INTER-AMERICAN COURT OF HUMAN RIGHTS

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY

STATE OF COSTA RICA, MAY 17, 2016

(ON THE CONTENT OF DISCRIMINATION BASED ON "GENDER IDENTITY")

BRIEF OF *AMICUS CURIAE*

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Preliminary Considerations.

This brief of *Amicus Curiae* is presented by the Center for Family and Human Rights (hereinafter "C-Fam"). It shows that Costa Rica's request for an advisory opinion by the Inter-American Court of Human Rights (hereinafter, the "Court") on the protections and rights that should be granted by state authorities on the basis of an individuals' subjective perception or preference of his or her own "gender identity" is based on false assumptions.

The laws of Costa Rica do not violate the American Convention on Human Rights (hereinafter, the "Convention," or the "American Convention"), nor do they violate any other international human rights obligation. Nothing in the Convention, nor in any other binding provision of international law, can be interpreted or construed so as to require the member states of the Organization of the American States to either recognize the categories of "sexual orientation" and "gender identity" within their laws, or to offer special protections or rights to individuals *based upon them.*

1. The American Convention does not require the state of Costa Rica to legally recognize a change in a person's name based on his or her subjective perception or preference of his or her own "gender identity" ("request (a)").

2. No provision in the Convention can be construed or interpreted so as to demand that national regulations on changes in a person's name based on his or her "gender identity" should be different from the ones presently in force in the state of Costa Rica. Therefore, article 54 of the Civil Code of the Republic of Costa Rica does not violate the Convention ("request (b)").

3. The American Convention does not provide special recognition and protection of patrimonial rights stemming from relations between persons of the same sex ("request (c)"). The Convention protects the rights of the family, the natural and fundamental group unit of society, constituted by the union of a man and a woman who exercise

their fundamental right to marry and found a family, in a singular manner, and similar protections are not prescribed for relations between individuals of the same sex.[1]

The requests presented by the state of Costa Rica are all based on the genuine but false assumption that the Convention prohibits discrimination based upon a person's "sexual orientation." This tenet, grounded on precedents of this Honorable Court, as well as on non-binding and controversial international documents, must be rejected and opposed, since it lacks both legal and scientific bases.

Furthermore, the final request of the state of Costa Rica, regarding the patrimonial rights already enjoyed by same-sex couples, represents a dangerous threat to the rights of the family and the health and wellbeing of children. An affirmative answer from this Honorable Court, one extending the rights that belong to the family to same-sex couples, would constitute a manifest and grave breach of international and of human rights law. Such an opinion would have the effect of nullifying the rights and privileges that international law reserves specifically for the family, which is the natural and fundamental group unit of society, "entitled to protection by society and the state."[2]

The state of Costa Rica, as well as all members of the Inter-American Human Rights' system, enjoy a wide margin of appreciation on the issues at hand.

Social mores are not part of non-derogable obligations of international and human rights law. While state governments must punish all sorts of violence and "discrimination"—where discrimination is properly understood to treat differently, on the basis of prejudice, what should be treated equally, on the basis of substantial equality—regardless of the sexual preferences of the victims and/or the perpetrators, the states remain free to offer additional protections and rights to individuals who identify as homosexual, lesbian, transsexual, transgender, or otherwise (hereinafter "LGBT"),

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[1] "1.The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. 2. 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.3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests. 5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock." *Ibid,* Article 17.

[2] *Ibid*. The same provision, with the same wording, can be found in all major UN Human Rights' treaties. See below, footnote 21.

including by allowing individuals who experience gender dysphoria, or otherwise wish to change their legal documents to reflect their subjective perception or preference for their own sex, but the Court cannot and may not impose such measures as a matter of obligation under the Convention.

- **Legal Bases for submission of an Amicus Curiae.**

C-Fam welcomes the opportunity to offer its contribution to the Inter-American Court of Human Rights, in accordance with article 73.3. of the Court's Rules of Procedures.

Based in New York, and in Washington, D.C., C-Fam is a non-partisan, non-profit research institute founded in the summer of 1997. C-Fam is an NGO holding special consultative status at the Economic and Social Council of the United Nations. It is dedicated to monitoring and affecting the social policy debate at the United Nations and other international institutions, in order to promote goods such as the dignity of the human person, the rights of the family, and the rights of children. C-Fam's personnel have participated in every major UN social policy debate since 1997, including the Rome Statute of the International Criminal Court, the Convention on Disabilities, Cairo+5, and dozens of others.

By means of this submission, it is C-Fam's hope that the Members of this Court will honor their duties as judges, and respect the limits of their mandates and the Court's jurisdiction. It is C-Fam's expectation that, convinced by the compelling arguments presented herein, the Justices will refrain from acting as lawmakers, and will not attempt to create new, special, and unprecedented rights based on the vague and undefined categories of "sexual orientation" and "gender identity."

It is C-Fam's goal to ensure that, in delivering this opinion, the Court will not violate the rights of the family, which are protected by international law; and that it will neither violate, nor otherwise undermine the rights of children, particularly their right to know and be cared for by their mother and father.

I. Introduction. The requests of Costa Rica.

In accordance with paragraphs 1 and 2 of article 64 of the American Convention, and based on the procedure established in Title III of the Rules of Procedure of the Court, the State of Costa Rica has addressed the Judges of the Court to request:

(a) An advisory opinion on the protection provided by articles 11(1), 18, and 24 in relation to Article 1 of the Convention as regards recognition of a change in a person's name based on his or her gender identity;

(b) An Advisory opinion on the compatibility of the practice consisting in applying article 54 of the Civil Code of the Republic of Costa Rica, Law No. 63 of September 28, 1887, to those persons who wish 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) An advisory opinion on the protections provided by Articles 11(2) and 24 in relation to article 1 of the Convention to the recognition of patrimonial rights derived from a relationship between persons of the same sex.

With reference to the grounds of these requests, the state of Costa Rica "acknowledges" that "progress in the recognition of the human rights derived from sexual orientation and gender identity has been uneven."[3] It also implicitly claims that individuals *can be* defined by their sexual orientation, by stating that some countries "have recognized right fully to those who *are* lesbian, gay, bisexual, transgender or intersex."[4] In order to defend these ideas, the State of Costa Rica mentions the decisions of the Court in the cases of *Atala Riffo and daughters v. Chile*[5] and *Duque v. Colombia*,[6] where the Inter-American Court determined that "acts which denigrate individuals owing to both their gender identity and, especially, in these cases, their sexual orientation constituted a category of discrimination protected by the Convention."[7]

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[3] State of Costa Rica Request for an Advisory Opinion, May 17, 2016, Let. B, Considerations on which the request is based, par. 1.

[4] *Ibid.* Emphasis added.

[5] IACtHR (Judgment) 24 February 2012, Atala-Riffo and Daughters v. Chile.

[6] IACtHR, Duque v. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of 26 February 2016. Series C No. 310 (Spanish only).

[7] State of Costa Rica Request, May 17, 2016, *Ibid.*

The State of Costa Rica requested "these advisory opinions because it "still has doubts concerning the content of the prohibition of discrimination based on sexual orientation and gender identity."[8] As mentioned in its request, "an interpretation by the Inter-American Court of the above-mentioned standards would provide crucial input for the State of Costa Rica … it would allow them to adapt domestic law to the Inter-American standards that protect the individual and his or her rights."[9]

The Costa Rican authorities take for granted that "gender identity" is "a category protected by Articles 1 and 24 of the Convention," as well as Articles 11(2) and 18. They ask if this protection also means that the state should not only allow, but also facilitate an individual's change in name. If the answer is affirmative, Costa Rica asks if article 54 of its Civil Code[10] is consistent with international human rights obligation, in that it establishes a procedure to change a person's name in non-contentious jurisdictional proceedings that entail expenses for the applicant and signify a delay.[11]

In its requests, the State of Costa Rica wonders, and even seems to suggest, that, in order not to discriminate, the state should provide "a free, rapid and accessible administrative procedure to exercise" the "human right" consisting in changing one's own name according to his or her gender identity.

Finally, assuming again, as *fait accompli*, that "sexual orientation," as well as "gender identity," are categories that are protected by the Convention, the State of Costa Rica asks if a law that regulates relations between persons of the same sex is required in order for the state to recognize certain patrimonial rights that derive from these kinds of relations. Implied in this question is the idea that relations between individuals of the same-sex should enjoy *the same rights* that the state is bound to afford the family, constituted by the union between a man and a woman who exercise their right to freely marry and found a family.

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[8] *Ibid.*

[9] *Ibid.*

[10] *"Article 54. Every Costa Rican entered in the Civil Registry may change his or her name following the authorization of the court, which shall be obtained by means of the respective non-contentious jurisdictional proceeding."*

[11] This procedure is different, and more costly, than the one at the disposal of individuals who want to change their name *without* changing their sex.

II. Interpreting Article 1 in relation to "Gender Identity."

The principal aim of this submission is to demonstrate that the requests presented by the State of Costa Rica are based on the false assumption that Article 1 of the American Convention prohibits discrimination based on individuals' self-professed "gender identity."

The origin of this idea are to be identified, as the State itself declares, not in the wording of Article 1 itself (which mentions neither "sexual orientation" nor "gender identity"), but on the judicial precedents of this Court, and in particular in the decisions of the cases *Atala Riffo and daughters v.* and *Chile*; *Duque v. Colombia.*

In the *Atala Riffo* case, the Court was asked to examine the legitimacy of a Chilean judicial proceeding that regarded the legal custody of two daughters of a self-identified lesbian woman who was living with her female partner. While the decision on the custody remained unchallenged, and remained attributed to the father of the girls, it was on that occasion that, for the first time, the Court came to the conclusion that "sexual orientation is a category protected by the Convention" and that "no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation."[12]

The breadth and the vagueness of this principle are self-evident. This judgement has been defined as one where "the IACtHR overreaches itself."[13] What is less evident, in fact, though equally undeniable, is that the conclusion of the Court was not and is not based on sound legal grounds. As shown below, the Court could not found its conclusions in existing international law and international human rights' obligations (a), nor could it come to this result by referring to the Inter-American Human Rights' system (b).

In the subsequent case of *Duque v. Colombia*, the Court repeated the same arguments as in the *Atala Riffo* case, to declare the existence, within the Inter-American system, of

[12] IACtHR (Judgment) 24 February 2012, Atala-Riffo and Daughters v. Chile, para 91.

[13] Cfr. Examining Atala-Riffo and Daughters v. Chile, the First Inter-American Case on Sexual Orientation, and Some of its Implications, Paúl, Álvaro, (March 19, 2014). Inter-American and European Human Rights Journal, Vol. 7, Nos. 1-2, 2014 (Protection of Human Rights in the Americas: Selected Essays for the Inter-American Court of Human Rights' Anniversary), pp. 54-74. Available at SSRN: https://ssrn.com/abstract=2539558.

obligations to protect individuals based on their "sexual orientation." In addition, in the second case the Court also mentioned the "Yogyakarta Principles," as well as the national laws of some of the member states of the OAS, as further grounds for prohibiting discrimination based on individuals' sexual orientation. As explained below, neither of these latter references is compelling or even convincing.

a) "Gender Identity" in International Law.

1. International law does not recognize the notion of "sexual orientation and gender identity."

Despite what the Court held in the *Atala Riffo* case, no binding UN treaty mentions the notions of sexual orientation and gender identity, and no UN treaty can be fairly interpreted to include these notions.[14] Also, there is no colorable argument that a customary international norm exists with regard to these notions, since well over 70 countries proscribe homosexual conduct in their penal laws.

To support its conclusion in that case, the Court referenced a good number of declarations and resolutions, all of which, however, are non-binding in nature. Among other controversial UN documents, it mentioned the 2008 "Declaration on human rights, sexual orientation and gender identity."[15] It failed to specify, however, that this was a non-binding statement, and not even a negotiated resolution. It equally failed to mention that this Declaration was only supported by 66 UN member states. It also omitted that only 12 of the 35 member states of the Organization of the American States (OAS) undersigned the statement.

It then referenced statements by the Human Rights Committee and by the Committee on Economic, Social, and Cultural Rights, which classified sexual orientation as one of the

[14] The Vienna Convention on the Law of Treaties ("VCLT") provides a canon to interpret international treaties. According to the VCLT interpretations must be made in "good faith" and on the basis of the "ordinary" meaning of the terms of the treaty and the overall "object and purpose" of the treaty at the time of its negotiation. No UN human rights treaty includes the words "sexual orientation and gender identity" in any form or, as a discussion of the context and drafting histories for the respective treaties will show, could it be interpreted in good faith to convey or imply such a right. Furthermore, during the negotiation of human rights treaties, many states had laws restricting or outlawing sodomy. None had laws recognizing same-sex legal arrangements or recognizing "gender identity" other than biologically determined sex. In light of this, and the fact that still over 76 countries proscribe homosexual conduct, also no customary international law could exists supporting the notion that consensual sex between adults of the same-sex is a protected right or freedom, or that states should promote social acceptance for homosexuality, nor that a person would be able to change their anatomy and legal identity to suit their subjective perception of "gender identity."

[15] Declaration on human rights, sexual orientation and gender identity, UNGA, A/63/635, December 22, 2008.

categories of forbidden discrimination considered in article 2(1) of the International Covenant on Civil and Political Rights[16] and Article 2(2) of the International Covenant on Economic, Social, and Cultural Rights.[17] All the referenced statements, however, are non-binding in nature. Treaty bodies' "evolutionary" and "progressive" interpretations of treaty provisions are recommendations for states, and nothing more. They have no legal value. Treaty bodies lack the power to change, to interpret, or to repeal the laws of sovereign states. Based on their mandates, they can neither increase, nor decrease, nor in any other way modify the provisions that were agreed and ratified by the signatory states, and of which only sovereign states are the final interpreters.

2. There is no consensus among UN member states on the use of the term "sexual orientation and gender identity."

Despite what the Court held, the only times the term has ever appeared in a UN General Assembly resolution has been in a bi-annual resolution on extrajudicial killings.[18] Even then, the resolution could not be adopted by consensus, and a vote was necessary to adopt it. Sexual mores are among the subjects that the UN Charter recognizes as "essentially" the purview of domestic legislation.[19]

3. Not even Human Rights Council resolution 32/2 of 2016 could or did establish any new international obligations with regards to "sexual orientation and gender identity."

UN resolutions are not binding in and of themselves. There is some argument for using UN resolutions as evidence of customary human rights law, although this is a novel and contested notion. However, even in this case, that argument is particularly weak. Resolution 32/2 was adopted by a recorded vote of 23 to 19, with 6 abstentions. In addition, member states have protested the establishment of the mandate, and already have contested it in the General Assembly. Therefore, there is not even a colorable

[16] UN Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992, para. 8.7.
[17] UN Committee on Economic, Social and Cultural Rights, General Comment No. 20 Non-discrimination and economic, social and cultural rights, E/C.12/GC/20, 2 of July of 2009, para. 32.
[18] General Assembly resolution on extrajudicial, summary or arbitrary executions, UN document A/RES/69/182.
[19] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 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").

argument that the resolution can be used as evidence of a new customary norm with regards to sexual orientation and gender identity.

4. States have no obligation to enact laws that give individuals any special benefits or protections on the basis of their sexual preferences and behavior or to sanction an individual's feeling about their gender identity.

All human beings possess the same fundamental rights by virtue of their inherent dignity and worth.[20] Human rights by definition belong to all people because of their humanity. Individuals who identify as LGBT have no special additional human rights beyond those of other citizens by virtue of their perceived sexual orientation and gender identity or their sexual behavior. International law does not protect unfettered sexual autonomy, or sexual conduct between consenting adults other than in the context of marriage between a man and a woman.[21] Accordingly, expressing a sexual preference, engaging in specific kinds of sexual behaviors, or professing a different sexual identity from one's biologically determined sexual identity do not entitle individuals to special legal protections or recognition under international law.

5. Only a small number of countries recognize the notions of sexual orientation and gender identity in their laws at all.

Very few countries in the world have even contemplated the notion of sexual orientation and gender identity in their national and democratic legislative processes.[22]

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[20] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Preamble and Article 1.

[21] The only scope for autonomous sexual choices enshrined in international law is found in the context of the right to freely marry and found a family (UDHR 16, ICCPR 23 and 24, CESCR 10) and the equal right of men and women to decide freely and responsibly on the number and spacing of children (CEDAW 16). The family, in the UDHR 16 and 15, ICCPR 23 and 24, and CESCR 10, is strictly understood as the union of a man and a woman in marriage, and their offspring. The UDHR and ICCPR recognize a right to be free of interference in one's privacy and family (UDHR 17; ICCPR 17). But at the time these instruments were negotiated and adopted by UN member states many countries outlawed sodomy. Many countries also restricted or penalized other forms of sexual conduct between consenting adults, including adultery and fornication, aside from sodomy. Therefore, the right to privacy and family life cannot include the right of consenting adults to engage in any kind of sexual conduct whatsoever, and can only be understood to protect the exercise of the right of men and women to freely marry and found a family.

[22] Information on same-sex marriage is taken from Wardle, Lynn D. and Clark, Elizabeth A and Durham Jr., W Cole and Smith, Robert Theron and Thayer, Donlu, Amicus Brief for 54 International and Comparative Law Experts from 27 Countries and the Marriage and Family Law Research Project (March 30, 2015), U.S. Supreme Court Marriage Cases, U.S. Supreme Court, Nos. 14-556, 14-562, 14-571 & 14-574. Available at SSRN: http://ssrn.com/abstract=2595342. The brief only finds 16 countries with same-sex marriage, but that information excludes developments in the United States, Ireland and Greenland in 2015, that bring the total to 19; Information on other laws is taken from the OHCHR reports on sexual orientation and gender identity, referenced above in note 5, and from *The Guardian*, "Interactive Map,

- *Same-sex Marriage*. Same-sex marriage is only recognized in 19 countries. Only 6 of them are OAS member states.[23]

Out of 13 national high courts to consider whether individuals who identify as LGBT have a right to marry another individual of their same-sex, only Brazil's, Colombia's, and the United States' courts found such a right, and the United States Supreme Court only did so on the basis of a reading of the U.S. Constitution that is widely seen as illegitimate.[24]

- *Homosexual Relationships.* Only 34 countries in the world give any special benefits or protections to relations between individuals of the same sex. Even then, these relations are usually not afforded the same protections and privileges as marriage between a man and a woman. Only in 4 OAS member states are same-sex couples offered most rights attached to marriage.[25]

- *Homosexual Adoption.* Only 26 countries permit homosexual adoption in any form. Only 7 OAS member states permit joint-parents adoption; 4 allow for second-parent adoption.[26]

- *Special LGBT Hate Crimes.* Most countries have criminal laws that apply equally to all. Only 40 countries single out individuals who identify as LGBT for special protection with laws to punish "hate crimes" on top of those that apply equally to all. In the Americas, prohibitions of discrimination based on sexual orientation exist only in Bolivia, Canada, Ecuador, some parts of Argentina, some parts of Brazil, and in Mexico; Other non-discrimination provisions specifying sexual orientation are found in Costa Rica and in the United States.

- *Homosexual Acts.* 72 countries penalize individuals who engage in homosexual acts. 11 of these states are members of the OAS.

Lesbian, gay, bisexual and transgender rights around the world," available at http://www.theguardian.com/world/ng-interactive/2014/may/-sp-gay-rights-world-lesbian-bisexual-transgender. This information excludes later developments.

[23] Argentina, Brazil, Colombia, Uruguay, Canada, and the United States. Same-sex marriage is also recognized in some parts of Mexico.

[24] *See* Statement Calling for Constitutional Resistance to Obergefell v. Hodges, available at: https://americanprinciplesproject.org/founding-principles/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges%E2%80%AF/; Seme have even compared the Obergfell v. Hodges ruling to the infamous Dredd v. Scott Supreme Court decision that legitimized slavery. *See* Call to Action Scholars Statement, Available at: https://campaignforamericanprinciples.com/scholars-statement/

[25] Brazil, Chile, Ecuador, some parts of Mexico.

[26] Joint adoption by same sex couples: Argentina, Brazil, Colombia, some parts of Mexico, Uruguay, Canada and some parts of the United States; second parent adoption: Argentina, Canada, United States, and Uruguay

6. Only a small subset of UN member states made recommendations on sexual orientation and gender identity during the Universal Periodic Review, and the vast majority of those recommendations have been rejected.

Only a few governments promote LGBT rights in the UPR, mostly in Western Europe. Of the 193 UN member states, 82% did not make a single recommendation related to sexual orientation or gender identity in the first UPR cycle, and 90% made fewer than five. Africa—the most frequent target of these recommendations—accepted just over 10% of these recommendations.[27]

b) "Gender Identity" in the Inter-American Human Rights System.

To reach its conclusion – i.e.: that Article 1 of the Convention prohibits discrimination based on individuals' "sexual orientation" –, the Court not only referred to non-binding UN documents mentioned above. It also grounded its assertions on the specificity of the Inter-American Human Rights System.

1. As the Court itself acknowledges, however, the American Convention, at its Article 1, prohibits exclusively discrimination based on: "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or *any other social condition*. (emphasis added)"

In light of the arguments listed under let. (a) above, this wording should have been sufficient to lead the same Court to acknowledge that the American Convention does not recognize the category of sexual orientation as a protected one. Instead, invoking an "evolving interpretation" of human rights' treaties, and arrogating to itself the role to be the interpreter, and the creator, of such "new rights," it "establishe[d] that a person's sexual orientation is a category protected by the Convention."[28] It also stated that the "lack of consensus in some countries regarding full respect for the rights of sexual

[27] Rebecca Oas, Positive Peer Pressure or Bullying? How wealthy developed countries use the Universal Periodic Review pressure the global south to accept sexual orientation and gender identity, Center for Family and Human Rights, May 2015, available at https://c-fam.org/flyer/positive-peer-pressure-or-bullying. More recently: "While most of the UN's 193 member countries have received SOGI recommendations, they emanate from a much smaller group of countries. Over 140 countries have never issued a single SOGI recommendation, while less than 25 account for over 90% of SOGI pressure within the UPR. Moreover, 30% of all SOGI recommendations in both UPR cycles come from just four countries: Canada, the Netherlands, Spain, and France." Rebecca Oas, "Sexual Rights" Proponents Seek Legitimacy Through Universal Periodic Review, November 17, 2016, C-Fam, available at: https://c-fam.org/friday_fax/sexual-rights-proponents-seek-legitimacy-through-universal-periodic-review/.

[28] IACtHR (Judgment) 24 February 2012, Atala-Riffo and Daughters v. Chile, para 91.

minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered."[29]

As mentioned above, according to the Vienna Convention on the Law of Treaties, this provision of the Convention cannot be interpreted in such an evolutionary way.[30]

Furthermore, according to Article 62 of the American Convention, "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."

Nowhere does the Convention give the power, to either the Court or to any of its judges, to expand and the meaning of these same *provisions* or otherwise offer innovative but unpredictable interpretations.

2. No other Inter-American Human Rights' instrument offers protections on the basis of individuals' sexual orientation and gender identity.

One of the Court's arguments to defend the idea that "sexual orientation and gender identity" are protected categories is to refer to resolutions that the General Assembly of the OAS has approved since 2008, which refer to the protection of persons against discriminatory treatment based on their sexual orientation, and demand the adoption of specific measures for an effective protection against discriminatory acts.[31]

It should be noted that these resolutions are non-binding in character, and were it not for this may never have been adopted. In fact these same resolutions did not enjoy the consensus of all the member states of the OAS. On the contrary, the controversies raised by the text of these resolutions are well known, acknowledged by all those who

[29] *Ibid.* Para 92.
[30] *Ibid.* note 17 above.
[31] IACtHR (Judgment) 24 February 2012, Atala-Riffo and Daughters v. Chile, para 86.

followed these negotiations and approvals, and evidenced by the reservations made by the OAS' member states throughout the years.[32]

As already mentioned, very few countries of the Americas explicitly recognize the categories of sexual orientation and gender identity in their national legislations. In fact, many more countries in the Americas criminalize sodomy.[33]

Further proof of the evident lack of consensus over the issues of sexual orientation and gender identity among the 35 member states of the OAS, and of the illegitimacy of a judicial pronouncement that transforms these terms into protected categories of international law, is the history of the Inter-American Convention Against All Forms of Discrimination and Intolerance.[34] This Convention, which is the first international instrument ever, either at the regional or universal level, to expressly embrace "sexual orientation," "gender identity," and "gender expression" as forbidden grounds or suspect categories of discrimination, remained dead letter.

After being welcomed by international LGBT activists as the most advanced form of protection of "human rights," this international treaty was signed only by 10 member states of the OAS. None of them ratified it.[35]

The reasons behind this absence of ratifications, however, cannot be seen as deriving from a "discriminatory" lack of acceptance of homosexual behaviors, of same-sex marriage, or of any other form of special recognition of LGBT rights by Latin American states. The fact that even countries like Argentina, Brazil, and Canada, which are at the forefront of international advocacy for so-called LGBT rights, did not ratify this treaty shall instead form good evidence of the fact that, according to their same constituencies, sexual orientation and gender identity cannot be elevated to "suspect categories of

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[32] In 2013, reservations were made by 13 member states. See: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiqw8-Rr73QAhUrwlQKHTFuDAwQFggdMAA&url=http%3A%2F%2Fwww.oas.org%2Fen%2Fsla%2Fdil%2Fdocs%2FAG-RES_2807_XLIII-O-13.pdf&usg=AFQjCNFshRNS7ZXnYSARQIV8Yj7AjrLvLA

[33] Almost all English speaking Carribean countries have statutes criminalizing homosexual intercourse. The sole exception is Bahamas. Usually these countries penalize "buggery", which is theoretically applicable also to heterosexual intercourse, and does not cover lesbian sexual acts.

[34] Organization of the American States, 2013. *Inter-American Convention Against All Forms of Discrimination and Intolerance,* available at: http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance.asp [accessed 29 November 2016].

[35] For state of ratification, see: http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance_signatories.asp

discrimination." It further proves that national legislatures are not willing to take this step, and that this Court should not usurp their sovereign democratic prerogative and take it for them.

States have many reasons to hesitate on taking such steps.

By defining sexual orientation and gender identity and expression as suspect categories, states would open themselves up to claims that they must grant to homosexual couples not just some form of public recognition, but each and all the benefits enjoyed by a family constituted by the marriage between a man and a woman, and other fertile relations between men and women, including parental rights (such as: the right to adopt, to access IVF, to the spouse's pension, to preferential rate loans).

If such a treaty were ratified, states would be asked by LGBT activists not only to recognize individuals' sex change by law, and to decriminalize consensual sex between same-sex adults, but also to enact special protections for individuals who identify as LGBT, including in criminal and in employment laws, as well as in other law enforcement mechanisms. Among other things, states might be coerced into granting special asylum rights to individuals who identify as LGBT, and they might even be asked to allow transsexual persons not to disclose their biological sex to their future spouses. Also, as is becoming true in some countries, and as demanded by LGBT advocates, states might be required to identify "transgender children"[36] and aid parents who believe it wise to prevent the normal biological development of their children in puberty.[37]

Notwithstanding what the Court affirmed in the *Atala Riffo* judgement, and repeated in *Duque v. Colombia*, as well as in the most recent pronouncement *Flor Freire v. Ecuador*,[38] the absence of ratification of the Convention Against All Forms of Discrimination and Intolerance by the member states of the OAS proves that the

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[36] Transgender Children & Youth: Understanding the Basics, Human Rights Campaign, available at: http://www.hrc.org/resources/transgender-children-and-youth-understanding-the-basics, [accessed 29 November 2016].

[37] Transgender children: the parents and doctors on the frontline, Adams Tim, The Guardian, November 13, 2016, available at: https://www.theguardian.com/society/2016/nov/13/transgender-children-the-parents-and-doctors-on-the-frontline [accessed 29 November 2016].

[38] IACtHR, Flor Freire v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2016. Series C No. 315. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_315_esp.pdf, [accessed 29 November 2016].

countries of Latin America are still far from having agreed on existence of rights and protections based on individuals' sexual orientation and gender identity. It is not the place of this Court to usurp the democratic and sovereign prerogative of states.

3. The "Yogyakarta Principles."

In the case *Duque v. Colombia*, this Court even suggested that the Principles of Yogyakarta constitute a further reason to argue that international law prohibits discrimination based on sexual orientation and gender identity.[39]

The Principles of Yogyakarta are a non-binding document that was adopted by representatives from various non-governmental organizations and United Nations treaty monitoring committee members following a November 2006 conference held in Yogyakarta, Indonesia.

It is C-Fam's earnest hope that such "Principles," which by no means form part of international law, will never again be quoted by the Honorable Judges of this Court.[40]

As Judge Eduardo Vio Grossi mentioned in his partially dissenting opinion in the case *Duque v. Colombia*, and after recalling that these principles were adopted by 29 natural persons, this document should not be viewed very highly at all, as it constitutes more hopeful activism than sober legal analysis. These principles might be viewed as suggestions, but they do not constitute provisions of international law.[41]

4. Inconsistent precedents of the European Court of Human Rights.

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[39] *Duque v. Colombia,* para. 110. "Por otra parte, los Principios de Yogyakarta sobre la aplicación del derecho internacional de los derechos humanos en relación con la orientación sexual y la identidad de género, establecen en el Principio N. 13 que todas las personas tienen derecho a la seguridad social y a otras medidas de protección social, sin discriminación por motivos de orientación sexual o identidad de género."

[40] For an extensive analysis of the "Yogyakarta Principles," see: Six Problems with the Yogyakarta Principles, P. Tozzi, April, 2007, available at: https://c-fam.org/wp-content/uploads/Yogyakarta-Principles.pdf

[41] IACtHR, Duque v. Colombia, Judgment of February 26, 2016, Partially Dissenting Opinion of Judge Eduardo Vio Grossi, available at: http://www.corteidh.or.cr/docs/casos/votos/vsc_vio_310_esp.doc, [accessed 29 November 2016].

Additionally, in the Atala Riffo judgement, this Court argued for sexual orientation as a protected category based on certain precedents of the European Court of Human Rights. The referenced European judgements, however, cannot support the conclusions of the courts.

"Human rights" are universal, but the jurisdictions of the regional courts of human rights are not. The European and the Inter-American Courts were established by different treaties, and they stem from the national sovereignties of different states with different peoples, traditions, cultures, and values. As underlined by Judge Alberto Pérez Pérez in his partially dissenting opinion, the case law of the European Court has "a persuasive value."[42] The "extensive citation of judgements by the ECHR does not imply that the Inter-American Court should take these as required precedents. … [T]hese rulings have "persuasive value" to the extent that the arguments contained therein may be intrinsically convincing, something that will depend, in good measure, "on the status of the Court from which they emanate, and on the personality of the judge who drafted the judgement."[43]

In another highly controversial case,[44] which perverted the meaning of Article 4 (Right to Life) of the Convention, paving the way for a right to abortion in the Americas, the Court similarly decided not to focus on Latin American state practice to interpret this provision, as Article 31 of the Vienna Convention requires. Also in that case, the Court relied on judicial decisions favoring its predetermined conclusion in non-parties to the American Convention, including the United States and European states. In that case too, the Court relied on the European court on Human Rights and the Council of Europe. As one scholar noted, "Putting aside the issue of whether United States domestic courts or European courts have any authority as sources of interpretation of the American Convention, the court cited only those decisions that favored abortion rights in those jurisdictions, while ignoring the jurisdictions that were not in favor."[45]

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[42] IACtHR, Atala-Riffo and Daughters v. Chile, Partially Dissenting Opinion of Judge Alberto Pérez Pérez, para 5.
[43] Ibid., para 17.
[44] Artavia Murillo et al. v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012).
[45] *The Inter-American Court on Human Rights' judgment in Artavia Murillo v. Costa Rica and its implications for the creation of abortion rights in the Inter-American System of Human Rights*, Ligia M. De Jesus, Oregon Review of International Law, Vol. 16, 2014, p. 232, available at: http://works.bepress.com/ligia_dejesus/12/

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In light of these arguments, the first request of the State of Costa Rica should be answered in the negative. The following requests should consequentially be dismissed.

III. "Gender Identity," Science, and Public Health.

In addition to the legal arguments presented above, we ask this Court to consider the further, following arguments, which equally suggest that the first question presented by the State of Costa Rica should receive a negative answer.

Both the best science, as well as public health concerns, demonstrate that there is no room in international law, nor in international policies, for offering special recognition and protection based on individuals' "sexual orientation and gender identity." Nor is there any compelling argument that these notions offer a useful or viable way to help protect the rights of individuals who identify as LGBT.

1. Experts find there is no single clinical or scientific definition on what constitutes a person to be lesbian, gay, or bisexual.

In 2016, a special report on sexuality and gender, resulting from a review of hundreds of scientific articles on lesbian, gay, bisexual, and transsexual (LGBT) health, which combined findings from the biological, psychological, and social sciences, found that there is no scientific support for the widespread notion that persons who experience same-sex attraction or gender dysphoria are "born that way."[46]

"The concept of sexual orientation itself is highly ambiguous; it can refer to a set of behaviors, to feelings of attraction, or to a sense of identity. Epidemiological studies show a rather modest association between genetic factors and sexual attractions or behaviors, but do not provide significant evidence pointing to particular genes. There is also evidence for other hypothesized biological causes of homosexual behaviors, attractions, or identity, such as the influence of hormones on prenatal development; but that evidence, too, is limited. Studies comparing the brains of homosexual and

[46] Lawrence S. Mayer, M.B., M.S., Ph.D. and Paul R. McHugh, M.D., "Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences," The New Atlantis, Fall 2016.

heterosexual persons have found some differences between the two groups, but have not demonstrated that these differences are inborn and not the result of environmental factors that influenced both psychological and neurobiological traits."[47] "Overall, the evidence suggests some measure of fluidity in patterns of sexual attraction and behavior – contrary to the "born that way" notion that oversimplifies the vast complexity of human sexuality."[48]

"Some of the most widely held views about sexual orientation, such as the 'born that way' hypothesis, simply are not supported by science," write the authors of the report, Lawrence S. Mayer and Paul R. McHugh of the Johns Hopkins University School of Medicine. McHugh was for twenty-five years the psychiatrist-in-chief at the Johns Hopkins Hospital.

"Deep conceptual and empirical difficulties prevent sexual orientation from being used to define a discrete class of persons. Sexual orientation is a complex and amorphous phenomenon that often defies consistent and uniform definition.[49]"

2. Science shows that sexual preferences are not immutable, but are in fact fluid, and often change over an individual's lifetime.

McHugh notes that individuals who identify as LGBT report that their sexual orientation and gender identity can and often do change over time, and that biological and genetic factors are widely recognized as unable to account for sexual orientation and gender identity.

For this reason, which confirms the insufficient evidence supporting the "born that way" theory, several voices also suggest caution in offering and performing treatments to halt or delay puberty. While gender-nonconforming youth are "increasingly receiving therapies that affirm their felt genders, and even hormone treatments or surgical modifications at young age … the majority of children who identify a gender that does

[47] *Ibid,* p. 13.
[48] *Ibid.*
[49] The following points are taken from the comprehensive review of science on the notions of sexual orientation and gender identity with bearing on the law by Dr. Paul McHugh, University Distinguished Professor of Psychiatry University and Behavioral Sciences at the Johns Hopkins University School of Medicine, in his "Brief in Support of Hollingsworth and Bipartisan Legal Advocacy Group addressing the merits and supporting reversal", *Hollingsworth v. Perry*, Supreme Court Docket Nos.12-144, 12-307 (2012). This brief contributed to the U.S. Supreme Court declining to consider individuals who identify as LGBT a discrete class in its famous 2013 decision on same-sex "marriage."

not conform to their biological sex will no longer do so by the time they reach adulthood."[50]

3. Popular notions of sexual orientation and gender identity are constantly expanding, making it harder to define any discrete class of persons.

In 2014, Facebook listed 56 gender identity categories for its users to choose from when creating their user profiles, including categories like "trans," "gender fluid," and "bigender."[51] By 2015, the list reached 71 gender options[52].

4. Even pro-LGBT groups are unable to define "sexual orientation and gender identity" in an objective and meaningful way.

The pro-LGBT American Psychological Association (APA), says sexual orientation and gender identity is a *continuum* of diverse factors like attraction, behavior, identity, and membership in a community. The APA also recognizes that biology and genetics are unable to account for sexual orientation and gender identity.[53]

5. States have the sovereign prerogative to legislate on health and morals to protect their populations from health and moral risks.

While few countries recognize the notion of sexual orientation and gender identity in law, several countries have laws that protect the health and morals of their populations from risks commonly associated with LGBT lifestyles. Such laws are essentially within their domestic jurisdiction, and neither the United Nations nor other international bodies can claim that these laws abuse human rights simply because they address LGBT

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[50] "Sexuality and Gender", *ibid*, p. 12.

[51] Will Oremus, Here Are All the Different Genders You can Be on Facebook (Slate, Feb 13, 2014). The list includes: Agender, Androgyne, Androgynous, Bigender, Cis, Cisgender, Cis Female, Cis Male, Cis Man, Cis Woman, Cisgender Female, Cisgender Male, Cisgender Man, Cisgender Woman, Female to Male, FTM, Gender Fluid, Gender Nonconforming, Gender Questioning, Gender Variant, Genderqueer, Intersex, Male to Female, MTF, Neither, Neutrois, Non-binary, Other, Pangender, Trans, Trans*, Trans Female, Trans* Female, Trans Male, Trans* Male, Trans Man, Trans* Man, Trans Person, Trans* Person, Trans Woman, Trans* Woman, Transfeminine, Transgender, Transgender Female, Transgender Male, Transgender Man, Transgender Person, Transgender Woman, Transmasculine, Transsexual, Transsexual Female, Transsexual Male, Transsexual Man, Transsexual Person, Transsexual Woman, Two-Spirit. Full article available at: http://www.slate.com/blogs/future_tense/2014/02/13/facebook_custom_gender_options_here_are_all_56_custom_options.html

[52] Facebook's 71 gender options come to UK users, Rhiannon Williams, The Telegraph, June 2014, available at: http://www.telegraph.co.uk/technology/facebook/10930654/Facebooks-71-gender-options-come-to-UK-users.html.

[53] American Psychological Association, Sexual Orientation and Homosexuality: Answers to Your Questions for a Better Understanding, What Is Sexual Orientation?, http://www.apa.org/topics/lgbt/orientation.pdf

conduct. Such conduct is not protected by international law and therefore cannot trump sovereign prerogatives.[54]

6. Men who have sex with men are 18 times more likely to contract HIV/AIDS from sexual activity than the overall population.

Since HIV is a gut-tropic virus, there is a major biological risk associated with anal sex. A second risk is that homosexuals possess "sexual role versatility." Combined with the propensity of homosexuals to lead a promiscuous lifestyle, it exposes them to further risks.[55] While HIV infections and deaths in all other populations have been declining, they have been increasing or remaining the same among men who have sex with men.[56]

7. Homosexual lifestyles are correlated with a host of other sexually transmitted infections (STI) and health risks, including substance abuse and depression.

The joint spread of HIV, syphilis, and other STIs among men who have sex with men has been labeled a "syndemic" of STI's, sexual and physical abuse, depression, and substance abuse.[57] UN agencies and the development assistance community more broadly, including USAID, recognize these inherent risks of homosexual acts, and the homosexual lifestyle generally, but do nothing to discourage such activity.[58]

8. Individuals who identify as LGBT are at higher risk of suffering from adverse mental health outcomes.

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[54] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 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").

[55] Office of the United Nations High Commissioner for Human Rights, The Role of the United Nations in Combatting Discrimination and Violence against Individuals Based on Sexual Orientation and Gender Identity, A Programmatic Overview, 12 November 2014, available at http://www.ohchr.org/Documents/Issues/Discrimination/LGBT_UN_SOGI_summary12Nov2014.pdf (listing over 34 dedicated personnel within UN agencies and funds as "focal points")

[56] Report of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity, 4 May 2015, UN Document A/HRC/29/23; Report of the United Nations High Commissioner for Human Rights on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, 17 November 2011, UN Document A/HRC/19/41.

[57] Beyrer, Chris, et al. "Global epidemiology of HIV infection in men who have sex with men." The Lancet 380.9839 (2012): 367-377, available at: http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3805037/

[58] O'Leary D, "The Syndemic of AIDS and STDS Among MSM", Linacre Quarterly, Volume 81, Issue 1 (February, 2014), pp. 12-37, available at: http://www.maneyonline.com/doi/full/10.1179/2050854913Y.0000000015

According to a recent comprehensive review of the science available on this topic, "Members of the non-heterosexual population are estimated to have about 1.5 times higher risk of experiencing anxiety disorders than members of the heterosexual population, as well as roughly double the risk of depression, 1.5 times the risk of substance abuse, and nearly 2.5 times the risk of suicide."[59]

At present, much of the effort to ameliorate the poor mental health outcomes of non-heterosexual populations is based on the particular hypothesis called the "social stress model." According to this model, poor mental health conditions among sexual minorities are caused by discrimination, stigmatization, and other similar stresses. Implied in the model is the idea that by reducing these stresses, such mental health problems would decrease among non-heterosexuals.

Recent scientific reports, however, found that "The social stress model probably accounts for some of the poor mental health outcomes experienced by sexual minorities, though the evidence supporting the model is limited, inconsistent and incomplete." "Other factors, such as the elevated rates of sexual abuse victimization among the LGBT population … may also account for some of these mental health disparities, as research has consistently shown that 'survivors of childhood sexual abuse are significantly at risk of a wide range of medical, psychological, behavioral, and sexual disorders.'"[60]

IV. The exclusivity of the rights of the family.

A final point should be made with reference to the last request submitted by the State of Costa Rica, regarding the patrimonial rights to be derived from a relationship between persons of the same sex.

It would be manifestly and gravely erroneous for this Court to affirm that, based on the non-discrimination prohibition in the American Convention, relations between individuals of the same sex already and automatically enjoy all the protections that national and international law reserve specifically for the family, *including* parental rights. Not even the legal recognition of "gender identity" as a protected category could

[59] *Ibid.*

[60] "Sexuality and Gender", Ibid., p. 85. Roberto Maniglio, "The impact of child sexual abuse on health: A systematic review of reviews," *Clinical Psychology Review 29* (2009). Available at: http://www.sciencedirect.com/science/article/pii/S0272735809001093.

lead to this conclusion, as demonstrated also by the most recent jurisprudence of the European Court of Human Rights.[61]

The law protects and supports the family, both at national and at international levels, based on its fundamental role in society. But it is only and exclusively the natural family, constituted by the union of a man and a woman who are open to childbearing, that is entitled to protection under UN treaties and the American Convention.

Relations between individuals of the same sex may very well constitute forms of love and friendship, and they might even be allowed, regulated, and even welcomed by national legislatures. However, same-sex couples can never constitute the "natural and fundamental group units of society." This is so for reasons that are inherent to the infertile nature of same-sex couples and do not depend on the law, but on biology.

Rights of the Family in International Law.

- The Universal Declaration of Human Rights (UDHR) defines the family as "the natural and fundamental group unit of society" and declares that it is "entitled to protection by society and the State."[62]

The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC) reflect the Universal Declaration of Human Rights verbatim in their provisions.[63]

These binding international norms have not gone unheeded. At least 111 countries have constitutional provisions that echo Article 16 of the UDHR.[64] By virtue of these provisions in international law, the family is a proper subject of human rights and is a bearer of rights in international human rights law.[65]

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[61] See below footnotes 81-83.
[62] Universal Declaration of Human Rights, Article 16.
[63] ICCPR, Article 23, ICESCR, Article 10.1, CRC, Preamble.
[64] *See* World Family Declaration, available at http://worldfamilydeclaration.org/WFD.
[65] *See* Charter of the Rights of the Family, (October 22, 1983), available at: http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-

The outcomes of United Nations conferences have recognized as much. The Programme of Action of the 1994 International Conference on Population and Development, for example, referred to the "rights of families."[66] Similarly, the Programme of Action of the 1995 World Summit for Social Development recognized that the family is "entitled to receive comprehensive protection and support."[67]

- The family is defined in international law and policy as "the natural and fundamental group unit of society." As such, it is "entitled to protection by society and the State" and is a proper subject of human rights.

By highlighting the "natural" and "fundamental" character of the family as social unit international law recognizes the family as a universal human experience that antedates any positive legal status or definition of the family. The family is as it were a pre-juridical entity. It is as such that the family is "entitled" to protection by society and the state. Such a definition cannot apply to same-sex couples.

The underlying justification for the singular protections to which the family is entitled in international law is best expressed in the Preamble of the CRC, which affirms how "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community."[68]

So too, the Declaration and Programme of Action of the 1993 World Conference on Human Rights pointed to the family's important role in the growth and wellbeing of children as the underlying reason for its special protection under international law, stressing that "the child for the full and harmonious development of his or her personality should grow up in a family environment which accordingly merits broader protection."[69]

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rights_en.html. *See also* The Family and Human Rights (December 16, 1998), available at: http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001115_family-human-rights_en.html.

[66] UN document A/CONF.171/13, paragraph 5.4.

[67] UN document A/CONF.166/9, paragraph 80.

[68] CRC, Preamble.

[69] A/CONF.157/23, paragraph 21.

In this regard, it is important to note how ICESCR established the obligation of state parties to that convention to provide the "widest possible protection and assistance to the family," and that the right to an adequate standard of living extends not only to individuals but to individuals "and their families."[70] The ICESCR, in this sense, does not merely "entitle" the family to generic social and economic protection and assistance, as the ICCPR, but also requires states to provide the family with the "widest possible" protection and assistance.

Several other core obligations of states towards the family in international law are also well established. These include the following: the protection of the equal rights of men and women to freely enter into marriage and found a family, and their equal rights during marriage and at its dissolution;[71] the obligation to create an environment conducive to family formation and stability;[72] the protection of the right of the child to know and be cared for by his or her parents; the related rights of the child to a cultural and religious identity;[73] and the "prior" right of parents to educate their children in accordance with their convictions.[74]

- The best available social science validates the exceptional status of the family in international law.

The self-evident truth of the benefit of the family to its individual members and society at large enshrined in international law is validated by the best available social science and research, making use of the most reliable data and widest possible samples. Children thrive in intact families formed by the marriage of a man and a woman. It is the place where individuals learn both love and responsibility. No other structure or institution is able to deliver the same quality outcomes for children as the family composed of a man and a woman in a stable and enduring relationship.[75]

A host of negative outcomes result from family breakdown and deprivation. When children are not brought up by their biological parents in a stable family environment, as

[70] UDHR, Articles 23, 25; ICESCR, Articles 7, 11.1.
[71] UDHR, Article 16; ICCPR, Article 23; ICESCR, Article 10.
[72] UDHR, Articles 23, 25; ICESCR, Articles 10, 11; CRC, Articles 18, 23, 27.
[73] ICCPR, Articles 23, 24; CRC, Articles 2, 3, 5, and especially 7, 8, 9, 10, 18, 27.
[74] UDHR, Article 26.3; ICCPR, Article 18; CRC, Articles 2, 3, 5, 14, 20, 29, 30.
[75] Regnerus M., "How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study". Soc Sci Res. 2012 Jul;41(4):752-70. Findings of this research are also observable at the website: http://www.familystructurestudies.com

for example in unmarried, cohabiting, or same-sex households, they are more likely to experience school failure, lower levels of education, behavioral problems, drug use, and loneliness, among other negative outcomes, as well as physical, sexual, and emotional abuse.[76]

Entering marriage and founding a family is associated with better physical and mental health, emotional wellbeing, less criminality and substance abuse, and longer life expectancies for both men and women. It is also positively correlated with lower infant mortality. Moreover, research shows that healthy families formed by the union of a man and a woman result in additional healthy families. While individuals who do not experience the benefits of being raised by their mother and father can certainly rise above their circumstances, children born in families that stay together are more likely to form their own families.[77]

- International law further establishes that the family is formed through the union of a man and a woman who exercise their right to freely "marry and found a family." This fundamental right is enshrined in the Universal Declaration of Human Rights and is binding international instruments.

Even as the family acquires specific legal characteristics across legal systems and social contexts, as well as across diverse cultures and religions, international law recognizes and protects the fundamental human right to marry and found a family. This fundamental right antedates any formal recognition of marriage by society and the state, and sanctions the self-evident truth of marriage as a permanent and exclusive union of a man and a woman naturally oriented towards procreation and childrearing.[78]

The UDHR (Article 16) ties the founding of the family to marriage, and affirms that "Men and women of full age, without any limitation due to race, nationality, or religion,

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[76] Ibid. Regnerus, M.; *see also* Sullins, Donald Paul, Emotional Problems among Children with Same-Sex Parents: Difference by Definition (January 25, 2015). British Journal of Education, Society and Behavioural Science 7(2):99-120, 2015. Available at SSRN: http://ssrn.com/abstract=2500537; *and* Sullins, Donald Paul, Child Attention-Deficit Hyperactivity Disorder (ADHD) in Same-Sex Parent Families in the United States: Prevalence and Comorbidities (January 21, 2015). British Journal of Medicine & Medical Research 6(10): 987-998, 2015, Article no. BJMMR.2015.275, ISSN: 2231-061. Available at SSRN: http://ssrn.com/abstract=2558745.

[77] *See* Wilcox et. al, Why Marriage Matters, Thirty Conclusions from the Social Sciences, Institute for American Values New York, 2011, available at: http://www.breakingthespiralofsilence.com/downloads/why_marriage_matters.pdf.

[78] *See* Girgis, Sherif and George, Robert and Anderson, Ryan T., What is Marriage? (November 23, 2012). Harvard Journal of Law and Public Policy, Vol. 34, No. 1, pp. 245-287, Winter 2010. Available at SSRN: http://ssrn.com/abstract=1722155.

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 (emphasis added)." The UDHR 16 language on the *equal right* of men and women to marry and found a family is reflected verbatim in the ICCPR (Article 23), the ICESCR (Article 10), as well as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW 16), which refers to equality within marriage as between "men and women" and refers to "husband and wife" in the context of the family.

These provisions effectively define the family in international law as resulting from the union of a man and a woman in marriage. This definition of the family is called *natural family* by anthropologists or *nuclear family* by social scientists.

The European Convention on Human Rights[79] and the Inter-American Convention on Human Rights[80] also reflect the langue of the UDHR on the right to marry and found a family verbatim.

In fact, the European Court of Human Rights has said on multiple occasions, while interpreting the provision on the right to marry and found a family in the ECHR (Article 12), that marriage is understood in the ECHR to be between a man and a woman, and that states do not have an obligation to grant individuals who identify as LGBT the right to marry another individual of the same sex.[81]

It is particularly important to consider these pronouncements of the ECtHR, since, as previously said, this Court recognized sexual orientation and gender identity as protected category against discrimination. This fact, however, was not deemed sufficient to extend the rights of the family to homosexual couples or to other forms of partnership that are not equivalent nor analogous to the family.

Most recently, in the 2016 case of *Chapin and Charpentier v. France*, the European Court declared that the question of same-sex marriage is "subject to the national laws of

[79] ECHR, Article 12.
[80] IACHR, Article 17.
[81] *See Hämäläinen v. Finland,* no. 37359/09, §§ 71, 96, ECtHR, 2014; *Schalk and Kopf v. AUSTRIA*, no. 30141/04, § 101, ECtHR, 2010; *Rees v. UK*, § 49. It should be conversely noted that the Court has elsewhere inconsistently applied the term "family" to relations between individuals of the same-sex.

the Contracting States."[82] It stated that Article 12 confirmed the traditional concept of marriage, which is the union between a man and a woman and "does not impose an obligation on the governments of the Contracting States to grant same-sex couples access to marriage."[83]

Furthermore, it found that Article 12 "cannot be interpreted as imposing such an obligation on the governments of the Contracting States to grant same-sex couples access to marriage."[84]

In regard to the right to respect for private life (guaranteed by Article 8) and the principle of non-discrimination (Article 14), the European Court continued affirming that "States are still free (...) to restrict access to marriage to different-sex couples";[85] and that they "enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition" of same-sex relationships, and its differences concerning the rights and obligations conferred by marriage.[86]

More recently, a different European tribunal, the European Court of Justice, equally called to ensure that the fundamental rights enshrined in the ECHR are respected by the member states of the European Union. Even more clearly than the European Court, it stated: "marital status and the benefits flowing therefrom are matters which fall within the competence of the Member States and that EU law does not detract from that competence. (...) The Member States are thus free to provide or not provide for marriage for persons of the same sex, or an alternative form of legal recognition of their relationship, and, if they do so provide, to lay down the date from which such a marriage or alternative form is to have effect."[87]

- Relations between individuals of the same sex and other social and legal arrangements that are neither equivalent nor analogous to the family are not entitled to the protections singularly reserved for the family in international law and policy.

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[82] ECtHR, Chapin and Charpentier v. France, Application N. 40183/07, § 36 (making reference to Schalk and Kopf v. Austria judgement (n°30141/04).
[83] *Ibid*, § 36, making reference to Gas and Dubois v. France, n°25951/07, § 66.
[84] *Ibid*, §39.
[85] *Ibid*, making reference to Schalk and Kopf ,§ 108 and Gas and Dubois, § 66.
[86] *Ibid.*, § 58.
[87] §§ 58 – 59

The definition of the family in international law only applies to relations between men and women and does not apply to relations between individuals of the same sex and other social and legal arrangements between adults that are not equivalent or analogous to the family, and indeed, incapable of constituting a family for purposes of international law.

The Vienna Convention on the Law of Treaties (VCLT) provides the most authoritative canon to interpret international treaties, and is considered widely to be part of customary international law. According to the VCLT (Article 31) treaties must be interpreted in "good faith" according to the "ordinary" meaning of the terms of the treaty as they were understood at the time the treaty was negotiated and its overall "object and purpose."

The ordinary meaning of the text of the provisions of international law on the right to marry and found a family is unambiguous. These provisions preclude that they apply to relations between individuals of the same sex because they explicitly refer to men and women and their equality before, during, and after marriage.

Moreover, it is impossible that UN member states could have intended these provisions to apply to relations between individuals of the same sex because at the time when all UN treaties were negotiated, with the single exception of the Convention on the Rights of Persons with Disabilities (CRPD), so-called same-sex "marriage" or unions of any type did not exist anywhere in the world, and neither did any kind of legal status for relations between individuals of the same sex. The first country to ever enact so-called same-sex "marriage" was the Netherlands in 2001. The first country to give any type of legal status to relations between individuals of the same-sex was Denmark in 1989.

- The international community has repeatedly rejected attempts to redefine the family in international law and policy.

Beginning with the Programme of Action of the International Conference on Population and Development (ICPD) UN policy employed the phrase "various forms of the family exist"[88] when describing the family. This phrase never displaced the definition of the family in the Universal Declaration of Human Rights, or the understanding that the family results from the union of a man and a woman. This is reflected also in the ICPD

[88] UN document A/CONF.171/13, Principle 9.

outcome itself where it states, "While various forms of the family exist in different social, cultural, legal and political systems, the family is the basic unit of society and as such is entitled to receive comprehensive protection and support."[89]

Similarly, the Programme of Action of the 1995 World Summit for Social Development recognized that "[i]n different cultural, political and social systems, various forms of the family exist." However it also linked the family to marriage, and when discussing the topic of the family it states that "[m]arriage must be entered into with the free consent of the intending spouses, and husband and wife should be equal partners."[90]

The entirety of Chapter V of the ICPD outcome dedicated to the family and family structure, does not pretend to redefine the family, but simply used the word "family" analogously[91] for "single-parent and multigenerational *families*." These situations, indicative of family breakdown, are certainly analogous and derivative of the family as enshrined in international law. It is important to highlight that even in this context the ICPD outcome did not use the term family in reference to "one-person *households*" (emphasis added).

In recent years, the phrase "various forms of the family exist" has been rejected by the General Assembly because of now confirmed suspicions that it would be construed by the UN secretariat and agencies as a mandate to recognize and promote the notion of so-called same-sex "marriage" or "families." The Office of the High Commissioner for Human Rights (OHCHR) is spearheading a UN system-wide effort to promote these notions. Recent General Assembly resolutions on the family excluded the phrase "various forms of the family exist," most significantly the General Assembly resolution on the celebration on the 20th Anniversary of the International Year of the Family and its predecessor resolutions.[92]

The 2030 Agenda also excludes this notion.[93] In fact, the 2030 agenda goes further by distinguishing "the family" from "the household," highlighting the exceptional status of the family in international law and policy as a status not shared by other social and legal

[89] ICPD, paragraph 5.1.
[90] UN document A/CONF.166/9, paragraph 80.
[91] ICPD, paragraph 5.6.
[92] UN Document A/RES/69/144.
[93] UN document A/RES/70/1.

arrangements. Target 5.4 of the Sustainable Development Goals commits government to "recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies, and the promotion of shared responsibility within *the household* and *the family* as nationally appropriate." The implication of this target is that while the family is entitled to protection under international law, countries may at the national level extend protections to other households as they deem fit, even if they are not equivalent or analogous to the family. This continues to exclude international recognition for any and all households as capable of constituting a family in UN policy and programming.

The exceptional status of the family in international law and policy is not too narrow to also include situations where the family is not intact, or where children deprived of their biological family are adopted by a putative family.

UN policy may indeed provide for "single-parent and multi-generational families" because they are analogous or derivative in so far as they seek to preserve the natural bonds of the family and the blood ties between children and their guardians, or try to reconstitute the nuclear family for a child deprived of his or her intact family in the absence of blood ties.

On the other hand, relations between individuals of the same sex and other social and legal arrangements that are neither equivalent nor analogous to the family should not be recognized as "families." There is no indication that the General Assembly wanted to extend the protections specifically reserved for the family under international law to relations between persons of the same-sex and other social and legal arrangements that are not equivalent or analogous to the family in the ICPD outcome, or the outcomes of subsequent UN conferences that employed the phrase "various forms of the family exist."

- International law protects all children equally, even when they are deprived of their family. It does not require sovereign states to extend the specific protections reserved for the family in international law and policy to social and legal arrangements that are neither equivalent nor analogous to the family.

Validating the choices of adults to live with individuals of the same sex or in other social and legal arrangements that are not analogous to the family, and equating them to

the family, is not necessary to prevent discrimination against children. International law requires the protection of children regardless of their situation in life, but it does not require states to confer the special protections reserved for the family on relations between individuals of the same sex or on other social and legal arrangements between adults that are not equivalent or analogous to the family.

The Universal Declaration of Human Rights and binding international human rights treaties recognize that many children are deprived of their family and must be provided with adequate protection, by providing that "[m]otherhood and childhood are entitled to special care and assistance" and that "all children, whether born in or out of wedlock, shall enjoy the same social protection" (Article 25).

This does not require states to elevate any social and legal arrangement where children may be situated as equivalent to the family. In fact, this norm enshrined in binding international human rights instruments, including the International Covenant on Civil and Political Rights (Article 24), the International Covenant on Economic, Social, and Cultural Rights (Article 10), and the Convention on the Rights of the Child (Articles 2, 7, 8, 20), underscores the obligation of member states to protect the family as the optimal environment for children. It presumes that states will afford the family specific protections that are not available to any type of household arrangement. Precisely because of this it requires states to make special efforts to protect children in whatever situation they may be, and to protect mothers whether or not they are married.

Children have a fundamental human right to know and be cared by their mother and father under international law. This right is the basis for rights of the child in the context of family reunification policies and adoption.[94] It is also related to the "prior" right of parents to educate their children in accordance with their religious and moral convictions and to the right of the child to a cultural and religious identity.[95]

Legal recognition, on the same basis as the family, for relations between persons of the same sex or other social and legal arrangements that are neither equivalent nor analogous to the family, threatens the right of the child to know and be cared for by his or her parents. This takes place where adoption and step-child adoption gives legal

[94] ICCPR, Articles 23, 24; CRC, Articles 2, 3, 5, and especially Articles 7, 8, 9, 10, 18, 27.
[95] UDHR, Article 26.3, ICCPR, Article 18; CRC, Articles 2, 3, 5, 14, 20, 29, 30.

guardianship of a child to persons that are not biologically related to the child in the context of so-called same-sex marriages and homosexual unions, or other social and legal arrangements that are not equivalent or analogous to the family. This kind of legal regimen directly threatens and undermines the right of the child, who is vulnerable and physically, intellectually, and emotionally immature to know his or her parents.

Such legal regimes may also threaten the health and wellbeing of children.

a) The Family in the Inter-American System of Human Rights.

As mentioned above, the American Convention on Human Rights also recognizes the rights of the family, and reflects the language of UDHR.

Moreover, Article 17 of the Convention cannot be interpreted as implicitly protecting the right of homosexual couples, or of other forms of same-sex unions. As recalled by judge Pérez Pérez in his partially dissenting opinion in the Atala Riffo case, this article "contains a number of provisions connected with each other (...) in a way that presupposes that the family is based on a heterosexual marriage."[96]

The same dissenting opinion goes on to stress that many Latin American constitutions contain provisions that are very similar to Article 17, and thus can be interpreted as referring exclusively to a family formed by the union of a man and a woman. This is true for Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Nicaragua, Paraguay, Peru, Uruguay, and Venezuela.[97]

The conclusion reached by judge Pérez Pérez is then one that we would invite this Court to ponder carefully. While agreeing with the notion that "an evolving interpretation" of the Convention can be understood as providing protection for discrimination based on sexual orientation, the judge affirms: "The same cannot be said with respect to the evolution of the notion of the family and its status as the foundation or basic natural element of society, which continues to be present in the Constitutions of many State Parties."[98]

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[96] IACtHR, Atala-Riffo and Daughters v. Chile, Partially Dissenting Opinion of Judge Alberto Pérez Pérez, paragraph 18.
[97] *Ibid,* paragraph 19.
[98] *Ibid,* paragraphs 20, 21.

Further arguments to reject the idea that same-sex couples enjoy the patrimonial rights that the law reserves to the family are the ones masterfully recalled by judge Vio Grossi in his partially dissenting opinion in *Duque v. Colombia.*

As the judge stated, this Honorable Court may not base its conclusions on the laws enacted by only some member states of the Inter-American system, which offer recognition to civil unions of individuals of the same sex. Based on the Convention, based on the Vienna Convention on the Law of Treaties, and based on the national laws of the majority of the member states, the rights of the family are reserved to an heterosexual couple and they cannot be extended to other kinds of unions. As the judge further underlines: "Con lo expuesto, por ende, no se está afirmando que la citadas unions no puedan o no deban ser abordadas en el future por el deDerecho Internacional. Lo que se sostiene es que, para que sean materia de Derecho Internacional, deben ser contemplados por alguna fuente de Derecho Internacional, esto es, un tratado, la costumbre o los principios generales de derecho aplicables a los Estados Partes de la Convención..."[99]

As illustrated throughout this *Amicus Brief,* nothing in international law can be interpreted in the mentioned terms.

V. Conclusions.

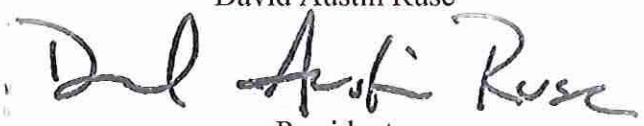
1. The American Convention does not require the state of Costa Rica, nor any other member state, to recognize a change in a person's name based on his or her "gender identity" ("request (a)").

2. Article 54 of the Civil Code of the Republic of Costa Rica does not violate the Convention ("request (b)").

[99] IACtHR, Duque v. Colombia, February 26, 2016, Partially Dissenting Opinion of Judge Eduardo Vio Grossi, p. 9.

3. The American Convention recognizes and protects the rights of the family. The recognition of patrimonial rights deriving from a relationship between persons of the same sex is a matter that may be subject to lawmaking by national legislatures provided that it does not violate or undermine the right of the child to know and be cared for by his/her mother and father ("request (c)").

David Austin Ruse



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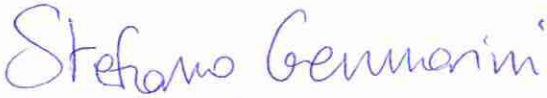

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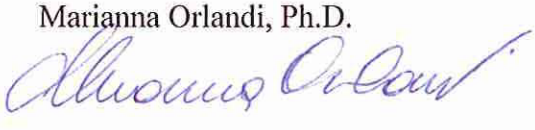

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