

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**ADVISORY OPINION OC-24/17  
OF NOVEMBER 24, 2017  
REQUESTED BY THE REPUBLIC OF COSTA RICA**

**GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION OF SAME-SEX COUPLES**

**STATE OBLIGATIONS CONCERNING CHANGE OF NAME, GENDER IDENTITY, AND RIGHTS DERIVED  
FROM A RELATIONSHIP BETWEEN SAME-SEX COUPLES (INTERPRETATION AND SCOPE OF  
ARTICLES 1(1), 3, 7, 11(2), 13, 17, 18 AND 24, IN RELATION TO ARTICLE 1, OF THE AMERICAN  
CONVENTION ON HUMAN RIGHTS)**

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

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

also present,

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

pursuant to Article 64(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and Articles 70 to 75 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), issues this Advisory Opinion, structured as follows:

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## I PRESENTATION OF THE REQUEST

1. On May 18, 2016, the Republic of Costa Rica (hereinafter “Costa Rica” or “the requesting State”), based on Articles 64(1) and 64(2) of the American Convention<sup>1</sup> and in accordance with the provisions of Articles 70<sup>2</sup> and 72<sup>3</sup> of the Rules of Procedure, presented a request for an advisory opinion concerning the interpretation and scope of Articles 11(2),<sup>4</sup> 18<sup>5</sup> and 24<sup>6</sup> of the American Convention on Human Rights, in relation to Article 1<sup>7</sup> of this instrument (hereinafter “the request”). Specifically, Costa Rica presented the request for an advisory opinion for the Court to rule on:<sup>8</sup>

- a. “[T]he protection provided by Articles 11(2), 18 and 24 in relation to Article 1 of the [American Convention] to the recognition of a change of name in accordance with the gender identity of the person concerned.”
- b. “[T]he compatibility with Articles 11(2), 18 and 24, in relation to Article 1 of the Convention of the practice of applying Article 54 of the Civil Code of the Republic of Costa Rica,<sup>9</sup> Statute No. 63 of September 28, 1887, to persons wishing to change their name based on their gender identity.”

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<sup>1</sup> Article 64 of the American Convention: “1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

<sup>2</sup> Article 70 of the Court’s Rules of Procedure: “1. 1. Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought. 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates. 3. If the advisory opinion is sought by an OAS organ other than the Commission, the request shall also specify how it relates to the sphere of competence of the organ in question, in addition to the information listed in the preceding paragraph.”

<sup>3</sup> Article 72 of the Court’s Rules of Procedure: “1. A request for an advisory opinion presented pursuant to Article 64(2) of the Convention shall indicate the following: a. the provisions of domestic law and of the Convention or of other treaties concerning the protection of human rights to which the request relates; b. the specific questions on which the opinion of the Court is being sought; c. the name and address of the requesting party’s Agent. 2. Copies of the domestic laws referred to in the request shall accompany the application.”

<sup>4</sup> Article 11(2) of the American Convention: “Right to Privacy. [...] 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”

<sup>5</sup> Article 18 of the American Convention: “Right to a Name. Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.”

<sup>6</sup> Article 24 of the American Convention: “Right to Equal Protection. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law”.

<sup>7</sup> Article 1 of the American Convention: “Obligation to Respect Rights. 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, “person” means every human being.”

<sup>8</sup> The complete text of the request [in Spanish only] can be consulted on the Court’s website at the following link: [http://www.corteidh.or.cr/docs/solicitudoc/solicitud\\_17\\_05\\_16\\_esp.pdf](http://www.corteidh.or.cr/docs/solicitudoc/solicitud_17_05_16_esp.pdf)

<sup>9</sup> Article 54 of the Civil Code of Costa Rica establishes that: “Every Costa Rican national registered in the Civil Registry may change his or her name with the authorization of the court and this shall be obtained by means of the corresponding voluntary jurisdiction proceeding.”

- c. [T]he protection provided by Articles 11(2) and 24 in relation to Article 1 of the [America Convention] to the recognition of the patrimonial rights derived from a relationship between persons of the same sex."

2. Costa Rica set out the considerations that had given rise to the request indicating that:

"Recognition of the human rights derived from sexual orientation and gender identity has been characterized by diverse processes in the different member States of the Inter-American system." It further indicated that "[a] wide range of situations can be distinguished, from countries that have fully recognized rights to lesbian, gay, bisexual, transgender and intersex persons, to those member States that, to date, maintain in force laws that prohibit any form of lifestyle and expression contrary to heteronormativity or that have failed to recognize the rights that relate to these groups."

In addition, it "recognized that, in the cases of *Atala Riffo and daughters v. Chile* and *Duque v. Colombia*, the Court had determined that actions denigrating a person based on either their gender identity, or especially as in these cases, sexual orientation, constituted a type of discrimination that the Convention provided protection against."

Despite this, Costa Rica indicated that it "was unsure about the extent of the prohibition of discrimination based on sexual orientation and gender identity or, in other words, that problems remained when determining whether certain actions are included in such category of discrimination." Accordingly, it asserted that "an interpretation by the Inter-American Court on the standards indicated above would make a significant contribution to the State of Costa Rica and all the countries of the Inter-American system of human rights, because it would allow them to adapt their domestic laws to the inter-American standards, providing a guarantee to individuals and their rights. In other words, it would guide and strengthen the actions taken by the States towards full compliance with their obligations regarding these human rights."

Lastly, it "consider[ed] necessary that the Court issue its opinion regarding the conformity with the Convention of the practice of requiring those who wished to change their name based on their gender identity to follow the voluntary jurisdiction procedure established in Article 54 of the Civil Code of the Republic of Costa Rica." In this regard, it mentioned that "the said procedure involves expenses for the applicant and entails a lengthy delay [...], [and therefore it] asked whether the application of that provision to the cases indicated is contrary to human rights."

3. Based on the foregoing, Costa Rica submitted the following specific questions to the Court:

1. "Taking into account that gender identity is a category protected by Articles 1 and 24 of the ACHR [American Convention on Human Rights], as well as the provisions of Articles 11(2) and 18 of the Convention: does this protection and the ACHR imply that the State must recognize and facilitate the name change of an individual in accordance with his or her gender identity?"

2. "If the answer to the preceding question is affirmative, could it be considered contrary to the ACHR that those interested in changing their given name may only do so through a judicial procedure, in the absence of a pertinent administrative procedure?"

3. "Could it be understood that, in accordance with the ACHR, Article 54 of the Civil Code of Costa Rica should be interpreted as to imply that those who wish to change their given name based on their gender identity are not obliged to submit to the judicial procedure established therein, but rather that the State must provide them with a free, prompt and accessible administrative procedure to exercise that human right?"

4. "Taking into account that non-discrimination based on sexual orientation is a category protected by Articles 1 and 24 of the ACHR, in addition to the provisions of Article 11(2) of the Convention: does this protection and the ACHR imply that the State should recognize all the patrimonial rights derived from a relationship between persons of the same sex?" and

5. "If the answer to the preceding question is affirmative, must there be a legal institution that regulates relationships between persons of the same sex for the State to recognize all the patrimonial rights that derive from that relationship?"

4. Costa Rica appointed Ana Helena Chacón Echeverría, Vice President of the Republic, Marvin Carvajal Pérez, General Counsel of the Presidency of the Republic, and Eugenia Gutiérrez Ruiz, Legal Counsel a.i. of the Ministry of Foreign Affairs and Worship, as the State's Agents.

## II PROCEEDINGS BEFORE THE COURT

5. In notes dated August 12, 2016, the Secretariat of the Court (hereinafter "the Secretariat"), pursuant to Article 73(1)<sup>10</sup> of the Rules of Procedure, forwarded the request to the other Member States of the Organization of American States (hereinafter "the OAS"), the OAS Secretary General, the President of the OAS Permanent Council, the President of the Inter-American Juridical Committee and the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission"). In these notes, the Secretariat advised that the President of the Court, in consultation with the other judges, had established December 9, 2016, as the time limit for presenting written observations on the said request. Also, in notes of August 12, 2016, on the instructions of the President and as established in Article 73(3)<sup>11</sup> of the said Rules of Procedure, the Secretariat invited several civil society and international organizations, as well as academic establishments in the region, to submit their written opinion on the questions presented to the Court within the said time frame. Lastly, an open invitation was issued on the Inter-American Court's website to all those interested in presenting their written opinion on the questions submitted to the Court. The original deadline was extended until February 14, 2017; those interested had around six months to forward their submissions.

6. The Secretariat received the following briefs with observations within the established time frame:<sup>12</sup>

*a. Written observations submitted by OAS Member States:* 1) Argentina; 2) Bolivia; 3) Brazil; 4) Colombia; 5) Guatemala; 6) Honduras; 7) United Mexican States; 8) Panama and 9) Uruguay;

*b. Written observations submitted by OAS organs:* Inter-American Commission on Human Rights;

*c. Written observations submitted by international organizations:* Office of the United Nations High Commissioner for Human Rights;

*d. Written observations submitted by state agencies:* 1) Human Rights Commission of the Federal District of Mexico; 2) Office of the Ombudsperson of the Republic of Costa Rica; 3) Office of the Federal Ombudsman (DPU) of Brazil and other institutions; 4) Argentine Public Defender's Office; 5) Office of the Ombudsman of the state of Río de Janeiro; 6) Public Defender's Office of the Autonomous City of Buenos Aires, and 7) Office of the Attorney General of Argentina;

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<sup>10</sup> Article 73(1) of the Court's Rules of Procedure: "Upon receipt of a request for an advisory opinion, the Secretary shall transmit copies thereof to all of the Member States, the Commission, the Permanent Council through its Presidency, the Secretary General, and, if applicable, to the OAS organs whose sphere of competence is referred to in the request."

<sup>11</sup> Article 73(3) of the Court's Rules of Procedure: "The Presidency may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention, the Presidency may do so after prior consultation with the Agent."

<sup>12</sup> The request for an advisory opinion presented by Costa Rica, the written and oral observations of the participating States, the Inter-American Commission, and also state and international agencies, academic establishments, non-governmental organizations, and members of civil society can be consulted on the Court's website at the following link: [http://www.corteidh.or.cr/cf/jurisprudencia2/observaciones\\_oc.cfm?nld\\_oc=1671](http://www.corteidh.or.cr/cf/jurisprudencia2/observaciones_oc.cfm?nld_oc=1671)

*e. Written observations submitted by national and international associations, academic establishments and non-governmental organizations:* 1) ADF International; 2) Amicus D.H., A.C.; 3) Asociación Civil 100% Diversidad y Derechos; 4) Asociación OTD Chile; 5) Asociación de Travestis, Transexuales y Transgéneros de Argentina, and the Red de Personas Trans de Latinoamérica y del Caribe; 6) Asociación Frente por los Derechos Igualitarios, Asociación Ciudadana ACCEDER, Asociación Movimiento Diversidad pro Derechos Humanos y Salud, Asociación Transvida, and Asociación Centro de Investigación y Promoción para América Central (CIPAC); 7) Asociación para la Promoción y Protección de los Derechos Humanos "Xumek"; 8) Australian Human Rights Centre, UNSW Faculty of Law; 9) Avocats Sans Frontières, Canada, and the UQAM Clinique internationale de défense des droits humains; 10) Center for Family and Human Rights (C-Fam); 11) Human Rights Center at the Pontificia Universidad Católica del Ecuador; 12) Centro de Direito Internacional; 13) Center for Human Rights Studies (CEDH), and Specialized Program on Protection of the Rights of Children and Adolescents of the Faculty of Law at the Universidad Nacional del Centro de la Provincia de Buenos Aires (UNICEN); 14) Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos – PROMSEX; 15) Centro Guadalupe Vida y Familia, Puerto Rico; 16) International Law Study Group of the Faculty of Law at the Universidad del Pacifico, Peru; 17) Center for Justice and International Law (CEJIL), Asociación LGTB Arcoiris-Honduras, Asociación REDTRANS-Nicaragua, Centro de Investigación y Promoción de Derechos Humanos, Centro de Investigación y Promoción para América Central de Derechos Humanos, Coalición contra la Impunidad, Comité de Familiares de Detenidos Desaparecidos en Honduras, Comunicando y Capacitando a Mujeres Trans, Fundación de Estudios para la Aplicación del Derecho, Mulabi / Espacio Latinoamericano de Sexualidades y Derechos, and Unidad de Atención Sicológica, Sexológica y Educativa para el Crecimiento Personal A.C.; 18) César Norberto Bissutti, Juliana Carbó, Gisela Vanesa Hill, Antonela Sabrina Rivero, Estefanía Watson and Leandro Anibal Ardo, members of the Human Rights Legal Clinic of the Faculty of Juridical and Social Sciences at the Universidad Nacional del Litoral, Santa Fe, Argentina; 19) Human Rights Legal Clinic and the International Law Group at the Pontificia Universidad Javeriana, Cali; 20) Human Rights Clinic at the Universidade Federal de Minas Gerais; 21) Human Rights Clinic of the Post-graduate program in Law at the Pontificia Universidade Católica do Paraná; 22) Human Rights and Environmental Law Clinic at the Universidade do Estado do Amazonas (Clínica DHDA/UEA); 23) Public Interest Clinic against People Trafficking of the Instituto Tecnológico Autónomo de México and the Grupo de Acción por los Derechos Humanos y la Justicia Social A.C.; 24) Public Interest Legal Clinic "Grupo de Acciones Públicas" of the Faculty of Jurisprudence at the Universidad del Rosario, Colombia; 25) Legal Clinic at the Universidad de San Andrés, Argentina; 26) Comisión Colombiana de Juristas; 27) Dejusticia; 28) Sixteen human rights organizations that form part of the Coalition of LGBTTTTI Organizations working at the OAS: Colombia Diversa; Akahatá; Asociación Alfil; Asociación Panambi; Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (Promsex); Colectiva Mujer y Salud; Fundación Diversencia; Heartland Alliance–Global Initiatives for Human Rights (GIHR); Liga Brasileira de Lésbicas; Letra S, Sida, Cultura y Vida Cotidiana, A.C.; Otrans–Reinas de la Noche; Ovejas Negras; Red Mexicana de Mujeres Trans; Red Latinoamericana y del Caribe de Personas Trans (Redlactrans); Taller Comunicación Mujer, and UNIBAM; 29) Faculty of Law at the Pontificia Universidad Católica de Chile; 30) Faculty of Law at the Universidad Veracruzana; 31) Faculty of Law Tijuana at the Universidad Autónoma de Baja California; 32) Fundación Iguales; 33) Fundación Myrna Mack; 34) Grupo de Advogados pela Diversidade Sexual e de Gênero–GADvS; 35) Group of students from the Escuela Libre de Derecho de Mexico. Coordinators: Daniel Esquivel Garay, Marianna Olivia Loredó Celaya and Claudio Martínez Santistevan. Members: Aranxa Bello Brindis, Daniela Morales Galván Duque, Eduardo González Ávila, Alejandra Muñoz Castillo, Rosete MacGregor, Jimena Pulliam de Teresa and Carlos Rodolfo Ríos Armillas. Legal adviser: Elí Rodríguez Martínez;

36) Grupo de Investigación Problemas Contemporáneos del Derecho y la Política (GIPCODEP), attached to the Faculty of Law and Political Science at the Universidad de San Buenaventura, Cali; 37) "Humanismo y Legalidad", "Ixtlamatque Ukari A.C" and "La Cana Proyecto de Reinserción Social"; 38) Jorge Kenneth Burbano Villamarín, Laura Melisa Posada Orjuela and Hans Alexander Villalobos Díaz, members of the Observatorio de Intervención Ciudadana Constitucional of the Faculty of Law at the Universidad Libre de Bogotá; 39) Karla Lasso Camacho and María Gracia Naranjo Ponce, students of the Legal Clinic at the Universidad San Francisco, Quito; 40) LIBERARTE Advisería Psicológica; 41) Movimiento Diversidad pro Derechos Humanos y Salud; 42) Natalia Castro and Gerardo Acosta, members of the Public Interest Litigation Group at the Universidad del Norte; 43) Red Lésbica CATTRACHAS, Honduras; 44) Parliamentarians for Global Action; 45) The Impact Litigation Project of the Center for Human Rights and Humanitarian Law at American University Washington College of Law; 46) The John Marshall Law School International Human Rights Clinic; 47) Universidad Centroamericana José Simeón Cañas, and

*f. Written observations submitted by members of civil society:* 1) Alicia I. Curiel, Adjunct Professor of Human Rights and Guarantees at the Universidad de Buenos Aires and Luciano Varela, studying for a master's degree in human rights at the Universidad Nacional de la Plata; 2) Cristabel Mañón Vallejo, Nahuiquetzalli Pérez Mañón and José Manuel Pérez Guerra; 3) Damián A. González-Salzberg, Lecturer and researcher in international human rights law at the University of Sheffield; 4) Daniel Arturo Valverde Mesén; 5) Elena Hernáiz Landáez; 6) Erick Vargas Campos; 7) Hermán M. Duarte Iraheta; 8) Hermilo Lares Contreras; 9) Ivonei Souza Trindade; 10) Jorge Alberto Pérez Tolentino; 11) José Benjamín González Mauricio, Andrea Yatzil Lamas Sánchez, Izack Alberto Zacarías Najar, Rafael Ríos Nuño, Carlos Eduardo Moyado Zapata and Kristyan Felype Luis Navarro; 12) Josefina Fernández, Paula Viturro and Emiliano Litardo; 13) Luis Alejandro Álvarez Mora and María José Vicente Ureña; 14) Luis Chinchilla, Nadia Mejía, Isiss Turcios and Larissa Reyes; 15) Luis Peraza Parga; 16) María Fernanda Téllez Girón García, Giovanni Alexander Salgado Cipriano, Yoceline Gutiérrez Montoya and Daniela Reyes Rodríguez; 17) Michael Vinicio Sánchez Araya; 18) Monsignor Óscar Fernández Guillén, President and representative of the National Episcopal Conference of Costa Rica; 19) Pablo Stolze, Professor of Civil Law at the Universidad Federal de Bahía; 20) Paul McHugh; 21) Paula Siverino Bavio; 22) Rossana Muga Gonzáles, Researcher at the Centro de Investigación Social Avanzada (CISAV-Mexico); 23) Tamara Adrián and Arminio Borjas; 24) Víctor Alonso Vargas Sibaja and Jorge Arturo Ulloa Cordero; 25) Xochithl Guadalupe Rangel Romero, Professor and researcher at the Universidad Autónoma de San Luis Potosí, and 26) Yashín Castrillo Fernández.

7. Following the conclusion of the written procedure and pursuant to Article 73(4) of the Rules of Procedure,<sup>13</sup> on March 31, 2017, the President of the Court issued an order<sup>14</sup> calling for a public hearing and invited the OAS Member States, the OAS Secretary General, the President of the OAS Permanent Council, the President of the Inter-American Juridical Committee, the Inter-American Commission, and members of various international and civil society organizations, academic establishments, and individuals who had submitted written observations to present their oral comments on the request for an advisory opinion submitted to the Court.

<sup>13</sup> Article 73(4) of the Court's Rules of Procedure: "[a]t the conclusion of the written proceedings, the Court shall decide whether oral proceedings should take place and shall establish the date for a hearing, unless it delegates the latter task to the Presidency. Prior consultation with the Agent is required in cases governed by Article 64(2) of the Convention."

<sup>14</sup> Cf. Request for Advisory Opinion OC-24. Call to a public hearing. Order of the President of the Inter-American Court of Human Rights of March 31, 2017. Available at: [http://www.corteidh.or.cr/docs/asuntos/solicitud\\_31\\_03\\_17.pdf](http://www.corteidh.or.cr/docs/asuntos/solicitud_31_03_17.pdf)

8. The public hearing was held on May 16 and 17, 2017, during the 118<sup>th</sup> regular session of the Inter-American Court of Human Rights, which took place in San José, Costa Rica.
9. The following persons appeared before the Court:
- 1) For the State of Costa Rica: Ana Helena Chacón Echeverría, Second Vice President of the Republic; Marvin Carvajal Pérez, Legal Counsel to the Presidency of the Republic; Eugenia Gutiérrez Ruiz, Assistant Legal Counsel, Ministry of Foreign Affairs and Worship; Emilio Arias Rodríguez, Minister of Human Development and Social Inclusion; Alejandra Mora Mora, Minister for Women's Affairs; María Fulmen Salazar, Vice Minister of Public Safety, William Vega Murillo, adviser, Vice Minister of Political Affairs and Civic Dialogue, Ministry of the Presidency; Luis Eduardo Salazar Muñoz, legal adviser, Legal Department of the Presidency of the Republic; María Rebeca Sandí Salvatierra, legal adviser, Legal Department of the Presidency of the Republic; Viviana Benavides Hernández, legal adviser, Legal Department of the Presidency of the Republic; Andrea González Yamuni, adviser to the Second Vice President of the Republic; Alejandra Arbuola Cabrera, adviser, Vice Ministry of Political Affairs and Civic Dialogue, Ministry of the Presidency; Natalia Córdoba Ulate, Chief of Staff of the Minister for Foreign Affairs; José Carlos Jiménez Alpizar, legal adviser, Legal Department of the Ministry of Foreign Affairs and Worship; María Julia Cerdas Jimenez, legal adviser, Legal Department of the Presidency of the Republic, and Ersilia Zúñiga Centeno, adviser, Presidency of the Republic;
  - 2) For the State of Argentina: Javier Salgado;
  - 3) For the Plurinational State of Bolivia: Jaime Ernesto Rossell Arteaga, Assistant Public Defender and Legal Representative of the State; Roberto Arce Brozek, Director General for the Defense of Human Rights and the Environment; Cynthia Fernández Torrez, Human Rights and Environmental Expert; José Enrique Colodro Baldiviezo, Chargé d'affaires a.i.; Ramiro Quisbert Liuca, First Secretary of the Embassy of Bolivia in Costa Rica, and Carlos Fuentes López, Second Secretary of the Embassy of Bolivia in Costa Rica;
  - 4) For the United Mexican States: Erasmo A. Lara Cabrera, Director General for Human Rights and Democracy of the Ministry of Foreign Affairs, and Óscar Francisco Holguín González, responsible for legal, political and media affairs at the Embassy of Mexico in Costa Rica;
  - 5) For the State of Uruguay: Marta Echarte Baraibar, Minister, and Tabaré Bocalandro Yapeyú, Minister Counsellor;
  - 6) For the Human Rights Commission of the Federal District of Mexico: Gabriel Santiago López, General Counsel;
  - 7) For the Office of the Federal Ombudsman (DPU) of Brazil and other institutions: Carlos Eduardo Barbosa Paz, Federal Ombudsman;
  - 8) For the Office of the Ombudsperson of the Republic of Costa Rica: Montserrat Solano Carboni, Ombudsperson of the Republic of Costa Rica; Gloriana López Fuscaldo, Director of the Ombudsperson's Office; Catalina Delgado Agüero and Angélica Solera Steller;
  - 9) For the Impact Litigation Project of the Center for Human Rights and Humanitarian Law at American University Washington College of Law: Whitney Washington, Natalia Gómez and Facundo Capurro;
  - 10) For the Inter-American Commission on Human Rights: Paulo Abrao, Executive Secretary; Silvia Serrano Guzmán, Adviser, and Selene Soto Rodríguez, Adviser;



- 11) For the Ombudsperson's Office of the state of Río de Janeiro: Livia Miranda Müller Drumond Casseres, Ombudsperson of the state of Río de Janeiro, and Rodrigo Baptista Pacheco, Second Assistant Ombudsperson of the state of Río de Janeiro;
- 12) For the Public Prosecution Service of the Autonomous City of Buenos Aires: Lorena Lampolio, Public Defender, and Josefina Fernández;
- 13) Hermán M. Duarte Iraheta;
- 14) For ADF International: Jeff Shafer, Neydy Casillas, Natalia Callejas and Michelle Riestras;
- 15) For Amicus D.H., A.C.: Luz Rebeca Lorea Hernández, Javier Meléndez López Velarde and Juan Pablo Delgado Miranda;
- 16) For the Asociación Civil 100% Diversidad y Derechos: Greta Marisa Pena, President, Francisco Cotado and Hernán Arrue;
- 17) For the Asociación OTD-Chile: Constanza Valdés Contreras, legal adviser;
- 18) For the Asociación de Travestis, Transexuales y Transgéneros de Argentina and the Red de Personas Trans de Latinoamérica y del Caribe: Marcela Romero, Regional Coordinator;
- 19) For the Asociación Frente por los Derechos Igualitarios (FDI), Asociación Ciudadana ACCEDER, and Asociación Transvida: Larissa Arroyo Navarrete, Dayana Hernández, Antonella Morales and Michelle Jones;
- 20) For the Center for Justice and International Law (CEJIL), Asociación LGTB Arcoíris-Honduras, Asociación REDTRANS-Nicaragua, Centro de Investigación y Promoción de los Derechos Humanos, Centro de Investigación y Promoción para América Central de Derechos Humanos, Coalición contra la Impunidad, Comité de Familiares de Detenidos Desaparecidos en Honduras, Comunicando y Capacitando a Mujeres Trans, Fundación de Estudios para la Aplicación del Derecho, Mulabi/Espacio Latinoamericano de Sexualidades y Derechos, and the Unidad de Atención Sicológica, Sexológica y Educativa para el Crecimiento Personal, A.C.: Marcela Martino, Florencia Reggiardo, Esteban Mandrigal, Samantha Colli, Gisela De León, Marcia Aguiluz, Natasha Jiménez, Daría Suárez and Karla Acuña;
- 21) For the Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos – PROMSEX: Brenda Álvarez;
- 22) For Colombia Diversa: Marcela Sánchez, Executive Director, and Lilibeth Cortés;
- 23) For the Comisión Colombiana de Juristas: Carolina Solano Gutiérrez;
- 24) For "Humanismo y Legalidad", "Asociación Ixtlamatque Ukari A.C." and "Asociación La Cana, Proyecto de Reinserción Social, A.C.": Norma Celia Bautista Romero, Marcela Duque Penagos, Daniela Ancira Ruiz, Raquel Adriana Aguirre García, Benjamín García Aguirre and Marlene Rodríguez Atriano;
- 25) For the Movimiento Diversidad Pro Derechos Humanos y Salud of Costa Rica: Marco Castillo Rojas and Giovanni Delgado Castro;
- 26) For the Red Lésbica CATTRACHAS-Honduras: Indyra Mendoza Aguilar and Karina Trujillo;
- 27) María Gracia Naranjo and Karla Lasso, Students of the Legal Clinic at the Universidad San Francisco, Quito;
- 28) For the Human Rights and Environmental Law Clinic at the Universidade do Estado do Amazonas (Clínica DHDA/UEA): Sílvia Maria da Silveira Loureiro, Hérika Luna Arce Lima and Érika Guedes de Sousa Lima;

- 29) For the Faculty of Law Tijuana at the Universidad Autónoma de Baja California: Laura Alicia Camarillo Govea and Elizabeth Nataly Rosas Rábago;
- 30) For the Faculty of Law at the Pontificia Universidad Católica de Chile: Álvaro Paúl;
- 31) For the Public Interest Clinic against People Trafficking at the Instituto Tecnológico Autónomo de México and the Grupo de Acción por los Derechos Humanos y la Justicia Social A.C.: Héctor Alberto Pérez, General Coordinator of the Clinic; Amalia Cruz Rojo, Legal Coordinator of the Clinic, Ana Lilia Amezcua Ferrer, Tábata Ximena Salas Ramírez and Edwin Alan Piñon González;
- 32) For the Faculty of Law at the Universidad Veracruzana: Geiser Manuel Caso Molinari, Iris del Carmen Cruz De Jesús, Sara Fernanda Parra Pérez, Teresa Nataly Solano Sánchez and Sonia Itzel Castilla Torres;
- 33) Daniel Valverde Mesén;
- 34) Hermilo de Jesús Lares Contreras and Rodolfo Reyes Leyva;
- 35) José Benjamín González Mauricio;
- 36) Jorge Arturo Ulloa Cordero;
- 37) Michael Vinicio Sánchez Araya;
- 38) Paula Siverino Bavio;
- 39) Tomás Henríquez Carrera, representing Dr. Paul McHugh, and
- 40) Yashín Castrillo Fernández.

10. Following the hearing, supplementary briefs were received from: 1) the State of Costa Rica; 2) the Impact Litigation Project of the Center for Human Rights and Humanitarian Law at American University Washington College of Law; 3) the Movimiento Diversidad pro Derechos Humanos y Salud of Costa Rica; 4) Hermán M. Duarte Iraheta; 5) Monsignor Óscar Fernández Guillén, President and representative of the National Episcopal Conference of Costa Rica; 6) the Human Rights Commission of the Federal District of Mexico; 7) the Office of the Federal Ombudsman (DPU) of Brazil and other institutions; 8) Paula Siverino Bavio, and 9) the Asociación Frente por los Derechos Igualitarios (FDI), Asociación Ciudadana ACCEDER, and Asociación Transvida.

11. In answering this request for an advisory opinion, the Court examined, took into account and analyzed the ninety-one briefs presented by States, OAS organs, international organization, State agencies, non-governmental organizations, academic establishments, and members of civil society, together with the observations and interventions of the forty participants in the public hearing (*supra* paras. 6 and 9). The Court expresses its appreciation for these valuable contributions that provided it with insight on the different questions raised by this request for an advisory opinion.

12. The Court began to deliberate the advisory opinion on November 21, 2017.

### III JURISDICTION AND ADMISSIBILITY

13. In this chapter, the Court will examine the scope of the Court's jurisdiction to issue advisory opinions, as well as the jurisdiction, admissibility and validity of ruling on the request for an advisory opinion presented by Costa Rica.

### A. The advisory jurisdiction of the Court in relation to this request

14. The request was submitted to the Court by the State of Costa Rica, based on the authority granted by Article 64(1) of the American Convention. Costa Rica is a Member State of the OAS and, therefore, has the right to request the Inter-American Court to issue advisory opinions on the interpretation of this treaty or of other treaties concerning the protection of human rights in the American states.

15. Furthermore, the Court considers that, as an organ with jurisdictional and advisory functions, it has the inherent authority to determine the scope of its own jurisdiction (*compétence de la compétence/Kompetenz-Kompetenz*) when exercising its advisory function, pursuant to Article 64(1) of the Convention.<sup>15</sup> And this is so, in particular, because the mere fact of having recourse to the Court supposes that the State or States who make the request recognize the Court's right to determine the scope of its competence in that regard.

16. The advisory function allows the Court to interpret any article of the American Convention, and no part or aspect of this instrument is excluded from such interpretation. Thus, it is plain that, since the Court is the "ultimate interpreter of the American Convention,"<sup>16</sup> it is competent to interpret all the provisions of the Convention, even those of a procedural nature, with full authority.<sup>17</sup>

17. In addition, the Court has considered that Article 64(1) of the Convention, when referring to the Court's authority to provide an opinion on "other treaties concerning the protection of human rights in the States of the Americas," is broad and non-restrictive. In other words, the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever the principal purpose of such a treaty is, and whether or not non-Member States of the Inter-American system are or have the right to become parties thereto.<sup>18</sup> Consequently, when interpreting the Convention within the framework of its advisory function and in the terms of Article 29(d) of the Convention, the Court may resort to the Convention or other treaties concerning the protection of human rights in the American States.<sup>19</sup>

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<sup>15</sup> Cf. *Case of the Constitutional Court v. Peru. Competence*. Judgment of September 24, 1999. Series C No. 55, para. 33, *Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights)*. Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15., para.5, *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. 17, and *Entitlement of Legal Entities to hold Rights under the Inter-American System of Human Rights (Interpretation and scope of Article 1(2) in relation to Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as Article 8(1) A and B of the Protocol of San Salvador)*. Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 14. See also, *Case of Vásquez Durand et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of February 15, 2017. Series C No. 332, para. 22.

<sup>16</sup> *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 154, para. 124; Advisory Opinion OC-21/14, para. 19, Advisory Opinion OC-22/16, para. 16, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016. Series C No. 312, para. 242.

<sup>17</sup> Cf. *Article 55 of the American Convention on Human Rights*. Advisory Opinion OC-20/09 of September 29, 2009. Series A No. 20, para. 18; Advisory Opinion OC-21/14, para. 19, and Advisory Opinion OC-22/16, para. 16.

<sup>18</sup> Cf. *"Other Treaties" Subject to the Advisory Function of the Court* (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, first operative paragraph; Advisory Opinion OC-21/14, para. 23, and Advisory Opinion OC-22/16, para. 26.

<sup>19</sup> Cf. *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, sole operative paragraph, Advisory Opinion OC-21/14, para. 22, and Advisory Opinion OC-22/16, para. 17.

## B. The requirements of admissibility of the request

18. The Court must now determine whether the request for an advisory opinion presented by the State of Costa Rica meets the formal and substantive requirements of admissibility.

19. First, the Court finds that the request presented by Costa Rica complies formally with the requirements described in Articles 70<sup>20</sup> and 71<sup>21</sup> of the Rules of Procedure, according to which, for a request to be considered by the Court, the questions must be precise, specifying the provisions that must be interpreted, indicating the considerations that give rise to the request, and providing the name and address of the agent.

20. Regarding the substantive requirements, the Court recalls that, on numerous occasions, it has indicated that compliance with the regulatory requirements to submit a request does not mean that the Court is obliged to respond to it.<sup>22</sup> To determine the validity of the request, the Court must bear in mind considerations that exceed questions of mere form and that relate to the characteristics it has recognized for the exercise of its advisory function.<sup>23</sup> It must go beyond the formalism that would prevent the Court from considering questions that have a juridical interest for the protection and promotion of human rights.<sup>24</sup> Also, the Court's advisory competence should not, in principle be used for abstract speculations without a foreseeable application to specific situations that justify the issuing of an advisory opinion.<sup>25</sup>

21. When recalling that the advisory function represents "a service that the Court is able to provide to all the members of the Inter-American system in order to help them comply with their international commitments" concerning human rights,<sup>26</sup> the Court considers that, based on the interpretation of the relevant provisions, its response to the request will be of great importance for the countries of the region, because it will identify the obligations of the States in relation to the rights of LGBTI persons within the framework of their obligation to respect and guarantee the

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<sup>20</sup> Article 70 of the Court's Rules of Procedure: "Interpretation of the Convention: 1. Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought. 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates. [...]"

<sup>21</sup> Article 71 of the Court's Rules of Procedure: "Interpretation of Other Treaties: 1. If, as provided for in Article 64(1) of the Convention, the interpretation requested refers to other treaties concerning the protection of human rights in the American States, the request shall indicate the name of the treaty and parties thereto, the specific questions on which the opinion of the Court is being sought, and the considerations giving rise to the request. [...]"

<sup>22</sup> Cf. *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 31; Advisory Opinion OC-21/14, para. 25, and Advisory Opinion OC-22/16, para. 21.

<sup>23</sup> Cf. Advisory Opinion OC-1/82, para. 25; Advisory Opinion OC-15/97, para. 39; *Juridical Status and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 19; *Juridical Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 50; *Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights* (Arts. 41 and 44 to 51 of the American Convention on Human Rights); Advisory Opinion OC-19/05 of November 28, 2005. Series A No. 19, para. 17, and Advisory Opinion OC-20/09, para. 14.

<sup>24</sup> Cf. Advisory Opinion OC-1/82, para. 25; *Certain Attributes of the Inter-American Commission on Human Rights* (Arts. 41, 42, 44, 46, 47, 50 and 51 American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993, Series A No. 13, para. 41; Advisory Opinion OC-15/97, para. 39, and Advisory Opinion OC-19/05, para. 17.

<sup>25</sup> Cf. *Judicial Guarantees in State of Emergency* (Arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 16; Advisory Opinion OC-21/14, para. 25, and Advisory Opinion OC-22/16, para. 21.

<sup>26</sup> Cf. Advisory Opinion OC-1/82, para. 39; Advisory Opinion OC-19/05, para. 18; Advisory Opinion OC-21/14, para. 28, and Advisory Opinion OC-22/16, para. 23.

human rights of all persons subject to their jurisdiction. This will lead to the determination of the principles and the specific obligations that States must meet concerning the right to equality and non-discrimination.

22. In this regard, the Court recalls, as it has on other occasions,<sup>27</sup> that the task of interpretation that it performs in the exercise of its advisory function not only seeks to clarify the reason for, meaning and purpose of international human rights norms, but also, and above all, to assist the OAS Member States and organs to comply fully and effectively with their relevant international obligations, and to define and implement public policies to protect human rights. Thus, its interpretations aim to help strengthen the system for the protection of human rights.

23. In addition, while this advisory opinion was being processed, the Commission presented information that a petition is currently at the admissibility stage concerning alleged discrimination and patrimonial prejudice due to the impossibility of incorporating a same-sex couple into the social security system and the absence of legal recognition for unions of same-sex couples.<sup>28</sup> Also, during the processing of this advisory opinion, a written observation was submitted to the Court by a person advising that a petition against Costa Rica was currently being processed before the Commission concerning the “violation of the fundamental rights to equality and non-discrimination based on sexual orientation, specifically owing to non-recognition of *de facto* unions of same-sex couples, and the prohibition to marry.”<sup>29</sup> This person asked the Court to reject outright the request for an advisory opinion submitted by the State of Costa Rica on May 18, 2016, considering that “the request made to the Court by the Executive branch [...] would result in a covert settlement, using the advisory opinion, of litigations at the domestic level (action of unconstitutionality) and at the international level (petition lodged before the Inter-American Commission), still pending a decision by the Constitutional Chamber (violation of the principle of exhaustion of domestic remedies), [both of which are] still being processed and have not been submitted to the Court’s consideration, without giving [this person] the right to file the pertinent recourses established by law, the American Convention and the Court’s Rules of Procedure, thus distorting the system upheld by the Convention.”

24. In this regard, the Court recalls, as it has in the context of other advisory consultations, that the mere fact that petitions related to the subject matter of the request exist before the Commission is not sufficient for the Court to abstain from responding to the questions submitted to it.<sup>30</sup>

25. Furthermore, the Court considers that it is not necessarily restricted to the literal terms of the requests that are submitted to it; rather, in exercise of its non-contentious or advisory competence and in view of the provisions of Article 2 of the Convention and the purpose of advisory opinions of “help[ing States to] comply with their international commitments” concerning human rights, it may also suggest the adoption of treaties or other kinds of international norms on matters relating to such commitments as well as other types of measures that may be required in order to guarantee human rights.<sup>31</sup>

26. The Court also finds it necessary to recall that, under international law, when a State is a party to an international treaty, such as the American Convention, this treaty is binding for all its

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<sup>27</sup> Cf. Advisory Opinion OC-1/82, para. 25, and Advisory Opinion OC-21/14, para. 29.

<sup>28</sup> Cf. Inter-American Commission on Human Rights, brief of June 17, 2016 (merits file, folio 20).

<sup>29</sup> Observation received on December 9, 2016 (file, folio 2036).

<sup>30</sup> Cf. Advisory Opinion OC-16/99, paras. 45 to 65, and Advisory Opinion OC-18/03, paras. 62 to 66.

<sup>31</sup> Cf. Advisory Opinion OC-21/14, para. 30, and Advisory Opinion OC-22/16, para. 24.

organs, including the Judiciary and the Legislature,<sup>32</sup> so that a violation by any of these organs gives rise to the international responsibility of the State.<sup>33</sup> Accordingly, the Court considers that the different organs of the State must carry out the corresponding conventionality control,<sup>34</sup> which must be based also on the considerations of the Court in the exercise of its non-contentious or advisory jurisdiction. Both, the non-contentious and the contentious jurisdiction undeniably share the same goal of the Inter-American human rights system, which is “the protection of the fundamental rights of the human being.”<sup>35</sup>

27. Furthermore, the interpretation given to a provision of the Convention<sup>36</sup> through an advisory opinion provides to all the organs of the OAS Member States, including those that are not parties to the Convention but that have undertaken to respect human rights under the Charter of the OAS (Article 3(I)) and the Inter-American Democratic Charter (Articles 3, 7, 8 and 9) with a source that, by its very nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights. In particular, it can provide guidance when deciding matters relating to the respect and guarantee of human rights in the context of the protection of LGBTI persons, to avoid possible human rights violations.<sup>37</sup>

28. Given the broad scope of the Court’s advisory function, which, as previously indicated, encompasses not only the States Parties to the American Convention, everything indicated in this Advisory Opinion also has legal relevance for all OAS Member States,<sup>38</sup> as well as for the organs of the OAS whose sphere of competence relates to the matter that is the subject of this request.

29. In short, the Court considers that it has jurisdiction to rule on the questions raised by Costa Rica and does not find in this request any reasons to abstain from doing so; it therefore admits the request and proceeds to respond to it.

## IV GENERAL CONSIDERATIONS

### A. Glossary

30. As already mentioned, the request for an advisory opinion presented by the State of Costa Rica required the Court to answer five questions on two issues related to the rights of LGBTI

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<sup>32</sup> Cf. *Case of Fontevecchia and D`Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238, para. 93; *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations.* Judgment of May 14, 2013. Series C No. 260, para. 221, and Advisory Opinion OC-21/14, para. 31.

<sup>33</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 164; *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. 197, and Advisory Opinion OC-21/14, para. 31.

<sup>34</sup> Cf. *Case of Almonacid Arellano et al. v. Chile*, para. 124, and *Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of January 30, 2014. Series C No. 276, para. 124, and OC-21/14, para. 31.

<sup>35</sup> *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights.* Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29, and Advisory Opinion OC-21/14, para. 31.

<sup>36</sup> Cf. *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, para. 79; *Case of Gelman v. Uruguay. Monitoring compliance with judgment.* Order of the Inter-American Court of Human Rights of March 20, 2013, *consideranda* 65 to 90, and Advisory Opinion OC-21/14, para. 31.

<sup>37</sup> Cf. Advisory Opinion OC-21/14, para. 31.

<sup>38</sup> Cf. Advisory Opinion OC-18/03, para. 65; OC-21/14, para. 32, and OC-22/16, para. 25.

persons. The first issue refers to recognition of the right to gender identity and, in particular, the procedure to process name change requests based on gender identity; the second refers to the patrimonial rights of same-sex couples.

31. The Court must approach these issues bearing in mind that they usually involve concepts and definitions on which no agreement has been reached by national and international agencies, or by organizations and groups that defend the respective rights, or in academic circles in which they are discussed. In addition, these definitions respond to a conceptual dynamic that is constantly changing and being revised. Furthermore, adopting definitions in this matter is highly sensitive because it is easy to stereotype or classify individuals, and this must be carefully avoided. Consequently, in this opinion, the Court will try to avoid, insofar as possible, the use of these conceptually problematic definitions and, when it must do so, it will do this with the greatest breadth and provisionality, without adopting or defending any conceptual or, especially, inflexible position.

32. Merely for illustrative purposes, and even to demonstrate this difficulty, the Court notes that the following concepts taken from different international sources appear to be the most up-to-date ones at the international level – and again insists that it does not adopt them as its own in this opinion:

**a) Sex:** Strictly speaking, the word sex refers to biological differences between men and women, their physiological characteristics, the sum of biological characteristics that define the spectrum of humans as females and males, or a biological construct referring to the genetic, hormonal, anatomical and physiological characteristics based on which an individual is classified at birth as either male or female.<sup>39</sup> Given that this word only establishes a subdivision between men and women, it does not recognize the existence of other categories that do not fit within the female/male binary system.

**b) Sex assigned at birth:** This idea transcends the concept of sex as male or female and is associated with the determination of sex as a social construct. Sex assignment is not an innate biological fact; rather, sex is assigned at birth based on the perception others have of the genitalia. Most individuals are easily classified, but some do not fit within the female/male binary system.<sup>40</sup>

**c) Gender/sex binary system:** Social and cultural model dominant in western culture which “considers gender and sex as consisting of two, and only two, rigid categories, namely male/man and female/woman. Such a system or model excludes those who do not fit within the two categories (such as transsexual or intersex persons).<sup>41</sup>

**d) Intersexuality:** All those situations in which an individual’s sexual anatomy does not physically conform to the culturally defined standard for the female or male body.<sup>42</sup>

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<sup>39</sup> Cf. OAS, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF.166/12, April 23, 2012, para. 13.

<sup>40</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 16, and Inter-American Commission on Human Rights, *Rapporteurship on the Rights of LGBTI Persons. Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>.

<sup>41</sup> Cf. Inter-American Commission on Human Rights, *Rapporteurship on the Rights of LGBTI Persons. Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>

<sup>42</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 17, and Inter-American Commission on Human Rights, *Rapporteurship on the Rights of LGBTI Persons. Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>

Intersexual people are born with sexual anatomy, reproductive organs, or chromosomal patterns that do not fit the typical definitions of male or female. These characteristics may be apparent at birth or emerge later in life. Intersex people may identify as a man or a woman or as neither of these categories. Intersexuality is not related to sexual orientation or gender identity: intersex people experience the same range of sexual orientations and gender identities as those who are not intersex.<sup>43</sup>

**e) Gender:** This refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences.<sup>44</sup>

**f) Gender identity:** Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth,<sup>45</sup> including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function through medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>46</sup> Gender identity is a broad concept that creates space for self-identification, and reflects a deeply felt and experienced sense of one's own gender.<sup>47</sup> Thus, gender identity and its expression also take

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<sup>43</sup> Cf. United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18, and OAS, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12, April 23, 2012, para. 13.

<sup>44</sup> Cf. United Nations, Committee on the Elimination of Discrimination against Women – CEDAW, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, 16 December 2010, para. 5, and OAS, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12, April 23, 2012, para. 14.

<sup>45</sup> Cf. Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>; UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, 23 October 2012, para. 8; UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, and *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, Yogyakarta Principles, March 2007. The Yogyakarta Principles are contained in a document drawn up by various experts, academics and activists in the area of international human rights law at the request of the United Nations High Commissioner for Human Rights. The document proposed a series of principles concerning sexual orientation and gender identity with the aim of providing guidance for the interpretation and application of international human rights law to protect LGBTI people. The final document was published in March 2007. Subsequently, on November 10, 2017, the Yogyakarta Principles "+10" were adopted as a supplement to the 2007 principles. This Court has used these principles in its case law (*Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 110).

<sup>46</sup> Cf. UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, 23 October 2012, para. 8; OAS, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12, April 23, 2012, and *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, Yogyakarta Principles, March 2007.

<sup>47</sup> Cf. UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, 23 October 2012, and United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18.



many forms; some people do not identify themselves as either male or female or identify themselves as both.<sup>48</sup>

**g) Gender expression:** is understood to be the outward manifestation of a person's gender, by physical aspects, which may include dress, hair style, or the use of cosmetics, or by mannerisms, speech, personal behavior or social interaction, and names or personal references. A person's gender expression may or may not correspond to his or her self-perceived gender identity.<sup>49</sup>

**h) Transgender or trans:** when the gender identity of the person does not correspond with the sex assigned at birth.<sup>50</sup> The gender identity of a trans person is not determined by surgical interventions or medical treatments.<sup>51</sup> The word *trans* is an umbrella term used to describe people with a wide range of gender identities, and the common denominator is that their sense of their own gender is different to the sex that they were assigned at birth and the gender identity that has traditionally been assigned to them. A transgender or trans person may identify her or himself as a man, woman, trans man, trans woman or non-binary person, or in other terms such as hijra, third gender, two-spirit, transvestite, fa'afafine, queer, transpinoy, muxhe, waria and meti. The concept of gender identity differs from that of sexual orientation.<sup>52</sup>

**i) Transsexual person:** Transsexual persons feel and perceive themselves as belonging to a gender that is not the one socially or culturally associated with their biological sex and who opt to have medical treatment – hormonal, surgical or both – to adapt their physical-biological appearance to their mental, spiritual and social sense of self.<sup>53</sup>

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<sup>48</sup> Cf. UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, 23 October 2012, para. 8. Also, United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, para. 10.

<sup>49</sup> Cf. *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, Yogyakarta Principles +10, of November 10, 2017, and Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 22.

<sup>50</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 21; Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGBTI Persons. Basic concepts. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>, United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18, and Council of Europe, *Case of law of the European Court of Human Rights relating to discrimination on grounds of sexual orientation or gender identity*, Strasbourg, March 2015.

<sup>51</sup> Cf. Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGBTI Persons. Basic concepts. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>, and United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18.

<sup>52</sup> Cf. United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18.

<sup>53</sup> Cf. OAS, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12. April 23, 2012, para. 19.

**j) Transvestite:** In general, it could be said that transvestites are persons who express their gender identity – either on a permanent or temporary basis – by wearing articles of clothing and adopting the deportment and mannerisms of the gender opposite to the one socially and culturally associated with their biological sex. This may or may not include body modifications.<sup>54</sup>

**k) Cisgender person:** When the gender identity of the person corresponds with the sex assigned at birth.<sup>55</sup>

**l) Sexual orientation:** refers to the emotional, affectional and sexual attraction to, individuals of a different gender or the same gender, or more than one gender,<sup>56</sup> as well as intimate and sexual relations with such individuals.<sup>57</sup> Sexual orientation is a broad concept which creates space for self-identification. In addition, sexual orientation can range along a continuum, including exclusive and non-exclusive attraction to the same or the opposite sex.<sup>58</sup> Everyone has a sexual orientation which is inherent to the identity of the individual.<sup>59</sup>

**m) Homosexuality:** refers to the emotional, affectional and sexual attraction to a person of the same gender, and to the capacity to maintain intimate and sexual relations with that other person. The terms gay and lesbian are related to this definition.<sup>60</sup>

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<sup>54</sup> Cf. OAS, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12. April 23, 2012, para. 19.

<sup>55</sup> Cf. Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGBTI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>

<sup>56</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 19; and Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGBTI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>; *Mutatis mutandis* Yogyakarta Principles. Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2007; UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, and *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, 23 October 2012.

<sup>57</sup> Cf. Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, March 2007; UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, and *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, 23 October 2012. Also, United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, para. 10.

<sup>58</sup> Cf. UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, October 23, 2012.

<sup>59</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 19, and United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18.

<sup>60</sup> Cf. OAS, Permanent Council of the Organization of American States. *Committee on Juridical and Political Affairs. Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12. April 23, 2012, para. 17, and United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and*

**n) Heterosexual person:** refers to women who feel emotionally, sexually and romantically attracted to men; or men who feel emotionally, sexually and romantically attracted to women.<sup>61</sup>

**o) Lesbian:** refers to women who feel emotionally, sexually and romantically attracted to other women on a long-term basis.<sup>62</sup>

**p) Gay:** This term is often used to describe men who feel emotionally, sexually and romantically attracted to other men,<sup>63</sup> although the term may be used to describe both gay men and lesbian women.<sup>64</sup>

**q) Homophobia and transphobia:** Homophobia is an irrational fear of, hatred or aversion towards lesbian, gay or bisexual people; transphobia denotes an irrational fear, hatred or aversion towards transgender people. Because the term homophobia is widely understood, it is often used in an all-encompassing way to refer to fear, hatred and aversion towards LGBTI people in general.<sup>65</sup>

**r) Lesbophobia:** is an irrational fear of, hatred or aversion towards lesbians.<sup>66</sup>

**s) Bisexual:** Person who feels emotionally, sexually and romantically attracted to persons of the same or a different sex.<sup>67</sup> The term bisexual tends to be interpreted and applied

*discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18.

<sup>61</sup> Cf. UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015; OAS, Permanent Council of the Organization of American States. Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12, April 23, 2012, para. 17, and Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>

<sup>62</sup> Cf. OAS, Permanent Council of the Organization of American States. *Committee on Juridical and Political Affairs. Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12, April 23, 2012, para. 17; Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>; UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, and *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, October 23, 2012.

<sup>63</sup> Cf. OAS, Permanent Council of the Organization of American States. *Committee on Juridical and Political Affairs. Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12, April 23, 2012, para. 17, and Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>.

<sup>64</sup> Cf. UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015; *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, October 23, 2012, and OAS, Permanent Council of the Organization of American States and *Committee on Juridical and Political Affairs. Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12, April 23, 2012, para. 17.

<sup>65</sup> Cf. United Nations, *Fact Sheet. LGBT Rights: Frequently Asked Questions*. Available at: <https://www.unfe.org/wp-content/uploads/2017/05/LGBT-Rights-FAQs.pdf>.

<sup>66</sup> Cf. *Mutatis mutandis*, United Nations, *Fact Sheet. LGBT Rights: Frequently Asked Questions*. Available at: <https://www.unfe.org/wp-content/uploads/2017/05/LGBT-Rights-FAQs.pdf>.

inconsistently, often with too narrow of an understanding. Bisexuality does not have to involve attraction to both sexes at the same time, nor does it have to involve equal attraction to or number of relationships with both sexes. Bisexuality is a unique identity, which requires an examination in its own right.<sup>68</sup>

**t) Cisnormativity:** idea or expectation that all people are cisgender, and that those assigned male at birth always grow up to be men and those assigned female at birth always grow up to be women.<sup>69</sup>

**u) Heteronormativity:** refers to the cultural bias in favor of heterosexual relationships, under which such relationships are deemed normal, natural and ideal, and are preferred over same-gender or same-sex relationships. This concept is composed of legal, social and cultural rules that require individuals to act according to dominant and ruling heterosexual patterns.<sup>70</sup>

**v) LGBTI:** Lesbian, Gay, Bisexual, Trans or Transgender and Intersex. The acronym LGBTI describes a diverse group of people who do not conform to conventional or traditional notions of male and female gender roles.<sup>71</sup> Regarding this specific acronym, the Court recalls that the terminology relating to these human groups is not fixed and evolves rapidly, and that many other terms exist including asexual people, queers, transvestites and transsexuals, among others. In addition, in different cultures other terms may be used to describe people who form same-sex relationships and those who self-identify or exhibit non-binary gender identities (such as hijra, meti, lala, skesana, motsoalle, mithli, kuchu, kawein, travesty, muxé, fa'afafine, fakaleiti, hamjensgara and Two-Spirit).<sup>72</sup> Despite the foregoing, although the Court will not rule on which acronyms, terms and definitions represent the populations analyzed more fairly and exactly, solely for the effects of this opinion and as it

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<sup>67</sup> Cf. Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>; United Nations, *Fact Sheet. LGBT Rights: Frequently Asked Questions*. Available at: <https://www.unfe.org/wp-content/uploads/2017/05/LGBT-Rights-FAQs.pdf>; UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, and *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, October 23, 2012. <https://www.unfe.org/wp-content/uploads/2017/05/LGBT-Rights-FAQs.pdf>

<sup>68</sup> Cf. UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, October 23, 2012.

<sup>69</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 32, and Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>.

<sup>70</sup> Cf. Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>, and Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 31.

<sup>71</sup> Cf. UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015. UNHCR, *Need to Know Guidance: Working with Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Forced Displacement*, 2011, and Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 1.

<sup>72</sup> Cf. United Nations, *Fact Sheet. LGBT Rights: Frequently Asked Questions*. Available at: <https://www.unfe.org/wp-content/uploads/2017/05/LGBT-Rights-FAQs.pdf>.

has done in previous cases<sup>73</sup> and has been the practice of the OAS General Assembly,<sup>74</sup> it will use this acronym indistinctly, and without this meaning a lack of acknowledgment of other manifestations of gender expression, gender identity and sexual orientation.

## B. Regarding this request for an advisory opinion

33. This request for an advisory opinion presented by Costa Rica refers to the rights of LGBTI persons.<sup>75</sup> The Court considers it appropriate to refer briefly to the context of the rights of these minorities in order to provide a frame of reference as regards the importance of the issues dealt with in this Opinion for the effective protection of the rights of such persons who have historically been victims of structural discrimination, stigmatization, diverse types of violence, and violations of their fundamental rights.<sup>76</sup>

34. In this regard, the Court recalls, for example, that within the sphere of the United Nations, the Human Rights Council has expressed its “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.”<sup>77</sup> Also, in 2011, the United Nations High Commissioner for Human Rights (hereinafter “the High Commissioner” or “UNHCHR”) indicated that, “[i]n all regions, people experience violence and discrimination because of their sexual orientation or gender identity,” and that “even the perception of homosexuality or transgender identity puts people at risk.”<sup>78</sup>

35. Likewise, in several resolutions adopted since 2008, the OAS General Assembly has stated that LGBTI persons are subject to various forms of violence and discrimination based on the perception of their sexual orientation and gender identity or expression, and has resolved to condemn acts of violence, human rights violations and all forms of discrimination on the basis of sexual orientation and gender identity or expression.<sup>79</sup>

<sup>73</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, paras. 92 and 267; *Case of the Hacienda Brazil Verde Workers v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of October 20, 2016. Series C No. 318, para. 76, and *Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2016. Series C No. 315, para. 129.

<sup>74</sup> Cf. OAS, General Assembly resolutions: AG/RES. 2908 (XLVII-O/17), Promotion and protection of human rights, June 21, 2017; AG/RES. 2887 (XLVI-O/16), Promotion and protection of human rights, June 14, 2016; AG/RES. 2863 (XLIV-O/14), Human Rights, Sexual Orientation, and Gender Identity and Expression, June 5, 2014; AG/RES. 2807 (XLIIO-O/13) corr.1, Human Rights, Sexual Orientation, and Gender Identity and Expression, June 6, 2013; AG/RES. 2721 (XLIIO-O/12), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2012; AG/RES. 2653 (XLI-O/11), Human Rights, Sexual Orientation, and Gender Identity, June 7, 2011; AG/RES. 2600 (XL-O/10), Human Rights, Sexual Orientation, and Gender Identity, June 8, 2010; AG/RES. 2504 (XXXIX-O/09), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2009, and AG/RES. 2435 (XXXVIII-O/08), Human Rights, Sexual Orientation, and Gender Identity, June 3, 2008.

<sup>75</sup> Cf. Request for an advisory opinion presented by Costa Rica (file, folio 4).

<sup>76</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, paras. 92 and 267.

<sup>77</sup> United Nations, Human Rights Council. Resolution 17/19 of 14 July 2011, A/HRC/RES/17/19. See also Resolutions 32/2 of 15 July 2016, A/HRC/RES/32/2, and 27/32 of 2 October 2014, A/HRC/RES/27/32.

<sup>78</sup> United Nations, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 1. Similarly, see United Nations, Report of the Office of the United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 5, and Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, paras. 2, 14 and 15. See also WHO *Sexual Health, Human Rights and the Law*, Geneva, 2015, p. 23.

<sup>79</sup> Cf. OAS, General Assembly resolutions: AG/RES. 2908 (XLVII-O/17), Promotion and protection of human rights, June 21, 2017; AG/RES. 2887 (XLVI-O/16), Promotion and protection of human rights, June 14, 2016; AG/RES. 2863 (XLIV-O/14), Human Rights, Sexual Orientation, and Gender Identity and Expression, June 5, 2014; AG/RES. 2807 (XLIIO-O/13) corr.1, Human Rights, Sexual Orientation, and Gender Identity and Expression, June 6, 2013; AG/RES. 2721 (XLIIO-O/12), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2012.

36. The different forms of discrimination against LGBTI persons are evident and present themselves in numerous ways both in the public and private sphere.<sup>80</sup> In the Court's opinion, one of the most extreme forms of discrimination against LGBTI persons is that which occurs in violent situations. Thus, the mechanisms for the protection of human rights of the United Nations<sup>81</sup> and of the Inter-American system<sup>82</sup> have documented violent acts committed against LGBTI persons in all regions based on prejudices. The UNHCHR has noted that "such violence may be physical (including murder, beatings, kidnapping and sexual assault) or psychological (including threats, coercion and the arbitrary deprivation of liberty, which includes forced psychiatric incarceration)."<sup>83</sup> In addition, it indicated that such prejudice-based violence "is often particularly brutal"<sup>84</sup> and considered that it constituted "a form of gender-based violence, driven by a desire to punish individuals whose appearance or behaviour appears to challenge gender stereotypes."<sup>85</sup> In addition, "LGBTI youth and lesbian, bisexual and transgender women are at particular risk of physical, psychological and sexual violence in family and community settings."<sup>86</sup>

37. For example, the United Nations Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment or punishment has noted that "discrimination on grounds of sexual orientation or gender identity may often contribute to the dehumanization of the victim,

O/12), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2012; AG/RES. 2653 (XLI-O/11), Human Rights, Sexual Orientation, and Gender Identity, June 7, 2011; AG/RES. 2600 (XL-O/10), Human Rights, Sexual Orientation, and Gender Identity, June 8, 2010; AG/RES. 2504 (XXXIX-O/09), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2009, and AG/RES. 2435 (XXXVIII-O/08), Human Rights, Sexual Orientation, and Gender Identity, June 3, 2008.

<sup>80</sup> Cf. United Nations, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 1.

<sup>81</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 21. See also, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, A/HRC/19/41, para. 20.

<sup>82</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 24.

<sup>83</sup> United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 21.

<sup>84</sup> United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 23, and Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 22. Also, Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, paras. 107 to 109.

<sup>85</sup> United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 21. Also, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, paras. 20 and 21. Similarly, see Organization for Security and Cooperation in Europe – OSCE, *Hate Crimes in the OSCE Region – Incidents and Responses, Annual Report 2006*, OSCE/ODIHR, Warsaw, 2007, p. 53.

<sup>86</sup> Cf. United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 14. In addition, the Independent Expert noted that multiple, interrelated and aggravated forms of violence and discrimination against LGBTI persons had been identified, which "appear not as singular events but as part of a prolonged vicious circle. They are multiple and multiplied — inextricably linked emotionally, psychologically, physically and structurally." Added to this, they "intersect in a variety of ways, and most clearly where the victim is not only attacked or discriminated against for having a different sexual orientation and gender identity but also on grounds of race, ethnic origin, age, gender, or membership of a minority or indigenous community." United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 39.

which is often a necessary condition for torture and ill-treatment to take place.”<sup>87</sup> Similarly, the United Nations Committee against Torture has expressed its concern with regard to the physical and sexual abuse perpetrated by police and prison staff against LGBTI persons in some countries of the region.<sup>88</sup>

38. Both the United Nations system<sup>89</sup> and the Inter-American system<sup>90</sup> have asserted that the response to these violations is inadequate, because often these violations are not properly investigated and prosecuted and there is a lack of support mechanisms for the victims.<sup>91</sup> The UNHCHR has also noted that “[h]uman rights defenders combating these violations are frequently persecuted and face discriminatory restrictions on their activities.”<sup>92</sup>

39. In addition, LGBTI persons also suffer both official discrimination, “in the form of State laws and policies that criminalize homosexuality, bar them from certain forms of employment, or deny them access to benefits, and unofficial discrimination in the form of social stigma, exclusion, and bias including at work, at home, at school and in health care institutions.”<sup>93</sup> For example, several States in the region still criminalize private consensual sexual relations between adults of the same

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<sup>87</sup> United Nations, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 1 February 2013, A/HRC/22/53, para. 79. See also, Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, 3 July 2001, A/56/156, paras. 17 to 25.

<sup>88</sup> Cf. United Nations, Committee against Torture, Concluding observations with regard to Argentina, 24 May 2017, CAT/C/ARG/CO/5-6, para. 35; Colombia, 29 May 2015, CAT/C/COL/CO/5; Costa Rica, 7 July 2008, CAT/C/CRI/CO/2, para. 11; Ecuador, 8 February 2006, CAT/C/ECU/CO/3, para. 17; United States of America, 25 July 2006, CAT/C/USA/CO/2, para. 37, and 19 December 2014, CAT/C/USA/CO/3-5; Paraguay, 14 December 2011, CAT/C/PRY/CO/4-6, para. 19, and Peru, 21 January 2013, CAT/C/PER/CO/5-6, para. 22.

<sup>89</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 25, and Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 23.

<sup>90</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 476.

<sup>91</sup> Cf. United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 14, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 25. Also, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 23. See also Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, paras. 97 to 101, and 103. The extent of the daily violence tends to be masked because “official statistics tend to understate the number of incidents, and victims are often reluctant to report their experiences for fear of extortion, breach of confidentiality or reprisals. In addition, prejudicial and inexact categorization of cases results in misidentification, concealment and underreporting.” Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 25. Also, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 23. See also Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, paras. 97 to 101, and 103.

<sup>92</sup> United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 14.

<sup>93</sup> United Nations, Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal. Sexual Orientation and Gender Identity in International Human Rights Law*, 2012, HR/PUB/12/06, p. 39.

sex,<sup>94</sup> while this Court<sup>95</sup> and different organs involved in the protection of international human rights law have considered this to be contrary to international human rights law because it violates the right to equality and non-discrimination and the right to privacy.<sup>96</sup> Added to this, these kinds of laws have negative repercussions on the quality of health services, dissuading this population from using such services. It may also result in the denial of care or the inexistence of services that respond to the specific health needs of LGBTI and intersexual persons.<sup>97</sup> Furthermore, in jurisdictions in which their sexual conduct is criminalized, it is “much more likely that the preventive health measures that should be tailored to these communities are suppressed.” In the same way, “the fear of judgment and punishment can deter those engaging in consensual same-sex conduct from seeking access to health services.” “These problems are compounded for persons living with HIV/AIDS.”<sup>98</sup> The UNHCHR has found that, as a result of such laws, “victims may be reluctant to report violence perpetrated by a family member for fear of the criminal ramifications of revealing their sexual orientation.”<sup>99</sup>

<sup>94</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 61. The following laws are mentioned: “[Antigua and Barbuda] Sexual Offences Act of 1995 (Act No. 9), Section 12 (Buggery); [Barbados] Sexual Offences Act, Chapter 154, Article 9 (Buggery); [Belize] Criminal Code of Belize establishes in its Chapter 101, Section 53 (carnal intercourse against the order of nature) and Section 45 (aggravated indecent assault); [Dominica] Sexual Offences Act 1998, Section 15 (Buggery), article 16 (Attempted buggery); [Grenada] Criminal Code, article 431 (“unnatural connexion”); [Guyana] Criminal Law Act, Chapter 8:01, section 353 (Attempt to commit unnatural offences), Section 354 (buggery); [Jamaica] Offences against the Person Act, Section 76 (Unnatural Crime), Section 77 (attempt); [Saint Kitts and Nevis] Offences against the Person Act, Part XII, Section 56 (Unnatural offences and Sodomy); [Saint Lucia] Criminal Code, Sub-Part C, Subsection 133 (Buggery); [Saint Vincent and the Grenadines] Criminal Code, Section 146 (buggery); and [Trinidad and Tobago] Sexual Offences Act Chapter 11:28, Section 13 (buggery).” Likewise, United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 15. See also, United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 11.

<sup>95</sup> Cf. *Case of Flor Freire v. Ecuador*, para. 123.

<sup>96</sup> Cf. United Nations, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 41; Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 43; Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, paras. 52 to 54; Human Rights Committee. *Toonen v. Australia*. Communication No. 488/1992, 31 March 1994, CCPR/C/WG/44/D/488/1992, paras. 8(1) to 9; Committee on Economic, Social and Cultural Rights: Concluding observations on the second periodic report of Sudan, E/C.12/SDN/CO/2, 9 October 2015, para. 19; Concluding observations on the third periodic report of Tunisia, E/C.12/TUN/CO/3, 14 November 2016, paras. 24 and 25; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, paras. 2, 6 and 7; ECHR. *Case of Dudgeon v. The United Kingdom*. No. 7525/76, 22 October 1981, paras. 61 and 63; *Case of Norris v. Ireland*. No. 10581/83, 26 October 1988, paras. 46 and 47; *Case of Modinos v. Cyprus*. No. 15070/89, 22 April 1993, paras. 24 and 25; *Case of A.D.T. v. The United Kingdom*. No. 35765/97, 31 July 2000, and *Case of H.Ç. v. Turkey*. No. 6428/12, 31 July 2000, and Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 60.

<sup>97</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 50. Similarly, United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, paras. 9 and 21.

<sup>98</sup> Cf. United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, paras. 18 and 19, and Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 50.

<sup>99</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 66.



40. In the private sphere, such persons typically suffer “discrimination in the form of social stigma, exclusion and bias, including at work, at home, at school and in health care institutions.”<sup>100</sup> Generally, stigmatization occurs “under the umbrella of culture, religion and tradition.”<sup>101</sup> Nevertheless, the interpretations on which such practices are based are “not immutable and homogenous”<sup>102</sup> and, in the Court’s opinion, it is the obligation of States to eradicate them encouraging empathy for sexual orientation and gender identity as an inherent aspect of everyone, which “invites reappraisal of both educational content and textbooks, and the building of pedagogical tools and methodology, to promote an open mindset and respect for human biodiversity.”<sup>103</sup>

41. The Court also notes that “discrimination against LGBTI individuals is often exacerbated by other identity factors such as sex, ethnicity, age and religion, and socio-economic factors such as poverty and armed conflict.”<sup>104</sup> “The impact of such multiple forms of discrimination may be felt at an individual level and a societal one, as LGBTI persons, deprived of access to such basic rights as employment, health, education and housing find themselves in poverty, cut off from economic opportunity.”<sup>105</sup> Thus, as the UNHCR has noted, “rates of poverty, homelessness and food insecurity are higher among LGBT[I] individuals than in the wider community.”<sup>106</sup>

42. In this regard, the UNHCHR has indicated that transgender persons “face multiple challenges in the exercise of their rights, including in employment and housing, in contracting obligations, enjoying State benefits, or when travelling abroad,” as a result of the lack of legal recognition of their self-perceived gender.<sup>107</sup>

43. Moreover, in the exercise of its contentious jurisdiction, the Court has observed the consequences of the failure of official recognition of relationships between persons of the same sex.<sup>108</sup> The UNHCHR has indicated that this lack of official recognition also results in “same-sex

and Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 76, 78 and 79.

<sup>100</sup> Cf. United Nations, Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal. Sexual Orientation and Gender Identity in International Human Rights Law*, 2012, HR/PUB/12/06, p. 39.

<sup>101</sup> United Nations, Report of the Special Rapporteur on the human right to safe drinking water and sanitation, 2 July 2012, A/HRC/21/42, para. 65.

<sup>102</sup> United Nations, Report of the Special Rapporteur on violence against women, its causes and consequences, 20 January 2006, E/CN.4/2006/61, para. 85.

<sup>103</sup> United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 61, and Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 262.

<sup>104</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 42.

<sup>105</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 42. Also, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, para. 6.

<sup>106</sup> United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 42.

<sup>107</sup> Cf. United Nations, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 69.

<sup>108</sup> Cf. *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2016. Series C No. 310.

partners being treated unfairly by private actors, including health-care providers and insurance companies.”<sup>109</sup>

44. Nevertheless, the Court is aware that the regional situation of LGBTI persons “is not homogeneous, but heterogeneous”;<sup>110</sup> accordingly, it is not necessarily the same in all the countries of the region. The degree of recognition and access to fundamental rights of such persons varies depending on the State in question.

45. Bearing this mind, the Court finds it evident that LGBTI persons face different forms of violence and discrimination, although consensus exists among several countries in the region that measures must be taken to combat this scourge.<sup>111</sup> Indeed this consensus is so that, in the context of the United Nations’ Universal Periodic Review, most of the OAS Member States have voluntarily accepted recommendations to confront violence and discrimination based on sexual orientation and gender identity.<sup>112</sup>

46. In this regard, the Court notes that, at the domestic level, some States of the region have begun to implement actions to recognize the situation of violence and discrimination against LGBTI persons and have implemented public policies or enacted laws that seek to prevent, respond to or eradicate the violations of which they are victims. For example, in 2010, the State of Brazil created a National Anti-discrimination Council attached to the Human Rights Secretariat, the purpose of which is to draw up and propose “guidelines for government action in the domestic sphere to combat discrimination and promote and defend the rights of Lesbian, Gay, Bisexual, Tranvestite and Transsexual persons.”<sup>113</sup> Similarly, since 2005, Argentina has a National Anti-discrimination Plan with a component relating to LGBTI persons.<sup>114</sup> Colombia has a Directorate for Indigenous,

<sup>109</sup> United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 68.

<sup>110</sup> United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 61, para. 18.

<sup>111</sup> Cf. OAS, General Assembly resolutions: AG/RES. 2908 (XLVII-O/17), Promotion and protection of human rights, June 21, 2017; AG/RES. 2887 (XLVI-O/16), Promotion and protection of human rights, June 14, 2016; AG/RES. 2863 (XLIV-O/14), Human Rights, Sexual Orientation, and Gender Identity and Expression, June 5, 2014; AG/RES. 2807 (XLIII-O/13) corr.1, Human Rights, Sexual Orientation, and Gender Identity and Expression, June 6, 2013; AG/RES. 2721 (XLII-O/12), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2012; AG/RES. 2653 (XLI-O/11), Human Rights, Sexual Orientation, and Gender Identity, June 7, 2011; AG/RES. 2600 (XL-O/10), Human Rights, Sexual Orientation, and Gender Identity, June 8, 2010; AG/RES. 2504 (XXXIX-O/09), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2009, and AG/RES. 2435 (XXXVIII-O/08), Human Rights, Sexual Orientation, and Gender Identity, June 3, 2008.

<sup>112</sup> Cf. United Nations, Human Rights Council, Antigua and Barbuda: 23 June 2016, A/HRC/33/13, para. 76.13; Barbados: 12 March 2013, A/HRC/23/11, paras. 102.38, 102.45 and 102.56, and 5 June 2013, A/HRC/23/11/Add.1, paras. 11 and 13; Bolivia: 17 December 2014, A/HRC/28/7, para. 114.9; Brazil: 9 July 2012, A/HRC/21/11, paras. 119.94 and 119.97, and 13 September 2012, A/HRC/21/11/Add.1, para. 19; Canada: 5 October 2009, A/HRC/11/17, para. 86.29, and 8 June 2009, A/HRC/11/17/Add.1, para. 36; Chile: 2 April 2014, A/HRC/26/5, paras. 121.70, 121.71, and 121.73, and 5 March 2014, A/HRC/26/5/Add.1, para. 4; Colombia: 4 July 2013, A/HRC/24/6, para. 116.43, and 19 July 2013, A/HRC/24/6/Add.1; Costa Rica: 7 July 2014, A/HRC/27/12, paras. 128.69-71, and 22 September 2014 A/HRC/27/12/Add.1; Cuba: 8 July 2013, A/HRC/24/16, para. 170.131-133, and 19 September 2013, A/HRC/24/16/Add.1, para. 6; Ecuador: 10 July 2017, A/HRC/36/4, paras. 118.17-23; El Salvador: 17 December 2014, A/HRC/28/5, paras. 103.9, 104.19 and 105.32-35, and 18 March 2015, A/HRC/28/5/Add.1, para. 13; United States of America: 20 July 2015, A/HRC/30/12, paras. 176.162-164, and 14 September 2015, A/HRC/30/12/Add.1, paras. 5 and 6; Guatemala: 31 December 2012, A/HRC/22/8, para. 99.27; Guyana: 13 April 2015, A/HRC/29/16, paras. 130.25-27; Haiti: 20 December 2016, A/HRC/34/14, para. 115.71; Honduras: 15 July 2015, A/HRC/30/11, paras. 124.10-11 124.18 and 124.20; Jamaica: 20 July 2015, A/HRC/30/15, paras. 119.20-21; Mexico: 11 December 2013, A/HRC/25/7, para. 148.39, and 14 March 2014, A/HRC/25/7/Add.1, para. 20; Nicaragua: 1 July 2014, A/HRC/27/16, paras. 114.34 and 116.4, 18 September 2014, and A/HRC/27/16/Add.1, para. 12, and Panama: 8 July 2015, A/HRC/30/7, paras. 90.38 to 44.

<sup>113</sup> Brazil. Office of the President of the Republic of Brazil. Decree No. 7,388, of December 9, 2010, article 1.

<sup>114</sup> Cf. Argentina. Annex “*Hacia un Plan Nacional contra la Discriminación - la Discriminación en Argentina. Diagnóstico y propuestas*” to Decree 1086/2005 of September 27, 2005. “*Plan Nacional Contra la Discriminación*”, pp. 160 to 171.

Rom and Minority Affairs with the mandate, *inter alia*, of designing “programs to provide technical and social assistance and support for policies for the indigenous and rom communities and the lesbian, gay, transsexual and bisexual [LGBTI] population.”<sup>115</sup> In the case of Costa Rica, the Executive branch’s “Policy to eradicate discrimination against the LGBTI population from its institutions”<sup>116</sup> was adopted in 2015. In it, the Government recognized “that discrimination towards persons of diverse sexual orientations still exists in Costa Rica and within its public institutions, whereby practices contrary to their human rights persist towards those who work in the public sector and also those who are users of the services of the public institutions.” In Chile, Statute No. 20,609 was enacted in 2012 establishing measures against discrimination based on sexual orientation and gender identity, among other protected categories.<sup>117</sup>

47. In addition to the above, it should be pointed out that, owing to the acts of violence described above, the violation of the right to equality and non-discrimination of LGBTI persons (Articles 1(1) and 24 of the American Convention, see *supra* para. 34 and *infra* paras. 98 and 134) results in the concurrent violation of other rights and provisions of the Convention, such as, and above all, the right to life and to physical integrity. This occurs because discriminatory speech and the resulting attitudes, which are based on stereotypes of heteronormativity and cisnormativity with different degrees of radicalization, lead to the homophobia, lesbophobia and transphobia that encourage such hate crimes.

48. The discrimination suffered by LGBTI persons is also extremely harmful to the right to mental integrity of such persons (Article 5(1) of the Convention), owing to the characteristics of discrimination based on sexual orientation. In many cases, this happens when a person is at a difficult stage of their psychological evolution, such as during puberty, when he or she has already internalized prejudicial disparagement, even coming from within the family circle.<sup>118</sup> This does not occur in other forms of discrimination where the person has been aware of the reason for the discrimination since infancy and is supported by the family unit which may also be subject to such discrimination. The contradiction in values which the adolescent is immersed in during the development of his or her personality is particularly harmful to his or her mental integrity, which also affects his or her identity and life project, and sometimes leads not only to self-harming conducts, but also to adolescent suicides.<sup>119</sup>

49. Thus, discrimination against this human group not only harms the right to individual health (Article 5(1)), but also to public health (Article 26 of the Convention and Article 10(1) of the Protocol of San Salvador), which is the sum of the health of the inhabitants. According to the World Health Organization (hereinafter “WHO”), the classic concept of health is a state of complete physical, mental and social well-being and not merely the absence of diseases or illnesses.<sup>120</sup> Those

<sup>115</sup> Colombia. Office of the President of the Republic of Colombia. Decree 4530, Article 13.9, published in Official Gazette No. 47,187 of November 28, 2008.

<sup>116</sup> Costa Rica. Office of the President of the Republic of Costa Rica. “*Política del Poder Ejecutivo para erradicar de sus instituciones la discriminación hacia la población LGBTI*,” May 12, 2015.

<sup>117</sup> Cf. Chile. National Congress of Chile. Act No. 20,609 of June 28, 2012.

<sup>118</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, paras. 22 and 66.

<sup>119</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 324, and United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 55. Also, UNICEF, *Position Paper No. 9: Eliminating discrimination against children and parents based on sexual orientation and/or gender identity*, November 2014, p. 3.

<sup>120</sup> Cf. WHO. Constitution of the World Health Organization, adopted by the International Health Conference held in New York from June 19 to July 22, 1946. Preamble.

discriminated against based on their sexual orientation – since this is part of their identity and, consequently, of their mental integrity – may be prone to psychological problems resulting from a specific situation or event; in other words, their individual health is affected as a whole even if the discrimination only occurs in certain situations.

50. As well it has been shown, at least based on pioneering North American research of the 1950s, that the sexual conduct of a very significant percentage of the population does not respond to the heteronormative or cisnormative stereotype. Therefore, owing to the discrimination suffered by LGBTI persons, who constitute a considerable percentage of the population, their interactions with the rest of the population tend to happen under conditions of more or less pronounced situational neurosis. This consequently also creates problems for those with whom LGBTI persons interact. As such, social relations in general tend to become unbalanced.

51. Consequently, the better the health (psychological well-being) of the members of a population, the better will be the public health of such society. Conversely, the more people with a deteriorated psychological well-being exist within a population, the more the general level of psychological well-being of the population (public health) will be affected. This is so not only because of those who suffer from poor psychological well-being, but also, because those individuals interact with other members in society who find themselves affected too.

### **C. Regarding the structure of this advisory opinion**

52. The Court recalls that it is inherent to its attributes the authority to structure its rulings as it considers most appropriate in the interests of law and for the purpose of an advisory opinion.

53. Bearing this in mind, in order to respond satisfactorily to the questions raised by the State of Costa Rica, the Court has decided to organize this opinion as follows: (1) Chapter V will refer specifically to the criteria used in this Opinion to interpret the provisions of the Convention; (2) Chapter VI will contain general consideration on the right to equality and non-discrimination and, in particular, will analyze this principle in relation to gender identity, gender expression and sexual orientation; (3) Chapter VII will deal with the issues raised in the first three questions posed by the State; that is, those related to the right to gender identity and the name change procedure, and (4) Chapter VIII will cover the last two questions, which relate to the rights derived from a relationship between same-sex couples.

## **V INTERPRETATION CRITERIA**

54. The contentious jurisdiction of the Inter-American Court consists essentially in the interpretation and application of the American Convention<sup>121</sup> or other treaties over which it has jurisdiction,<sup>122</sup> to determine the international responsibility of the State under international law,

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<sup>121</sup> Article 62 of the American Convention: 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention. [...] 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

<sup>122</sup> Cf. *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, paras. 45 to 58 and 77.

pursuant to international customary and treaty-based law.<sup>123</sup> However, the Court recalls, as it has on other occasions,<sup>124</sup> that the task of interpretation which it must perform in the exercise of its advisory function differs from its contentious jurisdiction in that there are no “parties” involved in the advisory procedure and there is no litigation to be decided. The main purpose of the advisory function is to obtain a judicial interpretation of one or several provisions of the Convention or of other treaties concerning the protection of human rights in the States of the Americas.<sup>125</sup>

55. To issue its opinion on the interpretation of the legal provisions cited in the request, the Court will resort to the Vienna Convention on the Law of Treaties, which contains the general and customary rules for the interpretation of international treaties.<sup>126</sup> This involves the simultaneous and joint application of the criteria of good faith, the analysis of the ordinary meaning to be given to the terms of the treaty in question in their context and in light of the given treaty’s object and purpose. Accordingly, the Court will use the methods set out in Articles 31<sup>127</sup> and 32<sup>128</sup> of the Vienna Convention to make this interpretation.

56. Based on the foregoing, the Court has asserted that, in the case of the American Convention, the object and purpose of the treaty is “the protection of the fundamental rights of the human being.”<sup>129</sup> To this end the Convention was designed to protect the human rights of individuals, regardless of their nationality, against their own State or any other.<sup>130</sup> In this regard, it is essential to recall the specificity of human rights treaties, which create a legal system under which States assume obligations towards the persons subject to their jurisdiction<sup>131</sup> and where a complaint for the violation of such obligations may be filed by the victims of these violations and by

<sup>123</sup> Cf. United Nations, Resolution 56/83 of the General Assembly, *Responsibility of States for internationally wrongful acts*, 28 January 2002, A/RES/56/83, article 3 (Characterization of an act of a State as internationally wrongful): “[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”

<sup>124</sup> Cf. Advisory Opinion OC-15/97, paras. 25 and 26, and Advisory Opinion OC-22/16, para. 26.

<sup>125</sup> Cf. *Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)*. Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 22, and OC-22/16, para. 26.

<sup>126</sup> Cf. Advisory Opinion OC-21/14, para. 52, and Advisory Opinion OC-22/16, para. 35. See also, International Court of Justice, *Case concerning the sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment of 17 December 2002, para. 37, and International Court of Justice, *Avena and Other Mexican Nationals (Mexico v. the United States of America)*, Judgment of 31 March 2004, para. 83.

<sup>127</sup> Cf. Vienna Convention on the Law of Treaties, U.N. Doc A/CONF.39/27 (1969), U.N.T.S. vol. 1155, p. 331, signed at Vienna on May 23, 1969, Article 31 (General rule of interpretation): “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.”

<sup>128</sup> Article 32 of the Vienna Convention on the Law of Treaties: (Supplementary means of interpretation): “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

<sup>129</sup> *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*. Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29, and Advisory Opinion OC-21/14, para. 54.

<sup>130</sup> Cf. Advisory Opinion OC-2/82, para. 33, and Advisory Opinion OC-21/14, para. 54.

<sup>131</sup> Cf. Advisory Opinion OC-2/82, para. 29, and Advisory Opinion OC-21/14, para. 54.

the community of States Parties to the Convention through the direct action of the Commission<sup>132</sup> and even by lodging a petition before the Court.<sup>133</sup> In this sense, the interpretation of the provisions must be based on the values that the Inter-American system seeks to safeguard, from the “best perspective” for the protection of the individual.<sup>134</sup>

57. Hence, the American Convention expressly contains specific interpretation standards in its Article 29,<sup>135</sup> including the *pro persona* principle, which means that “no provision of the Convention shall be interpreted as: [...] restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party,” or “excluding or limiting the effects that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”

58. In addition, the Court has repeatedly indicated that human rights treaties are living instruments, the interpretation of which must evolve with time and with the conditions of contemporary life.<sup>136</sup> This evolutive interpretation is consequent with the general rules of interpretation set out in Article 29 of the American Convention, as well as with those established by the Vienna Convention on the Law of Treaties.<sup>137</sup>

59. Furthermore, it is necessary to consider that the purpose of this advisory opinion is to interpret the right to equality and non-discrimination of LGBTI persons in relation to the obligation to respect and guarantee the human rights established in the American Convention. According to the systematic interpretation contained in the Vienna Convention on the Law of Treaties, “the provisions must be interpreted as part of a whole, the significance and scope of which must be established based on the legal system to which it belongs.”<sup>138</sup> The Court finds that, in application of these rules, it must take into consideration international legal standards regarding LGBTI persons when identifying the content and scope of the obligations assumed by States under the American Convention, and especially when indicating the measures that States must take. Owing to the subject matter submitted in the request, as additional sources of international law, the Court will take into consideration other relevant conventions to which the States of the Americas are a party to in order to make a harmonious interpretation of their international obligations in the terms of the provision cited. Moreover, the Court will consider the applicable obligations, and the case law and

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<sup>132</sup> Cf. Articles 43 and 44 of the American Convention.

<sup>133</sup> Cf. Article 61 of the American Convention.

<sup>134</sup> Cf. *Case of González et al. (“Cotton Field”) v. Mexico*, para. 33.

<sup>135</sup> Article 29 of the American Convention: “Restrictions regarding Interpretation: No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”

<sup>136</sup> Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 193; *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114; *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2012. Series C No. 257, para. 245, and *Case of the Hacienda Brazil Verde Workers v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of October 20, 2016. Series C No. 318, para. 245.

<sup>137</sup> Cf. Advisory Opinion OC-16/99, para. 114, and *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*, para. 245.

<sup>138</sup> *Case of González et al. (“Cotton Field”) v. Mexico*, para. 43, and *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*, para. 191.

decisions in this matter, as well as the relevant decisions, rulings and declarations adopted at the international level.

60. All in all, when answering the present request, the Court acts as a human rights court, guided by the norms that regulate its advisory jurisdiction, and proceeds to make a strictly legal analysis of the questions raised, pursuant to international human rights law, taking into account the relevant sources of international law.<sup>139</sup> In this regard, it should be clarified that the *corpus juris* of international human rights law consists of a series of rules expressly established in international treaties or to be found in international customary law as evidence of a practice generally accepted as law, as well as of the general principles of law and of a series of rules of a general nature or otherwise called *soft law*; the latter providing guidance on the interpretation of the former, because they give greater precision to the minimum content established in the treaties.<sup>140</sup> In addition, the Court will base its opinion on its own jurisprudence.

## VI

### THE RIGHT TO EQUALITY AND NON-DISCRIMINATION OF LGBTI PERSONS

#### A. The right to equality and non-discrimination

61. The Court has asserted that the notion of equality emanates directly from the oneness of the nature of humankind and is indissociable of the essential dignity of the individual. Thus, any situation is incompatible with this that, considering a specific group to be superior, gives it privileged treatment or, inversely, considering it inferior, treats it with hostility or otherwise subjects it to discrimination in the enjoyment of rights that are accorded to others not so classified.<sup>141</sup> States must refrain from taking actions that are directly or indirectly aimed at creating situations of *de jure* or *de facto* discrimination.<sup>142</sup> The Court's jurisprudence has also indicated that at the current stage of evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of *ius cogens*. The whole legal structure of national and international public order rests on this premise and it permeates every legal system.<sup>143</sup>

62. The American Convention, like the International Covenant on Civil and Political Rights, does not contain an explicit definition of the concept of "discrimination." Based on the definitions of discrimination established in Article 2 of the Inter-American Convention on Protecting the Human

<sup>139</sup> Cf. *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights)*. Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 60, and Advisory Opinion OC-22/16, para. 29.

<sup>140</sup> Cf. Advisory Opinion OC-14/94, para. 60, and Advisory Opinion OC-22/16, para. 29.

<sup>141</sup> Cf. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 55; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 79; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 91, and *Case of Flor Freire v. Ecuador*, para. 109.

<sup>142</sup> Cf. Advisory Opinion OC-18/03, para. 103, and *Case of Flor Freire v. Ecuador*, para. 110.

<sup>143</sup> Cf. Advisory Opinion OC-18/03, para. 101; *Case of Espinoza González v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2014. Series C No. 289, para. 216; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 79; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 91; *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 238, and *Case of Flor Freire v. Ecuador*, para. 109.

Rights of Older Persons,<sup>144</sup> Article 1(2)(a) of the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities,<sup>145</sup> Article 1(1) of the Inter-American Convention against all Forms of Discrimination and Intolerance<sup>146</sup>, Article 1(1) of the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance,<sup>147</sup> Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women,<sup>148</sup> and Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>149</sup> and also by the United Nations Human Rights Committee, discrimination may be defined as “any distinction, exclusion, restriction or preference based on specific reasons, such as race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of the human rights and fundamental freedoms of all persons.”<sup>150</sup>

63. In this regard, the Court has established that Article 1(1) of the Convention is a general obligation, the content of which extends to all the provisions of this treaty and establishes the obligation of States Parties to respect and ensure the free and full exercise of the rights and freedoms recognized therein “without any discrimination.” In other words, whatever the origin or form it takes, any treatment that may be considered discriminatory with regard to the exercise of any of the rights guaranteed in the Convention is, *per se*, incompatible with this general obligation.<sup>151</sup> If a State fails to comply with the general obligation to respect and guarantee human

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<sup>144</sup> Article 2 indicates that discrimination consists in: “[a]ny distinction, exclusion, or restriction with the purpose or effect of hindering, annulling, or restricting the recognition, enjoyment, or exercise, on an equal basis, of human rights and fundamental freedoms in the political, cultural, economic, social, or any other sphere of public and private life.”

<sup>145</sup> Article 1(2)(a) stipulates that: “[t]he term “discrimination against persons with disabilities” means any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.”

<sup>146</sup> Article 1(1) indicates that “[d]iscrimination shall mean any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties. Discrimination may be based on nationality; age; sex; sexual orientation; gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; socioeconomic status; educational level; migrant, refugee, repatriate, stateless or internally displaced status; disability; genetic trait; mental or physical health condition, including infectious-contagious condition and debilitating psychological condition; or any other condition.”

<sup>147</sup> Article 1(1) establishes that “[r]acial discrimination shall mean any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties.”

<sup>148</sup> Article 1 indicates that “the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

<sup>149</sup> Article 1(1) stipulates that: “[i]n this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

<sup>150</sup> *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 81, and *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 90. Also, United Nations, Human Rights Committee, General Comment No. 18, Non-discrimination, para. 6.

<sup>151</sup> *Cf. Advisory Opinion OC-4/84*, para. 53; *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of August 24, 2010. Series C No. 214, para. 268; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 78; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and*



rights by applying any form of differentiated treatment that may have discriminatory effects – in other words, that does not have a legitimate purpose, or is unnecessary and/or disproportionate – will result in the State’s international responsibility.<sup>152</sup> Consequently, there is an inseparable link between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination.<sup>153</sup>

64. Furthermore, while the general obligation under Article 1(1) refers to the State’s obligation to respect and ensure the rights contained in the American Convention “without any discrimination,” Article 24 protects the “right to equal protection of the law.”<sup>154</sup> That is, Article 24 of the American Convention prohibits any discrimination by the law, not only with regard to the rights contained in this instrument, but also as regards all the laws enacted by the State and their enforcement.<sup>155</sup> In other words, if a State discriminates in the respect or guarantee of a treaty-based right, it is in non-compliance with the obligation established in Article 1(1) and the substantive right in question. If, to the contrary, the discrimination refers to unequal protection by a domestic law or its enforcement, this must be examined in light of Article 24 of the American Convention<sup>156</sup> in relation to the categories protected by Article 1(1) of the Convention.

65. States are obliged to adopt positive measures to reverse or to change discriminatory situations existing within their society that prejudice a specific group of persons. This entails the special obligation of protection that the State must exercise with regard to the actions and practices of third parties, who with its acquiescence or tolerance, create, maintain or facilitate discriminatory situations.<sup>157</sup>

66. That said, the Court recalls that not every difference in treatment will be considered discriminatory, rather only differences based on criteria that cannot realistically be considered objective and reasonable;<sup>158</sup> in other words, when the difference in treatment does not have a legitimate purpose and there is no reasonable relationship of proportionality between the methods

*costs*, para. 93; *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 239, and *Case of Flor Freire v. Ecuador*, para. 111.

<sup>152</sup> Cf. Advisory Opinion OC-18/03 of September 17, 2003, para. 85; *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, para. 214; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 94, and *Case of Flor Freire v. Ecuador*, para. 111.

<sup>153</sup> Cf. Advisory Opinion OC-18/03 of September 17, 2003, para. 85; *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, para. 214; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 94, and *Case of Flor Freire v. Ecuador*, para. 111.

<sup>154</sup> Cf. Advisory Opinion OC-4/84, paras. 53 and 54; *Case of Espinoza Gonzáles v. Peru*, para. 217, and *Case of Flor Freire v. Ecuador*, para. 112.

<sup>155</sup> Cf. *Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of June 23, 2005. Series C No. 127, para. 186; *Case of Espinoza Gonzáles v. Peru*, para. 217, and *Case of Flor Freire v. Ecuador*, para. 112.

<sup>156</sup> 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; *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 243; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 104, and *Case of Flor Freire v. Ecuador*, para. 112.

<sup>157</sup> Cf. Advisory Opinion OC-18/03, para. 104; *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, para. 271; *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs*. Judgment of May 29, 2014. Series C No. 279, para. 201; *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 80; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 92; *Case of Flor Freire v. Ecuador*, para. 110, and *Case of the Hacienda Brazil Verde Workers v. Brazil*, para. 336. Also, United Nations, Human Rights Committee, General Comment No. 18: Non-discrimination, 10 November 1989, CCPR/C/37, para. 5.

<sup>158</sup> Cf. United Nations, Human Rights Committee, General Comment No. 18: Non-discrimination, 10 November 1989, para. 13. Also, *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 240.

used and the end pursued.<sup>159</sup> Moreover, in cases of prejudicial differential treatment, that is, when the differentiating criteria correspond to one of the categories protected by Article 1(1) of the Convention which relate to: (i) permanent personal traits that an individual cannot dispose of without losing his or her identity; (ii) groups that are traditionally marginalized, excluded or subordinated, and (iii) irrelevant criteria for the equitable distribution of property, rights or social benefits, the Court considers that there is evidence that the State has acted arbitrarily.<sup>160</sup>

67. The Court has also established that the prohibited categories of discrimination listed under Article 1(1) of the American Convention are neither exhaustive nor restrictive, but merely indicative.<sup>161</sup> Thus, the Court finds that by including the expression “or any other social condition” the wording of this article leaves the grounds of discrimination open in order to recognize other categories that were not explicitly listed but are analogous to these.<sup>162</sup> Consequently, when interpreting this phrase, the hermeneutic alternative that is most favorable to the protection of the rights of the individual and compatible to the application of the *pro persona* principle must be chosen.<sup>163</sup>

### **B. Sexual orientation, gender identity and gender expression as categories protected by Article 1(1) of the Convention**

68. Based on the above, and bearing in mind the general obligations of respect and guarantee established in Article 1(1) of the American Convention, the interpretation criteria established in Article 29 of this Convention, the stipulations of the Vienna Convention on the Law of Treaties, the resolutions of the OAS General Assembly, the standards established by the European Court and the United Nations agencies, the Court has determined that sexual orientation and gender identity are categories protected by the Convention. Consequently, the Convention prohibits any discriminatory law, act or practice based on a person’s sexual orientation or gender identity,<sup>164</sup> as this would be contrary to the provisions of Article 1(1) of the American Convention.

69. Accordingly, as already mentioned (*supra*, para. 58), the Court recalls that human rights treaties are living instruments the interpretation of which must evolve with time and with the conditions of contemporary life.<sup>165</sup> This evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention, as well as by the Vienna Convention on the Law of Treaties.<sup>166</sup>

<sup>159</sup> Cf. *Case of Norín Catrimán (Leaders, members and activist of the Mapuche Indigenous People) et al. v. Chile*, para. 200; *Case of Espinoza González v. Peru*, para. 219, and *Case of Flor Freire v. Ecuador*, para. 125.

<sup>160</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 240.

<sup>161</sup> Cf. *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 202; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 85, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 240.

<sup>162</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 85, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 240.

<sup>163</sup> Cf. *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 106, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, paras. 84 and 85.

<sup>164</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 91; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 105, and *Case of Flor Freire v. Ecuador*, para. 118.

<sup>165</sup> Cf. *Advisory Opinion OC-16/99*, para. 114; *Case of the Mapiripán Massacre v. Colombia*, para. 106, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 83.

<sup>166</sup> Cf. *Advisory Opinion OC-16/99*, para. 114; *Case of the Mapiripán Massacre v. Colombia*, para. 106, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 83.

70. Thus, when interpreting the phrase “any other social condition” of Article 1(1) of the Convention, the most favorable alternative for the safeguard of the rights protected by the treaty must be chosen, pursuant to the *pro homine* principle.<sup>167</sup> Likewise, the Court reiterates that the prohibited categories of discrimination listed under Article 1(1) of the American Convention are neither exhaustive nor restrictive, but merely indicative. Therefore, the wording of this article, with the inclusion of the words “any other social condition”, leaves the categories open to the incorporation of other grounds of discrimination that were not explicitly indicated. Consequently, the phrase “any other social condition” of Article 1(1) of the Convention must be interpreted by the Court in the most favorable perspective for the individual and for the evolution of fundamental rights in contemporary international law.<sup>168</sup>

71. In this regard, some recent regional treaties that deal with the issue of discrimination refer specifically to sexual orientation and gender identity as prohibited categories of discrimination. For instance, the Inter-American Convention on Protecting the Human Rights of Older Persons, in force since January 11, 2017, in its Article 5 on “Equality and non-discrimination for reasons of age” establishes the prohibition of “discrimination based on the age of older persons” and stipulates that “[i]n their policies, plans, and legislation on ageing and old age, States Parties shall develop specific approaches for older persons who are vulnerable and those who are victims of multiple discrimination, including women, persons with disabilities, persons of different sexual orientations and gender identities, migrants, persons living in poverty or social exclusion, people of African descent, and persons pertaining to indigenous peoples, the homeless, people deprived of their liberty, persons pertaining to traditional peoples, and persons who belong to ethnic, racial, national, linguistic, religious, and rural groups, among others.” Likewise, Article 1(1) of the Inter-American Convention against all Forms of Discrimination and Intolerance, adopted on June 5, 2013, establishes that “[d]iscrimination may be based on nationality; age; sex; sexual orientation; gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; socioeconomic status; educational level; migrant, refugee, repatriate, stateless or internally displaced status; disability; genetic trait; mental or physical health condition, including infectious-contagious condition and debilitating psychological condition, or any other condition.”

72. Also, since 2008, within the Inter-American system, the General Assembly of the Organization of American States has approved nine resolutions on the protection of persons against discriminatory treatment based on their sexual orientation and gender identity (since 2013, the resolutions also refer to discriminatory treatment based on gender expression), in which it has required the adoption of specific measures to ensure effective protection against discriminatory acts.<sup>169</sup>

73. Under the universal system for the protection of human rights, on December 22, 2008, the General Assembly of the United Nations adopted the “Statement on human rights, sexual

<sup>167</sup> Cf. Advisory Opinion OC-5/85, para. 52; *Case of the Mapiripán Massacre v. Colombia*, para. 106, *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 84.

<sup>168</sup> Cf. Advisory Opinion OC-16/99, para. 115, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 85.

<sup>169</sup> Cf. OAS, General Assembly resolutions: AG/RES. 2908 (XLVII-O/17), Promotion and protection of human rights, June 21, 2017; AG/RES. 2887 (XLVI-O/16), Promotion and protection of human rights, June 14, 2016; AG/RES. 2863 (XLIV-O/14), Human Rights, Sexual Orientation, and Gender Identity and Expression, June 5, 2014; AG/RES. 2807 (XLIIO-O/13) corr.1, Human Rights, Sexual Orientation, and Gender Identity and Expression, June 6, 2013; AG/RES. 2721 (XLII-O/12), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2012; AG/RES. 2653 (XLI-O/11), Human Rights, Sexual Orientation, and Gender Identity, June 7, 2011; AG/RES. 2600 (XL-O/10), Human Rights, Sexual Orientation, and Gender Identity, June 8, 2010; AG/RES. 2504 (XXXIX-O/09), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2009, and AG/RES. 2435 (XXXVIII-O/08), Human Rights, Sexual Orientation, and Gender Identity, June 3, 2008.

orientation and gender identity” reaffirming “the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity.”<sup>170</sup> Also, on March 22, 2011, the “Joint statement on ending acts of violence and related human rights violations based on sexual orientation and gender identity”<sup>171</sup> was presented before the Human Rights Council of the United Nations. On June 17, 2011, the Council approved a resolution on “human rights, sexual orientation and gender identity” in which it expressed its “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.”<sup>172</sup> This was reiterated in the resolutions 27/32 of September 26, 2014, and 32/2 of June 30, 2016.<sup>173</sup> The prohibition of discrimination based on sexual orientation, gender identity and gender expression has also been stressed in numerous reports by the United Nations Special Rapporteurs,<sup>174</sup> as well as by the United Nations High Commissioner for Human Rights.<sup>175</sup>

<sup>170</sup> United Nations, *Statement on human rights, sexual orientation, and gender identity, General Assembly of the United Nations*, 22 December 2008, A/63/635, para. 3.

<sup>171</sup> United Nations, *Joint Statement on ending acts of violence and related human rights violations based on sexual orientation and gender identity*. United Nations Human Rights Council, 22 March 2011.

<sup>172</sup> United Nations, Human Rights Council, *Resolution on human rights, sexual orientation, and gender identity*, Resolution 17/19, A/66/53, of 17 June 2011.

<sup>173</sup> Cf. United Nations, Human Rights Council, *Resolution on human rights, sexual orientation, and gender identity*, Resolution 27/32 of 26 September 2014, A/69/53/Add.1, and *Resolution on protection against violence and discrimination based on sexual orientation and gender identity*, Resolution 32/2 of 30 June 2016, A/71/53.

<sup>174</sup> Cf. Among other reports: United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 16 February 2004, E/CN.4/2004/49, paras. 32 and 38 (“International human rights law proscribes discrimination in access to health care and the underlying determinants of health, and to the means for their procurement, on the grounds of [...] sexual orientation [...]. [...] discrimination on the grounds of sexual orientation is impermissible under international human rights law.”); Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to Brazil, 28 February 2006, E/CN.4/2006/16/Add.3, para. 40; Report of the Special Rapporteur on violence against women, its causes and consequences, Integration of the human rights of women and the gender perspective: violence against women. Intersections of violence against women and HIV/AIDS, 17 January 2005, E/CN.4/2005/72, paras. 27 and 58; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions. Civil and political rights, including the question of disappearances and summary executions, 13 January 2003, E/CN.4/2003/3, paras. 66 and 67; Interim report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions, 2 July 2002, A/57/138, para. 37; Report of the Special Representative of the Secretary-General on human rights defenders, 26 January 2001, E/CN.4/2001/94, para. 89.g); Report of the Special Rapporteur on the independence of judges and lawyers; Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity, Mission to Brazil, 22 February 2005, E/CN.4/2005/60/Add.3, para. 28; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, 3 July 2001, A/56/156, paras. 17 to 25; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, Civil and political rights, including the questions of torture and detention, 27 December 2001, E/CN.4/2002/76, p. 14; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, 23 December 2003, E/CN.4/2004/56, para. 64; Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, 5 January 2004, E/CN.4/2004/9, para. 118, and Working Group on arbitrary detention, Opinion No. 7/2002 (Egypt), 24 January 2003, E/CN.4/2003/8/Add.1, p. 72, para. 28. Also, United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, para. 11, and Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, paras. 20 to 24.

<sup>175</sup> Cf. United Nations, Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23; Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal. Sexual Orientation and Gender Identity in International Human Rights Law*, 2012, HR/PUB/12/06, and *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, HR/PUB/16/3, New York and Geneva, 2016.

74. Likewise, the Human Rights Committee has classified sexual orientation, together with gender identity and expression, as one of the prohibited categories of discrimination contemplated in Article 2(1)<sup>176</sup> of the International Covenant on Civil and Political Rights.<sup>177</sup> The Committee on Economic, Social and Cultural Rights ruled similarly with regard to Article 2(2)<sup>178</sup> of the International Covenant on Economic, Social and Cultural Rights, and determined, in particular, that sexual orientation and gender identity can be included under “other status” so that these also constitute categories protected against any discriminatory differentiated treatment.<sup>179</sup>

<sup>176</sup> Article 2(1) of the International Covenant on Civil and Political Rights: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>177</sup> Cf. United Nations, Human Rights Committee, Concluding observations Turkmenistan, CCPR/C/TKM/CO/2 (CCPR, 2017), paras. 6 to 9; Concluding observations Slovakia, CCPR/C/SVK/CO/4 (CCPR, 2016), para. 15; Concluding observations Kazakhstan, CCPR/C/KAZ/CO/2 (CCPR, 2016), para. 10; Concluding observations Costa Rica, CCPR/C/CRI/CO/6 (CCPR, 2016), para. 12; Concluding observations Denmark, CCPR/C/DNK/CO/6 (CCPR, 2016), para. 14; Concluding observations Namibia, CCPR/C/NAM/CO/2 (CCPR, 2016), para. 36; Concluding observations San Marino, CCPR/C/SMR/CO/3 (CCPR, 2015), para. 9; Concluding observations Iraq, CCPR/C/IRQ/CO/5 (CCPR, 2015), para. 12.d; Concluding observations Korea, CCPR/C/KOR/CO/4 (CCPR, 2015), para. 15; Concluding observations former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/3 (CCPR, 2015), para. 7; Concluding observations Venezuela, CCPR/C/VEN/CO/4 (CCPR, 2015), para. 8; Concluding observations Cambodia, CCPR/C/KHM/CO/2 (CCPR, 2015), para. 9; Concluding observations Sri Lanka, CCPR/C/LKA/CO/5 (CCPR, 2014), para. 8; Concluding observations Japan, CCPR/C/JPN/CO/6 (CCPR, 2014), para. 11; Concluding observations Sierra Leone, CCPR/C/SLE/CO/1 (CCPR, 2014), para. 11; Concluding observations Ukraine, CCPR/C/UKR/CO/7 (CCPR, 2013), para. 8; Concluding observations Belize, CCPR/C/BLZ/CO/1 (CCPR, 2013), para. 13; Concluding observations Hong Kong, CCPR/C/CHN-HKG/CO/3 (CCPR, 2013), para. 23; Concluding observations Turkey, CCPR/C/TUR/CO/1 (CCPR, 2012), para. 8; Concluding observations Slovenia, CCPR/C/SVN/CO/3 (CCPR, 2016), para. 10; Concluding observations Chile, CCPR/C/CHL/CO/5, para. 16; Concluding observations Barbados, CCPR/C/BRB/CO/3, para. 13; Concluding observations United States of America, CCPR/C/USA/CO/3/Rev.1, para. 25; Concluding observations El Salvador, CCPR/CO/78/SLV, para. 16; Concluding observations Poland, CCPR/C/POL/CO/7 (CCPR, 2016), para. 13; Concluding observations Poland, CCPR/C/79/Add.110, para. 23; Concluding observations Kyrgyzstan, CCPR/C/KGZ/CO/2, para. 9; Concluding observations Malawi, CCPR/C/MWI/CO/1, para. 6; Concluding observations Kuwait, CCPR/C/KWT/CO/2, para. 30; Concluding observations Ireland, CCPR/C/IRL/CO/3, para. 8; Concluding observations Ireland, CCPR/C/IRL/CO/4, para. 7; Concluding observations Ukraine, CCPR/C/UKR/CO/7, para. 10; Concluding observations Peru, CCPR/C/PER/CO/5, para. 8, and Concluding observations Georgia, CCPR/C/GEO/CO/4, para. 8. Also, specifically on the prohibition to discriminate on the basis of sexual orientation, see: United Nations, Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992, 31 March 1994, para. 8.7 (“The State party has sought the Committee’s guidance as to whether sexual orientation may be considered an “other status” for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view, the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation”); *X v. Colombia*, Communication No. 1361/2005, 14 May 2007, CCPR/C/89/D/1361/2005, para. 7.2. (“The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation”); *Edward Young v. Australia*, Communication No. 941/2000, 18 September 2003, CCPR/C/78/D/941/2000, para. 10.4. See also: United Nations, Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, para. 26, and General Comment No. 35, CCPR/C/GC/35, paras. 3 and 9.

<sup>178</sup> Article 2(2) of the International Covenant on Economic, Social and Cultural Rights: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>179</sup> Cf. United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) 2 July 2009, E/C.12/GC/20, para. 32. See also, General Comment No. 23 on the Right to just and favorable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), 27 April 2016, E/C.12/GC/23, paras. 11, 48 and 65.a); General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, E/C.12/GC/22, paras. 9, 23, and 30. Regarding the protected category of “sexual orientation”, see: Committee on Economic, Social and Cultural Rights, General Comment No. 18. The right to work, 6 February 2006, E/C.12/GC/18, para. 12; General Comment No. 15. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 20 January 2003, E/C.12/2002/11, para. 13 (“[t]he Covenant thus proscribes any discrimination on the grounds of [...] sexual orientation”); General Comment No. 14. The right to the highest attainable standard of health (Article 12 of the International Covenant

75. Furthermore, in their general comments and recommendations, the Committee on the Rights of the Child,<sup>180</sup> the Committee against Torture<sup>181</sup> and the Committee on the Elimination of Discrimination against Women<sup>182</sup> have referred to the inclusion of sexual orientation as one of the prohibited categories of discrimination and to the need to eliminate practices that discriminate against individuals on the grounds of their sexual orientation and/or gender identity.

76. The United Nations High Commissioner for Human Rights has also expressed concern regarding human rights violations based on sexual orientation, gender expression and identity.<sup>183</sup> In this regard, the High Commissioner has recommended that States take appropriate legal measures to prohibit discrimination on the grounds of sexual orientation and gender expression and identity.<sup>184</sup>

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on Economic, Social and Cultural Rights), 11 August 2000, E/C.12/2000/4, para. 18 (“By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of [...] sexual orientation”). See also, United Nations, Committee on Economic, Social and Cultural Rights, Concluding observations Iran, E/C.12/IRN/CO/2, para. 7; Concluding observations Indonesia, E/C.12/IDN/CO/1, para. 6; Concluding observations Bulgaria, E/C.12/BGR/CO/4-5, para. 17; Concluding observations Slovakia, E/C.12/SVK/CO/2, para. 10, and Concluding observations Peru, E/C.12/PER/CO/2-4, para. 5.

<sup>180</sup> Cf. United Nations, Committee on the Rights of the Child, General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, para. 34; General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (Article 24), 17 April 2013, CRC/C/GC/15, para. 8; General Comment No. 3. HIV/AIDS and the rights of the child, CRC/GC/2003/3, 17 March 2003, para. 8 (“Of concern also is discrimination based on sexual orientation”); General Comment No. 4 (2003) Adolescent Health and Development in the Context of the Convention on the Rights of the Child, 21 July 2003, CRC/GC/2003/4, para. 6 (“States parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention without discrimination (art. 2), including with regard to “race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. These grounds also cover adolescents’ sexual orientation [...],” and General Comment No. 13 (2011) on the right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, paras. 60 and 72. See also: Concluding observations Nepal, CRC/C/NPL/CO/3-5 (CRC, 2016), para. 41, Concluding observations New Zealand, CRC/C/NZL/CO/5 (CRC, 2016), para. 15; Concluding observations Poland, CRC/C/POL/CO/3-4 (CRC, 2015), para. 17; Concluding observations Russia, CRC/C/RUS/CO/4-5, paras. 24 and 25, 55 and 56, 59 and 60; Concluding observations Gambia, CRC/C/GAM/CO/2-3, paras. 29 and 30; Concluding observations Australia, CRC/C/AUS/CO/4, paras. 29 and 30; Concluding observations Iraq, CRC/C/IRQ/CO/2-4, paras. 19 and 20, and Concluding observations Tanzania, CRC/C/TZA/CO/3-5, paras. 56 and 57.

<sup>181</sup> Cf. United Nations, Committee against Torture, General Comment No. 2. Implementation of Article 2 by the States Parties, CAT/C/GC/2, 24 January 2008, paras. 15 to 24; General Comment No. 3. Implementation of Article 3 by the States Parties, 13 December 2012, CAT/C/GC/3, para. 8, 32 and 39; Concluding observations Russia, CAT/C/RUS/CO/5, para. 15; Concluding observations Kyrgyzstan, CAT/C/KGZ/CO/2, para. 19.

<sup>182</sup> Cf. United Nations, Committee for the Elimination of Discrimination against Women, General Recommendation No. 27 on older women and protection of their human rights, 16 December 2010, CEDAW/C/GC/27, para. 13, and General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, para. 18 (“The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity.”) See also: Concluding observations Ecuador, CEDAW/C/ECU/CO/8-9 (CEDAW, 2015), para. 21.f; Concluding observations Uganda, CEDAW/C/UGA/CO/7, paras. 43 and 44; Concluding observations Costa Rica, CEDAW/C/CRI/CO/5-6, paras. 40 and 41; Concluding observations The Netherlands, CEDAW/C/NLD/CO/5, paras. 46 and 47; Concluding observations Germany, CEDAW/C/DEU/CO/6, para. 61; Concluding observations Guyana, CEDAW/C/GUY/CO/7-8, paras. 22 and 23, and Concluding observations Kyrgyzstan, CEDAW/C/KGZ/CO/4, paras. 9 and 10.

<sup>183</sup> Cf. United Nations, Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and of the Secretary-General, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, paras. 86, 88 and 111(q).

<sup>184</sup> Cf. United Nations, The United Nations High Commissioner for Human Rights. “Living Free and Equal”, HR/PUB/16/3, 2016, pp. 30 and 62.

77. Regarding the inclusion of sexual orientation and gender identity as prohibited grounds of discrimination, the European Court of Human Rights has indicated that that sexual orientation and gender identity can be understood to be included in the category of “other status” mentioned in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>185</sup> (hereinafter “the European Convention”), which prohibits discriminatory treatment.<sup>186</sup> In particular, in the case of *Salgueiro da Silva Mouta v. Portugal*, the European Court found that sexual orientation is a concept covered by Article 14 of the European Convention. It also repeated that the list of categories contained in this article was illustrative and not exhaustive.<sup>187</sup> As well, in the case of *Clift v. The United Kingdom*, the European Court reiterated that sexual orientation, as one of the categories that may be included under “other status,” is another specific example of the categories found on that list that are considered personal characteristics inasmuch as they are innate or inherent to the person.<sup>188</sup> In the case of *S.L. v. Austria*, it indicated that differences in treatment between the heterosexual and homosexual populations regarding the age of consent to engage in sexual relations lacked any objective and reasonable justification and, consequently, were discriminatory.<sup>189</sup> In addition, the Council of Europe has adopted a series of recommendations aimed at combating discrimination on the grounds of sexual orientation, and to a lesser degree of gender identity.<sup>190</sup>

78. Based on the above and taking into account the general obligation of respect and guarantee established in Article 1(1) of the American Convention, the interpretation criteria established in Article 29 of this Convention, the provisions of the Vienna Convention on the Law of Treaties, the resolutions of the OAS General Assembly, and the United Nations treaty bodies (*supra* paras. 71 to 76), the Inter-American Court establishes that sexual orientation and gender identity, as well as

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<sup>185</sup> Article 14 of the European Convention on Human Rights: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

<sup>186</sup> Cf. ECHR, *Case of Salgueiro da Silva Mouta v. Portugal* No. 33290/96, Judgment of 21 December 1999, para. 28; *Case of L. and V. v. Austria*, Nos. 39392/98 and 39829/98, Judgment of 9 January 2003, para. 45; *Case of S.L. v. Austria*, No. 45330/99, Judgment of 9 January 2003, para. 37; *Case of E.B. v. France*, No. 43546/02, Judgment of 22 January 2008, para. 50; *Case of Identoba et al. v. Georgia*, No. 73235/12, 12 May 2005, para. 96, and *Case of Goodwin v. The United Kingdom*, No. 28957/95, 11 July 2002, para. 108.

<sup>187</sup> Cf. ECHR, *Case of Salgueiro da Silva Mouta*, para. 28 (“the applicant’s sexual orientation [is] a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words [“]any ground such as[”]. See also: *Case of Fretté v. France*, No. 36515/97, Judgment of 26 February 2002, para. 32; *Case of Kozak v. Poland*, No. 13102/02, Judgment of 2 March 2010, para. 92; *Case of J.M. v. The United Kingdom*, No. 37060/06, Judgment of 28 September 2010, para. 55, and *Case of Alekseyev v. Russia*, Nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010, para. 108 (“The Court reiterates that sexual orientation is a concept covered by Article 14 [...]”).

<sup>188</sup> Cf. ECHR, *Case of Clift v. The United Kingdom*, No. 7205/07, Judgment of 13 July 2010, para. 57 (“As to its interpretation of ‘other status’, the Court has considered to constitute [“]other status[”] characteristics which, like some of the specific examples listed in the Article, can be said to be personal in the sense that they are innate or inherent”). However, based on this concept of “other status,” the European Court did not decide to establish the limitation that the characteristics should be inherent or innate in the individual. Also, *Case of Clift v. The United Kingdom*, para. 58.

<sup>189</sup> Cf. ECHR, *Case of S.L. v. Austria*, No. 45330/99, Judgment of 19 January 2003, paras. 44 to 46.

<sup>190</sup> Cf. Recommendation CM/Rec (2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity; Recommendation 1915 (2010) of the Parliamentary Assembly of the Council of Europe on Discrimination on the basis of sexual orientation and gender identity; Recommendation 924 (1981) of the Parliamentary Assembly of the Council of Europe on discrimination against homosexuals; Recommendation 1117 (1989) of the Parliamentary Assembly on the condition of transsexuals; Recommendation 1470 (2000) of the Parliamentary Assembly on the situation of gays and lesbians and their partners in respect to asylum and immigration in the member states of the Council of Europe; Recommendation 1474 (2000) of the Parliamentary Assembly on the situation of lesbians and gays in the member states of the Council of Europe, and Recommendation 1635 (2003) of the Parliamentary Assembly on lesbians and gays in sport.

gender expression, are categories protected by the Convention. Accordingly, the Convention proscribes any discriminatory law, action or practice based on the sexual orientation, gender identity or gender expression of the individual. Consequently, no provision, decision or practice under domestic law, either by state authorities or private individuals, can reduce or restrict in any way the rights of a person on the grounds of their sexual orientation, their gender identity and/or their gender expression.

79. With regard to gender expression, this Court has indicated that a person may be discriminated against on the grounds of the perception that others have of his or her relationship with a social sector or group, regardless of whether this corresponds to the reality or to the self-identification of the victim.<sup>191</sup> The purpose or effect of discrimination based on perception is to prevent or invalidate the recognition, enjoyment or exercise of the human rights and fundamental freedoms of the person subjected to such discrimination, irrespective of whether that person self-identifies with a specific category.<sup>192</sup> As with other forms of discrimination, the person is reduced to a single characteristic attributed to him or her, without taking into account other personal conditions.<sup>193</sup> Consequently, it can be considered that the prohibition to discriminate on the grounds of gender identity is understood not only with regard to the real or self-perceived identity, but also in relation to the identity perceived externally, regardless of whether or not that perception corresponds to the reality. Thus, it should be understood that any expression of gender constitutes a category protected by Article 1(1) of the American Convention.

80. Lastly, it is relevant to point out that several States in the region have recognized under their domestic legal system, either by constitutional provisions or by laws, decrees or court rulings, that sexual orientation and gender identity constitute categories protected against discriminatory differentiated treatment.<sup>194</sup>

<sup>191</sup> Cf. *Case of Perozo et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 195, para. 380; *Case of Ríos et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 194, para. 349, and *Case of Flor Freire v. Ecuador*, para. 120.

<sup>192</sup> Cf. *Mutatis mutandis, Case of Perozo et al. v. Venezuela*, para. 158; *Case of Ríos et al. v. Venezuela*, para. 146, and *Case of Flor Freire v. Ecuador*, para. 120.

<sup>193</sup> Cf. *Mutatis mutandis, Case of Perozo et al. v. Venezuela*, para. 158; *Case of Ríos et al. v. Venezuela*, para. 146, and *Case of Flor Freire v. Ecuador*, para. 120.

<sup>194</sup> Cf. Argentina. Act No. 23,592, August 23, 1988, article 1; Argentina. Legislature of the Autonomous City of Buenos Aires, Anti-discrimination Act, April 9, 2015, article 3; Bolivia. Constitution, February 7, 2009, article 14, para. II; Bolivia. Act No. 045, Law against racism and all forms of discrimination. October 8, 2010, article 5; Bolivia. Act No. 807, Act on gender identity, May 21, 2016, article 5; Brazil. Superior Court of Justice. Special Appeal No. 1,626,739 (2016/0245586); Canada, Canadian Human Rights Act, R.S.C., 1985, c. H-6 (1996, c. 14, s. 1; 1998, c. 9, s. 9; 2012, c. 1, s. 137(E); 2017, c. 3, ff. 9, 11, c. 13, s. 1.), article 2. Purpose of the Act; Chile. Act No. 20,609, July 24, 2012, article 2; Chile, Santiago Appeals Court, Judgment of March 9, 2015, case No. 9901-2014; Chile, Supreme Court of Chile, Judgment of March 13, 2017, case No. 99813; Colombia. Act No. 1752, June 3, 2015, article 1; Colombia. Act No. 1448, June 10, 2011, article 3; Constitutional Court of Colombia, Judgment C-481/98 of September 9, 1998, Judgment C-075/07 of February 7, 2007, Judgment C-577/11 of July 26, 2011, Judgment T-099/15 of March 10, 2015, Judgment T-478/15 of August 3, 2015, and Judgment SU-214/16 of April 28, 2016; Costa Rica, Decree 38999, "Executive Branch policy to eradicate from its institutions discrimination against the sexually diverse population," May 12, 2015, article 1; Costa Rica, Decision of the Supreme Electoral Court taken in resolution 3 of Regular Session No. 37-2016 of April 28, 2016, *Policy of non-discrimination on the grounds of sexual orientation and gender identity of the Supreme Electoral Court*; Ecuador, Constitution of the Republic of Ecuador, 2008, article 11; Constitutional Court of Ecuador, Judgment 037-13-SCN-CC, June 11, 2013; Mexico, Federal law to prevent and eliminate discrimination, June 11, 2003, article 1.III; Peru, Legislative Decree 1323, January 5, 2017, article 1; Peru, Act No. 28,237, Code of Constitutional Procedure, May 28, 2004, article 37(1); Puerto Rico, Act No. 22, Law to establish the public policy of the Government of Puerto Rico against discrimination on the grounds of sexual orientation or gender identity in public or private employments, May 29, 2013, article 1; Dominican Republic, Constitution, January 26, 2010, article 39; Dominican Republic, Act No. 550-14, December 19, 2014, article 182; Uruguay, Act No. 17,817, Law on the fight against racism, xenophobia and discrimination, September 14, 2004, article 2; Uruguay, Act No. 18,620, Law on the right to gender identity and change of name and sex on identity documents, November 17, 2009, article 1; Uruguay, Act



### C. Differences in treatment that are discriminatory

81. The Court considers that the criteria for determining whether there has been a violation of the principle of equality and non-discrimination in a specific case may have varying degrees, depending on the reasons for a difference in treatment. In this regard, the Court finds that, in the case of a measure that establishes a differentiated treatment involving one of these categories, a thorough examination must be made, incorporating especially rigorous elements in the analysis; in other words, the different treatment should constitute a necessary measure to achieve an objective that is imperative pursuant to the Convention. Thus, in this type of examination, in order to analyze the validity of the differentiating measure, the end pursued must not only be legitimate under the Convention, but also imperative. Also, the means chosen must not only be adequate and truly enabling, but also necessary; that is, that it could not be replaced by other less harmful means. In addition, there must be a strict proportionality analysis of the measure by which the benefits of adopting the measure in question must be clearly more advantageous than the restrictions it imposes on the treaty-based principles it affects.<sup>195</sup>

82. Furthermore, specifically regarding the scope of the right to non-discrimination on the grounds of sexual orientation, the Court indicates that this is not restricted to homosexuality in itself, but that also includes its forms of expression and the logical consequences in the life project of the individual.<sup>196</sup> In this regard, for example, sexual acts are a way of expressing a person's sexual orientation, and are therefore protected under the same right of non-discrimination on the basis of sexual orientation.<sup>197</sup>

83. Lastly, it is important to recall that the lack of consensus in some countries as regards to the full respect for the rights of certain groups or persons identified by their real or perceived sexual orientation, gender identity or gender expression cannot be considered a valid argument to deny or restrict their human rights or to reproduce and perpetuate the historical and structural discrimination that these groups or persons have suffered.<sup>198</sup> The fact that this issue could be

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No. 19,075, Law on same-sex marriage, May 9, 2013, article 1, and Venezuela, Organic Law of the People's Power, 9 December 2010, article 4.

<sup>195</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 241.

<sup>196</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 133, and *Case of Flor Feire v. Ecuador*, para. 119.

<sup>197</sup> Cf. *Case of Flor Freire v. Ecuador*, para. 119.

<sup>198</sup> According to different sources of international and comparative law this discrimination against the community of lesbians, gays, transsexuals, bisexuals and intersexuals is unacceptable because: (i) sexual orientation constitutes an essential aspect of a person's identity. Also, (ii) the LGBTI community has been discriminated against historically and stereotypes are often used in how it is treated. Cf. United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 16 February 2004, E/CN.4/2004/49, para. 33 ("[...] discrimination and stigma continue to pose a serious threat to sexual and reproductive health for many groups, including [...] sexual minorities [...]"); Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, 23 December 2003, E/CN.4/2004/56, para. 64 ("Attitudes and beliefs stemming from myths and fears associated with HIV/AIDS and sexuality contribute to stigma and discrimination against sexual minorities. In addition, the fact that members of these minorities are perceived as transgressing gender barriers or challenging predominant conceptions of gender roles seems to contribute to their vulnerability to torture as a way to "punish" their unaccepted behaviour."). Furthermore, (iii) they constitute a minority from which it is much more difficult to remove discriminations in settings such as the legislative sphere, and to avoid negative repercussions in the interpretation of laws by officials in the Executive and Legislative branches of government, and in access to justice. Cf. Special Rapporteur on the Independence of judges and lawyers, civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity. Mission to Brazil, E/CN.4/2005/60/Add.3, 22 February 2005, para. 28 ("Transvestites, transsexuals and homosexuals are also frequently the victims of violence and discrimination. When they turn to the judicial system, they are often confronted with the same prejudices and stereotypes they face in society at large."), and Constitutional Court of Colombia, Judgment C-481 of September 9, 1998. Lastly: (iv) sexual orientation does not constitute a rational criterion for the reasonable and fair distribution of property, rights or social benefits. Cf.

controversial in some sectors and countries, and thus that is not necessarily a matter of consensus, cannot lead the Court to abstain from taking a decision, because when so issuing its opinion, the Court must refer only and exclusively to the stipulations of the international obligations that States have assumed by a sovereign decision under and through the American Convention.<sup>199</sup>

84. No right that has been recognized to the individual can be denied or restricted in any circumstance, on the grounds of sexual orientation, gender identity or gender expression since this would violate Article 1(1) of the American Convention. Indeed, this Inter-American instrument proscribes discrimination in general, including against categories such as sexual orientation and gender identity which cannot be used to deny or restrict any of the rights established in the Convention.

## VII THE RIGHT TO GENDER IDENTITY AND THE NAME CHANGE PROCEDURE

### A. The right to identity

85. The Court recalls that the American Convention protects one of the most basic values of the human being, understood to be a rational being; that is, the recognition of his or her dignity. On other occasions, the Court has asserted that this value is an essential characteristic of the individual and, consequently, it is a basic human right enforceable *erga omnes* as an expression of a collective interest of the whole international community that does not admit derogation or suspension in cases provided for in the American Convention on Human Rights.<sup>200</sup> Moreover, it should be understood that this protection exists transversely in all the rights recognized in the American Convention.

86. In this regard, the Convention contains a universal clause for protection of dignity, based on the principle of individual autonomy and on the idea that all persons must be treated as equals, inasmuch as they are ends in themselves in accordance with their intentions, aspirations and life decisions. Moreover, the American Convention also recognizes the sanctity of private and family life, among other protected spheres. The Court has affirmed that this sphere of the individual's private life is an area of freedom shielded and exempt from arbitrary or abusive interference by third parties or by public authorities.<sup>201</sup>

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Constitutional Court of Colombia, Judgment C-481 of September 9, 1998, para. 25. In this judgment, which relates to the right of public schools teachers not to be dismissed because they are homosexual, the Colombian Constitutional Court indicated that removing a teacher from his post for this reason is based "on a prejudice without any empiric basis, which denotes the unfair stigma that has affected this population and that has been cited in order to encumber it or deprive it of rights, to the detriment of its possibilities of participating in such relevant spheres for social and economic life" (para. 29). Meanwhile, Judgment C-507 (1999) of the Colombian Constitutional Court declared unconstitutional a provision that established homosexuality in the armed forces as a disciplinary offense. In Judgment C-373 (2002), the Constitutional Court of Colombia declared unconstitutional a provision establishing that having received a disciplinary sanction for the offense of "homosexuality" was a motive for incapacity to exercise the office of notary.

<sup>199</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 92; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 123, and *Case of Flor Freire v. Ecuador*, para. 124.

<sup>200</sup> Cf. OAS, The Inter-American Juridical Committee, Opinion "on the scope of the right to identity," Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 12, and *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 123.

<sup>201</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 149; *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Series C No. 148, para. 194, and *Case of the Santa Bárbara Campesino Community v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 299, para. 200.

87. The Court has also indicated that the protection of the right to private life is not restricted to the right to privacy, because it comprises a series of factors related to the dignity of the individual, including, for example, the capacity to develop their own personality and aspirations, determine their identity, and define their personal relationships. The concept of private life encompasses aspects of social and physical identity, including the right to personal autonomy and personal development, and to establish and develop relationships with other human beings and with the external world.<sup>202</sup> The effective realization of the right to private life is decisive for the possibility of exercising personal autonomy in relation to the future course of events that are relevant for an individual's quality of life.<sup>203</sup> Furthermore, private life includes the way in which individuals see themselves and how they decide to project themselves towards others,<sup>204</sup> and this is an essential condition for the free development of the personality.<sup>205</sup>

88. That said, a crucial aspect of the recognition of dignity, is the possibility accorded to all human beings for self-determination and to freely choose the options and circumstances that give meaning to their existence based on their own preferences and convictions.<sup>206</sup> Under this framework, the principle of personal autonomy plays an essential role as it prohibits any action by the State that tries to exploit or utilize the individual; in other words, any action that converts the individual in means to an end which is alien to the choices about their own life, body and the full development of their personality, within the limits imposed by the Convention.<sup>207</sup> Thus, based on the principle of the free development of the personality or of personal autonomy, everyone is free and autonomous to live in a way that accords with their values, beliefs, convictions and interests.<sup>208</sup>

89. Moreover, the Court has made a broad interpretation of Article 7(1) of the American Convention by indicating that it includes a wide-ranging concept of liberty, and this is understood as the capacity to do or not to do whatever is legally permitted. In other words, it constitutes the right of everyone to organize, pursuant to the law, their individual and social life in accordance with their own choices and convictions.<sup>209</sup> Defined as such, liberty is a basic human right inherent in the attributes of the person that pervades the whole American Convention.<sup>210</sup> In this regard, the United

<sup>202</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 152; *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of August 30, 2010. Series C No. 215, para. 129, and *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, para. 143.

<sup>203</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 152, and *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, para. 143.

<sup>204</sup> Cf. *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2010. Series C No. 216, para. 119, and *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, para. 143.

<sup>205</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 152.

<sup>206</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 150; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 136, and *Case of Flor Freire v. Ecuador*, para. 103.

<sup>207</sup> Article 32 of the American Convention, "Relationship between Duties and Rights. 1. Every person has responsibilities to his family, his community, and mankind. 2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare in a democratic society." See also, *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 150.

<sup>208</sup> In this regard, see Constitutional Court of Colombia, Judgment T-063/2015.

<sup>209</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 148, and *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 52.

<sup>210</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 52; *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, para. 142, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 151.

Nations Human Rights Committee has stated that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, that being in his or her relationships with others or by themselves.<sup>211</sup> Accordingly, the Court understands that the right to identity arises from recognition of the free development of the personality and the protection of the right to privacy. This right is closely related to the principle of personal autonomy and it identifies the person as a self-determining and self-governing individual. In other words, the right to identity understands individuals as masters of themselves and of their own acts.<sup>212</sup>

90. Regarding the right to identity, the Court has indicated that, in general, it may be conceived as the series of attributes and characteristics that individualize a person in society and that encompass several rights depending on the subject of rights in question and the respective circumstances.<sup>213</sup> The right to identity may be affected by numerous situations or contexts that may occur from childhood to adulthood.<sup>214</sup> Although the American Convention does not specifically refer to the right to identity under this name, it includes other rights that are its components.<sup>215</sup> Thus, the Court recalls that the American Convention protects those elements as rights in themselves even though not all such rights will necessarily be implicated in all cases that concern the right to identity.<sup>216</sup> Moreover, the right to identity cannot be confused with, or reduced or subordinated to one of the rights that it includes, nor to the sum of them. For example, the name forms part of the right to identity, but it is not its only component.<sup>217</sup> In addition, this Court has indicated that the right to identity is closely related to human dignity, the right to privacy and the principle of personal autonomy (Articles 7 and 11 of the American Convention).<sup>218</sup>

91. It can also be understood that this right is closely linked to the individual in his or her specific individuality and private life, both of which are supported by historical and biological experiences and by the way in which this person relates to others, through the development of relationships within the family and society.<sup>219</sup> This also means that the individual may experience the need to be recognized as someone who is distinct and distinguishable from others. To achieve this, the State and society must respect and ensure the individuality of each person, as well as the right to be treated in keeping with the essential aspects of their personality, with no other limitations than those imposed by the rights of other persons. Thus, consolidating the individuality of the person before the State and before society implies having the legitimate authority to establish the exteriorization of their persona according to their most intimate convictions. Likewise,

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<sup>211</sup> Cf. United Nations, Human Rights Committee, *Case of Coeriel et al. v. The Netherlands*, 9 December 1994, CCPR/C/52/D/453/1991, para. 10.2.

<sup>212</sup> In this regard, see Constitutional Court of Colombia, Judgment T-063/2015.

<sup>213</sup> Cf. *Case of Gelman v. Uruguay*, para. 122; *Case of Fornerón and daughter v. Argentina*, para. 123, and *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs*. Judgment of October 14, 2014. Series C No. 285, para. 116.

<sup>214</sup> Cf. *Case of Contreras et al. v. El Salvador. Merits, reparations and costs*. Judgment of August 31, 2011. Series C No. 232, para. 113.

<sup>215</sup> Cf. *Case of Gelman v. Uruguay*, para. 122, and *Case of Contreras et al. v. El Salvador*, para. 112. See also, OAS, The Inter-American Juridical Committee, Opinion "on the scope of the right to identity", Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 11(2).

<sup>216</sup> Cf. *Case of Rochac Hernández et al. v. El Salvador*, para.116.

<sup>217</sup> Cf. OAS, The Inter-American Juridical Committee, Opinion "on the scope of the right to identity", Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 11.

<sup>218</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 149 to 152.

<sup>219</sup> Cf. *Case of Contreras et al. v. El Salvador*, para. 113

one of the essential components of any life plan and of the individualization of the person is precisely their gender and sexual identity.<sup>220</sup>

92. Additionally, the most relevant implications and scope of the right to identity and, therefore, the right to a sexual and gender identity, are that it constitutes an autonomous right based on the provisions of international law and those derived from the cultural elements considered in the domestic legal systems of the States, in order therefore to satisfy the specificity of the individual, with his or her rights that are unique, singular and identifiable.<sup>221</sup>

93. Regarding gender and sexual identity, the Court reiterates that this is also linked to the concept of liberty and to the possibility of all human beings for self-determination and to freely choose the options and circumstances that give meaning to their existence, according to their own convictions, as well as the right to protection of their privacy (*supra* para. 87).<sup>222</sup> Thus, in the case of sexual identity, the Court has established that affective life with a spouse or permanent companion, which logically includes sexual relations, is one of the main aspects of this circle or sphere of intimacy.<sup>223</sup> This sphere of intimacy is therefore also influenced by the self-identified sexual orientation of the individual.<sup>224</sup>

94. In this regard it should be recalled that, in this Opinion, gender identity has been defined as the internal and individual experience of gender as each person feels it, which may or may not correspond to the sex assigned at birth. This includes the personal experience of the body as well as other expressions of gender, such as dress, speech and mannerisms (*supra* para. 32.f). Thus, for this Court, recognition of gender identity is necessarily linked to the idea that sex and gender should be perceived as being a part of the constructed identity that is the result of the free and autonomous decision of each person, and without this having to be subject to their genitalia.<sup>225</sup>

95. In this way, the sex, together with the socially constructed identities, attributes and roles that are ascribed to the biological differences regarding the sex assigned at birth, far from constituting objective and unchangeable characteristics of the civil status that individualizes a person – for these being a physical or biological fact – are merely characteristics that depend on the subjective appreciation of the person concerned, and are based on the construction of a self-perceived gender identity dependent on the free development of the personality, sexual self-determination, and the right to privacy. Consequently, those who decide to assume this self-perceived gender identity, are the holders of legally protected interests which cannot be subject to any restriction based merely on the fact that society as a whole does not share specific singular

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<sup>220</sup> In this regard, see Constitutional Court of Colombia, Judgment T-594/93.

<sup>221</sup> Cf. OAS, The Inter-American Juridical Committee, Opinion “on the scope of the right to identity”, Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 15.

<sup>222</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 141.

<sup>223</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 141. See also, Constitutional Court of Colombia, Judgment T-499 of 2003. The Constitutional Court has defined the right to the free development of personality embodied in article 16 of the Colombian Constitution, as the right of individuals “to choose their life plan and develop their personality according to their interests, wishes and convictions, provided this does not affect the rights of third parties or violate the Constitution” (Constitutional Court of Colombia, Judgment C-309 of 1997). Likewise, it has been understood as “the capacity of individuals to define, autonomously, the essential choices that will guide the course of their existence” (Constitutional Court of Colombia, Judgment SU-642 of 1998).

<sup>224</sup> Cf. *Case of Flor Freire v. Ecuador*, para. 103. See, in this regard also, OAS, Permanent Council, Committee on Juridical and Political Affairs, CP/CAJP/INF.166/12, 23 April 2012, and Constitutional Court of Colombia, Judgment C-098/96, No. 4.

<sup>225</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 16.

lifestyles,<sup>226</sup> due to fears, stereotypes, and social and moral prejudices which have no reasonable basis. Thus, regarding the factors that define the sexual and gender identity of a person, precedence is given to the subjective factor over the physical or morphological features (objective factor). In this sense, owing to the complex human nature that leads everyone to develop their own personality based on the particular way they see themselves, the psychosocial sex should be given pre-eminence over the morphological sex in order to fully respect the right to sexual and gender identity, since these are elements that, to a great extent, define both how individuals see themselves and how they project themselves in society.<sup>227</sup>

96. Furthermore, the Court considers that the right to identity and, in particular, the manifestation of identity, is also protected by Article 13, which recognizes the right to freedom of expression. From this standpoint, arbitrarily interfering in the expression of the different attributes of the identity may signify a violation of this right. That said, regarding the exteriorization of identity, this Court indicated in the case of *López Álvarez v. Honduras* that one of the pillars of freedom of expression is precisely the right to speak and that this necessarily implies the right of the individual to use the language of his choice to express his or her thoughts. In that judgment, the Court analyzed the violation of the freedom of expression and the individuality of Mr. López Álvarez because he had been prevented from using the Garifuna language, an element profoundly and intrinsically linked to his identity.<sup>228</sup> In that case, the Court also considered that this violation was especially serious because it affected his personal dignity as a member of the Garifuna community.<sup>229</sup>

97. Based on the above, the Court agrees with the Commission when it pointed out that a lack of recognition of gender or sexual identity could result in indirect censure of gender expressions that diverge from cisnormative or heteronormative standards, which would send a general message that those persons who diverge from these “traditional” standards would not have the legal protection and recognition of their rights in equal conditions to persons who do not diverge from such standards.<sup>230</sup>

98. Accordingly, the Court understands gender identity to be both an and integral and a determining component of the personal identity of the individual; consequently, its recognition by the State is critical to ensuring that transgender persons can fully enjoy all human rights, including protection from violence, torture, ill-treatment, the right to health, education, employment,

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<sup>226</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 16. In this regard, see Constitutional Court of Colombia, Judgment T-063/2015. Likewise, see Constitutional Court of Peru, Judgment of October 21, 2016, File No. 06040-2015-PA/TC, para. 13: “based on the above, the biological reality should not be the only determinant to assign sex, because since this is also a construct, it should be understood within the social, cultural and interpersonal situations that individuals themselves experience during their existence. Consequently, the sex should not always be determined based on the genitalia, because this would signify succumbing to biological determinism, which would reduce human nature to mere physical existence, disregarding the fact that humans are also social and psychological beings.”

<sup>227</sup> In this regard, see Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 20.

<sup>228</sup> Cf. *Case of López Álvarez v. Honduras. Merits, reparations and costs*. Judgment of February 1, 2006. Series C No. 141, paras. 164, 169 and 171.

<sup>229</sup> Cf. *Case of López Álvarez v. Honduras*, para. 169.

<sup>230</sup> Cf. Inter-American Commission on Human Rights, Observation presented by the Commission on February 14, 2017, para. 49. See, similarly, United Nations, Committee on the Rights of the Child, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, para. 34, and Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, pp. 86 and 87.

housing, access to social security, and freedom of expression and association.<sup>231</sup> In this regard, the Court has indicated, in the same terms as the General Assembly of the Organization of American States, “that recognition of the identity of persons is one of the means through which observance of the rights to legal personhood, a name, a nationality, civil registration, and family relationships is facilitated, among other rights recognized in international instruments such as the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.”<sup>232</sup> Therefore, non-recognition of identity may mean that a person has no legal record of his or her existence, which makes it difficult to exercise fully his or her rights.<sup>233</sup>

99. Similarly, the Court shares the opinion of the Inter-American Juridical Committee which has asserted that the right to identity “has an instrumental value for exercising certain civil, cultural, economic, political and social rights so that they fully prevail to reinforce democracy and the exercise of basic rights and liberties. Consequently, the right to identity is a means to exercise rights in a democratic society, committed to the effective practice of citizenship and the values of representative democracy, thereby facilitating social inclusion, citizen participation and equal opportunities.”<sup>234</sup> Also, “depriving the right to identity, or a legal vacuum in the domestic law for its effective practice, places people in situations that hinder or prevent the enjoyment of or access to basic rights, thus creating differences in treatment and opportunities that affect the principles of equality before the law and non-discrimination, and obstructing the right of everyone to full recognition of their legal personality.”<sup>235</sup>

100. Accordingly, the State, as guarantor of all rights, must respect and ensure the coexistence of individuals with varied identities, gender expressions and sexual orientations and, therefore, must ensure that they are all able to live and develop with dignity and the respect to which everyone has a right to. The Court considers that this protection does not refer merely to the content of those rights, but that, through their protection, the State would also be ensuring the full enjoyment and exercise of other rights of individuals whose gender identity differs from the one associated with the sex assigned to them at birth.

101. Based on the above, the following conclusions can be reached:

- a) The right to identity emanates from the recognition of the free development of the personality and the right to privacy (*supra* paras. 88 and 89);
- b) The right to identity has been recognized by this Court as a right protected by the American Convention (*supra* para. 90);

<sup>231</sup> Cf. United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 94.

<sup>232</sup> *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2014. Series C No. 282, para. 267, and Case of *Gelman v. Uruguay*, para. 123. See also: OAS, General Assembly, Resolution AG/RES. 2362 (XXXVIII-O/08), “Inter-American program for universal civil registry and the “right to identity” of June 3, 2008, and Resolution AG/RES. 2602 (XL-O/10), Human rights, sexual orientation, and gender identity of June 8, 2010. Also, OAS, The Inter-American Juridical Committee, Opinion “on the scope of the right to identity,” Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, paras. 11.2 and 18.3.3.

<sup>233</sup> Cf. OAS, General Assembly, Resolution AG/RES. 2362 (XXXVIII-O/08), “Inter-American program for universal civil registry and the “right to identity” of June 3, 2008, and Resolution AG/RES. 2602 (XL-O/10), Human rights, sexual orientation, and gender identity of June 8, 2010.

<sup>234</sup> OAS, The Inter-American Juridical Committee, Opinion “on the scope of the right to identity”, Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 16.

<sup>235</sup> Cf. OAS, The Inter-American Juridical Committee, Opinion “on the scope of the right to identity”, Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 17.

- c) The right to identity includes other rights, according to the persons and circumstances of each case, although it is closely related to human dignity, the right to life, and the principle of personal autonomy (Articles 7 and 11 of the American Convention) (*supra* para. 90);
- d) Recognition of the affirmation of sexual and gender identity as a manifestation of personal autonomy is both an integral and a determining component of the personal identity of the individual which is protected by the American Convention in its Articles 7 and 11(2) (*supra* para. 98);
- e) Gender and sexual identity are linked to the concept of liberty, the right to privacy, and the possibility of all human beings for self-determination and to freely choose the options and circumstances that give meaning to their existence, according to their own convictions (*supra* para. 93);
- f) Gender identity has been defined in this Opinion as the internal and individual experience of gender as each person feels it, whether or not it corresponds to the sex assigned at birth (*supra* para. 94);
- g) Sex, gender and the socially constructed identities, attributes and roles that are ascribed to the biological differences regarding the sex assigned at birth, far from constituting objective and unchangeable characteristics of the civil status that individualizes a person – for these being a physical or biological fact – are merely characteristics that depend on the subjective appreciation of the person concerned, and are based on the construction of a self-perceived gender identity dependent on the free development of the personality, sexual self-determination, and the right to privacy (*supra* para. 95);
- h) The right to identity also has an instrumental value for the exercise of certain rights (*supra* para. 99);
- i) State recognition of gender identity is critical to ensuring that transgender persons can fully enjoy all human rights, including protection from violence, torture, ill-treatment, the right to health, education, employment, housing, access to social security, and freedom of expression and association (*supra* para. 98), and
- j) The State must ensure that individuals of all sexual orientations and gender identities are able to live with the dignity and respect to which everyone has a right to (*supra* para. 100).

**B. The right to recognition of juridical personality, the right to a name, and the right to gender identity**

102. In keeping with the questions raised in the request for this Advisory Opinion, the Court will now examine specifically the relationship that exists between the recognition of gender identity and the right to a name, as well as to the recognition of juridical personality.

103. Regarding the right to juridical personality protected under Article 3 of the American Convention, the Court has indicated that recognition of this right determines the effective existence of its holders before society and the State, which allows them to enjoy and exercise rights and empowers them to act. This constitutes an inherent right of the human being, which, according to the American Convention, can never be derogated by the State.<sup>236</sup> Consequently, the State must

<sup>236</sup> Cf. *Case of Bámaca Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000, Series C No. 70, para. 179; *Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 25, 2010. Series C No. 212, para. 101; *Case of the Massacres of the Rio Negro v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012 Series C No. 250, para. 119, and *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of August 29, 2014. Series C No. 282, para. 265.



necessarily respect and ensure the legal means and conditions so that the right to recognition of juridical personality can be exercised freely and fully by its holders.<sup>237</sup> The lack of recognition of juridical personality harms human dignity because it is an absolute denial of a person's condition as a subject of rights, and places that person in a vulnerable position owing to the non-observance of his or her rights by the State or by private individuals.<sup>238</sup> Also, this lack of recognition of juridical personality eliminates the possibility of being a holder of rights, which results in the impossibility of effectively exercising personally and directly the subjective rights, as well as fully assuming legal obligations and performing other acts of a personal and patrimonial nature.<sup>239</sup>

104. Regarding gender and sexual identity, the foregoing means that individuals, with their diverse sexual orientations and gender identities and expressions, should be able to enjoy their legal capacity in all aspects of life. This is so because the sexual orientation or gender identity that each person defines for himself or herself is essential for their personality and constitutes one of the fundamental aspects of their self-determination, dignity and liberty.<sup>240</sup> However, the right to juridical personality is not merely the capacity of the individual to enter the legal framework and hold rights and obligations, but also includes the possibility of all human beings, based on the mere fact of existing and irrespective of their condition, to possess certain attributes that constitute the essence of their juridical personality and individuality as subjects of law. Consequently, there is a close relationship between, on the one hand, the recognition of juridical personality and, on the other hand, the legal attributes inherent in all human beings that distinguish, identify and individualize them.<sup>241</sup>

105. Accordingly, it is the Court's opinion that the right of individuals to define, autonomously, their own sexual and gender identity is made effective by guaranteeing that their self-determined identities correspond with the personal identification information recorded in the different registers, as well as in the identity documents. This implies the existence of the right of all individuals to have their personal attributes and characteristics, which are recorded in these registers and other identification documents, coincide with their own identity definition and, if this is not the case, that there should be a mechanism of amending those records.

106. It has already been mentioned that the free development of the personality and the right to privacy imply the recognition of the rights to personal, sexual and gender identity, because, it is on the basis of these rights that individuals see themselves and project themselves in society.<sup>242</sup> A name, as an attribute of personality, represents an expression of individuality and its end is to affirm the identity of a person before society and in procedures before the State. Its purpose is to ensure that every individual has a unique and singular sign that distinguishes him or her from everyone else, by which he or she can be identified and recognized. It is a basic right inherent to

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<sup>237</sup> Cf. *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 189, and *Case of Chitay Nech et al. v. Guatemala*, para. 101.

<sup>238</sup> Cf. *Case of the Yean and Bosico Girls v. Dominican Republic.* Judgment of September 8 2005. Series C No. 130, para. 179.

<sup>239</sup> Cf. *Juridical Status and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 29, 2002, para. 41, and *Case of Bámaca Velásquez v. Guatemala. Merits*, para. 179.

<sup>240</sup> Cf. *Mutatis mutandis*, Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, 2007. Principle 6.

<sup>241</sup> In this regard, see Constitutional Court of Colombia, Judgment C-109 of 1995, section II, Nos. 7 and 8, and Judgment T-090 of

1995, section 2, No. 2.2.

<sup>242</sup> In this regard, see Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 17.

all persons based merely on their existence.<sup>243</sup> In addition, the Court has indicated that the right to a name recognized in Article 18 of the Convention and in various other international instruments,<sup>244</sup> constitutes a basic and essential element of the identify of each person, without which they cannot be recognized by society or registered by the State.<sup>245</sup>

107. The Court has also indicated that, as a result of the foregoing, States are obliged not only to protect the right to a name, but also to provide the means required to facilitate a person's registration.<sup>246</sup> As such, this right implies that the State must ensure that individuals are registered with the name chosen by them or their parents, depending on the time they are registered, without any type of restriction or interference in the moment of the choice of name and, once the person has been registered, that it be possible to keep and to re-establish the given name and surname.<sup>247</sup>

108. Moreover, the Inter-American Juridical Committee considered that "exercising the right to identity cannot be dissociated from registration and an effective national system, accessible and universal, that enables people to provide documents that contain the information relating to their identity, bearing in mind particularly that the right to identity is both a right in itself and an essential right for exercising other cultural, economic, political and social rights. Consequences of the right to identity are the right to registration after birth and a duty of the State to take the necessary measures for this purpose. Registration of the birth is a primary instrument and starting point to exercise the juridical personality before the State and other individuals, and to act in equal conditions before the law."<sup>248</sup>

109. Meanwhile, the United Nations Human Rights Committee has maintained that a person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name.<sup>249</sup>

110. On the right to a name, the ECHR has stated that although the European Convention does not contain any explicit reference to this matter, since the name and surname are part of the private and family life of any human being, given that they constitute a means of personal identification and a link to a family, there are protected by Article 8 of that instrument. Similarly, the European Court has stated that private life encompasses aspects of the personal and social identity of the individual, and the fact that there could be a public interest in regulating the use of

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<sup>243</sup> In this regard, see Constitutional Court of Colombia, Judgment T-063/15, section II No. 4.

<sup>244</sup> Cf. *Case of Gelman v. Uruguay*, para. 127. Also, see *inter alia*, the International Covenant on Civil and Political Rights, Article 24(2); Convention on the Rights of the Child, Article 7(1); African Charter on the Rights and Welfare of the Child, Article 6(1), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 29. The European Court of Human Rights has stated that the right to a name is protected by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, even though it is not specifically mentioned, cf. ECHR, *Case of Stjerna v. Finland*, No. 18131/91, Judgment of 25 November 1994, para. 37, and *Case of Burghartz v. Switzerland*, No. 16213/90, Judgment of 22 February 1994, para. 24.

<sup>245</sup> Cf. *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 182, and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, para. 268.

<sup>246</sup> Cf. *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 183, and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, para. 268.

<sup>247</sup> Cf. *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 184, and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, para. 268.

<sup>248</sup> Cf. OAS, The Inter-American Juridical Committee, Opinion "on the scope of the right to identity," Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 14.4.

<sup>249</sup> Cf. United Nations, Human Rights Committee, *Coeriel et al. v. The Netherlands*, No. 453/1991, CCPR/C/52/D/453/1991, para. 10.2.

names, this is not a sufficient reason to eliminate the matter from the scope of the right to private and family life contained in Article 8 of the Convention.<sup>250</sup>

111. Additionally, this Court maintains that the establishment of the name, as an attribute of the personality, is determinant for the free development of the choices that give meaning to each person's existence, as well as to the realization of the right to identity.<sup>251</sup> It is not a means of standardizing human beings; rather, to the contrary, it is a factor of distinction between them.<sup>252</sup> Thus why everyone should be able to choose their name freely and change their name as they wish. In this way, the lack of recognition of a change of name in accordance with the self-perceived identity means that the individual loses, totally or partially, the ownership of those rights and that, although that individual exists and may find himself or herself in a determined social context within the State, their very existence is not legally recognized in accordance with an essential component of their identity.<sup>253</sup> Under these circumstances, the right to the recognition of juridical personality and the right to gender identity are also compromised.

112. In this way, it can also be inferred that the right to recognition of gender identity necessarily includes the right that the personal information in records and on identity documents should correspond to the sexual and gender identity assumed by transgender persons. Thus, the Yogyakarta Principles establish the obligation of States "to take all necessary legislative, administrative and other measures to fully respect and legally recognize each person's self-defined gender identity," and to ensure that "procedures exist whereby all State-issued identity papers which indicate a person's gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person's profound self-defined gender identity."<sup>254</sup>

113. In this regard, it should be recalled that the ECHR<sup>255</sup> has established that the failure to recognize the identity of a transgender person may constitute interference in their private life. Also, the United Nations High Commissioner for Human Rights has recommended that States "issue legal identity documents, upon request, that reflect the preferred gender of the person concerned,"<sup>256</sup> and also "facilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting the preferred gender

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<sup>250</sup> Cf. ECHR Judgments *Stjerna v. Finland*, para. 37, and *Guillot v. France*, No. 22500/93, Judgment of 24 October 1993, paras. 21 and 22.

<sup>251</sup> In this regard, for example, Article 1 of Act No. 18.620 of Uruguay on the "Right to gender identity and to the change of name and sex in identity documents," establishes that "[e]veryone has the right to the free development of their personality in accordance with their own gender identity, regardless of their biological, genetic, anatomical, morphological, hormonal, assigned or other sex. [...] This right includes that of being identified in a way that fully recognizes the gender identity and the conformity between this identity and the name and sex indicated in the person's identity documents, whether records of the Civil Registry, identity, electoral, travel or other documents." Likewise, Argentina's Act 26,743 on gender identity establishes in its Article 1 that everyone has the right to their gender identity and "to be treated according to their gender identity and, in particular, to be identified in this way in the instruments that certify his or her identity as regard the given name, photograph and sex with which they are registered."

<sup>252</sup> In this regard, see Constitutional Court of Peru, Judgment of October 21, 2016, File No. 06040-2015-PA/TC, para. 14 and Constitutional Court of Colombia, Judgment T-063/15, section II No. 4.4.1.

<sup>253</sup> Cf. *Mutatis mutandis*, *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 180.

<sup>254</sup> Yogyakarta Principles, 2007. Principle 3.

<sup>255</sup> Cf. ECHR, *Case of Dudgeon v. The United Kingdom*. No. 7525/76, 22 October 1981, para. 41, and *Case of Goodwin v. The United Kingdom*, para. 77.

<sup>256</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. "Discrimination and violence against individuals based on their sexual orientation and gender identity." 4 May 2015, A/HRC/29/23, para. 79.i.

and name, without infringing other human rights.”<sup>257</sup> As well, the difference between the sexual and gender identity assumed by a person and the one that appears on the identity documents signifies the denial of a constitutive dimension of personal autonomy – the right to live as one wants – which, in turn, can result in rejection and discrimination by others – the right to live without humiliation – and complicates the employment opportunities that allow the person to obtain the material conditions required for a decent existence.<sup>258</sup>

114. Furthermore, as already mentioned, States must ensure the recognition of the gender identity of the individual, because this is critical for the full enjoyment of other human rights<sup>259</sup> (*supra* para. 113). Likewise, the Court notes that the failure to recognize this right may also impede the exercise of other fundamental rights and, consequently, have an important differential impact on transgender persons, who, as we have seen, generally find themselves in a situation of vulnerability (*supra* paras. 33 to 51). The lack of recognition of gender identity also constitutes a determinant factor in the reinforcement of acts of discrimination against such persons and may also become a major obstacle for the full enjoyment of all the rights recognized by international law, such as the right to a decent life, freedom of movement, freedom of expression, civil and political rights, personal integrity, health, education, and all the other rights.<sup>260</sup>

115. Consequently, it can be concluded that the right of each person to define his or her sexual and gender identity autonomously and that the personal information in records and on identity documents should correspond to and coincide with their self-defined identity is protected by the American Convention under the provisions that ensure the free development of the personality (Articles 7 and 11(2)), the right to privacy (Article 11(2)), the recognition of juridical personality (Article 3), and the right to a name (Article 18). Thus, States must respect and ensure to everyone the possibility of registering and/or changing, rectifying or amending their name and the other essential components of their identity such as the image, or the reference to sex or gender, without interference by the public authorities or by third parties. This necessarily means that those who identify themselves with diverse gender identities must be recognized as such. Moreover, the State must ensure that they can exercise their rights and contract obligations based on that same identity, without being obliged to purport another identity that does not represent their individuality, especially so when this involves a continuous exposure to the social questioning of that same identity, thus affecting the exercise and enjoyment of the rights recognized by domestic and international law.

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<sup>257</sup> Cf. United Nations, Report of the United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 84.h.

<sup>258</sup> Cf. United Nations, Report of the United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 71.

<sup>259</sup> Cf. United Nations, United Nations High Commissioner for Human Rights, *Living Free and Equal*, HR/PUB/16/3, 2016, p. 94.

<sup>260</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/29/23, paras. 21 and 60 to 62; Human Rights Committee, Concluding observations on the fourth periodic report of the Bolivarian Republic of Venezuela, 14 August 2015, CCPR/C/VEN/CO/4, para. 8; Concluding observations on the seventh periodic report of Ukraine, 22 August 2013, CCPR/C/UKR/CO/7, para. 10; Concluding observations on the third periodic report of Suriname, 3 December 2015, CCPR/C/SUR/CO/3, para. 27; Committee against Torture, Concluding observations of the Committee against Torture: Kuwait, June 28, 2011, CAT/C/KWT/CO/2, para. 25; Concluding observations on the second periodic report of Kyrgyzstan, 20 December 2013, CAT/C/KGZ/CO/2, para. 19; United Nations Educational, Scientific and Cultural Organization - UNESCO, *Out in the open: Education sector responses to violence based on Sexual Orientation and Gender Identity/Expression*, Paris, 2016; Human Rights Council, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 57. Similarly, see Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 6.

116. Based on the above, the answer to the first question raised by Costa Rica concerning the protection provided to the recognition of gender identity by Articles 11(2), 18 and 24, in relation to Article 1(1) of the Convention, is as follows:

**The change of name, the rectification of the image and the rectification of the sex or gender in the public records and identity documents, so that they correspond to the self-perceived gender identity is a right protected by Article 18 (Right to a Name), but also by Articles 3 (Right to Recognition of Juridical Personality), 7(1) (Right to Personal Liberty), and 11(2) (Right to Privacy) of the American Convention. Consequently, pursuant to the obligation to respect and ensure rights without any discrimination (Articles 1(1) and 24 of the Convention), and the obligation to adopt domestic legal provisions (Article 2 of the Convention), States are obliged to recognize, regulate and establish the appropriate procedure to this end.**

**C. The procedure for requesting the rectification of identity data to conform with the self-perceived gender identity**

117. In order to ensure that the interested persons are able to amend public records and identity documents so that these correspond to their self-perceived gender identity, the procedures should be regulated and implemented in accordance with certain basic characteristics, so that this right is truly protected, and so that the procedures do not violate the rights of third parties protected by the Convention.

118. The Court also notes that the measures implemented to make effective the right to identity should not hinder the principle of legal certainty. This principle guarantees, among other things, stability in legal situations and is an essential component of the trust that the people place in the democratic institutional framework. This principle is implicit in all the articles of the Convention.<sup>261</sup> The absence of legal certainty may stem from legal or administrative aspects or from state practices<sup>262</sup> that decrease public trust in the institutions (judicial, legislative and executive) or in the enjoyment of the rights and obligations recognized by these institutions, and produce instability in relation to the exercise of basic rights, and legal situations in general.

119. Thus, the Court considers that legal certainty is guaranteed, *inter alia*, as long as there is confidence that the fundamental rights and freedoms of everyone subject to the jurisdiction of a State Party to the American Convention will be fully respected. For the Court, this means that the implementation of the procedures described below must ensure that the rights and obligations of third parties are effectively protected, without this entailing hindrance to the full protection of the right to gender identity. Thus, although the effects of these procedures are opposable to third parties, the changes, amendments or rectifications made in accordance with gender identity should not alter the ownership of legal rights and obligations.

120. Accordingly, in relation to the effects of the procedure for recognition of gender identity, the Court recalls that it must not change the ownership of the legal rights and obligations that may correspond to the person prior to the registration of the change, nor those arising from relationships under family law in all its varying degrees.<sup>263</sup> This means that all those acts executed

<sup>261</sup> Cf. ECHR. *Case of Beian v. Romania (No. 1)*, No. 30658/05. Judgment of 6 December 2007, para. 39, and *Case of Brumărescu v. Romania*, No. 28342/95. Judgment of 10 November 1999, para. 61.

<sup>262</sup> Cf. ECHR. *Case of Nejdet Şahin and Perihan Şahin v. Turkey*, No. 13279/05. Judgment of October 20, 2011, para. 56.

<sup>263</sup> In this regard, see Argentina. Gender Identity Act, No. 26,743 of May 23, 2012, article 7.

by a person before the procedure to amend the identity data – in accordance with his or her self-perceived gender identity – that had legal effects continue to produce these effects and are enforceable, except in cases in which the law itself determines their extinction or modification.<sup>264</sup>

*a) The procedure for the complete rectification of the self-perceived gender identity*

121. First, and as indicated in the previous section, in addition to the name, which is just one element of the identity, this procedure should be designed to rectify – comprehensively – other components of the identity so that it can conform to the self-perceived gender identity of the person concerned. Therefore, the procedure should allow changes in the registration of the given name and, if applicable, a change of the photograph, as well as the rectification of the recorded gender or sex, on the identity documents and in all the relevant records required for the interested parties to exercise their subjective rights.

122. In this regard, it should be recalled that this Court has indicated that the protection of privacy established by the American Convention extends beyond those aspects specifically mentioned in the said provisions.<sup>265</sup> In this sense, although the right to one's self-image is not expressly stated in Article 11 of the Convention, personal photographs and pictures are evidently included within the sphere of protection of privacy.<sup>266</sup> Moreover, the photograph is a form of expression included in the sphere of protection of Article 13 of the Convention.<sup>267</sup> The photograph not only supports or gives credibility to information provided in writing but, in itself, has a significant content and expressive, communicative and informative value; indeed, in some cases, photographs can communicate or inform with the same or greater impact than the written word.<sup>268</sup> Indeed, the domestic law of several States of the region recognizes that changes made to the identity data so that it conforms to the self-perceived gender identity of the applicant is not limited to the given name, but also covers elements such as the person's sex or gender, and the photograph.<sup>269</sup>

123. Closely related to the foregoing, in its Report on Privacy and Data Protection, the Inter-American Juridical Committee stipulated that personal data included information that identifies, or can reasonably be used to identify, a specific individual, and that "the term data" was intentionally used "broadly in an effort to provide the broadest protection to the rights of the individuals concerned, without regard to the particular form in which the data is collected, stored, retrieved,

<sup>264</sup> In this regard, see Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 17

<sup>265</sup> Cf. *Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs*. Judgment of January 27, 2009. Series C No. 193, para. 55, and *Case of Fontevecchia and D`Amico v. Argentina*, para. 67.

<sup>266</sup> Cf. *Case of Fontevecchia and D`Amico v. Argentina*, para. 67. Similarly cf. ECHR, *Case of Schussel v. Austria*, Admissibility, No. 42409/98. Decision of 21 February 2002, para. 2, and *Case of Von Hannover v. Germany*, Nos. 40660/08 and 60641/08. Judgment of 7 February 2012, para. 50.

<sup>267</sup> Cf. *Case of Fontevecchia and D`Amico v. Argentina*, para. 67. See also, ECHR, *Case of Von Hannover v. Germany*, Nos. 40660/08 and 60641/08. Judgment of 7 February 2012, para. 42, and *Case of MGN Limited v. The United Kingdom*, No. 39401/04. Judgment of 18 January 2011, para. 143.

<sup>268</sup> Cf. *Case of Fontevecchia and D`Amico v. Argentina*, para. 67.

<sup>269</sup> Cf. Argentina. Act 26,743 of May 23, 2012, Article 1(c). Article 1 of Act No. 26,743, which established the right to gender identity, stipulates that everyone has a right "to be treated in keeping with their gender identity and, in particular, to be identified in this way in the instruments that prove their identity as regards the given name(s), photograph, and sex with which they are registered." Also, in Bolivia, Act No. 807 of May 21, 2016, establishes the procedure for the change of name, sex and photograph of transsexual and transgender persons in any public or private documentation related to their identity, allowing them to exercise fully their right to gender identity. Decisions have also been issued by domestic courts recognizing the foregoing; see, for example: Brazil. Superior Court of Justice, Judgment of May 9, 2017; Chile. Santiago Appeals Court, Judgment of March 9, 2015, case No. 9901-2014, and Colombia. Constitutional Court, Judgment T-063/15.

used or disseminated.”<sup>270</sup> It added that “[t]he term ‘sensitive personal data’ refers to data affecting the most intimate aspects of individuals [... d]epending on the specific cultural, social or political context.”<sup>271</sup> The Committee also asserted that “[t]he individual must be able to exercise the right to request the correction of (or an addition to) personal data about himself or herself that is incomplete, inaccurate, unnecessary or excessive.”<sup>272</sup>

124. Lastly, the Court considers that States must endeavor to ensure that those interested in the recognition of their self-perceived gender identity in the public records as well as on their identity documents do not have to undertake several procedures before numerous authorities. The Court understands that it is a State obligation to ensure that any changes in the personal data recorded before the civil registers be updated in all other relevant documents and institutions without requiring the applicant’s intervention, so that this person does not have to incur unreasonable burdens to achieve the amendment of his or her self-perceived gender identity in all relevant records.

125. In this regard, reference should be made to the Inter-American Program for Universal Civil Registry and the “Right to Identity,” which refers to the need to identify and promote best practices and standards for civil registry systems and their universalization, “taking the gender perspective into account,” as well as the need to “raise awareness” of the importance of effectively establishing “the identity of millions of persons, taking into account vulnerable groups and the rich diversity of cultures in the Americas.”<sup>273</sup> In particular, the document indicates that States must endeavor to identify, systematize and standardize the basic criteria and standards needed to ensure that national civil registry systems can function properly and guarantee universal coverage. Also, States must “promote the simplification of civil registry administrative processes and their standardization at the national level.”<sup>274</sup>

126. In this regard, in Uruguay, Act No. 18,620 “Right to gender identity and change of name and sex on identity documents,” specifically establishes the harmonization of the data in records and identity documents. In fact, article 4 of the law establishes that: “[w]hen a decision has been made approving the amendment request, the competent court shall inform the Directorate General of the Civil Registry, the respective Departmental Council, the National Civil Identification Department of the Ministry of the Interior, the National Civil Registry of the Electoral Court, and the

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<sup>270</sup> OAS, The Inter-American Juridical Committee, Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Definitions.

<sup>271</sup> OAS, The Inter-American Juridical Committee, Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Ninth principle.

<sup>272</sup> OAS, The Inter-American Juridical Committee, Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Eighth principle.

<sup>273</sup> OAS, General Assembly of the OAS, Resolution AG/RES. 2362 (XXXVIII-O/08), adopted on June 3, 2008. The Inter-American Program for Universal Civil Registry and the “Right to Identity” “is a consolidated effort by the OAS and its Member States, in consultation with international organizations and civil society, to promote and achieve in a progressive manner and in accordance with international law, applicable international human rights law, and domestic law, the purposes, objectives, and specific measures set for below: [...] Ensure that by 2015 birth registration, which is used to ensure the right to identity, with emphasis on persons in poverty and at risk, is universal, accessible, and, if possible, cost-free. Identify and promote best practices, criteria, and standards for civil registry systems and their universalization, in order to address the problems and overcome the obstacles that arise in this area, taking the gender perspective into account, as well as raise awareness of the need effectively to establish the identity of millions of persons, taking into account vulnerable groups and the rich diversity of cultures in the Americas. Promote and protect the rights to identity; juridical personality; a name; a nationality; inscription in the civil registry; family relations; and citizen participation as an essential element of decision-making. Contribute to building just and equitable societies based on the principles of social justice and social inclusion.

<sup>274</sup> Cf. OAS, General Assembly of the OAS, Resolution AG/RES. 2362 (XXXVIII-O/08). Section “Specific measures” Nos. 2.g and 2.i.

General Directorate of Records, so that they may make the corresponding amendments to the identity documents of the person concerned, as well as to the documents relating to the rights or obligations of said person. The identity document, passport and civil credentials shall always retain the same number.”<sup>275</sup> Likewise, in Bolivia it has been established that, following the issuing of the administrative decision, the change of name, the rectification of the sex recorded and of the photograph, will be notified *ex officio* to several institutions.<sup>276</sup>

b) *The procedure should be based solely on the free and informed consent of the applicant without requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing*

127. The regulation and implementation of this procedure should be based solely on the free and informed consent of the applicant. This is consistent with the fact that procedures for recognizing gender identity are founded on the possibility for self-determination and to freely choose the options and circumstances that give a meaning to a person’s existence, in keeping with their own choices and convictions, as well as with the applicant’s right to dignity and privacy (*supra* para. 88).

128. Similarly, in its report on Privacy and Data Protection, the Inter-American Juridical Committee mentioned that “consistent with these fundamental rights, the OAS Principles reflect the concepts of informational self-determination, freedom from arbitrary restrictions on access to data, and protection of privacy, identity, dignity and reputation.”<sup>277</sup>

129. In this regard, the United Nations High Commissioner and several of the United Nations human rights bodies have indicated that, to comply with international human rights commitments, States should respect the physical and mental integrity of individuals by providing legal recognition of their self-perceived gender identity without obstacles or abusive requirements that may constitute human rights violations. From this perspective, these bodies have recommended that the procedure for the recognition of gender identity should not require applicants to meet abusive preconditions such as the presentation of medical certificates or evidence of unmarried civil status;<sup>278</sup> nor should applicants be subjected to medical or psychological appraisals related to their

<sup>275</sup> Uruguay. Act No. 18,620 of October 25, 2009, article 4. See also: Argentina. Act 26,743, article 6: “the public official shall proceed, without the need for a judicial or administrative procedure, to notify *ex officio* the rectification of the sex and change of given name to the Civil Registry of the jurisdiction in which the birth was registered so that it may proceed to issue a new birth certificate adjusting it to these changes, and to issue a new national identity document that reflects the rectification of the sex and the new given name in the records.

<sup>276</sup> Cf. Bolivia. Act No. 807 of May 21, 2016. Article 9(v) indicates that the following shall be notified: Personal Identification Service – SEGIP; Financial System Supervision Authority – ASFI; Directorate General of Immigration – DIGEMIG; National Tax Service – SIN; Royalties; Judicial Criminal Records System – REJAP; National Police Records – SINARAP, of the Bolivian Police (FELCC, FELCN and FELCV); General Directorate of the Prison System; Office of the State Comptroller General – CGE; Ministry of Education; Ministry of Defense; Public Health Institutes; Social Security System – SENASIR; Pension, Securities and Insurance Authority – APS; and others that SERECI or the applicant deem necessary.

<sup>277</sup> OAS, The Inter-American Juridical Committee. Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Definitions.

<sup>278</sup> Cf. United Nations, United Nations High Commissioner for Human Rights. Informe “*Discrimination and violence against individuals based on their sexual orientation and gender identity*”. 4 May 2015, A/HRC/29/23, para. 79; Human Rights Committee. Concluding observations: Ireland. 30 July 2008, CCPR/C/IRL/CO/3, para. 8; Human Rights Committee. Concluding observations on the fourth periodic report of Ireland. 19 August 2014, CCPR/C/IRL/CO/4, para. 7; Human Rights Committee. Concluding observations on the seventh periodic report of Ukraine. 22 August 2013, CCPR/C/UKR/CO/7, para. 10; Committee on the Elimination of Discrimination against Women. Concluding observations: The Netherlands. 5 February 2010, CEDAW/C/NLD/CO/5, paras. 46-47; Human Rights Committee. Concluding observations on the fourth periodic report of the Republic of Korea. 3 December 2015, CCPR/C/KOR/CO/4, paras. 14-15; Committee against Torture. Concluding observations on the fifth periodic report of China with respect to Hong Kong (China). 3 February 2016, CAT/C/CHNHKG/CO/5, para. 29(a); Human Rights Council. Report of the Special Rapporteur on torture and other cruel,



self-perceived gender identity, or other requirements that undermine the principle according to which gender identity is not to be proven. Consequently, the procedure should be based on the mere expression of the applicant's intention. Likewise, the Yogyakarta Principles stipulate that "[n]o status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity."<sup>279</sup>

130. Moreover, in the case of the medical, psychological or psychiatric certificates that are usually required in this type of procedure, the Court understands that, in addition to being of an invasive nature and calling into question the applicant's self-assigned identity, they are based on the assumption that having an identity that differs from the sex assigned at birth is a pathology. In this sense, these types of requirements or medical certificates contribute to perpetuating the prejudices associated with the binary construct of male and female genders.<sup>280</sup>

131. Regarding the requirements and documentation usually demanded specifically from individuals who request a change in their identity data so that it corresponds to their gender identity, the Court considers that, pursuant to the principles of equality and non-discrimination (*supra* Chapter VI), it is unreasonable to establish a differentiated treatment between cisgender and transgender persons who wish to amend their records and identity documents. Indeed, in the case of cisgender persons, the sex assigned at birth and entered into the records corresponds to the gender identity that they assume autonomously throughout their life, while in the case of transgender persons, the identity assigned by third parties (generally their parents) differs from the one they have developed autonomously. Thus, transgender persons encounter obstacles to achieving recognition of and respect for their gender identity that cisgender persons do not have to face.

132. In the case of the requirement of certifications of good conduct or police records, the Court understands that, although these may be requested for a legitimate reason, which can only be to ensure that the purpose and/or effect of the request for amendments to the records and identity document is not to evade justice, it can also be understood that this requirement is a disproportionate restriction because it unreasonably transfers to the applicant a State obligation; that is, the harmonization of the records with the personal identity data. In this regard, it should be recalled that the protection of third parties and of the public order should be guaranteed by legal mechanisms that do not entail, permit or result in the impairment, hindrance or sacrifice of the basic human rights. To the contrary, the essence of the free development of the personality, the right to privacy, the right to personal and sexual identity, the right to health and, consequently, to the dignity of the individual and his or her right to equality and non-discrimination would be completely affected. All of this, given that the integral identification of individuals based on the rectification of their identity data to conform to their self-perceived gender identity is what would allow them to participate in all aspects of life. In this way, the State would be recognizing them legally as the persons they really are.<sup>281</sup>

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inhuman or degrading treatment or punishment, Juan E. Méndez. 1 February 2013, A/HRC/22/53, paras. 78 and 88; Committee on Economic, Social and Cultural Rights. General comment No. 22 (2016), on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, E/C.12/GC/22, para. 58; *Interagency Statement, Eliminating forced, coercive and otherwise involuntary sterilization*, May 2014, and *Joint statement of UN and regional human rights mechanisms on the rights of young LGBT and intersex people*, 13 May 2015.

<sup>279</sup> Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, March 2007, Principle 3.

<sup>280</sup> *Cf.* In this regard, see Constitutional Court of Colombia, Judgment T-063/15, section 7 No. 7.2.7.

<sup>281</sup> In this regard, see Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 7.

133. Lastly, the Court considers, in general, that in the context of the procedure for recognition of the right to gender identity, it is not reasonable to demand that the individual meet requirements that undermine the merely declarative nature of such procedures. In addition, it is inappropriate that such requirements become demands that invade the private sphere, because this would oblige individuals to subject the most intimate decisions and most private matters of their life to the public scrutiny of all those who, directly or indirectly, intervene in the procedure.<sup>282</sup>

c) *The procedure and the changes, corrections or amendments to the records should be confidential and the identity document should not reflect the change in gender identity*

134. In this Opinion, the Court has already indicated that the failure to recognize the right to gender identity of transgender persons contributes to reinforce and perpetuate discriminatory behavior towards them (*supra* Chapter IV.B). This may also increase their vulnerability to hate crimes, or transphobic and psychological violence,<sup>283</sup> which constitutes a form of gender-based violence, driven by a desire to punish individuals whose appearance or behavior appears to challenge gender stereotypes.<sup>284</sup> In the same way, the failure to recognize their gender identity may result in other human rights violations; for example, torture and ill-treatment in health centers or detention centers, sexual violence, denial of the right of access to health care, discrimination, exclusion and bullying in educational contexts, discrimination in access to employment or in the professional sphere, and access to housing and social security.<sup>285</sup>

135. In keeping with the above, undesired publicity concerning a change in gender identity, already effected or pending, may make the applicant more vulnerable to diverse acts of discrimination against his or her person, honor or reputation and, ultimately, may represent a major obstacle to the exercise of other human rights (*supra* para. 134). In this regard, both the procedure, and the amendments made in the records and on the identity documents in conformity with the self-perceived gender identity, should not be accessible to the public, and should not appear on the identity document itself.<sup>286</sup> This is consistent with the close relationship that exists between the right to identity and the right to privacy recognized in Article 11(2) of the Convention, which provides protection against any arbitrary interference in a person's privacy, which includes their gender identity. It is on this basis that this Court has asserted that "the sphere of private life is characterized by being exempt or immune from abusive and arbitrary interference or aggressions by third parties or the public authorities,"<sup>287</sup> and this "includes, among other dimensions, the ability to take decisions related to different areas of one's own life freely, to have a space of personal peace, to keep certain aspects of private life confidential, and to control public disclosure of personal information."<sup>288</sup> This does not mean that such information cannot be accessed if the

<sup>282</sup> In this regard, see Constitutional Court of Colombia, Judgment T-063/2015, section 7 No. 7.2.3.

<sup>283</sup> Cf. United Nations, United Nations High Commissioner for Human Rights, A/HRC/29/23, para. 21; Human Rights Committee, CCPR/C/VEN/CO/4, para. 8; Committee against Torture, CAT/C/KWT/CO/2, para. 25; Committee against Torture, CAT/C/KGZ/CO/2, para. 19; Human Rights Committee, CCPR/C/UKR/CO/7, para. 10, and Concluding observations on the third periodic report of Suriname, 3 December 2015, CCPR/C/SUR/CO/3, para. 27.

<sup>284</sup> Cf. United Nations, United Nations High Commissioner for Human Rights, A/HRC/29/23, para. 21.

<sup>285</sup> Cf. United Nations United Nations High Commissioner for Human Rights, A/HRC/29/23, paras. 34-38, 54, and 60-62; UNDP, Discussion Paper on *Transgender Health & Human Rights*, New York, 2013, and UNESCO, *Out in the open: Education sector responses to violence based on Sexual Orientation and Gender Identity/Expression*, UNESCO, Paris, 2016.

<sup>286</sup> See, for example, Constitutional Court of Colombia, Judgment T-063/2015.

<sup>287</sup> *Case of Atala Riffo and daughters v. Chile. Chile. Merits, reparations and costs*, para. 161.

<sup>288</sup> *Case of Fontevecchia and D`Amico v. Argentina*, para. 48.

person is summoned to appear before the competent authorities pursuant to the domestic law of the respective State.

136. In this regard, in its report on Privacy and Data Protection, the Inter-American Juridical Committee indicated that “[s]ome types of personal data, given its sensitivity in particular contexts, are especially likely to cause material harm to individuals if misused. Data controllers should adopt privacy and security measures that are commensurate with the sensitivity of the data and its capacity to harm individual data subjects.” Regarding sensitive data, the Committee suggested that “it might be considered entitled to special protection because its improper handling or disclosure would intrude deeply upon the personal dignity and honor of the individual concerned and could trigger unlawful or arbitrary discrimination against the individual or result in risk of serious harm to the individual.” “Accordingly, appropriate guarantees should be established within the context of national law and rules, reflecting the circumstances within the relevant jurisdiction, to ensure that the privacy interests of individuals are sufficiently protected” and “[e]xplicit consent of the individual concerned should be the governing rule for the collection, disclosure and use of sensitive personal data.”<sup>289</sup>

137. The same report indicates that “[p]ersonal data should be protected by reasonable and appropriate security safeguards against unauthorized access, loss, destruction, use, modification or disclosure.”<sup>290</sup> The report also recalled that “[t]he concept of privacy is well-established in international law and that it rests on fundamental concepts of personal honor and dignity as well as freedom of speech, thought, opinion and association. Provisions on the protection of privacy, personal honor and dignity are found in all the major human rights systems of the world.”<sup>291</sup> Lastly, the Committee stipulated that protecting the privacy of personal data “means not only keeping personal data secure, but also enabling individuals to control how their personal data is used and disclosed.”<sup>292</sup>

138. In addition, the Inter-American Program for Universal Civil Registry and the “Right to Identity” adopted by the OAS General Assembly established that “[t]hrough appropriate legislation, the States will guarantee the confidentiality of the personal information gathered by the civil registry systems, by applying the principles of personal data protection.”<sup>293</sup> Lastly, the confidential nature of the procedure to change the given name and, when appropriate, the gender or sex and the photograph to conform to a self-perceived gender identity is consistent with the Yogyakarta Principles as these stipulate that “[e]veryone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, [... which] includes the choice to disclose or not to disclose information relating to one’s sexual orientation or gender identity, as well as decisions and choices regarding both one’s own body and consensual sexual and other relations with others.”<sup>294</sup>

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<sup>289</sup> OAS, The Inter-American Juridical Committee. Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Ninth principle.

<sup>290</sup> OAS, The Inter-American Juridical Committee. Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Sixth principle.

<sup>291</sup> OAS, The Inter-American Juridical Committee, Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Definitions.

<sup>292</sup> OAS, The Inter-American Juridical Committee. Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Fifth principle.

<sup>293</sup> Cf. OAS, General Assembly of the OAS, AG/RES. 2362 (XXXVIII-O/08). Inter-American Program for Universal Civil Registry and the “Right to Identity”. Objectives 2.c.

<sup>294</sup> Cf. Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, March 2007, Principle 6.

139. In this regard, article 9 of the Argentine Gender Identity Act establishes that “an original birth registration shall only be accessed by those authorized by its owner or by a written and reasoned court order. [...] The rectifications of sex and name changes in the records shall not be made public without the authorization of the owner of the data.” Article 6 of this same law indicates expressly that “any reference to this law in the amended birth certificate and on the national identity document issued as a result is prohibited.”<sup>295</sup> Other States in the region have adopted gender identity laws that recognize the principle of confidentiality as a rule, and the principle of accessibility to the information as an exception when it is required by the judicial or fiscal authorities. For example, the Bolivian Gender Identity Act stipulates that the procedure must guarantee “that the information be accessible solely by the person concerned, those authorized by this law, or those authorized by a court order and/or by order of the public prosecutor.”<sup>296</sup>

140. Similarly, the Supreme Court of Mexico has understood that the rights to personal and sexual identity are “inherent human rights, that may not be interfered with by others” and that they constitute “rights essential to the human condition that must be guaranteed and defended, because they can be claimed both to defend privacy that is threatened or has been violated, and to require the State to prevent possible interferences that harm them; thus, even though they are not absolute, interfering with them can only be justified by law, when a higher interest is at issue.”<sup>297</sup> Accordingly, that Court understood that, in the case of individuals who have changed their gender identity, if “the data concerning the name and sex with which they were originally registered at birth” is retained “in their documents, including the birth certificate, and the decision granting the amendment is merely annotated in the margin, the resulting disclosure of such personal data would violate their fundamental rights to human dignity, equality and non-discrimination, privacy, image, personal and sexual identity, free development of the personality, and health, because the annotation in the margin means that, in even the most simple activities of their lives, these persons must reveal their previous condition, possibly giving rise to discriminatory acts towards them, without there being any reason to burden them in this way.”<sup>298</sup>

d) *The procedure should be prompt and, if possible, cost-free*

141. In this Opinion, the Court has mentioned that the right to identity is closely related to the exercise of certain rights (*supra* paras. 99 and 101.h). Reference has also been made to the impact that the denial of the right to gender identity has on the situation of vulnerability of transgender persons, as well as its specific effects on the exercise of other rights (*supra* paras. 98 and 101.i).

142. In this regard, it should be recalled that, on several occasions, this Court has indicated that the reasonable time for an administrative or judicial procedure is determined, among other elements, by the effects that the duration of the procedure has on the legal status of the person concerned. Thus, the Court has established that if the passage of time has a relevant impact on the legal status of this person, the procedure must be executed more promptly in order to settle the matter as soon as possible.<sup>299</sup> Accordingly, there can be no doubt that the effect that this type of procedure for name change and for the rectification of the self-perceived gender identity can have

<sup>295</sup> Argentina. Act No. 26,743, Articles 6 and 9.

<sup>296</sup> Bolivia. Act No. 807, of May 21, 2016, article 6. Also, article 10 of the act establishes that the administrative procedure to change the name, sex and photograph is confidential.

<sup>297</sup> Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 7.

<sup>298</sup> Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 18.

<sup>299</sup> 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 Andrade Salmón v. Bolivia. Merits, reparations and costs*. Judgment of December 1, 2016. Series C No. 330, para. 164.

on the persons concerned is of such significance that it must be executed as promptly as possible. The domestic laws of several States of the region establish the need for the procedure of change of name, sex and photograph of persons in accordance with their gender identity to be prompt.<sup>300</sup>

143. In addition, as indicated in the Inter-American Program for Universal Civil Registry and the "Right to Identity," the registration procedure should be cost-free,<sup>301</sup> or at least be the least onerous possible for those concerned; in particular if they are "in poverty and at risk [... and also] taking the gender perspective into account."<sup>302</sup> Also, the Committee of Ministers of the Council of Europe has affirmed that "procedural and financial obstacles are considered contrary to the quick and accessible nature of the change of name and gender procedure."<sup>303</sup> Similarly, the Court notes that Argentina's Gender identity Act No. 26,743 establishes that the procedure to amend the records provided for in the law is free of charge, personal, and does not require the intervention of an agent or a lawyer.<sup>304</sup>

144. In other cases, this Court has already analyzed the existence of pecuniary requirements to be able to access a right contained in the Convention, indicating that such requirements should not nullify the exercise of these rights.<sup>305</sup> In this regard, the Court understands that the foregoing observations on the necessary cost-free nature of this procedure relates to the need to reduce the obstacles, in this case of a financial nature, that can be placed in the way of the legal recognition of gender identity. The cost-free nature of this procedure also relates to the need to avoid creating discriminatory differences in treatment with regard to cisgender persons, who do not need to use such procedures and, consequently, do not incur pecuniary expenses for the recognition of their gender identity. This matter is especially relevant when recalling the context of vulnerability and poverty associated with those unable to obtain recognition of their gender identity.

*e) Regarding the requirement to provide evidence of surgical and/or hormonal therapy*

145. As already mentioned (*supra* para. 32.h), gender identity creates space for self-identification, in other words, the experience that a person has of his or her own gender<sup>306</sup> and, in some cases, this may eventually involve the modification of the appearance or bodily functions by medical, surgical or other means. However, it is important to stress that gender identity is not a concept that should be systematically associated with physical transformations. This should be understood even in situations in which a person's gender identity or expression is different from the

<sup>300</sup> See, for example: Bolivia. Act No. 807 of 2016, "Gender Identity Act", article 6: "Promptness. This refers to timely and prompt exercise in the administration of the procedure for the change of name, sex and photographic data of transsexual and transgender persons."

<sup>301</sup> Cf. OAS, General Assembly of the OAS, AG/RES. 2362 (XXXVIII-O/08). Objective 2.d.

<sup>302</sup> OAS, General Assembly of the OAS, AG/RES. 2362 (XXXVIII-O/08). Purpose.

<sup>303</sup> Cf. Committee of Ministers of the Council of Europe. Recommendation CM/Rec (2010) 5 of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity (adopted by the Committee of Ministers on 31 March 2010 at the 1081<sup>st</sup> meeting of the Ministers' Deputies).

<sup>304</sup> Cf. Argentina. Act No. 26,743, article 6 final paragraph. The cost-free nature of the procedure is established in Resolution 1795/2012 of the National Directorate of the National Civil Registry (amending Resolution No. 1417/12), declaring persons requesting rectification of their records and the consequent issue of a new national identity document exempt from the payment of any fee.

<sup>305</sup> Cf. *Case of Cantos v. Argentina. Merits, reparations and costs*. Judgment of November 28, 2002. Series C No. 97, para. 54, and *Case of Andrade Salmón v. Bolivia*, para. 117.

<sup>306</sup> Cf. UNHCR, Guidelines on international protection No. 9, Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/IP/12/09, 23 October 2012; UN, Fact sheet, LGBT Rights: Frequently Asked Questions. FREE&EQUAL, United Nations for LGBT Equality.

one assigned at birth, or that is typically associated with the sex assigned at birth, because transgender persons construct their identity regardless of medical treatment or surgery (*supra* para. 32.h).

146. Consequently, the procedure for name change, change of the photograph and rectification of the reference to sex or gender in records and on identity documents cannot require supporting evidence of total or partial surgery, hormonal therapy, sterilization, or bodily changes in order to grant the request or to prove the gender identity in question, because this could be contrary to the right to personal integrity recognized in Article 5(1) and 5(2) of the American Convention. Indeed, subjecting the recognition of a transgender person's gender identity to an undesired surgical intervention or sterilization would mean conditioning the full exercise of several rights, including the rights to privacy (Article 11(2) of the Convention) and to choose freely the options and circumstances that give a meaning to his or her existence (Article 7 of the Convention), and would lead to the refusal of the full and effective enjoyment of the right to personal integrity.<sup>307</sup> It should be recalled that, in the case of *I.V. v. Bolivia*, this Court indicated that health, as an integral part of the right to personal integrity, also includes the liberty of everyone to control their health and their body, and the right not to suffer from interferences, such as to be subjected to torture or to non-consensual medical treatments and experiments.<sup>308</sup> The foregoing could also constitute a violation of the principle of equality and non-discrimination contained in Articles 24 and 1(1) of the Convention because cisgender persons would not need to submit to such obstacles and harm to their personal integrity in order to enforce their right to identity.

147. In this regard, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has indicated that "[i]n States that permit the modification of gender markers on identity documents abusive requirements [have been] imposed, such as forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive medical procedures [...]. Even in places with no legislative requirement, enforced sterilization of individuals seeking gender reassignment is common. These practices are rooted in discrimination on the basis of sexual orientation and gender identity, violate the rights to physical integrity and self-determination of individuals and amount to ill-treatment or torture."<sup>309</sup> Similarly, the ECHR has established that the burden imposed on a person to prove the medical need for treatment, including irreversible surgery, in one of the most intimate areas of private life, seems disproportionate and violates the right to privacy contained in Article 8 of the Convention.<sup>310</sup>

148. Furthermore, in its General Comment No. 22 on the right to sexual and reproductive health, the Committee on Economic, Social and Cultural Rights indicated that: "[l]aws and policies that indirectly perpetuate coercive medical practices, including incentive- or quota-based contraceptive policies and hormonal therapy, as well as surgery or sterilization requirements for legal recognition of one's gender identity, constitute additional violations of the obligation to respect."<sup>311</sup> Likewise,

<sup>307</sup> Cf. ECHR, *Case of A.P., Garçon and Nicot v. France*, Nos. 79885/12, 52471/13, and 52596/13. Judgment of 6 April 2017, paras. 131 to 133.

<sup>308</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 155. Also, United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health* E/C.12/2000/4, 11 August 2000, para. 8.

<sup>309</sup> United Nations, Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 5 January 2016, A/HRC/31/57.

<sup>310</sup> Cf. ECHR, *Case of Christine Goodwin v. The United Kingdom*, paras. 75, 78 and 82, and *Case of A.P., Garçon and Nicot v. France*, para. 131 to 133.

<sup>311</sup> United Nations, Committee on Economic, Social and Cultural Rights. General comment No. 22, on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, E/C.12/GC/22, para. 58.

the Committee on the Rights of the Child has indicated that it condemned “the imposition of so-called ‘treatments’ to try to change sexual orientation and forced surgeries or treatments on intersex adolescents. It urges States to eliminate such practices, repeal all laws criminalizing or otherwise discriminating against individuals on the basis of their sexual orientation, gender identity or intersex status and adopt laws prohibiting discrimination on those grounds.”<sup>312</sup> Similarly, the Yogyakarta Principles stipulate that “[n]o one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.”<sup>313</sup> In addition, Argentina, Uruguay, and Bolivia have laws reflecting this, and the high courts of Colombia and Brazil have ruled in this sense.<sup>314</sup>

f) *The procedures in relation to children*

149. With regard to the regulation of the procedure for change of name, change of the photograph and rectification of the reference to sex or gender in the records and identity documents of children, the Court recalls, first that, as it has indicated in other cases, children are holders of the same rights as adults and of all the rights recognized in the American Convention as well as benefitting from the special measures of protection contained in Article 19 of the Convention, which must be defined based on the particular circumstances of each specific case.<sup>315</sup> The Court has also indicated that, when applied to children, the rights contained in general human rights instruments should be interpreted taking into consideration the *corpus juris* on the rights of the child.<sup>316</sup> Moreover, the Court has considered that Article 19 “should be understood as an additional supplementary right that the treaty establishes for individuals who, based on their physical and emotional stage of development, need special protection.”<sup>317</sup>

150. Additionally, the Court has understood that due protection of the rights of the child must take into consideration their innate characteristics and the need to encourage their development, offering them the conditions required to be able to live and develop their capabilities taking full advantage of their potential.<sup>318</sup> In this sense, children exercise their rights progressively, as they develop a greater degree of personal autonomy.<sup>319</sup> Thus, the Court understands that the pertinent measures of protection for children are special or more specific than those established for adults.<sup>320</sup>

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<sup>312</sup> United Nations, Committee on the Rights of the Child. General comment No. 20 on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, para. 34.

<sup>313</sup> Cf. Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, March 2007, Principle 3.

<sup>314</sup> Cf. Argentina. Act 26,743, article 4; Bolivia. Act No. 807 of 2016; Uruguay, Act No. 18,620, article 3; Colombia. Constitutional Court of Colombia, Judgment T-063/15; Mexico, Supreme Court of Justice of Mexico. Direct amparo 6/2008. January 6, 2009; Brazil, Superior Court of Justice of Brazil, Judgment of May 9, 2017.

<sup>315</sup> Cf. *Case of Gelman v. Uruguay*, para. 121; Advisory Opinion OC-21/14, para. 66, and *Case of Atala Riffo and daughters v. Chile*. Order of November 29, 2011, para. 6.

<sup>316</sup> Cf. *Case of Gelman v. Uruguay*, para. 121.

<sup>317</sup> *Case of the “Juvenile Re-education Institute” v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, para. 147, and *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012. Series C No. 250, para. 142.

<sup>318</sup> Cf. *Case of the Pacheco Tineo Family v. Bolivia*, para. 218, and Advisory Opinion OC-21/14, para. 66.

<sup>319</sup> Cf. *Case of Gelman v. Uruguay*, para. 129; Advisory Opinion OC-21/14, para. 66; *Case of Furlan and family members v. Argentina*, para. 203, and *Case of Mendoza et al. v. Argentina*, para. 143. See also, United Nations, Committee on the Rights of the Child, General Comment No. 7, Implementing child rights in early childhood, CRC/GC/7/rev. 1, 20 September 2006, para. 17.

<sup>320</sup> Cf. Advisory Opinion OC-21/14, para. 66.

151. According to the Court's jurisprudence, when it is a question of protecting the rights of the child and adopting measures to achieve this protection, in addition to the principle of progressive autonomy mentioned above (para. 150), the following four guiding principles that govern the Convention on the Rights of the Child should permeate and be implemented in every comprehensive protection system;<sup>321</sup> the principle of non-discrimination,<sup>322</sup> the principle of the best interests of the child,<sup>323</sup> the principle of respect for the right to life, survival and development,<sup>324</sup> and the principle of respect for the child's views in all matters affecting the child, in order to ensure his or her participation.<sup>325</sup>

152. In this regard, it is useful to recall that the principle of the best interest of the child implies, as governing criteria, that this should be a primary consideration in the design of public policies and in the drafting of laws concerning childhood, as well as in their implementation at all levels of the child's life.<sup>326</sup> In addition and closely related to the right to be heard, the Court has referred in other decisions to the obligation to fully respect the right of the child to be heard in all decisions that affect his or her life.<sup>327</sup> In particular, the Court has asserted that the right of the child to be

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<sup>321</sup> Cf. Advisory Opinion OC-21/14, para. 66, and *Case of Atala Riffo and daughters v. Chile*. Order of November 29, 2011, para. 7. Also, United Nations, Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, para. 12.

<sup>322</sup> Article 2 of the Convention on the Rights of the Child establishes the obligation for States Parties to respect and ensure the rights set forth in that instrument to each child within their jurisdiction without discrimination of any kind, which "requires that States take steps to identify children and groups of children towards whom recognition and exercise of their rights may require the adoption of special measures." Cf. *Matter of L.M. with regard to Paraguay*. Provisional measures. Order of the Inter-American Court of Human Rights of July 1, 2011, para. 14, and Advisory Opinion OC-21/14, para. 66. See also, United Nations, Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), 27 November 2003, CRC/GC/2003/5, para. 12, and Committee on the Rights of the Child, General comment No. 6. Treatment of unaccompanied and separated children outside their country of origin, para. 1.

<sup>323</sup> Paragraph 1 of Article 3 of the Convention on the Rights of the Child establishes that the best interests of the child must be the primary consideration in all actions concerning children. Cf. Advisory Opinion OC-21/14, para. 66. See also, United Nations, Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 12, and Committee on the Rights of the Child, General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/CG/14.

<sup>324</sup> Article 6 of the Convention on the Rights of the Child recognizes the inherent right of every child to life, and the obligation of States Parties to ensure to the maximum extent possible the survival and development of the child; in other words, as a holistic concept that includes the physical, mental, spiritual, moral, psychological and social development of the child. Cf. Advisory Opinion OC-21/14, para. 66. See also, United Nations, Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 12.

<sup>325</sup> Article 12 of the Convention on the Rights of the Child establishes the right of the child "to express his or her views freely in all matters affecting the child" and that the views of the child must be "given due weight in accordance with the age and maturity of the child." Cf. Advisory Opinion OC-21/14, para. 66; *Case of Gelman v. Uruguay*, para. 129, and *Case of Atala Riffo and daughters v. Chile*. Order of November 29, 2011, para. 7. See also, United Nations, Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 12, and Committee on the Rights of the Child, General comment No. 12. The right of the child to be heard, 20 July 2009, CRC/C/GC/12.

<sup>326</sup> Cf. Advisory Opinion OC-21/14, para. 70, and second operative paragraph of the opinion.

<sup>327</sup> Cf. *Case of Fornerón and daughter v. Argentina. Merits, reparations and costs*. Judgment of April 27, 2012. Series C No. 242; Advisory Opinion OC-21/14, para. 70, and *Case of Atala Riffo and daughters v. Chile*. Order of November 29, 2011, para. 7. See also, United Nations, Committee on the Rights of the Child, General comment No. 12. The right of the child to be heard, 20 July 2009, CRC/C/GC/12., para. 74.



heard is not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.<sup>328</sup>

153. Furthermore, in the context of contentious cases,<sup>329</sup> the Court has had the occasion to discuss the child's right to identity recognized in Article 8 of the Convention on the Rights of the Child. The first paragraph of this article establishes that: "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference." In such cases, the Court indicated that the right to identity was closely related to the person in his or her specific individuality and private life.<sup>330</sup> Similarly, in the case of *Gelman v. Uruguay*, the Court concluded that the State violated the right to liberty recognized in Article 7(1) of the Convention in a broad sense, for the abduction and subsequent elimination of the identity of a girl child by the State's security forces.<sup>331</sup> The Court considers that this right implies the possibility of every human being for self-determination and to freely choose the options and circumstances that give meaning to his or her existence.

154. Consequently, the Court understands that the foregoing considerations concerning the right to gender identity are also applicable to children who wish to apply for recognition of their self-perceived gender identity in their records and on their documents. This right should be understood in keeping with the special measures of protection established at the domestic level pursuant to Article 19 of the Convention, and those measures should necessarily be designed based on the principles of the child's best interests, progressive autonomy, and right to be heard and that the child's views be taken into account in any procedure that concerns the child, respect for the right to life, survival and development, and also the principle of non-discrimination. Lastly, it is important to underline that any restriction imposed on the full exercise of that right by provisions aimed at the protection of the child can only be justified based on these principles and should not be disproportionate. It is also pertinent to recall that the Committee on the Rights of the Child has emphasized that all adolescents have the rights "to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy."<sup>332</sup>

155. In addition, the Yogyakarta Principles have established that "everyone is entitled to the enjoyment of human rights" regardless of "their sexual orientation and gender identity" and "that in all actions concerning children the best interests of the child shall be a primary consideration and a child who is capable of forming personal views has the right to express those views freely, such views being given due weight in accordance with the age and maturity of the child."<sup>333</sup>

156. Lastly, and as an example of best practice in this regard, the Argentina's Gender Identity Act No. 26,743 of May 23, 2002, should be mentioned. Article 5 of the law refers to the procedure for amending a child's sex, name and picture in public records. In particular, the law establishes that, in the case of persons under the age of 18, the application "should be made through their legal representatives and with the express agreement of the minor, taking into account the

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<sup>328</sup> Cf. *Case of Atala Riffo and daughters v. Chile*. Order of November 29, 2011, para. 7. See also, United Nations, Committee on the Rights of the Child, General comment No. 12. The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para. 2.

<sup>329</sup> Cf. *Case of Gelman v. Uruguay*, paras. 122 to 124; *Case of Rochac Hernández et al. v. El Salvador*, paras. 116 and 117, and *Case of Contreras et al. v. El Salvador*, paras. 112 to 114.

<sup>330</sup> Cf. *Case of Contreras et al. v. El Salvador*, para. 113.

<sup>331</sup> Cf. *Case of Gelman v. Uruguay*, para. 129.

<sup>332</sup> United Nations, Committee on the Rights of the Child. General comment No. 20 on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, para. 34.

<sup>333</sup> Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, March 2007, Preamble.

principles of evolving capacities and best interests of the child as stipulated in the Convention on the Rights of the Child and in the law [...] on the comprehensive protection of the rights of children and adolescents. [...] In addition, the minor must be assisted by a children's lawyer. [...] When, for any reason, it is impossible to obtain the consent of any of the minor's legal representatives, or this is denied, then recourse may be had to a summary proceeding for the corresponding judges to rule based on the principles of the evolving capacities and best interests of the child as stipulated in the Convention on the Rights of the Child and in the law [...] on the comprehensive protection of the rights of children and adolescents."<sup>334</sup>

*g) The nature of the procedure*

157. This requirement is closely related to the second question raised by the State of Costa Rica concerning whether it "could it be considered contrary to the [American Convention] that those interested in changing their given name may only do so through a judicial procedure, without there being a pertinent administrative procedure."

158. Regarding this question, the considerations made *supra* concerning gender identity as an expression of the individuality of the person and the relationship that exists between this fundamental right and the possibility of all human beings to exercise self-determination and to freely choose the options and circumstances that give meaning to their existence, according to their own choices and convictions, without external interference should be recalled (*supra* para. 88). On this basis, the Court has recognized the fundamental right of everyone that the sex or gender registered in public records should coincide with the sexual and gender identity effectively assumed and experienced by the person concerned. Thus, the procedure for recognition of a person's self-perceived gender identity should consist of a registration process that everyone has the right to carry out autonomously, and in which the role of the State and of society should merely be to recognize and respect this registration of identity, without the intervention of the state authorities becoming an integral part of such identity. Accordingly, the said procedure may never be a space for external scrutiny and validation of the sexual and gender identity of the person requesting its recognition (*supra* para. 133).

159. Consequently, it can be affirmed that although, in principle, States may determine, based on their internal social and juridical circumstances, the most appropriate procedure to comply with the requirements for procedures to rectify the name and, if applicable, the reference to the sex/gender and the photograph in the corresponding records and identity documents, it is also true that the procedure best suited to the requirements established in this Opinion is one of an administrative or notarial nature, because, in some States, a judicial proceeding may incur in excessive formalities and delays characteristic of the proceedings of judicial nature. In this regard, it should be recalled that the Inter-American Program for Universal Civil Registry and the "Right to Identity" establishes that, "[i]n accordance with their domestic laws, the States will promote the cost-free use of administrative procedures in connection with registration processes in order to simplify and decentralize them, while leaving recourse to the judicial system as a last resort."<sup>335</sup>

160. In addition, a procedure of a judicial nature to obtain authorization to implement a right with these characteristics would place excessive constraints on the applicant and would not be appropriate because the procedure should be of an administrative nature in an administrative or judicial venue. Accordingly, the official responsible for the procedure could only deny the request, without violating the applicant's possibility for self-determination and right to privacy, if he or she

<sup>334</sup> Argentina. Act No. 26,743 of May 23, 2012, article 5.

<sup>335</sup> OAS, General Assembly of the OAS, AG/RES. 2362 (XXXVIII-O/08). Inter-American Program for Universal Civil Registry and the "Right to Identity". Objective 2.d.

notes a defect in the applicant's free and informed consent. In other words, any decision concerning a request for amendment or rectification based on gender identity should not be able to assign rights; it may only be of a declarative nature, because it should merely verify whether the requirements inherent to the manifestation of the will of the applicant have been met. Based on the foregoing, the answer to the second question raised by the State of Costa Rica concerning the nature of the procedure for a change of name so that this conforms to the self-perceived gender identity of the applicant is the following:

**States may determine and establish, in keeping with the characteristics of each context and their domestic law, the most appropriate procedures for the change of name, change of the photograph and rectification of the reference to sex or gender in records and on identity documents so that these conform to the self-perceived gender identity, regardless of whether these are of an administrative or judicial nature.<sup>336</sup> However, these procedures should comply with the following requirements established in this Opinion: (a) these should be centered on the complete rectification of the self-perceived gender identity; (b) these should be based solely on the free and informed consent of the applicant without involving requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing; (c) these should be confidential, and the changes, corrections or amendments to the records and on the identity documents should not reflect the changes made based on the gender identity; (d) these should be prompt and, insofar as possible, cost-free, and (e) these should not require evidence of surgery and/or hormonal therapy.**

**Since the Court notes that administrative or notarial procedures are those best suited to and most appropriate for these requirements, States may provide a parallel administrative procedure that the person concerned may choose.**

161. Lastly, and based on the above, it can also be indicated that the procedure for a change of name, change of the photograph and rectification of the reference to sex or gender in the records and on the identity documents so that these conform to the self-perceived gender identity does not necessarily have to be regulated by law, because it should consist of a simple procedure to verify the applicant's intention.

#### **D. Article 54 of the Civil Code of Costa Rica**

162. The State of Costa Rica asked the Court to rule on the compatibility with Articles 11(2), 18 and 24, in relation to Article 1(1) of the Convention, of the practice of applying Article 54 of the Civil Code of the Republic of Costa Rica<sup>337</sup> to those persons who wish to change their name based on their gender identity. In particular, it submitted the following question: "Could it be understood that, in accordance with the ACHR, Article 54 of the Civil Code of Costa Rica should be interpreted as to imply that those who wish to change their given name based on their gender identity are not obliged to submit to the judicial procedure established therein, but rather that the State must provide them with a free, prompt and accessible administrative procedure to exercise that human right?"

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<sup>336</sup> This category includes procedures of a notarial nature such as those established in the laws of Colombia. See Decree No. 1069 of 2015, regulating the justice and law sector, which refers to the procedure for amending a person's sex in the Civil Registry.

<sup>337</sup> Promulgated by Act No. 30 of April 19, 1885. It came into force on January 1, 1888, based on Act No. 63 of September 28, 1887.

163. Article 54 of the Civil Code establishes that “[e]very Costa Rican registered in the Civil Registry may change his or her name with the authorization of the court and this shall be obtained by means of the corresponding voluntary jurisdiction proceeding.” Meanwhile, article 55 of the Civil Code indicates that “when the request for a change has been submitted, the court shall order an announcement to be published in the Official Gazette indicating that any objections should be advised within 15 days,” and article 56 of the Civil Code indicates that “in the case of any name change or amendment, the Public Prosecution’s Office shall be heard, and before making its ruling the court shall obtain a report of good conduct and the police record of the applicant. It shall also advise the Ministry of Public Security.”

164. The Court notes, first, that although the request for an advisory opinion relates to article 54 of the Civil Code, which indicates the name change procedure, this article is closely related to articles 55 and 56 of the Code because these articles define some of the specific elements of the procedure. Consequently, the Court’s analysis will be based on these three articles.

165. During the proceedings of this Advisory Opinion, the Ombudsperson of the Republic of Costa Rica advised that, article 65 of the “The Supreme Electoral Tribunal and the Civil Registry Organic Act” establishes the possibility of amending entries in public records by way of administrative channel. In this case and based on the application of article 45 of the Civil Registry Rules of Procedure, in the administrative practice, it is considered that the amendment of entries in the records and, especially of the name, by means of a written petition (*ocurso*), is admissible by way of administrative channel only in the case of grammatical or spelling errors. In the case of a complete amendment to the records, those concerned are obliged to follow what is stipulated in 54 of the Civil Code.

166. The Ombudsperson added that, “currently, there are no legal restrictions to submitting a written petition as an administrative recourse to amend registry entries, including name and sex, because the rules that regulate this recourse do not establish a difference between the registry entries that may be amended using this procedure. Nevertheless, as verified on numerous occasions, the refusal to proceed with this recourse is due to the interpretation of the rules by the Supreme Electoral Tribunal and the administrative practice derived from this [...].”

167. In this regard, it should be pointed out that it is not incumbent on this Court to determine whether or not national regulations are being applied correctly in light of the domestic law, or to indicate the competent body to hear a specific matter in light of Costa Rica’s legal system. Rather, for this question, the Court must only interpret the rights recognized in the Convention and determine whether the referred provisions of domestic law – in this case article 54 of the Civil Code – conform with to the provisions of the American Convention.

168. Regarding the name change procedure referred to in article 54 of the Civil Code, the Court notes that: (a) it entails only the change of name and not of the other elements inherent in the right to identity such as, for example, the sex or gender recorded in the identity documents and other records; (b) it involves a judicial procedure; (c) it opens up the possibility of presenting objections to the name change request; (d) it requires the intervention of a third party (the Public Prosecution’s Office), and (e) it requires the submission of a report of good conduct and police records.

169. In the previous section, the Court verified that a procedure to decide a request for rectification of the records and the identity documents to the applicant’s gender identity must, among other requirements: (a) be centered on the complete rectification of the self-perceived gender identity; (b) the decision on the request should be based solely on the applicant’s free and informed consent, without third parties being able to interfere arbitrarily with the extremely personal right to gender identity; (c) should be cost-free insofar as possible, and implemented promptly; (d) should not require the submission of medical or psychological evidence, or required

accounts of the private life nor the submission of police records, and (e) should preferably be an administrative or notarial procedure rather than a procedure of a judicial nature.

170. The Court notes that the requirements established in articles 55 and 56 of the Civil Code of Costa Rica do not comply with the elements just mentioned, because they introduce the possibility of objections being raised by third parties and the Public Prosecution's Office. This signifies that the eventual decision of the judge would not be merely declarative. Also, article 55 of the Civil Code indicates that the judge must order the publication of an announcement in the Official Gazette, which means that the procedure is not confidential. Lastly, article 56 of the Civil Code of Costa Rica requires the submission of a report of good conduct and of the applicant's police record and, as already indicated (*supra* para. 168), this requirement is incompatible with the procedure to rectify the identity data of a person to the self-perceived gender identity of that person.

171. Based on the above, the Court considers that the answer to the third question raised by the State of Costa Rica is as follows:

**As it is currently worded, article 54 of the Civil Code of Costa Rica is in conformity with the provisions of the American Convention only if it is interpreted by the courts or regulated administratively to mean that the procedure established by this article can ensure that the persons who wish to change their identity data so that it accords with their self-perceived gender identity can do so through a merely administrative procedure that meets the following criteria:**

**(a) It must be centered on the complete rectification of the self-perceived gender identity; (b) it must be based solely on the applicant's free and informed consent, without requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing; (c) it must be confidential, and the changes, corrections or amendments to the records and the identity documents should not reflect the changes to conform to the gender identity; (d) it must be prompt and, insofar as possible, cost-free, and (e) it must not require evidence of surgery and/or hormonal therapy.**

**Consequently, based on the conventionality control, article 54 of the Civil Code of Costa Rica must be interpreted pursuant to the standards established above so that those who wish to have their records and/or their identity documents comprehensively rectified in order to conform to their self-perceived gender identity, may effectively enjoy this human right recognized in Articles 3, 7, 11(2), 13 and 18 of the American Convention.**

**The State of Costa Rica, in order to ensure a more effective protection of human rights, may issue a regulation that incorporates these previously mentioned standards into an administrative procedure that it may offer in parallel, in keeping with the considerations in the preceding paragraphs of this Opinion (*supra* para. 160).**

## VIII

### INTERNATIONAL PROTECTION OF RELATIONSHIPS BETWEEN SAME-SEX COUPLES

172. The fourth and fifth questions on which the State of Costa Rica requested this Court's opinion relate to the patrimonial rights derived from "relationships between persons of the same sex." In this chapter, the Court will refer, first, to the standards applicable to the "relationships" referred to by Costa Rica, and will then turn to the second part of the question regarding the

mechanisms through which this relationship should be protected, according to the American Convention.

### A. The treaty-based protection of the relationship between same-sex couples

173. As a preliminary observation, the Court notes that, in the request for this Advisory Opinion, the State of Costa Rica did not explain the kind of relationship between same-sex persons to which it was referring. However, the Court observes that, in its question, the State alludes to Article 11(2) of the Convention,<sup>338</sup> which protects the individual, *inter alia*, from arbitrary interference with his or her private life or family.<sup>339</sup> Accordingly, the Court understands that the questions submitted by the State refer to the patrimonial rights derived from the relationship which result from the emotional ties between same-sex couples, as in the case of *Duque v. Colombia*.<sup>340</sup> The Court also observes that, in general, the rights resulting from emotional ties between couples are usually protected by the Convention through the family and family life institutions.

174. In this regard, the Court recalls, that the American Convention contains two articles that provide complementary protection to both the family and the family life. Thus, this Court has considered that the possible violations of these protected rights should be analyzed not only as a possible arbitrary interference with the private and family life under Article 11(2) of the American Convention, but also, because of the impact that such violations may have on the family unit, in light of Article 17(1) of this same instrument.<sup>341</sup> None of the articles cited include a rigorous and exhaustive definition of what should be understood by "family." Regarding this, the Court has indicated that the American Convention does not refer to a specific narrow concept of family and that, in particular, it does not protect either a single specific model of the family.<sup>342</sup>

175. Consequently, to answer the questions raised by the State of Costa Rica, the Court finds it necessary to determine whether the emotional ties between same-sex couples can be considered "family" in the terms of the Convention, in order to establish the scope of the applicable international protection. To this end, the Court must resort to the general rules for the interpretation of international treaties and the special rules of interpretation of the American Convention referred to in Chapter V of this Opinion. Thus, the Court will analyze the ordinary meaning of the word (literal interpretation), its context (systematic interpretation), its object and purpose (teleological interpretation), as well as the evolutive interpretation of its scope. Also, pursuant to the provisions of Article 32 of the Vienna Convention, it will refer to supplementary means of interpretation, especially the preparatory works for the Convention.

176. To establish the ordinary meaning of the word "family," the Court deems it necessary to recognize the crucial importance of the family as a social institution, which emerges from the most basic needs and desires of the human being. It seeks to realize aspirations of safety, connection,

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<sup>338</sup> Article 11(2) of the American Convention: "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation."

<sup>339</sup> *Cf. Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 161.

<sup>340</sup> *Cf. Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 138.

<sup>341</sup> *Cf. Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 175.

<sup>342</sup> *Cf. Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, paras. 142 and 172. Similarly, see United Nations, Committee on the Elimination of Discrimination against Women, General Recommendation No. 21 (thirteenth session 1994). Equality in marriage and family relations, para. 13; Committee on the Rights of the Child, General Comment No. 7, 20 September 2006, Implementing child rights in early childhood, CRC/C/GC/7/Rev.1, paras. 15 and 19; Human Rights Committee, General Comment No. 19 (thirty-ninth session, 1990). Article 23 (The Family), HRI/GEN/1/Rev.9 (Vol. I), para. 2, and Human Rights Committee, General Comment No. 16 (thirty-second session, 1988). Article 17 (The right to privacy), HRI/GEN/1/Rev.9 (Vol. I), para. 5.

and refuge that express the best inclinations of humankind. The Court finds it evident that the family is an institution that has provided cohesion to entire communities, societies and peoples.

177. Notwithstanding its transcendental significance, the Court also notes that the existence of the family has accompanied the development of society. Its conceptualization has varied and evolved over time. For example, up until a few decades ago, it was still considered legitimate to distinguish between children born in and out of wedlock.<sup>343</sup> Furthermore, contemporary societies have cast off stereotyped notions of the roles that the members of a family should assume, which were very present in societies of this region when the Convention was drawn up. At times, these notions have evolved long before the laws of a State have been adapted to them.<sup>344</sup>

178. Furthermore, the Court observes that, today, family relationships have numerous forms and are not limited to relationships based on marriage.<sup>345</sup> Thus, this Court has found that:

“[...] [T]he definition of family should not be restricted by the traditional notion of a couple and their children, because other relatives may also be entitled to the right to family life, such as uncles and aunts, cousins, and grandparents, to name but a few of the possible members of the extended family, provided they have close personal ties. In addition, in many families the person or persons in charge of the legal or habitual maintenance, care and development of a child are not the biological parents. Furthermore, in the migratory context, “family ties” may have been established between individuals who are not necessarily family members in a legal sense, especially when, as regards children, they have not been accompanied by their parents in these processes. This is why the State has the obligation to determine, in each case, the composition of the child’s family unit. [...]”<sup>346</sup>

179. In the Court’s opinion, there is no doubt that – for example – a single-parent family must be protected in the same way that the grandparents who assume the role of parents of a grandchild.

<sup>343</sup> Cf. ECHR, Case of *Marckx v. Belgium*, No. 6833/74, Judgment of 13 June 1979, para. 14.

<sup>344</sup> For example, in Guatemala, in 1998, when provisions in the Civil Code established that a married woman could only exercise a profession or have an employment when this did not prejudice “her functions of mother and housewife,” Guatemala, Civil Code, Decree-Law No. 106, of September 14, 1963, articles 113 and 114. Also, article 109 of the Civil Code accorded conjugal representation to the husband, and article 131 authorized the husband to administer the conjugal property. In addition, article 110 referred to the responsibilities within the marriage, according the wife “the right and the [special] obligation” to care for the underage children and the household. These provisions were repealed or reformed by congressional Decrees No. 80-98 of December 23, 1998, and 27-99 of August 30, 1999. Similarly, in Nicaragua, article 151 of the Civil Code established that “[t]he husband is the representative of the family and, in his absence, the wife”; also, article 152 indicated that “[t]he husband is obliged to live with his wife and she to live with her husband and to follow him wherever he moves his residence.” These provisions were repealed by articles 79 to 82 and 671 of the Family Code, Act 870 of August 26, 2014. Article 158 of the Paraguayan Civil Code, Act No. 1183/85, December 18, 1985, established that “[t]he consent of both spouses shall be required for the woman to be able to take the following actions: (a) exercise a profession, industry or trade on her own account, or work outside the home; (b) hire out her services; (c) constitute single or joint-stock industrial or investment companies, or limited partnerships; (d) accept donations; (e) freely surrender transactions of the property that she administers. In all the situations in which the husband’s consent is required, if he refuses this or is unable to provide it, the wife may request due authorization from the judge, and the latter shall grant this when the petition responds to the needs or interests of the household.” Additionally, article 195 established that “[t]he husband is the administrator of the communal property, subject to the exceptions established in this chapter.” The preceding articles were repealed by Act 1/92 of June 25, 1992, article 98.

<sup>345</sup> Cf. Advisory Opinion OC-17/02, paras. 69 and 70; *Case of Atala Riffo and daughters v. Chile*, para. 142, and ECHR, *Case of Elsholz v. Germany*, No. 25735/94, Judgment of 13 July 2000, para. 43, *Case of Keegan v. Ireland*, No. 16969/90, Judgment of 26 May 1994, para. 44, and *Case of Kroon et al. v. The Netherlands*, No. 18535/91, Judgment of 27 October 1994, para. 30. In this regard, the Court has indicated that “the concept of family life is not reduced to marriage and should encompass other *de facto* family ties where the parties live together outside marriage.” *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 142

<sup>346</sup> Advisory Opinion OC-21/14, August 19, 2014, para. 272.

Likewise, adoption is unquestionably a social institution that, in certain circumstances, allows two or more persons who do not know each other to become a family. Also, pursuant to the considerations set out in Chapter VII of this Opinion, a family may also consist of persons with different gender identities and/or sexual orientations. All these models require protection by society and the State because, as mentioned previously (*supra* para. 174), the Convention does not protect a single or a specific model of a family.

180. Without limiting the foregoing, the European Court has indicated that a number of factors may be relevant to identify whether a relationship can be said to amount to “family life”, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other.<sup>347</sup> Despite this, the United Nations System has observed that “the concept of family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.”<sup>348</sup>

181. Given the impossibility of identifying an ordinary meaning for the word “family,” the Court observes that the *immediate* context<sup>349</sup> of Articles 11(2) and 17(1) does not provide a satisfactory answer either. On the one hand, paragraphs 2, 3, 4 and 5 of Article 17 clearly refer exclusively to one model of family relationship, but as noted previously, the protection of family relationships is not limited to relationships based on marriage. Meanwhile, paragraphs 1 and 3 of Article 11 do not offer any additional evidence to establish the scope of the word examined.

182. Thus, regarding Article 17(2) of the Convention, the Court considers that although it is true that, taken literally, it recognizes the “right of men and women of marriageable age to marry and to raise a family,” this wording does not propose a restrictive definition of how marriage should be understood or how a family should be based. In the opinion of this Court, Article 17(2) is merely establishing, expressly, the treaty-based protection of a specific model of marriage. In the Court’s opinion, this wording does not necessarily mean either that this is the only form of family protected by the American Convention.

183. As mentioned in Chapter V of this Opinion, a treaty’s context also includes, *inter alia*, the legal system to which the provisions to be interpreted belong.<sup>350</sup> Thus, the Court has considered that, when interpreting a treaty, it is not only the formal agreements and instruments that relate to it that must be taken into account,<sup>351</sup> but also the system to which it belongs;<sup>352</sup> in this case, the Inter-American system for the protection of human rights.<sup>353</sup>

<sup>347</sup> Cf. *Mutatis mutandi*, ECHR, *Case of X, Y and Z v. The United Kingdom*, No. 21830/93, Judgment of 22 April 1997, para. 36, and *Case of Şerife Yiğit v. Turkey*, No. 3976/05), Judgment of 2 November 2010 para. 96.

<sup>348</sup> United Nations, Human Rights Committee, General Comment No. 19 (thirty-ninth session, 1990). Article 23 (The Family), HRI/GEN/1/Rev.9 (Vol. I), para. 2. Also, Committee on the Elimination of Discrimination against Women, General Recommendation No. 21 (thirteenth session 1994). Equality in marriage and family relations, para. 13; Committee on the Rights of the Child, General Comment No. 7, 20 September 2006, Implementing child rights in early childhood, CRC/C/GC/7/Rev.1, paras. 15 and 19, and Human Rights Committee, General Comment No. 16 (thirty-second session, 1988). Article 17 (The right to privacy), HRI/GEN/1/Rev.9 (Vol. I), para. 5.

<sup>349</sup> Cf. World Trade Organization. *Import Prohibition of Certain Shrimp and Shrimp Products (United States v. India, Malaysia, Pakistan, Thailand)*. Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, para. 116.

<sup>350</sup> Cf. *Case of González et al. (“Cotton Field”) v. Mexico*, para. 43; *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, para. 191, and Advisory Opinion OC-22/16, para. 44.

<sup>351</sup> Article 31(2) of the Vienna Convention on the Law of Treaties establishes that: “2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”



184. Accordingly, in addition to taking into account all the provisions of the American Convention, the Court has found it necessary to verify all the formal agreements and instruments related to it, because this allows the Court to verify whether the interpretation given to a specific provision or word is coherent with the meaning of the other provisions.<sup>354</sup> Thus, the Court notes that Articles 5 and 6<sup>355</sup> of the American Declaration of the Rights and Duties of Man, Article 15<sup>356</sup> of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) of November 17, 1988, and Article XVII<sup>357</sup> of the American Declaration on the Rights of Indigenous Peoples of June 15, 2016, contain provisions similar to those of Article 17 of the American Convention.

185. None of these texts contains a definition of the word “family” or any indication of this. To the contrary, the wording of the provisions cited is broader. Indeed, the American Declaration and the Protocol of San Salvador refer to the right of “every person” or “everyone” to establish or form a family. Neither of these instruments mentions the sex, gender or sexual orientation of such persons, or specifically indicates a particular family model. Meanwhile, the American Declaration on the Rights of Indigenous Peoples is broader still, as it refers to the “family systems” characteristic of the indigenous peoples.

186. That said, the Court notes that, during the preparatory works for the adoption of the American Convention, there was no discussion on whether same-sex couples should be considered a form of family. Doubtless this was due to the historic moment during which this instrument was adopted. Nevertheless, similar considerations could be made about other family models,<sup>358</sup> including those in which the members do not assume roles based on gender stereotypes.<sup>359</sup>

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<sup>352</sup> Article 31(3)(c) of the Vienna Convention on the Law of Treaties stipulates that: “3. There shall be taken into account, together with the context: [...] c) any relevant rules of international law applicable in the relations between the parties.”

<sup>353</sup> Cf. Advisory Opinion OC-16/99, para. 113, and *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, para. 191.

<sup>354</sup> Cf. Advisory Opinion OC-22/16, para. 45.

<sup>355</sup> Article V of the American Declaration of the Rights and Duties of Man: “Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life”, and Article VI indicates that: “Every person has the right to establish a family, the basic element of society, and to receive protection therefore.”

<sup>356</sup> Article 15 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador): “Right to the Formation and the Protection of Families. 1. The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions. 2. Everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation [...]”

<sup>357</sup> Article XVII of the American Declaration on the Rights of Indigenous Peoples: “Indigenous family: 1. The family is a natural and fundamental group unit of society. Indigenous peoples have the right to preserve, maintain, and promote their own family systems. States shall recognize, respect, and protect the various indigenous forms of family, in particular the extended family, as well as the forms of matrimonial union, filiations, descent, and family name. In all cases, gender and generational equity shall be recognized and respected. [...]”

<sup>358</sup> For example, in the *travaux préparatoires* of the American Convention, the Court observes that the delegations of the States of Chile, Argentina, the United States of America, Guatemala, and Trinidad and Tobago made observations on the wording that was finally adopted in Article 17(5) of the Convention: “The law shall recognize equal rights for children born out of wedlock and those born in wedlock.” Inter-America Specialized Conference on Human Rights. *Actas y Documentos*. OEA/Ser.K/XVI/1.2, pp. 227 and 228. See also: Observations of the Government of Chile on the draft Convention on Human Rights, Doc. 7, September 26, 1969, para. 9. In their observations, these States indicated that it was necessary to establish exceptions to Article 17(5), specifically with regard to inheritance. However, their observations were not taken into account in the final text.

<sup>359</sup> The *travaux préparatoires* record that the Dominican Republic delegation indicated that “[t]he new concept of ‘adequate balancing of responsibilities’ (of the spouses) constitutes an interesting initiative.” Inter-America Specialized

187. In the Court's opinion, these circumstances mean that the assertion made on numerous occasions by the Court<sup>360</sup> and by its European counterpart<sup>361</sup> acquires special force and validity: human rights treaties are living instruments, the interpretation of which must evolve with the time and present-day conditions.<sup>362</sup> In this way, the evolutive interpretation converges with the object and purpose of the American Convention. As previously established (*supra* para. 58), the evolutive interpretation is consequent with the general rules of interpretation contained in Article 29 of the American Convention, as well as those established by the Vienna Convention on the Law of Treaties.

188. In this regard, the International Court of Justice has indicated that, in certain international treaties, the intention of the States Parties was precisely "to give the terms used a meaning capable of evolving, not one fixed once and for all [...] so as to make allowance for [...] developments in international law. In such instances, [...] in order to respect the parties' common intention at the time the treaty was concluded," it is necessary to make an evolutive interpretation. This "is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily ha[d] been aware that the meaning of the terms was likely to evolve over time." In such cases, the International Court of Justice established that, "the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."<sup>363</sup>

189. Indeed, a restrictive interpretation of the concept of "family" that excludes the emotional ties between a same-sex couple from the inter-American protection would defeat the object and purpose of the Convention. The Court recalls that the object and purpose of the American Convention is "the protection of the basic rights of the human being,"<sup>364</sup> with no distinctions.

190. The emotional ties protected by the Convention cannot be quantified or codified and, therefore, even from its early jurisprudence, this Court has understood the concept of family in a broad and flexible sense.<sup>365</sup> The wealth and diversity of the region has been reflected in the cases

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Conference on Human Rights. *Actas y Documentos*. OEA/Ser.K/XVI/1.2., Observations and comments on the draft convention on the protection of human rights presented by the Government of the Dominican Republic, p. 3.

<sup>360</sup> Cf. Advisory Opinion OC-16/99 of October 1, 1999, para. 114, and *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, para. 245.

<sup>361</sup> Cf. ECHR, *Case of Tyrer v. The United Kingdom*, No. 5856/72, Judgment of 25 April 1978, para. 31.

<sup>362</sup> Cf. *Case of the Hacienda Brazil Verde Workers v. Brazil*, para. 245.

<sup>363</sup> Cf. International Court of Justice, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, p. 213, paras. 64 and 66. The Court indicated that: "[...] there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied. [...] It is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning,"

<sup>364</sup> Advisory Opinion OC-2/82, para. 29; Advisory Opinion OC-21/14, para. 53, and Advisory Opinion OC-22/16 of February 26, 2016, para. 42.

<sup>365</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*, para. 68; *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*. Reparations and costs. Judgment of May 25, 2001. Series C No. 76, para. 86, and *Case of Loayza Tamayo v. Peru*. Reparations and costs. Judgment of November 27, 1998. Series C No. 42, para. 92. More recently, *Case of Fornerón and daughter v. Argentina*, para. 98.

submitted to the Court's contentious jurisdiction, which have revealed the different family arrangements that can be protected, including polygamous families.<sup>366</sup>

191. Bearing this in mind, the Court finds no reason to ignore the family relationships that same-sex couples who seek to undertake a life project together may establish by means of permanent emotional ties, typically characterized by cooperation and mutual support. In the Court's opinion, it is not its role to give preference to or distinguish one type of family tie over another. However, the Court finds that, under the Convention, it is the obligation of States to recognize such family ties and protect them.

192. On this basis the Court agrees with its European counterpart in that it would be "artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life.'"<sup>367</sup> Additionally, as already mentioned, a family may also consist of persons with different gender identities and/or sexual orientations (*supra* para. 179). The Court deems it important to stress that with this it is not downplaying other family models, nor is it ignoring the importance of the family institution as an essential component of society. To the contrary, the Court is recognizing the same dignity to the emotional ties of a couple formed by two persons who are part of a historically oppressed and discriminated minority.

193. Those who drafted and adopted the American Convention did not presume to know the absolute scope of the fundamental rights and freedoms recognized therein. Accordingly, the Convention confers on the States and the Court the task of identifying and protecting the scope in accordance with the passage of time. Thus, the Court considers that it is not diverging from the initial intention of the States that signed the Convention; to the contrary, by recognizing this family relationship, the Court is adhering to the original intention.

194. That said, the Court finds that the protection of this family model has two aspects. The first arises from Article 1(1) of the Convention, which gives rise to a general obligation the content of which extends to all the provisions of this treaty (*supra* para. 63). In addition, this protection extends to all the instruments of the Inter-American system for the protection of human rights<sup>368</sup> and, in general, to any international human rights treaty that contains any clause concerning the protection of the family.<sup>369</sup>

195. The second aspect of the protection of this type of family model refers to the domestic law of the States pursuant to Article 24 of the Convention. In other words, the "equal protection of the law" with regard to all the domestic laws of a State and their enforcement<sup>370</sup> (*supra* para. 64).

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<sup>366</sup> Cf. *Case of Aloeboetoe et al. v. Suriname*. Reparations and costs. Judgment of September 10, 1993. Series C No. 15, paras. 62 and *ff.*

<sup>367</sup> Cf. ECHR, *Case of Schalk and Kopf v. Austria*, No. 30141/04, Judgment of 24 June 2010, para. 94, and *Case of Vallianatos et al. v. Greece*, Nos. 29381/09 and 32684/09, Judgment of 7 November 2013, para. 73.

<sup>368</sup> For example, Article XI of the Inter-American Convention on the Forced Disappearance of Persons requires States "to establish and maintain official up-to-date records of their detainees," which must be made available to family members. Also, the Inter-American Convention on Protecting the Human Rights of Older Persons contains a wide range of provisions that protect not only older persons, but also their family members.

<sup>369</sup> For example, Article 5 of the Convention on the Rights of the Child establishes that: "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

<sup>370</sup> Cf. *Case of Yatama v. Nicaragua*, para. 186, and *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 94.

196. In this regard, the Court has already indicated that Principle No. 13 of the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, establishes that “[e]veryone has the right to social security and other social protection measures, without discrimination on the basis of sexual orientation or gender identity. Therefore, “States shall: (a) [t]ake all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation or gender identity, to social security and other social protection measures, including employment benefits, parental leave, unemployment benefits, health insurance or care or benefits (including for body modifications related to gender identity), other social insurance, family benefits, funeral benefits, pensions and benefits with regard to the loss of support for spouses or partners as the result of illness or death.”<sup>371</sup>

197. The Court has also noted that there is an increasing list of rights, benefits and responsibilities that same-sex couples could benefit from and enjoy. These aspects include, *inter alia*, taxes, inheritance and property rights, rules on intestate succession, spousal privilege as established by the law of evidence and procedural law, authority to take medical decisions, survivors’ rights and benefits, birth and death certificates, professional ethical standards, financial restrictions in electoral matters, workers’ compensation benefits, health insurance, and child custody.<sup>372</sup> All of this, in the Court’s opinion, must be ensured without any discrimination to families composed of same-sex couples.

198. Based on the above, the Court considers that the scope of the protection of the family relationship of a same-sex couple goes beyond mere patrimonial rights issues. As noted by this Court, the implications of the recognition of this family relationship permeates other rights, such as civil and political, economic and social rights, as well as other internationally recognized rights. Moreover, the protection extends to the rights and obligations established by the domestic laws of each State applicable to the family relationships of heterosexual couples.

199. Consequently, in answer to the fourth question raised by the State of Costa Rica, which refers to the protection of the patrimonial rights derived from a relationship between persons of the same sex, the Court concludes that:

**Pursuant to the right to the protection of private and family life (Article 11(2)), as well as the right to protection of the family (Article 17), the American Convention protects the family ties that may derive from a relationship between persons of the same sex. The Court also finds that all the patrimonial rights derived from a protected family relationship between a same-sex couple must be protected, with no discrimination as regards to heterosexual couples, pursuant to the right to equality and non-discrimination (Articles 1(1) and 24). Notwithstanding the foregoing, the international obligation of States goes beyond mere patrimonial rights and includes all the internationally recognized human rights, as well as the rights and obligations recognized under the domestic law of each State that arise from the family ties of heterosexual couples (*supra* para. 198).**

<sup>371</sup> Cf. *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 110. Also, Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, March 2007, Principle 13. The right to social security and to other social protection measures.

<sup>372</sup> Cf. *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 118. See also, Supreme Court of the United States, *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.* No. 14–556. Argued April 28, 2015—Decided June 26, 2015.

## B. The mechanisms States could use to protect diverse families

200. To respond to the fifth question raised by the State of Costa Rica, the Court finds it pertinent to examine the relevant international practice to ensure the rights derived from the family ties between same-sex couples. Thus, in this section, the Court will refer to some of the legislative, judicial and administrative measures that have been undertaken to this end.

201. The Court noted in the case of *Duque v. Colombia* that several States in the region have taken legislative, administrative and judicial actions to ensure the rights of same-sex couples by recognizing both, civil or *de facto* unions, and equal or same-sex marriage.<sup>373</sup>

202. Furthermore, the Court has indicated repeatedly that Article 1(1) of the Convention includes a twofold obligation. On the one hand, there is the obligation of respect (*negative obligation*), meaning that States must abstain from committing acts that violate the fundamental rights and freedoms recognized by the Convention;<sup>374</sup> on the other hand, there is the State obligation to guarantee these rights (*positive obligation*). These obligations imply the further obligation of States Parties to organize their whole governmental apparatus and, in general, all the structures through which public authority is exercised, so that they are able to guarantee, by law, the free and full exercise of human rights.<sup>375</sup> These obligations are constituted and should be realized in different ways, depending on the right in question. It is clear, for example, that ensuring equality and non-discrimination *de jure* and *de facto* does not call for the same actions by the State as ensuring the exercise of freedom of expression. Added to this, there is the general obligation contained in Article 2, which requires States to adapt their domestic law in order to give effect to the rights and freedoms recognized in the Convention.

203. Within the United Nations System, the Human Rights Committee has considered that States “should ensure that [their] legislation is not discriminatory of non-traditional forms of partnership”<sup>376</sup> and has indicated, for example, that a “difference in treatment in the granting of pension benefits to a partner of the same sex constitutes a violation of the prohibition of discrimination.”<sup>377</sup> Also, both the Committee on Economic, Social and Cultural Rights,<sup>378</sup> and the Committee on the Elimination of Discrimination against Women<sup>379</sup> have called on States to facilitate the legal recognition of same-sex couples. In this regard, the Office of the United Nations High Commissioner for Human Rights found that, in 2015, “34 States offered same-sex couples either marriage or civil unions, which bestow many of the same benefits and entitlements as marriage.”<sup>380</sup>

<sup>373</sup> Cf. *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, paras. 113 to 119.

<sup>374</sup> Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala*, para. 139, and *Case of Valencia Hinojosa et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 29, 2016. Series C No. 327, para. 130.

<sup>375</sup> Cf. *Case of Gelman v. Uruguay*, para. 189, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 207.

<sup>376</sup> Cf. United Nations, Human Rights Committee, Concluding observations. Ireland, 30 July 2008, CCPR/C/IRL/CO/3, para. 8.

<sup>377</sup> Cf. United Nations, Human Rights Committee, *Young v. Australia*, Communication No 941/2000, 18 September 2003, CCPR/C/78/D/941/2000, para. 10.4, and *X v. Colombia*, CCPR/C/89/D/1361/2005, para. 9.

<sup>378</sup> Cf. United Nations, Committee on Economic, Social and Cultural Rights, Concluding observations on the combined fourth and fifth reports of Bulgaria, 11 December 2012, E/C.12/BGR/CO/4-5, para. 17, and Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant, Slovakia, 8 June 2012, E/C.12/SVK/CO/2, para. 10.

<sup>379</sup> Cf. United Nations, Committee on the Elimination of Discrimination against Women, Concluding observations on the combined second and third periodic reports of Serbia, 30 July 2013, CEDAW/C/SRB/CO/2-3, para. 39.d.

<sup>380</sup> Cf. United Nations, Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights, 4 May 2015, A/HRC/29/23, para. 67.

204. Furthermore, the Court notes that, in the case of *Karner v. Austria*, the European Court of Human Rights indicated that “[t]he aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it.”<sup>381</sup> The European Court also recognized the right of the surviving cohabitant of a same-sex couple not to be evicted from the home as successor to the tenancy, a right that Austrian law accorded to the person who enjoyed the status of “life companion.” The European Court indicated that the interpretation of the Austrian Rent Act made by the Austrian Supreme Court contradicted what was stipulated in Article 14 (Prohibition of discrimination) of the European Convention in relation to Article 8 (Right of respect for private and family life) of this instrument. The European Court reiterated this legal reasoning in the case of *Kozak v. Poland*.<sup>382</sup>

205. The European jurisprudence has also established that, under Articles 14 and 8 of the European Convention, distinctions in permitting an uninsured dependent partner access to health insurance are inadmissible if they are based on the sexual orientation of couples.<sup>383</sup> In the 2013 case of *Vallianatos and Others v. Greece*, the Grand Chamber found that the State had violated these articles because the law that allowed a civil union to be legally recognized only permitted so for heterosexual couples.<sup>384</sup> In a subsequent decision, in 2015, in the case of *Oliari and Others v. Italy*, the European Court again established a violation of Article 8 of the Convention, because Italian laws did not provide same-sex couples with access to any type of civil union.<sup>385</sup>

206. In the case of Mexico City, the “cohabitation partnership” [*sociedad de convivencia*] of same-sex couples has been recognized since 2006,<sup>386</sup> and their marriage since 2009.<sup>387</sup> At the federal level, in 2015, the Supreme Court of Justice declared that: “is unconstitutional any law of any federal entity that considers that the purpose of [marriage] is procreation and/or that defines it as an act between a man and a woman.” The Supreme Court indicated that seeking to link marriage requirements to the sexual preferences of those who have access to the institution of marriage or to procreation was discriminatory, because it unjustifiably excluded homosexual couples who are similarly-situated to heterosexual couples from accessing this institution. The distinction was found to be discriminatory because sexual preferences were not a relevant factor for making the distinction, considering the overriding constitutional purpose. Since the purpose of marriage is not procreation, there is no justification for considering that the matrimonial union should be heterosexual, or that it be said to be “just between a man and a woman.” The Supreme Court found that the wording of this statement was discriminatory by itself and “recalled that no provision, decision or practice of domestic law, by either the state authorities or private individuals, may diminish or restrict the rights of a person based on his or her sexual orientation.”<sup>388</sup>

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<sup>381</sup> ECHR, *Case of Karner v. Austria*, No. 40016/98, Judgment of 24 July 2003, para. 41. (“The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. [...] as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realizing the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people”).

<sup>382</sup> Cf. ECHR, *Case of Kozak v. Poland*, No. 13102/02, Judgment of 2 March 2010, para. 99.

<sup>383</sup> Cf. ECHR, *Case of P.B. and J.S. v. Austria*, No. 18984/02, Judgment of 22 July 2010, paras. 40 to 44.

<sup>384</sup> Cf. ECHR, *Case of Vallianatos and Others v. Grecia*, Nos. 29381/09 and 32684/09, Judgment of 7 November 2013, paras. 90 to 92.

<sup>385</sup> Cf. ECHR, *Case of Oliari and Others v. Italy*, Nos. 18766/11 and 36030/11, Judgment of 21 July 2015, para. 185.

<sup>386</sup> Cf. Mexico. Mexico DF, Legislative Assembly of the Federal District, Federal District Cohabitation Act, November 16, 2006.

<sup>387</sup> Cf. Mexico. Mexico DF, Federal District Civil Code, paras. 2, and 146 and *ff.*

<sup>388</sup> Mexico. Supreme Court of Justice, First Chamber, June 19, 2015, 1a./J.43/2015.

207. Since 2007, Uruguay adopted the Cohabiting Union Act which applied to same-sex couples. The Act included as the beneficiaries of a survivor's pension, those persons who had maintained uninterrupted cohabitation with the testator in an exclusive, singular, stable, and permanent union I, whatever their sex, sexual identity, sexual orientation or sexual preferences.<sup>389</sup> Subsequently, in 2013, Uruguay recognized marriage for same-sex couples.<sup>390</sup>

208. In the case of Argentina, the City of Buenos Aires authorized the civil union of same-sex couples in 2002.<sup>391</sup> At the national level, the marriage of same-sex couples has been legal since 2010.<sup>392</sup> The law states that "the marriage shall have the same requirements and effects, regardless of whether the parties are of the same or a different sex."<sup>393</sup>

209. In Brazil, on May 5, 2011, the Federal Supreme Court guaranteed same-sex couples the same rights as heterosexual couples.<sup>394</sup> In addition, on May 14, 2013, the National Council of the Judiciary declared that, based on the principle of non-discrimination, the marriage or *de facto* union of same-sex couples could not be denied.<sup>395</sup>

210. Similarly, in Chile, since 2015, a law is in force creating the civil union agreement which benefits same-sex couples who, if they sign this agreement, are considered to be related by kinship. This civil cohabitation union gives rise to both patrimonial and non-patrimonial effects (articles 14 to 12).<sup>396</sup>

211. In Ecuador, the *de facto* union of same-sex couples was recognized in 2015 by an amendment to the Civil Code.<sup>397</sup> Since 2014, a resolution of the Civil Registry Directorate allowed a *de facto* union to be recorded in the civil registry.<sup>398</sup>

212. In the case of Colombia, the Constitutional Court indicated in the Judgment C-577-11 that "same-sex couples may go before a competent notary or judge to celebrate and formalize their contractual relationship."<sup>399</sup> Subsequently, on April 7, 2016, the Constitutional Court recognized marriage between same-sex couples. On that occasion, the Constitutional Court pointed out that there was no reason supported by the Constitution that justified refusing the surviving same-sex companion the right to receive the inheritance of the person with whom he or she had formed a family, especially if, based on the protective purpose underlying the special regulation of the family, that right had already been recognized to the surviving permanent companion in the case of

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<sup>389</sup> Cf. Uruguay, Act No. 18,246, on consensual union, December 27, 2007. "Article 14. The following paragraph shall be added to article 25 of Act No. 16,713, of September 3, 1995: Cohabitants shall be understood as persons who, when applicable, would have maintained with the decedent, an uninterrupted cohabitation of at least five years in exclusive, singular, stable and permanent consensual union, whatever their sex, or sexual identity, orientation or option, and who are not included in the specific impediments established in paragraphs 1, 2, 4 and 5 of article 91 of the Civil Code."

<sup>390</sup> Cf. Uruguay, Act No. 19,075, adopted by Parliament on April 10, 2013, and promulgated by the Executive on May 3, 2013.

<sup>391</sup> Cf. Argentina. City of Buenos Aires, Act No. 1004, December 12, 2002.

<sup>392</sup> Cf. Argentina. Act No. 26,618: "civil marriage," adopted on July 15, 2010, promulgated on July 21, 2010.

<sup>393</sup> Argentina. Act No. 26,618, article 2, which substitutes article 172 of the Civil Code.

<sup>394</sup> Cf. Brazil. Federal Supreme Court. Direct action for unconstitutionality No. 4277, May 5, 2011.

<sup>395</sup> Cf. Brazil. National Council of the Judiciary, Resolution No. 175, May 14, 2013.

<sup>396</sup> Cf. Chile. Act No. 20,830 on the civil union agreement and civil cohabitants, promulgated on April 13, 2015, and published on April 21, 2015.

<sup>397</sup> Cf. Act amending the Civil Code, June 19, 2015.

<sup>398</sup> Cf. Ecuador. Civil Registry Directorate. Resolution No. 0174.

<sup>399</sup> Constitutional Court of Colombia, Judgment C-577-11.

a *de facto* union composed of a heterosexual couple, also recognized as a family and, thus, comparable to a *de facto* union between persons of the same sex. Lastly that Court emphasized that the family formed by a same-sex couple is, as other families, “the basic institution and fundamental core of society,” so that “it merits the protection of society and the State.”<sup>400</sup>

213. Canada legalized marriage between persons of the same sex at the federal level on July 20, 2005.<sup>401</sup> However, this provision had already been adopted by several Canadian provinces before that date.<sup>402</sup> Meanwhile, the United States Supreme Court has also recognized that same-sex couples have the right to marry.<sup>403</sup>

214. In addition, there are other mechanisms to protect the rights derived from the family ties between same-sex couples that do not create specific legal institutions, but rather refer to rights or legal institutions that operate in specific areas. Thus, the Court notes that some States have undertaken actions seeking to protect the rights to health, social security and pensions, the extension of alimony obligations between partners, and inheritance rights, among others. This is the case of Costa Rica which, by administrative acts, has provided same-sex couples with access to family benefits under the social security umbrella.<sup>404</sup> Similarly, it has given them access to the old-age, invalidity and survivor's benefits scheme provided by the Costa Rican Social Security Institute, which gives them access to the survivor's pension.<sup>405</sup>

215. In a series of successive judgments of the Constitutional Court, Colombia extended the recognition of a number of rights derived from family ties to same-sex couples based on the recognition of the right to identity, human dignity and non-discrimination.<sup>406</sup> Thus, in the area of health, it extended the family coverage of the Obligatory Health Plan to same-sex couples;<sup>407</sup> it recognized the right to the survivor's pension to same-sex couples,<sup>408</sup> as well as the right to inheritance rights to persons living in *de facto* marital union.<sup>409</sup>

216. In Argentina, the Supreme Court of Justice recognized the right to a pension of same-sex cohabitants in 2008.<sup>410</sup> In 2011, the Supreme Court of Justice recognized the right to payment of

<sup>400</sup> Constitutional Court of Colombia, Judgments C238-12 and SU-214/16.

<sup>401</sup> Cf. Canada. Civil Marriage Act (full title: “An Act respecting certain aspects of legal capacity for marriage for civil purposes”), 20 July 2005.

<sup>402</sup> Cf. Ontario. Court of Appeal. *Halpern v. Canada*, 10 June 2003; British Columbia. Court of Appeal. *Barbeau v. British Columbia*, 8 July 2003; Quebec. Court of Appeal. *Catholic Civil Rights League v. Hendricks*, 19 March 2004; Yukon. Supreme Court of the Yukon Territory. *Dunbar & Edge v. Yukon*, 14 July 2004; Manitoba. Court of Queen's Bench. *Vogel et al. v. Attorney General of Canada*, 16 September 2004; Nova Scotia Supreme Court. *Boutilier v. Nova Scotia*, 24 September 2004; Saskatchewan. Court of Queen's Bench (Family Law Division). *N.W. v. Canada*, 5 November 2004; Newfoundland and Labrador. Supreme Court. *Pottle et al. v. Attorney General of Canada et al.*, 21 December 2004; Nuevo Brunswick. Court of Queen's Bench. *Harrison v. Canada*, 23 June 2005.

<sup>403</sup> Cf. United States of America. Supreme Court, Case of *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.*, No. 14–556. Argued April 28, 2015—Decided June 26, 2015.

<sup>404</sup> Cf. Costa Rica. Costa Rican Social Security Institute (CCSS), Board of Directors, Decision No. 47,069 of May 22, 2014. See also, Executive Decree No. 38999 of May 15, 2015.

<sup>405</sup> Cf. Costa Rica. Costa Rican Social Security Institute (CCSS), Board of Directors, Decision No. 59,994 of June 30, 2016.

<sup>406</sup> Cf. Constitutional Court, Judgment C-075 of 2007.

<sup>407</sup> Cf. Constitutional Court, Judgment C-811 of 2007.

<sup>408</sup> Cf. Constitutional Court, Judgment C-336 of 2008.

<sup>409</sup> Cf. Constitutional Court, Judgment C-283 of 2011.

<sup>410</sup> Cf. Argentina. National Social Security Administration, Resolution No.671/2008 on the pension for widows/widowers of same-sex couples, August 19, 2008.



the survivor's pension to same-sex couples retroactive to the date of the partner's death.<sup>411</sup> In Brazil, the right of same-sex couples to receive the survivor's pension was recognized by executive decree on December 10, 2010.<sup>412</sup>

217. Based on the above, the Court notes that States can adopt diverse types of administrative, judicial and legislative measures to ensure the rights of same-sex couples. As previously mentioned, Articles 11(2) and 17 of the Convention do not protect a specific family model, and neither of these provisions can be interpreted to exclude a group of persons from the rights recognized therein.

218. Indeed, if a State should decide that it is not necessary to create new legal institutions to ensure the rights of same-sex couples and, consequently, chooses to extend those that exist to couples composed of persons of the same sex – including marriage – based on the *pro persona* principle contained in Article 29 of the Convention, this recognition would mean that the extension of these institutions would also be protected by Articles 11(2) and 17 of the Convention. The Court considers that this would be the most simple and effective way to ensure the rights derived from the relationship between same-sex couples.

219. In addition, the Court reiterates its consistent jurisprudence that the presumed lack of consensus within some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to reproduce and perpetuate the historical and structural discrimination that such minorities have suffered<sup>413</sup> (*supra* para. 83).

220. The establishment of a differentiated treatment between heterosexual couples and couples of the same sex regarding the way in which they can form a family – either by a *de facto* marital union or a civil marriage – does not pass the strict test of equality (*supra* para. 81) because, in the Court's opinion, there is no purpose acceptable under the Convention for which this distinction could be considered necessary or proportionate.

221. The Court notes that, in order to deny the right of access to the institution of marriage, it is typically asserted that the purpose of marriage is procreation and that such a union could not meet this purpose. The Court finds that this assertion is incompatible with the intention of Article 17 of the Convention, which is the protection of the family as a social reality.<sup>414</sup> Moreover, the Court considers that procreation is not a characteristic that defines conjugal relationships, because affirming the contrary would be demeaning for couples – whether married or not – who, for whatever reason, are unable or unwilling to procreate.

222. In addition, the meaning of the word "marriage," like that of the word "family" has changed with the passage of time (*supra* para. 177). Although the etymology is always enlightening, no one seeks a semantic imposition of the etymology because, in such a case, it would be necessary to exclude from the language numerous words whose semantics differ from their etymology.

223. Added to the above, the evolution of marriage evidences that its current form responds to the existence of complex interactions of, *inter alia*, cultural, religious, sociological, economic, ideological and linguistic aspects.<sup>415</sup> The Court also notes that, at times, the opposition to the marriage of same-sex couples is based on philosophical or religious convictions. The Court

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<sup>411</sup> Cf. Argentina. Supreme Court of Justice, "P., A. v/ ANSeS ref/ pensions," June 28, 2011.

<sup>412</sup> Cf. Brazil. National Supplementary Social Welfare Bureau, Decree No. 941, December 9, 2010.

<sup>413</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 92, *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 123, and *Case of Flor Freire v. Ecuador*, para. 124.

<sup>414</sup> In this regard, see Supreme Court of Justice of Mexico, First Chamber, June 19, 2015, 1a./J.43/2015.

<sup>415</sup> In this regard, see Constitutional Court of Colombia, Judgment SU-214/16.

recognizes the important role that such convictions play in the life and dignity of those who profess them. Nevertheless, these convictions cannot be used as a parameter of conventionality because the Court could not use them as an interpretative guide when determining the rights of human being. In that sense, it is the Court's opinion that such convictions cannot condition what the Convention establishes in relation to discrimination based on sexual orientation. As such, in democratic societies there must exist a peaceful coexistence between the secular and the religious spheres, implying therefore that the role of the States and of this Court is to recognize the sphere inhabited by each of them, and never force one into the sphere of the other.<sup>416</sup>

224. Moreover, in the Court's opinion, there would be no sense in creating an institution that produces the same effects and gives rise to the same rights as marriage, but that is not called marriage except to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them. On that basis, there would be marriage for those who, according to the stereotype of heteronormativity, were considered "normal," while another institution with identical effects but with another name would exist for those considered "abnormal" according to this stereotype. Consequently, the Court deems inadmissible the existence of two types of formal unions to legally constitute the heterosexual and homosexual cohabiting community, because this would create a distinction based on an individual's sexual orientation that would be discriminatory and, therefore, incompatible with the American Convention.

225. In addition, as already indicated, the Court understands that the principle of human dignity derives from the complete autonomy of the individual to choose with whom he or she wishes to enter into a permanent and marital relationship, whether it be a natural one (*de facto* union) or a formal one (marriage). This free and autonomous choice forms part of the dignity of each person and is intrinsic to the most intimate and relevant aspects of his or her identity and life project (Articles 7(1) and 11(2)). Also, the Court considers that, provided there is an intention to enter into a permanent relationship and form a family, ties exist that merit equal rights and protection whatever the sexual orientation of the parties (Articles 11(2) and 17).<sup>417</sup> When asserting this, the Court is not diminishing the institution of marriage but, to the contrary, considers marriage necessary to recognize equal dignity to those persons who belong to a human group that has historically been oppressed and discriminated against (*supra* para. 33).

226. Notwithstanding the foregoing, this Court cannot ignore the possibility that some States must overcome institutional difficulties to adapt their domestic law and extend the right of access to the institution of marriage to same-sex couples, especially when there are rigorous procedures for legislative reform, which may demand a process that is politically complex and requires time. Given that such amendments are the fruit of juridical, judicial or legislative evolution that is gradually extending to other geographical areas of the Americas and that represents the progressive interpretation of the Convention, the Court urges those States to promote, in good faith, the legislative, administrative and judicial reforms required to adapt their domestic laws, and internal interpretations and practice.

227. That said, States that do not yet ensure the right of access to marriage to same-sex couples are obliged not to violate the provisions that prohibit discriminating against them and must, consequently, ensure them the same rights derived from marriage in the understanding that this is a transitional situation.

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<sup>416</sup> In this regard, see Constitutional Court of South Africa. *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC), Judgment of 1 December 2005.

<sup>417</sup> In this regard, see Constitutional Court of Colombia, Judgment SU-214/16.

228. Based on the above, in answer to the fifth question of the State of Costa Rica regarding whether there must be a legal institution that regulates relationships between persons of the same sex for the State to recognize all the patrimonial rights that derive from that relationship, the response of the Court is that:

**States must ensure access to all the legal institutions that exist in their domestic laws to guarantee the protection of all the rights of families composed of same-sex couples, without discrimination in relation to families constituted by heterosexual couples. To this end, States may need to amend existing institutions by taking administrative, judicial or legislative measures in order to extend such mechanisms to same-sex couples. States that encounter institutional difficulties to adapt the existing provisions, on a transitional basis, and while promoting such reforms in good faith, still have the obligation to ensure to same-sex couples, equality and parity of rights with respect to heterosexual couples without any discrimination.**

## IX OPINION

229. Based on the reasons given, in interpretation of Articles 1(1), 2, 11, 17, 18 and 29 of the American Convention on Human Rights

**THE COURT,**

**DECIDES**

unanimously that:

1. It is competent to issue this Advisory Opinion, in the terms established in paragraphs 13 to 29.

**AND IS OF THE OPINION**

by unanimity that:

2. The change of name and, in general, the rectification of public records and identity documents so that these conform to the self-perceived gender identity constitute a right protected by Articles 3, 7(1), 11(2) and 18 of the American Convention, in relation to Articles 1(1) and 24 of this instrument; consequently, States are obliged to recognize, regulate and establish the appropriate procedure to this end, as established in paragraphs 85 to 116.

by unanimity that:

3. States must ensure that persons interested in rectifying the annotation of gender or, if applicable the mention of sex, in changing their name and changing their photograph in the records and/or on their identity documents to conform to their self-perceived gender identity may have recourse to a procedure that must: (a) be centered on the complete rectification of the self-perceived gender identity; (b) be based solely on the free and informed consent of the applicant without demanding requirements such as medical and/or psychological certifications and others that could be unreasonable and pathologizing; (c) be confidential, and the changes, corrections or amendments to the records and the identity documents should not reflect the changes to conform

to the gender identity; (d) be prompt and, insofar as possible, cost-free, and (e) not require evidence of surgery and/or hormonal therapy. The procedure best adapted to these elements is the notarial or administrative procedure. States may provide in parallel an administrative procedure that allows the person a choice, as established in paragraphs 117 to 161.

by unanimity that:

4. Article 54 of the Civil Code of Costa Rica, as currently worded, is compatible with the provisions of the American Convention only if it is either interpreted by the courts, or regulated administratively, to the effect that the procedure established by this article can guarantee that persons who wish to change their identity data so that this conforms to their self-perceived gender identity is effectively an administrative procedure that meets the following criteria: (a) it must be centered on the complete rectification of the self-perceived gender identity; (b) it must be based solely on the free and informed consent of the applicant without demanding requirements such as medical and/or psychological certifications and others that could be unreasonable and pathologizing; (c) it must be confidential, and the changes, corrections or amendments to the records and the identity documents should not reflect the changes to conform to the gender identity; (d) it should be prompt and, insofar as possible, cost-free, and (e) it should not require evidence of surgery and/or hormonal therapy. Consequently, based on the conventionality control, Article 54 of the Civil Code should be interpreted pursuant to the above standards so that persons who wish to comprehensively rectify their records and/or identity document to their self-perceived gender identity may truly enjoy the human rights recognized in Articles 3, 7, 11(2), 13 and 18 of the American Convention as established in paragraphs 162 to 171.

by unanimity that:

5. The State of Costa Rica, in order to ensure the protection of human rights more effectively, may issue a regulation incorporating the above standards into the administrative procedure that it may provide in parallel, in accordance with the considerations in the previous paragraphs of this Opinion, as established in paragraphs 162 to 171.

by unanimity that:

6. The American Convention, based on the right to the protection of private and family life (Article 11(2)), as well as on the right to protection of the family (Article 17), protects the family ties that may derive from a relationship between a same-sex couple, as established in paragraphs 173 to 199.

by unanimity that:

7. The State must recognize and ensure all the rights derived from a family relationship between same-sex couples in accordance with the provisions of Articles 11(2) and 17(1) of the American Convention, as established in paragraphs 200 to 218.

by six votes to one, that:

8. Under Articles 1(1), 2, 11(2), 17 and 24 of the Convention, States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples, as established in paragraphs 200 to 228.

Judge Humberto Antonio Sierra Porto presented to the Court his concurring opinion and Judge Eduardo Vio Grossi his separate partially dissenting opinion, both of which are attached to this Advisory Opinion.

Inter-American Court of Human Rights. Advisory Opinion OC-24/17 of November 24, 2017.  
Requested by the Republic of Costa Rica.

Roberto F. Caldas  
President

Eduardo Ferrer Mac-Gregor Poisot

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Elizabeth Odio Benito

Eugenio Raúl Zaffaroni

L. Patricio Pazmiño Freire

Pablo Saavedra Alessandri  
Secretary

So ordered,

Roberto F. Caldas  
President

Pablo Saavedra Alessandri  
Secretary

**SEPARATE OPINION OF JUDGE EDUARDO VIO GROSSI,  
INTER-AMERICAN COURT OF HUMAN RIGHTS,  
ADVISORY OPINION OC-24/17  
OF NOVEMBER 24, 2017,  
REQUESTED BY THE REPUBLIC OF COSTA RICA**

**GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION WITH REGARD TO  
SAME-SEX COUPLES**

**STATE OBLIGATIONS IN RELATION TO CHANGE OF NAME, GENDER IDENTITY, AND RIGHTS  
DERIVED FROM A RELATIONSHIP BETWEEN SAME-SEX COUPLES (INTERPRETATION AND SCOPE OF  
ARTICLES 1(1), 3, 7, 11(2), 13, 17, 18 AND 24, IN RELATION TO ARTICLE 1, OF THE AMERICAN  
CONVENTION ON HUMAN RIGHTS)**

**INTRODUCTION**

1. This separate opinion<sup>1</sup> on the Advisory Opinion indicated above<sup>2</sup> is issued to explain the reasons why the author agrees – in the terms indicated below – with seven of its decisions, and why he disagrees with the eighth decision.<sup>3</sup> These explanations endeavor to facilitate the understanding of both the answers provided to the “specific questions”<sup>4</sup> raised by Costa Rica<sup>5</sup> in the request examined, and the author’s disagreement with the eighth decision. In addition, he takes advantage of the occasion to indicate the reasons why he agrees with the reference to the control of conventionality in OC-24.

2. Before proceeding, it is evidently essential to reiterate some considerations made in previous cases. Thus, this opinion is issued with full and absolute respect for the Inter-American

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<sup>1</sup> Art.66(2) of the American Convention on Human Rights: “If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.”

Art. 75(3) of the Rules of Procedure of the Inter-American Court of Human Rights: “Any judge who has taken part in the delivery of an advisory opinion is entitled to append a separate reasoned opinion, concurring or dissenting, to that of the Court. These opinions shall be submitted within a time limit to be fixed by the Presidency, so that the other Judges can take cognizance thereof before the advisory opinion is served. Advisory opinions shall be published in accordance with Article 32(1)(a) of these Rules.”

Hereinafter, each time that reference is made to “the Convention” it should be understood that this is to the American Convention on Human Rights. Also, hereafter, when reference is made to an article with no other reference, it should be understood that this corresponds to an article of the Convention.

<sup>2</sup> Hereinafter, OC-24. Also, the abbreviation “para.” will be used each time a paragraph is indicated in the footnotes, and it should be understood that it corresponds to OC-24.

<sup>3</sup> “Under Articles 1(1), 2, 11(2), 17 and 24 of the Convention, States must ensure total access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples, as established in paragraphs 200 to 228” of the Advisory Opinion.

<sup>4</sup> Art.72(1)(b) of these Rules of Procedure.: “A request for an advisory opinion presented pursuant to Article 64(2) of the Convention shall indicate the following: ... (b) the specific questions on which the opinion of the Court is being sought; ...”

<sup>5</sup> Hereinafter, the State.

Court of Human Rights<sup>6</sup> and its members and, also, as evidence of the dialogue and diversity of opinions that exist within the Court; consequently, with a view to providing a better understanding of its function and of the development of its jurisprudence and of human rights.<sup>7</sup>

## I. PRELIMINARY CONSIDERATIONS

### A. GENERAL OBSERVATIONS

3. As a first preliminary observation, it should be repeated that the Court has been established by the Convention as an autonomous entity, and this requires that it be rigorous in the exercise of its jurisdiction. Among other considerations, it must proceed pursuant to the principle of public law that it may only do what the law allows.

4. It also appears necessary to recall that the Court exercises its jurisdiction, both contentious<sup>8</sup> and advisory,<sup>9</sup> pursuant to international public law and, especially, the international human rights law expressed in the Convention. Thus, it does not exercise its jurisdiction in accordance with the domestic law of the States of the Americas and in the exercise of its competences, the domestic law of the States is considered either as merely a fact from which legal consequences can be inferred for the respective State, or as an act that establishes or reflects an international custom or a general principle of law; that is, one of the other two autonomous sources of international law that, together with the treaties,<sup>10</sup> creates it.

5. In addition, it is worth emphasizing that the matters regarding which the Court exercises its jurisdiction may also include aspects that are part of the internal, domestic or exclusive jurisdiction of the State, also known as a reserved domain and, in other latitudes, as the States' margin of appreciation. The said jurisdiction is contemplated in the Charter of the United Nations,<sup>11</sup> the Charter of the Organization of American States,<sup>12</sup> and also the Convention, although indirectly.<sup>13</sup>

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<sup>6</sup> Hereinafter, the Court.

<sup>7</sup> Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017.

<sup>8</sup> Art. 62(3) of the American Convention on Human Rights: "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

<sup>9</sup> Art. 64: "1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."

<sup>10</sup> Art. 38 of the Statute of the International Court of Justice: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto." This provision does not contemplate unilateral legal acts and the declarative legal resolutions of international organizations, the former as an autonomous source, and the latter as a subsidiary source.

<sup>11</sup> Art. 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to

6. The internal, domestic or exclusive jurisdiction of the State means, on the one hand, that international law, including international human rights law, does not encompass all the activities of the subjects of international law and, particularly, of the States<sup>14</sup> and, on the other hand, that in the case of those activities that it does not regulate or the aspects that do not include state acts and omissions, the respective State has the competence and the autonomy to regulate them.<sup>15</sup> This means that, when exercising its competences, the Court should consider the said legal institution as a reality within the international legal structure, although not with the same breadth and intensity as previously.

7. It is also necessary to reiterate that, in the exercise of its competences, it is not incumbent on the Court to amend the Convention; thus, its advisory or non-contentious jurisdiction should not seek to exercise the normative function, which is generally expressly conferred on the States<sup>16</sup> and in the case of the Convention, the States Parties.<sup>17</sup>

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settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

<sup>12</sup> Art.1 (para. 2): "The Organization of American States has no powers other than those expressly conferred upon it by this Charter, none of whose provisions authorizes it to intervene in matters that are within the internal jurisdiction of the Member States."

<sup>13</sup> Preamble, para. 2: "Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."

<sup>14</sup> "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." Permanent Court of International Justice, Advisory Opinion on Nationality Decrees in Tunis and Morocco, Series B N° 4 P. 24.

<sup>15</sup> Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Art.1: "At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

<sup>16</sup> The Vienna Convention on the Law of Treaties: "Art. 39. General rule regarding the amendment of treaties: A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Art. 40 of this Convention: Amendment of multilateral treaties: 1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs. 2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in: (a) the decision as to the action to be taken in regard to such proposal; (b) the negotiation and conclusion of any agreement for the amendment of the treaty. 3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended. 4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State. 5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State: (a) be considered as a party to the treaty as amended; and (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

<sup>17</sup> Art. 31: Recognition of Other Rights: Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention."

Art.76: "1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General. 2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification."



8. In this regard, it should be pointed out that, if the Court should assume, implicitly or expressly, the inter-American normative function under the umbrella of the exercise of its function of interpreting the Convention, this could have serious effects on the right of the States to formulate a reservation on the provision of the Convention that is being interpreted.

9. It is also necessary to bear in mind that the interpretive function consists in determining the meaning and scope of a provision that admits two or more possibilities of application and, consequently, indicating the appropriate one. The rules of interpretation established in the Vienna Convention on the Law of Treaties have this precise purpose; that is, to determine the will of the States parties employing, harmoniously and simultaneously, the principle of good faith, the terms of the treaties in their context, and the object and purpose they seek. None of these criteria or methods of interpretation may be omitted or privileged. Therefore, the result of the operation does not consist in expressing what the interpreter wishes that the norm establishes, but rather what it effectively and objectively establishes.

10. This text is based on the conviction that the Court's function in the exercise of its advisory and non-contentious competence is solely,<sup>18</sup> either "to interpret" the Convention or other human rights treaties or to determine the "compatibility" of a domestic law with such instruments<sup>19</sup> and, consequently and essentially, that an advisory opinion is not binding for the States Parties to the Convention or for the other members of the Organization of American States,<sup>20</sup> so that it is not appropriate that it order the adoption of any conduct.

11. Accordingly, an advisory opinion relates to the exercise of a competence that is distinct from the contentious competence in which the Court's function is "the interpretation and application"<sup>21</sup> of the Convention to decide a dispute, and in which its decision is binding for the State Party to the respective case.<sup>22</sup> To the contrary, the Advisory Opinion does not decide whether "there has been a violation of a right or freedom protected by this Convention" or, therefore, order "that the injured party be ensured the enjoyment of his right or freedom that was violated," or, "if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."<sup>23</sup>

12. In the Advisory Opinion, the Court responds to a request "regarding the interpretation of th[e] Convention or of other treaties concerning the protection of human rights in the American

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Art. 77: "1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection. 2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it."

<sup>18</sup> According to Art. 41, "the main function of the [Inter-American Commission on Human Rights, hereinafter,] the Commission shall be to promote respect for and defense of human rights."

<sup>19</sup> Footnote 9.

<sup>20</sup> Hereinafter, the OAS.

<sup>21</sup> Footnote 8.

<sup>22</sup> Art. 68: "1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. 2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state."

<sup>23</sup> Art. 63(1): "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

States,” or provides an opinion “regarding the compatibility of any of its domestic laws with the aforesaid international instruments.” Therefore, in the exercise of its advisory or non-contentious competence the Court does not order or rule, but rather convinces. The fact that the opinion is non-binding is the main difference with the contentious jurisdiction and is its fundamental characteristic.

13. Ultimately, the Convention conceives advisory opinions as decisions that warn States of the risks they may assume if they do not comply with the Court’s recommendations, in the eventuality that a case is filed against them and their responsibility is declared.<sup>24</sup> This is precisely what is asserted in OC-24, reiterating what has been maintained on other occasions<sup>25</sup> as regard the control of conventionality by means of an advisory opinion.

“Based on the provision of the Convention that is interpreted by the issue of an advisory opinion, all the organs of the OAS Member States, including those that are not party to the Convention but have undertaken to respect human rights under the Charter of the OAS (Article 3(I)) and the Interamerican Democratic Charter (Articles 3, 7, 8 and 9), have a source that, in accordance with its inherent nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights and, in particular, constitutes a guideline when deciding matters relating to the respect and guarantee of human rights in the context of the protection of LGBTI persons and thus avoiding possible human rights violations.”<sup>26</sup>

14. In this regard, it is implicitly indicated that the said control reposes, to a greater extent than the binding and obligatory orders and judgments of the Court, on the wisdom, impartiality and justice that should emanate from its rulings.

15. This means, consequently, that advisory opinions interpreting the Convention or other treaties should not, by their nature, refer to a specific case, but to situations that concern most or all of the OAS Member States, so that, owing to their very nature, advisory opinions are formulated in general and even abstract terms.

16. The foregoing reveals that it is possible to agree with an advisory opinion even if not with all the exact and precise terms it uses or for all the grounds it indicates regarding each matter dealt with.

## **B. SPECIFIC OBSERVATIONS ON OC-24**

17. In the specific case of OC-24, it should be indicated that the purpose of the request related to “recognition of the change of name in accordance with [or based on] gender identity” and “the patrimonial rights derived from a relationship between persons of the same sex.” Indeed, this stems from both the “specific questions”<sup>27</sup> submitted pursuant to the provisions of Article 70(1) of

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<sup>24</sup> Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of the Dismissed Employees of PetroPeru, the Ministry of Education, the Ministry of the Economy and Finance, and the National Port Authority v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017

<sup>25</sup> Para. 31 OC-21.

<sup>26</sup> Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of the Dismissed Employees of PetroPeru, the Ministry of Education, the Ministry of the Economy and Finance, and the National Port Authority v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017.

<sup>27</sup> “1. Taking into account that gender identity is a category protected by Articles 1 and 24 of the ACHR [American Convention on Human Rights], and also the provisions of Articles 11(2) and 18 of the Convention: does that protection and the ACHR mean that the State must recognize and facilitate the name change of an individual in accordance with their gender identity?”

the recently cited Rules of Procedure,<sup>28</sup> and from the purpose of the answers requested from the Court.<sup>29</sup>

18. Second, it should also be pointed out that both the request and OC-24 refer to the right to non-discrimination or the treaty-based obligation of non-discrimination. The former with regard to the gender identity of the individual and the latter with regard to LGBTI persons, and this is done citing the provisions of Article 1(1) of the Convention.<sup>30</sup>

19. It can be inferred from the provision cited above that the obligation it establishes relates to all “the rights and freedoms recognized” in the Convention. It can also be inferred from this that the said obligation is with regard to “all persons subject to the jurisdiction” of the State in question; in other words, according to Article 1(2), “every human being” who is under the effective control of the State, for any reason. And, it can also be inferred from this provision that the said obligation cannot be restricted whatever the “social condition” or special category or situation of an individual.<sup>31</sup>

20. Ultimately, therefore, the provisions of Article 1(1) of the Convention apply to everyone, among whom, undoubtedly and unquestionably, it should be understood that LGBTI persons are included.

21. Accordingly, to understand fully the significance of the said article, it appears necessary to clarify, insofar as possible, the concept of discrimination.

2. “If the answer to the preceding question is affirmative, could it be considered contrary to the ACHR that those interested in changing their given name may only do so by using a judicial procedure, in the absence of a relevant administrative procedure?”

3. “Could it be understood that, in accordance with the ACHR, Article 54 of the Civil Code of Costa Rica should be interpreted in the sense that those who wish to change their given name based on their gender identity are not obliged to submit to the judicial proceeding established therein, but rather that the State must provide them with a free, prompt and accessible administrative procedure to exercise that human right?”

4. “Taking into account that non-discrimination based on sexual orientation is a category protected by Articles 1 and 24 of the ACHR, in addition to the provisions of Article 11(2) of the Convention: does this protection and the ACHR mean that the State should recognize all the patrimonial rights derived from a relationship between persons of the same sex?” and

5. “If the answer to the preceding question is affirmative, must there be a legal mechanism that regulates relationships between persons of the same sex for the State to recognize all the patrimonial rights that derive from that relationship?”

<sup>28</sup> “A request for an advisory opinion presented pursuant to Article 64(2) of the Convention shall indicate the following: (b) the specific questions on which the opinion of the Court is being sought.” *Supra* footnote 3.

<sup>29</sup> Para.1: Costa Rica “presented the request for an advisory opinion for the Court to rule on:

(a) “[T]he protection provided by Articles 11(2), 18 and 24 in relation to Article 1 of the [American Convention] to recognition of a change of name in accordance with the gender identity of the person concerned.”

(b) “[T]he compatibility of the practice of applying Article 54 of the Civil Code of the Republic of Costa Rica,<sup>29</sup> Law No. 63 of September 28, 1887, to persons wishing to change their name based on their gender identity with Articles 11(2), 18 and 24, in relation to Article 1 of the Convention.”

(c) [T]he protection provided by Articles 11(2) and 24 in relation to Article 1 of the [America Convention] to the recognition of the patrimonial rights derived from a relationship between persons of the same sex.”

<sup>30</sup> “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

<sup>31</sup> *Diccionario de la Lengua Española, Real Academia Española*, 23rd edition online, “2.f. *Condición social de unas personas respecto de las demás*” [social condition of some individuals in relation to others].

22. The Court has adopted<sup>32</sup> the concept of discrimination established by the Human Rights Committee of the International Covenant on Civil and Political Rights. According to this concept, any distinction, exclusion, restriction or preference established will be discriminatory, "if it has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of the human rights and fundamental freedoms of all persons." Thus, if it does not have this purpose or effect, it would not be discriminatory and would, consequently, be permitted.

23. In addition, it should be underlined that this concept of discrimination corresponds to the definition in the *Diccionario de la Real Academia Española*; that is "*seleccionar excluyendo*" [choose by excluding] and "*dar trato desigual a una persona o colectividad por motivos raciales, religiosos, políticos, de sexo, etc.*"<sup>33</sup> [treat a person or collectivity unequally based on race, religion, politics, sex, etc.]. In short, it is the inequality in treatment for the reasons indicated that characterizes discrimination.

24. Accordingly, discrimination can only be understood if individuals who are in the same or an equal juridical condition or situation are treated differently, thus affecting the exercise or enjoyment of their human rights. In this regard, it could be said, for example, that if children or women are given a different treatment from that given, respectively, to other children<sup>34</sup> or other women,<sup>35</sup> affecting the recognition or enjoyment of their human rights, this would be discrimination.

25. This means that there may be differences in the situation of individuals that would have repercussions on human rights. In this regard, the Court has asserted that:

"Not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity";<sup>36</sup> thus "[i]t follows that there would be no discrimination in differences in treatment of individuals by a State when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind."<sup>37</sup>

26. Now the issue raised in this matter relates to whether the Convention permits a difference or distinction to be made in the State's treatment of individuals in relation to the "change of name [...], in accordance with their gender identity" or "based on their gender identity" and to "the patrimonial rights derived from a relationship between persons of the same sex."

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<sup>32</sup> "[A]ny distinction, exclusion, restriction or preference based on specific reasons, such as race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of the human rights and fundamental freedoms of all persons." Para. 62.

<sup>33</sup> 23rd edition online.

<sup>34</sup> Art. 19: "Rights of the Child. Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

<sup>35</sup> Art. 4.5: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women."

<sup>36</sup> OC-4/84 *cit.* para. 56.

<sup>37</sup> *Idem*, para. 57.

27. In this regard, it appears useful to emphasize that the request does not ask for a ruling on the meaning and scope of gender identity as a category protected by the Convention. That is, it does not ask for an interpretation of gender identity pursuant to the provisions of the Convention. To the contrary, the State asserts that "gender identity has already been recognized by the Court as a category protected by the Convention,"<sup>38</sup> and this is ratified by OC-24.<sup>39</sup>

28. In other words, according to the petition, it should be understood that the recognition of gender identity as a category protected by the Convention, has already happened. Therefore, it is a fact that is provided as an assumption on the basis of which OC-24 was requested and, consequently, not subject to discussion. Accordingly, it was not essential for OC-24 to refer to gender identity in the terms it does,<sup>40</sup> particularly when it does not alter the opinion that the Court had expressed previously.<sup>41</sup>

29. However, it should be noted that, at the time of this recognition, no treaty or legal instrument that was binding for the OAS Member States and that included the term gender identity was cited, and that, in this regard, OC-24 mentions the 2015 Inter-American Convention on Protecting the Human Rights of Older Persons, that entered into force on January 11, 2017, only for the eight States of the Americas that have ratified it, and the 2013 Inter-American Convention against all Forms of Discrimination and Intolerance; however, to date this convention has not been ratified by any State of the Americas.

30. Nevertheless, it should be pointed out that the "social condition" to which Article 1(1) of the Convention refers, including gender identity in this, is a question of fact; that is, it should be considered based on how it currently exists, in the same way as with "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, [or] birth." The norms can or do regulate these aspects of a person's life, but do not create them.

31. Bearing the above in mind and considering the provisions in the Court's Rules of Procedure in this matter,<sup>42</sup> this text indicates how the author understands the answers given in OC-24 to the "specific questions" raised, which the Court did not alter.<sup>43</sup>

## **II. THE QUESTIONS RAISED**

32. The request being examined contained five "specific questions."

### **A. NAME CHANGE**

33. The first "specific question" was worded as follows:

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<sup>38</sup> Para. 2.

<sup>39</sup> Para. 78.

<sup>40</sup> Part VI: The right to equality and non-discrimination of LGBTI persons, B. Sexual orientation, gender identity and gender expression as categories protected by Article 1(1) of the Convention, paras. 68 to 80.

<sup>41</sup> *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, paras. 83 to 93.

<sup>42</sup> Art. 70(1) of the Court's Rules of Procedure: "Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought."

<sup>43</sup> Para. 29.

“Taking into account that gender identity is a category protected by Articles 1 and 24 of the ACHR, and also the provisions of Articles 11(2)<sup>44</sup> and 18 of the Convention: does that protection and the ACHR mean that the State must recognize and facilitate the name change of an individual in accordance with his or her gender identity?”

34. And the Court was asked to rule on this “specific question”:

“[T]he protection provided by Articles 11(2) and 24<sup>45</sup> in relation to Article 1 of the [American Convention] to recognition of a change of name in accordance with the gender identity of the person concerned.”

35. The matter is therefore restricted solely and above all to the name change, one of the elements that constitutes an individual’s identity. It therefore relates essentially to the interpretation of Article 18 of the Convention.<sup>46</sup>

36. Accordingly, this question may be answered to the effect that, based on the said article, the means to ensure the right to a name should be regulated by law; that is, this article refers the matter to the sphere of the State’s domestic or exclusive jurisdiction. Evidently, in this regard, the law must respect the provisions of Articles 1(1) and 24 of the Convention and any possible restriction that it contemplates must be necessary for the purposes of the Convention and conform to the principle of proportionality.

37. Consequently, the said regulation must obviously envisage the possibility that the holder of the right to a name may decide to change his or her name. In this regard, it should be recalled that, in general, the name is assigned at birth; thus, strictly speaking, the holder of the right to a name does not exercise this right at that moment.

38. The right to change one’s name emerges, then, after the name has been assigned; consequently, the exercise of this right also falls within the sphere of the domestic, internal or exclusive jurisdiction of the State, as is the case in all the States Parties to the Convention.

39. That said, the matter is generally and more properly related to the control of conventionality that the Court should carry out in each contentious case submitted to it, in relation to the conditions that the corresponding State Party to the Convention has established or establishes to authorize the change of name or, as stated in OC-24, in relation to the “appropriate procedure”<sup>47</sup> that it has provided for this purpose.

40. This control should therefore relate to the feasibility that those conditions truly make it possible to exercise the right to change one’s name and do not subject this to a decision by the authorities that could be discriminatory<sup>48</sup> as regards the rights to a name, personal integrity, protection of honor and dignity, and equality before the law.

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<sup>44</sup> “Right to Privacy. ... 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”

<sup>45</sup> Right to Equal Protection: All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

<sup>46</sup> “Right to a Name. Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.”

<sup>47</sup> Para. 116.

<sup>48</sup> For example, this would be the case if the change of name was subject to being ridiculous, risible or morally or materially harmful for the applicant, or if it was a condition that the new name should be in keeping with the sex of the

41. These conditions should therefore be aimed at ensuring that the exercise of the said right is effective and, evidently, should not entail the violation of the rights of third parties, including those of society as a whole, or the principle of legal certainty. In short, these conditions should ensure that the State's decision in the case of a name change request is not arbitrary.

42. Consequently, in general, the reason why a person requests a name change should not be one of the elements considered when authorizing this. It is not the State's role to rule on this aspect. The State should merely ensure that the requested name change does not affect the rights of third parties. Ultimately, the respective State cannot refuse the name change based on the reason cited by the applicant to request it, whatever this may be. Moreover, it should not require the applicant to provide any specific reason.

43. In sum, if the State rejects the name change request – unless it does so because this could affect the rights of third parties – it would be committing a discriminatory act that violates the rights to a name, personal integrity, protection against arbitrary and abusive interference in private life, and equal protection of the law.

44. The foregoing also includes, undoubtedly, name change requests based on gender identity. It is, therefore, in this sense that the undersigned understands that OC-24 answers the first question raised regarding the change of name by indicating that it is a right protected by Article 18 of the Convention.<sup>49</sup>

45. The undersigned evidently agrees with this, in the understanding that it is appropriate in the case all name change requests based on "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition," thus, including gender identity.

46. Nevertheless, it should be pointed out that although the Court's decision included matters that were not raised in the request, such as those concerning registration of all the data relating to a person's identity or the incorporation of this data on the identity document – which may include, in addition to the person's given names and last names, the date and place of birth, nationality and profession, together with the corresponding photograph and fingerprint – it is also true that such matters also fall within the domestic or exclusive jurisdiction of the State. Consequently, it would only be by the control of conventionality in relation to a contentious case submitted to it on this matter that the Court could rule on such aspects; that is, on how the defendant State had exercised or exercises its jurisdiction in this regard.

47. It is on these grounds that the undersigned concurs with the second decision<sup>50</sup> of OC-24.

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person, disregarding the fact that there are names that do not correspond clearly to this, or that are neutral, and even invented by the applicants.

<sup>49</sup> "The change of name, the amendment of the photograph and the rectification of the sex or gender in public records and identity documents, so that they correspond to the self-perceived gender identity is a right protected by Article 18 (Right to a Name), but also by Articles 3 (Right to Recognition of Juridical Personality), 7(1) (Right to Personal Liberty), 11(2) (Right to Privacy) of the American Convention. Consequently, pursuant to the obligation to respect and ensure rights without any discrimination (Articles 1(1) and 24 of the Convention), and the obligation to adopt domestic legal provisions (Article 2 of the Convention), States are obliged to recognize, regulate and establish the appropriate procedure to this end." Para. 116.

<sup>50</sup> "The change of name and, in general, the amendment of public records and identity documents so that these conform to the self-perceived gender identity constitute a right protected by Articles 3, 7(1), 11(2) and 18 of the American Convention, in relation to Articles 1(1) and 24 of this instrument; consequently, States are obliged to recognize, regulate and establish the appropriate procedure to this end, as established in paragraphs 85 to 116."

## B. PROCEDURE

48. The second “specific question” posed in the request and identified with the number “2” is as follows:

“If the answer to the preceding question is affirmative, could it be considered contrary to the ACHR that those interested in changing their given name may only do so by using a judicial procedure, in the absence of a pertinent administrative procedure?”

49. This question obviously has the same purpose as the previous one; namely, that the Court rule on:

“[T]he protection provided by Articles 11(2), 18 and 24 in relation to Article 1 of the ACHR to recognition of a change of name in accordance with the gender identity of the person concerned.”

50. On this question, attention should be drawn to the fact that, among its considerations, OC-24 refers expressly to the internal, domestic or exclusive jurisdiction of the States.<sup>51</sup> It also does so when answering the above “specific question”;<sup>52</sup> nevertheless, after referring to the essential requirements for this procedure, it concludes by expressing preference for the administrative path.<sup>53</sup>

51. Having said this, it should be pointed out that the relevant issue here is not the name change procedure that the State establishes in the exercise of its internal, domestic or exclusive jurisdiction, but rather that this procedure respects the provisions of Articles 8(1)<sup>54</sup> and 25(1)<sup>55</sup> of the Convention.

52. Also, the limits to this internal, domestic or exclusive jurisdiction in this case should not be overlooked. And this is, above all, owing to the provisions of Article 1(1) of the Convention; that is, the appropriate procedure for the change should not be discriminatory for any reason.

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<sup>51</sup> “... in principle, States may determine, based on their internal social and juridical circumstances, the most appropriate procedure to comply with the requirements for a procedure to rectify the name and, if applicable, the reference to the sex/gender and the photograph in the corresponding records and identity documents ...” Para. 159.

<sup>52</sup> “States may determine and establish, in keeping with the characteristics of each context and their domestic law, the most appropriate procedures for a change of name, amendment of the photograph and rectification of the reference to sex or gender in records and on identity documents so that these conform to the self-perceived gender identity regardless of whether they are administrative or judicial in nature.” Para. 160.

<sup>53</sup> “Since the Court notes that administrative or notarial procedures are those best suited to and most appropriate for these requirements, States may provide a parallel administrative procedure that the person concerned may choose.” Para. 160.

<sup>54</sup> “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”

<sup>55</sup> “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”



53. Second, this limit is also established by the Convention in its Articles 3, which indicates that “[e]very person has the right to recognition as a person before the law”; 5(1), that “[e]very person has the right to have his physical, mental, and moral integrity respected,” and 11, that “[e]veryone has the right to have his honor respected and his dignity recognized,” “[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation,” and “[e]veryone has the right to the protection of the law against such interference or attacks”; and 24, that “[a]ll persons are equal before the law” and “[c]onsequently, they are entitled, without discrimination, to equal protection of the law.”

54. Thus, considering that the Court has understood that the provisions of Article 8(1) of the Convention are also applicable to the decisions taken by non-judicial authorities,<sup>56</sup> the significant aspect is not whether the name change procedure established by domestic law is administrative or judicial, but rather whether it allows the corresponding decision to be made by the competent authority, within a reasonable time, and that a judicial instance is provided where the said decision may be appealed.

55. Based on the foregoing, the undersigned concurs in approving the third decision<sup>57</sup> of OC-24.

### C. ADMINISTRATIVE PROCEDURE

56. The third “specific question” included in the request for an advisory opinion, and identified with the number “3” is as follows:

“Could it be understood that, in accordance with the ACHR, Article 54 of the Civil Code of Costa Rica should be interpreted in the sense that those who wish to change their given name based on their gender identity are not obliged to submit to the judicial proceeding established therein, but rather that the State must provide them with a free, prompt and accessible administrative procedure to exercise that human right?”

57. The purpose of this question was for the Court to rule on:

“[T]he compatibility of the practice of applying Article 54 of the Civil Code of the Republic of Costa Rica, Law No. 63 of September 28, 1887, to persons wishing to change their name based on their gender identity with Articles 11(2), 18 and 24, in relation to Article 1 of the Convention.”

58. The way in which the question is worded and the objective sought may lead to some confusion. Indeed, it is difficult to perceive the correspondence between the “specific question” and the objective sought by the State when raising it. And this is because it appears that the State is asking the Court to provide a ruling on the hierarchy of the Convention within the State’s domestic legal system. This is because the wording of the “specific question” posed – “that those who wish

<sup>56</sup> *Case of Claude Reyes et al. v. Chile*, Judgment of September 19, 2006, Series C No. 151, paras. 118 and 119.

<sup>57</sup> “States must ensure that persons interested in rectifying the annotation of gender or, if applicable the mention of sex, in changing their name, amending their photograph in the records and/or on their identity documents to conform to their self-perceived gender identity, may have recourse to a procedure that must: (a) be centered on the comprehensive adjustment to the self-perceived gender identity; (b) be based solely on the free and informed consent of the applicant without calling for requirements such as medical and/or psychological certifications and others that could be unreasonable and pathologizing; (c) be confidential; and the changes, corrections or amendments in the records and the identity documents should not reflect the changes to conform to the gender identity; (d) be prompt and cost-free insofar as possible, and (e) not require evidence of surgery and/or hormone treatment. The procedure best adapted to these elements is the notarial or administrative procedure. States may provide an administrative path, in parallel, that allows the person a choice, as established in paragraphs 117 to 161.”

to change their given name based on their gender identity are not obliged to submit to the judicial proceeding established therein” – could be understood to mean that the State wanted the Court to declare that, although this provision of the State’s domestic law is fully in force, it is not compulsory owing to the provisions of the Convention.

59. However, it would appear that this question does not consider that, although it may be true that, under the State’s Constitution, treaties take precedence over domestic law<sup>58</sup> and that, pursuant to the State’s case law, the Court’s jurisprudence “shall – in principle – have the same status as the interpreted provision,”<sup>59</sup> it is no less true that not only is it binding exclusively for the State concerned, but also, it does not correspond to the Court to rule on this matter.

60. Nevertheless, it could also be understood that what the “specific question” requires is a ruling on the “the compatibility of the practice of applying Article 54 of the Civil Code of the Republic of Costa Rica, Law No. 63 of September 28, 1887, to persons wishing to change their name based on their gender identity.” In its consideration, OC-24 partially examines this possibility.<sup>60</sup>

61. In summary, the wording used in OC-24 reveals, first, that the said Article 54, interpreted with the meaning and scope described is compatible with the Convention; second, that since the control of conventionality is exercised in the sphere of an advisory opinion, it is of a preventive nature and is not binding for the States, as it would have been if it had been exercised in relation to a contentious case; third, that the State could, in exercise of its internal, domestic or exclusive jurisdiction, issue a regulation incorporating an administrative procedure to permit the right to a change of name based on gender identity, which should also be understood to include any other reason.

62. It is on this basis that the undersigned concurs with the approval of the fourth<sup>61</sup> and fifth<sup>62</sup> decision of OC-24.

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<sup>58</sup> Art. 7. “Public treaties, and international conventions and agreements duly approved by the Legislative Assembly shall take preference over the laws, as of their promulgation or from the date they indicate.”

<sup>59</sup> Judgment 0421-S-90 of the Constitutional Chamber of the Supreme Court of Justice of the State.

<sup>60</sup> “... it is only for the Court to interpret the rights contained in the Convention and to determine whether the provisions of domestic law – in this case article 54 of the Civil Code – are adapted to the provisions of the American Convention.” Para. 167. And, it adds that “[a]s it is currently worded, article 54 of the Civil Code of Costa Rica is only in keeping with the provisions of the American Convention if it is interpreted by the courts or regulated administratively in the sense that the procedure established by this article, ensuring that persons who wish to change their identity data so that it accords with their self-perceived gender identity is merely an administrative procedure that meets the [...] criteria” that it indicates and that “[t]he State of Costa Rica, to ensure a more effective protection of human rights, may issue regulations that incorporate these standards into a parallel administrative procedure that it may provide in keeping with the considerations in the preceding paragraphs of this Opinion (*supra* para. 160).” Para. 171.

<sup>61</sup> “Article 54 of the Civil Code of Costa Rica, as currently worded, is in accordance with the provisions of the American Convention only if it is either interpreted by the courts, or regulated administratively, to the effect that the procedure established by this article can guarantee that persons who wish to change their identity data so that this conforms to their self-perceived gender identity is a totally administrative procedure that meets the following criteria: (a) it must be centered on the comprehensive adjustment of the self-perceived gender identity; (b) it must be based solely on the free and informed consent of the applicant without calling for requirements such as medical and/or psychological certifications and others that could be unreasonable and pathologizing; (c) it must be confidential; and the changes, corrections or amendments in the records and the identity documents should not reflect the changes to conform to the gender identity; (d) it should be prompt and cost-free insofar as possible, and (e) it should not require evidence of surgery and/or hormone treatment. Consequently, based on the control of its conformity with the Convention, Article 54 of the Civil Code should be interpreted pursuant to the above standards so that persons who wish to comprehensively adjust their records and/or identity document to their self-perceived gender identity may truly enjoy the human rights recognized in Articles 3, 7, 11(2), 13 and 18 of the American Convention as established in paragraphs 162 to 171.”

#### D. PATRIMONIAL RIGHTS

63. The fourth question submitted to the Court is as follows:

“Taking into account that non-discrimination based on sexual orientation is a category protected by Articles 1 and 24 of the ACHR, in addition to the provisions of Article 11(2) of the Convention: does this protection and the ACHR mean that the State should recognize all the patrimonial rights derived from a relationship between persons of the same sex?”

64. The purpose of this request was to obtain a ruling by the Court on:

“The protection provided by Articles 11(2) and 24 in relation to Article 1 of the ACHR to the recognition of the patrimonial rights derived from a relationship between persons of the same sex.”

65. Regarding this question, identified as number 4 in the request, and its purpose, it should be underscored that it relates solely to the patrimonial rights derived from a relationship between persons of the same sex. It is limited to the situation of persons of the same sex, without referring to gender identity, and covers only the patrimonial rights derived from a relationship between these persons.

66. It is also essential to recall that international law, including international human rights law, at the current state of its development, does not include special rights for unions between same-sex couples. There is no binding treaty for OAS Member States that regulates the situation of such couples. The Convention does not do so. Furthermore, there is no customary law or general principle of law that does so. Nor do the laws of most of those States refer to the matter. All this can be deduced from OC-24.<sup>63</sup> Of the 34 Member States of the OAS, only eight of them regulate cohabitation unions, civil unions or *de facto* unions.

67. In short, there is no autonomous source of international law, in other words, a treaty, custom, or general principle of law that, in the legal sphere of the Americas, governs the union of same-sex couples, creating the institution and establishing the corresponding rights. All that exists, are unilateral legal instruments of some OAS Member States<sup>64</sup> that, logically, are binding only for the States that have issued them, particularly as they correspond to a minority and, thus, cannot be considered evidence of an international custom or serve as grounds for a general principle of law.

68. With regard to the resolutions of international organizations concerning unions of same-sex couples, these are not declarations of law; that is, they do not interpret a provision of a convention

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<sup>62</sup> “The State of Costa Rica, in order to ensure the protection of human rights more effectively, may issue a regulation incorporating the above standards into the administrative procedure that it may provide in parallel, in accordance with the considerations in the previous paragraphs of this Opinion, as established in paragraphs 162 to 171.”

<sup>63</sup> Paras. 206 to 213.

<sup>64</sup> A unilateral legal instrument is the expression of the will of a single State, not subordinated to another legal instrument, and executed with the intention of producing relevant legal effects for that State and possibly for third parties. This autonomous source of international law is not included in Art. 38 of the Statute of the International Court of Justice.

or customary law or a general principle of law in force for the OAS Member States.<sup>65</sup> Consequently, they do not constitute a supplementary source of international law, but rather express an aspiration - that could evidently be considered very legitimate – of most of the member States of the international organization concerned, so that it is either international law or the domestic law of each of them that includes and regulates the situation.

69. And, regarding jurisprudence, there is only the judgment handed down in the Atala case.<sup>66</sup> In this regard, it should be noted that, as a supplementary source of international law, jurisprudence is not binding if it is expressed in advisory opinions and, conversely, it is binding if it is expressed in the ruling in a contentious case, but only for the State that is a party to the respective case.

70. Consequently, the situation of unions between same-sex couples is a matter that also falls within the internal, domestic or exclusive jurisdiction of the State.<sup>67</sup>

71. This signifies, first, that States, in exercise of their internal, domestic or exclusive jurisdiction, may regulate this situation unilaterally; international law does not prevent them from doing so. Second, it means that States may decide not to regulate the situation; in other words, based on the current development of international law, they do not commit any internationally wrongful act in this case. And, third, it means that the Court's possible control of the conventionality of the actions taken by States in this regard, either of a preventive nature by an advisory opinion, or of a binding nature by a judgment in a contentious case, would only be admissible with regard to those States that have regulated the relationship between same-sex couples, in order to determine whether this regulation has had a negative effect on human rights. From a different perspective this means that the recognition and regulation of unions between same-sex couples cannot be imposed on States by jurisprudence, and especially by an advisory opinion, which is not binding for the State that requests the opinion and, above all, for other States.

72. Accordingly, this brief is not an opinion on whether or not unions between same-sex couples are admissible. Recalling the function of the Court, which is to indicate the applicable international law, in particular the Convention, as it is expressed and not as the Court would like it to express, this text merely points out that the said unions are not established in either international law or the Convention, so that any decisions in this regard correspond to each State.

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<sup>65</sup> The resolutions of international organizations can be of four types. One type refers to those that, based on the treaty that regulates the organization in question, are compulsory for its member States. For example, the resolutions of the Security Council of the United Nations issued under Chapter VII of the Charter of the United Nations, "Action with respect to threats to the peace, breaches of the peace, and acts of aggression." Such resolutions are not autonomous sources of international law, because their binding nature arises from the treaty that regulates the respective organization; thus, it is the treaty that is the autonomous source. Another type relates to those issued to regulate the functioning of the organization that issues them. For example, resolutions concerning the organization's budget. Plainly, these are binding in that setting. The third type of resolution of international organizations refers to those issued to interpret a legal provision of either a convention, customary law or a general principle of law. These are known as "resolutions of international organizations that are declarations of law" and are a supplementary source of international law insofar as they define a law already established by an autonomous source. This type of resolution is not binding for member States. The fourth type of resolutions of international organizations is that which simply expresses aspirations that international law be amended in the sense outlined. Evidently, such resolutions, which are the most numerous, are not binding for the member States of the respective organization either.

<sup>66</sup> *Supra* No. 41.

<sup>67</sup> Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2015,

73. In addition, this brief considers that the Convention deals with the family regardless of the ties that exist between the persons who form it. Thus, paragraph 1 of Article 17, entitled "Rights of the Family" refers solely to the family,<sup>68</sup> while paragraph 2 recognizes the right to marry and to raise a family.<sup>69</sup> Meanwhile, Article 19<sup>70</sup> refers to the family and not to marriage.

74. Consequently, in this brief it is understood that the question raised is not whether the union of two persons of the same sex constitutes a family, but exclusively whether the State should recognize the patrimonial rights derived from such a union.

75. In short, and in the understanding that they are supported by the reasons set out above, the undersigned concurred with the approval of the 6th<sup>71</sup> and 7th<sup>72</sup> decisions of OC-24.

#### **E. LEGAL MECHANISM**

76. The fifth and last "specific question," identified with the number "5," is worded as follows:

"If the answer to the preceding question is affirmative, must there be a legal mechanism that regulates relationships between persons of the same sex for the State to recognize all the patrimonial rights that derive from that relationship?"

77. And, with the same purpose as the previous question; that is, to obtain a ruling from the Court on:

"The protection provided by Articles 11(2) and 24 in relation to Article 1 of the [America Convention] to the recognition of the patrimonial rights derived from a relationship between persons of the same sex."

78. In this regard, first, it should be noted that, as in the case of the previous question, this one refers exclusively to relationships between persons of the same sex, without referring to gender identity; that it is limited to the patrimonial rights derived from this relationship; that the object and purpose of the legal mechanism concerned is "for the State to recognize all the patrimonial rights that derive from" the relationship or union between persons of the same sex, and that the question does not indicate the legal mechanism to which it refers or aspires.

79. Second, it should be emphasized that, in its analysis and answer to the "specific question" posed, OC-24 includes marriage between persons of the same sex.<sup>73</sup> Indeed, both the response

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<sup>68</sup> "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

<sup>69</sup> "The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention."

<sup>70</sup> "Rights of the Child. Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State."

<sup>71</sup> "The American Convention, based on the right to the protection of private and family life (Article 11(2)), as well as on the right to protection of the family (Article 17), protects the family ties that may derive from a relationship between a same-sex couple, as established in paragraphs 173 to 199."

<sup>72</sup> "The State must recognize and ensure all the rights derived from a family relationship between same-sex couples in accordance with the provisions of Articles 11(2) and 17(1) of the American Convention, and as established in paragraphs 200 to 218."

<sup>73</sup> Paras. 218 to 227.

provided by OC-24<sup>74</sup> and the eighth decision,<sup>75</sup> include marriage between persons of the same sex as perhaps the most relevant legal mechanism for the recognition of the patrimonial rights derived from the relationship between these persons.

80. Thus, basically, the matter in hand relates to the interpretation of Article 17(2) of the Convention.<sup>76</sup>

81. That said, the answer provided by OC-24 implies, on the one hand, that, when referring to marriage, the Convention includes marriage between persons of the same sex and, on the other hand, that if the States Parties to the Convention have not provided for this in their domestic laws, they should do so. But, this answer is confusing.

82. Regarding marriage between same-sex couples as an international legal obligation, OC-24 appears to suppose that the only institution that serves “for the State to recognize all the patrimonial rights that derive from that relationship” is marriage between persons of the same sex, and this is obviously not so. As already mentioned, there is also the possibility of civil unions and similar models.

83. In addition, it should be noted that, under the Convention, the situation of marriage is different from that of a civil union or any similar mechanism. This is because while marriage is contemplated in the Convention, civil union is not. Also, it should be stressed that, while everything related to a civil union or any similar mechanism falls with the sphere of the internal, domestic or exclusive jurisdiction of the State, in the case of marriage, the only part that corresponds to this sphere is the age and “the conditions required by domestic law” to marry and to raise a family; but, “insofar as such conditions do not affect the principle of non-discrimination established in th[e] Convention,” which is what must be determined when exercising the control of conventionality during the hearing and deciding of a contentious case.

84. That said, it should be pointed out that OC-24 prescind[s] of the application of Article 31<sup>77</sup> of the Vienna Convention on the Law of Treaties, the provisions of which should be used by States to interpret treaties and, consequently, the Convention.

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<sup>74</sup> “States must ensure access to all the mechanisms that exist in their domestic laws to guarantee the protection of all the rights of families composed of same-sex couples, without discrimination in relation to families constituted by heterosexual couples. To this end, States may need to amend existing mechanisms by taking administrative, judicial or legislative measures in order to extend such mechanisms to same-sex couples. States that encounter institutional difficulties to adapt existing mechanisms, on a transitory basis while promoting such reforms in good faith, have the obligation to ensure to same-sex couples, equality and parity of rights with heterosexual couples, without any discrimination.” Para. 228.

<sup>75</sup> *Supra* footnote 3.

<sup>76</sup> “The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.”

<sup>77</sup> “Article 31 (General rule of interpretation): “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.”

85. Indeed, OC-24 accords no importance to the fact that the States Parties agreed to sign the Convention “in good faith”; in other words, that, at that time, 1969, they wished to sign it and did so pursuant to the “ordinary meaning” attributed to its terms, which were, according to the 20<sup>th</sup> edition of the *Diccionario de la Real Academia Española* (1984), in force until 1992: “*Matrimonio: Unión de hombre and mujer, concertada mediante ciertos ritos o formalidades legales*”<sup>78</sup> [Marriage: Union of men and women, celebrated by certain rites or legal formalities].

86. Furthermore, there is no evidence that OC-24 considered the “context” of the terms of the Convention. Thus, for example, it did not weigh the fact that, while in almost all its articles recognizing human rights, it refers to the subjects of these rights as “everyone,”<sup>79</sup> in Article 17(2) it refers to “[t]he right of men and women of marriageable age to marry.”

87. In addition, OC-24 does not mention the “Preamble” or the “annexes” to the Convention. Nor does it mention “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty” or “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”

88. A similar situation occurs with what should be taken into account together with the context; in other words: “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,” or “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,” or “any relevant rules of international law applicable in the relations between the parties.”

89. And it could not mention the foregoing because, quite simply, there is no preamble, annex or agreement in this regard. Moreover, even today, there is no treaty or other instrument that is binding for the States of the Americas that refers to marriage between persons of the same sex. There are merely a few laws that refer to this. The OC-24 itself recognizes that only six of the 23 States Parties to the Convention and eight of the 34 Member States of the OAS have laws on marriage between same-sex couples.<sup>80</sup> At the global level, around 24 of the 193 members of the United Nations include this in their laws, and even this only in recent years.

90. Regarding the mention made in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, to “any relevant rules of international law applicable in the relations between the parties,” it should be considered that the 1948 American Declaration of the Rights and Duties of Man does not refer to marriage, while, when referring to marriage, both the 1948 Universal Declaration of

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<sup>78</sup> Subsequently, the following phrase was added: “*En determinadas legislaciones, unión de dos personas del mismo sexo, concertada mediante ciertos ritos o formalidades legales, para establecer and mantener una comunidad de vida e intereses.*” [Under certain legal systems, the union of two persons of the same sex, celebrated by means of certain rites or legal formalities, to establish and maintain a common life and interests.]

<sup>79</sup> Arts. 3 (Right to the Recognition of Juridical Personality), 4 (Right to Life), 5 (Right to Personal Integrity), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 10 (Right to Compensation), 11 (Right to Privacy), 12 (Freedom of Conscience and Religion), 13 (Freedom of Thought and Expression), 14 (Right of Reply), 16 (Freedom of Association), 18 (Right to Name), 20 (Right to Nationality), 21 (Right to Property), 22 (Freedom of Movement and Residence), 24 (Right to Equal Protection) and 25 (Right to Judicial Protection). Art. 19 (Rights of the Child) refers to “every child; Art. 23 (Right to Participate in Government) alludes to “every citizen.” Arts. 6 (Freedom from Slavery) and 9 (Freedom from *Ex Post Facto* Laws) use the expression “no one.” This expression is also used following “everyone” in Articles 5, 7, 12, 20 and 22.

<sup>80</sup> Paras. 206 to 213.

Human Rights<sup>81</sup> and the 1966 International Covenant on Civil and Political Rights<sup>82</sup> refer to “men” and “women.”

91. In addition, regarding the resolutions of international organizations cited in OC-24 as sufficient precedents to support its opinion with regard to same-sex couples, it should be reiterated that such resolutions are not declarations of law; in other words, they do not interpret a provision of a convention or customary norm or a general principle of law in force for the aforementioned States. Consequently, they do not constitute a supplementary source of international law; rather they express an aspiration, which may evidently be considered very legitimate, of the member States of the international organization concerned that either international law or the domestic law of each of them establish and regulate the situation referred to.<sup>83</sup>

92. In other words, the resolutions of certain international organizations cited in OC-24 as evidence of the practice as regards recognition of marriage between same-sex couples<sup>84</sup> cannot be forced on the OAS Member States.

93. The OC-24 also appears to assert the binding nature of marriage between same-sex couples based on an evolutive interpretation,<sup>85</sup> but in relation to its sociological rather than its legal aspect. As indicated on another occasion: “the evolutive interpretation of the Convention, or considering the Convention a living law, does not mean interpreting it to legitimize, almost automatically, the social reality at the time of the interpretation because, in that case, the said reality would be the interpreter and even exercise the normative function.” Rather, “to the contrary, the evolutive interpretation of the Convention signifies understanding its provisions in the perspective of determining how they stipulate that these innovative matters or problems should be approached.”<sup>86</sup>

94. It should be added that, while Article 1(1) of the Convention would be the general rule as regards discrimination, the provisions of Article 17(2) of the Convention would be the special rule, so that the *lex specialis derogat legi generali* principle would be applicable, especially considering that the latter article mentions non-discrimination, from which it can be inferred that this provision considers that marriage, as it describes it – the union between a man and a woman – is not discriminatory.

95. As a supplementary element, it could be added that an evolutive interpretation is only appropriate in those situations in which the words used in the Convention could be understood with regard to rights that are implicitly or explicitly included therein, but not to rights that are not established or that are deliberately excluded from the Convention. Furthermore, an evolutive interpretation cannot go against the clear and explicit terms of the Convention. In this regard, it should be recalled that Article 31 of the Vienna Convention on the Law of Treaties establishes four rules of interpretation: good faith, the ordinary meaning of the terms in their context, and the

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<sup>81</sup> Art. 16: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”

<sup>82</sup> Art. 23(2): “The right of men and women of marriageable age to marry and to found a family shall be recognized.”

<sup>83</sup> *Supra* paras. 66 to 69.

<sup>84</sup> Paras. 203 to 205.

<sup>85</sup> Para. 187.

<sup>86</sup> Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2015.



object and purpose of the treaty, rules that should be employed harmoniously, without favoring or downplaying any one of them.

96. Thus, it is based on the above that the undersigned is unable to share the assertion made in OC-24 that "Article 17(2) is merely establishing, expressly, the treaty-based protection of a specific model of marriage,"<sup>87</sup> because Article 17(2) of the Convention refers expressly and only to the sole form of marriage that existed when the Convention was drafted and that continues to be the main model – the union between a man and a woman.

97. In addition, the undersigned is unable to agree with the view expressed in OC-24 that "where the parties have used generic terms in a treaty, the parties necessarily ha[d] been aware that the meaning of the terms was likely to evolve over time"<sup>88</sup> because, the adoption of this position when interpreting the Convention runs the risk of affecting the principle of legal certainty. Moreover, the matter in hand is not that the terms of the treaty change over time, but rather when and how this has occurred and, especially, if this has been established in one or several legal instruments that are binding for the States concerned.

98. Another additional point is that it would appear that, with the above phrase, OC-24 reproaches the States Parties to the Convention for not complying with the obligation to foresee the change in the meaning of the term, when this could never constitute a state obligation, in particular when it is considered that they probably did not desire a change.

99. Furthermore, it should be added that OC-24 is contradictory because it indicates the simultaneous existence of the state obligations, on the one hand, to allow same sex couples access to all the mechanisms that exist in their domestic laws for heterosexual couples, including marriage; while, on the other hand, and with regard to those States that endeavor, in good faith, to guarantee the patrimonial rights of same-sex couples, to ensure such couples, anyway, the same rights as heterosexual couples. In sum, it is unclear whether OC-24 is resorting to the customary norms applicable for the determination of an internationally wrongful act<sup>89</sup> and for compliance with the obligation of non-repetition, if such an act has already taken place.<sup>90</sup>

100. Evidently, the undersigned cannot agree either with the assertions in OC-24 that "[t]he Court also notes that, at times, the opposition to the marriage of same-sex couples is based on philosophical or religious convictions" and that these parameters "cannot be used [...] as a guide to interpretation when determining the rights of the human being," and "that such convictions cannot condition the provisions of the Convention in relation to discrimination based on sexual orientation."<sup>91</sup>

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<sup>87</sup> Para. 182.

<sup>88</sup> Para. 188.

<sup>89</sup> Art 2 of the Articles on Responsibility of States for Internationally Wrongful Acts, presented by the International Law Commission, Annex to Resolution A/RES/56/83: "Elements of an internationally wrongful act of a State. There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State."

<sup>90</sup> Art. 30 of the said Articles: "The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; and (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require."

<sup>91</sup> Para. 223.

101. The undersigned is unable to agree with this because, by presuming, without providing explanations or grounds for this, that those who oppose marriage between persons of the same sex have inappropriate religious or philosophical convictions (and, therefore, to interpret the Convention), OC-24 runs the risk that some may consider that such persons are opposed to human rights and, consequently, that their opinions can be suppressed, which is definitively discriminatory. It should not be forgotten that the Court is and should be the place in which everyone may present, respectfully and without fear, their claims for justice in the area of human rights.

102. Furthermore, the undersigned does not agree with this assertion because it does not appear to consider that every legal provision, particularly in a democratic society, results from the confrontation or consensus between different ideas, interests or positions based on distinct religious, ideological, political, cultural and even economic beliefs. In short, legal norms reflect the relations that exist in the respective national or international society at a specific moment.

103. Accordingly, no objections can be raised to individuals expressing their political, ideological or religious opinions on legal provisions. They are only exercising their rights to freedom of conscience and religion,<sup>92</sup> and freedom of thought and expression.<sup>93</sup> Moreover, those opinions may be useful to understand more exactly the meaning and scope of the provision concerned, so that it would be inappropriate for the Court to reject them *prima facie*.

104. Nevertheless, it should be recalled that the arguments set out in OC-24 regarding the recognition of marriage between same-sex couples would appear to be reasons to encourage its recognition under the domestic laws of the States, rather than to maintain that it has been adopted by international law.<sup>94</sup>

105. That said, Article 17(2) of the Convention indicates that the right to marry and to raise a family shall be recognized if the parties are "of marriageable age to marry [... and] meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of non-discrimination established in this Convention."

106. Thus, this article refers the determination of the conditions to marry and to raise a family to the sphere of the internal, domestic or exclusive jurisdiction of the respective State, adding that such conditions should not affect the principle of non-discrimination. This does not establish that recognition of marriage between persons of the same sex is required, but rather that the conditions to marry, understood as the union between a man and a woman, should not be discriminatory, as would be the case, for example, if marriage between a man and a woman was prohibited based on "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

107. Consequently, and in this regard, States may, for example and pursuant to the said Article 17(2), prohibit marriage between minors or between close relatives, or polygamy.

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<sup>92</sup> Art. 12(1): "Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private."

<sup>93</sup> Art. 13(1): "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

<sup>94</sup> Paras. 223 to 226.

108. Indeed, it is Article 17(2) of the Convention itself that makes the difference or distinction between marriage and other institutions that could exist between human beings. Consequently, since, according to the Convention, marriage is deemed to be the union between a man and a woman, it cannot be considered, in light of contemporary international law, that it would be discriminatory if the domestic laws of the States of the Americas did not allow marriage between persons of the same sex.

109. Lastly, in consequence, from the interpretation of Article 17(2) of the Convention, pursuant to the rules of interpretation contained in the Vienna Convention on the Law of Treaties, it cannot be inferred that marriage between persons of the same sex has been recognized by international law or by international human rights law either tacitly or even applying an evolutive interpretation. To the contrary, the interpretation of this article reveals clearly that there is no international obligation to recognize or celebrate marriage between persons of the same sex, and if this has not occurred, there is no obligation to amend the respective domestic laws to allow this.

110. Based on the above, the undersigned is unable to agree with the eighth decision<sup>95</sup> of OC-24.

### **III. CONTROL OF CONVENTIONALITY**

111. Bearing in mind the considerations in the judgment on the control of conventionality exercised in the context of the advisory and non-contentious jurisdiction, this text endeavors to insert those considerations into the Court's general concept of this control; that is, it is exercised either within the contentious jurisdiction, or within the advisory and non-contentious jurisdiction. In both cases, it has been included in jurisprudence to facilitate timely and full respect for international human rights law and, consequently, general international law also.

#### **A. BACKGROUND INFORMATION**

##### **a. Jurisprudence**

112. On numerous occasions the Court has referred to the control of conventionality<sup>96</sup> and, thus, has gradually clarified the terms of this mechanism arising from its obligation to protect rights.

<sup>95</sup> *Supra* footnote 3.

<sup>96</sup> See in this regard, *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 154; *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2006. Series C No. 158; *Case of La Cantuta v. Peru, merits, reparations and costs.* Judgment of November 29, 2006, Series C No. 162; *Case of Boyce et al. v. Barbados. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2007, Series C No. 169; *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of August 12, 2008, Series C No. 186; *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009, Series C No. 209; *Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of May 26, 2010, Series C No. 213; *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010, Series C No. 214; *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 30, 2010, Series C No. 215; *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010, Series C No. 216; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs.* Judgment of September 1, 2010, Series C No. 217; *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010, Series C No. 218; *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; *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010, Series C No. 220; *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011, Series C No. 221; *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011, Series C No. 227; *Case of López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2011, Series C No. 233; *Case of Fontevecchia and D'Amico v. Argentina, merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012,

However, it was in an order on monitoring compliance with judgment that it went into greater detail on the issue,<sup>97</sup> as follows:

“Inter-American jurisprudence has introduced the concept of “control of conventionality,” conceived as an institution used to apply international law, in this case international human rights law, and specifically the American Convention and its sources, including the jurisprudence of this Court.”<sup>98</sup>

113. And the Court added that:

“It is possible to observe two different expressions of this State obligation to exercise the control of conventionality, depending on whether or not the State was a party to a case in which judgment has been delivered. This is because the provision of the Convention interpreted and applied has different binding effects depending on whether or not the State was a substantive party to the international proceedings.”<sup>99</sup>

### b. Concept

114. In view of the foregoing, the issue of the control of conventionality is clearly inserted into the relationship between internal or domestic law and international law if it is considered that international law does not regulate all matters and, in the case of some matters, even when it does regulate them it does not do so completely. Consequently, the institution known as the reserved domain or the internal, domestic or exclusive jurisdiction of the State<sup>100</sup> or, as it is known in other latitudes, the margin of appreciation,<sup>101</sup> subsists as a central element of the international legal

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Series C No. 239; *Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012, Series C No. 246; *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012, Series C No. 250; *Case of the Massacres of El Mozote and Nearby Places v. El Salvador. Merits, reparations and costs.* Judgment of October 25, 2012, Series C No. 252; *Case of Gudiel Álvarez et al. (“Diario Militar”) v. Guatemala. Merits, reparations and costs.* Judgment of November 20, 2012, Series C No. 253; *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations.* Judgment of November 30, 2012, Series C No. 259; *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations.* Judgment of May 14, 2013, Series C No. 260; *Case of Gutiérrez and family v. Argentina. Merits, reparations and costs.* Judgment of November 25, 2013, Series C No. 271; *Case of García Cruz and Sánchez Silvestre v. Mexico. Merits, reparations and costs.* Judgment of November 26, 2013, Series C No. 273; *Case of J. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013, Series C No. 275; *Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of January 30, 2014, Series C No. 276; *Case of Norin Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs.* Judgment of May 29, 2014, Series C No. 279; *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of August 29, 2014, Series C No. 282; *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs.* Judgment of October 14, 2014, Series C No. 285; *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312; *Case of Tenorio Roca et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of June 22, 2016. Series C No. 314; *Case of Andrade Salmón v. Bolivia. Merits, reparations and costs.* Judgment of December 1, 2016. Series C No. 330, para. 93; *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; Entitlement of Legal Entities to hold Rights under the Inter-American System of Human Rights (Interpretation and scope of Article 1(2) in relation to Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as Article 8(1) A and B of the Protocol of San Salvador).* Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22.

<sup>97</sup> *Case of Gelman v. Uruguay. Monitoring compliance with judgment.* Order of the Inter-American Court of Human Rights of March 20, 2013.

<sup>98</sup> *Idem*, Para. 65.

<sup>99</sup> *Idem*, Para. 67.

<sup>100</sup> *Supra* footnote 14.

<sup>101</sup> *Supra* footnote 15.

structure, although not with the same intensity and breadth as before. This circumstance means that a matter is no longer in this exclusive jurisdiction to the extent that it is governed by international law and this is precisely why the said relationship has a different response based on whether a matter is decided internally or in the international sphere, in particular, as regards its effects.

115. Thus, the control of conventionality consists in comparing a domestic norm or practice with the provisions of the Convention to determine whether the former is compatible with the latter and, consequently, the primacy of one over the other should there be a contradiction between them. Evidently, the response will depend on whether this control is exercised by an organ of the pertinent State Party to the Convention prior to the intervention of the Court, or whether it is the Court that decides this subsequently or when the State Party has not exercised this control.

## **B. PRIOR CONTROL OF CONVENTIONALITY BY THE STATE**

### **a. Rationale**

116. First, it should be underlined that there is no international provision, either treaty-based, customary or a general principle of law, and this includes the Convention, that establishes the supremacy of international law over the corresponding domestic law in the internal sphere of the State. Thus, it may be concluded, with regard to the primacy of international law over the State's domestic law in the internal sphere, that this relates to the reserved domain or the internal, domestic or exclusive jurisdiction of the State, precisely because it is a matter that is not regulated at the international level.

117. It is in this perspective that attention should be drawn to the fact that, according to the above-mentioned order on compliance with judgment, the control of conventionality should be exercised by the state authorities, who are "subject to the rule of law and, therefore [...] obliged to apply the legal provisions that are in force [...] within their respective terms of reference and the corresponding procedural regulations." Thus, the Court recalls that these authorities "are also subject to the treaty"; that is, they are subject to both domestic law and the Convention.

118. Perhaps it is this that explains, at least in part, that, in practice, it is based on the provisions of the respective state Constitutions that their organs rule on the relationship between international law and the corresponding domestic law in the domestic sphere. Accordingly, it is the Constitution of each State that decides on the relationship between international law and the corresponding domestic law in the domestic sphere.

119. And this is precisely what happens in the 20 States Parties to the Convention that have accepted the Court's jurisdiction. Indeed, following the monistic doctrine regarding this relationship, some of the Constitutions grant treaties, constitutionally<sup>102</sup> and according to the interpretation of the Constitution made by their highest courts, either a "legal" status,<sup>103</sup> that is the same status as their laws, or an "infra-constitutional" or "supralegal" status";<sup>104</sup> in other words,

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<sup>102</sup> The references below refer to articles in the Constitution of the respective States.

<sup>103</sup> Barbados, Preamble and art 1; Trinidad and Tobago, art.2.

<sup>104</sup> Argentina, art.75.22; Brazil, art. 5; Ecuador, art. 163; El Salvador, art. 144; Guatemala, art. 46; Haiti, art. 276.2; Honduras, art. 18, and Nicaragua, art. 46.

they are above the law but below the Constitution. Meanwhile other Constitutions grant norms on human rights a “constitutional”<sup>105</sup> and even a “supra-constitutional” status.<sup>106</sup>

120. In short, it is because it is understood that the Convention is incorporated into the domestic law of the corresponding State Party that its state interpreter and executor must understand it as part of domestic law and, consequently, must interpret it and apply it in harmony with that law in accordance with the hierarchy assigned by the respective Constitution. In this situation, the source of the obligation to interpret and to apply the Convention is the Constitution and not the Convention or any other source of international law.

121. Accordingly, it is in this understanding – that the Convention has been incorporated into the respective domestic law – that its domestic interpreter must determine its meaning and scope as a treaty, bearing in mind, as will be pointed out below,<sup>107</sup> the *pacta sunt servanda* principle, the inappropriateness of citing domestic law to fail to comply with what has been agreed and, in a simultaneous and harmonious manner, the rules concerning good faith, the terms of the treaty in its context, and its object and purpose, without privileging or downplaying any of these elements.

122. Moreover, in this regard, it should be stressed that the control of conventionality is applicable not only with regard to the Convention, but also to all the treaties in force in the State in question.

#### **b. Jurisprudence**

123. Regarding the control of constitutionality that the State should exercise prior to the control eventually carried out by the Court, the latter has indicated that:

“In situations and cases in which the State concerned has not been a party to the international proceedings in which certain case law was established, merely because it is a party to the American Convention, all its public authorities and all its organs, including the democratic instances, judges and other organs that are part of the administration of justice at all levels, are bound by the treaty and must therefore exercise a control of conventionality within their respective spheres of competence and the corresponding procedural regulations, both when issuing and applying norms, as regards their validity and compatibility with the Convention, and also in the determination, prosecution and deciding of specific situations and concrete cases, taking into account the treaty itself and, as appropriate, the precedents and jurisprudence of the Inter-American Court.”<sup>108</sup>

124. Thus, the Court’s case law asserts that, even though a State Party to the Convention, is not a party to a case submitted to the Court, all its organs should exercise the pertinent control of conventionality “within their respective spheres of competence and the corresponding procedural regulations.”

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<sup>105</sup> Argentina, art. 75.22; Bolivia, art. 13.IV and 14.III; Colombia, art. 93; Chile, Art. 5.2; Mexico, art. 133; Panama, art. 17; Paraguay, art. 142; Peru, final provisions and fourth transitory provision; Dominican Republic, art. 74.3; Uruguay, art. 6, and Venezuela, art. 23 (has denounced the Convention).

<sup>106</sup> Bolivia, art. 257.I. and II., and Costa Rica, art. 7.

<sup>107</sup> *Infra*, paras. 139 and 140.

<sup>108</sup> *Case of Gelman v. Uruguay. Monitoring compliance with judgment.* Order of the Inter-American Court of Human Rights of March 20, 2013, para. 56.

125. In conclusion, therefore, in no part of the Court's jurisprudence is there an express and definitive indication that, in case of discrepancy, divergence or contradiction between the Constitution or any law of the respective State and the Convention "all" that State's "organs" "including its judges and other organs that are part of the administration of justice at all levels," must ensure that the Convention prevails over the domestic legal provisions. Consequently, neither has the Court referred to the primacy of one over the other in that eventuality, and has never called upon the State, in that hypothetical case, to disregard its Constitution.

126. Let it be repeated that what the Court has maintained is, to the contrary, "that the domestic authorities are subject to the rule of law and, therefore, are obliged to apply the legal provisions in force"<sup>109</sup> and also that they must "ensure that the effects of the provisions of the Convention are not diminished by the application of norms that are contrary to its object and purpose, or that judicial or administrative decisions do not make full or partial compliance with the international obligations illusory."<sup>110</sup> However, it has not indicated how that objective should be achieved.

127. In short, what the Court has stated is that the Convention should be interpreted and applied as part of the domestic law of the respective State and by its competent organ, but it has not indicated that the control of conventionality should be exercised against the provisions of domestic law, or that this interpretation and application cannot ultimately correspond, as in the case of control of constitutionality, to the State's highest court or a specialized court, such as the constitutional court.

128. And a problem arises precisely in those situations in which the pertinent state organ gives preference to the domestic law, which may even be the Constitution itself, over the provisions of the Convention, thus violating an international obligation under this instrument. If the said state organ justifies its action based on the Constitution, it would not be exercising control of conventionality, but rather control of constitutionality, the purpose of which is to ensure the supremacy of the Constitution over any other norm.

### **c. Comments**

129. As a first comment on the control of conventionality by a state organ, it can be affirmed that, if the Convention contradicts the provisions of the Constitution, obviously and definitively, the state organ will generally prefer the Constitution over the Convention or, in other words, the control of constitutionality over the control of conventionality, pursuant to the hierarchical system that characterizes the national social order and, consequently, its laws.

130. Second, it can be said that, since the control of conventionality by the organs of the respective State is not regulated by international law but rather international law leaves it to the sphere of the corresponding domestic law – in other words, to the State's reserved domain or its internal, domestic or exclusive jurisdiction – the foregoing comment is valid even in relation to States that have unilaterally accepted the primacy of the Convention in their domestic law or the binding effects of its case law, including when this emanates from cases in which they have not been a party because, logically and unilaterally, they could, always in the sphere of their internal, domestic or exclusive jurisdiction, amend their Constitution or the domestic law in question, depriving the Convention of this superior ranking.

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<sup>109</sup> *Idem*, para. 66.

<sup>110</sup> *Idem*.

131. Third, it can also be stated that the control of conventionality by the state organs is, consequently, preventive in nature; that is, it constitutes, if anything, an obligation of conduct, which is to “ensure that the effects of the provisions of the Convention are not diminished by the application of norms that are contrary to its object and purpose, or that judicial or administrative decisions do not make full or partial compliance with the international obligations illusory,” and not of result, as it would be if it was required that, in the event of contradiction between the domestic provision and the Convention, the corresponding state organ should always give the Convention and its provisions preference within the domestic legal system.

132. Thus, the control of conventionality by a state organ is preventive because if it decrees the primacy of the Convention over the provisions of its domestic law, it will generally avoid a case being submitted to the Court in this regard and if, to the contrary, it should decide that the domestic law prevails over the provision of the Convention, it runs the risk of the matter being brought before the inter-American human rights system and the possibility of the Court declaring the international responsibility of the State.

133. Nevertheless, the above could suggest that control of conventionality by the respective State would not be strictly useful or necessary. However, it should be pointed out that this mechanism has played and will surely continue to play a relevant and indispensable role, especially as regards the incorporation of the Convention into domestic law. Moreover, it has allowed the idea that the Convention should be applied as part of domestic law to be socialized among state agents in order to avoid the State incurring international responsibility.

### C. CONTROL OF CONVENTIONALITY BY THE COURT

#### a. Preliminary consideration

134. The first thing that should be recalled in this regard is that, under the international legal system, there is no hierarchy of autonomous sources; in other words, no norm establishes that one treaty has primacy over another, or that the treaty prevails over the custom or the custom over the treaty, or either of them over the general principles of law.<sup>111</sup> This differs from domestic legal systems, where the Constitution heads the hierarchy, followed by the laws, either organic, derived from special or regular quorums, decrees, resolutions, instructions and, lastly, contracts. What international law does contemplate is a preference for the use of autonomous sources, and that some of its norms, but not all, are *jus cogens*,<sup>112</sup> so that it is more difficult to amend them. Thus, the international legal system does not contain a regulatory framework with a status similar to that of the Constitution under the domestic legal system.

135. Consequently, the Convention does not rank higher than other treaties, and there is no international provision that establishes the primacy, in the international sphere, of one regulatory framework over another.

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<sup>111</sup> *Supra*, footnote 10.

<sup>112</sup> Art. 53 of the Vienna Convention on the Law of Treaties: “Treaties conflicting with a peremptory norm of general international law (*jus cogens*). A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”



136. Accordingly, when exercising the control of conventionality, the Court does so, not to guarantee the primacy of the Convention over other treaties in the international sphere, but rather, in this sphere, to assert or proclaim its binding nature for the respective States Parties to the Convention.

137. That said, the Court can exercise the control of conventionality in two situations. One is in the exercise of its advisory or non-contentious jurisdiction, and the other in the exercise of its contentious jurisdiction.

**b. Applicable provisions**

138. Taking the above into account, it can be said that the control of conventionality by the Court is founded on the following international norms:

**i. Vienna Convention on the Law of Treaties**

139. The provisions of the Vienna Convention on the Law of Treaties on which the control of conventionality exercised by the Court is based are, above all, Article 26, which embodies the *pacta sunt servanda* principle,<sup>113</sup> the first phrase of Article 27, which establishes that parties may not invoke internal law as justification for failure to comply with their obligations,<sup>114</sup> and Article 31(1), which establishes, as an essential rule, that treaties must be interpreted in good faith, according to the terms of the treaty in their context, and in light of its object and purpose.<sup>115</sup>

140. Therefore, pursuant to the Vienna Convention, which also codifies the customary law applicable to treaties between States,<sup>116</sup> that is, in the international sphere, treaties must be interpreted considering that the States parties have signed and ratified them freely, pledging their word to comply with them, even when such treaties may possibly contradict provisions of their domestic law. Also, according to this Convention, treaties should be interpreted based on the simultaneous and harmonious application of the four elements it stipulates. These are: that the will of the contracting parties is expressed by their intention to conclude the treaty in accordance with the ordinary terms used (unless these are accorded a special meaning), in their context, and in light of the object and purpose of the treaty. None of these elements should be disregarded or overvalued. They are all equally necessary for a correct interpretation of the treaty in question. None of them can be dispensed with or privileged and they must be employed harmoniously.

**ii. Draft articles on the responsibility of States for internationally wrongful acts, prepared by the International Law Commission of the United Nations**

141. The second group of provisions on which the control of conventionality by the Court is based are the customary norms on State responsibility for internationally wrongful acts.<sup>117</sup> These articles

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<sup>113</sup> "*Pacta sunt servanda*," Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

<sup>114</sup> "Internal law and observance of treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

<sup>115</sup> *Supra* footnote 77.

<sup>116</sup> Art. 1 of the Vienna Convention on the Law of Treaties: "Scope of the present Convention. The present Convention applies to treaties between States."

<sup>117</sup> Draft articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, Annex to Resolution A/RES/56/83 of 12 December 2001.

establish that every internationally wrongful act entails responsibility for the respective State;<sup>118</sup> that the wrongful act consists of an action or omission attributable to the State and that violates an international obligation under international law,<sup>119</sup> regardless of the provisions of its domestic law,<sup>120</sup> and that the State is responsible for any conduct of any of its organs.<sup>121</sup>

142. These provisions, as the previous ones, are also applicable to the control of conventionality of any treaty, not just the Convention.

### iii. American Convention on Human Rights

143. The specific provisions of the Convention that may be cited as support for the control of conventionality by the Court are those that establish that the States Parties to the Convention undertake to respect and ensure respect for human rights,<sup>122</sup> and their obligation to adopt the necessary measures to give effect to such rights.<sup>123</sup>

144. Thus, these provisions constitute a legal structure that allows the Court to proceed to impart justice in the cases submitted to its consideration, with the certainty that its decisions will be obeyed by the corresponding State, because the latter has freely consented to this.

## c. Control of conventionality and advisory and non-contentious jurisdiction

### i. Advisory and non-contentious jurisdiction

145. According to Article 64 of the Convention,<sup>124</sup> the Court has an advisory and non-contentious jurisdiction on the basis of which the Member States of the Organization of American States may consult the Court regarding the interpretation of the Convention or of other treaties concerning the protection of human rights in the States or with regard to the compatibility of their respective laws with the said international instruments.

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<sup>118</sup> "Art 1. Responsibility of a State for its internationally wrongful acts. Every internationally wrongful act of a State entails the international responsibility of that State."

<sup>119</sup> "Art. 2. Elements of an internationally wrongful act of a State. There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State."

<sup>120</sup> "Art. 3. Characterization of an act of a State as internationally wrongful. The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

<sup>121</sup> "Art. 4. Conduct of organs of a State. 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

<sup>122</sup> *Supra* footnote 30.

<sup>123</sup> Art. 2: "*Domestic Legal Effects*. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

<sup>124</sup> "1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."

146. It should be noted that the Convention recognizes the authority to request an advisory opinion to all the OAS Member States, not only the States Parties to this instrument and, also, that the corresponding request may relate both to the interpretation of the Convention or other human rights treaties and to the compatibility of the domestic laws of those States with such treaties.

147. The main organs of the OAS listed in Chapter X of its Charter may also request an advisory opinion from the Court.<sup>125</sup>

148. In other words, the Court may give advisory opinions at the request of more States and international organs and in more cases than has been established for other international judicial instances.<sup>126</sup>

149. The foregoing explains the relevance of advisory opinions, even though, as their name indicates, they are not binding,<sup>127</sup> which constitutes their main difference from the Court's judgments. And they are not binding, not only because, to the contrary, they would not differ from the latter, but also because there are no parties to an advisory opinion, from which it can be concluded that it would not be fair that a decision of the Court was binding for entities that had not appeared before it and had not been prosecuted or questioned. In addition, in the hypothesis that advisory opinions were considered binding for all the States, not only would the right to a defense be very seriously affected, but also States that are not parties to the Convention would, in this way be subject to the Court's jurisdiction, which would fall entirely outside the provisions of the Convention.

150. Nevertheless, this does not mean that the Court's advisory opinions do not have special relevance. Indeed, their importance stems precisely from the fact that, based on the Court's moral and intellectual authority, they allow it to exercise a preventive control of conventionality. In other words, they indicate to the States that have accepted the Court's contentious jurisdiction that, if they do not adapt their conduct to the Court's interpretation of the Convention, they run the risk of a case related to the opinion being submitted to the consideration of the Court and a decision declaring the international responsibility of the respective State. In addition, they provide the other States with guidance on full and complete respect for the human rights they undertook to respect, either as parties to the Convention, or as parties to other international legal instruments.

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<sup>125</sup> Currently, Chapter VIII: "Art. 53: The Organization of American States accomplishes its purposes by means of:

- a) The General Assembly;
- b) The Meeting of Consultation of Ministers of Foreign Affairs;
- c) The Councils;
- d) The Inter-American Juridical Committee;
- e) The Inter-American Commission on Human Rights;
- f) The General Secretariat;
- g) The Specialized Conferences, and
- h) The Specialized Organizations.

There may be established, in addition to those provided for in the Charter and in accordance with the provisions thereof, such subsidiary organs, agencies, and other entities as are considered necessary."

<sup>126</sup> For example, Art. 96 of the Charter of the United Nations: "1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

<sup>127</sup> Unless the respective State unilaterally assigns them a binding nature, as can be inferred from the decision in judgment 0421-S-90 of the Constitutional Chamber of Costa Rica, which indicated that the Court's jurisprudence "shall – in principle – have the same status as the interpreted provision."

## ii. Jurisprudence

151. Thus, as the Court has stated:

"When affirming its jurisdiction, the Court recalls the broad scope of its advisory function, unique in contemporary international law, owing to which, and contrary to the attributes of other international courts, all the organs of the OAS listed in Chapter X of the Charter and the Member States of the OAS are authorized to request advisory opinions, even if they are not parties to the Convention. Another characteristic of the breadth of this function relates to the purpose of the consultation, which is not limited to the American Convention, but includes other treaties concerning the protection of human rights in the States of the Americas. Moreover, all OAS Member States may request opinions regarding the compatibility of their domestic laws with the aforesaid international instruments."<sup>128</sup>

152. Meanwhile, in the advisory opinion that motivated this concurring opinion, the Court stated that it:

"... also finds it necessary to recall that, under international law, when a State is a party to an international treaty, such as the American Convention, this treaty is binding for all its organs, including the Judiciary and the Legislature, so that a violation by any of these organs gives rise to the international responsibility of the State. Accordingly, the Court considers that the different organs of the State must carry out the corresponding control of conformity with the Convention; based also on the considerations of the Court in exercise of its non-contentious or advisory jurisdiction, which undeniably shares with its contentious jurisdiction the goal of the inter-American human rights system, which is 'the protection of the fundamental rights of the human being.' Furthermore, the interpretation given to a provision of the Convention through an advisory opinion provides all the organs of the OAS Member States, including those that are not parties to the Convention but that have undertaken to respect human rights under the Charter of the OAS (Article 3(l)) and the Inter-American Democratic Charter (Articles 3, 7, 8 and 9) with a source that, by its very nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights. In particular, it can provide guidance when deciding matters relating to the respect and guarantee of human rights in the context of the protection of LGBTI persons, to avoid possible human rights violations."<sup>129</sup>

## iii. Comments

153. In this way, the Court clarified the scope of the control of conventionality in a situation it had not anticipated previously; that is, in the exercise of its advisory and non-contentious jurisdiction.

154. Above all, it clarified that the preventive effect differs from the effect of the control of conventionality executed by the State, because the control exercised by the Court through an advisory opinion enjoys a degree of certainty that the former lacks. Evidently, this certainty is not total or definitive, because the jurisprudence may change, Nevertheless, as indicated, it is supported by the Court's authority expressed in the wisdom, impartiality and justice that should emanate from its rulings. From this perspective, the judicial function consists in convincing rather than imposing.

### a. Control of conventionality and the contentious jurisdiction

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<sup>128</sup> Para. 23, OC-21.

<sup>129</sup> Paras. 26 and 27 of the OC.

### i. Applicable provisions

155. In relation to the control of conventionality exercised in the sphere of the Court's contentious jurisdiction,<sup>130</sup> the applicable provisions refer to the content of the judgment it delivers;<sup>131</sup> they confirm its status as *res judicata*,<sup>132</sup> declare its binding nature for the State party to the respective case<sup>133</sup> and establish what will happen if the ruling is not complied with.<sup>134</sup>

### ii. Contentious jurisdiction

156. In this regard, the control of conventionality occurs in cases in which, when there is a discrepancy between the provisions of the Convention and those of the Constitution or another domestic law or practice of the State in question, the respective state organ has given preference to the latter over the former in the domestic sphere.

157. If this happens, the control is exercised based on the reinforcing and complementary nature that the inter-American jurisdiction has in relation to the domestic jurisdiction,<sup>135</sup> which is revealed by compliance with the prior exhaustion of domestic remedies<sup>136</sup> or, in other words, when the respective State has had the opportunity to exercise its own control of conventionality.

### iii. Jurisprudence

158. Evidently, it is based on the said provisions that the Court, in an order on compliance with judgment, indicated that:

"When an international judgment exists that is *res judicata* with regard to a State that has been a party to a case submitted to the jurisdiction of the Inter-American Court, all its organs, including its judges and organs involved in the administration of justice, are also subject to the treaty and to the judgment of this Court, which obliges them to ensure that the effects of the provisions of the Convention and, consequently, the decisions of the Inter-American Court, are not diminished by the application of norms that are contrary to its object and purpose, or that judicial or administrative decisions do not make full or partial compliance with the international obligations illusory. In other words, in this case there is an international *res judicata* based on which the State is obliged to comply with and execute the judgment. The State of Uruguay finds itself in this

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<sup>130</sup> *Supra* footnote 8.

<sup>131</sup> *Supra* footnote 23.

<sup>132</sup> Art. 67: "The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment."

<sup>133</sup> *Supra* footnote 22.

<sup>134</sup> Art. 65: "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations".

<sup>135</sup> Second paragraph of the Preamble: "Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."

<sup>136</sup> Art. 46.1.a): "Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."

situation in relation to the judgment handed down in the Gelman case. Therefore, precisely because the control of conventionality is an institution that serves as an instrument to enforce international law, in this case in which *res judicata* exists, it is simply a question of using this to comply fully and in good faith with the rulings made in the judgment delivered by the Court in the specific case, so that, based on the foregoing, it would be incongruent to use this tool as a justification to fail to comply with the judgment.<sup>137</sup>

#### iv. Comments

159. In this regard, it should be stressed that, in cases in which it has considered that some law or action of the State concerned violates the provisions of the Convention, the Court has not indicated that, in the domestic sphere, the Convention has pre-eminence over the provisions of inter-American legal systems; rather, it has ordered the State to “nullify” the respective action that violates the Convention,<sup>138</sup> or to ensure that the domestic norm “does not continue to represent an obstacle to the continuation of the investigations,”<sup>139</sup> or that it “should amend its domestic laws,”<sup>140</sup> or ensure that the norm contrary to the Convention “never again represents an obstacle to the investigation of the facts that are the subject of this case or to the identification and punishment, as appropriate, of those responsible.”<sup>141</sup>

160. However, all this is with a view to the respective State ceasing to commit an internationally wrongful act, thus ending its international responsibility. Consequently, it leaves to the reserved domain or sphere of the internal, domestic or exclusive jurisdiction of the State, the manner or form of complying with the obligation “of result” determined in the respective judgment. This means that the domestic law or action of the corresponding state organ must not impede full compliance with the rulings of the Court and, consequently, the provisions of the Convention, which the State Party to the Convention has freely and solemnly undertaken to respect.

161. Therefore, and based on the provisions of the aforementioned norms and jurisprudence, the Court exercises the control of conventionality under Article 62(3) of the Convention, applying and interpreting the Convention as a treaty;<sup>142</sup> in other words, as an agreement between States under which they contract obligations that can be enforced among them.<sup>143</sup> These include allowing “any

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<sup>137</sup> *Case of Gelman v. Uruguay. Monitoring compliance with judgment.* Order of the Inter-American Court of Human Rights of March 20, 2013, para. 68.

<sup>138</sup> For example: *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of August 29, 2014. Series C No. 282.

<sup>139</sup> For example: *Case of the Members of the Village of Chichupac and Neighboring Communities of the Municipality of Rabinal v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of 30 November 30, 2016. Series C No. 328.

<sup>140</sup> For example: *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica. Preliminary objections, merits, reparations and costs* Judgment of November 28, 2012. Series C No. 257.

<sup>141</sup> For example: *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221.

<sup>142</sup> Art.2.1(a) of the Vienna Convention on the Law of Treaties: “Use of terms. 1. For the purposes of the present Convention: (a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

<sup>143</sup> Art. 1 of the Vienna Convention on the Law of Treaties: “Scope of the present Convention. The present Convention applies to treaties between States.”

person or group of persons or any non-governmental entity"<sup>144</sup> to initiate proceedings that may, ultimately, lead to the intervention of the international organs established in the Convention<sup>145</sup> and, in the case of the Court, because this is requested by any State or the Commission.<sup>146</sup>

162. In addition, and as clearly revealed by the provisions of both the Vienna Convention on the Law of Treaties and the American Convention, the purpose is not to grant the Convention a specific hierarchy under either the domestic or the international legal system, but simply to establish that the international commitments made by the State that is a party to this instrument should be interpreted and applied in the international sphere, that is within the framework of the relations between the States Parties, and are enforceable in that sphere, as well as by persons or groups of persons or non-governmental entities, and that if domestic laws do not guarantee the rights recognized by the Convention, the States Parties should adopt the appropriate measures to ensure this.

163. Therefore, the pre-eminence, in the international sphere, of international law and of the Convention over any provision of domestic law is evident and unquestionable precisely because the Convention is an international instrument; that is, an instrument agreed between States and binding in their reciprocal relations in matters that concern the relations between the State and the persons subject to its jurisdiction and that, consequently, are no longer part of the State's internal, domestic or exclusive jurisdiction or its margin of appreciation.

164. Accordingly, as established above, the control of conventionality by the Court is appropriate if the Commission finds that a decision of the State has violated the Convention, either because the State has not exercised the control of conventionality, or because, having done so, it has given its Constitution or domestic laws prevalence over the provisions of the Convention. In that case, and pursuant to Article 63(1) of the Convention, the Court shall indicate this in the judgment, ruling that the State must ensure the enjoyment of the right that was violated and remedy the consequences. Thus, the Convention reflects the provisions of the customary norms on State responsibility for internationally wrongful acts.<sup>147</sup> It should be recalled that the Court's judgments

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<sup>144</sup> Art. 44 of the Convention: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

<sup>145</sup> Art. 33 of the Convention: "The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: a. the Inter-American Commission on Human Rights, referred to as "The Commission;" and b. the Inter-American Court of Human Rights, referred to as "The Court."

<sup>146</sup> Art. 61(1) of the Convention: "Only the States Parties and the Commission shall have the right to submit a case to the Court."

<sup>147</sup> Art. 29: "Continued duty of performance. The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached"

Art. 30. Cessation and non-repetition. The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, circumstances so require."

Art. 31. Reparation. 1. The responsible State is under an obligation to make full reparation for the injury caused by the inter-nationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Art. 34. Forms of reparation. Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter

Art. 35. Restitution. A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit derived from restitution instead of compensation

usually include, in addition to restoration of the right that has been violated and the obligation of non-repetition, most of the forms of reparation established in the relevant customary norms; in other words, restitution, compensation and satisfaction. In sum, when complying with the provisions of the Convention, the Court is, ultimately, giving effect to the international responsibility of the State that is a party to the respective case.

165. In addition, and pursuant to Article 68 of the Convention,<sup>148</sup> the judgment delivered in the exercise of the control of conventionality by the Court in a contentious case submitted to it, is binding for the State Party to the respective case and for that particular case. Conversely, it is not binding for other cases concerning the same State or for the other States Parties to the Convention that have accepted the Court's jurisdiction but were not parties to the case in question. No international norm establishes that the Court's judgment has binding effects that go beyond the State that is a party to the respective case, or beyond that case. Thus, the Court follows the same tendencies as other international courts.<sup>149</sup> Consequently, its case law is not binding for States that are not parties to the case in question, unless a State, unilaterally, establishes this in its domestic law,<sup>150</sup> which could only be binding for that State.

166. Also, and pursuant to Article 68(1) of the Convention, it is the State that is a party to the case in which a judgment is delivered that must comply with this judgment; therefore, the judgment cannot be executed in its territory without its consent or participation. The Court was not designed to be, nor is it, a supranational organ; that is, with the authority to issue decisions directly applicable or enforceable in its States Parties without the intervention of the State affected by such decisions. Thus, it always requires the participation of that State, and this is so because there is no norm that accords the Court this authority. Rather, to the contrary, in this regard the Convention follows the general rule applicable to international courts.<sup>151</sup>

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Art. 36. Compensation. 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Art. 37. Satisfaction. 1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Art. 38. Interest. 1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result. 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled."

<sup>148</sup> *Supra* footnote 22.

<sup>149</sup> Art. 59 of the Statute of the International Court of Justice: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

Art. 46(1) of the European Convention on Human Rights: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."

Arts. 46. and 3 of the Statute of the African Court of Justice and Human Rights: "Binding Force and Execution of Judgments. 1. The decision of the Court shall be binding on the parties. [...] 3. The parties shall comply with the judgment made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution.

<sup>150</sup> This could be the case of Costa Rica, where the Constitutional Chamber of the Supreme Court of Justice asserted in its Judgment 0421-S-90 that the jurisprudence of the Inter-American Court "shall – in principle – have the same status as the interpreted provision."

<sup>151</sup> Art. 46(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms or the European Human Rights Convention (amended by Protocol No. 14, which entered into force on June 1, 2010): "Binding force and execution of judgments. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."



167. Lastly, it should be emphasized that, when the Court advises the General Assembly of the Organization of American States that the respective State Party has not complied with the judgment in a case to which it is a party, this ceases to be a jurisdictional matter, and becomes a political issue, in which the States of the inter-American human rights system must take the diplomatic measures they deem appropriate.<sup>152</sup>

168. It should be pointed out, however, that even in this eventuality, and given that the Court, pursuant to its rules of procedure, monitors compliance with the respective judgment,<sup>153</sup> compliance with the judgment could return to or continue in the domestic sphere.

169. Based on the above, it can be considered that the control of conventionality executed by the Court in the exercise of its contentious jurisdiction is similar to the control of constitutionality that exists under domestic legal systems, inasmuch as it is supported by the binding nature of the Convention, in the international sphere, for the States Parties that have accepted its jurisdiction. In other words, it does not have the preventive nature that characterizes the prior control of conventionality exercised by a state organ or the control executed by the Court in the sphere of its advisory and non-contentious jurisdiction, because the Court's decisions, under Articles 67 and 68 of the Convention, in other words, pursuant to its contentious jurisdiction, are final and non-appealable, and also compulsory for the State party to the case. Thus, in the international sphere, the control of conventionality executed by the Court is binding.

170. In short, compliance with the judgments of the Court and the system of international responsibility for non-compliance have been incorporated into the contemporary international legal system, under which the judgments lack direct binding force within the States Parties to the Convention that have accepted the Court's jurisdiction and, therefore, the Court does not have jurisdiction to execute or enforce compliance with its decisions. Accordingly, as indicated above, failure to comply with its decisions may ultimately become a political or diplomatic matter and leave the judicial sphere.

171. Without doubt, the control of conventionality exercised under the Court's contentious jurisdiction is useful, as the Court itself has indicated, "to apply international law, in this case international human rights law, and specifically, the American Convention and its sources, including the jurisprudence of this Court."<sup>154</sup> However, it is also true that it still does not play this role fully; of the 203 judgments on merits handed down by the Court, 25 have been archived because they have been executed fully, but 168 are at the stage of monitoring compliance with judgement within

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<sup>152</sup> Art. 46(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms or the European Human Rights Convention (amended by Protocol No. 14, which entered into force on June 1, 2010): "The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

<sup>153</sup> Art. 69 of the Court's Rules of Procedure: "Procedure for Monitoring Compliance with Judgments and Other Decisions of the Court. 1. The procedure for monitoring compliance with the judgments and other decisions of the Court shall be carried out through the submission of reports by the State and observations to those reports by the victims or their legal representatives. The Commission shall present observations to the State's reports and to the observations of the victims or their representatives. 2. The Court may require from other sources of information relevant data regarding the case in order to evaluate compliance therewith. To that end, the Tribunal may also request the expert opinions or reports that it considers appropriate. 3. When it deems it appropriate, the Tribunal may convene the State and the victims' representatives to a hearing in order to monitor compliance with its decisions; the Court shall hear the opinion of the Commission at that hearing. 4. Once the Tribunal has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the relevant orders. 5. These rules also apply to cases that have not been submitted by the Commission.

<sup>154</sup> *Supra* footnote 98.

the system because they have not been fully complied with, and the OAS General Assembly has been advised about another 15 in application of Article 65 of the Convention.<sup>155</sup>

## CONCLUSION

172. Two different issues have been discussed above. One, the “recognition of the change of name in accordance with [or based on] gender identity” and “the patrimonial rights derived from a relationship between persons of the same sex,” and the other on the control of conventionality. However, among other aspects the two issues have one element in common; that is, they raise the issue of the Court’s role, its possibilities and its limitations with regard to the development of international human rights law and, consequently, of general international law also.

173. Indeed, the question arises in both cases of how far the Court’s jurisprudence can go in matters that are not expressly established in the Convention, and even in matters regarding which a margin of doubt exists about whether it does so implicitly.

174. Regarding the first issue, in this opinion, the undersigned has concluded that if the recognition of unions of same-sex couples and even marriage between them is sought, either the States of the Americas must recognize this, unilaterally, as some – the minority – already have, or that a treaty establishing this be adopted.

175. With regard to the control of conventionality, it could be said that if the intention was to establish the supranational nature of the Convention in the domestic sphere, so that the its provisions had a direct binding force within the States Parties to the Convention, even without the participation of its organs and with prevalence or primacy over their respective Constitutions – thus providing a definitive response to the issue of the relationship between the domestic law of the States and international human rights law – rather than a jurisprudential act of the Court, this would require the pertinent explicit and unequivocal decision by those with the authority to create an autonomous source of international law, such as a treaty, custom, general principles of law, or a unilateral legal act.

176. And the legitimacy and effectiveness of changes such as this would require a source that is not supplementary such as jurisprudence, which according to Article 38 of the Statute of the International Court of Justice is only a “subsidiary means for the determination of rules of law,” but rather one that serves, or is sufficient in itself, pursuant to the same article “to decide in accordance with international law” the pertinent disputes; that is, as indicated, an autonomous source of international law.

177. This requirement is even clearer in the case of States that are obliged to exercise democracy effectively, as are the States of the Americas under the Inter-American Democratic Charter, which interprets the provisions of the OAS Charter and of the Convention.<sup>156</sup> Therefore, it

<sup>155</sup> Annual Report, Inter-American Court of Human Rights, 2016.

<sup>156</sup> “BEARING IN MIND that the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights contain the values and principles of liberty, equality, and social justice that are intrinsic to democracy; REAFFIRMING that the promotion and protection of human rights is a basic prerequisite for the existence of a democratic society, and recognizing the importance of the continuous development and strengthening of the inter-American human rights system for the consolidation of democracy” and “BEARING IN MIND the progressive development of international law and the advisability of clarifying the provisions set forth in the OAS Charter and related basic instruments on the preservation and defense of democratic institutions, according to established practice,” Paras. 8, 9 and 20, respectively of the Preamble of the Inter-American Democratic Charter (adopted at the first plenary session of the OAS General Assembly, held on September 11, 2001)

would not be the most appropriate way forward that the jurisdictional function<sup>157</sup> replace the normative function expressly assigned by the Convention to the States Parties<sup>158</sup> in matters concerning such profound changes as those mentioned.

Eduardo Vio Grossi  
Judge

Pablo Saavedra Alessandri  
Secretary

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<sup>157</sup> *Supra* footnote 8.

<sup>158</sup> *Supra* footnotes 16 and 17.

**CONCURRING OPINION OF  
JUDGE HUMBERTO ANTONIO SIERRA PORTO**

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**ADVISORY OPINION OC-24/17  
OF NOVEMBER 24, 2017  
REQUESTED BY THE REPUBLIC OF COSTA RICA**

**GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION WITH  
REGARD TO SAME-SEX COUPLES**

**STATE OBLIGATIONS IN RELATION TO CHANGE OF NAME, GENDER IDENTITY, AND  
RIGHTS DERIVED FROM A RELATIONSHIP BETWEEN SAME-SEX COUPLES  
(INTERPRETATION AND SCOPE OF ARTICLES 1(1), 3, 7, 11(2), 13, 17, 18 AND 24, IN  
RELATION TO ARTICLE 1, OF THE AMERICAN CONVENTION ON HUMAN RIGHTS)**

1. With my usual respect for the decisions of the Court, I submit the following concurring opinion attached to Advisory Opinion – 24/17 (hereinafter “OC-24”) with the intention of presenting in detail the reasons why I voted in favor of operative paragraphs 3 and 5 of the decision. The analysis will be made as follows: A. Introduction; B. The requirement of law (“*reserva de ley*”) in the American Convention; C. The requirement of law and the functions of law in relation to human rights, and D. the Costa Rican case.

**A. INTRODUCTION**

2. The purpose of this opinion is to elaborate on one aspect of a specific point that, although it was touched on by the Court in the text of OC-24, was not developed fully and extensively: this is the bases on which the powers of the Executive branch are founded to regulate human rights by regulations in certain cases. Thus, the main hypothesis of this opinion is to demonstrate that the principle of legality and the guarantee of the requirement of law cannot be used to prevent the full exercise of human rights, because this principle and the consequent guarantee also have limits.

3. In this regard, paragraph 161 of the opinion establishes that: “it can [...] be indicated that the procedure for a change of name, amendment of the photograph and rectification of the reference to sex or gender in the records and on the identity documents so that these conform to the self-perceived gender identity does not necessarily have to be regulated by law, because it should consist of a simple procedure to verify the applicant’s intention.”<sup>1</sup>

4. Meanwhile, paragraph 171 of OC-24 determines, with regard to the Costa Rican procedure for changing identity data so that it conforms to the self-perceived gender identity of the applicant, that “[t]he State of Costa Rica, to ensure a more effective

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<sup>1</sup> OC-24, para. 161.

protection of human rights, may issue regulations that incorporate these standards into an administrative procedure that it may provide in parallel.”<sup>2</sup>

5. Consequently, the intention of this opinion is to present in detail the reasons why I voted in favor of operative paragraphs 3 and 5 of OC-24 and, in more general terms, to examine the international principle on which the Inter-American Court determined the need for States to introduce – by regulation and in specific circumstances –ways other than the voluntary jurisdiction proceeding in the case of requests to change data in official records and documents based on the self-perceived gender identity. It describes what, in my opinion, is the *ratio decidendi* for the Court's decision that the Executive branch, or the Administration, as applicable, may issue, in certain circumstances such as those of this case, regulations that ensure the effective observance of human rights.

## **B. THE “REQUIREMENT OF LAW” IN THE AMERICAN CONVENTION**

6. I consider that this Advisory Opinion of the Court did not rule clearly and systematically on the circumstances in which a “law” in a formal and substantive sense<sup>3</sup> is required for States to comply with their international obligations. The Opinion adopted by the Court refers to the possibility that the procedure to amend the photograph and rectify the reference to sex or gender in the respective public records does not necessarily need to be regulated by a law, but rather this can be done by a regulation or a decree issued by the Executive branch.

7. During the public hearing held on May 16 and 17, 2017, the delegation from the Office of the Costa Rican Ombudsperson referred to the problem underlying the position of some public institutions that insist on the need to apply the “requirement of law” to allow the exercise of a right such as the right to gender identity. In this regard, this Office indicated that, “in the jurisprudence [...] and, in reality, in the discourse, above all, in the Legislative Assembly, there is a tendency to reverse the idea of the principle of the “requirement of law”; in other words, increasingly we see in statements of both the Constitutional Chamber and legislators that a law must be enacted to allow an action, although not necessarily to limit it [...]. In the opinion of the Office of the Ombudsperson, under the Civil Registry's current normative framework, an amendment would not be necessary, but rather simply an interpretation by this Court that permits applying a control of conventionality directly to interpret that there is no restriction to the right to identity that limits the possibility of a name change using administrative channels.”<sup>4</sup>

8. Regarding the “requirement of law,” it should be recalled that, historically, this mechanism was created to distribute the legislative competence between Congress (Parliament) and the Executive (King) at a time when the basis for the State's legitimacy was the result of the concurrence between the democratic principle and the monarchic principle. Nevertheless, today, the normative status of the Constitution is derived from the democratic principle (whether it be called the sovereignty of the

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<sup>2</sup> OC-24, para. 171.

<sup>3</sup> See, in this regard, The Word “Laws” in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, paras. 26, 27 and 32.

<sup>4</sup> Cf. Public hearing of May 16, 2017, intervention of the Office of the Costa Rican Ombudsperson.

people or national sovereignty), and the basis for the validity and effectiveness of laws in the domestic sphere lies with the will of the people.

9. According to this logic of democratic legitimacy, the main grounds for the fundamental rights and freedoms recognized in the American Convention include the democratic principle and the values inherent in the rule of law. Thus, the Inter-American Court has indicated that “[t]he concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning.”<sup>5</sup>

10. Nevertheless, I consider it appropriate to recall that the Court has indicated that the mere existence of a democratic regime does not guarantee, *per se*, permanent respect for human rights.<sup>6</sup> In this regard, the Court has asserted that “[t]he democratic legitimacy of specific acts or deeds in a society is limited by the international norms and obligations that protect the human rights recognized in treaties such as the American Convention, so that the existence of a truly democratic regime is determined by both its formal and substantial characteristics.”<sup>7</sup> It is a historical reality that rights, and particularly those of minorities or sectors subject to deeply-rooted discriminatory stereotypes, may be subject to abuse by the parliamentary majorities.

11. The Court also ruled on the “requirement of law” in matters related to fundamental rights in the order on monitoring compliance in the *case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. In the order, the Inter-American Court indicated that the need to regulate the technique of *in vitro* fertilization “should not represent an impediment to the exercise of the human rights to privacy and family life,”<sup>8</sup> because such rights should “have direct legal effects.”<sup>9</sup> On these grounds, added to the fact that the Court did not indicate what specific type of norm should be issued to comply with its judgment,<sup>10</sup> the Court considered that the technique of *in vitro* fertilization “could be carried out and monitored under the laws, technical regulations, medical protocols and health standards or any other applicable type of norm.”<sup>11</sup> This was established to prevent the rights protected by the Court’s judgment becoming

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<sup>5</sup> *Habeas corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)*. Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 26.

<sup>6</sup> *Cf. Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 239.

<sup>7</sup> *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 239.

<sup>8</sup> *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36.

<sup>9</sup> *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36.

<sup>10</sup> *Cf. Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 35.

<sup>11</sup> *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36.

illusory.<sup>12</sup> The foregoing was understood to be “without prejudice to the Legislature issuing a subsequent regulation in keeping with the standards indicated in the judgment.”<sup>13</sup>

12. That said, it is undeniable that the Court has been consistent in indicating the “requirement of law” for certain actions of the public authorities, specifically those aimed at limiting basic rights. From its early jurisprudence, this Court has indicated that “[i]n the spirit of the Convention, this principle [of legality] must be understood as one in which general legal norms must be created by the relevant organs pursuant to the procedures established in the Constitutions of each State Party, and one to which all public authorities must strictly adhere. In a democratic society, the principle of legality is inseparably linked to that of legitimacy by virtue of the international system that is the basis of the Convention as it relates to the ‘effective exercise of representative democracy,’ which results in [...] the respect for minority participation and the furtherance of the general welfare, *inter alia*”<sup>14</sup> [underlining added].

13. Bearing this in mind, I consider that Article 2 of the Convention<sup>15</sup> is especially relevant to determine whether it is necessary to issue laws in the formal sense so as to respect and ensure the rights recognized in the Convention. Regarding the general obligation to adapt domestic laws to the Convention, on several occasions the Court has asserted that “[u]nder the law of nations, a customary law prescribes that a State that has concluded an international agreement must introduce into its domestic laws whatever changes are needed to ensure execution of the obligations it has undertaken.”<sup>16</sup> In the American Convention this principle is contained in Article 2, which establishes the general obligation of each State Party to adapt its domestic law to the provisions of the Convention in order to ensure the rights recognized therein, which means that the domestic legal measures must be effective (principle of the *effet utile*).<sup>17</sup>

14. In this regard, I consider that the scope of Article 2 cannot be understood as if this provision meant that the fundamental rights and freedoms always require a law or “legislative interpretation.” In my opinion, it would be a reasoning *ad absurdum* to understand that no fundamental or human right could be applied, respected or made effective if there was no legislation. Thus, human rights treaties are typically considered to be self-executing treaties. For example, it would be irrational to consider

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<sup>12</sup> Cf. *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36.

<sup>13</sup> *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36.

<sup>14</sup> The Word “Laws” in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 32.

<sup>15</sup> Article 2. Domestic Legal Effects: Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

<sup>16</sup> *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 68; and *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of August 12, 2008. Series C No. 186, para. 179.

<sup>17</sup> Cf. *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 288.

that, without laws allowing conscientious objection in educational matters, the right to freedom of thought could not be effective.

15. Consequently, the “requirement of law” is not a mechanism that seeks to weaken the effectiveness of international human rights treaties and cannot be used as a mechanism to suspend their effectiveness. To the contrary, the American Convention calls for an integral reading and States must ensure its practical effects on this basis.

16. In this regard, it is pertinent to recall that, since the landmark judgment in the case of *Velásquez Rodríguez v. Honduras*, the Court has considered that the obligation to ensure rights entails “the duty of the States Parties to organize the government apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”<sup>18</sup>

17. That said, the doctrine of the control of conventionality developed by the Court means that not only the enactment or elimination of provisions under domestic law ensures the rights contained in the American Convention in keeping with the obligation included in Article 2 of this instrument. It also requires the development of state practices leading to the effective observance of the rights and freedoms that the Convention embodies. Consequently, the existence of a norm does not guarantee, *per se*, that its application is satisfactory. It is also necessary that the application of the laws or their interpretation, as judicial practice and a manifestation of state public order, is adapted to the purpose sought by Article 2 of the Convention.<sup>19</sup>

18. This means that the Convention – and the rights recognized therein – have direct legal effects, which supposes or signifies that all judicial agents have a direct application mandate and, in general, this does not require *interpositio legislatoris*, legislative interpretation.

19. Consequently, in my opinion, it is necessary to weigh the requirements of legality against the categorical imperative of the validity and effectiveness of human rights and against the direct effects of the international treaties that recognize and protect them. The only restrictions or limitations that are permitted, as noted above, are those that require the intervention of the people’s representatives through the State legislature. However, this does not mean that laws, in the formal or substantive sense, are always required to make human rights effective or to ensure their respect and guarantee. Indeed, it would be erroneous to consider that the regulation of a right is the same as its restriction or limitation. As indicated, the guarantee of the “requirement of law” seeks to create a system of checks and balances that calls for greater democratic legitimacy when restricting the exercise of a right, but it is not viable to require this same standard when the purpose is to guarantee a specific right, especially when the intention is to protect those who face numerous inequalities.

### **C. THE “REQUIREMENT OF LAW” AND THE FUNCTION OF LAW IN RELATION TO HUMAN RIGHTS**

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<sup>18</sup> *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 166.

<sup>19</sup> *Cf. Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009. Series C No. 209, para. 338.



20. Based on the considerations in the preceding section, even though the importance of the guarantee of the “requirement of law” has been emphasized as a safeguard and a limitation to the restriction by the State of the rights contained in the Convention, it was also noted that this same “requirement of law” cannot be used as a mechanism to obstruct real compliance with the fundamental rights or to suspend the full force of human rights. Neither the “requirement of law,” nor the principle of legality, nor the will of parliamentary majorities can be used to nullify human rights; such mechanisms cannot diminish the effectiveness of the rights, and they cannot be used as grounds to oppress certain sectors of society.

21. A recurring argument used to consider that the “requirement of law” is a mechanism that always requires *interpositio legislatoris* for the application and enjoyment of human rights, consists in understanding that the “requirement of law” is a mechanism to establish the content of the essential core of fundamental or human rights (as appropriate in the domestic or the international sphere). That is, we can only determine the intangible content of human rights if the legislator defines this in a law. This argument seeks to make the law a requirement *sine qua non* for the effective enjoyment of the right. This way of understanding the validity of treaty-based rights and, possibly, fundamental constitutional rights (when these coincide, I insist) is based on understanding that in order to regulate a right a “formal” law must be produced; that is, a law enacted by the Legislature. This argument is erroneous, among other reasons, because the very concept of the core or essential content means that the law cannot nullify or modify it.<sup>20</sup>

22. The starting point for the need to use the “requirement of law” is that, although *prima facie* it is necessary – in certain circumstances, *interpositio legislatoris* is a treaty-based requirement – it may be desirable but not essential for the effective enjoyment of the human rights recognized in the Convention.

23. The distinction between the two scenarios in which the principle of the “requirement of law” would or would not be applicable can be evaluated and analyzed by approaching the problem of the “requirement of law” in the case of fundamental rights from the perspective of the role played by the law in relation to those rights.

24. Thus, in general, it could be understood that, essentially, the law has three functions in relation to the fundamental human rights: (i) it systematizes them within the legal system by weighing and harmonizing them; (ii) it establishes or defines human rights, and (iii) it updates the content of human rights.

25. Regarding the first function, that of systematizing human rights within the legal system by weighing and harmonizing them, it should be recalled that human rights permeate the whole legal system. Accordingly, all laws are directly or indirectly related to them, either by establishing limits, conditions or assumptions for their exercise, or by defining precedence *prima facie* when there is a conflict between human rights or between these rights and other internationally protected rights.

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<sup>20</sup> The problem of when it should be understood that the “requirement of law” is necessary, and also the limits and purpose of this mechanism have been the subject of debates in Colombian constitutional jurisprudence owing to the sphere of competence of the statutory law to regulate fundamental rights (art. 152(a)). The main criterion traditionally employed by the Colombian Constitutional Court consists in using the concept of “essential content” as a criterion to determine the need to enact laws. Some aspects of this discussion can be seen in my separate opinion to the Judgment of the Constitutional Court of Colombia C-662 of 2009 on the President’s objections to the draft Sandra Ceballos Act establishing actions for the comprehensive treatment of cancer in Colombia.

26. However, when the right and its essential content is clearly described in the American Convention on Human Rights, or eventually in domestic law (for example, in the Constitution), the existence of laws to weigh or harmonize them is not essential (although always desirable). In this situation, in specific cases, the legal protection provided by domestic law may be sufficient. For example, the foregoing could be implemented by the effective protection of these rights by either ordinary mechanisms or special mechanisms such as the *amparo* proceeding or the remedy for protection of constitutional rights. Consequently, the laws that weigh rights may not be necessary, despite their importance and validity. The need to weigh and harmonize rights that could conflict does not negate the validity of rights that are worded clearly. The requirement of weighing rights is a concept that is not opposed to the effective validity of the treaty-based rights.

27. Based on the above and bearing in mind the *pro persona* principle, it can be understood that laws to weigh rights do not constitute a requirement *sine qua non* for the validity or the protection of various human rights, such as the right to life and to dignity. Indeed, the *pro persona* principle contained in Article 29 of the American Convention stipulates that no provision of this Convention shall be interpreted as: "(a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party [...]"<sup>21</sup> A correct interpretation, *favor libertatis*, does not understand that the "requirement of law" is a prerequisite for the effective exercise or enjoyment of the right to life or, in this case, to a name and to recognition of juridical personality.

28. With regard to the second function, which relates to establishing or defining human rights, it is understood that, as a general rule, legal definitions of fundamental rights contained in the Convention and in the Constitutions of the States are extremely abstract and general, so that it is for the interpreters – in particular, the legislators – to establish the scope of these rights as well as their sphere of application, and to indicate their boundaries and their internal limits. Therefore, under this function, according to which implementing legislation is required when the right is "merely expressed," the sphere of the "requirement of law" becomes pertinent when the wording of the right is vague or ambiguous so that it does not permit, with acceptable levels of objectivity, the application and/or respect for the right in specific cases. Consequently, if clarification of the content of human rights is sought, the enactment of a formal law is necessary and the "requirement of law" arises.

29. In this regard, it should be clarified that not all provisions that define the sphere of conduct protected by a human right should be covered by a formal and substantive law, because this would suppose an impossible burden for the legislator who would be required to define, in abstract, all the possible manifestations of the fundamental right regulated. Furthermore, it would entail the risk that those conducts that were part of the sphere of protection of the right and had not been explicitly included would not be protected by the domestic mechanisms for the defense of human rights.

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<sup>21</sup> American Convention on Human Rights, Article 29.

30. The third role that the law plays is that of updating the content of human rights. Indeed, the legal system should evolve in parallel to society and cannot ignore the changes in society, at the risk of becoming ineffective. Thus, in the case of human rights, the law must maintain in effect the scope of the rights and freedoms recognized by the Convention and by domestic law. Thus, the law must regulate new ways of exercising human rights, closely linked to technological progress and developments. Like the function of establishing rights, the laws that update rights, indicate meanings, scopes and contents that the law did not foresee or that simply did not exist when the right was established. One example of this would be the scope of freedom of expression and *habeas data*, which could not be imagined 50 or 100 years ago. However, it cannot be supposed that updating the scope of the provisions occurs exclusively through the enactment of new laws, because the Legislature usually does not have the capacity to respond promptly to the new needs; thus, in many cases, this evolution is implemented by the organs with competence to interpret human rights treaties or the Constitutions of the States.

31. In conclusion, the direct judicial effectiveness, the normative effects of the rights established in the American Convention, is compatible with the existence of the “requirement of law” when this is necessary or appropriate in accordance with the functions of the definition, harmonization or updating of rights. However, in the absence of a law, the exercise of the treaty-based rights and the obligation to ensure their effective enjoyment allows judges to take a decision that protects those whose rights have been violated. Furthermore, in situations in which the requirements of defining, weighing or harmonizing rights are not essential for determining the obligations derived from the treaty-based right, in addition to judicial protection, the right may be protected by regulation – or rather there is obligation to protect it in this way.

#### A. THE CASE OF COSTA RICA

32. Regarding the specific situation referred to in the questions raised by Costa Rica in the request for an advisory opinion concerning the regulation of the procedure to amend the data in the official records and document to conform to the self-perceived gender identity, it can be seen that the rights to a name and to recognition of juridical personality are established in the American Convention.<sup>22</sup> Furthermore, the recent case law of the Inter-American Court has clearly established that the right to identity is a right protected by the American Convention even though it is not expressly established among the treaty provisions.<sup>23</sup>

<sup>22</sup> American Convention on Human Rights, Article 3. Right to Recognition of Juridical Personality. Every person has the right to recognition as a person before the law. Article 18. Right to a Name. Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

<sup>23</sup> Cf. *Case of Gelman v. Uruguay*. Merits and reparations. Judgment of February 24, 2011. Series C No. 221, para. 122; *Case of Fornerón and daughter v. Argentina*. Merits, reparations and costs. Judgment of April 27, 2012. Series C No. 242, para. 123, and *Case of Rochac Hernández et al. v. El Salvador*. Merits, reparations and costs. Judgment of October 14, 2014. Series C No. 285, para. 116. Also, OC-24, para. 90: “[...] regarding the right to identity, the Court has indicated that, in general, it may be conceived as the series of attributes and characteristics that individualize a person in society and that encompass several rights according to the subject of rights in question and the circumstances of the case. The right to identity may be affected by numerous situations or contexts that may occur from childhood to adulthood. Although the American Convention does not specifically refer to the right to identity under this name, it does include other rights that are its components. Thus, the Court recalls that the American Convention protects such elements as rights in themselves; however, not all these elements will necessarily be involved in all cases

33. Consequently, regarding the hypotheses for the name change procedure based on gender identity, there can be no doubt about the right in question or how it is expressed. Accordingly, in the situation described in OC-24 regarding the judicial nature of the procedure, its regulation in order to give effect to an individual's gender identity does not constitute a law of "implementation" in the sense that the provision regulating the procedure must comply with the functions of defining or updating a right. Moreover, the situation does not necessarily entail a weighing or harmonizing function, because the procedure for recognition of gender identity does not refer, nor should it refer to a disputed issue, to a learning process, to the settlement of a dispute, or to the determination of rights.

34. To the contrary, as indicated in this Advisory Opinion, it is a procedure that should be merely declarative and "may never become an occasion for external scrutiny and validation of the sexual and gender identity of the person requesting its recognition."<sup>24</sup> Indeed, it has been established that "any decision concerning a request for amendment or rectification based on gender identity should not be able to assign rights, it may only be of a declarative nature because it should merely verify whether the applicant has met the requirements related to the request."<sup>25</sup>

35. Therefore, the position maintained in this opinion and, in my understanding, in the Advisory Opinion, is that the nature of the provision that regulates the procedure for recognition of the self-perceived gender identity corresponds to those provisions that constitute or define human rights that are clearly described in the American Convention (the rights to a name and to recognition of juridical personality – Articles 18 and 3 of the American Convention) or in the case law of the Inter-American Court (right to identity). Thus, taking into account that this type of regulation regarding the path for recognition of the right to a change of name does not necessarily need to be included in a law, although it should be included in a general legal norm (*supra* para. 27), this type of procedure can be regulated by administrative regulations or decrees issued by a State's Executive branch.<sup>26</sup>

## B. CONCLUSION

36. Based on the above, I consider that I have explained in greater detail the reasons why I have agreed with the position of the Inter-American Court in this matter. This is an extremely important issue for the effective enjoyment of human rights, not only in Costa Rica, but also in other countries of the region where a restrictive interpretation of the guarantee of the "requirement of law" has prevented or paralyzed the regulation of such rights. For example, in some States of the region this same argument has been used to obstruct the regulation of two issues on which it is urgent to have clarity regarding their application; these are access to abortion in the three situations in which it is permitted, and the type of procedures required to be able

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that concern the right to identity. Moreover, the right to identity cannot be confused with, or reduced or subordinated to one of the rights that it includes, nor to the sum of them. For example, a name forms part of the right to identity, but it is not the only component. In addition, this Court has indicated that the right to identity is closely related to human dignity, the right to privacy and the principle of personal autonomy (Articles 7 and 11 of the American Convention)."

<sup>24</sup> OC-24, para. 158.

<sup>25</sup> OC-24, para. 160.

<sup>26</sup> Cf. OC-24, paras. 161 and 171.

to apply euthanasia legally. Thus, I hope that this opinion contributes to convincing States to consider that the guarantee of the "requirement of law" cannot be used as an obstacle to the development of rights and, particularly, to compliance with the obligations of international law that they assume on ratifying human rights treaties such as the American Convention.

Humberto A. Sierra Porto  
Judge

Pablo Saavedra Alessandri  
Secretary