Inter-American Human Rights Moot Court Competition
Bench Memorandum

Dear Judges,

It is with great pleasure that we present to you the Bench Memo for the case of *Serafina Conejo Gallo and Adriana Timor v. Elizabetia.*

We were very excited when the Washington College of Law and its Human Rights Moot Court Competition asked us to imagine a case with a focus on the rights of lesbians, gays and trans, bisexual and intersex persons. While the disastrous effects of discrimination against sexually diverse populations are wide and reach across continents, cultures and legal traditions, they have also been marked by invisibility, stigma and outright negation.

Lesbians, gays and trans, bisexual and intersex persons have historically been and continue to be victims of persecution, discrimination and abuse, but great progress has been made globally and locally in the recent years to bring their problematic to light.

Following the rightful demands of an articulated and determined civil society, and its allies, OAS Member States have started to fulfill their debt through General Assembly Resolutions 2435, 2504, 2600, and 2653 and the actions that these prescribe. The Atala Case is a milestone at the Inter-American Commission and Court, and the adoption of the Commission's Plan of Action 4.6.i (on the rights of lesbians, gays and trans, bisexual and intersex persons) and the creation of the Unit on their rights have inscribed it firmly in its agenda.

However, much remains to be done to eradicate violence and discrimination and, to that end, increased knowledge of the violence and discrimination perpetrated against these persons and communities is a must. Our intent when creating this case has been twofold. We seek to promote academic visibility of the disastrous situation of violence and exclusion faced by trans women; we also want to bring to light the discussion concerning recognition –or not- of same sex couples as families or marriages, and all the derived legal effects. This is a highly relevant discussion in the Americas of the 2010's, and one that will be a dominant feature in the human rights agenda for years to come.

Serafina Conejo Gallo never existed. However, resemblance with the stories of a great number of brave existing women must be seen as a stark reminder of the enormity of the work that remains to be done so that stories such as Serafina's are relegated to the world of fiction.

Sincerely,

Victor Madrigal-Borloz Silvia Serrano

Introduction

This memorandum is divided in three parts that address the main legal issues in the case. Initially, international and Inter-American precedent is referenced, and then mention is made of the possible arguments of the parties.

Part A concerns the substantive issues of the case. Part B deals with procedural and preliminary issues. Part C concerns the issues connected to the provisional measures. Finally, the authors have included, as an Annex, the Study on Sexual Orientation, Gender Identity and Gender Expression (some relevant terms and standards). This document was issued by the Unit for the Rights of Lesbians, Gays and Trans, Bisexual and Intersex persons with the aim of providing a baseline in terminology, and is therefore considered an interesting reference document for the Judges.

A. Substantive issues

A.1 Sexual Orientation and Gender Identity in the light of the principle of equality and non-discrimination and the right to private life and autonomy; A.2 Right to a family; A.3 The right to marry; A.4 Legal effects of same-sex unions in comparison those of heterosexual unions; A.5 Possible arguments of the injured party; and A.6 Possible arguments of the State.

A.1. Sexual Orientation and Gender Identity in the light of the principle of equality and non-discrimination and the right to private life and autonomy

1. Pursuant to the American Declaration on the Rights and Duties of Man, "[e]very person has the right to the protection of the law against abusive attacks upon […] his private and family life". The right to privacy has spatial and objective components, as the home or correspondence, which are intimately connected with Articles IX and X of the Declaration. It also has spiritual components, closely connected with Article III of the same.

2. The right to privacy also has a component related to personal choices and the human dignity that is inherent to making them[1]. This component, described among others by the Supreme Court of the United States of America,[2] the Constitutional Court of Colombia,[3] the South African Constitutional Court[4], the

[1] It is telling that the European Convention on Human Rights includes all aspects in Article 8.

[2] *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 851 (1992)*. The Court expressed: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

[3] Constitutional Court of Colombia, Sentencia C 098 del 96, available in Spanish at the link http://www.corteconstitucional.gov.co/relatoria/1996/c-098-96.htm, párr. 4.2. The Court said: "Apart from compromising the most intimate and personal sphere of individuals, sexuality belongs to the realm of their

High Court of Delhi at New Delhi[5] and the High Court of Fiji[6], is deeply connected with intimacy, sexual autonomy and self-realization and has been also recognized by the Human Rights Committee of the Organization of the United Nations,[7] the European Court of Human Rights,[8] and the Inter-American Commission. In particular, the Inter-American Commission has stated "[t]here is a clear nexus between the sexual orientation and the development of the identity and life plan of an individual, including his or her personality, and relations with other human beings".[9]

3. Sexual autonomy is therefore an integral part of private life. It is generally a manner "in which human beings strive to achieve self-realization by way of actions that do not interfere with the liberty of others".[10] Further, when it occurs in private and among consenting adults, sexual activity is *per definitionem* not capable of violating the rights of third parties.[11] Hence, any interfering State action under these circumstances must be restrained and satisfy the strictest tests of legitimacy and necessity[12].

4. The legitimate nature of State actions is outlined straightforwardly in the considerations of the American Declaration, according to which "juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness". Interference in privacy can only answer to the protection of the rights of others when they may be at risk.

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fundamental freedoms, in which neither the State nor the collective may intervene because there are no public interests at stake, and no social damage can be perpetrated (translation of the IACHR).

4 Constitutional Court of South Africa. Judgement in Case CCT 11/98, available at http://www.saflii.org/za/cases/ZACC/1998/15.pdf. The Court recognized that sexual expression ''is at the core'' of ''a sphere of private intimacy and autonomy".

5 *Naz Foundation v. Government of Delhi* WP(C) No.7455/2001. The Court stated "at the root of dignity is the autonomy of the private will and a person's freedom of choice and of action".

6 McCoskar v The State [2005] FJHC 500; HAA0085 & 86.2005 (26 August 2005), available at http://www.humandignitytrust.org/uploaded/Library/Case_Law/Nadan__McCoskar_v_State.pdf . The Court stated "[t]he criminalization of carnal acts against the order of nature between consenting adult males or females in private is a severe restriction on a citizen's right to build relationships with dignity and free of State intervention and cannot be justified as necessary".

7 Toonen. Communication No. 488/1992 : Australia. 04/04/1994. CCPR/C/50/D/488/1992. (Jurisprudence); CCPR/C/50/D/488/1992. Original: English. Vide also, CCPR/C/79/Add 50; CCPR/C/79/Add 104.

8 European Ct HR.; Dudgeon v. United Kingdom, application 7525/76; available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57473.

9 CIDH, Karen Atala and daughters, Caso 12.502 (Chile), Presentation of September 17, 2013, available under the classification of 2010 at http://www.oas.org/en/iachr/decisions/cases.asp, párr. 111..

10 IACHR, Report No. 4/01, María Eugenia Morales de Sierra (Guatemala), January 19, 2001, paragraph 47; IACHR, Report No. 38/96, X and Y (Argentina), October 15, 1996, paragraph 91.

11 Nowak, Manfred; CCPR Commentary (2nd revised edition) N.P. Engel, Publisher; pág. 297.

12 Vide also, European Ct HR.; Dudgeon v. United Kingdom, application 7525/76; disponible en inglés al vínculo http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57473, par. 43

5. Further, any measure interfering with privacy in a democratic society must answer to an "imperative social need"[13] In this sense, it is not sufficient that such a measure answer to preferences or the mores of some: it must be proven that it answers to a need the satisfaction of which is an appropriate manner to protect the rights of the majority and, at the same time, has been carefully weighed to respect the rights of minorities.

6. Any State action denounced as an undue interference in privacy in relation to the sexual conduct of consenting adults shall be scrutinized with basis on those requirements.

7. Pursuant to the American Declaration, all persons are "born free and equal, in dignity and in rights" and "are equal before the law […] without distinction as to race, sex, language, creed or any other factor". This definition expresses "the right of everyone to equal protection of the law without discrimination."[14] This right to equality before the law means that the application of the law should be equal for all.[15] The provision was intended to ensure equality, not identity of treatment, and would not preclude reasonable differentiations between individuals or groups of individuals."[16]

8. In its Annual Report for the year 2000, the Inter-American Commission referred to the principle of non-discrimination as "a lynchpin of the inter-American system", and declared that the observance of that principle is also a primary challenge for Member States, who must create or strengthen the legal and institutional mechanisms to fight discrimination within the parameters established in the system. On that occasion, the Commission remarked that, once and for all, Member States had to seriously commit themselves to providing special protection for certain persons or groups of persons. Three years later, the Commission added that "[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a founding, basic, general and fundamental principle relation to the international protection of human rights". [17]

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13 ECHR, Lustig-Prean and Beckett, vide http://www.wcl.american.edu/hrbrief/07/3european.cfm, parr. 80 and

14 Bjorn Stormorken and Leo Zwaak, Human Rights Terminology in International Law: A Thesaurus, (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988) and Dudgeon v. United Kingdom, application 7525/76; available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57473, par. 43.

15 Article 26 of the International Covenant on Civil and Political Rights provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See Travaux preparatoires of the ICPR, Annotation on the Text of the Draft International Covenant on Human Rights, 10. U.N. GOAR, Annexes (Agenda item 28, pt.II) 1, 61, U.N. Doc. A/2929 (1955).

16 Id. See also Case Relating to Aspects of Laws on the Use of Languages in Education in Belgium, 1EHRR 252.

17 IACHR; Annual Report 2003; OEA/Ser.L/V/II.118; Doc. 70 rev. 2; 29 December 2003; Original: Spanish; par. 5.

9. A difference in how the law treats persons that are in similar situations must be considered discriminatory unless it aims at an objective that is legitimate, is objective, and is reasonable. The American Declaration refers to different classifications in relation to which distinction of treatment cannot be carried out. They are race, sex, language, creed and "any other factor". The Commission finds reason to believe, as did the United Nations Human Rights Committee[18] and the European Commission on Human Rights[19], that the expression "sex" makes reference to sexual identity. In any event, sexual orientation would be included in the expression "other status" of the non-discrimination clause of the American Convention on Human Rights, a conclusion that is applicable to "any other factor" for the purposes of article II of the Declaration.

10. Therefore, distinctions of legal treatment based solely on a person's sexual identity cannot be legitimate. Lesbian, gay, trans, bisexual and intersex persons have the right to equal protection of the law; and the said protection extends to their sexual choices and behavior. Any measure affecting the enjoyment of their rights will therefore be scrutinized as to whether it is objective and reasonable, that is, whether it pursues a legitimate aim, is conducive to it, and its effects in the enjoyment of rights are not disproportionate.

11. Furthermore, lesbian, gay, Trans, bisexual and intersex persons have historically been the object of violence, discrimination and hatred. In 2012, the General Assembly of OAS, furthering resolutions issued in 2008, 2009, 2010 and 2011 on this subject, resolved, *inter alia*,

> To condemn discrimination against persons by reason of their sexual orientation and gender identity; to urge member states within the parameters of the legal institutions of their domestic systems to eliminate, where they exist, barriers faced by lesbians, gays, and bisexual, transsexual, and intersex (LGBTI) persons in access to political participation and to other areas of public life; and to prevent interference in their private life.
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> To encourage member states to consider, within the parameters of the legal institutions of their domestic systems, adopting public policies against discrimination by reason of sexual orientation and gender identity.
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> To condemn acts of violence and human rights violations committed against persons by reason of their sexual orientation and gender identity, and to urge states to strengthen their national institutions with a view to preventing and investigating these acts and violations, and to ensuring due judicial protection for victims on an equal footing and that the perpetrators are brought to justice.

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[18] Toonen. Communication No. 488/1992 : Australia. 04/04/1994. CCPR/C/50/D/488/1992. (Jurisprudence); CCPR/C/50/D/488/1992. Original: English. Vide also, CCPR/C/79/Add 50; CCPR/C/79/Add 104, par. 8.7.

[19] European Commission HR; Application No. 25186/94 (Sutherland v. the United Kingdom). Informe de la Comisión adoptado el 1 de julio de 1997, par. 50.

> To urge member states to ensure adequate protection for human rights defenders who work on the issue of acts of violence, discrimination, and human rights violations committed against individuals on the basis of their sexual orientation and gender identity.[20]

12. The historical discrimination against LGTBI persons compels States to be particularly vigilant to adopt measures to ensure the interruption of cycles of violence, exclusion and stigma and, in this relation, lesbian, gay, Trans, bisexuals and intersex persons must be deemed to be protected both by their juridical personality, and by their condition as belonging to a group historically subjected to discrimination.

A.2. The right to a family

13. The vast majority of international human rights instruments establish the right to a family.

14. The American Convention does so in Article 17, "Rights of the Family," and establishes in pertinent part: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state (…)." The Inter-American Court has also indicated that the right to live free from interference in family life, enshrined in Article 11 of the Convention, is a precise corollary to the State's obligation to protect the family under Article 17.[21] In the words of the Court:

> […] unlike the provisions of the European Convention, which only protect the right to family life under Article 8, the American Convention contains two provisions that protect family life in a complementary manner. Indeed, the Court considers that the imposition of a single concept of family should be analyzed not only as possible arbitrary interference with private life, in accordance with Article 11.2 of the American Convention, but also, because of the impact it may have on a family unit, in light of Article 17 of said Convention.[22]

15. For more than a decade now, in both the European sphere and globally, the scope of the notion of family in international human rights instruments has begun to be interpreted, and there is broad consensus regarding the importance of the concept of diversity.

16. In this respect, General Comment 19 of the Human Rights Committee, regarding the protection of the family established in Article 23 of the International Covenant on Civil and Political Rights (ICCPR), bears noting. The Comment

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[20] OAS AG/RES. 2721 (XLII-O/12), available at http://www.oas.org/consejo/GENERAL%20ASSEMBLY/Resoluciones-Declaraciones.asp, under "Forty Second regular session", Cochabamba, Bolivia, June 2012

[21] I/A Court H.R., *Case of Atala Riffo and daughters v. Chile*, available at: http://www.corteidh.or.cr/pais.cfm?id_Pais=4, Para. 156 et seq.

[22] I/A Court H.R., *Case of Atala Riffo and daughters v. Chile*, available at: http://www.corteidh.or.cr/pais.cfm?id_Pais=4, Para. 175.

examines the obligations of States within the framework of a diverse concept of family, stating as follows:

> The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23. Consequently, States parties should report on how the concept and scope of the family is construed or defined in their own society and legal system. Where diverse concepts of the family, "nuclear" and "extended," exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice. [23]

17. In the same regard, in General Comment 28 regarding the Equality of rights between men and women enshrined in the ICCPR, the Human Rights Committee reiterated that the States, in giving effect to the recognition of the family, must accept the concept that families take various forms. The Committee cited—by way of example, without meaning for it to be an exhaustive list—unmarried couples and their children, and single-parent families.[24]

18. General Recommendation No. 21 of the Committee on the Elimination of all Forms of Discrimination Against Women similarly states:

> The form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires.[25]

19. The decisions of the European Court on this issue can be split into two groups, each of which provides arguments that can be used by both parties in the competition.

20. The first group of decisions concerns the response of the European Court when the States attempt to justify differences in treatment or restrictions to the exercise of rights on the argument that they were necessary to protect the "traditional family model." The European Court has rejected arguments based on

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[23] General Comment No. 19, General Comments adopted by the Human Rights Committee, Article 23 – The family, 39th Session, U.N. Doc. HRI/GEN/1/Rev.7 at 171 (1990), para. 2.

[24] General Comment No. 28, General Comments adopted by the Human Rights Committee, Article 3 - Equality of rights between men and women, 68th Session, U.N. Doc. HRI/GEN/1/Rev.7 at 207 (2000), para. 27.

[25] CEDAW. General Recommendation No. 21, para. 13.

a concept of "traditional family." Examples of this group of cases are *Salgueiro da Silva Mouta v. Portugal*[26] and *Karner v. Austria.*[27]

21. The second group of decisions handed down by the European Court address the scope of the Court's understanding of the "family" or "family life" protected by Article 8 of the European Convention. In previous cases involving heterosexual couples, the European Court had done a case-by-case analysis, taking account of the specific circumstances that led it to determine whether it was possible in each case to speak of "family" or "family life." An example of this trend is the case of *X, Y and Z v. the United Kingdom*, in which the European Court indicated that "When deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means."[28]

22. In the *Case of Schalk and Kopf v. Austria*, the European Court expressly stated that "a cohabiting same-sex couple living in a stable domestic partnership falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would."[29] The European Court added that it would be "artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8."[30]

23. This trend, seen at the universal level and in the European system, has also been accepted in the inter-American sphere. In the case of *Atala Riffo and daughters v. Chile*, the Inter-American Court took note of the developments in other systems, and held that:

> The American Convention does not define a closed concept of family, and by no means does it protect only a "traditional" model of family. The Court reiterates that the concept of family life is not confined solely to marriage-based relationships and may

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26 ECHR, *Case of Salgueiro Mouta v. Portugal* (No. 33290/96), Judgement of 21 December 1999, para. 34 to 36.

27 ECHR, *Case of Karner v. Austria* (No. 40016/98), Judgement of 24 October 2003, par. 41 ("The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. […] as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realizing the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people").

28 ECHR, *Case of X, Y and Z v. the United Kingdom*, (No. 21830/93), Judgment of 22 April, 1997, para. 36. Citing ECHR, *Case of Marckx v. Belgium*, (No. 6833/74), Judgment of 13 June, 1979, para. 31; *Case of Keegan*, para. 44, & *Case of Kroon and Others,* para. 30.

29 ECHR, *Case of Schalk and Kopf v. Austria* (No. 30141/04), Judgment of 24 June 2010, par. 94; *Case of P.B. & J.S. v. Austria*, (No. 18984/02), Judgment of 22 July, 2010. Final. October 22, 2010, para. 30.

30 ECHR, *Case of Schalk and Kopf*, para. 94.

encompass other de facto "family" ties where the parties are living together outside of marriage.[31]

24. The Court concluded that a concept of family that is limited or based on stereotypes "has no basis in the Convention, since there is no specific model of family."[32]

A.3. The right to marry

25. Article 17.2 of the American Convention states that "The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention."

26. In the Inter-American System, neither the Commission nor the Court has rendered any decisions on this provision. However, both the Human Rights Committee and the European Court have ruled on the issue of same-sex marriage, as described below.

27. The Human Rights Committee addressed the issue in the case of *Joslin v. New Zealand,* which involved a lesbian couple who applied for a marriage license in New Zealand. Their application was denied by the respective authorities based on the fact that the domestic law established marriage solely for heterosexual couples. The couple in this case had been in a stable relationship for more than 10 years, lived under the same roof, maintained a sexual relationship, shared their finances, and had assumed joint responsibility for their children, who were born during their prior, heterosexual marriages.[33] The Committee performed its analysis on the basis of the verbatim text of Article 23 of the ICCPR,[34] which establishes the right to marriage in terms of the States' obligation to guarantee the institution for "men and women."

28. The Human Rights Committee observed that Article 23.2 of the ICCPR is the only

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[31] Advisory Opinion OC-17/02, paras. 69 & 70. See also: ECHR, *Case of Keegan v. Ireland,* (No. 16969/90), Judgment of 26 May, 1994, para. 44, & *Case of Kroon and Others v. the Netherlands,* (No. 18535/91), Judgment of 27 October, 1994, para. 30.

[32] Similarly, the Supreme Court of Mexico has held that the legal recognition of families with same-sex parents, which exist by virtue of reproduction or adoption, is not inconsistent with the best interests of the child. On the contrary, such recognition gives rise to several rights benefitting the child, and creates obligations on the part of the parents. The reality is that such families exist, and as such, they must be protected by the law; they are as respectable as any others. Supreme Court of Mexico, Unconstitutionality Action A.I. 2/2010, August 16, 2010, para. 333.

[33] Human Rights Committee. *Case of Joslin v. New Zealand.* Communication No. 902/1999. CCPR/C/75/D/902/1999 (2002), para. 2.1.

[34] ICCPR. Article 23: "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children. "

article that contains the term "men and women," rather than "every human being," "everyone," and "all persons," which means that the States' obligation under the convention is to recognize as marriage only the union between a "man and a woman" who wish to marry each other.[35] It therefore concluded that no provision of the ICCPR had been violated.[36]

29. In this case the Committee did not even conduct a secondary analysis in light of the principle of equality and nondiscrimination (Article 26 of the ICCPR) or the right to privacy and autonomy (Article 17 of the ICCPR). The Committee based its opinion on the existence of a specific provision of the Covenant that regulates the institution of marriage, but it abstained from examining the consistency of this provision with other rights or principles of the same treaty and avoided any possibility of an evolutionary interpretation.

30. The European Court has ruled on the institution of marriage, holding that the prohibition for same-sex couples does not violate the European Convention. In 2010, the European Court handed down its most recent decision on the issue, the case of *Schalk and Kopf v. Austria*, which dealt with a same-sex couple with a stable history of cohabitation who applied before the proper authorities for permission to marry. Their request was denied on the basis that marriage can only be entered into by persons of opposite sexes. This argument was validated by the judiciary.

31. As noted in the above section on the right to a family, in this case the European Court modified its prior position and broadened the notion of family life to include the bond between same-sex couples. Nevertheless, the European Court held that the European Convention did not require States to allow marriage between same-sex couples.[37] In the opinion of the European Court, the national authorities are in the best position to address and respond to the needs of society on this subject given that marriage has deep roots and social connotations that vary significantly from one society to another.[38] On this point, the European Court underscored the absence of a regional consensus on the

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35 Human Rights Committee. *Case of Joslin v. New Zealand.* Communication No. 902/1999. CCPR/C/75/D/902/1999 (2002), para. 8.2.

36 Id., para. 8.3. Two members of the Committee presented their individual opinion stating that the decision not to find a violation of the Covenant referred exclusively to the recognition of homosexual couples under the specific institution of marriage. Nevertheless, in their opinion this decision does not mean that distinctions between married couples and homosexual couples affecting the ability to exercise other rights cannot in certain cases amount to a violation of the right to equal protection and of the principle of nondiscrimination under the ICCPR, when such distinctions are not justified by reasonable and objective criteria. Finally, they stated that they took no issue with the decision of the Committee because the State had expressed in its submissions that, although they are not married, the authors are recognized as a family, and would be even in the event that they had not assumed responsibility for their children. See *Case of Joslin v. New Zealand.* Communication No. 902/1999. CCPR/C/75/D/902/1999 (2002),, Individual Opinion of Mr. Rajsoomer Lallah and Mr. Martin Scheinin.

37 ECHR, *Case of Schalk and Kopf v. Austria* (No. 30141/04), Judgment of 24 June 2010.

38 ECHR, *Case of Schalk and Kopf v. Austria* (No. 30141/04), Judgment of 24 June 2010.

issue.

32. Unlike the Human Rights Committee, the European Court approached the issue first on the basis of Article 12 of the European Convention, which prescribes that States must allow every man and woman to have access to marriage. It also based its approach on Articles 8 and 14 of the Convention, corresponding to the rights to privacy and family life and the principle of nondiscrimination. Within the analytical framework of these last two provisions, the European Court accepted that there is a difference in treatment and interference in private and family life—but it found that it is justified.

A.4. Legal effects of same-sex unions in comparison to heterosexual couples

33. Beyond the recognition of the union between Serafina Conejo Gallo and Adriana Timor as a marriage—and therefore a constitutionally protected family—one of the debates behind both institutions (family and marriage) in many legal systems is that different rights, special protections, and obligations are provided for either married couples or those considered family. Couples often must be married in order to constitute a family, with the exception of the special recognition of domestic heterosexual partnerships—which in many cases does not include, in identical terms, domestic same-sex partnerships. It is also important in the analysis of the case to bear in mind that there is ample international case law addressing the different treatment of same-sex couples in the exercise of rights, protections, or obligations derived from the relationship between a couple.

34. Both the Human Rights Committee and the European Court have examined these legal distinctions between homosexual and heterosexual couples, indicating that in order for such a distinction not to be incompatible with the respective international instruments, especially the principles of equality and nondiscrimination; it must be justified on the basis of reasonable and objective criteria.

35. For example, in the case of *Young v. Australia,* the Human Rights Committee found that the regulation would effectively establish a legal differentiation between homosexual and heterosexual couples in obtaining a survivor's pension. In view of the respective State party's failure to allege the "reasonableness" and "objectivity" of the distinction, or to indicate the specific factors that would justify it, the HRC concluded that the distinction violated the right to equality.[39] This case makes an important point regarding the burden of proof required to

[39] Human Rights Committee. *Case of Young v. Australia* (Communication No. 941/2000), CCPR/C/78/D/941/2000, Decision of 18 September 2000, para. 10.4.

demonstrate the "reasonableness" of a difference in treatment, which is necessarily upon the State.

36. In this decision, the Committee appears to suggest an implied standard that is extremely relevant to the hypothetical case. The Committee suggests that the equality "test" would be applied more strictly to distinctions adversely affecting homosexual couples than to distinctions adversely affecting unmarried heterosexual couples, given that the latter have the legal option to marry, while the former do not.[40]

37. In considering these types of distinctions or legal exclusions, the European Court has found that the nondiscrimination clause is applicable in conjunction with the substantive provision, as sexual orientation has been the decisive element in granting a legally recognized benefit to heterosexual individuals.[41] Specifically, in the case of *Karner v. Austria*, the European Court ruled on a legal distinction involving succession to the tenancy of the residence in which a same-sex couple lived together as a couple. The European Court found this distinction to be in violation of the right to privacy in relation to the nondiscrimination clause. Just as the Committee had stated with respect to the burden of proof, the European Court held that States must demonstrate that such difference not only is appropriate for accomplishing the aim pursued but also that it is strictly necessary.[42]

38. Neither the analysis of the Human Rights Committee nor that of the European Court distinguishes between provisions that have the purpose or the effect of excluding same-sex couples from the right, protection, or obligation in question. The relevance of this point is that it is unlikely for there to be provisions that expressly exclude same-sex couples. Rather, there are provisions that are silent with regard to couples that have an exclusionary effect beyond the intent of the lawmakers. It is also not unusual to find decisions from national courts that, in determining whether a provision is discriminatory because it excludes same-sex couples, examine only the intent of the lawmakers and do not go on to examine the effect of the provision.

A.5. Possible arguments of the injured party

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[40] Human Rights Committee. *Case of Young v. Australia* (Communication No. 941/2000), CCPR/C/78/D/941/2000, Decision of 18 September 2000, para. 10.4. As for the "reasonableness and objectivity" of the distinction between married and unmarried heterosexual couples, see: Human Rights Committee. *Case of Broeks v. The Netherlands*, Communication No. 172 of 1984; Human Rights Committee. *Case of Danning v. The Netherlands*, Communication No. 182 of 1984; Human Rights Committee. *Case of Zwaan de Vries v. The Netherlands*, Communication No. 180 of 1984.

[41] ECHR, *Case Karner v. Austria* (40016/98), Judgment of 24 October 2003; Párr. 33.

[42] ECHR, *Case Karner v. Austria* (40016/98), Judgment of 24 October 2003; Párr. 33.

39. The representatives of the injured party can argue as a general matter that the case concerns a difference in treatment and interference in private life based on sexual orientation. This means that the Inter-American Court's analysis of whether the interference is arbitrary, and whether the differences in treatment are reasonable and objective, must be conducted in an especially strict manner based on the existing international consensus.

40. The analysis of the requirements of legitimate aim, suitability, necessity, and proportionality *stricto sensu*, which have been the Court's methodology of interpretation with regard to both differences in treatment and interference in private life, must have as its starting point that sexual orientation is a prohibited category covered by the nondiscrimination clause set forth in Article 1.1 of the Convention, and that with regard to private life, sexual orientation and its expression are part of one of the most protected aspects of both private life and personal autonomy.

41. It would be important for the representatives first to examine (i) whether, in light of Article 17.2 of the Convention, same-sex couples have the right to marry; and (ii) regardless of whether this specific article is interpreted in that way, how the prohibition could be analyzed in light of other provisions of the Convention, such as the principle of equality and nondiscrimination, the prohibition against arbitrary interference in private life and personal autonomy, and the right to a family.

Interpretation of Article 17.2 of the Convention

42. With regard to the interpretation of Article 17.2 of the Convention, the representatives can invoke the *pro persona* principle of interpretation, as well as the evolutionary interpretation of the literal meaning of the treaties.

43. It could be argued, precisely by virtue of the *pro persona* principle, that the meaning of "between a man and a woman" as a restrictive provision must be interpreted restrictively. As such, by not specifying "between a man and a woman [who marry] each other," it could be concluded that it does not necessarily have to be between persons of the opposite sex.

44. This progressive argument could be bolstered by providing examples of similar practices of other international bodies that have interpreted human rights provisions broadly, including in a manner that departs from their literal meaning in order to protect a minority not represented in that meaning.

45. They can argue that the fact that a provision of the Convention includes a majority understanding in its literal meaning does not mean that such

understanding cannot be broadened through interpretative means to include minorities, especially when the real possibility of being entitled to the right in question depends upon this interpretation. Along these lines, it could be argued that it is not a matter of including an accessory element to a right that is already recognized; rather, it is about recognizing the entitlement to that right and allowing for it to be exercised.

The principle of equality and nondiscrimination, the prohibition against arbitrary interference in private life and personal autonomy, and the right to a family

46. The representatives should point out that the case can be argued along two lines: first, as indicated in the above section, based on a proposed interpretation of Article 17.2 of the Convention; and second, from the perspective of the right to equality, private life, personal autonomy, and family. On this point, it would be important for the representatives to identify Article 396 of the Civil Code of Elizabetia as a provision that, by excluding same-sex couples, constitutes a difference in treatment, interference in private life, and the infringement of the right to a family.

47. Regarding the infringement of the right to equality, the representatives could make at least two arguments.

48. One argument is related to the ability to decide, on an equal footing with heterosexual couples, the type of union they want to apply to their romantic and emotional life. This argument is independent of whether the legal effects of one type of union or another are the same or different. The point of this argument is that, while heterosexual couples can choose to opt for either marriage or a domestic partnership, same-sex couples have only one option—and this in itself constitutes a difference in treatment and interference in private life and personal autonomy.

49. Second, it is important that the representatives approach Article 396 of the Civil Code in light of the other provisions of Elizabetian law cited in the hypothetical case, in order for them to be able to identify the violations to the right to equality not only with respect to the decision to marry and choose the type of union but also with respect to the legal effects of one type of union or another in the State of Elizabetia specifically.

50. It is important that the representatives identify at least three differences in this regard.

51. First, it follows from the Constitution, read in conjunction with the Civil Code, that in order for persons of the same sex to be constitutionally protected they must meet the requirements of a domestic partnership—that is, five years of cohabitation and a judicial decree—while heterosexual couples can either decide to marry and be a family immediately, or wait to meet the aforementioned requirements. Accordingly, there is a difference in treatment with respect to the right to a family in the terms of Articles 17 and 24 of the Convention.

52. Second, it is evident that Elizabetia does not understand same-sex couples to be on a completely equal footing with heterosexual couples. When it amended the Civil Code after the provision regulating domestic partnerships only with respect to heterosexual couples was ruled unconstitutional, it could not simply amend the language in order for same-sex couples to be included; rather, it saw the need to make a distinction between the legal effects, namely in terms of joint adoption.

53. Third, there are several rights, obligations, and protections under the domestic laws of States relating to the concepts of "family" or "relatives" that exclude same-sex couples who have not met the requirements for establishing a domestic partnership, while a married heterosexual couple would not have to wait for that period of time in order to be entitled to the legal effects of the notion of family. One example of such a situation in this case is the issue of the provisional measures and the ability to grant consent for a major medical procedure.

54. All of the above arguments enable the representatives to demonstrate that there is a difference in treatment, interference in private life, and an infringement of the right to a family.

55. Accordingly, in keeping with the consistent case law of the inter-American system, it is appropriate for them to argue whether those infringements are justified under the requirements of legitimate aim, suitability, necessity, and proportionality *stricto sensu*. The way in which the representatives examine these requirements will depend upon the legitimate aim cited by the respective State in its brief, if it does so. If it does not, the representatives should be prepared to argue according to the rules governing the burden of proof that the State failed to justify the infringement of the rights in question according to the standards of the inter-American system.

A.6. Possible arguments of the State

56. The possible arguments of the State of Elizabetia can be laid out according to the same framework of possible arguments that was described with respect to the injured party.

Interpretation of Article 17.2 of the Convention

57. This is the strongest point the State can argue. The literal text of Article 17.2 of the American Convention refers to marriage between "a man" and "a woman," unlike the rest of the provisions of the Convention, which refer to "every person" or "every human being." Accordingly, the main argument the representatives of the State could turn on the literal meaning of the treaty and on the fact that when the State of Elizabetia signed and ratified the American Convention it did so with respect to the rights and obligations established in its text.

58. The State can argue that although it is possible to determine the scope and content of a right established in the American Convention through the relevant case law, this possibility must be properly balanced with the intent expressed by the States upon their ratification of the international instrument. Therefore, the State can argue, it cannot go to the extreme of completely changing the text of a treaty that is as clear in its drafting as Article 17.2 of the American Convention.

59. Elizabetia can argue that both the Human Rights Committee and the European Court of Human Rights lend support to its position and that, to date, no international body or court has recognized the right of same-sex couples to marry. On this point, the State should cite in particular the Human Rights Committee case of *Joslin v. Australia*, and the case of *Schalk and Kopf v. Austria* of the European Court, which interpret Articles 23 and 12 of the respective treaties.

60. The State can also argue that the rules of interpretation must be applied step-by-step, and that only when the text of a provision fails to provide sufficient clarity regarding the scope and content of the right is it valid to resort to additional means of interpretation—which is not the case with Article 17.2 of the Convention.

The principle of equality and nondiscrimination, the prohibition against arbitrary interference in private life and personal autonomy, and the right to a family

61. The above argument of the State is a strong one, but because the IACHR's report on the merits included Articles 11, 24, and 17, the teams playing the role of the State must be prepared to respond to the arguments of the representatives regarding those provisions.

62. As stated earlier, and as it follows from the approach of the Inter-American Court, an initial step in the analysis of these cases is to determine whether the

provision or state act alleged to be a violation in fact infringes upon these rights; second, it is necessary to determine whether the infringement is justified or reasonable or objective when it affects the right to equality.

63. In the opinion of the authors, it is difficult for the State of Elizabetia to argue at the first stage of the analysis that the legal prohibition against marriage, in the context of the other provisions of Elizabetian law, does not constitute a violation of the rights to equality, private life, personal autonomy, and the right to a family. This is because same-sex couples do not have the same range of opportunities as heterosexual couples to choose a type of union. In addition, as previously stated, the ability to be recognized as a family and to be entitled to the effects derived from that status is different for same-sex couples in comparison to heterosexual couples.

64. In this respect, the State should be prepared to argue that while this infringement does exist, it is justified in view of the criteria established in the case law of the Inter-American Court, namely: legitimate aim, suitability, necessity, and proportionality. It is expected that the States will know the content of each one of these criteria, and present solid and creative arguments on each one of them.

65. The State could argue that although the category of sexual orientation requires strict scrutiny pursuant to the judgment of the Inter-American Court in the case of *Atala Riffo and daughters v. Chile,* this type of scrutiny must be weighed against other factors—present in the case law of the European Court under the doctrine of margin of appreciation—to determine the intensity of the scrutiny. As such, the State could argue that the scrutiny cannot be overly strict with regard to matters on which there is still no regional consensus, as in the case of same-sex marriage. On the contrary, the State could suggest that the Inter-American Court use the doctrine of margin of appreciation and conclude that the margin is broad in cases where consensus is absent.

66. The State can note again here that the international case law is in its favor, especially that of the European Court. In the case of *Schalk and Kopf v. Austria*, the European Court not only failed to find a violation of the right to marry but also failed to find a violation of the right to private life or the prohibition against discrimination, precisely because it applied a broad margin of appreciation and made reference to regional consensus.

67. One point that the State should use in its favor when examining whether the infringement is justified is related to the true impact of the difference in treatment, interference in private life, and the ability to constitute a "family."

68. The State could argue that it is one of the most advanced states in the region with respect to the progressive recognition of the rights of same-sex couples. It could note that there are few states that recognize that such couples can form a constitutionally protected family, and that the requirement of five years of cohabitation to obtain that recognition and all of the legal effects derived from it is not disproportionate.

Arguments on judicial guarantees and judicial protection

69. There are at least three issues surrounding these provisions: (i) the response of the domestic judicial authorities to the appeals filed, especially the motion to vacate before the court of appeals for administrative matters; (ii) the impossibility of filing a petition for a constitutional remedy to challenge a court decision, in light of Article 25 of the Convention; and (iii) the single-instance administrative appeal proceedings, in light of Article 8.2(h) of the Convention.

The response of the domestic judicial authorities to the appeals filed, especially the motion to vacate before the court of appeals for administrative matters

70. The following points regarding Article 25 of the Convention are gleaned from the consistent case law of the bodies of the inter-American system. The Inter-American Court has established that the protection of the individual from the arbitrary exercise of government power is the fundamental purpose of international human rights protection. The nonexistence of effective domestic remedies denies due process to individuals.[43] Additionally, the Court has repeatedly held that the guarantee contained in those provisions is not limited to those rights that are enshrined in the American Convention; rather, they also cover domestic judicial claims related to other rights to which individuals are entitled under the Constitution and domestic law. The Court has affirmed this scope in the following terms:

> Article 25(1) of the Convention has established, in broad terms, the obligation of the States to provide to all persons within their jurisdiction, an effective judicial remedy to violations of their fundamental rights. It provides, moreover, for the application of the guarantee recognized therein not only to the rights contained in the Convention, but also to those recognized by the Constitution and laws.[44]

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[43] I/A Court H.R., *Case of Claude-Reyes et al*. Judgment of September 19, 2006. Series C No. 151, para. 129; I/A Court H.R., *Case of García-Asto and Ramírez-Rojas.* Judgment of November 25, 2005. Series C No. 137, para. 113; I/A Court H.R., *Case of Palamara-Iribarne.* Judgment of November 22, 2005. Series C No. 135, para. 183.

[44] I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.).* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, para. 122; I/A Court H.R., *Case of Claude-Reyes et al*. Judgment of September 19, 2006. Series C No. 151, para. 128; I/A Court H.R., *Case of Yatama.* Judgment of June 23, 2005. Series C No. 127, para. 167.

71. The Court has also held that the domestic remedies must be available to the interested party, must resolve the issue in question effectively and in a well-reasoned manner, and potentially provide the appropriate reparation.[45]

72. Serafina Conejo Gallo and Adriana Timor initiated administrative proceedings to request a marriage license. When their case was denied at the administrative level, they filed a motion to vacate before the court of appeals for administrative matters in accordance with Elizabetian law. They subsequently filed a petition for a constitutional remedy to challenge the decision of the court of appeals for administrative matters, which is examined below.

73. The representatives could argue that the denial of the motion to vacate by Court No. 7 for the Review of Administrative Decisions was a denial of justice and evidenced the lack of effective remedies to challenge human rights violations. The representatives could refer to the fact that the Court did not take account of the nondiscrimination clause of the Constitution of the State of Elizabetia, and argue that Article 396 of the Civil Code, on which basis the motion was denied, is unconstitutional in light of that clause. The representatives could also argue that according to the case law of the Inter-American Court from *Almonacid Arellano v. Chile* to the present, all judicial authorities, regardless of their ranking, must exercise "conventionality control" with regard to the domestic regulatory framework; in other words, they could have explored the possibility of not applying Article 396 of the Civil Code based on the rights to equality, nondiscrimination, and private life established in the American Convention.

74. The State of Elizabetia could argue that the Inter-American Court has consistently held that the mere fact that a party loses an appeal does not mean that it is a violation of Article 25 of the Convention (See, e.g., case of *Raxcacó-Reyes v. Guatemala).* It can further argue that the concept of "conventionality control" cannot be invoked in this case, as it would be irresponsible for the judicial authorities to refrain from applying a domestic law provision related to an issue that: (i) has been rejected by the international courts; and (ii) has not been examined by the Inter-American Court.

The impossibility of filing a petition for a constitutional remedy to challenge a court decision, in light of Article 25 of the Convention

75. The other issue that the case raises in light of Article 25 of the American Convention is whether the stipulation under Elizabetian law that a petition for a constitutional remedy challenging a court decision is proper only when such decision is "manifestly arbitrary" violates the right to judicial protection.

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[45] I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.).* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, para. 126.

76. The representatives could argue that, according to the case law of the Inter-American Court ever since *Velásquez Rodríguez v. Honduras*, any state authority can violate the rights established in the American Convention by action or omission, and therefore, in light of Article 25 of the Convention, States have the obligation to allow remedies relating to fundamental rights to proceed with regard to human rights violations that may be committed by judicial authorities in the performance of their duties.

77. The representatives could add that in this case the denial of due process to Serafina Conejo Gallo and Adriana Timor was even more clear, since Court No. 7 for the Review of Administrative Decisions refused to examine the case in light of the Constitution and the American Convention, and the authority hearing their petition for a constitutional remedy—which would have been called upon to perform that analysis—refused on the grounds that the case did not involve "manifest arbitrariness." As such, no judicial authority at the national level ruled on the merits of the claim with regard to private life and discrimination.

78. For its part, the State could argue that the case did not involve an absolute restriction of petitions for a constitutional remedy against a court decision; rather, for such petitions to be admissible, it is necessary to allege "manifest arbitrariness," which was not sufficiently argued by the alleged victims. This lack of argument under the parameters established by domestic law for the admissibility of a petition is not attributable to the State. The State can assert that the reason for this restriction is clearly that the acts of the judiciary demand greater protection on account of the principles of legal certainty and judicial independence.

The single-instance administrative appeal proceedings, in light of Article 8.2(h) of the Convention – Violation not found by the IACHR in its report on the merits

79. The bodies of the inter-American system have consistently held that the purpose of Article 8.2(h) of the Convention is "to protect the right of defense by creating a remedy to prevent a flawed ruling, containing errors unduly prejudicial to a person's interests, from becoming final."[46] The decisions of the Court and the Commission have discussed extensively the scope of review and other aspects not relevant to the analysis of the hypothetical case.

80. It is important to recall that in the hypothetical case the Inter-American Commission did not find a violation of this provision, because the proceedings

[46] I/A Court H.R., *Case of Herrera-Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 158.

were not punitive in nature. In fact, the cases in which the inter-American system has examined Article 8.2(h) of the Convention are related to criminal cases or—at the very least—disciplinary or administrative sanctions proceedings. All of the cases have involved the punitive power of the State.

81. Accordingly, the jurisprudence of the inter-American system favors the State of Elizabetia on this issue.

82. Nevertheless, there are two points that the victims' representatives could raise in order to insist upon the application of Article 8.2(h) in the exercise of their autonomy to assert before the Court rights other than those asserted by the IACHR. One point is related to the general case law of the Court that indicates, without further specificity or distinction, that "Although Article 8 of the American Convention is entitled 'Judicial Guarantees' ['Right to a Fair Trial' in the English text], its application is not strictly limited to judicial remedies; rather, it applies to the requirements that must be observed at all stages of the proceedings in order for a person to be able to defend himself adequately in the face of any kind of act of the State that affects his rights."[47] The second point is related to the interests at stake and the nature of the proceeding to be reviewed, especially when the opportunity to file petitions for a constitutional remedy against the judgment in single-instance court proceedings is so limited.

83. Specifically, in the case of *Barbani Duarte et al. v. Uruguay,* the Inter-American Court examined its prior case law on the different guarantees that apply to different types of proceedings, and proposed a sort of case-by-case analysis of the guarantees that are necessary for the remedy or proceeding in question to reach its intended outcome.[48] This general, case-by-case approach could be used by the representatives to their advantage.

B. Preliminary issues

B.1. The requirement to exhaust domestic remedies; B.2. Analysis of admissibility in light of the current situation at the time of the admissibility report; B.3. Inclusion in the report on the merits of provisions of the Convention not included in the admissibility report.

B.1. The requirement to exhaust domestic remedies and the unconstitutionality action

84. To summarize in general terms, the admissibility reports of the Inter-American Commission include the following reference to the exhaustion of domestic

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47 I/A Court H.R., *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71, para. 69, citing 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, para. 27.

48 I/A Court H.R. *Case of Barbani Duarte et al v. Uruguay*; Judgement of October 13, 2011; Series C No. 234.

remedies:

> Article 46.1.a of the American Convention provides that in order for petitions alleging violation of the American Convention to be admissible, the available remedies under domestic law must first be pursued and exhausted in accordance with generally recognized principles of international law. This requirement is recognized by the Commission as a procedural requirement in order to allow domestic authorities to hear about the alleged violation of a right protected under the provisions of the American Convention and, if appropriate, to provide a solution before it is heard in an international venue.
>
> The requirement of prior exhaustion is applicable when the national system affords appropriate and effective remedies to redress the alleged human rights violation. Here, Article 46.2 establishes that the requirement does not apply when domestic legislation does not afford due process of law for the protection of the right in question; if the alleged victim was denied access to the remedies available under domestic law; or if there has been unwarranted delay in rendering a judgment on those remedies.

85. For its part, in ruling on States' objections alleging the failure to exhaust domestic remedies, the Inter-American Court has held repeatedly that it is a defense available to the State, but that the proper time for it to be raised is during the admissibility phase before the IACHR.[49] Particularly relevant to this case, the Court has specified the following content of that defense, which includes the States' burden not only to name the remedies that have not yet been exhausted but also to provide the basis of their effectiveness with respect to the alleged violation:

> The Court reaffirms that, pursuant to its case law[50] and international case law,[51] it is not up to the Court or the Commission to identify *sua sponte* the domestic remedies to be exhausted; rather, it is incumbent upon the State to timely specify the domestic remedies that must be exhausted and their effectiveness. In this case, the State should have indicated sufficiently clearly to the Commission, during the admissibility phase, its arguments with respect to the

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49 I/A Court H.R. *Case of Chocrón v. Venezuela*; Judgement of July 1, 2011; Series C No. 227, par. 21, citing *Case of Velásquez-Rodríguez v. Honduras.* Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 88; *Case of Heliodoro-Portugal v. Panama.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186, para. 14, & *Case of Bayarri v. Argentina.* Preliminary Objection, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C No. 187, para. 16.

50 I/A Court H.R. *Case of Chocrón v. Venezuela*; Judgement of July 1, 2011; Series C No. 227, par. 23; *Case of Velásquez-Rodríguez v. Honduras.* Preliminary Objections. *supra* nota 14, para. 88; *Case of Ríos et al. v. Venezuela.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 194, para. 37 & *Case of Perozo et al. v. Venezuela, supra* nota 13, para. 42.

51 I/A Court H.R. *Case of Chocrón v. Venezuela*; Judgement of July 1, 2011; Series C No. 227, par. 23; *Case of Reverón-Trujillo v. Venezuela, supra* nota 12, citing ECHR, *Case of Deweer v. Belgium*, Judgment of 27 February 1980, Series A no. 35, para. 26; ECHR, *Case of Foti and others v. Italy*, Judgment of 10 December 1982, Series A no. 56, para. 48, & ECHR, *Case of De Jong, Baljet and van den Brink v. the Netherlands*, Judgment of 22 May 1984, Series A no. 77, para. 36.

> remedies that, in its opinion, had not yet been exhausted. On this point, the Court reiterates that it is not for the international bodies to correct any want of precision in the State's arguments.[52]

86. The hypothetical case raises three main legal issues pertaining to the exhaustion of domestic remedies. The first issue relates to the suitability and effectiveness of the abstract unconstitutionality action; the second one concerns the accessibility and discretional nature of the unconstitutionality action in Elizabetia, given that it depends upon the Office of the Human Rights Prosecutor; and the third issue is related to the reasonableness of the requirement that the remedy be exhausted under the circumstances of the specific case. We discuss below the ways in which the parties might argue their positions on the exhaustion of domestic remedies with these legal questions in mind.

Possible arguments of the representatives

87. In general terms, the representatives could assert that the unconstitutionality action is a general and abstract mechanism that is not designed to resolve specific human rights violations. They could further maintain that the remedy is not suitable because the instant case is not limited to the validity of an allegedly discriminatory provision; rather, it also concerns several administrative and judicial acts that go beyond that issue of validity.

88. Nevertheless, the two strongest arguments the representatives of the alleged victims could make are related to accessibility and the discretional nature of the unconstitutionality action and the reasonableness of requiring that it be filed under the circumstances of this specific case.

89. Regarding the issue of accessibility, the representatives can argue that the requirement of obtaining the approval of the Office of the Human Rights Prosecutor prior to filing the unconstitutionality action seriously limits its accessibility.

90. In support of its position, the representatives can cite the Court's consistent opinion that any remedies to be exhausted must in fact be available to the alleged victims.[53] In terms of accessibility, the Inter-American Commission has indicated that, "If the domestic remedy is designed in such a way that its exercise is in effect beyond the reach of the alleged victim then there is certainly

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[52] I/A Court H.R. *Case of Chocrón v. Venezuela*; Judgement of July 1, 2011; Series C No. 227, par. 23; *Case of Reverón-Trujillo v. Venezuela, supra* nota 12, citing ECHR, *Case of Bozano v. France*, Judgment of 18 December 1986, Series A no. 111, para. 46.

[53] I/A Court H.R., *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights).* Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 17.

no obligation to exhaust it in order resolve the legal situation."[54] More specifically, with respect to constitutional challenges that require the gathering of signatures or a "favorable opinion from the Ombudsman of the People," the Commission has maintained that such requirements are "excessive."[55]

91. With regard to the discretional nature of the remedy, the representatives could argue that including the "approval" of a government authority as a requirement for the filing of the remedy turns it into a remedy that depends upon the particular opinion of the Office of the Human Rights Prosecutor.

92. There are several IACHR decisions that support this potential argument of the petitioners *mutatis mutandis.* In cases in which the admissibility of remedies that the State says should be exhausted is discretional in nature, the IACHR has indicated that it is not necessary to exhaust them.[56]

93. As for the reasonableness of the requirement of filing the unconstitutionality action, the representatives can argue that even if this action is considered suitable and the requirements are not excessive, it is still unreasonable to require that it be exhausted after the petitioners have availed themselves of administrative proceedings, court proceedings for the review of administrative actions, and the petition for a constitutional remedy.

94. The IACHR has repeatedly maintained that the requirement of exhaustion of domestic remedies does not mean that "that alleged victims have to exhaust all remedies available. (…) If the alleged victim raised the issue by any lawful and appropriate alternative under the domestic [legal] system and the State had the opportunity to remedy the matter within its jurisdiction, then the purpose of the international rule has thus been served."[57]

Possible arguments of the State

95. With regard to the procedural requirements for the objection to be proper, the State can argue that it raised the objection of failure to exhaust domestic remedies in a timely manner during the admissibility phase before the Inter-American Commission.

96. In more substantive terms regarding the admissibility of the objection, the State

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54 IACHR, Report No. 8/07. Petition 1425-04. Admissibility. Hugo Quintana Coello, et al. (Justices of the Supreme Court). Ecuador. February 27, 2007, para. 28.

55 IACHR, Report No. 8/07. Petition 1425-04. Admissibility. Hugo Quintana Coello, et al. (Justices of the Supreme Court). Ecuador. February 27, 2007, para. 29.

56 IACHR, Report No. 68/08. Petition 681-00. Admissibility. Guillermo Patricio Lynn. Argentina. October 16, 2008, para. 41.

57 See, e.g., IACHR, Report No. 57/03. Petition 12.337. Marcela Andrea Valdés Díaz (Chile). October 10, 2003, para. 40.

could argue that the remedies that must be exhausted are determined on a case-by-case basis, according to the suitability of the remedy to potentially resolve the alleged violation.[58]

97. Based on this general approach, the State could argue that there are certain circumstances under which the unconstitutionality action may be considered suitable—specifically, those cases in which the alleged violation of the American Convention stems from the operation of a provision that is alleged to be incompatible with the Convention. The State could argue that the central issue in this debate is the provision of the Civil Code that prevents the administrative and judicial authorities from allowing marriage between same-sex couples. The State could thus assert that the remedy to be exhausted in the instant case was the unconstitutionality action challenging Article 396 of the Code.

98. The State could cite IACHR precedent that supports this position. For example, in a case that challenged the validity of a provision that allowed criminal prosecution for defamation offenses, the Commission maintained that:

> The petitioners have argued that they exhausted the constitutional challenge of the provisions at Articles 172 and 175 of the Criminal Code, and the State indicates only that it was rejected by the Supreme Court. In this case, the adequate remedy is the constitutional challenge, and, accordingly, the petitioners have met the requirement of prior exhaustion of domestic remedies.[59]

99. Accordingly, the State could assert that there was "improper exhaustion" on the part of the representatives. Even though they had the suitable means to challenge the act that gave rise to the alleged violation (the operation of the provision), they availed themselves of administrative and judicial proceedings that were ineffective because the respective authorities were subject to the "rule of law."

100. The State could additionally argue that the requirement of obtaining the approval of the Office of the Human Rights Prosecutor was not in itself excessive. On one hand, the State could maintain that there is no practice of denial by the Prosecutor's Office and that the representatives have not proved otherwise; on the other hand, in the above-cited case in which the IACHR considered that it was an excessive requirement, there was also the requirement of gathering a certain number of signatures—something that is not required under Elizabetian law.

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[58] IACHR, Report No. 23/07. Petition 435/06, Eduardo Landaeta Mejías (Venezuela). March 9, 2007, para. 43.

[59] IACHR, Report No. 71/02, Petition 12.360. Admissibility. Santander Tristán Donoso. Panama. October 24, 2002, para. 22.

B.2. Admissibility analysis in light of the situation at the time of the admissibility report

101. As stated in the facts of the case, the petition against the State of Elizabetia, numbered 600-12 by the Commission, was submitted on February 1, 2012, while the petition for a constitutional remedy against the August 5, 2011 decision of Court No. 7 for the Review of Administrative Decisions was still pending. The decision on the petition for a constitutional remedy was issued days later, on February 18, 2011, within the three-month period provided under Elizabetian law for "especially complex" cases. Admissibility Report 179-12 was issued on September 22, 2012.

102. This procedural issue that has been included in the case raises a debate that has come up recently before the Inter-American Court. It is related to the admissibility decision of the Inter-American Commission in those cases in which the procedural status of compliance with the admissibility requirements, including the exhaustion of domestic remedies, changes between the date of the initial submission of the petition and the date on which the Commission issues its admissibility report. To address this situation, the Commission has historically used the following formulation, which it has used repeatedly in many cases:

> In situations where evolution of the facts initially presented at the domestic level implies a change in the compliance or noncompliance with admissibility requirements, the Commission has held that admissibility requirements of a petition must be examined at the moment at which the Commission [rules] on its admissibility.[60]

Possible arguments of the representatives

103. The hypothetical case indicates that the representatives invoked the argument presented by the Commission before the Inter-American Court and assumed it as their own position. It is therefore important that the arguments made by the representatives take account of this point and are tied to those that the Commission could have made in institutional terms.

104. The representatives could underscore the autonomy and independence of the Commission in its performance of the duties assigned to it by the Convention. As such, they could argue that it is primarily incumbent upon the Commission to rule on admissibility issues and that the manner in which the IACHR conducts its proceedings should be reviewed only under exceptional circumstances related to

[60] IACHR, Report No. 2/08. Petition 506-05. José Rodríguez Dañín. Bolivia. March 6, 2008, para. 56, citing IACHR, Report No. 20/05. Petition 714/00 (Rafael Correa Díaz). February 25, 2005. Peru, para. 32; IACHR, Report No. 25/04, Case 12.361 (Ana Victoria Sánchez Villalobos et al.), March 11, 2004. Costa Rica, para. 45; IACHR, Report No. 52/00. Cases 11.830 & 12.038. (Dismissed Congressional Employees), June 15, 2001, Peru, para. 21.

a serious infringement of the State's right of defense. The representatives could emphasize that the burden of arguing how a specific procedure or practice of the Commission infringes upon the State's right of defense necessarily falls to the State.

105. The representatives could support this position by citing several cases in which the Court has held that:

> (…) the Inter-American Commission has autonomy and independence in the exercise of its mandate as established by the American Convention and, in particular, in the exercise of its functions in the proceedings relating to the processing of individual petitions established in Articles 44 to 51 of the Convention. Nevertheless, in matters that it is considering, the Court is empowered to control the legality of the Commission's actions.[61] This does not necessarily entail [reviewing] the proceedings carried out before the latter, unless one of the parties argues, with justification, that there has been a grave error that violates its right of defense.[62]

106. Accordingly, the representatives could argue that the State of Elizabetia has not properly specified the manner in which the Commission's practice and its decision in Admissibility Report 179/12 adversely affected its right of defense, especially when it follows from the Rules of Procedure of the IACHR that the admissibility process and all of the information submitted by the petitioners can be contested by the State.

107. The representatives could further indicate that the Commission's practice of rendering a decision based on the current situation at the time of the admissibility report and not at the time of the initial submission is completely justified and consistent with the design of the petition and case system. On this point, they can assert that one of the reasons for this practice of the IACHR is that the Convention contains grounds for exemption from the exhaustion requirement that include, in particular, undue delay. The IACHR receives a high number of petitions in which a domestic case is pending and excessive delay is alleged. In that scenario, it is entirely possible for decisions to be made at the domestic level during the course of the proceedings before the Commission, and for the petitioners to provide updated information on their cases.

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61 I/A Court H.R., *Control of Legality in the Practice of Authorities of the Inter-American Commission of Human Rights (Arts. 41 & 44 to 51 of the American Convention on Human Rights).* Advisory Opinion OC-19/05 of November 28, 2005. Series A No. 19, paras. 1 & 3 of the Opinion; *Case of Grande v. Argentina.* Preliminary Objections and Merits. Judgment of August 31, 2011. Series C No. 231, para. 45; *Case of Gonzalez-Medina and relatives v. Dominican Republic*, para. 28.

62 *Case of Castañeda-Gutman v. Mexico.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, para. 42; *Case of Gonzalez-Medina and relatives v. Dominican Republic*, para. 28.

108. The petitioners could add that so long as the State has the ability to defend itself with regard to those updates, there is no reason to restrict or interfere with the autonomy of the IACHR to issue its admissibility decision.

Possible arguments of the State

109. In the hypothetical case, the State of Elizabetia has argued that this approach reflects an erroneous analysis on the part of the Inter-American Commission, and suggests that it should be corrected by Inter-American Court.

110. The State could base this argument on the fact that Article 46 of the American Convention clearly establishes that all domestic remedies must have been pursued and exhausted before a petition can be submitted. The State could suggest an explanatory interpretation of this provision and indicate that exhaustion is the prerequisite for "submission of the petition" and not for the "admissibility decision." One of the Court's judges has addressed this issue in a separate opinion,[63] which could be cited in the argument not as case law, but as legal scholarship.

111. The State could indicate that the American Convention gives the Commission a mandate to decide whether domestic remedies have been exhausted, or whether the exceptions to this requirement pursuant to Article 46.2 of the Convention are applicable, based on the current situation at the time the petition is submitted.

112. The State could cite the Inter-American Court's decisions in the cases of *Grande v. Argentina* and *Díaz Peña v. Venezuela,* in which it was more amenable to performing a sort of review of the proceedings before the Inter-American Commission.

113. Specifically, the State could highlight the following paragraph from *Díaz Peña:*

> The Commission considered that domestic remedies had been exhausted bearing in mind that different appeals had been filed over the period from March 24, 2006, to May 11, 2007 (*supra* para. 119(c)). Thus, it referred to appeals filed over a period that began more than five months after the initial petition was lodged before the Commission and culminated one year and seven months after this. The Court finds that, in these circumstances, it cannot be understood that the requirement of prior exhaustion of domestic remedies established in Article 46(1)(a) of the American Convention has been satisfied. Furthermore, the Court observes that, when the initial petition was forwarded to the State on February 23, 2007, the decision of May 11, 2007, that

[63] I/A Court H.R. *Case of Díaz Peña v. Venezuela*; Judgement of June 26, 2012; Series C No. 244, par. 21 Separate Opinion of Judge Eduardo Vio Grossi.

> supposedly exhausted domestic remedies had not yet been issued.[64] (emphasis added).

114. This decision has been criticized and is ambiguous as to whether the date to be considered is the date of the initial petition or the date on which it is "forwarded" to the State. However, it is certainly a judgment that the State of Elizabetia could use in its defense.

115. Finally, the State could argue that, although it has opportunities to respond to the information submitted by the petitioners, the States design their defense regarding the admissibility requirements based on the content of the initial petition; therefore, it is unacceptable for the States to have to modify their defense strategy every time the petitioners change their approach during the admissibility phase.

B.3. Inclusion in the report on the merits of provisions of the Convention that were not included in the admissibility report

116. The hypothetical case states that in Admissibility Report 179/12, the Commission found that "the facts alleged could amount to possible violations of Articles 11, 17, 24 8, and 25, in conjunction with Article 1.1 of the Convention." In its report on the merits, the Commission found a violation of Article 2 of the American Convention, which establishes the duty to enact provisions of domestic law. The State was of the opinion that this was a violation of its right of defense. This argument of the State of Elizabetia raises a debate on the scope of the Commission's analysis during the admissibility phase of what "amounts to" a violation, its power to add other provisions in the report on the merits, and the application of the principle of *iura novit curia,* versus the State's right of defense. This issue was examined recently in detail by the Inter-American Court in the case of *Furlan and Family v. Argentina*, which, in principle, does not lend support to this preliminary objection. Nevertheless, as indicated below, the State of Elizabetia could have reasonable arguments in its favor. The main points of the Court's judgment are as follows:

117. With regard to the State's right of defense, the Court recalled the minimum guarantees that must inform the individual petition system: (a) those related to conditions for the admissibility of the petitions (Articles 44 to 46 of the Convention);[65] and (b) those relating to the adversarial principles (Article 48 of the Convention)[66] and procedural [fairness]. It is also necessary to mention here the principle of legal certainty (Article 38 of the Commission's Rules of

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64 I/A Court H.R. *Case of Díaz Peña v. Venezuela*; Judgement of June 26, 2012; Series C No. 244, par. 123.

65 *Case of Velásquez-Rodríguez v. Honduras.* Preliminary Objections, para. 85; *Case of Grande v. Argentina.* Preliminary Objections and Merits. Judgment of August 31, 2011. Series C No. 231, para. 56.

66 I/A Court H.R., Advisory Opinion Oc-19/05, Opinion of November 28, 2005.

Procedure)."[67] Nevertheless, if a State alleges that there was a serious error that adversely affected these assumptions, "it must effectively demonstrate that harm." In the words of the Court, "a complaint or discrepancy [of opinion] related to the Inter-American Commission's actions is not sufficient."[68]

118. As for the specific issue in debate, that is, "the inclusion of new rights in the report on the merits that were not specified previously in the Commission's admissibility report," the Court underscored that neither the American Convention nor the Rules of Procedure of the Inter-American Commission contain any provision indicating that all of the rights allegedly violated must be included in the admissibility report. The Court specified that:

> The rights specified in the Report on Admissibility are the result of a preliminary assessment of the petition in progress, hence the possibility of including other rights or articles allegedly violated at subsequent stages of the proceedings is not limited, provided that the State's right to defend itself is protected in the factual background of the case under consideration.

119. The Court further emphasized that the principle of *iura novit curia* allows the Court to examine a possible violation of the provisions of the Convention that have not been alleged in the briefs submitted by the parties, provided that they are given the opportunity to express their respective positions in relation to the supporting facts.[69]

120. The State of Elizabetia could use this last point to its advantage, by indicating that the Commission was aware from the very beginning of this case of the existence of the provisions that were allegedly incompatible with the Convention. The State could argue that if the IACHR did not include Article 2 of the American Convention, even though it was clear these provisions existed, it sent a clear message to the State that that article of the Convention would not be examined at the merits phase. The State can maintain that the Commission's exclusion of the provision led it to design its defense strategy without knowing that the IACHR would, in examining the merits of the case, perform an analysis completely different from the one that was outlined at the admissibility phase—that is, an analysis of the compatibility of a provision with the Convention.

C. Issues connected to the provisional measures

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[67] I/A Court H.R., Advisory Opinion Oc-19/05, Opinion of November 28, 2005, par. 27.

[68] *Case of the Saramaka People. v. Suriname.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, para. 32; *Case of Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No. 219, para. 27.

[69] I/A Court H.R. *Case of Velásquez Rodríguez v. Honduras*; Judgement of July 29, 1988; Series C No. 4, para. 163.

C.1. Definitions and framework. C.2. Arguments concerning the request for provisional measures.

C.1. Definitions and framework

121. The mechanism of provisional measures is enshrined in Article 63.2 of the American Convention, and is designed to ensure a rapid response in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons.

122. The mechanism is further developed in Article 27 of the Rules of Court; the Court has said that its decisions concerning provisional measures are binding upon States by virtue of the basic principle of international law of State responsibility, pursuant to which all States must comply their obligations in good faith (*pacta sunt servanda*).[70]

123. The Court has stated that in order to adopt provisional measures, the three conditions of "extreme gravity", "urgency" and "irreparable harm" must concur in the situation under consideration[71]. According to the Tribunal "these three conditions must coexist and be present in any situation in which the Court's intervention is requested".[72]

124. Albeit not identical in all of its elements, the Inter-American Commission has a similar faculty by virtue of Article 106 of the Charter and Article 25 of its Rules of Procedure. Very recently, through an amendment of its Rules of Procedure, the Commission referred to the definitions of the elements of gravity, urgency and imminence in the following manner:

> "serious situation" refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the inter-American system;
>
> "urgent situation" refers to risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and
>
> "irreparable harm" refers to injury to rights that, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.

125. These definitions could be read in conjunction of the statement of the Court in relation to the gravity which, in words of the Court, For the purposes of adopting

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70 *Millacura Llaipen Matter,* Provisional Measures concerning Peru. Order of the President of the IACtHR of December 6, 2012, third consideration.

71 *James et al Matter,* Provisional Measures concerning Trinidad and Tobago. Order of the Corto f June 14, 1988, second consideration.

72 *Case of Carpio Nicolle et al.* Provisional Measures concerning Guatemala. Order of the Inter-American Court of July 6, 2009, fourteenth consideration.

provisional measures, the Convention requires that this be extreme, in other words, at its most intense or highest level.[73]

126. The Court may consider the group of political, historic, cultural factors, or circumstances of any other nature in which the situation is inscribed, in order to determine whether these affect a possible beneficiary or create for her a situation of vulnerability in a particular moment.[74]

127. The Court has also stated that provisional measures may have one of two objectives, one that is precautionary and one that is protective.

128. The precautionary objective of the measures aims at preserving the alleged rights in controversy until such time as the organs of the System have had the possibility to issue their findings and, if applicable, the respective order for reparations.

129. The protective aim is to protect all human rights from irreparable harm.

130. The statement of the Court that it cannot consider the merits of any relevant argument that is not exclusively related to the extreme seriousness, urgency and risk of irreparable harm is particularly relevant. In matters in which the Court concludes that it may not study prima facie conditions (*fumus boni iuris*) without issuing a conclusion on the merits of the case, it will not adopt provisional measures, as it would grant the applicant reason without the respective process[75].

C.2. Arguments surrounding the request for provisional measures

131. The situation presented in the request for provisional measures is deliberately ambiguous from a moral perspective.

132. The State will possibly argue that, should Serafina be allowed to give informed consent, this will constitute a conclusion on the merits of the case, because it will rest on the acceptance that she is "a spouse or relative" in the terms of the Elizabetan regulations. This argument is evidently supported by the fact that the legislation grants certain attributions to persons within a marriage or family in as forms of protection of their union; in the absence of such protection there are

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73 *Matter of Martinez Martinez et al.* Provisional Measures regarding the United Mexican States. Order of the Inter-American Court of Human Rights of March 1, 2012, sixth consideration.

74 *Matter of Castro Rodriguez.* Provisional Measures regarding the United Mexican States. Order of the Inter-American Court of Human Rights of February 13, 2013, tenth consideration.

75 *Matter of Castañeda Gutman.* Request for Precautionary Measures concerning the United Mexican States. Order of the Inter-American Court of Human Rights of November 25, 2005, fifth and seventh considerations.

no legal grounds for Serafina to provide informed consent ant the Court would be barred from ordering Elizabetia to accept her statement in light of the *Castaneda Gutman* precedent (vide par. 130, *supra*).

133. The State may also argue that the Court must assess the fact, on record, that Serafina would intend to provide informed consent to a high-risk operation, that only 15% of patients survive. The State could take the stance that the outcome of death would necessarily render the damage "irreparable" under the terms of Article 63.2 of the Convention.

134. Conversely, Serafina's argument may rest on the fact that she is the closest person to Adriana and in actual possession of relevant information as to her will in this situation. The legal ambivalence in the situation derives from the fact that the acceptance of Serafina's consent would immediately entail the type of legal protection that, under the Elizabetan regulations, is directed at spouses or family members.

135. Further, Serafina may have a different argument in relation to the notion of risk of irreparable damage, connected to the fact that survival with the almost certainty of suffering anterograde amnesia would be an irreversible situation and therefore not susceptible to reparation, restoration or adequate compensation.

Washington DC
March 17, 2013