

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF DUQUE V. COLOMBIA¹

JUDGMENT OF FEBRUARY 26, 2016
(Preliminary objections, merits, reparations and costs)

In the *Case of Duque v. Colombia*,

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

Roberto F. Caldas, President;
Eduardo Ferrer Mac-Gregor Poisot, Vice President;
Manuel E. Ventura Robles, Judge;
Diego García-Sayán, Judge;
Alberto Pérez, Judge, and
Eduardo Vio Grossi, Judge.

also present,

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

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and with Articles 31, 32, 65 and 67 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure” or “the Rules”), delivers this Judgment.

¹ The instant Judgment was delivered during the 113th Regular Session of the Court. Pursuant to Articles 54(3) of the American Convention on Human Rights, 5(3) of the Statute of the Court and 17(1) of its Rules of Procedure, judges whose terms have expired shall continue to exercise their functions in cases that they have begun to hear and that are still pending. Accordingly, Judges Manuel E. Ventura Robles, Diego García-Sayán and Alberto Pérez participated in the deliberation and signing of this Judgment. Judge Humberto Antonio Sierra Porto, who is a Colombian national, did not participate in the deliberation of this Judgment, pursuant to Articles 19(2) of the Statute and 19(1) of the Court’s Rules of Procedure.

CASE OF DUQUE V. COLOMBIA

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On October 21, 2014, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the jurisdiction of the Inter-American Court of Human Rights the case of *Ángel Alberto Duque* against the Republic of Colombia (hereinafter “the State” or “Colombia”). The Commission indicated that the case concerns the alleged international responsibility of Colombia for allegedly denying Mr. Duque’s claim to a “survivor’s pension”² after the death of his partner, supposedly because they were a same-sex couple. The Commission also considered that Mr. Duque was the victim of discrimination based on his sexual orientation, given that the different treatment to which he was subjected was based on a narrow and stereotyped concept of family, which arbitrarily excluded diverse families, such as those formed by same-sex couples. In addition, the Commission determined that the State did not provide the alleged victim with an effective remedy to challenge the alleged violation and that, on the contrary, the rulings issued by the judicial authorities perpetuated the prejudice and stigmatization of same-sex couples. Finally, the Commission concluded that, given the alleged victim’s multiple factors of vulnerability - including his sexual orientation, being HIV positive, and his financial situation - Mr. Duque’s right to personal integrity was also impaired.

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

a. *Petition.* On February 8, 2005, the Commission received a petition submitted by the Colombian Commission of Jurists and the attorney Germán Humberto Rincón Perfetti (hereinafter “the petitioners”).

b. *Admissibility Report.* On November 2, 2011, the Commission adopted Admissibility Report N°. 150/11.³

c. *Merits Report.* On April 2, 2014, the Commission adopted Merits Report N° 5/14, pursuant to Article 50 of the Convention, in which it reached a series of conclusions and made several recommendations to the State:

i. Conclusions. The Commission concluded that the State of Colombia was responsible for the violation of the following rights established in the American Convention:

- The right to personal integrity, established in Article 5(1), in relation to Article 1(1) of the American Convention, to the detriment of Ángel Alberto Duque;
- The rights to judicial guarantees and judicial protection, established in Articles 8(1) and 25, in relation to Article 1(1) of the American Convention, to the detriment of Ángel Alberto Duque, and
- The principles of equality and non-discrimination, established in Article 24, in relation to Articles 1(1) and 2 of the American Convention, to the detriment of Ángel Alberto Duque.

ii. Recommendations. The Commission made the following recommendations to the State:

² Under Colombian legislation, the survivor’s pension is one of the benefits protected under the general system of pensions (Book I of Law 100 of 1993), and its purpose is to protect a worker’s family from contingencies arising from his death.

³ In that Report, the Commission declared admissible the petition for the alleged violation of the rights established in Articles 5(1), 8(1), 24 and 25 of the American Convention, in connection with the obligations established in Articles 1(1) and 2 thereof.

- Make adequate reparation to Mr. Ángel Alberto Duque for the human rights violations declared in this report, including pecuniary and non-pecuniary damage. Such reparation should at least include the granting of the survivor's pension and just compensation. Furthermore, the State should provide uninterrupted access to the healthcare services and treatment that he requires as a person living with HIV;
- Take any necessary measures that may still be required to ensure the non-repetition of the facts of this case. In particular, the State should adopt the necessary measures so that all judicial decisions issued in Colombia subsequent to the facts of the present case, which have recognized the right to survivor's pension for same-sex couples —and determined that cases which preceded those decisions also benefited from their effects— are fully complied with;
- Take the necessary measures to ensure that the personnel of social security agencies, both in the private and public sphere, receive adequate training to accept and process requests of persons who are living or have lived as a same-sex couple, in accordance with the domestic legal system, and
- Take the necessary measures to ensure that same-sex couples are not discriminated against when attempting to access social security services and, in particular, that they are allowed to present the same evidence mandated for other couples, in accordance with the domestic legal system.

d. *Notification to the State.* On April 21, 2014, the Merits Report was notified to the State, which was granted a period of two months to provide a report on compliance with the recommendations. The State presented its report on June 20, 2014,⁴ requesting a three-month extension to submit certain information. This request was granted and the State subsequently submitted a second report.

e. *Submission to the Court.* On October 21, 2014, the Commission submitted to the Inter-American Court all the facts and alleged human rights violations described in its Merits Report, "given the need to obtain justice for the [alleged] victim." The Commission also noted that the State had not made a concrete proposal for comprehensive reparation in its second report, and had suggested that the alleged victim should open a second round of proceedings. Furthermore, the State did not recognize that the facts of the case could result in an internationally wrongful act.

3. *Request of the Inter-American Commission.* Based on the foregoing, the Commission asked the Court to declare the international responsibility of Colombia for the alleged violations indicated in the conclusions of its Merits Report and to require the State to implement certain measures of reparation, which are described and analyzed in the corresponding chapter.

II PROCEEDINGS BEFORE THE COURT

4. *Notification to the State and to the representatives*⁵. The submission of the case by the Commission was notified to the State and to the representatives on November 11, 2014.

5. *Brief with pleadings, motions and evidence.* On January 12, 2015, the representatives presented their brief with pleadings, motions and evidence⁶ (hereinafter "pleadings and motions brief"), pursuant to Articles 25 and 40 of the Rules of the Court.

⁴ The Commission does not mention this first report in its submission brief, but it is included in the case file.

⁵ The Colombian Commission of Jurists and Germán Humberto Rincón Perfetti acted as representatives in the case before the Court.

⁶ The representatives sent the pleadings and motions brief by email. In a communication received on January 30, 2015, the representatives forwarded the original brief and its annexes to the Court.

6. *Answering brief.* On April 1, 2015, the State submitted to the Court its brief answering the submission of the case, the pleadings and motions brief and the preliminary objections (hereinafter “answer” or “answering brief”), pursuant to Article 41 of the Rules of the Court.⁷

7. *Observations on the preliminary objections.* On June 1, 2014, the representatives and the Commission presented briefs containing their observations on the preliminary objections filed by the State, requesting that these be dismissed.

8. *Victims’ Legal Assistance Fund.* In an Order of May 5, 2014, the President of the Court declared admissible the request submitted by the alleged victim, through his representatives, to have access to the Victims’ Legal Assistance Fund, and granted financial assistance for the presentation of a maximum of three statements, either at the public hearing or by affidavit.

9. *Public hearing.* On July 2, 2015, the President of the Court issued an order in which he summoned the parties and the Commission to a public hearing on August 25, 2015, during the 53rd Special Session of the Court held in Tegucigalpa, Honduras.⁸ During the hearing, the Court received the statements of the alleged victim and an expert witness proposed by the representatives, an expert witness proposed by the Commission, and one witness and one expert witness offered by the State, together with the observations and final oral arguments of the Commission, the representatives of the alleged victim and the State, respectively. In that same order, the President also required the affidavits of four expert witnesses proposed by the representatives, one witness and one expert witness offered by the State, and one expert witness proposed by the Commission.

10. *Amici Curiae.* The Court received nine *amicus curiae* briefs submitted by: 1) the Latin Culture Foundation;⁹ 2) Human Rights Clinic of the University of Texas School of Law and the International Gay and Lesbian Human Rights Commission;¹⁰ 3) Alliance Defending Freedom Organization;¹¹ 4) Damián A. González-Salzberg;¹² 5) Leitner Center for Justice and International Law at Fordham Law School and the International Human Rights Commission for Gays and Lesbians;¹³ 6) *Colombia Diversa* and the Action Program for Equality and Social Inclusion (PAIIS) of the Law Faculty at Universidad de los Andes;¹⁴ 7) The Heartland Alliance for Human Needs and Human Rights, Venezuela Diversa Civil Association, United and Strong Inc., Corporation for Women’s Promotion/Women’s Communication Workshop, SASOD - Society Against Sexual Orientation Discrimination, Women and Health Collective, Aireana

⁷ The State sent its answering brief by email. In a communication received on April 23, 2015, the State forwarded the original brief and its annexes to the Court. Also, in a brief dated December 12, 2014, the State notified the Court of the appointment of Juana Inés Acosta López and Camilo Ernesto Vela Valenzuela as its Agents.

⁸ The following appeared at the hearing: a) for the Inter-American Commission: Tracy Susanne Robinson, Commissioner; Silvia Serrano Guzmán and Jorge H. Meza Flores, advisers of the Executive Secretariat; b) for the representatives of the alleged victim: Gustavo Gallón Giraldo, representative, Freddy Alejandro Malambo Ospina, representative and Germán Humberto Rincón Perfetti, representative; and c) for the State of Colombia: Juana Inés Acosta and Camilo Vela Valenzuela, Agents, Jonathan Riveros Tarazona, Adviser and Juanita López Patrón, Director of Legal Defense of ANDJE.

⁹ The brief was signed by María Inés Franck, President of the Foundation.

¹⁰ The brief was signed by Ariel Dulitzky, Law Professor and Director of the Human Rights Clinic of the University of Texas School of Law.

¹¹ The brief was signed by Neydy Casillas Padrón, Legal Adviser; Sofía Martínez Agraz, Legal Adviser; Federica dalla Pria, Assistant Attorney; Natalia Callejas Aquino, Assistant Attorney; and Isabella Franco Emerick Albergaria, Legal Intern.

¹² The brief was signed by Damián A. González-Salzberg, Professor of Law at the University of Sheffield.

¹³ The brief was signed by Zach Hudson.

¹⁴ The brief was signed by Marcela Sánchez Buitrago, Executive Director of *Colombia Diversa*; Viviana Bohórquez Monsalve, attorney of *Colombia Diversa*; Máviló Nicolás Giraldo Chica, attorney of *Colombia Diversa*; Andrea Parra, Director of PAIIS and Jenny Guzmán Moyano, law student.

Group for Lesbian Rights, United Belize Advocacy Movement, *Mulabi - Espacio Latinoamericano de Sexualidades y Derechos*, *Akahatá - Work Team on Sexualities and Genders*, *Colectivo Ovejas Negras*, Center for the Promotion and Defense of Sexual and Reproductive Rights (PROMSEX), *Red Nacional de Negras and Negros LGBT*, Women's Way Foundation, Jamaica Forum of Lesbians, All-Sexuals and Gays (J-FLAG), *Red Latinoamericana y del Caribe de Personas Trans (Redlactrans)*, *Amanda Jofré Trade Union*, Trans Network of Peru, Panamanian Association of Trans People, *Panambí Association* and *Alfil Association*;¹⁵ 8) Human Rights Clinic of the Faculty of Law of Santa Clara University, California¹⁶ and 9) Public Action Group of the Law Faculty of the Universidad del Rosario, Colombia Probono Foundation, Chile Probono Network, *Estudio Jurídico Ferrada Nheme* and the Baker and McKenzie Law Firm of Colombia.

11. *Final written arguments and observations.* On September 25, 2015, the representatives, the State and the Inter-American Commission, forwarded their final written arguments and final written observations, respectively.

12. *Deliberation of this case.* The Court began its deliberations on this Judgment on February 25, 2016.

III JURISDICTION

13. The Inter-American Court has jurisdiction to hear this case pursuant to Article 62(3) of the American Convention, because Colombia has been a State Party to the Convention since July 31, 1973, and accepted the contentious jurisdiction of this Court on June 21, 1985.

IV PRELIMINARY OBJECTIONS

14. The *State* filed two preliminary objections related to: a) the alleged failure to exhaust domestic remedies regarding the recognition of the survivor's pension claimed by Mr. Duque, and b) the supposed factual basis for the alleged violation of Articles 4(1) and 5(1) in relation to Article 1(1) of the American Convention. "As an additional objection," the State also alleged the failure to exhaust domestic remedies in relation to the rights to life and personal integrity. The Court will consider the objections submitted by the State.

A. Failure to exhaust domestic remedies regarding recognition of the survivor's pension claimed by Mr. Duque

A.1. Arguments of the State and observations of the Commission and the representatives

15. The *State* argued that, under the existing legal system, Mr. Ángel Alberto Duque had access to an administrative remedy (a formal claim for recognition of the right to a pension from the *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías -*

¹⁵ The brief was signed by Clovis J. Trevino, Covington & Burling LLP.

¹⁶ The brief was signed by Francisco J. Rivera Juaristi, Director and Supervising Attorney of the Clinic; Britton Schwartz, Supervising Attorney; Erica Sutter, Student; Allison Pruitt, student; and Forest Miles, student.

COLFONDOS) and a judicial remedy to obtain protection, at the domestic level, of the rights allegedly violated. The *State* added that during the admissibility proceeding, prior to the issuance of the Admissibility Report, it had informed the Commission that domestic case law had changed, offering adequate and effective remedies that Mr. Duque had not exhausted.

16. According to the *State*, Mr. Duque filed his petition with the Commission in 2005; however, it pointed out that Colombia's case law was modified by the Constitutional Court in Judgment C-336 of 2008, which granted same-sex couples the right to a survivor's pension and that this ruling was consolidated through Judgment T-051 of 2010. The *State* also argued that it had reported these advances in its case law in its brief of observations dated July 7, 2009, mentioning not only the domestic remedies that had not been exhausted, but also specifying those pending exhaustion and providing evidence to demonstrate that they were adequate and effective.

17. Finally, the *State* pointed out that domestic jurisprudence favors Mr. Duque; therefore the requirement to apply to the pension fund, as established by law, is reasonable. According to the *State*, this remedy remains effective today, making Mr. Duque's claims fully viable; thus, the decision to admit this case would be contrary to the principle of subsidiarity that governs the inter-American System.

18. The *Commission* argued that the principle of subsidiarity does not imply that States should have unlimited opportunities to resolve a matter. It added that when the State has had an opportunity to respond to an alleged violation without having done so, it should be understood that the principle of subsidiarity must be safeguarded. Otherwise, an excessive burden would be placed on the victims who, having received a rejection at the domestic level, would need to continue attempting to obtain a favorable response. The Commission indicated that in practice, this would lead to an unjustifiable delay in international justice and would not be in line with the system of petitions or the rule requiring the exhaustion of domestic remedies.

19. Furthermore, the *Commission* alleged that the State's central argument regarding the failure to exhaust domestic remedies was that Judgment T-051 of 2010 modified the judicial rules that prevented the application of Judgment C-336 of 2008, in cases where the death of a partner had occurred prior to that ruling and that the sworn statement of both parties before a notary was required as evidence of a homosexual union. However, bearing in mind that the State's final brief in the admissibility stage dates from 2009, it is clear that the State failed to notify the Commission, at the appropriate procedural moment - even though it had ample opportunity to do so- of the issuance of Judgment T-051 of 2010, its consequences for the analysis of the petition's admissibility and the subsequent judgments that ratified it.

20. Finally, the *Commission* indicated that, although the State emphasized in several sections of its answering brief that Judgment T-051 of 2010 predated the Commission's Admissibility Report, taking into account the rules on the burden of proof and the fact that it is not the task of the organs of the inter-American system to investigate *ex officio* the appropriateness and effectiveness of the remedies, the important point is not the date on which that ruling was issued, but rather whether it was notified to the Commission opportunely and properly with the respective arguments on its relevance for the assessment on admissibility. In that regard, the *de facto* and legal arguments presented by the State regarding the preliminary objections based on Judgment T-051 of 2010, and subsequent rulings, were not opportunely notified to the Commission and are therefore time-barred.

21. The *representatives* argued that, notwithstanding the legal changes regarding pensions for same-sex couples resulting from Judgment C-336 of 2008 of the Constitutional Court of Colombia, this did not automatically repair an act of discrimination based on sexual identity against Ángel Alberto Duque, given the denial of his request for a pension on March 19, 2002. According to the representatives, the State's argument concerning the

administrative and judicial remedy resulting from the Constitutional Court's decision, implicitly recognizes that the alleged victim did not have any remedy available to him to challenge the situation of discrimination he suffered at the time of the facts.

22. The *representatives* further argued that the exception described in Article 46(2) (a) of the American Convention, that "the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated," remains unchanged today, since this situation arose when the alleged human rights violation occurred. They also held that it was only after Judgment T-051 of 2010 was issued that the assumptions of Judgment C-336 of 2008 were implemented; thus, the remedies that the State suggests that Mr. Duque should have exhausted were not available until eight years after the facts that gave rise to the violation.

A.2. Considerations of the Court

23. Article 46(1)(a) of the American Convention establishes that in order to determine the admissibility of a petition or communication presented before the Inter-American Commission, pursuant to Articles 44 or 45 of the Convention, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law. In this regard, the Court has held that an objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be submitted at the proper procedural moment, that is, during the admissibility proceeding before the Commission.¹⁷ Moreover, in alleging a failure to exhaust domestic remedies, the State must specify which domestic remedies have not been exhausted, and must also demonstrate that these remedies were adequate, appropriate and effective.¹⁸

24. In order to analyze the alleged failure to exhaust domestic remedies in this case it is first necessary to determine whether the preliminary objection was submitted at the proper procedural moment. In this regard, the Court notes that the State included that argument in its written observations to the initial petition;¹⁹ therefore, it was presented at the appropriate procedural opportunity.

25. In second place, the State justifies its preliminary objection based on the following arguments: a) that under the existing legal system, Mr. Ángel Alberto Duque could have availed himself of an administrative remedy (filing a formal claim for recognition of pension rights with COLFONDOS) and a judicial remedy at the domestic level, to protect the rights that he considered violated and to challenge the possible rejection of that claim; however, he did not make use of these remedies, and b) that amendments were made to domestic case law between 2008 and 2010 and consequently Mr. Duque had access to adequate and effective remedies that he had not exhausted.

a) Exhaustion of domestic remedies in 2005

26. In relation to the first point, it is clear that on March 19, 2002, Mr. Duque filed a general request for information (*infra* para. 68) with COLFONDOS asking that it "advise [him] of the requirements [he] must meet to apply for, or be eligible to receive the survivor's pension of his partner [Mr. JOJG], who died on September 15, 2001. While he was alive, Mr.

¹⁷ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, para. 88, *Case of Gonzales Lluy and other v. Ecuador* para. 27.

¹⁸ *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, paras. 88 and 91, and *Case of López Lone et al. v. Honduras*, para. 21.

¹⁹ Cf. Republic of Colombia, Ministry of Foreign Relations, brief of January 31, 2006, DDH.GOI No. 2706/132 (evidence file, folios 307 et seq.).

JOJG was enrolled in the pension scheme of the *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías* -COLFONDOS S.A. and worked at the Office of the Deputy Director of Exchange Control in the Directorate of National Taxes and Customs (*Subdirección de Control Cambiario de la Dirección de Impuestos y Aduanas Nacionales*).²⁰ In his letter, Mr. Duque added that his "sexual orientation is gay and [he] lived as a couple with [his] partner for ten (10) years and three (3) months, from June 15, 1991, until the time of his death."²⁰ The letter was not accompanied by any documentation that would have made it possible to determine whether or not Mr. Duque complied with the legal requirements and to calculate the amount corresponding to the survivor's pension.²¹

27. Nevertheless, the Court notes that, in response to Mr. Duque's letter, COLFONDOS explained that "it could not proceed with the requested application process" because Mr. Duque "[did] not qualify as a legal beneficiary entitled to a survivor's pension." It added that Colombia's social security laws "do not make provision for a union between two persons of the same sex"²² (*infra* paras. 71 to 74). In view of COLFONDOS' rejection of his request, Mr. Duque filed a *tutela* action (special constitutional remedy) in which he requested that a court order "the general manager of COLFONDOS, and/or the person responsible, to recognize Mr. Ángel Alberto Duque's right to the survivor's pension of his partner [JOJG]. He argued that obtaining a survivor's pension would guarantee him access to the social security health services he required, since according to a certificate issued by the attending physician, "if the petitioner's antiretroviral treatment is stopped he will die."²³ (*infra* para. 51).

28. In its ruling on the *tutela* action, the Tenth Municipal Civil Court of Bogotá confirmed that "the petitioner indeed requested the recognition of the survivor's pension, which was denied [...]," but pointed out that the response from COLFONDOS was lawful and did not violate Mr. Duque's fundamental rights.²⁴ It also advised that if Mr. Duque was dissatisfied with the response, "he should have taken the matter to the ordinary (contentious-administrative) courts or filed an appeal or sought a review (*reposición*), within the statutory period, to challenge the decision issued by COLFONDOS on April 3, 2002. The court added that "the conflict presented by the petitioner is of a statutory nature and a *tutela* action is not appropriate to seek recognition of the right to a pension. This must be done through ordinary proceedings, if that right is to be ultimately recognized." In that regard, the court referred to the sixth article of Decree 2591/91, which establishes the inadmissibility of the *tutela* action, when other mechanisms or means of legal defense exist.²⁵

29. In relation to access to social security, the Tenth Municipal Civil Court of Bogotá added that "the petition seeking *amparo* relief will be denied, but not without advising the petitioner that, if his intention is also to obtain some type of social security health services, he could turn to the public health institutions created by the State for the purpose of protecting persons who do not have any financial resources, such as the program offered by SISBEN."²⁶ Although

²⁰ Petition submitted by Mr. Duque to the *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías* -COLFONDOS S.A on March 19, 2002 (evidence file, folio 4).

²¹ Cf. Statement provided during the public hearing by the witness Juan Manuel Trujillo, on August 25, 2015.

²² *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías* -COLFONDOS S.A., Official Letter No. DCI-E-P-1487-02, April 3, 2002 (evidence file, folio 63).

²³ *Tutela* action filed by Germán Humberto Rincón Perfetti on behalf of Ángel Alberto Duque, April 26, 2002 (evidence file, folio 7).

²⁴ Cf. Tenth Municipal Civil Court of Bogotá, Judgment of June 5, 2002 (evidence file, folios 84 and 86).

²⁵ Tenth Municipal Civil Court of Bogotá, Judgment of June 5, 2002 (evidence file, folio 86).

²⁶ Tenth Municipal Civil Court of Bogotá, Judgment of June 5, 2002 (evidence file, folio 86).

Mr. Duque challenged that decision, on July 19, 2002, the Twelfth Civil Court of the Bogotá Circuit upheld the ruling in its entirety.²⁷

30. Based on the foregoing, this Court arrives at the following conclusions: a) both COLFONDOS and the Tenth Municipal Civil Court of Bogotá and the Twelfth Civil Court of Bogotá considered that the letter sent by Mr. Duque (*supra* para. 70) had the same nature and consequences as a formal request for recognition of a pension; b) Mr. Duque filed the *tutela* action in pursuit of two different objectives: first to obtain a survivor's pension, and second to have access to social security health services in order to avoid the suspension of his medical treatment, and c) the Tenth Municipal Civil Court of Bogotá advised Mr. Duque that the *tutela* action was not the appropriate mechanism for requesting a survivor's pension, and that he should have approached the ordinary courts (contentious-administrative courts) and/or filed an appeal or a remedy of *reposición* (review) within the statutory period.

31. It should also be recalled that, in its arguments regarding the preliminary objection of failure to exhaust domestic remedies in relation to the rights to life and personal integrity, the State indicated that "the *tutela* action is an adequate and effective judicial mechanism through which to secure immediate protection of the fundamental rights to health, personal integrity and life when these are threatened by the irregular provision of medical services; thus, Mr. Duque should have exhausted that remedy in relation to the alleged lack of continuity of his antiretroviral treatment."

32. Consequently, it may be inferred that the *tutela* action filed by Mr. Duque, aimed at obtaining recognition of the survivor's pension and access to regular medical services, would be an adequate and effective remedy to accomplish both objectives pursued, notwithstanding the availability of other ordinary remedies specifically to request the survivor's pension, as mentioned by the Twelfth Civil Court of the Bogotá Circuit (*supra* para. 79). In this case, it is reasonable to conclude that, of the available options, the *tutela* was an appropriate remedy to address the urgent situation in which Mr. Duque found himself.

33. Therefore, the Court considers that, by the time the brief of observations to the State's petition was filed, in 2006, Mr. Duque had already exhausted the domestic remedies pursuant to Article 46(1)(a) of the American Convention.

b) Exhaustion of domestic remedies at the time when the Admissibility Report was issued in 2011

34. In the case of *Wong Ho Wing v. Peru*, the Court indicated that, under Article 46(1)(a) of the American Convention, the admissibility of a petition or communication lodged before the Inter-American Commission, pursuant to Articles 44 or 45 of the Convention, is subject to the requirement that the remedies under domestic law have been pursued and exhausted. This should be understood to mean that the exhaustion of domestic remedies is required when deciding on the admissibility of the petition and not when it is lodged.²⁸

35. The Court also recalls that the rule of prior exhaustion of domestic remedies was conceived in the interest of the State, because it seeks to exempt it from responding before an international organ for acts it is accused of before it has had the opportunity to remedy them by its own means.²⁹ This not only implies that such remedies should exist formally,

²⁷ Cf. Twelfth Civil Court of the Circuit of Santa Fe de Bogotá, Judgment of July 19, 2002 (evidence file, folios 93 and 94).

²⁸ Cf. *Case of Wong Ho Wing v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2015. Series C No. 297, para. 25.

²⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 61, and *Case of López Lone et al. v. Honduras*, para. 20.

but also that they must be adequate and effective, subject to the exceptions established in Article 46(2) of the Convention.³⁰ Furthermore, the fact that the analysis of compliance with the requirement to exhaust domestic remedies is carried out according to the situation at the time of deciding on the admissibility of the petition, does not affect the complementary nature of the inter-American system. To the contrary, if any domestic remedy is pending, the State has an opportunity to resolve the alleged situation during the admissibility stage.³¹

36. As to second argument concerning the preliminary objection related to the exhaustion of domestic remedies, the State indicated that between 2008 and 2010, Colombia's domestic legislation changed and, as a result, Mr. Duque could have availed himself of an administrative remedy in relation to COLFONDOS and a judicial remedy to ensure the protection of the rights that he considered had been violated at the domestic level.

37. Consequently, pursuant to its case law, this Court must determine whether, prior to the issuance of the Admissibility Report on November 2, 2011, the Commission had an opportunity to take into account the recent case law developments in Colombia which, according to the State, had created remedies that had not been exhausted by Mr. Duque.

38. With respect to the foregoing, the Court confirms that the State referred to the case law of the Constitutional Court of Colombia in several judgments and indicated the effects these would have had on domestic regulations concerning access to a survivor's pension for same-sex couples.³² Likewise, the Court notes that during the proceedings before the Commission, and prior to the issuance of the Merits Report, the State, in a brief dated July 8, 2009, notified the Commission of the case law developments up to that moment, referring specifically to judgments C-075 of 2007, C-811 of 2007, C-336 of 2008, and T-1241 of 2008. Furthermore, when it adopted the Admissibility Report, the Commission was aware of another Constitutional Court decision concerning the survivor's pension for same-sex couples, namely, judgment T-911 of 2009. In that Report, the Commission also referred to the State's argument according to which, following the Constitutional Court's decisions in judgments C-336 and T-1241, it stated that "a change occurred in the legal provisions that would have permitted the alleged victim to claim a survivor's pension." However, in the same Report, the Commission added that judgment T-911 of 2009 established that "there must be a sufficient showing, by a statement before a notary, of the will of the deceased to form a *de facto* marital

³⁰ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 63, and *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of April 17, 2015. Series C No. 292, para. 48.

³¹ Cf. *Case of Wong Ho Wing v. Peru*, para. 27.

³² Specifically, it mentioned the following: a) Judgment C-075 of 2007 which declared the *conditional enforceability* of Law 54 of 1990, "Definition of *de facto* marital unions and property rights between permanent partners." It stated that "the protection system established herein also applies to homosexual couples." Cf. Constitutional Court of Colombia, Judgment C-075 of 2007 (evidence file, folios 1866 et seq.); b) Judgment C-811 of 2007, which declared the *conditional enforceability* of Article 63 of Law 100 of 1993, namely, that the protection system also applies to same-sex couples affiliated to the contributory scheme of the General Social Security System Health Services. Cf. Constitutional Court of Colombia, Judgment C-811 of 2007 (evidence file, folios 1955 et seq.); c) Judgment C-336 of 2008 which declared the *conditional enforceability* of the definitions of permanent spouse or partner (*cónyuge o compañera o compañero permanente*) contained in Article 47121 of Law 100 of 1993, namely that permanent same-sex couples are also beneficiaries of the survivor's pension Cf. Constitutional Court of Colombia, Judgment C-336 of 2008 (evidence file, folios 2006 et seq.); d) Judgment T-051 of 2010, which established that Judgment C-336 of 2008 should also be applied in cases where the death of a spouse or partner occurred prior to that ruling, and recognized means of evidence other than a sworn statement before a notary public by the interested parties to certify the union between same-sex couples. Cf. Constitutional Court of Colombia, Judgment T-051 of 2010 (evidence file, folios 2228 et seq.); e) Judgment T-592 of 2010, which reaffirmed that Judgment C-336 of 2008 should be applied to cases in which the partner's death occurred prior to that ruling and reiterated that all the means of evidence available to heterosexual couples must be made available to homosexual couples when they wish to certify their status as permanent partners Cf. Constitutional Court of Colombia, Judgment T-592 of 2010 (evidence file, folios 2275 et seq.), and f) Judgment T-716 of 2011 and Judgment T-860 of 2011, reaffirming the aforementioned criteria on means of evidence and on the retroactive effects of Judgment C-336 of 2008 Cf. Constitutional Court of Colombia, Judgments T-716 of 2011 and T-860 of 2011 (evidence file, folios 2302 et seq. and 2354 et seq.).

union with the person who subsequently claims the right to the survivor's pension" and that "it is not possible to bring a claim for the derivative effects of Judgment C-336 of 2008 with respect to situations consolidated before it was handed down." Consequently, the Commission concluded that Mr. Duque was unable to benefit from those case law changes because his partner died in 2001.

39. There is no record that the State forwarded up-to-date information to the Commission after that report and prior to the issuance of the Admissibility Report in November of 2011, or that the Commission had any knowledge of the Constitutional Court's decisions in 2010 and 2011. Indeed, Admissibility Report N° 150/11 only refers to decisions issued prior to those years, information that the State itself emphasized when it pointed out that Judgment T-051 of 2010 "was brought to the attention of the [Commission] after the issuance of the Admissibility Report."³³ Similarly, the State indicated that "prior to the Admissibility Report issued by the [...] Commission, there was no order requiring the State to introduce judgment T-051 of 2010 into these international proceedings."

40. In addition, in its answering brief to the submission of the case, the State pointed out that the case law developments stemming from judgment C-336 of 2008 which, it argued, were consolidated in judgment T-051 of 2010, were subsequent to the facts of this case and to the filing of the petition. However, they took place prior to the issuance of the Admissibility Report. It also pointed out that "the principal wrongful act ceased with judgment C-336 of 2008 of the Constitutional Court and, although some effects of the internationally wrongful act persisted, these also disappeared with judgment T-051 of 2010, which consolidated the case law precedents for the protection of same-sex couples' pension rights." Similarly, it argued that the effects of the wrongful act were only fully resolved after the issuance of judgment T-051 of 2010. The Commission confirmed that the State's argument regarding failure to exhaust domestic remedies "focused on the fact that judgment T-051 of 2010 modified the legal provisions that prevented the application of judgment C-336 of 2008 in cases where the person's death had occurred prior to that decision and that required the sworn statement of both parties as evidence of the homosexual union." However, considering that the State's last brief in the admissibility stage dates back to 2009, it is clear that the State refrained from notifying the Commission of the issuance of judgment T-051 of 2010 at the appropriate procedural opportunity, despite having had ample opportunity to do so.

41. On this point, the Court reiterates that it is not the task of the Court or the Commission to identify *ex officio* which domestic remedies must be exhausted, or for international bodies to correct the lack of precision in the State's arguments.³⁴ Therefore, the advances in domestic case law and their potential effects on Colombia's national legislation could only have been taken into account by the Commission if the parties had provided that information in the context of the proceedings. Furthermore, there is no record to show that the Commission was notified of these case law developments in the context of proceedings related to other cases, or in relation to its functions to promote human rights.

42. With respect to the foregoing, the Court recalls that, pursuant to its case law, the Commission must analyze the exhaustion of domestic remedies when deciding on the admissibility of the petition, and not when this is lodged.³⁵ Thus, the Commission must have access to up-to-date, necessary and sufficient information to examine the petition's admissibility, and this should be forwarded by the parties involved in the proceedings. The Court finds that the judgments delivered by the Constitutional Court after 2009, which, according to

³³ Brief of final written arguments of the State, September 25, 2015 (merits file, folio 3974).

³⁴ Cf. *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 23, and *Case of López Lone et al. v. Honduras*, para. 23.

³⁵ Cf. *Case of Wong Ho Wing v. Peru*, para. 25.

the State, completely remedied “the internationally wrongful act” committed against Mr. Duque and provided him with remedies to claim the survivor’s pension (particularly judgment T-051 of 2010), were not known to the Commission at the time it issued Admissibility Report N° 150/11. Furthermore, although the State notified the Commission of certain case law changes, it was not clear, at that time, whether judgment C-336 of 2008 had possible retroactive effects or which mechanism was available for proving *de facto* marital unions for same-sex couples. Consequently, the Commission did not have sufficient information that would have allowed it to analyze and eventually conclude that domestic remedies were still available to Mr. Duque, which had not yet been exhausted in the domestic courts with the possibility of obtaining different results from those obtained in 2002. Also, the State did not indicate that remedies were available that would allow Mr. Duque to claim his pension rights retroactively, that is from 2002, a matter that, in any case, should be analyzed in the merits of this dispute.

c) Conclusion

43. Based on the above considerations, the Court deems it unnecessary to depart from the position expressed by the Commission in its Admissibility Report issued in this case. Therefore, the Court rejects the preliminary objection.

B. Factual basis for the alleged violation of Articles 4(1) and 5(1) in relation to Article 1(1) of the American Convention

44. The *State* argued that the representatives of the alleged victim did not provide evidence at any of the stage of the proceedings to prove that Mr. Duque’s prescribed antiretroviral treatment was suspended owing to his lack of financial resources.³⁶ The *Commission* argued that the determination of whether or not a fact alleged by one of the parties has been proven forms part of the merits of the case, and does not constitute grounds for inadmissibility under Article 47 of the American Convention.³⁷ The *representatives* added that the objection submitted is not admissible because the principle of procedural preclusion operates; thus, by not characterizing the facts as “manifestly unfounded” in the Admissibility Report, the issue raised by the State regarding compliance with Article 47(c) of the Convention was tacitly resolved. They further argued that this objection was not raised at the appropriate procedural moment, that is, during the admissibility stage.

45. The Court notes that in its arguments the State claimed that the representatives of the alleged victim did not provide evidence to prove that Mr. Duque’s prescribed antiretroviral treatment was suspended owing to his lack of financial resources. This Court finds that the State’s argument is related to the assessment of the means of evidence to determine the factual basis for the alleged violation of the right to personal integrity and the right to life. Consequently, the State’s argument does not constitute a preliminary objection or grounds for inadmissibility under Article 47 of the American Convention. Nevertheless, the Court will take into account the State’s arguments in determining the facts of the case in the section on the merits.

³⁶ According to the State, the file contains no document or statement to demonstrate that Mr. Duque was removed from the contributions-based scheme of the Social Security System or that he was refused the treatment prescribed by the attending physician.

³⁷ The Commission indicated that during the admissibility stage it does not analyze whether or not there is evidence to prove the alleged facts. A fact may constitute a violation of the American Convention or of other applicable inter-American instruments only if proven in the merits stage.

C. Failure to exhaust domestic remedies related to the rights to life and personal integrity

C.1. Arguments of the State and observations of the Commission and the representatives

46. The *State* argued that the *tutela* action is an adequate and effective judicial mechanism for securing immediate protection of the fundamental rights to health, personal integrity and life when these are threatened by the irregular provision of medical services. Therefore, Mr. Duque should have exhausted that remedy in relation to the alleged lack of continuity of his antiretroviral treatment. Furthermore, it indicated that if Mr. Duque considered that he could not cover the costs of the antiretroviral treatment or that it was being suspended, he could have filed a *tutela* action that was unconnected with the claim for the pension rights in question.

47. The *Commission* pointed out that the Colombian State had already had an opportunity to resolve the situation related to Mr. Duque's health, given that this matter was expressly raised in the *tutela* actions that were dismissed by two courts and was not selected for review by the Constitutional Court of Colombia. The Commission also emphasized that the principal violation in this case was the refusal to recognize Mr. Angel Duque's pension rights. The circumstances to which Mr. Duque could have been exposed in relation to his medical treatment are facts connected with the principal violation and, therefore, it is not the practice of the organs of the inter-American System to disregard the bounds of reasonableness by requiring the exhaustion of domestic remedies, separately and autonomously, in relation to each of the effects derived from the principal violation.

48. The *representatives* argued that the State's fragmentation of the right to a decent life and personal integrity on the one hand, and access to an effective remedy to protect Mr. Duque's right to non-discrimination in the granting of a survivor's pension on the other, does not suggest that the former was put at risk by the changes in the provision of care stemming from a lack of financial resources, owing to the refusal of the pension, while the effects of the latter were intrinsically derived from the response of the pension fund and the judicial authorities. The representatives further argued that the *tutela* action in relation to Mr. Duque's right to a decent life was inconsequential and ineffective because it granted him continued access to health services, but not to the differentiated quality of the contributory scheme *vis à vis* the subsidized scheme and the possibilities of increased survival.

C.2. Considerations of the Court

49. The Court reiterates that, in order to determine the admissibility of a petition or communication submitted to the Inter-American Commission, pursuant to Articles 44 or 45 of the Convention, it is necessary to have filed and exhausted the domestic remedies according to generally accepted principles of international law, at the appropriate procedural moment, that is, during the admissibility proceeding before the Commission (*supra* para. 23). When alleging failure to exhaust domestic remedies, the State must specify which domestic remedies have not yet been exhausted, and demonstrate that these remedies were available and were adequate, appropriate and effective.

50. The State considered that, in this case, the petitioner did not exhaust the domestic remedies in relation to the rights to life and personal integrity, namely, the *tutela* action to obtain immediate protection of his fundamental rights to health, personal integrity and life when these are threatened owing to the irregular provision of medical services. For its part, the Commission argued that: a) the Colombian State had already had an opportunity to resolve Mr. Duque's health situation, since the matter was raised in the *tutela* actions that

were rejected by two courts, and b) the principal violation in this case was the refusal to recognize Mr. Duque's right to a pension and the circumstances that could have affected his health treatment are facts connected to the main violation.

51. The Court notes that in the *tutela* action filed on April 26, 2002, Mr. Duque requested that a competent judge examine the matter and "order the general manager of COLFONDOS, and/or the person responsible, to recognize and pay the survivor's pension to Mr. Ángel Alberto Duque as the substitute of his partner [JOJG]. He argued that recognition of his right to a survivor's pension would ensure his access to the social security health services he needed, since according to the certificate of the attending physician "if the petitioner's antiretroviral treatment is stopped he will die."³⁸ (*supra* para. 27).

52. For its part, the Tenth Municipal Civil Court of Bogotá, which rejected the *tutela* action filed on June 5, 2002, stated the following regarding Mr. Duque's right to health: "the petition seeking *amparo* relief will be denied, but not without advising the petitioner that if it is also his intention to obtain some type of social security health service, he can apply to the public health institutions created by the State for the purpose of protecting persons who do not have any financial resources; a case in point would be the program offered by SISBEN."³⁹

53. In the instant case it has not been demonstrated that the State denied health treatment to the alleged victim as a fact separate from the recognition of a survivor's pension, in which case, given the different nature of the claims, it would have been necessary for Mr. Duque to exhaust the domestic remedies related to lack of health care. However, the representatives' arguments refer to the supposed effects on Mr. Duque's personal integrity stemming from an alleged lack of access to the contributions-based health scheme as a result of not being granted the survivor's pension. In that regard, the representatives - who do not dispute that Mr. Duque could access the subsidized healthcare regime - argue that this did not allow him to obtain treatment equivalent to the one he had received under the contributions-based regime; a situation which, they allege, would have put his life and integrity at risk.

54. The Court notes that the violation of the right to health alleged in the *tutela* action filed by Mr. Duque was closely connected with the claim for access to a specific healthcare system, namely, the contributory system which, in principle, the alleged victim could only access as a recognized beneficiary of the survivor's pension. From that perspective, it is reasonable to infer that the domestic remedies had been exhausted through the filing of the *tutela* action, notwithstanding the State's arguments that Mr. Duque could have availed himself of specific judicial remedies that had not been exhausted in relation to specific violations of the right to health.

55. Consequently, this Court finds that, because the representatives have linked the alleged violation of the rights to life and personal integrity to Mr. Duque's inability to access the contributions-based healthcare system because he was not a beneficiary of a survivor's pension, the arguments of failure to exhaust domestic remedies regarding the rights to life and personal integrity are subsumed in the arguments of failure to exhaust domestic remedies in relation to the possibility of claiming the pension. Therefore, the Court refers to the considerations set forth in paragraphs 23 to 43, and dismisses this preliminary objection.

³⁸ *Tutela* action filed by Germán Humberto Rincón Perfetti on behalf of Mr. Duque on April 26, 2002 (evidence file, folio 7).

³⁹ Tenth Municipal Civil Court of Bogotá, Judgment of June 5, 2002 (evidence file, folio 86).

V
PRIOR CONSIDERATIONS

56. During the proceedings in this case, the *State* on several occasions acknowledged the existence of a “continuous internationally wrongful act during at least part of the time when the legal provisions applied in Colombia did not recognize the right of same-sex couples to claim a survivor’s pension.” The *State* added that “this internationally wrongful act that existed in Colombia, does not immediately activate the enforceability of that internationally wrongful act before [the] Court.” As to the moment when the internationally wrongful act began, the *State* did not refer to a date, but considered that it was not “necessary to determine that moment for the purposes of analyzing international responsibility in the present case” and that the “relevant point is to analyze whether (a) the internationally wrongful act ceased, (b) when the internationally wrongful act ceased and (c) how this cessation would influence the ruling of the [Court].”

57. The *State* also indicated that “long before the case was submitted to the [...] Court, and even before the Admissibility Report was issued by the [...] Commission, the principal internationally wrongful act had ceased [given that] the case law of the Constitutional Court, specifically judgment C-336 of 2008, modified the provisions that were causing the internationally wrongful act.” On this point, the *State* emphasized that “the internationally wrongful act in this case was cause[d] by the effects of certain provisions, and not by the actions of the judges that applied them.”

58. Furthermore, the *State* recognized that “the effects continued after the cessation of the wrongful act [through judgment C-336 of 2008], in relation to two matters that were not made clear in the judgment. First, it did not specify what those effects were at the time of the judgment and second, it did not specify which means of evidence were available to same-sex couples to prove their union for the purposes of claiming the pension.” However, the *State* added that those effects “disappeared with the Constitutional Court’s subsequent binding case law, which was finally consolidated in 2010” since “the aforementioned points were clarified in judgment T051 of 2010.”

59. To summarize, the *State*: a) recognized that a continuous internationally wrongful act had existed, given that the domestic laws in force in Colombia in 2002 did not recognize the pension rights of same-sex couples. As stated by the Constitutional Court of Colombia in judgment C-336 of 2008, “there appears to be no justification to authorize discriminatory treatment whereby persons who are in homosexual relationships could not have access to survivors’ pensions under the same conditions applied to heterosexual couples;”⁴⁰ b) indicated that the internationally wrongful act had ceased with judgment C-336, which amended the provisions that were causing that wrongful act, and recognized the right of same-sex couples to claim a survivor’s pension under the same conditions as heterosexual couples, and c) affirmed that the effects of the internationally wrongful act had been rectified through the provision of an adequate and effective remedy to guarantee recognition of the pension rights of same-sex couples.

60. This Court recalls that Article 62 of its Rules establishes that “if the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case, or the brief submitted by the alleged victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects.”

⁴⁰ Constitutional Court of Colombia, Judgment C-336 of April 16, 2008 (evidence file, folio 1375).

61. In this case, the Court finds that the State's acknowledgment of an internationally wrongful act is not synonymous with an acknowledgment of international responsibility for the violation of a right protected under the Convention. The State argues, to the contrary, that it cannot be held responsible for the violation of the right to equal protection before the law because Colombian domestic law was modified and its effects repaired, thereby rectifying the internationally wrongful act and, pursuant to the principle of subsidiarity, preventing the Court from examining a violation of the Convention.

62. Consequently, the Court concludes that the State's acquiescence is not equivalent to an acknowledgement of international responsibility, in the terms established in Article 62 of its Rules, nor does it include reparation for the aforementioned unlawful act. Nevertheless, this Court considers that the State's argument does produce legal effects, both in the context of the alleged violation of Article 24 of the American Convention and eventual reparations.

VI EVIDENCE

A. Documentary, testimonial and expert evidence

63. The Court received various documents presented as evidence by the Commission, the representatives and the State, together with their main briefs. The Court also received the sworn statements (affidavits) of one witness⁴¹ and six expert witnesses.⁴² As to the evidence given during the public hearing, the Court heard the statements of the alleged victim Ángel Alberto Duque, of the witness Juan Manuel Trujillo Sánchez, and of the expert witnesses René Urueña, Rodrigo Uprimny Yepes and Macarena Sáez.

B. Admission of the evidence

64. The Court admits those documents presented as evidence by the parties and by the Commission at the proper procedural opportunity, the admissibility of which was not challenged or disputed.⁴³ With regard to certain documents indicated by means of electronic links, the Court has established that, if a party or the Commission provides at least the direct electronic link to the document mentioned as evidence and it is possible to access it, neither the legal certainty nor the procedural balance is impaired, since it can be immediately traced by the Court, by the other party or by the Commission.⁴⁴ In this case, neither the parties nor the Commission made any observations or raised any objection regarding the admissibility of such documents.

⁴¹ Ricardo Luque Núñez.

⁴² Miguel Rueda Sáenz, Fernando Ruiz, Robert Wintemute, Stefano Fabeni, Juan Carlos Upegui and Roberto Saba.

⁴³ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, para. 140, and *Case of López Lone et al. v. Honduras*, para. 33.

⁴⁴ Cf. *Case of Escué Zapata v. Colombia. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of López Lone et al. v. Honduras*, para. 35.

65. The Court also deems it pertinent to admit the statements received at the public hearing and those rendered through affidavits, insofar as these are in keeping with the object and purpose of this case, as defined in the Order that required them.⁴⁵

C. Assessment of the evidence

66. Based on the provisions of Articles 46, 47, 48, 50, 51, 52 and 57 of the Rules, as well as on its constant case law concerning evidence and its assessment, the Court will now examine and assess the documentary evidence forwarded by the parties and the Commission at the proper procedural moments, together with the statements and expert opinions rendered by affidavit and during the public hearing. To this end, it will abide by the principles of sound judicial discretion within the corresponding legal framework, taking into account the body of evidence and the arguments submitted in this case.⁴⁶

VII FACTS

67. In this chapter the Court will examine the main facts of the case in the following order: a) the situation of Ángel Alberto Duque and his request to COLFONDOS regarding the survivor's pension of his partner; b) the legal framework of the Colombian social security system; c) *tutela* actions filed to request recognition of the survivor's pension, and d) subsequent case law of the Constitutional Court of Colombia.

A. Situation of Ángel Alberto Duque and his request to COLFONDOS regarding the survivor's pension of his partner

68. The State does not dispute the fact that Mr. Ángel Alberto Duque and Mr. JOJG cohabited as a couple until September 15, 2001, the date on which JOJG died as the result of Acquired Immunodeficiency Syndrome (AIDS).⁴⁷

69. On August 4, 1997, Mr. Duque enrolled in the ETS-HIV/AIDS Program after being diagnosed with HIV C3 infection. From then on he began to receive antiretroviral treatment with AZT-3CT-IDV-RTV (800/100mg), which could not be suspended, as this could imply a risk of death.⁴⁸

70. Mr. JOJG was affiliated to the *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías* (COLFONDOS S.A.).⁴⁹ After his death on March 19, 2002, Mr. Duque sent a letter to COLFONDOS requesting information on the requirements that he had to meet

⁴⁵ The purpose of these statements is established in the Order of the Acting President of the Court of July 2, 2015.

⁴⁶ Cf. *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37 para. 76, and *Case of López Lone et al. v. Honduras*, para. 42.

⁴⁷ Cf. Petition submitted by the alleged victim to the *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías* on March 19, 2002 (evidence file, folio 4). *Tutela* action filed by the alleged victim on April 26, 2002 (evidence file, folio 7).

⁴⁸ Cf. Social Security, medical certificate, April 17, 2002 (evidence file, folio 21).

⁴⁹ Cf. Petition submitted by the alleged victim to the *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías* on March 19, 2002 (evidence file, folio 4).

to apply for his partner's survivor's pension.⁵⁰ On April 3, 2002, COLFONDOS replied to Mr. Duque's inquiry and advised him that, under existing legislation, he did not qualify as a beneficiary of a survivor's pension.⁵¹ In particular, COLFONDOS stated the following:⁵²

Colombia's social security laws, specifically Article 74 of Law 100 of 1993, provide that the beneficiaries of a survivor's pension are the surviving spouse or permanent companion or partner. However, the law establishes that beneficiary status applies to the union between a man and a woman; currently the law contains no provision for a union between two persons of the same sex.

B. Legal framework of Colombia's social security system

71. Law 100 of December 23, 1993, created the comprehensive social security system, defined as "the body of institutions, norms and procedures that the individual and the community have available to enjoy a quality life [...], to provide comprehensive coverage for contingencies, especially those detrimental to the health and financial situation of the citizens of Colombia, the goal being to achieve individual well-being and community integration."⁵³ Article 10 of this law stipulates that the purpose of the general pension system "is to guarantee that the public is protected against the contingencies associated with old age, disability and death."⁵⁴ For its part, Article 15 of the same law provides that enrolment in the pension system is mandatory for persons with an employment contract.⁵⁵

72. Likewise, Article 47 of this law, as drafted at the time of the events in this case, established that the following persons qualified as beneficiaries of the survivor's pensions: "For life, the surviving spouse or permanent partner."⁵⁶ Meanwhile, Article 74 in force at that time stated that:⁵⁷

In the event that the survivor's pension is triggered by the death of the pensioner, the surviving spouse or permanent partner must prove that he or she was living in marital union with the predecessor in title, at least from the time that the latter met the requirements to qualify for an old-age or disability pension until the time of his or her death, and has cohabited with the deceased for at least two (2) continuous years prior to his or her death, unless [the surviving spouse or permanent partner] has had one or more children with the deceased pensioner [...]

73. Furthermore, Article 1 of Law 54 of December 28, 1990, which regulates *de facto* marital unions and the property regime between permanent partners, defines *de facto* marital union as: "[t]he union between a man and a woman who, without being married, enter into a permanent and exclusive community. Also, and for all civil purposes, a partner or permanent

⁵⁰ Cf. Petition submitted by the alleged victim to the *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías* on March 19, 2002 (evidence file, folio 4).

⁵¹ Cf. *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías*- COLFONDOS S.A., Official letter No. OCI-E-P-1487-02 April 3, 2002 (evidence file, folio 63).

⁵² Cf. *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías* Compañía Colombiana Administradora- COLFONDOS S.A. Official letter No. OCI-E-P-1487-02 April 3, 2002 (evidence file, folio 63).

⁵³ Cf. Congress of the Republic of Colombia, Law 100 of December 23, 1993, Official Gazette No. 41.148, preamble (evidence file, folio 1294).

⁵⁴ Cf. Congress of the Republic of Colombia, Law 100 of December 23, 1993, Official Gazette No. 41.148, Article 10 (evidence file, folio 1300).

⁵⁵ Cf. Congress of the Republic of Colombia, Law 100 of December 23, 1993, Official Gazette No. 41.148, Article 15, in force at the time of the facts (evidence file, folio 1320).

⁵⁶ Cf. Congress of the Republic of Colombia, Law 100 of December 23, 1993, Official Gazette No. 41.148, Article 47, in force at the time of the facts (evidence file, folios 2871 and 2872).

⁵⁷ Cf. Congress of the Republic of Colombia, Law 100 of December 23, 1993, Official Gazette No. 41.148, Article 74, in force at the time of the facts (evidence file, folios 2879 and 2880).

partner shall be understood to be the man or woman who forms part of the *de facto* marital union."⁵⁸

74. Similarly, Decree 1889 of August 3, 1994, which regulates Law 100 of 1993, establishes the following in Articles 10 and 11:⁵⁹

Article 10. Permanent Partner. "For the purposes of the survivor's pension of the affiliate, permanent partner shall refer to the last person, of a sex different from that of the predecessor in title, who has lived in marital union with him or her for a period of no less than two (2) years.

This shall apply to a pensioner who satisfies the requirements set forth in paragraph a) of Articles 47 and 74 of Law 100 of 1993.

Article 11. Proof of Permanent Partner Status. Anyone named by the person affiliated to the respective administrative institution as being his or her permanent partner shall be presumed to be such. Permanent partner status may also be proven by the means that the law prescribes. In any event, the administrative institutions shall specify in their regulations what constitutes suitable proof in order to move forward with the respective procedure.

75. With regard to affiliation to the General Social Security Health Services System, Article 157 of Law 100 of 1993 establishes two types of affiliates. The first group includes persons enrolled in the healthcare system via a contributory scheme through an employment contract, such as public servants, pensioners and retirees, and independent workers with the means to pay.⁶⁰ The second category consists of persons enrolled in the healthcare system through the subsidized scheme, including the country's poorest and most vulnerable groups, or persons who do not have the means to pay contributions.⁶¹ In this second group, priority is given to the following: "mothers during pregnancy, birth and postpartum and during the nursing period, community mothers, mothers who are heads of households, infants under one year, minors in irregular circumstances, those suffering from Hansen's disease, persons over 65 years, disabled persons, *campesinos*, indigenous communities, independent workers and professionals, artists and sportspersons, bullfighters and their assistants, independent journalists, master craftsmen in construction work, bricklayers, taxi drivers, electricians, the unemployed and other persons who do not have the means to pay."⁶²

76. As for the health services available under each scheme, Article 162 of Law 100 of 1993 provides the following:⁶³

For members who contribute under the rules of the contributory scheme, the content of the Mandatory Health Plan defined by the National Social Security Health Services Council shall be as described in Decree-Law 1650 of 1977 and its regulations, including the supply of essential medications in generic form. For other beneficiaries of the contributor's family, the Mandatory

⁵⁸ Cf. Congress of the Republic of Colombia, Law 54 of December 28, 1990, Official Gazette No. 39.615, Article 1 (evidence file, folio 1368).

⁵⁹ President of the Republic of Colombia, Decree 1889 of August 3, 1994, Official Gazette No. 41.480, Articles 10 and 11 (evidence file, folio 1363).

⁶⁰ Cf. Congress of the Republic of Colombia, Law 100 of December 23, 1993, Official Gazette No. 41.148, Article 157(A)(1) (evidence file, folios 2911 and 2912).

⁶¹ Cf. Congress of the Republic of Colombia, Law 100 of December 23, 1993, Official Gazette No. 41.148, Article 157(A)(2) (evidence file, folio 2912).

⁶² Congress of the Republic of Colombia, Law 100 of December 23, 1993, Official Gazette No. 41.148, Article 157(A)(2) (evidence file, folio 2912).

⁶³ Cf. Congress of the Republic of Colombia, Law 100 of December 23, 1993, Official Gazette No. 41.148, Article 162 (evidence file, folio 2914).

Health Plan shall be similar to that described previously, but additional sums shall be required, especially at the primary care level, in the terms of Article 188 of this law.

For affiliates enrolled under the subsidized scheme, the National Social Security Health Services Council shall devise a program so that by the year 2001 these beneficiaries will gradually reach the contribution-based scheme's Mandatory Plan. At the outset, the plan will feature primary health care services equivalent to 50% of the per capita unit of payment under the contributory scheme. Secondary and tertiary care shall be gradually added to the plan based on their contributions to years of healthy living.

C. Tutela actions filed to request recognition of the survivor's pension

77. In view of the negative response he received from COLFONDOS, on April 26, 2002, Mr. Duque filed a *tutela* action to have his right to the survivor's pension recognized and requested that this pension be paid as a temporary measure while a legal action was brought.⁶⁴ Mr. Duque listed the following as grounds for his *tutela* action: he was Mr. JOJG's partner; he had no income of his own; he was living with HIV and was receiving antiretroviral treatment, which could not be suspended; that because of his partner's death he would lose his affiliation to the healthcare provider, but by obtaining the survivor's pension, he would have access to the medical treatment he needed for his health condition.⁶⁵ Mr. Duque also alleged that a refusal to recognize his right to a substitute pension would violate the rights to life, to equality, to constitute a family, to free development of one's personality, to social security, as well as the prohibition against degrading treatment, and the right to freedom of conscience, cultural diversity and human dignity.⁶⁶

78. On June 5, 2002, the Tenth Municipal Civil Court of Bogotá dismissed the *tutela* action filed by Mr. Duque, stating that:⁶⁷

[...] the petitioner does not meet the requirements that the law prescribes to be the beneficiary of a survivor's pension and no legal provision or case law has recognized this right in the case of homosexual couples; this is a fact of life, yet homosexual couples are waiting for the day when lawmakers legislate this right into law, as they did in the case of *de facto* marital unions.

[...] the Court concludes, therefore, that the action is inadmissible for that reason and also because the matter with which the party seeking *tutela* takes issue can be resolved through the judicial processes prescribed by law (the contentious-administrative avenue) and/or by filing petitions for reconsideration and appeal, within the statutory period, to challenge COLFONDOS' decision of April 3, 2002. The claim presented by the party bringing this action is statutory in nature and it is not appropriate to have recourse to the *tutela* action to obtain recognition of that pension. This must be done through regular proceedings, if that right is to be ultimately recognized. In this regard, Article 6 of Decree 2591/91 established the inadmissibility of the *tutela* action when other mechanisms or means of legal defense are available.

The respondent's refusal is in no way perceived as a violation of any of the rights that the party bringing the action invokes, since its decision is in full accordance with the law; it is an elementary application of legal and constitutional norms and thus does not recognize rights not given either in law or the Constitution. To do otherwise, to fail to observe those norms or to accede to the request, would be to violate the Constitution and the law.

On these grounds, the petition seeking *amparo* relief will be denied, but not without advising the petitioner that if it is also his intention to obtain some type of social security health service,

⁶⁴ Cf. *Tutela* action filed by the alleged victim on April 26, 2002 (evidence file, folios 6 to 19).

⁶⁵ Cf. *Tutela* action filed by the alleged victim on April 26, 2002 (evidence file, folios 7 and 8).

⁶⁶ Cf. *Tutela* action filed by the alleged victim on April 26, 2002 (evidence file, folios 11 to 16).

⁶⁷ Tenth Municipal Civil Court of Bogotá, Judgment of June 5, 2002 (evidence file, folio 86).

he can turn to the public health institutions created for the purpose of protecting persons who do not have any financial resources; a case in point would be the program offered by SISBEN.

79. The above ruling was challenged by Mr. Duque; however, on July 19, 2002, the Twelfth Civil Court of the Bogotá Circuit upheld the ruling in its entirety, stating that:⁶⁸

No violation of fundamental constitutional rights was committed. Furthermore, this was an attempt to obtain, by means of constitutional *amparo*, the protection of eminently property-related rights. Constitutional *amparo* cannot be either sought or granted with respect to social benefits, which are rights whose immediate source is the law; hence, it is only logical that such rights should be accorded only to those who meet the requirements that the law prescribes.

Following this line of reasoning, the social security institution was right to deny the application for a substitute pension made by the citizen who brought the *tutela* action, since the survivor's pension is intended to protect the family and, as it is currently defined in our milieu, the family is formed by the union of a man and a woman, the only ones potentially capable of preserving the species through the procreation of children. Thus, a homosexual union of a man with a man or a woman with another woman, does not, in itself, constitute a family. The intimate relationship that can exist between same-sex couples is one thing, but the relationship that forms a family is quite another.

80. The *tutela* file was referred to the Constitutional Court on August 26, 2002, but was not selected for examination and review.

D. Subsequent case law of the Constitutional Court

81. Since 2007, Colombia's Constitutional Court has granted same-sex couples the same pension benefits, social security benefits and property rights as those enjoyed by heterosexual couples. The Constitutional Court has likewise established that Law 54 of 1990 (which regulates matters pertaining to *de facto* marital unions) also applies to same-sex couples and that, therefore, such couples shall enjoy the same protection system, as long as they meet the legal requirements for recognition of their marital union.⁶⁹ The Constitutional Court subsequently determined that coverage of social security system health services provided under the contributory scheme would also apply to same-sex couples and, to that end, the same mechanism applied to heterosexual couples would be used to verify the status of the surviving partner and the permanent nature of the relationship between same-sex couples.⁷⁰

82. In 2008, the Constitutional Court of Colombia delivered judgment C-336, which ruled that permanent same-sex couples who could prove their status as such would be granted the right to a survivor's pension.⁷¹ From 2010 onwards, several decisions issued by the Constitutional Court confirmed that the death of one member of a same-sex couple prior to the notification of judgment C-336 of 2008 was no justification for denying the survivor's pension to the surviving partner. Furthermore, the Constitutional Court concluded that there were no constitutionally valid grounds to find that it was reasonable to give same-sex couples only one method of proving that their union was permanent, when heterosexual couples were

⁶⁸ Twelfth Civil Court of the Circuit of Santa Fe de Bogotá, Judgment, July 19, 2002 (evidence file, folios 92 and 93).

⁶⁹ Cf. Constitutional Court of Colombia, Judgment C-075 of February 7, 2007, paragraphs 6.2.3.2, 6.2.4 and 6.3 (evidence file, folios 1924 to 1926).

⁷⁰ Cf. Constitutional Court of Colombia, Judgment C-811 of October 3, 2007, section 6 (evidence file, folios 1990 to 1992).

⁷¹ Cf. Constitutional Court of Colombia, Judgment C-336 of April 16, 2008 (evidence file, folio 1411).

offered five different methods of doing so; thus, the Constitutional Court held that the same mechanisms should be applied in both cases.⁷²

VIII MERITS

83. Having regard to the alleged violations of rights protected under the Convention in this case, the Court will now analyze the following points: 1) the right to equality and non-discrimination before the law; 2) the right to judicial guarantees and judicial protection, and 3) the right to personal integrity and the right to life.

VIII-1 RIGHT TO EQUALITY AND NON-DISCRIMINATION BEFORE THE LAW

A. Arguments of the parties and of the Commission

84. The *Commission* argued that the reason for denying Mr. Duque a survivor's pension was expressly and exclusively based on the fact that he and his partner, JOJG, were a same-sex couple, since no other reasons were mentioned. It added that the administrative and judicial authorities justified their decision to exclude Mr. Duque from the right to claim a survivor's pension citing the need to "protect the family." In Colombia, at that time, a family was defined as a union between a man and woman and this reasoning, according to the Commission, was based on a "narrow and stereotyped understanding of the concept of family, which arbitrarily excludes diverse forms of families such as those constituted by same-sex couples, which are deserving of equal protection under the American Convention." The Commission also considered that the State did not demonstrate a causal relationship between the objective of protecting a specific family model and the exclusion of same-sex couples from the right to obtain a survivor's pension.

85. The Commission also indicated that the State had not rebutted the presumption that this difference in treatment was contrary to the Convention; indeed, the State recognized that prior to judgment C-336 of 2008 a situation of discrimination existed for same-sex couples regarding their access to a pension, which was, moreover, an "internationally wrongful act." Finally, it considered that the Judiciary must perform "conventionality control" *ex officio* between the domestic legal provisions and the American Convention. Consequently, the Commission considered that the State violated the principle of equality and non-discrimination before the law enshrined in Article 24 of the American Convention, in conjunction with the obligations to respect and guarantee rights, as set forth in Articles 1(1) and 2 thereof.

86. The *representatives* pointed out that in April 2002, the right of same-sex couples to a survivor's pension was not legally recognized and, as a result, Mr. Duque was denied this benefit. Thus, *ab initio*, there was an inconsistency between the Convention and Colombia's domestic laws. They emphasized that the reasons given for denying Mr. Duque a survivor's pension – the fact that this right was not legally recognized and the need to protect the family "formed by a man and a woman" – would not withstand scrutiny in terms of reasonableness and objectivity. As to the State's argument that the internationally wrongful act had ceased

⁷² Cf. Constitutional Court of Colombia, Judgment T-051/10 of February 2, 2010, paragraph 6.7 (evidence file, folios 1528 and 1529), and Constitutional Court of Colombia, Judgment T-860/11 of November 15, 2011 (evidence file, folios 1570 and 1572).

and had subsequently been redressed, they acknowledged that although judgment C-336 of 2008 constituted "significant progress in beginning efforts to overcome discrimination in relation to the pension rights of surviving partners of homosexual couples, it was insufficient and entailed many problems in its implementation."⁷³ With respect to judgment T-051 of 2010, they argued that this provision "only concerns the parties involved in the case (*inter comunis* effects), not the victim, and in any case its promulgation did not prevent the emergence of similar problems."⁷⁴ Finally, they argued that, even accepting that after judgment T-051 of 2010 was issued "some form of reparation could be envisaged, this does not automatically translate into a withdrawal of the Court's jurisdiction and consideration. That action could have effects in determining the amount of the reparations, but it is not an impediment to bringing the matter to the attention of the high Court for a decision, particularly since it occurred long after the facts and long after the opening of the proceedings before the inter-American System."

87. The *representatives* concluded that "despite the case law decisions of the Constitutional Court, its provisions are not applied and sanctions are not effectively enforced by domestic law." Therefore, they considered that the State violated Article 24 in relation to Articles 1(1) and 2 of the American Convention, owing to its failure to adopt domestic legal effects to prevent unequal and discriminatory treatment based on sexual orientation.

88. The *State* argued that, although an internationally wrongful act had existed, it had ceased with judgment C-336 of 2010 of the Constitutional Court, and that the effects that had persisted disappeared with judgment T-051 of 2010, which consolidated the case law precedents for the protection of the pension rights of same-sex couples. According to the *State*, the internationally wrongful act in this case was caused by the effect of certain rules, and not by the actions of the judges that applied them; therefore, the internationally wrongful act had ceased with the modification of those provisions. The *State* also indicated that its existing secondary obligations, particularly the duty to provide reparation, would now be protected through adequate and effective domestic remedies. It added that these remedies had not been activated because this task depended exclusively on Mr. Duque, and could not be transferred to the *State*, as it was up to the alleged victim to activate those remedies.

B. Considerations of the Court

89. The Court will present its considerations in the following order: a) the right to equality and non-discrimination; b) the right to equal protection before the law, c) the alleged cessation and reparation of the internationally wrongful act in this case, and d) conclusion.

B.1. Right to equality and non-discrimination

90. As in the case of the International Covenant on Civil and Political Rights, the American Convention does not contain an explicit definition of the concept of "discrimination." Based on the definitions of discrimination contained in Article 1(1) of the International Convention on

⁷³ The *representatives* also stated that "beginning with the Constitutional Court itself, there were case law differences between the applicable evidentiary systems and the time that the ruling was in force. In real or practical terms, this means that even nowadays, there are still many cases in which same-sex couples are denied the survivor's pension by private and public pension funds, citing a lack of legislation."

⁷⁴ They also indicated that, even with regard to the amount of the monthly payments that Mr. Duque did not receive, it is not possible to conclude that a pension claim based on the parameters of judgment C-336 of 2008 and its consolidation, [...]after judgment T-051 of 2010, would grant him the full amounts of the benefit that Ángel Alberto Duque did not receive, since only the last three years of payments prior to the presentation of the claim would be disbursed, because the rest would expire according to the rules of Article 488 of the Labor Code."

the Elimination of all Forms Racial Discrimination⁷⁵ and Article 1(1) of the Convention on the Elimination of all Forms of Discrimination Against Women,⁷⁶ the United Nations Human Rights Committee has defined discrimination as “any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”⁷⁷

91. Regarding the principle of equality and non-discrimination before the law, the Court has indicated that the notion of equality stems directly from the oneness of mankind and is inseparable from the essential dignity of the person. On this basis any situation is unacceptable which, considering a certain group superior, accords it privileges; or, conversely, considering it inferior, treats it with hostility or in any way discriminates against it in the enjoyment of rights that are recognized to those who do not form part of that group.⁷⁸ The Court has also indicated that at the current stage of evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The juridical structure of national and international public order rests upon it and it permeates the entire legal system.⁷⁹

92. Furthermore, the Court has established that States must refrain from taking steps that are aimed, in any way, at directly or indirectly creating situations of discrimination *de jure* or *de facto*.⁸⁰ States are obliged to adopt positive measures to reverse or change any discriminatory situations that exist in their societies, against any specific group of persons. This entails a special obligation of protection that the State must exercise with regard to the acts and practices of third parties that, with its tolerance or acquiescence, create, maintain or encourage discriminatory situations.⁸¹

⁷⁵ Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination states: “In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

⁷⁶ See *Case of Atala Riffo and Daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 81. Also, Article 1(1) of the Convention on the Elimination of all Forms of Discrimination Against Women states: “For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

⁷⁷ See *Case of Atala Riffo and Daughters v. Chile. Merits, reparations and costs*, para. 81. Also, United Nations, Human Rights Committee, General Comment No. 18, Non-discrimination, para. 6.

⁷⁸ Cf. *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica. Advisory Opinion OC-4/84*, of January 19, 1984. Series A No. 4, para. 55 and *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2014. Series C No. 289, para. 216.

⁷⁹ Cf. *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 101 and *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*, para. 216.

⁸⁰ Cf. Advisory Opinion OC-18/03, para. 103, and *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*, para. 220.

⁸¹ Cf. Advisory Opinion OC-18/03, para. 104; *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of August 24, 2010 Series C No. 214, para. 271; *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs*. Judgment of May 29, 2014. Series C No. 279, para. 201, and *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*, para. 220. Also, United Nations, Human Rights Committee, General Comment No. 18, Non-discrimination, November 10, 1989, CCPR/C/37, para. 6.

93. The Court has established that Article 1(1) of the Convention is a general norm whose content extends to all the provisions of the treaty and establishes the obligation of States Parties to respect and ensure the full and free exercise of the rights and freedoms recognized therein "without any discrimination." In other words, whatever its origin or form, any treatment that could be considered discriminatory in relation to the exercise of any of the rights recognized in the Convention is *per se* incompatible with this instrument.⁸² A State's failure to comply with the general obligation to respect and ensure human rights, through any discriminatory treatment, gives rise to its international responsibility.⁸³ Thus, there is an inseparable link between the obligation to respect and ensure human rights and the principle of equality and non-discrimination.⁸⁴

94. While the general obligation under Article 1(1) refers to the State's obligation to respect and guarantee "without discrimination" the rights enshrined in the American Convention, Article 24 protects the right to "equal protection of the law."⁸⁵ That is to say, Article 24 of the American Convention prohibits discrimination by the law, not only as regards the rights contained in said treaty, but also as regards all the laws enacted by the State and their implementation.⁸⁶ In other words, if a State discriminates in ensuring the respect for or guarantee of a treaty-based right, it would not be in compliance with the obligation established in Article 1(1) and the substantive right in question. If, to the contrary, the discrimination refers to unequal protection by domestic law or its application, the fact should be examined in light of Article 24 of the American Convention in relation to the categories protected under Article 1(1) of the Convention.⁸⁷

95. In the instant case, the representatives and the Commission alleged that the State had violated the principle of equality and non-discrimination for two reasons: a) through the existence of rules, specifically Article 1 of Law 54 of 1990 and Article 10 of Decree 1889 of August 3, 1994 (*supra* paras. 73 and 74), that prevented Mr. Duque from claiming a survivor's pension without discrimination, by establishing that only persons of the opposite sex could be considered as permanent partners, or could form *de facto* marital unions, and b) through the action of the administrative and judicial authorities who excluded Mr. Duque from the right to a survivor's pension (*supra* paras. 70, 78 and 79).

96. With respect to the first point, considering that the alleged discrimination refers to the supposed unequal protection afforded under the domestic laws, it is for this Court to analyze that fact in light of Article 24 of the American Convention. As to the second point, this will be analyzed the chapter concerning judicial guarantees.

⁸² Cf. Advisory Opinion OC-4/84, para. 53, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of June 22, 2015. Series C No. 293, para. 214.

⁸³ Cf. Advisory Opinion OC-18/03, para. 85, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, para. 214.

⁸⁴ Cf. Advisory Opinion OC-18/03, para. 85, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, para. 214.

⁸⁵ Cf. Advisory Opinion OC-4/84, paras. 53 and 54, and *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*, para. 217.

⁸⁶ Cf. *Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of June 23, 2005. Series C No. 127, para. 186, *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*, para. 217.

⁸⁷ Cf. *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 243.

B.2. Right to equality before the law in the instant case

97. As mentioned previously, in April 2002, Colombia's domestic laws denied same-sex couples legal recognition of the survivor's pension; this would constitute a violation of the right to equality protection the law, pursuant to Article 24 of the Convention.

98. The Court recalls that in its principal submissions and during the public hearing, the State "recognized that an internationally wrongful act existed during at least part of the time in which the legal provisions that did not permit the recognition and payment of pensions to same-sex couples were in effect. This was also acknowledged in judgment C-336 of 2008 [of the Constitutional Court of Colombia]. The State added that the internationally wrongful act was configured by the mere existence of norms that "did not allow the granting of pensions to same-sex couples and that were applied in Colombia." Regarding the temporal effects of this internationally wrongful act, the State did not specify the exact moment from which these rules should be considered discriminatory, but merely indicated that in 2008 the Colombian Constitutional Court declared it so. The State also considered that it was not "necessary to determine that moment for the purposes of analyzing international responsibility in the instant case."

99. With respect to the foregoing, this Court takes note of the fact that the State does not dispute the unlawful nature of the domestic provisions that did not recognize pensions for same-sex couples and the fact that they contravened the American Convention. Notwithstanding the State's acknowledgment, it is for the Court to determine whether Colombia's domestic laws regarding survivor's pensions were indeed discriminatory and contravened the right to equality before the law enshrined in Article 24 of the American Convention at the time when the facts of this case occurred, and if they were applied in the instant case.

100. The Court will now consider whether the aforementioned rules (Article 1 of Law 54 of 1990 and Article 10 of Decree 1889 of August 3, 1994) were discriminatory in light of the provisions of Article 24 of the Convention, in relation to Article 1(1) thereof. In analyzing this matter the Court must determine: a) whether those rules established a difference in treatment; b) whether that difference of treatment referred to the categories protected by Article 1(1) of the American Convention, and c) whether that difference in treatment was of a discriminatory nature.

B.2.1. The difference in treatment in Article 1 of Law 54 of 1990 and Article 10 of Decree 1889 of August 3, 1994

101. In the first place, the Court recalls that, at the time of the facts of this case, Article 47 of Law 100 of December 23, 1993, stipulated that the beneficiaries of a survivor's pension were, "[for] life, the surviving spouse or permanent partner." In addition, Article 74 of this law stated that "in the event that the survivor's pension is triggered by the death of the pensioner, the surviving spouse or permanent partner must prove that he or she was living in marital union with the predecessor in title, at least from the time that the latter met the requirements to qualify for an old-age or disability pension and until the time of his or her death, and has cohabited with the deceased for at least two (2) continuous years prior to his or her death [...]" (*supra* para. 74).

102. Similarly, Law 54 of December 28, 1990, which regulates *de facto* marital unions and the property regime between permanent partners, defines *de facto* marital union as "the union between a man and a woman who, without being married, enter into a permanent and exclusive community. Also, and for all civil purposes, a partner or permanent partner shall be understood to be the man or woman who form part of *de facto* marital union" (*supra* para. 73). Furthermore, Decree 1889 of August 3, 1994, which regulates Law 100 of 1993,

established in Articles 10 and 11 that, “for the purposes of the survivor’s pension of the affiliate, the permanent partner shall be the last person of the opposite sex to the predecessor in title, who has lived in marital union with him or her for a period of no less than two (2) years.” (*supra* para. 74).

103. The Court finds that Colombia’s domestic laws regulating *de facto* marital unions and the property regime between permanent partners, as well as the regulatory decree that created the social security system, established a difference in treatment between heterosexual couples who could form a *de facto* marital union and same-sex couples who could not.

B.2.2. Sexual orientation and categories protected by Article 1(1) of the American Convention

104. The Inter-American Court has established that a person’s sexual orientation and gender identity are categories protected by the Convention. Thus, any discriminatory law, act or practice based on an individual’s sexual orientation is prohibited by the Convention. Consequently, no rule, decision or practice of domestic law, either by State authorities or by private individuals, may diminish or restrict, in any way, the rights of a person based on their sexual orientation.⁸⁸

105. In that regard, this inter-American instrument prohibits discrimination in general, including categories such as sexual orientation, which cannot be used as a basis for denying or restricting any of the rights established in the Convention.⁸⁹ Any discrimination of this type would be contrary to the provisions of Article 1(1) of the American Convention.

B.2.3. The alleged discriminatory nature of the difference in treatment established in Article 1 of Law 54 of 1990 and Article 10 of Decree 1889 of August 3, 1994

106. With respect to the foregoing, the Court has determined that a difference in treatment is discriminatory when it does not have a purpose and a reasonable justification;⁹⁰ that is, when it does not seek a legitimate objective, and when there is no reasonable proportional relationship between the means used and the objective sought.⁹¹ This Court has also established that, as regards the prohibition of discrimination based on one of the protected categories established in Article 1(1) of the Convention, the possible restriction of a right requires rigorous and substantial justification, which means that the reasons used by the State to implement a differentiated treatment must be particularly serious and must be substantiated by an exhaustive reasoning.⁹²

⁸⁸ Cf. *Case of Atala Riffo and Daughters v. Chile. Merits, reparations and costs*, para. 91.

⁸⁹ Cf. *Case of Atala Riffo and Daughters v. Chile. Merits, reparations and costs*, para. 93.

⁹⁰ Cf. *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 46, and *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*, para. 219.

⁹¹ Cf. *Case of Norín Catrimán (Leaders, Members and Activist of the Mapuche Indigenous People) and et al. v. Chile*, para. 200, and *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*, para. 219.

⁹² Cf. *Case of Gonzales Lluy et al. v. Ecuador*, para. 257. Also, *Mutatis mutandis*, *Case of Atala Riffo and Daughters v. Chile. Merits, reparations and costs*, para. 124, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, para. 228.

107. In the instant case, the State did not offer any explanation regarding the social imperative or purpose of the difference in treatment, or regarding the need to resort to that differentiation as the only means to achieve that end.

108. With respect to the right of same-sex couples to a pension, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) has indicated that the International Covenant on Economic, Social and Cultural Rights prohibits any discrimination, whether direct or indirect, whether *de facto* or *de jure*, on grounds of race, color, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the purpose or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.⁹³

109. Similarly, in General Comment No. 20, the United Nations Committee on Economic, Social and Cultural Rights has indicated that "other status", as recognized in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, includes sexual orientation. Therefore, States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited reasons for discrimination.⁹⁴

110. For their part, the Yogyakarta Principles concerning the application of international human rights law to human rights violations based on sexual orientation and gender identity establish, in Principle N° 13, that everyone has the right to social security and other social protection measures, without discrimination on the basis of sexual orientation or gender identity. Accordingly, States must take all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation or gender identity, to social security and other social protection measures, including employment benefits, parental leave, unemployment benefits, health insurance or care or benefits (including for body modifications related to gender identity), other social insurance, family benefits, funeral benefits, pensions and benefits related to the loss of support for spouses or partners as the result of illness or death.⁹⁵

111. The Human Rights Committee has ruled that the distinction between same-sex couples, who are excluded from pension benefits under law, and unmarried heterosexual couples, who are granted such benefits, is not reasonable or objective, and that there are no factors to justify such a distinction; therefore, it constitutes discrimination based on a person's sexual orientation.⁹⁶

112. The Court will now refer to the legislation and jurisprudence of certain countries of the region that have recognized the right of same-sex couples to a survivor's pension and

⁹³ Cf. Economic and Social Council (CESCR), *General Comment N° 19: The Right to Social Security (Article 9)*, February 4, 2008, E/C.12/GC/19, para. 29.

⁹⁴ Cf. Economic and Social Council (CESCR), *General Comment N° 20: Non-discrimination and Economic, Social and Cultural Rights (Article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights)*, July 2, 2009, E/C.12/GC/20, para. 32

⁹⁵ Cf. *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007. Principle 13. The Right to Social Security and to Other Social Protection Measures.

⁹⁶ Cf. Human Rights Committee, *Case of Edward Young v. Australia*, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003), para. 10.4 "The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated Article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation."

have established that a person's sexual preferences do not constitute an obstacle to realizing the right to obtain a survivor's pension.

113. In the case of Mexico City, "domestic partnerships" between same-sex couples have been permitted since 2006⁹⁷ and marriage since 2009.⁹⁸ This statute grants various patrimonial rights. At the same time, Mexico's Supreme Court of Justice declared in 2015 that: "[t]he law of any federal entity that, on the one hand, considers that the purpose of [marriage] is procreation and/or that defines it as the union between a man and a woman, is unconstitutional."⁹⁹ The Supreme Court further indicated that linking the requirements of marriage to the sexual preferences of those who enter into the institution of matrimony, with the issue of procreation is discriminatory, since it unfairly excludes homosexual couples who live in conditions similar to heterosexual couples from having access to marriage¹⁰⁰

114. In 2007, Uruguay approved the Law on Concubinary Union that applies to same-sex couples and enables persons who have lived together continuously in a "concubinary union" of an exclusive, stable and permanent nature, to be beneficiaries of the survivor's pension, regardless of gender, sexual identity, orientation or preference.¹⁰¹ In 2013, Uruguay authorized marriage for same-sex couples.¹⁰²

115. In the case of Argentina, the city of Buenos Aires has authorized civil unions between same-sex couples since 2002.¹⁰³ Law 1004 specifies that, in the exercise of rights, obligations and benefits, "the members of a civil union shall be treated in a similar manner to spouses."¹⁰⁴ At national level, marriage between same-sex couples has been legal since 2010.¹⁰⁵ The law specifies that "marriage shall have the same requirements and effects, regardless of whether the partners are of the same or different sexes."¹⁰⁶ In addition, since 2008, the Supreme Court of Justice has recognized the right of same-sex couples to a pension.¹⁰⁷ In 2011, the Supreme Court of Justice recognized the right of same-sex couples to retroactive payments of a survivor's pension after the death of their partner.¹⁰⁸

⁹⁷ Cf. Mexico City, Legislative Assembly of the Federal District, Law on Domestic Partnerships of the Federal District, November 16, 2006.

⁹⁸ Cf. Mexico City, Civil Code of the Federal District, modified by Law of December 29, 2009.

⁹⁹ Mexico, Supreme Court of Justice, First Chamber, June 19, 2015, 1a./J.43/2015.

¹⁰⁰ Cf. Mexico, Supreme Court of Justice, First Chamber, June 19, 2015, 1a./J.43/2015.

¹⁰¹ Cf. Uruguay, Senate and Chamber of Representatives of the Oriental Republic of Uruguay, Law Nº 18.246, "Concubinary Union," December 27, 2007. Article 14- Addendum to Article 25 of Law Nº 16.713, of September 3, 1995. The following clause is hereby added: common law spouses or partners are understood as those persons who, at the time of the proceedings, have lived together continuously for at least five years in a common law union of an exclusive, singular, stable and permanent nature, regardless of their gender, sexual identity, orientation or preference, and that are not subject to the nullifying impediments established in paragraphs 1, 2, 4 and 5 of Article 91 of the Civil Code."

¹⁰² Cf. Law Nº 19.075, approved by Parliament on April 10, 2013, and promulgated by the Executive Branch on May 3, 2013.

¹⁰³ Cf. Argentina. City of Buenos Aires, Law Nº 1004, December 12, 2002

¹⁰⁴ Cf. Argentina. City of Buenos Aires, Law Nº 1004, December 12, 2002, Article 4.

¹⁰⁵ Cf. Argentina. The Senate and Chamber of Deputies of the Argentine Nation gathered in Congress, Law 26.618 "Civil Marriage," approved on July 15, 2010, promulgated on July 21, 2010.

¹⁰⁶ Argentina. The Senate and Chamber of Deputies of the Argentine Nation gathered in Congress, Law 26.618, "Civil Marriage," approved on July 15, 2010, promulgated on July 21, 2010, Article 172.

¹⁰⁷ Cf. Executive Director of the National Social Security Administration, Resolution 671/2008, of August 19, 2008.

¹⁰⁸ Cf. Argentina, Supreme Court of Justice, June 28, 2011.

116. In Brazil, an executive decree dated December 10, 2010, recognized the right of same-sex couples to receive a pension upon the death of their partner.¹⁰⁹ In addition, on May 5, 2011, the Supreme Federal Court recognized same-sex couples and granted them the same rights as heterosexual couples.¹¹⁰ Similarly, on May 14, 2013, the National Council of Justice declared that, based on the principle of non-discrimination,¹¹¹ marriage or *de facto* unions could not be denied to same-sex couples.

117. Likewise, in Chile, same-sex civil partners have enjoyed the same pension rights as heterosexual couples since October 2015.¹¹²

118. For its part, the Supreme Court of Justice of the United States has analyzed the principles and traditions that must be considered to demonstrate that the protection of the right to marry applies equally to same-sex couples. In that regard, the Supreme Court has determined that while individual States within the territory of the United States “are, in general, free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.”¹¹³

119. In the case of Colombia, the Constitutional Court has stated that the possibility of obtaining a dower (portion of the deceased person’s property awarded to the spouse) cannot be conditioned by a couple’s sexual orientation, since the purpose of this mechanism is to balance the burdens that accompany the decision to share a life in common.¹¹⁴

120. In judgment C-336 of 2008 concerning survivor’s pensions for same-sex couples the Constitutional Court stated that “the right to the free development of the personality implies autonomy for individuals so that they can make their own life choices. The State must provide conditions to exercise that right, offering similar judicial treatment to all persons regardless of their sexual orientation, given that a difference in treatment before the law based exclusively on a person’s sexual orientation [...] implies the denial of the validity of their life choices and a sanction for exercising a legitimate alternative, directly derived from their right to self-determination and their human dignity.”¹¹⁵

121. With regard to survivors’ pensions it indicated that “these must be guaranteed by the social security system, based on various constitutional principles, including the solidarity that ensures the economic and social stability of the next of kin of the predecessor in title;

¹⁰⁹ Cf. Brazil, *Superintendência Nacional of Previdência Complementar*, Ordinance N° 941, December 9, 2010.

¹¹⁰ Cf. Brazil, Supreme Federal Court, Direct Action of Unconstitutionality (ADI) N° 4277 of May 5, 2011.

¹¹¹ Cf. Brazil. National Council of Justice, Resolution N° 175, May 14, 2013.

¹¹² Chile, Ministry General Secretariat of Government, Law No. 20.830, on Civil Union and Civil Partnerships, signed into law on April 13, 2015 and published on April 21, 2015. “Article 1. The civil union agreement is a contract between two persons who share a home, for the purpose of regulating the legal effects derived from their affective life in common, of a stable and permanent nature. Prospective spouses shall be termed civil partners and shall be considered next of kin for the purposes of Article 42 of the Civil Code. Such a contract shall confer the status of civil partner. The terms of this agreement shall restore to the prospective partners their civil status prior to entering into this contract, except in the circumstances provided in subparagraph c) of Article 26.”

¹¹³ Supreme Court of Justice of the United States, *Obergefell et al. v. Hodges*, Director, Ohio Department of Health, et al. No. 14–556. Argued April 28, 2015— June 26, 2015.

¹¹⁴ Cf. Constitutional Court of Colombia, Judgment C-238 of March 22, 2012.

¹¹⁵ Constitutional Court of Colombia, Judgment C-336 of April 16, 2008 (evidence file, folio 1398).

reciprocity, through which the law confers on certain persons a benefit derived from their affective, personal and supportive relationship with the predecessor in title [...]. For this reason, the legal system creates a specific order of precedence regarding the persons affectively closest to the predecessor in title, prioritizing those who were most dependent emotionally and financially on him or her." The Constitutional Court concluded that "[i]n light of the higher provisions, there is no justification to authorize discriminatory treatment whereby persons who are in homosexual relationships cannot have access to a survivor's pension under the same conditions applied in the case of heterosexual couples. In order to eliminate discriminatory treatment toward homosexual couples as regards the benefit of the survivor's pension, the protection afforded to the permanent partners of heterosexual couples must be extended to the permanent partners of homosexual couples; there are not sufficient reasonable and objective grounds to explain the unequal treatment given to persons who, in exercise of their rights to the free development of their personality and to freedom of sexual preference, have decided to form a partnership with a person of the same gender."¹¹⁶

122. The Constitutional Court added that "there appears to be no justification for authorizing discriminatory treatment whereby persons who are in homosexual relationships cannot have access to a survivor's pension under the same conditions applied in the case of heterosexual couples."

123. Likewise, this Court has indicated that "a lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered. The fact that this could be a controversial matter in some sectors and countries, and that it is not necessarily an issue on which there is consensus, cannot lead this Court to refrain from making a ruling, because, when doing so, it must refer only and exclusively to the international obligations that the States assumed by sovereign decision under the American Convention."¹¹⁷

124. In the instant case, the Court concludes that the State has not provided an objective and reasonable justification for restricting access to a survivor's pension on the basis of sexual orientation. Consequently, the Court finds that the differentiation based on sexual orientation established in Article 1 of Law 54 of 1990 and Article 10 of Decree 1889 of 1994 regarding access to survivors' pensions, is discriminatory and violates Article 24 of the American Convention.

125. Consequently, the Court finds that the domestic laws in effect in 2002 that did not permit the payment of pensions to same-sex couples, amounted to a difference of treatment that violated the right to equality and non-discrimination, and therefore constituted an internationally wrongful act. Furthermore, this internationally wrongful act affected Mr. Duque, inasmuch as these domestic provisions were applied to him, both in the response of COLFONDOS to his pension application and in the *tutela* rulings by the Tenth Municipal Civil Court of Bogotá and the Twelfth Civil Court of the Bogotá Circuit (*supra* para. 79).

126. The Court will now determine whether the internationally wrongful act was subsequently rectified, having been annulled and repaired, in which case it would not be necessary to recognize the international responsibility of the State.

¹¹⁶ Constitutional Court of Colombia, Judgment C-336 of April 16, 2008 (evidence file, folio 1375 and 1376).

¹¹⁷ *Case of Atala Riffo and Daughters v. Chile. Merits, reparations and costs*, para. 92.

B.3. The alleged cessation and reparation of the internationally wrongful act in this case

127. The Court has stated that the Inter-American System of Human Rights includes “a local or national tier, consisting of each State’s obligation to guarantee the rights and freedoms recognized in the Convention and to punish violations committed” and that “if a specific case is not resolved at the local or national level, the Convention provides an international tier where the principal bodies are the Commission and this Court.” The Court has also indicated that “when a question has been definitively settled under domestic law, in accordance with the clauses of the Convention, the matter need not be brought to this Court for “approval” or “confirmation.”¹¹⁸

128. Similarly, this Court has indicated that the State’s responsibility under the Convention can only be required at international level after the State has had an opportunity to recognize, as appropriate, a violation of a right and repair the harm caused by its own means. This is based on the principle of subsidiarity, which permeates the Inter-American System of Human Rights, “reinforcing or complementing the protection provided by the domestic law of the American States,” as stated in the Preamble of the American Convention. Thus, the State “is the principal guarantor of human rights and, as a consequence, if a violation of said rights occurs, the State must resolve this issue in the domestic system and redress the victim before resorting to international bodies such as the Inter-American System for the Protection of Human Rights, as it derives from the ancillary nature of the international system in relation to local systems for the protection of human rights.”¹¹⁹ The complementary nature of the international jurisdiction signifies that the system of protection established by the American Convention on Human Rights does not replace the national jurisdiction, but rather complements it.¹²⁰

129. In the instant case, the State argued that the internationally wrongful act (*supra* para. 56) had ceased and had been rectified or repaired. It indicated that judgment C-336 of 2008 and judgment T-051 of the Constitutional Court, as well as subsequent judgments, had modified Colombia’s domestic legislation to allow pensions to be paid to same-sex couples; therefore, Mr. Duque could now avail himself of an adequate and effective remedy to apply for the survivor’s pension (*supra* para. 57).

130. With respect to the foregoing, the Court finds that the parties and the Commission indicted that the Constitutional Court of Colombia had modified the country’s domestic legislation by allowing same-sex couples to obtain a survivor’s pension. However, the Court also notes that disputes still persist with respect to a) the requirements for proving permanent partner status and b) the retroactive effects of the regulatory changes.

131. In relation to the first point, the Court confirms that: a) judgment C-336 of 2008 established that *de facto* unions between same-sex couples could be certified by means of a joint sworn statement before a notary by the interested parties, and b) judgment T-051 of 2010 stipulated that the reforms implemented by judgment C-336 of 2008, which recognized that same-sex couples have the right to a survivor’s pension under the same conditions as a

¹¹⁸ Cf. *Case of Las Palmeras v. Colombia. Merits*. Judgment of December 6, 2001. Series C No. 90, para. 33, and *Case of Tarazona Arrieta et al. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of October 15, 2014. Series C No. 286, para. 136.

¹¹⁹ Cf. *Case Acevedo Jaramillo et al. v. Peru. Interpretation of Judgment on Preliminary objections, merits, reparations and costs*. Judgment of November 24, 2006. Series C No. 157, para. 66, and *Case of the Campesino Community of Santa Bárbara v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 299, para. 159.

¹²⁰ Cf. *Case of Tarazona Arrieta et al. v. Peru*, para. 137. *Case of the Campesino Community of Santa Bárbara v. Peru*, para. 159.

heterosexual couple, would also apply in the cases of persons whose partner had died prior to its issuance, even if the claim was made before that date. It also established that a permanent union between persons of the same sex could be proved using methods other than a joint sworn statement before a notary by the interested parties.

132. Consequently, the State pointed out that following that precedent, as of 2010 Mr. Duque was in a position to submit a request for a survivor's pension to COLFONDOS on equal terms with the surviving spouse of a heterosexual couple. In this regard, COLFONDOS sent two communications to Mr. Duque, in 2014 and 2015, asking him to submit the necessary documentation "to formally begin the process of applying for the survivor's pension."¹²¹

133. The Court highlights the significant advances made in the jurisprudence of Colombia's Constitutional Court since 2008. Specifically, with regard to the retroactive effects of the regulatory changes, this Court notes that: a) judgment C-336 of 2008 did not expressly refer to the retroactive effects of its provisions, but b) judgment T-051 of 2010 clarified that judgment C-336 does indeed have retroactive effects, a fact that was confirmed in other rulings by the Constitutional Court of Colombia, such as judgment T-860 of 2011. These case law developments mark an important step forward toward the cessation of discriminatory treatment that contravened conventional rights.

134. However, the Court confirms that Article 488 of the Labor Code provides that "[t]hose actions related to the rights regulated in this code expire within three (3) years from the moment that the respective obligation has been made enforceable, except in the special cases established in the Labor Procedural Rules or in this statute." Therefore, the payments owed for unpaid benefits due to Ángel Alberto Duque in the event of being granted the survivor's pension would only cover the last three years prior to the filing of the claim, given that any other payments would expire under the rules of Article 488 of the Labor Code.

135. At the same time, the Court notes that the State cast doubt as to whether the pension that Mr. Duque could have claimed would entail the application of Article 488 of the Labor Code, preventing Mr. Duque from receiving the pensions not paid since 2002. In that regard, it referred to the statement of the witness proposed by the State, Mr. Juan Manuel Trujillo, Secretary General of COLFONDOS, indicating that "the denial in [the] letter of April 3, 2002, from COLFONDOS stopped or deterred or discouraged [...] Mr. Duque from taking the steps that he was inquiring about in his communication of March 19. Under that assumption, we could say that although this was not a formal request in legal terms, there was a direct and express intention by Mr. [...] Duque to prevent the expiry of the allowances and to claim his right."¹²² However, the State itself added that this "decision is not only a matter that concerns the pension fund, but also requires the intervention of the insurer, and there is no evidence to suggest that this entity would refuse to cover the pension insurance."

136. With respect to the foregoing, the Court considers that, despite the State's arguments, there is no certainty that the insurance company would indeed take this position. Therefore, even if Mr. Duque were able to claim a survivor's pension from COLFONDOS from 2010, under the same conditions as the surviving spouse of a heterosexual couple, as the State has affirmed, it is not certain whether that remedy, if approved, would be effective to restore, in full, the pensions not paid to Mr. Duque since 2002, owing to the discrimination to which he was subjected.

137. Thus, the Court confirms that, according to the State's arguments, the issuance of judgment T-051 2010 modifying the rules for proving the status of *de facto* unions would

¹²¹ Cf. Communications forwarded by COLFONDOS to Dr. German Rincón Perfetti, October 7, 2014 and January 26, 2015 (merits file, folios 2418 et seq.).

¹²² Statement by the witness Juan Manuel Trujillo during the public hearing in this case.

have fully repaired the internationally wrongful act (*supra* para.82). However, even if that were true in the sense that Mr. Duque could have requested a survivor's pension without discrimination, it is also true that, had this pension been granted, there is no certainty that it would have retroactive effects from the time during which he was subjected to a different treatment in 2002. Therefore, it is reasonable to conclude that the internationally wrongful act of which Mr. Duque was a victim still would not have been completely corrected, since the retroactive payments that he could have received would not be equivalent to those he would have received had he not been treated differently in a discriminatory manner.

B.4. Conclusion

138. Based on the foregoing considerations, this Court concludes that the State is responsible for the violation of the right to equality and non-discrimination established in Article 24 of the Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Angel Duque, given that he was not permitted to apply for a survivor's pension under conditions of equality, as established in Colombia's domestic legislation.

139. As to the alleged violation of Article 2 of the Convention, the Court considers that, in light of Colombia's legislative and case law developments regarding the recognition and protection of same-sex couples, it does not find the elements necessary to consider that the State violated the obligation to adopt provisions of domestic law. Consequently, the Court concludes that the State is not responsible for the violation of Article 2 of the American Convention, in relation to Articles 24 and 1(1) thereof.

VIII-2. RIGHTS TO JUDICIAL GUARANTEES AND JUDICIAL PROTECTION

A. Arguments of the parties and of the Commission

140. The *Commission* noted that the purpose of the *tutela* action filed by Mr. Duque was to challenge the validity of excluding same-sex couples from the right to claim a survivor's pension. However, the judges presiding over the *tutela* action "neglected their duty to examine the questions put to them and instead narrowed the scope of the *tutela*, which is contrary to the Convention and to the constitutional case law that the State itself cited." The Commission considered that because the judges referred the matter to the ordinary courts and failed to address the questions raised, Mr. Duque did not have an effective judicial remedy to challenge the rationality, reasonableness and proportionality of the provision that excluded him as a beneficiary of his partner's survivor's pension.

141. The *Commission* further noted that the merits of the *tutela* action - that is, the justification, reasonability and proportionality of the provisions being challenged- "were not duly analyzed by the courts; instead, the courts rejected them based on a dogmatic and formalistic interpretation of the provision in force." It also considered that "with their decisions, the judicial proceedings perpetuated the prejudices and stigmatization of same-sex couples by reaffirming a narrow and stereotyped view of the concept of family," the sole purpose of which was to "preserve the species through the procreation of children." It concluded that the State violated the right to judicial guarantees and judicial protection, enshrined in Articles 8(1) and 25 of the American Convention, in relation to the obligation to respect rights, stipulated in Article 1(1) thereof.

142. The *representatives* pointed out that the claims pursued by Mr. Duque before the public authorities show that he was not guaranteed access to due process, first because they

“reaffirmed the ineligibility of same-sex couples to access a survivor’s pension,” and secondly they “argued the lack of legitimacy in claiming the social benefits requested, adding that this was aimed at safeguarding the family comprised of a man and a woman.” The representatives concluded that Mr. Duque “had no possibility of having access to an effective remedy to adequately challenge the exclusion and differentiated treatment given to his petition owing to his sexual orientation.”

143. The *State* argued that it was not internationally responsible as a consequence of the rulings of the *tutela* actions filed by the alleged victim in 2002, since there were no elements of international law requiring it to exercise conventionality control or to apply international standards to rule favorably on the claims of the alleged victim.

144. The *State* also pointed out that the judges who issued those rulings were applying the provisions that were in force in Colombia at the time when the *tutela* actions were filed. Furthermore, when those decisions were issued, neither the domestic laws nor the existing jurisprudence allowed judges to deviate from the current interpretation, according to which same-sex couples did not have the right to a survivor’s pension. In addition, the State argued that when the judges of the courts of first and second instance issued their decisions in Mr. Duque’s case, Colombia had not developed an evolutive interpretation of the binding human rights treaties that allowed for recognition of pension rights for same-sex couples.

B. Considerations of the Court

145. The Court has considered that under the American Convention, the State has an obligation to provide effective judicial remedies to victims of human rights violations, pursuant to Article 25. These remedies must be substantiated in accordance with the rules of due process of law established in Article 8 (1) of the Convention, in keeping with the State’s general obligation to guarantee the free and full exercise of the rights recognized by the Convention in Article 1(1) to all persons subject to their jurisdiction.¹²³

146. The Court will now examine the alleged violations of judicial guarantees and judicial protection, as follows: 1) the alleged violation of Article 25 of the Convention based on the alleged lack of an effective remedy in Colombia to claim a survivor’s pension, and 2) the alleged violation of Article 8(1) of the Convention owing the alleged application of discriminatory stereotypes in judicial rulings.

B.1. Existence of an effective remedy in Colombia to claim a survivor’s pension

147. With respect to Article 25(1) of the Convention, this Court has indicated that this provision establishes, in broad terms, the obligation of States to guarantee to all persons subject to their jurisdiction, an effective judicial remedy against acts that violate their fundamental rights.¹²⁴ Furthermore, the Court has established that the State has the obligation to design and embody in legislation an effective remedy and to ensure the proper application of that remedy by its judicial authorities, in order to protect all persons under its

¹²³ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, para. 91, and *Case of Galindo Cárdenas et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of October 2, 2015. Series C No. 301, para. 258.

¹²⁴ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, para. 91, and *Case of Galindo Cárdenas et al. v. Peru. Preliminary objections, merits, reparations and costs*, para. 219.

jurisdiction against acts that violate their fundamental rights, or to determine those rights and obligations.¹²⁵

148. This Court has also determined that in order for the State to fulfill its obligations under Article 25 of the Convention, it is not sufficient that it provide a remedy through the Constitution or by law or that it be formally recognized, but that it must be truly effective.¹²⁶ In other words, such a remedy must provide results or answers to the violations of rights established in the Convention, in the Constitution or by law.¹²⁷ This means that the remedy must be appropriate to address the violation and must be effectively applied by the competent authority.¹²⁸ Furthermore, the analysis of an effective remedy by the competent authority cannot be reduced to a mere formality; instead it must examine the reasons invoked by the claimant and make express statements in that regard.¹²⁹

149. This Court has also determined that for a remedy to be effective, it is not sufficient that it be provided by the Constitution or by law, or that it be formally recognized; rather, it must also be truly effective in establishing whether or not there has been a violation of human rights and, if so, providing redress. The Court has also held that a remedy that proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.¹³⁰ Consequently, the State has the obligation to design and embody in legislation an effective recourse, and also to ensure the due application of said recourse by its judicial authorities.¹³¹

150. In the instant case, the Court recalls that on March 19, 2002, Mr. Duque sent a request to COLFONDOS asking for information on the requirements he would have to satisfy to apply for the survivor's pension of his partner JOJG (*supra* para. 70). On April 3, 2002, COLFONDOS responded to Mr. Duque's inquiry stating that he did not qualify as a legal beneficiary of the survivor's pension (*supra* para. 70). In view of the negative response from COLFONDOS, Mr. Duque filed a *tutela* action on April 26, 2002, requesting recognition and payment of a substitute pension within 48 hours as a temporary measure while the respective legal action was brought.

151. On June 5, 2002, the Tenth Municipal Civil Court of Bogotá rejected the *tutela* action, stating that "the action is out of order [...] given that the petitioner's claim can be resolved through the judicial processes prescribed by law, (the contentious-administrative courts) and/or by filing petitions for reconsideration (*reposición*) or appeal, within the statutory period, to challenge COLFONDOS' decision of April 3, 2002. The dispute that the petitioner presents is of a statutory nature and a *tutela* action is not the appropriate means to obtain recognition of the right to a pension. This must be done through ordinary proceedings, if that right is to be ultimately recognized. In this regard, Article 6 of Decree 2591/91, establishes

¹²⁵ *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 237, and *Case of Omar Humberto Maldonado Vargas et al. v. Chile. Merits, reparations and costs.* Judgment of September 2, 2015. Series C No. 300, para. 123.

¹²⁶ *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 of the American Convention on Human Rights).* Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24, and *Case of Omar Humberto Maldonado Vargas et al. v. Chile*, para. 123.

¹²⁷ *Cf. Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 30, 2010 Series C No. 215, para. 182, and *Case of Ruano Torres et al. v. El Salvador. Merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 303, para. 136.

¹²⁸ *Cf. Case of Maritza Urrutia v. Guatemala. Merits, reparations and costs.* Judgment of November 27, 2003. Series C No. 103, para. 117, and *Case of Omar Humberto Maldonado Vargas et al. v. Chile*, para. 123.

¹²⁹ *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 96, and *Case of Omar Humberto Maldonado Vargas et al. v. Chile*, para. 123.

¹³⁰ *Cf. Advisory Opinion OC-9/87*, para. 24, and *Case of López Lone et al. v. Honduras*, para. 247.

¹³¹ *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 237, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, para. 314.

the inadmissibility of the *tutela* action when other legal defense mechanisms are available.” (*supra* para. 78).

152. Although Mr. Duque challenged the court’s decision in the *tutela* action, the Twelfth Civil Court of the Bogotá Circuit upheld the ruling, in its entirety, on July 19, 2002, indicating the following: “[n]o violation of fundamental constitutional rights was committed. Furthermore, this was an attempt to obtain, by means of constitutional *amparo*, protection of rights that are eminently patrimonial in nature. Constitutional *amparo* cannot be sought or granted with respect to social benefits, which are rights whose immediate source is the law; thus, it is logical that such rights are accorded only to those who satisfy the requirements established by the law.” (*supra* para. 79).

153. Having regard to the foregoing, the Court will now analyze the following: i) whether the *tutela* action and the appeal were effective remedies in this case, and ii) whether it is possible to conclude that, at the time of the facts, Colombia provided no effective remedies for claiming a survivor’s pension.

154. With regard to the effectiveness of the *tutela* action and the appeal, the Court recalls that it has been determined that given the alleged urgency of Mr. Duque’s health condition, the *tutela* action was an appropriate remedy (*supra* para. 32). Nevertheless, the Court notes that in deciding on Mr. Duque’s request, the *tutela* and appeal rulings expressly stated that under the existing legal system it was not possible recognize the survivor’s pension through a *tutela* action. Mr. Duque was also advised of the remedies that he could pursue for that purpose, through the contentious-administrative courts and, if appropriate, by filing a petition for reconsideration (*reposición*) or an appeal against of the decision of COLFONDOS.

155. The Court considers that it does not have sufficient elements to conclude that the *tutela* action and the appeal filed by the alleged victim were not effective remedies, solely because they did not produce the legal outcome that Mr. Duque wished for. The judges ruled that the *tutela* action was not the appropriate remedy for claiming a pension, being of a subsidiary and residual nature, and that such a remedy only displaces the ordinary courts in certain circumstances, for example when the petitioner can prove an urgent situation or potential irreparable harm, a circumstance that was not considered applicable to Mr. Duque’s case. Nevertheless, the judges informed Mr. Duque of the remedies that would be adequate and appropriate for requesting the pension.¹³² The Court recalls that the State’s obligation to conduct proceedings in adherence to the guarantees of judicial protection is an obligation to take action and is not breached by the mere fact that the proceeding does not produce a satisfactory result or does not arrive at the conclusion sought by the alleged victim.¹³³ Furthermore, the Court finds no evidence that the State was unwilling to provide judicial protection to Mr. Duque, given that the courts of first and second instance ruled according to the existing laws, and indicated the appropriate channels through which Mr. Duque could claim the survivor’s pension.

156. At the same time, in order to analyze the alleged lack of effective recourse in Colombia it is necessary to consider the other remedies mentioned in the *tutela* rulings that were not

¹³² In its ruling on the *tutela* action, the Tenth Civil Court of Bogotá informed Mr. Duque that his complaint could be resolved through the procedures provided by law, through the contentious-administrative courts and/or the filing of petitions for reconsideration (*reposición*) and appeal, within the statutory period, against the decision issued by COLFONDOS on April 3, 2002. The court also advised Mr. Duque that if his intention was to obtain some type of social security in health, he could apply to the public health institutions of the State that exist to protect those persons without financial means, such as the program offered by SISBEN. This information was reiterated by the Twelfth Circuit Civil Court of Bogotá in its ruling on the *tutela* appeal.

¹³³ Cf. *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs*. Judgment of October 13, 2011. Series C No. 234, para. 122, and *Case of Garífuna Triunfo de la Cruz Community and its Members v. Honduras. Merits, reparations and costs*. Judgment of October 8, 2015. Series C No. 305, para. 237.

filed by the alleged victim. In that regard, it should be recalled that the *tutela* judges considered that Mr. Duque was not in an urgent situation that would have prevented him from pursuing his claim for a survivor's pension through the ordinary courts and for that reason decided that the *tutela* was not the appropriate mechanism, since it is of a subsidiary or residual nature and only displaces ordinary proceedings in certain circumstances, for example when the petitioner can prove a situation of urgency or the possibility of irreparable harm.

157. Accordingly, the Court considers that in the instant case it does not have sufficient elements to conclude that no appropriate or effective remedy existed in Colombia to apply for a survivor's pension, given that it is not possible to determine *in abstracto* the effectiveness or suitability of the domestic remedies still available to Mr. Duque in the contentious-administrative courts and of the remedies of reconsideration (*reposición*) or appeal against the decision of COLFONDOS, since those remedies were not filed.

158. Therefore, this Court considers that although the *tutela* action and the appeal failed to grant the pension claimed by Mr. Duque, it is not possible to conclude that Colombia lacked effective remedies based solely on the fact that he did not file other suitable remedies that were available to him to resolve the matter, as indicated by the *tutela* and appeal judges in their rulings. Thus, the Court concludes that there are not sufficient elements to prove that the actions of the judicial authorities impaired Mr. Ángel Alberto Duque's judicial protection. Consequently, the Court finds that the State did not violate the right to judicial protection recognized in Article 25(1) of the Convention.

B.2. Alleged violation of Article 8(1) of the Convention based on the supposed application of discriminatory stereotypes in judicial rulings

159. Under Article 8(1) of the Convention, decisions affecting the rights of persons must be adopted by a competent authority, in accordance with domestic law¹³⁴ and the procedures established for this purpose.

160. It has been alleged that the courts did not properly analyze the *tutela* action and appeal filed by the petitioner, but rejected these based on a dogmatic and formalistic interpretation of the existing laws; it has also been argued that the rulings issued in these judicial proceedings perpetuated the prejudice and stigmatization of same-sex couples by reaffirming a narrow and stereotyped perception of the concept of "family," viewed solely as a means of preserving the species through the procreation of children.

161. In that regard, the State held that the judges merely applied the laws in effect at the time of the facts, and also that in those days there was no obligation under national or international case law to recognize the right of same-sex couples to a survivor's pensions.

162. The Court reiterates that the right to be tried by an impartial judge or court is a fundamental guarantee of due process. In other words, the person on trial must have the guarantee that the judge or court presiding over his case brings to it the utmost objectivity.¹³⁵ This Court has established that impartiality demands that the judge acting in a specific dispute approach the facts of the case subjectively, free of all prejudice, and must offer sufficient objective guarantees from an objective viewpoint so as to inspire the necessary trust and

¹³⁴ Cf. *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2013. Series C No. 266, para. 158, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, para. 243.

¹³⁵ Cf. *Case of Herrera Ulloa v. Costa Rica*, para. 171, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, para. 304.

confidence in the parties to the case and in the citizens of a democratic society.¹³⁶ The impartiality of a court implies that its members have no direct interest in, a pre-established viewpoint on, or a preference for one of the parties, and that they are not involved in the controversy.¹³⁷ That is so, since a judge must appear to act without being subject to any influence, inducement, pressure, threat or interference, direct or indirect,¹³⁸ and only and exclusively in accordance with —and on the basis of— the law.¹³⁹

163. The Court reiterates that the personal impartiality of a judge must be presumed, until there is proof to the contrary.¹⁴⁰ For the analysis of subjective impartiality, the Court must attempt to ascertain the personal interests or motivations of the judge in a particular case.¹⁴¹ As to the type of evidence required to prove subjective impartiality, the European Court has indicated that it is necessary to determine whether a judge has shown hostility or if he has arranged for the case to be assigned to him for personal reasons.¹⁴²

164. In the instant case, the Court advises that rulings in the *tutela* action and the appeal provided arguments regarding the legal basis for not granting pensions to same-sex couples, citing the Colombian legislation in force at the time of the facts. From a reading of the entire *tutela* and appeal rulings, the Court finds no indication that Mr. Duque's sexual orientation was the primary or decisive factor in these decisions, or that these decisions were overwhelmingly based on a stereotyped view against him due to his sexual orientation. To the contrary, it is clear that the courts referred primarily to the provisions established in Articles 1 of Law 54 of 1990 and 10 of Decree 1889 of 1994 (*supra* paras. 73 and 74) to conclude that Mr. Duque was not entitled to a survivor's pension. Furthermore, the *tutela* and appeal rulings established that the *tutela* action was not the proper remedy for resolving this case, but that the case should be submitted to the ordinary courts. Therefore, the Court cannot conclude that the rulings were primarily based on the stereotyped views of the judges.

165. The Court emphasizes that a violation of Article 8(1) of the Convention arising from an alleged lack of judicial impartiality on the part of the judges must be established based on specific and concrete evidence that indicates a situation in which the judges have clearly

¹³⁶ Cf. *Case of Herrera Ulloa v. Costa Rica*, para. 171, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, para. 304.

¹³⁷ Cf. *Case of Palamara Iribarne v. Chile. Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, para. 146, and *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, para. 304.

¹³⁸ Principle 2 of the United Nations Basic Principles on the Independence of the Judiciary.

¹³⁹ Cf. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary objection, Merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 56, and *Case of López Lone et al. v. Honduras*, para. 233.

¹⁴⁰ Similarly, in European case law, see ECHR, *Case of Kyprianou v. Cyprus*, (No. 73797/01), Judgment of January 27, 2004, para. 119 ("In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary"), citing ECHR, *Case of Hauschildt v. Denmark*, (No. 10486/83), Judgment of May 24, 1989, para. 47.

¹⁴¹ Cf. ECHR, *Case Kyprianou v. Cyprus*, No. 73797/01, December 15, 2005, para. 118 ("a subjective approach, that is endeavoring to ascertain the personal conviction or interest of a given judge in a particular case").

¹⁴² Cf. ECHR, *Case of Kyprianou v. Cyprus*, No. 73797/01, December 15, 2005, para. 119 ("As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will or has arranged to have a case assigned to himself for personal"). See likewise, ECHR, *Case of Bellizzi v. Malta*, No. 46575/09, June 21, 2011, para. 52; and *Case of Cubber v. Belgium*, No. 9186/80, October 26, 1996, para. 25. The European Court also indicated that the subjective impartiality of a judge can be determined, according to the specific circumstances of the case, based on the judge's conduct during the proceedings, the content, the arguments and the language used in the decision, or the reasons for undertaking the investigation, which would indicate a lack of professional distance in relation to the decision. Cf. ECHR, *Case of Kyprianou v. Cyprus*, No. 73797/01, G.C., December 15, 2005, paras. 130 to 133.

allowed themselves to be influenced by aspects or criteria outside the legal provisions.¹⁴³ In this case, the Court considers that it is not possible to conclude that the authorities acted, essentially and primarily, on the basis of other aspects beyond what is expressly established in Colombian law. Furthermore, the Court does not find any elements to suggest that the judicial authorities acted with a lack of impartiality or were swayed by prejudices or stereotypes related to Mr. Duque's sexual orientation that decisively influenced their decision.

166. Consequently, the Court concludes that the State is not responsible for the violation of the judicial guarantees established in Article 8(1) of the Convention.

VIII-3 THE RIGHTS TO PERSONAL INTEGRITY AND TO LIFE

A. Arguments of the parties and of the Commission

167. The *Commission* recalled that in its Admissibility Report it determined that, in the instant case, the analysis of the right to personal integrity had a subsidiary nature and depended on the conclusion reached on the merits of the arguments formulated in relation to the rights enshrined in Articles 8(1), 24 and 25 of the American Convention. It considered that the following situations affected Mr. Duque's right to personal integrity: i) Mr. Duque's exclusion from the right to claim the survivor's pension of his deceased permanent partner, by virtue of a discriminatory provision based on his sexual orientation; ii) the lack of protection and of an unbiased and effective response by the judicial system, and iii) the suffering caused to him because of uncertainty regarding the regularity and provision of the medical treatment he required. In its Merits Report, the Commission indicated that it had already concluded in the Admissibility Report that the information presented did not configure a possible violation of the right enshrined in Article 4 of the Convention in relation to Article 1(1) thereof.

168. The *representatives* pointed out that by denying Mr. Duque his right to the survivor's pension and to other associated social benefits, particularly his access to healthcare as a person "diagnosed with HIV infection" receiving antiretroviral treatment - "treatment that must not be suspended, except under medical advice, since this circumstance could result in death" - the State violated Mr. Duque's right to physical, psychological and moral integrity. The *representatives* further argued that, in addition to causing Mr. Duque intrinsic moral harm because of the discriminatory treatment to which he was subjected owing to his sexual orientation, his physical integrity was threatened, since he was literally in danger of dying because he lacked the financial means to ensure adequate treatment for his HIV condition. Likewise, they stressed that the right to personal integrity is closely related to the right to the preservation of health, enshrined in Article XI of the American Declaration on the Rights and Duties of Man.

169. At the same time, the *representatives* emphasized the close links between the right to life, the right to physical, psychological and moral integrity and the right to the preservation of health, enshrined in Article XI of the American Declaration on the Rights and Duties of Man. They argued that "the refusal to grant Ángel Alberto Duque a survivor's pension meant that during several periods he was without protection to treat his serious physical and emotional health condition as a person diagnosed with HIV." They added that this "implied that the State [...] disregarded Mr. Ángel Alberto Duque's right to decent living conditions, undermining his dignity, which had already been injured through the act of discrimination, and had placed him

¹⁴³ Cf. *Case of Atala Riffo and Daughters v. Chile. Merits, reparations and costs*, para. 190.

in an extreme situation that threatened his very life," thereby violating Article 4(1) of the Convention to the detriment of Mr. Duque.

170. The *State* argued that its legal and institutional framework complies with the standards of the inter-American System and guarantees the right to health, especially for the population with HIV-AIDS. It also stressed that the case file contained no evidence to show that Mr. Duque was ever denied access to HIV treatment or that his medical care was in any way interrupted. The State emphasized that there is certainty that Mr. Duque was continuously enrolled in the social security system health services, and therefore he would have access to services derived from his enrolment. Likewise, the *State* pointed out that the representatives acknowledged that Mr. Duque had resolved his situation regarding access to health services, as warranted by his status as an HIV patient, and that in any case, if Mr. Duque did not have the financial means to make payments to the contributory scheme, he could still have had access to health services through the subsidized scheme, which provides services of equal quality for "catastrophic" illnesses, such as HIV.

B. Considerations of the Court

171. The Court will now analyze certain standards concerning the right to personal integrity, in relation to the right to health of persons with HIV. Subsequently, the Court will examine the arguments regarding the alleged violation of the rights to personal integrity and to life of Mr. Ángel Alberto Duque.

B.1. Standards regarding the right to personal integrity in relation to the right to health of persons with HIV

172. Article XI of the American Declaration on the Rights and Duties of Man establishes that "[e]very person has the right to the preservation of his health through sanitary and social measures relating to [...] and medical care, to the extent permitted by public and community resources." For its part, Article 45 of the OAS Charter requires that Member States "dedicate every effort to the [...] development of an efficient social security policy."¹⁴⁴ In this regard, Article 10 of the Additional Protocol to the American Convention on Human Rights in relation to Economic, Social and Cultural Rights, which was ratified by Colombia on October 22, 1997, and entered into force on November 16, 1999, establishes that everyone has right to health, understood as "the enjoyment of the highest level of physical, mental and social well-being," and also recognizes health as a public good.¹⁴⁵ Also, in July 2012, the General Assembly of

¹⁴⁴ Article 26 of the American Convention (Pact of San José) refers to the progressive development "of the rights derived from the economic [and] social [...] standards, contained in the [OAS] Charter [...] subject to available resources, by legislation or other appropriate means." That reference includes the right to health. Regarding the State's obligations in relation to Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights has stated that "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant." Likewise, it indicated that "[a]mong the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies." *Cf.* United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 3, E/1991/23, December 14, 1990, paras. 2 and 5.

¹⁴⁵ This article establishes that: "1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. 2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right: a. Primary health care, that is, essential health care made available to all individuals and families in the community; [and] b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction."

the Organization of American States emphasized the quality of health establishments, goods and services, which requires the presence of qualified medical personnel, as well as adequate health conditions.¹⁴⁶

173. The Protocol of San Salvador establishes that, among the measures to guarantee the right to health, the States must promote “universal immunization against the principal infectious diseases,” “prevention and treatment of endemic, occupational and other diseases,” and “satisfaction of the health needs of the highest risk groups and of those whose poverty makes them most vulnerable.”¹⁴⁷ Similar obligations are established in Article 12(2) of the International Covenant on Economic, Social and Cultural Rights, including measures to provide access to medications. According to General Comment N° 14, the right to the highest attainable standard of health generates some basic obligations that include the provision of “essential drugs, as defined by the WHO Action Programme on Essential Drugs.”¹⁴⁸

174. Access to medications is an essential part of the right to the highest attainable standard of health.¹⁴⁹ In particular, the United Nations Human Rights Council and the former U.N. Commission on Human Rights have issued resolutions recognizing that “access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria is one of the fundamental elements to gradually achieve the full exercise of the right of every person to enjoy the highest attainable standard of physical and mental health.”¹⁵⁰

¹⁴⁶ Cf. *Case of Gonzales Lluy et al. v. Ecuador*, para. 172, and OAS, *Progress Indicators for Measuring Rights under the Protocol of San Salvador*, OEA/Ser.L/XXV.2.1, Doc 2/11 rev.2, December 16, 2011, paras. 66 and 67. This document establishes that: “The Protocol refers to observance of the right (to health) in the framework of a health system that, however basic it may be, should ensure access to primary health care and the progressive development of a system that provides coverage to the country’s entire population [...]. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate and adequate sanitation.” These indicators include: “Existence of administrative recourse to submit complaints concerning the violation of obligations connected with the right to health. Competencies of ministries or oversight agencies in terms of receiving complaints from health system users. Training policies for judges and lawyers on the right to health.” Also see United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 9, E/C.12/1998/24, 3 December 1998, para. 10. Also see OAS, Social Charter of the Americas, approved by the OAS General Assembly on June 4, 2012, AG/doc.5242/12 rev. 2.

¹⁴⁷ Article 10(2) of the Protocol of San Salvador.

¹⁴⁸ Cf. *Case of Gonzales Lluy et al. v. Ecuador*, para. 163, and United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights. General Comment No. 14, E/C.12/2000/4, 11 August 2000, para. 43(d).

¹⁴⁹ Cf. *Case of Gonzales Lluy et al. v. Ecuador*, para. 164, and Human Rights Council of the United Nations, Resolution on ‘Access to medication in the context of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’ (June 11, 2013) Doc A/HRC/23/L.10/Rev. I para. 2; United Nations General Assembly, ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’. Paul Hunt’ (September 13, 2006) UN Doc A/61/338 para. 40, and United Nations Human Rights Council, ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’, Anand Grover, on access to medicines’ (May 1, 2013) UN Doc A/HRC/23/42 para. 3.

¹⁵⁰ *Case of Gonzales Lluy et al. v. Ecuador*, para. 164, and, for example, Resolutions of the United Nations Commission on Human Rights, ‘Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria,’ Resolutions 2001/33, 2002/32, 2004/26 and 2005/23. Similarly the Human Rights Council has commented on HIV/AIDS. Cf. United Nations Human Rights Council, Resolution on ‘The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS)’ (April 13, 2011) UN Doc A/HRC/RES/16/28, para. 1. Also, the Constitutional Court of Peru, in the context of recognizing persons with HIV as subjects of special protection, has stated that their life “depends on the specific actions undertaken by the State in conjunction with the community and the nuclear family, both in health matters and regarding access to highly active anti-retroviral treatment, as well as in other aspects of prevention, comprehensive quality assurance, social security and pensions.” Cf. Judgment of the Constitutional Court of August 9, 2011, file number 0479-2009-PA/TC, para. 29.

175. In this regard, the Court considers that the *International Guidelines on HIV/AIDS and Human Rights* of the Office of the United Nations High Commissioner for Human Rights (hereinafter "OHCHR") and the Joint United Nations Programme on HIV/AIDS (hereinafter "UNAIDS") constitute an authoritative reference to clarify some of the State's international obligations in this sphere. Guideline Six, revised in 2002, states the following:

States should enact legislation to provide for the regulation of HIV-related goods, services and information, so as to ensure widespread availability of quality prevention measures and services, adequate HIV prevention and care information, and safe and effective medication at an affordable price. States should also take the measures necessary to ensure for all persons, on a sustained and equal basis, the availability and accessibility of quality goods, services and information for HIV prevention, treatment, care and support, including antiretroviral and other safe and effective medicines, diagnostics and related technologies for preventive, curative and palliative care of HIV and related opportunistic infections and conditions. [...]¹⁵¹

176. This sixth guideline has been interpreted by OHCHR and UNAIDS to mean that an effective response to HIV requires an integral approach that comprises a continuous sequence of prevention, treatment, care and support:

Prevention, treatment, care and support are mutually reinforcing elements and a continuum of an effective response to HIV. They must be integrated into a comprehensive approach, and a multifaceted response is needed. Comprehensive treatment, care and support include antiretroviral and other medicines, diagnostics and related technologies for the care of HIV and AIDS, related opportunistic infections and other conditions, good nutrition, and social, spiritual and psychological support, as well as family, community and home-based care. HIV-prevention technologies include condoms, lubricants, sterile injection equipment, antiretroviral medicines (e.g. to prevent mother-to-child transmission or as post-exposure prophylaxis) and, once developed, safe and effective microbicides and vaccines. Based on human rights principles, universal access requires that these goods, services and information not only be available, acceptable and of good quality, but also within physical reach and affordable for all.¹⁵²

177. The Court notes that these standards emphasize that access to antiretroviral medications is just one of the elements of an effective response for persons living with HIV. In this sense, such persons require an integral approach that includes a continuous sequence of prevention, treatment, care and support. A response limited to access to antiretroviral medications and other medicines does not comply with the obligations of prevention, treatment, care and support derived from the right to the highest attainable standard of health.¹⁵³

¹⁵¹ *Case of Gonzales Lluy et al. v. Ecuador*, para. 195, and Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint United Nations Programme on HIV/AIDS (UNAIDS), *International Guidelines on HIV/AIDS and Human Rights*. Consolidated version, 2006, Guideline Six.

¹⁵² *Case of Gonzales Lluy et al. v. Ecuador*, para. 196, and OHCHR and UNAIDS, *International Guidelines on HIV/AIDS and Human Rights*. 2006 Consolidated Version, Commentary on Guideline Six, para. 26.

¹⁵³ The Guidelines also indicate that "States should also ensure access to adequate treatment and drugs, within the overall context of their public health policies, so that people living with HIV can live as long and as successfully as possible. People living with HIV should also have access to clinical trials and should be free to choose amongst all available drugs and therapies, including alternative therapies." OHCHR and UNAIDS, *International Guidelines on HIV/AIDS and Human Rights*. 2006 Consolidated Version, para. 145. With regard to the protection of the right to health of persons with HIV/AIDS, the Constitutional Court of Colombia has stated that "in order to ensure equality and human dignity to those persons in matters of health, the State must provide comprehensive protection, given the high costs entailed by the disease and to prevent discriminatory treatment." It has also held that "this constitutional duty [of protection] guarantees that AIDS patients receive comprehensive health care, free of charge, from the State, in order to ensure that a lack of financial means does not prevent such patients from treating their disease and alleviating their suffering, or being exposed to discrimination". Cf. Judgment T-843 of the Constitutional

178. In 2005, the Colombian State issued Law 972 (“Rules to Improve Care for People Affected by Catastrophic Diseases, particularly HIV/AIDS”). Article 1 of this law provides that comprehensive health care and the fight against disease shall be a priority for [...] Colombia and that the State, as well as the General Social Security System Health Services, shall ensure “the supply of medications, reagents and medical devices authorized for the diagnosis and treatment of ruinous or catastrophic diseases, according to the competencies and standards required to treat each disease.”¹⁵⁴

179. Likewise, the Constitutional Court of Colombia has recognized that the fundamental right to health of HIV/AIDS patients is protected in the domestic and international spheres, always with the aim of ensuring that the required treatment is not only comprehensive but also continuous and timely.¹⁵⁵ Colombia’s constitutional case law has also emphasized the special treatment that must be provided to those who suffer from this disease, because of its serious and progressive nature, observing specific areas of protection, namely: “(i) in health matters, by providing medicines, treatment and referrals between IPS, EPS or EPSS (health providers), when the affected person does not have the financial means to pay and there is evidence of serious detriment to his fundamental rights; (ii) in labor matters, by prohibiting unjustified dismissal or discrimination owing to the disease, and requiring special treatment in the workplace; (iii) on social security matters, when it has been necessary to recognize the right to a disability pension via a constitutional *amparo* in situations of urgency and (iv) in matters of protection for homeless people, when they are HIV-positive and that situation not only violates their own fundamental rights, but also those of the people around them.”¹⁵⁶

180. The Constitutional Court has also established that when a person with HIV/AIDS requires treatment or an essential procedure that will enable them to live in conditions of dignity, regardless of whether or not they are included in the Mandatory Health Plan, if the person is enrolled or affiliated to the subsidized or contributory health scheme, their right to health is considered fundamental and is protected through the *tutela* action.¹⁵⁷

181. Moreover, Colombian law has established that persons diagnosed with catastrophic diseases, such as HIV, are exempt from co-payments and moderating fees under the Mandatory Health Plan. According to Article 7 of Agreement 260 of 2004, concerning “Services subject to co-payments: co-payments shall be applied to all services included in the Mandatory Health Plan, with exception of: [...] catastrophic and high-cost diseases.”¹⁵⁸

B.2. Analysis of the specific case

182. In its Merits Report the Commission acknowledged that it did not have sufficient information concerning the continuity, quality and conditions of the medical treatment that Mr. Duque received following the death of his partner, JOJG. Nevertheless, the Commission

Court of Colombia of September 2, 2004. See also expert opinion of Paul Hunt March 6, 2015 (evidence file, folios 3706 to 3734).

¹⁵⁴ Congress of the Republic of Colombia, Law 972 of 2005, July 15, 2005, Amended by Art. 36, National Decree 126 of 2010, Official Gazette 45.970, related to “Adoption of norms to improve health care by the Colombian State of people suffering from ruinous or catastrophic diseases, especially HIV/AIDS” (evidence file, folio 2793).

¹⁵⁵ Constitutional Court of Colombia, Judgment T-228 of April 18, 2013.

¹⁵⁶ Constitutional Court of Colombia, Judgment T-027 of January 25, 2013.

¹⁵⁷ Constitutional Court of Colombia, Judgment T-579 of July 27, 2011.

¹⁵⁸ National Council of Social Security in Health, Agreement 000260 which “Defines the system of co-payments and moderating fees within the General Social Security System in Health, 4 February 2004 (evidence file, folios 2798 et seq..).

concluded that a "number of factors related to his sexual orientation, his illness and his financial situation took their toll on Mr. Duque."

183. As to the arguments of the representatives regarding the alleged violation of Mr. Duque's rights to life and personal integrity, these are related to: 1) the alleged harm caused to his moral integrity by the decisions of COLFONDOS and the *tutela* and appeal judges, who stigmatized him for being homosexual; 2) the alleged lack of medical care provided to Mr. Duque and its consequences for his health; 3) the alleged difference between the medical care offered under the contributions-based scheme and the subsidized system in Colombia and the negative effects that this difference had on Mr. Duque's health. The representatives argued that the violation stems directly from the lack of medical care received by Mr. Duque, owing to his lack of financial resources to cover the cost of adequate treatment for his disease. According to the representatives, this situation placed a strong emotional burden on Mr. Duque, who had to seek funds to obtain his treatment.

184. As to the alleged harm to Mr. Duque's moral integrity caused by the decisions of COLFONDOS and the *tutela* and appeal judges, the representatives argued that the discrimination suffered by Mr. Duque and his need to obtain medicines caused him a "tremendous emotional burden" that affected his personal integrity. However, the Court observes that no evidence was provided of any harm to Mr. Duque's psychological or moral integrity stemming from the resolutions issued by COLFONDOS and the domestic courts.

185. With regard to the alleged lack of medical care and its effects on Mr. Duque, the Court notes that according to the official letter sent by the Ministry of Health on February 9, 2015, concerning health matters, since 1995 and up until the present date, Mr. Duque has been "compensated" "for all the periods without interruption," being affiliated to "the New EPS S.A." and the "*Instituto de Seguros Sociales E.P.S.*" since 1995 and up to the present date. Moreover, an official letter forwarded by the Ministry of Health on March 25, 2015, states that there is "no evidence of interruptions in (Mr. Ángel Alberto Duque's) affiliation since May 1985 and up to the present date."¹⁵⁹ These official letters were not challenged by the representatives.

186. On another front, the Court confirms that in the *tutela* ruling, the Tenth Municipal Civil Court of Bogotá advised Mr. Duque that if his intention was to obtain some type of social security health services, he could turn to public health institutions that existed to protect those who do not have the financial means to pay, such as the program offered by "SISBEN" (System of Identification of Potential Beneficiaries for Social Programs).

187. The Court emphasizes the fact that no medical reports, analyses or evidence of any kind were provided to demonstrate that Mr. Duque had suffered health problems or that the State had suspended his medical assistance. Moreover, had it been necessary, Mr. Duque could have applied to the subsidized system to receive the medical care he required.

188. With respect to the differences between the contributory and the subsidized health systems in Colombia, the representatives indicated that "the differences were noteworthy, and remain so, in terms of the quality and continuity of the provision of services [...] in 2002 there were differences in the value of the Capitation Payment Units (UPC), which is the amount paid to the Health Promotion Entities (EPS) that provide health services [...] and which accounts for the differentiation- at least in material terms- in the treatment [of HIV] between the systems."

¹⁵⁹ Official Letter from the Ministry of Health of March 25, 2015 (evidence file, folio 2808).

189. In this regard, the State referred to the existing legal framework in Colombia which “guarantees the provision of all medicines, treatments and services required for the care of persons with HIV.”¹⁶⁰

190. For its part, the expert opinion provided by Mr. Ricardo Luque indicated, among other aspects, that: i) the Social Security System Health Services guarantee universal access to comprehensive care for HIV/AIDS patients, regardless of which scheme they are affiliated to, their ability to pay or the specific characteristics of the most affected population groups; ii) in 1997, the Colombian State unified and standardized the healthcare services offered under the subsidized scheme and the contributions-based scheme for high-cost events, including HIV/AIDS infection; therefore, under both schemes, and regardless of their ability to pay, persons with HIV-AIDS have access to the same package of services including antiretroviral drugs; and iii) there are differences in the value of the *Unidad de Pago por Capitación*-UPC

¹⁶⁰ The State referred to certain provisions, such as: a) Decree 559 of February 1991: Concerning the care of persons infected with HIV/AIDS, which must be provided in accordance with a medical opinion and subject to the technical-administrative rules issued by the Ministry of Health, and must be delivered through ambulatory, hospital, home or community-based services; b) Agreement 8 of 1994: Recognized that persons enrolled in the contributions-based system are entitled to treatment for AIDS and its complications, under the category of high cost treatment of ruinous or catastrophic diseases. This agreement expressly mentions treatment for AIDS and its complications; c) Resolution 526 of August 5, 1994: Established the Manual of Activities, Interventions and Procedures of the Mandatory Health Plan of the General Social Security System in Health. The Manual was issued with the aim of unifying criteria for the provision of health services within the Social Security System, to ensure access, quality and efficiency. Under this provision, the Mandatory Health Plan includes treatments for ruinous or catastrophic diseases, including treatment for AIDS and its complications; d) Decree 1543 of 1997, updated Decree 559 of 1991: Established mandatory care for persons infected with the HIV virus, guaranteeing health care that included medications to control the infection. This decree also emphasized the duties of the IPS and the health care teams in ensuring comprehensive health care for persons living with the virus; such care must be provided with respect for the person's dignity and without discrimination; e) Agreement 72 of 1997: Included, for the first time, antiretroviral drug treatment for persons affiliated both to the contributory and the subsidized systems, for high cost diseases; thus, regardless of a person's ability to pay, HIV/AIDS treatment was covered under both schemes; f) Agreement 228 of 2002: Updated the Mandatory Health Plan's Manual of Medicines, requiring that EPS (health promotion entities) and IPS (institutional health service providers) that offer special programs for managing HIV/AIDS must include the basic list of active ingredients with specific characteristics for each program; g) Agreement 260 of 2004: Established that persons diagnosed with catastrophic illnesses such as HIV, are exempt from co-payments and moderating fees in the POS; h) Agreement 306 of 2005: Updated the Mandatory Health Plan for the subsidized and contribution-based schemes, and expanded benefits and health technologies for the treatment of HIV/AIDS, including: ambulatory and hospital care of the necessary complexity, required inputs and materials, supply of antiretroviral drugs and protease inhibitors established in the system's current Manual of Medicines, viral load tests for HIV/AIDS and all necessary studies for the initial diagnosis of cases, as well as subsequent diagnoses and control; i) Law 972 of 2005: Adopted standards to improve the care provided by the Colombian State to the population suffering from ruinous or catastrophic diseases, especially HIV/AIDS. Declared that comprehensive State health care to tackle the virus is a matter of State interest and priority. Established that the State must guarantee the supply of medicines, reagents and medical devices authorized for the diagnosis and treatment of ruinous or catastrophic illnesses. It also included provisions that require Health Service Agents of the General Social Security System to guarantee and not deny medical assistance, hospital care and laboratory services to patients infected with HIV; j) Agreements 336 and 368 of 2007: Inclusion in the POS of the antiretroviral drugs Lopinavir + Ritonavir in tablet form; k) Decree 19 of 2012: Established standards to suppress or reform unnecessary regulations, procedures and processes in public administration. It also required the EPS to establish procedures for the supply of medicines covered by the POS for their affiliates, so as to ensure complete and immediate delivery; l) Resolution 1604 of 2013: "Regulation of Article 131 of Decree 019 of 2012 and other provisions": Establishes that in cases where the EPS cannot implement full delivery of medications within a period of 48 hours, a special mechanism must be created in accordance with the guidelines established by the Ministry of Health and Social Protection, to coordinate delivery to the affiliate's home or workplace, if he/she so wishes. It establishes the Monitoring, Tracking and Control System for the distribution and delivery of medicines which also serves as an information tool for the authorities for the purposes of inspection, surveillance and monitoring of the delivery mechanism; in the case of antiretroviral drugs, this task is the responsibility of the National Superintendence of Health and the Departmental Health Directorates; m) Resolution 5521 of 2014: Updates the POS and includes the supply of condoms in family planning services; and n) Statutory Law of February 2, 2015, "Regulation of the fundamental right to health and other provisions": Creates a legal and institutional framework to guarantee the fundamental right to health based on the principles of universality, quality and efficiency.

("Capitation Payment Unit") between the contributory and the subsidized systems, but this does not affect the coverage of services for high-cost diseases.

191. Consequently, the Court considers that it does not have elements to conclude that in the specific case of Mr. Duque the subsidized system would have provided him with lower quality protection than the contributory system.

192. Therefore, the Court concludes that the State is not responsible for the violation of the rights to personal integrity and to life, enshrined in Articles 4(1) and 5(1) of the American Convention, to the detriment of Ángel Alberto Duque.

IX REPARATIONS (Application of Article 63(1) of the American Convention)

193. The Court will now consider the pertinence of granting measures of reparation for the violations declared in this Judgment and will specify those measures. However, the Court deems it appropriate to acknowledge the fact that Colombia has made great strides in recognizing the right of same-sex couples to a survivor's pension; that the jurisprudence of its Constitutional Court recognizes "that the permanent partners of same-sex couples who can certify their status have right to a survivor's pension;"¹⁶¹ and the willingness of the different State institutions to move forward in that direction.

194. Based on Article 63(1) of the American Convention,¹⁶² the Court has indicated that any violation of an international obligation that has caused harm entails the duty to make adequate reparation¹⁶³ and that this provision "reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility."¹⁶⁴ The Court has also established that reparations must have a causal nexus with the facts of the case, the violations that have been declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must examine the concurrence of these elements in order to rule appropriately and according to the law.¹⁶⁵

195. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution, consisting of the re-establishment of the previous situation. If this is not feasible, the Court will determine measures to ensure the rights that have been violated and to redress the consequences of those violations.¹⁶⁶ Therefore, the Court has considered the need to grant different measures of reparation in order to redress

¹⁶¹ Cf. Judgment of the Constitutional Court of Colombia C-336 of April 16, 2008 (evidence file, folio 1411).

¹⁶² Article 63(1) of the American Convention provides that: "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."

¹⁶³ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, para. 254.

¹⁶⁴ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, para. 25, and *Case of Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, para. 254.

¹⁶⁵ Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, para. 254.

¹⁶⁶ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, para. 26, and *Case of Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, para. 255.

the harm comprehensively; thus, in addition to pecuniary compensation, measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition have special relevance for the harm caused.¹⁶⁷

196. Consequently, and without detriment to any reparation that might subsequently be agreed between the State and the victim, the Court will order measures aimed at redressing the harm caused. In doing so, it will take into account the claims presented by the Commission and the representatives, together with the arguments of the State, based on criteria established in its case law regarding the nature and scope of the obligation to provide reparation.¹⁶⁸

A. Injured party

197. The Court reiterates that, pursuant to Article 63(1) of the American Convention, the injured party is anyone who has been declared a victim of the violation of any right recognized therein. Therefore, the Court considers that Mr. Ángel Alberto Duque is the injured party and, as the victim of the violations declared in this Judgment, he will be considered the beneficiary of any reparations ordered by the Court.

B. Measure of Restitution

198. The *representatives* asked the Court to order the State to require the private pension fund COLFONDOS to process, within a period not exceeding four months, the survivor's pension to which Ángel Alberto Duque is entitled and to begin to pay him monthly. The *Commission* indicated that the reparations made to Mr. Duque should include the granting of a survivor's pension and fair compensation. The *State* did not present arguments in relation to this measure of reparation.

199. With regard to the foregoing, the Court confirms, in the first place, that the State was found responsible for violating the right to equality and non-discrimination established in Article 24 of the Convention, to the detriment of Mr. Duque, given that he was not allowed access, on an equal footing, the survivor's pension established in Colombia's domestic legislation (*supra* para. 138). Consequently, the State must guarantee that once Mr. Duque submits his application for the survivor's pension, it will be processed as a priority, within three months. Likewise, the Court establishes that, should Mr. Duque be granted the pension, the State must include the sum equivalent to all payments, plus the corresponding interest in accordance with Colombia's domestic regulations, which Mr. Duque did not receive since he presented his request for information to COLFONDOS, on April 3, 2002.

200. On this last point, the Court finds that the State referred to the testimony of Mr. Juan Manuel Trujillo, Secretary General of COLFONDOS, who stated that "the refusal in [the] letter sent by COLFONDOS on April 3, 2002, stopped or discouraged or deterred Mr. [...] Duque from continuing with the steps that he himself was asking about in his communication of March 19. Under that assumption, we could say that although it was not a formal request in legal terms, there was a direct and express intention by Mr. [...] Duque to pause the statute of limitations on the monthly payments and to claim his right."

¹⁶⁷ Cf. *Case of the Mapiripán Massacre v. Colombia. Merits, reparations and costs*, para. 294, and *Case of Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, para. 255.

¹⁶⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, paras. 25 to 27, and *Case of Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, para. 256.

C. Measures of satisfaction

201. The Court will decide on measures aimed at redressing non-pecuniary damage, as well as measures of a public nature or with repercussions.¹⁶⁹ International case law, and particularly that of the Court, has established repeatedly that the judgment constitutes *per se* a form of reparation.¹⁷⁰

202. The *representatives* requested that the Court order “the publication, in legible format, of the relevant parts of the Judgment, once, in the Official Gazette, including the titles of each chapter and the respective section– without the footnotes - as well as the operative paragraphs of this Judgment; and the publication of the official summary of the Judgment prepared by the Court in a newspaper with wide national circulation. The sked that this measure be implemented within six months of notification of this Judgment.” Also, “the immediate publication of the full text of the Judgment on the official web sites of the Office of the President of the Republic, the Ministry of Foreign Relations and the Ministry of Labor and Social Security.” The *State* requested that, should a judgment be issued against it, the Court consider the judgment, *per se*, and its publication, as a measure of satisfaction and a guarantee of non-repetition, in accordance with its own case law. The *Commission* did not comment specifically on this request.

203. As it has done in other cases,¹⁷¹ the Court deems it pertinent to order the State to make the following publications within six months of notification of this Judgment: a) the official summary of this Judgment prepared by the Court, to be published in the Official Gazette and in a newspaper with wide national circulation in Colombia, and b) the publication of this Judgment in its entirety, available for at least one year on an official web site of the State.

D. Other measures of reparation requested

204. As measures of non-repetition, the *representatives* requested: a) the promulgation of a law recognizing equal property rights for same-sex couples, in relation to the survivor’s pension to which heterosexual couples are entitled; b) a public policy for the training of officials of public and private pension funds and members of the judiciary, in order to eradicate all forms of discrimination based on sexual identity and sexual orientation, and c) that the Colombian State be required to organize a public act of acknowledgement of responsibility and apology to Ángel Alberto Duque, for the discrimination he suffered owing to his sexual identity and for being denied his request for a survivor’s pension by the administrative and judicial authorities because he was a homosexual.

205. In response to the first request, the *State* argued that: a) there is no need to promulgate a law recognizing equal property rights for same-sex couples because the jurisprudence of Colombia’s Constitutional Court has incorporated sexual choice into the country’s legal system and nowadays there would be full certainty regarding such recognition. As to the second request, the State indicated that: b) the measure requested by the representatives appears to be based on (i) a supposed failure, in practical terms, to comply with the judgments of the Constitutional Court and (ii) alleged discrimination by the *tutela*

¹⁶⁹ Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Reparations and Costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, para. 268.

¹⁷⁰ Cf. *Case of El Amparo v. Venezuela. Reparations and costs*. Judgment of September 14, 1996. Series C No. 28, para. 35, and *Case of Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, para. 268.

¹⁷¹ Cf. *Case of Cantoral Benavides v. Peru*. Reparations and costs. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, para. 271.

judges in 2002. It argued that no evidence was presented regarding the first point and, in relation to the second point, it indicated that in 2002 the judges would not have been required to agree to Mr. Duque's claims. With respect to the request for a public act of acknowledgement of responsibility, the *State* argued that the publication and dissemination of the judgment constituted a measure of satisfaction and a guarantee of non-repetition; therefore, a public act of acknowledgement of responsibility was not necessary, and the Court should refrain from ordering it.

206. The *Commission* requested that the Court order the State to implement the following measures as guarantees of non-repetition in this case: a) adopt the necessary measures to ensure that all case law decisions taken in Colombia subsequent to the facts of this case, which recognized the right of same-sex couples to a survivor's pension and determined that in cases prior to those rulings said decisions would have retroactive effects, are duly complied with and enforced; b) adopt all necessary measures to ensure that those who provide social security services, whether public or private, receive appropriate training to process the applications of persons who formed or form same-sex couples, in accordance with domestic laws; and c) adopt the necessary measures to ensure that same-sex couples do not face discrimination in accessing social security services and, in particular, that they can present the same evidence as that mandated for heterosexual couples, pursuant to the domestic legal system.

207. Regarding the representatives' request for a measure to introduce legislative reform, in this case the Court does not find the State responsible for a violation of the obligation to adopt domestic legal effects; nor does it consider that the provision currently in force violates the right to equality before the law. Furthermore, the Court does not conclude that a violation of the right to judicial protection exists owing to the lack of remedies to request a survivor's pension for same-sex couples. Consequently, it is not appropriate to grant the requested measure of reparation since there is no link between the reparation requested by the representatives and the Court's pronouncements in this Judgment.

208. As to the request for training measures, in this case the Court did not find that the officials of public and private pension funds were not applying the legal changes resulting from judgment C-336 of 2008. Nor did this Court consider that the right to judicial guarantees was violated through the failure of the judges hearing the *tutela* action to respect or guarantee rights. Consequently, the Court does not deem it appropriate to grant the requested measure of reparation.

209. With respect to the other measures of reparation requested, this Court considers that this Judgment, *per se*, and the reparations ordered therein are sufficient and adequate.

E. Measure of rehabilitation

210. In requesting a measure of rehabilitation, the *representatives* cited the psychological and moral harm suffered by Mr. Duque, both because of the discriminatory treatment to which he was subjected, and the distress, anxiety and uncertainty he experienced regarding access to the essential medical treatment he needed for his HIV condition. Accordingly, the representatives requested that the Court order the State to provide Mr. Duque with the required medical and psychological treatment, free of charge and for the time necessary, by competent professionals, including essential supplies of antiretroviral drugs to treat his disease.

211. In response, the *State* reiterated that "the alleged victim has access to the General Social Security System, which includes medicines, as well as medical and psychological treatment." It also indicated that "both healthcare regimes of the General Social Security System are required to provide HIV/AIDS patients with all the necessary assistance so that

they can properly address their illness. This includes all treatments prescribed by the attending physician, whether or not they are included in the Mandatory Health Plan. Those services, where necessary, may be prescribed free of charge.” In conclusion, the State argued that Mr. Duque would be able to obtain the necessary medical and psychological assistance, free of charge, if he meets the requirements for this, through the SGSSS. Consequently, the State asked the Court to reject the measure in question, arguing that it was not essential.

212. In the instant case, the Court did not declare the State responsible for the violation of Mr. Duque’s right to life or his right to integrity. Consequently, it is not appropriate to order the measure of reparation requested. Nevertheless, this Court recalls that the State has confirmed that Mr. Duque, as a HIV-positive patient, has the right to access a contributory or subsidized healthcare regime that would provide him with essential medical treatment for his condition. (*supra* paras. 172 to 181).

F. Compensation for pecuniary and non-pecuniary damage

F.1. Pecuniary damage

213. In relation to pecuniary damage, the *representatives* recalled that Ángel Alberto Duque submitted a request for the survivor’s pension to which he was entitled after the death of his partner, JOJG, on March 19, 2002, a request that was denied by COLFONDOS. Consequently, from that date onwards, Ángel Alberto Duque suffered financial hardship owing to a lack of income from the social benefits to which he was entitled. The *representatives* cited the attached expert opinion and asked the Court to order the State to pay six hundred and eighty-five million Colombian pesos (\$COP 685,000,000) equivalent to two hundred and eighty four thousand, seven hundred and four United States dollars (\$US 284,704), this being the amount that the victim did not receive because he was unable to access the survivor’s pension. They also urged the State to order COLFONDOS to process, within a period not exceeding four months, the survivor’s pension to which Ángel Alberto Duque is entitled and to begin to pay it monthly.

214. The *State* considered that “the pecuniary damage in this case is repaired through the granting of the survivor’s pension.” It reiterated that the measure of reparation under consideration could be implemented without the need for a Court order and that the State and the private pension fund had informed the victim’s representatives of the possibility of submitting documents in order to begin the necessary procedures to claim his right to the pension in question, as long as he met the general requirements for that purpose. It added that because these aspects relate to personal matters of Mr. Ángel Alberto Duque, they cannot be obtained *ex officio* by private pension funds. The State also pointed out that the representatives had not provided any evidence to support the sum claimed for pecuniary damage during the international proceedings and noted that the expert opinion was not provided as an annex.

215. The *Commission* referred to pecuniary and non-pecuniary damage jointly. It requested that the State provide adequate reparation to Mr. Duque for the alleged violations, including pecuniary and non-pecuniary damage, by at least granting him a survivor’s pension and just compensation. It also asked the State to provide Mr. Duque with continuous access to the health services and treatment he requires as a person living with HIV.

216. In its case law, the Court has developed the concept of pecuniary damage and has established the situations in which compensation must be provided.¹⁷² This Court has

¹⁷² Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of López Lone et al. v. Honduras*, para. 314.

determined that pecuniary damage involves “the loss of or detriment to the victims’ income, the expenses incurred as a result of the facts and the consequences of a pecuniary nature that have a casual nexus with the facts of the case.”¹⁷³

217. In the instant case, the Court has found the State responsible for the violation of the right to equality before the law, arising from the application of a discriminatory regulation against Mr. Duque (*supra* para. 138). Accordingly, the Court concluded that Mr. Duque did not have the possibility of claiming a survivor’s pension in conditions of equality and non-discrimination. However, the representatives have not proved the existence of consequential damages in this case. Consequently, it is not appropriate to grant this measure of reparation since it concerns damage of an uncertain or potential nature; also, any loss of income that could be declared at the domestic level, would be compensated through the retroactive recognition of the pension.

F.2. Non-pecuniary damage

218. In relation to non-pecuniary damage, the *representatives* asked the Court to award Mr. Duque the sum of USD 80,000, by virtue of being subjected to a situation that adversely affected his life and personal integrity, namely: (i) discriminatory treatment through a refusal to grant him a survivor’s pension because of his sexual orientation; and (ii) the deep anguish of wondering if he could continue living because he lacked the financial means to ensure the continuity of his medical treatment for his HIV condition. They pointed out that “both circumstances [...], caused deep affliction and a feeling of dejection in Ángel Alberto Duque.”

219. The *State* argued that the representatives were claiming that Mr. Duque’s alleged affliction was supposedly caused by his uncertainty regarding the continuity of the medical services he needed, without providing any evidence to prove the suspension of his antiretroviral treatment. It added that the necessary treatment for HIV patients is not conditional upon the recognition of their pension rights, or their capacity to pay. Therefore, most of the facts cited by the representatives as indicators of the moral damage allegedly inflicted on Mr. Duque, were not proven. The arguments of the *Commission* concerning this measure were presented in the preceding point, together with the pecuniary damage.

220. In its case law, the Court has developed the concept of non-pecuniary damage and has established that this “may include both the suffering and distress caused to the direct victim and his next of kin, the impairment of values that are highly significant to them, as well as suffering of a non-pecuniary nature that affects the living conditions of the victim or his family.”¹⁷⁴ The Court has indicated that “since it is impossible to assess the value of the non-pecuniary damage sustained in a precise equivalent in money, for the purposes of full reparation to the victim, compensation may be made effective by paying an amount of money or by delivering property or services whose value may be established in money, as the Court may reasonably determine at its judicial discretion and based on equitable standards.”¹⁷⁵

221. In this regard, the Court notes that in the present case it concluded that the State is responsible for the violation of the right to equality and non-discrimination recognized in Article 24 of the Convention, in relation to 1(1) thereof, to the detriment of Mr. Angel Duque, given that he did not have access, under equal conditions, to the survivor’s pension, pursuant

¹⁷³ Cf. *Case of Bámaca Velásquez v. Guatemala*, para. 43, and *Case of López Lone et al. v. Honduras*, para. 314.

¹⁷⁴ Cf. *Case of the Street Children (Villagrán Morales et al.) v. Guatemala. Reparations and costs*, para. 84, and *Case of López Lone et al. v. Honduras*, para. 320.

¹⁷⁵ *Case of Palamara Iribarne v. Chile. Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, para. 244 and *Case of Gonzales Lluy et al. v. Ecuador*, para. 412.

to Colombia's domestic legislation. As a result, for more than thirteen years, Mr. Duque was deprived of income would have contributed significantly to improving his living conditions, especially as he had been diagnosed with a "severe or catastrophic" illness, such as HIV. In consideration of his suffering and the non-pecuniary damage caused to the victim by that violation, the Court decides to set in equity the sum of USD 10,000 as compensation for non-pecuniary damage.

G. Costs and expenses

222. The *representatives* alleged that the Colombian Commission of Jurists had incurred a number of expenses related to its work on behalf of the victim, including travel and hotel expenses, communications, photocopies, stationery and mail costs. They stated that these expenses corresponded to the time dedicated to legal work on this specific case and to the investigation, compilation and presentation of evidence and the preparation of briefs, for a total sum of USD 40,275. They also indicated that the attorney Germán Humberto Rincón Perfetti had represented the victim twelve years ago, but that he "does not have receipts and documentary evidence of the expenses incurred, both in the proceedings at the domestic level, and in the inter-American System." Consequently, they requested that the Court "[...] set in equity, as payment for this professional's costs and expenses" the sum of USD 15,000. Lastly, the representatives referred to future expenses, pointing out that the aforementioned expenses "do not include those incurred by the [alleged] victim and his representatives during the remainder of the proceedings before the [...] Court."¹⁷⁶ Therefore, they asked the "[...] Court to grant [them], at the appropriate procedural stage, the opportunity to present up-to-date figures and receipts for the expenses incurred in the course of the international litigation process." The *Commission* did not refer to the costs and expenses.

223. The *State* argued that "proof of the disbursements made in representing the victim is an essential requirement so that the [...] Court can proceed to award the amount requested for costs and expenses." The *State* indicated that the amount requested by the attorney Germán Humberto Rincón Perfetti cannot be verified, and therefore asked that the Court reject the request.

224. Pursuant to its case law,¹⁷⁷ the Court reiterates that costs and expenses form part of the concept of reparation, since the actions taken by the victims to obtain justice at both the national and the international levels, entail expenditures that must be compensated when a State's international responsibility has been declared in a judgment against it. As to the reimbursement of costs and expenses, the Court must prudently assess those arising both before the domestic authorities and before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment can be made based on the principle of equity and taking into account the expenses indicated by the parties, provided their *quantum* is reasonable.¹⁷⁸

¹⁷⁶ They indicated that these future expenses include, *inter alia*, travel and additional expenses incurred by witnesses and expert witnesses to an eventual hearing before the Court; the transfer of the representatives to that same hearing; expenses required to obtain future evidence; and any others that may be incurred for the adequate representation of the victims before the Honorable Court."

¹⁷⁷ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para. 42, and *Case of the Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, para. 301.

¹⁷⁸ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of the Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, para. 301.

225. The Court has indicated that “the claims of the victims or their representatives in relation to costs and expenses, and the evidence supporting them, must be presented to the Court at the first procedural opportunity granted them, namely, in the brief containing pleadings and motions, without prejudice to those claims being updated subsequently, to include new costs and expenses incurred as a result of the proceedings before this Court.”¹⁷⁹ The Court also reiterates that it is not sufficient to remit probative documents; rather the parties must provide the reasoning that relates the evidence to the fact under consideration, and, in the case of alleged financial disbursements, the items and their justification must be clearly described.¹⁸⁰

226. In this case, the Court finds that the evidence provided by the representatives refers only to travel expenses and airline tickets to Washington D.C. However, no hearing took place before the Commission in relation to this case, and therefore these expenses are not duly justified.¹⁸¹ The Court also notes that the representatives did not provide evidence of the expenses related to the processing of the case before the Court and the hearing held on August 25, 2015, in Tegucigalpa, Honduras, during the 53rd Special Session of the Court. Furthermore, they did not provide evidence regarding the expenses incurred by the attorney Germán Humberto Rincón Perfetti during the domestic proceedings. Therefore, in the absence of supporting evidence, the Court is unable to determine the expenses incurred.

227. Consequently, the Court decides to award a total of USD\$ 10,000 (ten thousand United States dollars) for their work in the litigation of the case, both at the national and international levels, which the State must pay to the representatives within six months of notification of this Judgment. The Court considers that, during the stage of monitoring compliance with judgment, it may order the State to reimburse the victim or his representatives for subsequent expenses incurred at that stage, provided that these are reasonable.

H. Reimbursement of expenses to the Victims’ Legal Assistance Fund

228. The *representatives* of the victim requested support from the Victims’ Legal Assistance Fund to cover expenses incurred in the litigation of this case before the Court. In an Order of May 5, 2015, the President of the Court granted the representatives the financial assistance necessary for the presentation of a maximum of three statements, either at the hearing or by affidavit.

229. In the instant case, the Victims’ Legal Assistance Fund was used to cover expenses related to air fares for the victim, Ángel Alberto Duque, and for the expert witness, Rodrigo Uprimny Yepes, from the city of Bogotá, Colombia, to the city of Tegucigalpa, Honduras, where the public hearing in this case took place on August 25, 2015. Other disbursements were made to cover the accommodation and food expenses of the victim and of the expert witness, in Tegucigalpa, Honduras, on August 24 and 25, 2015. In addition, both received the amount corresponding to terminal expenses.¹⁸²

¹⁷⁹ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 275 and *Case of the Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, para. 302.

¹⁸⁰ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*, para. 277, and *Case of the Garífuna Triunfo de la Cruz Community and its Members v. Honduras*, para. 302.

¹⁸¹ Cf. Colombian Commission of Jurists, Expenses File of the Colombian Commission of Jurists, Annex to the claim for reparations in the Case of Angel Alberto Duque, (Evidence file, folios 1795 to 1846).

¹⁸² Merits file, folios 4124 to 4141.

230. On October 26, 2015, pursuant to Article 5 of the Rules for the Operation of the Fund, a report was forwarded to the State on the disbursements made. The State did not present observations to the disbursements reported, which amounted to US\$ 2,509.34 (two thousand five hundred and nine United States dollars and thirty-four cents) for the expenses incurred. The State must reimburse this amount to the Inter-American Court within ninety days of notification of this Judgment.

I. Method of compliance with the payments ordered

231. The State shall make the payments for compensation of non-pecuniary damage and to reimburse the costs and expenses established in this Judgment directly to the person indicated herein, within one year of notification of this Judgment, pursuant to the following paragraphs.

232. If the beneficiary should die before he receives the respective compensation, payment shall be made directly to his heirs, in accordance with applicable domestic law.

233. The State shall comply with its monetary obligations through payment in United States dollars, using the exchange rate in force on the New York Stock Exchange (United States of America), on the day before the payment to make the calculation.

234. If, for reasons that can be attributed to the beneficiary of the compensation, or his heirs, it is not possible to pay the amounts established within the time frame indicated, the State shall deposit these amounts in an account or certificate of deposit in his favor in a solvent Colombian financial institution, in United States dollars, and on the most favorable financial terms permitted by the State's laws and banking practice. If the corresponding compensation has not been claimed within ten years, the amounts shall be returned to the State with the accrued interest.

235. The amounts allocated in this Judgment as compensation for non-pecuniary damage, and for reimbursement of costs and expenses, shall be paid in full to the persons indicated, as established in this Judgment, without any deductions derived from possible taxes or charges.

236. If the State should fall into arrears, including with the reimbursement of expenses to the Victims' Legal Assistance Fund, it shall pay interest on the amount owed, corresponding to banking interest on arrears in the Republic of Colombia.

**X
OPERATIVE PARAGRAPHS**

Therefore,

THE COURT

DECIDES,

By four votes in favor and two against:

1. To reject the preliminary objection regarding the alleged failure to exhaust domestic remedies, pursuant to paragraphs 23 to 43 and 49 to 55 of this Judgment.

Dissenting, Judges Manuel E. Ventura Robles and Eduardo Vio Grossi

By four votes in favor and two against:

2. To reject the preliminary objection regarding the factual basis for the alleged violation of Articles 4(1) and 5(1), in relation to Article 1(1) of the American Convention, pursuant to paragraphs 44 and 45 of this Judgment.

Dissenting, Judges Manuel E. Ventura Robles and Eduardo Vio Grossi

DECLARES,

By four votes in favor and two against, that:

3. The State is responsible for the violation of the right to equality before the law, recognized in Article 24 of the American Convention, in relation to Article 1(1) thereof, pursuant to paragraphs 89 to 138 of this Judgment.

Dissenting, Judges Manuel E. Ventura Robles and Eduardo Vio Grossi

By four votes in favor and two against, that:

4. The State is not responsible for the violation of the obligation to adopt domestic legal effects, established in Article 2 of the American Convention, in relation to Articles 24 and 1(1) of the same instrument, pursuant to paragraph 139 of this Judgment.

Dissenting, Judges Manuel E. Ventura Robles and Eduardo Vio Grossi

By four votes in favor and two against, that:

5. The State is not responsible for the violation of the rights to judicial guarantees and judicial protection recognized in Articles 8(1) and 25 of the American Convention, in relation to Articles 1(1) and 2 thereof, pursuant to paragraphs 145 to 166 of this Judgment.

Dissenting, Judges Manuel E. Ventura Robles and Eduardo Vio Grossi

By four votes in favor and two against, that:

6. The State is not responsible for the violation of the rights to life and personal integrity recognized in Articles 4(1) and 5(1) of the American Convention, in relation to Articles 1(1) and 2 thereof, pursuant to paragraphs 171 to 192 of this Judgment.

Dissenting, Judges Manuel E. Ventura Robles and Eduardo Vio Grossi

AND ORDERS,

By four votes in favor and two against, that:

7. This Judgment constitutes, *per se*, a form of reparation.

Dissenting, Judges Manuel E. Ventura Robles and Eduardo Vio Grossi

By four votes in favor and two against, that:

8. The State shall issue the publications indicated in paragraph 203 of this Judgment within six months of notification, in the terms established therein. The publication of the Judgment shall be available on an official web site for a period of at least one year.

Dissenting, Judges Manuel E. Ventura Robles and Eduardo Vio Grossi

By four votes in favor and two against, that:

9. The State must guarantee that once Mr. Duque submits his application for the survivor's pension, it will be processed as a priority, pursuant to paragraphs 199 and 200 of this Judgment.

Dissenting, Judges Manuel E. Ventura Robles and Eduardo Vio Grossi

By four votes in favor and two against, that:

10. The State shall pay the amounts established in paragraphs 221 and 227 of this Judgment as compensation for non-pecuniary damage, and to reimburse costs and expenses, within one year of notification of this Judgment.

Dissenting, Judges Manuel E. Ventura Robles and Eduardo Vio Grossi

Unanimously, that:

11. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights for the sum disbursed during the processing of this case, pursuant to paragraph 230 of this Judgment.

Unanimously, that:

12. Within one year of notification of this Judgment, the State shall provide the Court with a report on the measures adopted to comply with it.

Unanimously, that:

13. The Court will monitor full compliance with this Judgment, in exercise of its authority and in compliance with its obligations under the American Convention on Human Rights, and will close this case when the State has fully complied with all its provisions.

Done at San José, Costa Rica, on February 26, 2016, in the Spanish language.

Judges Manuel E. Ventura Robles and Eduardo Vio Grossi informed the Court of their dissenting opinions, which accompany this Judgment.

Judgment of the Inter-American Court of Human Rights on Preliminary Objections, Merits, Reparations and Costs. Case of Duque v. Colombia.

Roberto F. Caldas
President

Eduardo Ferrer Mac-Gregor Poisot

Manuel E. Ventura Robles

Diego García-Sayán

Alberto Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Roberto F. Caldas
President

Pablo Saavedra Alessandri
Secretary

**DISSENTING OPINION OF JUDGE MANUEL E. VENTURA ROBLES,
INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF DUQUE V. COLOMBIA
JUDGMENT OF FEBRUARY 26, 2016
(Preliminary objections, merits, reparations and costs)**

In issuing this dissenting opinion in the Case of DUQUE v. COLOMBIA, in which the Court admitted the preliminary objection of failure to exhaust domestic remedies filed by the State, my intention to make very clear that in similar cases in future, the Commission's position should be not to submit such a case to the consideration of the Court or, if already submitted, the Court should admit the preliminary objection and the matter should be resolved in the processing of the case.

If we examine the Court's jurisprudence from its beginnings, the respondent States, with very few exceptions, have always filed the objection of failure to exhaust domestic remedies. This is generally rejected by the Court based on the casuistry or the facts in the processing of the case; a casuistry that, over time, has made it possible to generalize the Court's doctrine in this regard, which is nearly always applied. Nevertheless, the casuistry varies from one case to another.

And this circumstance is evident in the case at hand, in which the facts have led me to the conviction that the preliminary objection regarding failure to exhaust domestic remedies should be accepted and should end with the processing of the case. This, then, is a position adopted in a specific case which should become a rule of the Court when applying the principle of the subsidiarity of the international jurisdiction of human rights.

To assume this position it is not necessary to go into the details of the processing of the case, which the judgment already does extensively and which Judge Vio Grossi has discussed in his partially dissenting opinion. It is sufficient to apply the principle of subsidiarity that cuts across the American Convention on Human Rights, which the Preamble describes as being of a reinforcing or complementary nature.

And how could we not apply this principle and admit the preliminary objection if the State, through the judgment of the Constitutional Court, modified the domestic jurisprudence and opened the doors to reparations for the events that occurred, a claim that the victim could have effectively pursued since that time?

What more could the State have done to remedy the violation and open the doors to compensation for the victim and to other aspects of comprehensive reparation, especially the continuity of medical care?

If the victim did not wish to make a claim but instead wished to continue with the trial, that was his responsibility; but the obligation of the Court and the Commission was not to admit the case, since the inter-American jurisdiction for the protection of human rights has limits which are established by the States Parties to the American Convention on Human Rights. In the first place, its own subsidiary nature. In other words, this jurisdiction was not established so that all cases should be submitted to it, or so that the supposed victims could win all the cases in any circumstances. Examining the casuistry of the case is essential in order for the Court to admit or reject the case.

These brief reflections, though of a fundamental nature, seem to me to be of the utmost importance in writing my final dissenting opinion after twelve years of serving as a judge and they address a central point that is repeatedly invoked by the States: the failure to exhaust the remedies of the domestic jurisdiction.

Manuel E. Ventura Robles.
Judge

Pablo Saavedra Alessandri
Secretary

**PARTIALLY DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI,
INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF DUQUE V. COLOMBIA
JUDGMENT OF FEBRUARY 26, 2015
(Preliminary objections, merits, reparations and costs)**

INTRODUCTION

I issue this partially dissenting opinion¹ to the Judgment in the above case (hereinafter "the Judgment") given that, for reasons purely based on international law that are presented further on, I do not agree with the third operative paragraph, which establishes that "(t)he State is responsible for the violation of the right to equality before the law, recognized in Article 24 of the American Convention, in relation to Article 1(1) thereof, pursuant to paragraphs 89 to 138 of this Judgment."

As always, I express my dissent bearing in mind that the function of the Inter-American Court of Human Rights (hereinafter "the Court") is to impart justice on human rights matters through the interpretation and application of the American Convention on Human Rights (hereinafter "the Convention")² and, in general, of international law, without straying outside the bounds of the former or the latter. Furthermore, considering the Court's autonomous nature, in the exercise of its mission it has the special imperative of safeguarding, with particular care and zeal, the limits of its action as determined by the Convention and, in general, by international law. Under that perspective, this function not only implies respecting the principles of impartiality and legal certainty that should inspire the entire jurisdictional system, but also, fundamentally, of providing full guarantees of the effective exercise of human rights and, where these have been breached, ensuring their prompt reestablishment.

¹ Article 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.*"

Article 24(3) of the Statute of the Court: "*The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate,*" and

Article 65(2) of the Rules of the Court: "*Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, either concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the Presidency so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment.*"

² Article 62(3): "*The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.*"

Accordingly, I issue this opinion setting aside personal preferences and extrajudicial considerations regarding what the Convention and, in general, international law, should mandate in relation to the issue at hand. My aim is also to contribute to a better understanding of the scope of the Judgment and to the development of the Court's jurisprudence.

It is appropriate to place on the record that, although I also disagree with some of the grounds – though not with the decision – for dismissing the preliminary objections regarding prior exhaustion of domestic remedies filed by Colombia (hereinafter “the State”), I have chosen not to refer to that matter in this opinion,³ considering the importance of the decision adopted in the Judgment in its essential terms.

That said, I disagree with the ruling in this case because, in the first place, the claims made in the application were fully satisfied prior to the Judgment (*litigious purpose*). In the second place, no international legal obligation was invoked for the Court to rule as it has (*causa petendi*) and also because, ultimately and consequently, there could not have been discrimination.

I. The claims were satisfied (lack of a *litigious purpose*).

In this case, the victim made two claims in relation to the subject matter of the third operative paragraph of the Judgment,: i) to be allowed to request and obtain the survivor's pension of his same-sex partner, and ii) that Colombian law recognize the right of same-sex couples to receive a survivor's pension.

As to the first claim, it is important to recall that this was the reason that prompted the victim to allege that he had exhausted domestic remedies in relation to the refusal of his request for a survivor's pension, but not with respect to the laws that established that this benefit was only for opposite-sex couples, which he considered discriminatory. In other words, he did not exhaust the domestic remedies to challenge those bodies of law, since what he sought and claimed in the domestic or national courts was merely access to this benefit, and not to request that the laws preventing it be declared contrary to the Convention.⁴

That said, it should be noted that, as stated in the Judgment, the Constitutional Court of Colombia recognized the right of same-sex couples to request the survivor's pension in various decisions of 2007, 2008 and 2010.⁵ It is also important to reiterate that, as a

³ I have expressed my position in this regard in the following opinions: *Concurring Opinion of Judge Eduardo Vio Grossi, Case of Velásquez Paiz et al. v. Guatemala, Judgment of November 19, 2015 (Preliminary objections, merits, reparations and costs)*; *Dissenting Opinion of Judge Eduardo Vio Grossi, Case of the Campesino Community of Santa Bárbara v. Peru, Judgment of September 1, 2015 (Preliminary objections, merits, reparations and costs)*; *Separate Dissenting Opinion of Judge Eduardo Vio Grossi, Case of Wong Ho Wing v. Peru, Judgment of June 30, 2015 (Preliminary objection, merits, reparations and costs)*; *Dissenting Opinion of Judge Eduardo Vio Grossi, Case of Cruz Sánchez et al. v. Peru, Judgment of April 17, 2015 (Preliminary objections, merits, reparations and costs)*; *Dissenting Opinion of Judge Eduardo Vio Grossi, Case of Liakat Ali Alibux v. Suriname, Judgment of January 30, 2014 (Preliminary objections, merits, reparations and costs)*; and *Dissenting Opinion of Judge Eduardo Vio Grossi, Case of Díaz Peña v. Venezuela, Judgment of June 26, 2012 (Preliminary objection, merits, reparations and costs)*.

⁴ Paras. 27 to 31. Whenever reference is made to “para.” Is shall be understood to mean a paragraph of the Judgment.

⁵ Paras. 81 and 82.

result of that jurisprudence, the State has granted same-sex couples the possibility of requesting a survivor's pension since 2007. However, in this case, it was not requested through any means, and no reasons were given for not doing so.

Therefore, the obligation to grant the aforementioned pension, which is of a domestic nature, has been recognized by the case law of the Constitutional Court.

In this respect, it is appropriate to recall the Court's constant case law with regard to the fact that the State's responsibility under the Convention can only be required at the international level after the State has had an opportunity to declare the violation and to repair the damage caused by its own means.⁶ This is based on the principle of complementarity (subsidiarity), that permeates the inter-American human rights system, which – as stated in the Preamble to the American Convention – “reinforce[s] or complement[s] the protection provided by the domestic law of the American States.”

Consequently, and for that reason, the Judgment could not order, as mandated by Article 63 (1) of the Convention, “*that the injured party be ensured the enjoyment of his right or freedom that was violated,*” given that this had already occurred. It was unable to do so because the object and purpose pursued had already been accomplished with the intervention of the inter-American jurisdiction, in other words, the prompt and effective reestablishment of the human right that was violated.

As to the second claim, it is pertinent to recall that it was only in the petition lodged with the Inter-American Commission on Human Rights (hereinafter “the Commission”), which gave rise to the instant case where, for the first time, the provisions of the State's domestic laws were invoked which, at that time, were deemed contrary to the Convention.⁷ For this reason, the victim's representatives requested, as a measure of reparation, “*the promulgation of a law recognizing equal property rights for same-sex couples, in relation to the survivor's pension to which heterosexual couples are entitled.*”⁸

However, on this point it is essential to bear in mind that, in 2010 – that is, before the Commission issued its Admissibility Report on November 2, 2011, and well before it submitted the case to the Court, on October 21, 2014 – the *effect útil* sought through the intervention of the inter-American jurisdiction had already been fully achieved, and therefore it was unnecessary that the case continue.

Perhaps for this reason, in response to the petition of the victim's representatives, the Judgment, after considering the aforementioned decision of the Constitutional Court of Colombia, concludes that the latter “is not responsible for the violation of [...] Article 2 of the American Convention, in relation to Articles 24 and 1(1) of the same instrument,”⁹ and does not accede to their request.¹⁰

⁶ *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, para. 142, and *Case of Tarazona Arrieta et al. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of October 15, 2014. Series C No. 286, para. 137.

⁷ Paras. 2. a) and 95.

⁸ Para. 204.

⁹ Para. 139.

¹⁰ Para.139 and fourth operative paragraph.

Thus, bearing in mind the subsidiarity principle of the inter-American system and considering that the claims filed in the petition - namely, to obtain recognition of the victim's right to obtain a survivor's pension and to change the legislation related to this matter that was considered contrary to the Convention - were fully satisfied by the State prior to this case, we can conclude that in this case the Judgment should have recognized that no *litigious purpose*" remained to be decided.

II. Non-existence of the international legal obligation invoked (Absence of *causa petendi*).

It is perhaps for the reasons indicated above that the Judgment reduces what it considers to be an internationally wrongful act to the stipulations contained in the State's domestic legislation in force in 2002, applicable to the case,¹¹ and, even more inexplicable, to a mere eventuality that the aforesaid pension, if paid to the victim, would not be retroactive.¹²

Accordingly, the Judgment concludes by declaring, in the third operative paragraph, the violation of Article 24 in relation to Article 1(1) of the Convention¹³ and requiring the State to guarantee an effective remedy so that the victim can request the cited pension.¹⁴

Consequently, by characterizing the refusal, given in 2002, to provide information regarding the request for a survivor's pension as an internationally wrongful act, the Judgment limits the timeframe of the object of the litigation to the period from 2002 - the date of the aforementioned request - to 2007 and/or 2009, thereby including 2005, the year in which the petition that gave rise to this case was submitted to the Commission. And, I reiterate, it is based on a mere eventuality or possibility of a future and uncertain event.

That said, contrary to what is established in the Judgment, such legislation was not the object of litigation in this case, but rather the *causa petendi*. This conclusion is derived from the fact that, although the claim made before the Court is the petitioner's right to request a survivor's pension, such requirement is based on the fact that the domestic laws that prevented this request from being granted were contrary to international law and, in particular, to the Convention.

¹¹ "The Court finds that the differentiation based on sexual orientation, established in Article 1 of Law 54 of 1990 and Article 10 of Decree 1889 of 1994 regarding access to a survivor's pension, is discriminatory and violates Article 24 of the American Convention" (Para.124) and "that the domestic laws in effect in 2002 that did not permit the payment of pensions to same-sex couples, amounted to a difference of treatment that violated the right to equality and non-discrimination, and therefore constituted an internationally wrongful act." Para. 125

¹² In this regard, para. 137 states that "even if it were true [...]that Mr. Duque could have requested a survivor's pension without discrimination, it is also true that, had this pension been granted, there is no certainty that it would have retroactive effects up to the time in which he was subjected to a different treatment in 2002," adding that "[...] it is reasonable to conclude that the internationally wrongful act of which Mr. Duque was a victim still would not have been completely corrected, since the retroactive payments that he could have received would not be equivalent to those he would have received had he not been treated differently in a discriminatory manner."

¹³ Third operative paragraph.

¹⁴ Ninth operative paragraph.

In this regard, it should be noted that during the period in question there was no international legal obligation to grant a survivor's pension to a person in a civil or *de facto* union with a deceased partner of the same sex, since such unions were not internationally recognized; therefore, it was not appropriate to invoke this fact as grounds for the *litigious purpose* or to claim the right to request that pension. Indeed, at the time, there was no source of international law that required the State to recognize the right of same-sex couples to a survivor's pension.

The above situation is clearly evident from the rules established in Articles 31¹⁵ and 32¹⁶ of the Vienna Convention on the Law of Treaties,¹⁷ applicable to the Convention which is, after all, a treaty.

Indeed, there is no precedent to suggest that the States Parties to the Convention consented, in "*good faith*,"¹⁸ in 1969 - the year in which the latter was signed - that its provisions would apply to *de facto* unions between persons of the same sex. To the contrary, it could be argued that the States did not have any intention of regulating these unions internationally.

This may be surmised from the fact that, in those times, as noted in the Judgment, there was no international treaty, rule or law that alluded to *de facto* unions, and that such

¹⁵ *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."

¹⁶ "*Supplementary means of interpretation.*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

a) leaves the meaning ambiguous or obscure; or

b) leads to a result which is manifestly absurd or unreasonable."

¹⁷ Hereinafter, the Vienna Convention.

¹⁸ Article 31(1) of the Vienna Convention.

unions have only been recognized in five States Parties to the Convention since 2002.¹⁹ In addition, it should be noted that marriage between persons of the same sex has been permitted in only four States Parties to the Convention and in very recent times.²⁰ Thus, even nowadays, sixteen States Parties to the Convention do not contemplate *de facto* or civil unions between persons of the same sex in their respective legislations.

It should also be noted that the Judgment does not allude to the "*context*" of the terms of the Convention,²¹ from which it could be inferred that the States Parties understood that those unions were included. And this in consideration of the fact that there is no mention in the text of the Convention, or in its preamble or annexes, or in any subsequent "*agreement*," "*instrument*" or "*practice*"²² concerning the Convention or its evolutive interpretation, to suggest that the States Parties have understood that the Convention regulates or contemplates such unions.

In that order of ideas, the evolutive interpretation of the Convention or the notion that it is a living instrument, does not mean that it should be interpreted to legitimize, almost automatically, the social reality that is being expressed at the moment of the interpretation; in that case, the social reality itself would be the interpreter and would even exercise a regulatory function. Instead, the evolutive interpretation of the Convention implies understanding its provisions with a view to determining the manner in which these new issues or problems should be addressed from a juridical standpoint.

On the other hand, the Judgment does not invoke "*any relevant rules of international law applicable in the relations between the parties*"²³ to substantiate that such unions are contemplated or regulated by international law.

For those reasons, it does not seem acceptable that the Judgment refers to the domestic legislation of some States Parties to the Convention, as it has done, to argue that "*some countries of the region [...] have recognized the right of same-sex couples to access a survivor's pension [...]*."²⁴ It would have been more accurate to point out that, according to the information mentioned previously, the great majority of the States Parties to the Convention do not recognize *de facto* or civil unions between people of the same sex in their domestic or national legislation.

Instead, the Judgment refers to acts – not by States – but by state entities, such as Mexico City²⁵ and the City of Buenos Aires²⁶ that are not subjects of international law.

It also mentions certain resolutions of the United Nations Committee on Economic, Social and Cultural Rights, also subsequent to the petition which, rather than interpreting a rule of the Convention, formulate aspirations in relation to the International Covenant

¹⁹ Paras. 112 to 117.

²⁰ *Idem*.

²¹ Article 31 (1) and (2) of the Vienna Convention.

²² Article 31(2) and (3) of the Vienna Convention.

²³ Article 31 (3) (c) of the Vienna Convention.

²⁴ Para. 112

²⁵ Para. 113

²⁶ Para. 115

on Economic, Social and Cultural Rights²⁷ that, pursuant to Article 26 of the Convention,²⁸ are not among those enshrined therein.²⁹

Furthermore, in order to support its decision, the Judgment refers to the legislation of the United States of America, a State that is not a party to the Convention.³⁰

The Judgment even cites the Yogyakarta Principles, which were not only adopted after this case was submitted, but were approved by a group of 29 experts. Therefore, at most, this document could be regarded as an expression (not the only one, or the most relevant) of a doctrine, either in the form of a claim, a proposal or a suggestion and, therefore, not as a rule of international law or even as an interpretation of the Convention.³¹

Also, when it alludes to the situation in States Parties to the Convention, such as Uruguay,³² Argentina³³ and Brazil³⁴, the Judgment appears to equate civil or *de facto* unions between persons of the same sex with marriage between such couples, whereas these are two different institutions and are considered as such by the legislation of the States Parties to the Convention.

The foregoing also takes account of the fact that the State's recognition that the legislation in force in 2002 constituted an internationally wrongful act, on the one hand, is not binding for the Court³⁵ and, on the other that it was presented with a view to arguing that the internationally wrongful act had already ceased.³⁶

It is clear, then, that at the time of the facts that would have generated the State's international responsibility, the concept of *de facto* or civil union and its consequences, including issues pertaining to the survivor's pension, was not a matter regulated by international law, or by the Convention, and applicable to the instant case. Rather, it

²⁷ Para. 108.

²⁸ Article 26: "*Progressive Development. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, subject to available resources, by legislation or other appropriate means.*"

²⁹ Articles 31, 76 and 77, cited.

³⁰ Para.118.

³¹ Para.110.

³² Para. 114

³³ Para. 115

³⁴ Para. 116

³⁵ Article 62 of the Rules of the Court: "*Acquiescence. If the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or in the brief submitted by the alleged victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects.*"

³⁶ Paras. 59 and 61.

was a matter for the States' domestic, national or exclusive jurisdiction or, if preferred, a matter that falls within the margin of appreciation enjoyed by the States when applying international conventional norms.³⁷ In this regard, we should bear in mind that a State's domestic, national or exclusive jurisdiction is comprised of all matters or facets thereof that are not regulated by international law. This means that any matter not contemplated by the latter, is no longer a matter that concerns it. Therefore, it follows that international law does not encompass all human activities, leaving those matters that it does not regulate under the aegis of national or domestic law.

However, the above comments do not imply that these unions cannot or should not be addressed in future by international law. My argument is that in order for these to be the subject of international law, they must be embodied in a source of international law. In other words, they must be embodied in a treaty, a custom or in the general principles of law applicable to States Parties to the Convention and, ultimately, as regards the State concerned, by a unilateral juridical act, none of which occurred in the instant case during the period 2002 to 2007 and/or 2009.

Moreover, it should be recalled that the American Convention only contemplates some human rights, establishing in Article 31 entitled "*Recognition of Other Rights*," that "[o]ther rights and freedoms recognized in accordance with the procedures established in Articles 76³⁸ and 77³⁹ may be included in the system of protection of this Convention." And it is clear that the right to enter into a *de facto* or civil union between persons of the same sex was not envisaged in the Convention or in any provision of international law in force at the time of the facts that gave rise to the State's alleged international responsibility.

In this regard, it should be noted that the Convention and its evolution obviously reflect the cultural consensus that existed at that time among the States Parties. Therefore, its provisions do not include institutions that, although considered legitimate in other cultures, were not acceptable to inter-American society. This is the case with civil or *de facto* unions between persons of the same sex. In 1969, there was no consensus regarding the acceptance of that institution, nor did such acceptance exist at the time when the facts of this case occurred. At most, said acceptance was no more than an aspiration.

Therefore, the potential conventionality control that the State's domestic organs could have performed in this case, with respect to laws that did not permit the granting of a

³⁷ Paras. 58 and 62, *Advisory Opinion OC-4/84, January 19, 1984, Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*.

³⁸ "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.*"

³⁹ "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.*"

pension to the surviving same-sex partner of the deceased person, could only have determined that their provisions did not entail international responsibility on the part of the State.

In other words, this opinion is based on the assumption that it is for the States Parties,⁴⁰ and not the Court, to exercise the regulatory function in matters related to the Convention, especially those of high ethical and moral content that are considered to form the basis of society, and which, therefore, involve legitimate ideological, moral, religious and even ethical conceptions. Furthermore, in the current inter-American institutional scenario, such an exercise, if it were to occur, would be more democratic and would confer greater legitimacy upon any norm that is eventually adopted.

Considering all the foregoing points we may conclude that, at the time when the initial petition was filed in this case, there was no international obligation to recognize the civil or *de facto* union between persons of the same sex; therefore, the State's dismissal of the alleged victim's claim to obtain a survivor's pension due to the death of his same-sex partner, did not constitute an international wrongful act.

In sum, there was no *causa petendi* in this case.

III. Absence of discrimination

As I have already pointed out, the Judgment indicates that the provisions of Law 54 of 1990 and of Decree 1889 of 1994, which only recognized *partnerships* between persons of a different sex and, therefore, "*did not permit the payment of pensions to same-sex couples, amounted to a difference of treatment that violated the right to equality and non-discrimination.*"⁴¹

However, given that no internationally wrongful act existed at the time when the victim was denied the possibility of applying for the survivor's pension, obviously there could not have been any discrimination either.

But, in addition, we must also be mindful that not all distinction is discrimination.

Indeed, even the concept of discrimination as defined by the Human Rights Committee of the International Covenant on Civil and Political Rights, and adopted by the Court,⁴² leads to that conclusion. According to that concept, any distinction, exclusion, restriction, preference or difference of treatment established will constitute discrimination if it has "*the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, by all persons, on an equal footing, of human rights and fundamental freedoms.*" *Ergo*, if it does not have that purpose or effect, it will not constitute discrimination and will be, therefore, permitted. Thus, the Court admits that there is a difference between discrimination and distinction.

⁴⁰ Arts. 31, 76 and 77, previously cited.

⁴¹ Para. 125

⁴² "*Any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of human rights and fundamental freedoms.*" Para. 90.

In this regard, it should be emphasized that this concept of discrimination aligns with the definition given in the *Diccionario de la Real Academia Española*, that is, "to select excluding" and "to give unequal treatment to a person or group for reasons of race, religion, political views, sex, etc." Ultimately, unequal treatment for the aforementioned reasons is what characterizes discrimination.

That said, discrimination does indeed occur in cases such as the one at hand, in which equals are considered in a different manner.

Hence, discrimination only arises if persons who hold the same or equal legal status or situation, are treated in a different manner, thereby affecting their exercise or enjoyment of human rights. In that order of ideas we could say, for example, that if children or women were to be given a treatment different to that received by other children⁴³ or other women,⁴⁴ respectively, affecting the recognition or enjoyment of their human rights, there would be discrimination.

This implies, then, that there may be differences in the situation of persons in relation to their human rights.

The Court's jurisprudence has inclined toward this same view by affirming that "not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity,"⁴⁵ and 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."⁴⁶

That said, based on the position expressed by the Constitutional Court of Colombia, the Judgment affirms that "it is possible to conclude that the social purpose of Law 54 of 1990 was to protect the woman and the family" and that although "the purposes of the law could be considered legitimate,"⁴⁷ there is no "objective and reasonable justification for restricting access to a survivor's pension on the basis of sexual orientation" for the purpose of protecting the family.⁴⁸

However, the Judgment not only appears to forget its recently cited case law and the provisions of Article 17(1) of the Convention, that "the family is the natural and fundamental element of society and must be protected by society and the State." It also appears to associate or equate, in legal terms, the situation of a *de facto* or civil union between persons of the same sex with that of marriage, which, certainly, does not reflect

⁴³ Article 19 of the Convention: "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."

⁴⁴ Article 4(5) of the Convention: "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."

⁴⁵ OC-4/84 *cit.* para. 56.

⁴⁶ *Idem*, para. 57.

⁴⁷ Para. 108.

⁴⁸ Para.128.

the current status of the inter-American legal system or a correct interpretation of the Convention.

Indeed, it is undeniable that marriage and a civil or *de facto* union are clearly two different realities, with differentiated characteristics and diverse national regulations in the States. So much so that, as indicated previously, in some States Parties to the Convention the institution of civil or *de facto* union has been legally recognized and coexists with marriage. In some of those States, marriage is also permitted between persons of the same sex, while civil or *de facto* union is also recognized between persons of the opposite sex.

In synthesis, given that marriage and civil union are two different institutions and, furthermore, that only the former is contemplated in the Convention, it is not appropriate to invoke discrimination in the instant case, since the victim's legal status was not the same as that of a spouse in a marriage.

For this reason, it could be asserted that the decision in the Judgment could lead to the conclusion that all States Parties to the Convention that have not recognized civil or *de facto* unions between persons of the same sex in their domestic or national legislation - which are, as noted previously, the great majority - would be committing an international wrongful act, something that does not seem acceptable.

Finally, an additional point on this matter. The provisions of Article 1(1) of the Convention⁴⁹ and, therefore, the pertinent aspects of the obligation to ensure non-discrimination, permeate all the human rights enshrined therein; thus, such provisions should not be interpreted and applied in isolation, but in close connection with those rights.⁵⁰ The obligation of non-discrimination does not exist autonomously or separately from those rights. Therefore, when interpreting this right, it is necessary to determine the meaning and scope of the corresponding rule, understanding that it reflects what the States Parties agreed to in good faith in that regard and, within that framework, sought to establish a distinction, but not discrimination.

CONCLUSION

From the record it is clear that the claims of the petitioners were fully satisfied by the State well before the case was submitted to the Court. Likewise, it is clear that, at the time when the alleged victim was denied the possibility of requesting a survivor's pension by the national courts, there was no international legal obligation to recognize *de facto* unions between persons of the same sex or, consequently, to grant a pension based on that partnership. Finally, it is also clear that there could not have been discrimination, even less so in relation to a different institution, which is marriage.

Therefore, in consideration of the foregoing, I do not understand why this case was submitted by the Commission to the jurisdiction of the Court, and even less why the latter ruled as it did.

⁴⁹ "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."

⁵⁰ Para. 93 and Advisory Opinion OC-4/84, cited para. 53.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary