



8 de septiembre de 2015

Sr. Secretario
Pablo Saavedra Alessandri
Corte Interamericana de Derechos Humanos
San José, Costa Rica

Estimado Sr. Secretario,

Reciba un cordial saludo de parte de la **Clínica de Derechos Humanos de la Facultad de Derecho de la Universidad de Santa Clara** en California.

De conformidad con los artículos 2.3 y 44 del Reglamento de la Corte IDH, me permito remitirle un escrito en calidad de *amicus curiae* para su consideración en el caso No. 12.841, *Caso Ángel Alberto Duque vs. Colombia*.

El original será remitido al Tribunal dentro del plazo reglamentario de 7 días.

Le agradecemos tomar nota del presente escrito y ponerlo en conocimiento de las partes y de los Jueces.

En solidaridad,

Francisco J. Rivera Juaristi

Director y Abogado Supervisor

FJRivera@scu.edu

<http://law.scu.edu/ihrc/>

Britton Schwartz
Abogada Supervisora

Erica Sutter
Estudiante

Allison Pruitt
Estudiante

Forest Miles
Estudiante

Inter-American Court of Human Rights

**Case of ÁNGEL ALBERTO DUQUE V. COLOMBIA
No. 12841**

Amicus Curiae

Presented by the

International Human Rights Clinic

at

SANTA CLARA UNIVERSITY



500 El Camino Real
Santa Clara, CA 95053-0424
U.S.A.

Tel: +1 (408) 551-1955

Fax: +1 (408) 554-5047

IHRC@scu.edu

<http://law.scu.edu/ihrc/>

Prof. Francisco J. Rivera Juaristi, Director

Britton Schwartz, Supervising attorney

Forest Miles, Student

Allison Pruitt, Student

Erica Sutter, Student

September 9, 2015

With the support of the following organizations and persons:

Centro de Derechos Humanos de la Pontificia Universidad Católica del Ecuador
Centro de Documentación en Derechos Humanos “Segundo Montes Mozo S.J.” (CSMM), Ecuador
Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX) de Perú
Clínica de Asistencia Legal de la Escuela de Derecho, Sección de Discrimen por Orientación Sexual e Identidad de Género, Universidad de Puerto Rico
Columbia Law School Sexuality and Gender Law Clinic, Estados Unidos
Comité Permanente por la Defensa de los Derechos Humanos, Ecuador
Consultoría para los Derechos Humanos y el Desplazamiento (CODHES), Colombia
Fundación Ecuatoriana Equidad, Ecuador
International Women’s Human Rights Clinic at the City University of New York Law School
Movimiento Autónomo de Mujeres, Nicaragua
LatinoJustice PRLDEF, Estados Unidos
National Lawyers Guild, Estados Unidos
Plataforma Interamericana de Derechos Humanos, Democracia y Desarrollo (PIDHDD Regional), Ecuador
International Human Rights Clinic and Poverty Law, University of the West Indies
Women’s Link Worldwide
Asociadas por lo Justo (JASS), Mesoamérica
Comité Amplio para la Búsqueda de Equidad (CABE), Puerto Rico
Comisión Ecuménica de Derechos Humanos de Ecuador (CEDHU)
Carmen M. Vélez Vega, MSW., PhD., Professor, Universidad de Puerto Rico
Margaret Drew, Professor, UMass Law, Estados Unidos
Alda Facio, Vice-President, Working Group on the Elimination of Discrimination Against Women in Law and Practice, United Nations Organization

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I. STATEMENT OF INTEREST

1. The International Human Rights Clinic at Santa Clara University School of Law¹ in California, United States (“the Clinic”) respectfully submits this *amicus curiae* brief in the case of *Ángel Alberto Duque v Colombia* (No. 12841) before this Honorable Inter-American Court of Human Rights (“the Court” or “the Inter-American Court”), on behalf of the undersigned persons and organizations, with the purpose of submitting “reasoned arguments on the facts contained in the presentation of the case [and] legal considerations on the subject-matter of the proceeding,” pursuant to Article 2.3 of the Court’s Rules of Procedure and in conformity with Article 44 of the American Convention on Human Rights (“ACHR”). The Court’s decision in this case is of the utmost importance, since a growing number of similar cases are currently making their way through domestic courts in various countries, including the United States.² Thus, we believe the Court has a unique opportunity to establish criteria to guide domestic judges as they develop jurisprudence in this crucial area of the law.

¹ The Clinic offers law students the opportunity to gain professional experience by working on cases and projects in the area of international human rights law. The students work together with human rights organizations and experts, primarily in the United States and Latin America, through research, litigation, fact-finding, writing briefs, and advocacy.

² See e.g. Compl., *Schuett v. FedEx Corporation* (N. D. Cal. 2015) (No. 15-cv-189). (Plaintiff is suing defendant for failing to pay a survivor benefit upon her same-sex spouse’s death. The defendant had incorporated Section 3 of the Defense of Marriage Act for the purpose of defining the term “spouse”. The U.S. Supreme Court struck down Section 3 prior to the defendant’s spouse’s death but the defendant is still using the Section 3 definition which limits marriage to the union between a man and a woman, thus denying the plaintiff’s request for benefits.); *Gay couple take pension rights battle to court of appeal*, *The Guardian* (2015), available at <http://www.theguardian.com/world/2015/jun/29/gay-couple-take-pension-rights-battle-to-court-of-appeal>. (The petitioner is arguing that a ruling that requires civil partners and married couples to receive equal benefits retroactively applies. This would require inequalities in benefits for same-sex civil partners that occurred prior to the judgment to be remedied. In other words, the petitioner is asking for the judgment to be applied retroactively in addition to proactively.)

2. In light of the importance of this case for the uniform interpretation of the ACHR in all States Parties on the right to equal protection under the law without discrimination, this brief aims to achieve the following:

(1) present reasoned arguments in favor of a progressive interpretation of the right to equal treatment under the law without discrimination on the basis of sexual orientation or gender identity under the ACHR, that incorporates the right to a pension of same-sex partners;

(2) highlight the importance and the scope of the role domestic authorities must play in the application of the so-called “conventionality control” doctrine, and

(3) determine the scope of the Court’s jurisdiction in cases in which the State in question has adopted measures aimed at providing a partial remedy for the alleged violations in a case brought before the Inter-American Human Rights System.

3. Law students Forest Miles, Allison Pruitt, and Erica Sutter, along with supervising attorney Britton Schwartz and Professor Francisco J. Rivera Juaristi³ drafted the brief.

II. SUMMARY

4. In the *Case of Atala Riffo and Daughters v. Chile*,⁴ the Court held the prohibition on discrimination includes discrimination against individuals based on sexual orientation.⁵ Here, in the *Case of Ángel Alberto Duque v. Colombia* this Court is presented a unique opportunity to

³ Prof. Francisco J. Rivera Juaristi worked as a senior attorney in the Inter-American Court of Human Rights. See <http://law.scu.edu/faculty/profile/rivera-juaristi-francisco/>.

⁴ In *Atala Riffo*, this Court held that Chile violated Article 24 in conjunction with Article 1(1) of the Convention when it refused to grant custody of a woman’s two daughters because of her sexual orientation. IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239.

⁵ IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239, para. 93.

emphasize and clarify this notion of equality and non-discrimination for lesbian, gay, bisexual, transgender, and intersex (“LGBTI”) individuals. Specifically, this case provides an opportunity for this Court to explicitly recognize pension rights of same-sex couples — a right otherwise available to heterosexual couples. We therefore urge the Court to determine that a State Party’s denial of pension right to same-sex couples because of their sexual orientation and gender identity constitutes a violation of Article 24 ACHR, in conjunction with Article 1(1) of that treaty.

5. Furthermore, we invite the Court to highlight the importance and the scope of the duty of domestic judges to apply the so-called “conventionality control” principle, pursuant to Article 2 ACHR. The Court should clarify that the doctrine of conventionality control requires all judicial and administrative authorities in a State Party to resolve all controversies submitted to them in light of the ACHR and the jurisprudence of this Court. Furthermore, to ensure the effective exercise of the subsidiarity principle, judicial and administrative authorities must employ *ex officio* their own progressive interpretation of the ACHR, taking into account the *pro persona* principle found in Article 29 ACHR, all of which would promote a true vertical and horizontal jurisprudential dialogue. This case presents a significant opportunity for the Court to reiterate these principles and their importance in the Inter-American system.

6. Lastly, the particular circumstances in this case allow the Court to again address the scope of its jurisdiction in cases in which the State in question has taken measures aimed at providing a partial remedy for the alleged violations after the case was brought before the organs of the Inter-American Human Rights System. Furthermore, this case allows the Court to address the concept of integral reparations for human rights violations.

7. In light of the above consideration, we respectfully ask the Court to rule as follows:

- that the denial of pension rights to the surviving member of a same-sex couple because of his or her sexual orientation or gender identity amounts to a violation of the right to equal treatment under the law without discrimination, recognized in Article 24 ACHR, in relation to Article 1(1) thereof;
- that domestic courts' failure to effectively carry out a conventionality control analysis amounts to a violation of Article 2 ACHR, and
- that the Court can exercise jurisdiction over cases in which a State has taken measures aimed at providing a partial remedy for the alleged violation, where the case was already before the organs of the Inter-American Human Rights System.

III. ARGUMENT

A. A State Party violates the right to equal protection under the law recognized in Article 24 ACHR, in conjunction with Article 1(1) thereof, when it denies survivor pension benefits to same-sex couples because of their sexual orientation and gender identity.

8. A State Party violates Article 24 ACHR, in relation to Article 1(1) thereof, when the State discriminates against a person based on his or her sexual orientation or gender identity when determining survivor benefits upon a partner's death. Article 24 ACHR provides that "all persons are equal before the law" and thus "are entitled, *without discrimination*, to equal protection of the law."⁶ In Article 1(1), the ACHR states that States Parties to the Convention shall refrain from discriminating based on "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, *or any other social condition*."⁷

⁶ Art. 24. Am. Conv. H.R. (emphasis added).

⁷ Art. 1(1). Am. Conv. H.R. (emphasis added).

9. This Court has repeatedly defined the relationship between Article 1(1) — which the Court explained in the *Case of Atala Riffo and Daughters v. Chile*, “extends to all the provisions of the [ACHR]”⁸ — and Article 24. In that decision, this Court explained that “the general obligation of Article 1(1) refers to the State’s duty to respect and guarantee ‘without discrimination’ the rights included in the American Convention,” while Article 24 “protects the right to ‘equal protection before the law.’”⁹ Thus,

[I]f a State discriminates in the respect for or guarantee of a right contained in the convention, it will be failing to comply with its obligation under Article 1(1) and the substantive right in question. If, on the contrary, the discrimination refers to unequal protection by domestic laws, the fact must be analyzed in light of Article 24 of the American Convention.¹⁰

10. Here, denying a person pension benefits solely on the basis of sexual orientation or gender identity, is a violation of Article 24 in conjunction with Article 1(1) of the ACHR.

i. This Court has already recognized sexual orientation and gender identity is a protected class under ACHR Article 1(1).

11. This Court has already recognized sexual orientation and gender identity as protected social conditions.¹¹ In *Atala Riffo*, the Court held that “any regulation, act, or practice

⁸ IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239, para. 79.

⁹ See IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239, para. 82 (citing *Proposed Amendment to the Political Constitution of Costa Rica related to Naturalization*. Advisory Opinion OC-4/84, January 19 1984. Series A No. 4, paras. 53 and 54; and IACtHR, *Case of Barbani Duarte et. al. v. Uruguay. Merits, Reparations and Costs*. Judgment of October 13, 2011. Series C No. 234, para. 174).

¹⁰ See IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239, para. 82 (citing IACtHR, *Case of Apitz Barbera et al. (“Corte Primera Contencioso Administrativo”) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 5, 2008. Series C No. 182, para. 209; and IACtHR, *Case of Barbani Duarte et. al. v. Uruguay. Merits, Reparations and Costs*. Judgment of October 13, 2011. Series C No. 234, para. 174).

¹¹ IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239, para. 91.

considered discriminatory based on a person's sexual orientation is prohibited."¹² A person's sexual orientation is independent of his or her biological sex and has been defined as: "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."¹³

12. The language in Article 1(1) ACHR is not exclusive and could thus include other categories.¹⁴ In fact, the Court expressly stated that "the wording of [Article 1(1)] leaves open the criteria with the inclusion 'any other social condition,' allowing for the inclusion of other categories that have not been specifically indicated."¹⁵ Moreover, in determining whether the language "any other social condition" in Article 1(1) of the ACHR protected against discrimination based on sexual orientation, the Court noted it "should interpret the term... in the context of the most favorable option for the human being and in light of the evolution of fundamental rights in contemporary international law."¹⁶

13. Following this principle, the Court looked to trends of other international governmental organizations and their views on discrimination based on sexual orientation and gender identity,¹⁷ which had been evolving since at least 1981.¹⁸ In doing so, the Court noted several

¹² IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239, para. 91.

¹³ See, *inter alia*, the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, p. 8, 2006.

¹⁴ IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239, para. 85.

¹⁵ IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239, para. 85.

¹⁶ IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239, para. 85.

¹⁷ See IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239, paras. 86 - 90.

international and regional bodies that had made efforts to combat discrimination on the basis of sexual orientation and gender identity at the time of the *Atala Riffo* decision.

14. For example, the General Assembly of the Organization of American States (“OAS”) had approved four notable resolutions on the protection of persons against discrimination based on sexual orientation.¹⁹ In 2008, the OAS adopted AG/RES. 2435 which resolved to focus more attention on “acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity.”²⁰ In 2009, AG/RES. 2504 called States to action by encouraging them to condemn acts of violence and discrimination against individuals because of their sexual orientation.²¹ In 2010 and 2011, the OAS approved AG/RES 2600 and AG/RES 2653, respectively. Both called for States to take measures to end all discrimination based on sexual orientation and gender identity.²²

15. Likewise, multiple United Nations committees have held that sexual orientation and gender identity are prohibited categories of discrimination. For example, in the seminal case, *Toonen v. Australia*, the Human Rights Committee (“UNHRC”) held under Article 26 of the International Covenant on Civil and Political Rights (“ICCPR”)²³ that sexual orientation is a

¹⁸ See e.g. ECtHR, *Dudgeon v. The United Kingdom*, (No. 7525/76), Judgment of October 22, 1981. (Holding that laws criminalizing homosexual acts violated the ECHR.)

¹⁹ AG/RES. 2435 (XXXVIII-O/08), AG/RES. 2504 (XXXIX-O/09), AG/RES. 2600 (XL-O/10), and AG/RES. 2653 (XLI-O/11) on “Human Rights, Sexual Orientation and Gender Identity.”

²⁰ AG/RES. 2435 (XXXVIII-O/08) on “Human Rights, Sexual Orientation and Gender Identity.”

²¹ AG/RES. 2504 (XXXIX-O/09) on “Human Rights, Sexual Orientation and Gender Identity.”

²² See AG/RES. 2600 (XL-O/10), and AG/RES. 2653 (XLI-O/11) on “Human Rights, Sexual Orientation and Gender Identity.”

²³ The language of Article 26 is similar to the ACHR: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

protected status.²⁴ The Committee on Economic, Social and Cultural Rights has noted that “[o]ther statuses as recognized in article 2, paragraph 2 [of the International Covenant on Economic, Social and Cultural Rights], includes sexual orientation.”²⁵ The Committee on the Rights of the Child,²⁶ the Committee Against Torture,²⁷ and the Committee on Elimination of Discrimination Against Women²⁸ have all referenced the inclusion of sexual orientation as a prohibited category for discrimination. Furthermore, the United Nations General Assembly has adopted the “Declaration on Human Rights, Sexual Orientation, and Gender Identity,” which requires all human rights be applied equally regardless of sexual orientation or gender identity.²⁹

16. The European Court of Human Rights (“ECtHR”), has repeatedly recognized that States are prohibited from discriminating against an individual based on sexual orientation. For example, in 1999, the ECtHR held in *Caso Salguiero da Silva Mouta* that sexual orientation is

²⁴ See United Nations, Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992, April 4, 1992, para. 8.7.

²⁵ United Nations, Committee on Economic, Social, and Cultural Rights, General Observation No. 20, *Non-Discrimination and Economic, Social, and Cultural Rights*, Jul. 2, 2009, para. 32.

²⁶ United Nations, Committee on the Rights of the Child, General Comment No. 4, *The Health and Development of Adolescents in the Context of the Convention on the Rights of the Child*, CRC/GC/2003/4, July 21, 2003, para. 6 (“States Parties have the obligation to ensure that all human beings under 18 enjoy all the rights set forth in the Convention without discrimination (Art. 2), regardless of “race, color, sex, language, religion, or political or other opinion, national, ethnic or social origin, property, birth, disability or other status”. These grounds also cover adolescents’ sexual orientation”).

²⁷ Cf. United Nations, Committee Against Torture, General Comment No. 2, *Application of Article 2 by States Parties*, CAT/C/GC/2, of January 24, 2008 para. 20, 21 (“The principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention. [...] States Parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of [...] sexual orientation.”).

²⁸ Cf. United Nations, Committee on the Elimination of Discrimination Against Women, General Recommendation No. 27 on women of age and the protection of their human rights, CEDAW/C/GC/27, December 16, 2010, para. 13 (“The discrimination experienced by older women is often multidimensional, with the age factor compounding other forms of discrimination based on [...] sexual orientation.”).

²⁹ United Nations, General Assembly, *Declaration on Human Rights, Sexual Orientation and Gender Identity*, A/63/635, December 22, 2008, para. 3 (“We reaffirm the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation.”).

“undoubtedly covered by Article 14 of the [European Convention on Human Rights (“ECHR”)].”³⁰

17. Moreover, The Yogyakarta Principles, a set of international legal principles on the application of international law to human rights violations based on sexual orientation, call for States to

embody the principles of equality and non-discrimination on the basis of sexual orientation . . . in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles.³¹

Thus, upon considering these trends, the *Atala Riffo* Court held that sexual orientation is a protected category under ACHR Article 1(1).

18. Even this extensive list was not exhaustive. For example, *amici* in *Atala Riffo* pointed out that in 2011, twenty-two States “including Ecuador, Fiji, Portugal, South Africa, and Switzerland [had] expressly incorporated the right to protection from discrimination based on sexual orientation into their constitutions.”³² To date, sixty-eight States have introduced laws

³⁰ ECtHR, *Salgueiro da Silva Mouta v. Portugal*, (No. 33290/96), Judgment of December 21, 1999. Final, March 21, 2000, para. 28. Article 14 of the European Convention on Human Rights is similar to ACHR Article 24: “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.” See also *Clift v. United Kingdom*, (No. 7205/07), Judgment of July 13, 2010. Final, November 22, 2010, para. 57 (again noting that “other status” is not limited to the enumerated examples in Article 24 and includes sexual orientation).

³¹ The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, p. 8, 2006 (developed by human rights experts from twenty-five countries on behalf of the International Commission of Jurists, and the International Service for Human Rights).

³² Amicus Curiae brief presented by Amnesty International, ARC International, the Center for Constitutional Rights, Consultoría para los Derechos Humanos y el Desplazamiento, the Council for Global Equality, Human Rights Watch, the International Gay & Lesbian Human Rights Commission, the International Women’s Human Rights Clinic at the City University of New York, Lawyers for Children, Inc., the Legal Aid Society of New York, Legal Momentum, MADRE, the National Center for Lesbian Rights, the National Economic and Social Rights Initiative, the New York City Bar Association, and Women’s Link Worldwide, in the *Case of Atala Riffo and Daughters v. Chile*, Inter-American Court of Human Rights (September 2011) at 26 (citing Constitución Política de 1998, art. 23, § 3 (Ecuador), available at <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador98.html>; Constitution of Fiji (1998) sec. 38 (2) (a), available at <http://www.oefre.unibe.ch/law/icl/fj000000.html>; Constituição da República Portuguesa (2005) art. 13, § 2, available at <http://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx> (Portugal); Constitution of South Africa (1996), ch. 2, X7F’ 9 (3), available at <http://www.info.gov.za/documents/constitution/index.htm>;

prohibiting discrimination on the basis of sexual orientation.³³ At the same time, the United States was seeing a positive shift in attitude with regards to sexual orientation. California, Colorado, Connecticut, the District of Columbia, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, and Wisconsin had all implemented legislation to protect against sexual discrimination.³⁴ Furthermore, the United State Supreme Court's decisions in *Lawrence v. Texas* (1996)³⁵ and *Romer v. Evans* (2003)³⁶ had also advanced protection against sexual discrimination.

19. Since this Court's 2011 decision in *Atala Riffo*, the international community has continued this progressive tendency in many areas such as employment and education, but particularly in the area of same-sex marriage. In this sense, other foreign courts have joined the effort to forge a path towards eliminating discrimination based on sexual orientation and gender identity. For example, at least twenty-two countries have legalized same-sex marriages.³⁷ This includes the Latin American countries of Argentina (since 2010),³⁸ Brazil (since 2013),³⁹

Federal Constitution of the Swiss Confederation (2002) art. 8(2), available at <http://www.admin.ch/org/polit/00083/index.html?lang=en>.

³³ See *2015 Map on Lesbian and Gay Rights in the World*, INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION (2015), available at http://old.ilga.org/Statehomophobia/ILGA_WorldMap_2015_ENG.pdf.

³⁴ Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 Wm. & Mary L. Rev. 797, 825, 832 (2008). Since the article's publication, there are now only eighteen states with no state-level protection against employment discrimination based on sexual orientation. See *Non-Discrimination Laws: State By State Information - Map*, AMERICAN CIVIL LIBERTIES UNION, available at <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map>.

³⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a Texas sodomy law).

³⁶ *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a Colorado constitutional amendment which would have prohibited state and local government from protecting homosexual individuals from discrimination based on sexual orientation).

³⁷ See *Gay Marriage Around the World*, PEW RESEARCH RELIGION & PUBLIC LIFE (Jun. 26, 2015), available at <http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/>.

³⁸ Law No. 26.618, Jul. 15, 2010, [31949] B.O. 1 (Arg.).

³⁹ Brazil's Superior Tribunal de Justiça declared that "the right to equality is only realized in full if the right to difference is guaranteed" (S.T.J., Rec. Esp. No. 1.183.378-RS (2010/0036663-8 (Braz.)) (emphasis omitted).

Uruguay (since 2013),⁴⁰ and Mexico (since June 2015).⁴¹ The United States became the most recent country to legalize same-sex marriage in the landmark decision of *Obergefell v. Hodges* where U.S. Supreme Court Justice Kennedy declared “[petitioners’] hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”⁴² This growing shift towards protecting against discrimination based on sexual orientation emphasizes the point this Court made in *Atala Riffo*: that such discrimination is a violation of the human right to equal protection under the law without discrimination.

ii. Article 24 protection against non-discrimination based on sexual orientation and gender identity applies to same-sex survivor pension benefits.

20. The Article 24 ACHR prohibition on discrimination based on sexual orientation extends to same-sex survivor pension benefits. In the *Case of Atala Riffo and Daughters v. Chile*, this Court held “[a] right granted to all persons cannot be denied or restricted under any circumstances based on their sexual orientation.”⁴³ To do so would be a violation of Article 24 in conjunction with Article 1(1) of the ACHR.⁴⁴ This Court would follow its precedent in *Atala Riffo* by explicitly holding that States Parties to the ACHR cannot discriminate based on sexual orientation when determining survivor pension benefits.

⁴⁰ Ley No. 19.075, Art. 1 (Publicada D.O. 9 may/013 - N° 28710).

⁴¹ Matrimonio entre personas del mismo sexo [Marriage between persons of the same sex]. No existe razón de índole constitucional para no reconocerlo [No reason exists not to recognize it], Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación, Décima Época, Publicación: Friday, June 19, 2015, 09:30 h, Tesis: 1a./J.46/2015(10a.), (Mex.).

⁴² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

⁴³ IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239, para. 93.

⁴⁴ IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239, para. 93.

21. While the specific facts relating to same-sex pension rights is a question of first impression before this Court, the international community has had the opportunity to address this issue. In the 2003 case of *Young v. Australia*, the applicant challenged an Australian law which prevented same-sex veteran couples from receiving the same veteran pension benefits as heterosexual couples.⁴⁵ There, the UN Human Rights Committee (“UNHRC”) held Australia violated Article 26 (non-discrimination)⁴⁶ of the ICCPR.⁴⁷ The UNHRC determined that “the victim [was] entitled to an effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, *if necessary through an amendment of the law.*”⁴⁸

22. Similarly, in the case *P.B. and J.S. v. Austria*, the ECtHR addressed the issue of whether different treatment with regards to insurance coverage amounted to prohibited discrimination against a homosexual couple.⁴⁹ There, the applicants challenged an Austrian law which restricted insurance coverage to an insured person’s close family or a cohabitee of the opposite sex.⁵⁰ The ECtHR held that during the time the law was effective, Austria violated Article 14

⁴⁵ See United Nations, Human Rights Committee, *Young v. Australia*, Communication No. 941/2000, CCPR/C/78/D/941/2000, September 18, 2003.

⁴⁶ As discussed earlier, Article 26 of the ICCPR provides “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁴⁷ United Nations, Human Rights Committee, *Young v. Australia*, Communication No. 941/2000, CCPR/C/78/D/941/2000, September 18, 2003, para. 10.4.

⁴⁸ United Nations, Human Rights Committee, *Young v. Australia*, Communication No. 941/2000, CCPR/C/78/D/941/2000, September 18, 2003, para. 12.

⁴⁹ See ECtHR, Case *P.B. and J.S. v. Austria*, (No. 18984/02), Judgment of July 22, 2010. Final, October 22, 2010.

⁵⁰ See ECtHR, Case *P.B. and J.S. v. Austria*, (No. 18984/02), Judgment of July 22, 2010. Final, October 22, 2010, para. 17.

(discrimination) in conjunction with Article 8 of the European Convention on Human Rights (respect for family and private life).⁵¹

23. Even Colombia's own Constitutional Court has already recognized "that homosexual couples' lack of protection in the property area and the system regulating 'de facto marital unions' was discriminatory in that it applied exclusively to heterosexual couples and excluded homosexual couples."⁵² Additionally, in 2008, the Constitutional Court held "there was no justification to authorize discriminatory treatment whereby persons who were in homosexual relationships could not have access to the survivor's pension benefits under the same conditions that applied in the case of heterosexual couples."⁵³ Furthermore, the Colombian Constitutional Court has also already held "the fact that one member of a same-sex couple died before notification of [the 2008 Judgment] was not an acceptable reason to deny the surviving member the survivor's pension."⁵⁴ Thus, the current trend indicates that the prohibition on discrimination based on sexual orientation extends to same-sex pension benefits.

24. In the Inter-American System, the recognition of this right is the result of a progressive interpretation of the ACHR that must not be misunderstood for the creation of new rights that were not already protected by this treaty. On the contrary, the progressive interpretations of the ACHR found in the Court's judgments must be understood as recognition that the ACHR always protected those rights. The same principle applies to the Court's interpretation of Article 24 ACHR in the context of discrimination based on sexual orientation and gender identity. Pursuant

⁵¹ See ECtHR, Case *P.B. and J.S. v. Austria*, (No. 18984/02), Judgment of July 22, 2010. Final, October 22, 2010, paras. 40-42.

⁵² Constitutional Court of Colombia, Judgment C-075/07, February 7, 2007 (Justice Rodrigo Escobar Gil writing).

⁵³ Constitutional Court of Colombia, Judgment C-336/08, April 16, 2008 (Justice Clara Inés Vargas Hernández writing).

⁵⁴ Constitutional Court of Colombia, Judgment T-860/11, November 15, 2011 (Justice Humberto Antonio Sierra Porto writing).

to the Court's jurisprudence, States Parties had and continue to have the obligation to respect, protect, and guarantee this right from the moment the ACHR entered into force for each State.⁵⁵

25. We bring this argument to the Court's attention in response to the State's argument that the prohibition against discrimination on the basis of sexual orientation was first developed by the Court in 2011 in the *Atala Riffo* case and therefore the corresponding right had not been sufficiently developed in the Inter-American System in 2002, when Mr. Duque presented his *acción de tutela*. The State is correct in arguing that it is difficult to ascertain the exact moment in which international human rights law explicitly and definitively recognized the right to be free from discrimination on the basis of sexual orientation and gender identity, and specifically the right to a pension as a surviving beneficiary of a same-sex partner. The State's expert witness, Dr. René Urueña supported this argument in the public hearing. According to the expert witness, the idea of a "foot path" could serve as an adequate analogy to understand how international human rights law progresses and evolves, in that it is difficult to determine the exact moment when the foot path comes into being. The expert explained that these jurisprudential foot paths, or progressive interpretations of international human rights law by domestic courts or by regional or international bodies, may recognize binding obligations of State Parties even before the Inter-American Court issues a definitive judgment on a particular issue.⁵⁶ In this sense, domestic systems for the administration of justice must take into account not just domestic norms and jurisprudence, or those of the Inter-American Court, but also the progressive interpretation of international human rights law as understood by other states, regional and international bodies, or even public opinion. This understanding is recognized in Article 31(3)(b) (*general rules of*

⁵⁵ IACtHR, *Case of Vélez Restrepo and Family v. Colombia. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 3, 2012. Series C No. 248, para. 241.

⁵⁶ Expert Witness Testimony of Dr. René Urueña, *Ángel Alberto Duque v. Colombia*, IACtHR 53 Extraordinary Period of Sessions Honduras, August 25, 2015, available at <http://livestream.com/corteidh/events/4294466>.

interpretation) of the Vienna Convention on the Law of Treaties, which states that, in interpreting a treaty, States must take into account its context, and “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”⁵⁷ In other words, the ACHR must be interpreted not in light of the literal interpretation of the text of the treaty and its context, but also in light of the interpretation and practice followed by other States Parties.

26. Regarding the specific right to be free from discrimination in the full enjoyment of the right to a pension as a surviving beneficiary of a same-sex partner, it is unnecessary to determine when said right was “created” in the Inter-American System, since it logically stems from a *pro persona* interpretation of the general prohibition against discrimination as it relates to equal protection under the law, as the Court explained in *Atala Riffo*. That is, this right was not created by the Court when it issued the *Atala Riffo* decision in 2012, but rather the Court recognized that the right to be free from discrimination on the basis of sexual orientation and gender identity was always protected by the ACHR.

27. Here, the only reason Mr. Duque was denied his right to his partner’s pension benefits is because of his sexual orientation. Mr. Duque, who had been living with his partner for more than 10 years, sought his partner’s pension benefits through Articles 47 and 74 of 1993 Law 100 which provide “should the survivor’s pension be triggered by the pensioner’s death, the surviving spouse or permanent partner must prove he or she was living in marital union with the predecessor in title.”⁵⁸ Multiple laws, however, prevented Mr. Duque from proving the

⁵⁷ Art. 31.3(b) of the Vienna Convention on the Law of Treaties.

⁵⁸ Law 100 Arts. 47; 74, 1993, DIARIO OFICIAL [D.O.] (Colom.); See also *Ángel Alberto Duque v. Colombia*, Merits Report No. 5/14. April 2, 2014, para. 11.

necessary *de facto* marital union between him and his partner, JOJG.⁵⁹ Article 1 of Law 54 of 1990 defines a *de facto* marital union as “the union between a man and a woman who, without being married, enter into a permanent and exclusive community.”⁶⁰ Decree 1889 of 1994 states “[f]or purposes of the enrollee’s survivor’s pension, the permanent partner shall be the last person of the opposite sex to the enrollee, who has lived in marital union with him or her [...]”⁶¹ Therefore, under the normative regime that existed at the time of JOJG’s death, it was impossible for Mr. Duque or for any other same-sex partner in Colombia in 2002 to receive a survivor’s pension. Had Mr. Duque’s partner been of the opposite sex, Colombia would not have denied Mr. Duque a survivor’s pension.

28. Although the Constitutional Court of Colombia eventually recognized this right to same-sex partners in 2008 (*supra* para. 23), the right itself was not created by Colombia in 2008. Rather, the right always existed under the ACHR and Colombia’s failure to recognize this right had always constituted a violation of the ACHR.

29. Furthermore, the State’s argument in the sense that “the advances made in the protection of [this right] are covered by the principle of progressive realization,”⁶² seem equally flawed. The right to equal protection under the law recognized in Article 24 ACHR is a right that is not subject to a progressive realization insofar as it is not an economic, social or cultural right; rather the right to equal protection under the law requires its immediate respect, protection, and

⁵⁹ See IACHR, *Ángel Alberto Duque v. Colombia*, Merits Report No. 5/14. April 2, 2014, para. 11.

⁶⁰ Law 54, Art. 1, 1990, DIARIO OFICIAL [D.O.] (Colom.); See also IACHR, *Ángel Alberto Duque v. Colombia*, Merits Report No. 5/14. April 2, 2014, para. 11.

⁶¹ Law 1889, 1993, DIARIO OFICIAL [D.O.] (Colom.); See also IACHR, *Ángel Alberto Duque v. Colombia*, Merits Report No. 5/14. April 2, 2014, para. 11.

⁶² IACHR, *Ángel Alberto Duque v. Colombia*, Merits Report No. 5/14. April 2, 2014, para. 32.

guarantee from the moment a State ratifies the ACHR.⁶³ Furthermore, the denial of pension benefits in this case was not motivated by the State's lack of resources, but by discrimination on the basis of Mr. Duque's sexual orientation.⁶⁴

30. Considering that the State discriminated against Mr. Duque on the basis of his sexual orientation when the State denied him the pension to which he was entitled as a surviving beneficiary of his same-sex partner, Colombia violated the right to equal protection under the law without discrimination on the basis of sexual orientation recognized in Article 24 ACHR, in relation to Article 1(1) thereof. Therefore, *amici* respectfully request that the Court explicitly recognize that all State Parties to the ACHR have the duty to respect, protect, and guarantee the right of all persons to be free from discrimination on the basis of their sexual orientation and gender identity, a right that extends to pension benefits of same-sex partners under the same circumstances as they are recognized to heterosexual partners.

B. States Parties must apply the ACHR domestically, which implies taking legislative and judicial measures to respect, protect, and guarantee the right not to be discriminated against on the basis of sexual orientation and gender identity.

31. In this section, *amici* will make the following arguments: first, that the conventionality control doctrine and Article 2 ACHR impose a duty on judicial and administrative authorities in States Parties to apply the ACHR domestically and to take into account the Court's jurisprudence,⁶⁵ and second, that the ACHR and the Court's interpretation thereof require States

⁶³ This Court has stated "the first obligation 'with immediate effect' arising from economic, social, and cultural rights consists of ensuring that those rights shall be exercised in conditions of equality and without discrimination." IACHR, *Ángel Alberto Duque v. Colombia*, Merits Report No. 5/14. April 2, 2014, para. 73. (quoting IACHR, *Guidelines for preparation of progress indicators in the area of economic, social and cultural rights*, OEA/Ser.L/V/11.132, Doc. 14 rev. 1, 19 July 2008, para. 48)(emphasis added).

⁶⁴ See IACHR, *Ángel Alberto Duque v. Colombia*, Merits Report No. 5/14. April 2, 2014, paras. 24, 93.

⁶⁵ IACtHR, *Case of Atala Riffó and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239, para. 80; IACtHR, *Case of Almonacid Arellano v. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 124.

Parties to respect, protect, and guarantee the right not to be discriminated against on the basis of sexual orientation and gender identity, from the moment the State ratifies the ACHR (*supra* paras. 8-27), and this duty includes the obligation to modify discriminatory laws and to interpret them progressively in light of the *pro persona* principle and of the right to equal protection under the law without discrimination. Insofar as Colombian laws and their application by judicial authorities resulted in a discriminatory treatment of Mr. Duque because of his sexual orientation, we believe the Court should hold Colombia responsible for its violation of Article 2 ACHR. A holding to this effect regarding the conventionality control mechanism is of the utmost importance to achieve a uniform understanding and development of the right to equal protection under the law in all Member States.

i. In accordance with the conventionality control doctrine and the subsidiarity principle, domestic authorities must apply ex officio the ACHR and the Court's judgments and decisions, and they must interpret the ACHR pursuant to the pro persona principle.

32. Conventionality control requires all of the organs of each State Party to apply the ACHR and the Court's jurisprudence in all legislative measures and throughout all the mechanisms for the administration of justice. In the 2006 *Case of Almonacid Arellano v. Chile*, this Court described the duties all judges in all States Parties have pursuant to the doctrine of conventionality control, in the following terms:

The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation

thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.⁶⁶

33. Since *Almonacid*, this Court has reiterated its precedent numerous times. For example, two months after *Almonacid* the Court stated in the *Case of the Dismissed Congressional Employees v. Peru* that domestic judges in State Parties must

ensure that the *effet util* of the Convention is not reduced or annulled by the application of laws contrary to its provisions ... [and] should exercise not only a control of constitutionality, but also of ‘conventionality’ *ex officio* between domestic norms and the American Convention.⁶⁷

The doctrine of conventionality control has been applied by the Court to numerous contentious cases almost every year since *Almonacid*.⁶⁸

34. In 2010, the Court further clarified the doctrine of conventionality control in the *Case of Cabrera García and Montiel Flores v. Mexico*.⁶⁹ There, the Court clarified that all judges and all bodies involved in the administration of justice at all levels have the duty to apply *ex officio* a

⁶⁶ IACtHR, *Case of Almonacid Arellano v. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 124.

⁶⁷ IACtHR, *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, para. 128.

⁶⁸ IACtHR, *Case of La Cantúta v. Peru. Merits, Reparations and Costs*. Judgment of November 29, 2006. Series C No. 162, para. 173; IACtHR, *Case of Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2007. Series C No. 169, para. 79; IACtHR, *Case of Heliodoro Portugal v. Panama. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 186, para. 180; IACtHR, *Case of Rosendo Radilla Pacheco v. United Mexican States. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2009. Series C No. 209, para. 339; IACtHR, *Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits and Reparations*. Judgment of May 26, 2010. Series C No. 213, para. 208, note 307; IACtHR, *Case of Fernández Ortega et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 30, 2010. Series C No. 215, para. 234; IACtHR, *Case of Rosendo Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 31, 2010. Series C No. 216, para. 219; IACtHR, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs*. Judgment of September 1, 2010. Series C No. 217, para. 202; IACtHR, *Case of Vélez Loo v. Panama. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2010. Series C No. 218, para. 287; IACtHR, *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, paras. 106, 176; and IACtHR, *Case of Gelman v. Uruguay, Merits and Reparations*. Judgment of February 24, 2011. Series C No. 221, para. 193.

⁶⁹ IACtHR, *Case of Cabrera Garcia and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 26, 2010, para. 225.

conventionality control between domestic norms and the ACHR.⁷⁰ In a concurring opinion, then *ad hoc* Judge Eduardo Ferrer Mac-Gregor Poisot explained that this change indicates the intent of the Court “to establish that the doctrine of ‘conventionality control’ must be exercised by “all judges,’ ... regardless of their rank, grade, level or area of expertise.”⁷¹

35. The ex-President of the Inter-American Court, Sergio García Ramírez, has explained that this relationship between international law and national law can be described as being “regulated by constitutional provisions of a general and unilateral character, which affirm the level of recognition of international conventional law or of particular provisions of international treaties.”⁷² The Colombian State’s own constitutional law expert reiterated this in his testimony before the Court, where he emphasized that domestic interpretation of human rights law must be compatible with the Court’s progressive interpretation and with other developments in international law.⁷³

36. In this sense, several high courts in the region have explicitly recognized that conventionality control includes the duty to apply not just the ACHR, but also the Court’s interpretation thereof. For example, the Supreme Court of Justice of the Dominican Republic held that both the State and Judiciary are bound by the interpretations of the Convention made by the Court.⁷⁴ Similarly, the Constitutional Court of Peru has sustained that judgments of the

⁷⁰ IACtHR, *Case of Cabrera Garcia and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 26, 2010, para. 225.

⁷¹ IACtHR, *Concurring Opinion of Ad Hoc Judge Eduardo Ferrer Mac-Gregor Poisot Regarding the Judgement of the IACtHR in the Case of Cabrera Garcia and Montiel Flores v. Mexico*. November 26, 2010, para. 19.

⁷² Sergio García Ramírez, *The Relationship Between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions*, 5 NOTRE DAME J. OF INT’L & COMP. L. 115, 128 (2015) (*citing* Giuseppe de Vergottini, *Más allá del diálogo entre tribunales [Beyond Dialogue between Tribunals]* 88 (Pedro J. Tenorio Sánchez trans., Civitas 2011) (2010).

⁷³ Expert Witness Testimony by Dr. René Urueña, *Ángel Alberto Duque v. Colombia*, IACtHR 53 Extraordinary Period of Sessions Honduras, August 25, 2015, available at <http://livestream.com/corteidh/events/4294466>.

⁷⁴ Resolution N° 1920-2003 issued on November 13, 2003 by the Supreme Court of Justice of the Dominican Republic.

Court are “binding upon all national government institutions,” even when Peru is not a party to the proceeding.⁷⁵ Furthermore, the Supreme Court of Justice of Argentina has recognized that “the content of its decisions must be subordinated to the decisions of the [IACtHR].”⁷⁶ The Constitutional Chamber of the Supreme Court of Justice of Costa Rica has also stated that the Court’s interpretation of the ACHR has “the same weight” as the ACHR itself.⁷⁷ Finally, Bolivia’s Constitutional Court has recognized that the doctrine of the *effet util* of human rights judgments requires that domestic organs recognize the judgments of the Inter-American Court as having the same hierarchical rank as the ACHR.⁷⁸

37. The Court has also held that conventionality control also requires States to modify existing legislation that is contrary to the ACHR or to interpret such legislation in a way that is compatible with the ACHR.⁷⁹ This obligation stems also from Article 26 (*pacta sunt servanda*) of the Vienna Convention on the Law of Treaties, which requires States to comply with treaty obligations in good faith, and from Article 27 (*internal law and observance of treaties*) thereof, which states that a Party “may not invoke the provisions of its internal law as justification for its

⁷⁵ Judgment issued on July 21, 2006 by the Constitutional Tribunal of Peru (case file N° 2730-2006-PA/TC), Ground 12.

⁷⁶ Cf. Judgment issued on December 23, 2004 by the Supreme Court of Argentina (File No. 224. XXXIX), “Espósito, Miguel Angel s/ Incidental Proceeding of Limitation on the Criminal Action commenced by the Defense,” considering clause 6 and Judgment of the Inter-American Court of Human Rights of the Supreme Court of Argentina, Mazzeo, July Lilo, et al., cassation recourse and unconstitutionality. M. 2333. XLII. Et al. of July 13, 2007, para. 20.

⁷⁷ Judgment issued on May 9, 1995 by the Constitutional Chamber of the Supreme Court of Justice of Costa Rica. Action of Unconstitutionality. Vote 2313-95 (Case File 0421-S-90), Considering VII.

⁷⁸ Judgment issued on May 10, 2010 by the Constitutional Court of Bolivia (Case file N° 2006-13381-27-RAC), chapter III.3 on “The Inter-American System of Human Rights. Grounds and effects of the Judgments issued by the Inter-American Court of Human Rights.”

⁷⁹ See IACtHR, *Case of Radilla Pacheco v. México. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2009, paras. 338-339.

failure to perform a treaty.”⁸⁰ To the contrary, in light of Articles 1(1) and 2 ACHR, States Parties must modify domestic norms to “give effect” to the rights recognized in this international treaty. Specifically, Article 2 ACHR provides the following:

[w]here 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 may be necessary to give effect to those rights or freedoms.⁸¹

38. Accordingly, the Court has repeatedly held that States Parties’ obligations under Article 2 of the ACHR are twofold. First, States Parties must eliminate “laws and practices of any nature that result in a violation of the guarantees established in the convention[;]” second, States Parties must also implement “practices leading to the effective observance of those guarantees.”⁸² According to the Court, the duty to give domestic effect to the ACHR derives from “customary law[, which] 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.”⁸³ The Court has also declared that the formal existence of norms that are contrary to the ACHR may constitute, *per se*, a violation of a State Party’s duty to give legal effect to the ACHR, whether or not said norms have actually been applied in a given case.⁸⁴

⁸⁰ Arts. 26-27 of the Vienna Convention on the Law of Treaties. *See also* IACtHR, *Case of Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2007. Series C No. 169, paras. 77-78.

⁸¹ Art. 2. Am. Conv. H.R.

⁸² IACtHR, *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, para. 175 (citing IACtHR, *Case of Castillo Petrucci et al. v. Peru. Merits, Reparations, and Costs*. Judgment of May 30, 1999, para. 207).

⁸³ IACtHR, *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*. Judgment of August 27, 1998. Series C No. 39, para. 68.

⁸⁴ IACtHR, *Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, para. 98. *See also* IACtHR, *Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 106; IACtHR, *Case of La Cantuta v. Perú. Merits, Reparations and Costs*. Judgment of November 29, 2006. Series C No. 162, para. 174; IACtHR, *Case of Barrios Altos v. Perú. Interpretation of the Judgment of the Merits*. Judgment of September 3, 2001. Series C No. 83, para. 18 and second point of resolution.

39. The conventionality control principle also requires domestic judicial authorities to carry out *ex officio* their own progressive interpretation of the ACHR in light of the *pro persona* principle recognized in Article 29 ACHR interpretation norms. Article 29 ACHR requires States Parties to interpret the ACHR in a way that ensures maximum protection of all human rights recognized therein, whether that maximum protection stems from the text of the ACHR, from other treaties ratified by the State Party, or even from domestic norms or jurisprudence.⁸⁵ States must carry out this *pro persona* interpretation even where there is no specific Court jurisprudence that is exactly on point. The Court stated as much in the *Vélez Restrepo and Family v. Colombia* case, where it held as follows:

even though this Court's consistent case law is the interpretive authority of the obligations established in the American Convention, the obligation [...] to investigate and prosecute human rights violations [...] is a guarantee of due process derived from the obligations contained in Article 8(1) of the American Convention and does not depend solely on what this Court has reaffirmed in its case law. The guarantee that violations of human rights [...] are investigated by a competent court is embodied in the American Convention and is not the result of its application and interpretation by this Court in the exercise of its contentious jurisdiction; thus it must be respected by the States Parties from the moment they ratify the said treaty.⁸⁶

40. This requirement is neither excessive nor unreasonable. In fact, Article 29 ACHR incorporates this general *pro persona* interpretation principle which, according to Prof. Monica Pinto, is

an interpretation criteria that informs all human rights law and requires the adoption of the broadest norm or the most extensive interpretation with regards to the recognition of protected rights or, inversely, the most restrictive norm or interpretation with regards to

⁸⁵ On other occasions, the IACtHR has interpreted the ACHR in light of the practice and conventional interpretation of other States Parties. For example, the IACtHR has cited to the jurisprudence of the Constitutional Court of Colombia when interpreting provisions of the ACHR. *See, inter alia*, IACtHR, *Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations*. Judgment of June 27, 2012. Series C No. 245, notes. 206, 241, 247, and 276, and paras. 164, 182.

⁸⁶ IACtHR, *Case of Vélez Restrepo and Family v. Colombia. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 3, 2012. Series C No. 248, para. 241.

established restrictions [...] of the exercise of rights or of their extraordinary suspension.⁸⁷

41. Pursuant to this interpretation norm, restrictions of rights recognized in the ACHR must be interpreted restrictively. The Court, since its first Advisory Opinion in 1982, has stated that the textual method of treaty interpretation prohibits a restrictive interpretation of the ACHR beyond the restrictions already allowed by the treaty text.⁸⁸ In the case of the right to equal protection under the law, Article 24 ACHR does not contemplate any restriction whatsoever, and therefore any restriction of the full enjoyment of this right on the basis of a particular social condition (such as sexual orientation or gender identity) would be incompatible with the ACHR.

42. In this regard, *amici* agree with the following quote from Judge Eduardo Ferrer Mac-Gregor Poisot's concurring opinion when he was *Ad Hoc* Judge in the *Cabrera Garcia and Montiel Flores v. Mexico* case, and we invite the Court to incorporate this reasoning in its judgment:

all judges [...] must "interpret" national [norms] in line with the Constitution and conventional parameters, which means opting for the most favorable interpretation for the use and exercise of fundamental rights and freedoms in application of the pro homine libertatis or favor libertatis principle enshrined in Article 29 of the Pact of San Jose, rejecting interpretations that are incompatible or less protective. Conversely, whenever rights and freedoms are restricted or limited, judges must use the strictest interpretation of that limitation. And only when it is not possible to arrive at a constitutional and conventional interpretation, judges should disregard the national provision or declare it invalid, according to the jurisdiction conferred by the Constitution and national laws on each judge, producing a greater degree of intensity in the "conventionality control."⁸⁹ (emphasis added)

⁸⁷ Pinto, Mónica. *The pro homine Principle. Hermeneutic criteria and guidelines for the regulation of human rights*, in Abregu, Martín and Christian Courtis (Eds.) Editores El Puerto, Bs. As. 1997, p. 163.

⁸⁸ IACtHR, "Other treaties" subject to the consultative jurisdiction of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 37.

⁸⁹ IACtHR, *Concurring Opinion of Ad Hoc Judge Eduardo Ferrer Mac-Gregor Poisot Regarding the Judgement of the IACtHR in the Case of Cabrera Garcia and Montiel Flores v. Mexico*. November 26, 2010, para. 69

43. For purposes of the issues presented in the case at hand, the Court in *Atala Riffo* clarified this doctrine as follows:

based on the treaty control mechanism, legal and administrative interpretations and proper judicial guarantees should be applied in accordance with the principles established in the jurisprudence of this Court in [*Atala Riffo*]. This is of particular importance in relation to sexual orientation as one of the prohibited categories of discrimination pursuant to Article 1(1) of the American Convention.⁹⁰

Accordingly, each State Party has a duty to modify its domestic legislation to give effect to the ACHR, and judicial and administrative authorities have the duty to interpret domestic norms in light of the ACHR and of the Court's jurisprudence. Pursuant to *Atala Riffo*, this conventionality control test requires the elimination of norms that discriminate on the basis of sexual orientation and gender identity, and it requires the interpretation of such norms in light of the ACHR. In the next section, we will apply these criteria to the facts of Mr. Duque's case.

ii. Colombia did not comply with its Article 2 ACHR obligations, since Colombia's domestic laws and their application by judicial authorities discriminated against Mr. Duque because of his sexual orientation.

44. *Atala Riffo* requires States Parties to “take affirmative measures to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons.”⁹¹ Here, as mentioned above, domestic laws prevented Mr. Duque from proving a *de facto* marital union with his same-sex partner, which he needed to do to receive his partner's

⁹⁰ IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations, and Costs*. Judgment of February 24, 2012. Series C No. 239, para. 284.

⁹¹ IACtHR, *Case of Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs*. Judgment of February 24, 2012. Series C No. 239. para. 80. *See also*, the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, p. 19, 2006 (States shall “take all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation ... , to social security and other social protection measures, including ... pensions and benefits with regard to the loss of support for spouses or partners as the result of illness or death.”).

pension as a surviving beneficiary.⁹² Domestic law allowed couples of the opposite sex to prove their *de facto* marital union for purposes of receiving survivor pension benefits.⁹³ That is, domestic laws discriminated against Mr. Duque because of his sexual orientation.

45. Pursuant to Articles 1(1) and 2 ACHR, Colombia had a duty to modify its domestic legislation to ensure the full enjoyment of the rights recognized under the ACHR without discrimination. This obligation arose from the moment the ACHR came into effect in Colombia in 1973.⁹⁴ Therefore, such discriminatory laws *per se* constitute a lack of compliance of Colombia's obligation to give domestic effect to the ACHR, even had they not been applied in this specific case.⁹⁵

46. Furthermore, because said laws were applied in Mr. Duque's case, the doctrine of conventionality control required domestic judicial authorities to declare *ex officio* the incompatibility between those discriminatory laws and Articles 1(1) and 2 ACHR.⁹⁶ Here, the

⁹² Law 100 Arts. 47; 74, 1993, DIARIO OFICIAL [D.O.] (Colom.); *See also* IACHR, *Ángel Alberto Duque v. Colombia*, Merits Report No. 5/14. April 2, 2014, para. 11.

⁹³ *See* Law 54, Art. 1 (1990), which defines a *de facto* marital union as “the union between a man and a woman who, without being married, enter into a permanent and exclusive community”; and Law 1889, Art. 10 (1993), which provides that “[f]or purposes of the enrollee's survivor's pension, the permanent partner shall be the last person of the opposite sex to the enrollee, who has lived in marital union with him or her [...]”. *See also* IACHR, *Ángel Alberto Duque v. Colombia*, Merits Report No. 5/14. April 2, 2014, para. 11.

⁹⁴ IACtHR, *Case of Vélez Restrepo and Family v. Colombia. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 3, 2012. Series C No. 248, para. 241. (noting that “the guarantee that violations of human rights [. . .] are investigated by a competent court is embodied in the American Convention and is not the result of its application and interpretation by this Court in the exercise of its contentious jurisdiction; thus it must be respected by the States Parties from the moment they ratify the said treaty.”).

⁹⁵ IACtHR, *Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, para. 98. *See also* IACtHR, *Case of Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 106; IACtHR, *Case of La Cantuta v. Perú. Merits, Reparations and Costs*. Judgment of November 29, 2006. Series C No. 162, para. 174; IACtHR, *Case of Barrios Altos v. Perú. Interpretation of the Judgment of the Merits*. Judgment of September 3, 2001. Series C No. 83, para. 18 and second point of resolution.

⁹⁶ *See* IACtHR, *Case of Cabrera Garcia and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 26, 2010. Series C No. 220, para 225; IACtHR, *Case of Almonacid Arellano v. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 124, and IACtHR, *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, para. 128.

Colombian judicial authorities that ruled on Mr. Duque's *acción de tutela* in 2002 did not carry out an effective and *ex officio* conventionality control of these laws when Mr. Duque complained about their discriminatory nature and impact on him.⁹⁷

47. Domestic authorities failed to do so even though the Colombian Constitutional Court had been addressing the unconstitutionality of discrimination based on sexual orientation since 1996⁹⁸ (the same year the Supreme Court of the United States issued *Romer v. Evans*⁹⁹). It was not until 2008 that the judiciary carried out an effective conventionality control of these laws, when the Colombian Constitutional Court issued judgment C336-08 and recognized the discriminatory nature and effect of that these laws had on same-sex couples.¹⁰⁰ Nevertheless, according to Dr. Rodrigo Uprimny's expert testimony in the hearing before this Court, it is rather unclear whether judgment C336-08 can be retroactively applied to benefit Mr. Duque. In any case, the State's failure to comply with its obligation to carry out an effective conventionality control review in Mr. Duque's specific case, pursuant to Articles 1(1) and 2 ACHR, occurred in 2002, which gives rise to the State's international responsibility from that moment.

48. In light of all of the above, *amici* consider that the Court should declare that all domestic norms in any State Party that either discriminate directly or that have a discriminatory effect on the basis of a person's sexual orientation and gender identity, particularly as they relate to socioeconomic rights like a pension, are *per se* incompatible with Articles 1(1) and 2 ACHR

⁹⁷ IACHR, *Ángel Alberto Duque v. Colombia*, Merits Report No. 5/14. April 2, 2014, paras. 47-50.

⁹⁸ See Expert Witness Testimony of Dr. Rodrigo Uprimny, *Ángel Alberto Duque v. Colombia*, IACtHR 53 Extraordinary Period of Sessions Honduras, August 25, 2015, available at <http://livestream.com/corteidh/events/4294466>. See also Constitutional Court of Colombia, *Judgment C-098 of 1996*, and *Judgment C- 075 of 2007*.

⁹⁹ *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a Colorado constitutional amendment which would have prohibited state and local government from protecting homosexual individuals from discrimination based on sexual orientation).

¹⁰⁰ IACHR, *Ángel Alberto Duque v. Colombia*, Merits Report No. 5/14. April 2, 2014, paras. 51-54.

from the moment in which the treaty enters into force for each State Party, and that the failure to carry out *ex officio* an effective conventionality control review between said discriminatory norms and the ACHR in a given case by any body involved in the State Party's administration of justice gives rise to the international responsibility of that State for its failure to comply with Articles 1(1) and 2 ACHR.

49. In the present case, this Court should find Colombia internationally responsible because the State's judicial authorities did not resolve Mr. Duque's 2002 *acción de tutela* on the basis of the development of international human rights law at that time, nor did they carry out an *ex officio* and progressive interpretation of the right to equal protection under the law guided by the *pro persona* principle, as required by the conventionality control principle, Articles 1(1) and 2 ACHR, and the interpretation criteria found in Article 29 ACHR. Such a finding by this Court would provide useful guidance to all judicial authorities in all States Parties about the scope of their obligations under the ACHR.

iii. The subsidiarity principle reinforces the duty of all judges to apply and interpret the ACHR pursuant to the pro persona principle prior to the submission of a case before the Inter-American Human Rights System.

50. *Amici* observe that the State has argued it has met its international obligations by carrying out a proper conventionality control review of its discriminatory laws in its C336-08 judgment and subsequent jurisprudence from its Constitutional Court, which allegedly provides a remedy (or the possibility of a remedy) for the alleged violations against Mr. Duque, and that the exercise of jurisdiction by this Court under such circumstances would undermine the subsidiarity principle that governs the Inter-American System.¹⁰¹ The State seems to misunderstand the subsidiarity principle, and *amici* agree with Commissioner Tracy Robinson when she indicated

¹⁰¹ Representatives for Colombia, *Ángel Alberto Duque v. Colombia*, IACtHR 53 Extraordinary Period of Sessions Honduras, August 25, 2015, available at <http://livestream.com/corteidh/events/4294466>.

in the public hearing that the principle of subsidiarity does not give the State multiple and indefinite opportunities to comply with the ACHR.¹⁰² In this sense, the Court has stated the following:

The State's responsibility under the Convention can only be required at the international level after the State has had the opportunity to declare the violation and to repair the damage caused by its own means. This is based on the principle of complementarity (subsidiarity), that crosscuts the inter-American human rights system, which – as stated in the Preamble to the American Convention – “reinforce[es] or complement[s] the protection provided by the domestic law of the American States.” Thus, the State “is the main guarantor of the human rights of the individual, so that, if an act that violates the said rights occurs, it is the State itself that has the obligation to decide the matter at the domestic level and, [as appropriate,] to make reparation, before having to respond before international instances, such as the inter-American system, which derives from the subsidiary nature of the international proceedings in relation to the national systems that guarantee human rights.” These ideas have also been incorporated in recent case law based on the opinion that all the authorities and organs of a State Party to the Convention have the obligation to ensure “control of conformity with the Convention.”¹⁰³ (emphasis added and internal citations omitted)

51. That is, the purpose of the subsidiarity principle is to ensure the respect, protection and guarantee of the ACHR domestically so that a victim need not have to submit a case before the Inter-American System. In this sense, the subsidiarity principle actually required the State to do an adequate conventionality control analysis when Mr. Duque submitted his *acción de tutela* in 2002, before the case ever reached the Inter-American Commission.

¹⁰² IACHR Commissioner Tracy Robinson, Rapporteur on the Rights of LGBTI Persons, *Ángel Alberto Duque v. Colombia*, IACtHR 53 Extraordinary Period of Sessions Honduras, August 25, 2015, available at <http://livestream.com/corteidh/events/4294466>.

¹⁰³ IACtHR, *Case of Santo Domingo Massacre v. Colombia. Preliminary Objections, Merits and Reparations*. Judgment of November 30, 2012. Series C No. 259, para. 142 (citing IACtHR, *Case of Acevedo Jaramillo et al. v. Peru. Interpretation of the judgment on preliminary objections, merits, reparations and costs*. Judgment of November 24, 2006, para. 66; IACtHR, *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; IACtHR, *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of November 24, 2010. Series C No. 219, para. 176, and IACtHR, *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 26, 2010. Series C No. 220, para. 225. See also, IACtHR, *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011 Series C No. 221, para. 193).

52. Therefore, contrary to what the State has argued, the following factors indicate that the Court's exercise of jurisdiction in the present case is compatible with the subsidiarity principle: first, the State did not adopt the necessary measures to modify the discriminatory domestic norms that prevented Mr. Duque from obtaining in 2001 his same-sex partner's pension; second, the State's judicial authorities did not carry out an effective conventionality control review when they decided upon Mr. Duque's *acción de tutela* in 2002, and third, Colombia failed to ensure Mr. Duque's full enjoyment of the right to equal protection under the law without discrimination, and it failed to take appropriate measures to remedy the harm before Mr. Duque submitted his petition to the Inter-American Commission in 2005. Any subsequent action by Colombia aimed at providing a remedy in this case can only be considered by the Court in determining adequate forms of reparation for the damage already caused, but may not be considered *per se* by this Court in its analysis of the merits of the case. *Amici* will address this last point in more detail in the next section.

C. The domestic availability of a possible future remedy does not inhibit this Court from exerting jurisdiction in a case already brought before the Commission.

53. Lastly, *amici* observe that the State argued that the Court's exercise of jurisdiction in this case would be contrary to the exhaustion of domestic remedies requirement, since as of 2010 the Colombian Constitutional Court's jurisprudence paved the way for Mr. Duque to claim his pension as a survivor of his same-sex partner, something Mr. Duque has not pursued since his *acción de tutela* was rejected in 2002. During the public hearing in this case, Judges Ventura Robles and Vio Grossi expressed some skepticism concerning the State's argument. Therefore, *amici* consider that the Court should reiterate its precedent whereby it clearly establishes that States must provide a remedy for violations of the ACHR before a case is brought before the Commission, and that a subsequent partial remedy does not inhibit this Court from exerting

jurisdiction in such a case.¹⁰⁴ Furthermore, we are of the opinion that the State's position ignores the concept of the integral reparations for human rights violations in the Inter-American System.

54. In the *Gómez Paquiyauri Brothers v. Peru* case, this Court declared that the jurisdiction of the organs of the Inter-American Human Rights System is determined at the moment in which a petition is submitted before the Commission, so long as the facts that gave rise to the alleged violations had already occurred.¹⁰⁵ Under such circumstances, the Court held that

the international responsibility of the State arises immediately when the internationally illegal act attributed to it is committed, although it can only be demanded once the State has had the opportunity to correct it by its own means. Possible subsequent reparation under domestic legal venue does not inhibit the Commission or the Court from hearing the case that has already begun under the American Convention. Therefore, the Court cannot accept the position of the State that it duly investigated, to find that the State has not violated the Convention.¹⁰⁶

55. In making its own determinations on reparations, this Court may take into consideration and give proper weight to any actions taken by the State after the submission of the case before the Commission aimed at providing a remedy for the harm caused, but the Court is still able to analyze the merits of the case. In this regard, the Court has held:

when national mechanisms exist to determine forms of reparations, these procedures and results can be assessed. If these mechanisms do not satisfy criteria of objectivity, reasonableness and effectiveness to make adequate reparation for the violations of rights recognized in the Convention that have been declared by this Court, it is for the Court, in exercise of its subsidiary and complementary competence, to order the pertinent reparations.¹⁰⁷ (internal citations omitted)

¹⁰⁴ IACtHR, *Case of the Gomez-Paquiyauri Brothers v. Peru. Merits, Reparations and Costs*. Judgment of July 8, 2004. Series C No. 110, para. 75.

¹⁰⁵ IACtHR, *Case of the Gomez-Paquiyauri Brothers v. Peru. Merits, Reparations and Costs*. Judgment of July 8, 2004. Series C No. 110, para. 75.

¹⁰⁶ IACtHR, *Case of the Gomez-Paquiyauri Brothers v. Peru. Merits, Reparations and Costs*. Judgment of July 8, 2004. Series C No. 110, para. 75.

¹⁰⁷ IACtHR, *Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 26, 2010. Series C No. 213, para. 246.

56. In this case, the violation of the right to equal protection under the law without discrimination, as well as the failure to comply with the duty to give domestic legal effect to the ACHR, all took place before the submission of the case to the Commission. It was precisely the rejection of Mr. Duque's 2002 *acción de tutela* by the Constitutional Court of Colombia that motivated him to present his case before the Inter-American System in 2005. Six years later, in 2008, the Constitutional Court of Colombia determined that the domestic norms that prevented Mr. Duque from receiving his partner's pension were unconstitutional, but since this 2008 judgment did not specify that it could be retroactively applied, Mr. Duque did not benefit from it.¹⁰⁸ In 2011, the Constitutional Court issued a judgment in another *acción de tutela* declaring that the 2008 judgment could be applied retroactively, but according to expert witness Dr. Rodrigo Uprimny, given the *inter partes* nature of an *acción de tutela*, it is not clear whether the 2011 decision can be considered a binding precedent that would allow Mr. Duque to benefit from it. Therefore, it is not altogether true that the State has provided Mr. Duque with an effective remedy (or the possibility of an effective remedy). Even if the State were to specifically recognize Mr. Duque's right to a pension, this fact on its own could not be considered an integral form of reparation for the harms already caused, which would include monetary compensation for moral suffering, as well as measures of satisfaction and guarantees of non repetition.¹⁰⁹

57. Therefore, we are of the opinion that this Court can properly exercise jurisdiction over this case and issue a judgment on the merits, given that the facts that gave rise to the alleged violations took place before Mr. Duque submitted his case to the Commission, and given that the

¹⁰⁸ Constitutional Court of Colombia, Judgment C-336/08, 16 April 2008 (MP. Clara Inés Vargas Hernández).

¹⁰⁹ The Court has consistently indicated in its jurisprudence that “[r]eparations are measures tending to eliminate the effects of the violations committed. Their nature and amount depend on the characteristics of the violation and on both the pecuniary and non pecuniary damage caused.” See, *inter alia*, IACtHR, *Case of Acevedo Jaramillo et al. v. Perú. Preliminary Objections, Merits, Reparations and Costs*. Judgment of February 7, 2006. Series C No. 144, para. 297.

possible availability of a domestic mechanism by which Mr. Duque could reclaim his right to a pension does not, *per se*, constitute an integral form of reparation for the harms already caused.

IV. CONCLUSION

58. The Court has an opportunity in the present case to clarify the scope of the right under the ACHR to equal treatment under the law and to not be discriminated against on the basis of one's sexual orientation and gender identity, such that it incorporates same-sex partners' survivor pension rights. Furthermore, the Court has the opportunity to highlight the importance and the scope of the duty of domestic authorities to apply a conventionality control, and to determine the scope of the Court's jurisdiction in cases in which the State has taken steps aimed at providing a partial form of reparation for the alleged human rights violations in a case already brought before the Inter-American Human Rights System.

59. Therefore, *amici* invite the Court to declare that the right to equal protection under the law without discrimination (Article 24 ACHR, in relation to Article 1(1) thereof) requires States Parties to recognize the right to a pension of the survivor of a same-sex couple in the same conditions as such right may be recognized for heterosexual couples. Furthermore, we invite the Court to emphasize that all organs of every State Party have an obligation to respect, protect, and guarantee the right to be free from discrimination on the basis of sexual orientation and gender identity, which includes the obligation to adapt its norms to give domestic legal effect to the ACHR and to the jurisprudence of the Court, as well as the obligation of all judges to interpret *ex officio* the right to equal protection under the law without discrimination and apply the *pro persona* principle, pursuant to the doctrine of conventionality control, Articles 1(1) and 2 ACHR, and the interpretation criteria mentioned in Article 29 ACHR. Lastly, *amici* are of the opinion that the Court can exert jurisdiction over the merits of this case, and that the possible availability

NOTE: THE ORIGINAL AND AUTHENITC VERSION OF THIS BRIEF WAS SUBMITTED IN SPANISH

of partial domestic remedies developed after the case was submitted before the Inter-American System does not prevent the Court from hearing the merits of the case where the facts that gave rise to the violations had already taken place, and that such possible partial remedies may not be considered to provide an integral reparation of the damages already caused. A judgment from the Court that addresses the issues raised in this brief would have an impact beyond the particular case of Mr. Duque and would contribute to the elimination and prevention of discrimination on the grounds of sexual orientation and gender identity in all States Parties.



Presentado el 8 de Septiembre de 2015 por la Clínica de Derechos Humanos de la Facultad de Derecho de la Universidad de Santa Clara

Prof. Francisco J. Rivera Juaristi
Director y Abogado Supervisor

Ex Abogado *Senior* de la Corte Interamericana de Derechos Humanos

Britton Schwartz
Abogada Supervisora

Erica Sutter
Estudiante

Allison Pruitt
Estudiante

Forest Miles
Estudiante