

**REPORT No. 5/14**  
CASE 12,841  
MERITS  
ÁNGEL ALBERTO DUQUE  
COLOMBIA

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April 2, 2014

**I. SUMMARY**

1. On February 8, 2005, the Inter-American Commission on Human Rights (hereinafter the “Commission” or the “IACHR”) received a petition presented by the Colombian Commission of Jurists and Germán Humberto Rincón Perfetti (hereinafter “the petitioners”) in which it is alleged that the Republic of Colombia (hereinafter “the State,” “the Colombian State” or “Colombia”) is responsible for violation of a number of provisions of the American Convention on Human Rights (hereinafter “the American Convention”, “the Convention” or “the ACHR”). The petitioners contend that Ángel Alberto Duque was the victim of unfair discrimination; because of his sexual orientation, he was denied the pension he was entitled to receive as his partner’s survivor. The petitioners also allege that this discrimination left Mr. Duque unprotected and also affected, *inter alia*, his chances of getting the health services he needs because he is living with HIV. They also point out that the Colombian authorities narrowly interpreted and applied the rules on social security and pension substitution; they also contend that the responses to the claims filed did not ensure access to due process with the necessary guarantees.

2. The State, for its part, does not refute the facts as presented by the petitioners, but argues that it is not internationally responsible for the human rights violations being alleged. Specifically, the State believes that it has achieved significant progress on the subject of pensions between same-sex couples; it argues that in the instant case, the focus should not be on whether Mr. Duque is a victim of discrimination, since a situation of that nature might have happened due to the principle of “progressive realization” of economic, social and cultural rights (hereinafter the “ESCR”), and the margin of flexibility that States have to guarantee these types of rights to all their inhabitants. It also argues that this case is about hypothetical injuries and damages, since Mr. Duque had access to the medications needed to treat his illness. Finally, the State asserts that Mr. Duque was not denied the opportunity to avail himself of the courts and the fact that the decisions taken in first and second instance did not suit his interests does not mean that there was a violation of due process.

3. On November 2, 2011, the Commission approved Report No. 150/11, in which it declared that it was competent to take up the petition and that the petition was admissible for the possible violation of the rights protected in articles 5, 8(1), 24 and 25 of the American Convention, read in conjunction with the obligations established in articles 1(1) and 2 thereof. It also declared the petition inadmissible with respect to the violation of the right recognized in Article 4, read in conjunction with Article 1(1) of the American Convention.

4. After examining the positions of the parties, the Inter-American Commission concludes that the Colombian State is responsible for violation of the rights to the integrity of one’s person, judicial guarantees, equality and non-discrimination, and judicial protection, recognized in articles 5(1), 8(1), 24 and 25 of the American Convention, read in conjunction with the obligations set forth in Convention articles 1(1) and 2.

## II. PROCESSING WITH THE IACHR

5. The original petition was received on February 8, 2005. The processing of the petition from the time of its presentation to the admissibility decision is documented in detail in the admissibility report,<sup>1</sup> approved on November 2, 2011.

6. On November 8, 2011, the Commission notified the parties of the report and informed them that the petition had been registered as case number 12,841. Under Article 38(1) of the Rules of Procedure then in force, it set a three-month time period for the petitioners to submit any additional observations they might have regarding the merits. Likewise, in keeping with Article 48(1)(f) of the American Convention, it made itself available to the parties with a view to reaching a friendly settlement of the matter.

7. The petitioners filed their observations on the merits of the case on January 12, February 9 and November 20, 2012. Specifically, in their January 12, 2012 communication, the petitioners declined to explore the friendly settlement avenue, “given the importance of the case and its specifics, the human rights at issue and the position taken by the State during the inter-American proceedings.” For its part, the State submitted observations on the merits of the case on July 12, 2012 and February 28, 2013. On July 22, 2013, the International Gay and Lesbian Human Rights Commission filed an *amicus curiae* brief, which was duly forwarded to the parties.

## III. THE PARTIES’ POSITIONS

### A. The petitioners

8. The petitioners allege that Ángel Alberto Duque and JOJG lived together permanently, in a consensual union, for 10 years and three months until JOJG died on September 15, 2001, as the result of Acquired Immunodeficiency Syndrome (AIDS). They contend that the alleged victim received economic support from his partner for his personal expenses and health care. They further indicate that by means of such support, the alleged victim was able to enroll in a Health Provider Enterprise (EPS: *Empresa Prestadora de Salud*) to receive the medical treatment he required since, on August 4, 1997, he joined the ETS-HIV/AIDS Program run by the Social Security Institute (ISS) with a diagnosis of human immuno-deficiency virus (HIV).

9. The petitioners indicate that JOJG was enrolled with the *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías “COLFONDOS, S.A.”* (hereinafter “COLFONDOS”), which is why, at around the time of his death, Mr. Duque filed a request with COLFONDOS on March 19, 2002 asking what requirements he had to meet to be eligible to receive the survivor’s pension, based on the fact that he had been JOJG’s permanent partner.

10. The petitioners maintain that on April 3, 2002, COLFONDOS responded to the request for information and indicated that the applicant “[did] not prove beneficiary status in the terms required by law to be eligible to receive the survivor’s pension and consequently the transaction requested

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<sup>1</sup> IACHR, Report No. 150/11 (Admissibility), Petition 123-05, Ángel Alberto Duque (Colombia), November 2, 2011, paragraphs 4-6.

[could] not be completed.” Specifically, COLFONDOS based its reasoning on the fact that Colombian legislation on social security, namely Law 100 of 1993, provided that the beneficiary of the survivor’s pension would be the surviving spouse or permanent partner, which would preclude the union of two persons of the same sex.

11. The petitioners argue that articles 47 and 74 of 1993 Law 100 provide that “should the survivor’s pension be triggered by the pensioner’s death, the surviving spouse or permanent partner must prove that he or she was living in marital union with the predecessor in title.” However, according to the petitioners, permanent partner does not include same-sex couples because Article 1 of Law 54 of 1990 provides that “once the present law enters into force, and for all civil effects, a *de facto* marital union shall be the union between a man and a woman who, without being married, enter into a permanent and exclusive community. Also and for all civil effects, a partner or permanent partner shall be understood to be the man or woman who is half of the *de facto* marital union.” The petitioners also point out that Decree 1889 of 1994, which partially regulates Law 100 of 1993, provides the following in Article 10: “[f]or purposes of the enrollee’s survivor’s pension, the permanent partner shall be the last person of the opposite sex to the enrollee, who has lived in marital union with him or her [...]”.

12. The petitioners assert that in view of COLFONDOS’ refusal, on April 26, 2002 Mr. Duque filed a *tutela* action (a special constitutional remedy) to have his right to the survivor’s pension recognized, inasmuch as he was JOJG’s permanent partner. The alleged victim argued that in his case the recognition of the survivor’s pension would guarantee him access to social security health services. The petitioners indicate that on June 5, 2002, the Tenth Municipal Judge for Civil Matters denied the *tutela* action based on the same arguments as those put forth by COLFONDOS. The judge wrote that the action was unfounded based on the fact that the alleged victim’s claim was statutory and that the *tutela* action was not the proper means to resolve it; instead, he should have taken his case to the ordinary (contentious-administrative) courts or filed an appeal or sought reconsideration (*reposición*), within the legal timeframes, to challenge COLFONDOS’ decision. The petitioners also point out that the ruling of the Tenth Municipal Civil Court stated that if the alleged victim required some type of social security health services, he could apply to the program offered by the System for Identification of Potential Beneficiaries of Social Programs (SISBEN) for persons without economic resources; the ruling went on to say that from the claims made by the alleged victim, it appeared that at that time he was receiving health services from the ISS.

13. The petitioners state that Mr. Duque appealed the decision of the Tenth Municipal Civil Court but that the decision was upheld on July 19, 2002 by the Twelfth Circuit Civil Court, using the same arguments. According to the petitioners, the Twelfth Civil Court referred the *tutela* action to the Constitutional Court for review, and it was not selected. The petitioners therefore allege that Mr. Duque has had to obtain, by his own account, the funds necessary to be able to remain enrolled with the EPS and keep up the medical treatment he requires.

14. The petitioners contend that these acts constitute violations of the rights protected under articles 4, 5(1), 8(1), 24 and 25(1) of the American Convention, read in conjunction with articles 1(1) and 2 thereof.

15. Concerning the obligations to respect and guarantee human rights, the petitioners allege that the State must organize its apparatus to guarantee and ensure enjoyment of the internationally protected rights and freedoms. Here, according to the petitioners, the State’s obligations are not limited to the simple, formal adoption of the legislative, administrative or judicial measures necessary to

give effect to the rights recognized in the American Convention; instead, they must also put those measures into practice.

16. The petitioners underscore the close interrelationship between the right to life and the right to one's physical, mental and moral integrity, and the right to the preservation of health. The petitioners contend that the State's refusal meant that for some periods of time, Mr. Duque was without the protection he needed to treat his serious physical and emotional condition as a person living with HIV, thereby putting his right to life in jeopardy.

17. As for the right to personal integrity, the petitioners contend that by denying the alleged victim his legitimate right to a survivor's pension and thereby leaving him unprotected given that he had been reduced to a subsistence living, with no income and no job, the State placed Mr. Duque's physical and mental health in grave danger. Specifically, the petitioners state that Mr. Duque suffered very difficult days because his access to medical treatment was uncertain and "for a period of time he was without any medication." Furthermore, according to the petitioners, the denial of his legitimate right to a survivor's pension because of his sexual orientation, which left him unprotected, created in Mr. Duque a sense of injustice and even greater stigmatization, as well as mental suffering and anxiety. The petitioners underscore the fact that the lack of certain access to prompt and adequate medical assistance is just one of the numerous consequences of the discrimination evident in this case, as it adversely affects—in every respect—the quality of life, one's physical integrity, the right to develop one's personality without interference and the right to a decent life.

18. As for the treatment received, the petitioners point out that the denial of the survivor's pension meant that Mr. Duque moved from having the benefits provided by the contributor-based social security health system—with which JOJG was enrolled while alive—to the subsidized system, whose benefits were 50% less. They point out that having lost health coverage by virtue of his permanent partner's death and being denied the survivor's pension and other social benefits, and given the urgent need of maintaining the life-sustaining medical treatment that someone living with HIV requires, Mr. Duque had to obtain, by his own means, the resources needed to be able to remain enrolled with EPS. However, according to the petitioners, the fact that Mr. Duque obtained access to medical assistance by his own account, does not mean that he is guaranteed permanent medical assistance and under the conditions necessary due to the development of HIV. The petitioners therefore contend that the pension substitution will ensure Mr. Duque the conditions he needs to be assured proper medical treatment.

19. As for the principles of equality before the law and non-discrimination, the petitioners allege that the basic principle of equality and non-discrimination has become part of the *jus cogens* and that "sexual orientation" is a category protected under the American Convention and is one of the prohibited grounds for discrimination. The petitioners underscore the fact that the prohibition of discrimination for reasons of sexual orientation is not limited to civil and political rights, but extends as well to ESCR.

20. The petitioners state that in the instant case, Mr. Duque met the requirements set forth in the 1993 Law 100 to qualify for the survivor's pension as JOJG's permanent partner, inasmuch as: (i) JOJG enrolled in a pension system; (ii) JOJG made the necessary payments for over ten years; (iii) while enrolled in the pension system, JOJG died from AIDS; and (iv) his nuclear family was his permanent partner, Mr. Duque. Even so, Mr. Duque's application was denied because in Colombia there is no law on the books allowing a same-sex partner to succeed to a survivor's pension.

21. The petitioners maintain that although social security is a right recognized under Article 9 of the Protocol of San Salvador and in the provisions of Colombia's Constitution, laws of lower rank make access to social security via the survivor's pension conditional upon the existence of a heterosexual marital union, excluding, without justification, same-sex couples. Thus, according to the petitioners, the laws that define "partner or permanent partner" discriminate based on sexual orientation, since the community that a same-sex couple forms is not protected; hence, the State has introduced in its laws cause for exclusion based on sexual choice, which is unjustified discrimination in that it is not informed by criteria of reasonableness and justice.

22. The petitioners point out that in this case the enforcement of this discriminatory legal provision had the effect of unfairly denying Mr. Duque his inalienable right to social security, an injustice compounded by the looming danger that a person living with HIV faces.

23. As for developments since 2007 in the Colombian Constitutional Court's case law on the subject of the rights of same-sex couples, the petitioners argue that while it may be effective in preventing discrimination in similar cases in the future, that case law was developed subsequent to the facts in the present case and subsequent to the date on which the present petition was filed. As such, they argue, at the time of the events in this case, the legislation in force excluded same-sex couples. Furthermore, the petitioners point out that the case law did not have retroactive effects and could not serve as an effective remedy, because of: (i) the established means of proof; (ii) the temporal effects of the judgments; and (iii) the fact that by the time of these developments in case law, Mr. JOJG had already died.

24. As for the State's argument regarding the progressive realization of the right to social security within the context of ESCR, the petitioners point out that the obligations set forth in articles 1(1) and 2 of the American Convention are also incumbent upon the State with respect to the right protected under Article 26 thereof, and that aspect was never a consideration in the debate with the authorities who denied Mr. Duque his legitimate right to the survivor's pension. The petitioners stress the fact that the denial of the right to the survivor's pension and other related benefits was not due to the State not having sufficient means; instead, Mr. Duque's exclusion was due to his sexual orientation as the surviving half of a same-sex couple.

25. As for the right to judicial guarantees and judicial protection, the petitioners allege that the Colombian authorities prevented Mr. Duque from being able to secure effective judicial protection of his rights, by means of the following: (i) laws that, by providing rights to couples composed of a man and a woman, effectively introduce factors that discriminate against same-sex couples; and (ii) a narrow interpretation and enforcement of the applicable rules on social security and pension substitution, which had the effect of excluding same-sex couples as beneficiaries.

26. They also point out that the responses to the claims that Mr. Duque filed both with private institutions and public authorities, indicate that access to due process with the necessary guarantees, was not ensured. Thus, according to the petitioners, same-sex couples have been precluded from setting in motion the administrative and judicial actions allowed under the domestic legal system to claim the right to a survivor's pension. Specifically, the petitioners stress that the purpose of a *tutela* action is to be able to avail oneself of constitutional jurisdiction in order to create the opportunity to have access to internal judicial due process that would open up, under conditions of equality, access to the right to pension substitution that heterosexual couples enjoy.

27. Finally, with respect to the developments in the Constitutional Court's case law, which the State cites, the petitioners underscore the fact that the supposed existence of *ex post facto* remedies does not constitute compliance with the State's obligation to afford effective judicial remedies at the time the human rights violations occur. The petitioners state further that even after more than three years since this petition was filed, Mr. Duque still does not have an effective remedy within the domestic legal system to protect his rights, and his attempts to find legal and judicial protection were denied, both in the administrative forum and the judicial forum.

## **B. The State**

28. The State does not contest the facts alleged by the petitioners but maintains that it did not incur in any international responsibility with respect to the alleged violations of the rights protected under articles 5, 8(1), 24 and 25 of the American Convention, read in conjunction with articles 1(1) and 2 thereof.

29. As for the right to life, the State argues that the facts and rights that the IACHR expressly dismissed in its Admissibility Report ought not to be re-litigated in the merits phase of the proceedings.

30. Concerning the right to humane treatment, the State argues that the circumstances of Mr. Duque's illness is a separate issue from his request to be recognized as the surviving beneficiary of his partner's pension. Furthermore, the State alleges that Mr. Duque does not appear to be enrolled with the Social Security Health Services System, neither the contributor-based system nor the subsidized system. However, his ability to obtain a pension aside, he has special protection needs given his health condition; needs that the State can provide for through internal mechanisms that Mr. Duque has not yet tapped. The State mentioned that it has afforded Mr. Duque access to the social security health services system to receive the proper treatment for his illness, even though he does not have the resources needed to pay to enroll with a health care provider.

31. The State also claims that the petitioners have not proven the violations they allege, as there is no record that would show that Mr. Duque did not have access to the medications he needed to treat his illness. Given the circumstances, the State argues, the idea that Mr. Duque is unable to get the medical treatment he needs is merely an unsubstantiated hypothesis. The State also contends that the fact that Mr. Duque is not in the contributor-based system, cannot *per se* be a violation of the criteria established by the ACHR.

32. As for the principles of equal protection of the law and non-discrimination, the State contends that there is no violation of Article 24 of the ACHR since, with the progress made in the law to benefit the LGBTI community and the rulings of the Constitutional Court, the State has gradually succeeded in protecting the right of LGBTI couples to social security, while observing the non-regression clause. Specifically, the State observes that the current laws and rules have evolved since the time the petition was presented back in 2005, to make them conform to the requirements established in Article 2 of the ACHR. Thus, the State argues, there is no violation of Article 24 of the ACHR, because the advances made in the protection of ESCR are covered by the principle of progressive realization, which recognizes that full satisfaction of these rights cannot be guaranteed immediately and prohibits any regression in the progress achieved.

33. The State points out that Mr. Duque's pension situation, and that of the entire LGBTI community, has been determined by the progressive development and advances in guaranteeing ESCR to the entire population. The State therefore argues that this case ought not to focus on determining whether the effect on Mr. Duque has been discriminatory; this kind of situation happened because of the mechanism of "progressive realization" with respect to the ESCR and the margin of flexibility that the States have to guarantee rights of this kind to its entire population. The State contends that it is impossible to make the case that every situation that is less advantageous to a given group engages the State's international responsibility.

34. The State also observes that no proof has been offered of the harm that the alleged victim is said to have sustained, from which one can conclude that: (i) this claim alleging the discrimination that Mr. Duque supposedly experienced is not grounds for concluding that the State bears responsibility, as this would be contrary to the principle of progressive realization; and (ii) no link has been established between the supposed discrimination and any actual harm to Mr. Duque's interests or rights.

35. As for the rights to judicial guarantees and to judicial protection, the State alleges that if Mr. Duque believed that due process of law was not available in Colombia, he would not have applied, via the administrative avenue, for recognition of a pension right. The State further maintains that Mr. Duque was never denied access to justice; it also argues that the fact that the decisions of first and second instance by the constitutional judge did not go in his favor does not mean that due process of law does not exist in Colombia. Similarly, the State observes that the judges who decided his actions seeking *tutela* did not base their decisions on the fact that he was homosexual; instead, they reasoned that there was no provision in Colombian law for the circumstance of homosexuality.

36. The State also points out that the rulings of the courts notwithstanding, Mr. Duque has never proven to COLFONDOS that he was JOJG's pension beneficiary, which is a precondition for obtaining an analysis by COLFONDOS of his status as beneficiary. According to the State, the fact that COLFONDOS has indicated who could qualify to be the beneficiary of a survivor's pension in no way implies that a formal application claiming a survivor's pension has been received, or that Mr. Duque has in fact proven the existence of a *de facto* marital union or that he meets the requirements that the law prescribes to apply for recognition as beneficiary.

37. The State contends that Mr. Duque should submit the documents that the law prescribes to formally begin the process of applying for a survivor's pension and that if COLFONDOS does not accept his claim, Mr. Duque has an action of *tutela* available to him, as an effective and suitable remedy to seek correction of any improper interpretation of the laws in force on the subject of social security, inasmuch as the Constitutional Court has ruled that "although a survivor's pension is an economic benefit, it has also been classified as a basic right." Specifically the State alleges that through the advances it has made on the subject of social security, the jurisprudence of Colombia's Constitutional Court has upheld recognition of the survivor's pension: (i) irrespective of whether Mr. JOJG's death occurred prior to notification of judgment C-336 of 2008, and (ii) allowing same-sex couples to use all the means of proof that heterosexual couples can use to demonstrate the existence of a permanent union in order to qualify for a survivor's pension. Consequently, the State contends that based on the advances in jurisprudence, the legal conditions have been created to allow Mr. Duque to claim the survivor's pension if he proves his status as JOJG's beneficiary and permanent partner.



#### IV. ESTABLISHED FACTS

##### A. Situation of Ángel Alberto Duque and application for a survivor's pension

38. Mr. Ángel Alberto Duque and JOJG lived together as a couple for ten years and three months, from June 15, 1991 to September 15, 2001, when JOJG died from Acquired Immune Deficiency Syndrome (AIDS).<sup>2</sup> On August 4, 1997, Mr. Duque enrolled with the ETS-VIH/SIDA Program and was diagnosed with the HIV C3 infection. From then on he began to receive anti-retroviral treatments with AZT-3CT-IDV-RTV (800/100mg). The treatment cannot be stopped, as this could "lead to death."<sup>3</sup> JOJG provided Mr. Duque with the support he needed to cover his personal expenses and the medical care he required as a person living with HIV.<sup>4</sup>

39. JOJG was enrolled with the *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías* COLFONDOS S.A. and worked in 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*].<sup>5</sup> Because JOJG died, on March 19, 2002 Mr. Duque asked COLFONDOS to advise him of the requirements that he had to meet to apply for his partner's survivor's pension.<sup>6</sup>

40. On April 3, 2002, COLFONDOS answered Mr. Duque's request by advising him that he did not qualify as a legal beneficiary entitled to a survivor's pension; it therefore could not proceed with the requested application process.<sup>7</sup> Specifically, COLFONDOS wrote that

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

##### B. Legal framework of Colombia's social security system

41. Law 100 of December 23, 1993 created the comprehensive social security system, understood 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 the unforeseen

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<sup>2</sup> Annex 1. Request presented to the *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías* COLFONDOS S.A., March 19, 2002 (Annex 2 of the original petition). Annex 2. *Tutela* action brought by Germán Humberto Rincón Perfetti representing Ángel Alberto Duque, April 26, 2002 (Annex 4 of the original petition). Facts alleged at the domestic level and not contested by the State.

<sup>3</sup> Annex 3. *Instituto de Seguros Sociales* [Social Security Institute], Certification of patient Ángel Alberto Duque, April 17, 2002 (Annex 1 of the original petition).

<sup>4</sup> Annex 4. Original petition of February 8, 2005; the petitioners' observations of February 9, 2012. Facts not contested by the State.

<sup>5</sup> Annex 1. Request presented to the *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías* COLFONDOS S.A., March 19, 2002 (Annex 2 of the original petition).

<sup>6</sup> Annex 1. Request presented to the *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías* COLFONDOS S.A., March 19, 2002 (Annex 2 of the original petition).

<sup>7</sup> Annex 5. COLFONDOS, Memorandum No. DCI-E-P-1487-02 of April 3, 2002. (Annex 3 of the original petition).

eventuality, especially those detrimental to health and economic situation of the citizens of Colombia, the goal being individual wellbeing and community integration.”<sup>8</sup> Specifically, Article 10 provides that one of the objectives of the overall pension system “is to guarantee that the public is protected against contingencies resulting from old age, disability and death.” Article 15 provides that enrollment in the pension system is mandatory for persons with an employment contract.

42. Articles 47 and 74 of Law 100 of 1993 —as drafted at the time of the events in this case— establish the following as beneficiaries of the survivor’s pension.

a) For life, the surviving spouse or permanent partner.

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 continuous years prior to his or her death, unless the surviving spouse or permanent partner has had one or more children by the deceased pensioner.[...]

43. Article 1 of Law 54 of December 28, 1990, which regulates *de facto* marital unions and the property regime between permanent partners, defines a *de facto* marital union as

the union between a man and a woman who, without being married, enter into a permanent and exclusive community. Also, and for all civil effects, a partner or permanent partner shall be understood to be the man or woman who is half of the *de facto* marital union.<sup>9</sup>

44. Similarly, Decree 1889 of August 3, 1994, which regulates Law 100 of 1993, provides as follows:

ARTICLE 10. PERMANENT PARTNER. For purposes of the enrollee’s survivor’s pension, the permanent partner shall be the last person of the opposite sex to the enrollee, who has lived in marital union with him or her for a period of no less than two (2) years. This is with respect to a pensioner who satisfies the requirements spelled out in paragraph a) of articles 47 and 74 of Law 100 of 1993.

ARTICLE 11. PROOF OF PERMANENT PARTNER STATUS. Anyone whom an enrollee has listed with 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.<sup>10</sup>

45. Furthermore, in the case of the General Social Security Health Services System, Article 157 of Law 100 of 1993 establishes two types of enrollees, namely:

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<sup>8</sup> Law 100 of 1993, preamble. Available [in Spanish] at: [http://www.secretariasenado.gov.co/senado/basedoc/ley/1993/ley\\_0100\\_1993.html](http://www.secretariasenado.gov.co/senado/basedoc/ley/1993/ley_0100_1993.html).

<sup>9</sup> Law 54 of 1990. Available [in Spanish] at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=30896>.

<sup>10</sup> The last sentence was declared null by the Council of State in a decision of October 8, 1998, file 14634, C.P. Dr. Javier Díaz Bueno. Decree 1889 of 1994. Available [in Spanish] at: <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=31246>.

1. Persons enrolled in the System through a contribution-based regime are persons linked by way of an employment contract, public servants, pensioners and retirees, and independent workers with the means to pay.[...]

2. Persons enrolled in the System through the subsidized regime referenced in Article 211 of this law, are persons who do not have the means to pay the full amount of the contribution. The following shall be subsidized under the General Social Security Health Services System: the poorest and most vulnerable population in the country's rural and urban areas. Of particular importance within this group are mothers during pregnancy, birth and postpartum and during the nursing period, community mothers, mothers who are heads of household, children under the age of one, children in irregular circumstances, those suffering from Hansen's disease, those over age 65, the disabled, *campesinos*, indigenous communities, independent workers and professionals, artists and sportspersons, bullfighters and their subordinates, independent journalists, master craftsmen in construction work, bricklayers, taxi drivers, electricians, the unemployed and other persons who do not have the means to pay.

46. As for the health services available under each enrollment regime, Article 162 of Law 100 of 1993 provides the following:

For members who contribute under the rules of the contribution-based regime, the content of the Mandatory Health Plan shall be as described in decree-law 1650 of 1977 and its regulations, including the supply of essential medications in generic form. For the other beneficiaries of a contributing member's family, the Mandatory Health Plan shall be similar to the previous one, but additional sums shall be required, especially at the primary care level, as provided in Article 188 of this law.

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

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

47. In view of COLFONDOS' refusal, on April 26, 2002 Mr. Duque filed a *tutela* action to have his right to the survivor's pension recognized and the survivor's pension paid as a temporary measure while legal action was brought. Mr. Duque listed the following as the grounds for his *tutela* action: (i) he was JOJG's partner; (ii) he had no income, no job or revenue of any kind; (iii) he lived with HIV and was under anti-retroviral treatment, which could not be suspended;<sup>11</sup> (iv) he would lose his membership

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<sup>11</sup> As evidence for the court, Mr. Duque introduced an opinion written by the *Liga Colombiana de Lucha Contra el Sida* [Colombian League to Combat AIDS] which states the following: "FAILURE TO PROVIDE A STEADY SUPPLY OF antiretroviral medications to treat the HIV and AIDS infection not only produces a violation of human rights but also has grave consequences for the quality of life of persons living with HIV/AIDS and for public health [...]: erosion and deterioration of the length and quality of life of persons living with HIV/AIDS whose treatment is suspended; the HIV virus develops a resistance to the medications that were suspended; a resistance develops when a change is made to other antiretroviral medications that the patient has not taken previously; development of a more aggressive virus that is more difficult to control, since it is an HIV that is resistant to various antiretrovirals; likely transmission of that resistant HIV to other persons who have not contracted HIV and for whom the treatment would no longer be effective. Annex 6. Opinion of the *Liga Colombiana de Lucha Contra el Sida* [Colombian League to Combat AIDS], April 1, 1998 (Annex 7 of the original petition).

with the health services provider if he was left without any income as a result of his partner's death; and (v) access to the survivor's pension would enable him to receive the health services he required.<sup>12</sup> Mr. Duque also alleged that the substitute pension should be granted to a homosexual person and that the refusal to recognize a same-sex partner's right was in violation of the right to life, the right to equality, the right to constitute a family, the right to free development of one's personality, the right to social security, the prohibition against degrading treatment, freedom of conscience, cultural diversity and human dignity.<sup>13</sup>

48. On June 5, 2002, the Tenth Municipal Civil-Law Court of Bogotá denied the *tutela* action brought by Mr. Duque. After analyzing the laws in force, the judge held that

[...] the party seeking *tutela* does not meet the requirements that the law prescribes to be the beneficiary of a survivor's pension and that 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 out of order for this reason and 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 legal timeframes, to challenge COLFONDOS' decision of April 3, 2002. The conflict that the party bringing this action exposes is statutory in nature and a *tutela* action cannot be used to have the right to the pension recognized. This must be done through ordinary proceedings, if that right is to be ultimately recognized. [...]

The respondent party'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 more than conforms to the law; it is 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 made of it, 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 kind of social security health service, 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 that SISBEN offers.<sup>14</sup>

49. Mr. Duque challenged the court's ruling. The Twelfth Civil Court of the Bogotá Circuit upheld the ruling, in its entirety, on July 19, 2002. The Twelfth Court wrote that

No violation of fundamental constitutional rights was committed. What is more, this was an attempt to obtain, by means of constitutional *amparo*, protection of eminently property-related rights. Constitutional *amparo* cannot be either sought or granted with respect to social benefits,

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<sup>12</sup> Annex 7. *Tutela* action filed with the Bogotá Superior Court, Civil Chamber, April 26, 2004 (Annex 4 of the original petition).

<sup>13</sup> Annex 7. *Tutela* action filed with the Bogotá Superior Court, Civil Chamber, April 26, 2004 (Annex 4 of the original petition).

<sup>14</sup> Annex 8. Tenth Municipal Civil Court of Bogotá, Judgment of June 5, 2002 (Annex 5 of the original petition).

which are rights whose immediate source is the law; hence, it is only logical that such rights should be accorded only to those who satisfy the requirements that the law prescribes.

Following this line of reasoning, the social security institution was quite right to deny the substitute pension request made by the citizen who brought the *tutela* action, since the survivor's pension is intended to protect the family and, as it is now defined in our milieu, the family is formed by the union of a man and a woman, the only beings capable of preserving the species through procreation. 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.<sup>15</sup>

50. The *tutela* case file was referred to the Constitutional Court on August 26, 2002, but was not selected for review.<sup>16</sup>

#### **D. Subsequent case law of the Constitutional Court**

51. The Commission has already acknowledged that between 2007 and 2008, Colombia's Constitutional Court granted same-sex couples the same pension benefits, social security benefits and property rights as those enjoyed by heterosexual couples. Similarly, in 2009 Colombia's Constitutional Court decided to amend 42 provisions appearing in some 20 laws, to provide same-sex civil unions the same rights that cohabitating heterosexual unions enjoy.<sup>17</sup> The Commission pointed out that "[a]lthough the Colombian Constitution and Colombia's laws recognize the rights of LGBTI persons and provide for a number of remedies, access to those remedies and their effectiveness are limited in practice by the discrimination that LGBTI persons have traditionally experienced."<sup>18</sup>

52. Specifically, with regard to the pension right, in 2007 the Constitutional Court held that homosexual couples' lack of protection in the property area and the system regulating "*de facto* marital unions" was discriminatory in that it applied exclusively to heterosexual couples and excluded homosexual couples. Addressing this situation, the Constitutional Court found that there was a "protection deficit" regarding access to the survivor's pension in the case of homosexual couples.<sup>19</sup> The Court also held that the social security health services system under the contribution-based regime also allowed coverage of same-sex couples; in their case, the same mechanism should be used to verify their status as surviving partner and the permanence of their relationship.<sup>20</sup>

53. In 2008, the Constitutional Court ruled that there was no justification to authorize discriminatory treatment whereby persons who were in homosexual relationships could not have access

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<sup>15</sup> Annex 9. Twelfth Civil Law Court of the Santa Fe de Bogotá Circuit, Judgment of July 19, 2002 (Annex 6 of the original petition).

<sup>16</sup> The petitioners' observations of February 9, 2012; the State's observations of January 31, 2006.

<sup>17</sup> IACHR, *Annual Report of the Inter-American Commission on Human Rights 2011*, OEA/Ser.L/V/II., Doc. 69, December 30, 2011, Chapter IV. Colombia, par. 143.

<sup>18</sup> IACHR, *Annual Report of the Inter-American Commission on Human Rights 2011*, OEA/Ser.L/V/II., Doc. 69, December 30, 2011, Chapter IV. Colombia, par. 144.

<sup>19</sup> Constitutional Court of Colombia, Judgment C-075/07, February 7, 2007 (Justice Rodrigo Escobar Gil writing).

<sup>20</sup> Constitutional Court of Colombia, Judgment C-811/07, October 3, 2007 (Justice Marco Gerardo Monroy Cabra writing).

to the survivor's pension under the same conditions that applied in the case of heterosexual couples.<sup>21</sup> Thereafter in 2011, the Constitutional Court held that the fact that one member of a same-sex couple died before notification of Judgment C-336 of 2008 was not an acceptable reason to deny the surviving member the survivor's pension.<sup>22</sup> Likewise, 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 the system in the case of heterosexual couples offered such couples five different ways to prove that their relationship was permanent when adjudicating legal effects in the matter of pensions. Those five alternatives were: (i) a public deed executed before a notary; (ii) a record of settlement; (iii) a court ruling; (iv) the principal's registration of his or her partner with the respective pension administrator, and (v) any other proof allowed by law.<sup>23</sup>

54. The Commission has already applauded the advances in the Colombian Constitutional Court's case law intended to guarantee the rights of LGBTI individuals and couples, one such right being access to pension benefits in the case of same-sex couples.<sup>24</sup> However, the Commission must reiterate that these recent advances in case law began in 2007, and thus came well after the facts of this case, and even after the petition was filed with the IACHR.<sup>25</sup> Therefore, while the Commission recognizes that certain aspects of the case may have evolved over time; its analysis must focus on the alleged victim's situation and the alleged violation of rights in his case.

## V. THE LAW

### A. Preliminary considerations

55. Before embarking upon an analysis of the parties' allegations in light of the provisions of the American Convention, the Commission recalls that in its Admissibility Report 150/11 dated November 2, 2011, it concluded that the information presented by the petitioners did not tend to establish a violation of the right protected under Article 4 of the ACHR, read in conjunction with Article 1(1) thereof. While in the merits phase the petitioners continued to make allegations pertaining to Article 4 of the ACHR, and both parties submitted arguments regarding Article 26 of that instrument, the Commission finds no reason to deviate from its admissibility decision and, therefore, the analysis of the merits will be done based on the rights recognized in articles 5, 8(1), 24 and 25 of the ACHR, read in conjunction with the obligations established in articles 1(1) and 2 thereof.

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<sup>21</sup> Constitutional Court of Colombia, Judgment C-336/08, April 16, 2008 (Justice Clara Inés Vargas Hernández writing).

<sup>22</sup> Constitutional Court of Colombia, Judgment T-860/11, November 15, 2011 (Justice Humberto Antonio Sierra Porto writing).

<sup>23</sup> Constitutional Court of Colombia, Judgment T-860/11, November 15, 2011 (Justice Humberto Antonio Sierra Porto writing). See also, IACHR, Report No. 150/11 (Admissibility), Petition 123-05, Ángel Alberto Duque (Colombia), November 2, 2011, paragraphs 34-37.

<sup>24</sup> See, *inter alia*, IACHR, *Annual Report of the Inter-American Commission on Human Rights 2011*, OEA/Ser.L/V/II., Doc. 69, December 30, 2011, Chapter IV. Colombia, paragraphs 143 and 144; *Press Release 89/13, IACHR acknowledges recent steps taken by several OAS Member States to further equality for LGBTI persons*, November 21, 2013. Available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/089.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/089.asp).

<sup>25</sup> See, I/A Court H.R. *Case of Mejía Idrovo v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 5, 2011. Series C No. 228, par. 33.

**B. The right to equality and the prohibition of discrimination (Article 24 of the American Convention) read in conjunction with the obligations to respect and ensure rights and adopt domestic legal measures (articles 1(1) and 2 of the American Convention)**

56. Article 1(1) of the American Convention reads as follows:

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.

57. Article 2 of the American Convention provides as follows:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

58. Article 24 of the American Convention states that

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

59. Regarding these principles, the IACHR and the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) have repeatedly held that the right to equality and nondiscrimination is the central, basic axis of the inter-American human rights system.<sup>26</sup> The Commission has also pointed out the various conceptions of the right to equality and non-discrimination.<sup>27</sup> One conception is related to the prohibition of arbitrarily different treatment —with different treatment understood as meaning distinction, exclusion, restriction, or preference<sup>28</sup>— and another is related to the obligation of ensuring conditions of true equality for groups that have historically been excluded and are at greater risk of discrimination.<sup>29</sup>

60. The Inter-American Court has stated that “the notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of

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<sup>26</sup> See, IACHR, Application before the Inter-American Court of Human Rights, *Case of Karen Atala and Daughters v. Chile*, September 17, 2010, par. 74; I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 173.5.

<sup>27</sup> See, *inter alia*, IACHR, Application before the Inter-American Court of Human Rights, *Case of Karen Atala and Daughters v. Chile*, September 17, 2010, par. 80.

<sup>28</sup> See, *inter alia*, UN, Human Rights Committee, General Comment 18, Non-Discrimination, 11/10/89, CCPR/C/37, paragraph 7; I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 92; IACHR. *Fourth Progress Report of the Rapporteurship on Migrant Workers and Their Families*, OEA/Ser. L/V/II.117, doc. 1 rev. 1, Annual Report of the IACHR 2002, March 7, 2003, par. 58.

<sup>29</sup> See, *inter alia*, IACHR, Application before the Inter-American Court of Human Rights, *Case of Karen Atala and Daughters v. Chile*, September 17, 2010, par. 80.

its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.”<sup>30</sup> Even more, the Court has indicated that at the present stage of development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.<sup>31</sup>

61. In this vein, the Inter-American Court has repeatedly held that that there is an inseverable link between the obligation to respect and ensure human rights and the principle of equality and non-discrimination.<sup>32</sup> Furthermore, the right to equal protection of the law and non-discrimination means that States have an obligation to (i) abstain from enacting regulations that are discriminatory or have discriminatory effects on certain population groups in the exercise of their rights; (ii) eliminate discriminatory regulations; (iii) combat discriminatory practices, and (iv) establish norms and adopt the measures necessary to recognize and ensure the effective equality of all persons before the law.<sup>33</sup> Furthermore, the Court has held that States must refrain from taking any actions that in any way are either directly or indirectly aimed at creating situations of *de facto* or *de jure* discrimination.<sup>34</sup> States have an obligation to take positive measures to reverse or change discriminatory situations within their societies, situations that are prejudicial to a certain group of persons. This involves the special duty of protection that the State must exercise with respect to the actions and practices of third parties that, with its tolerance or acquiescence, create, maintain or foster discriminatory situations.<sup>35</sup>

62. As for the prohibition of any arbitrary difference in treatment, the Commission has written that

[w]hile the doctrine of the inter-American human rights system, like that of other human rights regimes, does not prohibit all distinctions in treatment in the enjoyment of protected rights and freedoms, it requires at base that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the

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<sup>30</sup> I/A Court H.R. *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, par. 55.

<sup>31</sup> I/A Court H.R. *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, par. 79; I/A Court H.R. *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 101;

<sup>32</sup> I/A Court H.R. *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 85.

<sup>33</sup> IACHR, *The work, education and resources of women: the road to equality in guaranteeing economic, social and cultural rights*, OEA/Ser.L/V/II.143, Doc. 59, November 3, 2011, paragraph 17, citing from I/A Court H.R. *Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. Series C No. 130, par. 141; *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, par. 88; *Case of López Álvarez v. Honduras*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141, par. 170; *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, par. 44.

<sup>34</sup> Cf. I/A Court H.R. *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 103; *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, par. 271.

<sup>35</sup> I/A Court H.R. *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, par. 80, citing from, *inter alia*, *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18.



principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought.<sup>36</sup> Distinctions based on grounds explicitly enumerated under pertinent articles of international human rights instruments are subject to a particularly strict level of scrutiny whereby states must show an especially weighty interest and compelling justification for the distinction.<sup>37</sup>

63. Thus, the IACHR has considered that a restriction must be based on very compelling reasons and that the burden of proof rests with the State. Hence, when a restriction is premised on a "suspect category," the Commission accepts the "reversal of the burden of proof" and the "presumption of invalidity."<sup>38</sup> In effect, the close scrutiny that must be done in the case of distinctions based on "suspect categories" serves to guarantee that the distinction is not based on the prejudices and/or stereotypes that generally surround suspect categories of distinction.<sup>39</sup> In practical terms, this means that after presenting such a distinction, the burden of proof falls on the State, and the general criteria must be subject to close scrutiny wherein it is not enough for the State to argue the existence of a legitimate goal; instead, the goal sought through the distinction must represent a particularly important purpose or a pressing social need.<sup>40</sup> Furthermore, it is not enough for the measure to be suitable or for a logical causal relationship to exist between it and the goal sought; instead, it must be strictly necessary to attain that goal, meaning that no other less harmful alternative exists.<sup>41</sup> Finally, to meet the proportionality requirement, the existence of an appropriate balance of interests in terms of the level of sacrifice and the level of benefit, must be argued.<sup>42</sup>

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<sup>36</sup> See, *inter alia*, IACHR, Report No. 51/01, Case 9903, *Ferrer-Mazorra et al.* (United States), Annual Report of the Inter-American Commission on Human Rights 2000, OEA/Ser./L/V/II.111, doc. 20, rev., April 16, 2001, par. 238

<sup>37</sup> See, *inter alia*, IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., October 22, 2002, paragraph 338, citing, *inter alia*, *Repetto, Inés*, Supreme Court of Justice (Argentina), November 8, 1988, Judges Petracchi and Bacqué, par. 6; *Loving v. Virginia*, 388 US 1, 87 (1967); Eur. Court H.R., *Abdulaziz v. United Kingdom*, Judgment of 28 May 1985, Ser. A No. 94, par. 79.

<sup>38</sup> See, *inter alia*, IACHR, *Access to justice for women victims of violence in the Americas*, OEA/Ser.L/V/II., Doc. 68, January 20, 2007, par. 58; IACHR, *The Situation of Persons of African Descent in the Americas*, OEA/Ser.L/V/II., Doc. 62, December 5, 2011, par. 91.

<sup>39</sup> IACHR, Application before the Inter-American Court of Human Rights, *Case of Karen Atala and Daughters v. Chile*, September 17, 2010, par. 88.

<sup>40</sup> See, *inter alia*, IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, paragraphs 80, 83; *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., October 22, 2002, par. 338; Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, par. 36; *Annual Report 1999*, Considerations regarding the compatibility of affirmative action measures designed to promote the political participation of women with the principles of equality and non-discrimination, Chapter VI; ECHR, *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, December 21, 1999, par. 29; *Belgian Linguistics (Merits)*, Judgment of 23 July 1968, p. 34; *Lustig-Prean and Beckett v. United Kingdom*, Applications Nos. 31417/96 and 32377/96, 27 September 1999, par. 80; *Smith v. Grady v. United Kingdom*, Applications Nos. 33985/96 and 33986/96, 27 September 1999, par. 87.

<sup>41</sup> See, *inter alia*, IACHR, Report No. 38/96, *X and Y* (Argentina), October 15, 1996, par. 74; *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, par. 83; ECHR, *Karner v. Austria*, Application No. 40016/98, 24 July 2003, par. 41; *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, December 21, 1999, par. 29; *Belgian Linguistics (Merits)*, Judgment of July 23, 1968, p. 34.

<sup>42</sup> IACHR, Application before the Inter-American Court of Human Rights, *Case of Karen Atala and Daughters v. Chile*, 17 September 2010, par. 89.

64. Article 1(1) of the American Convention has been used to interpret the word “discrimination” that appears in Convention Article 24.<sup>43</sup> The Court has written that the specific criteria by virtue of which discrimination is prohibited do not constitute an exhaustive or limitative list, but merely illustrative. Consequently, the expression “any other social condition” in Article 1(1) of the Convention should be interpreted in the context of the most favorable option for the human being and in light of the evolution of fundamental rights in contemporary international law.<sup>44</sup>

65. Similarly, the organs of the inter-American system have concluded that sexual orientation<sup>45</sup> is a category protected by the ACHR. Accordingly the following has been established:

[b]earing in mind the general obligations to respect and guarantee the rights established in Article 1(1) of the American Convention, the interpretation criteria set forth in Article 29 of that Convention, the provisions of the Vienna Convention on the Law of Treaties, and the standards established by the European Court and the mechanisms of the United Nations [...], the Inter-American Court establishes that the sexual orientation of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person’s sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.<sup>46</sup>

66. The Court also observed that “the prohibition of discrimination due to sexual orientation should include, as protected rights, the conduct associated with the expression of homosexuality”<sup>47</sup> and explained that “the alleged 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.”<sup>48</sup>

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<sup>43</sup> IACHR, Application before the Inter-American Court of Human Rights, *Case of Karen Atala and Daughters v. Chile*, 17 September 2010, par. 78.

<sup>44</sup> I/A Court H.R. *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, par. 85; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, October 1, 1999. Series A No. 16, par. 115.

<sup>45</sup> A person’s sexual orientation is independent of 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 intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.” In international human rights law sexual orientation —like gender identity and gender expression— have been considered as personal characteristics in the sense that they are innate or inherent to the person (like race or ethnicity) and immutable, with immutable understood as a characteristic that is difficult to control and from which the person cannot divorce himself or herself without sacrificing his or her identity. See, *inter alia*, the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2006; I/A Court H.R. *Case of Karen Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, paragraphs 87, 94.

<sup>46</sup> I/A Court H.R. *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, par. 91.

<sup>47</sup> I/A Court H.R. *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, par. 139.

<sup>48</sup> I/A Court H.R. *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, par. 92.

67. Therefore, The IACHR defines discrimination based on sexual orientation as any distinction, exclusion, restriction or preference made against a person on the grounds that they are lesbian, gay or bisexual —or perceived as such—, which has the effect or the purpose —whether *de jure* or *de facto*—<sup>49</sup> 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 persons. Additionally, the Court has established that “[a]s regards the prohibition of discrimination based on sexual orientation, any restriction of a right would need to be based on rigorous and weighty reasons. Furthermore, the burden of proof is inverted, which means that it is up to the authority to prove that its decision does not have a discriminatory purpose or effect.”<sup>50</sup>

68. On another level, various instruments and pronouncements underscore the indivisibility and interdependence of civil and political rights on the one hand, and economic, social and cultural rights on the other, and the duty of nondiscrimination and equality in the protection of these rights.<sup>51</sup> The organs of the inter-American system specifically, have already identified the right to social security, the right to health and labor rights as ESCR that emanate from the OAS Charter.<sup>52</sup>

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<sup>49</sup> The IACHR understands that this discrimination can manifest itself either directly (intentional or “targeted”) or indirectly (involuntary or “by outcome”), and the latter can be *de facto* —when it manifests itself in practice— or *de jure* —when it emanates from a law or a provision—. The Committee on Economic, Social and Cultural Rights has written that in order for States parties to “guarantee” that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively: (i) formal discrimination: Eliminating formal discrimination requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds; (ii) Substantive discrimination: Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by Article 2(2). The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination. Direct discrimination also occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground. Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, par. 2 of the International Covenant on Economic, Social and Cultural Rights)*. E/C.12/GC/20, July 2, 2009, paragraphs 8, 10.

<sup>50</sup> Cf. I/A Court H.R. *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, par. 124.

<sup>51</sup> IACHR, *The work, education and resources of women: the road to equality in guaranteeing economic, social and cultural rights*, OEA/Ser.L/V/II.143, Doc. 59, November 3, 2011, par. 29, citing, *inter alia*, IACHR, *Third Report on the Situation of Human Rights in Paraguay*, OEA/Ser./L./VII.110 doc. 52, March 9, 2001, par. 4; *See also: Vienna Declaration and Program of Action*, A/CONF.157/23, 12 July 1993, par. 5.

<sup>52</sup> IACHR, *The work, education and resources of women: the road to equality in guaranteeing economic, social and cultural rights*, OEA/Ser.L/V/II.143, Doc. 59, November 3, 2011, par. 31, citing I/A Court H.R. *Case of Acevedo Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”) v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2009, Series C No. 198, par. 106; IACHR, Report No. 38/09, Case 12,670, Admissibility and Merits, National Association of Ex-Employees of the Peruvian Social Security Institute *et al.* (Peru), March 27, 2009, par. 130; IACHR, Report No. 25/04, Petition 12,361, Admissibility, Ana Victoria Sánchez Villalobos *et al.* (Costa Rica), March 11, 2004, paragraphs 52-70; IACHR, Report No. 27/09, Merits, Case 12,249, Jorge Odir Miranda Cortez *et al.* (El Salvador), March 20, 2009, paragraphs 77 and 79; IACHR, Report No. 100/01, Case 11,381, Milton García Fajardo *et al.* (Nicaragua), October 11, 2001, par. 95.; IACHR, Report No. 121/09, Petition 1186-04, Admissibility, Opario Lemoth Morris *et al.* (Buzos Miskitos) (Honduras), November 12, 2009, par. 50.

69. In two cases whose circumstances were similar to those of this case, the UN Human Rights Committee found violations of the principle of equality and non-discrimination based on the fact that

while it was not open to the author to enter into marriage with his same-sex permanent partner, the Act does not make a distinction between married and unmarried couples but between homosexual and heterosexual couples. The Committee finds that the State party has put forward no argument that might demonstrate that such a distinction between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, is reasonable and objective. Nor has the State party adduced any evidence of the existence of factors that might justify making such a distinction. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author's right to his life partner's pension on the basis of his sexual orientation.<sup>53</sup>

### **Application to the case at hand**

70. In this case, the petitioners allege that Mr. Duque was the target of unfair discrimination as he was denied his partner's survivor's pension based on his sexual orientation. The petitioners also argue that this discriminatory situation left Mr. Duque unprotected and adversely affected, *inter alia*, his chances of getting the health services he needed giving his condition as a person living with HIV. They also point out that the denial of Mr. Duque's legitimate right to the pension and his lack of protection generated in him a sense of stigmatization, mental suffering, and anxiety. For its part, the State argues that this case ought not to focus on determining whether Mr. Duque was the victim of discrimination, since a situation of this kind was bound to happen as a consequence of the mechanism of progressive realization in the area of ESCR and the margin of flexibility that States have to guarantee rights of this kind to all their inhabitants. The State further argues that this case concerns hypothetical damages, since there is no record showing that Mr. Duque did not have access to the medications needed to treat his illness.

71. At the international level before the Commission, the State has alleged that the facts of this case should be analyzed as a function of the progressive realization of the ESCR. The Commission reiterates that the obligation of "progressive realization" of the ESCR is related to: (i) the resources that the State earmarks to fulfill its obligations in this area; (ii) the organization of the State apparatus to guarantee these rights; (iii) satisfaction of the minimum essential levels, and (iv) the guarantee of fullest possible enjoyment of these rights in a given country at a given moment in time.<sup>54</sup>

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<sup>53</sup> See, *inter alia*, UN, Human Rights Committee *X vs. Colombia*, Communication No. 1361/2005, CCPR/C/89/D/1361/2005, May 14, 2007, par. 7.2.; *Young vs. Australia*, Communication No. 941/2000, CCPR/C/78/D/941/2000, September 18, 2003, par. 10.4. For its part, the Court of Justice of the European Communities held that the refusal to grant the survivor's pension to life partners constitutes direct discrimination on grounds of sexual orientation, if surviving spouses and surviving life partners are in a comparable situation as regards that pension. Court of Justice of the European Communities, Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, April 1, 2008. Information available at: <http://curia.europa.eu/en/actu/communiqués/cp08/aff/cp080017en.pdf>. It has also held that an occupational pension scheme in the form of a supplementary retirement pension paid to a member of a civil union and less than the amount paid had the same person been married may constitute discrimination based on sexual orientation if the civil union is between persons of the same sex and if the situation is legally and factually comparable to a marriage. Court of Justice of the European Communities, 147/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, May 10, 2011. Information available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-147/08>.

<sup>54</sup> See, *inter alia*, IACHR, *The Work, Education and Resources of Women: the Road to Equality in Guaranteeing Economic, Social and Cultural Rights*, OEA/Ser.L/V/II.143, Doc. 59, November 3, 2011, par. 49, citing UN, Committee on

72. However, the Commission believes that the argument concerning the progressive realization of the DESC does not apply to the instant case, because the quality, nature or scope of the survivor's pension or the service provided by health services in Colombia is not at issue. Instead, what is at issue is the application of a domestic norm that establishes exclusion for same-sex couples with regard to pension rights. The State, moreover, has neither argued nor demonstrated that Mr. Duque was unable to access the survivor's pension because of the country's economic or technical limitations. Furthermore, according to the facts established in this case, because of the mandatory nature of social security and the contributions that Mr. JOJG made, the material conditions were there for Mr. Duque to get the medical treatment he required, simply by ensuring his continued enrollment in the contributor-based health services regime.

73. The Commission notes that, in the instant case, the State submits that the concept of "progressive realization", when applied to social security rights, would allow to gradually extend the coverage group by group; hence, it argues, the denial of pensions to same-sex couples is a problem that has been remedied with the passage of time. However, the IACHR has already established that "the first obligation 'with immediate effect' arising from economic, social, and cultural rights consists of ensuring that those rights shall be exercised in conditions of equality and without discrimination".<sup>55</sup> That is to say that, while implementation of the ESCR involves an obligation of "progressive realization", the latter cannot be discriminatory.<sup>56</sup> In the instant case, the State has not explained what objective reason—and necessary according to the standard of strict scrutiny— would justify access to pension rights in the case of different-sex couples, as a question of "progressive" realization.

74. Since evaluating whether a distinction is "reasonable and objective" must be done on a case-by-case basis, the Commission, the Court, and other international courts and agencies have made use of a standard test involving several elements: (i) the existence of a legitimate goal; (ii) the suitability or logical means-to-end relationship between the goal sought and the distinction; (iii) the necessity, in order words, whether other less burdensome and equally suitable alternatives exist; and (iv) proportionality *strictu sensu*, i.e., the balance between the interests at stake and the level of sacrifice required from one party compared to the level of benefit of the other.<sup>57</sup>

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...continuation

Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations (paragraph 1 of Article 2 of the Covenant)*, December 14, 1990; UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 19, The right to social security (Article 9)*, E/C.12/GC/19, February 4, 2008, paragraphs 59, 79; I/A Court H.R. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru*, Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2009. Series C No. 198, par. 105.

<sup>55</sup> IACHR, *Guidelines for preparation of progress indicators in the area of economic, social and cultural rights*, OEA/Ser.L/V/II.132, Doc. 14 rev. 1, 19 July 2008, par. 48.

<sup>56</sup> See, *inter alia*, IACHR, *The Work, Education and Resources of Women: the Road to Equality in Guaranteeing Economic, Social and Cultural Rights*, OEA/Ser.L/V/II.143, Doc. 59, November 3, 2011, par. 49, citing UN, Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations (paragraph 1 of Article 2 of the Covenant)*, December 14, 1990; UN, Committee on Economic, Social and Cultural Rights, *General Comment No. 19, The right to social security (Article 9)*, E/C.12/GC/19, February 4, 2008.

<sup>57</sup> IACHR, Application before the Inter-American Court of Human Rights, Karen Atala and Daughters, September 17, 2010, par. 86.

75. Based on this, the Commission must now assess whether the exclusion of same sex couples from the right to a survivor's pension pursued a legitimate aim and, if so, whether such restriction complied with the requirements of suitability, necessity and proportionality.

76. In the chapter on established facts, the Commission has shown that the decision to deny Mr. Duque a survivor's pension as JOJG's permanent partner was expressly and exclusively based on the fact that they were a same-sex couple. The Commission notes that no other reasons were cited —not in the reply from COLFONDOS,<sup>58</sup> not in the *tutela action*, and not in the case file with the IACHR—. In particular, when confirming the lower-court ruling, the Twelfth Circuit Civil Law Court of Bogotá maintained that the exclusion of same-sex couples was justified based on the fact that the survivor's pension was intended to protect the family, understood as being “formed by the union of a man and a woman, the only beings capable of preserving the species through procreation.”

77. In this vein, the Commission notes that the reasons to exclude the alleged victim from the right to a survivor's right, which were given both by administrative and judicial authorities, stemmed from the need to “protect the family”. Preliminarily, the Commission considers that such purpose could, in the abstract, constitute legitimate goals that the State could pursue when restricting rights.

78. However, as for the suitability requirement, the Commission finds that the reasoning offered by administrative and judicial authorities works only if one assumes a narrow and stereotyped understanding of the concept of family, which arbitrarily excludes diverse forms of families such as those formed by same-sex couples, which are deserving of equal protection under the American Convention. In effect, the Inter-American Court has established that “the American Convention does not define a limited concept of family, nor does it only protect a ‘traditional’ model of the family”.<sup>59</sup> The Commission considers that there is no causal relationship between the means used and the goal pursued, failing to satisfy the suitability requirement. Hence the other requirements for the legitimacy of the restriction need not be examined.

79. Furthermore, the fact that subsequent case law of the Constitutional Court expanded legal protection to include all types of families shows that there was no reason to maintain that narrow concept of family.<sup>60</sup>

80. In this connection, the Commission reiterates that the Inter-American Court has established in its case law that it is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system.<sup>61</sup> But

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<sup>58</sup> In effect, COLFONDOS' reply makes it clear that the specific circumstances of Mr. JOJG and Mr. Duque were not examined, since the request was rejected based on the automatic application of the norms in force at the time (articles 47 and 74 of Law 100 of 1993, Article 1 of Law 54 of 1990 and Article 10 of Decree 1889 of 1994), which provided that the only legally recognized civil unions were those between a man and a woman.

<sup>59</sup> I/A Court H.R. *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, par. 142. See also: ECHR, *Vallianatos and others v. Greece*, Applications nos. 29381/09 y 32684/09, 7 november 2013, par. 73; *Case of P.B. and J.S. v. Austria*, Application No. 18984/02, 22 July 2010, par. 30; *Schalk and Kopf v. Austria*, Application No. 30141/04, 24 June 2010, par. 94.

<sup>60</sup> See also: ECHR, *Kozak v. Poland*, Application No. 13102/02, 2 June 2010, par. 99.

<sup>61</sup> I/A Court H.R. *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, par. 124; I/A Court H.R., *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, par. 173

when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its object and purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise an *ex officio* “conventionality control” between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights, within their respective spheres of competence and the corresponding procedural regulations. In this task, the judges and organs for the administration of justice must take into account not only the treaty, but also its interpretation by the Inter-American Court, as the final interpreter of the American Convention.<sup>62</sup>

81. In view of the above, the Commission finds that the State violated the principle of equal justice and non-discrimination, recognized in Article 24 of the American Convention, read in conjunction with the obligations to respect and ensure the rights, as set forth in articles 1(1) and 2 of the Convention, to the detriment of Ángel Alberto Duque.

**C. Rights to judicial guarantees and to judicial protection (Articles 8(1) and 25(1) of the American Convention), read in conjunction with the obligation to respect rights (Article 1(1) of the American Convention).**

82. Article 8(1) of the American Convention reads as follows:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

83. Article 25(1) of the American Convention provides that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

84. As for the scope of the right to judicial protection, both the Commission and the Court have held that judicial protection applies not only with respect to the rights contained in the Convention, but also those recognized by a State’s Constitution and laws.<sup>63</sup> Further, as Article 8(1) provides, when determining a person’s rights and obligations of a criminal, civil, labor, fiscal or any other nature, “due guarantees” must be observed that ensure the right to due process, in accordance with the

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<sup>62</sup> I/A Court H.R., *Case of Furlan and Family v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2012. Series C No. 246, par. 303; I/A Court H.R., *Case of Boyce et al. v. Barbados*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169, par. 78; I/A Court H.R. *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, par. 124.

<sup>63</sup> See, *inter alia*, I/A Court H.R. *Case of the Dismissed Congressional Employees (Aguado Alfaro et al) v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, par. 122; *Case of Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, par. 128; *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, par. 167; and IACHR, Report No. 27/09, Merits, Case 12,249, Jorge Odir Miranda Cortez et al, El Salvador, March 20, 2009, par. 43.

corresponding procedure.<sup>64</sup> Further, decisions adopted by domestic bodies that could affect human rights should be duly substantiated; otherwise, they would be arbitrary.<sup>65</sup>

85. The Court has also written that Article 25(1) of the Convention makes it incumbent upon the State to offer, to all persons subject to its jurisdiction, an effective judicial remedy against acts that violate a person's fundamental rights, since the absence of such a remedy leaves individuals defenseless.<sup>66</sup> This guarantee "is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention."<sup>67</sup>

86. For such a remedy to exist, 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 there has been a violation of human rights and in providing redress.<sup>68</sup> A remedy which 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.<sup>69</sup> Moreover, for the State to be in compliance with the provisions of Article 25(1) of the Convention, it is not enough for the resources to exist formally; instead, they must also be effective;<sup>70</sup> in other words, they must afford the individual a real possibility of filing a remedy to obtain judicial protection.<sup>71</sup>

87. As for the relationship between the right recognized in Article 25 of the Convention and the obligations set forth in articles 1(1) and 2 thereof, the Court has written that:

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<sup>64</sup> I/A Court H.R. *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, par. 148; IACHR, Report No. 83/09, Case 11,732, Merits, Horacio Anibal Schillizzi Moreno, Argentina, August 6, 2009, par. 53

<sup>65</sup> Cf. I/A Court H.R. *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, par. 152.

<sup>66</sup> I/A Court H.R. *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, par. 167.

<sup>67</sup> See, *inter alia*, I/A Court H.R. *Case of Castillo Páez v. Peru*. Merits. Judgment of November 3, 1997. Series C No. 34, par. 82; *Case of Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, par. 131; *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 183, par. 78.

<sup>68</sup> See, *inter alia*, I/A Court H.R. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, par. 24; I/A Court H.R. *Case of the "Five Pensioners" v. Peru*. Merits, Reparations and Costs. Judgment of February 28 2003. Series C No. 98, par. 136; IACHR, Report No. 30/97, Case 10,087, Gustavo Carranza, Argentina, September 30, 1997, par. 74; IACHR, Report No. 48/00, Case 11,166, Walter Humberto Vásquez Vejarano, Peru, April 13, 2000, par. 84; IACHR, Report No. 83/09, Case 11,732, Merits, Horacio Anibal Schillizzi Moreno, Argentina, August 6, 2009, par. 58

<sup>69</sup> See, *inter alia*, I/A Court H.R. *Case of Baldeón García v. Peru*. Merits, Reparations and Costs. Judgment of April 6, 2006. Series C No. 147, par. 145; *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, par. 111; IACHR, Report No. 100/01, Case 11,381, Milton García Fajardo *et al.*, Nicaragua, October 11, 2001, par. 81

<sup>70</sup> See, *inter alia*, I/A Court H.R. *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, par. 131; *Case of Maritza Urrutia*. Judgment of November 27, 2003. Series C No. 103, par. 117; and *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, par. 121; IACHR, Report No. 133/99, Case 11,725, Carmelo Soria Espinoza, Chile, November 19, 1999, par. 88.

<sup>71</sup> I/A Court H.R. *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, par. 169.



Article 25 is closely linked to the general obligation in Article 1.1 of the American Convention, in that it assigns duties of protection to the States Parties through their domestic legislation, from which it is clear that 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.<sup>72</sup> At the same time, the State's general duty to adapt its domestic law to the stipulations of said Convention in order to guarantee the rights enshrined in it, established in Article 2, includes the enactment of regulations and the development of practices that seek to achieve an effective observation of the rights and liberties enshrined in it, as well as the adoption of measures to suppress the regulations and practices of any nature that imply a violation to the guarantees established in the Convention.<sup>73</sup>

88. The Court has also held that under the principle of non-discrimination recognized in Article 1(1) of the American Convention, in order to ensure access to justice in the case of members of at-risk groups, it is essential "that States offer effective protection that considers the particularities, social and economic characteristics, as well as the situation of special vulnerability, customary law, values, customs, and traditions."<sup>74</sup>

89. The IACHR has maintained that the lack of judicial guarantees and the lack of sensitivity in justice operators regarding racial discrimination deepen the sense of resignation among discriminated groups, and perpetuate segregation and exclusion patterns.<sup>75</sup> The Inter-American Court has also made reference to a lack of willingness to help, a lack of sensitivity and incompetence among civil servants in conducting investigations and domestic juridical proceedings<sup>76</sup> and has written that the use of abstract, stereotyped and/or discriminatory arguments to justify court decisions constitutes discriminatory treatment.<sup>77</sup> Likewise, on the subject of gender stereotypes and access to justice, the I/A Court has written that practices based on persistent, socially-dominant gender stereotypes are exacerbated when the stereotypes are reflected, either implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities.<sup>78</sup>

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<sup>72</sup> See, *inter alia*, I/A Court H.R. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, par. 237; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79, par. 135; *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, par. 99.

<sup>73</sup> See, *inter alia*, I/A Court H.R. *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, par. 60, citing the *Case of Castillo Petruzzi et al. v. Peru*. Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52, par. 207.

<sup>74</sup> See, *inter alia*, I/A Court H.R. *Case of Rosendo Cantú et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2010. Series C No. 216, par. 184; *Case of Fernández Ortega et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 30, 2010. Series C No. 215, par. 200.

<sup>75</sup> Cf. IACHR, *The Situation of Persons of African Descent in the Americas*, OEA/Ser.L/V/II., Doc. 62, December 5, 2011, par. 139.

<sup>76</sup> I/A Court H.R. *Case of Rosendo Cantú et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2010. Series C No. 216, par. 181.

<sup>77</sup> I/A Court H.R. *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, par. 146.

<sup>78</sup> Cf. I/A Court H.R. *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, par. 401.

90. The Commission observes that courts have to take multiple factors into account, one of which is the nature of the legal interest or right at stake. For example, the European Court of Human Rights found that judicial guarantees —specifically the guarantee of a reasonable time period— had been violated in domestic court proceedings involving a person living with HIV, since what was at stake in the contested proceedings was of crucial importance to the petitioner given the nature of his illness; hence, his case called for “exceptional diligence”.<sup>79</sup>

91. The petitioners observed that the Colombian authorities narrowly interpreted and applied the laws on social security and pension substitution, and the responses to the *tutela* actions failed to afford due process with the necessary guarantees. The State, for its part, argued that Mr. Duque’s access to justice was in no way restricted; the fact that the decisions of first and second instance did not go in his favor did not mean that due process was denied. It also pointed out that the refusal of the judges presiding over the *tutela* actions was not because he was homosexual; instead, the State alleged, it was due to the fact that no provision in Colombian domestic law contemplated the situation his case raised.

92. The Commission observes that the judges who presided over the *tutela* action filed by Mr. Duque expressly stated that *tutela* was not the proper remedy by which to challenge a provision that excluded him as the beneficiary of JOJG’s survivor’s pension; this was, in the eyes of the court, an “elementary application of legal and constitutional norms.” The State, however, has repeatedly argued to the Commission that “*tutela* [is the] adequate and effective remedy by which to correct an improper interpretation of the law in force in the area of social security,”<sup>80</sup> since the Constitutional Court has held that “although a survivor’s pension is an economic benefit, it has also been classified as a basic right.”<sup>81</sup>

93. The Commission must again point out that this case is not about the right to the survivor’s pension *per se*; instead, it is about the discriminatory nature of the provisions that denied same-sex couples’ access to a survivor’s pension. The purpose of the *tutela* action was to question the validity of that exclusion, which precluded analysis of the other relevant requirements to qualify for the requested 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 therefore considers that because of the referral to the ordinary courts and the failure 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 permanent partner’s survivor’s pension.

94. The Commission also notes that the merits of the *tutela* action, i.e. justification, rationality and proportionality of the provisions being challenged, were not duly analyzed by the courts; instead, the courts threw them out based on a dogmatic and formalistic interpretation of the provision in force. The Commission also notes that the courts did not examine the set of rights at stake in this case, nor did they take into account the differentiated impact caused by Mr. Duque’s HIV condition. Because judicial decisions must be well founded, the standards applied in the judicial decisions were

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<sup>79</sup> Cf. ECHR. Case X. vs. France. Application No. 18020/91, March 31, 1992, par. 47.

<sup>80</sup> Annex 10. See, *inter alia*, The Colombian State’s Observations of February 28, 2013, par. 31.

<sup>81</sup> Annex 10. See, *inter alia*, The Colombian State’s Observations of February 28, 2013, par. 35.

incompatible with the terms of Article 8(1) of the ACHR and constituted a violation of the right of access to justice.

95. The Commission has established that Mr. Duque was a victim of discrimination based on sexual orientation by virtue of the law that made him ineligible for the survivor's pension of his deceased permanent partner. Likewise, as observed in the preceding paragraphs, the Commission considers that by their decisions, the judicial proceedings perpetuated the prejudices and stigmatization of same-sex couples by reaffirming a narrow and stereotyped perception of the concept of family, whose sole purpose, the court said, is that of "preserving the species through procreation." The Commission has already determined that this action and reasoning are incompatible with the American Convention.

96. The Commission therefore concludes that the State violated the right to judicial guarantees and the right to judicial protection, recognized in articles 8(1) and 25 of the American Convention, read in conjunction with the obligation to respect rights, stipulated in Article 1(1) thereof, to the detriment of Ángel Alberto Duque.

**D. Right to the integrity of one's person (Article 5(1) of the American Convention), read in conjunction with the obligation to respect the Convention-protected rights (Article 1(1) of the American Convention)**

97. Article 5(1) of the American Convention provides that

1. Every person has the right to have his physical, mental, and moral integrity respected.

98. The Inter-American Commission has made it abundantly clear that the right to the integrity of one's person protected by the American Convention and by other international human rights instruments is an expansive one.<sup>82</sup> In effect, infringement of this right is a type of violation that has a varying connotation of degree, and the personal characteristics of the alleged victim must be considered when determining whether the integrity of his or her person was violated.<sup>83</sup> Moreover, in the specific case of the right to health, the Court has held that the right to the integrity of one's person is directly and immediately linked to attention to human health and that the absence of adequate medical care can lead to the violation of Article 5(1) of the Convention.<sup>84</sup>

99. The Commission recalls that Admissibility Report No. 150/11 considered the analysis of the right to personal integrity to be secondary in nature in this case and to be contingent on the conclusion reached with respect to the merits of the allegations made with regard to the rights

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<sup>82</sup> See, in general, IACHR, Report No. 49/99, Case 11.610, Loren Laroye Riebe Star, Jorge Barón Guttlein and Rodolfo Izal Elorz, Mexico, April 13, 1999, par. 91.

<sup>83</sup> I/A Court H.R. *Case of Ximenes Lopes v. Brazil*. Judgment of July 4, 2006. Series C No. 149, par. 127.

<sup>84</sup> I/A Court H.R. *Case of Suárez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, par. 130, citing, *inter alia*, *Case of Albán Cornejo et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of November 22, 2007. Series C No. 171, par. 117; and *Case of Vera Vera et al. v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of May 19, 2011. Series C No. 226, par. 43.

protected under articles 8(1), 24 and 25 of the American Convention.<sup>85</sup> In the preceding paragraphs, the IACHR has concluded that the State violated the rights mentioned herein, to the detriment of Mr. Duque.

100. The Commission must emphasize the fact that persons living with HIV are in an especially vulnerable situation, given the characteristics of the illness, the medical treatment required, the exclusion and discrimination usually associated with it,<sup>86</sup> and other factors. The lack of proper medical treatment normally injures affected persons' physical, mental and moral integrity and usually leads to an early death.<sup>87</sup> While in this case the Commission does not have sufficient information about the continuity, quality and conditions of the medical treatment that Mr. Duque received subsequent to JOJG's death, it has established that a number of factors related to his sexual orientation, his illness and his financial situation took their toll on Mr. Duque.

101. In that context, the Commission considers that the effects of being denied his right to the survivor's pension of his deceased permanent partner because of a provision in the law that discriminated on the basis of sexual orientation; the futile quest for protection and the lack of an effective and unbiased response from the judicial system; and the suffering he endured because he could never be certain that the necessary medical treatment would be available to him on a regular basis, are all factors that have affected Mr. Duque's right to personal integrity. The Commission therefore concludes that the State violated the right to personal integrity recognized in Article 5(1) of the American Convention, read in conjunction with the obligation to respect rights undertaken in Article 1(1) of the Convention, to the detriment of Ángel Alberto Duque.

## VI. CONCLUSIONS

102. Based on the foregoing analysis the Commission concludes that the State of Colombia is responsible for violation of the rights to personal integrity, judicial guarantees, equality and non-discrimination, and judicial protection, recognized in articles 5(1), 8(1), 24 and 25 of the American Convention, read in conjunction with articles 1(1) and 2 thereof, to the detriment of Ángel Alberto Duque.

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<sup>85</sup> IACHR, Report No. 150/11, Admissibility, Petition 123-05, Ángel Alberto Duque, Colombia, November 2, 2011, par. 45.

<sup>86</sup> IACHR, Report No. 27/09, Merits, Case 12.249, Jorge Odir Miranda Cortez et al, El Salvador, 20 March 2009, par. 70; See also, *inter alia*, UNAIDS, *Protocol for the identification of discrimination against people living with HIV*, 2000. Available at: [http://www.unaids.org/en/media/unaids/contentassets/dataimport/publications/irc-pub01/jc295-protocol\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/dataimport/publications/irc-pub01/jc295-protocol_en.pdf); Pan American Health Organization, Resolution CD45.R10, *Scaling-up of Treatment within a Comprehensive Response to HIV/AIDS*, October 1, 2004. Available at: <http://iris.paho.org/xmlui/bitstream/handle/123456789/252/CD45.r10-e.pdf?sequence=2>.

<sup>87</sup> IACHR, Report No. 63/08, Case 12.534, Admissibility and Merits, Andrea Mortlock, United States, June 25, 2008, par. 90.

**VII. RECOMMENDATIONS**

103. Based on the these conclusions,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THE FOLLOWING TO THE STATE OF COLOMBIA:**

1. Make adequate reparations to Mr. Ángel Alberto Duque for the human rights violations declared in this report, including pecuniary and non-pecuniary damages. 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 health services and treatment that he requires as a person living with HIV.

2. Take the necessary measures that may still be necessary to ensure the non-repetition of the facts of the present 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 were previous to those decisions also benefited from their effects— are fully complied with.

3. 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.

4. Take the necessary measures to ensure that same-sex couples are not discriminated against when trying to access social security services and, in particular, that they are allowed to present the same evidence required to other couples, in accordance with the domestic legal system.

**LIST OF ANNEXES**

**Annex 1.** Request presented to the *Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías* COLFONDOS S.A., March 19, 2002 (Annex 2 of the original petition).

**Annex 2.** *Tutela* action brought by Germán Humberto Rincón Perfetti representing Ángel Alberto Duque, April 26, 2002 (Annex 4 of the original petition).

**Annex 3.** *Instituto de Seguros Sociales*, Certification of patient Ángel Alberto Duque, dated April 17, 2002 (Annex 1 of the original petition).

**Annex 4.** Original petition of February 8, 2005; the petitioners' observations of February 9, 2012.

**Annex 5.** COLFONDOS, Memorandum No. DCI-E-P-1487-02 of April 3, 2002 (Annex 3 of the original petition).

**Annex 6.** Opinion of the *Liga Colombiana de Lucha Contra el Sida* [Colombian League to Combat AIDS] of April 1, 1998 (Annex 7 of the original petition).

**Annex 7.** *Tutela* action filed with the Bogotá Superior Court, Civil Chamber, April 26, 2004 (Annex 4 of the original petition).

**Annex 8.** Tenth Municipal Civil Court of Bogotá, Judgment of June 5, 2002 (Annex 5 of the original petition).

**Annex 9.** Twelfth Civil Law Court of the Santa Fe de Bogotá Circuit, Judgment of July 19, 2002 (Annex 6 of the original petition).

**Annex 10.** The Colombian State's observations of February 28, 2013.