Azul Rojas Marín y otra vs. Perù: the first Inter-American Court of Human Rights case on torture and discrimination against the LGBTI community

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Title: *Azul Rojas Marín c. Perù*: il primo caso della Corte Interamericana dei Diritti Umani in merito alla tortura e alla discriminazione perpetrata contro la comunità LGBTI

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1. – The Azul Rojas Marín y otra vs. Perù judgment was the last case decided by the Inter-American Court of Human Rights (hereinafter the Court) before the Covid-19 emergency's outbreak. In fact, the judgment was issued on 12 March 2020 (IACHR, Agreement of Court 1/20, Suspension of time limits due to the health emergency caused by COVID-19, 17-03-2020).

This case pertains to an act of torture perpetrated by State agents against an LGBTI (lesbian, gay, bisexual, trans-sexual, intersexual, hereinafter LGBTI) person, Azul Rojas Marín.

Specifically, it relates to the illegal, arbitrary and discriminatory deprivation of liberty of Azul Rojas Marín on 25 February 2008 on the grounds of her sexual orientation or gender expression, as well as the rape she suffered while in detention. It is also related to the improper investigation of the surrounding facts and its impact on Azul Rojas Marin's right to personal integrity.

The Court ruled that the State of Perù violated, in relation to its obligation stated in Art. 1, § 1, ACHR, Marín's right to personal integrity, (Art. 5, § 1), right to not be subject to torture (Art. 5 § 2, ACHR), right to personal liberty (Art. 7, § 1, §2, §3, §4, ACHR), right to judicial protection (Art. 25, § 2, ACHR), right to a fair trial (Art. 8, ACHR) and right to privacy (Art. 11, ACHR).

This decision has to be welcomed as it is the Court's first ruling on a complaint of torture against a member of the LGBTI's community.

2. – On 15 April 2009, the *Coordinadora Nacional de Derechos Humanos*, the *Centro de Promociòn y Defensa de los Derechos Sexuales y Reproductivos* (PromSex) and Redress Trust, (hereinafter the Representatives), filed the initial petition before the Inter-American Commission on Human Rights (hereinafter the Commission), which on 24 February 2018, approved the *Informe de Fondo*. The State of Perù was notified in order to be informed of the measures to adopt as a means of reparation for the victim. The State did not comply. (§2)

Therefore, on 22 August 2018, the Commission submitted the present case to the Court, stressing that the facts of the case consisted of serious acts of violence against Azul Rojas Marín and considered that such violence was linked to the identification or perception of Marín as a homosexual. According to the Commission, the facts were not sufficiently investigated and the State failed to comply with its obligation to protect a victim of sexual violence, with the aggravating factor of existing prejudice against the LGBTI community. (§1)

3.- The Court was competent to hear the case, since Perù had accepted the contentious jurisdiction of the Court, in accordance with Art. 62, §3, ACHR. (§17)

The State opposed the alleged violations and raised three preliminary objections: 1) the alleged failure to exhaust domestic remedies; 2) the subsidiarity of the inter-American system; 3) the preliminary exception of the "fourth instance". (§ 18)

It appears interesting to delve deeper into the subject matter of the last exception. In fact, the State alleged that the Commission acted as "a court of fourth instance" in classifying the sexual violence suffered by Azul Rojas Marín as torture in its Report on the Merits, a classification that should have been attributed the domestic authorities. Therefore, Perù requested the Court to conduct a review of the legality of the Commission's actions. (§ 30)

The Court established that, in assessing the fulfilment of certain international obligations, there may be an intrinsic interrelationship between the analysis of international law and domestic law. Thus, the determination whether or not the actions of judicial organs constitute a violation of the State's international obligations may lead to examine the respective domestic processes in order to establish their compatibility with the American Convention (IACHR, Los Niños de la Calle vs. Guatemala, 19 -10 – 1999, ⌈*Fondo*⌉, § 222). In this sense, although the Commision is not a fourth instance of judicial review, nor does it examine the evaluation of evidence carried out by national judges, it is competent, on an exceptional basis, to decide on the content of judicial resolutions that manifestly contravene the American Convention (IACHR, Rico vs. Argentina, 2-09-2019, ⌈*Excepciòn Preliminar y Fondo*⌉, § 82). (§ 31)

The Court considered that the determination whether or not the alleged facts could be qualified as torture was not a review of the rulings of domestic courts. On the contrary, it was part of the competence of the Inter-American system's organs to establish whether a violation of the American Convention and, if applicable, of the Inter-American Convention to Prevent and Punish Torture, had occurred. (§32).

For the above-mentioned reason, the Court rejected this preliminary exception. (§33)

4. – The facts of the case at stake took place in February 2008 in *Casa Grande*, a small agricultural town in northern Perù. On 25 February 2008, Rojas Marín, on her way home, was stopped by some policemen and arrested. At that time, she identified himself as a gay man. While, currently, she identifies herself as a woman and uses the name Azul. (§ 52)

The circumstances of his arrest, its reasons and what happened at the police station appeared controversial.

On the one hand, the Representatives and the Commission alleged that the presumed victim was detained by State agents in an illegal, arbitrary, and discriminatory manner and she was subjected to serious acts of physical and psychological violence, including rape, and to a particular ferocity due to her identification or perception, at that time, as a gay man.

On the other hand, the State argued that the alleged victim was detained for identification purposes, which was permitted under Peruvian law. It also stressed that the framing of the facts was a State's task, and that, in this sense, the prosecution considered that torture could not be configured. (§ 53)

5. – The case at stake brings reflection on several issues such as the right to personal liberty, the right to personal integrity and privacy, the right to judicial protection and judicial guarantees.

However, my analysis will be circumscribed to the right to equality and non-discrimination in relation to the right to personal integrity. Such methodological decision is determined by the circumstance that the Court, in this specific subject matter, showed an innovative approach. In ruling that Azul Rojas Marín was a victim of torture due to her sexual orientation, the Court realized a step forward in its jurisprudence. First of all, it was the first time that it analysed the violation of the right to the personal integrity of a member of the LGBTI community. Moreover, such decision expanded and enriched the exiguous Court's jurisprudence on LGBTI rights, that had mainly focus on the equality of these people in front of the law.

The Commission noted that what happened to Azul Rojas Marín had to be understood as violence due to prejudice, given that it was associated with the perception of Azul Rojas Marín, at that time, as a gay man. It indicated that the elements of prejudice were present in three key moments: in the initial arrest; in the events that occurred at the Casa Grande Police Station and in the lack of effective investigation.

Regarding the first moment, the Commission emphasized that "there were no objective facts that motivated the arrest, but rather that the arrest was based on subjective assessments".

With respect to the second and third moments, the Commission indicated that the decision to dismiss the case for the crime of rape and abuse of authority controls, based on the alleged divergence of the statements of the victim and on the lack of procedural immediacy in the Marín's medical examination, was inconsistent. (§83)

The Representatives noted that on the grounds of the circumstances of the attacks on Azul it was possible to establish that the motive of such acts was her sexual orientation and her gender expression. Alike the Commission, they concluded that Azul was a victim of violence due to prejudice, stating that these aggressions occurred in a propitious context since the Peruvian State did not comply with the duty to adopt provisions of domestic law for the prevention, punishment, and eradication of violence due to prejudice.

In this sense, the Representatives alleged that the State violated the rights to the prohibition of discrimination and the right to equality before the law, which were respectively recognized in Articles 1, §1 and 24 of the Convention. (§ 84)

Ultimately, the State alleged that Mss. Rojas Marín's suspicious attitude was the motive for the police intervention and not her status as an LGBTI person. In fact, she did not have documents and she had alcoholic breath. By virtue of those findings, the State denied the Commission's allegations that "from the moment Azul Rojas Marín was intercepted by State officials, they exercised physical violence against her and verbally attacked her with repeated references to her sexual orientation". (§85)

The Court then developed its considerations, recalling Art. 1, § 1 of the Convention which provided that "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or other status". (§86)

The Commission has repeatedly established that the principle of non-discrimination is one of the pillars of any democratic system and that it is one of the fundamental bases of the human rights protection system instituted by the Organization of American States (Comisiòn Inter-Americana De Derechos Humanos, *Avances y Desafíos hacia el reconocimiento de los derechos de las personas LGBTI en las Américas*, 7-12-2018, OEA/Ser.L/V/II.170 Doc. 184, § 29).

Indeed, according to the jurisprudence of the Court, "at the present stage of the evolution of international law, the principles of equality and non-discrimination have entered the domain of the *jus cogens*" (Comisiòn Inter-Americana, *Avances y Desafíos…*, § 30).

Likewise, the Court warned that effective respect for human rights implied that their eventual violation constituted, *per se*, an international illicit act, regardless of the personal condition of the alleged victim. Thus, the arbitrary detention or torture of a person was always contrary to international law and, especially, to international human rights law (IACHR, Masacre de la Rochela vs. Colombia 11-05-2017, [*Fondo, Reparaciones y Costas*] § 132). (§88)

Under the obligation to not discriminate, States were also obliged to take positive measures to reverse or change existing discriminatory situations in their societies. This implied the State's special duty of protection in relation to actions and practices of third parties that, under its tolerance or acquiesce, create, maintain or favour discriminatory situations (IACHR, Caso Atala Riffo y niñas Vs. Chile, 24-02-2012, [*Fondo, Reparaciones y Costas*], §80).

In this sense, it is important to examine, with particular consideration, the discrimination carried out on the basis of one of the categories listed in Art. 1, §1 of the Convention. Indeed, an unlawful act of discrimination takes place because of what the victim specifically represents or appears to be and for what distinguishes him or her from other persons.

The Court recognised that LGBTI people have historically been victims of structural discrimination, stigmatisation, various forms of violence and violations of their fundamental rights (IACHR, Caso Atala Riffo…, §267).

In this regard, it had already been established that a person's sexual orientation, gender identity or gender expression were categories protected by the Convention (IACHR, Caso Atala Riffo…, §93), so that the States could not persecute a person because of his or her sexual orientation, gender identity and/or gender expression. (§90)

This standard was also consolidated by the Court in the subsequent cases *Flor Freire v. Ecuador* (IACHR, Flor Freire vs. Ecuador, 31-8-2016, [*Excepción Preliminar, Fondo, Reparaciones y Costas*]) and *Duqe v. Colombia* (IACHR, Duque vs. Colombia, 26-2-2016 [Excepciones Preliminares, Fondo, Reparaciones y Costas]), in which it was reaffirmed that sexual orientation was a prohibited criterion of discrimination under Art. 1, §1 of the Convention.

The Court was aware that the forms of discrimination against LGBTI people were manifested in many different ways, publicly and privately. But one of the most heinous forms of discrimination against LGBTI persons was represented by situations of violence. (§91) Such violence "can be physical (murder, beatings, abduction, sexual assault) or psychological (threats, coercion or arbitrary deprivation of liberty, including forced psychiatric confinement)" (United Nations High Commissioner for Human Rights, *Leyes y prácticas discriminatorias y actos de violencia cometidos contra personas por su orientación sexual e identidad de género*, 17-10- 2011).

Therefore, violence against LGBTI people was based on prejudice and it could be determined by the desire to punish those perceived to be challenging gender norms, which were traditionally considered as based on a binary approach, man/woman and male/female. (§92)

On this ground, violence against LGBTI people drove a symbolic message of exclusion or subordination and the victim had been chosen for this specific purpose. (§93)

The San José Court realized that in the present case, the allegations of discrimination constituted a cross-cutting issue to the other alleged human rights violations. For this reason, the Court declared that it would have used "the lens of discrimination" throughout the judgment when analysing the other violations. (§ 95)

6. – As already pointed out, we will only focus on the violation of the right to personal integrity in relation to the principle of non-discrimination.

Ms. Rojas Marín requested "the expansion of the complaint and of the investigation into the crime of torture" under the terms of Art. 321 of the Peruvian Criminal Code, in order to adequately define this crime (§63)

On 16 June 2008, the Public Prosecutor's Office denied Ms. Marin's request and decided not to extend the investigation for the crime of torture. Ms. Rojas Marín appealed this refusal. On 28 August 2008, the First Superior Criminal Prosecutor's Office of the Judicial District of La Libertad declared the complaint had no ground, indicating that the intentional element of the crime of torture was not fulfilled. (§64)

Indeed, the State of Perù argued that "the legal qualification of the facts was a matter for the national authorities" and that in order to be considered as a crime of torture, there had to be a special intent, which was not demonstrated in the present case. For this reason, the State, at the time, considered that it was not appropriate to change the criminal definition of torture. It further clarified that the classification of the crime of torture was modified in 2017. (§138)

Since Art. 5, § 1 of the ACHR enshrined the right to personal integrity, both physical, mental and moral, while Art. 5, § 2 ACHR established the absolute prohibition of subjecting anyone to torture or to cruel, inhuman or degrading treatment or punishment, the Court recognized that torture and cruel, inhuman or degrading treatment or punishment were absolutely and strictly prohibited by International Human Rights Law. In fact, this prohibition, which was absolute and imperative, constituted international *jus cogens* (IACHR, Caso Maritza Urrutia vs. Guatemala, 27-11-2003, [*Fondo, Reparaciones y Costas*], § 92).

Additionally, the general obligations arising from Articles 5 and 11 of the IACHR were reinforced by the specific obligations arising from the Inter-American Convention to Prevent and Punish Torture, whose Articles 1 and 6 stated the absolute prohibition of torture (IACHR, Fernandez Ortega y otros Vs. Mexico, 30-08-2010, [*Fondo, Reparaciones y Costas*], §129).

In her statements, Ms. Rojas Marín indicated, on at least three occasions, that State agents beat her to force her into the police vehicle, then they locked her in a room where she was forcibly stripped, naked, slapped, and given derogatory remarks regarding her sexual orientation and she was anally raped with a baton on two occasions. (§ 145)

Without prejudice to the fact that several of the alleged abuses left no physical traces, the Court noted that the injuries found in the extragenital and genital areas were consistent with what was reported by the alleged victim. (§154) The Court found the violence suffered by Ms. Rojas Marín to be sufficiently accredited.

The core question was represented by the legal qualification of such acts of violence (IACHR, Loayza Tamayo Vs. Perù, 3-12-2001, [*Reparaciones y Costas*], §150).

Since the Court defined "torture" as any act of ill-treatment that: (i) was intentional; (ii) caused severe physical or mental suffering; and (iii) was committed for any purpose or aim. (IACHR, Bueno Alves vs. Argentina,11-05-2207, [*Fondo, Reparaciones y Costas*], §102), on the grounds of evidence offered it found that the severity of the mistreatment suffered by Rojas Marín had been demonstrated. (§ 162)

With regard to the purpose, the Court considered that in general terms, rape, like torture, was intended, among other things, to intimidate, degrade, humiliate, punish or control the potential victims (IACHR, Mujeres Víctimas de Tortura Sexual en Atenco vs. Mexico, 28-11-2018, [*Excepción Preliminar, Fondo, Reparaciones y Costas*], § 193).

In this respect, expert Juan Méndez indicated that, "to determine whether a case of torture had been motivated by prejudice against LGBTI persons", the modality and characteristics of violence should have been used as indicators. (§ 163) In the present case, one of the assaults suffered by the alleged victim was anal rape. On this point, the expert María Mercedes Gómez, in the statement released during the hearing, indicated that the rape by means of "an element that symbolically represents authority", such as a baton, was intended to restore a masculinity that was threatened by the perception of the victim's non-compliance with established gender norms. (§ 163)

Additionally, the Court highlighted that the case fell within the scope of what it considered to be a "hate crime", since it was clear that the assault was motivated by her sexual orientation; in other words, this crime not only damaged Azul Rojas Marín's legal assets, but it was also sent a message to all LGBTI persons, as a threat to the freedom and dignity of this entire social group. (§ 165)

In light of all the above-mentioned considerations, the Court concluded that the set of abuses and aggressions suffered by Azul Rojas Marín, including rape, constituted an act of torture by State agents.

Therefore, the State was found to be accountable for the violations against the right to personal integrity and the right to not be subjected to torture, as enshrined in Articles 5, §1, 5, § 2 and 11 of the Convention, in relation to the obligations to respect and guarantee those rights without discrimination, codified in Art.1, § 1 of the same treaty and in Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture.

7. – The OAS General Assembly in various resolutions expressed that LGBTI people are subject to various forms of violence and discrimination in the American region, based on the perception of their sexual orientation and gender identity or expression and condemned acts of violence, human rights violations and all forms of discrimination based on sexual orientation and gender identity (OAS, Cuarta Sesiòn Plenaria, Resoluciones de la Asamblea General, *Derechos humanos y prevención de discriminaciòn y violencia contra personas LGBTI*, 5-06-2018, AG/RES 2928[XLVIII-0/18]). (§46)

Only after 2017 the Peruvian State disclosed statistical information on the LGBTI population which showed that the 62.7% of them had been victim of violence or discrimination, with 17.7% being victims of sexual violence. Only 4.4% of the total number of people attacked or discriminated denounced the fact to the Authorities and claimed that they had been mistreated when they reported these facts (Instituto Nacional de Estadística e Informática, *Primera Encuesta Virtual para personas LGBTI*, 2017, p. 5).

According to a study of 2017, in Perù there were significant prejudices against the LGBTI population. In fact, the "56.5 per cent of the LGBTI population was afraid to express its sexual orientation and/or gender identity, with fear of discrimination and/or assault" (Instituto Nacional de Estadística e Informática, *Primera Encuesta…*, 2017, page 22-23).

The majority of people in Perù believed that LGBTI people did not have to be school teachers and that they should not have the right to civil marriage (Defensoría del Pueblo del Perù, *Derechos Humanos de las personas LGBTI*, 2017, p. 20).

In order to understand the society's attitude towards the LGBTIs, it is significant to recall that in 2012 local governments in Perù included, within the goals of citizen security, the "eradication of homosexuals", which involved removing homosexual persons from the territory of the districts. (Defensoría del Pueblo del Perù, *Derechos Humanos…*, 2017, p. 17). (§49)

With regard to acts of violence, the Committee against Torture noted in its concluding observations on Perù's periodic reports for 2008, that the Perú's situation was worrying. It cited cases of harassment and violent attacks, some of which had resulted in deaths, committed against the lesbian, gay, bisexual and transgender community by members of the national police, armed forces or municipal security patrols ("*serenos*") or by prison officials. It also referred to reported cases, in which members of this community had been subjected to arbitrary detention and physical abuse or denial of fundamental legal safeguards in police stations. (§ 50)

Therefore, the Committee had invited Perù, as State party of the Organization of American States, to take effective measures to protect LGBTI community from attacks, ill-treatment and arbitrary detention, and to ensure that all cases of violence were promptly, effectively and impartially investigated, prosecuted and punished, and that victims got redress (Committee against Torture, *Obeservacions finales sobre los informes periódicos quinto y sexto combinadas del Perù*, 21-01-2013, CAT/C/PER/CO/5-6, § 22).

In few words, the Court concluded that strong prejudices against the LGBTI population existed and continued to exist in Peruvian society. (§ 51)

Considering the uninterrupted and structural characteristic of this discriminatory phenomenon, it seems still correct to use the above-mentioned data, which reflect the situation ten years after this case took place, to contextualize what happened to Azul Rojas Marin.

As far as the LGBTI question is concerned, it is necessary to stress that the Inter-American Court jurisprudence on this issue consist of few cases (IACHR, *Derechos de las personas LGTBI*, Cuadernillo de jurisprudencia n. 19, San José, 2018).

It is also interesting to assess that in the case at stake, as already highlighted, the discrimination constitutes a cross-cutting issue in the analysis of other human rights violations, while in the other cases in which the Court has dealt with LGBTI rights their violation *per se* represented the core of the judgments.

In fact, in the cases Atala Riffo (IACHR, Atala Riffo y niñas Vs. Chile, 24-2-2012 [*Fondo*, *Reparaciones y Costas*]), Flor Freire (IACHR, Flor Freire vs. Ecuador, 31-8-2016, [*Excepción Preliminar*, *Fondo*, *Reparaciones y Costas*]) and Duque (IACHR, Duque vs. Colombia, 26-2-2016 [Excepciones Preliminares, Fondo, Reparaciones y Costas]), the Court found the violation of the Art. 24 of IACHR, which enshrined the equality in front of the law, in relation to Art. 1, § 1 of the Convention. The difference between the two articles lies in their scope rather than in its contents. Thus, while the prohibition of discrimination in Art. 1, §1 is restricted to the rights enshrined in the same IACHR, Art. 24 extends this prohibition to all provisions of the OAS States Parties that provide legal basis for discrimination (Uprimny y Sánchez, *Comentario Convenciòn Americana Derechos Humanos*, Segunda ediciòn, Konras Adenauer Stiftung, 2019, § 711).

Before proceeding with our analysis, it appears necessary to clarify that the Atala Riffo case regarded the international responsibility of the State of Chile for the discrimination and the arbitrary interference with Karen Atala Riffo's private life, due to her sexual orientation, discrimination that resulted in the withdrawal of her children custody, whereas Flor Freire case concerned the international accountability of the State of Ecuador for the discrimination of Homero Flor Freire, who was expelled from the army due to the fact he had allegedly committed sexual acts with another man, on the basis of a discriminatory law, and, lastly, Duque case was related

to the international responsibility of the State of Colombia, since there was a law that denied Duque the possibility to obtain the survivor's pension for the death of his partner, because they were a same sex couple.

In the judgment at stake, the Representatives asked the Court to declare the violation of the Art. 24 IACHR, which states the right to equal protection in front of the law. The Court did not address such violation. It is interesting to stress that all the previous cases concerning LGBTI resulted in a violation of such article. The question is whether or not the Court failed to denounce the inequality of the LGBTI in front of the law. The Court determined that the right to equality in front of the law was not a core problem in this judgment.

Even though the Court in the Rojas Marín case, in a strict sense, could not identify any discriminatory law applied by Perù, I consider the principle of equality to be double-sided: not only does it prescribe that "things that are alike must be treated alike" (Aristotle, *Ethica Nichomachea*), but it also establishes that there should be equal opportunities for disadvantaged and marginalized groups in society. Art. 24 IACHR when affirming that "all person are equal before the law" should be read as referring both to formal and substantive equality. Given this interpretation, the Court, in my opinion, had to find the State of Perù accountable also for the violation of the principle of substantial equality. Indeed, the Court could have *per se* considered as violation of right to equal protection, in its substantial aspect, the absence of a law that recognized the vulnerability of the LGBTI's group and the failure to criminalize the so called "hate crimes" and to not conceive the prejudice based on sexual orientation/gender identity as an aggravating circumstance or as an element of the crime of torture. So, not protecting such group of people should have amounted to a violation of Art. 24 IACHR. Instead, here the Court only took into account the formal aspect of equality, not its substantial one. As such, tin this case he absence of an anti-discriminatory law in favour of the LGBTI group was used against Rojas Marín. The Court failed to consider the inequality inherent in the lack of a law which provided for this specific protection.

For what concern the discrimination *per se*, not related to the equal protection, as already pointed out, the decision in the case at stake is rooted in the Court's previous jurisprudence.

The Atala Riffo (IACHR, Atala Riffo…) case represented a landmark case since it identified the legal bases in order to address the discrimination suffered by LGBTI people.

When interpreting the expression "any other social condition" in Art. 1.1. of the Convention, the most favourable alternative for the protection of the rights protected by that treaty should be chosen (IACHR, *Derechos de las personas LGTBI*, Cuadernillo de jurisprudencia n. 19, § 84, San José, 2018).

The wording of that article leaves the criteria open to the inclusion of the term "other social condition" in order to incorporate other categories that have not been explicitly indicated (IACHR, *Derechos de las personas LGTBI*, Cuadernillo de jurisprudencia n. 19, § 85, San José, 2018).

Such approach is consistent with the framework of the Universal System of Human Rights Protection, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights that have identified sexual orientation as one of the categories of prohibited discrimination.

The Inter-American Court emphasizes that the alleged lack of consensus within some countries regarding the full respect for the rights of sexual minorities cannot be considered a valid argument for denying or restricting their human rights. Such consideration is particularly suitable in the present case since the data showed that Peruvian society was reluctant to recognize the LGBTI's rights (IACHR, Atala Riffo y niñas Vs. Chile, 24-2-2012 [*Fondo, Reparaciones y Costas*], § 92-93).

On the contrary, States have an obligation to design, implement and promote projects in order to ensure the respect and acceptance for people whose sexual orientation, identity gender - actual or perceived - or whose sexual characteristics differ from those patterns that are mostly accepted by society (Comisiòn Inter-Americana De Derechos Humanos, *Avances y Desafíos hacia el reconocimiento de los derechos de las personas LGBTI en las Américas*, 7-12-2018, OEA/Ser.L/V/II.170 Doc. 184).

8. – The international community welcomed the judgment at stake since it was ground-breaking in the fight for the recognition of LGBTI rights. Gabriela Oporto Patroni, coordinator of strategic litigation at Promsex (the civil organization that supported Azul Rojas Marín in the filing of the complaint before the Court), recently affirmed that this "is a sentence that should represent a before and after for the LGTBI community in Perù and in the region, since it establishes parameters for the proper investigation of crimes committed due to people's sexual orientation, identity or gender expression, real or perceived". Nevertheless, discrimination is going on. Especially during this time of health emergency, transgender people in Perù are dealing with measures enacted by the Government to contain the coronavirus outbreak which order that men and women can leave their home on separate days. Human rights advocates said the rule has left trans-people vulnerable to invasive questioning and harassment by police, despite Government assurances that law enforcement would have been free from discrimination (Oscar Lopez, *Peru is responsible for rape and torture of trans woman, rules human rights court*, 7-04-2020, Independent UK).

The international effort to promote international standards on sexual orientation and gender identity, which is condensed in the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity, deserves to be mentioned. In fact, while not adopted as international standards, these principles are a guiding tool already cited by UN bodies and national courts. Yogyakarta Principle number 3 is particularly relevant: "Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom" (Thomas Hammarberg, *Derechos humanos e identidad de género, Informe temático*, "Transrespeto versus transfobia en el mundo" (TvT), 2010).

Even if it seems noteworthy to point out that such principles were not taken into consideration by the Court in its reasoning, it appears more interesting to examine the European and African system in order to assess the extent of this Court's judgment in the regional human right framework.

For what the African system is concerned**,** we notice that in the past the only opportunity the Commission may have had to make a pronouncement on sexual orientation and gender identity was a communication led before the African Commission in 1995 concerning the legal status of gay persons in Zimbabwe, communication which stated that the criminalisation of consensual sexual contact between gay men in private was a violation of several articles of the African Charter. However, the case was withdrawn by the complainant, before the Commission made a decision (William A. Courson, *Zimbabwe, African Human Rights Case Law Analyser*, Institute for Human Rights and Development in Africa, 22-03-1995).

So, the African Court never had the chance to rule on a case involving LGBTI issues.

The African Human Rights Commission, by his own part, in the last years has declared to be concerned, since many countries have criminalized lesbian acts and many other countries have recently passed laws that restrict and punish groups who work on sexual orientation and gender identity issues. LGBT people are harassed,

threatened, and even killed. Many of these abuses include the element of discrimination against LGBT people. It is especially significant that the Commission addressed this issue. It also dropped a general comment on torture affirming that anyone, regardless of their gender, may be a victim of sexual and gender-based violence that amounts to torture or ill-treatment. In this regard, "lesbian, gay, bisexual, transgender and intersexual persons are of equal concern." So-called "corrective rape" and forced anal testing are expressly listed as acts of sexual and gender-based violence that may amount to torture and ill-treatment under the African Charter (Human rights Watch, *African Commission tackles sexual orientation and gender identity*, 06-01-2017).

As far as the European Human Rights system is concerned, sexual orientation and gender identity are included in the "other status" referred to in Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits discriminatory treatment (Publications Office of the European Union, *Handbook on European non-discrimination law*, 2018, Luxembourg).

The European Court of Human rights had the opportunity to address the violation of the principle of non-discrimination in relation to sexual orientation and gender identity in several cases (Press Unit of the European Court of Human Rights, *Factsheet on Sexual Orientation issues*, April 2020).

The European Court issued two judgments that constituted leading cases in the international LGBTI rights framework concerning same sex couples: in *Schalk and Kopf v. Austria*, the Court held for the first time that an unmarried same-sex couple without children constituted a family for the purposes of privacy under Art. 8 of the Convention and in *Oliari and others v. Italy* stated that the absence of a legal framework recognizing homosexual relationships violates the right to respect for private and family life as provided by Art. 8 (Pietro Pustorino, *Same-Sex Couples Before the ECthHR: the Right to Marriage*, Springer-Verlag, 2014).

While in other cases, the Court dealt with the connection of the right to life and prohibition of inhuman or degrading treatment with the above-mentioned principle of non-discrimination. Recalling the following cases is important since they could be useful tools to draw distinctions between the European Court's jurisprudence and the Inter-American Court's one.

In the case *Identoba v. Georgia* (ECtHR, *Identoba and Others v. Georgia*, 12-05-2015), the Court held that there had been a violation of Art. 3 (prohibition of inhuman or degrading treatment) of the Convention in conjunction with Art. 14 (prohibition of discrimination), with respect to the 13 applicants who had participated in a pacific march. It observed that negative attitudes against members of the community were widespread in some parts of Georgian society. Thus, the discriminatory overtones of the attacks were particularly clear. Moreover, the Authorities failed in their obligation to provide adequate protection. Lastly, noting that Georgian criminal law provided that discrimination on the grounds of sexual orientation and gender identity should be treated as an aggravating circumstance in the commission of an offence, the Court found that it would have been essential for the Authorities to conduct the investigation in that specific context. Consequently, they had failed to carry out a proper inquiry into the 13 applicants' allegations of ill-treatment.

In another case, *M.C. and C.A. v. Romania* (ECtHR, *M.C. and C.A. v. Romania*, 12-04-2016), the European Court ruled that there had been a violation of Art. 3 (prohibition of inhuman or degrading treatment) of the Convention, always connected with Art. 14 (prohibition of discrimination), against a group of six young men and a woman who participated in the annual gay march in Bucharest. It found that the investigations were ineffective because, among other reasons, they had failed to take into account possible discriminatory motives.

It is noteworthy that the Inter-American Court's jurisprudence appears to be more advanced in the recognition of the LGBTI's rights than the one of the African Court on human and people's rights. As pointed out before, the African Court never had the chance to rule on an LGBTI issue, while the Court dealt with this question in at least four cases.

For what the European system is concerned, the EtCHR's case law on LGBTI rights is more solid and consistent. The European Court, indeed, had the chance to develop and expand the jurisprudence on sexual orientation/gender issues in numerous cases, some of them related to the right to privacy, others to the right to family (Art. 8 EHRC) or the right to security and personal liberty (Art. 5 EHRC) and still others to the freedom of expression (Art. 9 ECHR) or the freedom of assembly (Art. 11 ECHR) (Press Unit…, *Factsheet*…, April 2020).

The Inter-American Court, instead, only focused on family rights, on the right to equality and on the right to personal integrity, privacy and liberty.

It is curious that the Inter-American Court, in order to support its reasoning, never mentioned the EtCHR's jurisprudence in the Rojas Marín case, since the International Regional Courts are used to recall their respective jurisprudence to strengthen their judgments.

Indeed, the Inter-American Court, in my opinion, could have had recalled the European Court's cases such as *Identoba v. Georgia* or *M.C. and C.A. v. Romania*, considering that they dealt with cases of inhuman or degrading treatment linked to the prohibition of discrimination. The Court could have used such reference to stress the coherence of its judgment with the regional international human rights framework.

9. – In accordance with Art. 63, par. 1 of the Convention, the San José Court provided for adequate remedies, since the violation of an international obligation entailed the obligation to grant an appropriate reparation (IACHR, Velásquez Rodríguez vs. Honduras, 21-7-1989, [*Reparaciones y costas*]).

First of all, the Court ordered the State to publish both a summary of the judgment of the Court and the judgment itself and to pay an established amount to Marín, as a beneficiary, in order to compensate for the material damage she had suffered, and to the *Fondo de Asistencia Legal de Victimas de la Corte Interamericana*. The State also had to provide for the medical and psychological treatment of the victim.

The Court also established that the State had to continue the necessary investigation in order to determine and to try those accountable for the act of torture against Azul Rojas Marín. Moreover, the State of Perù should have adopted a Protocol for the investigation and justice administration in criminal cases concerning violence against LGBTI persons, should have drafted and implemented a plan for raising awareness on such issue and a system of data collection regarding cases of violence perpetrated against the LGBTI community and finally should have eliminated the reference to the "eradication of homosexual and transgender people" contained in the *Planes de Seguridad Ciudadana de las Regiones y Distritos del Perù*.

The State was also obliged to inform the tribunal of the measures taken in order to conform to this judgment. For this reason, the Court also declared it would monitor the State's compliance with these prescriptions.

Nevertheless, the IACHR continues to be concerned about the high rates of violence registered against LGBTI people, or those perceived as such, in the Americas, and the absence of an efficient state response in the face of such problems, even if it recognizes that several OAS Member States have adopted measures to address violence against LGBTI people, on the understanding that this violence is deeply rooted in the society in South and Central America (Comisiòn Inter-Americana, *Avances y Desafíos*…, §172). On the ground of this alarm, among other

measures, the IACHR recommended States to adopt legislation against hate crimes or crimes by prejudice, through amendments to existing legislation or through the issuance of new laws, in order to identify, judge and sanctioning violence committed on the grounds of prejudice against people because of their sexual orientation, gender identity, and bodily diversity. So, for example, the States of Bolivia, Ecuador and El Salvador have modified their legislation in order to criminalize the discrimination on the grounds of sexual orientation and gender identity and related acts of violence (Comisiòn Inter-Americana, *Avances y Desafíos…*, §173-178).