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REFERENCE: LPO/Written submission Advisory Opinion/I.A.Court H.R./MP

14 February 2017

Excellency,

I write to you with reference to the call for written submissions made by the Inter-American Court of Human Rights in accordance with article 73 (3) of its Rules of Procedure in the framework of the request for an advisory opinion submitted by the State of Costa Rica on 18 May 2016.

I have the honour to transmit herewith a written submission by the Office of the United Nations High Commissioner for Human Rights to the Court.

This written submission is made on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied of the privileges and immunities of the United Nations, including the Office of the United Nations High Commissioner for Human Rights, its officials and experts on missions, pursuant to the Charter of the United Nations and the 1946 Convention on the Privileges and Immunities of the United Nations.

Please accept, Excellency, the assurances of my highest consideration.

A handwritten signature in black ink, appearing to read 'Zeid Ra'ad Al Hussein'.

Zeid Ra'ad Al Hussein  
High Commissioner for Human Rights

**By e-mail and mail:**

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**Inter-American Court of Human Rights**

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**Request for an Advisory Opinion submitted by the State of Costa Rica to the Court on 18  
May 2016**

**\*\*\***

**Written submission**  
**from the**  
**Office of the United Nations High Commissioner for Human Rights<sup>1</sup>**

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<sup>1</sup> This written submission is made on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

## **Introduction**

On 18 May 2016, the State of Costa Rica submitted a request for an advisory opinion to the Inter-American Court of Human Rights (hereinafter “I/A Court H.R.” and “the Court”).<sup>2</sup> The request, made pursuant to Article 64 (1) and (2) of the Convention, inquired about:

- the protection provided by Articles 11(2), 18 and 24 in relation to Article 1 of the American Convention on Human Rights (hereinafter “the Convention”) as regards recognition of a change in a person’s name based on his or her gender identity;
- the compatibility of the practice consisting in applying article 54 of the Civil Code of the Republic of Costa Rica, Law No. 63 of September 28, 1887, to those persons who wish to change their name based on their gender identity, with Articles 11(2), 18 and 24 in relation to Article 1 of the Convention;
- the protection provided by Articles 11(2) and 24 in relation to Article 1 of the Convention to the recognition of patrimonial rights derived from a relationship between persons of the same sex.

In accordance with Article 73 (3) of its Rules of Procedure, the I/A Court H.R. has called for written submissions from interested actors with regard to the subject-matter.<sup>3</sup> The Office of the United Nations High Commissioner for Human Rights (hereinafter “OHCHR”) is honored to submit this written contribution within the framework of the long-standing cooperation with the Inter-American System for the protection of human rights. This contribution provides an overview of international human rights standards that may be relevant in relation to (1) the legal recognition of gender identity and accessibility of name change based on the person’s gender identity, and (2) legal recognition of same-sex couples and their children, and related patrimonial rights. It also provides examples of relevant recommendations of United Nations human rights mechanisms and of good State practices.

## **Protection of lesbian, gay, bisexual, transgender and intersex persons in the United Nations human rights system**

States are required under international human rights law to respect, protect and fulfil the human rights of all persons without discrimination of any kind. This is an immediate and cross-cutting obligation that is contained, inter alia, in the Universal Declaration of Human Rights (articles 2 and 7), the International Covenant on Civil and Political Rights (ICCPR, articles 2 (1) and 26), the International Covenant on Economic, Social and Cultural Rights (ICESCR, article 2), the Convention on the Rights of the Child (CRC, article 2), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, articles 1 and 2).

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<sup>2</sup> For more details please refer to: [http://www.corteidh.or.cr/docs/solicitudoc/solicitud\\_17\\_05\\_16\\_esp.pdf](http://www.corteidh.or.cr/docs/solicitudoc/solicitud_17_05_16_esp.pdf).

<sup>3</sup> For more details please refer to: [http://www.corteidh.or.cr/cf/jurisprudencia2/observaciones\\_oc.cfm?nId\\_oc=1671](http://www.corteidh.or.cr/cf/jurisprudencia2/observaciones_oc.cfm?nId_oc=1671).

In their jurisprudence, general comments and concluding observations, United Nations treaty bodies have consistently affirmed that sexual orientation and gender identity, like, for instance, race, sex, color or religion, are prohibited grounds for discrimination under international human rights law.<sup>4</sup>

United Nations human rights mechanisms have also expressed concern with regard to human rights violations based on gender expression and called on States to address these.<sup>5</sup>

United Nations treaty bodies and experts have also condemned human rights violations against intersex persons, including unnecessary surgery and other medical procedures on intersex children. They have held that such violations, as well as discrimination against intersex persons, are contrary to the obligations of States under international human rights law and should be prohibited.<sup>6</sup>

OHCHR has recommended States to take measures to legally prohibit discrimination on the grounds of sexual orientation, gender identity, gender expression and sex characteristics<sup>7</sup> and to include these grounds as protected characteristics in legislation on hate crimes and incitement to hatred or violence.<sup>8</sup>

The legal obligations of States with regard to the protection of the human rights of lesbian, gay, bisexual, transgender (LGBT) and intersex persons include:<sup>9</sup>

- protecting persons from violence;
- preventing torture and cruel, inhuman or degrading treatment or punishment;
- repealing discriminatory laws, including laws that criminalize homosexuality and so-called “cross-dressing”;

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<sup>4</sup> Selected references: CRC/C/GC/15, para. 8; CRC/C/GC/13, paras. 60 and 72; CRC/C/RUS/CO/4-5, paras. 24-25, 55-56, 59-60; CRC/C/GAM/CO/2-3, paras. 29-30; CRC/C/AUS/CO/4, paras. 29-30; CRC/C/IRQ/CO/2-4, paras. 19-20; CRC/C/TZA/CO/3-5, paras. 56-57; CCPR/C/GC/35, paras. 3, 9; CCPR/C/GC/34, para. 26; CCPR/C/KGZ/CO/2, para. 9; CCPR/C/MWI/CO/1, para. 7; CCPR/C/KWT/CO/2, para. 30; CCPR/C/IRL/CO/3, para. 8; CCPR/C/IRL/CO/4, para. 7; CCPR/C/UKR/CO/7, para. 10; CCPR/C/PER/CO/5, para. 8; CCPR/C/GEO/CO/4, para. 8; CCPR/C/89/D/1361/2005 para 7.2, CCPR/C/106/D/1932/2010 para. 10.5, E/C.12/GC/20, paras. 7-11, 27, 32, 39; E/C.12/GC/22 paras. 9, 19, 23, 30, 40, 58, 59; E/C.12/IRN/CO/2, para. 7; E/C.12/IDN/CO/1, para. 6; E/C.12/BGR/CO/4-5, para. 17; E/C.12/SVK/CO/2, para. 10; E/C.12/PER/CO/2-4, para. 5; CAT/C/GC/2, paras. 15-19, 21; CAT/C/GC/3, para. 8, 32, 39; CAT/C/RUS/CO/5, para. 15; CAT/C/KGZ/CO/2, para. 19; CEDAW/C/GC/28, para. 18; CEDAW/C/UGA/CO/7, paras. 43-44; CEDAW/C/CRI/CO/5-6, paras. 40-41; CEDAW/C/NLD/CO/5, paras. 46-47; CEDAW/C/DEU/CO/6, para. 61; CEDAW/C/GUY/CO/7-8, paras. 22-23; CEDAW/C/KGZ/CO/4, paras. 9-10.

<sup>5</sup> Report of the High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity (A/HRC/29/23), May 2015, para. 36; E/C.12/GC/22, paras. 23, 40; A/HRC/29/33/Add.1, paras. 86, 88, 111(q).

<sup>6</sup> See joint statement on violence and harmful medical practices on intersex children and adults, 24 October 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E> and CRC/C/CHE/CO/2-4, paras. 42-43; CRC/C/IRL/CO/3-4, paras. 39-40; CAT/C/DNK/CO/6-7, paras. 42-43; CAT/C/CHE/CO/7, para. 20; E/C.12/GC/22, para. 59; CEDAW/C/FRA/CO/7-8, paras. 18-19; A/HRC/31/57, paras. 4-50, 68-69, 72; A/HRC/22/53, paras. 77-78, 88; A/HRC/32/32, paras. 85, 94; A/70/213, paras. 84-86, 111-112.

<sup>7</sup> OHCHR uses the term “sex characteristics” to refer to the ground of discrimination on the basis of which intersex people face human rights violations, while acknowledging that different terms are used by different States and in different contexts.

<sup>8</sup> “Living Free and Equal”, OHCHR, Geneva and New York, 2016, <http://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf>, p. 30, 62.

<sup>9</sup> For an overview of the source of these legal obligations, see A/HRC/29/23, Section III.

- prohibiting and addressing discrimination based on sexual orientation and gender identity and discrimination against intersex persons;
- safeguarding freedom of expression, association and peaceful assembly of all LGBT and intersex persons.

### **International human rights standards and good practices regarding the legal recognition of gender identity**

Gender identity reflects a deeply felt and experienced sense of a person’s own gender, and is an integral aspect of overall identity.<sup>10</sup> States should ensure that all people, including transgender people, have access to legal recognition of their gender identity on the basis of, inter alia, the rights to freedom from discrimination, equal protection of the law, privacy, identity and freedom of expression.<sup>11</sup>

Legal recognition of gender identity, including of transgender persons, is, furthermore, critical for the fulfillment of their other human rights, including protection from violence, torture and ill treatment, rights to health, education, employment, housing and access to social security, as well as freedom of expression, peaceful assembly and association.<sup>12</sup>

The lack of legal recognition of their gender identity can contribute to reinforcing and perpetuating discriminatory attitudes towards transgender people, including denial of their identity. As such, it can increase their vulnerability to hate crimes. United Nations human rights mechanisms continue to receive reports of transphobic violence committed in all regions, including physical violence (such as murder, beatings, kidnapping and sexual assault) and psychological violence (such as threats, coercion and the arbitrary deprivation of liberty, including forced psychiatric incarceration).<sup>13</sup> These attacks constitute a form of gender-based violence, driven by a desire to punish individuals whose appearance or behaviour seem to challenge gender stereotypes.<sup>14</sup>

Lack of recognition can further act as an obstacle to reporting violence. As recorded by UN human rights mechanisms, transgender persons have been subjected to harassment, humiliation, abuse or arrest upon attempting to report the attacks and seek police protection, based on, inter alia, the fact that their gender identity was not recognised in their official documents.<sup>15</sup> Lack of recognition of their gender identity may also lead to violations of their human rights in other contexts, including torture and ill treatment in medical and detention settings;<sup>16</sup> sexual violence;<sup>17</sup> denial of the right to

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<sup>10</sup> “Living Free and Equal”, p. 18.

<sup>11</sup> CCPR/C/IRL/CO/3, para. 8; CCPR/C/UKR/CO/7, para. 10; CEDAW/C/BEL/CO/7, paras 44-45; CRC/C/GC/20, para. 34; A/HRC/14/22/Add.2.: Kyrgyzstan, para 92; “Living Free and Equal”, p. 86-87, 94.

<sup>12</sup> “Living Free and Equal”, p. 94.

<sup>13</sup> A/HRC/29/23, para. 21; CCPR/C/VEN/CO/4, para. 8; CAT/C/KWT/CO/2, para. 25; CAT/C/KGZ/CO/2, para. 19; CCPR/C/UKR/CO/7, para. 10; CCPR/C/SUR/CO/3, para. 27.

<sup>14</sup> A/HRC/29/23, para. 21.

<sup>15</sup> A/HRC/29/33/Add.1, para. 86; CCPR/C/SUR/CO/3, paras. 27-28; OHCHR Press Briefing Note, 14 July 2015.

<sup>16</sup> A/HRC/29/23, paras. 34-38, 54.

<sup>17</sup> *Ibid*, para. 54.

health;<sup>18</sup> discrimination, exclusion and bullying in education contexts;<sup>19</sup> discrimination in employment, housing and access to social security, as well as restrictions on their rights to freedom of expression, peaceful assembly and association.<sup>20</sup>

United Nations human rights mechanisms have also recorded incidents of transgender persons facing exclusion, denial of access, verbal harassment, physical abuse and even arrest when using sex-segregated bathrooms, based on, inter alia, their appearance and the fact that their gender identity was not recognised.<sup>21</sup>

As highlighted in the 2015 report of the High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity to the United Nations Human Rights Council, “in spite of recent advances in several countries, transgender persons are generally still unable to obtain legal recognition of their preferred gender, including a change in recorded sex and first name on State-issued identity documents.”<sup>22</sup>

OHCHR and United Nations human rights mechanisms, including the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee against Torture, the Committee on Economic, Social and Cultural Rights and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, have stressed that in order to fulfill international human rights obligations, States should respect the physical and psychological integrity of transgender persons by legally recognizing self-identified gender without abusive requirements that may further violate human rights, including requirements for applicants to be unmarried or subjected to forced, coerced or otherwise involuntary sterilization, gender reassignment, treatment, medical diagnosis and other medical procedures.<sup>23</sup>

On the basis of the legal obligation of non-discrimination, the recommendations by United Nations Human Rights mechanisms,<sup>24</sup> and a survey of international good practices, OHCHR recommends that the process of recognition should:<sup>25</sup>

- be based on self-definition by the applicant;
- be a simple administrative process;

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<sup>18</sup> UNDP, Discussion Paper on Transgender Health & Human Rights, 2014.

<sup>19</sup> UNESCO, Out in the open: Education sector responses to violence based on Sexual Orientation and Gender Identity/Expression (2016).

<sup>20</sup> A/HRC/29/23, paras. 60-62.

<sup>21</sup> Report of the Special Rapporteur on the human right to safe drinking water and sanitation on stigma and the realization of the human rights to water and sanitation (A/HRC/21/42), 2 July 2012.

<sup>22</sup> A/HRC/29/23, para. 69.

<sup>23</sup> *Ibid.*, para.79 (i); “Living Free and Equal”, p. 94-96; CCPR/C/IRL/CO/3, para. 8; CCPR/C/IRL/CO/4, para. 7; CCPR/C/UKR/CO/7, para. 10; CEDAW/C/NLD/CO/5, paras. 46-47; CCPR/C/KOR/CO/4, paras. 14-15; CAT/C/CHN-HKG/CO/5, para. 29(a); A/HRC/22/53, paras. 78, 88; E/C.12/GC/22, para. 58; Eliminating forced, coercive and otherwise involuntary sterilization, UN Interagency Statement, May 2014; Joint statement of UN and regional human rights mechanisms on the rights of young LGBT and intersex people, 13 May 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E>.

<sup>24</sup> *Ibid.*

<sup>25</sup> “Living Free and Equal”, p. 94-5.

- not require applicants to fulfill abusive requirements including presenting medical certifications, undergoing surgery, treatment, sterilization or divorce;
- acknowledge and recognize non-binary identities, such as gender identities that are neither “man” nor “woman”;<sup>26</sup>
- ensure that minors have access to recognition of their gender identity. Safeguards for minors should not be discriminatory or disproportionate, and should respect the rights enshrined in the Convention on the Rights of the Child.

OHCHR has further recommended that State officials receive training on respectful, non-discriminatory treatment of transgender persons, even when they have not obtained legal recognition of their gender identity. The latter is particularly important in relation to access to public services and health care, as well as in the context of detention and contact with law enforcement officials.<sup>27</sup>

In relation to questions 1, 1.1 and 1.2 on pages 7 and 8 of the request for an advisory opinion submitted by Costa Rica, results of the research carried out by OHCHR on measures taken by States to implement United Nations recommendations on legal recognition of gender identity highlight that an administrative process based on self-identification and without the above-mentioned abusive requirements is best practice in ensuring effective fulfillment of this right.<sup>28</sup> It is important to note that judicial procedures may create significant additional barriers to accessing legal recognition of gender identity, unnecessarily prolong the process and create additional financial burdens. The judicialization of the process of legal recognition of gender identity may constitute a disproportionate and unnecessary intrusion into the exercise of the rights to freedom from discrimination, equal protection of the law, privacy, identity and freedom of expression by transgender persons, particularly where a judge is asked to determine the validity of a person’s gender identity, which is a deeply personal and intimate matter. Pre-existing procedures for name change on official documentation may not constitute the most adequate or effective way to access legal recognition of gender identity, especially as they usually do not contemplate a change in gender marker on official documents and may involve court proceedings, present other obstacles or otherwise be particularly burdensome for transgender persons to access. Given the specificity of legal recognition of gender identity and the complexity of its implications, some countries have chosen to adopt specific legislation on legal recognition of gender identity,<sup>29</sup> separate from legislation on change of name.

The results of the survey carried out by OHCHR highlights several good practices. For instance, the explicit inclusion of gender identity and gender expression in constitutional non-discrimination

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<sup>26</sup> *Ibid*, p. 97-98

<sup>27</sup> *Ibid*, p. 121.

<sup>28</sup> *Ibid*, p. 94-96.

<sup>29</sup> For example, Argentina Ley 26.743, Identidad de Género (2012); Denmark Legislative Amendment to the Civil Registration System, L182, 11 June 2014; Ireland Gender Recognition Act 2015; Malta Gender Identity, Gender Expression and Sex Characteristics Act (2015); and Norway Lov om endring av juridisk kjønn, Prop. 74 L (2015-2016), Innst. 315 L (2015-2016), Lovvedtak 71 (2015-2016).

provisions represents an important protective measure by enshrining protection in the basic law of a country, thereby guiding other laws, public policies and the work of the authorities in relation to the human rights of transgender persons, including legal recognition of gender identity.<sup>30</sup> The Constitution of Fiji includes gender identity and gender expression as protected grounds.<sup>31</sup> The Constitutions of Bolivia and Malta explicitly include gender identity as a non-discrimination ground.<sup>32</sup>

Several States have also adopted specific laws on legal recognition of gender identity. In 2012, Argentina adopted a pioneering law enshrining the right of all individuals to recognition of their gender identity, and to respect of their identity by others.<sup>33</sup> It establishes a simple and free administrative process for modification of name and sex markers on official documents through the Civil Registry, and prohibits authorities from requiring persons to undergo surgery or psychological or medical treatment to obtain such recognition.<sup>34</sup> It also enshrines the right to be treated with dignity, and stipulates that all public and private actors must respect a person's gender identity, including their self-identified name, regardless of whether it is in conformity with the information on their national identity document.<sup>35</sup> The law stipulates that no existing rights or obligations are to be affected by such changes, including those relating to family law, such as adoption.<sup>36</sup> The law also establishes measures to protect the privacy of the individuals concerned.<sup>37</sup> In addition, this law establishes the right for minors to have their gender identity legally recognized through their legal representative, on the condition of express consent of the minor and taking into account the provisions of the Convention on the Rights of the Child.<sup>38</sup>

Similarly in 2015, Malta adopted the “Gender Identity, Gender Expression and Sex Characteristics Act”, which establishes the right to a quick, transparent and accessible procedure for the recognition of a person's gender identity based on self-identification.<sup>39</sup> In 2014, the Supreme Court of India rendered a seminal judgment, which held that denial of recognition of gender identity breached constitutional rights of equal protection of the law and to dignity.<sup>40</sup> In Colombia, a 2015 Government decree has allowed persons to modify their sex marker in the Civil Registry on the basis of a simple sworn declaration.<sup>41</sup> The Government of the Federal District of Mexico City has

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<sup>30</sup> “Living Free and Equal”, chapter 4.2.

<sup>31</sup> *Ibid.*, p. 62.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, p. 114-115; Ley 26.743, Identidad de Género (2012). The law also establishes the right of all adults to access, should they wish to, partial or comprehensive hormonal treatment and surgery to adjust their bodies, in line with their gender identity, as part of their right to comprehensive health, and on the basis of their informed consent. No-one is required to undergo such procedures in order to obtain recognition of their gender identity. The law also explicitly rejects a link between surgery and hormonal treatment, so that individuals may access, should they wish to, hormonal treatment only. Such procedures are mandated to be included in the basic national public health insurance scheme.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> “Living Free and Equal”, p. 50.

<sup>40</sup> “Living Free and Equal”, p. 80-81; Supreme Court of India, *National Legal Services Authority v Union of India and others*, 15 April 2014.

<sup>41</sup> “Living Free and Equal”, p. 96; Ministerio de Justicia y del Derecho, Decreto 1227, 4 June 2015.

adopted a decree on legal recognition of gender identity based on a simple administrative declaration.<sup>42</sup>

In addition to legal reform, targeted policy and support measures are required for effective access to legal recognition of gender identity. In 2011, having identified that transgender persons lacked awareness of the procedure and were facing difficulties linked to travel costs, costs of obtaining documentation and lack of access to trained legal aid professionals in exercising their rights under the Law on Gender Identity, the Ministry of Social Development of Uruguay developed a programme to guide them through the process of changing their name on official documents and to provide direct support to overcoming obstacles.<sup>43</sup>

### **International human rights standards and good practices regarding legal recognition of same-sex couples and their children, and related patrimonial rights**

States have an obligation to ensure that laws, policies and programmes executed by State authorities do not discriminate against individuals. They also have an obligation to address discriminatory practices, including by private actors, and to take action to prevent and eliminate the conditions and attitudes that contribute to *de jure* or *de facto* discrimination.<sup>44</sup>

The lack of official recognition of same-sex relationships and the absence of legal prohibition on discrimination makes it possible for public bodies and private actors, including health care providers and insurance companies, to treat same-sex partners and their children unfairly.<sup>45</sup>

Discrimination against same-sex couples with regard to rights and benefits, including inheritance, has been found to violate obligations of States under United Nations human rights treaties.<sup>46</sup> For example, in the case *X vs. Colombia*, the United Nations Human Rights Committee concluded that by denying a life partner in a same-sex couple pension rights on the basis of their sexual orientation, Colombia had violated the right to equality and non-discrimination enshrined in Article 26 of the International Covenant on Civil and Political Rights.<sup>47</sup>

The United Nations Committee on Economic, Social and Cultural Rights has called upon States to provide for legal recognition of same-sex couples. It has based this recommendation to States on the basis of their obligations under Articles 2 and 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which stipulate, respectively, that States should “undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social

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<sup>42</sup> “Living Free and Equal,” p. 96; Gobierno del Distrito Federal, Decreto por el que se reforman y adicionan diversas disposiciones del Código Civil para el Distrito Federal y del Código de Procedimientos Civiles para el Distrito Federal, 18 December 2014.

<sup>43</sup> “Living Free and Equal,” p. 82-83. Uruguay, Ministerio de Desarrollo Social, Diversidad sexual en Uruguay – Las políticas de inclusión social para personas LGBT del Ministerio de Desarrollo Social (2010-2014) Informe Final, December 2014 ([https://issuu.com/dnpsmides/docs/15.02\\_-\\_diversidad\\_sexual\\_en\\_uruguay](https://issuu.com/dnpsmides/docs/15.02_-_diversidad_sexual_en_uruguay)).

<sup>44</sup> A/HRC/29/23, para. 41.

<sup>45</sup> *Ibid*, para. 68.

<sup>46</sup> See CCPR/C/78/D/941/2000. See also CCPR/C/CHN/HKG/CO/3, para. 23.

<sup>47</sup> See CCPR/C/89/D/1361/2005.

origin, property, birth or other status” and that the “widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”<sup>48</sup> The Committee has clarified that “other status” includes sexual orientation and gender identity, in line with the interpretation of other UN human rights treaty bodies of the obligation of States under international human rights law to protect persons from discrimination.<sup>49</sup>

In this respect, it is important to emphasize that international human rights law makes no prescription with regards to the definition of the family. Under international human rights law, it is the State’s duty to protect and provide assistance to the family, including care and education of children. The Committee on the Rights of the Child has emphasized that a variety of arrangements can provide for young children’s care, nurturance and development, and that family patterns are variable and changing in many regions, with an overall trend towards greater diversity in family size, parental roles and arrangements for bringing up children.<sup>50</sup>

In addition, both the Committee on the Rights of the Child and the I/A Court H.R. have rejected arguments, frequently aired in discussions in relation to legal recognition of same-sex couples and families, that seek to justify discriminatory measures in relation to characteristics of families on the basis of the best interests of the child.<sup>51</sup> The Committee on the Rights of the Child has emphasized that discrimination on the basis of the sexual orientation and gender identity of the child or the child’s parents or legal guardians is prohibited under Article 2 the Convention.<sup>52</sup>

The United Nations Children’s Fund, the Committee on the Rights of the Child and regional bodies, including the Inter-American Court of Human Rights, have expressed concern over discrimination against children of same-sex couples and the lack of legal protection extended to them.<sup>53</sup> United Nations Human Rights mechanisms have urged States to provide legal recognition to same-sex couples and their children, and to ensure that same-sex couples are not discriminated against, including with regard to benefits and patrimonial rights such as those related to pensions, taxation and inheritance.<sup>54</sup>

The High Commissioner for Human Rights has also recommended that States should address discrimination by “providing legal recognition to same-sex couples and their children, ensuring that

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<sup>48</sup> International Covenant on Economic, Social and Cultural Rights, Article 10; E/C.12/BGR/CO/4-5, para. 17; E/C.12/SVK/CO/2, para. 10.

<sup>49</sup> E/C.12/GC/20, paras. 7-11, 27, 32, 39; E/C.12/GC/22 paras. 9, 19, 23, 30, 40, 58, 59. See also the section “Protection of LGBT and intersex persons in the United Nations human rights system ”

<sup>50</sup> CRC/C/GC/7/Rev.1, paras 15, 19.

<sup>51</sup> CRC/C/GC/14, para. 34, Inter-American Court of Human Rights, *Atala Riffó and Daughters v. Chile*, Serie C. No. 239, 24 February 2012, paras. 108-111, 127.

<sup>52</sup> CRC/C/GC/15, para. 8.

<sup>53</sup> See, *inter alia*, A/HRC/29/23, paras. 67-68; CRC/C/GC/15, para. 8; CRC/C/GAM/CO/2-3, paras. 29-30; “Eliminating discrimination against children and parents based on sexual orientation and/or gender identity”, UNICEF, position paper no.9, 2014 ([https://www.unicef.org/videoaudio/PDFs/Current\\_Issues\\_Paper- Sexual\\_Identification\\_Gender\\_Identity.pdf](https://www.unicef.org/videoaudio/PDFs/Current_Issues_Paper- Sexual_Identification_Gender_Identity.pdf)); Inter-American Court of Human Rights, *Atala Riffó and Daughters v. Chile*, Serie C. No. 239, 24 February 2012.

<sup>54</sup> See E/C.12/BGR/CO/4-5, para. 17; E/C.12/SVK/CO/2, para. 10; CCPR/C/JPN/CO/5, para. 29; CRC/C/GC/15, para. 8; CCPR/C/IRL/CO/3, para. 8.

benefits traditionally accorded married partners – including those related to benefits, pensions, and taxation and inheritance – are accorded on a non-discriminatory basis”.<sup>55</sup>

Legal recognition of the relationship of same-sex couples may take various forms, ranging from civil unions and civil partnerships to marriage. It is up to the State to determine the form of recognition, but whatever form is chosen, there should be no difference in treatment between same-sex and different-sex couples.<sup>56</sup> The United Nations Human Rights Committee has welcomed the legal recognition of same-sex marriage by States, as have the United Nations Secretary-General and High Commissioner for Human Rights.<sup>57</sup>

In States where civil unions are available to same-sex couples in lieu of marriage, the benefits and entitlements associated with such unions should be equivalent to those associated with marriage.<sup>58</sup> Where unmarried heterosexual couples are entitled to certain benefits, those same benefits should be extended to unmarried same-sex couples.<sup>59</sup>

In the context of the legal recognition of relationships between same-sex couples, it is important that States also legally recognize the gender identity of transgender persons, and comply with their obligation to protect persons from discrimination on the basis of gender identity.<sup>60</sup> In this regard, States should remove all restrictions to the recognition of relationships of transgender persons. Legislation and procedures regulating marriage and civil unions should recognize the self-identified gender identity of transgender persons and not be based on the sex assigned to a person at birth.<sup>61</sup> For instance, New Zealand has adopted an open definition of marriage as “the union of two persons, regardless of their sex, sexual orientation, or gender identity”.<sup>62</sup> States should also remove requirements of divorce or being single from laws on legal recognition of gender identity.<sup>63</sup>

States should further remove discriminatory restrictions in relation to parenting and adoption by same-sex couples.<sup>64</sup> This is particularly important in relation to the legal recognition of the ties between children and same-sex parents. In absence of such recognition, children in such families may be left unprotected and without effective access to their patrimonial rights, including inheritance, in case of death or injury of one or both of their parents. The European Court of Human Rights has recognized that same-sex relationships and the relationship between a same-sex

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<sup>55</sup> A/HRC/29/23, para. 79 (h).

<sup>56</sup> “Living Free and Equal”, p. 75.

<sup>57</sup> See, *inter alia*, CCPR/C/FRA/CO/5, para. 3(e); CCPR/C/CAN/CO/6, para.3(b); CCPR/C/GBR/CO/7, para. 3(f); CCPR/C/NZL/CO/6, para. 3(g); A/HRC/29/23, paras. 3, 73; and statement by the UN Secretary-General at the UN Free & Equal Lunch, 26 June 2015 (<https://www.un.org/sg/en/content/sg/statement/2015-06-26/secretary-general-remarks-un-free-equal-lunch-delivered>).

<sup>58</sup> “Living Free and Equal”, p. 75; CCPR/C/IRL/CO/3, para. 8.

<sup>59</sup> See CCPR/C/CHN/HKG/CO/3, para. 23; CCPR/C/78/D/941/2000, para. 10.4; CCPR/C/JPN/CO/5, para. 29; CEDAW/C/SRB/CO/2-3, para. 39(d); see also European Court of Human Rights, *Vallianatos and others v. Greece*, applications 29381/09 and 32684/09, 7 November 2013, paras. 79-81.

<sup>60</sup> “Living Free and Equal,” p. 76.

<sup>61</sup> *Ibid*, p. 76.

<sup>62</sup> New Zealand, Marriage Act 1955, as amended by Legislation Act 2012, <http://www.legislation.govt.nz/act/public/1955/0092/latest/DLM292028.html>

<sup>63</sup> See section on “International human rights standards and good practices regarding the legal recognition of gender identity”.

<sup>64</sup> “Living Free and Equal”, p. 75, 122.

couple and the children they raise is protected by the European Convention on Human Rights and Fundamental Freedoms, and that discrimination in adoption cases between same-sex and different-sex couples is prohibited as it is not necessary, proportionate nor does it have a legitimate aim.<sup>65</sup>

Judicial decisions in several States, including Brazil and South Africa, have, similarly, struck down discriminatory sections of legislation that restricted parenting or adoption by same-sex couples.<sup>66</sup> Judicial authorities have also condemned and ordered reparations for discriminatory treatment of same-sex couples in cases related to parenting rights. An example of this is the *Atala* case in the I/A Court H.R.,<sup>67</sup> which highlighted that judicial determinations and considerations based on “unfounded and stereotyped assumptions” including “preconceptions regarding the attributes, behaviors and characteristics of homosexuals or the impact these may have on children” are not admissible.<sup>68</sup> In Mexico, the Supreme Court has issued guidance to judges to avoid such stereotypes and to guarantee constitutional rights, including in the consideration of cases relating to family life.<sup>69</sup>

In addition, there should be no restrictions on parenting or adoption on the basis of a person’s gender identity or expression.<sup>70</sup> Failure to remove such restrictions negatively impacts on the rights, including the patrimonial rights of both the transgender parent/partner, as well as children in families with transgender parents, particularly in cases of death or injury of the transgender parent(s).

As of November 2016, 22 countries had adopted measures providing for civil marriage between same-sex couples on an equal basis as different-sex couples.<sup>71</sup> At least 12 other States provide for official recognition of same-sex couples through civil partnerships or unions with many of the rights associated with civil marriage.<sup>72</sup>

OHCHR appreciates the opportunity to submit this written contribution and hopes that the information provided herein will be useful for the Inter-American Court of Human Rights.

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<sup>65</sup> European Court of Human Rights, *X and others v. Austria*, application 19010/07.

<sup>66</sup> “Living Free and Equal,” p. 77; Brazil, Superior Tribunal de Justiça, *Recurso Especial 889.852 - RS (2006/0209137-4)*; South Africa Constitutional Court, *Minister of Home Affairs and Another v. Fourie and Another (CCT 60/04)* [2005]; South Africa Constitutional Court, *Du Toit and Another v Minister of Welfare and Population Development and Others (CCT40/01)* (2002).

<sup>67</sup> Inter-American Court of Human Rights, *Atala Riffo and Daughters v. Chile*, Serie C. No. 239, 24 February 2012.

<sup>68</sup> *Ibid*, paras. 109, 111, 125, 145.

<sup>69</sup> “Living Free and Equal,” p. 77.

<sup>70</sup> *Ibid*, p. 76.

<sup>71</sup> *Ibid*, p. 75-78. The States are: Argentina, Belgium, Brazil, Canada, Colombia, Denmark, Finland, France, Iceland, Ireland, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, the United Kingdom (with the exception of Northern Ireland), Uruguay and the United States of America.

<sup>72</sup> *Ibid*, p. 75-78. The States are: Austria, Chile, Croatia, Cyprus, Ecuador, Estonia, Germany, Greece, Hungary, Liechtenstein, Malta, Switzerland.