**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[[1]](#footnote-1) on the Advisory Opinion indicated above[[2]](#footnote-2) 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.[[3]](#footnote-3) These explanations endeavor to facilitate the understanding of both the answers provided to the “specific questions”[[4]](#footnote-4) raised by Costa Rica[[5]](#footnote-5) 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 Court of Human Rights[[6]](#footnote-6) 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.[[7]](#footnote-7)
3. **PRELIMINARY CONSIDERATIONS**
4. **GENERAL OBSERVATIONS**
5. 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.
6. It also appears necessary to recall that the Court exercises its jurisdiction, both contentious[[8]](#footnote-8) and advisory,[[9]](#footnote-9) 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,[[10]](#footnote-10) creates it.
7. 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,[[11]](#footnote-11) the Charter of the Organization of American States,[[12]](#footnote-12) and also the Convention, although indirectly.[[13]](#footnote-13)
8. 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[[14]](#footnote-14) 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.[[15]](#footnote-15) 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.
9. 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[[16]](#footnote-16) and in the case of the Convention, the States Parties.[[17]](#footnote-17)
10. 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.
11. 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.
12. This text is based on the conviction that the Court’s function in the exercise of its advisory and non-contentious competence is solely,[[18]](#footnote-18) either “to interpret” the Convention or other human rights treaties or to determine the “compatibility” of a domestic law with such instruments[[19]](#footnote-19) 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,[[20]](#footnote-20) so that it is not appropriate that it order the adoption of any conduct.
13. 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”[[21]](#footnote-21) of the Convention to decide a dispute, and in which its decision is binding for the State Party to the respective case.[[22]](#footnote-22) 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.”[[23]](#footnote-23)
14. 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 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.
15. 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*.*[[24]](#footnote-24) This is precisely what is asserted in OC-24, reiterating what has been maintained on other occasions[[25]](#footnote-25) 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(l)) 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*.*”[[26]](#footnote-26)

1. 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.
2. 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.
3. 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**

1. In the specific case of OC-24, it should be indicated that the purpose of the request related to “recognition of the change of namein 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”[[27]](#footnote-27) submitted pursuant to the provisions of Article 70(1) of the recently cited Rules of Procedure,[[28]](#footnote-28) and from the purpose of the answers requested from the Court.[[29]](#footnote-29)
2. 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 LGTBI persons, and this is done citing the provisions of Article 1(1) of the Convention.[[30]](#footnote-30)
3. 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.[[31]](#footnote-31)
4. Ultimately, therefore, the provisions of Article 1(1) of the Convention apply to everyone, among whom, undoubtedly and unquestionably, it should be understood that LGTBI persons are included.
5. Accordingly, to understand fully the significance of the said article, it appears necessary to clarify, insofar as possible, the concept of discrimination.
6. The Court has adopted[[32]](#footnote-32) 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.
7. 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*.”[[33]](#footnote-33) [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.
8. 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[[34]](#footnote-34) or other women,[[35]](#footnote-35) affecting the recognition or enjoyment of their human rights, this would be discrimination.
9. 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”;[[36]](#footnote-36) 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.*”*[[37]](#footnote-37)

1. 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.”
2. 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,”[[38]](#footnote-38)and this is ratified by OC-24.[[39]](#footnote-39)
3. 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,[[40]](#footnote-40) particularly when it does not alter the opinion that the Court had expressed previously.[[41]](#footnote-41)
4. 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.
5. 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.
6. Bearing the above in mind and considering the provisions in the Court’s Rules of Procedure in this matter,[[42]](#footnote-42) this text indicates how the author understands the answers given in OC-24 to the “specific questions” raised, which the Court did not alter.[[43]](#footnote-43)
7. **THE QUESTIONS RAISED**
8. The request being examined contained five “specific questions.”
9. **NAME CHANGE**
10. The first “specific question” was worded as follows:

*“*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)[[44]](#footnote-44) 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?”

1. And the Court was asked to rule on this “specific question”:

*“*[T]he protection provided by Articles 11(2) and 24[[45]](#footnote-45) 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.”

1. 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.[[46]](#footnote-46)
2. 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.
3. 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.
4. 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.
5. 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”[[47]](#footnote-47) that it has provided for this purpose.
6. 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[[48]](#footnote-48) as regards the rights to a name, personal integrity, protection of honor and dignity, and equality before the law.
7. 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.
8. 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.
9. 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.
10. 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.[[49]](#footnote-49)
11. 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.
12. 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.
13. It is on these grounds that the undersigned concurs with the second decision[[50]](#footnote-50) of OC-24.
14. **PROCEDURE**
15. 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?”

1. 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.”

1. 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.[[51]](#footnote-51) It also does so when answering the above “specific question”;[[52]](#footnote-52) nevertheless, after referring to the essential requirements for this procedure, it concludes by expressing preference for the administrative path.[[53]](#footnote-53)
2. 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)[[54]](#footnote-54) and 25(1)[[55]](#footnote-55) of the Convention.
3. 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.
4. 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.*”*
5. 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,[[56]](#footnote-56) 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.
6. Based on the foregoing, the undersigned concurs in approving the third decision[[57]](#footnote-57) of OC-24.
7. **ADMINISTRATIVE PROCEDURE**
8. 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?”

1. 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.”

1. 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 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.
2. 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[[58]](#footnote-58) and that, pursuant to the State’s case law, the Court’s jurisprudence “shall – in principle – have the same status as the interpreted provision,”[[59]](#footnote-59) 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.
3. 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.[[60]](#footnote-60)
4. 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.
5. It is on this basis that the undersigned concurs with the approval of the fourth[[61]](#footnote-61) and fifth[[62]](#footnote-62) decision of OC-24.
6. **PATRIMONIAL RIGHTS**
7. 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?”

1. 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.”

1. 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.
2. 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.[[63]](#footnote-63) Of the 34 Member States of the OAS, only eight of them regulate cohabitation unions, civil unions or *de facto* unions.
3. 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[[64]](#footnote-64) 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.
4. 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 or customary law or a general principle of law in force for the OAS Member States.[[65]](#footnote-65) 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.
5. And, regarding jurisprudence, there is only the judgment handed down in the Atala case.[[66]](#footnote-66) 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.
6. 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.[[67]](#footnote-67)
7. 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.
8. 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.
9. 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,[[68]](#footnote-68) while paragraph 2 recognizes the right to marry and to raise a family.[[69]](#footnote-69) Meanwhile, Article 19[[70]](#footnote-70) refers to the family and not to marriage.
10. 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.
11. 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[[71]](#footnote-71) and 7th[[72]](#footnote-72) decisions of OC-24.
12. **LEGAL MECHANISM**
13. 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?”

1. 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.”

1. 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.
2. 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.[[73]](#footnote-73) Indeed, both the response provided by OC-24[[74]](#footnote-74) and the eighth decision,[[75]](#footnote-75) 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.
3. Thus, basically, the matter in hand relates to the interpretation of Article 17(2) of the Convention.[[76]](#footnote-76)
4. 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.
5. 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.
6. 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.
7. That said, it should be pointed out that OC-24 prescinds of the application of Article 31[[77]](#footnote-77) 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.
8. 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 20th 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*”[[78]](#footnote-78) [Marriage: Union of men and women, celebrated by certain rites or legal formalities].
9. 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,”[[79]](#footnote-79) in Article 17(2) it refers to “[t]he right of men and women of marriageable age to marry.”
10. 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.”
11. 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.*”*
12. 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.[[80]](#footnote-80) 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.
13. 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 Human Rights[[81]](#footnote-81) and the 1966 International Covenant on Civil and Political Rights[[82]](#footnote-82) refer to “men” and “women.”
14. 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.[[83]](#footnote-83)
15. 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[[84]](#footnote-84) cannot be forced on the OAS Member States.
16. The OC-24 also appears to assert the binding nature of marriage between same-sex couples based on an evolutive interpretation,[[85]](#footnote-85) 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.”[[86]](#footnote-86)
17. 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.
18. 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 object and purpose of the treaty, rules that should be employed harmoniously, without favoring or downplaying any one of them.
19. 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,”[[87]](#footnote-87) 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.
20. 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”[[88]](#footnote-88) 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.
21. 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.
22. 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[[89]](#footnote-89) and for compliance with the obligation of non-repetition, if such an act has already taken place.[[90]](#footnote-90)
23. 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.”*[[91]](#footnote-91)*
24. 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.

1. 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.
2. 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,[[92]](#footnote-92) and freedom of thought and expression.[[93]](#footnote-93) 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*.
3. 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.[[94]](#footnote-94)
4. 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.”
5. 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.”
6. 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.
7. 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.

1. 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.
2. Based on the above, the undersigned is unable to agree with the eighth decision[[95]](#footnote-95) of OC-24.
3. **CONTROL OF CONVENTIONALITY**
4. 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.
5. **BACKGROUND INFORMATION**
6. **Jurisprudence**
7. On numerous occasions the Court has referred to the control of conventionality[[96]](#footnote-96) and, thus, has gradually clarified the terms of this mechanism arising from its obligation to protect rights. However, it was in an order on monitoring compliance with judgment that it went into greater detail on the issue,[[97]](#footnote-97) 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.”[[98]](#footnote-98)

1. 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.”[[99]](#footnote-99)

1. **Concept**
2. 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[[100]](#footnote-100) or, as it is known in other latitudes, the margin of appreciation,[[101]](#footnote-101) subsists as a central element of the international legal 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.
3. 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.
4. **PRIOR CONTROL OF CONVENTIONALITY BY THE STATE**
5. **Rationale**
6. 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.
7. 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.
8. 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.
9. 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[[102]](#footnote-102) and according to the interpretation of the Constitution made by their highest courts, either a“legal” status,[[103]](#footnote-103) that is the same status as their laws, or an “infra-constitutional” or “supralegal” status*”;*[[104]](#footnote-104)in other words, they are above the law but below the Constitution Meanwhile other Constitutions grant norms on human rights a “constitutional”[[105]](#footnote-105)andeven a “supra-constitutional” status.[[106]](#footnote-106)
10. 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.
11. 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,[[107]](#footnote-107) 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.
12. 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.
13. **Jurisprudence**
14. 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.”[[108]](#footnote-108)

1. 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.”
2. 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.
3. 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”[[109]](#footnote-109) 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.”[[110]](#footnote-110) However, it has not indicated how that objective should be achieved.
4. 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.
5. 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.
6. **Comments**
7. 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.
8. 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.
9. 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.
10. 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.
11. 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**

1. **Preliminary consideration**
2. 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.[[111]](#footnote-111) 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,*[[112]](#footnote-112) 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.
3. 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.
4. 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.
5. 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.
6. **Applicable provisions**
7. Taking the above into account, it can be said that the control of conventionality by the Court is founded on the following international norms:
8. **Vienna Convention on the Law of Treaties**
9. The provisions of the Vienna Convention on the Law of Treaties on which the control of conventionality exercised by the Court if based are, above all, Article 26, which embodies the *pacta sunt servanda* principle,[[113]](#footnote-113) the first phrase of Article 27, which establishes that parties may not invoke internal law as justification for failure to comply with their obligations,[[114]](#footnote-114) 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.[[115]](#footnote-115)
10. Therefore, pursuant to the Vienna Convention, which also codifies the customary law applicable to treaties between States,[[116]](#footnote-116) 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**

1. 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.[[117]](#footnote-117) These articles establish that every internationally wrongful act entails responsibility for the respective State;[[118]](#footnote-118) that the wrongful act consists of an action or omission attributable to the State and that violates an international obligation under international law,[[119]](#footnote-119) regardless of the provisions of its domestic law,[[120]](#footnote-120) and that the State is responsible for any conduct of any of its organs.[[121]](#footnote-121)
2. 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**

1. 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,[[122]](#footnote-122) and their obligation to adopt the necessary measures to give effect to such rights.[[123]](#footnote-123)
2. 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.
3. **Control of conventionality and advisory and non-contentious jurisdiction**
4. **Advisory and non-contentious jurisdiction**
5. According to Article 64 of the Convention,[[124]](#footnote-124) 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.
6. 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.
7. The main organs of the OAS listed in Chapter X of its Charter may also request an advisory opinion from the Court.[[125]](#footnote-125)
8. 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.[[126]](#footnote-126)
9. The foregoing explains the relevance of advisory opinions, even though, as their name indicates, they are not binding,[[127]](#footnote-127) 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.
10. 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.
11. **Jurisprudence**
12. 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.”[[128]](#footnote-128)

1. 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.”[[129]](#footnote-129)

1. **Comments**
2. 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.
3. 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.
4. **Control of conventionality and the contentious jurisdiction**
5. **Applicable provisions**
6. In relation to the control of conventionality exercised in the sphere of the Court’s contentious jurisdiction,[[130]](#footnote-130) the applicable provisions refer to the content of the judgment it delivers;[[131]](#footnote-131) they confirm its status as *res judicata*,[[132]](#footnote-132) declare its binding nature for the State party to the respective case[[133]](#footnote-133) and establish what will happen if the ruling is not complied with.[[134]](#footnote-134)
7. **Contentious jurisdiction**
8. 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.
9. 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,[[135]](#footnote-135) which is revealed by compliance with the prior exhaustion of domestic remedies[[136]](#footnote-136) or, in other words, when the respective State has had the opportunity to exercise its own control of conventionality.
10. **Jurisprudence**
11. 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 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.*”*[[137]](#footnote-137)

1. **Comments**
2. 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,[[138]](#footnote-138) or to ensure that the domestic norm “does not continue to represent an obstacle to the continuation of the investigations,”[[139]](#footnote-139) or that it “should amend its domestic laws,”[[140]](#footnote-140) 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.”[[141]](#footnote-141)
3. 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.
4. 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;[[142]](#footnote-142) in other words, as an agreement between States under which they contract obligations that can be enforced among them.[[143]](#footnote-143) These include allowing “any person or group of persons or any non-governmental entity”[[144]](#footnote-144) to initiate proceedings that may, ultimately, lead to the intervention of the international organs established in the Convention[[145]](#footnote-145) and, in the case of the Court, because this is requested by any State or the Commission.[[146]](#footnote-146)
5. 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.
6. 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.
7. 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.[[147]](#footnote-147) It should be recalled that the Court’s judgments 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.
8. In addition, and pursuant to Article 68 of the Convention,[[148]](#footnote-148) 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.[[149]](#footnote-149) 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,[[150]](#footnote-150) which could only be binding for that State.
9. 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.[[151]](#footnote-151)
10. 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.[[152]](#footnote-152)
11. 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,[[153]](#footnote-153) compliance with the judgment could return to or continue in the domestic sphere.
12. 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.
13. 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.
14. 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*.*”[[154]](#footnote-154) 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 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.[[155]](#footnote-155)

**CONCLUSION**

1. 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.
2. 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.
3. 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.
4. 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.
5. 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.
6. 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.[[156]](#footnote-156) Therefore, it would not be the most appropriate way forward that the jurisdictional function[[157]](#footnote-157) replace the normative function expressly assigned by the Convention to the States Parties[[158]](#footnote-158) in matters concerning such profound changes as those mentioned.

Eduardo Vio Grossi

Judge

Pablo Saavedra Alessandri

 Secretary

1. 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. [↑](#footnote-ref-1)
2. 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. [↑](#footnote-ref-2)
3. “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. [↑](#footnote-ref-3)
4. 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; …” [↑](#footnote-ref-4)
5. Hereinafter, the State. [↑](#footnote-ref-5)
6. Hereinafter, the Court. [↑](#footnote-ref-6)
7. 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. [↑](#footnote-ref-7)
8. 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*.”* [↑](#footnote-ref-8)
9. 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.” [↑](#footnote-ref-9)
10. 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. [↑](#footnote-ref-10)
11. 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 settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” [↑](#footnote-ref-11)
12. 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.*”* [↑](#footnote-ref-12)
13. 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.” [↑](#footnote-ref-13)
14. “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 Nº 4 P. 24. [↑](#footnote-ref-14)
15. 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.” [↑](#footnote-ref-15)
16. 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.” [↑](#footnote-ref-16)
17. 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.”

 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.” [↑](#footnote-ref-17)
18. 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.” [↑](#footnote-ref-18)
19. Footnote 9. [↑](#footnote-ref-19)
20. Hereinafter, the OAS. [↑](#footnote-ref-20)
21. Footnote 8. [↑](#footnote-ref-21)
22. 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.” [↑](#footnote-ref-22)
23. 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.” [↑](#footnote-ref-23)
24. 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.* Judgmentof November 23, 2017 [↑](#footnote-ref-24)
25. Para. 31 OC-21. [↑](#footnote-ref-25)
26. 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.* Judgmentof November 23, 2017. [↑](#footnote-ref-26)
27. *“*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?”

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?” [↑](#footnote-ref-27)
28. “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. [↑](#footnote-ref-28)
29. 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, 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.” [↑](#footnote-ref-29)
30. *“*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.*”* [↑](#footnote-ref-30)
31. *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]. [↑](#footnote-ref-31)
32. “[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. [↑](#footnote-ref-32)
33. 23rd edition online. [↑](#footnote-ref-33)
34. 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. [↑](#footnote-ref-34)
35. 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.” [↑](#footnote-ref-35)
36. OC-4/84 *cit*. para. 56. [↑](#footnote-ref-36)
37. *Idem*, para. 57. [↑](#footnote-ref-37)
38. Para. 2. [↑](#footnote-ref-38)
39. Para. 78. [↑](#footnote-ref-39)
40. Part VI: The right to equality and non-discrimination of LGTBI persons, B. Sexual orientation, gender identity and gender expression as categories protected by Article 1(1) of the Convention, paras. 68 to 80. [↑](#footnote-ref-40)
41. *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. [↑](#footnote-ref-41)
42. 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.*”* [↑](#footnote-ref-42)
43. Para. 29. [↑](#footnote-ref-43)
44. *“*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*.”* [↑](#footnote-ref-44)
45. Right to Equal Protection: All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.” [↑](#footnote-ref-45)
46. “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.” [↑](#footnote-ref-46)
47. Para. 116. [↑](#footnote-ref-47)
48. 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 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. [↑](#footnote-ref-48)
49. “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. [↑](#footnote-ref-49)
50. “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.” [↑](#footnote-ref-50)
51. “… 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. [↑](#footnote-ref-51)
52. “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. [↑](#footnote-ref-52)
53. *“*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. [↑](#footnote-ref-53)
54. “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.” [↑](#footnote-ref-54)
55. *“*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*.”* [↑](#footnote-ref-55)
56. *Case of Claude Reyes et al. v. Chile,* Judgment of September 19, 2006, Series C No. 151, paras. 118 and 119. [↑](#footnote-ref-56)
57. “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.” [↑](#footnote-ref-57)
58. 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.” [↑](#footnote-ref-58)
59. Judgment 0421-S-90 of the Constitutional Chamber of the Supreme Court of Justice of the State. [↑](#footnote-ref-59)
60. “… 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. [↑](#footnote-ref-60)
61. *“*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.” [↑](#footnote-ref-61)
62. “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.” [↑](#footnote-ref-62)
63. Paras. 206 to 213. [↑](#footnote-ref-63)
64. 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. [↑](#footnote-ref-64)
65. 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. [↑](#footnote-ref-65)
66. *Supra* No. 41. [↑](#footnote-ref-66)
67. 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, [↑](#footnote-ref-67)
68. “The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.” [↑](#footnote-ref-68)
69. “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.” [↑](#footnote-ref-69)
70. “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.” [↑](#footnote-ref-70)
71. “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.” [↑](#footnote-ref-71)
72. “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.” [↑](#footnote-ref-72)
73. Paras. 218 to 227. [↑](#footnote-ref-73)
74. *“*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. [↑](#footnote-ref-74)
75. *Supra* footnote 3. [↑](#footnote-ref-75)
76. “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.” [↑](#footnote-ref-76)
77. *“*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.” [↑](#footnote-ref-77)
78. 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.] [↑](#footnote-ref-78)
79. 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. [↑](#footnote-ref-79)
80. Paras. 206 to 213. [↑](#footnote-ref-80)
81. 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.*”* [↑](#footnote-ref-81)
82. Art. 23(2): *“*The right of men and women of marriageable age to marry and to found a family shall be recognized.” [↑](#footnote-ref-82)
83. *Supra* paras. 66 to 69. [↑](#footnote-ref-83)
84. Paras. 203 to 205. [↑](#footnote-ref-84)
85. Para. 187. [↑](#footnote-ref-85)
86. 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. [↑](#footnote-ref-86)
87. Para. 182. [↑](#footnote-ref-87)
88. Para. 188. [↑](#footnote-ref-88)
89. 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*.”*  [↑](#footnote-ref-89)
90. 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.” [↑](#footnote-ref-90)
91. Para. 223. [↑](#footnote-ref-91)
92. 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.” [↑](#footnote-ref-92)
93. 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.” [↑](#footnote-ref-93)
94. Paras. 223 to 226. [↑](#footnote-ref-94)
95. *Supra* footnote 3. [↑](#footnote-ref-95)
96. 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, 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.* Judgmentof 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.* Judgmentof January 30, 2014, Series C No. 276*; Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs.* Judgmentof May 29, 2014, Series C No. 279*; Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgmentof August 29, 2014, Series C No. 282, *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs.* Judgmentof October 14, 2014, Series C No. 285*;* ***Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgmentof February 29, 2016. Series C No. 312*; Case of Tenorio Roca et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgmentof June 22, 2016. Series C No. 314;***Case of Andrade Salmón v. Bolivia. Merits, reparations and costs.* Judgmentof 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.** [↑](#footnote-ref-96)
97. *Case of Gelman v. Uruguay. Monitoring compliance with judgment*. Order of the Inter-American Court of Human Rights of March 20, 2013. [↑](#footnote-ref-97)
98. *Idem*, Para. 65. [↑](#footnote-ref-98)
99. *Idem,* Para. 67. [↑](#footnote-ref-99)
100. *Supra* footnote 14. [↑](#footnote-ref-100)
101. *Supra* footnote 15. [↑](#footnote-ref-101)
102. The references below refer to articles in the Constitution of the respective States. [↑](#footnote-ref-102)
103. Barbados, Preamble and art 1; Trinidad and Tobago, art.2. [↑](#footnote-ref-103)
104. 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. [↑](#footnote-ref-104)
105. 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). [↑](#footnote-ref-105)
106. Bolivia, art. 257.I. and II., and Costa Rica, art. 7. [↑](#footnote-ref-106)
107. *Infra*, paras. 139 and 140. [↑](#footnote-ref-107)
108. *Case of Gelman v. Uruguay. Monitoring compliance with judgment*. Order of the Inter-American Court of Human Rights of March 20, 2013, para. 56. [↑](#footnote-ref-108)
109. *Idem,* para. 66. [↑](#footnote-ref-109)
110. *Idem*. [↑](#footnote-ref-110)
111. *Supra,* footnote 10. [↑](#footnote-ref-111)
112. 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.” [↑](#footnote-ref-112)
113. “*Pacta sunt servanda,"* Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” [↑](#footnote-ref-113)
114. “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.” [↑](#footnote-ref-114)
115. *Supra* footnote 77. [↑](#footnote-ref-115)
116. Art. 1 of the Vienna Convention on the Law of Treaties: “Scope of the present Convention. The present Convention applies to treaties between States.” [↑](#footnote-ref-116)
117. 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. [↑](#footnote-ref-117)
118. “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.” [↑](#footnote-ref-118)
119. “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.” [↑](#footnote-ref-119)
120. “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.” [↑](#footnote-ref-120)
121. “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.” [↑](#footnote-ref-121)
122. *Supra* footnote 30*.* [↑](#footnote-ref-122)
123. 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.” [↑](#footnote-ref-123)
124. *“*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*.”* [↑](#footnote-ref-124)
125. 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.” [↑](#footnote-ref-125)
126. 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.” [↑](#footnote-ref-126)
127. 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.” [↑](#footnote-ref-127)
128. Para. 23, OC-21. [↑](#footnote-ref-128)
129. Paras. 26 and 27 of the OC. [↑](#footnote-ref-129)
130. *Supra* footnote 8. [↑](#footnote-ref-130)
131. *Supra* footnote 23. [↑](#footnote-ref-131)
132. 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.” [↑](#footnote-ref-132)
133. *Supra* footnote 22. [↑](#footnote-ref-133)
134. 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”. [↑](#footnote-ref-134)
135. 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*.*” [↑](#footnote-ref-135)
136. 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.” [↑](#footnote-ref-136)
137. *Case of Gelman v. Uruguay. Monitoring compliance with judgment*. Order of the Inter-American Court of Human Rights of March 20, 2013, para. 68. [↑](#footnote-ref-137)
138. For example*: Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgmentof August 29, 2014. Series C No. 282. [↑](#footnote-ref-138)
139. 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. [↑](#footnote-ref-139)
140. For example: *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica. Preliminary objections, merits, reparations and costs* Judgmentof November 28, 2012. Series C No. 257. [↑](#footnote-ref-140)
141. For example: *Case of Gelman v. Uruguay. Merits and reparations.* Judgment *of February 24, 2011. Series C No. 221.* [↑](#footnote-ref-141)
142. 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.” [↑](#footnote-ref-142)
143. Art. 1 of the Vienna Convention on the Law of Treaties: “Scope of the present Convention. The present Convention applies to treaties between States.” [↑](#footnote-ref-143)
144. 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.” [↑](#footnote-ref-144)
145. 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." [↑](#footnote-ref-145)
146. Art. 61(1) of the Convention: “Only the States Parties and the Commission shall have the right to submit a case to the Court.” [↑](#footnote-ref-146)
147. 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

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.” [↑](#footnote-ref-147)
148. *Supra* footnote 22. [↑](#footnote-ref-148)
149. 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. [↑](#footnote-ref-149)
150. 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.” [↑](#footnote-ref-150)
151. 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*.”*  [↑](#footnote-ref-151)
152. 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.” [↑](#footnote-ref-152)
153. 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. [↑](#footnote-ref-153)
154. *Supra* footnote 98. [↑](#footnote-ref-154)
155. Annual Report, Inter-American Court of Human Rights, 2016*.* [↑](#footnote-ref-155)
156. *“*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) [↑](#footnote-ref-156)
157. *Supra* footnote 8. [↑](#footnote-ref-157)
158. *Supra* footnotes 16 and 17. [↑](#footnote-ref-158)