

over an extended period of time with the purpose of misleading a Trial Chamber. If this does not warrant the highest sentences provided for in Article 70(3) of the ICC Statute, it is difficult to imagine what would.

Notwithstanding the sentencing issue, the judgments against Jean-Pierre Bemba, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido constitute a clear signal by the ICC about the intolerability of witness interference. They provide for a thorough review of the evidence in the case and a careful analysis of a large number of related procedural and evidentiary issues. In this manner, the ICC deals forcefully with an extreme form of violations against the administration of justice.

JONAS NILSSON  
*The Hague, The Netherlands*  
 doi:10.1017/ajil.2018.63

*Inter-American Court of Human Rights—principle of individual autonomy—right to identity—rectification of gender identity information—protection of different models of the family—evolutionary interpretation—protection of same-sex couples including same-sex marriage*

GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION OF SAME SEX COUPLES. STATE OBLIGATIONS CONCERNING CHANGE OF NAME, GENDER IDENTITY, AND RIGHTS DERIVED FROM A RELATIONSHIP BETWEEN SAME-SEX COUPLES (INTERPRETATION AND SCOPE OF ARTICLES 1(1), 3, 7, 11(2), 13, 17, 18, AND 24, IN RELATION TO ARTICLE 1, OF THE AMERICAN CONVENTION ON HUMAN RIGHTS). Advisory Opinion OC-24/17. Series A, No. 24. At [http://www.corteidh.or.cr/docs/opiniones/seriea\\_24\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf). Inter-American Court of Human Rights, November 24, 2017.

In its advisory opinion, OC-24/17 (Advisory Opinion), the Inter-American Court of Human Rights (IACtHR or Court) addressed globally debated issues concerning gender identity, same-sex relationships, and the rights of LGBTI persons. As discussed below, the Court reached conclusions more progressive than those of its European counterpart, due to its finding that the principle of individual autonomy is embedded in the foundations of human rights law and permeates individual self-determination, the free development of one's personality, and the protection of different models of the family. In line with an apparent trend in the Court's case law, the Advisory Opinion rejects the idea that domestic societies are sometimes entitled, by virtue of a margin of appreciation, to choose among different possibilities for protecting human rights, provided that certain international legal limits are observed—an idea addressed in the dissenting opinion.

Costa Rica requested the Advisory Opinion in May 2016.<sup>1</sup> After informing members of the Organization of American States (OAS) and OAS bodies that they could present observations in response to the request, the Court invited civil society, international organizations,

<sup>1</sup> After publication of the Advisory Opinion, Costa Rican president Luis Guillermo Solís welcomed the decision, stressing his championing of rights for same-sex couples during his election campaign. Costa Rican Government Press Release, *Somos un Estado Respetuoso del Derecho Internacional* (Jan. 10, 2018).

academics, and others to submit written observations on the request, and afterwards, to participate in a public hearing. Numerous actors presented their views.

Costa Rica posed five questions (para. 3), which the Court summarized as raising two issues—namely, “the right to gender identity and, in particular, the procedure to process name change requests based on gender identity”; and “the patrimonial rights of same-sex couples” (para. 30). The Court examined the substance of those issues after exploring its competence and applicable general principles.

The IACtHR began by examining its jurisdiction to issue the opinion and the admissibility of the state’s request. The Court indicated that it was empowered to issue the Advisory Opinion, despite the fact that a petition raising some of the same issues was pending before the Inter-American Commission on Human Rights, because “the mere fact that petitions related to the subject matter of the request exist before the Commission is not sufficient for the Court to abstain” (paras. 23–24). The Court recalled that it is not obliged to respond to requests of advisory opinions that are only about “abstract speculations” (para. 20). But it considered that a response to the questions, far from being merely speculative, was of “great importance for the countries of the region, because it will identify the obligations of the States in relation to the rights of LGBTI persons” (para. 21), which the Court later emphasized have been affected by the “structural discrimination, stigmatization, diverse types of violence, and violations of [the] fundamental rights” experienced by LGBTI persons (paras. 33–55). The IACtHR concluded the discussion of its competence by pointing out that the “different organs of the State must carry out the corresponding conventionality control,”<sup>2</sup> and that the “advisory jurisdiction” can contribute “in a preventive manner” to promoting human rights and “avoid[ing] possible” violations (paras. 26–27).

In Section V, the IACtHR set out the applicable interpretative criteria, including, in addition to Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the “specificity of human rights treaties” (para. 56), according to which their interpretation “must be based on the values that the . . . system seeks to safeguard” (*id.*); the *pro personae* principle (protection “most favorable” to the individual (para. 67)); and “evolutive” interpretation (paras. 57–58). Regarding systemic interpretation, the Court said that it considers the entire *corpus juris* of international human rights law, including soft law, which provides “guidance on the interpretation” and “greater precision,” as well as “its own jurisprudence” (para. 60).

The IACtHR next considered the “right to equality and non-discrimination of LGBTI persons” in Section VI. The Court began by reiterating its position, originally asserted in advisory opinion OC-18/03,<sup>3</sup> that “the fundamental principle of equality and non-discrimination” is *ius cogens* and “permeates every legal system” (para. 61). The Court argued that any discriminatory treatment “with regard to the exercise of any of the rights guaranteed in the Convention is, *per se*, incompatible” with the aforementioned principle and that differential treatments are discriminatory if they lack a legitimate purpose, are unnecessary, or are disproportionate (para. 63). Furthermore, the IACtHR recalled that Article 24 of the American Convention on Human Rights (ACHR) requires equal protection by domestic law

<sup>2</sup> Such doctrine basically holds that all state authorities are obliged to take into account the ACHR and the case law of the IACtHR when they exercise their functions. Eduardo Ferrer MacGregor, *Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL UNBOUND 93 (2015).

<sup>3</sup> Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, paras. 100–01, 110 (Sept. 17, 2003).

(para. 64) and that states are obliged “to adopt positive measures to reverse or to change discriminatory situations existing within their” societies (para. 65). The Court then discussed the categories and groups protected from discrimination, which are related to “permanent personal traits” (para. 66) central to an individual’s identity. The Court added that those “traditionally marginalized, excluded or subordinated” are also protected, and that it is prohibited to resort to “irrelevant criteria for the equitable distribution” of rights and benefits (*id.*). According to the IACtHR, “sexual orientation and gender identity are categories protected by the Convention,” and states thus have an obligation to eliminate discriminatory practices based on actual or perceived “sexual orientation and/or gender identity” (paras. 68, 74, 78–79).

The Court then, in Section VII, explored whether states are obligated to recognize name and other changes based on an individual’s self-perceived gender identity. At the outset, the IACtHR asserted that “the protection of dignity” is “based on the principle of individual autonomy and on the idea that all persons must be treated as equals, inasmuch as they are ends in themselves in accordance with their intentions, aspirations and life decisions” (para. 86). In addition, the sphere of private life is “shielded and exempt from arbitrary or abusive interference by third parties or by public authorities” (paras. 85–86). Gender and sexual identity are also tied to the “concept of liberty” (para. 93).

Flowing from dignity and the principle of autonomy, the Court inferred the right to individual self-determination, the right to “to freely choose the options and circumstances that give meaning to [one’s] existence” (para. 88), and the “right to identity [which] arises from recognition of the free development of the personality and the protection of the right to privacy” (para. 89).

For the Court, this right to identity is not limited to a person’s name (para. 90). It further encompasses a recognition that sex, sexual orientation, and gender defined are “essential for [one’s] personality” (para. 104), and that the expression of individuality (para. 106) is “part of the constructed identity that is the result of the free and autonomous decision of each person” and not necessarily determined by genitalia (para. 94). For the IACtHR, self-perceived gender identity and its expression cannot be subject to restrictions based on social disagreement (para. 95), and appropriate “recognition by the State” of self-perceived identity is “critical to ensuring” the full enjoyment of human rights (para. 98). Thus, to ensure alignment with self-defined identity (para. 115) and protect from “arbitrary or unlawful interference with one’s privacy” (para. 109), individuals are entitled to have a name change, image rectification, and correction of sex or gender appear in public records and identity documents (paras. 116, 122). According to the Court, the procedures to achieve these changes must be based exclusively on the free and informed consent of the applicant (para. 127), and cannot be conditioned on requiring medical certificates, psychological appraisals, surgeries, or treatments (paras. 128–30, 145, 148). Furthermore, such procedures must “settle the matter as soon as possible” (para. 142), and, if possible, be cost-free; in addition, the respective corrections or amendments must be confidential to protect against “undesired publicity” and vulnerability or obstacles in the exercise of rights (para. 135).<sup>4</sup>

<sup>4</sup> Regarding children, the Court urged considering maturity and capacity to form personal views (paras. 154–55).

Although states are, in principle, free to determine “the most appropriate procedure to comply with the” previous requirements (para. 159), administrative or notarial procedures are preferred because judicial proceedings are often lengthy and impose excessive constraints on applicants (paras. 159–60). Whatever procedure a state chooses, it “may only be of a declarative nature, because it should merely verify” the individual’s free will (para. 160). Turning to the Costa Rican statute, the IACtHR recalled that it is not empowered to determine if domestic law is “applied correctly,” but only if it conforms to international standards (para. 167). The Court then concluded that the Costa Rican Civil Code would be consistent with the ACHR “only if” it is interpreted as permitting changes that meet the conditions set forth above.

The Court next turned in Section VIII to the protection of same-sex couples, which it analyzed under Articles 11 and 17 of the ACHR, which protect the right to privacy and the rights of the family, respectively. After mentioning that families must be permitted to realize “aspirations of safety, connection, and refuge” (para. 176), the IACtHR concluded that the two provisions neither “include a rigorous and exhaustive definition of what should be understood by ‘family’” nor “refer to a specific narrow concept of family” (para. 174), that the very conceptualization of what a family is has varied over time (para. 177), and that its own case law has recognized protections for “numerous forms” of families (paras. 178–79, 182). The Court considered that the reference to the “right of men and women of marriageable age to marry and to raise a family” in Article 17 “does not necessarily mean . . . that [heterosexual marriage] is the only form of family protected” (para. 182), and that other instruments contain broader wordings on the concept of family models (paras. 185–86). The Court then insisted on an evolutionary interpretation, asserting that whenever generic terms are used, parties must be aware that their meaning is “likely to evolve” (paras. 97, 188).

Based on the above, the IACtHR said that states cannot “give preference to or distinguish one type of family tie over another,” but instead are under an obligation to recognize and protect all families (para. 191), and that the protection of same-sex couples must go “beyond mere patrimonial rights issues” (para. 198). For the Court, protection of same-sex couples “extends to the rights and obligations established by the domestic laws of each State [that are] applicable to the family relationships of heterosexual couples” (*id.*). The IACtHR then noted progressive developments toward recognition of same-sex marriage or civil unions in some states in the region and argued that differentiated treatment of opposite-sex and same-sex couples

regarding the way in which they can form a family—either by a *de facto* marital union or a civil marriage—[do] not pass the strict test of equality . . . because, in the Court’s opinion, there is no purpose acceptable under the Convention for . . . this distinction

to be necessary or proportionate (para. 220). Among other considerations, procreation does not define conjugal relationships (para. 221), and “philosophical or religious convictions,” however important, “cannot be used as a parameter” of consistency with international standards (para. 223). Lastly, the Court insisted on the principle of human dignity, which derives “from the complete autonomy” to make free choices (para. 225). Notwithstanding these points, the Court admitted that, for states facing difficulties recognizing same-sex marriages, a gradual evolution in good faith is possible (paras. 226–27).

Judge Humberto Antonio Sierra Porto added a concurring opinion to explain why despite a “requirement of law” under the Convention, the absence of domestic laws implementing a particular human right, for example, the recognition of self-identified gender identity, should not bar the enjoyment of that right. In a separate opinion, Judge Eduardo Vio Grossi disagreed in part with the Court’s analysis. After observing that advisory opinions are not binding (para. 12), he argued that international law does not currently require same-sex marriage, finding no evidence of such a requirement in treaty law, general principles, or customary law (with only eight of the thirty-four OAS members regulating same-sex unions) (para. 66). He also questioned the Court’s interpretative methods, arguing that social reality cannot be the basis of evolutionary interpretation of the ACHR, “because, in that case, the said reality would be the interpreter and even exercise the normative function” (para. 93), that the resolutions of international organizations mentioned by the IACtHR are not declaratory of existing international law (para. 68), and that the Court’s case law cannot create new obligations for states (paras. 7, 71). As such, Judge Vio Grossi concluded that states are permitted but not required to regulate same-sex unions, and their decision to do so is a matter within their “internal, domestic or exclusive” jurisdiction or margin of appreciation (paras. 70, 114).

\* \* \* \*

Advisory Opinion OC-24/17, in addition to being a landmark in terms of LGBTI rights, is noteworthy because it goes beyond a decision of the European Court of Human Rights (ECtHR) on same-sex marriage. It is my contention that the IACtHR reached its more progressive conclusions due to two factors: its refusal to embrace the doctrine of the margin of appreciation; and its consideration of autonomy as a pillar of human rights law.

Focusing on the lack of a European consensus on recognition of same-sex relationships, the ECtHR decided in *Schalk and Kopf v. Austria* that, given the “diversity of national regulations” and the social and cultural connotations of marriage, “whether or not to allow same-sex marriage is left to regulation by the national law of” states. Accordingly, the ECtHR did not “substitute its own judgment in place of that of the national authorities.”<sup>5</sup>

There are equally wide disparities in domestic regulation of same-sex unions in the Americas. The IACtHR, however, takes a different approach. Relying on the principles of liberty, autonomy, and self-determination, the Court reasoned, on the one hand, that states cannot prevent the modification of names and other identity documents requested by individuals who consider such changes necessary for their records to conform to their self-identified gender, and on the other hand, that states that do not strive toward full recognition of same-sex marriage are acting in contravention of the ACHR.

The striking difference between the two regional human rights courts is thus the result of different ways of approaching complex cases. Advisory Opinion OC-24/17 confirms the IACtHR’s reluctance to resort to notions of margin of appreciation, instead working on the assumption that there is a single right solution to legal problems involving individual liberties. This approach may be the legacy of the unambiguous violations that the IACtHR examined during its first years, which were related to egregious abuses against life, personal integrity, liberty, due process, and other fundamental rights.

<sup>5</sup> *Schalk and Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409, 429.

The IACtHR's position has implications for multilevel governance, subsidiarity, and allocation of legal authority.<sup>6</sup> The Court conceives of itself as having the final word on human rights issues, even those that have public policy implications. This approach has been contested, and in the recent Costa Rican presidential election at least one candidate endorsed a rejection of the Advisory Opinion.<sup>7</sup> Given the IACtHR's view that a unilateral declaration recognizing its competence is an irrevocable "ironclad clause,"<sup>8</sup> this approach also creates a risk of states withdrawing from the ACHR altogether, as Venezuela and Trinidad and Tobago have done.

Advisory Opinion OC-24/17 reinforces the IACtHR's vision of itself as having a "constitutional" mission to interpret human rights and by doing so guide state conduct, even when exercising its advisory jurisdiction and over states who are not parties to a contentious case. This is confirmed by the Advisory Opinion's reference to the conventionality control doctrine. This approach has the benefit that, if states heed the Court's interpretations, multiple instances of litigation based on similar issues can be avoided and an excessive workload prevented. Yet, from a formal perspective it cannot be ignored that states that are not parties to a contentious case are not bound by the Court's pronouncements, which despite their *de facto* influence in any event lack *stare decisis*.

At the same time, there is a concern that the IACtHR attaches undue weight to non-binding human rights standards than might formally be warranted. For example, Advisory Opinion OC-24/17 makes frequent reference to the Yogyakarta Principles, despite the fact that, as a document drafted by experts, it is neither a treaty nor a source of hard law. Some could thus argue, as the separate opinion did, that the Court circumvents hard law arguments in favor of selectively chosen soft law that supports its interpretive pretensions. To deflect accusations of bias, the Court could have clarified that its invocation of selective national practices and soft law was not central to the rationale of its decision.

On the other hand, the IACtHR's case law reveals how theoretical and philosophical considerations can have a decisive impact on interpretation, the resolution of cases, and the implementation of law, and how legal considerations are often not "pure" or hermetic.<sup>9</sup> In this sense, despite the fact that most resolutions and instruments consider that human dignity is the foundation of human rights,<sup>10</sup> the Court's position, coincident with that of some authors,<sup>11</sup> is that autonomy must also be regarded as a central tenet of their foundation. In addition, the Court resorted to the notion of the free development of an individual's personality, a principle enshrined in Colombian constitutional law,<sup>12</sup> which may have been raised by

<sup>6</sup> JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 72–76 (2009).

<sup>7</sup> David Bolaños Acuña, *Las Ideas de Fabricio Alvarado Sobre la Corte IDH, Puestas a Prueba*, SEMANARIO UNIVERSIDAD (Feb. 3, 2018).

<sup>8</sup> Case of Ivcher Bronstein v. Peru, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54, paras. 36, 51 (Sept. 24, 1999).

<sup>9</sup> JAN KLABBERS, INTERNATIONAL LAW 3 (2017); Iain Scobbie, *Legal Theory as a Source of International Law: Institutional Facts and the Identification of International Law*, in THE OXFORD HANDBOOK OF THE SOURCES OF INTERNATIONAL LAW 493, 496 (Samantha Besson & Jean d'Aspremont eds., 2017); Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AJIL 848, 853 (1983).

<sup>10</sup> GA Res. 41/120, para. 4(b) (Dec. 04, 1986); Schachter, *supra* note 9, at 848.

<sup>11</sup> Michael Goodhart, *Human Rights and Non-state Actors: Theoretical Puzzles*, in NON-STATE ACTORS IN THE HUMAN RIGHTS UNIVERSE 23, 36 (George Andreopoulos, Zehra F. Kabasakal Arat & Peter Juviler eds., 2006).

<sup>12</sup> Colombian Constitutional Court, Judgment T-498/17 (Aug. 3, 2017).

Colombian IACtHR Judge Sierra and that seemed to be a decisive factor in the Advisory Opinion, as revealed by the Court's reliance on the notion of the primacy of free will in the conduct of one's affairs. Furthermore, although not expressly asked about same-sex marriage but only about patrimonial rights for same-sex couples, the Court decided that the latter issue had to be addressed in light of the autonomy considerations it raises.

Also noteworthy was the IACtHR's open invitation for different stakeholders to participate in the process, which could contribute to the perception of the procedural legitimacy<sup>13</sup> of its advisory function. Furthermore, Section IV, which addresses the structural discrimination facing LGBTI persons, could be seen as having the function of sensitizing and facilitating the acceptance of sexual minorities by states and the public. Finally, the Advisory Opinion is embedded in somewhat recent efforts to promote LGBTI rights in the Inter-American human rights system, including the creation of a rapporteurship in the Inter-American Commission on Human Rights, operational since February 2014, and the cases of *Duque v. Colombia* and *Atala Riffo and Daughters v. Chile*, in which the IACtHR protected the rights of surviving partners and paternity rights of LGBTI persons, respectively.<sup>14</sup>

NICOLÁS CARRILLO-SANTARELLI  
*La Sabana University*  
doi:10.1017/ajil.2018.51

<sup>13</sup> THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7, 22–26 (2002).

<sup>14</sup> Case of *Duque v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310 (Feb. 26, 2016); Case of *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).