

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF HENDRIX V. GUATEMALA

JUDGMENT OF MARCH 7, 2023

(Merits)

In the case of *Hendrix v. Guatemala*,

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), composed of the following judges:

Ricardo C. Pérez Manrique, President,
Eduardo Ferrer Mac-Gregor Poisot, Vice President,
Humberto Antonio Sierra Porto,
Nancy Hernández López,
Verónica Gómez,
Patricia Pérez Goldberg, and
Rodrigo Mudrovitsch,

also present,

Pablo Saavedra Alessandri, Registrar, and
Romina I. Sijniensky, Deputy Registrar,

pursuant to Article 62(3) of the American Convention on Human Rights (hereinafter also “the American Convention” or “the Convention”) and Articles 31, 32, 65 and 67 of the Rules of Procedure of the Inter-American Court (hereinafter also “the Court’s Rules of Procedure” or “the Rules of Procedure”), delivers this judgment structured as follows:

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I
INTRODUCTION OF THE CASE AND CAUSE OF ACTION

1. *The case submitted to the Court.* On November 25, 2020, the Inter-American Commission on Human Rights (hereinafter also “the Inter-American Commission” or “the Commission”), pursuant to Articles 51 and 61 of the American Convention and Article 35 of the Rules of Procedure, submitted to the jurisdiction of the Inter-American Court the case of *Hendrix v. Guatemala*. The Commission indicated that it related to the alleged international responsibility of the Republic of Guatemala (hereinafter also “the State” or “Guatemala”) for impeding Steven Edward Hendrix (hereinafter also “Mr. Hendrix” or “the alleged victim”) from exercising the profession of public notary, even though he had the respective university degree obtained in Guatemala, because he was not a Guatemalan national. The Commission alleged that the State had not provided sufficient reasons to prove that prohibiting foreign nationals from exercising the notarial profession in Guatemala constituted a restriction that met the requirements established by the American Convention. The Commission determined that the State was responsible for the violation of the rights to equality before the law and to judicial protection recognized in Articles 24 and 25(1) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of this instrument, to the detriment of Mr. Hendrix.

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

a. *Petition.* On November 5, 2004, Steven Edward Hendrix lodged the initial petition before the Commission.

b. *Admissibility Report.* On October 29, 2009, the Commission adopted Admissibility Report No. 101/09, and this was notified to the parties on November 20, 2009.

c. *Merits Report.* The Commission adopted Merits Report No. 194/20 (hereinafter also “the Merits Report” or “Report No. 194/20”) on July 14, 2020, in which it reached a series of conclusions¹ and made several recommendations to the State.

d. *Notification to the State.* The Merits Report was notified to the State on August 25, 2020, and it was granted two months to report on compliance with the recommendations. On October 22, 2020, the State requested a two-month extension. Then, on November 24, 2020, the State forwarded a communications stating, “expressly, that it did not waive its right to file preliminary objections should this matter be submitted to the Inter-American Court of Human Rights.”

3. *Submission of the case to the Court.* Consequently, on November 25, 2020, the Commission submitted to the Court all the facts and alleged human rights violations described in the Merits Report² owing to “the need to obtain justice and reparation for the [alleged] victim.” The Court notes with concern that more than 16 years elapsed between the lodging of the initial petition before the Commission and the submission of the case before the Court.

4. *The Inter-American Commission’s request.* Based on the foregoing, the Commission asked the Court to conclude and declare the international responsibility of

¹ In Report No. 194/20, the Commission concluded that the Guatemalan State was responsible for the violation of the rights established in Articles 24 (Equality before the Law) and 25(1) (Judicial Protection) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this instrument.

² The Commission appointed Commissioner Esmeralda Arosema de Troitiño as its delegate in this case, and then Deputy Executive Secretary Marisol Blanchard, and lawyers Jorge Humberto Meza Flores and Christian González Chacón, as its legal advisers.

Guatemala for the alleged violation of the rights indicated in the conclusions to the Merits Report. Additionally, the Commission asked the Court to order the State to adopt specific measures of reparation.

II PROCEEDINGS BEFORE THE COURT

5. *Notification of the case to the State and to the representatives.* The Court notified the Commission's submission of the case to the State and the representatives³ on January 12, 2021.

6. *Brief with pleadings, motions and evidence.* On March 12, 2021, the representatives presented their brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief") with annexes. The representatives agreed in substance with the Commission's arguments and conclusions and also alleged the violation of Articles 8(2)(h),⁴ 20(3), 21 and 26 of the American Convention, all in relation to Articles 1(1) and 2 of the Convention, to the detriment of the alleged victim. Lastly, they asked the Court to order the State to adopt diverse measures of reparation and to reimburse certain costs and expenses.

7. *Answering brief.* On June 14, 2021, the State presented to the Court its brief answering the submission of the case by the Commission and with observations on the pleadings and motions brief (hereinafter "the answering brief")⁵ with annexes. In this brief, the State contested the alleged violations.

8. *Public hearing.* On February 18, 2022, the President of the Court issued an order in which he called the parties and the Commission to a public hearing on the merits and possible reparations and costs, and to receive the final oral arguments and observations of the parties and of the Commission, respectively.⁶ Owing to the exceptional circumstances resulting from the COVID-19 pandemic, the public hearing was held by videoconference, as established in the Court's Rules of Procedure, on March 28, 2022, during the Court's 147th regular session.⁷

³ On January 7, 2021, Mr. Hendrix advised that he would continue to represent himself. Subsequently, on March 12, 2021, in the pleadings and motions brief, he appointed Víctor Manuel Rodríguez Rescia of *Servicios Internacionales de Profesionales en Derechos Humanos* (SIPDH) as his representative.

⁴ It should be noted that, although the representatives indicated the violation of Article 8(2)(h) of the Convention in their pleadings and motions brief, they did not present specific arguments to substantiate the alleged violation. Subsequently, no mention was made of this article either during the public hearing or in the final arguments. Accordingly, the Court will not rule in this regard.

⁵ On February 3, 2021, the State appointed Jorge Luis Donado Vivar, Attorney General, as its Agent in this case and Lilian Elizabeth Nájara Reyes and María Gabriela Hernández Siguantay, from the International Affairs Unit of the Attorney General's Office, as Deputy Agents.

⁶ *Cf. Case of Hendrix v. Guatemala.* Call to a hearing. Order of the President of the Inter-American Court of Human Rights of February 18, 2022. Available at: https://www.corteidh.or.cr/docs/asuntos/hendrix_18_02_22.pdf

⁷ There appeared at this hearing: (a) for the Inter-American Commission: Esmeralda Arosemena de Troitiño, Commissioner, Marisol Blanchard, Deputy Executive Secretary, Jorge Meza Flores and Christian González, lawyers of the Commission; (b) for the representatives: Víctor Manuel Rodríguez Rescia, Juan Ignacio Rodríguez Porras and Bertha Carolina López Pérez from *Servicios Internacionales de Profesionales en Derechos Humanos* (SIPDH), and (c) for the State: Jorge Luis Donado Vivar, Attorney General; Lilian Nájara, María Gabriela Hernández and Rony Rosales from the Attorney General's Office; Ramiro Alejandro Contreras Escobar, Executive Director of the Presidential Commission for Peace and Human Rights, and Guisela del Carmen Vargas Juárez, Director for Legal Affairs, International Treaties and Translations of the Ministry of Foreign Affairs.

9. *Amicus curiae*. The Court received two *amicus curiae* briefs submitted by: (a) the Guatemalan Institute of Notarial Law,⁸ and (b) the International Union of Notaries (UINL).⁹

10. *Final written arguments and observations*. On April 28, 2022, the Commission presented its final written observations. On the same date, the representatives and the State each forwarded their final written arguments. The State attached several documents to its final arguments. The briefs were transmitted to the parties and to the Commission, and the representatives and the Commission were granted a time frame for presenting any observations they deemed pertinent on the documentation annexed by the State.

11. *Observations on the annexes*. On May 13, 2022, the Commission advised that it had no observations to make in this regard. On the same date, the representatives submitted their observations on the annexes presented by the State.

12. *Deliberation of the case*. The Court deliberated on this judgment on November 10 and 22, 2022, during its 154th regular session, and virtually on March 6 and 7, 2023, during its 156th regular session.

III JURISDICTION

13. The Inter-American Court has jurisdiction to hear this case, pursuant to Article 62(3) of the American Convention because Guatemala has been a State Party to the American Convention since May 25, 1978, and accepted the contentious jurisdiction of the Court on March 9, 1987.

IV EVIDENCE

A. Admissibility of the documentary evidence

14. In this case, as in others,¹⁰ the Court admits the probative value of those documents presented by the parties and by the Commission at the appropriate procedural moment (*supra* paras. 1, 6 and 7), that were not contested or challenged and the authenticity of which was not questioned.

15. The State presented several annexes to its final written arguments,¹¹ relating to different agreements, draft legislation, domestic law, and official communications issued

⁸ The brief was signed by Lorena Isabel Flores Estrada, Luis Felipe Lepe Monterroso, Edgar Raúl Sánchez Vargas, Axel Ottoniel Maas Jácome, Ovidio David Parra Vela, Claudia María Godínez Soto, Nery Roberto Muñoz, Mayra Yojana Veliz López, Maritza Grisel Murcia and Francisco Javier Urizar Pérez. It referred to the characteristics of the Guatemalan notarial system as regards the legal requirements to exercise the profession, specifically in relation to nationality, contained in Article 2(1) of the Notarial Code.

⁹ The brief was signed by Cristina Noemí Armella and David Figueroa Márquez. It referred to the characteristics of the Guatemalan notarial system as regards the legal requirements to exercise the profession.

¹⁰ *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Aroca Palma et al. v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of November 8, 2022. Series C No. 471, para. 26.

¹¹ Specifically: (1) Government Decision No. 99-2020 of the President of the Republic of Guatemala, dated July 30, 2020; (2) Interior Affairs Committee, File of Legislative Decree 314, Law on the Notarial Function; (3) Law on the Judiciary, Congressional Decree 2-89; (4) Congress of the Republic, draft legislation for Decree 54-77; (5) Official communication 250-2022-SAGP/jabs Guatemala of April 8, 2022, issued by the Director of the General Protocols Archive; (6) Official communication No. 1065 of April 11, 2022, issued by the Director General a.i. of the Judiciary; (7) List of international instruments on extradition to which Guatemala is a party; (8) Extradition Treaty between the United States of America and Guatemala, signed on February 27, 1903, and containing the Supplementary Convention to the treaty signed on February 20, 1940; (9) Regular session No. 52 Sessions Record, March 13, 1982, National Constituent Assembly; (10) Official communication VDES-ICE/167-2022 MLFV/kl, of April 7, 2022, issued by the Vice Minister of Integration and Foreign Trade of the Ministry of Economy of Guatemala; (11) Immigration Code, Congressional Decree 44-2016; (12) General Regulations to the

by private and government entities, as well as by the Universidad de San Carlos de Guatemala (hereinafter also "the USAC"). The representatives indicated that many of the annexes were time-barred and the State had not duly justified why the Court should include them in its considerations. They therefore asked the Court to declare the said documentation inadmissible.¹² According to Article 57 of the Rules of Procedure evidence presented outside the procedural moments regulated in Articles 35(1) (submission of the case by the Commission), 40(2) (the pleadings and motions brief), and 41(1) (the State's answering brief), is not admissible, unless its time-barred presentation is justified by one of the exceptions established in Article 57(2) of the Rules of Procedure, namely: *force majeure*, grave impediment or a fact that occurred after the said procedural moments.¹³ Consequently, owing to the State's failure to justify their late presentation, the documents submitted together with its final written arguments are inadmissible.¹⁴ Nevertheless, the Court admits the documents contained in annexes 5, 11, 14, 15 and 16 provided by the State based on Article 58(a) of the Rules of Procedure.

B. Admissibility of the testimonial and expert evidence

16. As indicated, the Court deemed it pertinent to admit the statement,¹⁵ and the expert opinions provided during the public hearing and by affidavit,¹⁶ insofar as they were in keeping with the purpose defined by the President in the order requiring them and the purpose of this case.

17. Regarding the affidavit made by William Cartwright, in its final arguments, the State alleged that there were several inconsistencies in the witness's statement in relation to Mr. Hendrix's collaboration in the creation of master's degree programs in the USAC and to his time in Guatemala. The Court considers that the State's observations with regard to Mr. Cartwright's statement refer to its probative value and not to its admissibility. Therefore, it admits the statement, and the observations made by Guatemala will be taken into account when assessing the evidence during the analysis of the merits of the case.

V FACTS

18. In this chapter, the Court will set out the facts that have been established in this case based on the body of evidence and the factual framework that the Commission submitted to the Court's consideration. The said facts will be described in the following order: (A) Legal framework; (B) Steven Edward Hendrix, and (C) Procedures followed by Mr. Hendrix to register as a notary.

Immigration Code, National Immigration Authority Decision No. 7-2019; (13) Civil Registry Law, Congressional Decree 90-2005; (14) Official communication UCM-No. 49-2022 of March 30, 2022, of the Guatemalan Immigration Institute; (15) SG/ivma Official communication No. 307-2022 of April 6, 2022, of the Ministry of Labor and Social Welfare; (16) Official communication. REF. RyE Inc. No. 08/2022 of April 18, 2022, of the Records and Statistics Office of the Universidad de San Carlos de Guatemala, and (17) Official communication No. DEEP/46-2022 of April 18, 2022, of the Director of the Postgraduate Studies Department of the Legal and Social Sciences Faculty at the Universidad de San Carlos de Guatemala.

¹² The representatives indicated that annexes 1 and 3 mentioned in footnote 10 of the final written arguments, had already been presented with the answering brief.

¹³ Cf. *Case of the Barrios Family v. Venezuela. Merits, reparations and costs*. Judgment of November 24, 2011. Series C No. 237, para. 17, and *Case of Valencia Campos et al. v. Bolivia. Preliminary objection, merits, reparations and costs*. Judgment of October 18, 2022. Series C No. 469, footnote 20.

¹⁴ Namely: annexes 2, 4, 6, 7, 8, 9, 10, 12, 13 and 17 mentioned in footnote 10 of the final written arguments.

¹⁵ Statement by Steven Edward Hendrix, offered by the representatives, and made during the public hearing before the Court.

¹⁶ Expert opinion of Gabriel Orellana Rojas, offered by the State and provided during the public hearing, and expert opinion of Roberto P. Saba, proposed by the Commission and provided by affidavit received on March 21, 2022.

A. Legal framework

A.1. Guatemalan laws

19. Article 4 of the Guatemalan Constitution¹⁷ establishes:

ARTICLE 4. Freedom and equality.

In Guatemala all human beings are free and equal in dignity and rights. Men and women, whatsoever their civil status, have equal opportunities and responsibilities. No one shall be subjected to servitude or to any other condition that impairs their dignity. Human beings must conduct themselves as brothers one to another.

20. And Article 146 of the Guatemalan Constitution¹⁸ stipulates:

ARTICLE 146. Naturalization.

Those who obtain their naturalization pursuant to the law are Guatemalan.

Naturalized Guatemalans shall have the same rights as Guatemalan nationals, subject to the limitations established in this Constitution.

21. The pertinent part of the Guatemalan Notarial Code¹⁹ (hereinafter also “the Notarial Code”) establishes:

Article 1. The Notary has the legal authority to attest and authenticate the legal documents in which he intervenes pursuant to the law or at the request of a party. [Translator’s note: hereafter also “attestation authority.”]

Article 2. To exercise the profession of Notary, it is necessary:

- a. To be Guatemalan by birth, at least 18 years of age, a lay person, and domiciled in the Republic, subject to the provisions of paragraph 2 of Article 6.
- b. To have obtained the required university degree in the Republic or document of incorporation pursuant to the law.
- c. To have registered the required university degree or document of incorporation before the Supreme Court of Justice, together with the signature and seal that will be used with the usual first and last names.
- d. To be of recognized integrity

Article 54. Notaries are able to authenticate signatures when these are written or acknowledged in their presence. They are also able to authenticate photocopies, photostats, and other copies prepared using similar procedures, provided these have been processed, copied or reproduced, as applicable, from the original, in the presence of the authenticating notary.

Article 60. The notary, in the acts in which he intervenes pursuant to the law or at the request of a party, shall prepare an official notarial record in which he shall record the acts he witnesses and the circumstances of which he is aware.

22. The Law Regulating Notarial Procedures in Matters of Voluntary Jurisdiction stipulates:

WHEREAS: Notaries, as auxiliaries of the judiciary, provide effective collaboration to the courts, through their authority to attest documents in the processing of procedural acts; [...] Therefore, it is appropriate to expand the function of the notary to enable him to intervene in the different acts in which there is no dispute to facilitate the execution of civil acts[.]²⁰

¹⁷ Cf. 1985 Constitution of the Republic of Guatemala, article 146 (evidence file, folios 2192 to 2286).

¹⁸ Cf. 1985 Constitution of the Republic of Guatemala, article 146, *supra*.

¹⁹ Cf. Notarial Code, Decree No. 314 of the Congress of the Republic of Guatemala, articles 1, 2 and 54 (evidence file, folios 1384 to 1417).

²⁰ Cf. Law Regulating Notarial Procedures in Matters of Voluntary Jurisdiction, Decree No. 54-77 of the Congress of the Republic of Guatemala (evidence file, folios 2550 to 2559).

23. In this regard, the Guatemalan Code of Civil and Commercial Procedure establishes that “[v]oluntary jurisdiction includes all acts in which, either by law or at the request of the parties involved, the intervention of a judge is required, without there being any disputed matters between any of the parties.”²¹

24. In addition, the Guatemalan Code of Civil and Commercial Procedure²² establishes:

Article 186. Authenticity of documents.

Documents authorized by a notary or by a public official or employee in exercise of their functions, shall be considered authentic and constitute conclusive proof, save for the right of the parties to contest them alleging invalidity or falsity.

The other documents referred to in articles 177 and 178, as well as private documents duly signed by the parties, shall be deemed to be authentic, unless there is evidence to the contrary.

Any challenge by the opposing party shall be filed within ten days of notification of the resolution admitting the evidence.

However, private documents shall only take effect vis-a-vis third parties as of the date on which they have been recognized before a competent judge or authenticated by a notary.

B. Steven Edward Hendrix

25. Steven Edward Hendrix is a national of the United States of America. Between 1997 and 2006, he visited Guatemala on different occasions for a minimum of 3 days and a maximum of 3 months and 24 days. Mr. Hendrix left Guatemala for the last time on April 16, 2006.²³ There is no record that Mr. Hendrix had a temporary or permanent residence permit in Guatemala,²⁴ or a work permit issued by the country’s authorities.²⁵ At the time of the facts, Mr. Hendrix worked as a consultant for the United States Agency for International Development (USAID). Currently, he is employed by the United States Government.²⁶

26. Mr. Hendrix obtained a juris doctor degree from the University of Wisconsin-Madison, United States, in 1987.²⁷ Subsequently, on September 19, 1997, Steven Edward

²¹ Cf. Code of Civil and Commercial Procedure, Decree Law No. 107, article 401 (evidence file, folios 1419 to 1577).

²² Cf. Code of Civil and Commercial Procedure, Decree Law No. 107, article 186, *supra*.

²³ During the public hearing before the Court, Mr. Hendrix stated that he had lived in Guatemala for six years and had legal residence and a “legal right to work.” The State provided Mr. Hendrix’s immigration records with information from August 15, 1995, to March 30, 2022, which record numerous entries into and departures from Guatemalan territory between 1997 and 2006. Based on the evidence in the case file, the Court notes that Mr. Hendrix was present in Guatemala for a total of less than 2 years. Cf. Statement made by Steven Edward Hendrix during the public hearing before the Court on March 28, 2022, and Official communication UCM-No 49-2022, of March 30, 2022, issued by the Guatemalan Immigration Institute (evidence file, folios 3568 to 3571).

²⁴ According to the Foreign Nationals Subdirectorates of the Guatemalan Immigration Institute, Mr. Hendrix does not have the regular immigration status granted by this entity and there is no information regarding temporary or permanent residence permits in his name. At the time of the facts, temporary or permanent residence was regulated by the existing “Immigration Law” and its Regulations, both derogated in 2016 by the Immigration Code. Both the previous Immigration Law and the current Immigration Code stipulate that, for a person to be designated a resident of Guatemala, he must possess a temporary or permanent residence permit. Cf. Official communication IGM-SE-0207-2021 of the Foreign Nationals Subdirectorates, Guatemalan Immigration Institute, of February 19, 2021 (evidence file, folios 2802 to 2806); Immigration Law, Decree 95-98 of November 26, 1998, articles 12, 14, 15, 16, 22. Available at: <https://www.oas.org/dil/Migrants/Guatemala/Decree%20N%C2%B0%2095-98%20-Ley%20de%20Migraci%C3%B3n%20de%20Guatemala.pdf>, and Immigration Code, articles 75 and 78 (evidence file, folios 3415 to 3492).

²⁵ There is no record in the files of the Ministry of Labor and Social Welfare that Mr. Hendrix was granted a work permit. Cf. SG/ivma Official communication No. 307-2022, of April 6, 2022, issued by the Ministry of Labor and Social Welfare (evidence file, folios 3573 and 3574).

²⁶ Cf. Statement by Steven Edward Hendrix, *supra*. In his statement he indicated: “[...] I was a USAID consultant at that time; I was not an employee, I was a USAID consultant; [...] today, I work in Washington. [...] But when I obtain that title of notary, I am in conversations to move to Guatemala [...]”

²⁷ Cf. Law degree in the name of Steven Edward Hendrix of May 17, 1987, issued by the University of Wisconsin-Madison, United States (evidence file, folio 1035). It is also worth pointing out that Mr. Hendrix’s law degree has been recognized in Bolivia. Cf. National law degree in the name of Steven Edward Hendrix dated January 30, 1995, issued by the President of the Universidad Mayor de San Andrés, Bolivia (evidence file, folio

Hendrix presented an incorporation request to the Universidad de San Carlos de Guatemala (hereinafter "the USAC") for the said degree to be recognized in Guatemala.²⁸ On November 17, 1997, the Board of the USAC School of Legal and Social Sciences decided that his request was admissible.²⁹ On March 30, 1998, by Decision No. 443-985, issued by the USAC President, it was declared that, as of that date, Steven Edward Hendrix was a member of the School of Legal and Social Sciences and an order was given to extend the corresponding diploma granting him incorporation as Doctor in Legal and Social Sciences.³⁰

27. On August 17, 1998, the Board of the USAC School of Legal and Social Sciences authorized Steven Hendrix to complete a legal practicum so that, at its conclusion, he could continue with the necessary procedures to take the professional and technical examination.³¹ On September 18, 2000, considering that he had met the legal documentation and incorporation requirements, he was awarded a degree in legal and social sciences with the title of lawyer and notary.³²

28. Mr. Hendrix argued that the respective diplomas had not been delivered to him.³³ However, a USAC communication indicates that no request had been made to this end on behalf of Mr. Hendrix, and that the diplomas were never requested.³⁴

C. Procedures followed by Mr. Hendrix to register as a notary

29. On November 22, 2000, Mr. Hendrix submitted his request for membership as a lawyer and notary of the Guatemalan Lawyers and Notaries Professional Association (hereinafter also "the CANG").³⁵ On February 6, 2001, in resolution 3-2001, the Board of the Guatemalan Lawyers and Notaries Professional Association decided to authorize Mr. Hendrix to practice law, but not to serve as a notary, indicating:

Regarding membership in the Association of the United States lawyer, Steven Hendrix, a graduate of the School of Legal and Social Sciences at the Universidad de San Carlos de Guatemala, with a degree in legal and social sciences and with the titles of lawyer and notary. Pursuant to paragraph 1 of article [2 of] the Notarial Code, it is necessary to be a Guatemalan by birth in order to exercise the profession of notary in the State of Guatemala. Before taking a decision, the Board RESOLVES: (a) to request the School of Legal and Social Sciences at the Universidad de San Carlos de Guatemala to provide a report on the incorporation of Steven Edward Hendrix and whether it is legally authorized to grant him the title of notary, a profession that, pursuant to our current laws, can be exercised exclusively by Guatemalans by birth, so that the Guatemalan Lawyers and Notaries

1037). The representatives indicated that he had also validated his initial degree in Ghana, but did not provide any evidence in this regard.

²⁸ Cf. Request for incorporation made to the Universidad de San Carlos de Guatemala on September 19, 1997, signed by Steven Edward Hendrix (evidence file, folio 1264).

²⁹ Cf. Certification of the ninth point, paragraph 9.1 of Minutes No. 35-97 dated November 21, 1997, of the session of the Board of the School of Legal and Social Sciences at the Universidad of Guatemala of November 17, 1997 (evidence file, folios 1266 to 1268).

³⁰ Cf. Transcript of Decision No. 443-98 of March 30, 1998, transcribed on the same date (evidence file, folio 1270) and Doctoral degree in Legal and Social Sciences in the name of Steven Edward Hendrix dated March 30, 1998, issued by the Universidad de San Carlos de Guatemala (evidence file, folio 1039).

³¹ Cf. Certification of the ninth point, paragraph 9.1 of Minutes No. 27-98 of November 10, 1998 (evidence file, folios 1272 and 1273).

³² Cf. Request for membership in the Guatemalan Lawyers and Notaries Professional Association and file of the registration of the professional membership of Steven Edward Hendrix of November 22, 2000 (evidence file, folios 1275 to 1301).

³³ Cf. Statement by Steven Edward Hendrix, *supra*.

³⁴ Cf. Official communication RyE Inc. No. 08 /2022 of April 18, 2022, issued by the Records and Statistics Office of the Universidad de San Carlos de Guatemala (evidence file, folios 3576 and 3577).

³⁵ Cf. Request for membership in the Guatemalan Lawyers and Notaries Professional Association and file of the registration of the professional membership of Steven Edward Hendrix of November 22, 2000, *supra*.

Professional Association is unable to authorize the applicant to exercise that profession, rather only that of lawyer.³⁶

30. On December 17, 2001, the Guatemalan Lawyers and Notaries Professional Association swore in Mr. Hendrix as a lawyer, but not as a notary. On February 6, 2002, the alleged victim registered as a lawyer with the Supreme Court of Justice. On January 17, 2002, the CANG notified him of the decision of January 16, 2002, not to register him as a notary as he did not meet the requirement of being Guatemalan by birth.³⁷

31. On January 18, 2002, the alleged victim filed an appeal against the refusal to grant him membership as a notary, asking that the matter be referred to the Assembly of Presidents of Professional Associations of Guatemala,³⁸ which examined and rejected the appeal on April 22, 2002, considering that the Association "acted in accordance with the law," so that the appealed decision was final.³⁹

32. On May 9, 2002, Mr. Hendrix filed an application for constitutional amparo before the Third Chamber of the Appellate Court against the decisions of the Lawyers and Notaries Professional Association and the Assembly of Presidents of Professional Associations of Guatemala rejecting his request to register as a notary. He argued that several of his constitutional rights had been violated and underscored that "there is no reasonable justification for a restriction based on nationality in the case of notaries" and that "under an international treaty, Guatemala even receives notaries from other nations already," because "in [...] 1925, Guatemala ratified a convention on the exercise of liberal professions," under which "professional lawyers and notaries from other countries that are signatories to the convention can be accepted in Guatemala." In addition, he argued that the Guatemalan Lawyers and Notaries Professional Association had committed an act of *ultra vires* by failing to register his notary degree, because that entity was not authorized to not register degrees awarded by the Universidad de San Carlos de Guatemala.⁴⁰

33. On June 25, 2002, the Third Chamber of the Appellate Court rejected the application for amparo and sentenced Mr. Hendrix to pay costs. The Chamber considered that he had not been wronged because it could be concluded from the contested decisions that "what was at issue was not a denial that a degree had been awarded, but rather non-authorization to exercise as a notary [...] due to failure to meet the requirement of being a Guatemalan by birth that was necessary in order to grant such authorization and, consequently, the amparo is plainly inadmissible."⁴¹

³⁶ Cf. Item 4.1 of Resolution 3-2001 of February 6, 2001, issued by the Guatemalan Lawyers and Notaries Professional Association and its transcript, recorded in note of January 16, 2002, addressed by the Secretary of the Board of that entity to Steven Edward Hendrix (evidence file, folios 31 and 1303). Resolution 4-2001 of February 20, 2001, of the Guatemalan Lawyers and Notaries Professional Association records that Mr. Hendrix was informed that, pursuant to the Notarial Code, the CANG was unable to register him as a notary as he was not a Guatemalan by birth. However, Mr. Hendrix agreed to be registered as a lawyer. Consequently, the Board agreed to grant him membership only as a lawyer. Cf. Resolution 4-2001 of February 20, 2001, of the Guatemalan Lawyers and Notaries Professional Association (evidence file, folio 1303).

³⁷ Cf. Item 4.1 of Resolution 3-2001 of February 6, 2001, *supra*. Moreover, this concurs with the allegations made by the representatives before the Court during the public hearing of March 28, 2022, and the contents of the application for amparo. Cf. Application for amparo filed by Steven Edward Hendrix on May 9, 2002, before the Third Chamber of the Appellate Court of Guatemala (evidence file, folios 36 to 59).

³⁸ Cf. Appeal filed by Steven Edward Hendrix on January 18, 2002, before the Board of the Guatemalan Lawyers and Notaries Professional Association requesting that the matter be referred to the General Assembly of Presidents of Professional Associations of Guatemala (evidence file, folios 1305 to 1319).

³⁹ Cf. Resolution No. 1151.13.02.02 of April 22, 2002, issued by the Assembly of Presidents of Professional Associations of Guatemala (evidence file, folios 33 and 34).

⁴⁰ Cf. Application for amparo filed by Steven Edward Hendrix on May 9, 2002, before the Third Chamber of the Appellate Court of Guatemala, *supra*.

⁴¹ Cf. Judgment of June 25, 2002, handed down by the Third Chamber of the Appellate Court constituted as an Amparo Court (evidence file, folios 75 to 83).

34. Mr. Hendrix filed an appeal against the ruling of June 25, 2002, before the Constitutional Court. On April 21, 2004, the Constitutional Court declared the amparo admissible, revoked the previous ruling, and declared that authorization should be given to permit Mr. Hendrix to exercise the profession of notary, conditional on the latter acquiring Guatemalan nationality.⁴² In particular, that court:

Considers that the fact that a professional qualification has been validly conferred on a person who, due to his nationality, is unable to exercise the profession authorized by this qualification based on statutory law, gives rise to a conflict of a constitutional nature between the constitutional norm (article 81 of the Constitution) which establishes that "[t]he rights acquired by the exercise of the professions accredited by such qualifications [including university degrees] should be respected and no provisions of any kind may be issued that limit or restrict them," with the content of article 2(1) of the Notarial Code, which indicates that, in order to be authorized to exercise the profession of notary, it is necessary "[t]o be Guatemalan by birth, at least 18 years of age, a lay person, and domiciled in the Republic."

In the opinion of this court, the said conflict can be resolved applying the provisions of article 146 of the Constitution which establishes that "[t]hose who obtain their naturalization pursuant to the law are Guatemalan" and that "[n]aturalized Guatemalans shall have the same rights as Guatemalan nationals," subject to the limitations established in the Constitution none of which concern the exercise of the notarial profession.

Thus, in order to preserve the applicant's acquired right to exercise the profession of notary, conditioning the authorization of its exercise to obtaining the nationality referred to in article 146 *ibid.*, the requested amparo should be granted, circumscribed to the terms set forth in the operative paragraphs of this judgment [...].

35. Subsequently, pursuant to the ruling of the Constitutional Court, the following documents were issued:

- a) Resolution APCOP 1151.12.02/Amparo 24-2002/Res. APCOP 1283.6620.07 of April 16, 2007, declaring that the decision of the Constitutional Court should be executed and urging the CANG Board to issue a new decision,⁴³ and
- b) Official communication JD-136-2007 of the CANG Board regarding the eighteenth point of Decision 18-2007 of April 25, 2007, establishing that, before Mr. Hendrix was sworn in as a notary, he must comply with article 146 of the Constitution.⁴⁴

36. In addition, on February 17, 2010, the Secretary of the CANG Board addressed a letter to the Presidential Commission for the Coordination of Human Rights Policies advising that, in a session held on February 10, 2010, the CANG had decided that, pursuant to the ruling delivered by the Constitutional Court and the resolution issued by the Assembly of Presidents of Professional Associations, before proceeding to swear in the lawyer, Edward Steven Hendrix, as a notary, this professional must comply with the provisions of article 146 of the Guatemalan Constitution.⁴⁵

37. On May 3, 2010, at the request of the Presidential Commission for the Coordination of Human Rights Policies, the Secretary of the Board of the Guatemalan Institute of Notarial Law, on the Board's instructions, presented a report on the possible violation of Article 24 of the American Convention based on preventing a notary who did not have Guatemalan nationality from exercising this profession.⁴⁶ The report indicated:

⁴² Cf. Judgment of April 21, 2004, delivered by the Constitutional Court (evidence file, folios 1379 to 1382).

⁴³ Cf. Resolution APCOP 1151.12.02/Amparo 24-2002/Res. APCOP 1283.6620.07 of the Assembly of Presidents of Professional Associations of April 16, 2007 (evidence file, folios 2857 to 2859).

⁴⁴ Cf. Transcript of May 2, 2007, of Decision 18-2007 of the CANG Board's session of April 25, 2007 (evidence file, folio 2861).

⁴⁵ Cf. Transcript of Decision 5-2010 of the Board of the Guatemalan Lawyers and Notaries Professional Association's session of February 10, 2010, contained in a letter of February 17, 2010, from the Board's Secretary (evidence file, folio 99).

⁴⁶ Cf. Report of April 27, 2010, of the Guatemalan Institute of Notarial Law, presented on May 3, 2010 (evidence file, folios 85 to 97).

According to Guatemalan constitutional jurisprudence, it is evident that the principle of equality before the law is not violated if different provisions are applied to different situations, provided that such differences are reasonable. In the case in question, and based on the extensive legal doctrine set forth, the requirement imposed by the legislator on the notarial function is not only reasonable, but easily understandable and in keeping with notarial principles. Most countries treat foreigners in a different way to nationals; thus, a foreigner needs work permits and a national does not, and a foreigner cannot vote or be elected, or occupy public office. In Guatemala, for example, legal persons are restricted from engaging in certain commercial activities if they do not have Guatemalan nationality. [...]

Based on the said doctrine, it is concluded that, in Guatemala, notaries are public officials because they exercise their competence delegated by the State of Guatemala. Therefore, Guatemalan notaries are independent public officials who do not obtain their income from the State, but rather from private individuals. The nationality requirement imposed by Guatemalan law is not arbitrary; it is rooted in a long tradition of the Latin notary system, which is different in each country. However, Mexico, Argentina and Spain, among others, require the condition of nationality in order to exercise the notarial profession. The Spanish Notarial Law clearly indicates: "Notaries are public officials" and, in one article, it establishes the requirement that they "be Spanish in order to exercise attestation authority." Therefore, the requirement that, in Guatemala, notaries must be Guatemalan in order to exercise the notarial profession is not alien to the context of the Latin notarial system and, as the doctrine cited explains, it is a requirement based on solid historical and legal grounds, and it is perfectly legitimate for the State to establish the requirements for the exercise of the notarial function.

VI MERITS

38. This case relates to the alleged international responsibility of the State with regard to the nationality requirement established in the Notarial Code of Guatemala in order to exercise the profession of notary (*supra* para. 21). It is claimed that, as a foreign national who has not acquired Guatemalan nationality by naturalization, the alleged victim was not authorized to exercise the notarial profession.

39. To decide the merits of the dispute, the Court will analyze whether Mr. Hendrix complied with the requirements established in the laws of Guatemala to be authorized to exercise as a notary. Subsequently, it will refer to the alleged violation of the rights to judicial protection, nationality, work, and property.

VI-1 RIGHT TO EQUALITY BEFORE THE LAW, IN RELATION TO THE OBLIGATIONS NOT TO DISCRIMINATE AND TO ADOPT DOMESTIC LEGAL PROVISIONS⁴⁷

A. Arguments of the Commission and of the parties

40. The **Commission** argued that, even though the alleged victim had studied law and the notarial profession in Guatemala, pursuant to administrative and judicial decisions he was prevented from exercising notarial functions based on article 2(1) of the Notarial Code, which requires notaries to be Guatemalan nationals. It asserted that, for a restriction and a difference in treatment imposed on the exercise of the right to exercise a profession based "on national origin" to be in keeping with the Convention, it must be established by law and comply with the proportionality test; namely, have a legitimate objective, and be suitable, necessary and strictly proportionate. In this regard, it considered that the objectives indicated by the State, either "to protect sovereignty" or the "principle of accountability" were legitimate, and the limitation complied with the principle of legality. However, it argued that it did not comply with the principles of suitability and necessity, and considered that the State had not provided sufficient reasons to justify that this prohibition constituted a restriction that met the standards established by the American Convention.

⁴⁷ Articles 1(1), 2 and 24 of the American Convention.

41. The Commission considered that there were no substantive grounds to presume that foreigners, as a class, were not capable of exercising the attestation authority delegated to notaries under Guatemalan law, or that this would be detrimental to national sovereignty, to the principle of accountability, to “*arraigo*” [Note: having roots in or an attachment to the country], or to the independence required to conduct their professional functions. It also indicated that what would appear to jeopardize the objective sought was the lack of rootedness or domicile in Guatemala. However, it indicated that, to achieve the said objective, it would be sufficient to require proof of roots, attachment or domicile in Guatemala, together with professional qualifications, and to ensure state oversight of performance. Thus, the restriction would not be necessary.

42. Regarding the requirement of suitability, it indicated that the State had not justified that the restriction established against foreign nationals would contribute to safeguarding national sovereignty. It added that, even supposing that the restriction sought to guarantee professionals who were technically proficient and trustworthy for the exercise of this public function, the alleged victim had passed all the examinations required to obtain the title of lawyer and notary, demonstrating his technical and professional capability to perform such work on an equal footing with Guatemalan nationals. It argued that, under an accountability system or regular evaluations, the State would be able to supervise the correct performance and the trustworthiness of those who exercise notarial functions, even if they are foreign nationals.

43. According to the Commission, pursuant to international and comparative case law regarding the functions of notaries, it could be observed that: (i) they do not operate as public officials or servants in the traditional sense; (ii) they do not perform functions that “go to the heart of representative government”; (iii) they do not play any role in formulating or executing public policies, and (iv) they do not have coercive or sanctioning authority. It added that various national and international courts⁴⁸ that have analyzed the prohibition of non-nationals from exercising the notarial profession under Latin notarial systems have concluded that such limitations constitute discrimination based on nationality or unreasonable restrictions of the right to work.

44. Based on the above, the Commission concluded that the provisions established in article 2(1) of the Guatemalan Notarial Code and the consequent impediment for the victim to register as a notary in Guatemala were arbitrary and, therefore, violated the principle of equality and non-discrimination established in Article 24 of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of this instrument. The Commission clarified that the foregoing was independent of the regulations and requirements that must be met for a foreigner to be able to reside in the country and exercise a profession.

45. The **representatives** argued that the ban on Mr. Hendrix to exercise the notarial profession in Guatemala based on his nationality – even though he met all the formal requirements – was arbitrary. They indicated that, pursuant to the standards established by the Court for differentiating between distinction and discrimination, it did not constitute a distinction, but rather discriminatory treatment based on unequal protection under domestic law. In this regard, the State had incurred in discriminating acts *de jure* – by upholding legal provisions that restricted the rights of the individual based on his or her nationality – and *de facto* – by implementing administrative and judicial decisions that reinforced the application of the said legal provisions, decisions that did not involve a

⁴⁸ It indicated that, in Costa Rica in 1993, the Constitutional Chamber of the Supreme Court declared that the provision of the Organic Law of the Notarial Function then in force that established the requirement of being Costa Rican by birth or naturalization to exercise the notary function was unconstitutional. Cf. Constitutional Chamber of the Supreme Court of Justice of the Republic of Costa Rica, Resolution No. 02093-1993 of May 19, 1993. See also: Court of Justice of the European Union in matters: C-50/08; C-47/08, C-51/08; C-53/08; C-54/08, and C-61/08 of May 24, 2011, and the Supreme Court of the United States [of America], *Bernal v. Fainter*, No. 83-630, of March 28, 1984.

proportionality test, but conformed to a legalistic analysis of the situation. Thus, the representatives alleged that article 2(1) of the Guatemalan Notarial Code was neither proportionate nor reasonable when requiring the person concerned to be a national or obliging that person to take Guatemalan citizenship in order to be a notary, because less harmful measures existed.

46. The representatives argued that, even though the restriction of the exercise of the notarial profession was established by law, it did not comply with the other elements of the proportionality test. They pointed out that Guatemala had indicated that the objective of this restriction was accountability and the protection of national sovereignty, and also as a mechanism to ensure the correct use of the legal authority to attest documents. In this regard, they argued that: (a) discrimination based on nationality was prohibited and clearly violated international obligations; (b) sovereignty could not be argued as a legitimate objective to run counter to the principle of equality and non-discrimination recognized as a *jus cogens* norm; (c) even if it were accepted as a legitimate objective, the measure was not necessary because, in Guatemala, notaries were not public officials and did not represent the interests of the State; rather, they possessed a function of the authentication of documents that involved the consent of third parties; (d) even if it were accepted that the notary performed a public function, there were less harmful ways of protecting the function, such as the accreditation procedures established in article 1 of the Guatemalan Notarial Code with which Mr. Hendrix had complied; (e) the notarial function was a technical function, and although it was a public function it was not a direct consequence of popular sovereignty, and (f) Guatemala had an accountability system that ensured that notarial functions were performed in keeping with the interests of the State to safeguard legal certainty.

47. The representatives also presented arguments on the need for rootedness in the country, and the guarantee of legal security and certainty in order to prove that neither do these pass the proportionality test. In addition, regarding a comparison between the Anglo-Saxon notarial system and the Latin notarial system, they underscored that the difference between the two systems was not the purpose of this international dispute and that, irrespective of the system, international human rights law did not allow discrimination based on nationality.

48. The **State** alleged that the requirement of legality had been met and that the analysis should not focus only on article 2(1) of the Notarial Code, but also on articles 4 and 146 of the Constitution. It argued that the State's position at the domestic level was based on the law and that the authorities acted in accordance with their legal powers and not arbitrarily. Regarding the objective of the restriction, it pointed out that the purpose of article 2(1) of the Notarial Code was to protect the sovereignty derived from the attestation authority, and to reinforce legal certainty and the protection of human rights both of which were guaranteed owing to the intervention of the notary. It asserted that, in Guatemala, notaries were vested with attestation authority delegated by the State – based on its sovereignty – and by law, in exercise of which they certified and authenticated documents, acts, contracts and other legal affairs. It added that, in exercise of this attestation authority the notary acted in the name of the State, and exercised a public function.

49. With regard to the suitability of the measure, it argued that this exists because Guatemalan notaries were invested with "attestation authority" which meant that they were able to establish an objective truth, with *erga omnes* effects. In addition, they received, interpreted and gave legal form to the intention of the parties in order to adjust this to the country's legal requirements. As a result of this "attestation authority" the relationship between notaries and the general public was not circumscribed to a merely private sphere, but encompassed public elements because they exercised a public function of general interest. It indicated that Guatemala had adopted an eclectic theory under which notaries were responsible for a public function which they exercised as a liberal profession.

From that perspective, notaries acted on behalf of the State but were not public officials; they did not defend the State's interests because they were not part of the public administration hierarchy, they were not paid by the State, they were not government-dependent, and the State did not respond for their actions.

50. The State argued that the foregoing indicated that the notarial function was subject to a system of oversight and accountability, based on which notaries could be held responsible in the civil, criminal, administrative and disciplinary sphere if their actions were unlawful and/or unethical. It also argued that, in order to guarantee this system, it was necessary for the notary to have roots in the country, and the "quintessential way to achieve this objective, pursuant to the parameters established by international law, is by nationality." It indicated that, if the element of nationality were excluded, there was a risk that notaries could act in such a way that it was impossible for them to be held legally accountable for their actions because, in the absence of rootedness in or a close attachment to the country, nothing would prevent them from leaving national territory indefinitely. It also considered that, if they committed an offense and fled to their country of origin, it was possible that the State of which they were a national would refuse to extradite them to Guatemala. It added that, if they abandoned the country with documents deposited with them, this would seriously affect legal certainty and would give rise to the violation of fundamental rights.

51. The State argued that the restriction contained in article 2(1) of the Notarial Code met the requirements of necessity and proportionality because it was the least restrictive measure possible to comply with the objectives sought: safeguard of national sovereignty, guarantee of legal certainty, and protection of human rights. It indicated that, in Guatemala, the notarial system was an open and unrestricted Latin system; therefore, the number of notaries was not limited and it was not necessary to pass a competitive examination to obtain a post of notary. The only requirements for exercising the function throughout national territory were to have obtained the necessary professional qualifications and to be duly registered with the professional association. Regarding the nationality requirement, it argued that article 2(1) of the Notarial Code sought to ensure that the notary had roots in and an attachment to the country; thus, it established that nationality was a requirement in order to authorize the exercise of notarial functions. The State considered that the said restriction was not arbitrary and did not prevent a foreign national from obtaining the professional qualification of notary, taking into account that the Guatemalan Constitution established that there were two types of Guatemalans based on the way nationality was acquired: Guatemalans by birth, and naturalized Guatemalans.⁴⁹ Consequently, the exercise of notarial functions was not reserved only to Guatemalans by birth. Anyone who wished to exercise notarial functions, and was a national of a country other than Guatemala, was required, in general and objectively, to acquire Guatemalan nationality as an essential requisite to register as a notary, and no additional requirements or obligations were imposed on naturalized Guatemalans.

52. Regarding this specific case, the State considered that Mr. Hendrix had no roots or attachment to the country and, therefore, if it registered him as a notary, he would be accorded an unjustified privilege in relation to all the foreign nationals who had complied with the requirement of naturalization.⁵⁰ The State concluded that it had guaranteed the

⁴⁹ Cf. Constitution of Guatemala, articles 144 and 145, *supra*, according to which Guatemalans by birth are persons born in national territory, the children of a Guatemalan father or mother born abroad, and nationals by birth of the Republics that constitute the Central American Federation. Naturalized Guatemalans are those who do not comply with the foregoing conditions and obtain Guatemalan nationality pursuant to the law.

⁵⁰ The State indicated that, in Guatemala, according to the General Archive of Protocols, entity responsible for notarial supervision, there are currently: (i) 10 naturalized Guatemalans who have been registered and authorized to exercise notarial functions in Guatemala, placing them on an equal footing with Guatemalans by birth; (ii) 4 notaries who are Spanish nationals and who have obtained the condition of naturalized Guatemalans; (iii) 105 notaries of different nationalities who are Guatemalans by birth by being children of a Guatemalan father or mother, and (iv) 120 notaries who are Guatemalan by birth or because they are nationals by birth of the Republics that constitute the Central American Federation.

principle of equality before the law and non-discrimination because the distinction made was objective, proportionate, reasonable, legitimate and justified. Consequently, Guatemala was not internationally responsible for violating Articles 24, 1(1) and 2 of the Convention.

B. Considerations of the Court

53. In light of the foregoing, the Court finds it relevant to refer to the following points: B.1) The function of public notary in Guatemala; B.2) The principle of equality and non-discrimination; B.3) Analysis of the specific case, and B.4) The rights to judicial protection, nationality, work, and property.

B.1. The function of public notary in Guatemala

54. The expert opinion provided to the Court by Gabriel Orellana Rojas reveals that the condition of nationality to exercise notarial functions in countries with a Latin notarial system is a common requirement.⁵¹ In this regard, expert witness Orellana Rojas stated that this requirement was included in the Principles for the legal organization of the Latin notarial system adopted at the First Congress of the Latin Notarial System. The principles establish the requirement of citizenship by birth or naturalization of the country in which the profession is exercised.⁵²

55. In this regard, several countries that share the Latin notarial system have established the requirements of nationality as essential in order to grant the title of notary. Currently, this is the standard in most countries in the region, including: Argentina,⁵³

⁵¹ Expert witness Gabriel Orellana Rojas stated that, in the region, there are two systems that regulate notarial functions: the Anglo-Saxon notary system and the Latin notary system. *Cf.* Written expert opinion submitted to the Inter-American Court by Gabriel Orellana Rojas (evidence file, folios 2901 to 2929), and also provided during the public hearing before this Court on March 28, 2022. Under the Anglo-Saxon system, notaries who are known as notary public, merely provide external authenticity to the documents they authorize or in which they intervene. Consequently, the notarial function is limited to verification of certain facts, such as the identity of the grantors in a document and the authentication of their signatures, also the reception of their sworn or unsworn statements and confirmation that a document was signed in their presence. Under the Anglo-Saxon system, it is not the notary's function to verify whether or not the necessary requirements and assumptions have been met to ensure the validity of the legal affair documented. The notary public does not draft the documents submitted to him or control their legality; therefore, he does not need to have knowledge of the law; he is not vested with the State's "*fe pública*" (legal authority to attest documents), and he does not authorize public instruments with *erga omnes* effects. In addition, under the Anglo-Saxon system, the notary does not need to be impartial and there are no requirements for access to the function. To the contrary, under the Latin system, notaries produce a special type of document: the public instrument. Under Latin-type systems, such documents are attributed with substantive, executive and evidentiary effects, qualities that a notarized document under the Anglo-Saxon system does not possess. Thus, under the Latin notarial system, the legislator has attributed privileged effects to the notarized public instrument. Under the Latin system, notarized documents are those authorized by the notary and their purpose may be to legalize any kind of act or business. Furthermore, their authenticity includes their authorship, signatures, date and content. Also, under the Latin system, notarized documents enjoy the presumption of the legality, veracity and integrity of their content and can only be contested in court. They have evidentiary and enforceability value. Added to this, under the Latin system, owing to its legal investiture, the notarial function can be extended to matters of voluntary jurisdiction so that, under the said voluntary jurisdiction, notaries can examine, process and decide matters in which no lawsuit has been filed pursuant to the competence established in domestic law. It is worth pointing out that there may be substantial differences in the exercise of notarial functions in each country based on the norms that regulate their functions. *Cf.* Written expert opinion submitted to the Inter-American Court by Gabriel Orellana Rojas, *supra*, and also provided during the public hearing before this Court, *supra*, and *amicus curiae* submitted to the Inter-American Court of Human Rights by the International Union of Notaries (merits file, folios 649 to 688).

⁵² *Cf.* Written expert opinion of Gabriel Orellana Rojas, *supra*, also provided during the public hearing before the Court, *supra*.

⁵³ "ARTICLE 1. To exercise notarial functions, it is necessary: (a) To be Argentine by birth or naturalized, and in the latter case, have been naturalized for ten years [...]." *Cf.* Law 12990, Professional Exercise by Notaries, art. 1. Consulted on July 14, 2022. Available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/45000-49999/45260/texact.htm>

Bolivia,⁵⁴ Brazil,⁵⁵ Chile,⁵⁶ Colombia,⁵⁷ Ecuador,⁵⁸ El Salvador,⁵⁹ Honduras,⁶⁰ Mexico,⁶¹ Panama,⁶² Paraguay,⁶³ Peru⁶⁴ and Dominican Republic,⁶⁵ among others.⁶⁶ Other countries

⁵⁴ "ARTICLE 12. (Requirements for appointment). To be appointed a notary with attestation authority, in addition to the conditions established in article 234 of the State Constitution, it is necessary: [...]"; Cf. Law No. 483, Law of the Plurinational Notary System, art. 12. Consulted on July 14, 2022. Available at: http://www.silep.gob.bo/norma/13245/ley_actualizada; and "article 234. To access public functions, it is necessary: 1. To be a Bolivian national." Cf. Constitution of the Plurinational State of Bolivia, art. 234. Consulted on July 14, 2022. Available at: <http://www.silep.gob.bo/norma/12928/leyactualizada>

⁵⁵ "Art. 14. Designation to exercise notarial and registration functions is contingent on the following requirements: [...] II. Brazilian nationality; [...]" Cf. Law No. 8,935, regulating article 236 of the Federal Constitution, Notarial and Registration Services, art. 14. Consulted on July 14, 2022. Available at: http://www.planalto.gov.br/ccivil_03/leis/l8935.htm

⁵⁶ "Art. 463. To be a rapporteur, a secretary of the Supreme Court or the Appellate Courts, or a notary requires the same conditions as to be a district judge," and "Art. 252. To be a judge, it is necessary: 1. To be a Chilean national; 2. To have a law degree, and 3. To have completed satisfactorily the training program for applicants to the first level of the Judiciary, without prejudice to the provisions of article 284 bis. [...]" Articles 269 and 284 of the law should also be referred to. Cf. Law 7471, Organic Code of Courts, articles 463 and 252. Consulted on October 26, 2022. Available at: <https://www.bcn.cl/leychile/navegar?idNorma=25563>

⁵⁷ "ARTICLE 132. To be a notary, of any kind, it is necessary to be a Colombian national, a citizen, a person of excellent reputation, and over 30 years of age." Cf. Decree 960 of 1970, issuing the Notarial Statute, art. 132. Consulted on July 15, 2022. Available at: <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=149249#:~:text=Notariado%20y%20Registro,Expide%20el%20estatuto%20del%20Notariado.,Superintendencia%20de%20Notariado%20y%20Registro>.

⁵⁸ "ARTICLE 299. Requirements to be a notary. To be a notary, it is necessary: to be Ecuadorian and have the right to political participation; [...]" Cf. Organic Code of the Judicial Function, art. 299. Consulted on July 15, 2022. Available at: <https://app.vlex.com/#vid/631472775>

⁵⁹ "ARTICLE 4. Only those authorized by the Supreme Court of Justice may exercise notarial functions pursuant to the law. To obtain this authorization, it is necessary: 1. To be Salvadoran; [...]" Cf. Notary Law, art. 4. Consulted on July 15, 2022. Available at: <https://app.vlex.com/#vid/644825717>

⁶⁰ "ARTICLE 7. To be a notary, it is necessary: (i) To be Honduran by birth and with free exercise of civil rights; [...]" Cf. Decree 353-2005, Notarial Code, art. 7. Consulted on July 15, 2022. Available at: <https://www.poderjudicial.gob.hn/transparencia/regulacion/Documents/Codigo%20del%20Notariado.pdf>

⁶¹ In Mexico, the matter is regulated by the laws of the federal entities such as: "Article 11. Applicants for designation as notary must obtain a certification granted by the state governor, who is only able to grant this to those who comply with the following requirements: I. To be a Mexican citizen by birth, at least 28 years of age; [...]" Cf. Decree No. 54, Notary Law of the state de Mexico, art. 11. Consulted on July 15, 2022. Available at: <https://legislacion.edomex.gob.mx/sites/legislacion.edomex.gob.mx/files/files/pdf/ley/vig/levvig019.pdf>;

"Article 54. In order to apply to take the examination for candidates for the post of notary interested part must comply with the following requirements: I. Be Mexican by birth, and be at least 25 and no more than 60 years of age when applying to take the examination; [...]" Cf. Mexico City Notary Law, art. 54. Consulted on July 15, 2022. Available at: https://colegiodenotarios.org.mx/doctos/LEY_DEL_NOTARIADO_PARA_LA_CUADRA DE MEXICO 2021.pdf.

⁶² "ARTICLE 2120. To be a circuit, principal or substitute notary in Panama and Colón requires the same qualifications as to be a justice of the Supreme Court of Justice. To be a circuit, principal or substitute notary in other places of the Republic, it is necessary to be Panamanian by birth or by naturalization, with more than ten years continuous residence in the Republic [...]" Cf. Administrative Code, art. 2120. Consulted on July 15, 2022. Available at: <https://app.vlex.com/#vid/41025245>.

⁶³ "Art. 102. The conditions required to perform the functions of notary are: (a) to be Paraguayan y birth or naturalized [...]" Cf. Law No. 879, Judicial Organization Code, art. 102. Consulted on July 15, 2022. Available at: <https://www.bacn.gov.py/leyes-paraguayas/2321/ley-n-879-codigo-de-organizacion-judicial#:~:text=Art.,IX%20de%20la%20Constituci%C3%B3n%20Nacional>.

⁶⁴ "Article 10. Requirements for applicants. To apply for the post of notary it is necessary: (a) To be Peruvian by birth. [...]" Cf. Decree No. 1049, Legislative Decree on the notary function, art. 10. Consulted on July 15, 2022. Available at: <https://www.gob.pe/institucion/minjus/informes-publicaciones/1947983-Decree-legislativo-del-notariado-n-1049>.

⁶⁵ "Article 22. Requirements. The following requirements are established for appointment as a notary: (1) To be Dominican and to be in full enjoyment of civil and political rights pursuant to the Constitution and the law; [...]" Cf. Law No. 140-15, Notarial Law establishing the Dominican Notaries Professional Association, art. 22. Consulted on July 15, 2022. Available at: <https://app.vlex.com/#vid/840941985>.

⁶⁶ Other Latin America States also establish the nationality requirement in order to exercise notary functions. This is the case of Cuba and Venezuela. The Notaries Law of the Cuban State establishes: "Article 8. To be appointed a notary, the following requirements must be complied with: (a) to be a Cuban citizen; [...]" Cf. Law No. 50, State Notaries Law, art. 8. Consulted on July 18, 2022. Available at: https://www.ciegodeavila.gob.cu/images/PDF/nuestraRegion/Otras_Direcciones/Justicia/Ley_50_De_las_Notasr%C3%ADas_Estatales_y_su_Reglamento.pdf. And the Venezuelan Registration and Notaries Law establishes: "Article 69. [...] Notaries Public must be Venezuelan, at least 18 years of age, and lawyers, with at least five

in the region that also follow the Latin notarial system, such as Uruguay⁶⁷ and Nicaragua,⁶⁸ do not establish a total restriction of the notarial function based on nationality; rather, foreign nationals must comply with some additional requirements. Meanwhile, the laws of Costa Rica establish the principle of reciprocity and, according to this, a foreign national is able to exercise the profession of notary in Costa Rican territory only when Costa Rican notaries are accorded the same benefit in the foreign national's country of origin.⁶⁹

56. From the foregoing, the Court understands that the Latin-type notary system prevails in the region and that most legal systems of the countries that follow this system establish nationality as a requirement for the exercise of the notarial profession. Under this system, it is mainly understood that notaries exercise a public function on behalf of the State and the documents they produce are considered authentic. The attestation authority vested in the notary confers legal security and certainty on the expression of intention between the parties. Moreover, some legal systems grant notaries competence in relation to voluntary jurisdiction and, on this basis, they exercise the functions inherent in this jurisdiction in non-contentious cases.

57. Guatemala has adopted the Latin-type notarial system. According to the laws of Guatemala, the notarial function is regulated principally by the Notarial Code, which establishes that "the notary has the legal authority to authenticate and register the acts and contracts in which he intervenes pursuant to the law or at the request of a party" (*supra* para. 21). The Guatemalan notarial system is *numerus apertus*, which signifies that the number of notaries in the country is not limited; rather, to be a notary it is only necessary to comply with the legal requirements of nationality, domicile, professional degree, and registration (*supra* para. 21).

58. Regarding the nationality requirement, in its *amicus curiae*, the Guatemalan Institute of Notarial Law indicated that, following Decree No. 1563 of August 20, 1934, the requirement to be a Guatemalan citizen by birth was established as a condition for authorizing the exercise of the notarial profession. However, when deciding the application for amparo filed by the alleged victim in this case, the Guatemalan Constitutional Court ordered that Mr. Hendrix be authorized to exercise the notarial profession once he acquired Guatemalan nationality by naturalization, considering that article 2 of the Notarial Code should be interpreted in light of article 146 of the Constitution, according to which: "naturalized Guatemalans shall have the same rights as Guatemalans by birth," subject to the limitations established in the Constitution, and the fact that the Constitution did not include restrictions related to the exercise of the notarial profession (*supra* para. 34).

years professional experience." Cf. Registration and Notaries Law, art. 69. Consulted on July 18, 2022. Available at: <https://app.vlex.com/#search/jurisdiction:VE/ley+de+registros+y+notarias/WW/vid/879958351>.

⁶⁷ Article 2 of the 1878 Notarial Organic Law originally established legal or natural citizenship as an essential requirement for the exercise of notary functions. In 1926, the citizenship requirement was revoked and substituted in the Notarial Regulations as follows: "Art. 2. To be a notary public and exercise the profession, it is necessary: [...] (e) in the case of a foreigner, also, to prove that he has resided in the country for three years if he is married and for four years if single." Cf. Decree Law No. 1421, Notarial Organic Law and Notarial Regulations. Consulted on July 18, 2022. Available at: <https://www.aeu.org.uy/Documentos/Ley-Organica-y-Reglamento-Notarialuc996#:~:text=La%20Ley%20Org%C3%A1nica%20Notarial%20y,el%20ejercicio%20de%20sus%20funciones>.

⁶⁸ "Article 10. [...] For a notary who has been admitted or incorporated to be able to exercise his profession, it is necessary that the Supreme Court of Justice authorize this after he has complied with the following requirements: [...] b. Presentation of the academic degree issued by the respective Faculty and, if he is a foreign national, the government decree recognizing this. [...]." Cf. Notarial Law. Consulted on July 15, 2022. Available at: <https://www.registropublico.gob.ni/Files/PDF/MarcoLegal/Leyes/Ley-Notariado.pdf>

⁶⁹ "Article 3. Requirements. To be a public notary and exercise such functions, the following requirements must be met: [...] Foreign nationals who comply with the preceding requirements may exercise notary functions provided that the same benefit is accorded to Costa Rican notaries in their country of origin, in equal conditions." Cf. Law No. 7764, Notarial Code, art. 3. Consulted on July 15, 2022. Available at: http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?nValor1=1&nValor2=42683

59. Additionally, in Guatemala, notaries are considered to be “auxiliaries of the judiciary” because, through their attestation authority, they collaborate with the courts in the processing of procedural acts. Therefore, they have the function of intervening in acts in which there is no dispute.⁷⁰ In particular, civil and commercial law stipulate that the voluntary jurisdiction encompasses all acts that, by law or at the request of the interested parties, require the intervention of a judge without there being a dispute between the parties. The following matters relating to “voluntary jurisdiction” can be processed before a notary: (a) missing person declaration; (b) declaration of presumed death; (c) late registration of certificates (birth, marriage, death); (d) rectification of records; (e) family assets; (f) disposition and encumbrance of property of minors, the legally incapacitated, and the missing; (g) intestate succession processes; (h) probate procedures; (9) *[sic]* declaration of incapacity; (i) suppletory titling; (j) rectification of urban property lines; (k) tracing and dividing up joint property rights; (l) recognition of pregnancy or birth; (m) name changes; (n) identification of third parties; (o) determination of age; (p) replacement of certificates (birth, marriage, death),⁷¹ and (q) authorization of marriages.⁷² Under the voluntary jurisdiction, the notary can also act as an auxiliary of the Tax Administration Bureau when carrying out certain activities through the purchase of special stamped paper for protocols or the authorization of certain contracts or acts that convert him into a channel for the payment of value added tax, stamp duty, and the notarial stamp.⁷³

60. Furthermore, according to Guatemalan law and as indicated by the State, notaries are able to prepare documents and contracts relating to the ownership and possession of real estate. In Guatemala, property titles can only be registered, modified, expanded or amended by a certified copy of a public document authorized by a notary.⁷⁴ In addition, notaries are responsible for recording hearings, assemblies and meetings between both physical and legal persons; the latter group includes the associations and organizations endorsed by domestic law. Notaries are empowered to authorize and legalize the constitution of civil society organizations, civil associations, non-governmental organizations, and commercial corporations.⁷⁵ They are also auxiliaries of the administration of justice because they intervene in judicial proceedings.⁷⁶ In the case of evidence, it is established that a notarized transcript, and the documents that the notary authenticates constitute valid proof.⁷⁷ Notaries can also act as an estate partitioner in oral hearings on the division of common property, or as an executor in an executory process. In bankruptcy cases, the notary can intervene as an auxiliary to the liquidator, taking part

⁷⁰ Cf. Law Regulating Notarial Procedures in Matters of Voluntary Jurisdiction, Decree No. 54-77 of the Congress of the Republic of Guatemala, *supra*. In 1983 notarial functions were expanded by the Rectification Law on Urban Property, Decree Law 125-83 of the Head of State (evidence file, folios 2561 to 2565).

⁷¹ Cf. Law Regulating Notarial Procedures in Matters of Voluntary Jurisdiction, Decree No. 54-77 of the Congress of the Republic of Guatemala, *supra*; Manual for the Evaluation of Voluntary Jurisdiction Procedures and Processes of the Guatemalan Attorney General’s Office. Consulted on November 17, 2021. Available at: <https://pgn.gob.gt/wp-content/uploads/2016/07/GUI%CC%81A-DE-CALIFICACION%CC%81N-DE-JURISDICCION-VOLUNTARIA.pdf>; and Webpage of the General Archive of Protocols of Guatemala, Voluntary Jurisdiction Files. Consulted on November 17, 2022. Available at: http://ww2.oj.gob.gt/archivodeprotocolos/index.php?option=com_content&view=article&id=162&Itemid=154

⁷² Cf. 1985 Constitution of the Republic of Guatemala, article 49, *supra*.

⁷³ Cf. Law on Stamp Duty and Special Stamped Paper for Protocols, Decree No. 37-92, articles 2.1 and 2.9 (evidence file, folios 2567 to 2587); Law on Valued Added Tax, Decree No. 27-92, articles 3.8, 3.9, 6, 7, 8, 9, 16 and 17 (evidence file, folios 2590 to 2629); Revenue Stamp and Notarial Stamp Law, Decree No. 82-96, article 1 (evidence file, folios 2632 to 2638).

⁷⁴ Cf. Civil Code, Decree Law No. 106, articles 1124 and 1130 (evidence file, folios 1611 to 2032).

⁷⁵ Cf. Civil Code, Decree Law No. 106, articles 1728 and 1729, *supra*; Code of Commerce, Decree No. 2-70 of the Congress of the Republic, article 16 (evidence file, folios 2307 to 2548); Regulations for Registration of Civil Associations, Government Decision No. 512-98, article 1 (evidence file, folios 2288 to 2292); Law on Non-governmental development organizations, Decree No. 02-2003, article 5 (evidence file, folios 2294 to 2305).

⁷⁶ Cf. Code of Civil and Commercial Procedure, Decree Law No. 107, article 33, *supra*.

⁷⁷ Cf. Code of Civil and Commercial Procedure, Decree Law No. 107, articles 181, 186, 192, *supra*.

in the repossession of assets, and preparing inventories and valuations.⁷⁸ In the area of elections and political parties, a public deed must be drawn up in order to set up a committee for the constitution of a political party and for it to have legal entity, and this document can only be authorized by a notary. Moreover, only when the procedures and requirements have been complied with can the political party be constituted, also by means of a public deed.⁷⁹

61. Taking into account the foregoing, in Guatemala, notaries are independent liberal professionals who perform a public function, even though they are not considered public officials *stricto sensu*.⁸⁰

B.2. Principle of equality and non-discrimination

62. The Court has indicated that the notion of equality emanates directly from the oneness of humankind, and is inseparable from the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority or, to the contrary, characterizing a group as inferior and treating it with hostility or otherwise subjecting it to discrimination in the enjoyment of rights which are accorded to others not so classified.⁸¹ States must refrain from actions that, in any way, are addressed directly or indirectly at creating situation of *de jure* or *de facto* discrimination.⁸² This Court's case law has also indicated that, at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*. It underlines the legal structure of national and international public order and permeates the legal system.⁸³

63. In addition, the Court has determined that Article 1(1) of the Convention is a general norm the content of which extends to all the provisions of the treaty and establishes the obligation of States Parties to respect and to ensure the free and full exercise of the rights and freedoms recognized therein "without any discrimination." In other words, whatsoever the origin or form it assumes, any treatment that may be considered discriminatory in relation to the exercise of any of the rights guaranteed in the Convention is, *per se*, incompatible with this instrument.⁸⁴ Non-compliance by the State with the general obligation to respect and to ensure human rights by any differentiated treatment that may be discriminatory – that is, that does not pursue a legitimate objective, or is unnecessary and/or disproportionate – gives rise to its international responsibility.

⁷⁸ Cf. Code of Civil and Commercial Procedure, Decree Law No. 107, articles 220, 298, 381, 382 and 384, *supra*.

⁷⁹ Cf. Electoral and Political Parties Law, Decree No. 1-85, articles 27.h, 52, and 63 (evidence file, folios 2639 and 2740).

⁸⁰ Cf. Written expert opinion presented to the Inter-American Court by Gabriel Orellana Rojas, *supra*, and also provided during the public hearing before this Court, *supra*.

⁸¹ Cf. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 55, and *Case of Guevara Díaz v. Costa Rica. Merits, reparations and costs*. Judgment of June 22, 2022, Series C. No. 453, para. 46.

⁸² Cf. *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 103; *Rights to freedom of association, to collective bargaining and to strike, and their relationship to other rights, with a gender perspective (interpretation and scope of Articles 13, 15, 16, 24, 25 and 26, in relation to Articles 1(1) and 2 of the American Convention on Human Rights, Articles 3, 6, 7 and 8 of the Protocol of San Salvador, Articles 2, 3, 4, 5 and 6 of the Convention of Belem do Pará, Articles 34, 44 and 45 of the Charter of the Organization of American States, and Articles II, IV, XIV, XXI and XXII of the American Declaration of the Rights and Duties of Man)*. Advisory Opinion OC-27/21 of May 5, 2021. Series A No. 27, para. 152, and *Case of Guevara Díaz v. Costa Rica*, *supra*, para. 46. This translates, for example, into the prohibition to enact laws, in the broad sense, to issue civil administrative or any other type of measure, or to foster actions and practices of officials, in application or interpretation of the law, that discriminate against a specific group of individuals because they are foreigners or for other reasons. Cf. *Advisory Opinion OC-18/03*, *supra*, para. 103.

⁸³ Cf. *Advisory Opinion OC-18/03*, *supra*, para. 101; *Advisory Opinion OC-27/21*, *supra*, para. 152, and *Case of Guevara Díaz v. Costa Rica*, *supra*, para. 46.

⁸⁴ Cf. *Advisory Opinion OC-4/84*, *supra*, para. 53, and *Case of Guevara Díaz v. Costa Rica*, *supra*, para. 47.

Consequently, there is an indissoluble link between the obligation to respect and to ensure human rights and the principle of equality and non-discrimination.⁸⁵

64. In addition, Article 24 of the American Convention prohibits discrimination *de jure*, not only in relation to the rights contained in the Convention but also with regard to all the laws enacted by the State and their application.⁸⁶ In addition, the Court has indicated that Article 24 of the Convention gives rise to a mandate aimed at guaranteeing material equality.⁸⁷

65. Thus, the right to equality and non-discrimination encompasses two concepts: one related to the prohibition of arbitrary differences in treatment, and the other to the State obligation to create conditions of real equality for groups that have historically been excluded or that are at greater risk of discrimination.⁸⁸ Furthermore, the Court has determined that a difference in treatment is discriminatory when it does not have a reasonable and objective justification;⁸⁹ in other words, when it does not pursue a legitimate purpose and when the relationship between the means used and the end pursued is disproportionate.⁹⁰ The Court has also established that, in the case of the prohibition of discrimination based on one of the protected categories established in Article 1(1) of the Convention, the possible restriction of a right requires rigorous substantiation, which means that the reasons that the State uses to differentiate treatment must be particularly weighty and be supported by comprehensive arguments.⁹¹

B.3. Analysis of the specific case

66. In the instant case, both the Commission and the representatives have indicated that Mr. Hendrix was subjected to discriminatory treatment in relation to the authorization to exercise the profession of notary because he was not a Guatemalan national by birth or by naturalization. To examine the presumed violation of the alleged victim's right to equality, they asked this Court to analyze the legality, legitimacy, suitability, necessity and proportionality of the nationality requirement as a condition to exercise notarial functions.

67. That said, before making the analysis proposed by the Commission and by the representatives, the Court finds it necessary to determine whether Mr. Hendrix was in a similar situation to Guatemala nationals as regards the exercise of the notarial profession. Indeed, the right to equality, at least as regards equality of treatment, is based on the supposition that individuals in similar factual conditions cannot be the object of unjustified

⁸⁵ Cf. *Advisory Opinion OC-18/03, supra*, para. 85; *Advisory Opinion OC-27/21, supra*, para. 154, and *Case of Guevara Díaz v. Costa Rica, supra*, para. 47.

⁸⁶ Cf. *Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of June 23, 2005. Series C No. 127, para. 186; *Case of Barbosa de Souza et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of September 7, 2021. Series C No. 435, para. 139, and *Advisory Opinion OC-27/21, supra*, para. 156.

⁸⁷ Cf. *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 15, 2020. Series C No. 407, para. 199, and *Advisory Opinion OC-27/21, supra*, para. 156.

⁸⁸ Cf. *Advisory Opinion OC-18/03, supra*, para. 92; *Advisory Opinion OC-27/21, supra*, para. 158, and *Case of Guevara Díaz v. Costa Rica, supra*, para. 49.

⁸⁹ Cf. *Juridical Status and Human Rights of the Child*, *Advisory Opinion OC-17/02*, August 28, 2002. Series A No. 17, para. 46, and *Case of Guevara Díaz v. Costa Rica, supra*, para. 49. The Court has indicated that not all differences in legal treatment are discriminatory as such, because not all differences in treatment are, in themselves, offensive to human dignity. Cf. *Advisory Opinion OC-4/84, supra*, para. 56.

⁹⁰ Cf. *Case of Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs*. Judgment of May 29, 2014. Series C No. 279, para. 200, and *Case of Guevara Díaz v. Costa Rica, supra*, para. 49.

⁹¹ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series No. 298, para. 257, and *Case of Guevara Díaz v. Costa Rica, supra*, para. 49.

differentiated treatment. Therefore, even though, throughout the proceedings before the Court, the discussion has focused on the conformity with the Convention of nationality as a requirement to exercise the notarial profession, the evidence in the case file reveals that Mr. Hendrix was in a special situation that could involve an impediment to the exercise of the notarial profession.

68. Consequently, it is first necessary to establish the specific situation of Mr. Hendrix in Guatemala because the alleged violation of the right to equality is based on a supposed discriminatory treatment and, in order to analyze this, it is necessary to determine whether the alleged victim was in a similar factual situation to the other persons who exercise notarial functions in Guatemala, so that it is possible to require identical treatment by the State. In this regard, it should be recalled that, in Guatemala, according to the State, in addition to other requirements, notaries are not only required to be Guatemalan nationals by birth or by naturalization, but must also prove their rootedness or attachment to the country.

69. As noted in the chapter on the facts, Steven Edward Hendrix is a national of the United States of America and lived in Guatemala intermittently for several periods between 1997 and 2006 (*supra* para. 25 and footnote 22). However, during those years, Mr. Hendrix had neither a temporary or a permanent residence permit in Guatemala, nor has one been recorded to date (*supra* para. 25 and footnote 23). During his time in Guatemala, Mr. Hendrix worked as a consultant for USAID (*supra* para. 25 and footnote 25). In other words, Mr. Hendrix was a foreign national who lived intermittently in Guatemala while he performed functions for an agency of the United States government. Currently, Mr. Hendrix resides in Washington D.C., and is employed as an official of the United States government. He has indicated that he would return to Guatemala once he is able to exercise the profession of notary (*supra* para. 25 and footnote 25).

70. The foregoing reveals that, when applying for registration to exercise notarial functions, Mr. Hendrix was not resident in Guatemala. The Court notes that article 2 of the Notarial Code requires the notary to be domiciled in Guatemala⁹² (*supra* para. 21). In other words, there was no information or evidence that allowed Mr. Hendrix's roots in or attachment to Guatemala to be established and, according to the law, this was a necessary condition to exercise notarial public functions according to the different expert opinions presented by the State⁹³ and the Commission. Thus, in his affidavit, expert witness Roberto P. Saba stated that it was possible to assume that "the requirement of rootedness, attachment or domicile in [a] country constitutes functional criteria [for a restriction] that bears a means-to-an-end relationship with the objective sought by the State," understanding this objective as an adequate use of the attestation authority.⁹⁴

⁹² Article 32 del Civil Code establishes that: "The domicile is constituted voluntarily by residence in a place with the intention of remaining there." Article 33 establishes that: "The intention to remain is presumed by continuous residence in a place for one year. This presumption will cease if it is verified that residence is occasional or that residence is established elsewhere." Meanwhile, article 34 indicates that "If a person lives alternatively or has usual occupations in several places, he shall be considered domiciled in any one of them; but if these occupations have a special relationship with a specific place, this will be the person's domicile." Lastly, article 35 indicates that "The persons who does not have a usual residence shall be considered domiciled in the place where he is." *Cf.* Civil Code, Decree Law No. 106, articles 32, 33, 34 and 35, *supra*.

⁹³ Expert witness Gabriel Orellana Rojas stated that: "Guatemalan nationality as an essential requirement to exercise notarial functions is justified based on the need to ensure the notary's rootedness in or attachment to the country considering, as already mentioned, that the Latin-type notary system entails the exercise of a public function, even though the notary is not a public official. The importance of roots is reinforced by the requirement of being domiciled in the country. The notary's attachment to the country has special relevance and is also justified in the case of Guatemala because criminal law establishes the possibility of imposing on foreign nationals the accessory penalty of "the expulsion of foreigners from national territory" (article 42 of the Criminal Code); a penalty that corresponds to the accessory penalties of "absolute disqualification" and "special disqualification" for nationals." *Cf.* Written expert opinion presented to the Inter-American Court by Gabriel Orellana Rojas, *supra*, and also provided during the public hearing before this Court, *supra*.

⁹⁴ *Cf.* Expert opinion provided by Roberto P. Saba by affidavit of March 21, 2022 (evidence file, folios 2867 to 2895).

71. The requirement of rootedness is especially important if all the competences and functions exercised by notaries in Guatemala are taken into account. In this regard, the State argued that "Guatemalan notaries have attestation authority delegated by the State – based on its sovereignty – and by law, in exercise of which they certify and authenticate documents, acts, contracts and other legal affairs." Based on the attestation authority, "the notary acts on behalf of the [State] and exercises a public function." The Court recognizes that the American Convention does not impose a specific notarial system or a special way of exercising notarial functions and, therefore, States have broad freedom to configure their respective notarial system. Hence, the diversity of systems and requirements established by domestic law for access to this function. In the case of Guatemala, the notary is invested by the State with a public function pursuant to which he exercises delegated authority to confer authenticity on legal documents and affairs.

72. The Court also underlines that, in Guatemala, the notarial function is personal and cannot be delegated; that it is compulsory to provide the service. Notaries perform different acts related to property and the ownership of real estate, civil and commercial companies, civil associations, and non-governmental organization; the legitimacy of evidence; political parties, and the functions of an estate partitioner. The notarial protocol, documents and files are in the custody of the notary who must maintain them available for examination, inspection and control. Notaries are also auxiliaries of the administration of justice, in matters related to voluntary jurisdiction (*supra* paras. 59 and 60). In this regard, the Regulatory Law of Notarial Procedures in Matters of Voluntary Jurisdiction, establishes that, in Guatemala, notaries are auxiliaries of the judiciary and provide efficient collaboration with the country through their attestation authority in the processing of procedural acts; thus, the notary's function is expanded so that he may accomplish the different acts in which there is no dispute, in order to facilitate the celebration of civil acts (*supra* para. 59). Based on these regulations, Guatemala argued that, since the notary is an auxiliary of the courts of justice and, owing to the attestation authority vested in him, the State decided to raise him to the rank of voluntary magistrate. Thus, it entrusted the notary with the processing of certain matters in the area of voluntary jurisdiction in order not to inundate or overload the judiciary, allowing the notary to perform activities that were previously reserved to judges, thereby ensuring that the rights of those who use notarial services are duly protected and they are guaranteed access to justice.

73. Owing to the importance of the public functions conducted by notaries, if the notarial function is exercised improperly, there is a public interest in the State being able to implement the principle of accountability by accessing the necessary documentation to conduct the corresponding proceedings and apply the appropriate sanctions. This therefore justifies subjecting the notarial function to permanent oversight. In Guatemala, this oversight is exercised by the professional association which, on behalf of the State, is responsible for the overall administration of the function, and its inspection and control. In this regard, the Court considers that the notary's roots in the country are essential to guarantee the principle of accountability, because such roots involve an attachment between the person exercising the notarial profession and the country, and this makes it possible to hold such persons legally responsible for any errors in the exercise of their function.

74. Consequently, the Court finds that the requirement of rootedness in the country seeks to safeguard the accountability of those who exercise the notarial public function. Protection of the public interest requires having the security that a close connection exists between the notary and the State.

75. In the instant case, it has already been pointed out that Mr. Hendrix never put down any roots in Guatemala, and the case file contains no other elements that demonstrate his attachment to the territory in which he asked for authorization to exercise the notarial profession. From this perspective, it is clear that Mr. Hendrix was not in a

similar factual situation to the other notaries in Guatemala who, being domiciled in Guatemalan territory, had the rootedness required for the exercise of the notarial public function.

76. Consequently, this Court finds that the State did not violate the right to equality before the law recognized in Article 24 of the American Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Steven Edward Hendrix.

B.4. Rights to judicial protection, nationality, work, and property⁹⁵

77. Regarding the alleged violation of Article 25(1) of the American Convention, the Court recalls that the right to judicial protection entails the obligation to guarantee to all persons subject to the jurisdiction of the State an effective judicial remedy against acts that violate their fundamental rights.⁹⁶ This effectiveness supposes that, in addition to the formal existence of the remedies, these lead to results or responses to the violations of the rights established in the Convention, the Constitution, or the laws.⁹⁷ This means that the remedy must be appropriate to address the violation and that its application by the competent authority is effective.⁹⁸ The effectiveness of the judicial remedy means that the analysis by the competent authority cannot be reduced to a mere formality; rather, it is necessary to examine the reasons cited by the plaintiff and make an express ruling on them.⁹⁹ This Court does not evaluate the effectiveness of the remedies filed based on the possibility of a decision that favors the victim's interests.¹⁰⁰

78. In the instant case, the Court notes that, in its judgment, the Guatemalan Constitutional Court analyzed the arguments submitted by the alleged victim, and even annulled the appealed administrative and judicial decisions that failed to decide the problem related to the requirement of Guatemalan nationality to exercise the notarial profession.¹⁰¹ Thus, the Constitutional Court moved away from the literal text of article 2(1) of the Notarial Code and made an interpretation in light of article 146 of the Constitution, establishing that both Guatemalans by birth and naturalized Guatemalans could exercise the notarial profession (*supra* para. 34). Therefore, even though the judgment that decided the application for amparo did not accept all of Mr. Hendrix's claims, this Court finds that Mr. Hendrix did have access to an effective judicial remedy. Consequently, the Court finds that the State did not violate the right to judicial protection established in Article 25(1) of the American Convention to the detriment of Steven Edward Hendrix.

79. Based on the decision taken in section B.2. regarding the principle of equality and non-discrimination, the Court considers that it is not necessary to rule on the alleged

⁹⁵ Articles 25(1), 20, 26 and 21 of the American Convention.

⁹⁶ *Cf. Case of Mejía Idrovo v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of July 5, 2011, Series C No. 228, para. 95, and *Case of Cuya Lavy et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of September 28, 2021. Series C No. 438, para. 170.

⁹⁷ *Cf. Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights),* Advisory Opinion OC-9/87, October 6, 1987. Series A No. 9, para. 24, and *Case of Benites Cabrera et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of October 4, 2022. Series C No. 465, para. 90.

⁹⁸ *Cf. Advisory Opinion OC-9/87, supra*, para. 24, and *Case of Mina Cuero v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of September 7, 2022. Series C No. 464, para. 116.

⁹⁹ *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 96, and *Case of Habbal et al. v. Argentina. Preliminary objections and merits.* Judgment of August 31, 2022. Series C No. 463, para.108.

¹⁰⁰ *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 67, and *Case of Cuya Lavy et al. v. Peru, supra*, para. 171.

¹⁰¹ In this judgment, it ordered the Lawyers' Association and the Assembly of Presidents of Professional Associations to issue a new resolution containing the authorization to exercise the notarial profession, conditional on compliance with the necessary requirements. *Cf.* Judgment of April 21, 2004 issued by the Constitutional Court, *supra*.

violations of the rights to nationality and to work, established in Articles 20(3) and 26 of the American Convention, since it has declared that the State did not violate Articles 24, 1(1) and 2 of the American Convention.

80. During the public hearing in this case, the representatives alleged the violation of Article 21 of the Convention based on the *iura novit curia* principle. The Court notes that the representatives indicated that the USAC had retained Mr. Hendrix's degrees in law and the notarial profession. In this regard, the State indicated that the reason why the USAC had not delivered the degrees to Mr. Hendrix was because he had not made the necessary arrangements with the USAC (*supra* para. 28). The Court finds that it does not have sufficient factual and probative elements to examine these arguments and, therefore, it will not rule on the alleged violation of Article 21 of the American Convention.

VII OPERATIVE PARAGRAPHS

81. Therefore,

THE COURT,

DECLARES:

By six votes to one, that:

1. The State is not responsible for the violation of the right to equality before the law recognized in Article 24 of the American Convention on Human Rights, in relation to the obligations to respect and to guarantee rights established in Articles 1(1) and 2 of the American Convention, to the detriment of Steven Edward Hendrix, pursuant to paragraphs 66 to 76 of this judgment.

Dissenting Judge Rodrigo Mudrovitsch.

By six votes to one, that:

2. The State is not responsible for the violation of the right to judicial protection recognized in Article 25(1) of the American Convention on Human Rights, in relation to the obligation established in Article 1(1) of the Convention, to the detriment of Steven Edward Hendrix, pursuant to paragraph 78 of this judgment.

Dissenting Judge Rodrigo Mudrovitsch.

AND ESTABLISHES

Unanimously, that:

3. The Secretariat of the Court shall notify this judgment to the Republic of Guatemala, the representatives of the alleged victim, and the Inter-American Commission on Human Rights.

4. The file is closed.

DONE, at San José, Costa Rica, on March 7, 2023, in the Spanish language.

Judges Nancy Hernández López and Patricia Pérez Goldberg advised the Court of their concurring opinion, and Judge Rodrigo Mudrovitsch advised the Court of his dissenting opinion.

I/A Court H.R., *Case of Hendrix v. Guatemala*. Merits. Judgment of March 7, 2023.

Ricardo C. Pérez Manrique
President

Eduardo Ferrer Mac-Gregor Poisot

Humberto A. Sierra Porto

Nancy Hernández López

Verónica Gómez

Patricia Pérez Goldberg

Rodrigo Mudrovitsch

Pablo Saavedra Alessandri
Registrar

So ordered,

Ricardo C. Pérez Manrique
President

Pablo Saavedra Alessandri
Registrar

CONCURRING OPINION OF
JUDGES NANCY HERNÁNDEZ LÓPEZ AND PATRICIA PÉREZ GOLDBERG
INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF HENDRIX V. GUATEMALA
JUDGMENT OF MARCH 7, 2023
(Merits)

Concurring with the majority decision of the Inter-American Court of Human Rights (hereinafter, “the Court”), we issue this opinion¹ in order to explain why the condition established in the domestic laws of Guatemala, consisting in requiring nationality by naturalization of those who exercise the notarial function, does not contravene Article 24 of the American Convention on Human Rights (hereinafter, “the Convention” or “the American Convention”) in relation to Articles 1(1) and 2 of this instrument.

1. First, the judgment based its deliberations on determining whether or not Mr. Hendrix was in a similar factual situation to nationals who exercise the notarial function in Guatemala. It made this analysis because, only if the alleged victim had been in a similar situation, would it have been in order to examine whether or not an unjustified differentiated treatment had existed, with the consequent violation of the right to equality established in Article 24 of the Convention.
2. The judgment asserts that, in Guatemala, those who exercise the notarial profession must not only be Guatemalan nationals, but also – among other requirements – they must prove that they have roots in the country. This requirement is justified owing to the many different functions performed by notaries, all of which lead to the conclusion that they exercise a public role that must be subject to the principle of accountability and permanent oversight. This permanent oversight can only be exercised with regard to notaries if they have roots in the country.
3. In this specific case, the judgment concluded that Mr. Hendrix never had either temporary or permanent residence in Guatemala because he was a foreign citizen who lived in Guatemala intermittently while performing functions for an agency of the United States government.² Thus, as Mr. Hendrix had no roots in the country in which he sought to exercise the notarial function, he was not in a similar factual situation to other notaries in Guatemala. Consequently, the judgment concluded that the State had not violated Article 24 of the Convention, in relation to Articles 1(1) and 2 of this instrument.
4. While sharing the Court’s reasoning on this point and, evidently, the conclusion that exonerates the Republic of Guatemala from international responsibility, we believe that, in this case, the Court should have examined whether or not the nationality requirement for those who exercise the notarial profession in Guatemala constitutes a discriminatory

¹ Article 65(2) of the Inter-American Court’s Rules of Procedure: “Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the President so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment.”

² Para. 69.

treatment that violates the right to equality because this is the central issue of the case brought before the Court.

5. In this regard, first, it should be recalled that, in the case of foreign nationals, it cannot be considered that every difference in treatment by the State constitutes discrimination. As this Court has established, a difference in treatment is considered discriminatory when it has no reasonable and objective justification; that is, when it does not seek a legitimate objective and when there is no proportionality between the means used and the end sought.³ In other words, in the instant case, in order to determine whether the restriction of the exercise of the notarial profession by a foreign national who has not acquired Guatemalan nationality is compatible with the American Convention and the relevant standards established by this Court, we must examine its legality and its objective, and also the suitability, necessity and proportionality of the requirement.
6. Regarding the first aspect – namely, that the restriction be established by law – it should be recalled that article 2(1) of the Notarial Code establishes that, to exercise the notarial function, it is necessary to be Guatemalan by birth, at least 18 years of age, a lay person, and domiciled in the Republic. Regarding the expression “Guatemalan by birth,” the Constitutional Court interpreted article 2(1) of the Notarial Code in relation to article 146 of the Guatemalan Constitution, and therefore modified the literal text of the said norm and determined that the allusion to “a Guatemalan by birth” should be understood as “by birth and/or naturalized.”⁴
7. We must now ask ourselves what objective the State was seeking when imposing the restriction and whether or not it was compatible with the provisions of the Convention.⁵ In this regard, the objective alleged by the State of ensuring that notaries had roots in, or an attachment to, the country in order to guarantee the principle of accountability is legitimate. Indeed, those who exercise the notarial function in Guatemala perform a public function; they are auxiliaries of the administration of justice in non-contentious matters, and they are subject to the principle of accountability by means of permanent oversight by their professional association. Thus, the restriction has an objective that falls within the general interest and, therefore, does not contravene the Convention. Also, as indicated by expert witness Orellana during the public hearing, the nationality requirement seeks to enhance the independence of the exercise of the notarial profession, which is not met merely by the requirement of roots.⁶ Thus, roots alone do

³ Cf. *Case of Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs.* Judgment of May 29, 2014. Series C No. 279, para. 200; *Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2016. Series C No. 315, para. 125, and *Case of Guevara Díaz v. Costa Rica. Merits, reparations and costs.* Judgment of June 22, 2022. Series C No. 453, para. 49.

⁴ Cf. Expert opinion of Gabriel Orellana Rojas provided to the Court during a virtual hearing held on March 28, 2022.

⁵ Article 30 of the Convention: “The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”

⁶ In this regard, during the public hearing expert witness Orellana stated that:

Therefore, the problem I see here is that, under the Latin notarial system, the notary must be independent in his criteria and in his actions. A foreign notary, for example, a United State notary, could, under certain circumstances, find himself bound by decisions taken by the State Department, by the FAC bureau or any other bureau of the United States that, at a certain moment, classifies certain Guatemalans as unable to enter into legal or commercial relations, transactions and operations with United States citizens. In that case, at a certain moment, this United States notary, who is working and exercising his profession in Guatemala ceases to have the most essential characteristics for a Latin notary, which is his independence, because he will no longer obey his own conscience, or his own

not guarantee the objectives established by law, but rather only one of them, that of accountability, omitting independence, which is central in the exercise of the notarial function.

8. Consequently the measure adopted by the State of Guatemala is suitable to achieve the legitimate objectives sought because the nationality requirement makes it possible to ensure permanent oversight and accountability and reinforces the concept of the independence of notaries. It is an appropriate state measure to achieve the State's legitimate objectives.
9. Lastly, it is necessary to examine whether the nationality requirement is a necessary and proportionate measure taking into account the functions performed by a notary in Guatemala. Nationality can be considered a legal and political relationship that connects a person to the State; it binds that person to the State by ties of loyalty and fidelity and ensures his diplomatic and consular protection.⁷ This means that the individual acquires and exercises the rights and responsibilities inherent in membership of a political community. It is worth underlining that the exercise of the public function by notaries is a right, but it is also an obligation because its exercise cannot be denied if requested. The State delegates public functions to the notary by law, and vests him with attestation authority; thus, it is reasonably possible to require the notary to have a legal and political relationship that binds him to the State. The State has competence to establish the system for the attribution of attestation authority that guarantees oversight of the delegated function and effective accountability. Based on these considerations, it may be concluded that the nationality requirement established in the laws of Guatemala is both necessary – because there are no alternatives that permit full compliance with the said objective – and strictly proportionate. Regarding the latter, the sacrifice inherent in the restriction is not exaggerated or excessive in relation to the advantages obtained by this limitation.⁸ It should not be forgotten that notaries are vested with attestation authority in the exercise of their functions and, in the case of Guatemala, they are also auxiliaries of the administration of justice. Accordingly, the requirement that such persons be nationals of the State on behalf of which they act does not signify a disproportionate restriction.
10. Additionally, given that the requirement of nationality includes the possibility of

interests; rather, he knows that if he does not comply with the mandates of the State Department or any other United State public entity that has this authority, he will be failing to exercise the profession or the mandate he has received from the State of Guatemala, which, in this case, is totally unrelated to that relationship. In other words, here, we are losing sight of the characteristic of independence that the Latin notary should have. [...] Also, let us suppose that he could have roots without having nationality; then, the other aspect we face is that any measure that he takes of a precautionary [nature], a bond, a surety, whatever, this is not going to be a complete guarantee that this foreign notary will enjoy total independence in relation to the requirements of Guatemalan law because if, tomorrow, Mr. Hendrix receives a subpoena from the United States preventing him from attending to a list of potential clients in the Republic of Guatemala, he is not independent. Opinion provided by Gabriel Orellana before the Inter-American Court of Human Rights on March 28, 2022.

⁷ *Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 74, para. 91 and *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 35. It is also worth pointing out that the said Advisory Opinion OC-4/84 indicates that: "while it is traditionally accepted that the determination and regulation of nationality are matters for each State to decide, contemporary developments reveal that international law imposes certain limits on the broad discretionary powers enjoyed by States in that area and that, currently, the regulation of nationality involves not only the jurisdiction of the States, but also the requirement of the full protection of human rights," para. 32.

⁸ *Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 83.

obtaining this by naturalization as a result of the decision of the Guatemalan Constitutional Court, we consider that this establishes a less restrictive measure because it allows foreigners to exercise the notarial function when they have become naturalized Guatemalans, rather than completely denying them access to the exercise of this profession; thus, it constitutes a less onerous restriction. We consider that the State's decision was not based on a regulation issued specifically and deliberately to be applied to the alleged victim with a discriminatory purpose due to his condition as a foreigner, or owing to his national origin, and we therefore conclude that the requirement of nationality by naturalization contained in article 2(1) of the Notarial Code of Guatemala is an objective and reasonable requirement that responds to the particular characteristics of the Guatemalan notary.

11. Based on the above, we conclude that the restriction imposed by the State is legitimate, complies with international standards, and does not violate Article 24 of the American Convention on Human Rights in relation to Articles 1(1) and 2 of this instrument.

Nancy Hernández López
Judge

Patricia Pérez Goldberg
Judge

Pablo Saavedra Alessandri
Registrar

DISSENTING OPINION OF JUDGE RODRIGO MUDROVITSCH

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF HENDRIX V. GUATEMALA

JUDGMENT OF MARCH 7, 2023

(Merits)

I. Introduction

1. The case of *Hendrix v. Guatemala* discusses the international responsibility of the State for potential human rights violations in the context of the impediment to the exercise of professional activities based on nationality. The alleged victim, Mr. Hendrix, a United States citizen, was prevented from registering as a notary before the Guatemalan Lawyers and Notaries Professional Association ("CANG") because he was not Guatemalan by birth or by naturalization. After he had filed administrative and judicial remedies, the Guatemalan Constitutional Court conditioned his exercise of the profession to the acquisition of Guatemalan nationality.

2. The Inter-American Court of Human Rights ("the Inter-American Court" or "the Court") indicated that non-compliance with the condition of "domicile" established in article 2(1) of the Guatemalan Notarial Code was sufficient justification for the alleged victim to be unable to register as a notary in Guatemala.¹ Consequently, the Court also rejected the alleged violation of Articles 24, 25 and 26 of the American Convention on Human Rights ("the Convention").²

3. With the greatest respect for the majority position of the Inter-American Court, I consider that, in the instant case, it was necessary to reaffirm the inter-American standards in relation to the principle of equality and non-discrimination (Article 24 of the Convention) and examine in detail the elements of the proportionality test in relation to the measure that restricted rights in cases of impediments to the exercise of a profession based on nationality. In addition, I understand that the professional restriction was not properly examined by the competent administrative and judicial organs, depriving Mr. Hendrix of access to judicial review (Article 25 of the Convention) and of the right to work, because he was prevented from exercising the notarial profession (Article 26 of the Convention).

4. Consequently, this dissenting opinion is organized in four parts: (II) description of the factual context that gave rise to the violations; (III) establishment of the criterion applied to Mr. Hendrix by the Guatemala courts (nationality), and analysis of the violation of the right to equality and non-discrimination by the adoption of the nationality requirement for the exercise of the notarial profession, including the application of the proportionality test to the differentiated treatment of nationals and non-nationals involving an impediment to the exercise of a profession in Guatemala; (IV) violation of the rights to due process and judicial protection, and (V) violation of the right to work.

II. The case before the Court

5. The alleged victim in this case, Mr. Hendrix, is a United States citizen, with a juris doctorate degree from the University of Wisconsin-Madison in the United States of America, a degree of juris doctor and lawyer from the Universidad Mayor de San Andrés

¹ Cf. *Case of Hendrix v. Guatemala. Merits*. Judgment of March 7, 2023. Series C No. 485, paras. 70 and 71. Hereinafter "judgment".

² Cf. Judgment, paras. 78 and 79.

in Bolivia, and a degree in law and the notarial profession from the Universidad de San Carlos de Guatemala ("USAC").³ At the time of the facts, he worked for the United States government. The judgment noted that,⁴ between 1997 and 2006, Mr. Hendrix entered Guatemala⁵ on several occasions, the last time being on April 16, 2006.

6. Among other requisites for the exercise of the profession, article 2 of the Guatemalan Notarial Code required the notary to be a lawyer registered with the relevant professional association (the Guatemalan Lawyers and Notaries Professional Association) and to be a Guatemalan national by birth or naturalization. According to the State, the justification for the nationality requirement was the fact that "because the notary possesses *fe pública* (the legal authority to attest documents, or attestation authority), he exercises a function, acts on behalf of the State, is subject to oversight and legal responsibility and, above all, provides legal certainty. This makes it necessary for the notary to prove *arraigo* (rootedness in the country), and the way to prove this situation is by nationality."⁶ According to expert witness Gabriel Orellana Rojas, rootedness is composed of two elements: domicile and nationality.⁷

7. On November 22, 2000, Mr. Hendrix submitted a request to register as a lawyer and notary before the CANG. However, the CANG Board only authorized his registration as a lawyer and refused to register him as a notary based on the argument that the legal provisions only permitted the registration of professionals who were Guatemalan by birth.⁸ On three occasions Mr. Hendrix attempted to obtain reconsideration of the decision, in one administrative and two judicial instances, namely: the Assembly of Presidents of Professional Associations of Guatemala, the Third Chamber of the Appellate Court, and the Guatemalan Constitutional Court.

8. First, Mr. Hendrix filed an appeal against the partial denial of his request by the CANG. This appeal was rejected by the Assembly of Presidents of Professional Associations of Guatemala on April 22, 2002.⁹ In the judicial sphere, on May 9, 2002, he submitted an application for amparo before the Third Chamber of the Appellate Court against the decisions of the CANG and the Assembly of Presidents of Professional Associations of Guatemala, which was also rejected.¹⁰

9. Lastly, Mr. Hendrix filed an appeal before the Guatemalan Constitutional Court, arguing that he had acquired the right to exercise the profession of lawyer and notary by obtaining the respective academic degrees from the School of Legal and Social Sciences of the University de San Carlos de Guatemala.¹¹ The substantive issue that the Constitutional Court was asked to examine was whether article 2(1) of the Notarial Code, which prevented non-nationals from registering as notaries, was compatible with article

³ On September 19, 1997, Mr. Hendrix submitted a request for recognition of his juris doctorate degree issued by the University of Wisconsin-Madison (USA) to the Universidad de San Carlos de Guatemala. On November 17, 1997, the Board of the USAC School of Legal and Social Sciences admitted his request and awarded Mr. Hendrix the title of Doctor in Legal and Social Sciences. *Cf.* Answering brief of June 14, 2021, paras. 11 and 12. Subsequently, on August 17, 1998, at the request of Mr. Hendrix, the Board of the USAC School of Legal and Social Sciences admitted the alleged victim's incorporation as a lawyer and notary. *Cf.* Answering brief of June 14, 2021, para. 14.

⁴ *Cf.* Judgment, para. 25.

⁵ *Cf.* Judgment, para. 25.

⁶ *Cf.* Answering brief of June 14, 2021, para. 114.

⁷ *Cf.* Expert opinion provided by Gabriel Rojas during the public hearing held on March 28, 2022.

⁸ *Cf.* Transcript of "Resolution 3-2001 of February 6, 2001, of the Guatemalan Lawyers and Notaries Professional Association recorded in a note of January 16, 2002, of the Board's Secretary."

⁹ *Cf.* Resolution No. 1151-13-02-02 of April 22, 2002, issued by the Assembly of Presidents of Professional Associations of Guatemala.

¹⁰ *Cf.* Judgment of the Third Chamber of the Appellate Court of June 25, 2002.

¹¹ *Cf.* File No. 1006-2002, Guatemalan Constitutional Court.

81 of the Constitution,¹² which refers to rights acquired as a result of university degrees. In response, the Guatemalan Constitutional Court confirmed the denial of the registration and, based on article 146 de la Constitución, which equates Guatemalans by birth to naturalized Guatemalans,¹³ asserted that the registration of Mr. Hendrix as a notary was conditional on his naturalization.

10. To date, Mr. Hendrix has been unable to register as a notary, and has not taken the necessary steps to acquire Guatemalan nationality.¹⁴

III. Violation of the right to equality and non-discrimination owing to the inability to register as a notary due to nationality

11. The majority position adopted by the Inter-American Court was that the State of Guatemala did not violate the rights of Mr. Hendrix because he was not a permanent resident of that country. This circumstance violated the requirement of domicile, which includes the aforementioned rootedness in the country, placing him in a particular situation that did not permit equating him to other persons who exercise notarial functions in Guatemala.¹⁵ In this way, the Court ruled out the analysis of the requirement of "*nationality*," since Mr. Hendrix did not meet the requirement of "*domicile*" in order to register as a notary.

12. The failure to address the "*nationality*" requirement when examining whether there had been discrimination in this specific case leads me to disagree with the majority position. I understand that, from the moment the exercise of a profession is conditioned on renouncing the nationality of origin and acquiring a new nationality, a situation that is incompatible with the Convention is created.

13. Consequently, in this section (III.a), I will examine the Court's approach to the requirement of "*domicile*" and establish the standard that was applied to Mr. Hendrix from the time this case was submitted, which is that of nationality. In continuation (III.b), I will analyze the violation of Mr. Hendrix's right to equality and non-discrimination, presenting (III.b.i) the conceptual framework that the Inter-American Court attributes to this guarantee in relation to the distinctions between national and non-nationals, to then (III.b.ii) evaluate whether the restriction applied by the State was compatible with the Convention based on the proportionality test usually applied by this Court.

(a) The requirement applied to Mr. Hendrix: discrimination based on nationality

14. In order to reject the argument of discriminatory treatment by the State, the majority position of the Court based itself on the premise that the petitioner did not comply with the requirement of *rootedness* in Guatemala, because he was not domiciled in the country. I consider that this position does not adequately reflect the facts of the case, because the criterion used by the Guatemalan jurisdiction to reject Mr. Hendrix's claim was the lack of nationality and not of domicile. In my opinion, the divergence from the parameters adopted by the domestic judicial authorities resulted in unacceptable distortions in the analysis of the facts as I will demonstrate below.

15. The judgment addresses the difference in treatment based on criteria that are neither objective nor reasonable, analyzing whether the petitioner was in an analogous

¹² Cf. Constitution of Guatemala. Article 81. Degrees and diplomas. Degrees and diplomas issued by the State have full legal value. The rights acquired for the exercise of the professions accredited by the said degrees must be respected and no provisions of any kind may be issued that limit or restrict them.

¹³ Cf. Constitution of Guatemala. Article 146. Naturalization. Those who obtain their naturalization pursuant to the law are Guatemalans. Naturalized Guatemalans have the same rights as Guatemalans by birth, subject to the limitations established in this Constitution.

¹⁴ Cf. Judgment, para. 25.

¹⁵ Cf. Judgment, paras. 75 and 76.

situation to that of Guatemalan nationals who wished to be notaries. When assessing the conditions supposedly required by law to register as a notary, the Court found that, in addition to nationality, applicants were required to have “roots” in the country. This element includes, among other factors, domicile in Guatemala. The judgment then examined whether Mr. Hendrix met the requirement of rootedness based on domicile.

That said, before making the analysis proposed by the Commission and by the representatives, the Court finds it necessary **to determine whether Mr. Hendrix was in a similar situation to Guatemala nationals as regards the exercise of the notarial profession.** Indeed, the right to equality, at least as regards equality of treatment, is based on the supposition that individuals in similar factual conditions cannot be the object of unjustified differentiated treatment. [...]

Consequently, it is first necessary to establish the specific situation of Mr. Hendrix in Guatemala because the alleged violation of the right to equality is based on a supposed discriminatory treatment and, in order to analyze this, it is necessary to determine whether the alleged victim was in a similar factual situation to the other persons who exercise notarial functions in Guatemala, so that it is possible to require identical treatment by the State. In this regard, it should be recalled that, in Guatemala, **according to the State, in addition to other requirements, notaries are not only required to be Guatemalan nationals by birth or by naturalization, but must also prove their rootedness or attachment to the country.** [...]

[W]hen applying for registration to exercise notarial functions, **Mr. Hendrix was not resident in Guatemala.** The Court notes that article 2 of the Notarial Code requires the notary to be domiciled in Guatemala. [...] In **other words, there was no information or evidence that allowed Mr. Hendrix’s roots in or attachment to Guatemala to be established and, according to the law, this was a necessary condition to exercise notarial public functions** according to the different expert opinions presented by the State and the Commission.¹⁶

16. After providing the grounds for the conclusion that “the evidence in the case file reveals that Mr. Hendrix was in a special situation that could involve an impediment to the exercise of the notarial profession,”¹⁷ the judgment discusses the importance of the requirement of “rootedness” considering all the competences and functions performed by notaries in Guatemala.¹⁸ Based on this, it indicates that:

Owing to the importance of the public functions conducted by notaries, **if the notarial function is exercised improperly, there is a public interest in the State being able to implement the principle of accountability** by accessing the necessary documentation to conduct the corresponding proceedings, and apply the appropriate sanctions. **This therefore justifies subjecting the notarial function to permanent oversight.** In Guatemala, this oversight is exercised by the professional association which, on behalf of the State, is responsible for the overall administration of the function, and its inspection and control. In this regard, **the Court considers that the notary’s roots in the country are essential to guarantee the principle of accountability, because such roots involve an attachment between the person exercising the notarial profession and the country, and this makes it possible to hold such persons legally responsible** for any errors in the exercise of their function.¹⁹

17. In this regard, it concludes that the requirement of rootedness in the country safeguards the possibility of attributing responsibility to notaries who exercise a function of public interest.²⁰ It then reiterates its conclusion that “Mr. Hendrix never put down any roots in Guatemala” and “was not in a similar factual situation to the other notaries in Guatemala who, being domiciled in Guatemalan territory, had the rootedness required for

¹⁶ Cf. Judgment, paras. 67 to 70.

¹⁷ Cf. Judgment, para. 67.

¹⁸ Cf. Judgment, paras. 70 and 71.

¹⁹ Cf. Judgment, para. 73.

²⁰ Cf. Judgment, para. 74.

*the exercise of the notarial public function.*²¹ And, this meant that, according to the majority position, the State had not violated Article 24 of the Convention, in relation to Articles 1(1) and 2 of this instrument.

18. Up to a certain point, I agree with the majority position of the Court when it identifies that protecting the possibility of holding those who exercise the notarial profession under the Guatemalan system accountable is a legitimate objective. I consider that the requirement of domicile, which is a component of rootedness, serves this purpose and constitutes a legitimate justification for a restriction to the exercise of the profession.

19. Nevertheless, my disagreement lies precisely with the restrictive approach that selects domicile as the **only** element in its analysis of the allegation of discrimination in this specific case. This is because the requirement of "nationality" is also a component of rootedness and, of itself, constitutes an impediment to the exercise of the profession in Guatemala. Moreover, this is precisely the reason alleged by the State in the domestic proceedings to prevent Mr. Hendrix from exercising his profession.

20. The right to equality and non-discrimination involves a series of obligations for the State. Among its direct obligations, the following can be identified: (i) the obligation not to introduce discriminatory provisions into its laws, and (ii) the obligation not to act in a discriminatory manner, which includes the situations in which the State applies its laws in a way that generates discriminatory situations. As is explained in the judgment (para. 21), in order to exercise the notarial profession, article 2(1) of the Guatemalan Notarial Code indicates that it is necessary "**[t]o be Guatemalan by birth, at least 18 years of age, a lay person, and domiciled in the Republic, subject to the provisions of paragraph 2 of Article 6.**"²² I believe that, bearing in mind the State's obligation not to introduce discriminatory provisions into its laws, the requirement of **both** "nationality" **and** "domicile" should be strictly analyzed as possible discriminatory provisions, and scrutinized to verify if they conform to the Convention.

21. In addition, even though Mr. Hendrix was not domiciled in Guatemala, **that was not the specific reason why, at the domestic level, he was prevented from access to the profession of notary.** In the three internal decisions that prevented him from exercising the profession – in both the administrative²³ and the two judicial decisions²⁴ – **the objection presented by the State was based on his foreign nationality.** Even the judgment of the Constitutional Court focused specifically on weighing the right acquired by the academic degree against the requirement of possessing Guatemalan nationality in order to register with the professional association.²⁵ Also, I recall that the Constitutional Court established naturalization as the only condition for Mr. Hendrix to be a notary, without referring to his domicile.

22. Accordingly, the case of *Hendrix v. Guatemala* has a clear factual framework: the conformity with the Convention of the application of the nationality requirement by the Guatemalan administrative and judicial authorities. The discussion concerning the application of the domicile requirement exceeds this framework because it was not addressed by either the Guatemalan notarial or judicial authorities. By making it a focus of analysis, the majority position of the Court unduly modified the factual framework of

²¹ Cf. Judgment, para. 75.

²² The exception refers to "consuls or diplomatic agents of the Republic, accredited and resident abroad, who are authorized notaries pursuant to this law," which is not relevant to this specific case.

²³ Cf. Transcript of "Resolution 3-2001 of February 6, 2001, of the Guatemalan Lawyers and Notaries Professional Association included in the note of January 16, 2002, of the Board's Secretary."

²⁴ Cf. Judgment of the Third Chamber of the Appellate Court of June 25, 2002; Judgment of the Constitutional Court of April 21, 2004.

²⁵ Cf. Judgment of the Constitutional Court of April 21, 2004.

the case and altered the very content of the domestic acts that were submitted to its jurisdiction.

23. Thus, with due respect, it would correspond to the State's judicial authorities, at the domestic level, to determine whether or not Mr. Hendrix was domiciled in the country. When they had the opportunity, the domestic courts did not do so. In this situation, I believe that, in light of the Convention, the Court should have given value to **the requirement they applied rather than to the one they failed to apply.**

24. It is also necessary to analyze what the State's measure was actually based on, even in cases in which the characteristic adopted by the State when applying the measure was not, in fact, verified, or in cases such as that of Mr. Hendrix, even if there were other factual impediments to the exercise of a specific right.²⁶ It is not sufficient that it was possible to justify the State's measure; it should have been justified for the correct reasons.

25. The majority position of the Court, from which I dissent, was based on the following question: If the State had applied the most appropriate requirement under the Convention – *rootedness (domicile)* – could Mr. Hendrix have been a notary? As I have been able to demonstrate in the preceding paragraphs, this question deviates from the factual framework by not assessing the *specific* conduct of the State. Thus, the question that should have been asked is the following: Did the restriction on access to the notarial profession based on the nationality requirement violate the Convention? I will devote the following sections to answering this second question, which relates to the matter that was really submitted to the Court in *Hendrix v. Guatemala*.

(b) Violation of the right to equality and non-discrimination

(i) Equality and non-discrimination standards in relation to nationality

26. Discrimination, in its broadest and most descriptive sense, consists in according a different treatment to anyone who has a specific characteristic or trait precisely because that person possesses that trait.²⁷ In its strictest and most legal sense, discrimination is a serious moral offense: it is treating someone differently in a way that prejudices them, causing them a disadvantage (often structural and with historical roots), without justification - that is to say, for a supposed reason (having this or that socially undervalued trait) – which is not a valid reason,²⁸ in violation of the duty not to accord different treatment to individuals in similar circumstances, when the only differentiating factor is that trait.²⁹ Discriminatory treatment is unjust and frequently the result of ignorance, stereotyping, prejudice and stigmatization.³⁰ The type of demeaning treatment produced

²⁶ It is not a question of applying the concept of "discrimination by perception" directly to Mr. Hendrix, but of demonstrating the relevance of the reason for the difference applied by the State, even though this does not necessarily lead to different results. For the concept of "discrimination by perception" see *Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2016. Series C No. 315. Cf. Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights (art 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights, para. 16, E/C.12/GC/20.

²⁷ Cf. GARDNER, John, *Discrimination: The Good, the Bad, and the Wrongful*, Proceedings of the Aristotelian Society, v. 118, n. 1, p. 55-81, 2018, p. 56.

²⁸ *Ibid.*, p. 64 and 65.

²⁹ *Ibid.*, p. 73.

³⁰ Cf. GARDNER, J, *Discrimination as Injustice*, Oxford Journal of Legal Studies, v. 16, n. 3, p. 353-368, 1996, p. 355. "The primary duties of the law relating to sex and race discrimination are duties to treat people in certain ways defined by reference to the way that others are treated. As the very name 'discrimination' implies, they are duties essentially concerned with people's relative positions." SOLANKE, Iyiola, *Discrimination as stigma: a theory of anti-discrimination law*, Oxford; Portland, Oregon: Hart Publishing, 2017; ALEXANDER, Larry, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, University of Pennsylvania Law Review, v. 141, n. 1, p. 149-219, 1992.

by discrimination is degrading for the person demeaned, because it affects their dignity, self-esteem and autonomy.³¹

27. The Inter-American Court has already decided that “any treatment that may be considered discriminatory with regard to the exercise of any of the rights guaranteed in the Convention is, *per se*, incompatible therewith.”³² Thus, the act or omission of any public authority that violates any of the rights established in the Convention may be attributed to the State as source of international responsibility. As mentioned in the judgment,³³ the Court establishes a difference between the obligation to respect rights without discrimination of Article 1(1) of the Convention and the equality before the law of Article 24:

In this regard, the Court considers that the arguments of the representative should not be analyzed under the provisions of Article 24 of the Convention but pursuant to the general non-discrimination obligation contained in Article 1(1) thereof. **The difference between the two articles lies in that the general obligation contained in Article 1(1) refers to the State’s duty to respect and guarantee “non-discrimination” in the enjoyment of the rights enshrined in the American Convention, while Article 24 protects the right to “equal treatment before the law.”** In other words, if the State discriminates in the respect and guarantee of a Convention-based right, it would be violating Article 1(1) and the substantial right concerned. If, on the contrary, the discrimination refers to unequal protection under domestic law, it would be violating Article 24.³⁴

28. As Lauterpacht asserts, the right to equality and non-discrimination is the basis for all the other freedoms³⁵ established in different international instruments. Consequently, this principle is one of the pillars of the Universal Declaration of Human Rights (Articles 1, 2 and 7)³⁶ and of the American Declaration of the Rights and Duties of Man (Article 2) and has been reaffirmed in articles 2 and 26 of the International Covenant on Civil and Political Rights, in article 14 of the European Convention on Human Rights (and also in article 1 of its Protocol No. 12), and in articles 2 and 3 of the African Charter of Human and Peoples’ Rights.

29. The right to equality and non-discrimination encompasses practices that discriminate directly, as well as those that generate disproportionately discriminatory effects towards certain persons, even when a discriminatory intention cannot be proved.³⁷

³¹ Cf. HELLMAN, Deborah, *When Is Discrimination Wrong?* Cambridge, MA: Harvard University Press, 2008.

³² Cf. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 53; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 78; *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs*. Judgment of October 24, 2012. Series C No. 251, para. 224.

³³ Cf. Judgment, paras. 63 to 65.

³⁴ Cf. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 209.

³⁵ Cf. LAUTERPACHT, Hersch. *An International Bill of the Rights of Man*. Oxford: Oxford University Press, 2013, p. 115.

³⁶ Universal Declaration of Human Rights.

Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]

Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

³⁷ Cf. *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs*. Judgment of October 24, 2012. Series C No. 251, para. 234; *Case of Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People v. Chile. Merits, reparations and costs*. Judgment of May 29, 2014. Series C No. 279, paras. 200 and 201.

Thus, even though the formulation of such laws or practices may seem neutral, they may have negative effects in the practice. Among the different occasions that the Court has had to rule on the principle of equality and non-discrimination, Advisory Opinion No. 18 (2003) was paradigmatic because it was the first time the Court acknowledged that the right to equality and non-discrimination formed part of *jus cogens*.³⁸ Thus, even though all States have the obligation to respect the Convention-based guarantees, without distinction, the principle “may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including private individuals.”³⁹

30. Under Advisory Opinion OC-18/03, the State of Mexico consulted the Court on the possible restriction by the State of the enjoyment of the labor rights of undocumented migrant workers owing to their irregular migratory situation. In this context, the Court separated the concepts of “distinction,” which includes the differentiated treatment that is compatible with international standards, from “discrimination,” which refers to any exclusion, restriction or privilege that is not objective and reasonable.⁴⁰

31. In principle, the restriction of rights may be justified when two basic and essential requirements are met: the restriction must be based on a specific legal provision and be applied proportionately.⁴¹ The application of this general principle is governed by the peculiarities of each right analyzed, in light of the international treaty that guides the analysis of the monitoring entity, in the case of the Inter-American Court, in particular the American Convention.

32. Allegations of the violation of the right to equality and non-discrimination call for a specific analysis of whether a differentiation was made based on criteria that were not objective and reasonable.⁴² Regarding the existence of differentiation, this stage of the analysis calls for the identification of a difference in treatment between individuals or groups in a similar situation. In the case of the criteria on which the differentiation is based, I note that the specific criteria based on which discrimination is prohibited in Article 1(1) of the Convention (race, color, sex, language, religion, political or other opinions, national or social origin, economic position, birth or any other social condition) are merely illustrative.⁴³

33. As I explained in the preceding section, in the instant case, the distinction that regulated the restriction of Mr. Hendrix’s rights was his nationality, based on article 2(1) of the Guatemalan Notarial Code, which used this criterion to regulate access to the notarial profession, and not his domicile. It is evident that the criterion of “nationality” is

³⁸ Cf. *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 97; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 79; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2016. Series C No. 310, para. 91; *Case of Vélez Loo v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 248; *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs*. Judgment of October 24, 2012. Series C No. 251, para. 225.

³⁹ Thus, “all the norms of *jus cogens* necessarily generate obligations *erga omnes*. While *jus cogens* is a concept of material law, obligations *erga omnes* refer to the structure of their fulfillment by all the entities and all the individuals bound by them.” Cf. *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18. Opinion of Judge Cançado Trindade, para. 80.

⁴⁰ Cf. *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 84.

⁴¹ Cf. *Case of Valencia Campos et al. v. Bolivia. Preliminary objection, merits, reparations and costs*. Judgment of October 18, 2022. Series C No. 469. Separate opinion of Judge Nancy Hernández López and Judge Rodrigo Mudrovitsch, para. 39.

⁴² Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 240.

⁴³ Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 240.

a suspect reason⁴⁴ for differentiation because it is explicitly included on the non-exhaustive list contained in Article 1(1) of the Convention (“national origin”). Similarly, the Inter-American Convention against All Forms of Discrimination and Intolerance also underscores discrimination based on nationality or migratory status.⁴⁵

34. The Inter-American Court’s case law includes numerous cases in which a distinction based on nationality, made without suitable, necessary and proportionate justification, has been declared discriminatory. In the *Yean and Bosico Girls v. Dominican Republic (2005)*, for example, the fact that the State impeded the late registration of children of Haitian migrants led the Court to recognize the violation of the duty to provide each individual with equal and effective legal protection, without discrimination based on nationality or non-national status.⁴⁶ In *Vélez Loo v. Panama (2010)*, the Court also verified a violation of the right to equality and non-discrimination based on nationality when examining the detention of an undocumented migrant⁴⁷ and reiterated that States may only accord a differentiated treatment between migrants and nationals if that treatment is reasonable, objective and proportionate, and does not harm human rights.⁴⁸

35. In *Nadege Dorzema et al v. Dominican Republic (2012)*, the Court again referred to discriminatory practices against migrants in Dominican Republic when examining the use of force by Dominican state agents against a group of Haitians, and indicated that police actions based on parameters of nationality and non-nationality constituted discrimination.⁴⁹ In *Expelled Dominicans and Haitians v. Dominican Republic (2014)*, the Court assessed the violations committed in the context of mass expulsions of migrants and of violence against families of Haitian origin, and consolidated the case law standards developed previously.⁵⁰

36. The review of this relevant chain of precedents establishing the State’s duty to guarantee equal treatment to both national and non-nationals reinforces the criterion asserted by Judge Cançado Trindade in his separate opinion to Advisory Opinion OC-18/03,

⁴⁴ Here, a parallelism is established with the concept of “suspect” or “more sensitive” categories adopted by the European Court when analyzing differentiating criteria adopted in State measures. If the categories are sensitive or suspect, only “very weighty reasons” may make the State’s justification objective and reasonable, thus increasing the burden of proof. The justification provided by that court was “that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion.” Cf. ECHR. *Kiyutin v. Russia*, no. 2700/10, § 63, 2011, and *D.H. and Others v. the Czech Republic [GC]*, no. 57325/00, § 182. In cases such as ECHR. *Andrejeva v. Latvia*, the European Court specifically considered nationality as a suspect category. Cf. ECHR. *Andrejeva v. Latvia [GC]*, no. 55707/00, § 87, 2009. Cf. also ARNARDÓTTIR, O. M. *Non-Discrimination Under Article 14 ECHR – The Burden of Proof*. *Scandinavian Studies in Law*, v. 51, p. 13-39, 2007.

⁴⁵ “Article 1(1). Discrimination shall mean any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties. Discrimination may be based on nationality; age; sex; sexual orientation; gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; socioeconomic status; educational level; migrant, refugee, repatriate, stateless or internally displaced status; disability; genetic trait; mental or physical health condition, including infectious-contagious condition and debilitating psychological condition; or any other condition.”

⁴⁶ Cf. *Case of the Yean and Bosico Girls v. Dominican Republic*. Judgment of September 8, 2005. Series C No. 130, para. 140.

⁴⁷ Cf. *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 119; *Case of Vélez Loo v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 248.

⁴⁸ Cf. *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18, para. 119; *Case of Vélez Loo v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 248.

⁴⁹ Cf. *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs*. Judgment of October 24, 2012. Series C No. 251, para. 233.

⁵⁰ Cf. *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2014. Series C No. 282, paras. 264 and 402.

emphasizing that the principle of equality and non-discrimination acquired special importance for the protection of the rights of migrants.⁵¹

37. In addition to the standards concerning discrimination based on nationality, the Court has examined the principle of equality from the point of view of treatment based on stereotyping. This perspective is pertinent in the instant case, insofar as the State's justification for impeding non-nationals from exercising the notarial profession in the country is based on presumptions relating to the suitability (or alleged lack of suitability) of immigrants to respond for fraudulent acts in cases relating to the application of legal responsibility. Therefore, designation as a notary was conditioned to the acquisition of Guatemalan nationality in order to incorporate non-nationals into Guatemalan society. Consequently, the professional impediment for non-nationals is based on the occurrence of two scenarios: the deficient performance of notarial functions, and the impossibility of legal responsibilities being assumed outside Guatemalan territory. Thus, the State argued that, if the said circumstances occurred, non-nationals would be more susceptible of remaining unpunished owing to their lack of ties to Guatemala.

38. In *Hendrix v. Guatemala*, it can be seen that the State replicates the feeling of distrust in relation to the credibility of the acts to be conducted by the stereotyped person – in this case, the non-national. As the Court indicated in Advisory Opinion OC-24/17, possible differences of opinion in relation to certain social groups cannot be used to justify discriminatory actions, especially when they reproduce structural and historical stigmas.⁵² In *Gonzales Lluy et al. v. Ecuador (2015)*, the Court examined the restriction of the right to education of the victim, Talia Gonzales Lluy, infected by the HIV virus during a blood transfusion, in relation to the interests of the children who studied with her. At that time, the Court concluded that the risk to her companions' health was minimal and that the decision to separate her from the school was based on subjective and stereotypical arguments.⁵³ The Court considered that the State had not proved that the measure was necessary and the least harmful, and concluded that the restriction imposed was disproportionate. Moreover, there was evidence that there were alternative biosafety measures capable of preventing the transmission of diseases. From a comparative perspective, *mutatis mutandis*, the instant case relates to the nationality requirement to guarantee the suitability of notaries. The content of the right to equality and non-discrimination does not allow the incorporation into domestic law of speculations, presumptions, stereotypes or generalized considerations as legitimate justifications for specific restrictions of rights.⁵⁴

39. Recapitulation of the Court's precedents concerning discriminatory treatment based on nationality reveal inter-American case law's strong commitment to according the greatest scope possible to the principle of equality and non-discrimination. In addition, it proclaims the obligation of States to eliminate any provision that establishes restrictions of rights between nationals and non-nationals that are not reasonable and based on objective criteria.

40. Consequently, it is necessary to evaluate whether the restriction of Mr. Hendrix's rights owing to his condition of non-national is compatible with the Court's traditional case

⁵¹ Cf. *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18. Separate opinion of Judge Antônio Augusto Cançado Trindade, para. 33.

⁵² Cf. *Mutatis mutandis, Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples. State Obligations in relation to Change of Name, Gender Identity, and Rights deriving 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 of November 24, 2017. Series A No. 24, para. 83.

⁵³ Cf. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 274.

⁵⁴ Cf. *Mutatis mutandis, Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 258.

law in this area or whether it violated the petitioner's right to equality and non-discrimination. To this end, I will now examine the substantive justification of the State's conduct based on the proportionality test. The Court has used this test extensively and signified that, once the sphere of protection of a specific right has been breached, the intervention can only be considered proportionate if it satisfies the criteria of strict appropriateness (or suitability), necessity and proportionality.⁵⁵

(ii) Discriminatory nature of the professional restriction based on nationality

41. Any restriction of the rights recognized in the American Convention should comply with the basic requirements of Article 30, and may only be applied pursuant to a law enacted for reasons of general interest, and for the purpose for which it was established. Thus, before applying the proportionality test to the measure, it is necessary to verify: (i) whether the restrictive measure was previously established by law, and (ii) whether it had a legitimate objective.

42. Regarding the requirement of **legality**, inter-American case law is categorical in noting that any restriction of rights must be expressly established in a prior law, as a way of guaranteeing that such restrictions are not left to the discretion of the public authorities. In this regard, I can confirm that the requirement of Guatemalan nationality by birth or naturalization for membership in the professional association is established in article 2(1) of the Notarial Code. Also, the legal provision requiring renunciation of the nationality of origin in order to acquire Guatemalan nationality is contained in article 37 of the Nationality Law, which should be interpreted in light of article 146 of the Constitution of the Republic. Those norms were issued pursuant to the procedures required by Guatemalan law and adopted by the Legislature. I therefore consider that this requirement is met.

43. Regarding the existence of a **legitimate objective** for the restriction of the exercise of the notarial profession based on the criterion of nationality, I consider it important to point out that, here, I will only examine whether the objective alleged by the State may be considered legitimate.⁵⁶ Recognizing the existence of a legitimate objective or purpose does not signify admitting that the measure adopted can contribute to achieving the said objective – an analysis made in relation to the standard of suitability under the proportionality test.⁵⁷ As the Court has emphasized previously, the legitimacy of the purpose “does not necessarily mean that the restriction in question has been legal [...], using the most suitable, necessary or proportionate means.”⁵⁸

44. Contrary to other provisions of the Convention, for example, Articles 13(2) and 16, the content of which provide a textual basis for delimiting an important aspect of a State's laws and regulations; namely, the legitimate purposes of restrictions, Articles 1(1) and 24

⁵⁵ Cf. *Case of Valencia Campos et al. v. Bolivia. Preliminary objection, merits, reparations and costs*. Judgment of October 18, 2022. Series C No. 469. Separate opinion of Judge Nancy Hernández López and Judge Rodrigo Mudrovitsch, para. 43.

⁵⁶ A similar analysis was made, for example in *Usón Ramírez v. Venezuela*: “To that end, the Court reiterates that when analyzing the legitimacy of the objective in this case (the protection of the right to honor of the Armed Forces) the idea is not to determine whether the Armed Forces have an effective “right” to honor or reputation; the analysis is to determine whether such objective would be legitimate for the purpose of restricting the right to freedom of expression of Mr. Usón Ramírez.” Cf. *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, para. 63.

⁵⁷ Despite the different focuses of the criteria, even in cases in which the existence of a legitimate objective and the suitability of the measure are examined together, these are two clearly differentiated stages. Thus, “the Court must determine whether the protection of the reputation of the Armed Forces serves a lawful purpose that justifies a restriction of freedom of expression and, as the case may be, whether a criminal sanction is suitable to achieve such purpose.” Cf. *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, para. 62.

⁵⁸ Cf. *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, para. 66

do not indicate what the legitimate purposes or objectives of an intervention in their respective spheres of protection would be, not even as a guiding principle.⁵⁹ In Advisory Opinion OC-04/84, which assesses a proposed amendment to the Constitution of Costa Rica related to naturalization, the Court indicated that differences in treatment “may not be unjust or unreasonable; that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.”⁶⁰

45. On this basis, I have therefore verified that the objectives sought by the professional restriction based on national origin are the following: (i) protection of State sovereignty; (ii) promotion of legal certainty and security, and (iii) protection of human rights. Such objectives are characterized, in the abstract, as legitimate, so that this second requirement is also met.⁶¹

46. The principle of proportionality⁶² signifies that, once the sphere of protection of a specific right has been breached, the intervention can only be considered proportionate if it satisfies the criteria of strict appropriateness (or suitability), necessity and proportionality.⁶³ The first requirement calls for the analysis of whether the differentiating measure is suitable: that is, whether it pursues a legitimate and essential objective pursuant to the Convention.⁶⁴ The second requirement calls for the measure to be necessary to achieve that objective; that is, it cannot be substituted by a less harmful measure,⁶⁵ in other words by a restrictive measure that is less harmful for the holder of the rights, but one that is able to achieve the objective pursued by the legislator. The idea that underlies necessity or enforceability is that freedoms are the rule; therefore, they should only be restricted insofar as essential to protect other human rights or as strictly required to promote an objective of general interest. Lastly, we have the proportionality test, *stricto sensu*, according to which the benefits of the adoption of the measure analyzed must clearly exceed the sacrifices imposed by the restriction of the treaty-based rights concerned.⁶⁶ In this section, I will address the criteria sequentially.⁶⁷

1. Suitability

⁵⁹ Cf. MÜLLER, Friedrich. *Discours de la Méthode Juridique*. Trad. Olivier Jouanjan. Paris: Presses Universitaires de France, 1996, p. 372 and ff.

⁶⁰ Cf. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 57; *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/02, August 28, 2002. Series A No. 17, para. 57.

⁶¹ Cf. Answering brief of June 14, 2021, para. 227.

⁶² Cf. *Case of Álvarez Ramos v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 30, 2019. Series C No. 380, para. 104-110; *Case of Palamara Iribarne v. Chile. Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, para. 79; *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, para. 102.

⁶³ Cf. *Case of Valencia Campos et al. v. Bolivia. Preliminary objection, merits, reparations and costs*. Judgment of October 18, 2022. Series C No. 469. Separate opinion of Judge Nancy Hernández López and Judge Rodrigo Mudrovitsch, para. 43.

⁶⁴ Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 241; *Case of Valencia Campos et al. v. Bolivia. Preliminary objection, merits, reparations and costs*. Judgment of October 18, 2022. Series C No. 469. Separate opinion of Judge Nancy Hernández López and Judge Rodrigo Mudrovitsch, para. 43.

⁶⁵ Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 241; *Case of Valencia Campos et al. v. Bolivia. Preliminary objection, merits, reparations and costs*. Judgment of October 18, 2022. Series C No. 469. Separate opinion of Judge Nancy Hernández López and Judge Rodrigo Mudrovitsch, para. 43.

⁶⁶ Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 241; *Case of Valencia Campos et al. v. Bolivia. Preliminary objection, merits, reparations and costs*. Judgment of October 18, 2022. Series C No. 469. Separate opinion of Judge Nancy Hernández López and Judge Rodrigo Mudrovitsch, para. 43.

⁶⁷ Regarding the criteria examined, I note that there are differences in the terminology used in the Court's case law, in the application of these standards by other international courts, and in legal doctrine. Consequently, I find it essential to examine them based on the substance of each matter, over and above questions of nomenclature.

47. The determination of suitability tries to verify whether it is reasonable to use the State act analyzed to promote the legitimate objectives sought.⁶⁸ What is required is a “reasonable connection” between the restrictive measure and the objective sought.⁶⁹ In other words, the measure **should be instrumental** to achieve the objective sought or, at least, promote it substantially. According to the Court’s case law, to evaluate the proportionality of a difference in treatment, it is necessary to verify whether there is a well-founded connection between this difference and the objectives of the norm that establishes such distinction,⁷⁰ and to examine whether the measure pursues an objective that is legitimate⁷¹ and essential according to the Convention.⁷²

48. Since it refers to the relationship between the means and the ends, the examination of the suitability – and of the ensuing necessity – cannot be performed in abstract, without empirical information regarding the measures considered and the scope of their effects. Thus, the examination of the suitability of the measures imposed on Mr. Hendrix first requires clarifying the nature of the notarial function as such and the way in which it is exercised in the State of Guatemala.

49. The Latin notary, as Jorge Luis Hellig explains, is an impartial professional with a law degree, a guardian of legality, who enjoys autonomy in his decisions and is independent from the public sector, exercising the following activities: “(a) he advises the parties; (b) interprets the parties’ intentions; (c) drafts, reads and explains the instrument; (d) validates the instrument, thereby granting it recognition by the State; (e) conserves the instrument; (f) replicates the instrument, and (g) occupies his functions for an indefinite period.”⁷³

50. Under the Anglo-Saxon system, for example, the United States of America (with the exception of the state of Luisiana), notaries are appointed as notary public and do not need a law degree because they act exclusively to authenticate and formally validate instruments. Therefore, under the Anglo-Saxon system, notaries do not exercise a public function because they do not intervene in the drafting of the document, or ensure the legality of its content.⁷⁴ As argued by the International Union of Notaries (UINL), “the intervention of the notary public does not accord legal security because he does not ensure

⁶⁸ Cf. *Case of Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People v. Chile. Merits, reparations and costs.* Judgment of May 29, 2014. Series C No. 279, para. 200; *Case of Espinoza González v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2014. Series C No. 289, para. 219; *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples. State Obligations in relation to Change of Name, Gender Identity, and Rights deriving 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 of November 24, 2017. Series A No. 24, para. 81.

⁶⁹ Cf. BARAK, Aharon. *Proportionality: constitutional rights and their limitations.* Cambridge: Cambridge University Press, 2012, p. 303.

⁷⁰ Cf. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 57; *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/02, August 28, 2002. Series A No. 17, para. 47.

⁷¹ Cf. *Case of Espinoza González v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2014. Series C No. 289, para. 219; *Case of Guevara Díaz v. Costa Rica. Merits, reparations and costs.* Judgment of June 22, 2022. Series C No. 453, para. 47; *Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala. Merits, reparations and costs.* Judgment of October 6, 2021. Series C No. 440, para. 132.

⁷² Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 30, 2016. Series C No. 329, para. 241; *Case of Pavez Pavez v. Chile. Merits, reparations and costs.* Judgment of February 4, 2022. Series C No. 449, para. 69.

⁷³ Cf. HELIG, Jorge Ríos. *La práctica del derecho notarial.* 8. ed. Ciudad de México: McGraw-Hill, 2012, p. 29.

⁷⁴ Cf. Answering brief of June 14, 2021, para. 36; *Amicus curiae* brief of the International Union of Notaries (UINL), p. 6.

adherence to the law and authenticity and because he belongs to a system based on reparatory rather than preventive law.⁷⁵

51. Regarding their **status**, in Guatemala, notaries are considered liberal professionals of a hybrid nature, who exercise a public function with personal civil, criminal and administrative responsibility,⁷⁶ but who are free to negotiate their fees with the private individuals to whom they provide services. In the words of the State, the notary is “a law professional who possesses the legal authority to attest documents delegated by the sovereign State and by law, which means that he exercises a public function, acts on behalf of the State, and his activity is of public interest because he provides legal certainty and protects human rights.”⁷⁷

52. Regarding their **activities**, according to the State, notaries “give shape to the intention of the parties in order to give this intention legal form, adapting it to the legal requirements of form and substance, and also [...] attest to facts and acts that take place in their presence, which gives these authenticity and is considered conclusive proof.”⁷⁸ Guatemalan law allows notaries to validate instruments, authenticate signatures, draw up notarial instruments, and act as auxiliaries of justice in cases of voluntary jurisdiction.⁷⁹ Notaries also have attestation authority to confer legal certainty on the relations between private individuals⁸⁰ through public instruments authenticated in the course of their notarial activities.⁸¹ The concept of attestation authority is, therefore, a central element of a notary’s identity.⁸²

53. Regarding the **selection** of notaries, the notarial system in each State must be verified. In the countries that have adopted the Latin notarial system there are three ways to access the notarial function: appointment, a competitive competition, and a professional degree.⁸³ Guatemala has adopted the model of the professional degree. After obtaining a notarial degree, the interested party must register with the respective professional association. As the UINL indicated: “the award of a notary degree does not result in the automatic authorization to exercise the notarial profession in the Republic of Guatemala.”⁸⁴ The foregoing is derived from the nature of the profession under the Latin notarial system adopted by Guatemala and other countries of the Americas.⁸⁵

54. Bearing in mind this description of the notarial function, I will now examine the suitability of nationality as a criterion for the admission of new notaries in Guatemala. The State argued the protection of state sovereignty, the promotion of legal certainty and security, and the protection of human rights as objectives when imposing the restriction of the nationality of the candidate for entry into the notarial profession.⁸⁶ Therefore, it is

⁷⁵ Cf. *Amicus curiae* brief of the International Union of Notaries (UINL), p. 6.

⁷⁶ Cf. Answering brief of June 14, 2021, para. 30.

⁷⁷ Cf. Answering brief of June 14, 2021, para. 8.

⁷⁸ Cf. Answering brief of June 14, 2021, para. 31.

⁷⁹ Cf. Articles 54 and 60 of the Guatemalan Notarial Code; Merits Report (IACHR), paras. 25 to 30.

⁸⁰ Cf. Answering brief of June 14, 2021, paras. 81 and 225.

⁸¹ Guatemalan Notarial Code. Article 1. “The Notary has the legal authority to attest and authenticate the legal documents in which he intervenes pursuant to the law or at the request of a party.”

⁸² As pointed out by the State, the legal authority to attest documents or attestation authority creates an official truth and provides legal certainty and security in social relationships. The public instruments produced possess the characteristic of full proof and, consequently, contribute to legal certainty and security. Cf. Answering brief of June 14, 2021, para. 76 and 77; Code of Civil and Commercial Procedure of Guatemala. Article 186. “Documents authorized by a notary or by a public official or employee in exercise of their functions, are considered authentic and constitute conclusive proof, save for the right of the parties to contest them alleging invalidity or falsity. [...]”

⁸³ Cf. The State’s brief with final arguments of April 28, 2022, para. 49.

⁸⁴ Cf. *Amicus curiae* brief of the International Union of Notaries (UINL), p. 3.

⁸⁵ Cf. Judgment, paras. 54 and 55.

⁸⁶ Cf. Answering brief of June 14, 2021, para. 227.

necessary to examine the suitability of this restriction in relation to each of these objectives.

55. First, despite the State's arguments, there continues to be a high degree of uncertainty as regards the possible causal relationship between the said measure and the protection of **State sovereignty**. In addition to the fact that "sovereignty" is distinguished by its capacity to convey competing claims⁸⁷ – and its composition is clearly paradoxical⁸⁸ – the way in which the State cited this concept was even more imprecise. The arguments made in the answering brief fluctuate between two different arguments. The first appears to suggest that notarial acts, as such, protect the State's sovereignty – by means of the attestation authority; therefore, the protection of sovereignty would be reinforced by the exclusive practice of such acts by the country's nationals.⁸⁹ However, the causal relationship is unclear because, in Guatemala, the notary's function is, above all, dedicated to attributing certainty and truth to the intentions expressed by private individuals,⁹⁰ an activity that, if it is exercised exclusively by the country's nationals, **does not appear to increase the protection of the State's supreme authority in its territory perceptibly, or to reinforce its independence in relation to other States** – the domain in which the concept of "sovereignty" usually operates,⁹¹ since the Peace of Westphalia.⁹²

56. The second argument, which is more indirect, indicates that the possible admission of non-nationals into the body of notaries would impair the sovereignty of Guatemala because it is the State that, in exercise of its sovereignty, vests attestation authority in the notary by law, and that the State is the ultimate authority to establish the criteria for the exercise of the notarial function.⁹³ However, invoking sovereignty in this way would be trying to evade the impact of international law, because what is being examined in this case is precisely the proportionality of the restrictive criteria chosen by the State in relation to the human rights established in the Convention.⁹⁴ This appeal to sovereignty is in total contradiction to the idea that this attribute is conditioned by international law,⁹⁵ either in the domain of the law of treaties,⁹⁶ or in that of the protection of human rights.⁹⁷ In both

⁸⁷ Cf. GRIMM, Dieter. *Sovereignty: the origin and future of a political and legal concept*. Trad. Belinda Cooper. New York: Columbia University Press, 2015, pp. 92 and ff., which rightly indicates that the advent of a multi-level system in the European context has reactivated "sovereignty" by giving voice to positions concerning a political order that is referred to as a post-sovereign era.

⁸⁸ This is because "sovereignty" functions as an external reference for two social system that, since they are self-founded, lack external references, as indicated by NEUENSCHWANDER MAGALHÃES, Juliana. *Formação do conceito de soberania: história de um paradoxo*. São Paulo: Saraiva, 2016, p. 238.

⁸⁹ Cf. Answering brief of June 14, 2021, para. 180(f): "Sovereignty is protected by this means (the attestation authority/*fe pública*) [...]."

⁹⁰ Cf. Answering brief of June 14, 2021, para. 225.

⁹¹ Cf. BESSON, Samantha. *Sovereignty*. In: Max Planck Encyclopedias of International Law. Oxford: Oxford University Press, 2011. Available at: <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472>. Accessed on March 14, 2023.

⁹² Cf. DIHN, Nguyen Quoc. DAILLER, Patrick. PELLET, Alain. *Direito Internacional Público*. 2ª ed. Lisboa: Fundação Calouste Gulbenkian, 2003, p. 53.

⁹³ Cf. Answering brief of June 14, 2021, para. 82.

⁹⁴ Cf. CANÇADO TRINDADE, Antônio Augusto. *Tratado de direito internacional de direitos humanos*. 2. ed. Porto Alegre: Sergio Antonio Fabris, 2003. v. 2, p. 29: "Once assumed [treaty-based human rights obligations], States may no longer invoke sovereignty – in any case inadequate, in its absolute sense, at the level of international relations – as an element for interpreting treaties to which they are parties."

⁹⁵ Article 14, Draft Declaration on the Rights and Duties of States ([1949] *I.L.C. Yearbook 286*): "Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law."

⁹⁶ In this regard, Article 27 of the Vienna Convention on the Law of Treaties: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

⁹⁷ Cf. JACKSON, Robert. *Sovereignty: Evolution of an idea*. Cambridge: Polity Press, 2007, p. 124: "International human rights law is a law of sovereign states that is fundamentally concerned with the safety, freedom, and dignity of individual human beings and with the obligations of states in that regard."

lines of arguments, the State has not provided sufficient evidence to establish the causal nexus between the measure adopted and the suitable objective. **Therefore, it did not prove satisfactorily the instrumentality of the measure in relation to the objective.**

57. I emphasize this point because, in theory, in a different situation and based on the distinctive criterion of nationality, the State could prove that a causal nexus existed between the measure of disqualification and the legitimate objective of protecting sovereignty, as occurs, for example, in the context of public functions that, owing to their purpose, require a special concept of national or community loyalty. This is the case, for example, of the nationality requirement to form part of the diplomatic corps or to exercise military command functions. Therefore, as the State has not complied adequately with its duty to provide specific arguments, I agree with the understanding of the Inter-American Commission on Human Rights⁹⁸ that the absence of arguments that explain the relationship between the protection of State sovereignty and the prohibition of notaries in Guatemalan having a foreign nationality precludes a precise understanding of the objective sought by the State using the means at its disposal,⁹⁹ which results in non-compliance with the requirement.

58. I note that, at times, the State's arguments concerning sovereignty are similar to the argument concerning another objective: the protection of national security. Evidently, restricting the nationality of notaries is not suitable for that purpose because the exercise of the notarial profession is not an appropriate means to respond to such threats. Possible failures by notaries to exercise their functions satisfactorily represent, at most, isolated or local offenses against law and order. Moreover, it is always necessary to take great care not to abuse this line of arguments which, in this case, could lead to a stereotyped characterization of the immigrant as, *per se*, a threat to national sovereignty and security.

59. Therefore, non-nationality cannot result in an individual being suspected of, or labelled as having presumed hostility towards a specific national community, even though this stereotype is established in a legal measure. Ultimately, the principle of equality requires that, faced with the universality of human rights, there is an authentic right to be different, especially in relation to those traits that make up an individual's identity and personality. The State's reasons – construed from a style that emulates the former *raison d'état*¹⁰⁰ – should, in this regard, be subject to strict and severe scrutiny in relation to the treaty-based principle of equality, always exercised on an empirical basis, as I have mentioned in another part of this opinion.

60. Second, it is necessary to examine whether nationality as a condition for access to the notarial profession is suitable to guarantee **legal security**, which refers to the requirement of *rootedness*. The State argued that a person's nationality is an indicator of his roots in and attachment to the country, and this would facilitate accountability in his notarial activities and possible legal responsibility for his acts in case of improper exercise of his functions or bad faith.¹⁰¹ The State argued that the requirement of Guatemalan nationality eliminated the risk of a non-national notary committing an offense by making unlawful use of good faith and fleeing to his country of origin, making it almost impossible to request his extradition and culminating in impunity.¹⁰²

⁹⁸ Cf. IACHR. Merits Report 194/20, paras. 51 and 52.

⁹⁹ Cf. *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2014. Series C No. 282, para. 317.

¹⁰⁰ Cf. STOLLEIS, Michael. "La Idea del Estado Soberano." In: *La textura histórica de las formas políticas*. Madrid: Marcial Pons, 2011, p. 32.

¹⁰¹ Cf. The State's brief with final arguments of April 28, 2022, para. 166.

¹⁰² "If a notary should commit an offense owing to the unlawful use of his attestation authority, the State of Guatemala can guarantee that the professional in question responds personally before the courts and makes integral reparation to the victims." Cf. The State's brief with final arguments of April 28, 2022, para. 167.

61. According to the State's argument, **the protection of human rights** would also be an objective of the restriction based on nationality. In other words, such restriction would be the measure used to seek an increase in legal security which, in turn, would promote the protection of human rights. Under the democratic rule of law, the relationship between legal security and the protection of human rights is undisputed. Moreover, I recognize that the notarial activity contributes to the administration of justice and to the formalization of relations between private individuals, contributing to the cohesion of legal ties and the production of evidence within and outside the judicial sphere.

62. However, I note that, despite demonstrating the link between legal security and the protection of human rights, the State's argument does not go to the heart of the analysis of suitability, which is the connection between the requirement of Guatemalan nationality and the protection of human rights. Here, it is necessary to recall Barak's reflection that a society that strives to protect human rights should not permit the use of any general consideration of supposed public interest to justify the limitation of a right.¹⁰³ On this basis, I understand that the mention of the protection of human rights as the objective of the restrictive measure does not offer convincing elements for the analysis of suitability, because it does not justify how the limitation of the constitutional – and conventional – right to equality and non-discrimination would promote the other rights cited by the State.¹⁰⁴

2. Necessity

63. On several occasions, the Inter-American Court has established that it is necessary "to examine the alternatives that exist to achieve the legitimate objective sought and to identify their greater or lesser harmfulness."¹⁰⁵ The assessment of necessity is, thus, eminently comparative.¹⁰⁶ Between two measures that are equally suitable to achieve or promote the legitimate objective pursued, it is necessary to determine which of them will have less effect, or no effect whatsoever, on the achievement of other legitimate objectives.¹⁰⁷

64. Thus, at this stage of the reasoning proposed by the proportionality test, it is necessary to verify the existence of alternative measures to the criterion of nationality that are suitable to ensure the objective pursued and to preserve the right to equality and non-discrimination. As I will explain below, Guatemala already has suitable alternative measures that do not violate the right to equality to achieve the general objective cited in its defense, namely: **(i) the requirement of domicile, (ii) legal responsibility, and (iii) the obligation of notaries to hand in their protocol when leaving the country.**

¹⁰³ Cf. BARAK, Aharon. *Proportionality: constitutional rights and their limitations*. Cambridge: Cambridge University Press, 2012, p. 265.

¹⁰⁴ Cf. Answering brief of June 14, 2021, para. 84 and ff.

¹⁰⁵ Cf. *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, para. 72; *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 93; *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of August 6, 2008. Series C No. 184, para. 196, and *Case of Kimel v. Argentina. Merits, reparations and costs*. Judgment of May 2, 2008. Series C No. 177, para. 74.

¹⁰⁶ Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 241; *Case of Pavez Pavez v. Chile. Merits, reparations and costs*. Judgment of February 4, 2022. Series C No. 449, para. 69; *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples. State Obligations in relation to Change of Name, Gender Identity, and Rights deriving 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 of November 24, 2017. Series A No. 24, para. 81, and *Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2016. Series C No. 315, para. 126.

¹⁰⁷ Cf. ALEXY, Robert. *Teoría de los derechos fundamentales*. Madrid: Centro de Estudios Constitucionales, 1993, p. 113.

65. As argued extensively by the State, the expert witness who testified during the hearing, and the Guatemalan Institute of Notarial Law, the attachment between the person exercising the notarial function in Guatemala and the Guatemalan State represented by rootedness is composed of two elements: domicile and nationality.¹⁰⁸ However, it is unclear what additional guarantees nationality alone would provide; in other words, what aspects of the achievement of the objectives sought are not sufficiently protected by the **criterion of domicile, per se**. This question is relevant insofar as the requirement of domicile is an adequate alternative means of achieving the alleged objectives and does not impair the principle of equality between nationals and non-nationals protected by the Convention.

66. The domicile is defined by the Guatemalan Civil Code as the voluntary establishment of residence with the intention of permanence and the place recognized by the law for the exercise of rights and fulfillment of obligations.¹⁰⁹ By establishing his domicile, the individual – irrespective of his nationality – creates an attachment to the State, which facilitates monitoring his actions and holding him accountable for them.

67. In view of the fact that one of the main concerns expressed by the State focused on the risk that the notary would improperly abandon the country without handing in his protocol to the competent authorities, and that his misconduct would go unpunished, it is worth pointing out that article 262 of the Guatemalan Code of Criminal Procedure¹¹⁰ **establishes the circumstances that should be considered to assess the risk of flight**. Among such circumstances, the following are expressly listed: roots and domicile in the country and also family ties, and business and work relations. However, it does not expressly mention nationality, which leads us to conclude that the requirement of domicile responds satisfactorily to the needs for State control of migratory movements and efforts to prevent flight.

68. If neutral measures exist in relation to the discrimination criterion in question, it is not justified to use others based on nationality. Indeed, if it were plausible that the nationality of a Guatemalan notary in some way guaranteed the State's control of his activity and, therefore, the achievement of the objective of legal certainty and security, based on a strict scrutiny, the State would have to prove that it is the only instrument that is specifically useful for overseeing the actions of notaries effectively. The verification of domicile, for example, would appear to be sufficient to guarantee the legal security sought, as well as to ensure the localization of the notary in the case of civil or criminal responsibility. However, in cases in which a suspect distinction is cited, it is for the State to make an analytical comparison of the different measures to achieve the objective sought. It is this action that reveals and translates the essence of the assessment of necessity made at the second stage of the proportionality test.

69. In addition, expanding the analysis from the Guatemalan national sphere to the international standards for the function established in the Fundamental Principles of the Latin-type Notarial System of the International Union of Notaries (UINL), it can be seen that the most recent version, adopted in 2005, does not establish nationality as a requirement for the exercise of notarial activities. In order to oversee the technical and ethical quality of the notarial activity, the Union establishes the requirement of obtaining

¹⁰⁸ Cf. Judgment, paras. 48-52.

¹⁰⁹ Cf. Civil Code of Guatemala. Article 32. "The domicile is constituted voluntarily by residence in a place with the intention of remaining there."

¹¹⁰ Cf. Code of Criminal Procedure of Guatemala, Article 262. (Risk of flight). "To decide whether there is a risk of flight, special consideration shall be given to the following circumstances: (i) Rootedness or attachment to the country determined by domicile, usual residence, seat of the family, business or work, and facilities to abandon the country definitively or to remain hidden [...]."

a law degree,¹¹¹ the constant scrutiny of the authorities and the collegiate bodies,¹¹² and respect for the ethical rules that guide the exercise of the profession at the national and international levels.¹¹³ Additionally, in the document: "Deontology and Rules of Organization for Notariats," the UINL establishes that it is compulsory for notaries to be members of the national professional association responsible for the scrutiny of the notarial activity,¹¹⁴ as well as the power of the State to scrutinize, check, inspect and sanction notarial activities, either directly or through the notarial association.¹¹⁵

70. The requirements indicated by the UINL are suitable means to control the notarial function, are able to support the objectives sought by the Guatemalan State, and do not impose any distinction between nationals and non-nationals for the exercise of the notarial profession. Guatemala already possesses mechanisms that meet the standards of the International Union of Notaries for preventive oversight of the notarial activity by requiring a university degree (art. 2 of the Notarial Code) and compulsory membership in the Guatemalan Lawyers and Notaries Professional Association pursuant to Decree 72-2001.

71. Should the notary act improperly, the laws of Guatemala also establish repressive monitoring mechanisms and the establishment of **legal responsibility**. And, despite the presumption of the authenticity of the documents produced by notaries, pursuant to the Guatemalan Code of Civil and Commercial Procedure, the parties may allege their nullity or falsity.¹¹⁶ If such irregularities are proved, the notary may be held responsible in the disciplinary, administrative, civil or criminal sphere.¹¹⁷

72. If, by act or omission, the notary fails to comply with a legal duty or acts with malice, unjustifiable ignorance, negligence or fault, he must compensate the person prejudiced,¹¹⁸ pursuant to article 1645 of the Guatemalan Civil Code¹¹⁹ Also, article 5 of

¹¹¹ Cf. Fundamental principles of the International Union of Latin Notaries. Principle 13. "The law in each State determines the conditions governing access to the profession of Notary and the holding of public office as a Notary. It establishes what examinations and qualifications are to be considered necessary and demands that candidates should always have a law degree and the highest legal qualification."

¹¹² Cf. Fundamental principles of the International Union of Latin Notaries. Principle 14. "The law of each State determines the disciplinary code that applies to Notaries, who are to be under the constant supervision of their public authorities and collegiate bodies."

¹¹³ Cf. Fundamental principles of the International Union of Latin Notaries. Principle 19. "Notaries are obliged to respect the deontological rules of their profession at both the national and the international level."

¹¹⁴ Cf. Article 21, Deontology and Rules of Organization for Notariats. Available at: <https://www.uinl.org/organizacion-de-la-funcion>. Consulted on May 4, 2023.

¹¹⁵ Cf. Article 26. Deontology and Rules of Organization for Notariats. Available at: <https://www.uinl.org/organizacion-de-la-funcion>. Consulted on May 4, 2023.

¹¹⁶ Cf. Code of Civil and Commercial Procedure of Guatemala. Article 186. "Authenticity of documents. Documents authorized by notary or by public official or employee in the exercise of their functions, shall be considered authentic and constitute conclusive proof, subject to the right of the parties to contest them alleging nullity or falsity. The other documents referred to in articles 177 and 178, as well as private documents that are duly signed by the parties, shall be considered authentic in the absence of evidence to the contrary. The contestation by the opposite party shall be made within ten days of notification of the resolution admitting the evidence. However, private documents shall only have effects vis-à-vis third parties as of the date on which they have been recognized before a competent judge or legalized by a notary."

¹¹⁷ Cf. Code of Civil and Commercial Procedure of Guatemala. Article 187. "Contestation of documents. The party who contests a private or public document presented by the opposite party, shall specify in his brief the reasons for the contestation with the greatest possible precision. This brief will form a separate file, to be processed according to the procedure for incidental matters, and the decision issued may be appealed. If the contestation of the document has not been decided when the time limit for presenting evidence expires, the judge may suspend the main proceedings until the incidental matter has been decided, if he considers that this is essential for the judgment. If, when the incidental matter relating to the contestation is decided, it is declared that the document is partially or totally false, the original file or a certification by the pertinent party, shall be forwarded to the respective criminal judge. The criminal proceedings for falsity do not detain or modify the conclusions of the civil proceedings."

¹¹⁸ Cf. Answering brief of June 14, 2021, paras. 63 and 64.

¹¹⁹ Cf. Civil Code of Guatemala. Article 1645. "Anyone who causes harm or prejudice to another person, either intentionally, or due to negligence or imprudence, is obliged to redress this, except if he proves that the harm or prejudice occurred due to the inexcusable negligence or fault of the victim."

the Notarial Code establishes the civil responsibility of the notary in cases of the nullity of the public instrument.¹²⁰

73. Regarding criminal responsibility, if the notary commits any of the offenses established in the Criminal Code,¹²¹ he can be disqualified from the exercise of the notarial profession pursuant to article 58 of the code.¹²² Notaries who refuse to hand over their protocol when requested may also be held criminally responsible.¹²³

74. In the case of administrative responsibility, in its final arguments, the Guatemalan State clarified that when there is an impediment to the exercise of the profession, a complaint may be filed before the Supreme Court of Justice, which may act, *ex officio*, if it is aware of any cause for disqualification in relation to any specific notary.¹²⁴ In addition, the General Archive of Protocols of the President of the Judiciary may inspect and review notarial protocols. Lastly, regarding disciplinary responsibility, the notary must maintain professional discipline and, if he does not, offenses are examined by the Honor Court of the Guatemalan Lawyers and Notaries Professional Association.¹²⁵

75. Thus, it can be seen that the laws of Guatemala appear to establish a strong range of suitable mechanisms to oversee the notarial function and to sanction professionals who act irregularly. Such mechanisms efficiently promote the guarantee of the proper exercise of the attestation authority by notaries and do not impair the right to equality and non-discrimination.

76. Ultimately, owing to the concern related to the scenario that a non-national notary may leave the country taking with him his notarial protocols, it is important to underline the existence of a suitable mechanism that anticipates this scenario, and this is the **obligation to hand in the protocol before leaving the country**. According to article 8 of the Guatemalan Notarial Code, the protocol consists of the "ordered collection of original documents signed by the parties, official deeds, reasons for the certification of signatures, and documents registered by the notary pursuant to this law." The Notarial Code establishes two scenarios in which the notary must hand in his protocol to the General Archive of Protocols: the first, when the professional is disqualified from the exercise of the notarial profession (art. 26), and the second, if the notary will be absent from the country for more than one year (art. 27). If the notary will be absent from the country for less than a year, the Notarial Code establishes that: "he shall deposit it with another authorized notary, and must give written notice, signed and sealed by both notaries, to the Director of the General Archive of Protocols in the capital, or to a judge of first instance of the notary's domicile."¹²⁶

¹²⁰ Cf. Guatemalan Notarial Code. Article 35. "In order for civil responsibility for damage to proceed against the notary due to the nullity of the instrument, it is necessary that he has been summonsed and heard in the respective trial concerning the cause of nullity."

¹²¹ Cf. The following articles of the Criminal Code of Guatemala: article 222. Undue publicity; article 223. Revelation of professional secrets; article 264. Special cases of fraud; article 321. Falsification; article 322. Misrepresentation of the facts; article 327. Suppression, concealment or destruction of documents; article 437. Liability; article 438. Non-compliance with formalities.

¹²² Cf. Criminal Code of Guatemala. Article 58. Application of special disqualification: li. "Together with the main sanction, special disqualification shall be imposed, when the offense is committed with abuse in the exercise of, or with violation of the duties inherent in, a profession or activity. In offenses against the public administration and the administration of justice, together with the main sanction, special or absolute disqualification shall be imposed, which may not be less than four years."

¹²³ Cf. The State's brief with final arguments of April 28, 2022, para. 83.

¹²⁴ Cf. The State's brief with final arguments of April 28, 2022, para. 80.

¹²⁵ Cf. Answering brief of June 14, 2021, para. 72.

¹²⁶ Cf. Guatemalan Notarial Code. Article 27. "The notary who must be absent from the Republic for more than one year shall hand in his protocol to the General Archive of Protocols in the capital and, in the departments, to the judge of first instance, who will forward it to the said archive. If the notary will be absent for less time, he shall deposit it with another authorized notary, and must give written notice, signed and sealed by both notaries, to the Director of the General Archive of Protocols in the capital, or to a judge of first instance of the domicile of

77. Considering all these elements, it is evident that the guarantee of the proper exercise of the notarial profession does not depend on the national origin of the professional and is not increased by this. As expert witness Roberto P. Saba argued: "it is possible that Guatemalan nationals do not have roots, ties or domicile in Guatemala, or are unable to perform their function, or their performance is not satisfactory, and that Guatemalan non-nationals have roots, ties or domicile in Guatemala, exercise their functions excellently, and their performance is faultless."¹²⁷

78. Considering that the laws of Guatemala establish suitable alternative mechanisms to ensure the proper exercise of the notarial function that uphold the objectives of protection of sovereignty and legal certainty and security without requiring a distinction between nationals and non-nationals who aspire to exercise the notary profession, it should be concluded that the requirement of Guatemalan nationality does not meet the criterion of necessity and, therefore, violates the right to equality and non-discrimination. However, I will now examine the last category of the proportionality test, in order to exhaust the aspects that make the nationality requirement disproportionate.

3. Strict proportionality

79. Regarding this last category of the test, the Court has alleged that "[a]t this stage of the analysis, whether the restriction is strictly proportionate must be considered so that the sacrifice inherent in such restriction is not exaggerated or disproportionate to the advantages obtained through such limitation,"¹²⁸ and that "[t]o weigh this up, it is necessary to analyze: (i) the level of impact on one of the rights in question, determining whether the intensity of this impact was serious, intermediate, or moderate; (ii) the importance of satisfying the opposing right, and (iii) whether the satisfaction of that right justified the restriction of the other one."¹²⁹

80. In this regard, I propose a hypothetical abstraction of non-compliance with the two previous stages of the test in order to evaluate, in greater detail, the strict proportionality in relation to the first criterion mentioned in the precedent cited in the preceding paragraph; that is, the level of impact on the right to equality and non-discrimination.

81. According to the arguments submitted by the State, there is no absolute impediment to the exercise of the notarial function by non-nationals, insofar as the law allows them to become naturalized, and naturalized Guatemalans meet the nationality requirement stipulated in article 2 of the Notarial Code. In Guatemala, as a general rule, the acquisition of Guatemalan nationality requires **renouncing the original nationality**, according to article 146 of the Constitution and article 37 of the Nationality Law. Let me recall that the right to equality and non-discrimination is essential for the guarantee of other human rights and that there is an inextricable relationship between **an individual's nationality and identity**. Therefore, to condition the exercise of a profession to the renunciation of the nationality of origin constitutes a significant sacrifice not only of the right to equality and non-discrimination, but also of the right to identity.

the notary, when he is not domiciled in the department of Guatemala, and the latter shall forward it to the General Archive of Protocols within eight days. The written notice shall indicate the name and address of the notary with whom the protocol has been deposited."

¹²⁷ Cf. Expert opinion of Roberto P. Saba of March 21, 2022, p. 20.

¹²⁸ Cf. *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, para. 79; *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 93; *Case of Kimel v. Argentina. Merits, reparations and costs*. Judgment of May 2, 2008. Series C No. 177, para. 83, and *Case of Yvon Neptune v. Haiti. Merits, reparations and costs*. Judgment of May 6, 2008. Series C No. 180, para. 98. See also, *Case of the "Juvenile Re-education Institute" v. Paraguay. Preliminary objections, merits, reparations and costs*. Judgment of September 2, 2004. Series C No. 112, para. 228.

¹²⁹ Cf. *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, para. 80.

82. The State justified the renunciation of the nationality of origin owing to the prohibition to invoke foreign sovereignty against Guatemala.¹³⁰ However, the law establishes exceptions to the nationality of origin that undermine this line of argument concerning the invocation of foreign sovereignty and, also, emphasize the unreasonable nature of the criterion of nationality to perform the notarial function, because it stipulates differences in treatment not only between Guatemalan nationals and non-nationals, but also between different categories of non-nationals.

83. In Guatemala there are two hypotheses of **double nationality** in which non-nationals may exercise the notarial function without having to renounce their nationality of origin. The first, in article 145 of the Guatemalan Constitution, establishes that nationals by birth of member countries of the Central American Federation - Costa Rica, El Salvador, Guatemala, Nicaragua and Honduras – may also be considered Guatemalan without losing their nationality of origin, following a statement of interest. Under the second scenario, the 1961 Agreement on nationality between Spain and Guatemala¹³¹ allows Guatemalans or Spaniards by birth to acquire the nationality of the other State by establishing residence in its territory.¹³² Moreover, I would like to point out that article 7 of this instrument establishes that nationals who benefit from double nationality shall not “be subject simultaneously to the laws of both parties.” The criterion to determine the applicable laws is, precisely, the individual’s domicile.

84. If the distinction between nationals and non-nationals for the exercise of the notarial profession is based, according to the State, on preventing a possible invoking of foreign sovereignty against Guatemala and, ultimately, on preventing the impunity of the notary who commits irregularities in Guatemalan territory and then flees to his country of origin and cannot be extradited because he is a national of that other country, it should be noted that, under the laws currently in force in Guatemala, such hypotheses are already possible in relation to those who enjoy the benefit of double nationality. According to the Inter-American Convention on Extradition,¹³³ “[w]hen the person whose extradition is sought is a citizen of the country to which the requisition is addressed, his delivery may or may not be made, as the legislation or circumstances of the case may, in the judgment of the surrendering State, determine.”

85. Thus, there are no effective guarantees that it will be possible to extradite individuals with double nationality if they flee to the other country. The existence of these exceptions reinforces the notion that the ordinary exercise of the notarial function, as well as its inspection, oversight, and sanction in cases when irregularities are committed, does not depend on the requirement of Guatemalan nationality. Therefore, in an analysis of strict proportionality, the weight of the supposed benefits of the restriction do not appear substantial enough to justify the consequences.

86. Furthermore, as they stand at present, the rules on access to the notarial profession are flagrantly disproportionate because, in addition to differentiating nationals and non-nationals, they even impose a more severe restriction on non-nationals who enjoy the benefit of double nationality, requiring them to renounce their nationality of origin. It should be underlined that this observation is not a criticism of the double nationality

¹³⁰ Cf. Answering brief of June 14, 2021, para. 167.

¹³¹ Cf. Spain and Guatemala. Agreement on Nationality, 1961. Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201971/volume-1971-I-33704-English.pdf>. Consulted on May 4, 2023.

¹³² Cf. Answering brief of June 14, 2021, para. 252. According to the information provided by the General Archive of Protocols, “currently there are: (i) 10 naturalized Guatemalans who have been registered and authorized to exercise notarial functions in Guatemala, placing them on an equal footing to Guatemalans by birth; (ii) 4 notaries who are Spanish nationals and who have obtained the condition of naturalized Guatemalans; (iii) 105 notaries of different nationalities who are Guatemalans by birth by being children of a Guatemalan father or mother, and (iv) 120 notaries who are Guatemalan by birth or because they are nationals by birth of the Republics that constitute the Central American Federation.”

¹³³ Cf. Inter-American Convention on Extradition, 1933. Available at: <https://www.oas.org/juridico/spanish/tratados/a-35.html>. Consulted on May 4, 2023.

agreements signed by the State, but merely a demonstration that the nationality requirement for notaries lacks a reasonable basis and is relativized by domestic law itself.

87. Therefore, the restriction suffered by the victim in this case is even more unequal, assuming – regardless of the intention of the legislator – a casuistic character. It is the objective dimension of equality between immigrants that is jeopardized when the legislator allows himself this type of incoherence. Also, it should be pointed out that, in general, immigrants do not have political rights and, in the practice, this deprives them of the valuable instruments for collective mobilization and pressure inherent in representative democracy to obtain, by the efforts of their specific group, the repeal of the legislation, not of isonomy. Therefore, there is a special need for vigilance on the part of the international jurisdiction with regard to the human rights of non-nationals who, owing to the distinction related to political rights, are especially vulnerable to discriminatory actions based on their origin.

88. In the absence of individualization and the inexistence of a legitimate suspicion or an activity that has been verified to prejudice State security, the restriction of the exercise of the notarial profession by non-nationals becomes a generalized and disproportionate measure, given the lack of objective reasons that justify the restriction. If there is a conflict between the right to equality and non-discrimination and other fundamental guarantees, the proportionality of any nationality-based difference for the exercise of the profession should be assessed **on a case-by-case basis, as an exceptional measure**, and the State should provide a detailed explanation of the grounds for the application of this distinction.

(iii) Conclusion on the proportionality test

89. Based on the foregoing, despite the importance of the objectives alleged by the State, the restriction on non-nationals registering as notaries is not compatible with the Convention. The measure is not suitable owing to the absence of a rational connection between the restrictive measure that prevented Mr. Hendrix from exercising the profession of notary and the objectives of the protection of sovereignty and human rights alleged by the State to justify this restriction. Moreover, it is not necessary because the objective sought may be achieved by less harmful means that already exist in the laws of Guatemala, such as the use of the criterion of domicile, the system of legal responsibility, and the obligation to hand in the protocol when leaving the country. Lastly, it is disproportionate, strictly speaking, because when weighing the severity of the restriction imposed on the right to equality and non-discrimination against the satisfaction of the objectives supposedly guaranteed by this restriction, the sacrifice of the said right is flagrant without an imperative of the same magnitude being satisfied on the other side of the scales.

90. The conclusion that the measure imposed was disproportionate is, therefore, inevitable. The solution adopted by the State in relation to the claims made by Mr. Hendrix **deviates from the chain of precedents** of the Court, and constitutes not a mere distinction, but rather real discriminatory treatment with regard to non-nationals who wish to exercise the profession of notary in Guatemala.

91. Based on these conclusions, I will now set out my assessment of the right to judicial protection and to work.

IV. Violation of Article 25 of the Convention: Judicial Protection

92. Article 25 of the Convention establishes the obligation of States to guarantee a **simple, prompt and effective** judicial remedy before a competent judge or court against

possible human rights violations.¹³⁴ This judicial protection must be available to all persons subject to the jurisdiction of the country, regardless of whether or not they are nationals. The effectiveness of the remedy must be evaluated on a case-by-case basis, to determine whether domestic mechanisms exist that guarantee true access to justice.¹³⁵

93. In *Workers of the Fireworks Factory of Santo Antônio de Jesus and their family members v. Brazil* (2020), the Court declared that the guarantee of the right to take steps to discover the truth about what happened to the alleged victims and their family members, **to obtain answers to the claims and requests submitted to the authorities**, and to punish those responsible within a reasonable time were ways of realizing access to justice.¹³⁶

94. Therefore, the remedies should not be limited to their formal existence. Judicial protection should provide results and responses to the any alleged human rights violations. On previous occasions, the Court has indicated that “[t]he analysis by the competent authority of a judicial remedy that contests the lawfulness of the deprivation of liberty cannot be reduced to a mere formality; rather, it is necessary to examine the reasons cited by the plaintiff and rule expressly on them.”¹³⁷

95. In this regard, the case law of the Inter-American Court establishes two State obligations in relation to the effectiveness of access to justice: the first relates to the fact that the remedy is established by law and to the real possibility of filing effective remedies before the competent authorities, and the second relates to the guarantee of the means to ensure execution of the judicial decisions or judgment for the effective protection of human rights.¹³⁸ Therefore, there is no obligation to take a favorable decision, provided the factual and legal situation is decided, rectified and, if appropriate, repaired.¹³⁹

96. In addition, in *Cuscul Pivaral et al. v. Guatemala* (2018) and *Zegarra Marín v. Peru* (2017),¹⁴⁰ the Court indicated that the obligation to provide the reasoning for a decision is one of the guarantees included in Article 8(1) of the Convention to ensure the right to due process. This obligation corresponds to the right of citizens to be tried for legitimate reasons, so that a decision that is not duly substantiated is an arbitrary decision.¹⁴¹

¹³⁴ Cf. *Case of Habbal et al. v. Argentina. Preliminary objections and merits*. Judgment of August 31, 2022. Series C No. 463, para. 108; *Case of Pavez Pavez v. Chile. Merits, reparations and costs*. Judgment of February 4, 2022. Series C No. 449, para. 155; *Case of the Former Judicial Employees v. Guatemala. Preliminary objections, merits and reparations*. Judgment of November 17, 2021. Series C No. 445, para. 77.

¹³⁵ Cf. *Case of Goiburú et al. v. Paraguay. Merits, reparations and costs*. Judgment of September 22, 2006. Series C No. 153, para. 120.

¹³⁶ Cf. *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their family members v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 15, 2020. Series C No. 407, paras. 217-218.

¹³⁷ Cf. *Case of Habbal et al. v. Argentina. Preliminary objects and merits*. Judgment of August 31, 2022. Series C No. 463, para. 108; *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 169. *Case of López Álvarez v. Honduras. Merits, reparations and costs*. Judgment of February 1, 2006. Series C No. 141, para. 96.

¹³⁸ Cf. *Case of Former Judicial Employees v. Guatemala. Preliminary objections, merits and reparations*. Judgment of November 17, 2021. Series C No. 445, para. 79; *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, para. 237; *Case of Ríos Avalos et al. v. Paraguay. Merits, reparations and costs*. Judgment of August 19, 2021. Series C No. 429, para. 148.

¹³⁹ Cf. *Case of Romero Feris v. Argentina. Merits, reparations and costs*. Judgment of October 15, 2019. Series C No. 391, para. 147.

¹⁴⁰ Cf. *Case of Zegarra Marín v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of February 15, 2017. Series C No. 331, para. 146.

¹⁴¹ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2018. Series C No. 359, para. 171. In this regard: The reasoning is the exteriorization of the justification allowing a conclusion to be reached. The obligation to provide the reasons for a ruling is a guarantee related to the proper administration of justice that ensures to citizens their right to be tried for the reasons established by law, while providing credibility to judicial decisions in a democratic society. Based on the foregoing, the rulings adopted by the States' domestic courts that may affect human rights must be reasoned; to the contrary, they would be arbitrary. The reasoning of a ruling should provide information on the facts,

97. In the instant case, the Board of the Guatemalan Lawyers and Notaries Professional Association decided to reject the request to register him as a notary filed by Mr. Hendrix, a United States citizen, who had been awarded a notary degree by the Universidad de San Carlos de Guatemala, as follows:

IT IS AGREED: (a) to request the School of Legal and Social Sciences at the Universidad de San Carlos de Guatemala to provide a report on the incorporation of Steven Edward Hendrix and whether it is legally authorized to award him the degree of notary, a profession that, pursuant to our current laws can be exercised exclusively by Guatemalans by birth, so that the Guatemalan Lawyers and Notaries Professional Association **is unable to authorize the applicant to exercise this profession**, rather only that of the law.¹⁴²

98. As a result of the impossibility of registering as a notary, Mr. Hendrix filed three remedies, one administrative against the decision of the Board before the Assembly of Professional Associations of Guatemala, and two judicial. The administrative decision merely cited Guatemalan law to ratify the negation:

This Assembly of Presidents of Professional Associations, on examining this appeal, finds that the Guatemalan Lawyers and Notaries Professional Association acted in accordance with our laws and that, at no time, were constitutional or conventional principles violated; therefore, it is in order to declare this appeal inadmissible and, as a result, the resolution appealed is confirmed.¹⁴³

99. After exhausting the administrative mechanisms, Mr. Hendrix resorted to the courts by means of an application for amparo filed by before the Third Chamber of the Appellate Court. The main justification for rejecting the alleged victim's application was that the authorities challenged had not expropriated or confiscated Mr. Hendrix's notary degree:

[...] the said resolution, which is contested, did not harm the applicant for amparo, because a reading of the resolution does not lead to the conclusion that the awarding of a degree was denied; rather, it was the authorization for the applicant, Steven Edward Hendrix, to exercise the notarial function that was denied because he does not comply with the requirement of being Guatemalan by birth, and **for this reason the amparo is plainly inadmissible**.¹⁴⁴

100. The alleged victim appealed this decision before the Guatemalan Constitutional Court. Mr. Hendrix argued that the aforementioned decisions were unconstitutional because: (i) a difference was made based on nationality, without reasonable justification; (ii) the decisions violated his right to freedom of activity by refusing to register him as a notary; (iii) they violated his right of action because he was not heard by a competent court; (iv) they did not respect the undertaking made with the World Trade Organization in relation to the promotion of a policy of inclusion and non-discrimination based on national origin and, lastly, (v) they violated the right to recognition of the notary degree.¹⁴⁵ However, the Constitutional Court reasoned that the arguments could not be admitted because Guatemala had adopted the Latin notarial system:

It is concluded that this court is unable to admit the applicant's thesis supported by the case law precedents he cites, and the international treaties [signed by Guatemala on issues related to world trade] that he lists because the Guatemalan notarial system – of the tendency known as the "Latin notarial system" – differs from the notarial system in his country [United States of America].¹⁴⁶

grounds and laws on which the court has based itself to take its decision, so that any indication of arbitrariness can be dismissed, while demonstrating to the parties that they have been heard during the proceedings. Also, it should show that the arguments of the parties have been duly taken into account and that all the evidence has been analyzed.

¹⁴² Cf. Transcript of Resolution 3-2001 of February 6, 2001, of the Guatemalan Lawyers and Notaries Professional Association recorded in a note of January 16, 2002, of the Board's Secretary.

¹⁴³ Cf. Resolution No. 1151-12-02-02 of April 22, 2002, issued by the Assembly of Presidents of Professional Associations of Guatemala.

¹⁴⁴ Cf. Judgment of the Third Chamber of the Appellate Court of June 25, 2002.

¹⁴⁵ Cf. Judgment of the Constitutional Court of April 21, 2004, page 7.

¹⁴⁶ Cf. Judgment of the Constitutional Court of April 21, 2004, page 11.

101. In addition, the constitutional dispute examined by the Guatemalan Constitutional Court was, on the one hand, between the right acquired by a title (article 81 of the Guatemalan Constitution), which includes a university degree and, on the other hand, with regard to the nationality requirement for professional registration as a notary in Guatemala (article 2(1) of the Notarial Code).¹⁴⁷ Therefore, the court decided to condition his registration as a notary to the acquisition of Guatemalan nationality.

In the opinion of this court, the conflict that arose can be resolved by applying the provisions of article 146 of the Constitution of the Republic which stipulates: "Those who obtain their naturalization pursuant to the law are Guatemalan," and "Naturalized Guatemalans have the same rights as Guatemalan nationals, subject to the limitations established in this Constitution," which does not include any related to the exercise of the notarial profession.¹⁴⁸

102. To determine whether or not there was a violation of Article 25 of the Convention, it is necessary to verify whether the remedies met the requirements of suitability and effectiveness.¹⁴⁹ These requirements are met when the competent authority examines the reasons cited by the plaintiff, rules expressly on them, and monitors compliance with its decisions. Therefore, the duty to substantiate the decisions is an obligation of means or conduct, without an obligation to decide in favor of the alleged victim.¹⁵⁰ Therefore, I will examine whether the judicial decisions conducted a **sufficient judicial review**¹⁵¹ as regards a complete analysis of all the elements involved in Mr. Hendrix's case.

103. In the previously mentioned case of *Cuscul Pivaral et al. v. Guatemala* (2018), the representatives in the domestic proceedings filed an application for amparo asking the Guatemalan Constitutional Court to recognize the State obligation to acquire and distribute medicines to persons with HIV. However, after a conciliation agreement on October 30, 2002, the Constitutional Court declared the application without grounds understanding that the contested act had ceased. Nevertheless, the Inter-American Court noted that the reason indicated by the domestic court was insufficient because it had not ruled on the risk to the applicants' rights to health and to life, and concluded that the analysis of the judicial remedy should have examined the arguments submitted by the parties and ruled on them expressly in light of the standards derived from the Convention.¹⁵²

104. In light of these criteria, I note that the Guatemalan Constitutional Court should have examined whether the measure was effective to guarantee the rights analyzed and to permit Mr. Hendrix to exercise them, ruling on the central aspect underlying the filing of the remedies; that is, the restriction of the right to equality and non-discrimination. However, in the instant case, all the domestic decisions, both administrative and judicial, merely cited and applied the legal provisions without providing the due statement of reasons.¹⁵³

105. Costa Rica, for example, had similar legislation to that of Guatemala and decided to annul the nationality requirement to register as a notary considering that this was a discriminatory and unconstitutional criterion.¹⁵⁴ On another occasion, the same

¹⁴⁷ Cf. Judgment of the Constitutional Court of April 21, 2004, pages 11-12.

¹⁴⁸ Cf. Judgment of the Constitutional Court of April 21, 2004, page 12.

¹⁴⁹ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 175.

¹⁵⁰ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 176.

¹⁵¹ Cf. *Case of the Dismissed Workers of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344, para. 178; *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs.* Judgment of October 13, 2011. Series C No. 234, para. 204.

¹⁵² Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 177.

¹⁵³ Cf. *Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 187.

¹⁵⁴ Cf. Constitutional Chamber, Costa Rica. Resolution No. 02093-1993.

Constitutional Chamber understood that “suitability, and moral and ethical character – rather than nationality – should therefore be some of the valid parameters that a professional association can take into account when incorporating professionals.”¹⁵⁵ Thus, the Costa Rican Supreme Court of Justice concluded that:

The law may establish it in this way, but the reasons to proceed thus should be plainly logical and reasonable: **it cannot simply be founded on the fact that this is what the law requires. In other words, the nature of the function – public or private – does not constitute, alone and a priori, sufficient reason to regulate a different legal treatment**, especially when it is possible to observe, as in the case of notaries, that for the exercise of this function, which is highly technical, all that can reasonably be required is technical or professional competence – which is assumed by the requirement that the notary must be a lawyer, **a condition that is not excluded to a foreign national – and ethical and moral suitability – qualities that are not satisfied only by those who have a specific nationality**. If the foreign national who is a lawyer incorporated in the respective professional association is able to exercise his profession in Costa Rica, there is evidently insufficient reason to explain why he cannot exercise the notarial function.

106. Thus, I note that the domestic courts did not examine the restrictive measure using the proportionality test. As argued in the preceding point, this test, established by several national constitutional courts, and by the international courts of human rights, reveals itself to be an effective analytical parameter to combat arbitrary restrictions of rights.¹⁵⁶ By failing to provide comprehensive arguments regarding the proportionality of the requirement of Guatemalan nationality for professional registration – as provided by the Costa Rican court – the judicial review conducted by the Guatemalan Constitutional Court failed to address, even minimally, the impact of the severe restriction imposed on the right to equality and non-discrimination in this case, culminating in a violation of Article 25 of the Convention.

V. Violation of Article 26 of the Convention: Right to work

107. The structure of the Inter-American Court’s case law on the content of the right to work is closely related to the guarantees of equality and non-discrimination in all domains: from access to and permanence in employment to the enjoyment of decent and equal working conditions. As the Court has stated and reiterated in its most recent precedents, States have the duty to protect the individual against arbitrary or unlawful interference in the enjoyment of his work-related guarantees.¹⁵⁷ In its judgments, the Court has also recalled that labor protection additionally includes the right of individuals to exercise the functions that they freely choose.¹⁵⁸

108. Thus, in *Pavez Pavez v. Chile* (2022), the Court addressed the specific repercussions of discriminatory treatment with regard to the right to work, emphasizing that States are responsible for guaranteeing its realization without discrimination and with equal opportunities.¹⁵⁹ More recently, in *Guevara Díaz v. Costa Rica* (2022), the Court underlined that any measure based on discriminatory motives that prevented access to the labor market violated this right.¹⁶⁰ On that occasion, when examining the specific implications of the right to work, the Inter-American Court considered that the act of direct

¹⁵⁵ Constitutional Chamber, Costa Rica. Resolution No. 03300-2004.

¹⁵⁶ Cf. NEWTON, Michael; MAY, Larry. *Proportionality in International Law*. Oxford: Oxford University Press, 2014, p. 216 and ss.

¹⁵⁷ Cf. *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, para. 130. Similarly, and more recently, *Mina Cuero* 132-134, *Benites* 112-114, *Nissen* 102 -103, and *Aguinaga* 99.

¹⁵⁸ For example, *Mina Cuero*, 131, *Benites* 135, *Aguinaga* 98.

¹⁵⁹ Cf. *Case of Pavez Pavez v. Chile. Merits, reparations and costs*. Judgment of February 4, 2022. Series C No. 449, paras. 89, 90 and 136.

¹⁶⁰ Cf. *Case of Guevara Díaz v. Costa Rica. Merits, reparations and costs*. Judgment of June 22, 2022. Series C No. 453, para. 60.

discrimination in access to employment by the State constituted a violation of the right to work.¹⁶¹

109. Therefore, the sphere of protection of Article 26 of the Convention, as it has been interpreted by the Inter-American Court, protects the individual not only against arbitrary removal (job stability), but also against the denial of access to a job based on discriminatory barriers.

110. In the preceding sections, it has been demonstrated not only that (i) Mr. Hendrix was deprived of obtaining the job he sought owing to the application of a discriminatory condition, but also (ii) he did not enjoy adequate judicial protection to redress the harm to his rights. These two circumstances analyzed based on the Inter-American Court's standards lead, *per se*, to the conclusion that the petitioner was arbitrarily prevented from enjoying his right to work based on discriminatory reasons in violation of Article 26 of the Convention.

111. Thus, in the instant case, it can be seen that the foreign nationality of Mr. Hendrix placed him at a disadvantage. Access to a career is an advantage because jobs are opportunities not only to obtain an income, but also for self-fulfillment, which, in turn, is an evident component of the notion of a decent life. However, as it is regulated in Guatemala, not everyone can exercise the notarial career. In this context, guaranteeing equal opportunities of access to employment is a necessary condition to avoid discriminatory treatment.¹⁶²

112. According to the opinion provided by expert witness Gabriel Orellana Rojas during the public hearing, in Guatemala most lawyers are also notaries and, therefore, those who do not exercise notarial activities are at a clear disadvantage in relation to the others.¹⁶³ In this case, one of the problems encountered refers to whether or not non-arbitrary reasons existed to support the validity of the nationality requirement in the procedure for access to the notarial career in Guatemala.

113. In its final arguments, Guatemala asserted that the "nationality" requirement for the notarial practice was common among Latin American countries. It added that this requirement was not exclusive to Guatemala, but had been adopted by several countries of the Americas.¹⁶⁴ Accordingly, it indicated that there was "a general, uniform and harmonious practice that has existed over time in relation to the nationality requirement for the exercise of the notarial function and, therefore, it complied with one of the elements for recognition of an international custom."¹⁶⁵

114. However, exercise of the functions of notary and lawyer is incompatible in many Latin American countries that also establish nationality as an essential requirement for the exercise of the notarial profession. This is a sign that, in those countries, the objectives of the notarial profession and the law are more significantly different than in Guatemala: while the former seeks to be fully impartial in the name of legal security and the interests of the State (although in weak sense), the latter seeks to harmonize the interests of society with private interests.

115. Thus, the references to comparative law are, more than sources of inspiration, an interpretive necessity. However, comparative analyses must be aware of certain methodological risks; especially that of the irrelevance of suggested relationships and the

¹⁶¹ Cf. *Case of Guevara Díaz v. Costa Rica. Merits, reparations and costs*. Judgment of June 22, 2022. Series C No. 453, para. 79.

¹⁶² For a more direct defense of the relationship between non-discrimination and equal opportunities, cf. SEGALL, Shlomi, ¿What's so Bad about Discrimination? *Utilitas*, v. 24, n. 1, p. 82-100, 2012.

¹⁶³ Cf. Expert opinion provided by Gabriel Orellana Rojas during the public hearing held on March 28, 2022.

¹⁶⁴ Cf. The State's brief with final arguments of April 28, 2022, para. 112.

¹⁶⁵ Cf. The State's brief with final arguments of April 28, 2022, para. 127.

deliberate search for inexistent patterns.¹⁶⁶ Such risks are increased, particularly due to the abundant presence of false cognates, as is the case of the concept of the “notary” in the domestic sphere. Thus, when developing arguments, comparative law should be used with great care and methodological rigor, paying attention to the contextual and legal characteristics of what is being compared.

116. Regarding the legal nature of the Guatemalan notary, as the State argued in its answering brief, the notary is not considered to be a public servant or official.¹⁶⁷ In Guatemala, the notarial function is exercised as a liberal profession, which **is not subject** to direct, immediate and continuing dependence on the public administration. As the Commission noted with regard to notaries: (i) they do not function as public officials or servants in the traditional sense; (ii) they do not perform functions that “go to the heart of representative government”; (iii) they do not have any role in formulating or executing public policies, and (iv) they do not have coercive or sanctioning authority.”¹⁶⁸

117. Thus, the mere citing of the Latin notarial system is not sufficient to substantiate the argument of professional impediment. Even though the system may be the same, in different countries **the notarial practice is incompatible with the exercise of other liberal professions**, especially that of law. Therefore, in my opinion, the argument of comparative law presented by the State, in the sense that the nationality requirement to exercise the notarial function is a characteristic common to numerous countries under this system, is not the most adequate in this case.

118. It is inherent in the procedural notion of equal opportunities that the skills required in a selection process have a rational connection with the performance of the activities for which the person is selected. Therefore, the first step in an analysis of comparative law is to examine whether the objectives of the activities in each country are similar. It is worth indicating, however, that in many of those States the exercise of the notary profession is incompatible with the exercise of the law – not only in the same cases in which they participate, but in general – contrary to the system in Guatemala, where such occupations are compatible.

Argentina¹⁶⁹

ARTICLE 7. The exercise of the notarial function **is incompatible**:

d) **With the exercise of law**, prosecution, or any other liberal profession.

Bolivia¹⁷⁰

ARTICLE 13. (Incompatibilities). **The exercise of the notarial function by notaries vested with the legal authority to attest documents is incompatible with the exercise of law** or of any public post or private occupation, with the exception of university teaching, provided there is no incompatibility in the timetable.

Brazil¹⁷¹

¹⁶⁶ Cf. WATSON, Alan. *Legal transplants: an approach to comparative law*. 2nd ed. Athens: University of Georgia Press, 1993, p. 10-12.

¹⁶⁷ Cf. Answering brief of June 14, 2021, para. 55.

¹⁶⁸ Cf. Merits Report (IACHR), para. 68.

¹⁶⁹ Cf. Law 12,990 (Argentina). Available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/45000-49999/45260/texact.htm>. Consulted, May 4, 2023.

¹⁷⁰ Cf. Law No. 483 (Bolivia). Available at: <https://sistemas.mre.gov.br/kitweb/datafiles/SantaCruz/pt-br/file/lei%20483%20de%2025%20de%20janeiro%20de%202014%20-%20lei%20do%20notariado%20plurinacional.pdf>. Consulted, May 4, 2023.

¹⁷¹ Cf. Law No. 8,935 of November 28, 1994 (Brazil). Available at: http://www.planalto.gov.br/ccivil_03/leis/18935.htm. Consulted, May 4, 2023.

Art. 25. **The exercise of notarial and recording functions is incompatible with the exercise of law**, the intermediation of such services or any other position, employment or public function, even though it be by commission.

Colombia¹⁷²

ARTICLE 10. **The exercise of the notarial function is incompatible** with that of any public post or employment; with the private or official management of other business; **with the exercise of law**; with that of political representation functions; with the condition of minister of any religion; with that of the functions of executor, guardian, auxiliary of justice; with intervention in politics, other than exercising the vote and, in general, with any activity that could prejudice the exercise of the function.

Ecuador¹⁷³

Art. 38. Composition of the judiciary. The following are members of the judiciary and, in general, are referred to as servants of the judiciary:

5. Notaries and other servants of the judiciary who provide their services in the auxiliary organs of the judiciary.

Art. 103. Prohibitions. **Servants of the judiciary are prohibited from:**

12. Exercising the liberal profession of lawyer directly or through an intermediary.

Panama¹⁷⁴

Art. 2121. The function of notary **is incompatible with any other function of the administrative or judicial branch, and with the exercise of law.**

Paraguay¹⁷⁵

Art. 97. The exercise of the profession of lawyer or prosecutor is incompatible with the post of public official attached to the Executive or to the Judiciary, or as a member of the Police or Armed Forces in active service. [...]

Thos who exercise the profession of notary or notary public may not register as a lawyer.

119. I note, therefore, that the analysis would be methodologically more appropriate if it took into consideration the countries that accept the concomitant exercise of the functions of both notary and lawyer. In my opinion, the countries located principally in Central America can provided a more fertile terrain for the use of comparative law in relation to Guatemala. For example:

El Salvador¹⁷⁶

¹⁷² Cf. Decree 960 of 1970 (Colombia). Available at: <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=149249#:~:text=Notariado%20y%20Registro-,Expide%20el%20estatuto%20del%20Notariado.,Superintendencia%20de%20Notariado%20y%20Registro>. Consulted on May 4, 2023.

¹⁷³ Cf. Organic Code of the Judicial Function (Ecuador). Available at: https://www.Funcionjudicial.gob.ec/www/pdf/normativa/codigo_organico_fj.pdf. Consulted on May 4, 2023.

¹⁷⁴ Cf. Administrative Code (Panama). Available at: <https://vlex.com.pa/vid/codigo-administrativo-41025245>. Consulted on May 4, 2023.

¹⁷⁵ Cf. Code of Judicial Organization, Law 879 (Paraguay). Available at: <https://www.bacn.gov.py/leyes-paraguayas/2321/ley-n-879-codigo-de-organizacionjudicial#:~:text=Art.,IX%20de%20la%20Constituci%C3%B3n%20Nacional>. Consulted on May 4, 2023.

¹⁷⁶ Cf. Decree 296 of 1992 (El Salvador). Available at: http://www.oas.org/juridico/spanish/mesicic3_slv_transferencia.pdf. Consulted on May 4, 2023.

Article 17. For tax-related purposes, the provision of services consists in all those taxable operations that do not consist in the transfer of the ownership or movable tangible property, indicating among them the following: [...]

(n) The services provided by the free exercise of university professions and of public accounting or independent, non-subordinate services provided by those who personally exercise professions or occupations that may or may not require a degree or license to exercise them, either natural persons or companies legally constituted by them. For the effects of this law, the notarial function shall be considered a liberal profession.

Honduras¹⁷⁷

ARTICLE 53. Non-contentious acts established in the Code of Civil Procedure and other laws may be examined, processed and resolved by notaries following the express and unanimous consent of the interested parties.

The notary is prohibited from intervening in non-contentious matters when he has taken part in these as a lawyer or has participated in the authorization of the act or contract in question.

ARTICLE 92. It shall correspond solely to the interested parties to appoint the notary when they have to pay the fees for the notarial acts. No natural or legal person may establish the exclusivity of a notary or special rates for fees.

120. In my opinion, this case constitutes a violation of Mr. Hendrix's right to work owing to the specificities of the notarial function in Guatemala. Based on the proportionality test, I consider that the impediment to the exercise of the profession owing to national origin prevented the alleged victim from being able to exercise the notarial function in a discriminatory context in relation to opportunities. Excluding the participation of non-nationals in private or public functions should only be justified as an **exceptional** mechanism. Consequently, I consider that the implementation of article 2(1) of the Notarial Code, which prevents non-nationals from exercising the profession of notary, is incompatible with the American Convention.

VI. Conclusion and final considerations

121. The judgment delivered by the Inter-American Court in this case finds that the State was not responsible for the violation of the right to equality established in Article 24 of the Convention, in relation to its Articles 1(1) and 2.¹⁷⁸ Neither does it consider the State responsible for violating the right to judicial protection recognized in Article 25(1) in light of Article 1(1) of the Convention.¹⁷⁹ In addition, the judgment does not address the possibility that the right to work guaranteed by Article 26 of the Convention may have been violated. For the reasons described throughout this opinion, I disagree with the majority position on these three issues.

122. As I have tried to point out, when applying the criterion of domicile to the detriment of the analysis of the standard applied by the State – nationality – the Court not only strayed from the factual framework delimited for the case, but also failed to examine the nationality requirement in light of the Convention, to reaffirm the exceptional nature of its adoption and, consequently, to determine a measure of reparation leading to the amendment of article 2(1) of the Notarial Code.

123. Finally, I recall that the effects of the Court's judgments exceed the force of *res judicata* between the parties established in Article 68(1) of the Convention. The control of

¹⁷⁷ Cf. Decree 353/2005 (Honduras). Available at: <https://www.notarioshonduras.org/wp-content/uploads/2017/01/Codigo-del-Notariado.pdf>. Accessed: May 4, 2023.

¹⁷⁸ Cf. Judgment, first operative paragraph.

¹⁷⁹ Cf. Judgment, second operative paragraph.

conventionality entails the obligation of national judges to consider in their decisions¹⁸⁰ both the instruments of the inter-American system and the case law of the Court, an obligation that extends to other domestic authorities.¹⁸¹ In this specific case, this entails the Inter-American Court's duty to contemplate the implications of its judgment for the establishment of its standards in order to ensure the soundness of its precedents. In *Hendrix v. Guatemala*, the discrepancy that I respectfully perceived in relation to the path followed by the Court on the issue of equality and non-discrimination has led me to record this discrepancy.

Rodrigo Mudrovitsch
Judge

Pablo Saavedra Alessandri
Registrar

¹⁸⁰ Cf. *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 154, para. 124.

¹⁸¹ Cf. *Case of Gelman v. Uruguay.* Order on monitoring compliance with judgment of March 20, 2013, para. 193.