.

188 *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs*. Judgment of November 25, 2006. Series C No. 160, para. 311; *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 163, and *Case of Bedoya Lima et al. v. Colombia. Merits, Reparations and Costs*. Judgment of August 26, 2021. Series C No. 431, para. 102.

recalls the importance of adopting a care protocol whose objective is to reduce the consequences on the biopsycho-social well-being of the victim.[189] This Court has indicated that, in cases of sexual violence, once the facts are known, the State must provide, free, immediate professional assistance, both medical, psychological and/or psychiatric, by a professional specifically trained in caring for victims of this type of crime and with a gender and childhood perspective.[190] The child must be accompanied throughout the criminal proceedings, ensuring that it is the same professional who is treating the child or adolescent. It is essential during the legal process and support services that, without discrimination, the child or adolescent's age, level of maturity and understanding, gender, sexual orientation, socioeconomic level, skills and abilities are taken into account, along with any other factor or special need arising.[191]

106. As established by the Court, States must guarantee that (i) the process takes place in an environment that is not intimidating, hostile, insensitive or inappropriate for the age of the child or adolescent; (ii) the personnel in charge of receiving the account, including prosecutorial, judicial, administrative authorities, health personnel, among others, are duly trained in the matter, so that the child or adolescent feels respected and safe at the time of relating what happened to them and in expressing their opinion and in an appropriate physical, mental and emotional environment, which allows them to relate the occurrences or their experiences in the way they choose, without the use of offensive, discriminatory or stigmatizing language by personnel;[192] (iii) the children and adolescents are treated with tact and sensitivity throughout the criminal proceedings, explaining to them the reason and utility of the procedures to be carried out or the nature of the expert examinations to which they will be subjected, always based on in their age, degree of maturity and development, and in accordance with their right to information; (iv) children and adolescents who are victims of sexual violence have their privacy and the confidentiality of information respected, if applicable, avoiding at all times their participation in an excessive number of interventions or their exposure to the public, adopting the measures that are necessary to avoid causing them suffering during the proceedings and subjecting them to further harm;[193] (v) the interview with the child or adolescent victim of sexual violence, which must be video recorded,[194] is carried out by a specialized psychologist or a professional from related disciplines duly trained in taking this type of statement, and must not be questioned directly by the court or the parties; (vi) the interview rooms provide an environment that is safe and not intimidating, hostile, insensitive or inappropriate, and which provides privacy and inspires confidence in the victims, and (vii) that children and adolescents are not interrogated more than strictly necessary, taking into account their best interests, to avoid re-victimization or a traumatic impact.[195]

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189 *Cf. Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 163.

190 The Court has indicated that, in cases of violence against women, upon becoming aware of the alleged acts, it is necessary that a complete and detailed medical and psychological examination be immediately carried out by suitable and trained personnel, if possible, of the sex indicated by the victim, offering for them to be accompanied by a trusted person if they wish. Said examination must be carried out in accordance with protocols specifically aimed at documenting evidence in cases of gender violence. *Cf. Case of Fernández Ortega et al. v. Mexico, supra*, para. 194, and *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 166 and footnote 219.

191 *Cf. Case of V.R.P., V.P.C. et al. v. Nicaragua, supra,* para. 165.

192 *Cf. Case of Rosendo Cantú et al. v. Mexico, supra*, para. 201, and *Case V.R.P., V.P.C. and others Vs. Nicaragua, supra*, para. 166.

193 *Cf. Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, paras. 166, 167 and 168.

194 As the Court highlighted in the judgment in the *Case of V.R.P., V.P.C. et al. v. Nicaragua*, several countries have adopted, as good practice, the use of special devices such as the Gesell chamber or closed-circuit television (CCTV) that enable the authorities and the parties to follow the child or adolescent's statement from outside the court in order to minimize any re-victimizing effects. In fact, since 2003, different countries such as Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, the Dominican Republic and Uruguay have incorporated the use of the Gesell chamber or closed-circuit television (CCTV).

195 *Cf. Case of Rosendo Cantú v. Mexico, supra*, para. 201, and *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 168.

107. Regarding the physical examination, the Court has already ruled that the authorities should avoid, as far as possible, subjecting victims of sexual violence to more than one physical evaluation, which could lead to revictimization. The medical examination in these cases must be carried out by a professional with extensive knowledge and experience in cases of sexual violence against children and adolescents, who will seek to minimize and avoid causing additional trauma or re-victimizing them. It is recommended that the victim, or if appropriate their legal representative, be able to choose the sex of the professional and that the examination be carried out by a health professional specializing in child and adolescent gynecology, with specific training in performing forensic medical examinations in cases of sexual violence. In addition, the medical examination must only be carried out following the informed consent of the victim or their legal representative, according to their level of maturity, taking into account the right of the child or adolescent to be heard, in an appropriate place, respecting their right to privacy, and allowing the victim to have a trusted companion present.[196] It is also considered necessary to prepare a record of the examination, which records the information provided to the victim prior to and during the examination, and the record of the victim's informed consent regarding each stage of the examination. Said report must be signed by the doctor or specialist who performed the examination, the victim or their legal representative, and the trusted person accompanying them.[197] The necessity of a gynecological examination must be considered based on a case-by-case analysis, taking into account the time elapsed from the moment in which the sexual violence is alleged to have occurred. Consequently, the Court considers that the request to perform a gynecological examination must be justified in detail and, if it is not required or does not have the informed consent of the victim, the examination must be omitted, which under no circumstances should serve as an excuse to discredit and/or prevent an investigation.[198].

108. Taking into account the criteria developed above, based on the relevant articles of the American Convention and the Convention of Belém do Pará, and in light of the international *corpus juris* for the protection of children and adolescents, the Court will analyze below if, within the framework of the development of the criminal proceedings for Brisa's rape, the State violated its duty of enhanced due diligence, special protection and non-revictimization, as well as the rights to humane treatment, to Brisa's private and family life. To do this, it will analyze whether the investigative procedures and judicial actions met the previously mentioned criteria or whether, on the contrary, they subjected the victim to re-victimization. In this regard, the Court considers it important to emphasize once again that, in cases of sexual violence, it has highlighted that the investigation must try to avoid, as far as possible, re-victimization or re-experiencing of the victim's profound traumatic experience.[199] This becomes especially relevant in the case of girls, by virtue of the State's duty of enhanced diligence and the aggravated vulnerability characterizing their situation, having been victims of sexual violence.

B.1.(b) Due diligence in the criminal proceedings for the sexual violence suffered by Brisa

109. Based on the standards developed above, the Court will analyze whether in this case the State complied with its duty of due diligence regarding (i) the forensic medical examinations carried out; (ii) Brisa's interviews and statements during the investigations and criminal proceedings, and (iii) other state acts and omissions.

i) *The forensic medical examinations conducted*

196 *Cf. Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 169.

197 The Court understands that the main function of the record is to avoid possible irregularities or violations during the forensic examination and to serve as a document evidencing each step that was carried out throughout the procedure.

198 *Cf. Case of Espinoza Gonzáles v. Peru, supra*, para. 256, and *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra* para. 169. See also, WHO. Guidelines for medico-legal care for victims of sexual violence. 2003, pp. 18, 43 and 58. Available at: https://www.who.int/publications/i/item/WHO-RHR-15.24

199 *Cf. Case of Fernández Ortega et al. v. Mexico, supra*, para. 196, and *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 171.

110. The Court confirms that, after the parents of the alleged victim learned of the sexual violence she suffered and after having sought psychological support, on July 15, 2002, Brisa's father first reported the events to the DNI, in Cochabamba, Bolivia. Following the DNI's request for a forensic medical examination of Brisa[200] to Dr. M.R.C., said examination was carried out on July 31, 2002. The Commission and the representatives argued that the examination in question was carried out by a male doctor and five male medical students, according to what the alleged victim stated. However, the State argued that the medical examination was carried out by the doctor, as can be seen from the signature on the expert forensic medical certificate.

111. In this regard, from the analysis of the evidence in the file, the Court confirms that Dr. M.R.C. was on duty on July 31, 2002,[201] and participated in carrying out the aforementioned forensic gynecological examination, as stated in the certificate signed by her.[202] Nevertheless, the Court considers that the presence of the signature of Dr. M.R.C. on the certificate and the fact that she was on duty on the day of the exam and was in charge of carrying out the medical assessment does not necessarily imply that she was the only professional present, especially when it is known that, at the time, "it was common practice for the doctors to be accompanied by practicing students."[203] Additionally, it is noted that there is no information that a record has been prepared regarding the exam - which in itself is a lack of due diligence - so there is no evidence of how it was carried out, its circumstances, any possible questions asked of the alleged victim or information that may have been provided.

112. Taking into consideration the central role that the statement by a victim of sexual violence has in cases of this nature, as the Court has already pointed out on previous occasions,[204] in addition to the evidentiary elements that corroborate Brisa's statement in this case (*supra*, para. 47), the Court considers it proven that Brisa had a traumatic experience during that first forensic gynecological examination. In this regard, it should be noted that the mother of the alleged victim was not allowed to accompany her during the examination.[205] Therefore, the Court considers it proven that male professionals and/or students participated in the examination carried out on the alleged victim. Brisa asked that the students not be in the room, but her request was not heeded and some of them even used force to oblige her to open her legs when they carried out the medical examination, despite the fact that Brisa clearly stated that she was in pain and uncomfortable, which was ignored by those present.[206] In view of this, the Court considers that there were a series of

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200 Ms. Oviedo Bellot clarified that "it was a daily practice at that time that, in cases of sexual violence against a child or adolescent, a letter was first prepared addressed to the forensic doctor who is part of the district attorney's office. The exam was carried out and validated under the seal of the district attorney's office. If the Public Prosecutor's Office considered that the method of obtaining the forensic medical certificate had generated defects of nullity in the proceedings, it had the procedural remedies to correct it, such as, for example, requesting data that appears in the forensic doctor's record as provided for in [Article] 218 of the Code of Criminal Procedure". *Cf*. Statement of María Leonor Oviedo Bellot, *supra* (evidence file, folio 11454).

201 *Cf.* Letter signed by the National Director of the Forensic Investigations Institute of the State Attorney General's Office, *supra* (evidence file, folio 10447).

202 *Cf.* Forensic medical certificate signed by M.R.C., forensic medical doctor of the Public Prosecutor's Office of Cochabamba, on July 31, 2002 (evidence file, folio 9500).

203 *Cf.* Statement of María Leonor Oviedo Bellot, *supra* (evidence file, folios 11453 and 11459).

204 *Cf. Case of Fernández Ortega et al. v. Mexico, supra*, para. 100, and C*ase of J. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 27, 2013. Series C No. 275, para. 323.

205 The Court does not have information about who prevented Ms. Luz Stella Losada from entering the examination room. According to Brisa's mother, "Brisa enters her examination at that forensic place and comes out devastated. I try to ask her what happened. Brisa was upset, she really didn't tell me anything, she was, I understood, full of anger and pain. I respected her silence, but it was very traumatic." *Cf*. Statement of Luz Stella Losada during the public hearing, *supra*.

206 The expert witness Cillero Bruñol highlighted that the consent of the victim of sexual violence, her parents or her legal representatives is a central element for the preparation of the necessary record to attest the consent of the girl or adolescent regarding the forensic examination, as well as "of the investigations that were carried out to avoid any type of dispute regarding the events and conditions in which the expert assessment was carried out." Additionally, he indicated that, in some

omissions and shortcomings in the performance of the first forensic medical examination that are incompatible with the requirements of strict due diligence since: (i) they did not allow Brisa to be accompanied by a trusted person during the medical examination; (ii) there is no evidence that the girl or her mother was provided with information about the content of said examination or what the medical practice would be; (iii) it was not proven that the people who were present at the examination were professionals specially trained in caring for victims who were children or adolescents or that they were specialized in gynecology with training for this type of examination in cases of sexual violence; (iv) the presence of an excessive number of health personnel was confirmed; (v) Brisa's wish for the students to leave the exam room was not respected; (vi) physical force was used to perform the examination; (vii) her expressions of discomfort and pain were not respected; (viii) there is no evidence of Brisa's consent to carry out each of the forensic review procedures, and (ix) no record of the examination was made.[207]

113. Regarding the above, the Court reiterates the paramount importance of the doctor being trained to care for a girl victim of sexual violence and ensuring her a safe, adequate environment that is not intimidating, hostile or insensitive. Along these lines, the Court considers that the presence of a multiplicity of people during the gynecological examination of a girl who is a victim of sexual violence is contrary to the standards on the matter, since the girl is naked, exposing her genitals to a group of people who were not supposed to be present in a procedure of this nature, which implies an arbitrary intrusion into their private life and intimacy. The Court reiterates that this type of examination must be carried out on a single occasion, by a doctor trained in the matter and with the presence of only those people strictly necessary (*supra* para. 107). The Court understands that this especially serious act, in violation of due diligence, exposed Brisa to re-victimization. Bolivia should have adopted the necessary protection measures so that its institutions acted under the principle of the girl's best interests, and prevented proceedings, which in themselves could bring with them elements of re-actualizing the trauma, from constituting an act of institutional violence. Based on all of the above, the Court understands that, during the forensic examination, the medical assessment was not carried out in a manner appropriate for the treatment of a girl victim of sexual violence, reviving her trauma[208] instead of protecting her and providing containment mechanisms that would make her feel safe, understood and listened to during the procedure to avoid her re-victimization. Furthermore, for this Court, the use of force and ignoring signs of the victim's pain and discomfort[209] constituted an act of institutional violence of a sexual nature.

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countries, the preparation of a document signed by the adolescent is required as an expression of her agreement with it. *Cf*. Expert opinion of Miguel Cillero Bruñol during the public hearing, *supra*.

[207] The Court agrees with the statement by the expert Mesa Peluffo during the public hearing of this case in the sense that before starting the forensic medical examination, it must be explained to the alleged victim why and how the examination is carried out, in a detailed manner and explain each step before undertaking it. "[Th]ey have to be told why you need to see their genitals and "I'm going to do it this way", that is, "now you're going to have to open your legs, now I'm going to insert a speculum so I can see the vagina" and show her that it is a speculum, "see, I'm going to put this in, it's small, but then I'm going to enlarge it so I can see better." "[T]his is the type of advance notice that should be given." And "obviously" if the victim expresses some discomfort or pain or starts crying, you have to stop immediately, give them space, it is necessary to ask them if they want to go out for a moment. *Cf*. Expert opinion of Sylvia Mesa Peluffo during the public hearing of this case.

[208] The expert Mesa Peluffo maintained that "[i]n regard to the psychological impact of revictimization by the State, as Judith Herman says, trauma is the affliction of those who have no power. In trauma the victim is helpless in the face of an overwhelming force. Traumatic events, such as rape, destroy the normal protective systems that give people a sense of control, connection and meaning, resulting in what we call post-traumatic stress disorder. The person, upon finding themselves in this helpless situation, presents a combination of feelings of anxiety and danger, maintains a permanent state of alert, has intrusive memories and nightmares related to the trauma, avoids any stimulus that reminds them of the traumatic events, may experience feelings of guilt, fear and anger, has difficulties relating to other people and their life trajectory is altered. The impact of revictimization on victims of sexual violence, especially girls and adolescents, is often devastating. Girls and adolescents deserve special protection in judicial processes, since the actions of justice officers can increase the trauma they have suffered as a result of violence. Therefore, it is essential to have special protocols for investigation and action, as well as to avoid actions that may lead to revictimization." *Cf*. Expert opinion of Sylvia Mesa Peluffo, *supra*.

[209] According to expert Mesa Peluffo, the "medical examination carried out in the presence of several male students, who laughed at her when she said that she did not want them to be present and even forcibly opened her legs, may have been experienced by Brisa as a new rape, as it reactivated intrusive memories of the trauma." *Cf*. Expert opinion of Sylvia Mesa Peluffo, *supra*.

114. Despite the fact that Brisa had already been subjected to three examinations (two psychological and one medical) following private consultations and that, based on the findings, the existence of sexual violence was established, and additionally a forensic gynecological examination was carried out in July 2002,[210] this information was not considered sufficient evidence by the State, and she was subjected to another forensic gynecological examination, seven years after the sexual violence occurred.[211] This examination was absolutely unnecessary because, given the circumstances of the crime, it did not constitute useful evidence.[212] Additionally, it should be noted that what the Trial Court had in fact ordered on August 1, 2008 was evidence "on the points of expertise indicated in the accusation"[213] as agreed by the lawyer for the alleged victim's family.[214] However, a new gynecological examination was performed.

115. The Court notes that the State did not consider granting the already existing medical and psychological opinions sufficient evidentiary weight, which could have avoided subjecting Brisa to a re-enactment of the traumatic event already experienced, nor did it respect her right to be heard regarding the circumstances of carrying out said procedures, in accordance with her age, maturity and degree of development. Brisa's submission to two gynecological examinations did not serve the purpose of minimizing the trauma resulting from sexual violence, but instead increased it.[215] In short, the Court considers that, in the circumstances of this case, the need to perform the second forensic gynecological examination was not justified.

ii) Brisa's interviews and statements during the investigations and the criminal proceedings

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[210] According to Ms. Oviedo Bellot, the DNI's practice of requesting forensic medical examinations directly from the Forensic Institute was endorsed by the District Attorney's Office by putting its seal on the letter where the request is made. *Cf*. Statement of María Leonor Oviedo Bellot, *supra* (evidence file, folios 11452, 11453 and 11459). However, the certificate of the first forensic medical examination carried out through that procedure was rejected as evidence in the first and second trials because the request was not made by the Public Prosecutor's Office. *Cf*. Record of oral trial hearing from March 17 to 25, 2003 (evidence file, folios 10359 to 10360), and Record of oral trial hearing from September 15 to 20, 2005 (evidence file, folio 9854). In her witness statement before this Court, the prosecutor N.T.A in charge of the investigation indicated that, at the time of presenting the prosecutor's request, she decided not to order a new examination and to accept the forensic medical certificate presented by the complainants so as not to re-victimize Brisa. *Cf*. Declaration of N.T.A. of March 14, 2022 (evidence file, folio 11633).

[211] According to Ms. Oviedo Bellot, "when the 3rd oral trial had to be carried out, the prosecutor asked the Sentencing Court No. 3 to carry out a medical examination with two points to be addressed: (1) What is an old tear of the hymen? and (2) What is the information of an old tear exam? The Court accepted the expert's proposal, allowing Dr. [M.R.C.] […] to respond to these two points with documents. As Brisa's lawyer, we are aware of the prosecutor's request for these two requirements, accepted by the Court. It is important to note that during the preparation for the third trial, the prosecutor's communication with Brisa's legal team was scarce and almost non-existent. I was not informed, nor did I agree, that a second examination should be carried out. However, what actually happened is that a new medical examination was carried out, subjecting Brisa to a totally unnecessary re-victimization without taking into account the time that has passed since the event occurred, without there being any duly motivated justification for her review." She also pointed out that "as Brisa lawyers we adhered to the Prosecutor's offer of experts […] by brief dated July 30, 2008, but we were unaware that a medical examination would be carried out, since it was not appropriate because the points of expertise were theoretical." *Cf*. Statement of María Leonor Oviedo Bellot, *supra* (evidence file, folio 11453).

[212] The expert Mesa Peluffo pointed out that "seven years after the events, she was subjected to a new examination that could not provide any evidence, technically inexplicable, which resulted in a new punishment for having reported it." *Cf*. Expert opinion of Sylvia Mesa Peluffo, *supra*.

[213] *Cf.* Order issued by Sentencing Court No. 3 on August 1, 2008 (evidence file, folio 9036).

[214] *Cf.* Statement of María Leonor Oviedo Bellot, *supra* (evidence file, folio 11459).

[215] In the expert opinion of expert Mesa Peluffo, "forensic medical examinations should be carried out only when they are necessary, because they can provide essential evidence for a case and even then, they should preferably be done by female doctors, trained and sensitized to perform them. The medical examination, for a girl or adolescent who has just experienced a rape, is in itself traumatic, because it reminds her of the events and if it is not done with empathy, explaining each step, it makes her relive them. *Cf*. Expert opinion of Sylvia Mesa Peluffo, *supra*.

116. Furthermore, the Court was able to verify that Brisa was forced to recount on various occasions [216] the events related to the sexual violence of which she was a victim, contrary to one of the key elements of strict and enhanced due diligence which is the adoption of the necessary measures to avoid the repetition of interviews, since their recurrence forces the victims to re-experience traumatic events.[217] One of these interviews was conducted, at the request of the Head of the Minors and Family Division of the Judicial Technical Police, before the SEDEGES of Cochabamba, on August 1, 2002. It is noted that, during the interview, the alleged victim was unable to choose a trusted person to accompany her, instead a representative of the National Organization for Minors, Women and Families,[218] whom Brisa did not know, was present. Furthermore, the Court notes that one of the questions that was asked – "why didn't you say anything?", referring to the fact that the girl had stated that sometimes "she didn't respond at all" to E.G.A.,[219] could have put Brisa in a position of feeling guilty for the sexual violence that she suffered, since from the question it could be inferred that it was up to the alleged victim to resist and do so expressly. Taking the above into account, the Court considers that said interview was re-victimizing. Additionally, it is noted that the recording of the statement was not ordered to avoid its repetition in the future.

117. Additionally, the Court notes that Brisa indicated that her initial contact with Prosecutor N.T.A. occurred without the presence of her mother or father or her lawyers. In this regard, the State argued that Prosecutor N.T.A could not have been present during the statement made by the alleged victim before SEDEGES, since she had not yet received the case. However, the Court notes that, as can be seen from the representatives' arguments, the aforementioned interview with the Prosecutor did not occur at the same time as the statement made before SEDEGES and was not an act of the proceedings, but rather an informal event. Indeed, as Brisa reported in the public hearing before the Court:

> The Prosecutor […] took me alone to a very small room, and she looked at me, she was standing, I was sitting, and she told me, Tell me what happened to you? I was terrified, I was shaking, and somehow, I found the courage to tell her. And she told me, don't take anything out, don't omit any details, so I told them everything, from beginning to end, as soon as I finished, she looked at me and said: now start over and don't leave anything out, again, from beginning to end. And I did. I was crying, but I finished. And she told me: "ok, again", and I told her again, I started talking, I panicked, I had a panic attack, I was crying, and she kept insisting, tell me again, tell me again, I finished , again she told me, and she did it again and again, and then she told me: "I ask you to tell me this so many times because I am going to find the lie that you are telling me, and I myself am going to make sure that you go to jail for defamation", I was terrified, this woman in front of me is the one who can send people to jail and she is threatening to put me in jail, what happens if I make a mistake in what I am saying? What happens if I change something about my story? I was so scared and then she told me: "Even if everything you are telling me is true, how can you be so cruel? How can you be so insensitive to think about sending this man to jail or bringing that destruction to his family, and all that pain to his parents? If you stay silent you can save yourself all this."[220]

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[216] Brisa testified on, at least, the following dates: August 1, 2002, March 18, 2003; on March 21, 2003 (in the framework of the oral trial hearing, a confrontation was held between Brisa, her father, and a defense witness) and on September 17, 2005. *Cf*. Information statement of Brisa De Angulo Losada (evidence file, folios 10621 to 10626); Record of the oral trial hearing from March 17 to 25, 2003 (evidence file, folios 7629, 7630, 7643 and 7644), and Record of the oral trial hearing from September 15 to 20, 2005 (evidence file, folios 10411 to 10414). The witness Oviedo Bellot indicated that the alleged victim testified three times before authorities and five times before different professionals in order to obtain evidence. *Cf*. Statement of María Leonor Oviedo Bellot, *supra* (evidence file, folio 11454).

[217] In this regard, the expert Mesa Peluffo stressed that "[t]he two trials she had to face revived her pain, since she was subjected to long interrogations in which she had to repeat her story many times, and each time she had to repeat it revived in her the terror and pain she experienced at the time of the events, which increases the symptoms of post-traumatic stress." *Cf*. Expert opinion of Sylvia Mesa Peluffo, *supra*.

[218] *Cf.* Application form to ONAMFA dated August 1, 2002 (evidence file, folio 10621 to 10622).

[219] *Cf.* Information statement of Brisa De Angulo Losada, *supra* (evidence file, folio 10625).

[220] *Cf.* Statement by Brisa de Angulo Losada during the public hearing, *supra*.

118. Brisa's mother corroborated the facts cited above in her witness statement before the Court.[221] The aforementioned prosecutor, in her testimony presented to this Court, asserted: "I never conducted an interview alone with […] Brisa Liliana De Angulo, but rather her parents, as complainants and plaintiffs, were the ones who approached the prosecutor's office to follow up on the case and request or coordinate investigative actions or to present their briefs. I never made any contact."[222] However, taking into account the statement of the alleged victim, corroborated by her mother and the circumstances of the case, the Court considers what Brisa reported as sufficiently proven regarding the circumstances of the initial contact she had with Prosecutor N.T.A., without the presence of her mother or father or her legal representative. As observed, in light of the previously established standards (*supra* paras. 104 to 106), instead of being empathetic, sensitive, and duly trained to interview a girl victim of sexual violence, Prosecutor N.T.A. interacted with Brisa without any gender or childhood perspective, in a disrespectful manner, repeating gender stereotypes, intimidating her, threatening her with criminal prosecution, asking her to repeat her story, in an apparent effort to detect contradictions and, thus, ended up re-victimizing her.

119. Furthermore, it is noted that, contrary to what was stated by the prosecutor in her statement,[223] all officials involved in the investigation and criminal proceedings initiated as a result of sexual violence perpetrated against a girl must be properly trained to interact with the victim, which also means having a broad understanding of the consequences of the trauma resulting from rape, especially so as not to create re-victimizing situations in the context of judicial proceedings.

iii) Other state acts and omissions

120. Additionally, the Court identifies other acts and omissions that demonstrate the State's lack of due diligence. In effect, Brisa was not offered the necessary psychological and/or psychiatric support at the beginning of the judicial process until her recovery, only to be accompanied during some of the procedural acts by a psychologist whom she did not know.[224] In this regard, this Court has highlighted that comprehensive care for a girl victim is not only limited to the actions of the judicial authorities during the progress of the criminal proceedings in order to protect her rights and ensure her participation is non-revictimizing, but that this care must be comprehensive and multidisciplinary before, during and after investigations and criminal proceedings. Additionally, the Court has considered that there must be a coordinated and integrated approach that provides various care and support services to the girl to safeguard her current well-being and subsequent development.[225] Furthermore, the prosecutor in charge did not propose the alleged victim as a witness, ignoring the importance of the testimony of victims of sexual violence in crimes of that nature. Thus, the private prosecution had to propose it. The victim's statement was not recorded to avoid its repetition in the future and the participation of the accused's lawyer was not allowed in the aforementioned statement, which subsequently caused the first trial to be annulled due to the violation of his right to a defense. The Court also notes that on March 24, 2003, when taking the statement of the alleged victim and her family who indicated that they had suffered harassment and

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221 Ms. Stella Losada declared before the Court that "[t]he prosecutor requested that she wanted an interview with Brisa, [...] and at that appointment, when Brisa entered, the prosecutor did not allow me to enter, and I had to stay outside, Brisa came out upset, that wasn't my girl, something happened in there, and I wanted to ask her. Brisa didn't answer me, so I asked her, please, let's go have a cup of coffee, a juice somewhere, calm down, you're with me, and she agreed, and when she was calmer, I asked her, please, Brisa, start telling me everything you remember." *Cf*. Statement of Luz Stella Losada during the public hearing, *supra*.

222 *Cf.* Statement of N.T.A, *supra* (evidence file, folio 11634).

223 In her testimony, when responding to a question that had been asked by the Inter-American Commission about whether she was certified in trauma-informed management in cases of child sexual violence, Prosecutor N.T.A. stated that they considered that "this answer would have to be answered by the psychologist who interviewed Brisa Liliana de Angulo, since my work is not directed at the management of traumas, but rather at the exercise of the functions established in [Article 45] of the Organic Law of the Public Prosecutor's Office." *Cf*. Declaration of N.T. A., *supra* (evidence file, folio 11635).

224 *Cf.* Letter from Brisa De Angulo Losada, *supra* (evidence file, folios 7251 to 7252).

225 *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 194.

threats, the Trial Court imposed the responsibility for reporting the facts[226] to the corresponding authorities on them, instead of ordering protective measures or investigating the reported situation.

121. Similarly, with respect to the first hearing, the Court's attention is drawn to the content of the judgment of March 28, 2003, in which Sentencing Court No. 4 unanimously ruled that the accused was the author of the crime of aggravated statutory rape, instead of the crime of rape, as it did not consider the use of violence or intimidation as proven (*supra* para. 60). In this regard, it noted, among other reasons, that "it had not been convincingly demonstrated that the element of 'physical violence' had occurred in the successive sexual abuses" and that intimidation had not been demonstrated "in an indubitable manner", since based on "certain personality traits of […] Brisa," such as her "strong personality," "it [was] not possible to conceive that Brisa has been intimidated by [the accused]."[227] Beyond the use of gender stereotypes as one of the bases of the decision, which will be analyzed below (*infra* section b.4), the Court warns that said reasoning demonstrates a flagrant lack of training and sensitivity regarding the particular circumstances in cases of sexual violence committed against a girl, especially in her home and by a person who held power over her and, consequently, the absence of a gender and childhood perspective when examining the case.

122. In addition to the above, the Court finds that, during the second hearing, the following actions denote the lack of strict and enhanced due diligence that was required in this case: there was no admission or appropriate assessment of the victim's statement, supported up to that point by three psychological and two medical reviews (*supra* paras. 46, 47, 52 and 69), especially regarding the lack of consent for the sexual act; the presiding judge announced that no crime had occurred before hearing the evidence.[228] Additionally, he warned the alleged victim and her father, while he was taking their statements, that he would suspend their testimony and remove them from the courtroom if Brisa did not stop crying.[229] The latter constitutes an absolute disrespect for the dignity and psychological well-being of a victim of sexual violence[230] and denotes not only the judicial authority's lack of "empathic neutrality" towards Brisa, but also the creation of a completely hostile environment.

123. Furthermore, the Court notes that the State did not act with due diligence to prevent the escape of the accused after the annulment of the acquittal in May 2007. In effect, according to his own testimony during the second hearing, he stated that he had not escaped, although his family had asked him to do so.[231] In addition to this, and being aware of the escape of the accused, the State did not carry out any relevant steps to achieve his arrest and extradition between 2008 and 2014, and acted excessively slowly until 2019 (*supra* paras. 70 to 73). The above also illustrates an absolute lack of due diligence by Bolivia, especially in a case in which the victim was a girl, who for 20 years has remained waiting for proceedings to continue and the impunity of the case to be reversed.

124. Based on the preceding considerations, the Court concludes that the State did not take the necessary measures to avoid Brisa's revictimization,[232] nor did it conduct the criminal process with a

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226 *Cf.* Record of oral trial hearing from March 17 to 25, 2003 (evidence file, folio 10372).

227 *Cf.* Judgment issued by the Sentencing Court No. 4 of Cochabamba, *supra* (evidence file, folios 7667,7668,7673), and Record of reading of the sentence of March 28, 2003 (evidence file, folio 9690).

228 *Cf.* Record of oral trial hearing from September 15 to 20, 2005 (evidence file, folio 9826 to 9871).

229 *Cf.* Record of the oral trial hearing from September 15 to 20, 2005 (evidence file, folios 9852 to 9853); Statement of Brisa De Angulo Losada during the public hearing, *supra*; and Statement of José Miguel De Angulo, *supra* (evidence file, folios 11436 to 11437), and Letter from Brisa De Angulo Losada, *supra* (evidence file, folio 7254).

230 Expert witness Šimonović asserted that, in her expert opinion, "trials like this are not only a violation of Brisa's right as a victim, but also demonstrate why so many victims of sexual violence are reluctant to use the judicial system, allowing a culture of impunity for the perpetrators." *Cf.* Expert opinion of Dubravka Šimonović, *supra* (evidence file, folio 11495).

231 *Cf.* Record of oral trial hearing from September 15 to 20, 2005 (evidence file, folio 9870).

232 This Court considers it pertinent to note that the interrogation of the alleged victim by the State during the public hearing before the Court also resulted in revictimizing, not only by virtue of some of the questions asked and frequent

gender and childhood perspective, and in accordance with the duty of strict, enhanced due diligence and the special protection that was required in a complaint of sexual violation against a girl. Therefore, the Court finds that Bolivia is responsible for the violation of the rights to humane treatment, a fair trial, private and family life, the rights of the child and judicial protection, pursuant to Articles 5(1), 8(1), 11(2), 19 and 25(1) of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof, as well as for failure to comply with the obligations derived from Articles 7(b) and 7(f) of the Convention of Belém do Pará, to the detriment of Brisa de Angulo Losada.

B.2 Reasonable timeframe and the speed of the process

125. The Court has indicated that the right of access to justice in cases of human rights violations must ensure, in a reasonable time, the right of the alleged victims or their next of kin to have everything necessary done to learn the truth about what happened and investigate, prosecute and, where appropriate, punish those possibly responsible.[233] Furthermore, a prolonged delay in the process may, in itself, constitute a violation of the right to a fair trial.[234]

126. Although it is true that, for the purposes of analyzing the reasonable period, in general terms the Court must consider the overall duration of a process until the final judgment is issued,[235], in certain particular situations a specific assessment of its different stages may be appropriate.[236] In this regard, the Court has established that the assessment of the reasonable period must be analyzed in each specific case, in relation to the total duration of the process, which could also include the execution of the final sentence. Thus, it has considered four elements in order to analyze whether the guarantee of a reasonable period of time was met, namely: (i) the complexity of the matter,[237] (ii) the procedural activity of the interested party,[238] (iii) the conduct of the judicial authorities,[239]

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interruptions, but also through its position, which could be perceived as hostile. As an example, the Court considers that when the State asked her to "cite the limitations in her life, social relationships, student and economic achievements generated by the events that are the subject of the international complaint," it implied that the eventual positive development of the personal and professional life of the alleged victim would distort the effects that the alleged failures of the State during the criminal process could have caused. *Cf*. State's interrogation of the declarant Brisa De Angulo Losada, during the public hearing of the present case.

233 *Cf. Case of Bulacio v. Argentina. Merits, Reparations and Costs*. Judgment of September 18, 2003. Series C No. 100, para. 114, and *Case of Sales Pimenta v. Brazil, supra*, para. 106.

234 *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. *Merits, Reparations and Costs*. Judgment of June 21, 2002. Series C No. 94, para. 145, and *Case of Sales Pimenta v. Brazil, supra*, para. 106.

235 *Cf. Case of Suárez Rosero v. Ecuador. Reparations and Costs*. Judgment of January 20, 1999. Series C No. 44, para. 71, and *Case of Grijalva Bueno v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 3, 2021. Series C No. 426, para. 141.

236 *Cf. Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 20, 2013. Series C No. 270, para. 403, and *Case of Grijalva Bueno v. Ecuador, supra*, para. 141.

237 Regarding the analysis of the complexity of the matter, the Court has taken into account, among other criteria, the complexity of the evidence, the plurality of procedural subjects or the number of victims, the time elapsed since it became aware of the event that should be investigated, the characteristics of the remedy contained in domestic legislation and the context in which the violation occurred. *Cf. Case of Genie Lacayo v. Nicaragua. Preliminary Objections.* Judgment of January 27, 1995. Series C No. 21, para. 78, and *Case of Sales Pimenta v. Brazil, supra,* para. 107 and footnote 180.

238 Regarding the activity of the interested party in obtaining justice, the Court has taken into consideration whether the procedural conduct of the interested party has contributed in some degree to unduly prolonging the duration of the process. *Cf. Case of Cantos v. Argentina. Merits, Reparations and Costs*. Judgment of November 28, 2002. Series C No. 97, para. 57, and *Case of Sales Pimenta v. Brazil, supra*, para. 107 and footnote 181.

239 The Court has understood that, for the judgment to be fully effective, the judicial authorities must act quickly and without delay, because the principle of effective judicial protection requires that the execution procedures be carried out without obstacles or undue delays, so that they achieve their objective quickly, easily and comprehensively. *Cf. Case of Mejía Idrovo v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 5, 2011. Series C No. 228, para. 106, and *Case of Sales Pimenta v. Brazil, supra*, para. 107 and footnote 182.

and (iv) the impact on the legal situation of the alleged victim.[240] The Court recalls that it is up to the State to justify, based on the criteria indicated, the reason why it has required the time elapsed to deal with the cases and, in the event that it cannot be justified, the Court has broad powers to make its own estimate in this regard.[241] The Court also reiterates that the total duration of the process must be considered, from the first procedural act until the final sentence is handed down, including any possible appeals that may be presented.[242]

127. Additionally, the Court highlights that the criminal process involved a girl victim of sexual violence, which requires that, in this case, the judicial guarantee of a reasonable time established in Article 8(1) of the American Convention must be analyzed together with the duty of the State to act "without delay" and with due diligence to investigate and punish violence against women, provided in article 7(b) of the Convention of Belém do Pará,[243] as well as taking into account the duty of special protection derived from Article 19 of the American Convention. Similarly, Article 9 of the Convention of Belém do Pará [244] provides the content of these duties, in relation to the particular situation of vulnerability and the needs of the alleged victim when the victim is a girl.[245]

128. Regarding the complexity of the matter, the Court notes that, in this case, there was only one victim and one alleged perpetrator, identified by the victim from the beginning. In addition, at the beginning of the criminal proceedings and during the first stage, there was already a statement given by the victim,[246] the investigative statement of the accused,[247] a gynecological forensic examination,[248] without prejudice to the serious irregularities indicated above, documentary evidence referring to two psychological assessments of Brisa[249] and a medical assessment,[250] as well as witness statements.[251] Therefore, this Court confirms that there are no relevant elements of complexity.

129. In relation to the procedural activity of the interested party, the Court notes that there was a procedural impetus promoted by Brisa's father and legal representatives. In fact, on August 1, 2002, José Miguel De Angulo filed a complaint against E.G.A. before the TJP for the crime of rape against his daughter, and on November 15, 2002, after the formal accusation presented by the Public Prosecutor's Office, Brisa and her parents filed private charges. Furthermore, it should be emphasized

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240 The Court has stated that to determine the reasonableness of the term, the impact generated by the duration of the procedure on the legal situation of the person involved must be taken into account, considering, among other elements, the subject matter of the dispute. *Cf. Case of National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 21, 2019. Series C No. 394, para. 148, and *Case of Sales Pimenta v. Brazil, supra*, para. 107 and footnote 183.

241 *Cf. Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 22, 2009. Series C No. 202, para. 156, and *Case of Sales Pimenta v. Brazil, supra*, para. 107.

242 *Cf. Case of Suárez Rosero v. Ecuador. Reparations and Costs, supra*, para. 71, and *Case of Sales Pimenta v. Brazil, supra,* para. 107.

243 *Cf. Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 278.

244 Article 9 of the Belém do Pará Convention provides that "[…] the States Parties will take special account of the vulnerability of women to violence by reason of, among others, [… of] minor age […]".

245 The Committee on the Rights of the Child has stated that "[i]n all actions involving children who have been victims of violence, the principle of speed must be applied, respecting the rule of law." *Cf. Committee on the Rights of the Child. General Comment No. 13:* Right of the child to freedom from all forms of violence, CRC/C/GC/13, April 18, 2011, para. 54.d.

246 *Cf.* Information statement of Brisa De Angulo Losada, *supra* (evidence file, folios 7266 to 7267).

247 *Cf.* Record of interview conducted by the Departmental Directorate of the PTJ of Quillacollo on August 7, 2002 (evidence file, folios 7277 to 7278).

248 *Cf.* Forensic medical certificate signed by M.R.C, *supra* (evidence file, folio 9500).

249 *Cf.* Certificate produced by Terri S. Gilsson, *supra* (evidence file, folio 7860) and Psychological certification produced by the DNI psychologist, *supra* (evidence file, folios 7260 to 7261).

250 *Cf.* Certificate produced by Lourdes de Armas, *supra* (evidence file, folio 7853).

251 *Cf.* Record of the oral trial hearing issued by the Sentencing Court No. 4 of Cochabamba, March 17 to 25, 2003 (evidence file, folios 7618 to 7619).

that, contrary to the declarations by the State, the Court verifies that no dilatory or obstructive conduct is observed on the part of the alleged victim, her family members or legal representatives, as even if Brisa's legal representatives had withheld the arrest warrant for E.G.A. – which is not proven – this could not justify the inertia of the judicial authorities in arresting the accused.

130. Regarding the conduct of the judicial authorities, the Court has understood that, as leaders of the process, they have the duty to direct and prosecute the criminal investigation with the aim of identifying, prosecuting and, where appropriate, punishing all those responsible for the events.[252] In this case, the state authorities were not diligent in the investigation of the acts of sexual violence against Brisa, nor have they taken into account the effects of time during each stage of the criminal process. Almost 20 years have passed since the sexual violence suffered by Brisa and, to date, there is no final sentence of conviction or acquittal, since the request for extradition from Colombia to Bolivia to appear in the third trial has been denied (*supra* para. 75). The Court confirms that this excessive delay in the processing of the criminal proceedings is the result of prolonged periods of inaction, without any explanation or justification provided from the facts by the authorities in charge of the prosecution. Furthermore, it is noted that the errors and shortcomings of the Public Prosecutor's Office and the judicial authorities were the cause of significant delays in the processing of some appeals, the repetition of evidence, the revocation of two final sentences and the resubmission of the case for new prosecution on two occasions, and, due to the failure to establish the necessary safeguards, facilitated the accused's escape to his country of origin.

131. The Court verifies, for example, that more than a year elapsed between the decision of the Superior Court of Justice of Cochabamba that annulled the acquittal ruling of September 2005, ordering the remand of the case for a new trial by another Trial Court (*supra* para. 67), until the third trial was ordered (*supra* para. 68); almost six years between the declaration of E.G.A.'s contempt of court (*supra* para. 70) and the arrangement of the red alert before Interpol (*supra* para. 71); almost ten years between the declaration of E.G.A.'s contempt of court and the request by the Public Prosecutor's Office to the National Director of Interpol that the international notification of search, location and arrest for the purposes of extradition of the accused for contempt of court be submitted to the system (*supra* para. 71), and two more years to issue the petition with a formal request for extradition to the competent authority in Colombia (*supra* para. 73). The Court warns that the periods of little or no activity by the Bolivian judicial authorities added together are equivalent to 15 years, which, in addition to being inadmissible *per se*, ultimately contributed to the current state of absolute impunity in the present case.

132. Finally, with regard to the impact generated on the legal situation of the people involved in the proceedings, this Court has established that, if the passage of time has a relevant impact on the legal situation of the individual, it is necessary for the proceedings to advance with greater diligence to resolve the case in a short period of time.[253] When dealing with a girl in a case of sexual violence, the Court considers that an enhanced criterion of speed is required.[254] In this case, the Court observes that the excessive delay in the processing of the criminal process prolonged and intensified the serious impact on Brisa's mental health caused by the sexual violence to which she was subjected. It is logical to infer that, if the judicial authorities had taken into account that she was a girl, it would have been evident that the case required greater diligence by the judicial authorities, since its primary objective, which was to investigate and punish the sexual violence suffered by Brisa and obtain the psychological support necessary to process the traumatic events she experienced, depended on the brevity of the judicial process. Therefore, the Court considers that it is sufficiently proven that the prolongation of the process in this case affected the progress of her daily life.

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252 *Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs*. Judgment of November 25, 2003. Series C Series C No. 101, para. 211, and *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 281.

253 *Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs*. Judgment of November 27, 2008. Series C No. 192, para. 155, and *Case of Sales Pimenta v. Brazil, supra*, para. 111.

254 *Cf. Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, para. 283.

133. Therefore, taking into account the previous considerations, the Court concludes that Bolivia exceeded the reasonable period of the investigation and trial related to the sexual violence in question, in violation of the right to a fair trial and the rights of the child, established in Articles 8(1) and 19 of the American Convention, read in conjunction with Article 1(1) thereof and Article 7(b) of the Convention of Belém do Pará, to the detriment of Brisa De Angulo Losada.

B.3 Consent in the crimes of sexual violence and access to justice

134. The Inter-American Commission, the representatives, as well as the expert witness Cillero and the experts Šimonović and Mesa made reference to the importance of the concept of consent in crimes of sexual violence and presented arguments both in the sense that this was not an element taken into account with due care by the Bolivian courts, and that criminal legislation would need to make the concept of consent a central element of crimes of sexual violence to allow true access to justice for the victims of said crimes.

135. Moreover, it is highlighted that the two types of criminal offenses used in the criminal proceedings regarding the sexual violence suffered by Brisa were rape (*supra* para. 55) and statutory rape (*supra* para. 60), in their aggravated forms (Article 310 of the Criminal Code). It is recalled that, on the date of the events, rape consisted of having "carnal access with a person of either sex", "anal or vaginal penetration" or introducing "objects for libidinous purposes", through the use of "physical violence or intimidation", while statutory rape was defined when someone "through seduction or deception, had sexual intercourse with a person of either sex, over fourteen (14) years of age and under eighteen (18)." Taking into account the above, the Court will next analyze the compatibility of the crimes of statutory rape and rape with the American Convention, based on the international *corpus juris* on the matter and the expert opinions provided during the processing of the *sub judice* case, and the specific impact of the use of these criminal offenses in the judicial process established as a result of the sexual violence perpetrated against the alleged victim.

136. The Court, following international case law and taking into account the provisions of the Convention of Belém do Pará, has previously considered that sexual violence consists of actions of a sexual nature that are committed against a person without their consent, which in addition to including the physical invasion of the human body, may include acts that do not involve penetration or even any physical contact.[255]

137. Similarly, following the jurisprudential and regulatory criteria that prevail both in the field of International Criminal Law and in Comparative Criminal Law, this Court has considered that rape must also be understood as acts of vaginal or anal penetration, without the consent of the victim, through the use of other parts of the aggressor's body or objects, such as oral penetration by the male organ. In this regard, the Court clarifies that for an act to be considered rape, it is sufficient that penetration occurs, no matter how insignificant it may be, in the terms described above.[256]

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[255] *Cf. Case of the Miguel Castro Castro Prison v. Peru, supra*, para. 306, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 28, 2018. Series C No. 371, para. 181.

[256] *Cf.* International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Anto Furundzija*, Judgment of December 10, 1998, case No. IT-95-17/1-T, para. 185; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kunarac et al.,* Judgment of February 22, 2001, case No. IT-96-23-T and IT-96-23/1-T, paras. 437 and 438; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kunarac et al.,* Appeal judgment of June 12, 2002, case No. IT-96-23-T and IT-96-23/1-T, para. 127, and *Case of J. v. Peru, supra*, para. 359. Additionally, the Assembly of States Parties to the Rome Statute of the International Criminal Court indicated, for the purposes of the classification of the crime against humanity and the war crime of rape, that rape occurred when "The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body." Cf. International Criminal Court. Report of the Preparatory Commission of the International Criminal Court: The Elements of the crimes, U.N.

Furthermore, it must be understood that vaginal penetration refers to the penetration, with any part of the aggressor's body or objects, of any genital orifice, including the labia majora and minora, as well as the vaginal orifice. This interpretation is in line with the conception that any type of penetration, no matter how insignificant, is sufficient for an act to be considered rape. This Court understands that rape is a form of sexual violence.[257]

138. Since at least 2001, international organizations and courts have identified consent as a central element of the crime of rape. Thus, in 2001 the International Criminal Tribunal for the former Yugoslavia (ICTY), in the case of *The Prosecutor v. Kunarac, Kovac and Vukovic*, observed that there was no definition of the crime of rape in international humanitarian law and ruled that lack of consent was itself a constitutive element of rape as a crime in international criminal law and that "force or the threat of force provides clear evidence of lack of consent, but force is not per se an element of rape."[258]

139. In the case of *MC. v. Bulgaria*,[259] in 2003, the European Court of Human Rights[260] established key legal concepts regarding the issue of rape, which contributed significantly to the definition of rape in the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter "Istanbul Convention") which was adopted in 2011.[261] In the case of *MC. Vs. Bulgaria*, the European Court declared the international responsibility of the State for closing a criminal investigation into a case of sexual violence against a minor, of 14 years old, for "not finding evidence of the use of force or physical resistance during the assault". The European Court reasoned that "the authorities failed to consider all the circumstances that could have inhibited physical resistance on the part of the victim in this case, considering the particular vulnerability of a minor in cases of rape and the environment of coercion created by the aggressor". It also determined that the lack of consent should be the central aspect of the investigation and its conclusions, since "although in practice it may be difficult to prove the lack of consent in the absence of "direct" evidence of a rape, such as traces of violence or direct witnesses, the authorities must explore all the facts and decide based on an evaluation of all the related circumstances."[262]

140. In its decision related to the case cited above, the European Court held that "the constant evolution of the understanding of the way in which victims experience rape demonstrated that victims of sexual abuse – especially underage girls – generally, do not put up physical resistance due to

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Doc. PCNICC/2000/1/Add.2 (2000), article 7 (1) g)-1., and article 8 (2) e) vi)-1. Available at: https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf and Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay et al*., Judgment of March 2, 2009, case No. SCSL-04-15-T, paras. 145 and 146. This interpretation was also used by the Truth Commission in its report, which "understands rape as a form of sexual violence, which occurs when the perpetrator has invaded a person's body through conduct that has been caused the penetration, however insignificant, of any part of the body of the victim or the perpetrator with a sexual organ or of the anal or vaginal opening of the victim with an object or other part of the body. Such invasion must have occurred by force, or by threat of force or by coercion, such as that caused by fear of violence, intimidation, detention, psychological oppression or abuse of power, against that or another person or taking advantage of a coercive environment, or that has been carried out against a person incapable of giving free consent." Cf. Report of the Truth and Reconciliation Commission, Volume VI, Chapter 1.5, page. 265.

257 *Cf. Case of J. v. Peru, supra*, para. 359, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 182. See also, article 2 of the Belém do Pará Convention, and International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Judgment of September 2, 1998, case No. ICTR-96-4-T, para. 688.

258 *Cf.* Expert opinion of Dubravka Šimonović (evidence file, folio 11472), and International Criminal Tribunal for the former Yugoslavia, *Kunarac et al.* (IT-96-23 & IT-96-23/1-A), Judgment of the trial, case No. IT-96-23-T and IT-96-23/1-T, para. 129.

259 ECHR, *Case of MC. v. Bulgaria*, No. 39272/98. Judgment of December 4, 2003.

260 In 2002, the Committee of Ministers of the Council of Europe indicated that national laws should criminalize any sexual act committed without consent, even if the victim shows no signs of resistance. Recommendation No. R (2002) 5 adopted on April 30, 2002, by the Committee of Ministers of the Council of Europe. Cf. Written version of the expert opinion of Miguel Cillero Bruñol, *supra* (evidence file, folio 11691).

261 *Cf.* Expert opinion of Dubravka Šimonović, *supra* (evidence file, folios 11472 to 11473).

262 *Cf.* ECHR, *Case of M.C. v. Bulgaria*, *supra*, para. 181; Expert opinion of Dubravka Šimonović, *supra* (evidence file, folios 11472 to 11473), and Written version of the expert opinion of Miguel Cillero Bruñol, *supra* (evidence file, folio 11691).

various psychological factors or because they fear that the perpetrator will become violent with them"[263] and this highlights the importance of analyzing various elements of evidence that can suggest the lack of the victim's consent, far beyond the force. In this sense, the European Court considered that "any limited approach that is used to prosecute sexual crimes, such as requiring evidence of physical resistance in all cases, may lead to certain types of rape not being punished and, therefore, it jeopardizes the effective protection of the sexual autonomy of individuals." Thus, it concluded that "States Party […] must require the effective criminalization and conviction of any non-consensual sexual act, even in the absence of physical resistance on the part of the victim."[264]

141. In May 2011, the Istanbul Convention in its Article 36 provided the first legally binding definition of sexual violence in international law, including rape. This provision indicates the following:

> (1) Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:
> a. a engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
> b. b engaging in other non-consensual acts of a sexual nature with a person;
> c. c causing another person to engage in non-consensual acts of a sexual nature with a third person.
> (2) Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.
> (3) Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.[265]

142. Similarly, in 2010 the Committee on the Elimination of Discrimination against Women (hereinafter "the CEDAW Committee") issued a decision considered historic in the case of *Karen Tayag Vertido v. Philippines*,[266] which concluded that "rape myths and stereotypes affected the victim's right to a fair trial." In particular, the Committee ruled on the fact that the decision of the domestic judicial process had focused on the personality and behavior of the victim and had erroneously interpreted the lack of evidence of physical resistance as an indication that the victim had expressed her consent. The Committee noted that a victim should not be required to physically resist to lend credence to a claim of rape and therefore recommended that the Philippines "revise [its] definition of rape in law to focus on the lack of consent" and to promulgate a definition that "required the existence of an 'unambiguous and voluntary agreement' and that required proof by the accused of measures taken to secure the consent of the complainant/survivor," or that "required that the act took place under 'coercive circumstances, including a wide range of coercive circumstances."[267]

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263 *Cf.* ECHR, *Case of M.C. v. Bulgaria,* para. 164; Expert opinion of Dubravka Šimonović, *supra* (evidence file, folios 11472 to 11473), and Written version of the expert opinion of Miguel Cillero Bruñol, *supra* (evidence file, folio 11691).

264 *Cf.* ECHR, Case of M.C. Vs. Bulgaria, supra, para. 166; Expert opinion of Dubravka Šimonović, *supra* (evidence file, folios 11472 to 11473) and Written version of the expert opinion of Miguel Cillero Bruñol, *supra* (evidence file, folio 11691).

265 *Cf.* Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, May 11, 2011. Available at: https://www.coe.int/en/web/istanbul-convention/text-of-the-convention According to expert witness Šimonović, some of the States that have ratified the Istanbul Convention have already promoted adjustments to their criminal regulations. As an example, the expert cited Germany, which "modified the rape provisions in its 2016 Penal Code to reflect the "no means no" principle, defining rape as any sexual act "against the discernible will of a person". Sweden has promoted similar changes. *Cf*. Expert opinion of Dubravka Šimonović, *supra* (evidence file, folio 11475). The Court observes that Spain also recently approved a reform in its legislation (Organic Law 10/2022 of September 6, 2002, on the comprehensive guarantee of sexual freedom), with a view to "consider[ing] sexual violence acts of a non-consensual sexual activity or that condition the free development of sexual life in any public or private sphere, which includes sexual assault, sexual harassment and the exploitation of the prostitution of others, as well as all other crimes provided for in Title VIII of the Book II of Organic Law 10/1995, of November 23, of the Criminal Code, specifically aimed at protecting minors." Available in Spanish at: https://www.boe.es/buscar/act.php?id=BOE-A-2022-14630.

266 *Cf.* CEDAW Committee, *Case of Karen Tayag Vertido v. Philippines*, CEDAW/C/46/D/18/2008, adopted on September 22, 2010, and Expert Opinion of Dubravka Šimonović, *supra* (evidence file, folios 11473 a 11474).

267 *Cf.* CEDAW Committee, *Case of Karen Tayag Vertido v. Philippines, supra*, paras. 8.5 to 8.9, and Expert opinion of Dubravka Šimonović, *supra* (evidence file, folios 11473 to 11474).

143. Subsequently, in 2017, the CEDAW Committee called on States to define rape, using lack of consent as a basis and "taking into account coercive circumstances".[268] In 2019, the Platform of Independent Expert Mechanisms on Discrimination and Violence against Women (hereinafter "the EDVAW Platform"),[269] highlighted that "absence of consent must become the global norm to define rape" and called on States to "[r]eview criminal codes and ensure that the definition of rape is based on lack of consent, and is in line with international standards."[270]

144. In December 2021, the Committee of Experts of the Follow-up Mechanism of the Belém do Pará Convention (hereinafter "the Committee of Experts of the MESECVI" or "the CEVI") prepared a general recommendation specifically on the concept of consent in cases of sexual violence against women for gender reasons.[271] According to the MESECVI Committee of Experts, "the concept of consent in cases of sexual violence constitutes […] a legal concept that allows us to discern between the formation of a crime against the sexual freedom of a person and the performance of a consensual act."[272] Corroborating the understanding of the other international organizations and courts cited above, the CEVI stressed the importance of considering consent as a fundamental component in cases of sexual violence and stated that this should be understood as "the ability of women to indicate their willingness to participate in the act". According to the CEVI, this "concept constitutes the distinction between a consensual act and an act of abuse or rape."[273]

145. Taking the above into account, the Court agrees with the position of the different international organizations, so it considers that the criminal regulatory provisions related to sexual violence must contain the concept of consent as their central axis,[274] that is, so that if a rape is committed, proof of threat, use of force or physical violence should not be required, it being sufficient to demonstrate, by any suitable means of proof, that the victim did not consent to the sexual act. Criminal offenses related to sexual violence must focus on consent, an essential element in access to justice for women victims of sexual violence. It is worth saying that it is not appropriate to demonstrate resistance to physical aggression, but rather the lack of consent, in accordance with Article 7 of the Belém do Pará Convention. It should be emphasized that consent can only be understood when it has been freely expressed through acts that, taking into account the circumstances of the case, clearly express the

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268 *Cf.* CEDAW Committee, General Recommendation No. 35: gender-based violence against women, which updates general recommendation number. 19, CEDAW/C/GC/35, July 26, 2017, para. 29.e, and Expert opinion of Dubravka Šimonović, *supra* (evidence file, folio 11475).

269 The EDVAW platform is composed of the UN Special Rapporteur on violence against women, the UN Committee on the Elimination of Discrimination against Women, the UN Working Group on the Issue of Discrimination against Women and Girls, the Committee of Experts of the Follow-up Mechanism of the Belém do Pará Convention, the Group of Experts on Combating Violence against Women and Domestic Violence, the Special Rapporteur on the Rights of Women in Africa of the African Commission on Human and People's Rights, and the Rapporteurship of the Inter-American Commission on Human Rights on Women's Rights. Available at: https://www.ohchr.org/en/special-procedures/sr-violence-against-women/edvaw-platform-cooperation-among-un-global-and-regional-womens-rights-mechanisms.

270 *Cf.* Declaration of the EDVAW Platform of November 25, 2019. Available at: https://www.ohchr.org/en/special-procedures/sr-violence-against-women/edvaw-platform-cooperation-among-un-global-and-regional-womens-rights-mechanisms, and Expert opinion of Dubravka Šimonović, *supra* (evidence file, folio 11475).

271 *Cf.* Committee of Experts of the MESECVI, General Recommendation No. 3: *The concept of consent in cases of gender-based sexual violence against women*, OEA/Ser.L/II/7.10, MESECVI/CEVI/doc.267/21, December 7, 2021, and Written version of the expert opinion of Sylvia Mesa Peluffo, *supra* (evidence file, folio 11655).

272 *Cf.* Committee of Experts of the MESECVI, General Recommendation No. 3, *supra*, p. 24.

273 *Cf.* Committee of Experts of the MESECVI, General Recommendation No. 3, *supra*, p. 5.

274 Along the same lines, the expert witness Bruñol pointed out that "in the crime of rape, in comparative law, but also in international standards, and the case law of the European Court of Human Rights, for example, it is established very clearly that we must transition from those forms of physical and psychological, or structural violence that would be the basis of the crime of rape, to effectively focusing the entire classification on the element of the lack of all consent. Until now the crime of rape has tended to be classified in a way that centers around proving how that resistance was overcome, often requiring resistance, and not just focusing on the fact that the absence of consent already generates the crime. […] that is, there is a very important trend throughout the world, to move forward, both at the level of international standards at a conventional level, as well as at the level of comparative doctrine, to move towards a crime of rape focused on the lack of consent." *Cf*. Expert opinion of Miguel Cillero Bruñol, *supra*.

person's will. Either through verbal consent, or because said consent is derived from behavior that is evidently identifiable with voluntary participation.

146. The importance of the role of consent in situations of sexual violence is also justified based on the high incidence of cases in which sexual abuse occurs when the relationships between victim and aggressor are permeated by power asymmetries, which allow the aggressor to subdue the victim through acts committed in the institutional, work, or school environment, and through economic deprivation, among others.[275] As the CEVI warns, often in these situations, there is no physical violence and the victim does not explicitly refuse, "but the rape occurs because consent is assumed in situations of unequal power."[276] According to the CEVI:

> In recent years, the concept of consent has been used as an exoneration from criminal liability to avoid investigations related to crimes committed against women, adolescents and girls for gender reasons, which has allowed, together with other circumstances, a high range of impunity for crimes against sexual freedom in the Americas and the Caribbean. This is because the legal conceptualization of the concept in Criminal Codes, is conceived from a vision where violence is only conceived through the exercise of force and physical violence, which generates a limited vision of what free choice of the exercise of a sexual act represents.[277]

147. The Court understands that there are situations in which defects in consent occur and recognizes that the lack of a legal definition of psychological violence, for example, hinders the possibility of investigating rape. In this regard, in line with General Recommendation No. 3 of the CEVI, the Court considers it essential that States include in their criminal regulations some elements to determine the absence of consent in a sexual act, such as (a) the use of force or the threat of its use; (b) coercion or fear of violence or its consequences;[278] (c) intimidation; (d) detention and/or deprivation of liberty; (e) psychological oppression; (f) abuse of power, and (g) failure to understand sexual violence.[279]

148. The Court considers it necessary that criminal law also establish that consent cannot be inferred (i) when force, threat of force, coercion or taking advantage of a coercive environment has diminished the victim's ability to give a free and voluntary consent; (ii) when the victim is unable to give free consent; (iii) the victim's silence or lack of resistance to sexual violence, and (iv) when there is a power relationship that forces the victim to carry out the act for fear of its consequences, taking advantage of an environment of coercion.[280]

149. The Court considers that it is essential that the regulations concerning crimes of sexual violence provide that consent cannot be inferred, but must always be offered expressly, freely and prior to the act and that it can be reversible.[281] By virtue of this premise, as this Court has already pointed out, in the face of "any type of coercive circumstance it is no longer necessary for the concept of consent to occur because that circumstance has, without a doubt, eliminated consent."[282]

150. Regarding the *sub judice* case, as has been indicated, the crimes of rape and statutory rape were used during the criminal proceedings followed as a result of the sexual violence perpetrated against Brisa. At the date of the events, as previously mentioned, the crime of rape, provided for in

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275 *Cf.* Committee of Experts of the MESECVI, General Recommendation No. 3, *supra*, pp. 6 to 10.

276 *Cf.* Committee of Experts of the MESECVI, General Recommendation No. 3, *supra*, p. 10.

277 *Cf.* Committee of Experts of the MESECVI, General Recommendation No. 3, *supra*, p. 25.

278 "Sexual coercion is any type of pressure that is exerted on someone to oblige them to perform a sexual act against their will; They include fear, intimidation, detention, psychological oppression and abuse of power." *Cf*. Committee of Experts of the MESECVI, General Recommendation No. 3, *supra*, p. 26.

279 *Cf.* Committee of Experts of the MESECVI, General Recommendation No. 3, *supra*, pp. 26 to 28.

280 *Cf.* Committee of Experts of the MESECVI, General Recommendation No. 3, *supra*, pp. 31 to 32.

281 *Cf.* Committee of Experts of the MESECVI, General Recommendation No. 3, *supra*, p. 44.

282 In the *Case of J. v. Peru*, the Court recognized that "the circumstances in which the acts occurred eliminate any possibility that there was consent." See: para. 360.

Article 308 of the Bolivian Criminal Code, required the use of violence or intimidation to be carried out, unless the victim was in a situation of "mental illness", serious psychological disturbance or severe intellectual impairment […], or that she is incapable of resisting for any other reason" (*supra* para. 38). The change in that provision made in 2013 included consent, but not as a central element of the crime, but in addition to intimidation, physical or psychological violence. It must be noted that intimidation and violence always imply an absence of consent. However, the absence of consent may not be accompanied by any violence or intimidation. Thus, the legislative modification cited above did not change the definition of the criminal offense in any way, but rather added a term that, in the context in which it was included, was redundant. The crime of statutory rape, in turn, requires seduction or deception and, at the time of the events and at present, is applied in cases in which the victim is over fourteen years of age and under eighteen (*supra* paras. 40 and 42).

151. The Court notes, therefore, that the criminal legislation of Bolivia did not establish - and continues without doing so today - consent as a central element of the crime of rape and requires the demonstration of violence or intimidation. Nor does it refer to circumstances in which consent is flawed, such as in cases of evident asymmetry of power between the aggressor and the victim.

152. The Court recalls that the present case deals with the criminal process initiated following the complaint of the rape of a 16-year-old girl by her 26-year-old cousin, who constituted a figure of authority vis-à-vis the alleged victim, due to the symbolic place he occupied as "elder brother" and "guardian"[283] and the trust placed in him by Brisa [284] and her parents (*supra* para. 34). The Court notes that the criminal complaint filed by José Miguel De Angulo was as a result of the physical and, especially, psychological symptoms presented by his daughter, who had been assessed by two psychologists and a doctor (*supra* paras. 46 and 52). They all concluded that Brisa's story, symptoms, and mental state were consistent with those of a victim of sexual violence, who should receive continuous psychological support for as long as necessary to be able to deal with the sexual violence suffered.[285]

153. The Court recalls that, after the annulment of the conviction handed down by Trial Court No. 4 in 2003 and the holding of a second trial, the accused was acquitted by Trial Court No. 2 in 2005. This collegiate judicial body expressly held that it was necessary to prove the existence of physical violence or intimidation for the crime of rape to be established and, therefore, excluded the expert

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[283] Brisa and her parents pointed out that E.G.A. began to take care of her education and that of her younger sisters when he moved to live in the De Angulo Losada family residence. *Cf*. Statement of Brisa De Angulo Losada during the public hearing, *supra*; Statement of Luz Stella Losada during the public hearing, *supra*, and Statement of José Miguel De Angulo, *supra* (evidence file, folios 11433 to 11434).

[284] After the assessment interview she had with Brisa, psychologist Sandra Muñoz indicated that: "[t]he trust and fraternal affection that Brisa gave to her cousin generated feelings of guilt in the teenager, because this made it difficult for her to become aware and inform her parents about the constant sexual abuse." Cf. Psychological certification carried out by the DNI psychologist, *supra* (evidence file, folio 7850).

[285] According to Sandra Muñoz, "it was identified that [E.G.A] used mechanisms of psychological manipulation, based on emotional persuasion such as: when she did not agree to have sexual relations with him, he proceeded not to speak to her for several days, to discredit her actions and accept Brisa's apology." On the other hand, she stated that the alleged victim presented a "high rate of anxiety and anguish that have been triggered by the entire situation of sexual abuse, the disclosure of the fact and facing the corresponding legal process." *Cf*. Psychological certification carried out by the DNI psychologist, *supra* (evidence file, folios 7850 and 7851). Similarly, Dr. Lourdes Armas indicated that Brisa "did not want to discuss much about this [sexual abuse] today and she was very depressed. She was seduced into maintaining this situation for some time, the last time this happened was over a month ago; She was confused and very frustrated. Her parents were also very agitated and depressed." From the genito-urinary examination she performed, she indicated "hymen not intact," and her interpretation was that the alleged victim was a "16-year-old [w]oman in a state of having suffered sexual abuse." *Cf*. Certificate produced by Lourdes de Armas, *supra* (evidence file, folio 7853). In her psychological assessment of Brisa, Terri S. Glisson, "a therapist with 20 years of experience in sexual abuse and its treatment," stated "[i]t is my opinion that Brisa is a victim of sexual abuse and rape committed by her cousin […]. Brisa's reports of her relationship are of the nature of a minor being seduced by an adult man for the purpose of sexually exploiting her. [E.G.A.] developed a relationship with Brisa based on trust, family ties, and service to God, and used these qualities to exploit Brisa sexually and to manipulate her into believing she had done something wrong. Brisa has suffered psychological harm and emotional harm from this man as well as sexual abuse." *Cf*. Certificate made by Terri S. Gilsson, supra (evidence file, folio 7860).

opinion on psychological coercion and evidence of Brisa's mental state (*supra* para. 65). In that regard, the Sentencing Court No. 2 asserted that "it cannot affirm whether [the] sexual intercourse constituted a consensual relationship or sexual assault […] because," among other factors, "the victim [did not] refer to what the intimidation behaviors were that made her yield to her attacker." Thus, it is noted that, when examining the nature of the sexual relations existing between a 16-year-old girl and a 26-year-old adult man who represented an authority figure for her, evidencing an asymmetry of power between the two, and with whom she also had a relationship of trust, the Trial Court did not consider it relevant to focus on the existence or not of consent on the part of Brisa or on the existence of an environment of coercion, by virtue of which her consent could not be inferred, "but in the reliable verification of the existence of violence or intimidation, eliminating at the same time the only evidence that would support said elements."[286]

154. In this regard, this Court has indicated that reference cannot be made to the victims' consent to have sexual relations when the aggressor holds a figure of authority over the victim (*supra* paras. 147 and 148), because it creates a power inequality that is aggravated by the age difference between the victim and the perpetrator. It is true that "what may seem like consent on the part of the victim can be invalidated precisely because of the power inequalities in the relationship that materialize in submission on the part of the victim."[287] In view of the above, it is considered that the application of the reference law and its interpretation by the domestic courts resulted in the denial of justice to a girl who was a victim of sexual violence, such as Brisa.

155. In turn, the criminal offense of statutory rape,[288], as included in Bolivian legislation, creates a hierarchy between sexual crimes that reduces the visibility and severity of sexual violence committed against children and adolescents[289] and does not consider the importance of the concept of consent. Furthermore, incidences are restricted only to cases of "seduction or deception" in which the victim's capacity for consent would be compromised or would be non-existent. This ignores other possible particular conditions of vulnerability of the victim and conceals relationships based on power asymmetries.[290] Consequently, this Court understands that the criminal offense of statutory rape, as it was and is provided for in the legislation of Bolivia, is incompatible with the American Convention,[291] as, in any hypothesis of sexual intercourse with a person between 14 and 18 years of age, without

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286 *Cf.* Expert opinion of Sylvia Mesa Peluffo during public hearing, *supra*.

287 *Cf.* Expert opinion of Sylvia Mesa Peluffo during public hearing, *supra*.

288 The term "statutory rape" in the Bolivian legal system, and in most Latin American legal systems, is different from its use in Portuguese in Brazil. According to Ms. Šimonović's expert opinion, the definition of statutory rape in most Latin American countries refers to cases in which an adult has sexual relations with a minor who is already of legal age for consent, through seduction or deception. In Brazil, on the other hand, the term "statutory" is used to describe the act of coercing someone, through violence or serious threat, to have carnal access or another libidinous act, which is a definition very similar to what most countries understand as "rape". *Cf*. Expert opinion of Dubravka Šimonović, *supra*, (evidence file, folio 11486 to 11486).

289 *Cf.* Written version of the expert opinion of Sylvia Mesa Peluffo, *supra* (evidence file, folio 11657), Expert opinion of María Elena Attar Bellido, *supra* (evidence file, folio 11554), Expert opinion of Dubravka Šimonović, *supra* (evidence file, folio 11485).

290 Expert witness Attar Bellido argued that "it is important to emphasize that in cases in which there is abuse of a relationship of trust or authority or in a circle of trust due to blood, spiritual or family ties of affection, sexual violence against [girls, children and adolescents] cannot be classified as statutory rape and the facts cannot be assessed within the framework of "seduction or deception" - even if the aggravating circumstance of article 310 of the [Criminal Code] is applied - because it would imply a minimization of the seriousness of the sexual violence to this group that deserves enhanced protection, therefore, from a gender perspective and in this context of abuse of a relationship of trust or authority, sexual violence must be classified as rape against children and adolescents." Cf. Expert opinion of María Elena Attar Bellido, *supra* (evidence file, folio 11556).

291 According to expert witness Mesa Peluffo, "the crime of statutory rape […] is a criminal concept with gender bias, which should have been eliminated if the State had complied with the obligation imposed by Article 7(e) of the Belém do Pará Convention. The existence and adequate application of laws that strongly punish sexual violence and especially incest is an essential deterrent to establishing a culture of non-tolerance, with which Bolivia does not comply, so it would be necessary for the State to harmonize its legislation with the Belém do Pará Conventions, the Rights of the Child and CEDAW." Cf. Expert opinion of Sylvia Mesa Peluffo, *supra*.

their consent or in a context in which their consent cannot be inferred due to seduction, deception, abuse of power, coercion, intimidation or other reason, it becomes considered under the crime of rape (*supra* paras. 145 to 149).

156. In light of all the previous considerations, the Court concludes that the State is responsible for the violation of the rights of the child, equality before the law and judicial protection, pursuant to Articles 19, 24 and 25 of the American Convention on Human Rights, established in Articles 1(1) and 2 thereof, as well as for failure to comply with the obligations derived from Articles 7(b), 7(c) and 7(e) of the Convention of Belém do Pará, to the detriment of Brisa De Angulo Losada.

B.4 Discrimination in access to justice based on reasons of gender and childhood, and institutional violence

157. Regarding the principle of equality before the law and non-discrimination, the Court has indicated that the notion of equality arises directly from the natural unity of humankind and is inseparable from the essential dignity of the individual, which is incompatible with any situation that, because a certain group is considered superior, leads to its privileged treatment or, conversely, a group, because it is considered inferior, is treated with hostility or any form of discrimination, excluded from the enjoyment of rights that are recognized for those who do not consider themselves to be in such a situation.[292] At the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*.[293] The legal framework of national and international public order rests on it and permeates the entire legal system. States must refrain from carrying out actions that are in any way aimed, directly or indirectly, at creating situations of de jure or de facto discrimination.[294]

158. The Court has indicated that, while the general obligation of Article 1(1) of the American Convention refers to the State's duty to respect and guarantee "without discrimination" the rights contained in said treaty, Article 24 protects the right to "equal protection of the law".[295] Article 24 of the American Convention prohibits discrimination in law or in fact, not only with respect to the rights enshrined therein, but with respect to all laws approved by the State and their application. That is, it does not limit itself to reiterating the provisions of Article 1(1) of the Convention, regarding the obligation of States to respect and guarantee, without discrimination, the rights recognized in said treaty, but it enshrines a right that also entails the States' obligations to respect and guarantee the principle of equality and non-discrimination in the safeguarding of other rights and in all domestic legislation that it approves.[296] In short, the Court has affirmed that, if a State discriminates in the respect or guarantee of a conventional right, it would violate Article 1(1) and the substantive right in question. If, on the other hand, discrimination refers to unequal protection of domestic law or its application, the fact must be analyzed in light of Article 24 of the American Convention.[297]

159. According to the Court's case law, Article 24 of the Convention also contains a mandate aimed at guaranteeing material equality. Thus, the right to equality provided for by the aforementioned provision has a formal dimension, which protects equality before the law, and a material or

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[292] *Cf. Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 55, and *Case of Barbosa de Souza v. Brazil, supra*, para. 138.

[293] *Cf. Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 103, and *Case of Manuela et al. v. El Salvador, supra*, para. 248.

[294] *Cf.* Advisory Opinion OC-18/03, *supra*, paras. 101, 103 and 104, and *Case of Barbosa de Souza et al. v. Brazil, supra*, para. 138.

[295] Advisory Opinion OC-4/84, *supra*, para. 53 and 54, and *Case of Barbosa de Souza et al. v. Brazil, supra*, para. 139.

[296] *Cf.* Case of *Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 23, 2005. Series C No. 127, para. 186, and *Case of Barbosa de Souza et al. v. Brazil, supra*, para. 139.

[297] *Cf. 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, and *Case of Barbosa de Souza et al. v. Brazil, supra*, para. 139.

substantial dimension, which determines "the adoption of positive promotional measures in favor of groups historically discriminated or marginalized due to the factors referred to in Article 1(1) of the American Convention."[298]

160. The Court considers that rape is a form of sexual violence.[299] Both the Belém do Pará Convention and the Convention on the Elimination of All Forms of Discrimination against Women and its supervisory body have recognized the link between violence against women and discrimination.[300] The Court has already highlighted the special vulnerability of girls to sexual violence, especially in the family sphere, as well as the greater risk of facing obstacles and discrimination in access to justice due to their condition of being both a woman and a girl (*supra* para. 100). In this case, said violence was carried out by a private individual. However, this does not exempt the State from responsibility since it was called upon to adopt comprehensive policies to prevent, punish and eradicate violence against women, taking particularly into account cases in which the woman is under 18 years of age.

161. The Court reiterates that judicial ineffectiveness in the face of individual cases of violence against women fosters an environment of impunity that facilitates and promotes the repetition of acts of violence in general and sends a message according to which violence against women can be tolerated and accepted, which favors its perpetuation and the social acceptance of the phenomenon, women's sensation of feeling unsafe, as well as their persisting mistrust in the system of administration of justice.[301] This inefficiency or indifference constitutes in itself discrimination against women in access to justice.

162. In this regard, as mentioned above, the State must reinforce guarantees of protection during the investigation and criminal proceedings, when the case refers to the rape of a girl, especially if this sexual violence was carried out in the family sphere. In these cases, the obligations of due diligence and adoption of protective measures must be heightened. Furthermore, investigations and criminal proceedings must be directed by the State with a gender and childhood perspective, based on the victim's status as a girl and taking into account the aggravated nature of the rape, as well as its possible effects.

163. In this context, the use of gender stereotypes by officials and authorities of the justice system during a judicial process violates the aforementioned obligation that States have to adopt a gender perspective in criminal investigations and processes. The Court has reiterated that the gender stereotype refers to a preconception of attributes, behaviors or characteristics possessed or roles that are or should be performed by men and women respectively,[302] and that it is possible to associate the subordination of women to practices based on socially dominant gender stereotypes and socially persistent gender norms. Its creation and use becomes one of the causes of gender violence against women, conditions that worsen when they are reflected, implicitly or explicitly, in

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298 *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil, supra*, para. 199, and *Case of Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala*. *Merits, Reparations and Costs.* Judgment of October 6, 2021. Series C No. 440, para. 135. See also, *Case of Vicky Hernández et al. v. Honduras. Merits, Reparations and Costs*. Judgment of March 26, 2021. Series C No. 422. Para. 66.

299 *Cf. Case of J. v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 27, 2013. Series C No. 275, para. 359, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 182.

300 *Cf. Case of González et al. ("Cotton Field") v. Mexico, supra*, paras. 394 and 395; the Convention of Belém do Pará, preamble and Article 6; the Convention on the Elimination of All Forms of Discrimination against Women, Article 1, and Committee on the Elimination of Discrimination against Women. General Recommendation No. 19: Violence against Women, UN Doc. A/47/38, January 29, 1992, paras. 1 and 6.

301 *Cf. Case of González et al. ("Cotton Field") v. Mexico*, *supra*, paras. 388 and 400, and *Case of Barbosa de Souza et al. v. Brazil, supra*, para. 125.

302 *Cf. Case of González et al. ("Cotton Field") v. Mexico, supra*, para. 401, and *Case of Digna Ochoa and family members v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 25, 2021. Series C No. 447, para. 123.

policies and practices, particularly in reasoning and language. of state authorities.[303] In particular, the Court has recognized that personal prejudices and gender stereotypes affect the objectivity of state officials in charge of investigating the complaints presented to them, influencing their perception to determine whether or not an act of violence occurred, in their evaluation of the credibility of witnesses and the victim themselves. Stereotypes "distort perceptions and lead to decisions based on preconceived beliefs and myths, rather than facts," which in turn can lead to denial of justice, including the re-victimization of complainants.[304]

164. In this case, it is noted that, in addition to the high indicence of impunity in cases of sexual violence against children and adolescents that existed in Bolivia at the time,[305] gender stereotypes were used by some justice officers to refer to the alleged victim's personal attributes and thus question the existence of sexual violence. In fact, during the first trial, the Trial Court modified ex officio the criminal offense from rape to statutory rape after having glimpsed "certain personality traits of […] Brisa",[306] such as her "strong personality", based on which it concluded that "it is not possible to conceive that Brisa has been intimidated by [the accused]."[307] Furthermore, during that same trial, while the alleged victim was giving her testimony, one of the citizen judges questioned her rape because Brisa had not screamed. These stereotypes reinforce the misconceived and discriminatory idea that a victim of sexual violence has to be "weak", appear "defenseless", react or resist aggression.[308]

165. The Court also notes the use of gender stereotypes in the questions addressed to the witnesses during the oral trial held between March 17 and 28, 2003. It should be noted that, although most of these questions were not posed by state authorities, they, especially the judges, were responsible for directing the process and, therefore, preventing interrogations permeated by gender stereotypes. Although the court record of that first hearing does not include the witnesses' answers, but only the questions that were asked, the Court notes that the defendant's lawyers questioned the witnesses, asking them, for example, " Why did you leave a young girl alone with a young man?" "From what age have you, as a couple, allowed Brisa to wear makeup or dress up?" "How many boyfriends has [Brisa] had?" "How did Brisa dress before November, did she wear dresses, makeup or adornments?"; "Is it impossible for a teenager to fall in love with one of her relatives in a healthy way? Have you heard of the theory of 'provocative victims'?"; "How would you rate Brisa in terms of her character and her manner of acting? Was she like that with everyone? Didn't she take off her sweater? How old was Brisa? How many years ago did you see Brisa conquer someone? Did you see Brisa at that sleepover

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303 *Cf.* mutatis mutandis, *Case of González et al. ("Cotton Field") v. Mexico, supra*, para. 401.

304 *Cf. Case of Gutiérrez Hernández et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 24, 2017. Series C No. 339, para. 173, and *Case of Digna Ochoa and family members v. Mexico, supra,* para. 320. Similarly, UN, Committee on the Elimination of Discrimination against Women. General Recommendation No. 33: Women's access to justice, CEDAW/C/GC/33, August 3, 2015, para. 26.

305 According to the amicus curiae filed by The Global Women's Institute, Together for Girls, Futures Without Violence, The Equality Institute, Prevention Collaborative, Children's Institute at the University of Cape Town in South Africa, Sexual Violence Research Initiative (SVRI), Raising Voices, BRAVE Movement, MenEngage Alliance, Natasha Stott Despoja, Lauren Fite, Raúl R. Herrera and Charlotte Bunch, in 2006 only 11.04% of reported cases of sexual violence against children and adolescents received a judicial response and 0.04% received a response from the criminal courts (merits file, folio 1196).

306 At the same time, when referring to the personality of the aggressor, the Court considered it relevant that he was "27 years old, single and without children, [with] higher education in Veterinary Medicine." In addition, it pointed out that it was important in setting the sentence "the youth of the accused and his family social relationships, would be seriously affected." *Cf*. Judgment issued by the Sentencing Court No. 4, supra (evidence file folio 7668).

307 *Cf.* Judgment issued by the Sentencing Court No. 4, *supra* (evidence file folios 7667,7668,7673).

308 According to expert Mesa Peluffo, "in general gender stereotypes tend to consider that an ideal woman is a modest woman, she is a weak woman, she is a woman who cannot face things, she is a woman who also considers a woman's word doesn't count. A very common stereotype is that adolescent girls lie, that adolescent girls are promiscuous, so the application of those stereotypes, when people have those stereotypes and have not analyzed them, let's say, have not worked on them, the stereotypes will be reflected in the way they investigate and the way they decide. Then we're going to start finding out which are the good victims and which are the bad victims. In the case of Brisa, for example, it is argued that since she was a very strong girl, she could have stopped the aggressor, that is a stereotype that evidently guided the court in that case. Cf. Expert opinion of Sylvia Mesa Peluffo, *supra*.

with abnormal or suspicious attitudes towards someone? […] on the day of the sleepover did you see Brisa and […] kissing each other?", and "did you see Brisa fall in love with [E.G.A]?" The Prosecutor asked José Miguel de Angulo if "on some occasion Brisa found him viewing pornographic sites."[309]

166. The Court warns that the State was faced with a report of rape committed against a girl, and due to her situation of double vulnerability previously indicated and in the terms of articles 1(1) and 24 of the American Convention, Bolivia had to adopt positive measures to guarantee effective and equal access to justice, in the terms already established by this Court (*supra* paras. 95 to 107). In this regard, the Court recalls that it has already referred to the information on the process and the comprehensive care services available; the right to participate and have opinions taken into account; the right to free legal assistance; the specialization of all participating officers; and the right to have medical, psychological and psychiatric assistance services that support their recovery, rehabilitation and reintegration. In this case, it was demonstrated that said measures, which were necessary to guarantee Brisa material equality in the criminal process, were not adopted, so there was intersectional discrimination in access to justice, for reasons of gender, as well as the victim's status as a girl.

167. Furthermore, it was up to Bolivia to heighten protection measures in favor of Brisa so as not to prejudice her by causing further harm with the investigation process, understanding that all decisions adopted must obey the main purpose of comprehensively protecting the rights of children, safeguarding their subsequent development, ensuring their best interests, and avoiding their re-victimization.

168. In this case, the State required the girl to undergo two unnecessary gynecological examinations and to be interviewed on several occasions to recount the events, among other acts analyzed above. Furthermore, the actions of the forensic doctor and their team were discriminatory, by not considering Brisa's right to be heard and to provide her consent, when she asked for the medical students to leave the examination room or she resisted and expressed pain and anguish at the start of the medical examination. This added to the lack of comprehensive care for the victim, increased the trauma suffered, maintained existing post-traumatic stress and prevented the girl's recovery and rehabilitation, the impact of which still has an effect on her personal integrity to this day. Consequently, the Court considers that the way in which the investigation into Brisa's rape was conducted was discriminatory and not carried out with a gender perspective and enhanced protection of the rights of the child, in accordance with the special obligations imposed by Article 19 of the American Convention and the Convention of Belém do Pará.

169. In view of the above, the Court considers that the State failed to comply with its obligation to guarantee, without gender-based discrimination and the victim's condition as a developing person, the right of access to justice, pursuant to Articles 8(1), 19 and 25(1) of the American Convention, established in Articles 1(1) and 24 thereof and Articles 7(b) and 7(e) of the Convention of Belém do Pará, to the detriment of Brisa de Angulo Losada.

170. Additionally, the Court considers that in this case the State became a second aggressor, by committing various revictimizing acts that, taking into account the definition of violence against women adopted in the Convention of Belém do Pará, constituted institutional violence. Indeed, Article 1 of the Belém do Pará Convention indicates that "violence against women should be understood as any act or conduct, based on gender, which causes death, physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere." Similarly, said instrument highlights that said violence includes that which is perpetrated or tolerated by the State or its agents, wherever it occurs.

[309] *Cf.* Record of oral trial hearing from March 17 to 28, 2003 (evidence file, folios 9640, 9644, 9647, 9648, 9659, 9661, 9666 and 9667).

171. In conclusion, the Court considers that the girl suffered institutional violence during the judicial procedure, in particular, following the first forensic medical examination, the first interview with Prosecutor N.T.A. and her interrogation during the second hearing. The girl and her family turned to the judicial system seeking protection and to obtain restitution of her violated rights. However, not only did the State not comply with the enhanced due diligence and special protection required in the judicial process where a situation of sexual violence was investigated, but it responded with a new form of violence. In this regard, in addition to the violation of the right of access to justice without discrimination, the Court considers that the State exercised institutional violence, causing greater harm and multiplying the traumatic experience suffered by Brisa. Consequently, this Court determines that the re-victimizing acts carried out by state officers to the detriment of Brisa De Angulo Losada constituted institutional violence and must be classified, taking into account the magnitude of the suffering caused, as cruel, inhuman and degrading treatment pursuant to Article 5(2) of the American Convention, as established in Article 1(1) thereof.

B.5 Conclusion

172. In view of the above, the Court considers that Bolivia is responsible for the violation of the rights to humane treatment, to a fair trial, to private and family life, to the rights of the child, to equality before the law and judicial protection, pursuant to Articles 5(1), 5(2), 8(1), 11(2), 19, 24 and 25(1) of the American Convention on Human Rights, as established in Articles 1(1) and 2 thereof, as well as the breach of the obligations derived from Articles 7(b), 7(c), 7(e) and 7(f) of the Convention of Belém do Pará, to the detriment of Brisa De Angulo Losada.

VIII
REPARATIONS

173. Based on the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has caused harm entails the duty to adequately repair it, and that this provision includes a customary norm that constitutes one of the fundamental principles of contemporary International Law on the responsibility of a State.[310]

174. Reparation for harm caused by the breach of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of the restoration of the original condition. If this is not feasible, as occurs in most cases of human rights violations, the Court will determine measures to guarantee the violated rights and repair the consequences produced by the violations.[311] Therefore, the Court has considered the need to grant various measures of reparation in order to comprehensively compensate for the harm, which is why, in addition to pecuniary compensation, measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition have special relevance for the damages caused.[312]

175. The Court has established that reparations must have a causal link with the facts of the case, the declared violations, the proven damages, as well as the measures requested to repair the respective damages. Therefore, the Court must observe said concurrence to rule appropriately and in accordance with law.[313] The Court also considers that reparations must include an analysis that

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[310] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Aroca Palma et al. v. Ecuador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 8, 2022. Series C No. 471, para. 120.

[311] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, paras. 25 and 2, and *Case of Aroca Palma et al. v. Ecuador, supra*, para. 121.

[312] *Cf. Case of the Las Dos Erres Massacre v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Aroca Palma et al. v. Ecuador, supra*, para. 121.

[313] *Cf. Case of Ticona Estrada v. Bolivia. Merits, Reparations and Costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Aroca Palma et al. v. Ecuador, supra*, para. 121.

considers not only the right of the victims to obtain reparation, but also incorporates a gender and childhood perspective, both in its formulation and in its implementation.[314]

176. Taking into account the violations of the American Convention and the Convention of Belém do Pará declared in the previous chapter, in light of the standards established in the Court's case law regarding the nature and scope of the obligation to make reparations,[315] the Court will analyze the petitions presented by the Commission and the representatives, as well as the arguments of the State in this regard, to establish below the measures of reparation for these violations.

177. The Court considers it pertinent to highlight that the victim expressly stated that she would not request rehabilitation measures or compensatory compensation. This will therefore be taken into consideration when determining reparations.

A. Injured Party

178. Pursuant to Article 63(1) of the Convention, the Court holds that an injured party is anyone who has been declared a victim of the violation of any right recognized in the Convention. Therefore, this Court considers as the "injured party" Brisa De Angulo Losada, who, in her capacity as a victim of the violations declared in Chapter VII of this judgment, will be the beneficiary of the reparations ordered by the Court.

B. Obligation to investigate the facts and identify, prosecute and, where appropriate, punish those responsible

179. The ***Commission*** requested that the Court order the State of Bolivia "to continue the investigation and criminal proceedings in a diligent, effective manner, with a gender and childhood perspective and within a reasonable period of time in order to completely clarify the facts and determine potential responsibilities with their corresponding sanctions." It indicated that, within the framework of the continuity of the investigation and the criminal proceedings, the State must (a) take all measures at its disposal to remedy and correct the multiple deficiencies, irregularities and omissions; (b) refrain from invoking stereotypes, and (c) initiate ex officio an investigation into the actions of officers, both medical and otherwise, who directly committed or contributed to the materialization of the alleged violations.

180. The ***representatives*** requested that the Court order Bolivia: (i) undertake the capture, extradition, prosecution and subsequent punishment of E.G.A., in order to ensure the victim's access to justice; (ii) initiate an ex officio investigation against the actions of M.C.A., the then presiding judge of Sentencing Court No. 2 of the Superior Court of Bolivia, who would have directly contributed to the revictimization of Brisa and her family during the trial and to the alleged violations of their human rights.

181. The ***State*** rejected the requests of the Commission and the representatives. It recalled that the request for detention for extradition purposes in Colombia against E.G.A. is in progress, so, regardless of any decision of the Court, the hearing will be carried out in accordance with domestic regulations, international instruments and the case law of the Court once the accused, who is in contempt of court, is extradited. Furthermore, it noted that neither the Commission nor the representatives pointed out specific facts that, in accordance with national legislation and the principle of legality, could constitute crimes or disciplinary offenses, nor did they identify the state

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[314] *Cf. Case of I.V. v Bolivia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 30, 2016. Series C No. 329, para. 326, and *Case of Barbosa de Souza et al. v. Brazil, supra*, para. 165.

[315] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, paras. 25 to 27, and *Case of Sales Pimenta v. Brazil, supra*, para. 138.

authorities that would be responsible for the alleged violations. It clarified that, with respect to the then Presiding Judge of Sentencing Court No. 2 of the Superior Court of Bolivia, the Court's acquittal ruling was unanimous and, subsequently, annulled and amended, and that the alleged victim has not initiated criminal or disciplinary proceedings against it.

182. The ***Court*** declared in this judgment, inter alia, that the State failed to comply with the duty to investigate with the corresponding enhanced and strict due diligence in a case of sexual violence perpetrated against a girl, ultimately re-victimizing the victim, and allowing the case to remain in a state of absolute impunity. The Court takes into consideration that, after the public hearing of the case, the State reported that, on February 21, 2022, E.G.A. was captured for extradition purposes in Colombian territory. However, on September 2, 2022, the Criminal Cassation Chamber of the Supreme Court of Justice of Colombia decided to cancel the arrest warrant against E.G.A. due to "the prescription of the criminal action in light of Colombian regulations"[316] and ordered his immediate release.

183. This Court expresses its deep concern about the failures in the investigation and prosecution of the facts that led, due to the passage of time, to the present case remaining unpunished. In this sense, it reiterates that judicial ineffectiveness when dealing with individual cases of violence against women fosters an environment of impunity that facilitates and promotes the repetition of acts of violence in general and sends a message that violence against women is tolerated and accepted, which leads to its perpetuation and social acceptance of the phenomenon, women's sensation of feeling unsafe, as well as their persistent mistrust in the system of administration of justice. Additionally, it recalls that girls are especially vulnerable to being victims of human rights violations and that said vulnerability can be framed and enhanced, due to factors of historical discrimination that have contributed to women and girls suffering higher rates of sexual violence, especially in the family sphere. The Court considers that inefficiency, indifference and obstacles in access to justice are discriminatory, since they do not allow women and girls to exercise the right of access to justice under conditions of equality.[317]

184. The Court reiterates that judicial ineffectiveness in the face of individual cases of violence against women fosters an environment of impunity that facilitates and promotes the repetition of acts of violence in general and sends a message that violence against women will be tolerated and accepted. This encourages the perpetuation of gender violence and its social acceptance, as well as women's sensation of feeling unsafe and their persistent mistrust in the justice administration system.[318]

185. In the circumstances of this case, the Court considers it pertinent to order the State to keep the criminal proceedings open and promote the investigation of the case if there is any change in circumstances that allows it.

186. Furthermore, this Court established that different state authorities in charge of the investigation and trial contributed to Brisa's revictimization, by carrying out forensic examinations, repetitive interrogations, inappropriate questions and comments that incorporated gender stereotypes, among other acts. Therefore, the Court considers it pertinent to order the State to adopt all necessary measures to, within a reasonable period of time, determine, through the competent public institutions, the possible responsibilities of the officers who, by their actions, contributed to the commission of revictimizing actions and possible procedural irregularities to the detriment of Brisa and, to the extent appropriate, apply the consequences provided for in law.

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316 *Cf.* Decision issued by the Criminal Cassation Chamber of the Supreme Court of Justice of Colombia on September 2, 2022 (evidence file, folios 12077 to 12088).

317 *Case of V.R.P., V.P.C. et al. v. Nicaragua, supra*, paras. 156 and 291.

318 *Cf. Case of González et al. ("Cotton Field") v. Mexico, supra*, paras. 388 and 400, and *Case of Barbosa de Souza et al. v. Brazil, supra*, para. 125.

C. Measures of Satisfaction

187. The ***Commission*** requested, in general terms, that the Court order the State to adopt measures of satisfaction to fully repair the alleged violations, both in their pecuniary and non-pecuniary aspects.

188. The ***representatives*** requested that the Court order Bolivia (i) to publish the official summary of the judgment within a period of six months from the notification of the judgment to the State in (a) the Government's Official Gazette, and (b) in *Los Tiempos*, or in a national newspaper of similar reputation. Along with these publications, it requested that the State publish its "public commitment to develop a comprehensive, holistic and transformative national strategy to prevent and respond to sexual violence against girls and adolescents, especially incest"; (ii) publish the entirety of the judgment, for a period of one year, on the official State website, and (iii) recognize the human rights violations confirmed in the judgment, announce the measures it has adopted and will adopt to ensure that these violations do not occur again and express their "public commitment to develop a comprehensive, holistic and transformative national strategy to prevent and respond to sexual violence against girls and adolescents, especially incest," through a press conference with the participation of high level government officials.

189. The ***State*** rejected all the claims made. It stated that since the alleged violations did not exist, it would not be their responsibility to make the requested publications or the press conference. Finally, it indicated that, for several years, it has been generating legislation, public policies and institutional actions to fight against sexual violence.

c.1 Publication of the judgment

190. The Court orders, as it has done in other cases,[319] that the State publish, within a period of six months from the notification of this judgment, in a legible and appropriate font size: (a) the summary official of this judgment prepared by the Court, once only, in the Official Gazette; (b) the official summary of this judgment prepared by the Court, once only, in a media outlet with wide national circulation, and (c) this judgment in its entirety, available for a period of one year, in at least one appropriate official website, in a manner accessible to the public from the home page of the website. The State must immediately inform this Court once it proceeds to make each of the stipulated publications, regardless of the period of one year to present its first report, as provided in operative paragraph 22 of this judgment.

c.2 Public act of recognition of international responsibility

191. In order to repair the harm caused to the victim and prevent events such as those in this case from being repeated, especially taking into account the state of absolute impunity of the sexual violence suffered by Brisa, solely attributable to the conduct of the State, and the need to give visibility to the importance of investigating with enhanced due diligence sexual crimes committed against children and adolescents, the Court considers it necessary to order that the State carry out a public act of recognition of international responsibility in relation to the facts of this case, within a period of one year from the notification of this judgment. In said act, reference must be made to the human rights violations declared in this judgment. It must be carried out through a public ceremony in the presence of senior State officials and the alleged victim and/or her family and representatives, if they so wish. The State and the victim, and/or their representatives, must agree on the modality of compliance with the public act, as well as the specifications that are required, such as the place and date of the event. Furthermore, in order to contribute to raising awareness to prevent and avoid

[319] *Cf. Case of Cantoral Benavides v. Peru. Merits, Reparations and Costs*. Judgment of December 3, 2021. Series C No. 88, para. 79, and *Case of Aroca Palma et al. v. Ecuador, supra*, para. 135.

the repetition of harmful events such as those that occurred in this case,[320] the Court orders the State to disseminate said act through the media as widely as possible, including broadcast on radio, free and national television, and social networks.

D. Guarantees of non-repetition

192. The ***Commission*** requested that the Court order the State to adopt legislative, administrative and other measures to ensure the proper training of officers who come into contact with (a) complaints of sexual violence against girls and adolescents, (b) the investigation of these complaints, and (c) their prosecution, in order to carry out its role with a gender and childhood perspective, and in accordance with inter-American standards.

193. The ***representatives*** requested that the Court order Bolivia (i) to carry out a "broad, holistic and transformative" national strategy that includes at least (a) legislative reforms related to the modification of the criminal offense of rape and sexual abuse so that they include the element of consent, (b) national policies and mechanisms on sexual violence, designed by intersectoral networks and commissions with the aim of applying them in all government departments, (c) the collection of data on child victims of sexual violence, in such a way as to indicate how many cases are incestuous, how many are reported to the authorities, how many are investigated, how many perpetrators are charged, how many cases are prosecuted and the results of those trials, (d) prevention mechanisms to understand and address social constructions and the culture of impunity that allow sexual violence against girls and adolescents to continue, specifically incest, and, to end sexist stereotypes and patriarchal relationships that endanger the physical integrity of girls, (e) protection efforts that include aspects such as ensuring that existing support services will be adequately resourced, and that staff will be trained by internationally certified trainers so that they can respond appropriately and sensitively to children and adolescents who request help, (f) guidelines based on empirical data, incorporating international practices, as well as a program of continuous and mandatory training of internationally certified instructors for all justice sector officers who respond to or interact with child and adolescent victims of sexual violence, with special attention to incest, (g) guidelines on forensic interviews and forensic medical examinations, (h) integrated management of cases of sexual violence, (i) the inclusion of civil society organizations and of the voices of survivors of sexual violence in the development, implementation, monitoring and improvement of a national strategy, (j) standardization of public education and awareness programs on incest, and (k) psychological, medical and legal services accessible to child victims of sexual violence, particularly incest, and their families.

194. The ***State*** rejected the requests made. It indicated that, it has been progressively implementing public policies and legislative, institutional and administrative measures to fight sexual violence and promote the rights of children, adolescents and women, accompanied by training for public servants from the Public Prosecutor's Office, the Police, the judiciary and others who may come into contact with complaints of sexual violence to the detriment of these cohorts. Regarding legislative reforms, it pointed out that the state obligation to adopt its internal regulations must be framed in International Human Rights Law, not personal requirements. In this regard, it warned that it was not identified or proved that the current criminal legislation is contrary to the international treaties signed by Bolivia. Finally, it recalled that Bolivia has already modified its criminal legislation, while increasing the penalties for those crimes where the victims are children and adolescents.

195. The ***Court*** recalls that the State must prevent the occurrence of human rights violations such as those described in this case and, therefore, adopt all legal, administrative and other measures

[320] *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs*. Judgment of November 25, 2006. Series C No. 160, para. 445, and *Case of Aroca Palma et al. v. Ecuador, supra*, para. 136.

that are appropriate for this purpose.[321] The Court assesses positively the progress that the State has made after the events in this case, so it will take them into account when determining the guarantees of non-repetition of this case.

d.1. Adaption to domestic legislation

196. This Court assesses positively the different laws that the State has implemented against gender violence, sexual violence and in favor of the protection of children and adolescents,[322] as well as the different procedural reforms that seek to facilitate access to justice for victims of sexual violence.[323] Particularly, the Court highlights the modification of the Code of Criminal Procedure, which establishes that the sentencing courts be made up of three technical judges, and not two justice professionals and two citizens as was established at the time of the events,[324] which guarantees that cases of sexual violence against minors are judged by judicial authorities of a technical nature, who have the appropriate training and specialization.

197. Without prejudice to the foregoing, the Court considers it relevant to order some legislative adjustments as they constitute measures aimed at eliminating obstacles and contribute to obtaining justice for child victims of sexual violence. The aforementioned regulatory reforms are also intended to punish those who use their position of power, control or influence over minors to abuse or exploit their dependence or vulnerability and eliminate gender stereotypes and discrimination in the criminalization of acts of sexual violence.

198. Regarding the classification of the crime of rape, the Court observes that, although the last modification made to this criminal offense (*supra* para. 43) includes the requirement that sexual acts be non-consensual, consent appears as a tangential and additional element in the configuration of the crime of rape, since it continues to require that intimidation, physical or psychological violence be exercised, or that the victim be incapable of resisting. Therefore, the State must, within a reasonable period of time, adapt its domestic legal system in such a way that the absence of consent is central and constitutive of the crime of rape, in such a way that the crime is not required to be committed through violence or intimidation, the lack of consent for the sexual act being sufficient. When classifying this crime, the coercive circumstances that nullify consent must be taken into account, in accordance with the standards established in paragraphs 145 to 149 of this judgment.

199. Additionally, this Court warns that the crime of statutory rape is based on traditions and gender stereotypes; it does not identify the victim's particular condition of vulnerability; it conceals relationships of power, and creates a hierarchy between sexual crimes that diminishes, makes invisible and normalizes the seriousness of sexual violence against children and adolescents.[325] Furthermore, the Court notes that the regulatory adaptation cited above will necessarily imply that

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321 *Cf. Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, para. 106, and *Case of Barbosa de Souza et al. v. Brazil, supra*, para. 186.

322 Comprehensive Law to Guarantee Women a Life Free of Violence (Law No. 348 of 2013); Updated Code for Children and Adolescents (Law No. 548 of 2014); Code of Families and Family Process (merits file, folios 106, 107, 233, 235, 511).

323 Law No. 1970 of 2010 modified the Code of Criminal Procedure, limiting the duration of proceedings in cases of sexual violence against children and adolescents to a maximum of 3 years, counted from the first act of the proceedings. The Law of Abbreviation of Criminal Procedure and Strengthening the Comprehensive Fight against Violence against Children, Adolescents and Women, provides that, in the case of victims who are minors and adult perpetrators, the eight-year statute of limitations begins four years after the victim has reached legal adulthood (Law No. 1173 of 2019). The Law of the Judicial Body (Law No. 025 of 2010), provides, within the organizational structure of the judicial body, public courts in matters of childhood and adolescence, as well as public courts in matters of intrafamily or domestic violence (file background, pages 106, 186, 232, 520).

324 Article 8 of the Law on Decongestion and Effectiveness of the Criminal Procedure System, of October 30, 2014, modified Article 52 of the Criminal Procedure Law.

325 *Cf.* Written version of Sylvia Mesa Peluffo's expert opinion dated April 12, 2022 (evidence file, folios 11657 to 11658); Expert opinion of María Elena Attar Bellido dated March 21, 2022 (evidence file, folio 11554), and expert opinion of Dubravka Šimonović dated March 18, 2022 (evidence file, folio 11485).

the criminal offense of rape would protect the legal rights covered by the criminal offense of statutory rape. Consequently, and in order to ensure that all forms of sexual violence against adolescent minors are based on lack of consent and are prosecuted and punished in accordance with the seriousness of the facts, the State must, within a reasonable period of time, eliminate the criminal offense of statutory rape from its legal system.

200. Regarding the concept of incest, this Court considers that the case revealed special characteristics of the legal approach to incest in the Bolivian justice system that led to Brisa's revictimization. In effect, the representatives criticized the status of incest as a "mere aggravating circumstance," requesting as a measure of reparation that it be transformed into an autonomous offense. The State did not specifically address this argument in its considerations.

201. It should be emphasized that incestuous rape entails a differentiated and particular impact on the rights of children and adolescents, specifically protected by the American Convention and other international instruments. Taking into account the prevalence and the differentiated and aggravated impact of incestuous rape, as well as the importance of increasing visibility of its definition and prohibition, the Court considers that incest is different from other forms of sexual violation and requires a specialized approach on the part of the State in its legislation. Thus, the Court considers it appropriate to order the State to, within a reasonable period of time, make incestuous rape visible with its own *nomen juris* in the Bolivian Penal Code.

d.2. Adoption of standardized protocols for investigation and comprehensive care in cases of sexual violence to the detriment of children and adolescents

202. The State indicated that it has implemented a series of instruments for the investigation and prosecution of crimes against sexual freedom with a gender and childhood perspective [326] and for addressing cases of violence against children and adolescents.[327] The Court notes that the investigation and trial protocols indicated by the State are focused on the prevention, combat and eradication of gender violence and violence against women in general. Thus, the Court notes that, according to the information provided, only one protocol refers to the collection of testimony from children and adolescents who are victims or witnesses, and that the State did not specify whether the other protocols include a specific section or general guidelines for cases in which the victim is a child or adolescent.

203. The Court considers that the general criteria established in the cited documentation imply significant progress in terms of the adaptation of domestic standards and practices to international regulations. However, it warns that it is necessary to have standards more focused on children, which take into account the criteria established in this judgment and in other international instruments that consider the specific conditions and needs of children and adolescents.

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[326] Among them, the State made reference to the Gesell Chamber Interview Protocol and Methodology for Collecting Testimony from Children and Adolescents, victims and/or Witnesses; Medical - Forensic Examination Protocol in Sexual Crimes; Protocol for specialized medical-forensic care for violence against women; Specialized Forensic Psychology Care Protocol for women victims of violence; Protocol and institutional critical route for the care and protection of victims, within the framework of the Law to guarantee women a life free of violence; Gesell Chamber Use Guide. 2nd Edition; Action guide for protection, assistance, security and comprehensive reparation measures for damages to direct and indirect victims of gender-based violence; Action Guide for Measures of Protection, Assistance, Security and Comprehensive Remedy of Harm to Direct and Indirect Victims of Gender-Based Violence; Protocol for the Investigation, Sanction and Comprehensive Remedy of Harm in Gender-based Violence, and an Investigative Action Protocol for the Pursuit of Cases Provided for in the Law against harassment and political violence towards women. (Merits file, folios 527 to 528).

[327] Among them, the State pointed out the Protocol for Prosecution with a Gender Perspective; Protocol for the Participation of Children and Adolescents in judicial proceedings and intervention by the interdisciplinary professional team; Integrated Bolivian Model of Action against Gender-Based Violence, intended to assist different state institutions involved in the path of care for women in situations of violence, and Guide to Roles and Functions for Ombudsmen for Children and Adolescents. Cf. List of instruments used by the different actors who deal with cases of violence against children (evidence file, folio 11893).

204. The Court considers it appropriate to order that the State adapt its existing protocols or adopt new protocols that incorporate international standards on the matter (*supra* paras. 101 to 107) in investigations and criminal proceedings arising from acts of sexual violence to the detriment of children and adolescents; that it ensure that the statements and interviews, the medical-forensic examinations, as well as the expert psychological and/or psychiatric assessments are carried out in a manner tailored to the needs of that particular group of victims, and define the content of the specialized comprehensive care to children and adolescents who are victims of sexual violence. Therefore, the Court orders the State to adopt, implement, supervise and appropriately monitor three standardized protocols, namely: (i) investigation and action protocol during the criminal proceedings for cases involving child and adolescent victims of sexual violence; (ii) protocol on a comprehensive approach and medical-legal assessment for cases of children and adolescents who are victims of sexual violence, and (iii) a comprehensive care protocol for children and adolescents who are victims of sexual violence.

205. In relation to the investigation and action protocol during the criminal proceedings for cases of children and adolescent victims of sexual violence, the State must take into account the criteria established in international instruments on the protection of the rights of the child, as well as the standards developed in this judgment and in the case law of the Court. In this sense, said protocol must take into consideration that enhanced due diligence with a gender and childhood perspective, as the case may be, implies the adoption of special measures and the development of a process adapted to children and adolescents with a view to avoiding their revictimization, which must include, in accordance with the standards developed in paragraphs 103 to 106, at least the following criteria: (i) the right to information related to the procedure, as well as legal and health assistance services and other protective measures available; (ii) legal assistance, free of charge and provided by the State, of a duly trained lawyer, and/or specialized in childhood and adolescence, with the power to become a procedural party, oppose judicial measures, file appeals and carry out any other procedural act aimed at defending their rights in the proceedings; (iii) the right to be heard, with due guarantees and within a reasonable time, which entails an enhanced criterion of speed; (iv) the right of the child or adolescent victim to participate in the criminal process, depending on their age and maturity, and provided that it does not imply harm to their psycho-social well-being. To do this, only strictly necessary procedures must be carried out and the presence and interaction of children and adolescents with the perpetrator must be avoided; (v) generate adequate conditions so that children and adolescents can participate effectively in the criminal process through special protections and specialized support; (vi) the interview must be carried out by a specialized psychologist or a professional from related disciplines duly trained in taking this type of statements from children and adolescents; (vii) the interview rooms will provide a safe environment that is not intimidating, hostile, insensitive or inappropriate and that encourages privacy and trust; (viii) the justice service personnel who participate must be trained in the area, and (ix) immediate and professional assistance, both medical and psychological and/or psychiatric, must be provided by a professional person specifically trained in the care of victims of this type of crimes and with a gender and childhood perspective. The Court considers that this protocol should be directed, in particular, to all personnel of the administration of justice who participate in the investigation and processing of criminal proceedings in cases of children or adolescents who are victims of sexual violence, whether this has occurred in the public or private sphere.

206. With respect to the protocol on a comprehensive approach and medical-legal assessment for cases of children and adolescents who are victims of sexual violence, the Court orders the State of Bolivia to adopt a specific standardized protocol so that all health personnel, whether public or private and, in particular, the staff of the Forensic Investigations Institute, have the necessary criteria for the execution of the corresponding examinations, in accordance with the criteria established in paragraph 107 of this judgment, the case law of the Court, and international standards on the matter. The Court highlights that, if a medical examination is considered necessary, the State must guarantee at least the following: (i) more than one physical assessment must be avoided, insofar as possible;

(ii) it must be carried out by a professional with extensive knowledge and experience in cases of sexual violence against children and adolescents; (iii) the victim or their legal representative, depending on the degree of maturity of the child or adolescent, may choose the sex of the professional person; (iv) the examination must be carried out by a health professional specialized in the care of children with specific training to perform forensic medical examinations in cases of sexual violence; (v) it must be carried out after the informed consent of the victim or their legal representative, according to their level of maturity, taking into account the right of the child or adolescent to be heard, and (vi) it will be carried out in an appropriate place and their right to privacy will be respected, allowing the victim the presence of a trusted companion and prohibiting the participation or presence of other professional persons who are not expressly authorized by the victim or their legal representative.

207. Finally, in relation to the specific standardized protocol of comprehensive care for children and adolescent victims of sexual violence, the Court considers that the State must provide protection measures from the moment it becomes aware of the sexual violence, in accordance with the criteria established in paragraphs 101, 103 and 105 of this judgment. In particular, the Court orders the State to ensure that said protocol guarantees the establishment of special protections and specialized medical, psychological and/or psychiatric support so that children and adolescents can participate effectively in the criminal process according to their experiences and understanding and avoiding revictimization. The protocol must also guarantee that assistance is provided before, during and after the investigations and criminal proceedings to achieve the reintegration and rehabilitation of the victims. In this regard, immediate and professional assistance, both medical, psychological, and psychiatric, will be provided by specialized personnel, with a gender and childhood perspective, and without discrimination, for the victims and their families, for the time necessary to achieve recovery. The Court considers that this protocol should be directed not only to health personnel who participate in cases of sexual violence, but also to social and family support personnel who provide comprehensive care to victims, so it should include mechanisms for support provided to the victims and their families. The protocol must also clearly establish coordination actions between different state agencies that provide assistance to children and adolescents who are victims of sexual violence in Bolivia.

208. Bolivia must comply with the reparation measures provided for in this section within a period of two years from the notification of this judgment. The State must also create a system of indicators that measure the effectiveness of the protocols referred to above and verify, in a differentiated manner and by gender and age, the substantive decrease in impunity with respect to crimes of sexual violence committed against children and adolescents.[328] To comply with this obligation, the State has a period of two years from the adoption of the aforementioned protocols.

d.3. Training and awareness-raising program

209. The Court notes that the training programs carried out by the executive and judicial body are mostly focused on gender violence and violence against women and international standards on human rights, without specifying situations of sexual violence against children and adolescents, and that have not been issued to all people involved in the treatment of cases of sexual violence against minors.[329] Additionally, the Court notes that the Public Prosecutor's Office has adopted a series of

[328] *Cf. Case of Digna Ochoa and family members v. Mexico, supra*, para. 179, and *Case of Sales Pimenta v. Brazil, supra*, para. 172.

[329] The State indicated that it has adopted measures in the executive branch (Comprehensive Program to Fight Sexual Violence); in the judicial branch (courses on human rights and international humanitarian law, on domestic regulations and on gender issues); in the Public Prosecutor's Office (courses related to general staff training issues and related to protection of victims and witnesses and socialization of protocols related to crimes of sexual violence and gender violence); in the Bolivian Police (instruments on the fight against violence against women), and in the Ministry of Health (technical-normative documents on clinical care and for victims of sexual violence, to the continuity of life, model of comprehensive care for victims

training programs, for officers of the Public Prosecution, on human rights and care for victims of sexual violence and observes that it includes some training on care for minors who are victims of sexual violence. Furthermore, the Court observes that the State of Bolivia presented information on existing health measures for the care of victims of family or domestic violence. In particular, the State reported that Law 2033 of 1999 prescribes the right of victims of sexual violence to "receive emergency, material and medical care in state hospitals and medical centers" and "receive free post-traumatic, psychological treatment and sexual therapy for the recovery of their physical and mental health in state hospitals and medical centers." However, the Court notes that the State did not present information on the measures adopted to implement said legislation effectively.

210. Accordingly, and considering the need for all public officials who work with issues of sexual violence to receive sufficient and appropriate training, this Court considers that the State must adopt and implement permanent training and courses for public officials who, due to their role in the justice administration system, work with issues of sexual violence; in particular, officials belonging to the Judiciary and the Public Prosecutor's Office. Such training and courses must address due diligence standards in the investigation of cases of sexual violence against children and adolescents, as well as its eradication and the protection measures to be adopted. Similarly, incest and the circumstances in which this aggravating circumstance occurs must be included in the training. Furthermore, the training must be based on the criteria established in this judgment, which correspond to the content of the standardized protocols ordered by this Court (*supra* paras. 204 to 207), in the Court's case law in relation to gender violence and protection of children's rights, as well as international standards on the matter. Training must be provided from a gender and child protection perspective, aimed at deconstructing gender stereotypes and false beliefs regarding sexual violence, to ensure that investigations and prosecutions of these events are carried out in accordance with the strictest due diligence standards.

211. If it deems appropriate, the State may turn to organizations such as the Inter-American Commission of Women or the Committee of Experts of the Follow-up Mechanism of the Belém do Pará Convention, so that such entities provide advice or assistance that may be useful in compliance with the measure ordered. Furthermore, in accordance with statements from the Committee on the Rights of the Child, the Court highlights the importance of children's participation in the formulation of public prevention policies.[330]

212. The Court also orders the State to adopt and implement permanent training and courses for forensic doctors and other personnel of the Forensic Investigations Institute, with the aim of authorizing the corresponding certification to said professionals, providing them with training on the appropriate treatment of child and adolescent victims of sexual violence during medical examinations, and with a view to ensuring that said examinations are carried out in accordance with the criteria established in this judgment (*supra* para. 107) and international standards on the matter.

213. Furthermore, the State must implement a campaign to raise awareness through an open-access television channel, radio, and social networks, aimed at confronting the sociocultural perceptions that normalize or trivialize incest. The campaign must be aimed at the general population of Bolivia and take into account the country's cultural and linguistic diversity. It must also include information on the circumstances of vulnerability that facilitate the occurrence of incest, the existence of an aggravating circumstance for the criminalization of this behavior, the concept of incest in Bolivia, the rights of children, and the importance of consent in sexual relations. Similarly, the campaign must have a gender and childhood perspective, and the entire population must be able to understand it.

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of sexual violence, assessment of victims of sexual violence – methodology for collecting, custody and processing of evidence). Cf. Comprehensive law to guarantee women a life free of violence of March 9, 2013 (evidence file, pages 521 to 530), and the Child and Adolescent Code of July 17, 2014 (evidence file, pages 1310 to 1317).

330 *Cf.* Committee on the Rights of the Child. General Comment No. 13, *supra*, para. 39.

214. The State must comply with the reparation measures provided in this section within a period of 18 months from the notification of this judgment. The State must present an annual report for five years, in which it indicates the actions that have been carried out for such purposes.

d.4. Sexual education for children and adolescents

215. The Court has indicated that sexual and reproductive education must be suitable to enable children to have an adequate understanding of the implications of sexual and emotional relationships, particularly in relation to consent for such relationships and the exercise of freedoms regarding their sexual and reproductive rights.[331] In this regard, Bolivia has indicated that it is developing a Comprehensive Sexual Education Program. However, the Court notes that the program has not been approved to date and that the State did not provide additional information on other measures in this regard that are currently in force.

216. Therefore, the Court considers it pertinent that the State, within a period of two years from the notification of this judgment, incorporates adequate, timely and appropriate information into the compulsory school teaching materials in accordance with the level of maturity of the children and adolescents aimed at providing them with tools to prevent, identify and report acts that constitute sexual violence and its risks. These materials must include information about the importance of consent in sexual relations and about incest. The State must present an annual report for three years, in which it indicates the actions that have been carried out for such purposes.

d.5. Statistics on sexual violence against children and adolescents

217. The Court values the information presented by the State regarding the existence of the Information System for Children and Adolescents ("SINNA" according to its initials in Spanish) and the records and statistics carried out by the Bolivian Police and the Public Prosecution, and that these databases have been used for the development of technical instruments such as the Integrated Bolivian Model of Action against Gender-Based Violence and for Strengthening the capacities of the different actors in addressing cases of sexual violence against children and adolescents. However, the Court notes that said information is fragmented in different national institutions and that the data is not publicly accessible.

218. Considering the above and taking into account the importance of access to information for the formulation of appropriate public policies aimed at preventing the repetition of events such as those in this case, this Court orders that the State design, within a period of one year, and implement, within three years, a national, centralized system for collecting data on cases of sexual violence against minors, disaggregating age, place of occurrence, profile of the perpetrator, relationship with the victim, among other variables, that allow the quantitative and qualitative analysis of acts of sexual violence against minors. In addition, the number of cases that were effectively prosecuted must be specified, identifying the number of accusations, convictions, and acquittals. This information must be disseminated annually by the State, guaranteeing its access to the entire population in general, as well as the confidentiality of the identity of the victims. To this end, the State must present to the Court an annual report for five years from the implementation of the data collection system, in which it indicates the actions that have been carried out for this purpose.

E. Other reparation measures requested

219. The ***Commission*** asked the Court to order the State to provide the health care measures necessary for Brisa's rehabilitation, if she so wishes, by mutual agreement. It added that, if it is not possible to implement the measures due to Brisa's lack of permanence in Bolivia, the State be ordered

[331] *Case of Guzmán Albarracín et al. v. Ecuador, supra*, para. 139.

to "provide an adequate sum of money" for her to pay for her treatment. Furthermore, the Commission requested, in general terms, that the Court order the State to adopt measures of satisfaction and economic compensation to fully repair the alleged violations, both in their pecuniary and non-pecuniary aspects. The Commission did not request additional guarantees of non-repetition.

220. The ***representatives*** did not request rehabilitation measures in favor of the alleged victim. They indicated that the alleged victim "does not request" "as such" "any type of compensation for damages for herself and, instead, intends to focus the Court's attention on granting measures of satisfaction and non-repetition." Additionally, within the framework of the satisfaction measures, the representatives also requested that the State be ordered to (i) guarantee that Brisa and those who provided support will not be subject to retaliation by the State for having presented this case before the Court; (ii) that together with the publications of the judgment and in the act of recognition of responsibility, the State makes public its "commitment [...] to develop a comprehensive, holistic and transformative national strategy to prevent and respond to sexual violence against girls and adolescents, especially incest"; (iii) publicly support and ensure that all necessary licenses and permits are granted each year before the National Day of Solidarity with Victims of Sexual Assault and against Sexual Violence in Children and Adolescents which is celebrated on December 9 August in Bolivia, so that all activities related to the celebration of that day can be carried out without problem, and (iv) facilitate access to academic, technical and financial support available from international organizations to strengthen the government, specifically the judicial system, to achieve more effective management of cases of sexual violence against girls and adolescents.

221. Additionally, the representatives requested other guarantees of non-repetition related to Bolivia being ordered to (i) formally and publicly commit to adopting comprehensive measures to end all forms of violence against children; (ii) participate in the World Association Route city programs to pilot their strategy in Cochabamba, Bolivia; (iii) create a multisectoral and holistic national action plan to eliminate sexual violence against "children and adolescents", with special emphasis on incest, prioritizing that it be developed in collaboration with the World Alliance. They explained that the aforementioned plan should take into consideration the practices of INSPIRE and the Global Alliance, and incorporate the Sustainable Development Goals of eradicating violence against children by 2030, and the Clinical Guidelines of the World Health Organization on the response to children and adolescents who have been subjected to sexual violence; (iv) carry out a "broad, holistic and transformative" national strategy that includes at least (a) legislative reforms related to the elimination of the statute of limitations for crimes of sexual assault in the Bolivian Criminal Code and the Code of Criminal Procedure, the creation of a criminal offence of incest, and the modification of criminal procedural legislation in order to create incentives for the accused to submit to an abbreviated criminal process in cases of sexual violence against children and adolescents, (b) the effective prosecution of cases of sexual violence against children through specialized prosecutors, practices that prevent revictimization and procedures adapted to children, as well as effective judicial remedies. For the aforementioned effectiveness, the State must "collaborate with a national observatory established by civil society for the management of trials in cases of sexual violence against children and provide support", (c) effective capture and recapture policies and procedures , (d) ensure that the personnel of special child protection agencies or ombudsman offices have stable positions and adequate financing and training for the management of sexual violence against children and adolescents, (e) annual and sufficient budget allocations, and (f) surveillance and supervision mechanisms.

222. The ***State*** rejected the Commission's request. Furthermore, it recalled that the alleged victim, of her own volition, decided not to go to the specialized public health institutions and professionals, and that, in the stage prior to submitting the case to the Court, she expressed her "rejection to an arrangement of medical or psychological care with the State." In that sense, the alleged victim did not incorporate this measure into her requests. Regarding compensatory damages, taking into account the failure to exhaust domestic remedies and the non-existence of the alleged violations, it would not be appropriate to provide financial compensation. It also highlighted that the alleged victim

stated that she was not requesting any compensation for herself and, in that sense, she did not establish any amount for pecuniary or non-pecuniary reparation. On the other hand, the State rejected all the claims made regarding the satisfaction measures and stated that Brisa, her parents, and lawyers did not demonstrate the existence of any persecution against the potential beneficiaries of the measures for their participation in the case, and if so, they did not go to the competent authorities. They added that the proposed beneficiaries and even Brisa, have been carrying out their work at the Una Brisa de Esperanza Center. It indicated that since the alleged violations did not exist, it would not be their responsibility to make the requested publications or hold the press conference. It pointed out that through its departments the State already supports the National Day of Solidarity with Victims of Sexual Assaults and against Sexual Violence against Children and Adolescents. Finally, it pointed out that, for several years, it has been generating legislation, public policies, and institutional actions to fight sexual violence.

223. Regarding the guarantees of non-repetition requested, the State expressed its rejection of the requests made. It indicated that, progressively, it has been implementing public policies and legislative, institutional, and administrative measures to fight sexual violence and promote the rights of children, adolescents and women. Regarding legislative reforms, it pointed out that the state obligation to adopt its internal regulations must be framed in International Human Rights Law, not personal requirements. In this regard, it warned that it was not identified or proved that the current criminal legislation is contrary to the international treaties signed by Bolivia. Finally, it recalled that Bolivia has already modified its criminal legislation, while increasing the penalties for those crimes where the victims are children and adolescents.

224. The ***Court*** has ordered rehabilitation measures when it determines that the events analyzed have affected the personal integrity of the victims, as is the situation in this case (*supra* para. 171). Additionally, this Court has developed in its case law the concept of pecuniary damage and has established that this involves the loss or detriment of the victims' income, the expenses incurred as a result of the events and the pecuniary consequences that have a causal link with the facts of the case.[332] The Court has also established in its case law that non-pecuniary damage "can include both the suffering and afflictions caused by the violation and the impairment of very significant values for people and any alteration, of a non-pecuniary nature, in the victim's living conditions."[333]

225. In this case, it is evident that Brisa has experienced profound suffering and anguish to the detriment of her mental and moral integrity due to the serious violations committed by the State (*supra* paras. 110 to 124 and 164 to 171). In particular, given the flagrant revictimization suffered during the domestic investigation and criminal process and caused by Bolivia during the public hearing before the Court, causing suffering in addition to the sexual and psychological violence of which she was a victim. Furthermore, the Court observes that the body of evidence in the file [334] allows us to verify that the suffering caused and experienced by the denial of justice, personal prejudices, the repeated use of gender stereotypes, and in general, the lack of a gender and childhood perspective during the investigation and criminal proceedings, caused a significant impact on Brisa's life. Namely, the victim indicated during the public hearing of the case that,

> [t]wenty years later, I still have night terrors, and post-traumatic stress syndrome, and it has more to do with what the prosecutors, coroners and judges did […]. It has been twenty years, and they still have not brought the perpetrator to justice, I am still waiting, there were three, and now I am waiting for the fourth trial, and I can tell you that not a single person in the judicial system treated me with care, with respect,

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[332] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and Costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Aroca Palma et al. v. Ecuador, supra*, para. 144.

[333] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and Costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Aroca Palma et al. v. Ecuador, supra*, para. 144.

[334] *Cf.* Statement of Brisa De Angulo Losada during the public hearing, *supra*; Letter from Brisa De Angulo Losada of December 2011 (evidence file, folios 7243 to 7245); Statement of Luz Stella Losada during the public hearing, *supra*; Statement of José Miguel De Angulo, *supra* (evidence file, folios 11435 to 11439); Statement of María Leonor Oviedo Bellott, *supra* (evidence file, folios 11454 to 11457), and Expert opinion of Sylvia Mesa Peluffo given during the public hearing, *supra*.

> with dignity, or sensitivity, everywhere I went they treated me as the criminal, as the one to blame for having been raped, and I was a girl, the system did not protect me, it did not prevent it, it did not prevent the sexual violence, and did not protect me once I had suffered it.[335]

226. However, this Court takes into account the will of the victim,[336] expressed in the briefs presented by the representatives, as well as in her statement at a public hearing, regarding her desire that "anything that the government was going to give for health, for therapy, please give it to the girls who are suffering right now," and to "not seek[e] any kind of damages for herself and instead […] focus the attention of the Court in the granting of measures of satisfaction and non-repetition", for which the Court refrains from making any determination regarding measures of rehabilitation and compensatory compensation.

227. Furthermore, regarding the other measures of satisfaction and guarantees of non-repetition requested, the Court considers that the issuance of this judgment, and the other measures of reparation ordered, are sufficient and appropriate to remedy the violations suffered by the victims. Thus, it does not consider it necessary to order the additional measures requested by the representatives.

F. Costs and expenses

228. The ***representatives*** indicated that the alleged victim would request reimbursement of the expenses for local and international travel, and other expenses that may be incurred by her, her witnesses, experts and representatives in relation to the hearing of the case. In their final written arguments, they indicated that by virtue of the hearing having been held in a virtual format, "Brisa does not request reimbursement of any costs or expenses." For its part, the ***State*** noted that the victim had only requested reimbursement for the travel expenses generated by a possible hearing in the case, which is why it only requested that such expenses be taken into account, and not those related to the payment of fees, for example. Subsequently, in its final written arguments, it stated that the only requested expense "was not carried out" taking into account that the public hearing was held virtually, for which it requested that "the State not be ordered to pay costs and expenses."

229. As the ***Court*** has already pointed out on previous occasions,[337] costs and expenses are part of the concept of reparation, since the activity carried out by the victims in order to obtain justice, both nationally and internationally, involves expenditures that must be compensated when the international responsibility of the State is declared through a judgment. However, the Court notes that the victim, through her representatives, expressly indicated that she was not requesting reimbursement of any sum for costs and expenses. Therefore, the Court, as it has done in other cases, considers that the costs and expenses of the litigation are not the subject of dispute and it is not necessary for it to rule on this point.

IX
OPERATIVE PARAGRAPHS

230. Therefore,

THE COURT

DECIDES,

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335 *Cf.* Statement of Brisa De Angulo Losada during the public hearing, *supra*.

336 *Cf. Case of Gelman v. Uruguay. Merits and Reparations*. Judgment of February 24, 2011. Series C No. 221, paras. 286 and 297.

337 *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and Costs*. Judgment of August 27, 1998. Series C No. 39, paras. 82, and *Case of Aroca Palma et al. v. Ecuador, supra*, para. 150.

unanimously,

1. To dismiss the preliminary objection regarding the exhaustion of domestic remedies, in accordance with paragraphs 20 to 23 of this judgment.

2. To declare the preliminary objection due to lack of jurisdiction *ratione materiae* as devoid of purpose, in accordance with paragraphs 25 to 26 of this judgment.

DECLARES,

Unanimously, that:

3. The State is responsible for the violation of the rights to humane treatment, a fair trial, private and family life, the rights of the child and judicial protection, pursuant to Articles 5(1), 8(1), 11(2), 19 and 25(1) of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof, as well as for failure to comply with the obligations derived from Articles 7(b) and 7(f) of the Convention of Belém do Pará, to the detriment of Brisa De Angulo Losada, in accordance with paragraphs 110 to 124 of this judgment.

4. The State is responsible for the violation of the guarantee of a reasonable period of time for the process and the rights of the child, recognized in Articles 8(1) and 19 of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof and Article 7(b) of the Convention of Belém do Pará, to the detriment of Brisa De Angulo Losada, in the terms of paragraphs 125 to 133 of this judgment.

5. The State is responsible for the violation of the rights of the child, equality before the law and judicial protection, pursuant to Articles 19, 24 and 25 of the American Convention on Human Rights, read in conjunction with Articles 1(1) and 2 thereof, as well as for failure to comply with the obligations derived from Articles 7(b), 7(c) and 7(e) of the Convention of Belém do Pará, to the detriment of Brisa De Angulo Losada, of in accordance with paragraphs 134 to 156 of this judgment.

6. The State is responsible for failure to comply with its obligation to guarantee, without discrimination based on gender, as well as the victim's status as a girl, the right of access to justice pursuant to Articles 8(1), 19 and 25(1) of the American Convention on Human Rights, read in conjunction with Articles 1(1), 2 and 24 thereof and Articles 7(b) and 7(e) of the Convention of Belém do Pará, to the detriment of Brisa De Angulo Losada, under the terms of paragraphs 157 to 169 of this judgment.

7. The State is responsible for the violation of the prohibition of cruel, inhuman, and degrading treatment, established in Article 5(2) of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof, to the detriment of Brisa de Angulo Losada, under the terms of paragraphs 157 to 171 of this judgment.

AND ESTABLISHES:

unanimously, that:

8. This judgment constitutes, in itself, a form of reparation.

9. The State will keep the criminal proceedings against E.G.A. open and will progress the investigation of the case if there is any change in circumstances that allows it, pursuant to paragraph 185 of this judgment.

10. The State will adopt all necessary measures, within a reasonable period of time, to determine,

through the competent public institutions, the possible responsibilities of the officers who, by their actions, contributed to the commission of revictimizing actions and possible procedural irregularities to the detriment of Brisa De Angulo Losada, pursuant to paragraph 186 of this judgment.

11. The State will carry out, within a period of six months from the notification of this judgment, the publications indicated in paragraph 190 of this judgment.

12. The State will carry out a public act of recognition of international responsibility, pursuant to paragraph 191 of this judgment.

13. The State will adapt its domestic legal system in such a way that the absence of consent is central and constitutive of the crime of rape, pursuant to paragraph 198 of this judgment.

14. The State will adapt its domestic legal system in relation to the criminal offense of statutory rape, pursuant to paragraph 199 of this judgment.

15. The State will adapt its domestic legal system to make incestuous sexual rape visible, pursuant to paragraph 201 of this judgment.

16. The State will adapt its existing protocols or adopt new protocols, implement, supervise and monitor an investigation and action protocol during the criminal proceedings for cases of child and adolescent victims of sexual violence; a protocol on a comprehensive approach and medical-legal assessment for cases of child and adolescent victims of sexual violence, and a comprehensive care protocol for child and adolescent victims of sexual violence, pursuant to paragraphs 204 to 208 of this judgment.

17. The State will adopt and implement permanent training and courses for public officers who, due to their work in the justice administration system, work with issues of sexual violence; in particular, officers belonging to the Judiciary and the Public Prosecutor's Office. Said training and courses must address standards of due diligence in the investigation, pursuant to paragraphs 210 to 211 and 214 of this judgment.

18. The State will adopt and implement permanent training and courses for forensic doctors and other personnel of the Forensic Investigation Institute, with the objective of providing training on the appropriate treatment of child and adolescent victims of sexual violence during medical examinations, pursuant to paragraphs 212 and 214 of this judgment.

19. The State will implement a campaign to raise awareness, aimed at the general population of Bolivia, through an open-access television channel, radio, and social networks, aimed at confronting the sociocultural perceptions that normalize or trivialize incest, pursuant to paragraphs 213 and 214 of this judgment.

20. The State will incorporate adequate, timely information into the compulsory school teaching materials in accordance with the level of maturity of the children and adolescents aimed at providing them with tools to prevent, identify and report acts that constitute sexual violence and its risks, pursuant to paragraph 216 of this judgment.

21. The State will design and implement a national and centralized system for collecting data on cases of sexual violence against minors, pursuant to paragraph 218 of this judgment.

22. The State, within a period of one year from the notification of this judgment, will submit to the Court a report on the measures adopted to comply with it, without prejudice to the provisions of paragraph 190 of this judgment.

23. The Court will monitor full compliance with this judgment, in exercise of its authority and in

compliance with its obligations pursuant to the American Convention on Human Rights and shall declare this case closed once the State has fully complied with all the measures ordered herein.

Judge Rodrigo Mudrovitsch announced his individual concurring opinion.

DONE San Jose, Costa Rica, on November 18, 2022, in the Spanish language.

I/A Court H.R. *Case of Angulo Losada v. Bolivia. Preliminary Objections, Merits and Reparations*. Judgment of November 18, 2022. Judgment adopted in San José, Costa Rica.

Ricardo C. Pérez Manrique
President

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Nancy Hernández López

Verónica Gómez

Patricia Pérez Goldberg

Rodrigo Mudrovitsch

Pablo Saavedra Alessandri
Registrar

So ordered,

Pablo Saavedra Alessandri
Registrar

Ricardo C. Pérez Manrique
President

CONCURRING OPINION OF JUDGE RODRIGO MUDROVITSCH

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF ANGULO LOSADA V. BOLIVIA

JUDGMENT OF NOVEMBER 18, 2022
(PRELIMINARY OBJECTIONS, MERITS AND REPARATIONS)

1. In the *Case of Angulo Losada v. Bolivia*[1], the international responsibility of the State for violations of the American Convention on Human Rights ("Convention") and the Convention of Belém do Pará is discussed, in the context of the State's actions regarding reports of episodes of sexual violence suffered by Brisa Liliana de Angulo Losada ("Ms. Losada"[2]). It has been demonstrated before the Inter-American Court of Human Rights ("Court") that the State was responsible for violations of the rights to humane treatment, a fair trial, private and family life, and judicial protection;[3] to the guarantee of legal proceedings within a reasonable timeframe;[4]; to the right to judicial protection;[5] to the obligation to guarantee, without gender and age-based discrimination, the right to access to justice;[6] and the prohibition of cruel, inhuman and degrading treatment,[7] all to the detriment of Ms. Losada. Given this panorama, this Court has tried to develop a set of measures capable of repairing, to the greatest extent possible, the harm suffered by the victim, and preventing more people from being subjected to similar situations.

2. Article 63(1) of the Convention grants the Court a unique capacity to redress human rights violations in a specific and effective manner. In each case it decides, the Court considers a wide range of remedies, such as restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition[8] – seeking specifically to provide a

[1] *Cf*. *Case of Angulo Losada v. Bolivia. Merits, Reparations and Costs*. Judgment of November 18, 2022, hereinafter "judgment".
[2] I emphasize that my reference to the victim as "Ms. Losada" (considering her current age) should not obscure that she was a minor at the time of the violence and rape she suffered.
[3] Pursuant to Articles 5(1), 8(1), 11(2), 19 and 25(1) of the ACHR in relation to its Article 1(1), as well as articles 7(b) and 7(c) of the Convention of Belém do Pará (Cf. Sentence, paragraph 320, operative paragraph n. (3).
[4] Pursuant to Articles 8(1) and 19 of the ACHR in relation to its Article 1(1) and Article 7(b) of the Convention of Belém do Pará (*Cf*. Judgment, para. 320, operative paragraph n. 4).
[5] Pursuant to Articles 19, 24 and 25 of the ACHR in relation to its Articles 1(1) and 2, as well as Articles 7(b) and 7(e) of the Convention of Belém do Pará (*Cf*. Judgment, para. 320, operative paragraph n. 5).
[6] Pursuant to Articles 8(1), 19 and 25(1) of the ACHR in relation to its Articles 1(1), 2 and 24 and Articles 7(b) and 7(e) of the Convention of Belém do Pará (*Cf*. Judgment, para. 320, operative paragraph n. 6).
[7] Pursuant to Article 5(2) of the ACHR in relation to its Article 1(1) (*Cf*. Judgment, para. 320, operative paragraph n. 7)
[8] In the terminology adopted in the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" ("Basic Principles"), a United Nations study - influenced by the work of this Court - on the appropriateness of various reparatory measures in the context of international human rights law ("IHRL"). Cf. UNGA. *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law.* Resolution A/RES/60/147 adopted on March 21, 2006, Annex.

comprehensive remedy to victims of violations that have occurred. As noted by professor and judge Antonio Augusto Cançado Trindade, although *reparatio* does not change the wrong that has already been committed and the pain that has been caused, it has a double purpose: (i) to provide reparation to the victims and their families whose rights have been violated and (ii) restore the legal order, built on the basis of full respect for human rights, undermined by the violations.[9] To restore the legal order, it is necessary to guarantee that the offending behavior is not repeated, in a movement guided by the "spirit of human solidarity."[10]

3. Supported by these notions, the Court defined the following reparatory measures in the case in question: maintaining the criminal proceedings open against E.G.A; determining the responsibility of state officials who potentially contributed to the commission of the violations; the publication of this judgment; holding a public act of recognition of international responsibility; the adaptation and adoption of state conduct protocols; the implementation of training for public officers whose work involves issues of sexual violence and for forensic doctors; the launch of an awareness campaign on the issue of incest; the incorporation of adequate information on the risks, prevention and reporting of sexual violence in school materials; the implementation of a data collection system on cases of sexual violence against minors; and adjustments in the domestic legal system.[11]

4. With the primary objective of more forcefully addressing general prevention measures, that is, essentially aimed at unraveling the restrictions that have been imposed on Ms. Losada in her access to justice, faced by countless people, I present this concurrent opinion. Specifically, I think it is essential to deepen some discussions on reparatory measures related to the modifications of Bolivian criminal legislation. In the case in question, the Court ruled that the State must adapt its legal system (in particular, its criminal legislation) so that: the absence of consent is central and constitutive of the crime of rape (the coercive circumstances that nullify consent must be taken into account),[12] that the crime of statutory rape be eliminated from the legal system,[13] and that incestuous rape be given visibility by giving it its own *nomen juris* in the Bolivian Criminal Code.[14]

5. Thus, this opinion will be structured as follows: preliminary considerations on the case being tried **(I)**; reflections on the role of the inter-American system of human rights ("IHR System") to ensure the adaptation of domestic laws to international *standards* and on the complex interaction between the field of Human Rights and Criminal Law **(II)**; deepen the discussion on the necessary modification of the offense of "rape" and the suppression of the offense of "statutory rape" to effectively incorporate the criterion of consent as central in sexual crimes **(III)**; and substantiate my position that the best measure for Bolivia to adopt when adapting its domestic legal system to give greater visibility to incestuous rape is to adopt a specific *nomen juris* for incestuous rape **(IV).**

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[9] *Cf. Case of Bulacio vs. Argentina. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of September 18, 2003. Series C No. 100. Reasoned Opinion of Judge Cançado Trindade, para. 22.

[10] Cf. *Case of Bulacio vs. Argentina. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of September 18, 2003. Series C No. 100. Reasoned Opinion of Judge Cançado Trindade, para. 22 (our emphasis).

[11] *Cf*. Judgment, para. 230.

[12] Ibid., para. 198.

[13] Ibid., para. 199.

[14] Ibid., para. 201.

I. The case being tried

6. Ms. Losada is a Bolivian citizen born in 1985 and who, at the time of the initial events of this case, lived in Cochabamba, Bolivia.[15] In August 2001, when the victim was about to turn 16, E.G.A, her 26-year-old cousin, came from Colombia (his country of nationality) to live temporarily with her family.[16] Taking into account that Ms. Losada's older brothers had recently moved to the United States, E.G.A would have quickly occupied this "space of affection and trust."[17].

7. In October 2001, as set forth in the judgment (para. 33-37) and included in the Commission's Merits Report,[18] in the Brief with Pleadings, Motions and Evidence,[19] in the written statement of Ms. Losada[20] and in her participation at the public hearing held on March 29 and 30, 2022, E.G.A began a series of sexual assaults on the victim that lasted approximately 8 months. I note that there is no controversy in the testimonies and evidence verified by the Bolivian authorities regarding the occurrence of repeated sexual relations between Ms. Losada and her cousin, with the disagreement, at the domestic level, essentially based on E.G.A's conduct being subsumed in the description of a criminal offense. The sexual relations developed in secret, and E.G.A used pressure and psychological violence, as well as threats to Ms. Losada and her younger sisters, to guarantee her silence.[21] The consequences of the recurring violence that the victim suffered were palpable: over time, she stopped eating, cried daily and vomited a lot.[22]

8. Realizing the suffering Ms. Losada was going through - but not knowing the cause - her parents decided to take her on a trip to the United States for a brother's graduation in May 2002.[23] The discovery of the violence exercised to the detriment of Ms. Losada occurred by chance. The family did not discover what was happening until one of her brothers read passages from her private diary. As soon as she learned that her parents had discovered the violence perpetrated by her cousin, the victim attempted suicide.[24] After receiving specialized medical and psychological care, it was found that Ms. Losada suffered from depression and was not willing to talk about what was happening. Furthermore, in a gynecological examination, it was found that Ms. Losada was in a state of having suffered sexual abuse.[25] The psychologist consulted, in turn, confirmed the existence of sexual exploitation, manipulation and high risk of mental health problems.[26] It is worth highlighting the important warning made by the professional that the risk of mental health problems would be exacerbated if she did not receive adequate help or if the response of the judicial system somehow accused the victim instead of acknowledging a crime.[27]

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[15] Ibid., para. 33.
[16] Ibid.
[17] Ibid.; Brief with Pleadings, Motions and Evidence of November 20, 2020.
[18] *Cf*. ICHR. Report on Merits. 141/19, *Angulo Losada v. Bolivia*. November 28, 2019.
[19] *Cf*. Brief of Pleadings, Motions and Evidence of November 20, 2020.
[20] *Cf*. Information Statement of Brisa De Angulo Losada, August 1, 2002 (Evidence File, fl. 1064).
[21] *Cf*. Judgment, para. 35.
[22] Ibid., para. 36.
[23] Ibid., para. 46.
[24] *Cf*. Brief of Requests, Arguments and Evidence of November 20, 2020; Informative statement of Brisa de Angulo Losada of August 1, 2002 (evidence file, fl. 1064).
[25] *Cf*. Judgment, para. 46; Certificate of Terri S. Gilsson, LP.C., dated August 8, 2002 (evidence file, fl. 7860).
[26] *Cf*. Judgment, para. 46; certificate from Lourdes de Armas, M.D., dated July 25, 2002 (evidence file, fl. 7853).
[27] Ibid.

9. In July 2002, upon her return to Bolivia, Ms. Losada filed a complaint against E.G.A before the Technical Judicial Police.[28] The internal procedures that followed the accusation were detailed in the judgment (para. 48-76), so it is worth highlighting specific events. As was done in the judgment, I will organize my considerations by grouping the judicial proceedings into three groups (from 2003 to 2005, from 2005 to 2007 and from 2007 to date).

10. The first series of judicial proceedings (2003-2005) was marked from the beginning by the dispute over whether the criminal offense that should be applied to E.G.A was "rape" or "statutory rape." The Public Prosecutor's Office accused E.G.A before the Sentencing Court No. 4 of Cochabamba for the crime of aggravated "rape",[29] criminalised in Article 308 of the Criminal Code:

> Art. 308. Whoever, using physical violence or intimidation, has sexual intercourse with a person of either sex; anal or vaginal penetration or introducing objects for libidinous purposes, will incur imprisonment from five (5) to fifteen (15) years. (…)

11. The aggravating circumstances[30] presented by the accusation were paragraphs 1, 2, 3 and 7 of article 310 of the Bolivian Penal Code in force until the date of the events:

> (1) If as a result of the violation any of the circumstances provided for in Arts. 270 and 271 of the Criminal Code [which deal with minor, serious and very serious **injury**].
> (2) The victim suffers serious **trauma** or **psychological damage**.
> (3) If the author was an **ancestor, descendant or relative** within the fourth degree of consanguinity or second degree of affinity. (…)
> (7) If the perpetrator had subjected the victim to **humiliating or degrading conditions**. (…)

12. On handing down the sentence on March 28, 2003, the Sentencing Court No. 4 of Cochabamba convicted the accused of the crime of "statutory rape" (Art. 309 of the Criminal Code) aggravated only by the concurrence of incest,[31] and established a custodial sentence of 7 years.[32] To justify the subsumption of the facts to an article other than that required in the indictment, the Court applied the *iura novit curia* principle and reasoned that "it has not been convincingly demonstrated that the elements of physical violence or intimidation have occurred"[33], although elements of psychological manipulation and seduction have been identified, typical figures of the crime of "statutory rape". At that time, the crime of "statutory rape" in article 309 of the Penal Code was described in the following terms:

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[28] *Cf*. Judgment, para. 47.
[29] Ibid., para. 58; Judgment issued by the Sentencing Court No. 4 of Cochabamba on March 28, 2003 (evidence file, fls. 7667,7668,7673), p. 1.
[30] It is worth clarifying that the term "aggravating" in Bolivian legislation is equivalent to the term "qualifying" in Portuguese. In Portuguese, the term "aggravating" describes the factors that increase the calculation of the penalty to be applied in a conviction that are considered in the second phase of the calculation of the sentence and are reflected in a generic legal provision that can be applied to various types of crimes.
[31] The other aggravating circumstances were rejected due to lack of evidence and due to the application of the *in dubio pro reo* principle.
[32] *Cf*. Judgment, para. 61; Judgment issued by the Sentencing Court No. 4 of Cochabamba on March 28, 2003 (evidence file, fls. 7667,7668,7673), p. 11.
[33] The fact that the court identified Ms. Losada as a "strong personality" made it inconceivable that she had been intimidated by E.G.A to have sexual relations, which were a product of the seduction and deception typical of the crime of statutory rape. In this context, they recognize Brisa's position of vulnerability and that there is asymmetry of power in the relationship, which invalidates consent as provided for in the offense of "statutory rape".

> Whoever, through **seduction** or **deception**, has sexual intercourse with a person of either sex; over fourteen (14) years old and under eighteen (18), will be punished with deprivation of liberty for two (2) to six (6) years.

13. The ruling of the Cochabamba Sentencing Court No. 4 was appealed by both parties in April 2003.[34] While the prosecution alleged the concurrence of errors, improper and erroneous application of the law and violation of the substantive law by the Court (focusing on the alleged erroneous subsumption of E.G.A's conduct in the offense of "statutory rape" and not "rape"), the defendants alleged that Ms. Losada's testimony was taken without the defendant and his lawyer being present, which would constitute a procedural defect, the consequence of which would render proceedings absolutely invalid. After several appeals, on April 11, 2005, the Third Criminal Chamber of the Superior Court of Justice of Cochabamba annulled the sentence in its entirety and ordered that the trial be held again by another court.[35]

14. In May 2005, the second series of criminal proceedings (2005-2007) against E.G.A began before the Sentencing Court No. 2 of Cochabamba, the Public Prosecution again charged E.G.A with the crime of aggravated "rape" under sections 1, 2, 3 and 7 of Article 310 of the Criminal Code.[36] On September 16, 2005, the public hearing began before Sentencing Court No. 2 (with the presence of E.G.A.'s lawyer in Ms. Losada's statement) and, seven days later, the Court issued a ruling absolving E.G.A of all charges due to lack of sufficient evidence.[37] Specifically, the Court declared that the elements of the offense of "rape" did not exist because it could not conclude with certainty that "carnal access" had occurred, because it did not find conclusive evidence that physical or moral violence had occurred at the time of the event, because contradictory testimonies called into question the only evidence accepted by the court that would demonstrate its occurrence, and because it was not possible to identify guilt or malice in the conduct of the accused.[38]

15. Ms. Losada's representatives and the Public Prosecutor's Office appealed the ruling of Sentencing Court No. 2, and their appeals were dismissed by the Criminal Chamber of the First Supreme Court of Justice of Cochabamba.[39] The representatives then filed an appeal, which culminated in the annulment by the First Criminal Chamber of the Supreme Court of Justice of the Nation of the order of March 6, 2006 (which had confirmed the ruling of the Sentencing Court No. 2) and demanding that the First Criminal Chamber of the Supreme Court of Justice of Cochabamba re-examine Ms. Losada's representatives' appeal.[40] Finally, in May 2007, the First Criminal Chamber annulled the September 2005 ruling of the Sentencing Court No. 2 due to the incorrect subsumption of the offense of "statutory rape", ordering the case be returned for another trial.[41]

16. Thus, in 2008 preparations began for the third series of criminal proceedings against E.G.A. The fact that E.G.A left Bolivia in 2007 and did not attend any legal proceedings made it impossible to hold hearings and continue the process.[42] Despite

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[34] *Cf*. Judgment, para. 62.
[35] Ibid., para. 64; Sentence issued by the Third Criminal Chamber of the Superior Court of Justice of Cochabamba on April 11, 2005 (evidence file, fls. 8123 to 8124).
[36] *Cf*. Judgment, para. 65.
[37] Ibid., para. 66; Judgment issued by Sentencing Court No. 2 on September 16, 2005 (evidence file, fls. 8294 to 8310).
[38] *Cf*. Judgment issued by Sentencing Court No. 2 on September 16, 2005 (evidence file, fls. 8294 to 8310).
[39] *Cf*. Judgment, para. 68.
[40] Ibid.
[41] Ibid.
[42] Ibid., para. 69-71.

the issuance of an arrest warrant in November 2008 and the fact that the State had been aware of his departure from the country since at least 2007,[43] the Bolivian authorities only activated INTERPOL and began diplomatic procedures for his extradition from Colombia ten years later, in 2018.[44] In 2020, a "petition with a formal request" for extradition was issued to the competent authority in Colombia, which led to the capture of E.G.A for extradition purposes in February 2022. However, in September 2022, the Colombian Supreme Court of Justice annulled the arrest warrant and ordered his immediate release, considering that the criminal action had expired according to Colombian legislation.[45] Thus, as the Court noted, more than 20 years have passed since the sexual violence suffered by Ms. Losada, "there is no final judgment of conviction or acquittal, since the request for extradition from Colombia to Bolivia to appear in court has been denied in the third trial."[46]

17. The analysis of the facts of this case, presented in the judgment and summarized above, demonstrates, as will be developed later, the centrality of issues related to the classification of sexual crimes in the Bolivian Criminal Code in violation of Ms. Losada's human rights during the domestic investigative and judicial procedures - in particular, due to the absence of effective introduction of the element of consent as a characteristic of the offense of "rape" (combined with the possibility of framing sexual acts under the offense of " statutory rape") and the disregard of the seriousness of the incestuous rape suffered by the victim. However, before continuing with the discussion of these two points, I consider it necessary to present some reflections on the complex interaction between International Human Rights Law and Criminal Law.

II. On the imperative of adapting domestic regulations to international standards in Human Rights and their complex interaction with Criminal Law

18. The interaction between International Human Rights Law and Criminal Law is the subject of recurring debate within the IHR System.[47] One of its manifestations occurs precisely in the context of reparatory measures in which the Court orders some change in the domestic law of the States as a guarantee of non-repetition. Taking into account that this opinion is based on two proposals to modify the Bolivian Criminal Code, I believe it is necessary to first discuss the foundations of the Court's prerogative to demand the adaptation of criminal offenses in the countries under its jurisdiction **(II.a)** and then, the complex relationship between Criminal Law and Human Rights that is evident in this debate **(II.b).**

a. On the *standards* adopted by the Court to demand the adaptation of criminal offenses regarding reparation

19. Since its first ruling on the merits, the Court has highlighted the existence of obligations to prevent, investigate and punish violations of human rights, which derive from the duty of "guarantee" of the States, crystallized in Article 1(1) of the

[43] Ibid., para. 123.
[44] Ibid., para.72.
[45] Ibid., para. 76.
[46] Ibid., para. 130.
[47] In my reasoned opinion in *Moya Chacón v. Costa Rica* (2022) I was able to explore, specifically, the interaction between criminal law and the right to freedom of expression. Below, I expand my considerations on international human rights law in general. *Cf. Case of Moya Chacón v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 23, 2022. Series C No. 451, concurring opinion of Judge Rodrigo Mudrovitsch, para. 8-43.

Convention. These obligations are closely related to Article 25 of the Convention, which establishes the right of everyone to a simple, prompt and effective remedy before the competent jurisdictional bodies against acts that violate their human rights. In the words of the Court in *Velásquez Rodríguez v. Honduras* (1988):

> The second obligation of the States Parties is to "**guarantee**" the free and full exercise of the rights recognized in the Convention to every person under its jurisdiction. This obligation implies the duty of the States Parties to organize the entire government apparatus and, in general, all the structures through which the exercise of public power is manifested, in such a way that they are capable of legally ensuring the free and full exercise of human rights. As a consequence of this obligation, **States must prevent, investigate and punish any violation of the rights recognized by the Convention** and also seek to restore, if possible, the violated right and, where appropriate, repair the damage caused by the human rights violation.[48]

20. For a State to be able to prevent, investigate and punish a human rights violation, it is necessary that it has, in its domestic legal system, consolidated legal institutions that allow it to act. The state instrument must include an institutional apparatus composed, among others, of police and investigative forces and a consolidated judiciary, as well as legislation that classifies certain human rights violations as illegal. In this regard, it is worth noting the decision of the drafters of the Convention to dedicate its second article to the duty of States to adopt provisions of domestic law (legislative or otherwise) to give effect to the rights and freedoms provided for in the Convention.[49] The interpretation of Article 2 of the Convention shows that the opposite also occurs, forcing States to eliminate from their legal system the provisions that violate or contribute to the violation of the human rights provided for therein.[50] The importance of this adaptation is reflected in the aforementioned "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law"[51] adopted within the United Nations, which list, among the measures of non-repetition, the "Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law."[52].

21. Specifically with regard to the adoption of criminal law as a tool to prevent and remedy human rights violations, this practice was further consolidated in the paradigmatic Declaration and Program of Action of the Vienna World Conference (1993), which established the duty of States to "abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law."[53] As observed in the *dictum* pronounced by the Court in the *Case of Velásquez*

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[48] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 166.
[49] Art. 2 of the Convention, in turn, is closely related to Article 27 of the CVDT. Cf. C*ase of Noguera and another vs. Paraguay. Merits, Reparations and Costs*. Judgment of March 9, 2020. Series C No. 401, para. 68.
[50] This obligation is specifically expressed in relation to Article 24 of the Convention (right to equality and non-discrimination). In the words of the Court, *"(…) States have the obligation not to introduce discriminatory regulations into their legal system, to eliminate any regulations of a discriminatory nature, to combat practices of this type and establish laws and other measures that recognize and ensure the effective equality of everyone before the law."* Cf. *Case V.R.P., V.P.C. et al. v. Nicaragua. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of March 8, 2018. Series C No. 350, para. 289, 292.
[51] *Cf.* note n. 8 *supra.*
[52] *Cf.* UNGA. Basic principles and guidelines on the right of victims of gross violations of international human rights standards and serious violations of international humanitarian law to seek remedies and obtain reparations. Resolution A/RES/60/147 adopted on March 21, 2006, Annex, Principle No. 23(h).
[53] *Cf*. UN. *Vienna Declaration and Program of Action.* Approved by the World Conference on Human Rights on June 25, 1993, A/CONF.157/23, Part II.A.60.

Rodríguez v. Costa Rica (1988), the Court links, from the beginning of its work, the duty to prevent violations of human rights with maintaining criminal law adapted to the Convention, including the classification of some crimes:

> **The State has a legal duty** to take reasonable steps **to prevent human rights violations** and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation. **This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible** and the obligation to indemnify the victims for damages.[54]

22. Like any obligation derived from the States' duties to prevent, investigate and punish, the obligation to establish and maintain an adequate legal framework for protection - which includes the criminal classification of certain conduct - is complemented and enhanced in cases of especially vulnerable groups, culminating in an enhanced duty of due diligence. This relationship, highlighted by the Court in the judgment (para. 93-100), was also detailed in the context of violence against a woman in the case of *VRP and VPC v. Nicaragua* (2018):

> (…)The Court also recalls that, in cases of violence against women, the general obligations established in Articles 8 and 25 of the American Convention **are complemented and reinforced** for those States that are parties, by the obligations derived from the specific inter-American treaty, the Convention of Belém do Pará. Article 7(b) of **this Convention specifically obliges the States Parties to apply due diligence to prevent, investigate, punish and eradicate violence against women**. (…)Thus, the Court has established that States must adopt comprehensive measures to comply with due **diligence. In particular, they must have an appropriate legal protection framework, which is enforced effectively, and prevention policies and practices that allow it to act effectively in response to reports**.[55]

23. Therefore, the relationship between the duty to investigate and punish and the obligation to adopt substantive criminal legislation that is compatible with international human rights standards is unequivocal. Thus, in cases in which the failure by a State to comply with its obligations to guarantee is due, at least in part, to its failure to adapt its criminal legislation to international human rights *standards*, the Court has the prerogative to demand reforms in legislation as part of reparatory measures. Such measures may consist of the modification or suppression of regulations considered inadequate to promote the objectives of the Convention or the creation and entry into force of regulations intended to prevent violations of the Convention, as explained by the Court in *Casa Nina v. Peru* (2020).[56]

24. The development of the Court's case law regarding reforms in the States' criminal legislation as reparatory measures is based on the case of *Palomino v. Peru* (2005), in which the representatives alleged a violation of Article 2 of the Convention due to the alleged incompatibility of Article 320 of the Penal Code then in force in Peru (which classified the crime of "forced disappearance") with international standards

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[54] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 174-5.

[55] *Cf. Case of V.R.P., V.P.C. et al. v. Nicaragua*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of March 8, 2018. Series C No. 350, para. 152-3.

[56] *Cf. Case of Casa Nina v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2020. Series C No. 419, para. 100.

on the subject.[57] The Commission supported the representatives' claim, specifying that the criminal offense of "forced disappearance" **(i)** provided for requirements for the formation of the crime that prevented the judicial interpreter from interpreting conduct in terms of the offense; **(ii)** placed the burden of proving the events on the victim's relatives; and **(iii)** considered only the "public officer" as the active subject of acquiescence in the crime, excluding the possibility of the perpetration of the crime by individuals acting with the support or acquiescence of the State.[58] Thus, both the IACHR and the representatives demanded the reform of the criminal classification as reparation.[59]

25. A In light of the principle of *effet utile*, the Court reaffirmed the existence of an obligation arising from the exegesis of Article 2 of the Convention for States to effectively adapt their legislation to the parameters of the Convention[60] and, in view of the argument made, it highlighted that States have the duty to classify the crime of "forced disappearance", and they must do so in accordance with international parameters on the subject.[61] This is because the adequate classification of forced disappearance is of "primary character for the effective eradication of this practice", its inclusion under other types such as kidnapping, torture or homicide not being sufficient.[62] The Court concluded, therefore, that Article 320 of the Peruvian Criminal Code violated international parameters[63] and ruled, as a reparatory measure[64], that:

> The State must **adopt all measures necessary to amend**, within a reasonable period of time, **its criminal law in order to render it consistent with the international standards on forced disappearance of persons**, paying special attention to the provisions of the American Convention and the Inter-American Convention on Forced Disappearance, pursuant to the criteria established in paragraphs 90 to 110 of the instant Judgment.[65]

26. Similar reasoning has been adopted in subsequent cases in which the Court has ordered the modification of the States' criminal legislation - all regarding the classification of "forced disappearance" in their domestic legal systems.[66] It was in the *case of Albán Cornejo et al. v. Ecuador* (2007), however, that the Court had, for the first time, the opportunity to rule on the adequacy of criminal norms other than

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[57] *Cf. Case of Gómez Palomino v. Peru. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135, para. 88.
[58] Ibid., para. 87.
[59] Ibid., para. 69-70.
[60] Ibid., para. 91.
[61] Ibid., para. 96.
[62] Ibid., para. 92.
[63] Ibid., para. 100-10.
[64] It should be noted that, in a previous case, the victim's representatives had already demanded recognition of a violation of Article 2 of the ACHR due to an inadequate classification of forced disappearance in the Honduran Penal Code, but the Court did not discuss this argument. *Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 7, 2003. Series C No. 99.
[65] *Cf. Case of Gómez Palomino v. Peru. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135, para. 149.
[66] *Cf. Case of Blanco Romero et al. v. Venezuela. Merits, Reparations and Costs*. Judgment of November 28, 2005. Series C No. 138, para. 105; *Case of Heliodoro Portugal v. Panama. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 12, 2008. Series C No. 186, para. 183; *Case of Tiu Tojín v. Guatemala. Merits, Reparations and Costs*. Judgment of November 16, 2008. Series C No. 190, para. 58; *Case of Anzualdo Castro v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 22, 2009. Series C No. 202, para. 167; *Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2009. Series C No. 209, para. 318; *Case of Contreras et al. v. El Salvador. Merits, Reparations and Costs*. Judgment of August 31, 2011. Series C No. 232, para. 219; *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 287.

this specific type and to detail the limits of its understanding on the need for reform in the States' criminal legislation. The case concerned the death of Ms. Albán Cornejo after being hospitalized due to a diagnosis of bacterial meningitis. On that occasion, the victim received a dose of morphine, which was considered medical misconduct.[67] The representatives and the IACHR argued the inadequacy of the internal regulations, especially the absence of specific regulation of medical malpractice (including criminal classification), which would translate into an obstacle to accessing justice.[68]

27. When dealing with the duty of States to prevent and punish human rights violations, the Court reinforced the specific duty to adapt the domestic criminal legal system to the Convention (both in material and procedural terms) and specified that, in material terms, "such purpose is realized through the enactment of adequate criminal descriptions in accordance with criminal legal provisions, which meet the requirements of punitive law in a democratic society and which are adequate for the protection of goods and legal interests, from a criminal perspective."[69] In this case, however, the Court considered the separate classification of the crime of medical malpractice unnecessary, it being subsumed under the already existing crimes of injuries or homicide being sufficient.[70]

28. The case of *Albán Cornejo* thus demonstrates that, although the Court understands that any violation of the rights provided for in the Convention implies the State's duty to investigate and, where appropriate, punish,[71] it is not always necessary to adopt a new criminal offense in domestic law when a violation is identified. Thus, States have a certain degree of autonomy to define their criminal policies, always limited by obligations under the convention and the norms of International Human Rights Law. The role of the Court, in this context, is not to define the States' domestic legislation, but to strictly verify its compatibility with the Convention and, in cases where the incompatibility culminates in violation, determine the reparations available.

b. On the tension between the international protection of Human Rights and the possible need to influence Criminal Law

29. The standards discussed above highlight the multifaceted interaction between the areas of Human Rights and Criminal Law in the international sphere. As Françoise Tulkens, former judge of the European Court of Human Rights ("EHR Court"), warns, "the obvious nature of this relationship (...) should not, however, obscure its complex and paradoxical character...".[72] The paradox to which the judge refers was translated by former judge Christine Van der Wyngaert of the International Criminal Court into

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[67] *Cf. Case of Albán Cornejo et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of November 22, 2007. Series C No. 171, para. 2, 84.
[68] Ibid., para. 113-4.
[69] Ibid., para. 135.
[70] Ibid., para. 136.
[71] *Cf*. *Case of Bulacio v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 18, 2003. Series C No. 100, para. 110.
[72] *Cf*. TULKENS, Françoise. The Paradoxical Relationship between Criminal Law and Human Rights. *Journal of International Criminal Justice*, vol. 9 (2011), p. 578 (our translation).

an understanding of Criminal Law as a "shield" and "sword" of Human Rights.[73] This duality and its compatibility will be addressed in sequence.

i. On the origins of Human Rights as protection against the punitive excesses of States

30. Although the first historical outlines of Criminal Law were based on markedly retributive objectives, its modern formation has come to focus on limiting the use of state coercion, in order to guarantee the normative effectiveness of the rights of the accused in criminal proceedings.[74] This search for the establishment of controls and guarantees on the exercise of the punitive power of the State is closely linked to the emergence of modern debates on the protection of fundamental rights.

31. Each constitution forged according to the Western model, by providing for a myriad of individual rights that must be protected by the Public Authorities, has demonstrated a special concern for the protection of the rights of the accused. This concern has been reflected in various restrictions on the application of criminal law (e.g., the principle of strict legality and the non-retroactivity of the most burdensome law), the establishment of procedural guarantees (e.g., the presumption of innocence, *in dubio pro reo*, the principle of natural judgment, the prohibition of emergency courts, the requirements of due legal process and the legitimacy of evidence) and in the provision of limits to criminal execution (for example, the prohibition of cruel and inhuman punishments , the individualization of the sentence and the rights of the convicted).[75] I note, therefore, that the process of constitutional adaptation of criminal law[76] was characterized by a series of protections of the rights of the accused to guarantee a fair trial.[77]

32. International Human Rights Law has incorporated this heritage from its inception, so that its first instruments already conferred rights and guarantees to the accused in domestic criminal systems in a wide range of areas, such as investigation, trial and criminal execution. The 1948 American Declaration of the Rights and Duties of Man already provided for the strict legality of custodial sentences, the right to prompt judicial review of the legality of a detention, to a trial within a reasonable time, and to humane treatment in prison (Article 25), as well as the principle of presumption of innocence (Article 26). The Universal Declaration of Human Rights, also of 1948, established the right to a public, fair and equitable trial by an independent and impartial court (Article 10), as well as the presumption of innocence and the non-retroactivity of the most severe criminal laws (Article 11). Moreover, it cannot be

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[73] Robert Roth attributes the expression to Judge Van den Wyngaert, reporting that it was said in a presentation on the European citizen and criminal justice in the European Union in 1995. Cf. ROTH, Robert. Libres propos sur la subsidiarité du droit pénal. In: AUER, Andreas; DELLEY, Jean-Daniel; HOTTELIER, Michel; MALINVERNI, Giorgio (Eds.). Aux confins du droit: essais en l'honneur du Professeur Charles-Albert Morand. Bâle: Helbing & Lichtenhahn, 2001, p. 429-446.

[74] *Cf*. CARDENAS, Juan. 'The Crime Victim in the Prosecutorial Process.' *Harvard Journal of Law and Public Policy*, Vol. 9 (1986), p. 360

[75] *Cf*. BADARÓ, Gustavo. Criminal Process. 4th ed. São Paulo: Revista dos Tribunais (2016), p. 37; RAMOS, André de Carvalho. Criminalization mandates in the International Human Rights Law: new paradigms for the protection of victims of violations of human rights. Brazilian Journal of Criminal Sciences, vol. 62 (2006), p. 3.

[76] *Cf*. RAMOS, André de Carvalho. 'Criminalization mandates in the International Human Rights Law: new paradigms for the protection of victims of violations of human rights. Revista Brasileira de Ciências Criminais', vol. 62 (2006), p.3.

[77] *Cf*. FLETCHER, George. 'Justice and Fairness in the Protection of Crime Victims.' *Lewis and Clark Law Review*, Vol. 9 (2005), p. 551. This evolution can also be observed in substantive criminal law, with the abolition of crimes whose existence was, in itself, incompatible with human rights.

forgotten that, parallel to the establishment of the first treaties in the field of international human rights law, international demands have also emerged to fight against the impunity of those who violate human rights, which will be addressed below.

ii. The imperative to fight against impunity and the appearance of an apparent tension in the international protection of Human Rights

33. The international sense of indignation at the massive violations of human rights and humanitarian law at the end of the Second World War and the desire that they not be repeated directed the States' attention to the need to combat impunity and promote investigation and punishment of those responsible. From that moment on, the process described by Kathryn Sikkink as the "cascade of justice" began,[78], ""a dramatic and interrelated new trend in global politics of holding individual public officials, including heads of state, criminally responsible for human rights violations."[79]

34. From the institutional point of view, the first years of UN activity were marked by the General Assembly's adoption of resolutions that emphasized the imperative of fighting impunity,[80] supported by the debates that preceded the creation of the Nuremberg Tribunal[81] and consolidated in the aforementioned Declaration and in the Program of Action of the Vienna World Conference (1993). In accordance with the descriptions by Professor and former Judge Antônio Augusto Cançado Trindade in a concurring opinion in the *case of Barrios Altos v. Peru* in 2001, these efforts demonstrated that the fight against impunity is "a truly universal cry (...)."[82]

35. As has already been made clear in the Court's case law discussed in the previous section (*supra*, para. 19-29), the fight against impunity for those who violate human rights is not an end in itself, but also aims to prevent future violations. This reasoning is verified in sources beyond the IHR System, with the UN International Law Commission, for example, having long stated that "prevention and punishment are simply two aspects of the obligation to provide protection and both have a common objective, namely, to prevent potential perpetrators of protected persons from carrying out such attacks."[83] The International Court of Justice ("ICJ"), for its part, has already pointed out, when dealing with the application of the Convention on Genocide (which provides for its criminal classification), that "provisions regulating punishment also have a deterrent and therefore a preventive effect" and that "one

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[78] *Cf*. SIKKINK, Kathryn. *The Justice Cascade: how human rights prosecutions are changing world politics*. Nova York; Londres: W. W. Norton & Company, 2011, p. 9. The term had already been used by the author in LUTZ, Ellen; SIKKINK, Kathryn. The justice cascade: the evolution and impact of foreign human rights trials in Latin America. *Chicago Journal of International Law*, v. 2 (2001). According to Sikkink, the term "cascade" was borrowed from author Cass Sunstein, who used the term "social norm cascades" in his work to define a rapid and drastic change in the legitimacy of norms and actions on behalf of those rules. *Cf.* SUSTEIN, Cass. *Free Markets and Social Justice.* New York: Oxford University Press, 1997.

[79] *Cf*. SIKKINK, Kathryn. *The Justice Cascade: how human rights prosecutions are changing world politics*. Nova York; Londres: W. W. Norton & Company, 2011, p. 9 (our translation).

[80] *Cf*. for example, AGNU. Resolution A/Res/3(I) (Extradition and Punishment of War Criminals) adopted on February 13, 1946; UNAG. Resolution A/RES/95(I) (Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal) adopted on December 11, 1946.

[81] *Cf*. RAMOS, André de Carvalho. 'Criminalization mandates in the International Human Rights Law: new paradigms for the protection of victims of violations of human rights.' Revista Brasileira de Ciências Criminais, vol. 62 (2006), p. 4.

[82] *Cf. Case of Barrios Altos v. Peru. Merits*. Judgment of March 14, 2001. Series C No. 75. Reasoned opinion of Judge Cançado Trindade, para. 4.

[83] *Cf*. International Law Commission. *Fourth report on State responsibility*, by Mr. Roberto Ago, Special Rapporteur. A. Doc. A/CN.4/264 e Add. 1 (1972-1973), p. 98 (our translation).

of the most effective means to prevent criminal acts, in general, is to punish the people who commit them and to effectively apply those penalties to those who commit the acts carried out."[84]

36. Thus, as stated by the European Court of Human Rights in *Opuz v. Turkey* (2009) when discussing the State's obligations to guarantee the right to life:

> This involves a primary duty on the State to secure the right to life by **putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions**. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (…)[85].

37. The emergence of so many initiatives at the international and regional level aimed at combating impunity soon raised concerns that the duty to investigate and punish was overvalued, to the detriment of the human rights of prisoners.[86] Some authors and agents pointed out that a paradoxical relationship seemed to be emerging between Criminal Law and Human Rights, in which a "mutation" occurred in favor of the progressive defense of the mobilization of Criminal Law for the prevention and reparation of victims of violations.[87] At the inter-American level, the Court's determination to guarantee victims' access to justice - which includes, in some cases, the use of the criminal system - has also raised valid concerns about the risk that the eventual strengthening of the duty to investigate and punish States under their jurisdiction might culminate in more violations.[88] Concern for a "Criminal Law of Human Rights" plays an important role in keeping the Court's eyes always mindful of this delicate balance, which will be addressed below.

iii. The importance of Criminal Law as the *ultima ratio* of the protection of human rights

38. Understanding the relationship between Criminal Law and Human Rights requires returning to what is understood by impunity. When issuing its ruling in the case of *Paniagua Morales et al. ("White Van") vs. Guatemala* (1998), the Court has defined it as follows:

> The Court notes that there existed and still exists in Guatemala the situation of impunity with regard to the acts of the instant case, **impunity meaning the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention,** in view of the fact that the State has the obligation to use all the legal means at its disposal to combat

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[84] *Cf*. ICJ. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. Rep. 43 (February 26, 2007), p. 109, para. 159 (our translation).

[85] Cf. ECHR. *Opuz v. Turkey*, no. 33401/02, 2009, para. 128. *cf*. ECHR. *Osman v. United Kingdom*, Reports of Judgments and Decisions 1998-VIII, 1998, para. 115; ECHR. *Kontrová v. Slovakia*, no. No. 7510/04, para. 49; ECHR. *MC v. Bulgaria*, no. 39272/98, 2003, para. 153.

[86] *Cf*. BASCH, Fernando Felipe. The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers. *American University International Law Review*, v. 23 (2007), p. 213.

[87] *Cf*., as an example, PASTOR, Daniel. The neo-punitivist drift of organizations and activists as a cause of the current discredit of human rights. New Criminal Doctrine (2005).

[88] *Cf*. BASCH, Fernando Felipe. The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers. *American University International Law Review*, v. 23 (2007), p. 207.

> that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.[89]

39. As Luis Greco explains, "impunity" does not describe the mere "absence of punishment", but rather the "absence of punishment where it should be imposed."[90] I understand that such a condition is embodied in two requirements: Criminal Law must only be mobilized (i) in cases of strict necessity and (ii) within the quadrants of due legal process, with all its guarantees.

40. First, I will address the criterion of strict necessity, already addressed in my reasoned opinion in the *case of Moya Chacón et al. v. Costa Rica* (2022). When debating the "absolute exceptionality of the use of criminal measures",[91] I recall Roxin's teachings that Criminal Law is only the last of all means of social solution for a given problem, constituting the "*ultima ratio* of social policy" and serving as subsidiary protection of legal rights.[92]

41. Thus, returning to the words of Luis Greco, the duty to punish only arises in the absence of alternatives:

> If the foundation of the duty to punish is the duty to protect human rights (...), this protection is based on the nature of a crime that is clam, for which the punishment represents a value. It becomes, therefore, an empirical quest that is the most indicated, and it is impossible to exclude in advance the existence of other more adequate methods. **What matters, however, is whether the State succeeds or fails to comply with its duty to actively protect human rights without criminal law. A need to punish will hardly arise when these alternative methods are insufficient.** The fact that human rights require the State to provide active protection does not mean that this protection has to be given only by Criminal Law. A need to punish will hardly arise when these alternative methods are insufficient. **The fact that human rights require the State to provide active protection does not mean that this protection has to be given only by Criminal Law.**[93]

42. The criterion of strict necessity in the application of criminal measures is widely recognized in the case law of this Court and is a strong hallmark of its rulings on freedom of expression. In my reasoned opinion in *Moya Chacón et al. v. Costa Rica* (2022), I highlighted "a clear and growing tendency [in case law] to increasingly restrict the use of criminal solutions to protect conduct relating to the exercise of freedom of expression",[94] since "criminal law cannot be used to sanction any type of

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[89] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits*. Judgment of March 8, 1998. Series C No. 37, para. 173.
[90] *Cf.* GRECO, Luis. 'Por que inexistem deveres absolutos de punir.' *Católica Law Review*, v. 3 (2007), p. 121 (our translation).
[91] *Cf. Caso Moya Chacón vs. Costa Rica. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 23 de mayo de 2022. Serie C No. 451, voto razonado del Juez Rodrigo Mudrovitsch, párr. 5.
[92] *Cf.* ROXIN, Claus. *Derecho penal: parte general - tomo I. Fundamentos: las estructuras de la teoría del delito*. (*Criminal law: general part - volume I. Fundamentals: the structures of the theory of crime.)* Trad. Diego-Manuel Luzón Peña et al. Madrid: Civitas, 1997, p. 65. In its entirety: "*Criminal law is only the last of all the protective measures that must be considered, that is to say that it can only be made to intervene when other means of social solution to the problem– such as civil action, police or legal-technical regulations, non-criminal sanctions, etc.— fail. For this reason, punishment is called the 'ultima ratio of social policy' and its mission is defined as subsidiary protection of legal rights. This limitation of criminal law follows from the principle of proportionality of the rule of law of our Constitution: Since criminal law makes the harshest of all state interferences with a citizen's freedom possible, it can only be made to intervene when other less harsh means do not promise sufficient success.*" (our translation)
[93] *Cf.* GRECO, Luis. 'Por que inexistem deveres absolutos de punir.' *Católica Law Review*, v. 3 (2007), p. 121.
[94] *Cf. Case of Moya Chacón v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 23, 2022. Series C No. 451, reasoned opinión of Judge Rodrigo Mudrovitsch, para. 25.

rights violation because it is the harshest sanction that the State can impose on an individual."[95].

43. We must contrast, however, two different situations: cases of improper criminalization of conduct related to freedom of expression and cases in which the Court recognized the need to apply Criminal Law. In *Cotton Field vs. Mexico* (2009), for example, the Court discussed a series of femicides that have occurred in the country without having been properly investigated, and highlighted:

> (…) [T]he administrative or criminal sanctions play an important role in creating the appropriate type of capability and institutional culture deal with factors that explain the context of violence against women established in this case. If those responsible for such serious irregularities are allowed to continue in their functions or, worse still, to occupy positions of authority, this may create impunity together with conditions that allow the factors that produce the context of violence to persist or deteriorate.
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> Based on the information available in the case file before the Court, the Tribunal finds that none of the officials supposedly responsible for the negligence that occurred in the instant case has been investigated. Specifically, the serious irregularities that occurred in the investigation of those responsible and in the handling of the evidence during the first stage of the investigation have not been clarified. This emphasizes the defenselessness of the victims, contributes to impunity, and encourages the chronic repetition of the human rights violations in question.[96]

44. Having therefore established the limitation of the application of Criminal Law to cases of strict necessity, it is important to highlight the requirements related to the **guarantees of due legal process**. As explained (*supra*, para. 38), the Court defines impunity as the lack of investigation, persecution, capture, prosecution and conviction of those possibly responsible for Human Rights violations.[97] Therefore, it is not an obligation to impose a criminal sanction, but rather there are procedures that must be carried out to clarify the facts, evaluate responsibilities and, only if the individual responsibility of the prisoner is determined in a manner compatible with the protection of their Human Rights, conclude with a criminal sentence.

45. The right to judicial guarantees applies throughout this entire process, starting with the principle of criminal legality (provided for in Article 9 of the Convention) and its ramifications, as explained by the Court in *Lori Berenson Mejía vs. Peru* (2004):

> (…) crimes must be classified and described in precise and unambiguous language that narrowly defines the criminalized conduct, establishing its elements, and the factors that distinguish it from behaviors that are either not punishable or punishable but not with imprisonment. (…) Under the rule of law, the principles of **legality and non-retroactivity** govern the actions of all State organs, in their respective spheres of competence, particularly when they must exercise their powers to punish. In a democratic system, extreme precautions must be taken so that **criminal sanctions are adopted with strict respect for the basic rights** of people and after **careful verification** of the effective existence of the illicit conduct. In this sense, it is up to the criminal judge, at the time of applying the criminal law, to strictly adhere to its provisions and observe the **greatest rigor in adapting the conduct** of the incriminated person

[95] Ibid., para. 38.
[96] *Cf. Case of González et al.("Cotton Field") v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 16, 2009. Series C No. 205, para. 377-8.
[97] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, para. 173.

> to the criminal offense, in such a way that does not incur the penalty of acts that are not punishable in the legal system.[98]

46. The Court's concern about the dangers inherent in the movement of the repressive criminal system was evident, for example, in the case of *Fermín Ramírez vs. Guatemala* (2005), in which the Court considered that invoking the author's dangerousness as an aggravating factor in the criminal process violated the rights of the accused:

> This citing (...) clearly constitutes an expression of the exercise of the state's *ius puniendi* over the basis of the personal characteristics of the agent and not the act committed, that is, it **substitutes the Criminal System based on the crime committed, proper of the criminal system of a democratic society, for a Criminal System based on the situation of the perpetrator, which opens the door to authoritarianism precisely in a subject in which the juridical rights of greatest hierarchy are at stake.** (...) In the end, the individual will be punished – even with the death penalty – not based on what he has done, but on what he is. It is not even necessary to weigh in the implications, which are evident, of this return to the past, absolutely unacceptable from the point of view of human rights.[99]

47. This recognition of prisoners in criminal proceedings as true subjects of law endowed with freedoms and human rights is precisely what differentiates the "justice cascade" initiated at the end of the Second World War from the politically biased persecutory trials that were common practice in the past.[100] Thus, it is evident that it is the strict link between the actions of States in the criminal field and Human Rights - by adherence to the principle of the *ultima ratio* of Criminal Law and respect for judicial guarantees - which makes aspects of the relationship compatible with Criminal Law, which is both "shield" and "sword".

c. Partial conclusion

48. The discussion in this section demonstrates that the imperative to maintain Criminal Law as *ultima ratio* does not mean that its applicability is non-existent or that it cannot, under any circumstances, be mobilized as an instrument to protect human rights. It means, rather, that the apparent paradox between the fields requires careful consideration between the fight against impunity and all procedural guarantees and the human rights of the accused. At the end of the day, "[t]he conflict (…) was never one of Human Rights against Criminal Law per se, but rather with the abuse of the latter".[101] It also means that the punishment of persons responsible for human rights violations does not have a merely symbolic or metaphysical value, but rather fulfills a function of reparation and prevention of future violations (as explained *supra*, paras. 19-28).

49. In a manner consistent with its aims and objectives, this Court understands the risks involved in the management of the criminal apparatus by the States, such as the

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[98] *Cf. Case of Lori Berenson Mejía v. Perú. Merits, Reparations and Costs.* Judgment of November 25, 2004. Series C No. 119, para. 79-8

[99] *Cf. Case of Fermín Ramírez v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 20, 2005. Series C No. 126, para. 94-5.

[100] *Cf.* SIKKINK, Kathryn. *The Justice Cascade: how human rights prosecutions are changing world politics*. Nova York; London: W. W. Norton & Company, 2011.

[101] *Cf.* CALDERÓN, Jean Paul; MÉGRET, Frédéric. "Penalization" of human rights?: Twists and paradoxes in the jurisprudence of the Inter-American Court of Human Rights. *Law & Society* (*Derecho & Sociedad)*, v. 47 (2016), p. 17.

excessive exercise of state *ius puniendi*[102] Thus, it carefully weighs the nuances and peculiarities of each case so that its zeal in the fight against impunity does not come to the detriment of its rigidity in the protection and guarantee of the human rights of the accused, which includes respect for its procedural guarantees. The Court must continue to establish, in a clear and justified manner, the strict cases in which the State must resort to criminal proceedings to repair and prevent violations of human rights, as well as which behaviors do not require the mobilization of the criminal apparatus. Alternatives to Criminal Law must also be sought that are capable of effectively achieving the objectives the measure seeks to pursue. In this specific case, without ignoring its absolute exceptionality, I understand that the mobilization of criminal law is necessary as a measure of reparation, which is why I will present the reforms that I consider necessary in the domestic legal system to achieve this objective.

III. On the necessary modification of the offense of "rape" to effectively incorporate the criterion of consent

50. As previously described (*supra*, para. 7), Ms. Losada was the victim of several sexual assaults between 2001 and 2002, without the State having managed, more than 20 years later, to guarantee her right to justice. The analysis of the judicial procedures that followed the accusation of the attacks revealed that the disputes over the interpretation of the terms "rape" and "statutory rape" in the Criminal Code contributed significantly to the fact that the State has not issued any resolution of *res judicata.*

51. In this context, this Court analyzed the importance of the standard of consent in the classification of sexual crimes to guarantee victims' access to justice.[103] After mapping the international standards on the matter, the Court went on to examine the conformity of the crimes of rape and statutory rape, provided for in the Bolivian legal system, with the American Convention, in light of the international *corpus juris* on the matter, and the impact of the offense classifications on the victim's access to justice.[104] Finally, the Court expressed its agreement with the various international organizations that consider that "the criminal regulatory provisions related to sexual violence must contain the concept of consent as their central axis" and that, for their configuration, "[it is enough] that it is demonstrated, by any suitable means of proof, that the victim did not consent to the sexual act" (or that the circumstances invalidate any expression of consent).[105] The Court also assessed that the offense of "statutory rape" "is based on traditions and gender stereotypes, does not identify the particular conditions of vulnerability of the victim, conceals power relations and creates a hierarchy between sexual crimes that diminishes, naturalizes, and renders invisible the seriousness "of sexual violence against children and adolescents", and is an obstacle for "basing all forms of sexual violence against adolescents and minors on lack of consent".[106]

52. Based on these findings, the Court ordered the State to adjust "its domestic legal system in such a way that voluntary consent is central and constitutive of the crime of rape" (considering the coercive circumstances that annul consent) and eliminate

[102] *Cf. Case of Fermín Ramírez v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 20, 2005. Series C No. 126, para.98.
[103] Cf. Judgment, para.134 – 156.
[104] Ibid., para. 134-156.
[105] Ibid., para. 145.
[106] Ibid., párr. 199.

"the criminal offense of statutory rape from its legal system."[107] Below, I will develop some of the foundations set forth in the judgment to inform this resolution.

a. The classification of the crimes "rape" and "statutory rape" in the Bolivian legal system

53. Although some sexual crimes were already criminalized in Bolivian criminal legislation since the Criminal Code of Santa Cruz (1831), the classification of the crimes of "rape" and "statutory rape", in a form close to the current one, only occurred in 1972, with the approval of the Criminal Code currently in force.[108] The separation between "rape" and "statutory rape" was very common in Latin American countries and still persists in most legal systems in the region,[109] with "statutory rape" generally describing cases in which an adult has sexual relations with a minor of legal age of consent through seduction or deception, with much reduced penalties compared to "rape."

54. The offense of "statutory rape" has persisted practically unchanged in Bolivia since the entry into force of the Criminal Code, being defined, both at the time of the events and today, as follows in Art. 309 of the Criminal Code:

> Whoever, through **seduction or deception**, has sexual intercourse with a person of either sex over fourteen (14) and under eighteen (18) years of age, will be punished with imprisonment for three to six years.

55. "Rape", in turn, is classified in article 308 of the Criminal Code, being defined, at the time of the events, after some modifications to the original text, as follows:

> Whoever, using **physical violence or intimidation**, has sexual intercourse with a person of either sex; anal or vaginal penetration or introducing objects for libidinous purposes, will incur imprisonment from five (5) to fifteen (15) years.
>
> Anyone who, under the same circumstances as in the previous paragraph, even if there was no physical violence or intimidation, taking advantage of the victim's mental illness, serious psychological disturbance or severe intellectual impairment, or who was incapable of resisting for any other reason, will incur imprisonment of fifteen (15) to twenty (20) years.

56. Since 2001, the sexual crimes chapter of the Bolivian Criminal Code has been amended by several laws, in particular Law No. 348 of 2013, Law No. 548 of 2014 and Law No. 1173 of 2019.[110] The most relevant change to Article 308 was introduced by the Comprehensive Law to Guarantee Women a Life Free of Violence (the aforementioned Law No. 348 of 2013), which increased the penalty imposed on the crime and modified its definition, which currently reads:

> Anyone who, **through intimidation, physical or psychological violence**, performs, with a person of either sex, **non-consensual** sexual acts that involve carnal access, through penetration of the male member, or any other part of the body, or any object, vaginally, anal or orally, for libidinous purposes will be punished with deprivation of liberty for a period of fifteen (15) to twenty (20) years; and who, under the same

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[107] Ibid., para. 198-199.
[108] *Cf*. *Amicus Curiae* presented by networks and organizations defending women's human rights from the Plurinational State of Bolivia, para. 21.
[109] A recent report by the NGO Equality Now noted that 17 of the 43 jurisdictions studied in the American Continent still adopt the separation of "statutory rape" from "rape." *Cf*. Equality Now. *Failure to protect how discriminatory sexual violence laws and practices are hurting women, girls, and adolescents in the Americas*. Available: http://www.equalitynow.org/esvamericas. Accessed November 29, 2022.
[110] *Cf.* Escrito de Contestación de 17 de febrero de 2021, párr. 312.

> circumstances, even if there was no physical violence or intimidation, taking advantage of the victim's serious mental illness or lack of intelligence or who was incapable of resisting for any other reason.

57. It is possible to deduce an attempt by the Bolivian State to include the parameter of absence of consent in Article 308, with the addition of "non-consensual sexual acts" in the description of criminal behavior. However, as the judgment highlights, this is an ineffective integration of said criterion, since the qualification of "non-consensual sexual acts" is conditioned to the concurrence of "intimidation, physical or psychological violence", making the requirement of consent redundant.[111] Intimidation and violence always imply, after all, the absence of consent, but the opposite is not correct. Therefore, the inclusion of this parameter did not change the definition of the classification. Thus, the article provides for two forms of rape very similar to its original classification: (i) sexual acts resulting from intimidation or violence, whether physical or psychological, and (ii) sexual acts performed taking advantage of some circumstance that prevents the victim's resistance. Furthermore, as the Court emphasizes, the law "[does not] refer to circumstances in which consent is flawed, such as in cases of evident asymmetry of power between the aggressor and the victim."

58. The representatives argued that this classification of rape in the Bolivian legal system is incompatible with the Convention and requested the elimination of the criteria of intimidation and violence so that the criterion of consent, which must be clearly defined, prevails.[112] The State, however, maintained that no legislative change was appropriate, either because it had not violated the rights of the victim in the specific case, or because the current classification would be compatible with the Convention.[113] Next, I will explain the reasons that justify granting the measure requested by the victim.

b. On the need to truly center the definition of "rape" on the parameter of consent

59. When classifying an act of a sexual nature as a crime, it is necessary to identify (i) what type of conduct must be inhibited and (ii) what conditions must precede the sexual act to assess the conduct as illicit.[114] In Bolivian law, the crime of "rape" includes the following types of conduct: "carnal access," "anal or vaginal penetration," and "introduction of objects for libidinous purposes." The classification of "statutory rape" already covers "carnal access" specifically with those over 14 and under 18 years of age, while other sexual acts not belonging to these categories are addressed in the "sexual abuse" classification (Art. 312 of the Criminal Code). As the Court stated in the judgment, "sexual violence consists of actions of a sexual nature that are committed against a person without their consent, which in addition to including the physical invasion of the human body, can include acts that do not involve penetration or even any physical contact."[115]

60. Thus, the definition of the classifications of sexual conduct that can be classified as sexual crimes in Bolivia seems too restrictive to me. Considering, however, that these categorizations alone did not entail the problems observed in the specific case, I will

[111] *Cf*. Judgment, para. 150.
[112] *Cf*. Brief with Pleadings, Motions and Evidence of November 20, 2020, p. 293, 295.
[113] *Cf*. Answering brief of February 17, 2021, para. 231.
[114] *Cf*. HÖRNLE, Tatiana. #MeToo – Implications for Criminal Law? *Bergen Journal of Criminal Law and Criminal Justice*, vol. 6, 2 (2018), p. 124.
[115] *Cf*. Judgment, para. 136.

focus my considerations on the second element of the offense: the conditions that must precede the sexual act for the conduct to be illicit.

61. As already noted, in Bolivia sexual acts committed through intimidation or violence or taking advantage of any circumstance that prevents the victim's resistance are considered "rape." Thus, the relevance of the parameter of the victim's resistance is highlighted, which requires the demonstration of the attempt to resist (overcome by intimidation or violence) or the inability to resist, even if the event occurred without the consent of the victim or in situations in which the victim could not resist or in which any resistance on the part of the victim could aggravate their situation. The application of this parameter was evident in the case of Ms. Losada.

62. Before Sentencing Court No. 4, the opening of the classification of "rape" to an evaluation of the victim's capacity for resistance gave rise to a series of inadequate and discriminatory testimonies and arguments about the victim.[116] Her character and her personal history guided the hearings more than E.G.A's own behavior, in a clear process of revictimization.[117] Similarly, the emphasis on a victim's capacity for resistance contained in Article 309 of the Penal Code made her position of vulnerability and the position of trust occupied by the abuser irrelevant to the court. The court's perception that Ms. Losada had the capacity to resist her cousin's attacks because she had a "strong personality" led Sentencing Court No. 4 to change the offense that should be analyzed from "rape" (which had been the petition of the Public Prosecution) to "statutory rape" and to analyze E.G.A's conduct on the basis that "seduction or deception" had occurred, which resulted in a reduction of the sentence.[118] According to the Court, "[t]hese stereotypes reinforce the misconceived and discriminatory idea that a victim of sexual violence has to be 'weak', appear 'defenseless', react or resist the aggression."[119].

63. After the annulment of the first trial, the Public Prosecution again accused the prisoner before Sentencing Court No. 2 for the crime of "rape." On this occasion, the court incorporated E.G.A's conduct into the latter type and acquitted the accused due to lack of conclusive evidence that intimidation or violence existed at the time of the alleged sexual union.[120] In the Court's evaluation:

> This collegiate judicial body expressly held that **it was necessary to prove the existence of physical violence or intimidation for the crime of rape to be established** and, therefore, excluded the expert opinion on psychological coercion and evidence of Brisa's mental state (…) In that regard, the Sentencing Court No. 2 asserted that "it cannot affirm whether [the] sexual intercourse constituted a consensual relationship or sexual assault […] because," among other factors, "the victim [did not] refer to what the intimidation behaviors were that made her yield to her attacker." Thus, it is noted that, **when examining the nature of the sexual relations existing between a 16-year-old girl and a 26-year-old adult man who represented an authority figure for her, evidencing an asymmetry of power between the two, and with whom she also had a relationship of trust, the Trial Court did not consider it relevant to focus on the existence or not of consent** on the part of Brisa or on the existence of an environment of coercion, by virtue of which her consent

[116] *Cf.* Brief of Pleadings, Motions and Evidence of November 20, 2020, p. 92.
[117] *Cf.* Judgment, para. 164-5.
[118] Ibid., para.121. As the Court stated, "Beyond the use of gender stereotypes as one of the bases of the decision, which will be analyzed below (*infra* section b.4), the Court warns that said reasoning demonstrates a flagrant lack of training and sensitivity regarding the particular circumstances in cases of sexual violence committed against a girl, especially in her home and by a person who held power over her and, consequently, the absence of a gender and childhood perspective when examining the case."
[119] Ibid., para. 164
[120] Ibid., para. 153

> could not be inferred, "but in the reliable verification of the existence of violence or intimidation, eliminating at the same time the only evidence that would support said elements (…) In view of the above, it is considered that the application of the reference regulations and their interpretation by the domestic courts resulted in the denial of justice to a girl who was a victim of sexual violence, such as Brisa.[121]

64. The classification of rape in Bolivia and its evaluation by Sentencing Courts No. 2 and No. 4 conforms to the traditional model of the formation of sexual crimes in Western countries, which focuses on the existence of a coercive/violent act or a practical impossibility of resistance (such as due to unconsciousness or some mental incapacity).[122] Historically, it was understood that an "honorable" woman would at least attempt to defend her honor, so the crime required physical resistance.[123] This logic was already verifiable in the laws of medieval Europe and was justified by the low degree of sophistication in the evaluation of evidence in trials (in which clear signs of physical resistance or visual or auditory testimony were required)[124] and because the objective of the laws was the protection of moral values - and not the sexual autonomy of the victim.[125]

65. It should be noted that the victim's resistance, as a condition of the illegality of the action, does not cover situations, such as the one in the case at hand, that should be considered as rape. According to the summary made by the ECHR of the expertise received in the *Case of M.C. v. Bulgaria* (2003), very similar to that of Ms. Losada and to which reference is made in the judgment, there are diverse patterns of reaction to sexual violence:

> The experts stated, with reference to scientific publications in several countries, **that two patterns of response by rape victims to their attacker were known: violent physical resistance and "frozen fright"** (also known as "traumatic psychological infantilism syndrome"). The latter was explained by the fact that any experience-based model of behaviour was inadequate when the victim was faced with the inevitability of rape. As a result, **the victim, terrorised, often adopted a passive-response model of submission**, characteristic of childhood, **or sought a psychological dissociation from the event, as if it were not happening to her**.
>
> The experts stated that all the scientific publications they had studied indicated that **the "frozen-fright pattern" prevailed**. Further, they had conducted their own research for the purposes of their written opinion in the present case. They had analysed all the cases of young women aged 14 to 20 who had contacted two specialised treatment programmes for victims of violence in Bulgaria during the period from 1996 to 2001, declaring that they had been raped. Cases that were too different from that of the applicant had been excluded. As a result, twenty-five cases had been identified, in twenty-four of which the victim had not resisted violently but had reacted with passive submission[126].

66. The resistance required for the criminal offense also makes it difficult to resolve criminal cases for evidentiary reasons, since the judiciary would require, from this perspective, physical proof not only of the inability to resist, but also of the

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[121] Ibid., para. 153-4 (our highlight).
[122] *Cf*. HÖRNLE, Tatiana. #MeToo – Implications for Criminal Law? *Bergen Journal of Criminal Law and Criminal Justice*, vol. 6, 2 (2018), p. 124.
[123] Ibid., p. 125-6.
[124] *Cf*. KRATZER-CRYLAN, Ceylan. Finalität, *Widerstand, "Bescholtenheit": Zur Revision der Schlüsselbegriffe des § 177 StGB*. In: Schriften zum Strafrecht (SR), Band 274. Berlin: Duncker & Humboldt (2015), p. 109; HÖRNLE, Tatiana. #MeToo – Implications for Criminal Law? Bergen Journal of Criminal Law and Criminal Justice, vol. 6, 2 (2018), p. 125.
[125] *Cf*. HÖRNLE, Tatiana. #MeToo – Implications for Criminal Law? *Bergen Journal of Criminal Law and Criminal Justice,* vol. 6, 2 (2018), p. 125.
[126] *Cf*. ECHR. *M.C. v. Bulgaria*, no. 39272/98, 2003, para. 70-1.

demonstration of the attempt to resist, requirements that are difficult to demonstrate. This situation is aggravated by the fact that, for various reasons (including fear of reprisals, loss of family support or social stigma), many victims do not immediately report sexual violence. This is especially true for children, who may not realize that acts committed against them constitute a crime. Consequently, victims who are slow to report violence often face difficulty – or even the impossibility – of obtaining physical or medical evidence, such as bodily injuries, to prove that additional physical violence was used during the rape.

67. In the majority of States that have not carried out a substantial reform of the definition of sexual crimes, their definition continues to be based on these outdated concepts.[127] Laws that are not designed to protect the sexual autonomy of citizens are unlikely to be able to do so adequately, so there is a clear need for countries to rethink the classification of sexual crimes under their jurisdiction in order to protect the right to autonomy and negative sexual freedom effectively.[128] Some countries began reforms in this sense starting in the middle of the 20th century.[129] In the last 30 years, the effort to effectively protect these rights has been enhanced with the emergence of the consent criterion.[130] Currently, the majority of States Parties to the UN Convention on the Elimination of All Forms of Discrimination against Women of 1981 (CEDAW) already adopt the parameter of lack of consent to define sexual rape.[131] Some regions, however, continue to lag behind in this process: a 2021 study reveals that, in the American Continent, 23 of the 43 jurisdictions studied still based their classification of rape on the use of force and threats.[132]

68. It is essential, at this point, to highlight and deepen the Court's conclusion that the incorporation of the parameter of consent is not only supported, but is required by International Human Rights Law.[133] The Committee in charge of ensuring compliance with CEDAW has already had the opportunity to analyze a case very similar to that of Ms. Losada, which occurred in the Philippines, in which a woman, Ms. Vertido, was raped.[134] The State, however, acquitted the accused after eight years without a first instance decision based on an extremely restrictive and discriminatory interpretation of the criminal classification of "rape".[135] In this context, as noted in the judgment,[136] the CEDAW Committee has highlighted the centrality of consent as a parameter to be evaluated in the investigation of the case in question:

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[127] *Cf*. HÖRNLE, Tatiana. #MeToo – Implications for Criminal Law? *Bergen Journal of Criminal Law and Criminal Justice*, vol. 6, 2 (2018), p. 123, 126.
[128] *Cf*. HÖRNLE, Tatiana. Sexuelle Selbstbestimmung: Bedeutung, Voraussetzungen und kriminalpolitische Forderungen. Zeitschrift für die gesamten Strafrechtswissenschaften, vol. 127 (2016), p. 851; HÖRNLE, Tatiana. #MeToo – Implications for Criminal Law? *Bergen Journal of Criminal Law and Criminal Justice*, vol. 6, 2 (2018), p. 126.
[129] *Cf*. HÖRNLE, Tatiana. #MeToo – Implications for Criminal Law? *Bergen Journal of Criminal Law and Criminal Justice*, vol. 6, 2 (2018), p. 125.
[130] *Cf.* Special Rapporteur on violence against women and girls, its causes and consequences (Dubravka Šimonović). *Rape as a grave and systematic human rights violation and gender-based violence against women*, A/HRC/47/26 (2021), para. 70.

[131] *Cf*. CEDAW. *Vertido v. Phillipines*, CEDAW/C/46/D/18/2008, 2010, para. 8.7.
[132] Equality Now. *Failure to protect how discriminatory sexual violence laws and practices are hurting women, girls, and adolescents in the Americas*. Disponible en: http://www.equalitynow.org/esvamericas. Accessed on November 29, 2022.
[133] *Cf*. Judgment, para. 149.
[134] *Cf*. CEDAW. *Vertido v. Phillipines*, CEDAW/C/46/D/18/2008, 2010.
[135] Ibid.
[136] *Cf*. Judgment, para. 146.

> With regard to the definition of rape, the Committee notes that the **lack of consent is not an essential element of the definition of rape** in the Philippines Revised Penal Code. It recalls its general recommendation No. 19 of 29 January 1992 on violence against women, where it made clear, in paragraph 24 (b), that "States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women and respect their integrity and dignity". Through its consideration of States parties' reports, **the Committee has clarified time and again that rape constitutes a violation of women's right to personal security and bodily integrity, and that its essential element was lack of consent**[137].

69. In evaluating the criminal classification of the crime in the Philippines, the CEDAW Committee observed that the domestic court, in discussing the occurrence or non-occurrence of physical resistance on the part of the victim, had adopted discriminatory and stereotypical views on what a woman's behavior should be when she experiences sexual violence, which led to the re-victimization of Ms. Vertido and demonstrated the inadequacy of this requirement:

> (…) stereotyping affects women's right to a fair and just trial and that **the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape** based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general. (…)
>
> It is clear from the judgement that the assessment of the credibility of the author's version of events was influenced by a number of stereotypes, the author in this situation not having followed what was expected from a rational and "ideal victim" or what the judge considered to be the rational and ideal response of a woman in a rape situation (…)
>
> Although there exists a legal precedent established by the Supreme Court of the Philippines that it is not necessary to establish that the accused had overcome the victim's physical resistance in order to prove lack of consent, the Committee finds that **to expect the author to have resisted in the situation at stake reinforces in a particular manner the myth that women must physically resist the sexual assault.** In this regard, the Committee stresses that **there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct**, regardless of whether the perpetrator threatened to use or used physical violence[138].

70. The CEDAW Committee, based on this evaluation, prescribed the reparation measure described in the Judgment:

> (…) recommended that the Philippines "revise [its] definition of rape in law to focus on lack of consent" and enact a definition that "requires the existence of an 'unambiguous and voluntary agreement' and requires evidence by the accused of measures taken to secure the consent of the complainant/survivor", or that "required that the act take place under 'coercive circumstances, including a wide range of coercive circumstances'".[139]

71. Building on this and other precedents, UN Women - the UN agency responsible for developing programs, policies and standards for the protection of women's rights - has specified in its "Handbook for legislation on violence against women" (2012), that:

> "Legislation should: (…) **remove any requirement that sexual assault be committed by force or violence**, and any requirement of proof of penetration, and

[137] *Cf*. CEDAW. *Vertido v. Phillipines*, CEDAW/C/46/D/18/2008, 2010, para. 8.7.
[138] Ibid., para. 8.4-5.
[139] *Cf*. Judgment, para. 142; CEDAW. *Vertido v. Phillipines*, CEDAW/C/46/D/18/2008, 2010, para. 8.9.b.i.

> minimize secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either: (i) requires the existence of "unequivocal and voluntary agreement" and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or (ii) requires that the act take place in "coercive circumstances" and includes a broad range of coercive circumstances"[140]

72. Furthermore, the ECHR ruled in the *Case of M.C. v. Bulgaria* (2003), which dealt with the conduct of the State following the complaint by the victim, who was 14 years old at the time, of having been sexually assaulted by two adult men. The investigation carried out by the State concluded that there was insufficient evidence that the victim was forced to have sexual relations, which revealed the inadequacy of the classification of rape in Bulgaria and the lack of diligence of the State authorities in the processing of complaints. See the similarity of the classification of "rape" in Bolivia with its equivalent in Bulgaria at the time of the events (Art. 152.1 of the Criminal Code): "sexual relations with a woman (1) unable to defend herself, where she did not give her consent ; (2) that she was coerced by the use of force or threats; (3) that she was brought to a state of helplessness by the perpetrator."[141]

73. The ECHR began its considerations by emphasizing the positive obligation of States to enact criminal legislation capable of effectively punishing incidences of rape and to enforce such legislation through effective investigation and prosecution.[142] To do this, States must consider the evolution of the modern understanding of the elements that characterize rape, the outline of which was described by the European court:

> **[H]istorically, proof of physical force and physical resistance was required** under domestic law and practice in rape cases in a number of countries. The last decades, however, have seen a **clear and steady trend** in Europe and some other parts of the world **towards abandoning formalistic definitions and narrow interpretations** of the law in this area (…).
>
> it appears that **a requirement that the victim must resist physically is no longer present in the statutes of European countries**. In common-law countries, in Europe and elsewhere, **reference to physical force has been removed** from the legislation and/or case-law (…). In most European countries influenced by the continental legal tradition, the definition of rape contains references to the use of violence or threats of violence by the perpetrator. It is significant, however, that in case-law and legal theory, lack of consent, not force, is seen as the constituent element of the offence of rape (…).
>
> The Court also notes that the member States of the Council of Europe, through the Committee of Ministers, have agreed that **penalising non-consensual sexual acts, "[including] in cases where the victim does not show signs of resistance", is necessary** for the effective protection of women against violence (…) and have urged the implementation of further reforms in this area. In international criminal law, it has recently been recognised that force is not an element of rape and that taking advantage of coercive circumstances to proceed with sexual acts is also punishable. (…) the development of law and practice in that **area reflects the evolution of societies towards effective equality and respect for each individual's sexual autonomy**[143]**.**

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[140] *Cf*. UN WOMEN. Handbook for Legislation on Violence against Women. New York, 2012, part 3.4.3.1.
[141] *Cf*. ECHR. *M.C. v. Bulgaria*, no. 39272/98, 2003, para. 74 (our translation). In the original: *"sexual intercourse with a woman (1) incapable of defending herself, where she did not consent; (2) who was compelled by the use of force or threats; (3) who was brought to a state of helplessness by the perpetrator".*
[142] Ibid., para. 153.
[143] Ibid., para. 156-165.

74. Based on these observations, the EHR Court has considered that "any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy"[144]. Thus, the EHR Court established that the obligations of the Member States relating to Articles 3 (prohibition of torture and right to physical integrity) and 8 (right to private life) of the European Convention require the criminalization of any non-consensual sexual act, even in the absence of physical resistance on the part of the victim.[145] Once this parameter was established, the Court went on to evaluate the Bulgarian legislation and concluded that it did not contemplate the criminalization of every non-consensual act and that the State had not demonstrated that its judicial power interpreted it in a broad sense.[146] In the case, it was recorded that the authorities adopted stereotypical and discriminatory points of view by demanding evidence of violence, resistance or shouting,[147] with the EHR Court elaborating then parameters for the conduct of the authorities in cases of violations:

> (…) it appears that the prosecutors did not exclude the possibility that the applicant might not have consented, but adopted the view that in any event, in the absence of proof of resistance, it could not be concluded that the perpetrators had understood that the applicant had not consented (…). The prosecutors forwent the possibility of proving the perpetrators' *mens rea* by assessing all the surrounding circumstances, such as evidence that they had deliberately misled the applicant in order to take her to a deserted area, thus creating an environment of coercion, and also by judging the credibility of the versions of the facts proposed by the three men and witnesses called by them (…).
>
> The Court considers that, while in practice it may sometimes be difficult to prove lack of consent in the absence of "direct" proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent. That was not done in the applicant's case. The Court finds that the failure of the authorities in the applicant's case to investigate sufficiently the surrounding circumstances was the result of their putting undue emphasis on "direct" proof of rape. Their approach in the particular case was restrictive, practically elevating "resistance" to the status of defining element of the offence.
>
> The authorities may also be criticised for having attached little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors[148].

75. The study carried out by the ECHR in this case and its conclusions served as substance to establish the obligations of the States parties to the Convention on Preventing and Combating Violence against Women and Domestic Violence (or "Istanbul Convention") of 2011 in relation to the classification of sexual crimes, whose article 36 incorporates the standard of consent reflected in the Judgment:

> (1) Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: (a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; (b) engaging in other non-consensual acts of a sexual nature with a person; (c) causing another person to engage in non-consensual acts of a sexual nature

[144] Ibid., para. 166
[145] Ibid.
[146] Ibid., para. 170, 173.
[147] Ibid., para. 179.
[148] Ibid., para. 180-3.

> with a third person. (2) Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances[149].

76. Another paradigmatic precedent in the definition of consent as an appropriate parameter for sexual violation comes from the International Criminal Tribunal for the former Yugoslavia ("ICTY") in the *Case of Prosecutor v. Kunarac, Kovac and Vokovic* (2001),[150] already discussed in the judgment.[151] On that occasion, the Court needed to establish a definition for the crime of "rape" crystallized in common Article III of the Geneva Conventions and constituting a crime against humanity, upon verifying that there was no definition of "rape" in the International Humanitarian Law.[152] After carrying out an in-depth study, the Court of First Instance concluded that the parameter should be the absence of the victim's consent to the sexual act, and that this consent must be given voluntarily, of free and spontaneous will, and must be evaluated in the context of the circumstances of each case.[153] The prisoners filed an appeal in which they argued that the correct standard of the crime of rape was the "use of coercion or force", and not the "lack of consent."[154] The Court of Appeals rejected this appeal, consolidating that "the force or the threat of force provides clear evidence of lack of consent, but force is not a per se element of rape" - thus reinforcing the consent standard.[155]

77. Also within the framework of International Criminal Law, the International Criminal Court, when defining the rules of evidence for the crimes of the Rome Statute (which includes sexual violence in its article 7(1)(g), established the standard of consent and specified in the following terms:

> Rule 70: Principles of evidence in cases of sexual violence
> In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:
> (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
> (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
> (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
> (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.[156]

78. Although this Court has not had the opportunity to analyze, prior to the present case, a situation as similar to that of Ms. Losada as the aforementioned European

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[149] *Cf*. Judgment, para. 139.

[150] As stated by the European Court in *M.C. v. Bulgaria*, although the rulings in the case *Prosecutor v. Kunarac, Kovac and Vokovic* (2001) of ICTY were issued in the particular context of a rape that occurred during an armed conflict, the case reflects a universal trend towards the adoption of the criterion of absence of consent as an essential element of the crimes of rape and sexual abuse. Cf. ECHR. *MC v. Bulgaria*, no. 39272/98, 2003, para. 163.

[151] *Cf*. Judgment, para. 138.

[152] *Cf*. ICTY (Trial Chamber). *Prosecutor v. Kunarac, Kovac y Vokovic*. Case No. IT-96-23-T & IT-96-23/1-T (2001).

[153] Ibid.

[154] *Cf*. ICTY (Appeals Chamber). *Prosectuor v. Kunarac, Kovac e Vokovic*. Case No. IT-96-23-T & IT-96-23/1-T (2002).

[155] Ibid.

[156] *Cf.* ICC. *Rules of Procedure and Evidence*. Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A.

precedent,[157] the *Case of Fernández Ortega et al. Mexico* (2010) discussed the sexual rape of the victim, a 25-year-old indigenous woman, in the context of the invasion of her home by about eleven armed soldiers, without the State having completed the investigation and prosecution of those responsible. When examining the evidence at its disposal to evaluate the case - specifically, the evidence that sexual violence had occurred -, the Court relied on the aforementioned cases *MC vs. Bulgaria* of the ECHR and *Kunarac, Kovac and Vukovic* of the ICTY to address the absence of evidence of physical resistance:

> With regard to the medical examinations, it should be emphasized that the alleged victim only received medical assistance on one occasion after reporting the facts, from a general practitioner, who performed a physical and gynecological examination from which she determined that "there was no evidence of violence". In this regard, the Court observes that the medical certificate concurs with the different statements made by Ms. Fernández Ortega, because, **in none of them, the alleged victim says that she opposed physical resistance to the attack.** In this regard, the Court notes that international jurisprudence has established that **the use of force cannot be considered an essential element to punish non-consensual sexual acts, and that evidence of the existence of physical resistance to such acts cannot be required; rather it is sufficient that there are coercive elements in the conduct.** In this case, **it is established that the act was committed in a situation of extreme coercion,** aggravated by the fact that it occurred in a context of power subjectification by three armed soldiers.[158]

79. The same standard was recommended by the Commission, which already stated that "in order to properly investigate, prosecute and punish cases of sexual violence, States must consider both the body of evidence and the context in which the sexual assault occurred, and not confine themselves to direct evidence of physical resistance on the part of the victim."[159]

80. Thus, because (i) the traditional model for classifying sexual crimes, adopted by Bolivia, is based on obsolete premises and does not consider all forms of rape; (ii) the resistance requirement does not take into account situations in which this is not the response of the victim, who may be paralyzed by psychological avoidance or fear of further injury; (iii) resistance-focused definitions of rape perpetuate the misperception that it is the victim's responsibility to protect herself and that if she does not do so it is because she voluntarily participates in the sexual act; and (iv) requiring genuine and voluntary consent to the sexual act and considering the coercive circumstances that invalidate any consent is the most appropriate standard under International Human Rights Law to protect victims of rape, it is concluded that Bolivia must eliminate violence and intimidation requirements of Article 308 of its Criminal Code as a guarantee of non-repetition, truly incorporating a parameter focused on the absence of consent.[160]

c. The change of the classification of "rape" will only be effective if the classification of "statutory rape" is eliminated from the Bolivian legal system.

[157] ECHR. *M.C. v. Bulgaria*, no. 39272/98, 2003.
[158] *Cf. Case of Fernández Ortega et al. v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 30, 2010. Serie C No. 215, para. 115.
[159] *Cf*. ICHR, *Access to justice for women victims of sexual violence de in Mesoamerica,* OEA/Ser.L/V/II. Doc. 63 (2011), para. 97.
[160] The same conclusion was offered by Dr. Dubravka Šimonović in expert witness testimony. *Cf*. Expert testimony by Dubravka Šimonović (evidence file, fl. 11495).

81. As explained (*supra*, para. 12), the classification of "statutory rape" in Bolivia describes cases in which an adult has sexual relations with a minor (under 18 years of age) who has already reached the legal age of consent (14 years of age) through seduction or deception. Despite appearing to provide additional protection to this group, what happens in practice is that cases where individuals are accused of sexual crimes against people (usually women) between 14 and 18 years old are classified as "statutory rape" in instead of being classified as "rape", which leads to the imposition of lighter penalties for conduct of equal or greater social reprehensibility than those provided for in the crime of rape. The evidentiary difficulties inherent in the "seduction or deception" standard could, in a prospective judgment, lead to impunity for sexual crimes against this category of victims - similar to what happened in this case.

82. This Court already had the opportunity to evaluate the classification of statutory rape in a State-defendant in the *Case of Guzmán Albarracín vs. Ecuador* (2020), which dealt with sexual violence against a victim between 14 and 16 years old by the vice principal of her school, which led her to suicide.[161] The Ecuadorian judicial authorities framed the conduct of the accused under the crime of "statutory rape" (appraised based on the element of "seduction", in parallel to the Bolivian classification) and not in the crime of "sexual harassment" (a classification of greater penalty, similar to the crime of "rape" in Bolivia)[162]. The Court analyzed the inadequacy of the classification in the following terms:

> First, because it dismisses a crime based on a judgment of the victim's alleged conduct, making her responsible under the notion of "seduction." (…) This view of women – or, in this case, a girl - as "provocative" permits sexual violence and discrimination exercised through harassment, absolving the perpetrator of responsibility for it. Regarding the latter, it should be noted that, although the ruling attributes a crime to the vice principal, it dismisses the crime of sexual harassment. Thus, (…) the decision implicitly validated sexual harassment against a girl, since it did not consider that this conduct includes "grooming" for subsequent abuse, in which the perpetrator takes advantage of a relationship of power (…)
>
> Furthermore, in defining the perpetrator's conduct as "rape," the Court (…) referred to the requirements of "honesty" and "maidenhood," which imply an assessment of the victim's previous conduct. In other words, it amounts to a conceptual judgment of the victim prior to the evaluation of the aggressor's actions. Thus, the crime is configured in the measure that the affected woman meets certain standards of behavior based on gender preconceptions or biases regarding the conduct supposedly expected of a woman merely because she is a woman.[163]

83. The repeal of the "statutory rape" classification also serves to avoid the double application of the penalty for this crime with the penalty for "rape", which would occur if the reform of Article 308 of the Bolivian Penal Code described above were applied. By carrying out the necessary replacement of the traditional core of "rape" with the element of consent, the elements of the "statutory rape" classification (seduction and deception) lose their distinctive characteristic, since they are elements that also invalidate a victim's consent. Thus, there would be an overlap in the content of both crimes, opening room for arbitrariness due to the lower penalties attributed to the "statutory rape" classification.

[161] *Cf. Case of Guzmán Albarracín et al. v. Ecuador. Merits, Reparations and Costs*. Judgment of June 24, 2020. Series C No. 405.
[162] Ibid., para. 70.
[163] Ibid., para. 191-2.

84. Therefore, I join the evaluation of the United Nations Special Rapporteur on Violence against Women, Dr. Dubravka, who presented a valuable expert opinion before this Court, and noted that "the existence of a less serious crime that affects adolescents contributes to the impunity of offenders, since evidence suggests that rapists tend to be accused of statutory rape and not rape if they face prosecution", so the classification of "statutory rape" should be abolished in countries where it still exists. Concern about impunity for sexual crimes is especially relevant in the context of Bolivia, which, according to data from the Pan American Health Organization, has the highest rate of sexual violence in Latin America and the second highest in the American Hemisphere.[164]

85. Thus, it seems crucial that the State, in addition to adapting its legal system so that the lack of consent is central and constitutive of the crime of "rape", also adapts it in relation to the crime of statutory rape to eliminate it from criminal legislation.[165]

d. Partial conclusion

86. Considering the above, an effective remedy in the present case requires the true incorporation of the criterion of consent in Article 308 of the Bolivian Criminal Code, as well as the elimination of the classification of "statutory rape" provided for in Article 309, in order to ensure that all cases of statutory rape are evaluated on the basis of the amended Article 308. These amendments are necessary for the State to comply with its obligations under Articles 5, 11, 8 and 25 of the Convention and especially Article 7(e) of the Convention of Belém do Pará, which establishes the duty of the State to take all appropriate measures, including legislative measures, to modify or abolish existing laws and regulations that support the persistence and tolerance of violence against women.

87. Finally, I note that the effective incorporation of the criterion of consent requires a precise definition of the meaning of consent and in what circumstances its absence should be presumed. This definition should be developed on the basis of international standards on the matter, in particular those included in the Model Law on Rape prepared by the United Nations Special Rapporteur on violence against women.[166] I note with satisfaction the research carried out by the representatives of the victims to prepare their proposal for "Article 308 ter" in the Criminal Code that would define the meaning of consent, providing a solid substratum for the State to adequately adopt this measure of non-repetition of crimes.

88. The proposal defines consent as "agree[ment] by choice and (…) freedom and ability to make that choice," requiring that "[t]he author's belief and confidence in the recipient's consent must be reasonable" and that "silence cannot be used to infer consent." It is also defined that minors under 14 years of age do not have the legal capacity to consent to sexual relations and that the absence of consent is presumed if the act is carried out in circumstances that eliminate or limit the person's capacity

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[164] *Cf*. Pan-American Health Organization*. Violence against women in Latin America and the Caribbean.* (2013), p. 9. Available at: https://www.paho.org/hq/dmdocuments/2013/paho-vaw-exec-summ-eng.pdf. Accessed November 29, 2022. According to data from the NGO *Equality Now*, Bolivia continues to have the highest rate of sexual violence in Latin America.
Cf. Equality Now. Sexual Violence Against Adolescent Girls in Bolivia and its Consequences. Available at: https://www.equalitynow.org/sexual_violence_against_adolescent_girls_in_bolivia/. Accessed November 29, 2022.

[165] *Cf*. Judgment, para. 199, 230 (operative paragraphs 13 and 14).

[166] *Cf*. Human Rights Council. *A framework for legislation on rape (Model Rape Law): report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*. A_HRC_47_26_Add.1-EN (2021).

to consent, explaining a series of circumstances that would generate said presumption: violence or threat, restriction or confinement, state of unconsciousness, intoxication, mental disability, physical disability, impersonalization, deception, exploitation of coercive power, pretext of cultural, ancestral or religious practices or social, cultural or religious disadvantage. I consider that such parameters effectively reinforce those that were already introduced in the judgment:

> (…) The Court considers it necessary that criminal law also establish that consent cannot be inferred (i) when force, threat of force, coercion or taking advantage of a coercive environment has diminished the victim's ability to give a free and voluntary consent; (ii) when the victim is unable to give free consent; (iii) the victim's silence or lack of resistance to sexual violence, and (iv) when there is a power relationship that forces the victim to carry out the act for fear of its consequences, taking advantage of an environment of coercion.
> (...) The Court considers that it is essential that the regulations concerning crimes of sexual violence provide that consent cannot be inferred, but must always be offered expressly, freely and prior to the act and that it can be reversible. By virtue of this premise, as this Court has already pointed out, in the face of "any type of coercive circumstance it is no longer necessary for the concept of consent to occur because that circumstance has, without a doubt, eliminated consent."[167]

IV. On the imperative to give greater visibility to incestuous rape and the appropriateness of establishing a specific *nomen juris* for this purpose.

89. The *Case of Angulo Losada v. Bolivia* revealed, in addition to the difficulties in adequately protecting victims of sexual violence due to the lack of effective incorporation of the standard of consent discussed above, particularities of the legal approach to incestuous rape that also led to the revictimization of Ms. Losada.[168] The Court considered that, due to the differentiated nature of incestuous rape in relation to other forms of rape and its differentiated impact on the rights of children, the crime requires a specialized approach by the State.[169] I therefore determine that the State had to adapt its legislation to give greater visibility to the crime of incestuous rape, and that this visibility had to be given through the attribution of a specific *nomen juris* in the Criminal Code to the classified conduct. Below, I will set out the reasons why the adoption of a specific *nomen juris* for incestuous rape is an appropriate remedy in the case at hand.

a. The approach to incest by the Bolivian legal system

90. Since the entry into force of the current Bolivian Criminal Code in 1972, the aggravating circumstances of sexual crimes are specified in its Article 310. The original text established that the death of the victim would increase the penalty for rape from 10 to 20 years and for statutory rape from 4 to 10 years, and three circumstances that would increase the penalty by one third: serious damage to the victim's health, the concurrence of two or more people in the act and the case where "the perpetrator was ancestor, descendant, brother, half-brother, or person adopting or in charge of the education or custody of the victim.[170] Thus, we have the classification of incest as an aggravating circumstance of sexual crimes in the Criminal Code – but without the term "incest" being used in the legislation.

[167] *Cf.* Judgment, para. 148.
[168] Ibid., para. 200.
[169] Ibid., para. 201.
[170] Original text available at: http://www.silep.gob.bo/norma/4368/texto_ordenado.

91. In 2001, when the initial events in this case occurred, Article 310 had already been significantly modified, with the aggravating circumstance of incest increasing the penalty by five years if the perpetrator was "an ancestor, descendant or relative within the fourth degree of consanguinity or second of affinity". Furthermore, the Law for the Protection of Victims of Crimes Against Sexual Freedom, of October 29, 1999, added an aggravating circumstance for situations in which "the perpetrator was in charge of the education or custody of the victim, or if the victim was in situation of dependency or authority", a circumstance that the State considered, in its answering brief, as another classification of incest. Since then, although several laws have modified the aggravating circumstances of sexual crimes (the last modification having been made in 2019 through Law No. 1173), the section that traditionally refers to incest has remained practically unchanged.[171] Currently, Article 310, section "o" has the following wording:

> Article 310. (AGGRAVATING FACTORS). The penalty will be aggravated in the cases of the previous crimes, with five (5) years, when: (...) o) The author was an ancestor, descendant or relative within the fourth degree of consanguinity or second degree of affinity; (…)

92. The representatives questioned this approach of the Bolivian legal system, pointing out that incest should not be a mere aggravating circumstance, but rather classified as autonomous, to give visibility to the "culture of incest" existing in the country and allow the formulation of specific strategies for prevention.[172] Based on the mobilization of data from international organizations and NGOs, they pointed out that incest is a common and taboo fact in Bolivia, remaining hidden and secret due to the reinforcement of the culture of silence regarding sexual violence that occurs in the family environment.[173] When specifying their allegation about the existence of a "culture of incest" in Bolivia, the representatives stated:

> Incestuous rape culture is particularly dangerous. This culture is based on a set of beliefs, norms, values and social constructions that make children and adolescents experience and accept as normal the supposed right of adult men to be owners of life, feelings, thoughts, the decisions and bodies of children and adolescents, especially if they are female. This culture of incest in families is driven by ingrained notions of loyalty and respect for authority, keeping and protecting family secrets, and toxic and polarizing gender stereotypes.[174]

93. For these reasons, they also stated that a separate classification for incest is essential to shed light on this systemic and structural problem. They further affirm that laws can be important accelerators of social change, transforming cultural practices and contributing to the effective protection of children against this serious form of violence.[175] Thus, the representatives requested, as a reparatory measure, the transformation of the aggravating circumstance "o" of Article 310 of the Penal Code into an autonomous classification that includes incestuous rape. The State did not address this argument in its considerations.

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[171] However, section "g" was added to Article 310, which the State understands also refers to incest: "The perpetrator is in charge of the education or custody of the victim, or if the victim is in a situation of dependency with respect to the perpetrator or under their authority."
[172] Cf. Brief of Pleadings, Motions and Evidence of November 20, 2020, p.288-90.
[173] Ibid.
[174] Ibid., p. 2.
[175] Ibid., p. 288-90.

b. On intrafamilial sexual violence as a serious human rights violation and the imperative for its prevention

94. Although sexual relations between family members, whether consensual or not, are popularly known as "incest", it is crucial to differentiate "incest" from "incestuous rape", the latter also known as intrafamilial sexual violence. The criminalization of incest in its consensual form between persons who have reached the age of consent, which was the subject of heated debate in the paradigmatic "incest case" of the German Constitutional Court in 2008,[176] will not be debated in this opinion, nor was it demanded by the victims, who focused their arguments on "incestuous rape." Indeed, unlike consensual incest, in which some maintain - as did Judge Hassemer of the German Constitutional Court in his dissenting opinion in the aforementioned case[177] - that criminalization would not be appropriate since there is no protected legal right, the criminalization of incestuous rape is imperative for the protection of the physical and psychological integrity and sexual autonomy of people who are in a situation of extreme vulnerability, especially aggravated in the case of victims who have not reached the legal age of consent.

95. As the UN Special Rapporteur on violence against women, Dr. Radhika Coomaraswamy, points out, "[m]any of those who have undergone incestuous practices subsequently suffer various psychological and physical disorders."[178] The psychological consequences of incestuous sexual rape of minors can be classified into three main types: emotional adaptation difficulties, interpersonal adaptation difficulties and sexual adaptation difficulties.[179] The serious consequences of this form of abuse are evident in Ms. Losada's case, as she described in a hearing when she was asked how her parents discovered her abuse:

> When I was a very active girl, I was on the national swimming team, I played piano, violin, and I worked a lot in community services, with older people, children, and suddenly my life began to change, I literally I was dying in his face, I stopped going swimming, I stopped playing music, I no longer went to school, I developed bulimia, anorexia, I began to mutilate myself, I became depressed, I spent hours in my room sleeping, crying and sleeping, on a trip to the United States I tried to commit suicide twice (…).[180]

96. Studies of multiple subjects unanimously indicate that the highest rate of sexual violence against children occurs in their homes and comes from someone with whom they have a relationship of trust.[181] This is also corroborated by the reports of international organizations and human rights NGOs presented in the proceedings.[182] The most striking characteristic of this type of rape is the use of

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[176] *Cf*. BVerfGE 120, 224 – Geschwisterbeischlaf (2008).
[177] *Cf*. BVerfGE 120, 224 – Geschwisterbeischlaf (2008), dissenting opinion of Judge Hassemer, para. 73.
[178] *Cf.* Human Rights Commission. *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85*. E/CN.4/1996/53 (1996), párr. 66-72 (our translation).
[179] *Cf*. AZEVEDO, Maria Amélia; GUERRA, Viviane de Azevedo. *Pele de asno não é só história...: Um estudo sobre a vitimização sexual de crianças e adolescentes em família*. São Paulo: Iglu, 1988.
[180] *Cf.* Statement by Brisa De Angulo Losada at public hearing before the Court on March 29, 2022.
[181] *Cf*. FURNISS, Tilman. *The Multiprofessional Handbook of Child Sexual Abuse.* Porto Alegre: Artes Médicas, 1993; HABIGZAN, Luísa et al. Abuso sexual infantil e dinâmica familiar: aspectos observados em processos jurídicos (Child sexual abuse and family dynamics: aspects observed in legal processes). *Psicologia: Teoria e Pesquisa*, vol. 21, 3, (2005), p. 341-348.
[182] *Cf.,* e.g., Ibero-American Federation of Ombudsman. *Niñez y adolescencia: III Informe sobre derechos humanos (*Childhood and adolescence: III Report on human rights*),* (2005), p. 125. Available at https://www.acnur.org/fileadmin/Documentos/Publicaciones/2010/8016.pdf.
Accessed November 20, 2022.

secrecy as a tool to continue the abuse and to reinforce the connection between victim and aggressor, which makes reporting and investigating the violence especially difficult.[183] The "Secret Syndrome", characteristic of abusive intrafamilial relationships, describes the process by which the aggressor, trying to avoid social rejection, uses forms of coercion so that the minor does not reveal what happens between them.[184] No wonder Florence Rush describes incest as "humanity's best kept secret."[185]

97. By keeping their attacker's secret, the victim has the psychological tendency to feel complicit in what happened, being overcome by feelings of guilt that can have serious repercussions for her entire life.[186] Guilt, coupled with altered understanding of the family institution and relationships of trust, makes incestuous rape even more harmful than ordinary rape, which is already one of the greatest atrocities that can be inflicted on a human being. I note that the secrecy about rape can persist even if the victim reports the violence suffered to a family member. Specialized literature describes situations in which mothers, for example, cover up the abuse suffered by their children to maintain the supposed stability and security of their family.[187]

98. This typical structure of domestic sexual violence is fully observable in the case at hand. Ms. Losada was subjected for months to repeated abuse by her cousin who was 10 years older, who lived at her home and, as the victim describes, occupied the emotional space opened in her life after the departure of her older brothers from their parents' home, establishing a relationship of trust.[188] As stated in the judgment and in written statements and in Ms. Losada's public hearing, E.G.A used emotional manipulation techniques to generate feelings of guilt and shame in the victim, convincing her that she had voluntarily participated in the sexual acts and that her conduct had been incorrect and intentional.[189] Her trusting relationship with her older cousin made her negate any future bad feelings on her part and berate herself for thinking poorly of her cousin.[190] I highlight the excerpt of her testimony at the public hearing, which demonstrates the pernicious effects of this manipulation:

> (…) I was repeatedly raped, tortured dozens of times, but **it never occurred to me to tell anyone about any of this or ask for help. What's more, I thought it was better for me to take my own life before sharing this**; I tried to commit suicide twice, and there are several reasons why I didn't tell anyone. That question is one of the most difficult for me because when I went to court, they told me: but **why didn't you say anything?** I didn't understand at that time, after years of working with other survivors, and understanding the trauma, now I understand, I know what was happening to me. **I didn't**

[183] Furniss (1993) describes an "interlocking syndrome of secrecy", linking the child and the person committing the abuse and family members. *Cf.* FURNISS, Tilman. *The Multiprofessional Handbook of Child Sexual Abuse*. Porto Alegre: Artes Médicas, 1993. Similarly, *cf.* RANGEL, Patricia Calmon. *Abuso sexual intrafamiliar recorrente (Recurring intrafamilial sexual abuse)*. Curitiba: Juruá, 2001.
[184] *Cf*. FURNISS, Tilman. *The Multiprofessional Handbook of Child Sexual Abuse*. Porto Alegre: Artes Médicas, 1993.
[185] *Cf*. RUSH, Florence. *The Best-kept Secret: Sexual Abuse of Children*. Hoboken: Prentice Hall, 1980 (our translation).
[186] *Cf*. RANGEL, Patricia Calmon. *Abuso sexual intrafamiliar recorrente (*Recurring intrafamilial sexual abuse). Curitiba: Juruá, 2001.
[187] *Cf*. PFEIFFER, Luci; SALVAGNI, Edila. Current view of sexual abuse in childhood and adolescence. *Journal of Pediatrics*, vol. 81, 5 (2005), p. 197-204. In the case of Ms. Losada, as she describes at the hearing, "*all the former members of my family turned against me, they even went to trial to speak ill of me*." Cf. Statement of Brisa De Angulo Losada in public hearing before the Court on March 29, 2022.
[188] *Cf*. Information Statement by Brisa De Angulo Losada on August 1, 2002 (evidence file, fl. 1064), para. 3-7.
[189] Ibid. para. 8-15; Brief of Pleadings, Motions and Evidence of November 20, 2020, p. 69.
[190] *Cf*. Information Statement by Brisa De Angulo Losada on August 1, 2002 (evidence file, fl. 1064), para. 8-15; Brief of Pleadings, Motions and Evidence of November 20, 2020, p. 69.

> **know that what was happening to me was a crime**, I had a wrong idea: that [if] rape happens, it is something that happens in a dark alley by a stranger. My parents didn't know that incestuous rape was a crime, we had never heard of this type of crime. **The aggressor, like other aggressors, is very clever at keeping the victim silent**. He was an adult, part of my family, he had to guide me, he had to protect me, he was the person who had to show me and that I had to see the world through his eyes. I never thought about what he was doing to me... I hated it, but I couldn't give it a name, I couldn't understand that it was a crime. Furthermore, he filled me with fear. He did not use physical violence during the act of rape, but he did worse at other times; He hit me, threw me to the ground, kicked me, and tortured the animals. I knew what he was capable of, I knew what he could do to me if I didn't do what he wanted. I was full of fear. I didn't even dare to confront him or question what he was doing.[191]

99. With the set of circumstances contributing to the fact that incestuous rape is not revealed (and, consequently, investigated and punished), it is essential that the State act to widely disseminate the illicit and reprehensible nature of this conduct, mobilizing everything its apparatus to facilitate, to the greatest extent possible, dialogues on the topic and reports of its occurrence. Breaking the cycle of abuse depends on exposing the secret.[192] In this sense, laws are especially important because (i) they provide the appropriate framework and tools to punish offenders and protect victims through criminal justice and child protection systems; (ii) they serve as protective measures to deter potential perpetrators of sexual violence when they are widely disseminated and understood; and (iii) when combined with public awareness campaigns and training of authorities, they serve to accelerate cultural and social change. In child sexual abuse expert Dr. David Finkelhor's summary, "[t]he most basic thing the criminal justice system can do about a crime is to increase its detection and disclosure and the likelihood that the offender will be apprehended and prosecuted."[193]

100. It is especially relevant, therefore, that the State acts to raise awareness among families about the importance of fully supporting a child who is a victim of abuse. When a victim overcomes all obstacles to reporting and breaks the silence, the abuse can have even more destructive effects if they do not receive the expected support.[194] Additionally, when the abuse is revealed in a supportive environment and the victim feels protected and respected, they can finally begin their healing process, restore their perception of security and reinforce their self-esteem, becoming less vulnerable to new attacks.[195] The State must also have a supportive attitude to avoid victimization during investigative and judicial procedures. The crucial nature of this approach is evident in the testimony of Ms. Losada, who testified before this Court that "[t]wenty years later, I still have night terrors, and post-traumatic stress syndrome, and it has more to do with the actions of the prosecutors, forensic doctors and judges, rather than the rapes themselves."[196]

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[191] *Cf.* Statement by Brisa De Angulo Losada at the public hearing before the Court audiencia on March 29, 2022.
[192] *Cf*. FURNISS, Tilman. *The Multiprofessional Handbook of Child Sexual Abuse.* Porto Alegre: Artes Médicas, 1993.
[193] *Cf*. Together for Girls. *Preventing Sexual Violence Against Children*. Available at: https://www.togetherforgirls.org/svsolutions/. Accessed on November 29, 2022.
[194] *Cf.* DURRANT, Michael; WHITE, Cheryl. *Terapia del abuso sexual*. España: Gedisa, 1993.
[195] *Cf.* RANGEL, Patricia Calmon. *Abuso sexual intrafamiliar recorrente*. Curitiba: Juruá, 2001.
[196] *Cf.* Statement of Brisa De Angulo Losada at Public Hearing before the Court on March 29, 2022.

101. Thus, incestuous rape is marked by specificities that distinguish it from other forms of rape and that require specialized treatment by the State in its legislation, which will be examined below.

c. Evaluation of the classification of incestuous sexual violence in Bolivia and the need for its classification as an autonomous offense

102. Despite the importance of considering the above elements when classifying incestuous rape, as Dr. Radhika Coomaraswamy points out, "[i]n many parts of the world incest is culturally tolerated and in many countries' criminal code it is not listed as a crime."[197] This is not the case of Bolivia, where the Penal Code considers sexual crimes when the perpetrator "was an ancestor, descendant or relative within the fourth degree of consanguinity or second degree of affinity" or "is in charge of the education or custody of the victim, or if the victim is in a situation of dependence on or under their authority." Article 310 is therefore compatible with the UN Model Law on Rape, which requires that criminal laws on rape include incest[198] – without specifying whether in the form of an aggravating circumstance or an autonomous offense.

103. In this case the Court had the opportunity to rely on the evaluation of the drafter of the Model Law on the classification of sexual crimes in Bolivia. In an expert report submitted to this Court, Dr. Dubravka stated that she does not agree that incest necessarily has to be classified as autonomous in the country and can be addressed as an aggravating circumstance.[199] The expert noted that, in her capacity as Special Rapporteur, she had recommended that States include among the circumstances that aggravate sexual crimes, among others, situations in which the perpetrator is or has been the spouse or partner of the victim or is related to her, or has abused his or her power or authority over the victim.[200] Thus, the expert considers that Article 310 of the Bolivian Criminal Code, by establishing that the incestuous nature of the crime is an aggravating circumstance that increases the prison sentence by 5 years, is appropriate.[201]

104. To evaluate the need for an autonomous classification of incestuous rape, I consider it essential to return to the case of *Albán Cornejo et al. v. Ecuador* (2007) discussed above (para. 26-28), in which the victim's representatives demanded the autonomous classification of the crime of medical malpractice. The Court considered the autonomous classification unnecessary, given the sufficiency of its subsumption in the existing crimes of injury or homicide[202] and the absence of international agreements that require a separate classification, differentiating the case from its decisions on forced disappearance. The Court has also established the parameters to

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[197] *Cf.* Human Rights Commission. *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85*. E/CN.4/1996/53 (1996), para. 66-72.
[198] *Cf*. HUMAN RIGHTS COUNCIL. A framework for legislation on rape (Model Rape Law): report of the Special Rapporteur on Violence against Women, Its Causes and Consequences. A_HRC_47_26_Add.1-EN (2021), para. 15.
[199] *Cf*. Expert testimony of Dubravka Šimonović (evidence file, fl. 11495).
[200] *Cf*. Human Rights Council. *A framework for legislation on rape (Model Rape Law): report of the Special Rapporteur on Violence against Women, Its Causes and Consequences.* A_HRC_47_26_Add.1-EN (2021).
[201] *Cf*. Expert testimony of Dubravka Šimonović (evidence file, fl. 11495).
[202] *Cf*. *Case of Albán Cornejo et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of November 22, 2007. Series C No. 171, para. 136.

determine whether there is a need for an autonomous classification of a certain crime in the following terms:

> Medical malpractice is usually related to the criminal descriptions related to injuries or homicide. **It would seem it is not strictly necessary to include specific criminal descriptions for medical malpractice as long as general descriptions suffice and adequate rules pertaining to the judicial examination of the seriousness of the crime, the circumstances in which it was committed and the responsibility of the perpetrator exist**. Notwithstanding, it is the duty of the State to decide the best way to respond, in this area, to the needs for punishment, since there is no binding agreement on the formulation of the description as in other cases in which essential elements of the criminal description, including the accuracy of autonomous descriptions, have been provided for in international instruments, for example, genocide, torture, forced disappearance, etc.[203]

105. Thus, it is clear that adapting the judgment to the idea that, in cases in which there is no absolute need to criminalize some conduct, under the prism of International Human Rights Law, the principle of *ultima ratio* demands that Criminal Law not be used.

106. In effect, enacting criminal laws without adhering to the criterion of strict necessity and without rigorous criteria that guarantee their effective application and coherence distorts the function of Criminal Law and does not adequately serve the purpose of protecting the legal rights of greatest importance to society (which characterizes the instrumental function of criminal law[204]). In this way, there is a risk of adopting a merely symbolic criminal law, defined by Roxin and Greco as "criminal provisions that do not primarily have specific protective effects, but are intended to self-represent political or ideological groups through commitment to certain values or the repudiation of positions considered harmful".[205] Regarding the distinction between a legitimate criminal symbolic function and an illegitimate one, the authors explain:

> (...) [It] is natural that all criminal mechanisms seek not only to achieve the prevention and punishment of two specific crimes, but also to exert an influence on the general legal consciousness. To the extent that the State is committed to protecting life, physical integrity, property, etc., it also attempts to reinforce the population's consideration for these values. There is nothing to question you. On the contrary, this positive general prevention call is among the reconceived purposes of criminal law. (...) [A] legitimacy and illegitimacy of the "symbolic" legislative tendencies depend, on the side of the awareness purposes that guide a device and its demonstration of commitment to axiological positions, also on what is necessary for the real protection of a peaceful coexistence.[206]

107. Thus, although the symbolic power of the law plays an important role in the criminal system - including preventive effects -, the creation of criminal classifications cannot serve an end in itself, nor merely symbolic purposes. After all, in addition to the symbolic weight of Criminal Law not being able to solve social problems of crime, the constant risk that Criminal Law serves as a "sword" even when its intention is to be a "shield" can culminate in more human rights violations. Not all social desires must

[203] Ibid., para. 135-136.
[204] *Cf.* RIPOLLÉS, José. El Derecho Penal simbólico y los efectos de la pena. *Boletín Mexicano de Derecho Comparado,* vol. 25, 103 (2002), p. 68.
[205] ROXIN, Claus; GRECO, Luis Strafrecht: Allgemeiner Tell. Band I (Grundlagen – Der Aufbau der Verbrechensiehre). Munique: C.H. Beck, 2020, p.46 (Our Translation).
[206] Ibid., p. 46-47.

be attended to by the repressive system, or there is a risk of creating the perception that greater social criminal control is the solution to all problems.[207]

108. Taking these premises into consideration, I then analyze the victims' demand that incestuous rape be transformed into an autonomous criminal offense in Bolivia, as well as the argument of expert witness Dubravka that the problem in this case did not arise from the absence of an autonomous offense, but from the inadequate assessment of the seriousness of the incestuous element in the violations suffered by Ms. Losada by the domestic courts.[208] Regarding the second series of trials, I recall the words of the expert:

> In the case of Brisa, however, **the Supreme Court made an erroneous decision in the Second Criminal Chamber: "that the relationship between cousins causes social unease but is not a crime."** Article 310 criminalizes incest in my expert opinion and, if indeed incest is already an aggravating circumstance, then the court should have applied the corresponding additional penalty. Furthermore, although the first sentence did apply an additional penalty regarding the aggravating circumstance of incest, it only added one year to the sentence while the law seems to indicate five years. Combined with other circumstances that occurred during Brisa's trials, this is another indication of the **influence of discriminatory myths and gender stereotypes about rape in Bolivia's criminal justice system**, especially as it relates to sexual violence. My additional recommendation to Bolivia would be to carefully consider whether it is adequately taking into account the aggravating circumstances in relation to the crimes of rape and sexual violence, including in cases of incest, and whether further guidance is necessary to avoid lesser sentences or even the impunity of the perpetrators.[209]

109. In addition to the actions of the judiciary, the case revealed another problem in the understanding of incestuous rape as a crime in Bolivia, related to the representatives' assertion that there is a "culture of incest" that permeates society, and which contributes to the fact that incestuous rape is not sufficiently condemned. As she pointed out at the hearing, at the age of 16, Ms. Losada had not yet become aware of the criminal nature of the violence she suffered, nor did her parents know that incestuous rape was a crime in Bolivia. In a statement to the police, E.G.A declared that his relations with Ms. Losada were not illegal.[210] Furthermore, the Prosecutor's Office did not accuse E.G.A of incest when it filed the complaint, even though it knew that they were both cousins and that Ms. Losada was a minor. It was the intervention of the victim's parents, in the private accusation, that managed to include the aggravating circumstance in the court's analysis.

110. Therefore, I consider that, although it is not strictly necessary to classify the aggravating circumstance of incestuous rape present in Article 310 as an autonomous crime, the State must act to increase the visibility and reprehensibility of this conduct. Therefore, below, I defend the incorporation of a *nomen juris* for incestuous rape in the Bolivian Criminal Code as an alternative way to serve this purpose without increasing criminal legislation with a new offense.

d. On the incorporation of a *nomen juris* for incestuous rape in the Bolivian Criminal Code

111. The public perception of the illegality and reprehensibility of certain behaviors is affected not only by the classification of the act itself, but also by the way in which

[207] *Cf*. MORON, Eduardo; MATTOSINHO, Francisco. A lei n.º 13.104/2015 (feminicídio): simbolismo penal ou uma questão de direitos humanos? *Revista de Direitos Humanos em Perspectiva*, vol. 1, 2 (2015), p. 239.
[208] *Cf*. Expert opinion of Dubravka Šimonović (evidence file, fl. 11495).
[209] *Cf*. Expert opinion of Dubravka Šimonović (evidence file, fl. 11495), para. 61.
[210] *Cf*. Brief of Pleadings, Motions and Evidence of November 20, 2020, p. 240.

criminal legislation classifies and qualifies certain crimes.[211] The creation of an autonomous offense is not the only tool available to the State to highlight the seriousness of a behavior. Among other mechanisms, there is the possibility of attributing a specific *nomen juris* to a crime in its aggravated form, giving greater prominence and perception of seriousness to the modality in question.

112. In Brazil, the discussion on the classification of the act of killing a woman for reasons of her gender, considered a structural problem in the country, has provided valuable lessons. Despite the fact that Brazilian criminal legislation already provides for the concept of homicide qualified due to clumsy motive, a category in which cases of death due to gender violence could fall, the Brazilian legislator chose to create a specific aggravating circumstance for the homicide of women as a result of their sex.

113. Law no. 13.104/2015, however, went beyond including the mere description of the conduct in the Criminal Code,[212] providing for the inclusion of the name "feminicide" as the title of this aggravating circumstance,[213] with the purpose of giving greater visibility to the occurrence of homicides of women for gender reasons and promote awareness, sensitize and change the patriarchal mentality that underlies the high rates of gender violence.[214] Furthermore, by making the problem visible to the population, the State reinforces the obligation of its authorities to take measures to prevent the death of women, through the creation of appropriate public policies for the prevention and eradication of violence, as well as the criminal prosecution of the aggressor.[215] Naming feminicide fulfills the essential function of reversing the social perception of gender violence as something that "mitigates" - and does not aggravate - a homicide, an archaic perception regarding "honor crimes" whose consequences remain entrenched in contemporary societies.[216] Similarly, incest has been recognized for much of history as a circumstance that mitigates or even excludes rape as a punishable offense, a perception actively countered by the establishment of the *nomen juris* "incestuous rape."

e. Partial conclusion

114. Therefore, by serving the imperative of combating the "culture of incest" without increasing the number of crimes classified in the Criminal Code, the creation of the *nomen juris* "incestuous rape" is a reparative measure of non-repetition applicable in this case. Specifically, it would try to call the form of the offense in Article 308 ("rape") where aggravated by incest as "incestuous rape" and the form aggravated by incest in Article 308 bis ("rape of a child or adolescent") as "incestuous rape of a child or adolescent." I believe that this solution adopted by the Court adequately fulfills the purpose of giving greater visibility to incestuous rape, the importance of which was highlighted by Ms. Losada herself:

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[211] *Cf*. ASHWORTH, Andrew. Principles of Criminal Law (6a ed.). Oxford: Oxford University Press, 2009, p. 78-80.
[212] The new law also modified the Appalling Crimes Law (Law 8,072/90) to include feminicide.
[213] Brazilian Criminal Code, Art. 121, para. 2nd, section VI c/c art. 121, para. 2º-A, sections I and II.
[214] *Cf*. CLADEM. Contributions to the debate on the criminal classification of femicide/feminicide (2012), p. 177-229. Available in Portuguese at: http://www.compromissoeatitude.org.br/wpcontent/uploads/2013/10/CLADEM_TipificacaoFeminicidio2012.pdf. Accessed November 29, 2022.
[215] Ibid.
[216] *Cf*. MORON, Eduardo; MATTOSINHO, Francisco. A lei n.º 13.104/2015 (feminicídio): simbolismo penal ou uma questão de direitos humanos? Revista de Derechos Humanos en Perspectiva (Magazine of Human Rights in Perspective), vol. 1, 2 (2015), p. 245.

> (…) **[the] incest has to be made visible, it has to be recognized as a crime in itself, as an aggravating circumstance**, a girl who grows up in a family and has an uncle, a father, a stepfather, there should not be the question whether or not there was questioning, or an adult cousin, they are the adults, they are the ones who have to guide us, the ones who have to take care of us, for me, **the fact that we have made incest so invisible, yes, we listen about rapes, in universities, we hear about rapes in schools, but where it happens most in my experience, 70% to 80% of girls who are victims of sexual violence is within the family environment, we have to make that visible**, we have to put ourselves as a criminal code, that people know that this is a crime, that I can go to schools and tell them, children and adolescents, if an adult in your family touches you in a sexual way, that is a crime, whether you have not consented, or have consented, and all the explanation that I have to give is that it is a crime in itself, **every child or adolescent has to grow up safe in their home.**[217]

115. I point out, however, that the adoption of an autonomous offense for incestuous rape could also be an adequate protection measure in some contexts if all the elements indicated in the judgment are considered, taking into account the nefarious nature of this crime and of the importance of protected legal rights. The argument in favor of the adoption of its own *nomen juris* in this specific case is not intended to delegitimize the possibility of adopting specific classifications of crime in American legal systems, but rather to reinforce that the adoption of a new offense is not strictly necessary in the current state of the Bolivian criminal legislation to achieve the desired objective of conferring greater visibility and a perception of seriousness to the crime.

V. Conclusion

116. The judgment handed down by the Court in this case lent itself to addressing, in depth, the international responsibility of the State for violations of the rights to humane treatment, to a fair trial, to private and family life, to rights of the child, to equality before the law and to judicial protection pursuant to Articles 5(1), 5(2), 8(1), 11(2), 19, 24 and 25(1) of the Convention read in conjunction with Articles 1(1) and 2, as well as for non-compliance with the obligations derived from Articles 7(b), 7(c), 7(e) and 7(f) of the Convention of Belém do Pará, to the detriment of Ms. Losada,[218] conclusions with which I fully agree.

117. The prominence of the Court's role as interpreter and supervisor of the States Parties' compliance with the Convention derives largely from the development, in each specific case, of a set of measures to repair, to the greatest extent possible, the damage suffered by the victim and prevent new victims from being subjected to similar situations, establishing, along these lines, a type of special, individualized and specific prevention, and another general, abstract and generic one. Thus, based on Article 63(1) of the Convention, the Court listed in the judgment the suitable and appropriate measures to repair the damage suffered by Ms. Losada, correcting the legislative and institutional deficits that contributed to the violation of her rights and that still put present and future victims of sexual crimes in Bolivia at risk.

118. In this context, this concurring opinion sought to reinforce the importance of two reparation measures adopted by the Court in the judgment: the effective introduction of the element of consent as a characterizer of the offense of "rape" in the Bolivian Criminal Code (which includes elimination of the offense of "statutory rape" from the legal statute) and the attribution of a *nomen juris* in the Criminal Code to incestuous

[217] *Cf.* Statement of Brisa De Angulo Losada during the public hearing before the Court on March 29, 2022.
[218] *Cf*. Judgment, para. 172.

rapes. To this end, I tried to highlight the role of the IHR System to guarantee the adaptation of domestic regulations to international standards and made considerations on the complex interaction between Human Rights and Criminal Law to support debates on changes in Bolivian criminal legislation.

119. At the public hearing of this case, Ms. Losada stated that the reason she studied Law was precisely her desire to one day be able to argue before this Court. When asked what she expected from this Court, the victim referred to the importance of strengthening the State's response to situations of sexual violence against minors:

> I would like to tell the Court that I have worked with 2,200 boys and girls who have been sexually abused, (…) who seek help and no one responds. I want the Court to understand that every day my life is at risk, because I do not want my history to be repeated, and it is being repeated every day, it has been repeated for twenty years, I want the Court to know that we have the possibility of changing this, and to prevent it from happening again, **so that in twenty years they do not have another girl in my place, asking them to act, and asking governments to respond to this horrible situation.**[219]

120. As can be seen, Ms. Losada expresses a moving detachment, worrying less about her own situation and more about the general and abstract guarantees of non-repetition that can protect her peers in the future. For such effects to be effectively achieved, it is first necessary that her story be told appropriately and, second, that this narration drives concrete changes. This Court's judgment, with which I agree, achieves both objectives, but, with special attention to Ms. Losada's commendable petition, this opinion seeks to highlight them once again.

Rodrigo Mudrovitsch
Judge

Pablo Saavedra Alessandri
Registar

[219] *Cf.* Statement of Brisa De Angulo Losada during the public hearing before the Court on March 29, 2022.