

PERMANENT COUNCIL



OEA/Ser.G
CP/doc.4846/13
17 March 2013
Original: Spanish

NOTE FROM THE CHAIR OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE
CHAIR OF THE PERMANENT COUNCIL TRANSMITTING THE PRELIMINARY REPORT ON
“SEXUAL ORIENTATION, GENDER IDENTITY, AND GENDER EXPRESSION”



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURÍDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZATION OF AMERICAN STATES
Av. Marechal Floriano, 196 - 3º andar - Palácio Itamaraty – Centro
Rio de Janeiro, RJ - 20080-002 - Brasil
Tel.: (55-21) 2206-9903; Fax (55-21) 2203-2090
e-mail: cjioea.trp@terra.com.br

Rio de Janeiro, March 8, 2013

Excellency:

On behalf of the Inter-American Juridical Committee I am pleased to forward to the Permanent Council of the Organization of American States, through your good offices, a preliminary report on the topic “Sexual orientation, gender identity and gender expression,” adopted by the Inter-American Juridical Committee at its session in March 2013. The Committee intends to continue with the topic by including the rule of law at the international level, taking into account the OAS member states' legislation.

Accept, Excellency, the renewed assurances of my highest consideration.

João Clemente Baena Soares
Chair
Inter-American Juridical Committee

To His Excellency Ambassador
Arturo Vallarino
Permanent Representative of Panama to the
Organization of American States
Chair of the Permanent Council

82nd REGULAR SESSION
March 11 – 15, 2013
Rio de Janeiro, Brazil

OEA/Ser.Q
CJI/doc.417/12 rev.1
March 4, 2012
Original: Spanish

SEXUAL ORIENTATION, GENDER IDENTITY AND GENDER EXPRESSION

(Presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. MANDATE

During its forty-first regular session, held in San Salvador, El Salvador, in June 2011, the General Assembly of the Organization of American States adopted resolution AG/RES. 2553 (XLI-O/11) in which it asked the Inter-American Commission on Human Rights (IACHR) and the Inter-American Juridical Committee (IAJC) each to prepare a study on the legal implications and conceptual and terminological developments as regards sexual orientation, gender identity and gender expression. It also instructed the Committee on Juridical and Political Affairs to include on its agenda an examination of the results of the requested studies, with interested civil society organizations participating. This review was to take place prior to the forty-second regular session of the OAS General Assembly.

At the 79th regular session of the Inter-American Juridical Committee, held in Rio de Janeiro, Brazil, in August 2011, Dr. Freddy Castillo Castellanos and Dr. Ana Elizabeth Villalta Vizcarra were designated as the rapporteurs for this topic.

During the 80th regular session of the Inter-American Juridical Committee, held in Mexico City in March 2012, the rapporteurs presented some initial observations on how the topic would be addressed. Some members of the Juridical Committee thought that the best course of action would be to define the mandate and limit it to international norms intended to put an end to manifestations of violence or discrimination, and that the topic should be approached from a legal perspective.

At its forty-second regular session, held in Cochabamba, Bolivia, in June 2012, the General Assembly adopted AG/RES. 2722 (XLII-O/12), in which it asked the Inter-American Juridical Committee “to report on progress made on the study of the legal implications and conceptual and terminological developments related to sexual orientation, gender identity and gender expression.”

During the 81st regular session of the Inter-American Juridical Committee, held in the city of Rio de Janeiro, Brazil, from August 6 to 11, 2012, as the rapporteur for the topic I presented a first report on the concepts that come into play in connection with this topic; the meeting also saw a related study by the Inter-American Commission on Human Rights and a judgment issued by the Inter-American Court of Human Rights in a case involving sexual orientation. The report (CJI/doc.417/12) was discussed by the members of the Committee, and they decided that the study would be limited to the legal implications and conceptual developments, and that the relevant works in the areas of doctrine and jurisprudence would be cited. Taking those parameters into account, the following rapporteur’s report is hereby submitted.

II. REPORT

Accordingly, and in furtherance of the rapporteur's assigned topic, research was conducted to define, in layman's terms, the concepts of sexual orientation, gender identity and expression, together with the various legal implications of each of those categories, which will be explained below in this report.

- 'Sexual orientation' is a proper term to refer to physical and/or emotional attraction to a person of the same or opposite sex or of both sexes.
- 'Gender identity' is the term used to describe the inner sense of transgender persons, who identify themselves with the opposite sex. In other words, a person can subjectively feel a gender identity that is different from his or her sexual or physiological characteristics.
- 'Gender expression' is the external manifestation of the cultural traits and/or features that identify a person as either male or female, based on those patterns that a society, at any given moment in history, regards as gender appropriate.

Other concepts related to this subject are as follows:

- 'Sexual diversity' is the term that captures and celebrates all forms of expression manifested by the various sexual orientations and gender identity.
- The expression 'LGBTI' refers to "lesbian, gay, bisexual, transgender and intersex persons".
 - A 'lesbian' is a woman who feels a physical and/or emotional attraction to another woman.
 - A 'gay' is a person who feels an emotional and/or physical attraction toward another person of the same sex (the term is generally used to refer to men).
 - A 'bisexual' is a person who is emotionally and/or physically attracted to both men and women.
 - 'Transgender' is the term used to refer to those persons whose biological sex is different from their gender identity and gender expression.
 - Intersex people are those who simultaneously present male and female sexual characteristics.
- A 'transsexual' is a person whose gender identity and biological sex do not match. As a general rule, transsexuals undergo some form of treatment to modify their bodies so that their sex and their gender identity are the same.
- A 'transvestite' is a person who adopts the dress normally associated with the opposite sex but who does not necessarily identify himself or herself as being of that sex.
- 'Intersexual' is the term used to refer to persons who are born with masculine and feminine genitalia or internal reproductive organs.
- A 'heterosexual' is a person who is physically and emotionally attracted to persons of the opposite sex.

In keeping with the mandate from the General Assembly, the Inter-American Commission on Human Rights (IACHR) has prepared a study titled "Sexual Orientation, Gender Identity and Gender Expression: Some Terminology and Relevant Standards." It is important to note that on the basis of

this study and given the importance of the topic, the IACHR has created, within its Executive Secretariat, a Unit on the Rights of LGBTBI Persons. The functions of that Unit are to provide technical assistance to the states concerning compliance with their obligations in this area.

In keeping with the various international treaties and conventions, the Inter-American Commission on Human Rights has defined discrimination based on sexual orientation, gender identity or gender expression as any distinction, exclusion, restriction or preference made on the basis of any attribute of the person and whose *de jure* or *de facto* effect or purpose is to impair or nullify the recognition, enjoyment or exercise, on a basis of equality, of human rights and fundamental freedoms, taking into account the social and cultural attributes that have been associated with those categories.

In this report, it is only fitting that emphasis should be placed on the need to eradicate any and all forms of discrimination based on gender identity, sexual orientation, and gender expression.

Similarly, Amnesty International has said: “All people should be able to enjoy all the human rights described in the Universal Declaration of Human Rights. Yet millions of people across the globe face execution, imprisonment, torture, violence and discrimination because of their sexual orientation or gender identity.”

These people face an array of violations: beatings at the hands of the security forces; loss of custody of their children; attacks, even murders, on the street (hate crimes); regular subjection to verbal abuse; bullying at school; denial of employment and health services; driven to suicide; in some cases, state executions; threats for campaigning for their human rights; cruel, inhuman, and degrading treatment; arbitrary arrest; restrictions on their freedom of association, etc.

In general terms, the negative attitudes and prejudices these persons face drive them to adopt a position of “invisibility” that can lead to emotional problems and, more seriously, to the discriminatory treatment they encounter in their day-to-day lives.

Consequently, this report offers a theoretical introduction to the principle of nondiscrimination within both the universal and regional/hemispheric systems, which will provide us with basic, clear conceptual tools for addressing the topic correctly. That principle is also closely related to the principle of equality.

Thus, within the universal system, there are instruments that address those principles:

Article 1 of the Universal Declaration of Human Rights provides that: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Article 2.1 of the UDHR states that, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” and, finally, Article 7 establishes that, “All are equal before the law and are entitled ... to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

Article 26 of the International Covenant on Civil and Political Rights provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2.2 of the International Covenant on Economic, Social and Cultural rights stipulates:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Nondiscrimination is also dealt with by other instruments within the universal system, such as the “Convention on the Elimination of All Forms of Discrimination against Women” and the “International Convention on the Elimination of All Forms of Racial Discrimination”; while the principle of nondiscrimination is also addressed in the “Convention on the Rights of the Child”, the “International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families”, and other similar instruments.

Within the regional, inter-American or hemispheric system, there are also instruments that address those principles, including the following:

Article 3.1 of the Charter of the Organization of American States (OAS) provides that, “The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex,” while Article 45.a stipulates that “All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security.”

Article II of the American Declaration of the Rights and Duties of Man: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”

Article 1.1 of the American Convention on Human Rights:

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.

Article 3 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (the Protocol of San Salvador) establishes the obligation of nondiscrimination and provides that:

The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

Article 9 of the Inter-American Democratic Charter:

The elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation.

As in the universal system, there are other inter-american conventions that deal with the principle of nondiscrimination, such as the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities.

Within the inter-American sphere, work is currently underway on negotiating a draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance. This instrument defines “discrimination” as any distinction, exclusion, restriction, or preference, in any area of public or private life, based, *inter alia*, on “sexual orientation, gender identity and expression,” and whose purpose or effect is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties. As can be seen, this draft Convention already addresses discrimination based on sexual orientation and gender identity and expression.

These are three related but distinct factors: sexual orientation, as already noted, involves a person’s sexual preferences and covers a range of possible options including heterosexuality, homosexuality, and bisexuality; gender identity entails how people perceive themselves in terms of gender (man or woman); and gender expression refers to the external manifestation of either sexual orientation or gender identity. It is often the case that those who openly express their sexual orientation or gender identity are probably more susceptible and vulnerable to discrimination, in that they make their status visible to others, which in turn leads to a violation of their basic rights and freedoms.

In practice, discrimination on the grounds of sexual orientation, gender identity, and gender expression is currently banned by several international instruments in both the universal and regional spheres, which frame it in the categories of “other social condition” or – occasionally, and somewhat more forcedly – in the categories of “gender” or “sex.” Thus, in the absence of a specific and comprehensive listing of all those categories covered by the traditional grounds for nondiscrimination, they have been incorporated into two forms of discrimination in international legal practice, namely: discrimination on the grounds of “sex,” and those open forms of discrimination covered by “any other social condition.”

This is the interpretation of the inter-American human rights system, by way of its Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Both have held that sexual orientation and gender identity are covered by the phrase “any other social

condition,” set forth in Article 1(1) of the American Convention on Human Rights or Pact of San José.

The Inter-American Commission on Human Rights has written that sexual orientation, gender identity, and gender expression are fundamental components of a person’s private life or privacy and has emphasized that the right to private life guarantees spheres of privacy in which neither the State nor anyone else can intrude, such as the freedom to develop one’s own personality, to pursue one’s own aspirations and to determine one’s own identity, as well as those spheres of activity that are uniquely personal such as decisions, interpersonal and family relations, and the home.

For its part, the Inter-American Court of Human Rights has held that ‘the realm of privacy is free from and immune to any arbitrary or abusive intrusion or aggression by either third parties or the state.’

The Inter-American Court of Human Rights has cited these principles in the “*Case of Atala Riffo and Daughters v. Chile*,” a case in which a mother lost care and custody of her daughters when the father filed a custody suit against her on the grounds that her sexual orientation and cohabitation with a same-sex partner would cause the girls “suffering.”

In this case, the Inter-American Court of Human Rights held that the right to equality and nondiscrimination meant that sexual identity and gender identity were categories protected by the American Convention on Human Rights under the clause “other social condition” that appears in Article 1(1) of that Convention.

The American Convention on Human Rights prohibits any discriminatory regulation, act or practice based on a person’s sexual orientation. Therefore, no provision, decision or practice under domestic law, either by state authorities or by private parties, can in any way discriminate against a person or restrict that person’s rights based on his or her sexual orientation.

The Inter-American Court of Human Rights held that sexual orientation is a category protected by Article 1(1) of the American Convention, which is a general provision that applies to all other provisions of the Convention and establishes the obligation of the States Parties to respect and ensure the free and full exercise of the rights and freedoms recognized therein “without any discrimination”. Hence, any treatment that can be deemed to be discriminatory with respect to the exercise of any of the rights protected under the Convention is, *per se*, incompatible with it.

With regard to the right to equality and nondiscrimination, the Inter-American Court of Human Rights held that sexual orientation and gender identity are categories protected by the American Convention on Human Rights under the phrase “any other social condition”, which appears in Article 1(1) of the Convention. Hence, any discriminatory regulation, act or practice based on a person’s sexual orientation is prohibited by the Convention.

In the section of the judgment in the *Case of Atala Riffo and daughters v. Chile*, in which the Court establishes the reparations to be made, the Court ordered the State to continue implementing, within a reasonable period of time, educational programs and training courses on this subject, targeting public officials at the regional and national level, particularly judicial officers in all

branches and at all levels of the judiciary.

Because of the importance of the issues that the IACHR and the Inter-American Court of Human Rights examined in this area, this rapporteur's report has prepared excerpts taken from the summary of the Inter-American Court's judgment in the *Case of Atala Riffo and Daughters v. Chile*, and from the Commission's report titled "Sexual Orientation, Gender Identity and Gender Expression: Some Terminology and Relevant Standards." Those excerpts appear as appendices to this rapporteur's report, since this study contains conceptual and terminological developments related to sexual orientation, gender identity, and gender expression and an extract from the summary of the Inter-American Court of Human Rights' judgment in the *Case of Atala Riffo and Daughters v. Chile*, because that case provides precedent within the inter-American system regarding discrimination on the grounds of sexual orientation.

III. RECOMMENDATION

Given the information reported thus far, this rapporteurship deems it advisable to recommend that inasmuch as the existing international treaties and conventions contain no specific and exhaustive regulations that would make sexual orientation, gender identity, and gender expression separate and specific prohibited grounds for discrimination and in order to prevent that omission from having legal consequences, these categories should for now be subsumed into the category of nondiscrimination "for reasons of sex" or "any other social condition", as set forth in the universal and regional instruments referred to, particularly in the general provision contained in Article 1(1) of the American Convention on Human Rights; as the Inter-American Court of Human Rights clearly established in its judgment in the *Case of Atala Riffo and Daughters v. Chile*, any discrimination based on sexual orientation and gender identity was understood to be prohibited.

Should these measures to protect and guarantee their rights not be sufficient to eradicate any form of discrimination for these categories, the best course of action would be to wait for the result of the ongoing negotiations within the Organization of American States for the draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance, which includes sexual orientation and gender identity and expression among the grounds for discrimination.

All administrative and judicial officials, officers of the court and academics in the member states of the Organization of American States (OAS) should receive continuing education and training in this topic, with a view to wiping out all forms of discrimination in this area, and to pursue a comprehensive policy for awareness-raising and tolerance.

El Salvador has created the Directorate for Sexual Diversity within the Secretariat of Social Inclusion of the office of the President of the Republic. That Secretariat, which is headed by the First Lady of the Republic, has begun to hold seminars on these categories for public officials and employees of the executive branch, together with training days for the general public to prevent discrimination on the grounds of gender identity and/or sexual orientation.

Similarly, the President of the Republic issued Executive Decree No. 56 on May 4, 2010, titled "Provisions for the prevention of all forms of discrimination in the public administration, for reasons of gender identity and/or sexual orientation," which prohibits all forms of discrimination by reason of gender identity and/or sexual orientation in the activities of the public administration.

Discrimination therein is understood as any distinction, exclusion, or restriction based on gender identity and/or sexual orientation whose purpose or effect is to nullify or curtail the equal recognition, enjoyment, or exercise of human rights and fundamental freedoms.

It also establishes that the heads and directors of the various offices and bodies that make up the public administration must ensure the development of a culture of respect and tolerance within the activities they oversee, irrespective of any individual's gender identity and/or sexual orientation.

No rule, agreement, order, instruction, resolution, or circular shall apply within the public administration that could in any way create discrimination by reason of gender identity or sexual orientation.

The Directorate of Sexual Diversity is now preparing a manual for preventing discrimination on the grounds of sexual orientation in the public administration, and for improving the treatment given by public and private institutions to persons belonging to the LGBTI group within society. In addition, talks are being given in the country's schools, with the aim of teaching tolerance and raising student awareness about not discriminating against people on account of their sexual orientation.

Currently, many of the region's states are organizing seminars, talks, and training days to prevent discrimination for reasons of sexual orientation, gender identity and gender expression, and to educate people and raise their awareness, create suitable environments and ensure access to public services. All these campaigns have led to the creation of the International Day Against Homophobia and Transphobia, which is held on May 17.

Documents enclosed with the report:

**A) SEXUAL ORIENTATION, GENDER IDENTITY AND GENDER EXPRESSION:
SOME TERMINOLOGY AND RELEVANT STANDARDS**

Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights (IACHR) has received ample information on the situation of the rights of lesbian, gay, trans, bisexual and intersex persons (hereinafter “LGTBI”) in the countries of the Americas, particularly regarding the serious discrimination they face.

Given the situation, the Commission’s Strategic Plan features a Plan of Action 4.6.i on the rights of LGTBI persons. In November 2011, the Commission created within its Executive Secretariat a specialized unit on this subject whose functions include that of providing technical support to States in meeting their obligations in this area.

Through AG/RES. 2653 (XLI-O/11) on “Human Rights, Sexual Orientation and Gender Identity,” the General Assembly of the Organization of American States (hereinafter the “OAS”) asked the Commission to prepare a study “on the legal implications and conceptual and terminological developments as regards sexual orientation, gender identity, and gender expression.”

Here, the Inter-American Commission on Human Rights wrote that concepts like “sexual orientation”, “gender identity” and “gender expression” or reference to persons by the acronym LGTBI have, at the very least, social, legal and medical connotations. For example, the letters B (for bisexual), G (for gay), I (for intersex), L (for lesbian), and T (for trans) have been used to signify trends, movements or events organized to demand rights, to express solidarity, to mobilize the community or to protest; they can also be used to signify communities, groups, or identities.

It also found that in the legal area, particularly within the United Nations system, these social debates generally come under the rubric of “sexual minorities,” a cover term for issues related to the rights of gay, lesbian, trans, bisexual, and intersex persons.

The Commission wrote that from the more technically precise standpoint of the sociology of law, the expressions ‘sexual orientation’, ‘gender identity’ and ‘gender expression’ have been used to make reference to the recognition and enforceability of rights by, *inter alia*, the legislature and the judiciary. Labeling someone as a lesbian, gay, trans, bisexual or intersex person ensures that his/her sexual orientation and/or gender identity are recognized in law as legally protected (but traditionally ‘invisibilized’) aspects that go into constructing his/her identity; it recognizes the discrimination to which persons who so identify themselves have historically been subjected, and affords them protection.

The Inter-American Court of Human Rights has held that in the international law of human rights, sexual orientation – and by analogy also gender identity and gender expression – have been understood as personal characteristics that are innate and inherent to the person (such as race and ethnicity) and immutable, understood as meaning it is a characteristic that is difficult to control and which a person cannot abandon without sacrificing his or her identity. (Case No. 12,504, *Karen Atala v. Chile*, September 17, 2010).

In the realm of health sciences, the Pan American Health Organization (hereinafter “PAHO”) recommends that when treating someone in a health center the individual be asked his/her assigned sex at birth (“male, female, or other”) and how the person identifies himself/herself in terms of gender identity (“feminine, masculine, trans female, trans male, trans person, transvestite, or other”). PAHO observes that this information is vital to determining the proper treatment.

This document outlines some accepted notions of sex, gender, sexual orientation, gender identity, and gender expression. In closing, reference is made to the standards for the definition of discrimination, specifically as it relates to sexual orientation, gender identity, and gender expression, as well as standards related to sexual orientation, gender identity and gender expression as aspects pertaining to the individual’s right to a private life and the corresponding obligations of the State.

In the strict sense, the term “sex” refers to “biological differences between men and women,” their physiological characteristics, “the sum of biological characteristics that define the spectrum of humans as females and males,” or “a biological construct, referring to the genetic, hormonal, anatomical, and physiological characteristics on whose basis one is labeled at birth as either male or female.”

Sex is understood to refer to men, women and to intersex persons as well. In the literature, intersexuality has been defined as “all those situations in which an individual’s sexual anatomy does not physically conform to the culturally defined standard for the female and male body.”

The difference between sex and gender is that the first is a reference to a biological difference, whereas the second is a social construction. The United Nations Committee that monitors compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has written that the term “sex” refers to biological differences between men and women. The term “gender” refers to socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences.

At the international level, however, and with some degree of uniformity at the domestic level, the categories ‘sex’ and ‘gender’ have historically been used interchangeably.

A person’s sexual orientation is independent from his or her biological sex or gender identity. It has been defined as “each person’s capacity for profound emotional, affectional and sexual attraction to, and for maintaining intimate and sexual relations with individuals of a different gender or the same gender or more than one gender.”

The terms ‘heterosexuality’, ‘homosexuality’ and ‘bisexuality’ come under the heading of sexual orientation and can be defined as follows:

Heterosexuality

This term refers to a person’s capacity for profound emotional, affectional, and sexual attraction to a person of a different gender and to the capacity to maintain intimate and sexual relations with that other person.

Homosexuality

This term refers to a person's capacity for profound emotional, affectional, and sexual attraction to a person of the same gender and to the capacity to maintain intimate and sexual relations with that other person. The LGBTI movement prefers the term *lesbian* (for female homosexuality) and *gay* [or *gai* in Spanish] (for male or female homosexuality, the latter in the English-speaking countries).

Bisexuality

This term refers to a person's capacity for profound emotional, affectional, and sexual attraction to a person of a different gender and of the same gender, and to that person's capacity to maintain intimate and sexual relations with these persons.

Gender identity

According to the Yogyakarta Principles, gender identity is each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech, and mannerisms.

Generally speaking, gender identity includes the category of transgenderism or trans. The following are the most commonly accepted definitions of this category and its subcategories.

Transgenderism or trans

This umbrella term –which includes the subcategory of transexuality and other variations– is used to describe the different variants of gender identity, whose common denominator is that the person's biological sex and the gender identity traditionally assigned to that sex do not match. A trans person can construct his/her identity regardless of surgical interventions or medical treatment.

Transexualism

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

Other subcategories that do not necessarily imply body alterations

In this category one finds persons who are transvestites. Transvestites can generally be said to be persons who express their gender identity –either on a permanent or temporary basis– by wearing articles of clothing and adopting the deportment and mannerisms of the gender opposite to the one socially and culturally associated with their biological sex. This may or may not include body modifications.

Other terms have also been included under the category *transgender*, such as: cross-dressers (persons who occasionally wear clothing of the opposite sex); drag queens (men who dress as women, exaggerating feminine traits, generally on festive occasions); drag kings (women who dress as men, exaggerating male traits, generally on festive occasions), and transformists [sometimes referred to as transgender performers] (men or women who play characters of the opposite sex in shows).

Gender expression

Gender expression has been defined as “the outward manifestations of the cultural traits that enable a person to identify himself/herself as male or female, according to the patterns that, at a particular moment in history, a given society defines as gender appropriate.”

Discrimination based on gender identity, sexual orientation, and gender expression.

The various international conventions and treaties define discrimination as any distinction, exclusion, restriction or preference made on the basis of any attribute of the person and whose effect or purpose is to impair or nullify the recognition, enjoyment or exercise, on a basis of equality, of human rights and fundamental freedoms.

The IACHR defines discrimination based on sexual orientation, gender identity or gender expression as any distinction, exclusion, restriction or preference made against a person on these grounds, which has the effect or the purpose –whether *de jure* or *de facto*– of impairing or nullifying the recognition, enjoyment or exercise, on the basis of equality, of human rights and fundamental freedoms, taking into account the social and cultural attributes that have been associated with those categories.

Nevertheless –particularly given the absence of specific, exhaustive regulations governing the prohibited grounds of discrimination for these categories-, from a legal standpoint, nondiscrimination on the basis of sexual orientation and gender identity has generally been subsumed under two prohibited grounds for discrimination under international law, namely: discrimination by reason of “sex”, and under the open-ended clause on discrimination on the basis of “any other social condition”.

As for the interpretation of these provisions and the application of these standards within the inter-American human rights system, the Commission and the Inter-American Court of Human Rights have maintained that sexual orientation and gender identity are covered under the phrase “any other social condition” that appears in Article 1(1) of the American Convention on Human Rights.

With respect to sexual orientation and its link to the right to privacy, the Commission has written the following:

Sexual orientation constitutes a fundamental component of the private life of an individual that, absent substantive and convincing reasons, should be free from arbitrary and abusive interferences by the State. The Commission reiterates that the right to privacy protects the right to determine one’s own identity and to establish personal and family relations on the basis of that identity, even if it is not accepted or tolerated by a majority within society.

Thus, sexual orientation, gender identity and gender expression are fundamental components of an individual's private life or privacy. The Inter-American Commission has highlighted that the right to a private life guarantees realms of privacy in which neither the State nor anyone else can intrude, such as the ability to pursue the development of one's personality and aspirations and to determine one's identity; it also includes those spheres of activity that are uniquely personal, such as one's decisions, interpersonal and family relations, and home.

In this regard, the Inter-American Court has established that "the sphere of privacy is characterized by being free and immune to the intrusions and abusive aggressions by third parties or the State."

B. INTER-AMERICAN COURT OF HUMAN RIGHTS

Case of Atala Riffo and Daughters v. Chile

The facts of this case concern the custody suit that the father of three girls brought against their mother, Ms. Karen Atala Riffo, on the grounds that her sexual orientation and her co-habitation with a same-sex partner would cause suffering to the three girls. Among the issues that the Court had to resolve was the alleged international responsibility of the State for the discriminatory treatment that Ms. Atala received and the arbitrary interference in her private and family life that she experienced in the court proceedings in which she lost care and custody of her daughters.

In its judgment, the Court found Chile internationally responsible for violation of the following:

- i) the right to equal protection and nondiscrimination, recognized in Article 24 of the American Convention, in conjunction with Article 1(1) thereof, to the detriment of Karen Atala Riffo;
- ii) the right to equal protection and nondiscrimination, recognized in Article 24 of the American Convention, in conjunction with Articles 19 (rights of the child) and 1(1) (obligation to respect and ensure the Convention-protected rights), to the detriment of the three girls;
- iii) the right to a private life, protected under Article 11(2) (protection of private life and to have one's honor and reputation respected), in conjunction with the obligation to respect and ensure the Convention-protected rights, to the detriment of Karen Atala Riffo;
- iv) Articles 11(2) (protection of private life and the right to have one's honor and reputation respected) and 17(1) (protection of the family), in conjunction with Article 1(1) (obligation to respect and ensure the Convention-protected rights) of the American Convention, to the detriment of Karen Atala Riffo and the girls;
- v) the right to a hearing, protected under Article 8(1) (judicial guarantees), in conjunction with Articles 19 (rights of the child) and 1(1) (obligation to respect and ensure the Convention-protected rights) of the American Convention, to the detriment of the girls, and
- vi) the guarantee of impartiality protected under Article 8(1) (judicial guarantees), in conjunction with Article 1(1) (obligation to respect and

ensure the Convention-protected rights) of the American Convention, in the case of the disciplinary inquiry, to the detriment of Karen Atala Riffo.

1. The Court's conclusions and findings

1.1 Equality and nondiscrimination and sexual orientation as a category protected under Article 1(1) of the American Convention. The Court emphasized that Article 1(1) of the American Convention is a general provision that applies to all other provisions of the Convention and establishes the obligation of the States Parties to respect and ensure the free and full exercise of the rights and freedoms recognized therein "without any discrimination". Hence, any treatment that can be deemed to be discriminatory with respect to the exercise of any of the rights protected under the Convention is, *per se*, incompatible with it.

With regard to the right to equal protection and nondiscrimination, the Court also held that sexual orientation and gender identity are categories protected by the American Convention under the phrase "any other social condition," which appears in its Article 1(1). Thus, the Convention prohibits any discriminatory regulation, act or practice based on a person's sexual orientation. Consequently, no regulation, decision, or practice under domestic law, whether by state authorities or individuals, may in any way diminish or restrict the rights of a person by virtue of his or her sexual orientation.

1.2 The principle of the child's best interests and assumptions of risk. The Inter-American Court underscored the fact that the general purpose of protecting the child's best interest is, in itself, a legitimate aim and is also an imperative. It also wrote that in order to ensure that the child's best interests are served to the maximum extent possible, the preamble of the Convention on the Rights of the Child establishes that children require "special care", and Article 19 of the American Convention states that they must receive "special measures of protection."

The Inter-American Court wrote that the determination of the child's best interests in cases involving the care and custody of minors must be based on an assessment of specific parental behaviors and their negative impact on the well-being and development of the child, or of any real and proven damage or risks to the child's well-being and not those that are speculative or imaginary. Therefore, speculations, assumptions, stereotypes, or generalized considerations regarding the parents' personal characteristics or cultural preferences regarding the family's traditional concepts are not admissible.

The Court observed that while in the abstract, the "child's best interests" is considered a legitimate goal, the mere reference to this purpose, without specific proof of the risks or damage to the girls that could result from the mother's sexual orientation, cannot serve as a suitable measure to restrict a protected right, such as the right to exercise all human rights without discrimination based on the person's sexual orientation. The child's best interests cannot be used to justify discrimination against the parents based on their sexual orientation. Therefore, the judge cannot take this social condition into consideration as an element in a custody ruling.

The Court added that a determination based on unfounded and stereotyped assumptions about the parent's capacity and suitability to ensure and promote the child's well-being and development is not sufficient to guarantee the legitimate goal of protecting the child's best interests. The Court held that considerations based on stereotypes of sexual orientation, that is, preconceptions

regarding the attributes, behaviors or characteristics of homosexuals or the impact these may have on children, are not admissible.

1.2.1 Alleged social discrimination

The Court found that a distinction in treatment and a restriction of a right cannot be legally justified by invoking the presumed social discrimination, proven or not, that the minors might face due to the circumstance of their mother or father. The Court wrote that while it was true that certain societies may be intolerant of a person by reason of his or her race, gender, nationality, or sexual orientation, States cannot use this as a justification to perpetuate discriminatory treatment. States are under an international obligation to adopt the measures necessary “to give effect to” the rights established in the Convention, as stipulated in Article 2 of that inter-American instrument, and therefore must be inclined, precisely, to confront manifestations of intolerance and discrimination in order to prevent exclusion or the denial of a specific status.

The Court wrote that social, cultural, and institutional changes are taking place within contemporary societies to make them more accepting of their citizens’ different lifestyles. This is evident in the social acceptance of interracial couples, single mothers or fathers and divorced couples, which at one time were not accepted by society. In this regard, the law and the State must help to advance social progress; otherwise there is a grave risk of legitimizing and consolidating different forms of discrimination that violate human rights.

On the other hand, with regard to the argument that the child’s best interests might be affected by the risk of rejection by society, the Court considered that a potential social stigma due to the mother’s or father’s sexual orientation cannot be considered as valid “harm” for purposes of determining the child’s best interests. If the judges who analyze such cases find that social discrimination does exist, it is completely inadmissible to legitimize that discrimination by arguing the protection of the child’s best interests. In the instant case, the Court also emphasized that there was no reason why Ms. Atala should suffer because of the potential discrimination that her daughters might endure in their community because of their mother’s sexual orientation.

The Court therefore concluded that the argument of potential social discrimination was not adequate to meet the stated purpose of protecting the best interests of Ms. Atala’s daughters.

1.2.2 Alleged confusion of sexual roles

As for the possible confusion of roles that the three girls might experience as a result of living with their mother and her partner, the Court held that in a case involving the prohibition of discrimination based on sexual orientation, any curtailment of a right would have to be based on rigorous and serious grounds. Furthermore, the burden of proof would be reversed, which means that it would be up to the authorities to prove that their decision did not have a discriminatory purpose or effect. Indeed, the State bears the burden of proving that a concrete, specific and real harm to the girls’ development exists. The Inter-American Court observed that in the present case, the Chilean Supreme Court did not issue a judgment based on an analysis *in abstracto* of the alleged impact of the mother’s sexual orientation on the girls’ development, but instead cited the alleged existence of specific evidence. However, in its considerations it limited itself to the application of a test of speculative damage; with regard to the alleged damage, it merely mentioned “the possible confusion

of sexual roles” and the “risk to the girls’ development”. The Inter-American Court therefore concluded that the Supreme Court of Justice did not comply with the requirement to apply a strict scrutiny test and substantiate the specific harm allegedly suffered by the three girls as a result of their mother cohabiting with a same-sex partner.

1.2.3 The argument alleging prioritization of self-interests

Concerning the argument to the effect that Ms. Atala had put her own self-interests first, the Court wrote that the scope of the right to nondiscrimination based on sexual orientation is not limited to the fact of being a homosexual *per se*, but includes its expression and the ensuing consequences for a person’s life project. The Court explained that the scope of protection of the right to a private life has been interpreted in broad terms by international human rights courts, which have held that the scope of protection extends well beyond the right to privacy.

In this regard, a person’s sexual orientation is also linked to the notion of freedom and a person’s right to self-determination and to freely choose the options and circumstances that give meaning to his or her existence, based on his or her own choices and convictions.

The Court, therefore, held that to require the mother to limit her lifestyle options implied adherence to a “traditional” concept of women’s social role as mothers, where society expects women to bear the bulk of the responsibility for their children’s upbringing, which in the Atala case would have meant that Ms. Atala would have to put her children’s upbringing first, even if it meant sacrificing an essential aspect of her identity. The Court wrote that the argument alleging that Ms. Atala had put her own interests ahead of everything else was not germane and did nothing to further the girls’ best interests.

1.2.4 The argument asserting a right to a “normal and traditional” family

Finally, in response to the argument asserting a right to a “normal and traditional” family, the Court held that the American Convention’s definition of family is not a narrow one, nor does the American Convention protect only a “traditional” model of the family. In this regard, the Court reiterated that the concept of family life is not limited to families based on marriage and may encompass other *de facto* family ties in which the parties live together out of wedlock.

In the Atala case, this Court found that the language used by the Supreme Court of Chile regarding the girls’ alleged need to grow up in a “normally structured family that is appreciated within its social *milieu*,” and not in an “exceptional family”, reflected a narrow, stereotyped concept of family, which had no basis in the Convention, as there is no single, specific model of family (the “traditional family”) posited therein.

1.2.5 Conclusion

Based on these considerations, the Court concluded that while the Supreme Court’s ruling and the decision on temporary custody sought to protect the best interests of the girls, it was not demonstrated that the grounds stated in the decisions were appropriate to achieve said purpose, since the Supreme Court and the Juvenile Court of Villarrica did not prove in this specific case that Ms. Atala’s cohabitation with her partner had a negative effect on the girls’ best interests. On the

contrary, they used abstract, stereotyped and/or discriminatory arguments to justify their decisions, with the result that the decisions discriminated against Ms. Atala, in violation of Article 24 and Article 1(1) of the American Convention.

The Inter-American Court underscored the fact that children must not become victims of discrimination by reason of their own status as minors, nor must their parents or other family members by reason of their circumstances, which in this case was the sexual orientation of the mother.

The Court wrote that in using the mother's sexual orientation as grounds for its decision, the Supreme Court also discriminated against the three girls, since it took into account factors it would not have considered had the custody case been between two heterosexual parents. Specifically, this Court reiterated that the "best interests of the child" is a guiding principle in the drafting of provisions and in their application in all aspects of a child's life.

The Court also held that the discriminatory treatment of the mother had repercussions for the girls, since it was used as grounds for deciding that they should not continue to live with their mother. The decision had far-reaching consequences, as the girls were separated from their mother because of her sexual orientation. Therefore, the Court concluded that Article 24, in conjunction with Articles 19 and 1(1) of the American Convention, were violated to the detriment of the girls.

1.3 Right to private life and right to family life

The Court held that Article 11 of the Convention prohibited all arbitrary or abusive interference in a person's private life, and encompassed various spheres of intimacy, as well as the private lives of families. The Court wrote that the realm of privacy was exempt and immune from abusive or arbitrary intrusion or aggression by third parties or by public authorities. It also wrote that privacy was a broad concept that did not lend itself to exhaustive definitions but included, *inter alia*, sexual life and the right to establish and develop relations with other human beings. In other words, private life includes the way in which the individual perceives himself or herself and the *persona* that he or she decides to project to others and when.

The Court found that during the custody proceedings, a stereotype of Ms. Atala's sexual orientation was used, resulting in arbitrary interference in her private life, given that sexual orientation is part of a person's intimacy and is irrelevant when examining an individual's suitability as a parent. Therefore, the Court concluded that the State violated Article 11(2), in conjunction with Article 1(1) of the American Convention, to the detriment of Karen Atala Riffo.

The Court reiterated that Article 11(2) of the American Convention was closely linked to the right to protection of the family and the right to live in a family, recognized in Article 17 of the Convention, which requires the State not only to order and directly implement measures of protection for children, but also to favor, in the broadest possible terms, the development and strengthening of the family unit. The Court wrote that various treaty-based human rights bodies have observed that there is no one model of family, as families may be different. In the Atala Case, the Court found that a family unit had clearly been created and, as such, was protected by articles 11(2) and 17(1) of the American Convention, since they shared their lives, with frequent contact and a personal and emotional closeness between Ms. Atala, her partner, her eldest son and the three girls. The Court

concluded that breaking up the family that the mother, her partner and the girls had created constituted arbitrary interference in their private and family life.

1.4 Judicial guarantees

As for the alleged violation of the judicial guarantees of the judges' impartiality and independence, to the detriment of Ms. Atala, the Court was of the view that no specific evidence was offered to disprove the presumption of the subjective impartiality of the judges, nor were there any convincing elements that might call into question the objective impartiality of the judgment of the Supreme Court. An interpretation of the provisions of the Chilean Civil Code in a manner contrary to the American Convention in matters of child custody involving a homosexual individual would not, by itself, be sufficient for the Court to find a lack of objective impartiality. The Court, therefore, found that in the Supreme Court's ruling in this case, the State had not violated the judicial guarantees recognized in Article 8(1) of the Convention.

On the other hand, the Court concluded that the Supreme Court's ruling had violated the girls' right to be heard, protected under Article 8(1), in conjunction with articles 19 and 1(1) of the American Convention. In its judgment the Supreme Court had not explained how it had assessed or taken into consideration the girls' stated preferences, which were a matter of record. The Inter-American Court found that the Chilean Supreme Court did not adopt a decision that considered the relevance it attributed to the living arrangements preferred by the girls, nor did it explain the reasons why it did not rule in accordance with the wishes expressed by the three girls. On the contrary, the Supreme Court simply based its decision on the supposed best interests of the three girls, without explaining the reasons why or the grounds upon which it considered it legitimate to overrule the wishes expressed by the girls during the custody proceedings, particularly given the connection between a child's right to participate and the goal of complying with the principle of the child's best interests. Accordingly, the Court concluded that the Supreme Court's decision violated the girls' right to be heard and be duly taken into account, embodied in Article 8(1), in conjunction with articles 19 and 1(1) of the American Convention, to the detriment of the girls.

2. The Court's findings regarding the differentiation in the disciplinary inquiry against Ms. Atala

As for the facts associated with the disciplinary inquiry, the Court did not find any connection whatsoever between the desire to protect the "image of the judicial branch" and Ms. Atala's sexual orientation. A person's sexual orientation or the exercise thereof cannot provide grounds, under any circumstances, to undertake a disciplinary proceeding, since there is no connection between the correct performance of a person's professional duties and their sexual orientation. Therefore, since differentiation based on sexual orientation is discriminatory in a disciplinary inquiry, the Court concluded that the State violated Article 24 in conjunction with Article 1(1) of the American Convention, to the detriment of Karen Atala Riffo.

The Court also held that although the disciplinary investigation was undertaken on legal grounds and did not end with any disciplinary sanctions against Ms. Atala for her sexual orientation, it did investigate this matter in an arbitrary manner, which constituted an intrusion into Ms. Atala's private life that extended into her professional life as well. Therefore, the State was responsible for violating the right to privacy, recognized in Article 11(2) in conjunction with Article 1(1) of the

American Convention, to the detriment of Karen Atala Riffo.

Concerning protection of the guarantee of subjective impartiality, the Court held that prejudices and stereotypes were evident in the report issued by the visiting minister, which demonstrated that those who prepared and approved said report were not objective regarding this matter. On the contrary, they expressed their personal position regarding Ms. Atala's sexual orientation in a disciplinary sphere in which a judicial reprimand for this fact was neither acceptable nor lawful. Consequently, the Court found that the extraordinary visit and the disciplinary investigation were conducted without the necessary subjective impartiality, and that therefore the State had violated Article 8(1) in relation to Article 1(1) of the American Convention, to the detriment of Karen Atala Riffo.

Reparations

On the matter of reparations, the Court wrote that a judgment *per se* constituted a form of reparation. It also ordered the State to make the following additional reparations:

- i) through its public health institutions, provide free and immediate, adequate and effective medical and psychological treatment to the victims that request such treatment;
- ii) publish the official summary of the Judgment written by the Court, once only, in the Official Gazette and in a newspaper with nationwide circulation, and the full text of the judgment on the official website;
- iii) hold a public act at which it acknowledges international responsibility for the events of the present case;
- iv) within a reasonable period of time, continue to implement permanent education programs and training courses directed at public officials at the regional and national levels, and particularly judicial officials in all areas and at all levels of the Judicial Branch, and
- v) pay the specified amounts as compensation for pecuniary and non-pecuniary damages and as reimbursement for costs and expenses, as the case may be.

The Inter-American Court will monitor full compliance with this Judgment and will consider the case concluded once the State has fully complied with the measures ordered in the Judgment.

* * *