INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF ATALA RIFFO AND DAUGHTERS *v.* CHILE

JUDGMENT OF FEBRUARY 24, 2012
(Merits, Reparations and Costs)

In the case of *Atala Riffo and daughters,*

The Inter-American Court of Human Rights (hereinafter, the "Inter-American Court" or the "Court") composed of the following judges[1]:

Diego García-Sayán, President;
Manuel E. Ventura Robles, Vice-President;
Leonardo A. Franco, Judge;
Margarette May Macaulay, Judge;
Rhadys Abreu-Blondet, Judge;
Alberto Pérez Pérez, Judge;

Also present:

Pablo Saavedra Alessandri, Secretary and,
Emilia Segares Rodríguez, Deputy Secretary;

Pursuant to Articles 62.3 and 63.1 of the American Convention on Human Rights (hereinafter, the "Convention" or the "American Convention") and Articles 31, 32, 56, 57, 65 and 67 of the Court's Rules of Procedure [2] (hereinafter, the "Rules of Procedure") delivers this Judgment.

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[1] According to article 19.1 of the Rules of Procedure of the Inter-American Court, applicable to this case (*infra* note 2), which sets forth that "[i]n the cases referred to in Article 44 of the Convention, a Judge who is a national of the respondent State shall not be able to participate in the hearing and deliberation of the case", Judge Vio Grossi, of Chilean nationality, did not participate in the processing of this case nor in the deliberation of this Judgment.

[2] The Rules of Procedure approved by the Court at its Eighty-fifth Regular Period of Sessions held on November 16-28, 2009, apply in this case in accordance with the provisions of Article 79 of said Rules of Procedure. Article 79.2 of the Rules of Procedure stipulates that"[i]n cases in which the Commission has adopted a report under Article 50 of the Convention before these Rules of Procedure have come into force, the presentation of the case before the Court will be governed by Articles 33 and 34 of the Rules of Procedure previously in force. Statements shall be received with the aid of the Victim's Legal Assistance Fund, and the dispositions of these Rules of Procedure shall apply". Therefore, as to the presentation of the case, Articles 33 and 34 of the Rules of Procedure approved by the Court at its Forty-ninth Regular Session, shall apply.

I.
INTRODUCTION OF THE CASE AND PURPOSE OF THE APPLICATION

1. On September 17, 2010, the Inter-American Commission on Human Rights (hereinafter, the "Inter-American Commission" or "the Commission") filed a claim against the Republic of Chile (hereinafter, the "State" or "Chile") in relation to case 12.502[3]. The initial petition was lodged before the Inter-American Commission on November 24, 2004 by Ms. Karen Atala Riffo, (hereinafter "Ms. Atala") represented by attorneys of the *Asociación Gremial Libertades* Públicas, *Clinica de Acciones de Interés Público* of Diego Portales University and *Fundación Ideas*[4].

2. On July 23, 2008, the Commission approved Report on Admissibility No. 42/08 and on December 18, 2009, it approved the Report on Merits No. 139/09, according to article 50 of the American Convention[5]. On September 17, 2010, the Inter-American Commission considered that the State had not complied with the recommendations made in the Merits Report, for which reason it decided to submit the instant case to the jurisdiction of the Inter-American Court. The Inter-American Commission appointed Commissioner Luz Patricia Mejía, and Executive Secretary Santiago A. Canton as its delegates in this case. Assistant Executive Secretary Elizabeth Abi-Mershed and attorneys Silvia Serrano Guzmán, Rosa Celorio and María Claudia Pulido, Specialists of the Executive Secretariat of the Commission, were designated to act as legal advisors.

3. According to the Commission, the present case concerns the alleged international responsibility of the State for discriminatory treatment and arbitrary interference in the private and family life suffered by Ms. Atala due to her sexual orientation, in the legal process that resulted in the loss of care and custody of her daughters M., V and R. The case also concerns the alleged failure to take into account the best interests of the girls, whose custody and care were determined without having regard to their rights, and on the basis of alleged discriminatory prejudices. The Commission requested the Court to declare the violation of Articles 11 (Right to Privacy), 17.1 and 17.4 (Rights of the Family), 19 (Rights of the Child), 24 (Right to Equal Protection) and 25 (Right to Judicial Protection) of the Convention, in relation to article 1.1 thereof. Likewise, the Commission requested the Court to order the State to adopt reparation measures.

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[3] At the request of the Inter-American Commission, the identity of the three daughters of Ms. Karen Atala Riffo, shall not be disclosed. Such daughters shall be referred to as "M., V. and R.". Moreover, at the request of the representatives, in order to protect the right to private and family life of M., V. and R., the affidavits forwarded by the parties and "related to the family situation" of Ms. Atala and her daughters shall not be disclosed. (Case file, volume III, page 1162)

[4] In the initial petition, Ms. Atala indicated that Fundación Ideas was represented by Francisco Estévez Valencia and she appointed Verónica Undurraga Valdés, Claudio Moraga Klenner, Felipe González Morales and Domingo Lovera Parmo as her representatives before the Inter-American Commission (record of appendices to the petition, volume III, pages 1533 and 1572).

[5] In Merits Report No. 139/09, the Commission concluded that the State of Chile "did violate the right of Karen Atala to live free from discrimination as provided in Article 24 of the American Convention, in conjunction with Article 1.1 thereof." Moreover, "the State also violated articles 11.2, 17.4, 19, 8.1, and 25.1 of the American Convention, in conjunction with Article 1.1 thereof, with respect to the individuals identified in the corresponding sections". The Commission recommended that the State of Chile: i) "[p]rovide Karen Atala and M., V., and R. with comprehensive redress for the human rights violations that arose from the decision […] taking into consideration their situation and needs" and ii) [a]dopt legislation, public policies, programs and initiatives to prohibit and eradicate discrimination on the basis of sexual orientation from all spheres of public power, including the administration of justice. These measures must be accompanied by adequate human and financial resources to guarantee their implementation, and training/re-education programs for the public officials involved in upholding those rights". Merits Report No.139/09, Case 12.502, Karen Atala and daughters of December 18, 2009 (record of appendices to the application, volume I, annex 2, pages 22 to 67).

4. The application was notified to the State and to the representatives on October 19, 2010.

5. On December 25, 2010, Macarena Sáez, Helena Olea and Jorge Contesse, indicating that they were the representatives of Ms. Atala and her daughters M., V. and R[6] (hereinafter, the "representatives") filed a brief with the Court containing pleadings, motions and evidence (hereinafter, "brief of pleadings and motions") according to article 40 of the Court's Rules of Procedure[7]. The representatives indicated that they agreed in full with the facts presented in the application and asked the Court to declare the international responsibility of the State for the violation of articles 11 (Right to Private and Family Life), 17 (Right to a Family), 19 (Rights of the Child), 24 (Right to Equality) and 25 (Judicial Protection) of the Convention, in relation to article 1.1 thereof. In consequence, they requested that the Court order several reparation measures.

6. On March 11, 2011, Chile filed with the Court a brief containing its response to the application and the observations to the brief of pleadings and motions (hereinafter, "brief of response"). In said brief, the State contested all the claims presented by the Commission and the representatives and denied its international responsibility for the alleged violations of the American Convention. In relation to the measures of reparation requested by the Commission and the representatives, the State requested that the Court dismiss the claim in its entirety. The State appointed Mr. Miguel Angel González and Ms. Paulina González Vergara as Agents.

II
PROCEEDING BEFORE THE COURT

7. Through a Decision issued on July 7, 2011[8], the President of the Court ordered the receipt of various statements in this case. Likewise, he summoned the parties to a public hearing, which was held on August 23 and 24, 2011, during the 92nd regular sessions of the Court, in the city of Bogota, Colombia[9].

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[6] As mentioned subsequently (*infra* paras. **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.** to 71), regarding the representation of the girls M., V. and R., in the Decision of November 29, 2011 the Court noted that the file contained no specific statements by the girls M., V. and R. as to whether they agreed to be represented by either one of their parents and whether they wished to be considered as alleged victims in this case. Accordingly, a judicial proceeding was held to directly hear the daughters M. and R (*infra* para. **¡Error! No se encuentra el origen de la referencia.**).

[7] Ms. Karen Atala Riffo appointed Macarena Sáez from the organization "Libertades Públicas A.G", Helena Olea from "Corporación Humanas, Centro Regional de Derechos Humanos y Justicia de Género" and Jorge Contesse from "Centro de Derechos Humanos de la Universidad Diego Portales", as her representatives.

[8] *See Case of Atala Riffo and daughters V. Chile*. Order of the President of the Inter-American Court of Human Rights of July 7, 2011. Available at: http://corteidh.or.cr/docs/asuntos/atala_21_08_11.pdf
The representatives requested a modification in the format of two statements, which was accepted by the full Court. See *Case of Atala Riffo and daughters V. Chile.* Order of the Inter-American Court of Human Rights of August 21, 2011.Available at: http://corteidh.or.cr/docs/asuntos/atala_21_08_11.pdf

[9] The following persons attended this hearing: a) on behalf of the Inter-American Commission: Commissioner Rodrigo Escobar Gil and legal advisors Silvia Serrano and Rosa Celorio; b) on behalf of the representatives: Helena Olea Rodríguez, Macarena Sáez Torres, Jorge Contesse Singh, José Ignacio Escobar Opazo, Francisco Cox Vial and Catalina Lagos Tschorne, and c) on behalf of the State: Agents Miguel Ángel González Morales and Paulina González Vergara; Gustavo Ayares Ossandón, Ambassador of Chile to Colombia; Ricardo

8. On August 18, September 6 and October 18, 2011, Mr. Reinaldo Bustamante Alarcón forwarded several communications on behalf of Jaime López Allendes, father of the girls M., V. and R., in relation to this case. In said briefs, the following requests were made: i) participation of the minors and legal representation by their father in the proceeding before the Inter-American Court; ii) request to include an intervener in the proceeding; iii) request to annul the proceedings before the Commission and the Court and iv) request to collaborate with the State's brief.

9. On November 30, 2011, the Secretariat sent a note to Mr. Bustamante, following the instructions of the full Court, in reply to the briefs submitted (*supra* para. **¡Error! No se encuentra el origen de la referencia.**). The note indicated that: i) in a Decision issued on November 29, 2011 the Court ordered, as evidence to facilitate adjudication of the case, that the three girls must be informed of their right to be personally heard by the Court (*infra* paras. **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.**); ii) the Court is not competent to address requests made by individuals or organizations other than the alleged victims participating in the proceedings of a case before the Court; iii) the Court does not find irregularities in the manner in which notice of this case was served and iv) given that Mr. López is not a party to this case and that his participation as a third intervener has not been accepted, he does not have legal standing to present arguments as to the merits or evidence[10].

10. Furthermore, the Court received the *amici curiae* briefs from: 1) the National Association of Judges of Chile [*Asociación Nacional de Magistrados del Poder Judicial de Chile]*[11]; 2) the Ombudsgay organization[12]; 3) Mr. José Pedro Silva Prado, a professor of Procedural Law and President of the Chilean Institute of Procedural Law; 4) Mr. José Ignacio Martínez Estay, a professor of the Jean Monnet Program, an initiative of the European Union, of the University of Los Andes, Chile; 5) the Human Rights Group [*Nucleo Derechos Humanos*] of the Law Department of the Pontificia Universidad Católica of Río de Janeiro[13]; 6) Mr. Diego Freedman, a professor at the School of Law of the University of Buenos Aires; 7) Ms. María Inés Franck, President of *Asociación Civil Nueva Política* and Mr. Jorge Nicolás Lafferriere, Director of *Centro de Bioética, Persona and Familia*; 8) the Research Seminary on Family and Individual Law, of the Law School of the Pontificia Universidad Católica of Argentina[14]; 9) Mr. Luis A. González Placencia, President of the Human Rights Commission

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Hernández Menéndez, Adviser of the Chilean Embassy in Colombia;; Milenko Bertrand-Galindo Arriagada, Felipe Bravo Allende and Alberto Vergara Arteaga.

[10] Notwithstanding the foregoing, the Court confirmed that the evidence furnished by Mr. Bustamante, concerning psychological expert opinions on the three girls and statements rendered by several people, were forwarded by the parties as appendices to their main briefs, which included a copy of the main documents of the custody proceeding.

[11] The brief was presented by Mr. Leopoldo Llanos Sagristá, Minister of the Appeals Court of Temuco, Chile and President of the National Association of Judges of Chile [Asociación Nacional de Magistrados del Poder Judicial de Chile].

[12] The brief was presented by Ms. Geraldina González de la Vega, Legal Adviser and Mr. Alejandro Juarez Zepeda, General Coordinator.

[13] The brief was filed by Ms. Marcia Nina Bernardes, Professor at the Law Department and Coordinator of *Nucleo de Derechos Humanos* of Pontificia Universidad Católica of Rio of Janeiro; Andrea Schettini, Luiza Athayde, Maria Fernanda Marques, Isabella Benevides, Isabella Maioli, Julia Rosa, Juliana Streva, Karen Oliveira and Maria Eduarda Vianna; and Mr. Felipe Saldanha.

[14] The brief was filed by Mr. Jorge Nicolás Laferriere and Ms. Úrsula C. Basset, Co-Directors of the Seminary.

of the Federal District and Mr. José Luis Caballero Ochoa, Coordinator of the Human Rights Master's Program of the Ibero-American University; 10) Ms. Úrsula C. Basset, a professor and researcher at the University of Buenos Aires[15]; 11) Ms. Judith Butler, professor of the Maxine Elliot Program at the University of California, at Berkeley; 12) Mr. Alejandro Romero Seguel and Ms. Maite Aguirrezabal Grünstein, Doctors of Law at Navarra University and Procedural Law professors; 13) Mr. Carlos Álvarez Cozzi, Professor of Private Law at the Economic Sciences and Administration School and Associate Professor of Private International Law at the Law School of the University of the Republic of Uruguay; 14) Mr. James J. Silk, Director of Allard K. Lowenstein, Legal Clinic on Human Rights, of Yale University Law School; 15) Ms. María Sara Rodríguez Pinto, Doctor of Law at the *Universidad Autónoma de Madrid* and Professor of Civil Law; 16) Ms. Natalia Gherardi, Executive Director of the *Equipo Latinoamericano de Justicia and Género*, and Ms. Josefina Durán, Director of that organization's Law Department; 17) Ms. Laura Clérico, Ms. Liliana Ronconi, Mr. Gustavo Beade and Mr. Martín Aldao, professors and researchers at the University of Buenos Aires Law School; 18) Messrs. Carlo Casini, Antonio Gioacchino Spagnolo and Joseph Meaney[16]; 19) from the Chancellor and some members of the *Universidad Católica Santo Toribio de Mogrovejo*[17]; 20) Ms. María del Pilar Vásquez Calva, Coordinator of *Enlace Gubernamental de Vida and Familia A.C.*; 21) Ms. Suzanne B. Goldberg and Mr. Michael Kavey, lawyers at *Sexuality & Gender Law Clinic* of Columbia University and Ms. Adriana T. Luciano, an attorney at Paul, Weiss, Rifkind, Wharton & Garrisson LLP; 22) Ms. Elba Nuñez Ibáñez, Gabriela Filoni, Jeannette Llaja and Mr. Gastón Chillier[18]; Mr. 23) Mr. Brent McBurney and Mr. Bruce Abramson, attorneys at *Advocates International*; 24) Ms. Gail English, President of *Lawyers Christian Fellowship, a*nd Ms. *Shirley Richards*; 25) *Colombia Diversa* and *Centro de Derechos Humanos y Litigio Internacional*[19]; 26) Messrs. Piero A. Tozzi and Brian W. Raum of *Alliance Defense Fund*; 27) Mr. Jorge Rafael Scala, Professor of the postgraduate program on Human Development at the *Universidad Libre Internacional de las Américas* and Honorary Professor at *Universidad Ricardo Palma*; 28) the Center for Global Justice, Human Rights and the Rule of Law [*Centro para la Justicia Global, los Derechos Humanos y el Estado de Derecho]* of the Law School at

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[15] Ms. Ursula C. Basset is a member of the Board of Directors of the International Academy for the Study of Jurisprudence on Family [*Academia International para la Jurisprudencia sobre la Family]* and the Board of Directors of the International Society of Family Law.

[16] Mr. Carlo Casini is a member of the European Parliament, President of the Constitutional Affairs Commission of the European Parliament and President of the Italian Pro-Life Movement. Mr. Antonio Gioacchino Spagnolo is a professor of Bioethics and Director of the Bioethics Institute of the Catholic University of the Sacred Heart in Rome. Mr. Joseph Meaney is the director of international coordination at Human Life International.

[17] The brief was signed by Mr. Hugo Calienes Bedoya, Chancellor and Director of the Institute of Bioethics at USAT, and by Mr. Carlos Tejeda Lombardi, Director of the USAT Law School, Mr. Rafael Santa Maria D'Angelo, Coordinator of the Department of History and Philosophy of Law, Mr. Javier Colina Seminario, legal adviser at USAT, Ms. Rosa Sánchez Barragán, Coordinator of the Department of Civil Law, Ms. Erika Valdivieso López, Dean of the Faculty of Law of USAT, Ms. Angelica Burga Coronel, Professor of Legal Protection of Rights, Ms. Ana María Olguín Britto, Director of the Science Institute for Marriage and the Family of USAT and Ms. Tania Díaz Delgado, all professors of the Law School and the Science Institute for Marriage and the Family of the Catholic University of Santo Toribio of Mongrovejo.

[18] Ms. Elba Nuñez Ibañez is the Regional Coordinator of the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM). Ms. Gabriela Filoni is responsible for the Litigation Support Program of the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM). Ms. Jeannette Llaja is a member of the Latin American and Caribbean Committee for the Defense of Women's Rights of Peru. Mr. Gaston Chillier is the Executive Director of the Center of Legal and Social Studies.

[19] The brief was filed by Ms. Marcela Sánchez Buitrago, Executive Director of *Colombia Diversa*, and Mr. Mauricio Noguera Rojas and Mr. Santiago Medina Villareal, on behalf of *Colombia Diversa*; and Ms. Viviana Bohórquez Monsalve, on behalf of Human Rights and International Litigation Center [Centro de Derechos Humanos y Litigio Internacional].

Regent University[20]; 29) Mr. Álvaro Francisco Amaya Villareal, Ms. Bárbara Mora Martínez and Ms. Carolina Restrepo Herrera; 30) Ms. Lisa Davis, Ms. Jessica Stern, Ms. Dorothy L. Fernández, Ms. Megan C. Kieffer, Ms. Rachel M. Wertheimer, Ms. Erin I. Herlihy, and Mr. Justin D. Hoogs[21]; 31) Ms. Andrea Minichiello Williams, Ms. Ruth Ross and Mr. Mark Mudri[22]; and 32) the Department of Sexual and Reproductive Rights of the Program on Health Rights, Division of Legal Studies of the Center for Economic Research and Education [*Área de Derechos Sexuales and Reproductivos del Programa de Right to Salud, División de Estudios Jurídicos del Centro de Investigación and Docencia Económicas*[23]**.**

11. On September 24, 2011, the representatives and the State forwarded their final arguments and the Inter-American Commission presented its final written observations on this case. Moreover, on that occasion, the parties answered the questions prepared by the judges as well as the requests by the Court for evidence to facilitate adjudication of the case. These briefs were forwarded to the parties, to whom the Court gave an opportunity to present any observations deemed pertinent.

12. On November 29, 2011, the Court issued a Decision in which it ordered, as evidence to facilitate adjudication of the case, that the three girls M., V. and R., be informed of their right to be heard by the Court and of the consequences arising from the exercise of that right, so that they could express their wishes in that regard[24].

13. On February 8, 2012, the Secretariat of the Inter-American Court held a hearing in Santiago de Chile in which the girls M. and R. participated. For reasons of *force majeure* the girl V. was not present at the hearing. During said hearing the girls made several observations in relation to the case, which are of a confidential nature (*infra* paras. **¡Error! No se encuentra el origen de la referencia.** to 71).

14. On February 16, 2012, the record of the above mentioned proceedings was communicated to the parties. [25]

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[20] The brief was filed by Ms. Lynne Marie Kohm, on behalf of the Center for Global Justice, Human Rights and the Rule of Law of the Law School at Regent University.

[21] The brief was filed by Ms. Lisa Davis, Clinical Professor of Law, of the International Women's Human Rights Clinic at the City University of New York Law School; Ms. Jessica Stern, of the International Gay and Lesbian Human Rights Commission; and Dorothy L. Fernández, Justin D. Hoogs, Megan C. Kieffer, Rachel M. Wertheimer and Erin I. Herlihy, of Morrison & Foerster LLP. Other participant in the brief include Amnesty International; ARC International; Center for Constitutional Rights; the Council for Global Equality; Human Rights Watch; Lawyers for Children Inc; Legal Aid Society of New York; Legal Momentum; MADRE; *Centro Nacional de Derechos Lésbicos*; *Iniciativa Nacional de Derechos Económicos y Sociales*; the New York City Bar Association; Women's Link Worldwide and the *Consultoría para los Derechos Humanos y el Desplazamiento* (CODHES).

[22] Ms. Andrea Minichiello Williams is the Director General of the Christian Legal Center/Christian Legal Fellowship. Ms. Ruth Ross is the Executive Director of the Christian Legal Fellowship. Mr. Mark Mudri is the Regional Facilitator of Advocates Oceania.

[23] The brief was filed by Ms. Estefania Vela Barba and Mr. Alejandro Madrazo Lajous, of the Sexual and Reproductive Rights Area of the Program on Health Rights of the Legal Studies Division of the Center for Economic Research and Teaching.

[24] Case of Atala Riffo and daughters V. Chile. Order of the Inter-American Court of Human Rights of November 29, 2011. Available at: http://www.corteidh.or.cr/docs/asuntos/atala_29_11_111.pdf

[25] In a brief filed on February 23, 2012, the State submitted its observations regarding the confidentiality of the aforementioned record of proceedings.

III
COMPETENCE

15. The Inter- American Court has jurisdiction over this case in accordance with Article 62.3 of the American Convention, given the fact that Chile has been a State Party to the American Convention since August 21, 1990 and accepted the binding jurisdiction of the Court on that same date.

IV
EVIDENCE

16. Based on the provisions of Articles 46, 49 and 50 of the Rules of Procedure, as well as on the Court's case law regarding evidence and assessment thereof[26], the Court shall now examine and assess the documentary evidence forwarded by the parties at the different procedural stages, the statements of the alleged victim, the testimonies and expert opinions rendered by affidavit and at the public hearing before the Court, as well as evidence to facilitate adjudication of the case. In doing so, the Court shall adhere to the principles of sound judgment, within the applicable legal framework[27].

A. **Documentary, Testimonial and Expert Evidence**

17. The Court received the affidavits rendered by the following seven expert witnesses and six witnesses :

a) *Stefano Fabeni*, an expert witness proposed by the Commission, Director of the program on the LGTBI community (Lesbian, gay, bisexual, transgender and intersexual people) of the Global Rights Organization, who rendered an expert opinion regarding: i) the legislative and other types of measures that a State must adopt to prevent discrimination based on sexual orientation in the exercise of public power, and in particular, in the judiciary and ii) the different elements that must be taken into account when formulating and applying public policies to eradicate and prevent discriminatory prejudices based on sexual orientation in that sphere;

b) *Leonor Etcheberry*, an expert witness proposed by the representatives, a lawyer and professor of Family Law at Diego Portales University in Chile, who rendered an expert opinion on: "the manner in which custody proceedings are reviewed and decided under Chilean law and its connection with the way in which the proceeding [...] by the Judge in the Atala Riffo case was carried out";

c) *Fabiola Lathrop*, an expert witness proposed by the representatives, a lawyer and Professor of Family Law at the University of Chile, who rendered an expert opinion on: concepts related to custody in Chile and in comparative law, with an emphasis on discrimination based on sexual orientation;

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[26] *See Case of the "White Van" (Paniagua Morales et al) v. Guatemala. Reparations and Legal Costs.* Judgment of May 25, 2001. Series C No. 76, para. 50 and *Case of Chocrón Chocrón v. Venezuela. Preliminary Objections, Merits, Reparations and Legal Costs.* Judgment of July 1, 2011. Series C Nº. 227, para. 26.

[27] *See* Case of the *"White Van" (Paniagua Morales et al) v. Guatemala*, Merits. Judgment of March 8, 1998. Series C, Nº 37, para. 76; *and Case of Chocrón Chocrón, supra note 13, para. 26.*

d) *Miguel Cillero*, an expert witness proposed by the representatives, a professor of Law at Diego Portales University in Chile, who rendered an expert opinion on: the treatment of the principle of the best interests of the child under International Law;

e) *Monica Pinto*, an expert witness proposed by the representatives, a law professor and dean at the Law School of the University of Buenos Aires, who rendered an expert opinion on: the development of international human rights law in relation to non-discrimination and the treatment of sexual orientation as a suspect category;

f) *Maria Alicia Espinoza Abarzúa*, an expert witness proposed by the representatives, a child and adolescent psychiatrist, who rendered an expert opinion on: the alleged mental damage caused and the alleged need for therapy of the daughters of Ms. Atala Riffo;

g) *Claudia Figueroa Morales*, an expert witness proposed by the representatives, an adult psychiatrist, who rendered an expert opinion on: i) the mental health and alleged impact on the life plan of Ms. Atala Riffo as a result of the custody proceedings and ii) Ms. Atala Riffo's alleged need for psychiatric support in the future;

h) *Juan Pablo Olmedo*, a witness proposed by the representatives, who made a statement regarding: the alleged interference with the private life of Ms. Atala during the custody proceedings in which he acted as her lawyer;

i) *Sergio Vera Atala*, a witness proposed by the representatives, who made a statement regarding: the alleged impact on his family life, on his mother's life, on Ms. Atala Riffo and on the lives of his sisters as a result of the legal proceedings in Chile;

j) *María del Carmen Riffo Véjar*, a witness proposed by the representatives, who made a statement regarding: the alleged impact that the decision of the Supreme Court of Chile had on her family life, on her daughter's life, on Ms. Atala Riffo and on her granddaughters;

k) *Judith Riffo Véjar*, a witness proposed by the representatives, who made a statement regarding: the alleged impact that the decision of the Supreme Court of Chile had on her family life, on her niece's life, on Ms. Atala Riffo and on her grand nieces;

l) *Elías Atala Riffo*, a witness proposed by the representatives, who made a statement regarding: the alleged impact that the decision of the Supreme Court of Chile has had on his family life, on his sister's life, on Ms. Atala Riffo and on his nieces; and

m) *Emma De Ramón*, a witness proposed by the representatives, who made a statement regarding: the process experienced by the family of Ms. Atala during the custody proceedings and after the judgment issued by the Supreme Court of Chile.

18. As to the evidence produced at the public hearing, the Court heard the statements of the alleged victim and five expert witnesses:

a) *Karen Atala Riffo*, the alleged victim proposed by the representatives, who made a statement regarding: i) the alleged violation of her rights from the beginning of the custody proceeding of her daughters and ii) the alleged impact of the decision issued by the Supreme Court of Chile on her personal and family life;

b) *Juan Carlos Marín*, an expert witness proposed by the representatives, a Chilean lawyer and professor of Civil Law at the *Instituto Tecnológico Autónomo* of Mexico, who rendered an expert opinion regarding: the use of the *recurso de queja* (remedy of complaint) and its exceptional use;

c) *Robert Warren Wintemute*, an expert witness proposed by the representatives, Professor of Human Rights at King's College London, who rendered an expert opinion regarding: the status of International Law regarding discrimination based on sexual orientation, with emphasis on the European Human Rights System;

d) *Rodrigo Uprimny*, an expert witness proposed by the Commission, an expert on the right to equality and non-discrimination, who rendered an expert opinion regarding: i) international human rights standards related to sexual orientation and their links with the rights to equality, non-discrimination and private life and ii) the treatment of sexual orientation under international law as a prohibited criterion for discrimination, and as an aspect of a person's private life and the relevant case law in the universal human rights system, in other regional systems and in comparative law;

e) *Allison Jernow*, an expert witness proposed by the Commission, a lawyer with the International Commission of Jurists and coordinator of the project on sexual orientation and gender identity, who rendered an expert opinion regarding: i) the use of sexual orientation as a factor in judicial decisions regarding custody, in light of international human rights standards in the matter of equality, non-discrimination and private and family life; and ii) the relationship between the standards of international human rights law and custody issues in the present case, and

f) *Emilio García Mendez*, an expert witness proposed by the Commission, an international adviser on the rights of the child, who rendered an expert opinion on: i) international standards on the human rights of children applicable to cases related to care and custody; ii) the way in which the best interests of children and their right to participate and be heard in procedures concerning them, must be reflected in the practice of the judicial authorities who decide such cases and iii) the harm caused to the child's best interests when discriminatory prejudices are applied in such decisions.

B. **Admission of Documentary Evidence**

19. In the case at hand, as in many other cases[28], the Court admits the evidentiary value of such documents timely forwarded by the parties, which have not been disputed or challenged, or their authenticity questioned, only insofar as these are pertinent and useful to determine the facts and their possible legal consequences.

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[28] Cf. *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140; *and Case of Fontevecchia and D`Amico v. Argentina. Merits, Reparations and Legal Costs*. Judgment of November 29, 2011. Series C Nº. 238, para. 13.

20. As to the newspaper articles submitted, this Court has considered that these may be assessed when they refer to well-known public facts or statements by State officials, or when they corroborate aspects related to the case. [29] Therefore, the Court decides to admit those newspaper articles that are complete, or at least those whose source and publication date can be verified, and shall assess them according to the body of evidence, the observations of the parties and the rules of sound judgment.

21. As to some of the documents referred to by the parties by means of their electronic links, the Court has established that if a party provides at least the direct electronic link to the document cited as evidence, and it is possible to access this document, the legal certainty and the procedural balance will not be affected, because its location is immediately available to the Court and to the other parties[30]. In this case, no opposition or observations were expressed by the other parties regarding the content and authenticity of the documents.

22. Furthermore, together with the final written arguments, the representatives and the State forwarded various documents as evidence, which were requested by the Court based on the terms stipulated in Article 58.b of the Court's Rules of Procedure, and the parties had the opportunity to present any observations deemed pertinent. The Court admits said documents as evidence. These will be assessed taking into consideration the body of evidence, the observations of the parties and the rules of sound judgment.

23. Following the public hearing, written versions of the expert opinions rendered by Juan Carlos Marín, Robert Warren Wintemute and Allison Jernow at the public hearing in this case were forwarded. These statements were also conveyed to the other parties. The Court admits these documents insofar as they refer to the purpose duly specified by the President of the Court for such expert opinions (*supra* para. 18), considering these are useful for the present case and that there were no objections, nor was their authenticity or veracity challenged.

C. Admission of testimonial and expert evidence

24. As to the statements rendered before a notary public and those made at the public hearing, the Court admits these, considering they are relevant inasmuch as they relate to the purpose defined by the President of the Court in the Order requiring them (*supra* paras. 17 and 18). These statements shall be assessed in the appropriate chapter, together with the entire body of evidence, taking into account the observations made by the parties[31].

25. According to the case-law of this Court, the statements made by the alleged victims cannot be assessed separately but as part of the entire body of evidence in the proceedings, since they are useful insofar as they may provide more information on the alleged violations and their consequences[32]. Based on the foregoing, the Court admits the statement made by

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[29] *Cf. Case of Velásquez Rodríguez*, *supra* note 28, para. 146 and *Case of Fontevecchia and D`Amico*, *supra* note 28, para. 14.

[30] *Cf. Case of Escué Zapata v. Colombia. Merits, Reparations and Costs*. Judgment of July 4, 2007. Series C Nº. 165, para. 26; Case of Radilla Pacheco v. Mexico, supra note 12, para. 86; and *Case of Chitay Nech et al. v. Guatemala*. *Preliminary Objections, Merits, Reparations and Legal Costs.* Judgment of May 25, 2010. Series C No. 212, para. 54.

[31] *Cf. Case Loayza Tamayo vs. Peru. Merits. Judgment of September* 17, 1997. Series C No. 33, para. 43 and *Case of Barrios Family v. Venezuela. Merits, Reparations and Costs*. Judgment of November 24, 2011. Series C No. 238, para. 25.

the alleged victim, Karen Atala, which shall be assessed according to the aforementioned criterion.

26. Furthermore, regarding the expert witnesses, the State made several observations based on, in general: a) its disagreement with the content of some of the expert opinions, contradicting or giving its opinion regarding such reports; b) the scope of the statements of the expert witnesses in relation to the purpose of the expert opinion, which, on occasion, the State considers to be biased or merely personal observations; c) some elements used to render such an opinion and d) the methodology used to render some of the opinions.

27. The Court considers it pertinent to point out that, unlike witnesses, who should avoid giving personal opinions, expert witnesses may offer technical or personal opinions as long as these are related to their special knowledge or experience. In addition, experts may refer both to specific matters of the case or any other relevant point of the litigation, provided that these concern the purpose for which they were convened and the conclusions are well founded[33]. As to observations concerning the content of the expert opinions, the Court finds that such observations do not challenge their admissibility, but seek to question their evidentiary value, for which reason these shall be considered, if pertinent, in the relevant chapters of this Judgment.

28. In particular, regarding the observations made by the State about the alleged "lack of objectivity and the personal considerations" made by expert witness Espinoza, which fall outside the purpose for which she was summoned, the Court shall consider the State's observation and repeats that it shall admit only those statements that serve the purpose duly stipulated (*supra* para. 17). Regarding the methodology of the expert report of Ms. Espinoza, notwithstanding the objection made by the State, the Court notes that, in said report, there is an explanation of the procedure followed. Expert witness Espinoza pointed out that she based her report on the meetings held with the López Atala girls and their mother, as well as on various precedents. The Court considers that the objections to the method used by the expert witness, which stem from the report itself, do not affect its admissibility.

V
RIGHT TO EQUALITY AND NON-DISCRIMINATION, RIGHT TO PRIVATE LIFE, RIGHT TO FAMILY LIFE, RIGHTS OF THE CHILD, RIGHT TO A FAIR TRIAL AND TO JUDICIAL PROTECTION IN RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS REGARDING THE CUSTODY PROCEEDING

29. Firstly, the Court considers it necessary to emphasize that the purpose of the present case is not to determine whether the mother or the father offered the three girls a better home (*infra* paras. **¡Error! No se encuentra el origen de la referencia.** to **¡Error! No se encuentra el origen de la referencia.**). In this case, the dispute between the parties concerns two aspects: i) the custody suit filed by the father of the girls and ii) the disciplinary proceeding conducted against Ms. Atala. This chapter focuses on the debates surrounding the custody trial. In a subsequent chapter, the disciplinary proceeding will be analyzed.

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[32] *Cf. Case of Loayza Tamayo, supra* note 31, para 43 and *Case of Chocrón Chocrón*, *supra* note 26, para 34.

[33] *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Legal Costs.* Judgment of June 30, 2009. Series C N° 197, para. 42; and *Case of Barrios Family, supra* note 31, para 28.

A. Proven facts in relation to the custody proceedings

30. On March 29, 1993, Ms. Atala married Ricardo Jaime López Allendes[34]. Her daughters, M., V., and R. were born in 1994, 1998, and 1999, respectively[35]. Ms. Atala has an older son, Sergio Vera Atala, who was born of a previous marriage. In March 2002, Ms. Atala and Mr. López Allendes decided to end their marriage through a *de facto* separation. As part of the dissolution of their marriage, they established by mutual consent that Ms. Atala would maintain the care and custody of the three girls in the city of Villarica, with weekly visits to the home of their father in Temuco[36]. In November 2002, Ms. Emma de Ramón, the partner of Ms. Atala, began living in the same house with Ms. Atala, her three daughters and her eldest son[37].

1) Custody proceedings[38]

31. On January 14, 2003, the father of the three girls filed a custody suit with the Juvenile Court of Villarrica, considering that "the physical and emotional development [of the girls] was seriously at risk" should they continue to live in the care of their mother. In the suit, Mr. López argued that Ms. Atala "[was] not capable of watching over and caring for [the three girls, given that] her new sexual lifestyle choice, together with her cohabiting in a lesbian relationship with another woman, [were] producing […] harmful consequences for the development of these minors …" since the mother [had] not shown any concern for caring and protecting [...] the development of the girl[s]." In addition, Mr. López argued that "[to] treat as normal, within the legal order, partners of the same sex [leads] to distort the meaning of a human couple, man and woman, and therefore, alters the natural meaning of the family, [...] since it affects the fundamental values of the family, as the core unit of society"; therefore, the "sexual choice made by the mother w[ould] disrupt the healthy, fair and normal coexistence to which [M., V. and R.] have a right." Finally, Mr. López argued that "[i]t would be necessary to take into account all the consequences of a biological nature that would be implied for minors living with a lesbian couple [;] in fact, solely in terms of diseases, given the sexual practices of a lesbian couple, the girls are [would be]

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34 *Cf.* Marriage certificate of September 22, 2011 (case record, volume XII, page 5926).

35 *Cf*. Psychological Reports on M., V., and R., of November 15, 2002 (record of appendices to the application, volume V, appendix 23, pages 2680, 2683 and 2686).

36 *Cf.* Decision of the Juvenile Court of Villarrica of October 29, 2003 (record of appendices to the application, volume V, appendix 12, page 2581).

37 In this regard, the Juvenile Court of Villarrica established that "in June 2002 [Ms. Atala] began a relationship with [Ms.] Emma of Ramón[,] who since November 2002 work [ed] as the coordinator of the regional archive of Araucanía in the town of Temuco [and therefore, move[d] into the common home and join [ed] the nuclear family." Judgment of the Juvenile Court of Villarrica on October 29, 2003 (record of appendices to the application, volume V, appendix 12, page 2582).

38 The system for the custody of minors in Chile is governed by article 225 of the Civil Code, which provides that: "If the parents live separately, the mother shall see to the personal care of the children. Nonetheless, through a public document, or document issued before any official of the Civil Registry, with an entry on the margin of the child's birth record within thirty days of the granting thereof, both parties may, by mutual agreement, determine that the personal care of one or more children falls to the father. This agreement may be revoked, following the same formalities. Be that as it may, when necessary to protect the interests of the child, whether because of mistreatment, neglect, or another just cause, the judge may transfer the care of the child to the other parent But it would not entrust the personal care of the child to a parent who had not contributed, while she or he could, to the upkeep of the child while the child was in the custody of the other parent. As long as an amendment related to the personal care is not annulled by a subsequent one, any agreement or resolution is unenforceable to third parties." Judgment of the Supreme Court of Justice of Chile of May 31, 2004 (record of appendices to the application, volume V, page 2671)

under constant risk of contracting sexually transmitted diseases such as herpes and AIDS" [39].

32. On January 28, 2003, Ms. Atala responded to the custody suit filed by Mr. López, expressing "the sadness it has caused me to read the libelous allegations and the manner in which what our family life was and, what is today my private life, were described and judged." Ms. Atala alleged that its text and tone "affected her due to its aggressiveness, prejudice, discrimination, ignorance of the right to homosexual identity, the distortion of the facts it expresses and, finally, its disdain for the best interest of [her] daughters." She also asserted that "the allegations made regarding [her] sexual identity have nothing to do with [her] function and role as a mother, and consequently, should remain outside the suit, in that issues of connubial relations and sexual choice do not extend to parental relationships, which are the subject of the proceeding." Finally, Ms. Atala argued that neither the Chilean Civil Code nor the law on minors consider a "different sexual choice" as being grounds for "disqualification as a parent" [40].

33. On January 28, 2003, the Juvenile Court of Villarrica ordered "discovery" for which it decided to establish the following items as "substantial, pertinent and disputed facts": i) "grounds for qualification and disqualification of parents to have custody of the minors" and ii) the "environment offered by the parents to the minors". Also, the court decided to set a date for a hearing and request, *inter alia*, the following items of evidence: i) "psychological report on both parties and on the minors"; ii) "psychiatric report on both parties"; iii) to hear "the minors in question at a private hearing"; iv) "complete socio-economic report of the respondent and the minors" and v) to request the "Psychology Department of the University of Chile [to confirm] whether any psychological studies exist at the national and international level to show if there are differences between children raised by heterosexual and homosexual couples and the consequences that such circumstances may have in relation to minors"[41].

34. A number of media organizations covered the custody suit, including newspapers with national circulation such as *Las Últimas Noticias* and *La Cuarta*[42]. Based on these news reports, and other reasons related to the alleged misuse of remedies at the criminal court of Villarrica where Ms. Atala served as a judge (*infra* para. 211), on March 19, 2003, the full Court of Appeals of Temuco appointed Judge Lenin Lillo[43] to conduct a special visit at the criminal court.

35. On March 11, 2003, Ms. Atala's representative furnished documentary evidence, requested that six testimonies be admitted and asked the court to carry out other evidentiary proceedings, which was accepted by the trial court[44]. In addition, the

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[39] Custody suit filed before the Juvenile Court of Villarrica on January 14, 2003 (record of appendices to the petition, volume V, annex 1, pages 2499, 2500, 2503 and 2504).

[40] Response to the custody suit of January 28, 2003 (record of appendices to the application, volume V, appendix 2, pages 2507, 2513, 2516, 2521 and 2522).

[41] Court Order of the Juvenile Court of Villarrica of January 28, 2003 (record of appendices to the application, volume I, page 113 and 114).

[42] Press release, "Lawyer Demands Custody of his Daughters because Spouse/Judge is a Lesbian", Newspaper La Cuarta, February 28, 2003; and "Lawyer Demands Custody of his Daughters because his Former Wife is a Lesbian", Newspaper Las Últimas Noticias, March 1, 2003 (record of appendices to the application, volume V, appendices 3 and 4, pages 2529 to 2532).

[43] Report prepared by Minister Lenin Lillo Hunzinker, Court of Appeals of Temuco, April 2, 2003 (case file, volume XII, page 5927).

[44] Specifically, the representative furnished the following documentary evidence: i) psychological report of V. and R. of December 2002; ii) psychological report of M. of December 2002; iii) psychological report of the minors and their mother; iv) certification provided by the nurse at the health center attended by the minors, certifying that "there [was] no evidence or physical signs of mistreatment" in the girls; v) copy of the academic reports of M.

representative requested the trial court to carry out different proceedings[45]. Moreover, Mr. López' attorney requested the trial court to produce twenty-two testimonies, a request that was also accepted by the court[46]. On April 3, 2003, the Juvenile Court of Villarrica received the testimonies of six relatives of the complainant and three relatives of the respondent[47].

36. On April 8, 2003, the Juvenile Court of Villarrica held a private hearing with the girls M., V. and R. and "a record of the private hearing was kept in a closed envelope at the safe of the Court". The court also heard the elder son of Ms. Atala at the private hearing[48].

37. On April 10, 2003, a hearing was held to present documentary evidence[49]. On April 14, 2003, the Juvenile Court of Villarrica received four testimonies from individuals proposed by the petitioner, in particular from a psychologist and a social worker[50]. In this regard, the social worker when asked whether "children raised in homosexual families suffer adverse consequences", indicated that "there are social consequences, such as confusing paternal and maternal roles which affect the development of sexual identity." The social worker added that "another of the consequences is that in Chile, according to a study [...] on tolerance and discrimination [carried out] in 1997, the conclusion was reached that Chileans show an outright rejection of homosexual minorities[,] expressed by 60.2 per cent of the population. [Based] on the foregoing and taking into account this high level of discrimination[,] the minors would be exposed to situations of social discrimination that they would not have wished for"[51].

38. In addition to the relatives and close friends who made statements during the hearing (*supra* para. 35) three domestic employees who worked at the home of the López Atala family also made statements, indicating, among other things, that the father showed far more concern for his daughters than Ms. Atala[52]. One of the workers also described the behavior of the girls[53].

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and V.; vi) Christmas card made by M.; vii) copy of the decisions "in which the minors [were] recognized as dependant relatives of the respondent"; viii) certificate of "Isapré Más Vida"; ix) copy of the grades obtained by Ms. Atala in her profession; x) copy of the alimony arrangements made between Ms. Atala and the father of her elder son; xi) copy of a health certificate of Ms. Atala "certifying the absence of genital herpes"; xii) copy of a health certificate of Ms. Emma of Ramón "certifying the absence of genital herpes" xiii) copy of the negative AIDS test of Ms. Atala; xiv) copy of the negative AIDS test of Ms. of Ramón; and xv) notary's copy of the appointment of Ms. of Ramón as coordinator of the regional archive of Araucanía. Brief of Ms. Atala of March 11, 2003 (record of appendices to the application, volume I, pages 192 to 193).

[45] The attorney requested: i) a report of the psychiatrist in charge of marriage counseling for Ms. Atala and the petitioner; ii) to issue an official letter to the human rights department of the claimant's workplace; iii) to request the Pan American Health Organization to inform on "the date on which homosexuality was eliminated from the catalogue of pathological conducts"; iv) to request the National Women's Service to inform regarding the "concept of family included in the Report of the National Commission on Family"; v) to request the General Ministry of Government to forward the plan to overcome discrimination in Chile; and vi) to request the Director of the Human Rights Department of the Ministry of Foreign Affairs to inform "on the international obligations assumed by the [...] State of Chile in the field of non-discrimination for sexual orientation or identity". Brief of Ms. Atala of March 11, 2003 (record of appendices to the application, volume I, pages 193 to 195).

[46] Cf. Brief of Mr. López of March 11, 2003 (record of appendices to the application, volume I, pages 197 to 199).

[47] Cf. Record of the Juvenile Court of Villarrica of April 3, 2003 (record of appendices to the application, volume I, pages 327 to 334).

[48] Cf. Record of the Juvenile Court of Villarrica of April 8, 2003 (record of appendices to the application, volume I, pages 350 and 351).

[49] Cf. Record of the Juvenile Court of Villarrica of April 10, 2003 (record of appendices to the application, volume I, pages 352 to 373).

[50] Cf. Record of the Juvenile Court of Villarrica of April 14, 2003 (record of appendices to the application, volume I, pages 374 to 393).

[51] Testimony of Edith Paola Retarnal Arevalo of April 14, 2003 (record of appendices to the application, volume I, page 390).

[52] *Cf.* Testimonial evidence rendered in an affidavit on April 14, 2003 before the Juvenile Court of Villarrica by Erecilda Teresa Solis Ruíz (record of appendices to the application, volume I, page 370), Ana Delia Pacheco

2) Provisional custody granted to the father

39. In the context of the custody suit, the girls' father filed a suit for provisional custody on March 10, 2003, with a view to obtaining custody of his daughters prior to the conclusion of the proceeding. In this regard, Mr. López representative argued the alleged "incompetence that the sexual choice made by the mother and respondent, [Ms.] Atala Riffo, and that was reflected in her express acknowledgement that she is a lesbian, produces and will produce for the overall psychological and social-environmental development of these three young girls, not to mention the hardly maternal and violent behavior she has shown over the years, not only with her family but also with her social environment." In addition, she argued that "the respondent's need to be happy and fulfill herself as a person in all areas of her life […] is not compatible with being a parent, which includes maternal capabilities [...], which, it seems, the respondent has selfishly disregarded." The representative of girls' father also argued that the girls have the right to live in a family made up of a father and mother of different sexes[54].

40. On March 13, 2003, Ms. Atala answered the provisional custody motion filed by her former spouse, asking that it be rejected in its entirety. In particular, Ms. Atala's representative argued that:

> The legal representative of the petitioner [sought] to render without effect the *status quo* achieved to date, a situation to which she has contributed with her assistance, participation, and personal contribution as a professional in the appearances made, having achieved a temporary system that better reflects the best interests of the minors […]. The fact that [Ms. Atala] is a lesbian and acknowledges her condition as such, does not affect her maternal abilities and her ability to create an environment with love, affection, respect, and tolerance for the purposes of the education and development of the girls as human beings and future citizens of our country.[55]

41. On May 2, 2003, the Juvenile Court of Villarica granted provisional custody of the girls to the father, and regulated the mother's visits, even though it expressly acknowledged that there was no evidence to presume the legal incompetence of the mother. The Juvenile Court based its decision, *inter alia*, on the following arguments: i) "Whereas […] the respondent, having expressly acknowledged her sexual choice, cohabits with her partner in the home she shares with her daughters, […] thereby altering the normal family routine, giving preference to her personal interests and well-being over the emotional well-being and social development of her daughters" and ii) "Whereas, the fact that the respondent has given preference to her own well-being and personal interest over carrying out her role as a mother, under conditions that could affect the subsequent development of the minors in the case, […]there is no conclusion other than that the petitioner presents more favorable arguments on behalf of the best interest of the girls, arguments which, in the context of a heterosexual and traditional society, take on great importance" [56].

Guzmán ((record of appendices to the application, volume I, page 375), and Graciela del Carmen Curín Jara ((record of appendices to the application, volume I, page 377).

[53] *Cf.* Testimonial evidence obtained through an oral statement rendered on April 14, 2003 before the Juvenile Court of Villarrica by Ana Delia Pacheco Guzmán (record of appendices to the application, volume I, page 376).

[54] Suit for Provisional Custody of Mr. López Allendes of March 10, 2003 (record of appendices to the application, volume V, pages 2546 to 2552).

[55] Response to Motion for Provisional Custody of March 13, 2003(record of appendices to the application, volume V, pages 2554 to 2557).

[56] Decision in the provisional custody proceeding by the Juvenile Court of Villarrica, May 2, 2003 (record of appendices to the application, volume V, appendix 10, pages 2559 to 2567). In the context of the provisional

42. On May 8, 2003, in compliance with the decision of the Juvenile Court of Villarrica, Ms. Atala delivered her three daughters to their father[57]. In response to that decision, on May 13, 2003, Ms. Atala sought to prevent the Regular Judge of the Juvenile Court of Villarica from continuing to hear the custody proceeding based on his having incurred in grounds for incompatibility [*implicancia*] as set forth in the Organic Code of the Courts[58]. Ms. Atala's representative maintained that in the decision of May 2, 2003, the judge gave "form and content, with the force of a judicial decision, to a specific model of society, a view that is no doubt at the bottom of the issue presented and is discriminatory because it is based on stereotypes and patriarchal assumptions that do not accept and value diversity and pluralism within society"[59].

43. On May 14, 2003, the Regular Judge of the Juvenile Court of Villarica declared the "sufficient grounds" for incompatibility (*implicancia)* without expressing an opinion on the merits, and refrained from intervening in the custody proceeding until it was resolved in accordance with Article 120 of the Code of Civil Procedure[60].

3) Lower court decision granting custody of the girls to Ms. Atala

44. Given the disqualification of the Regular Judge, the Acting Judge of the Juvenile Court of Villarica was responsible for issuing a decision on the merits on October 29, 2003[61]. In that ruling, the Judge rejected the petition for custody based on the view that the existing evidence had established that the respondent's sexual orientation was not an impediment to carrying out responsible motherhood, that there was no psychiatric pathology that would prevent her from exercising her "role as a mother," and that there were no indications that would allow for the presumption of any grounds for incapacity on the part of the mother to take on the personal care of the minors. The Judge also concluded that "no concrete evidence has shown that the presence of the mother's partner in the

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custody proceeding, the Juvenile Court gathered as testimonial evidence the following statements from: i) a godfather of one of the girls; ii) a psychologist; iii) a friend of the family; iv) a domestic employee, and v) a nanny (record of merits, volume XII, pages 5919 to 5921). Furthermore, the Juvenile Court considered as documentary evidence various newspaper publications, a socio-economic report, a set of photographs, a report issued by Ms. Atala's psychiatrist, a report by the psychologist in charge of the girls' therapy and the report of a student nurse (record of merits, volume XII, pages 5918 to 5921). Likewise, the Court considered that "sufficient grounds exist[ed] to affect the duty to personal care, legally established, [for which reason] the petitioner's request was accept[ed]."

[57] Cf. Record of May 15, 2003 (record of appendices to the application, volume I, page 572).

[58] In this respect, the Organic Code of Courts [Código Orgánico de Cortes] provides:
Art. 194. Judges may not be competent to hear certain cases based on incompatibility or recusal, if necessary, by virtue of legal reasons.
Art. 195. Incompatibility grounds: […] 8. The judge having given his opinion regarding the issue at hand with full knowledge of the precedents necessary to issue a judgment.
Available at http://www.oas.org/juridico/spanish/chi_res9.pdf (last visit February 22, 2012)

[59] Petition to bar Judge Luis Humberto Toledo Obando, May 13, 2003 (record of appendices to the application, volume V, page 2573).

[60] Court Order of the Juvenile Court of Villarrica of May 14, 2003 (record of appendices to the application, volume II, page 569). Article 120 of the Chilean Code of Civil Procedure in effect at the time of the events provides that: Once grounds for disqualification are accepted as sufficient or declared in accordance with subparagraph 2 of the preceding article, said declaration shall be made known to the official whose incompatibility or recusal has been sought, ordering him to abstain from participating in the matter in question as long as the motion is not resolved". Available at: http://www.leychile.cl/Navegar?idNorma=172986 (last access February 20, 2012), electronic address furnished by the State in its brief of final arguments (record of merits, volume XII, page 5914).

[61] Decision of the Juvenile Court of Villarrica of October 29, 2003 (record of appendices to the application, volume V, page 2607).

home is harmful to the well-being of the girls." The Judge pointed out that it had been established that homosexuality was not considered pathological conduct and that the respondent showed no "contraindication from a psychological perspective that would make her unfit to carry out her maternal role."

45. In evaluating Ms. Atala's alleged incapacity to be a mother, because of her acknowledged status as a lesbian and because she was living with a partner of the same sex, the court considered a series of reports from organizations such as the Pan American Health Organization, the Psychology Department of the University of Chile, and the School of Education of the Pontifical Catholic University of Chile, indicating that: i) "homosexuality is a normal behavior and is not a manifestation of a pathological conduct" and ii) "the ability to love children, care for them, protect them, respect their rights, and promote their life choices […], is unrelated to the sexual identity or choices of the parents" [62]. The court also considered psychological reports on the minors and psychological reports on the respondent and the petitioner, concluding that "the presence of the mother's partner in the home [where] the girls live[d] with their mother [was] not an impediment for the mother to assume the personal care of the minors [and that] no concrete evidence ha[d] shown that the presence of the mother's partner in the home is harmful to the well-being of the girls."

46. Regarding the quality of care that Ms. Atala provided for her daughters, the court considered a report issued by a nurse at Villarrica Hospital and educational reports, and indicated that this evidence "demonstrates the mother's constant concern for the health and education of her daughters and, consequently, it is established that the respondent has provided for the upbringing, personal care and education of her daughters." The court also indicated that although the complaint stated that the girls had been subject to mistreatment by Ms. Atala, "it never describes concrete acts, and whether such acts amounted to physical or mental mistreatment." In addition, it declared that the court believed that there was no evidence that would "lend credence to any type of mistreatment of the girls" by their mother.

47. On the petitioner's argument regarding the girls' risk of contracting sexually transmitted diseases, the judge considered medical certificates of Ms. Atala and her partner confirming that there is no evidence of such diseases. On the moral danger the minors allegedly faced, the trial court considered a social report on the respondent demonstrating a harmonious family environment, "with clear rules and limits and a family routine that operates appropriately with the supervision of the mother, who in the context of a satisfactory partnership relationship, is seen as being in harmony with her environment and concerned with and close to her daughters." In addition, the court referred to the conclusion of the report from the Psychology Department of the University of Chile asserting that "the sexual orientation of the mother does not constitute a danger to the morality of the minors because, as already indicated, as it is a normal condition or form of human sexuality it is not subject to an ethical or moral judgment but rather may only be considered a person's physical condition, and not in itself subject to a value judgment."

48. Regarding the potential discrimination that the girls might be subjected to and that was mentioned by relatives and witnesses for the petitioner, the Acting Judge also concluded that "the minors have not been subjected to any discrimination to date and what the witnesses and relatives of the petitioner indicate is a fear of possible future discrimination." On this point, the court considered that it should "base [its] decision on definite and proven facts in the case and not on mere suppositions or fears."

[62] Decision of the Juvenile Court of Villarrica, October 29 2003 (record of appendices to the petition, volume V, pages 2591, 2594 and 2595).

49. Finally, in its decision, the Juvenile Court considered that the girls had been heard by the court and that, in the last hearing, dated October 8, 2003, "R. and V. expressed their desire to return to live with their mother, and in the case of M. only a slight preference for the mother was detected." In this respect, the court observed that the statements made by the girls during the hearing had been given consideration, but did not influence the court's decision due to their young age and the possibility that their opinions might be affected "artificially by outside factors that influence them, distort them, or make them unsuited to the proposed purpose." [63]

4) Appeal to the Court of Appeals of Temuco and injunction granted in favor of the father

50. Pursuant to the decision issued on October 29, 2003, the Juvenile Court of Villarrica ordered that the girls be handed over to their mother on December 18, 2003[64]. However, on November 11, 2003, the girls' father filed an appeal against the court's Decision and subsequently a petition for temporary injunction [*solicitud provisional de no innovar*], arguing that complying with the decision would mean a radical and violent change in the girls' current *status quo*[65].

51. On November 24, 2003, the Court of Appeals of Temuco granted the injunction, maintaining custody with the father[66]. With respect to this injunction, Ms. Atala filed a disciplinary complaint against two members of the Court, based on the grounds of recusal and disqualification.[67] Chile's Supreme Court of Justice ruled on her complaint on July 2, 2004, declaring by a majority vote that there was no fault or abuse on the part of the Judges. Notwithstanding this decision, some members of the Court "almost issued a severe warning to the judges being challenged due to the omission for which the complaint was filed."[68]

52. On March 30, 2004, the Court of Appeals of Temuco, without the two Judges who had withdrawn from the proceeding (supra para.51), unanimously upheld the decision appealed by the girls' father, sharing the considerations of the lower court judge, and rendered without effect the injunction granted on November 24, 2003[69]. The Court of Appeals did not put forward new grounds and fully upheld the lower court's decision.

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[63] Decision of the Juvenile Court of Villarrica of October 29, 2003 (record of appendices to the application, volume V, pages 2591, 2594, 2595).

[64] Court Order of the Juvenile Court of Villarrica of November 5, 2003 (record of appendices to the application, volume II, page 933).

[65] Appeal filed by Mr. López Allendes, on November 11, 2003 (record of appendices to the application, volume V, pages 2614 to 2632) and Petition for Temporary Injunction filed by Mr. López Allendes on November 22, 2003 (record of appendices to the application, volume V, pages 2634 to 2636).

[66] Granting of injunction by the Court of Appeals of Temuco, November 24, 2003 (record of appendices to the application, volume V, page 2638).

[67] On January 7, 2003, the Rapporteur of the Court of Appeals of Temuco certified that "Judge Archibaldo Loyola had disqualified himself from hearing the case and that Judge Lenin Lillo Hunzinker had considered that the grounds for recusal, stipulated in Article 196 of the Organic Code of Courts, applied to him, insofar as he had prior knowledge of the case, given that he had participated in an investigation during the extraordinary visit to the Juvenile Court of Villarrica". See record of appendices to the application, volume V, page 2640.

[68] Ruling of the Supreme Court of Justice of Chile, July 2, 2004 (record of appendices to the application, volume V, page 2645).

[69] Judgment of the Temuco Court of Appeals, March 30, 2004 (record of appendices to the application, volume V, page 2643).

5) Filing of remedy of complaint (recurso de queja) with the Supreme Court of Justice and granting of second injunction in favor of the father

53. On April 5, 2004, the girls' father filed a remedy of complaint (*recurso de queja*) with the Supreme Court of Chile against the Judges of the Court of Appeals of Temuco and requested that the girls remain in his care on a provisional basis. The girls' father argued that, in their decision, the judges being challenged had committed a "fault and serious and flagrant abuse" because; i) they [had] given preference to the rights of the mother over the rights of the daughters; ii) they [had] failed in their legal duty to protect the vulnerability of the girls; and iii) they [had] violated the principles governing the conscientious assessment of evidence in cases involving family matters.[70] More specifically, Mr. López Allendes argued that the judges had ignored all the evidence in the case demonstrating that "open expression of lesbian behavior produced directly and immediately in M., V., and R. confusion regarding sexual roles that interfered with and will later interfere with the development of a clear and defined sexual identity."[71] The Court granted the requested injunction on April 7, 2004.[72]

6) Decision of the Supreme Court of Justice of Chile

54. On May 31, 2004, the Fourth Chamber of Chile's Supreme Court of Justice, in a split three-to-two decision, admitted the complaint appeal and granted permanent custody to the father. [73]

55. In the first place, the Supreme Court emphasized that "in all measures concerning [children], the best interests of children must be given priority over other considerations and rights related to their parents, in such a way that it might be necessary to separate them from their parents." The Supreme Court also noted that the first paragraph of Article 225 of the Civil Code, which provides that when parents are living separately the personal care of the children falls to the mother, is not an "absolute and final" rule. Therefore, the Court declared that "the court may entrust the personal care of the children to the other parent, terminating the custody of the parent who has it, if there is 'justified cause' that makes it essential to make this decision, always taking the interest of the child into account."

56. In this context, the Court concluded that: i) "no regard was given to the testimony in either the permanent custody proceeding or the provisional custody file with respect to the deterioration of the social, family and educational environment of the girls since the mother began to cohabit with her homosexual partner, or to the possibility that the girls could be the target of social discrimination arising from this fact"; ii) "the testimony of persons close to the girls, such as the house maids, refers to games and attitudes of the girls that reflect confusion about the sexuality of the mother, which they could have perceived in the new cohabitation scheme at their home"; iii) Ms. Atala "put her own interests before those of her daughters when she chose to begin to live with a same sex partner, at the same home where she raised and cared for her daughters, separately from the girls' father" and iv) "the

[70] Appeal complaint and petition for injunction filed by the Mr. López Allendes, April 5, 2004 (record of appendices to the application, volume V, pages 2652 to 2655).

[71] Appeal complaint and petition for injunction filed by the Mr. López Allendes, April 5, 2004 (record of appendices to the application, volume V, page 2654).

[72] Cf. Granting of injunction by the Supreme Court of Chile, April 7, 2004 (record of appendices to the application, volume V, page 2666).

[73] *Cf.* Decision of the Fourth Chamber of the Supreme Court of Justice of Chile of May 31, 2004 (record of appendices to the application, volume V, appendix 22, pages 2669 to 2677).

potential confusion over sexual roles that could be caused in them by the absence from the home of a male father and his replacement by another person of the female gender poses a risk to the integral development of the children from which they must be protected."

57. The Court also deemed the girls to be in a "situation of risk" that placed them in a "vulnerable position in their social environment, since clearly their unique family environment differs significantly from that of their school companions and acquaintances in the neighborhood where they live, exposing them to ostracism and discrimination, which would also affect their personal development." Therefore, the Court felt that the conditions described constitute "just cause" in accordance with Article 225 of the Civil Code, justifying awarding custody to the father, given that the current situation "brings with it the risk of harm, which could become irreversible for the interests of the minors, whose protection should have preference over any other consideration." The Court concluded that the challenged judges failed by "not having strictly evaluated the evidence in the proceeding" and by "having passed over the preferred right of the minors to live and grow within the bosom of a family that is structured normally and appreciated in the social environment, according to the proper traditional model, and have incurred serious fault or abuse, which must be corrected through admission of the instant complaint appeal."[74]

58. The two judges of the Chamber of the Supreme Court who voted to reject the remedy of complaint put forward some arguments regarding the nature of that remedy.[75] In addition, the dissenting judges deemed that, in accordance with Article 225 and the preference it gives to the mother for the care of children in case of separation, "the judge cannot change the general rule of where to place the care of the children based on arbitrary judgments or unjustified, frivolous or ambiguous grounds, but rather only when a restrictive examination of the legal standard and the accompanying evidence shows an "essential" interest of the child."[76]

B. Prior considerations

1. Prior consideration on the matter of the case before the Inter-American Court

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[74] Ruling of the Supreme Court of Justice of Chile, May 31, 2004 (record of appendices to the application, volume V, page 2670, 2671, 2672, 2673).

[75] In particular, they indicated that "it is not a procedural remedy that empowers this Court to resolve all factual and legal issues presented by the parties in the case. As is fully known and in accordance with Article 545 of the Organic Code of the Courts, the complaint appeal is a disciplinary remedy, the exclusive purpose of which is to correct faults or serious abuses committed in the issuance of a jurisdictional ruling, through a) invalidation of the ruling and b) the imposition of disciplinary measures on the judges who committed the serious fault or abuse contained in the ruling being voided. Then and discarding as a legal imperative the possibility that the complaint appeal might mean, in this Supreme Court, the opening of a third instance – that our procedural system does not accept – or that it was a suitable means for imposing debatable opinions or interpretations, it is appropriate to examine whether the judges being challenged have committed some serious fault or abuse by granting their mother, Jacqueline Karen Atala Riffo, the care of her three minor daughters, M., V., and R., aged 10, 8, and 4". Judgment of the Supreme Court of Justice of Chile, May 31, 2004, dissenting votes of Judges Jose Benquis C. and Orlando Álvarez H. (record of appendices to the application, volume V, pages 2673 and 2674).

[76] Judgment of the Supreme Court of Justice of Chile, May 31, 2004, dissenting votes of Judges Jose Benquis C. and Orlando Álvarez H. (record of appendices to the application, volume V, page 2675). In said analysis, the judges considered that: i) "the record did not provide any history on the basis of which it could be speculated that the mother […] had mistreated or neglected her daughters" and ii) the "expert opinions that appear in the record from both psychologists and social workers indicate that the mother's sexuality does not infringe the rights of the girls, nor does it deprive her of the exercise of her right as a mother, since from a psychological or psychiatric perspective, in the judgment of those experts, this is an absolutely normal person". Therefore, the judges conclude that "by depriving the mother, based solely on her sexual choice, of the custody of her minor daughters, – as the father ha[d] requested based on clearly subjective assessments – means imposing both on the daughters and on their mother an unnamed sanction that is outside the margin of the law, in addition to being discriminatory".

Arguments of the parties

59. The Commission argued that the present case "refers to discrimination and arbitrary interference in the private life of [Ms.] Atala, which occurred in the context of a judicial proceeding regarding the custody and care of her three daughters." This, in consideration of the fact that [Ms.] Atala's sexual orientation, and particularly the expression of that orientation in her lifestyle, were allegedly the main grounds for the decisions taken to remove custody of her daughters."

60. The representatives agreed with the Commission's general arguments, adding that "the proceedings brought before the Inter-American System […] have not sought, nor do they seek, to reopen the custody proceedings and use the Inter-American System as a fourth instance." Furthermore, they argued that "the State presented to this […] Court reasons that the Supreme Court did not express in its decision on the remedy of complaint, basing itself on documents that the Supreme Court had knowledge of and rejected in its ruling."

61. For its part, the State argued that "it is not true that the reason why Chilean courts decided to take custody from the mother to hand it over to the father in the case of the López Atala girls was the sexual orientation" of Ms. Atala. Specifically, the State alleged that "the purpose of the custody trial in the case of López with Atala was not to declare the disqualification of the mother, but to determine if the father or mother offered better conditions to ensure the well-being of the three girls." Accordingly, the State argued that "[i]t is not true that the grounds for the mentioned decisions were the mother's sexual orientation or its mere expression. On the contrary, from the tenor of these [decisions] it can be concluded […] that these are based on the higher interest of the child, and, within that context, the defendant's sexual orientation was considered, among other circumstances, in the measure that its expression had specific adverse effects on the girls' well-being." According to the State, "the judgment issued by the Supreme Court ruled that the lower courts had incurred in serious misconduct or abuse in violating the rules on the assessment of evidence, […] since […] said courts did not weigh the overall merits of all the evidence presented."

62. In general terms, the State argued that, in the custody proceeding "there [was] abundant evidence […] that prove[d]… that the father offered better conditions for the well-being" of the girls. Specifically, the State argued, that "there was compelling evidence that showed that the defendant had an intensely self-centered attitude and personal characteristics that made it difficult for her to adequately exercise a maternal role, circumstances that led to the conclusion that the mother did not offer a suitable environment for the development of her daughters."

63. On the other hand, the State argued that "regarding the father there was considerable evidence […] that prove[d]: i) his dedication and attention to the care of his daughters; ii) his skills in their upbringing; iii) the favorable environment he offered for the well-being of his daughters, and iv) the positive relationship that existed between the girls and the claimant's partner." Furthermore, the State noted that upon examining the evidence in the case file, it would be clear that the decision regarding provisional custody "also took into account matters other than the aforesaid sexual orientation, such as determining whether the father or the mother offered a greater degree of commitment and care to the girls."

Considerations of the Court

64. From the arguments presented by the State, and from the evidence contained in the case file, the Court considers that at the custody trial the following aspects were discussed, *inter alia*: i) the sexual orientation of Ms. Atala; ii) Ms. Atala's personality; iii) the alleged damage caused to the girls, and iv) the alleged precedence given by Ms. Atala to her interests. In addition, with respect to the girls' father, arguments were presented in favor and against the question of whether he could offer them greater well-being. The State considered that the Inter-American Court should analyze all the evidence examined during the custody trial and not only the judgments issued by the domestic courts.

65. In this regard, the Court reiterates that international jurisdiction has a subsidiary,[77] reinforcing, and complementary[78] role, and therefore does not perform the duties of a "fourth instance" court. The Court is not an appeals body that must resolve disagreements between parties regarding some aspects of the assessment of the evidence or the application of domestic law in matters that do not directly concern compliance with international human rights obligations. Thus, this Court has held that, in principle, "it is up to the State courts to examine the facts and the evidence presented in individual cases."[79]

66. Accordingly, it is not up to this Court to determine whether the mother or the father offered the three girls a better home, or to assess the evidence to that end, since this is outside the scope of the present case, whose purpose is to determine whether or not the judicial authorities have fulfilled their obligations under the Convention. Similarly, and based on the subsidiary nature of the Inter-American system, the Court is not competent to issue a ruling on the custody of the three girls M., V. and R., since this is a matter exclusively for Chile's domestic courts. Therefore, the current custody of the minors is not the object of this case.

2. Prior consideration on the participation of the girls M., V. and R.

67. In the Decision of November 29, 2011 (*supra* para 12) the Court noted that the file contained no specific statements by the daughters M., V. and R. as to whether or not they agreed with the representation exercised by either of their parents or whether they wished to be considered as alleged victims in this case. The Court pointed out that although there were two briefs in which both the mother and the father stated that they were acting on behalf of the three girls before this Court, the position of the mother and the father did not necessarily represent the girls' best interests.

68. Furthermore, in its Decision, the Court stated that children exercise their rights progressively, as they develop a greater degree of independence, and for this reason during early childhood their relatives act on their behalf. Clearly, the level of physical and intellectual development, experience and information varies widely among children. Therefore, when the hearing was held in accordance with the aforementioned Decision

[77] *Cf. Case of Acevedo Jaramillo et al. v. Peru. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2006. Series C No. 157, para. 66 and *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 26 2010. Series C No. 220, para. 16.

[78] The Preamble to the American Convention states that international protection is "in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states." See also, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75). Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 31; *The Expression "Laws " in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 26, and Case of *Velásquez Rodríguez v. Honduras*. *Merits*. Judgment of July 29, 1988. Series C No. 4, para. 61.

[79] Cabrera, para. 16. *Case Nogueira of Carvalho et al. v. Brazil. Preliminary Objections and Merits*. Judgment of November 28, 2006. Series C No. 161, para. 80 and *Case Cabrera García and Montiel Flores, supra* note 77, para. 16.

(*supra* para. 13), it was taken into account that the three girls were then aged 12, 13 and 17 years of age and that there might be differences in their views and in the level of personal independence for each of the girls to exercise her rights. In the instant case, the Court heard two of the girls on February 8, 2012. (*supra* para. **¡Error! No se encuentra el origen de la referencia.**).

69. During the hearing, the Secretariat staff was accompanied by the psychiatrist María Alicia Espinoza[80]. Prior to commencing the proceeding, the delegation of the Secretariat of the Court held a prior meeting with the psychiatrist, consisting of an exchange of ideas, in order to ensure that the information provided was accessible and appropriate for the girls. Taking into account the international standards on a child's right to be heard (*infra* paras. **¡Error! No se encuentra el origen de la referencia.** to **¡Error! No se encuentra el origen de la referencia.**), the girls M. and R. were, in the first place, informed jointly by the staff of the Secretariat of their right to be heard, the effects or consequences that their opinions might have in the dispute in this case, the position and arguments of the parties in the present case. They were also asked whether they wished to continue participating in the proceeding. Subsequently, instead of conducting a unilateral examination, a conversation was held with each girl separately, in order to provide the girls with an appropriate environment of trust. During the proceeding neither of the parents and neither of the parties were present. Furthermore, the proceeding conducted with the girls was private, due to the request, both by the Commission and by the representatives in this case, that the identity of the girls remain confidential (*supra* note 3), and to the need to protect the girls' best interest and their right to privacy. In addition, the girls expressly requested that everything said by them during the meeting be kept in the strictest confidence.

70. During the proceeding of February 8, 2012, the girls M. and R. said they were aware of and understood the matters related to the three alleged violations in which they were presented as alleged victims in the present case (*infra* paras. **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.**). From the statements made by the two girls and bearing in mind the progressive nature of children's rights, the Court noted that the two girls had expressed freely and independently their own views and judgments regarding the facts of the case that concern them, as well as some of their expectations and interests in the resolution of this case. Therefore, the Court shall consider them as alleged victims in the case at hand (*infra* paras. **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.**).

71. As mentioned previously, the girl V. did not participate in the hearing for reasons of *force majeure* (*supra* para. **¡Error! No se encuentra el origen de la referencia.**). Based on the preceding considerations, the Court finds no grounds to consider that the girl V. is not in the same situation as her sisters (*infra* paras. **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.**). However, for the purposes of reparations, the competent national authority for children must privately confirm the girl V's free opinion regarding whether she wishes to be considered as an injured party.

[80] In its brief of February 3, 2012 the State presented its observations concerning the participation of the psychiatrist Espinoza in the proceeding. On February 6, 2012, following the instructions of the President of the Court, the parties were informed that psychiatrist Espinoza had been designated to accompany the delegation of the Secretariat, if necessary. Likewise, the record sent to the parties indicated that although the support of psychiatrist Espinoza had been contemplated in this case, this was not necessary.

C. The right to equality and the prohibition of discrimination

Arguments of the parties

72. Regarding the alleged violation of Articles 24[81] and 1.1[82] of the American Convention the Commission argued that "it is widely acknowledged in the American States that discrimination based on sexual orientation is forbidden." It noted that "sexual orientation […] was the grounds for the Supreme Court's decision," which presumably determined that Ms. Atala "should not have custody of her daughters [given that] she lived with a person of the same sex. The Supreme Court added that "a distinction was made to the detriment of [Ms.] Atala regarding the application of relevant legal instruments for the determination of family matters, based on the expression of her sexual orientation and her decision to form a couple and establish a life with her [partner]." It also noted that the "provisional custody decision […] was also a distinction based on Ms. Atala's sexual orientation." Furthermore, it stated that "in comparative constitutional law the definition of "suspect category has been used" and, consequently, a strict scrutiny test has been applied to cases related to sexual orientation."

73. The representatives pointed out that the States "signed the American Convention with an open clause of non-discrimination, and therefore they cannot now claim that their level of social and political development prevents them from understanding that sexual orientation is included as a category for which discrimination is prohibited." They also alleged that the "decision in the remedy of complaint is […] a judgment of scrutiny of [Mrs.] Atala and her private life, without considering her parenting skills, which was the issue that needed to be considered. They added that "the scrutiny judgment [was not applied] to the life of [Mr.] López, about which nothing is known, questioned or investigated, nor of his parental skills." Therefore, they consider that "this mere fact constitutes a difference in treatment, which is not contemplated by Chilean Law and is clearly prohibited by international law." Furthermore, they alleged that the "Supreme Court of Chile […] created a category of persons who, by their very nature, regardless of their behavior, would not be able to take care of their own children, by virtue of being associated with situations of mistreatment and neglect."

74. The State argued that "the [Inter-American] System [of Human Rights] needs the credibility and trust of the Member States. A relationship based on mutual trust could be affected if the Court assumes an excessively regulatory role, without considering the views of the majority of the States." The State argued that "upon signing [the American Convention], the Member States agreed to abide by its provisions. Although the legal

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[81] Article 24 of the American Convention (Right to Equal Protection) stipulates that:

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

[82] Article 1.1 of the American Convention (Obligation to Respect Rights) states that:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction and free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.

interpretation may be flexible and the language of human rights acknowledges their progressive development, the States gave their consent to a notion of human rights that had certain types of violations in mind, and not others that did not exist at the time. If it should be necessary to extend the scope of the agreement to include matters on which there is not a minimum consensus, the [American Convention] itself establishes a procedure for incorporating protocols that protect other rights."

75. Likewise, the State pointed out that "sexual orientation was not a suspect category on which there was consensus in 2004," when the Supreme Court issued its judgment in the present case. It argued that "it would not be appropriate to demand [that the Supreme Court of Chile] pass a strict scrutiny test for a category on which the Inter-American consensus is recent." It added that "the establishment of a "suspect super-category", as the sexual orientation of one of the parents would be in this case, and other similar ones, may end up shifting the focus of a family law trial into a matter that gives priority to consideration of the parents' rights, to the detriment of the child's best interest in the specific case."

76. Finally, the State argued that "having declared the mother legally competent, the decision to accept the custody petition filed by the father and based on the girls' best interest and well-being is not arbitrary." It also indicated that "it is not true that the grounds for these decisions were based on the mother's sexual orientation or on its mere expression" and that "the [mother's] sexual orientation was considered, among other factors, to the extent that its expression had specific adverse effects on the girls´ best interest.

Considerations of the Court

77. To resolve these controversies, the Court will examine 1) the scope of the right to equality and non-discrimination; 2) sexual orientation as a category protected by Article 1.1 of the American Convention; 3) whether in this case there was a difference in treatment based on sexual orientation; 4) whether said difference in treatment constitutes discrimination, for which purpose the Court will strictly assess the reasons given to justify said difference in treatment, taking into consideration the children's best interest and the alleged risk and damage to the girls.

1. Right to equality and non-discrimination

78. The Court has established that Article 1(1) of the Convention is a regulation of a general nature, whose content extends to all the provisions of the treaty and it establishes the obligation of the States Parties to respect and guarantee the full and free exercise of the rights and freedoms acknowledged therein "without any discrimination". That is to say, whatever the origin or form it assumes, any treatment that may be considered

discriminatory regarding the exercise of any of the rights guaranteed in the Convention is *per se* incompatible with it[83].

79. Regarding the principle of equality before the law and non-discrimination, the Court has stated[84] that "the notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified." The Court's case law has also indicated that at the present stage of development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The juridical framework of national and international public order rests on this principle and permeates the entire legal system.[85]

80. Moreover, the Court has mentioned that "the States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination."[86] The States are obliged "to take affirmative measures to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligations to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations."[87]

81. The American Convention, like the International Covenant on Civil and Political Rights, does not include an explicit definition of the concept of "discrimination." Based on the definitions of discrimination in Article 1(1) of the International Convention on the Elimination of all Forms of Racial Discrimination[88] and Article 1(1) of the Convention on the Elimination of all Forms of Discrimination against Women,[89] the Human Rights Committee of the United Nations has defined discrimination as:

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[83] *Cf. Proposed Amendment to the Political Constitution of Costa Rica related to Naturalization.* Advisory Opinion OC-4/84, January 19 1984. Series A No. 4, para. 53 and *Case of Indigenous Community Xákmok Kásek. v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010 Series C No. 214, para. 268.

[84] *Cf.* Advisory Opinion OC-4/84, *supra* note 83, para. 55.

[85] Cf. *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03, of September 17, 2003. Series A No. 18, para. 101 and *Case Indigenous Community Xákmok Kásek*, *supra* note 83, para. 269.

[86] Cf. Advisory Opinion OC-18/03, *supra note* 85, para. 103 and *Case of Indigenous Community Xákmok Kásek*, *supra* note 83, para. 271

[87] Cf. Advisory Opinion OC-18/03, *supra note* 85 para. 104; *Case of Indigenous Community Xákmok Kásek*, *supra* note 83, para. 271; and UN, Human Rights Committee, General Comment No. 18, Non- discrimination, November 10, 1989, CCPR/C/37, para. 6.

[88] Article 1.1 of the International Convention on the Elimination of all Forms of Racial Discrimination states: "In this Convention, the term "racial discrimination " shall men any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

[89] Article 1.1 of the International Convention on the Elimination of all Forms of Discrimination against Women states: "For the purposes of the present Convention, the term "discrimination against women " shall men any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

> …any distinction, exclusion, restriction, or preference based on certain motives, such as race, color, gender, language, religion, a political or any other opinion, the national or social origin, property, birth or any other social condition, that seeks to annul or diminish the acknowledgment, enjoyment, or exercise, in conditions of equality, of the human rights and fundamental freedoms to which every person is entitled.[90]

82. The Court reiterates that while the general obligation of Article 1(1) refers to the State's duty to respect and guarantee "without discrimination" the rights included in the American Convention, Article 24 protects the right to "equal protection before the law" [91]. That is, Article 24 of the American Convention prohibits discrimination, by law or *de facto,* not only with regard to the rights enshrined in said treaty, but also in regard to all laws approved by the State and their application. In other words, if a State discriminates in the respect for or guarantee of a right contained in the Convention, it will be failing to comply with its obligation under in Article 1(1) and the substantive right in question. If, on the contrary, the discrimination refers to unequal protection by domestic laws, the fact must be analyzed in light of Article 24 of the American Convention.[92]

2. Sexual orientation as a category protected by Article 1(1) of the American Convention

83. The Court has established, as has the European Human Rights Court, that human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions[93] This evolving interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention, as well as those established in the Vienna Convention on the Law of Treaties.[94]

84. In this regard, when interpreting the words "any other social condition" of Article 1.1 of the Convention, it is always necessary to choose the alternative that is most favorable to the protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being[95]

85. According to Article 1(1) of the American Convention, the specific criteria by virtue of which discrimination is prohibited do not constitute an exhaustive or limitative list, but merely illustrative. Indeed, the wording of said article leaves open the criteria with the inclusion of the term "another social condition," allowing for the inclusion of other categories that have not been explicitly indicated. Consequently, the Court should interpret the term "any other social condition" of Article 1.1 of the Convention in the context of the most

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[90] United Nations, Human Rights Committee, General Comment No. 18, Non-discrimination, November 10, 1989, CCPR/C/37, para. 6.

[91] *Cf.* Advisory Opinion OC-4/84, *supra* note 83, paras. 53 and 54 and *Case of Barbani Duarte et al. v. Uruguay. Merits, Reparations and Costs*. Judgment of October 13, 2011. Series C No. 234, para. 174.

[92] *Case of Apitz Barbera et al. ("Corte Primera Contencioso Administrativo") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 5, 2008. Series C No. 182, para. 209 and *Case Barbani Duarte et al., supra* note 91, para. 174.

[93] *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law.* Advisory Opinion OC-16/99, October 1, 1999. Series A No. 16, para. 114 and *Case of the Mapiripán Massacre v. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C No. 134, para. 106. In the European Court see ECHR, Case of *Tyrer v. United Kingdom*, (No. 5856/72), Ruling of April 25, 1978, para. 31.

[94] *Cf.* Advisory Opinion OC-16/99, *supra* note 93, para. 114 and *Case of the Mapiripán Massacre v. Colombia*, *supra* note 93, para. 106.

[95] *Cf. Compulsory Membership for Journalists (Arts. 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 52, and *Case of Mapiripán Massacre, supra* note 93, para. 106.

favorable option for the human being and in light of the evolution of fundamental rights in contemporary international law[96].

86. In this regard, in the Inter-American system, the General Assembly of the Organization of American States (hereinafter the OAS) has approved, since 2008, in its annual meetings four successive resolutions referring to the protection of persons against discriminatory treatment based on their sexual orientation, demanding the adoption of specific measures for an effective protection against discriminatory acts.[97]

87. With regard to the inclusion of sexual orientation as a forbidden category of discrimination, the European Court of Human Rights has stated that sexual orientation is "another condition" mentioned in Article 14[98] of the European Convention on Human Rights that forbids discriminatory treatments.[99] Specifically, in the *Case of Salgueiro da Silva Mouta v. Portugal,* the European Court concluded that sexual orientation is "a concept covered by Article 14 of the European Convention. It also reiterated that the list of categories in said article has illustrative purposes and is not exhaustive.[100] Recently, in the *Case of Clift v. United Kingdom*, the European Court reiterated that sexual orientation, as one of the categories that may be included under "another condition", is another specific

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96 *Cf.* Advisory Opinion OC-16/99, *supra* note 93, para. 115.

97 *Cf.* AG/RES. 2653 (XLI-O/11), Human rights, sexual orientation and gender identity, approved at the fourth plenary session, held on June 7, 2011 ("THE GENERAL ASSEMBLY […] RESOLVES: 1. To condemn discrimination against persons by reason of their sexual orientation and gender identity, and to urge States, within the parameters of the legal institutions of their domestic systems, to adopt the necessary measures to prevent, sanction and eradicate such discrimination"); AG/RES. 2600 (XL-O/10), Human rights, sexual orientation and gender identity, approved at the fourth plenary session, held on June 8, 2010 ("THE GENERAL ASSEMBLY […] RESOLVES: 1. To condemn discrimination against persons by reason of their sexual orientation and gender identity, and to urge states, within the parameters of the legal institutions of their domestic systems, to adopt the necessary measures to prevent, punish, and eradicate such discrimination. 2. To condemn acts of violence and human rights violations committed against persons because of their sexual orientation and gender identity, and to urge States to prevent and investigate these acts and violations and to ensure due judicial protection for victims on an equal footing and that the perpetrators are brought to justice. 3. To encourage the member states to consider, within the parameters of the legal institutions of their domestic systems, adopting public policies against discrimination by reason of sexual orientation and gender identity."); AG/RES. 2504 (XXXIX-O/09), Human Rights, sexual orientation and gender identity, approved in the fourth plenary session, held on June 4, 2009 ("THE GENERAL ASSEMBLY […] RESOLVES: 1.To condemn acts of violence and human rights violations committed against individuals by reason sexual orientation and gender identity. 2. Urge States to prevent and investigate these acts and violations and to ensure due judicial protection for victims on an equal footing and that the perpetrators are brought to justice"); AG/RES. 2435 (XXXVIII-O/08), Human rights, sexual orientation and gender identity, approved at the fourth plenary session, held on June 3, 2008 ("THE GENERAL ASSEMBLY […] RESOLVES: 1.To express concern over acts of violence and human rights violations perpetrated against individuals by reason of their sexual orientation and gender identity").

98 Article 14 European Convention: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

99 *Cf.* ECHR, Case *Salgueiro da Silva Mouta v. Portugal*, (No. 33290/96), Judgment of December 21, 1999. Final, March 21, 2000, para. 28; Case *L. and V. v. Austria* (No. 39392/98 and 39829/98), Judgment of January 9, 2003. Final, April 9, 2003, para. 45; Case *S.L. v. Austria*, (No. 45330/99), Judgment of January 9, 2003. Final, April 9, 2003, para. 37; Case *E.B. V. France*, (No. 43546/02), Judgment of January 22, 2008, para. 50.

100 *Cf.* ECHR, *Caso Salgueiro da Silva Mouta*, *supra* note **¡Error! Marcador no definido.**, para. 28 ("the applicant's sexual orientation […] [is] a concept that is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as"., See also ECHR, *Case of Fretté v. France*, (No. 36515/97), Judgment of February 26, 2002. Final, May 26, 2002, para. 32; *Cf.* ECHR, Case *Kozak v. Poland*, (No. 13102/02), Judgment of March 2, 2010. Final, June 2, 2010, para. 92; ECHR, Case *J.M. v. United Kingdom*, (No. 37060/06), Judgment of September 28, 2010. Final, December 28, 2010, para. 55 and ECHR, Case *Alekseyev v. Russia*, (No. 4916/07, 25924/08 and 14599/09), Judgment of October 21, 2010. Final, April 11, 2011, para. 108. ("The Court reiterates that sexual orientation is a concept covered by Article 14").

example of those found on said list, which are considered as personal characteristics in the sense that they are innate or inherent to the person.[101]

88. In the context of the universal system for the protection of human rights, the Human Rights Committee and the Committee on Economic, Social, and Cultural Rights have classified sexual orientation as one of the categories of forbidden discrimination considered in Article 2.1[102] of the International Covenant on Civil and Political Rights and Article 2.2[103] of the International Covenant on Economic, Social, and Cultural Rights. In this regard, in the case of *Toonen v. Australia* the Human Rights Committee indicated that the reference to the category "gender" would include the sexual orientation of persons.[104] Likewise, the United Nations Human Rights Committee has expressed its concern regarding several discriminatory situations related to people's sexual orientation, which it has expressed repeatedly in its final observations to the reports presented by the States.[105]

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101 *Cf.* ECHR, Case *Clift v. United Kingdom*, (No. 7205/07), Judgment of July 13, 2010. Final, November 22, 2010, para. 57 ("the Court has considered to constitute [`]other status[´] characteristics which, like some of the specific examples listed in the Article, can be said to be personal in the sense that they are innate or inherent. "However, in finding violations of Article 14 in a number of other cases, the Court has accepted that "status" existed where the distinction relied upon did not involve a characteristic which could be said to be innate or inherent, and thus "personal" in the sense discussed above").

102 Article 2.1: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.

103 Article 2.2: The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

104 United Nations, Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992, April 4, 1992, para. 8.7 ("The State party has sought the Committee's guidance as to whether sexual orientation may be considered as "other status" for the purposes of Article 26. The same issue could arise under Article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view, the reference to "sex" in Articles 2, paragraph 1, and 26 is to be taken as including sexual orientation"). *Cf. X V. Colombia*, Communication No. 1361/2005, CCPR/C/89/D/1361/2005, May 14, 2007, para. 7.2. ("The Committee recalls its earlier jurisprudence that the prohibition against discrimination under Article 26 comprises also discrimination based on sexual orientation"). In this regard, the Human Rights Committee, in *Edward Young v. Australia*, Communication No. 941/2000, CCPR/C/78/D/941/2000, September 18, 2003, para. 10.4.; see also United Nations, Human Rights Committee, *Final comments, Poland*, CCPR/C/79/Add.110, July 25, 1999, para. 23.

105 *Cf., inter alia,* United Nations, Human Rights Committee, *Concluding observations, Chile*, CCPR/C/CHL/CO/5, April 17, 2007, para. 16 ("While it observes with satisfaction that the laws criminalizing homosexual relations between consenting adults have been repealed, the Committee remains concerned about the discrimination The State Party should guarantee equal rights to all individuals, as established in the Covenant, regardless of their sexual orientation, including equality before the law and in access to health care. It should also launch awareness-raising programs to combat social prejudice"); *Concluding observations, Barbados*, CCPR/C/BRB/CO/3, May 14, 2007, para. 13 ("The Committee expresses its concern over discrimination against homosexuals in the State Party and, in particular over the criminalizing of consensual sexual acts between adults of the same sex (Art. 26)"); *Concluding observations, United States of America*, CCPR/C/USA/CO/3/Rev.1, December 18, 2006, para. 25 ("It also notes with concern the failure to outlaw employment discrimination on the basis of sexual orientation in many states (Arts. 2 and 26). The State Party should acknowledge its legal obligation under Articles 2 and 26 to ensure to everyone the rights recognized by the Covenant, as well as equal protection before the law, without discrimination on the basis of sexual orientation."); *Concluding observations, El Salvador*, CCPR/CO/78/SLV, August 22, 2003, para. 16 ("The Committee expresses concern at the incidents of people being attacked, or even killed, on account of their sexual orientation (Article 9), at the small number of investigations mounted into such illegal acts, and at the current provisions (such as local "Contravention Orders") used to discriminate against people on account of their sexual orientation (Article 26)."

89. For its part, the Committee on Economic, Social, and Cultural Rights has determined that sexual orientation may be included in "another social condition"[106]. Similarly, in the context of their general observations and recommendations, the Committee on the Rights of the Child,[107] the Committee against Torture,[108] and the Committee on the Elimination of Discrimination against Women[109] have made references to the inclusion of sexual orientation as one of the prohibited categories for discrimination.

90. On December 22, 2008 the United Nations General Assembly adopted the "Declaration on Human Rights, Sexual Orientation, and Gender Identity", reaffirming the "principle of non-discrimination, which requires that human rights apply equally to every human being, regardless of sexual orientation or gender identity."[110] Likewise, on March 22, 2011 the "Joint statement on ending acts of violence and related human rights violations based on sexual orientation and gender identity" was filed before the Human Rights Council of the United Nations.[111] On June 15, 2011 the Council approved a resolution on human rights, sexual orientation, and gender identity in which it expressed its grave concern over acts of violence and discrimination, in all the regions of the world, committed against

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106 Cf. United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 20. Non-discrimination and economic, social and cultural rights (Article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, 2 of July of 2009, para. 32 ("any other social condition", as stated in Article 2.2 of the Covenant, includes sexual orientation"). *Cf.* Committee on Economic, Social and Cultural Rights, General Comment No. 18. The right to work, E/C.12/GC/18, February 6, 2006, para. 12 ("Under paragraph 2 of Article 2, as well as Article 3, the Covenant prohibits any discrimination in access to and maintenance of employment for reasons of […] sexual orientation"); General Comment No. 15. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, of January 20, 2003, para. 13 ("the Covenant prohibits any discrimination for reasons of […] sexual orientation"); General Comment No. 14. The right to enjoy the highest attainable level of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, August 11, 2000, para. 18 ("By virtue of the provisions in paragraph 2 of Article 2 and in Article 3, the Covenant proscribes all discrimination in access to health care and the underlying determinants of health, and to the means for their procurement, on the grounds of […] sexual orientation").

107 Cf. United Nations, Committee on the Rights of the Child, General Comment No. 3 (2003). HIV/AIDS and the rights of the child, CRC/GC/2003/3, of March 17, 2003, para. 8 ("of concern also is discrimination based on sexual orientation"); General Comment No. 4 (2003). The health and development of adolescents in the context of the Convention on the Rights of the Child, CRC/GC/2003/4, July 21, 2003, para. 6 ("States Parties have the obligation to ensure that all human beings under 18 enjoy all the rights set forth in the Convention without discrimination (Art. 2), regardless of "race, color, sex, language, religion, or political or other opinion, national, ethnic or social origin, property, birth, disability or other status". These grounds also cover sexual orientation").

108 Cf. United Nations, Committee Against Torture, General Comment No. 2, Application of Article 2 by States Parties, CAT/C/GC/2, of January 24, 2008 para. 20, 21 ("The principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention. […] States Parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws re in practice applied to all persons, regardless of their […] and sexual orientation").

109 Cf. United Nations, Committee on the Elimination of Discrimination Against Women, General Recommendation No. 27 on women of age and the protection of their human rights, CEDAW/C/GC/27, December 16, 2010, para. 13 ("The discrimination experienced by older women is often multidimensional, with the age factor compounding other forms of discrimination based on […] sexual orientation"); Draft of General Recommendation Nº 28 in relation to Article 2 of the Convention on the elimination of all forms of discrimination against women, CEDAW/C/GC/28, December 16, 2010, para. 18 ("The discrimination of based on sex and gender is inextricable linked with other factors that affect women, such as race, ethnic origin, religion or belief, health, status, age, class, caste, sexual orientation").

110 Declaration on human rights, sexual orientation and gender identity, United Nations General Assembly, A/63/635, December 22, 2008, para. 3.

111 Joint declaration on ending acts of violence and related human rights violations based on sexual orientation and gender identity, presented by Colombia in the 16th session of the United Nations Human Rights Council, March 22, 2011. Available at: http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/494-1.pdf

individuals because of their sexual orientation and gender identity.[112] The prohibition of discrimination based on sexual orientation has also been highlighted in numerous reports by special rapporteurs of the United Nations.[113]

91. Bearing in mind the general obligations to respect and guarantee the rights established in Article 1.1 of the American Convention, the interpretation criteria set forth in Article 29 of that Convention, the provisions of the Vienna Convention on the Law of Treaties, and the standards established by the European Court and the mechanisms of the United Nations (*supra* paras. 83-90), the Inter-American Court accepts that the sexual orientation of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person's sexual orientation is prohibited. Consequently, no regulation, decision, or practice of domestic legislation, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on their sexual orientation.

92. With regard to the State's argument that, on the date on which the Supreme Court issued its ruling there was a lack of consensus regarding sexual orientation as a prohibited category for discrimination, the Court points out that the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the

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[112] United Nations Human Rights Council, Resolution regarding human rights, sexual orientation and gender identity, A/HRC/17/L.9/Rev.1, June 15, 2011.

[113] *Cf.,* Among other reports, Report of the Special Rapporteur on the right of all persons to enjoy the highest attainable standard of physical and mental health, E/CN.4/2004/49, February 16, 2004, paras. 32, 38 ("International human rights law proscribes all discrimination in access to health care and the underlying determinants of health, and to the means for their procurement, on the grounds of …… sexual orientation [...] discrimination on the grounds of sexual orientation is impermissible under international human rights law"). See also the Report of the Special Rapporteur on freedom of religion or belief, A/HRC/6/5, July 20, 2007, para. 28; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to Brazil, E/CN.4/2006/16/Add.3, February 28, 2006, para. 40; Report of the Special Rapporteur on violence against women, its causes and consequences, Integration of the human rights of women and gender perspective: violence against women, Investigation into the links between violence against women and HIV/AIDS, E/CN.4/2005/72, January 17, 2005, para. 27, 58; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, civil and political rights, in particular questions related to disappearances and summary executions, E/CN.4/2003/3, January 13, 2003, paras.. 66, 67; Report provisional of la Special Rapporteur of the Human rights Commission on extrajudicial, summary or arbitrary executions, A/57/138, July 2, 2002, para. 37; Report of the Special Representative of the Secretary General on human rights defenders, E/CN.4/2001/94, January 26, 2001, para. 89 g); Special Rapporteur on the independence of judges and lawyers, civil and political rights, in particular questions related to: the independence of the judicial branch, the administration of justice, impunity, Mission to Brazil, E/CN.4/2005/60/Add.3, February 22, 2005, para. 28; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment, A/56/156, July 3, 2001, paras.. 17-25; Report on civil and political rights, in particular questions related to torture and detention E/CN.4/2002/76, December 27, 2001, page. 14; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment, E/CN.4/2004/56, December 23, 2003, para. 64; Report of the Special Rapporteur on the sale of children, child prostitution and the use of children in pornography E/CN.4/2004/9, January 5, 2004, para. 118; Working Group on Arbitrary Detention, Opinion No. 7/2002 (Egypt), E/CN.4/2003/8/Add.1, January 24, 2003, page. 72, para. 28. Within the framework of comparative law some States explicitly prohibit discrimination based on sexual orientation in their Constitutions (for example Bolivia, Ecuador, Kosovo, Portugal, South Africa, Sweden and Switzerland) or through laws, for example in matters of family law, regarding granting homosexuals the same rights as heterosexuals. For example, in Argentina, Articles 2 and 4 of Law No. 26.618 of July 21, 2010 establish that: "Marriage shall have the same requirements and effects, regardless of the fact that the spouses are of the same or of different sex" and "In marriages constituted by same-sex couples, in the absence of an agreement, the judge shall decide [on custody] taking into consideration the best interests of the child"; Uruguay approved Law No. 18.246 (Diario Oficial No. 27402, January 10, 2008), which recognizes civil unions ("concubinary unions ") between same-sex couples. In 2009, Law No. 18.590, (Diario Oficial No. 27837, 26 October 2009), authorized joint adoption by couples living in civil union.

historical and structural discrimination that these minorities have suffered[114]. The fact that this is a controversial issue in some sectors and countries, and that it is not necessarily a matter of consensus, cannot lead this Court to abstain from issuing a decision, since in doing so it must refer solely and exclusively to the stipulations of the international obligations arising from a sovereign decision by the States to adhere to the American Convention.

93. A right granted to all persons cannot be denied or restricted under any circumstances based on their sexual orientation. This would violate Article 1.1 of the American Convention. This inter-American instrument proscribes discrimination, in general, including categories such as sexual orientation, which cannot be used as grounds for denying or restricting any of the rights established in the Convention.

3. Difference in treatment based on sexual orientation

94. The Court notes that in order to prove that a distinction in treatment has occurred in a particular decision, it is not necessary that the decision in its entirety be based "fundamentally and solely" on the person's sexual orientation. It is sufficient to confirm that, to a certain extent, the person's sexual orientation was taken into account, either explicitly or implicitly, in adopting a specific decision.[115]

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[114] According to different international and comparative law sources, this discrimination against the Lesbian, Gay, Transsexual, Bisexual, and Intersexual (hereinafter "LGTBI") is unacceptable because i) sexual orientation constitutes an essential aspect of a person's identity (*infra* para. 139). Likewise, ii) the LGTBI community has been historically discriminated against and the use of stereotypes in treatment towards said community is common. *Cf.* Report of the Special Rapporteur on the right of all persons to enjoy the highest level possible of physical and mental health, E/CN.4/2004/49, February 16, 2004, para.33 ("discrimination and stigmatization continue to represent a grave threat against the sexual and reproductive health of many groups, such as […] sexual minorities,".); Report of the Special Rapporteur on matters of torture and other cruel, inhuman, or degrading treatments, E/CN.4/2004/56, December 23, 2003, para. 64 ("The attitudes and beliefs derived from myths and fears related to HIV/AIDS and sexuality contribute to stigmatization and discrimination against sexual minorities. Moreover, the perception that members of these minorities do not respect sexual barriers or question the predominant concepts of the role attributed to each gender seems to contribute to their vulnerability to torture as a form of "punishing" their unaccepted behavior"). On the other hand, iii) they constitute a minority that faces greater difficulty in removing discrimination in areas such as the legislative sphere, as well as avoiding negative repercussions in the interpretation of regulations by officials of the executive or legislative branches and in access to justice. *Cf.* Special Rapporteur on the independence of senior judges and attorneys, Civil and political rights, especially matters related to: independence of the judiciary, the administration of justice, impunity, Mission to Brazil, E/CN.4/2005/60/Add.3, February 22, 2005, para. 28 ("Transvestites, transsexuals, and homosexuals are also frequently the victims of episodes of violence and discrimination. When they turn to the judicial system, they frequently face the same prejudice and stereotypes of society reproduced there"); Constitutional Court of Colombia, Judgment C-481 of September 9, 1998, Juridical Grounds, para. 24 (considering that homosexuals constitute one of the minority groups traditionally discriminated). Finally, iv) sexual orientation does not constitute a rational criterion for the rational and equal distribution or sharing of properties, rights, or social burdens. *Cf.* Constitutional Court of Colombia, Judgment C-481 of September 9, 1998, para. 25. In this judgment, regarding the right of a public school to not be fired due to his homosexual condition, the Colombian Court stated that the separation of the professor from his work was based "on a prejudice without any empirical support whatsoever, which denotes the unfair stigmatization that has affected this population and that has been invoked to impose burdens upon them or deprive them of rights, in detriment of their possibilities to participate in realms that are so relevant for both social and economic life." (para. 29) On its part, judgment C-507 of 1999 declared unconstitutional a provision that declared homosexuality in the armed forces a disciplinary infraction. In judgment C-373 of 2002 the Court declared unconstitutional a provision that established as a cause for disqualification to exercise the position of notary having been punished at a disciplinary level for the infraction of homosexuality.

[115] *Cf.* ECHR, *Case of E.B. v. France*, *supra* note **¡Error! Marcador no definido.**, paras. 88 and 89 "notwithstanding the precautions taken by the Nancy Administrative Court of Appeal, and subsequently by the *Conseil d'Etat*, to justify taking account of the applicant's "lifestyle", the inescapable conclusion is that her sexual orientation was consistently at the center of deliberations in her regard and omnipresent at every stage of the administrative and judicial proceedings. […] The Court considers that the reference to the applicant's homosexuality was, if not explicit, at least implicit. The influence of the applicant's avowed homosexuality on the assessment of her application has been established and, having regard to the foregoing, was a decisive factor leading to the decision to refuse her authorization to adopt")

95. In the case at hand, it is alleged that discriminatory treatment occurred with respect to two different facts in the custody process: the Judgment issued in the remedy of complaint and the ruling on temporary custody. To determine whether there is a causal or decisive link between the decisions of the Supreme Court of Justice of Chile and the Juvenile Court of Villarrica, and the sexual orientation of Ms. Atala, it is necessary to analyze the arguments presented by the national judicial authorities, their actions, the language used, and the context in which the judicial decisions were made, in order to determine whether the difference in treatment was based on sexual orientation.[116] In this regard, in the *Case of Salgueiro da Silva Mouta v. Portugal,* the European Court concluded that the domestic court, in considering the father's cohabitation with another man as such, made the petitioner's sexual orientation a decisive factor in the final judgment.

96. Regarding the context of the custody proceeding, the Court notes out that the custody claim was filed under the supposition that Ms. Atala "[was] not capable of looking after and taking care of [the three girls, given that] her new choice of sexual life together with her lesbian relationship with another woman, [were] having […] harmful consequences on the development of these minors, since the mother ha[d] shown no interest whatsoever in looking after and protecting […] the overall development of these girls."[117] Therefore, in addition to other considerations, the custody process revolved around Ms. Atala's sexual orientation and the alleged effects that her living with her partner could have on the three girls. Therefore, this consideration was central to the discussion between the parties and in the main judicial decisions made during the proceeding (*supra* paras. 41 and 56).

97. Specifically, the Court finds that the Supreme Court of Justice of Chile invoked the following reasons as grounds for the judgment: i) the "deterioration in the social, family, and educational environment of the girls since the mother began to cohabit with her homosexual partner" and the "effects that this cohabitation could have on the' psychological and emotional well-being of the daughters;" ii) the alleged "risk for the integral development of the girls from which they must be protected" due to "the potential confusion over sexual roles that could be caused in them by the absence from the home of a male father and his replacement by another person of the female gender;" iii) the alleged existence of "a situation of risk" that places them in a "vulnerable position in their social environment," due to the risk of social discrimination, iv) that Ms. Atala had allegedly put "her own interests before those of her daughters when she chose to express her homosexual status" [118]. These arguments and the language used show a link between the judgment and the fact that Ms. Atala lived with a partner of the same sex, which indicates that the Supreme Court gave significant importance to Ms. Atala's sexual orientation.

98. Regarding the provisional custody ruling, the Court finds verifies that the Juvenile Court of Villarrica[119] used the following arguments: i) that Ms. Atala allegedly put her own

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[116] Cf. ECHR, *Case of Salgueiro da Silva Mouta v. Portugal*, *supra* note **¡Error! Marcador no definido.**, paras. 28 and 31 and *Case of E.B., supra* note **¡Error! Marcador no definido.**, para. 85.

[117] Custody claim filed before the Juvenile Court of Villarica of January, 14, 2003 (record of appendices to the claim, volume V, appendix 1, page 2500).

[118] Judgment of the Supreme Court of Justice of Chile, May 31, 2004 (record of appendices to the petition, volume V, pages 2669 to 2677).

[119] The Court indicated that "as stated in Article 225 of the Civil Code, if parents live separately, the mother will see to the personal care of the children, and in any case, when the interest of the child makes it necessary, either due to abuse, lack of care, or any other aggravated cause, the Judge may hand over the personal care of the children to the other parent." It added that "the Judge is given the hard judicial task of deciding which of the parents is most suitable to make effective the Right to Custody of the minors, for which it must turn to objective

interests before the well-being of her daughters (*supra* para. **¡Error! No se encuentra el origen de la referencia.**), and ii) that "in the context of a heterosexual and traditional society" the father offered "more favorable arguments on behalf of the girls' best interests" (*supra* para. **¡Error! No se encuentra el origen de la referencia.**). In this regard, the Court considers that, as with the judgment of the Supreme Court (*supra* para. 97), the provisional custody decision was based mainly on Ms. Atala's sexual orientation. Therefore, this Court concludes that there was a difference in treatment based on this category.

99. To determine whether these differences in treatment constituted discrimination, the following paragraphs analyze the justification given by the State for making such a distinction in treatment, in other words, the supposed protection of the child's best interest and the alleged damage the girls had suffered as a consequence of their mother's sexual orientation.

4. The principle of the child's best interest and assumptions of risk

Arguments of the parties

100. The Commission considered that a child's best interest is "not only a legitimate aim, but also a pressing social need," but that "the lack of suitability or causal relationship between the goal sought and the distinction [made]" is evident in the speculative and abstract reasoning of the decisions."

101. The Commission stated that "both judicial authorities [(the Supreme Court and the Juvenile Court of Villarrica)] based their decisions on assumptions of risk derived from prejudices and erroneous stereotypes regarding the characteristics and behavior of a given social group." In this regard, it argued that "the decision was based on the judges' stereotyped conceptions of the nature and effects of relationships between people of the same sex."

102. The representatives argued that the girls' best interest "would in fact, in theory […] be a legitimate goal." However, they stated that "it is not enough […] to argue a legitimate goal for it to be one; the State has the obligation to prove that said goal is real." In this regard, they argued that "the State simply says it is protecting the girls but it does not objectively offer grounds for the damage that was allegedly caused to the girls and, therefore, the decision lacks a legitimate goal."

103. The representatives also stated that "it is appropriate to consider whether complete separation from the mother fulfills the stated objective of protecting the girls." In this regard, they argued that "it may be considered that it does, even though it does so a way that does not satisfy the principle of prohibition of arbitrariness, since the level of intensity with which the rights are affected is clearly very high, and this leads to violations of their rights." Specifically, the representatives indicated that the court decisions "separate[d] the girls from their mother figure, their referent, their place of residence, schools, friends, and pets." Furthermore, the representatives noted that the State "rewrites the judgment it would have wished the Supreme Court to write, but it is not the one that began this proceeding."

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parameters – as is the merits of the proceedings – and to a judgment of probability, deciding in an interlocutory manner due to the urgency the well-being of the girls calls for, with which of the two parents it is convenient that they stay." Ruling in the provisional custody claim by the Juvenile Court of Villarica, May 2, 2003 (record of appendices to the claim, volume V, pages 2559 to 2567).

104. Regarding the provisional custody decision, the representatives argued that "it was neither objective nor reasonable." In addition, they pointed out that the "judges assumed that, in the case of lesbian women, living with a partner is a selfish interest that can only provide well-being to the mother."

105. For its part, the State argued that, in the context of a custody suit "a priority [is established] in favor of the child's best interest over any other protected interest in dispute, [therefore] it is clear that in a custody proceeding it is necessary to understand the aforementioned interest as strong grounds for justifying a change in [a child's] regimen of personal care." Specifically, the State argued that "the judgment of the Supreme Court found that the lower courts had incurred in serious fault or abuse by violating the rules for the assessment of evidence, affecting the girls' best interest." Likewise, the State indicated that in the provisional custody decision "the court declared […] that it is the task of the sentencing body to safeguard a child's best interest and ensure his or her greatest well-being […] and therefore it decided to grant provisional custody to the father." Furthermore, the State argued that "the decision on provisional custody, after assessing all the evidence to date in the case [...] conclude[ed] that: i) the girls showed disturbances of a psychological nature and emotional deficiencies […], and ii) that the father offered certainty of an appropriate environment."

106. The State argued that "as regards to the requirement of "suitability" to ensure that the measures applied by States are not discriminatory, in order to comply with the scrutiny test […] it would have been sufficient to have proven the harmful situation suffered by the girls in the case." Specifically, the State argued that "there is abundant evidence on record proving: i) the specific adverse effects that the respondent's expression of her sexual orientation had on the well-being of her daughters, and ii) that the father offered better conditions for their wellbeing, a matter in no way related to the defendant's sexual orientation." The State also argued that "there is convincing evidence that the defendant displayed an intensely self-centered attitude as well as personal characteristics that made it difficult for her to properly exercise her role as a mother, circumstances that led to the conclusion that the mother did not offer a suitable environment for the development of her daughters." Likewise, it stated that "there was abundant evidence on record, not only on the negative effects that the respondent's expression of her sexual orientation had on the well-being of her daughters, but also on totally external circumstances, such as the determination of whether the father or mother offered a better environment for the girls' development and a greater degree of commitment and care toward them."

Considerations of the Court

107. The Inter-American Court finds that, among its considerations, the Supreme Court of Justice of Chile stated that "in all measures concerning [children] it is essential to consider the child's best interest over any other consideration and rights regarding their parents, which could make it necessary to separate them from their parents."[120] For its part, the Juvenile Court of Villarrica, in the provisional custody ruling, stated that "it is the sentencing body's task to ensure […] the child's best interest, which implies conducting a preventive … analysis leading to the ultimate purpose of any judicial ruling affecting a minor, which is none other than seeking their greatest well-being."[121]

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[120] Judgment of the Supreme Court of Justice of Chile of May 31, 2004 (record of appendices to the petition, volume V, pages 2670).

[121] Ruling on the provisional custody claim by the Juvenile Court of Villarrica, May 2, 2003 (record of appendices to the petition, volume V, page 2566).

108. The general purpose of protecting the child's best interest is, in itself, a legitimate aim and is also an imperative. Accordingly, the Court reiterates that the regulating principle regarding children's rights is based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential[122]. Likewise, it should be noted that the preamble of the Convention on the Rights of the Child establishes that children require "special care" and Article 19 of the American Convention states that they must receive "special measures of protection." [123]

109. Similarly, the Court finds that the determination of the child's best interest in cases involving the care and custody of minors must be based on an assessment of specific parental behaviors and their negative impact on the well-being and development of the child, or of any real and proven damage or risks to the child's well-being and not those that are speculative or imaginary. Therefore, speculations, assumptions, stereotypes, or generalized considerations regarding the parents' personal characteristics or cultural preferences regarding the family's traditional concepts are not admissible.[124]

110. In conclusion, the Inter-American Court notes that, "the child's best interest" being considered as a legitimate goal, in abstract terms, the mere reference to this purpose, without specific proof of the risks or damage to the girls that could result from the mother's sexual orientation, cannot serve as a suitable measure to restrict a protected right, such as the right to exercise all human rights without discrimination based on the person's sexual orientation.[125] The child's best interest cannot be used to justify discrimination against the parents based on their sexual orientation. Therefore, the judge cannot take this social condition into consideration as an element in a custody ruling.

111. A determination based on unfounded and stereotyped assumptions about the parent's capacity and suitability to ensure and promote the child's well-being and development is not sufficient to guarantee the legitimate goal of protecting the child's best

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122 *Cf. Juridical Status and Human Rights of the Child*. Advisory Opinion OC-17/02 August 28, 2002. Series A No. 17, para. 56. In similar vein, see: Preamble of the American Convention.

123 Advisory Opinion OC-17/02, *supra* note 122, para. 60.

124 *Cf., inter alia,* in Australia: *In the Marriage of C. and J.A. Doyle*, (1992) 15 Fam. L.R. 274, 274, 277 (The parent's lifestyle is of no relevance without a consideration of its consequences on the child's well-being); in the Philippines: Supreme Court of the Philippines, *Joycelyn Pablo-Gualberto v. Crisanto Rafaelito Gualberto*, G.R. No. 156254 of June 28, 2005, stating that sexual preference of itself is not a sign of parental incompetence to exercise the custody of minors ("sexual preference or moral laxity alone does not prove parental neglect or incompetence. [...] To deprive the wife of custody, the husband must clearly establish that her moral lapses have had an adverse effect on the welfare of the child or have distracted the offending spouse from exercising proper parental care"); in South Africa: Constitutional Court of South Africa, *Du Toit and Another v Minister of Welfare and Population Development and Others* (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC) (10 September 2002), permitting the adoption of minors by same-sex couples, considering that it will not affect the child's best interest, and Constitutional Court of South Africa, *J and Another v Director General, Department of Home Affairs and Others* (CCT46/02) [2003] ZACC 3; 2003 (5) BCLR 463; 2003 (5) SA 621 (CC) (28 March 2003).

125 In similar vein, in a case on the withdrawal of the custody of a minor based on the mother's religious beliefs, the European Court of Human Rights criticized the lack of specific and direct evidence proving the impact the religious beliefs had on the upbringing and the daily life of the children, for which reason it considered that the domestic court had issued a judgment in abstract, and based on general considerations, without establishing a relationship between the children's lifestyle and the mother's. The Court stated that "Although relevant, that reasoning was not in the Court's view sufficient. 43. In those circumstances, the Court cannot conclude that there was a reasonably proportionate relationship between the means employed and the legitimate aim pursued. ECHR, *Case of Palau-Martínez v. France*, (No. 64927/01), Judgment of December 16, 2003. Final, March 16, 2004, paras. 42-43.

interest.[126] The Court finds that considerations based on stereotypes of sexual orientation, that is, preconceptions regarding the attributes, behaviors or characteristics of homosexuals or the impact these may have on children is not admissible.[127]

112. Furthermore, the Court emphasizes that although the State provided evidence concerning the specific arguments that the father could allegedly offer better environment for his daughters during the custody proceeding, for the purposes of analyzing the suitability of the measure, the Court will only take into consideration the evidence and arguments that have been explicitly used by the Supreme Court or by the Juvenile Court of Villarica as grounds for their decisions on provisional custody (*supra* paras. **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.**).

113. The Court notes that the Supreme Court of Justice mentioned four arguments directly related to Ms. Atala's sexual orientation: i) the alleged social discrimination suffered by the three girls due to Ms. Atala's expression of her sexual orientation[128]; ii) the girls' alleged confusion regarding sexual roles as a consequence of their mother cohabiting with a partner of the same sex;[129] iii) the alleged priority Ms. Atala gave to her personal life over the interests of her three daughters[130], and iv) the right of the girls to live in the bosom of a family with a father and a mother[131]. The Supreme Court concluded that the appealed judges failed by "not having strictly evaluated in conscience the evidence in the proceeding" and by "having passed over the preferred right of the minors to live and grow within the bosom of a family that is structured normally and appreciated in the social milieu, according to the proper traditional model, and ha[d] incurred in serious fault or abuse, which must be corrected through the admission of the *recurso de queja* (remedy of complaint)" [132]. The main grounds for the provisional custody decision were the mother's alleged preferred interests and the argument of the girls' right to live in a traditional family (*supra* para.

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[126] In this regard, the expert witness Jernow stated that "analysis of the child's best interest […] cannot be based on groundless assumptions or stereotypes about parental capacity" (record of merits, volume XI, page 5069). Similarly, expert witness Wintemute stated that "discrimination based on the race, religion, sex or sexual orientation of the child´s parent is never in the best interest of the child. What is in the best interest of the child is a custody decision that considers the qualities of the two parents, without examining considerations that are irrelevant, and that are often linked to social prejudices" […]A non-discriminatory custody decision should not refer to the sexual orientation of either parent. It should focus solely on the parenting skills of each parent, what kind of home they can provide, etc. There should be no need even to mention sexual orientation" (record of merits, volume XI, pages 5355 and 5358). Similarly, at the public hearing, the expert witness García Méndez emphasized that "the sexual conduct that courts have generally taken into account in cases of this nature, are sexual conducts that refer to promiscuity, […] without any other type of consideration."

[127] On the concept of stereotypes, *Cf. Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations, and Costs*. Judgment of November 16, 2009. Series C No. 205, para. 401.

[128] Judgment of the Supreme Court of Justice of Chile, May 31 2004 (record of appendices to the petition, volume V, page 2672).

[129] Judgment of the Supreme Court of Justice of Chile, May 31 2004 (record of appendices to the petition, volume V, page 2672)."

[130] Judgment of la Supreme Court of Justice of Chile, May 31 2004 (record of appendices to the petition, volume V, page 2672).

[131] Judgment of the Supreme Court of Justice of Chile of May 31, 2004 (record of appendices to the petition, volume V, page 2672).

[132] The Supreme Court considered that the situation described constitutes an "aggravated cause" pursuant to Article 225 of the Civil Code, to justify handing over custody to the father, given that the current situation represented "a scenario that implies a risk of harm, which could become irreversible, for the interests of the minors, whose protection must override all other considerations." Judgment of the Supreme Court of Justice of Chile of May 31, 2004 (record of appendices to the petition, volume V, pages 2672 and 2673).

¡Error! No se encuentra el origen de la referencia.), for which reason these points shall be examined jointly.

114. Accordingly, the Court proceeds to consider whether these arguments were appropriate to fulfill the purpose stated in the Supreme Court's judgment and in the decision of the Juvenile Court of Villarica, namely, to protect the best interest of the three girls.

4.1. Alleged social discrimination

115. The Court notes that among the statements taken during in the proceedings, one of the witnesses stated that "there has been discrimination against the little girls, not by other children, but by the parents, who repress the children; I do not have proof of specific acts of discrimination, but an example given was that if there was a slumber party at Karen's house they would not allow their daughters to go."[133] In addition, some of the witnesses indicated that: "the girls are going to be discriminated against and affected in their social relationships;"[134] ii) "in the school environment and among their peers […] they are being pointed out, I am concerned that because we live in such a small city this situation could be difficult"[135], and iii) "the parents of their schoolmates and friends adopt protective attitudes towards their children regarding this situation, which they consider contradictory to the education they give their children and this must necessarily generate negative situations and isolation for the little girls which, according to what I have heard, is unfortunately happening."[136]

116. Likewise, the social worker who testified at the proceeding indicated that "in Chile according to a study […] on tolerance and discrimination [conducted in] 1997, it was found that Chileans express a high level of rejection toward homosexual minorities [,] with the percentage of rejection being 60.2%. Based on this, and aware of the high [level of] discrimination [,] these minors would be exposed to unwarranted situations of social discrimination"[137].

117. On the other hand, the Court notes that the custody case file contains eight affidavits from parents of schoolmates and friends of the three girls in which they testify, *inter alia*, that "they have never discriminated against [Ms. Atala's] daughters in any way and that their children got together, played and participated in activities with the López Atala girls[138].

118. In this regard, the Court confirms that although the case file contained evidence from individuals who stated that the girls could be suffering discrimination within their social environment due to their mother cohabiting with a partner of the same sex, there is also evidence to the contrary regarding to this point (*supra* paras. 115, 116 and 117). However, the Court notes that the Supreme Court described the potential social discrimination that the girls might suffer in a manner that was conditional and abstract, since it stated that: i) "the girls could be subjected to social discrimination," and ii) that "clearly their unique

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133 Testimony of April 10 2003 (record of appendices to the petition, volume I, page 360).

134 Testimony of April 3, 2003 (record of appendices to the petition, volume I, page 327).

135 Testimony of April 3, 2003 (record of appendices to the petition, volume I, page 328).

136 Testimony of April 3, 2003 (record of appendices to the petition, volume I, page 329).

137 Testimony of the social worker of April 14, 2003 (record of appendices to the petition, volume I, page 390).

138 Affidavits of May 2003 (record of appendices to the petition, volume I, pages 458 through 464).´

family environment differs significantly from that of their school companions and acquaintances in the neighborhood where they live, exposing them to ostracism and discrimination, which would also affect their personal development."[139]

119. The Court considers that to justify a distinction in treatment and the restriction of a right, based on the alleged possibility of social discrimination, proven or not, that the minors might face due to their parents' situation cannot be used as legal grounds for a decision. While it is true that certain societies can be intolerant toward a person because of their race, gender, nationality, or sexual orientation, States cannot use this as justification to perpetuate discriminatory treatments. States are internationally compelled to adopt the measures necessary "to make effective" the rights established in the Convention, as stipulated in Article 2 of said Inter-American instrument, and therefore must be inclined, precisely, to confront intolerant and discriminatory expressions in order to prevent exclusion or the denial of a specific status.

120. The Court notes that social, cultural, and institutional changes are taking place in the framework of contemporary societies, which are aimed at being more inclusive of their citizens´ different lifestyles. This is evident in the social acceptance of interracial couples,[140] single mothers or fathers and divorced couples, which at one time were not accepted by society. In this regard, the law and the State must help to promote social progress; otherwise there is a grave risk of legitimizing and consolidating different forms of discrimination that violate human rights[141].

121. On the other hand, with regard to the argument that the child's best interest might be affected by the risk of rejection by society, the Court considers that potential social stigma due to the mother or father's sexual orientation cannot be considered as a valid "harm" for the purposes of determining the child's best interest. If the judges who analyze such cases confirm the existence of social discrimination, it is completely inadmissible to legitimize that discrimination with the argument of protecting the child's best interest. In the instant case, the Court also emphasizes that Ms. Atala had no reason to suffer the consequences of the girls allegedly being discriminated against in their community due to her sexual orientation.

122. Therefore, the Court concludes that the argument of potential social discrimination was not adequate to fulfill the declared purpose of protecting the best interest of Ms. Atala's daughters.

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[139] Judgment of the Supreme Court of Justice of Chile of May 31, 2004 (record of appendices to the petition, volume V, pages 2672).

[140] *Cf.* The Supreme Court of Justice of the United States of America, *Palmore v. Sidoti*, 466 US 429, 433 (April 25, 1984), annulling a court's decision to grant custody of a minor to the father because it considered that the mother's new relationship with her new partner of another race would imply suffering for the child, due to the social stigma attached to the mother's relationship, who through her decision had allegedly put her personal interests before those of the child ("The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty in concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be beyond the reach of the law, but the law cannot, directly or indirectly, give them effect").

[141] In this regard, in a case on discrimination based on religious belief in the context of a judicial decision on the custody of minors, the European Court of Human Rights rejected the argument of a national court, according to which the best interest of two minors could be affected by the risk of social stigma due to the mother's beliefs since she belonged to the Jehovah Witnesses religious sect. *Cf.* ECHR, *Case of Hoffmann v. Austria*, (No. 12875/87), Judgment of June 23, 1993, paras. 15, 33 to 36.

4.2. Alleged confusion of sexual roles

123. With regard to the possible confusion of roles that could affect the three girls due to their living with their mother and her partner, the Supreme Court based its decision on: i) "the testimony of persons close to the girls, such as the house maids, who refer to games and attitudes of the girls that reflect confusion about the sexuality of the mother, which they could have perceived in the new cohabitation arrangements at their home," and ii) "apart from the effects that this cohabitation could have on the well-being and psychological and emotional development of the daughters, given their ages, the potential confusion over sexual roles that could be caused by the absence from the home of a male father and his replacement by another person of the female gender poses a risk to the integral development of the children from which they must be protected" [142].

124. As regards the prohibition of discrimination based on sexual orientation, any restriction of a right would need to be based on rigorous and weighty reasons [143]. Furthermore, the burden of proof would be inverted, which means that it is up to the authority to prove that its decision does not have a discriminatory purpose or effect [144]. This is especially pertinent in a case such as this, bearing in mind that the determination of harm must be supported by technical evidence and reports from experts and researchers in order to reach conclusions that do not result in discriminatory decisions.

125. Indeed, the burden of proof here falls on the State, which must demonstrate that the judicial decision under consideration has been based on the existence of clear, specific and real harm to the children's development. Thus, the judicial decisions on such matters would need to define in a specific and concrete manner the connections and causality between the behavior and the alleged impact on the child's development. Otherwise, there is a risk of basing the decision on stereotypes (*supra* paras. 109 and 111) exclusively associated with the unfounded preconception that children raised by homosexual couples would necessarily have difficulties in defining gender or sexual roles.

126. The case law of some countries, as well as many scientific reports, have clearly referred to this matter. For example, the Supreme Court of Justice of Mexico, in a 2010

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142 Judgment of the Supreme Court of Justice of Chile, May 31 2004 (record of appendices to the petition, volume V, page 2672).

143 *Cf.* ECHR, *Karner V. Austria*, (No. 40016/98), Judgment of July 24, 2003. Final, October 24, 2003, para. 37 ("very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention"), and ECHR, *Case of Kozak*, *supra* note **¡Error! Marcador no definido.**, para. 92.

144 *Cf.* ECHR, *Case E.B*, *supra* note **¡Error! No se encuentra el origen de la referencia.**, para. 74 (The Court observes, moreover, that the Government, on whom the burden of proof lay […], were unable to produce statistical information on the frequency of reliance on that ground according to the – declared or known – sexual orientation of the persons applying for adoption, which alone could provide an accurate picture of administrative practice and establish the absence of discrimination when relying on that ground); *Case D.H. et al. V. Czech Republic*, (No. 57325/00), Judgment of November 13, 2007, para. 177 (As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified); *Case of Orsus et al. v. Croatia*, (No. 15766/03), Judgment of March 16, 2010, para. 150 (discrimination potentially contrary to the Convention may result from a of facto situation. Where an applicant produces prima facie evidence that the effect of a measure or practice is discriminatory, the burden of proof will shift on to the respondent State, to whom it falls to show that the difference in treatment is not discriminatory); *Case of Andrejeva v. Latvia*, (No. 55707/00), Judgment of February 18, 2009, para. 84 (Lastly, as to the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified); *Case of Serife Yigit v. Turkey*, (No. 3976/05), Judgment of November 2, 2010, para. 71 (As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified), and *Case of Muñoz Díaz v. Spain*, (No. 49151/07), Judgment of March 8, 2010, para. 50.

judgment on the right of homosexual couples to adopt minors, considered it relevant that the petitioners did not empirically justify an alleged infringement of the child's best interest in cases of adoption by same-sex couples based on documents or scientific analysis. On the contrary, the Supreme Court took into account existing studies on the impact of sexual orientation on a child's development, and considered that it was not possible to uphold the general hypothesis that living with homosexual parents has a negative effect on children's development.[145] Furthermore, the Supreme Court indicated that:

> Heterosexuality does not guarantee that an adopted child will live in the best situation for his development: this has nothing to do with heterosexuality-homosexuality. All types of families have advantages and disadvantages and each family must be analyzed individually, not from a statistical point of view[146].

127. On the other hand, several judgments issued by international courts[147] conclude that in judicial decisions concerning the custody of minors, consideration of the parent's behavior is only admissible when there is specific evidence showing that the parent's behavior has a direct, negative impact on the child's well-being and development. This seeks to ensure that greater scrutiny is applied when the judicial decision concerns the right to equality of population groups that are traditionally discriminated against, such as homosexuals (*supra* para. 92 and **¡Error! No se encuentra el origen de la referencia.**).

128. For their part, the experts Rodrigo Uprimny and Allison Jernow cited and provided a number of scientific reports considered representative and authoritative in the field of social sciences, to conclude that living with homosexual parents *per se* does not affect a child's emotional and psychological development. These studies agree that: i) the attitudes of homosexual parents are equivalent to those of heterosexual parents; ii) the psychological development and emotional well-being of girls or boys raised by gay fathers or lesbian mothers are comparable to those of girls or boys raised by heterosexual parents; iii) sexual orientation is irrelevant to the formation of affective bonds between children and their parents; iv) the sexual orientation of the mother or father does not affect children's development in terms of gender and their sense of themselves as male or female, their gender role, behavior and/ or sexual orientation, and v) the children of homosexual parents are not more affected by social stigma than other children [148]. Similarly, the expert Jernow

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[145] *Cf.* Supreme Court of Justice of Mexico, Action of Unconstitutionality A.I. 2/2010, August 16, 2010, para. 336.

[146] Supreme Court of Justice of Mexico, Action of Unconstitutionality A.I. 2/2010, August 16, 2010, para. 338.

[147] Cf. ECHR, *Case of M. and C. v. Romania*, (No. 29032/04). Judgment of September 27, 2011. Final, December 27, 2011, para. 147, and *Case of Palau-Martinez v. France* (No. 64927/01), Judgment of December 16, 2003. Final, March 16, 2004, paras. 42, 43, where the European Court establishes that a judicial decision on the handing over of the custody of minors to a state institution must not consider *in abstracto* the possible effects of a specific condition of the parents, protected against discriminatory treatments, in the well-being of the child.

[148] *Cf.* statement offered by expert Rodrigo Uprimny at the public hearing on August 23, 2011, referring to the American Psychology Association, Council of Representatives, *Policy Statement on Sexual Orientation, Parents, & Children,* adopted by the APA Council of Representatives July 28 / 30, 2004, which states that: "There is no scientific evidence that a parent's effectiveness is related to their sexual orientation: homosexual mothers and fathers are as prone as heterosexual mothers and fathers to provide a healthy and favorable environment for their children [and] […] science has proven that the adaptation, development, and psychological well-being of children is not related to the sexual orientation of their parents, and that the children of homosexual parents have the same probabilities of development as those of heterosexual parents." Available at: http://www.apa.org/about/governance/council/policy/parenting.aspx (last visit February 19 2012)
Also see written statement offered by the expert Allison Jernow on September 16, 2011, mentioning the following studies: R. McNair, D. Dempsey, S. Wise, A. Perlesz, *Lesbian Parenting: Issues Strengths and Challenges*, in: 63 Family Matters 40 (2002); A. Brewaeys, I. Ponjaert, E.V. Van Hall, S. Golombok, *Donor insemination: child development and family functioning in lesbian mother families*, in: Human Reproduction Vol. 12, 1997, Page 1349 and 1350; Fiona Tasker, Susan Golombok, *Adults Raised as Children in Lesbian Families*, American Journal

mentioned several judgments issued by national courts that used scientific investigations as documentary evidence to affirm that the child's best interest is not injured by the parent's homosexuality.[149]

129. The Court notes that the American Psychological Association, referred to by the expert, has stated that existing studies on this matter are "impressively consistent in their failure to identify any deficits in the development of children raised in a lesbian or gay household […] the abilities of gay and lesbian persons as parents and the positive outcome for their children are not areas where credible scientific researchers disagree"[150]. Therefore, the expert concluded that:

> Where speculation about potential future harm to a child´s development is soundly refuted by all available social science research, such speculation cannot possibly establish the evidentiary basis for a custody determination[151].

130. The Court observes that, in the instant case, the Supreme Court of Justice of Chile did not issue a judgment based on an analysis *in abstracto* of the alleged impact of the mother's sexual orientation on the girls' development[152], but instead cited the alleged

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Orthopsychiatry Vol. 65, 1995, Page. 203; K. Vanfraussen, I. Ponjaert-Kristofferson, A. Breways, *Family Functioning in Lesbian Families Created by Donor Insemination*, in: American Journal of Orthopsychiatry Vol. 73, 2003, Page. 78; Marina Rupp, *The living conditions of children in same-sex civil partnerships,* Federal Ministry of Justice of Germany, 2009, page 27; Henry M.W. Bos, Frank van Balen, Dymphna C. van den Boom, *Experience of parenthood, couple relationship, social support, and child-rearing goals in planned lesbian mother families*, in: Journal of Child Psychology and Psychiatry Vol. 45, 2004, page 755; Rafael Portugal Fernández, Alberto Arauxo Vilar, *Aportaciones desde la salud mental a la teoría de la adoption en parejas homosexuales*, in: Avances en salud mental relacional Vol. 3, 2004. This last study indicates that "no significant differences are found between homosexuals and heterosexuals in terms of the effectiveness with which they exercise their role as parents" and that "the research carried out to date unanimously indicates that there are no significant differences between children raised by homosexuals and children raised by heterosexuals in terms of sexual identity, sexual roles, sexual orientation, sexual relationships with peers and adults, relationships of friendship, popularity"; Stéphane Nadaud, «Quelques repères pour comprendre la question homoparentale», in: M. Gross, Homoparentalités, état des lieux, Ed. érès «La vie of l'enfant», Toulouse, 2005, and Fiona Tasker, Susan Golombok, *Adults Raised as Children in Lesbian Families*, in: American Journal Orthopsychiatry Vol. 65, 1995, Page. 203. *Cf*. Written statement rendered by the expert Allison Jernow on September 16, 2011 (record of merits, volume XI, pages 5079 and 5080).

[149] *Cf.* written statement rendered by the expert Allison Jernow on September 16, 2011, mentioning the cases of *Re K and B and Six Other Applications*, Ontario Supreme Court, May 24, 1995, para. 89; *Boots v. Sharrow*, Ontario Supreme Court of Justice, 2004 Can LII 5031, January 7, 2004; *Bubis v. Jones*, Ontario Supreme Court, 2000 Can LII 22571, April 10, 2000, Supreme Court of Justice (Brazil) Public Ministry of the State of Rio Grande do Sul v. LMGB, April 27, 2010; District Court of Porto Alegre (Brazil), Adoption of VLN, No. 1605872, July 3, 2006 (record of merits, volume XI, page 5082 and 5083).

[150] *Cf.* written statement offered by the expert Allison Jernow on September 16, 2011 which cites: Amicus Curiae brief presented by the American Psychological Association, Arkansas Psychological Association, National Association of Social Workers and National Association of Social Workers, Arkansas Chapter, in *Department of Human Services v. Matthew Howard*, Supreme Court of Arkansas (December 2005) at 10-11 ("The APA has described the studies as 'impressively consistent in their failure to identity any deficits in the development of children raised in a lesbian or gay household […] the abilities of gay and lesbian persons as parents and the positive outcome for their children are not areas where credible scientific researchers disagree'"). *Cf*. written statement rendered by the expert Allison Jernow on September 16, 2011 (record of merits, volume XI, page 5081).

[151] *Cf.* written statement rendered by the expert Allison Jernow on September 16, 2011 "Where speculation about potential future harm to a child's development is soundly refuted by all available social science research, such speculation cannot possibly establish the evidentiary basis for a custody determination." (record of merits, volume XI, page 5083).

[152] The Supreme Court referred to the testimonies given by the house maids regarding the girls' alleged confusion over roles. *Cf*. Judgment of the Supreme Court of Justice of Chile of May 31, 2004 considering paragraph 15 (record of appendices to the petition, volume V, page 2672).

existence of specific evidence. However, in its considerations it limited itself to the application of a test of speculative damage, merely referring, as regards the alleged damage, to "the possible confusion of sexual roles" and the "situation of risk for the girls' development".[153] The Supreme Court of Justice referred to "the deterioration of the social, family, and educational environment of the girls since the mother began to cohabit with her homosexual partner," without specifying the connection between said cohabitation and the alleged deterioration. It did not present arguments to challenge the possibility that the alleged deterioration might not have occurred as a result of the relationship with the new partner, but rather as a consequence of the parents' earlier separation and its possible negative effects on the girls. Nor did the Supreme Court of Justice present specific arguments to support the claim that the family situation with the father was more favorable. The Supreme Court of Justice's argument was based on the potential psychological damage that might be caused to the three girls by their living with a homosexual couple, without giving sufficiently weighty reasons that would serve to refute the claim that the parents' sexual orientation does not have a negative effect on the child's psychological and emotional wellbeing, development, sexual orientation and social relationships.

131. The Inter-American Court concludes that the Supreme Court of Justice did not comply with the requirement to apply a strict scrutiny test and substantiate the specific harm allegedly suffered by the three girls as a result of their mother cohabiting with a same-sex partner. Moreover, the Court considers that, in this specific case, the fact of the girls living with their mother and her partner did not deprive them of a father, since the purpose of the custody hearing did not imply that the father would have lost contact with them.

4.3. Alleged privilege of interests

132. In its judgment, the Supreme Court indicated that "it cannot be ignored that the mother of the minors, in making the decision to openly express her homosexuality, as may be done freely by anyone in the context of very personal gender rights, without deserving any juridical disapproval or reproach for this, put her own interests before those of her daughters, especially when she began to live with her homosexual partner in the same home where she undertook the upbringing and care of her daughters separately from their father." [154] Similarly, the Juvenile Court of Villarrica declared that "the respondent has given preference to her own well-being and personal interest over carrying out her role as a mother, under conditions that could affect the subsequent development of the minors" [155].

133. The Inter-American Court considers it necessary to emphasize that the scope of the right to non-discrimination due to sexual orientation is not limited to the fact of being a homosexual *per se*, but includes its expression and the ensuing consequences in a person's life project. In this regard, in the *Case of Laskey, Jaggard, and Brown v. United Kingdom*, the European Court of Human Rights stated that both sexual orientation and its exercise are a relevant aspect of private life[156].

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153 Judgment of the Supreme Court of Justice of Chile of May 31, 2004 (record of appendices to the petition, volume V, page 2672).

154 Judgment of the Supreme Court of Justice of Chile, May 31 2004 (record of appendices to the petition, volume V, page 2672).

155 Decision on provisional custody issued by the Juvenile Court of Villarrica, May 2 2003 (record of appendices to the petition, volume V, page 2567).

156 *Cf.* ECHR, *Case of Laskey, Jaggard, and Brown v. United Kingdom*, (No. 21627/93; 21826/93; 21974/93), Judgment of February 19, 1997, para. 36 ("There can be no doubt that sexual orientation and activity concern an

134. In this regard, the expert Wintemute stated that:

> "as the case law of the European Court makes clear, sexual orientation also includes conduct. This means that protection against discrimination based on sexual orientation is not only about less favourable treatment for being lesbian or gay. It also covers discrimination because an individual acts on their sexual orientation, by choosing to engage in consensual sexual activity in private, or to enter into a long-term couple relationship with a partner of the same sex."[157]

135. The scope of protection of the right to a private life has been interpreted in broad terms by the international human rights courts, when stating that it goes far beyond the right to privacy. According to the European Court of Human Rights, the right to a private life encompasses physical and social identity, an individual's personal development and personal autonomy as well as their right to establish and develop relationships with other people and their social environment, including the right to establish and maintain relationships with people of the same sex [158]. Moreover, the right to maintain personal relationships with other individuals, in the context of the right to a private life, extends to the public and professional spheres[159].

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intimate aspect of private life"). See also *Case of Dudgeon v. United Kingdom*, (No. 7525/76), Judgment of October 22, 1981, para. 52; *Case of A.D.T. v. United Kingdom*, (No. 35765/97), Judgment of July 31, 2000. Final, October 31, 2000, para. 23 ("the Court recalls that the mere existence of legislation prohibiting male homosexual conduct in private may continuously and directly affect a person's private life").

[157] *Cf.* expert testimony rendered by expert Robert Wintemute, September 16, 2011 (record of merits, volume XI, pages 5360). He also stated that the Supreme Court of Canada in the *Case of Egan v. Canada* established that "sexual orientation is more than simply a ´status` that an individual possesses: it is something that is demonstrated in an individual's conduct by the choice of a partner. Just as the [Canadian] *Charter* [of Rights and Freedoms] protects religious beliefs and religious practice as aspects of religious freedom, so too should it be recognized that sexual orientation encompasses aspects of ´status` and ´conduct` and that both should receive protection". *Egan v. Canada*, [1995] 2 SCR, 513, 518 (record of merits, volume XI, page 5360).

[158] *Cf.* ECHR, *Case of Pretty V. United Kingdom* (No. 2346/02), Judgment of April 29, 2002. Final, July 29, 2002, para. 61 ("the concept of ['']private life['] is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person […]. It can sometimes embrace aspects of an individual's physical and social identity […]. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 […]. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world […]. Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees"); *Case of Schalk and Kopf v. Austria*, (No. 30141/04), Judgment of June 24, 2010, November 22, 2010, para. 90 ("It is undisputed […] that the relationship of a same-sex couple like the applicants' falls within the notion of ['']private life['] within the meaning of Article 8"); *Case Dudgeon*, *supra* note **¡Error! Marcador no definido.**, para. 41 ("the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1"); *Case Burghartz v. Switzerland*, (No. 16213/90), Judgment of February 22, 1994, para. 24, and *Case Laskey, Jaggard and Brown*, *supra* note **¡Error! Marcador no definido.**, para. 36.

[159] *Cf.* ECHR, *Case Peck V. United Kingdom*, (No. 44647/98), Judgment of January 28, 2003. Final, April 28, 2003, para. 57 ("Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. That Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of ['']private life['']"), citing ECHR, *Case P.G. and J.H. v. United Kingdom* (No. 44787/98), Judgment of September 25, 2001. Final, December 25, 2001, para. 56. *Cf.* ECHR, *Case Niemietz v. Germany*, (No. 13710/88), Judgment of December 16, 1992, para. 29 ("The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of ['']private life['']. However, it would be too restrictive to limit the notion to an ['']inner circle['] in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of ['']private life['] should be taken to exclude activities of a professional or business nature since it is, after all, in the

136. In this regard, a person's sexual orientation is also linked to the notion of freedom and a person's right to self-determination and to freely choose the options and circumstances that give meaning to his or her existence, in accordance with his or her own choices and convictions [160]. Therefore, " [t]he emotional life with the spouse or permanent partner, which obviously includes sexual relationships, is one of the main aspects of that realm or circle of intimacy"[161].

137. For its part, the Supreme Court of Justice of Mexico has stated that:

> from human dignity […] arises, among others, the free development of the personality, that is, every individual's right to choose, freely and in an autonomous manner, how to live their life, which includes, among other expressions, […] their free sexual choice. […] [a] person's sexual orientation, as part of their personal identity, [is] a relevant element in any life project they may have and that, as any other person, includes the desire to share their life with another person of the same or different sex[162].

138. In the instant case, the Court notes that both the Supreme Court of Justice and the Juvenile Court of Villarica based their decisions to award custody to the father on the assumption that Ms. Atala could openly declare herself a lesbian. However, they indicated that by exercising her homosexuality when she decided to live with a same-sex partner, she put her own interests before those of her daughters (*supra* paras. 41 and 56).

139. In this regard, the Court considers that the prohibition of discrimination due to sexual orientation should include, as protected rights, the conduct associated with the expression of homosexuality. Furthermore, if sexual orientation is an essential component of a person's identity[163], it was not reasonable to require Ms. Atala to put he life and family project on hold in order to allegedly protect her daughters. Under no circumstance can it be considered "legally reprehensible" that Ms. Atala made the decision to restart her life. Furthermore, no evidence was found of any harm caused to the three girls.

140. Therefore, the Court considers that to require the mother to limit her lifestyle options implies using a "traditional" concept of women's social role as mothers, according to which it is socially expected that women bear the main responsibility for their children's upbringing and that in pursuit of this she should have given precedence to raising her children, renouncing an essential aspect of her identity. Therefore, the Court considers that using the argument of Ms. Atala's alleged preference of her personal interests, does not fulfill the purpose of protecting the best interest of the three girls.

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course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world").

160 *Mutatis mutandi*, *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. 52.

161 Constitutional Court of Colombia, Judgment T-499, 2003. The Constitutional Court has defined the right to the free development of the personality, enshrined in Article 16 of the Political Constitution of Colombia, as the right of persons to "choose their life plan and develop their personality according to their interests, wishes and convictions, provided that it does not affect the rights of others, or violate the constitutional order" (Constitutional Court, Judgment C-309 of 1997), and "a person's capacity to independently make the life choices that will determine the course of his existence" (Constitutional Court, Judgment SU-642 of 1998).

162 Supreme Court of Justice of Mexico, Action of Unconstitutionality A.I. 2/2010, August 16, 2010, paras. 263 and 264.

163 *Cf.* ECHR, *Case of Clift*, *supra* note **¡Error! Marcador no definido.**, para. 57 ("the Court has considered to constitute 'other status' characteristics which, like some of the specific examples listed in the Article, can be said to be personal in the sense that they are innate or inherent. Thus in Salgueiro da Silva Mouta, […] it found that sexual orientation was [']undoubtedly covered['] by Article 14").

4.4. Right to a "normal and traditional" family

141. In this regard, the Supreme Court of Justice stated that "the preferred right of the minors to live and grow within the bosom of a family that is structured normally and is appreciated in the social environment, according to the proper traditional model" was disregarded[164]. For its part, the Juvenile Court of Villarica, in its provisional custody decision, indicated that "the petitioner offers more favorable arguments on behalf of the best interest of the girls, which in the context of a heterosexual and traditional society take on great importance" [165].

142. The Court confirms that the American Convention does not define a limited concept of family, nor does it only protect a "traditional" model of the family. In this regard, the Court reiterates that the concept of family life is not limited only to marriage and must encompass other *de factor* family ties in which the parties live together outside marriage[166].

143. International case law is consistent on this point. In the case of *Salgueiro da Silva Mouta v. Portugal*, the European Court considered that the decision of a national court to remove an underage child from the custody of a homosexual parent, with the argument that the child should live in a traditional Portuguese family, lacked a reasonable relationship of proportionality between the measure taken (withdrawal of the custody) and the purpose sought (protection of the best interest of the minor) [167].

144. Similarly, in the *Case of Karner v. Austria*, the European Court of Human Rights stated that:

> "The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. […] as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realizing the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people" [168].

145. In the instant case, this Court finds that the language used by the Supreme Court of Chile regarding the girls' alleged need to grow up in a "normally structured family that is appreciated within its social environment," and not in an "exceptional family", reflects a

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164 Judgment of the Supreme Court of Justice of Chile, May 31 2004 (record of appendices to the petition, volume V, page 2673).

165 Decision in the provisional custody application by the Juvenile Court of Villarrica, of May 2 2003 (record of appendices to the petition, volume V, page 2567).

166 Advisory Opinion OC-17/02, *supra* note 122, paras. 69 and 70. Also see: ECHR, *Case Keegan v. Ireland,* (No. 16969/90), Judgment of May 26, 1994, para. 44, and *Case Kroon et al. v. Netherlands,* (No. 18535/91), Judgment of October 27, 1994, para. 30.

167 *Cf.* ECHR, *Case Salgueiro da Silva Mouta, supra* note **¡Error! Marcador no definido.**, paras. 34 to 36.

168 ECHR, *Case Karner*, *supra* note 143, para. 41 ("The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. […] as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realizing the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people").

limited, stereotyped perception of the concept of family, which has no basis in the Convention, since there is no specific model of family (the "traditional family")[169].

4.5. *Conclusion*

146. Bearing in mind all the foregoing considerations, this Court concludes that although the Judgment of the Supreme Court and the provisional custody ruling sought to protect the best interests of the girls M., V., and R., it was not demonstrated that the grounds stated in the decisions were appropriate to achieve said purpose, since the Supreme Court of Justice and the Juvenile Court of Villarrica did not prove in this specific case that Ms. Atala's cohabitation with her partner had a negative effect on the girls' best interest (*supra* paras. **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.**). On the contrary they used abstract, stereotyped, and/or discriminating arguments to justify their decisions (*supra* paras. **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.**), for which reason said decisions constitute discriminatory treatment against Ms. Atala. Therefore, the Court concludes that the State violated the right to equality enshrined in Article 24, in conjunction with Article 1.1 of the American Convention, to the detriment of Karen Atala Riffo.

5. Discriminatory treatment against the girls M., V. and R.

Arguments of the parties

147. In relation to Article 19 of the American Convention[170], the Commission argued that "the Supreme Court violated the girls' best interest […] in the absence of determinations based on evidence and specific facts."

148. The representatives argued that the judgment of the Supreme Court of Justice had injured the child's best interest "when it ignored the right of the girls M., V., and R. not to be separated from their family." They added that children could not be discriminated against based on their parents' status.

149. The State indicated that the alleged violations in relation to the three girls "were refuted from the moment it was demonstrated that said judgment was not the result of discrimination based on sexual orientation, but rather of the analysis of specific facts proven in the custody trial."

Considerations of the Court

150. The Court has already concluded that both the Judgment of the Supreme Court and the decision of the Juvenile Court of Villarrica, regarding provisional custody, constituted

[169] The Supreme Court of Justice of Mexico has stated that legal recognition of homoparental families, which exist either through reproduction or adoption, does not disregard the child's best interest. On the contrary, from such recognition come a series of rights in favor of the child and duties for those who are his parents, since it is a reality that such families exist and, therefore, must be protected by law: they are each as respectable as others *Cf*. Supreme Court of Justice of Mexico, Action of Unconstitutionality A.I. 2/2010, August 16, 2010, para. 333.

[170] Article 19 of the American Convention establishes that "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the State."

discriminatory treatment against Ms. Atala (*supra* para. 146). Accordingly, it will proceed to analyze whether said treatment, in turn, resulted in discrimination against the girls M., V., and R. In this regard, the Court considers that the prohibition of discrimination, in cases related to minors, must be interpreted in light of Article 2 of the Convention on the Rights of the Child, which states that:

> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

151. In this regard, the Court points out that children cannot be discriminated against based on their own status and this prohibition extends also to the conditions of their parents or family members, for example in this case the mother's sexual orientation. The Committee on the Rights of the Child has pointed out in its General Comment No. 7 that children may suffer the consequences of discrimination against their parents, for example if they are born out of wedlock or in other circumstances that deviate from traditional values [171].

152. On the other hand, regarding the relationship between the child's best interest and the prohibition of discrimination, the expert Cillero Bruñol stated that:

> a decision justified with the child's best interest, understood as the protection of his rights, cannot at the same time expect to legitimize a discriminatory decision *prima facie*, or in abstract, that affects the child's right to be taken care of by his mother[172].

153. For his part, the expert Robert Wintemute emphasized that:

> " discrimination based on [...] the sexual orientation of the child's parent is never in the best interest of the child" [173].

154. By having used the mother's sexual orientation as grounds for its decision, the Supreme Court, in turn, discriminated against the three girls, since it took into account considerations it would not have used if the custody proceedings had been between two heterosexual parents. In particular, this Court reiterates that the child's best interest is a guiding principle in the drafting of provisions and in their application in all aspects of the child's life [174].

155. Furthermore, the discriminatory treatment against the mother had repercussions for the girls, since it was used as grounds to decide that they should not continue to live with their mother. Thus, the effects of this decision were extended when the girls were separated from their mother due to her sexual orientation. Therefore, the Court concludes that Article

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171 *Cf.* United Nations, Committee on the Rights of the Child, General Comment No. 7. Implementing Child Rights in Early Childhood, CRC/C/GC/7, September 30, 2005, para. 12.

172 Written statement rendered by expert Miguel Cillero Bruñol, August 4, 2011 (record of merits, volume II, page 929).

173 Written statement rendered by expert Robert Wintemute, September 16, 2011 (record of merits, volume XI, page 5355).

174 Advisory Opinion OC-17/02, *supra note* 122, para. 137, opinion 2.

24, in conjunction with Articles 19 and 1.1 of the American Convention, was violated in detriment of the girls M., V., and R.

D. Right to private life and right to family life

Arguments of the parties

156. With respect to the alleged violation of Article 11[175] of the American Convention, the Commission argued that "the right to a private life encompasses all spheres of the intimate realm and autonomy of an individual, including his or her personality, identity, decisions over his or her sexual life, personal and family relations[, given that] sexual orientation constitutes a fundamental component of an individual's private life." It held that "the State's interference in the private life of Karen Atala was arbitrary, since the custody decision was based on discriminatory prejudices driven by her sexual orientation [….] and it also arbitrarily interfered in her autonomy to make decisions on her personal life based on said orientation. The latter […since] in the absence of objective reasons, the Supreme Court of Justice, based on the expression of her sexual orientation, deprived her of the custody of her daughters and a life in common with them, a fundamental aspect of her life plan."

157. For their part, the representatives argued that "the interference is arbitrary because the only justification is the expression of the mother's sexual orientation, which is part of her personal identity, an essential characteristic of all individuals, which has no bearing whatsoever on the daughters' well-being." The representatives pointed out that "there is no question that both [Ms.] Atala and her daughters suffered arbitrary interference in their private life."

158. Furthermore, in relation to Articles 11.2 and 17[176] of the American Convention, the Commission and the representatives alleged "unlawful and arbitrary interference in the right to private and family life, which extends to the development of relationships between members of a family and the role of emotional relationships in the life project of each member." The representatives pointed out that "there is no single concept of family" and that "[Ms.] Atala, her daughters and [Ms.] De Ramón undoubtedly constituted a family unit which was broken up by decisions based on prejudice against Judge Atala's expression of her sexual orientation."

159. The State argued that "in a custody trial, whose purpose is to consider which parent shall take charge of the personal care of the children, the judge not only has the power but also the obligation to assess each and every one of the specific conditions and circumstances that determine the child's best interest. […] It is therefore inherent to the custody trial […] that the judge may, according to law, investigate intimate details of the life of the persons. It argued "that the pursuit of the child's best interest must prevail over an

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[175] Article 11 of the Convention states that:

1. Everyone has the right to have his honor respected and his dignity recognized.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home or his correspondence, or of unlawful attacks on his honor or reputation.

3. Everyone has the right to the protection of the law against such interference or attacks.

[176] In this regard, Article 17 of the Convention states:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

unalterable conception of the right to intimacy, since the realm of private life cannot be excluded from the judge's knowledge and consideration." It added that "neither [the] Supreme Court nor the other domestic courts have violated the right enshrined in Article 11.2 of the American Convention in the decisions on the custody trial […] but, on the contrary, have merely issued rulings regarding considerations that are inherent to a trial of that nature."

160. Finally, the State argued that "the separation of the family is not attributable to the actions of the Chilean courts [since] the task of the Chilean courts was precisely the opposite, that is, responding to the petition of the parties […] to decide, according to the girls' best interest, which new family unit provided the best support for their development."

Considerations of the Court

161. Article 11 of the Convention prohibits all arbitrary or abusive interference in a person's private life, and encompasses various spheres of the intimate realm as well as the private lives of their families. In that regard, the Court has held that the realm of privacy is exempt and immune from abusive or arbitrary intrusion or aggression by third parties or by the public authorities[177].

162. Furthermore, regarding Article 11 of the American Convention, the Court has specified that, although this provision is titled "Protection of Honor and Dignity" (in Spanish) its content includes, among others, the protection of privacy[178]. Privacy is an ample concept that is not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings.[179] Thus, privacy includes the way in which the individual views himself and to what extent and how he decides to project this view to others[180].

163. The Court observes that the Commission's arguments regarding the alleged violation of Ms. Karen Atala's right to privacy were focused on the judgment issued by the Supreme Court. On their part, the representatives added the ruling on the provisional custody as another fact that allegedly generated the violation of Ms. Atala's right to privacy. Therefore, these two facts will be analyzed.

164. The Court has established in its case law that the right to private life is not an absolute right and, therefore, may be restricted by States provided that the intrusions are neither abusive nor arbitrary. For this reason, these must be regulated by the law, pursue a

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177 *Cf. Case of the Ituango Masacres v. Colombia. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 1, 2006 Series C No. 148, para. 194 and *Case Fontevecchia and D`Amico*, *supra* note 28, para. 48.

178 *Cf. Case of the Massacres of Ituango v. Colombia, supra* note 177, para. 193 and *Case of Rosendo Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 31, 2010. Series C No. 216, para. 119.

179 *Cf. Case of Rosendo Cantú et al, supra* note **¡Error! Marcador no definido.**, para. 119, and *Case of Fernández Ortega et al. v. Mexico. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of August 30, 2010 Series C No. 215, para. 129, quoting ECHR, *Case of Dudgeon v. United Kingdom*, (No. 7525/76), Judgment of October 22, 1981, para. 41, Case of X and Y v. The Netherlands, (No. 8978/80), Judgment of March 26, 1985, para. 22. *Case of Niemietz, supra* note 159, para. 29, and *Case of Peck*, *supra* note 159, para. 57.

180 *Cf. Case Rosendo Cantú et al.*, *supra* note **¡Error! Marcador no definido.**, para. 119, and *Case Fernández Ortega et al., supra* note **¡Error! Marcador no definido.**, para. 129, citing ECHR, *Case Niemietz*, *supra* note 159, para. 29, and *Case Peck*, *supra* note 159, para. 57.

legitimate goal and comply with the requirements of suitability, necessity and proportionality, in other words, they must be necessary in a democratic society[181].

165. In this regard the Court emphasizes that Ms. Atala's sexual orientation is part of her private life, and therefore any interference in it must meet the standards of "suitability, necessity, and proportionality." This differs from the context of a custody proceeding, where specific parental behaviors that have allegedly caused damage to the child may be analyzed (*supra* paras. 109 and 111).

166. Given that the domestic courts gave importance to the issue of Ms. Atala's sexual orientation in the custody decision, they exposed different aspects of her private life throughout the proceedings. The Court notes that the reason given by the courts for interfering in Ms. Atala's private life was the same one used to justify the discriminatory treatment (*supra* para.107), namely, the alleged best interest of the three girls. The Court considers that, although that principle is related *in abstracto* to a legitimate goal (*supra* para.110), the measure was unsuitable and disproportionate to achieve that purpose, since the domestic courts should have limited themselves to examining parental behavior– which could be part of their private life – but without exposing and scrutinizing Ms. Atala's sexual orientation.

167. The Court finds that during the custody proceeding, based on a stereotyped vision on the scope of Ms. Atala's sexual orientation (*supra* para. 146), there was arbitrary interference in her private life, given that sexual orientation is part of a person's intimacy and is not relevant when examining aspects related to an individual's suitability as a parent. Therefore, the Court concludes that the State violated Article 11.2, in conjunction with Article 1.1 of the American Convention, to the detriment of Karen Atala Riffo.

168. Furthermore, the Court notes that one of the central arguments considered in the judgment of the Supreme Court of Justice and the decision of the Juvenile Court of Villarica in the provisional custody proceeding, was Ms. Atala's cohabitation with her lesbian partner (*supra* paras. **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.**). Accordingly, this Court considers it essential to examine the alleged violation of the right to family life alleged by the Commission and the representatives.

169. In this regard, the Court reiterates that Article 11. 2 of the American Convention is closely linked to the right to protection of the family and to live in a family, recognized in Article 17 of the Convention, which requires the State not only to provide and directly implement measures of protection for children, but also to favor, in the broadest possible terms, the development and strength of the family unit[182]. The Court has established that, under certain conditions, the separation of children from their family constitutes a violation of said right[183], since even legal separations of a child from his family may only proceed if these are duly justified[184].

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[181] *Cf. Case of Tristán Donoso v. Panama. Preliminary Objection, Merits, Reparations and Costs.* Judgment January 27, 2009. Series C No.193, para. 56 and *Case of Escher et al. v. Brazil. Preliminary Objection, Merits, Reparations and Costs.* Judgment *of* July 6, 2009. Series C No. 200, para. 116.

[182] *Cf.* Advisory Opinion OC-17/02, *supra* note 122, para. 66 and *Case Chitay Nech et al.*, *supra* note **¡Error! Marcador no definido.**, para. 157.

[183] *Cf.* Advisory Opinion OC-17/02, *supra* note 122, paras. 71 and 72 and *Case Chitay Nech et al.*, *supra* note **¡Error! Marcador no definido.**, para. 157.

[184] *Cf.* Advisory Opinion OC-17/02, *supra* note 122, para. 77.

170. With regard to Articles 11.2 and 17.1 of the American Convention, every person's right to protection against arbitrary or unlawful interference with his or her family is implicitly a part of the right to protection of the family, and is also explicitly recognized by Articles 12.1 of the Universal Declaration of Human Rights,[185] V of the American Declaration of Rights and Duties of Man,[186] 17 of the International Covenant of Civil and Political Rights,[187] and 8 of the European Human Rights Convention.[188] These provisions are especially significant when separation of a child from his family is being analyzed[189].

171. According to the case law of the European Court of Human Rights, the mutual enjoyment of harmonious relations between parents and children is a fundamental component of family life,[190] and the purpose of Article 8 of the European Convention on Human Rights is to protect individuals against arbitrary interference by public authorities and to require the State to take affirmative measures to promote effective respect for family life.[191]

172. With regard to the concept of family, various human rights organs created by treaties, have stated that there is no single model for a family, which may have many variations[192]. Similarly, the European Court has interpreted the concept of "family" in broad terms. With regard to different sex couples, it has repeatedly indicated that:

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[185] Article 12.1 states that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

[186] Article V of the American Declaration of Rights and Duties of Man states that "every person has the right to the protection of the law against abusive attacks upon his honor, his reputation and his private and family life."

[187] Article 17 of the International Covenant of Civil and Political Rights states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

[188] In this regard, Article 8.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms states that: "[e]veryone has the right to respect for his private and family life, his home and his correspondence." Likewise, Article 8.2 states that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[189] *Cf*. Advisory Opinion OC-17/02, *supra* note 122, para. 71.

[190] *Cf.* Advisory Opinion OC-17/02, *supra* note 122, para. 72, citing ECHR, *Case of Buchberger v. Austria*, (No. 32899/96). Judgment of December 20, 2001. Final, March 20, 2003, para. 35; *Case of T and K v. Finland, Judgment of July 12, 2001, para.* 151; *Case of Elsholz v. Germany, Judgment of July 13, 2000, para.* 43; *Case of Bronda v. Italy, Judgment of June 9, 1998, para.* 51; Case of *Johansen v. Norway, Judgment of August 7, 1996, para.* 52.

[191] *Cf.* ECHR, Case of Olsson v. Sweden, Judgment of March 24, 1988, para. 81.

[192] *Cf.* United Nations, Committee on the Elimination of Discrimination Against Women, General Recommendation No. 21 (13th period of sessions, 1994). Equality in marriage and in family relationships, para. 13 ("The form and the concept of a family can vary from State to State and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family, both at law and in private, must conform to the principles of equality and justice for all people, as Article 2 of the Convention requires"); Committee on the Rights of the Child, General Comment No. 7. Implementing Child Rights in Early Childhood, *supra* note 171, paras. 15 and 19 ("The Committee recognizes that *'family'* here refers to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family and other traditional and modern community-based arrangements, provided that these are consistent with children's rights and best interests. […]The Committee notes that in practice family patterns are variable and changing in many regions, as is the availability of informal networks of support for parents, with an overall trend towards greater diversity in family size, parental roles and arrangements for bringing up children"); Human Rights Committee, General Comment No.

> The notion of family [..]is not confined solely to families based on marriage and may encompass other de facto ties where the parties are living together out of wedlock. A child born of such a relationship is ipso jure part of that "family" unit from the moment and by the very fact of his birth. Thus there exists between the child and his parents a bond amounting to family life. The Court further recalls that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention[193].

173. In the Case of *X, Y and Z v. United Kingdom,* the European Court of Human Rights, following an ample concept of family, acknowledged that a transsexual, their female partner and a child may comprise a family, stating that:

> When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means[194].

174. In the first place, and with respect to the conventional protection of same-sex couples in the *Case Schalk and Kopf v. Austria,* the European Court revised its case law in force at that time, which only accepted that the emotional and sexual relationship of a same-sex couple constitutes "private life," but had not considered what constituted "family life," despite the applicants having lived together in a long-term relationship[195]. Applying a broader concept of family, the European Court established that "a cohabiting same-sex couple living in a stable *de facto* partnerships, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would[196]," considering it

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19 (39th period of sessions, 1990). The family (Article 23), HRI/GEN/1/Rev.9 (Vol.I), para. 2 ("The Committee notes that the concept of family may differ in some respects from State to State, and even between regions within a State, and that it is therefore not possible to give the concept a standard definition"), and United Nations, C Human Rights Committee, General Comment No. 16 (32nd period of sessions, 1988). Right to Privacy (Article 17), HRI/GEN/1/Rev.9 (Vol.I), para. 5 ("Regarding the term "family", the objectives of the Covenant require that for the purposes of Article 17, this term be given a broad interpretation that includes all those comprising the family, as understood in the society of the State Party concerned.")

193 ECHR, *Case of Schalk and Kopf*, *supra* note 158, para. 91 ("the notion of family […] is not confined to marriage-based relationships and may encompass other of facto "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is ipso jure part of that "family" unit from the moment and by the very fact of his birth. Thus there exists between the child and his parents a bond amounting to family life. The Court further recalls that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention"), citing ECHR, *Case Elsholz*, *supra* note **¡Error! Marcador no definido.**, para. 43; *Case Keegan*, *supra* note 166, para. 44, and *Case of Johnston et al. v. Ireland*, (No. 9697/82), Judgment of December 18, 1986, para. 56; *see also* ECHR, *Case of Alim V. Russia* (No. 39417/07), Judgment of September 27, 2011, para. 70; *Case of Berrehab v. The Netherlands*, (No. 10730/84), Judgment of June 21, 1988, para. 21, and *Case of L. v. Netherlands*, (No. 45582/99), Judgment of June 1, 2004. Final, September 1, 2004, para. 36.

194 *Cf.* ECHR, *Case of X, Y and Z v. United Kingdom*, (No. 21830/93), Judgment of April 22, 1997, para. 36 ("When deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means"); ECHR, *Case of Marckx V. Belgium*, (No. 6833/74), Judgment of June 13, 1979, para. 31; *Case of Keegan*, *supra* note 166, para. 44, and *Case of Kroon et al.*, *supra* note 166, para. 30.

195 ECHR, *Case Schalk and Kopf*, *supra* note 158, para. 92 ("the Court's case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes 'private life' but has not found that it constitutes 'family life', even where a long-term relationship of cohabiting partners was at stake").

196 ECHR, *Case Schalk and Kopf*, *supra* note 158, para. 94 ("a cohabiting same-sex couple living in a stable of facto partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would") and *Case P.B. and J.S. v. Austria*, (No. 18984/02), Judgment of July 22, 2010. Final, October 22, 2010, para. 30.

"artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8" of the European Convention[197].

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

176. In the instant case, the Court notes that from November 2002, up until the decision on provisional custody was issued, in May 2003, there was a close relationship between Ms. Atala, Ms. De Ramón, Ms. Atala's older son and the three girls. In this regard, Ms. Atala stated that "we were an absolutely normal family. A boy, three girls, a cat, a male dog, a female dog, a house, we had projects as a family. We had dreams as a family" [198]. In addition, Ms. De Ramón stated that the "life of the five family members, six [with her …] was almost idyllic, since [they] had a relationship based on plenty of communication, at least among the women in the family"[199].

177. Therefore, it is clear that they had created a family unit which, as such, was protected under Articles 11.2 and 17.1 of the American Convention, since they shared their lives, with frequent contact and a personal and emotional closeness between Ms. Atala, her partner, her eldest son and the three girls. The aforementioned, without prejudice to the fact that the girls shared another family environment with their father.

178. This Court has already concluded that the grounds presented both by the Supreme Court of Justice and by the Juvenile Court of Villarica in the provisional custody decision were not an appropriate measure to protect the girls' best interest (*supra* para. **¡Error! No se encuentra el origen de la referencia.**), which also had the result of separating the family constituted by the mother, her partner and the girls. This amounts to arbitrary interference with the right to private and family life. Therefore, the Court rules that the State violated Articles 11.2 and 17.1, in conjunction with Article 1.1 of the American Convention to the detriment of Karen Atala Riffo and the girls M., V. and R. Regarding the latter, said violations of family life also occurred in relation to Article 19 of the Convention, given that they were separated in an unjustified manner from one of their family environments.

E. Judicial guarantees and judicial protection

1. Judicial guarantees and judicial protection regarding Ms. Atala

Arguments of the parties

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[197] ECHR, *Case Schalk and Kopf*, *supra* note 158, para. 94 ("the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8") and the *Case of P.B. and J.S.*, *supra* note 196, para. 30.

[198] Statement by Ms. Karen Atala Riffo before the Inter-American Court at the public hearing in the present case.

[199] Statement by Ms. Emma of Ramón, August 4, 2011 (record of merits, volume II, page 762).

179. The Commission and the representatives argued the alleged violation of the judicial guarantee of impartiality due to the judges' stereotyped approach to the case. The Commission pointed out that given "their consideration of [Ms. Atala's] sexual orientation as a key element in her fitness as a mother, together with the evident use of discriminatory prejudices," it may be concluded that Ms. Atala "was not afforded the guarantees of impartiality." The representatives added that the annulment of the Appeals Court judgment by the Supreme Court of Justice was a violation of judicial independence. The Commission and the representatives argued that all the aforementioned affects access to justice, for which reason they alleged the violation of Article 8.1 [200] and Article 25[201] of the American Convention.

180. Furthermore, the representatives argued that the Supreme Court "admitted [d] a remedy of complaint […], in a case that was inadmissible, breaching the rules of due process and the [internal objective] independence of judges" and by ordering a disciplinary sanction to be applied to the Judges of the Court of Appeals of Temuco "for having a specific interpretation" of the Civil Code. They considered that "through a remedy which by legal stipulation does not constitute an instance, as is the case of the *recurso de queja* (remedy of complaint), the Supreme Court heard and issued a ruling in a case that had already been decided and processed by the pertinent authorities before the respective competent courts." Moreover, the representatives argued a violation of the right to judicial fairness because the decision of the Supreme Court "is based on prejudice and lack[ed] a rational and juridical basis." Finally, they indicated that Ms. Atala does not wish "once again [...] to subject [the girls] to the pressure of a custody trial [...] renouncing the return [... of] the girls to the family unit with their mother."

181. The State argued that "the Supreme Court of Justice did not exceed its powers, nor did it abuse them when, after confirming the grave misconduct or abuse, and endorsing the remedy of complaint, it decided to annul the appealed ruling, issuing instead a replacement judgment." On the other hand, the State denied a violation of Article 25.1 of the Convention with the argument that the petitioner "could have and can still try to revoke the decision of the Supreme Court by filing […] a new custody petition regarding the girls, with the only requirement of proving that any of the circumstances that prompted the judgment has changed," given that the ruling that grants custody to the girls' father "only has formal *res judicata*." It concluded that "in order to affect the right to appeal against a judicial ruling, it is necessary to prove the existence of a violation of the due process when this was issued, without the aggrieved party having a means of appeal, whatever that may be, through which it may revert the alleged breach of fundamental rights."

Considerations of the Court

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200 Article 8.1 of the American Convention(Right to a Fair Trial) establishes that:

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

201 Article 25.1 of the American Convention(Right to Judicial Protection) provides:

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

182. In the instant case, the Supreme Court of Justice considered that the judges of the Appeals Court of Temuco "committed a fault or abuse both in applying the legal provisions that govern the matter, and in assessing the background of the case in which they issued the judgment that gave rise to the remedy [of complaint]" [202].

183. In this regard, the Court noted that the argument of the representatives regarding the wrongful acceptance of the remedy of complaint by the Supreme Court of Justice is directly related to the alleged non-existence of a grave fault by the Court of Appeals of Temuco. In this regard, it should be noted that the *recurso de queja* (remedy of complaint) in Chile is established in Article 545 of the Organic Code of Courts.[203] It is a disciplinary remedy that has its source in Article 82 of the Constitution[204] and, in general is based on the jurisprudential practice of the Superior Courts of Justice, the Courts of Appeals, and the Supreme Court of Justice.[205]

184. In the opinion of the expert Marín, the practice of using the remedy of complaint as a means to have judgments revised distorted the procedural system by using the cassation appeal, as the natural jurisdictional appeal established in domestic law, to correct the errors of lower court judges.[206] According to the expert, the complaint appeal caused *de facto* the creation of a third instance, where the Supreme Court distorted the facts proven in the respective court and the way in which the judges had assessed said evidence.[207]

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[202] Judgment of the Supreme Court of Justice of Chile, May 31, 2004 (record of appendices to the petition, volume V, page 2673).

[203] Cf. Article 545 of the Organic Code of Courts states: The sole purpose of the *recurso of queja* (remedy of complaint or complaint appeal) is to correct serious faults or abuses committed in the issuance of a jurisdictional ruling. It shall only be admissible when the fault or abuse is committed in an interlocutory decision that puts an end to the case or makes its continuation impossible, and there is no ordinary or extraordinary remedy available, without prejudice to the ability of the Supreme Court to act *ex officio* in the exercise of its disciplinary powers. Final, first or single-instance rulings issued by arbitrators are excepted, in which case the *recurso of queja* shall be admissible, in addition to the cassation appeal with respect to procedure. The decision that accepts the *recurso of queja* shall contain precise considerations to demonstrate the fault or abuse, as well as the obvious and serious errors and omissions that constitute them and that exist in the decision that produces the *recurso,* and shall determine the measures conducive to remedying said fault or abuse. In no case may it modify, amend, or invalidate judicial decisions with respect to which the law provides ordinary or extraordinary jurisdictional remedies, unless a *recurso of queja* filed against a first or single instance final decision issued by arbiters or arbitrators is involved. In the event that a superior court of justice, making use of its disciplinary authorities, annuls a jurisdictional ruling it must apply the disciplinary measure or measures considered appropriate. In the event that a superior court, making use of its disciplinary powers, invalidates a jurisdictional decision, it shall apply the relevant disciplinary measure or measures. In such case, the chamber shall provide that the full court is informed regarding the history for purposes of imposing the appropriate disciplinary measures, given the nature of the faults or abuses, which may not be less than a private admonition" (record of merits volume XI, page 5398).

[204] Article 82 of the Political Constitution states that "the Supreme Court is entrusted with the executive, correctional and economic supervision of all the Courts of the nation. The Constitutional Court, the Elections Qualifying Court and the Regional Electoral Courts are excepted from this norm" (record of merits, volume XI, page 5393).

[205] *Cf.* Written report of the expert Dr. Juan Carlos Marín González on complaint appeals in Chile (record on merits, volume XI, page 5393 and 5411).

[206] *Cf.* Written report of the expert Dr. Juan Carlos Marín González on complaint appeals in Chile (record on merits, volume XI, page 5411).

[207] In this regard, expert Marín cited the legislative reasons for the approval of law 19.374 of 1995, which modified the complaint appeal and jurisprudence of the Supreme Court of Justice, to explain that Chilean legislators modified the complaint appeal with the objective of limiting this disciplinary recourse and preventing the distortion of the procedural system and of the jurisdictional function of the superior courts of justice, in order to prevent abusive practices and, therefore, the revision of trials through a third instance that openly breaches the principle of bilateralism of the hearing. *Cf.* Written report of the expert Dr. Juan Carlos Marín González on the complaint appeal in Chile (record on merits, volume XI, page 5397, 5398, and 5400).

185. Furthermore, the Court notes that, according to the Chilean legal doctrine forwarded by the State, the complaint appeal is defined as "the procedural juridical act directly presented by a party before a higher Court and against the judge or judges who issued a ruling in a given proceeding containing a serious fault or abuse, and requesting a prompt remedy to the wrongdoing that prompted the filing of their appeal through its correction, annulment, or invalidation, without detriment to the application of the appropriate disciplinary sanctions, according to that Court, regarding the judge or judges against whom the appeal was filed."[208] Said remedy is filed "directly before a Court of higher rank than the one that issued the ruling with the serious fault or abuse, so that it may be considered and resolved by that court." It is not filed against a ruling, but against the judge or judges that issued the ruling with a serious fault or abuse, so that it may be modified, corrected, or left without effect. The appeal has not been "created to correct simple errors of interpretation, but judicial faults or abuses that fall within the scope of the disciplinary jurisdiction of the higher court. Therefore, it does not constitute an instance for the revision of all matters *de facto* and *de iure*, but it only allows the superior court to examine if a serious fault or abuse was committed. The higher court is empowered to revoke, correct, or invalidate the ruling[209]. The fault or abuse committed by a judge may stem from the formal breach of the law, an erroneous interpretation of the law, or a faulty assessment of the background of the proceedings[210].

186. In considering whether or not, in this case, the guarantees of judicial independence were ignored by accepting the remedy of complaint, the Court recalls that one of the main objectives of the separation of public powers is to guarantee the independence of judges, for the purpose of preventing the judicial system and its members from being subject to wrongful restrictions in the exercise of their role by bodies foreign to the Judicial Power or even by senior judges that carry out review or appeal duties.[211] Moreover, the guarantee of judicial independence includes guarantees against external pressures[212], and therefore the State must abstain from undue interference with the Judiciary or its members, that is, in relation to a specific judge, and must prevent such intrusions and investigate and sanction those who commit them.[213]

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208 *Cf.* Mario Mosquera Ruíz, Cristián Maturana Miquel, Los Recursos Procesales, 2010, Juridical Editorial of Chile, Santiago, Chile, page 383, as documentary evidence enclosed by the State with the brief on final arguments (record on merits, volume XII, page 5945).

209 *Cf.* Mario Mosquera Ruíz and Cristián Maturana Miquel, *Los Recursos Procesales*, pages 383 and 384, *supra* note **¡Error! Marcador no definido.**, pages 5945 and 5946.

210 *Cf.* Mario Mosquera Ruíz, Cristián Maturana Miquel, *Los Recursos Procesales*, page 387, *supra* note **¡Error! Marcador no definido.**, volume XII, page 5949.

211 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, para. 55 and *Case of Reverón Trujillo v. Venezuela*, para. 67.

212 *Cf. Case of the Constitutional Court v. Peru, Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 71, para. 75, and *Case of Reverón Trujillo*, *supra* note **¡Error! Marcador no definido.**, para. 80. See also ECHR. *Case of Campbell and Fell v. the United Kingdom,* (No. 7819/77; 7878/77), Judgment of June 28, 1984, para. 78, and *Case of Langborger v. Sweden*, (No. 11179/84), Judgment of June 22, 1989, para. 32. See also Principles 2, 3, and 4 of the Basic Principles of the United National regarding the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan on August 26-September 6, 1985, and confirmed by the General Assembly in resolutions 40/32 of November 29 1985 and 40/146 of December 13, 1985.

213 *Cf. Case of Reverón Trujillo supra* note **¡Error! Marcador no definido.**, para. 146.

187. The Court considers that in this case there are not sufficient evidentiary elements to infer the existence of external pressures against the judges who considered the case of the ruling against Ms. Atala. On the other hand, given that the judges of the Court of Appeals of Temuco who were sanctioned for the remedy of complaint are not alleged victims in the present case, this limits any ruling that the Court may issue in relation to a possible violation of Article 8.1 of the Convention for said decision to sanction.

188. Finally, the Court has previously emphasized that, since it is not a fourth instance, it cannot assess the evidence regarding which of the parents of the three girls offers them a better home (*supra* para. 66). Similarly, since this Court is not a fourth instance, it cannot issue a ruling on the dispute between different sectors of the local doctrine on the scope of domestic law regarding the requirements for the admissibility of a remedy of complaint.

189. On the other hand, regarding the Supreme Court's impartiality in issuing its decision on the remedy of complaint, the Court recalls that judges who intervene in a particular dispute are required to approach the facts of the case impartially, without subjectivity or prejudice and, at the same time, offer sufficient guarantees of an objective nature that would eliminate any concerns that a defendant or the community might have regarding a lack of impartiality. While personal or subjective impartiality is presumed unless there is evidence to the contrary, for example proof that a member of a court or the judge has shown personal prejudice or partialities against the parties, the so-called objective evidence consists in determining whether the questioned judge provided convincing elements that would dispel any legitimate fears or well-based suspicions of prejudice regarding their conduct. Thus, a judge must appear to act without being subject to influences, incentives, pressures, threats, or interference, direct or indirect,[214] but instead only and exclusively according to the Law.[215]

190. The Inter-American Court points out that, while it is true that in the case at hand some violations to the Convention have been declared, a violation of Article 8.1 of the Convention for the alleged lack of judicial impartiality must be established based on specific, concrete evidentiary elements that indicate a situation in which the judges have clearly allowed themselves to be influenced by aspects or criteria outside of the legal provisions.

191. The Court finds that neither the Commission nor the representatives have provided specific evidence to disprove the presumption of the judges' subjective impartiality. Nor are there any convincing elements that might call into question the objective impartiality of the Villarica Court's decision regarding provisional custody or of the judgment of the Supreme Court. An interpretation of the provisions of the Chilean Civil Code in a manner contrary to the American Convention in matters of child custody involving a homosexual individual is not enough, in itself, for this Court to declare a lack of objective impartiality.

192. Therefore, the Court considers that the State did not violate the judicial guarantees recognized in Article 8.1 of the Convention, in relation to the decision of the Supreme Court of Justice and the Villarrica Court in this case.

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[214] Principle 2 of the Basic Principles of the United Nations regarding the Independence of the Judiciary, *supra* note 212.

[215] *Case of Apitz Barbera et al. supra* note **¡Error! Marcador no definido.**, para. 56.

2. Right of the girls M., V., and R. to be heard and to have their opinions be taken into consideration

Arguments of the parties

193. The Commission noted as "particularly serious in the custody proceedings, the Supreme Court's failure to take the girls' preferences and needs into account, in contrast what occurred in the lower courts." It added that "the Supreme Court of Justice of Chile made no efforts to hear the girls."

194. The representatives argued that even though "there are procedural mechanisms carefully designed to make sure that children's views are taken into consideration in the decisions that affect them and that decisions are in fact made in their interest, before that of any other person that intervenes[,] [t]he Supreme Court completely ignored these mechanisms and arbitrarily decided to give greater weight to opinions based on prejudice and stereotypes, to the detriment of the expert opinion of professionals and, even more important, of the girls themselves, unlike the action of the lower-instance courts."

195. The State indicated that "in the context of considering a mechanism of appeal, such as a remedy of complaint, there is no procedural opportunity to repeat the statements given by the girls, and this is unnecessary based on due process. From the standpoint of the girls' interest and protection it is counterproductive, as well as unnecessary, to require them to make another statement in the same proceedings regarding their parents' separation and their desire to live with one of them, thereby increasing their level of victimization." The State added that "the girls *were* heard by the lower courts and the Supreme Court had access to these prior statements." Furthermore, it indicated that, "on the other hand, the principle of recognizing the girls' autonomy and subjectivity in no case implies, nor can it seek to impose upon them, the final responsibility of deciding their fate. […] When there is conflict between the views and wishes of the boy, girl, or teenager and their "best interest", [...], and their compatibility is not possible, their interest must necessarily prevail over their wishes, since otherwise the special regimen of protection they enjoy would no longer have a reason to exist."

Considerations of the Court

196. The Court emphasizes that children enjoy the rights established in the American Convention, in addition to the special measures of protection contemplated in Article 19 of the Convention, which must be defined according to the circumstances of each specific case.[216] In the instant case, the Court notes that Article 8.1 of the American Convention embodies every person's the right to be heard, including children, in proceedings in which their rights are determined. This right must be interpreted in light of Article 12 of the Convention on the Rights of the Child,[217] which contains appropriate stipulations on the

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[216] *Case of Gelman v. Uruguay, Merits and Reparations,* Judgment of February 24, 2011, Series C No. 221, para. 121.

[217] Article 12 of the Convention on the Rights of the Child states: 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

child's right to be heard, for the purpose of facilitating the child's intervention according to his age and maturity and ensuring that it does not harm his genuine interest[218].

197. Specifically, General Comment No. 12 of 2009 of the United Nations Committee on the Rights of the Child emphasizes the relationship between the "best interest of the child" and the right to be heard, when it states that "there can be no correct application of Article 3 if the components of Article 12 are not respected [(best interest of the child)]. Likewise, Article 3 reinforces the functionality of Article 12 facilitating the essential role of children in all decisions affecting their lives" [219].

198. In order to determine the scope of the terms described in Article 12 of that Convention, the Committee clarified a number of points such as: i) "States parties cannot begin with the assumption that a child is incapable of expressing her or his own views;"[220] ii) "it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter"[221]; iii) the child can express her or his views without pressure and can choose whether or not she or he wants to exercise her or his right to be heard; iv) "implementation of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child's parents or guardian;"[222] v) "the capacity of the child […]has to be assessed in order to give due weight to her or his views, or to communicate to the child the way in which those views have influenced the outcome of the process;"[223] vi) "children's levels of understanding are not uniformly linked to their biological age," for which reason the maturity of the child must be determined based on "the capacity […]to express their views on issues in a reasonable and independent manner" [224].

199. On the other hand, the Court reiterates that children exercise their rights progressively as they develop a greater level of personal autonomy[225]. Consequently, those responsible for applying the law, whether in the administrative or judicial sphere, must take into account the specific conditions of the child and his or her best interests to decide on the child's participation, as appropriate, in determining his or her rights. This consideration will

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218 *Cf.* Advisory Opinion OC-17/02, *supra* note 122, para. 99. For its part, the United Nations, Committee on the Rights of the Child has established that the right "to be heard in any judicial and administrative proceedings affecting the child" implies that "this provision applies to all relevant judicial proceedings affecting the child, without limitation". United Nations, Committee on the Rights of the Child, General Comment No. 12 (2009). The right of the child to be heard, CRC/C/GC/12, July 20, 2009, para. 32. In particular, UNICEF has indicated that "'any judicial […] proceedings affecting the child' covers a very wide range of court hearings, including all civil proceedings such as divorce, custody, care and adoption proceedings, name-changing, judicial applications relating to place of residence, religion, education, disposal of money and so forth, judicial decision-making on nationality, immigration and refugee status, and criminal proceedings; it also covers States' involvement in international courts." UNICEF, Implementation Handbook for the Convention on the Rights of the Child (Third edition fully revised) 2007, p. 156.

219 Committee on the Rights of the Child, General Comment No. 12, *supra* note 218, para. 74.

220 Committee on the Rights of the Child, General Comment No. 12, *supra* note 218, para. 20

221 Committee on the Rights of the Child, General Comment No. 12, *supra* note 218, para. 21

222 Committee on the Rights of the Child, General Comment No. 12, *supra* note 218, para. 25

223 Committee on the Rights of the Child, General Comment No. 12, *supra* note 218, para. 28

224 Committee on the Rights of the Child, General Comment No. 12, *supra* note 218, para. 30

225 *Cf.* Committee on the Rights of the Child, General Comment No. 7, *supra* note 171, para. 17.

seek as much access as possible by the minor to the examination of his or her own case[226]. Likewise, the Court considers that children should be informed of their right to be heard directly, or through a representative, if they so wish. In this regard, where a conflict of interests arises between the mother and the father, the State must guarantee, as far as possible, that the child's interests are represented by someone outside said conflict.

200. In this regard, the Committee on the Rights of the Child has emphasized that Article 12 of the Convention on the Rights of the Child not only establishes the right of each child to express his views in all matters affecting him, but also includes the subsequent right to have these views taken into consideration, according to the child's age and maturity[227]. It is not sufficient to listen to the child; the child's views must be seriously considered when he or she is capable of forming his or her own opinion, and for this reason the views of the child must be assessed on a case-by-case basis[228]. If the child is capable of forming his or her own views in a reasonable and independent manner, the decision maker must consider the child's views as a significant factor in the settlement of the issue[229]. Therefore, in the context of judicial decisions on custody, all legislation on separation and divorce must protect the child's right to be heard by those responsible for making decisions[230].

201. In the instant case, the Court notes that on April 8, 2003 the Juvenile Court of Villarrica heard M., V., and R., in a private hearing and that "records of the private hearing were kept in a closed envelope in the Court's merits box"[231]. In addition, the ruling on the provisional custody petition by the Juvenile Court of Villarrica on May 2, 2003, stated "[t]hat, as recorded in the main custody file, the girls were heard at a private hearing" [232].

202. For its part, the judgment of the lower court indicated "[i]t is proven in the records kept in the court's safe that the minors were heard by this [Court]. In this hearing it was confirmed that the three minors wish for their parents to get back together, and in the last of the hearings held on October 8, 2003, [R.] and [V.] expressed their desire to go back to living with their mother, and in the case of [M.] the court only detected a slight preference for the mother figure"[233]. Furthermore, the Court clarified that "the hearings ordered to listen to the girls had the exclusive purpose of complying with the mandate of […] Article 12 of the Convention of the Rights of the Child and are simply an element to be considered, but they do not determine the decision […], by reason of their young age [the girls] are not in a position to issue a legally valid opinion regarding their situation and considering also that the opinion of the minors can be "affected artificially by outside factors that influence them, distort them, or make them unsuited to the proposed goal"[234]. Finally, the Juvenile Court

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[226] Advisory Opinion OC-17/02, *supra* note 122, para. 102

[227] *Cf. Committee on the Rights of the Child, General Comment* No. 12, *supra note* 218, para. 15.

[228] *Cf. Committee on the Rights of the Child, General Comment* No. 12, *supra note* 218, paras. 28 y 29.

[229] *Cf. Committee on the Rights of the Child, General Comment* No. 12, *supra note* 218, para. 44.

[230] *Cf. Committee on the Rights of the Child, General Comment* No. 12, *supra note* 218, paras. 28 y 29.

[231] Records of the Juvenile Court of Villarrica of April 8, 2003 (record of appendices to the petition, volume I, page 350).

[232] Decision on the provisional custody petition by the Juvenile Court of Villarrica, May 2, 2003, considering paragraph No 7. (record of appendices to the petition, volume V, page 2565).

[233] *Cf.* Judgment of the Juvenile Court of Villarrica of October 29, 2003, considering clause No. 36 (record of appendices to the petition, volume V, page 2605).

[234] *Cf.* Judgment of the Juvenile Court of Villarrica of October 29, 2003, considering clause No. 36 (record of appendices to the petition, volume V, page 2605).

took into consideration a series of psychological reports which it ordered to determine the girls' psychological and emotional status[235].

203. In this regard, the Court finds that the first instance court in the custody proceeding complied with the obligations arising from the child's right to be heard in a judicial proceeding that affects them, since it is clearly stated that the views of the three girls were taken into account, bearing in mind their maturity and capacity at that time.

204. On the other hand, the Court notes that there is no evidence in the custody case file stating that the girls were heard again by the Supreme Court of Justice of Chile in the context of the decision on the remedy of complaint, nor is there any mention in the ruling issued by the Supreme Court regarding the decision to set aside the wishes expressed by the girls during the proceedings.

205. In the present case, the Court takes note of the unique nature of the remedy of complaint, which is mainly a disciplinary recourse against lower court judges and in which no evidence other than at already presented during the entire custody hearing is gathered (*supra* para. 185). Likewise, this Court cautions that a child must not be interviewed more often than necessary, particularly when disturbing events are investigated, since the process of "hearing" a child may be difficult and may cause traumatic effects in the child[236]. Therefore, the Court does not consider that the Supreme Court needed to hold a new hearing in the context of the decision on the remedy of complaint to hear the girls express their preferences regarding which parent they would rather live with, if there were already several pieces of evidence in the custody case file that confirmed their wishes.

206. However, the fact that a judicial authority is not required to gather the testimony of a child once again in the context of a judicial proceeding, does not release it from the obligation to duly consider and assess, in one way or another, the views expressed by the child in the lower courts, according to the child's age and maturity. If appropriate, the respective judicial authority must argue specifically why it will not take into account the child's views. In this regard, the expert García Méndez stated that:

> In any type of conflict between children's views and those of the parental authority or institutional authorities, […] the child's opinion cannot be thrown out discretionally. In other words, this means that […] very sophisticated arguments must be developed to eventually oppose the children's views. [T]he child's opinion does not automatically create case law […]. But similarly, the child's views cannot be automatically disregarded without offering weighty and profound arguments [237].

207. Likewise, the expert Cillero Bruñol stated that:

> [There is] an obligation [on the part of the state authorities] to consider their opinion in deliberations that lead to a decision that affects children. […] [T]he adults responsible for the decision must not decide arbitrarily when the child says something relevant to the decision […]. […] If the children are sufficiently developed in their opinions and points of view, these must prevail in matters affecting them, unless there are very serious reasons against them. This means that if the children's opinions are well-based, precise, with sufficient knowledge of the facts and the consequences they imply, they must *prima facie* prevail over other arguments to determine the decision that will affect the child in what refers to the facts and states that involve him. This priority is demanded by the principle of the best interest of the child of Article 3 of the [Convention on the Rights of the Child]. The foregoing does not mean that the determination of the child's best interest is always going to coincide in the specific case with the child's opinions, even when

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235 *Cf.* Judgment of the Juvenile Court of Villarrica of October 29, 2003, considering clause No. 36 (record of appendices to the petition, volume V, page 2589).

236 *Cf. Committee on the Rights of the Child, General Comment* No. 12, *supra* note 218, para. 24.

237 Statement by expert García Méndez at the hearing in the present case held on August 23, 2011.

> the child has the required age and maturity to have his own opinion […] The judge or person responsible for the proceedings must reasonable assess the weight of the child's opinions, in relation to their consequences for the totality of their fundamental rights, as well as with regard to the level of maturity of the child, but this assessment […] demands a superior argumentative burden for the decision that is different to the child's opinion[238].

208. The Court finds that the Supreme Court of Justice did not explain in its judgment how it assessed or took into consideration the statements and preferences expressed by the girls and included in the case file. Indeed, this Court notes that the Supreme Court did not adopt a decision that considered the relevance attributed by said Court to the living arrangements preferred by the minors and the reasons why it did not rule in accordance with the wishes expressed by the three girls. On the contrary, the Supreme Court simply based its decision on the alleged best interest of the three minors without giving reasons for why it considered it legitimate to contradict the wishes expressed by the girls during the custody proceeding, particularly given the connection between a child's right to participate and the goal of complying with the principle of the child's best interest (*supra para*. **¡Error! No se encuentra el origen de la referencia.**). Accordingly, the Court concludes that the aforementioned decision by the Supreme Court of Justice violated the girls' right to be heard and be duly taken into account, embodied in Article 8.1, in connection with Articles 19 and 1.1 of the American Convention, to the detriment of the girls M., V. and R.

VI
RIGHT TO EQUALITY AND THE PROHIBITION OF NON-DISCRIMINATION, RIGHT TO A PRIVATE LIFE AND RIGHT TO JUDICAL GUARANTEES IN RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS IN RELATION TO THE DISCIPLINARY INVESTIGATION

209. One of the aspects of the dispute is the disciplinary proceeding carried out against Ms. Atala. Regarding this matter, this chapter will establish the proven facts in that case and will then analyze the controversies surrounding: i) the right to equality; ii) private life, and iii) judicial guarantees.

C. Facts proven regarding the disciplinary investigation against Ms. Atala

210. On March 17, 2003 the President of the Committee of Judges of the Court of Oral Trials in criminal matters of Villarrica informed the Visiting Minister of the Court of Appeals of Temuco, Mr. Lenin Lillo, "of a specific situation that occurred on the 12th" of March, 2003. In said brief, the President of the Committee of Judges stated that Ms. Atala had requested that one of her subordinates "transcribe, draw up and print official letters on behalf of the Juvenile Court of Villarrica, requesting proceedings in the custody case […] in which said superior judge [was] a litigating party". Moreover, he stated that "he held a private meeting [with] the Judge Atala Riffo […] warning of the inappropriateness of her actions and her interference in the sphere of another Court, where she [was] not a judge but a defendant"[239].

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[238] Expert report offered by Miguel Cillero Bruñol on the treatment of the principle of the best interest of the child in International Law, July 2011 (record on merits, volume II, pages 935, 939, 940)

[239] Brief of the President of the Committee of Judges of the Court of Oral Criminal Trials of Villarrica, March 17, 2003 (record of merits, volume XIII, page 7040).

211. On that same day and on March 19, 2003, the full Court of Appeals of Temuco appointed Judge Lenin Lillo[240] to conduct an extraordinary visit to the criminal court of Villarrica where Ms. Atala was serving as a judge. It was stated that the visit "respond[ed] to two basic facts: one, the publications that appeared in the newspapers Las Últimas Noticias […] and La Cuarta […] which mentioned the fact that [Ms.] Atala was a lesbian"[241] and the other concerned the facts described in the complaint filed on March 17, 2003.

212. After the visit to the Court where Ms. Atala served as a judge, Mr. Lillo filed a report before the Court of Appeals of Temuco,[242] making reference to three alleged irregularities, namely: i) "use of resources and employees to comply with proceedings ordered by the Judge […] of the Juvenile Court;" ii) "improper use of the court's seal," and iii) "publications made in the press." Regarding the first point, he described the facts reported by the President of the Committee of Judges and concluded that said facts "were, in the opinion of [that] visitor especially serious given that Ms. […] Atala […], making use of resources and employees of the Court of which she forms part, has become directly involved in complying with actions ordered in the trial that is taking place in the Juvenile Court." Regarding the second point, Mr. Lillo stated that "it was especially serious because Judge Karen Atala had overstepped her powers by using elements of the Court that are under the responsibility of third parties in order to favor people related to her circle of friends."

213. Finally, Mr. Lillo referred to the publications made in the newspapers "Las Últimas Noticias" and "La Cuarta", informing the public of the custody suit and referring to Ms. Atala's "lesbian relationship."

214. Referring to these matters in his report, Mr. Lillo concluded that:

> This visitor is not inclined to issue value judgments regarding the sexual inclination of Judge Atala. However, it is impossible to sidestep the fact that her peculiar emotional relationship has transcended the private sphere with the appearance of the above-mentioned publications, which clearly damages the image of both Ms. Atala and the Judiciary. All the foregoing takes on a seriousness that merits the notice of the Ilmo Court[243].

215. On April 2, 2003, the Court of Appeals of Temuco approved the visit carried out by Mr. Lillo and filed charges against Ms. Atala[244]. Subsequently, on May 9, 2003 the Court of Appeals issued "a severe warning for the use of resources and staff to comply with proceedings ordered by the Judge of the Juvenile Court […] in a case in which she is one of the parties to the dispute" [245].

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[240] Report prepared by the Minister Lenin Lillo of the Court of Appeals of Temuco of April 2, 2003 (record on merits, volume XII, page 5927).

[241] Report prepared by the Minister Lenin Lillo of the Court of Appeals of Temuco of April 2, 2003 (record on merits, volume XII, page 5927).

[242] Report prepared by the Minister Lenin Lillo of the Court of Appeals of Temuco of April 2, 2003 (record on merits, volume XII, pages 5927 to 5934).

[243] Report prepared by Minister Lenin Lillo of the Court of Appeals of Temuco, April 2, 2003 (record of merits, volume XII, page 5934).

[244] The Court of Appeals of Temuco stated that it "approved the visit carried out by Judge Lenin Lillo […] and charges are filed against Ms. Karen Atala Riffo on the three counts mentioned in the report by the visitor." Decision of the Court of Appeals of Temuco, April 2, 2003 (record of merits, volume XII, page 5935).

[245] Ruling of the Court of Appeals of Temuco, May 9, 2003 (record of merits, volume XII, page 5937).

D. The right to equality and the prohibition of non-discrimination

Arguments of the parties

216. The representatives argued that Ms. Atala "had a stable relationship with her partner that was no different from other couples, except for the fact that her partner was of the same sex," thus "the order to investigate and carry out a visit to the court where Judge Atala worked was based exclusively on a discriminatory rejection of her sexual orientation."

217. The State argued that "the report submitted by Judge Lillo to the full Court of Appeals of Temuco includes a number of serious precedents that called for a 'severe warning´" and that his warning to Ms. Atala "is not at all related to her homosexuality, but instead concerns complaints and facts verified by Judge Lillo."

Considerations of the Court

218. The Court notes that the Court of Appeals of Temuco received a complaint on March 17, 2003 against Ms. Atala for the use of implements and employees of the Court for personal matters (*supra* para. 210). However, the Court notes that, according to the visiting judge's report, other considerations were expressed as the reason for carrying out the visit to Ms. Atala's work place. These expressly referred to Ms. Atala's sexual orientation since they were related to "the reports published in the newspapers "La Cuarta" on February 28, [2003] and "Las Últimas Noticias" dated March 1, [2003], in which the public was informed of the content of a custody claim filed by [Mr. López] against his wife […] because the latter maintained a lesbian relationship with another woman" [246]. Thus, one of the reasons for the visit to Ms. Atala's work place was to confirm the press reports about her sexual orientation.

219. The Court notes that the disciplinary investigation and the extraordinary visit mentioned have their legal basis in Articles 544 No. 4,[247] 559,[248] and 560[249] of the Organic Code of Courts. Since one of the purposes of the visit was to investigate Ms. Atala's sexual orientation based on the press reports, the Court finds that Ms Atala received a differentiated and unlawful treatment by having her sexual orientation and her relationship

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[246] Report prepared by Judge Lenin Lillo of the Court of Appeals of Temuco, April 2, 2003 (record of merits, volume XII, page 5934).

[247] Article 544 No. 4, upon which the Report prepared by Judge Lenin Lillo of the Court of Appeals of Temuco of April 2, 2003 is based (record on merits, volume XII, page 5927), states that: "the disciplinary powers that correspond to the Supreme Court or the Courts of Appeals must be exercised especially regarding officials of the judiciary that are in any of the following situations: […] 4. When, due to irregularity in their moral behavior or due to vices that are not well regarded by the public, they compromise the decorum of their ministry. Available at: http://www.leychile.cl/Navegar?idNorma=25563 (last access February 20, 2012), electronic address provided by the State (record of merits, volume XII, page 5914).

[248] Article 559 states that: The Superior Courts of Justice will order extraordinary visits by any of its ministers at the courts within their respective jurisdictional territory, provided this is required for a better judicial service. Available at: http://www.leychile.cl/Navegar?idNorma=25563 (last access February 20, 2012) (record of merits, volume XII, page 5914).

[249] Article 560 states: The Court will extraordinarily order these visits in the following cases: 1. When it concerns civil cases that may affect international relations and over which the courts of justice have competence; 2. When it concerns an investigation of facts or crimes that must be heard by the military justice system and that may affect international relationships or that cause public alarm and they demand a prompt repression due to their seriousness and damaging consequences, and 3. Whenever it is necessary to investigate facts that affect the behavior of judges in the exercise of their duties and when there is a notable delay in the processing of the matters submitted to said judges. Available at: http://www.leychile.cl/Navegar?idNorma=25563 (last access February 20, 2012) (record of merits, volume XII, page 5914).

with a person of the same sex included as an aspect to be investigated in the disciplinary proceedings.

220. Finally, the State argued that the "warning" issued by the Court of Temuco was based "solely" on "the use of resources and employees to carry out proceedings diligences ordered" by the court in charge of the custody trial, and therefore Ms. Atala was not being sanctioned, according to that argument, for her sexual orientation. However, the Court notes that the report prepared by the visiting judge, which was later approved by the Court of Appeals of Temuco, and based on which charges were filed against Ms. Atala, stated that "it is impossible to ignore the fact that her peculiar emotional relationship has transcended the private sphere with the appearance of the aforementioned publications, which clearly damages the image of both [Ms.] Atala and the Judicial Branch. All the foregoing takes on a seriousness that merits the Court's notice"[250]. Therefore, although the Court of Temuco did not expressly sanction Ms. Atala for her sexual orientation, that aspect was included in the considerations of the report prepared by the visiting judge, whose legitimacy was not disavowed or questioned by the Court of Temuco.

221. Now, regarding the legitimate purpose pursued by said investigation, the Court notes that the report submitted did not clearly state the purpose of the visit with respect to the inquiry regarding sexual orientation, since it only referred to the press reports published. In that regard, although the legitimate purpose was not made explicit in the report, from the comments made therein it is possible to infer that the inquiry regarding Ms. Atala's sexual orientation sought to protect the "image of the judicial branch." However, the alleged protection of the judiciary's image cannot justify a difference in treatment based on sexual orientation. Furthermore, the purpose served by making a difference in treatment of this nature must be concrete and not abstract. In this specific case, the Court does not find any connection whatsoever between the desire to protect the "image of the judicial branch" and Ms. Atala's sexual orientation. A person's sexual orientation or the exercise thereof cannot provide grounds, under any circumstances, to undertake a disciplinary proceeding, since there is no connection between the correct performance of a person's professional duties and their sexual orientation.

222. Therefore, since differentiation in a disciplinary inquiry based on sexual orientation is discriminatory, the Court concludes that the State violated Article 24 in conjunction with Article 1.1 of the American Convention to the detriment of Karen Atala Riffo.

C. Right to private life

Arguments of the parties

223. The representatives stated that the investigation amounted to interference with the private life of Ms. Atala, since her "office was searched […], including her computer and printer, staff members of the court [were] interviewed […] on possible visits [Ms.] Atala had received from women [and Ms.] Atala was questioned about her private life and her relationship with her partner." They added that "[Ms.] Atala was unlawfully exposed before her social and professional community, violating her private life."

[250] Report prepared by Judge Lenin Lillo of the Court of Appeals of Temuco of April 2, 2003 (record on merits, volume XII, page 5934).

224. The State indicated that the visit "did not result in any administrative sanctions against [Ms.] Atala, since the Court of Appeals of Temuco considered that her private activities and her family life did not hinder her judicial work."

Considerations of the Court

225. As mentioned previously (*supra* para. **¡Error! No se encuentra el origen de la referencia.**), Article 11 of the Convention prohibits any arbitrary or abusive interference with the private life of persons, and therefore the realm of privacy is exempt and immune to abusive or arbitrary intrusion or aggression by the public authorities[251]. According to the Court's jurisprudence, to determine whether there was arbitrary interference with private life it is necessary to analyze, among other requirements, the legality and purpose of the measure.

226. In this case, Ms. Atala stated the following regarding the visit paid to her work place:

> "the minister [Lillo] sat down at my desk, in my office, checked my personal computer, checked all the websites I had visited. Afterwards he questioned all the staff members at the Court, one by one, and also questioned the cleaning staff and then my fellow judges because I was member of a three-judge collegiate and he went to the Court of Guarantees, because I was a member of the Oral Criminal Court. He questioned the two judges there as well as the secretary of the Court of Villarrica. That is, he questioned 6 colleagues asking them whether or not I was a lesbian" [252].

227. Faced with this treatment, Ms. Atala stated that:

> "I felt deeply humiliated, exposed, as if I had been stripped naked and thrown into a public square"[253].

228. Ms. Atala also explained that, prior to the extraordinary visit, the Court of Appeals of Temuco had sent the officials of the Court of Villarrica a questionnaire with questions to investigate Ms. Atala's sexual condition[254]. These statements were not contested by the State.

229. Specifically, the Court notes that in the report on Judge Lillo's visit the following facts were stated as conclusions: i) that Ms. Atala "began to be visited in her office by a large number of women starting in mid 2002,"[255] including her current partner "with whom she would spend hours in her office;" ii) that she asked a court employee to "sketch a ring based on some models she gave him[,]downloaded from the internet from a page called "breaking the silence", which was managed by sexual minorities;" iii) that Ms. Atala "was visited at the Court by" her partner's "parents" and that she introduced them "as her in-laws;" iv) that Ms. Atala used the Court's fax "to send information about sexual minorities to

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[251] *Cf. Case of the Ituango Massacres*, *supra* note 177, para. 194 and *Case Fontevecchia and D`Amico*, *supra* note 28, para. 48.

[252] Statement by Ms. Karen Atala Riffo rendered before the Inter-American Court at a public hearing in the present case.

[253] Statement by Ms. Karen Atala Riffo rendered before the Inter-American Court at a public hearing in the present case.

[254] Statement by Ms. Karen Atala Riffo rendered before the Inter-American Court at a public hearing in the present case.

[255] Report prepared by Judge Lenin Lillo of the Court of Appeals of Temuco of April 2, 2003, *supra* note **¡Error! Marcador no definido.**, page 5933.

institutions," and v) that Ms. Atala "openly expressed her homosexuality" to Mr. Lillo and "defended her determination to openly communicate it to the Court's officials and Senior Judges"[256].

230. The Court finds that, although the disciplinary investigation began with legal grounds[257] and did not end with any disciplinary sanctions against Ms. Atala for her sexual orientation, it did investigate this in an arbitrary manner, which constitutes interference with Ms. Atala's right to privacy, and which extends to her professional sphere. Therefore, the State is responsible for violating the right to privacy, recognized in Article 11.2 in conjunction with Article 1.1 of the American Convention, to the detriment of Karen Atala Riffo.

D. Judicial guarantees

231. The Commission described the "content of the extraordinary visit ordered by the Court of Appeals of Temuco as an example of the lack of fairness and the discriminatory prejudice existing in the Chilean judicial power at the time of the custody trial." It also argued that "the impact of this visit on the custody case with regard to prejudgment, since Judge Lenin Lillo ended up participating in the granting of the injunction on November 24, 2003".

232. The representatives argued that "[w]hen a Court of Appeals of the State of Chile decides to begin a disciplinary proceeding against a judge and appoints a minister to conduct an extraordinary visit because her sexual orientation has been leaked [in the media], there is also a violation of impartiality, since the visit is a procedure that originates due to prejudice." They also argued that the "violation of the right to be judged by an impartial court occurred from the moment that, on November 24, 2003, two judges who had issued a negative opinion regarding Judge Atala's sexual orientation participated in granting the injunction." In particular, the representatives stated that "Judges Lenin Lillo and Archibaldo Loyola were legally disqualified" from participating in granting the injunction issued against the lower-court ruling, since "the first [had] act[ed] as visiting judge in the context of the disciplinary investigation and the second had "directly urged [Ms.] Atala to renounce [custody of] her daughters."

233. The State did not comment on the allegations regarding the extraordinary visit. At the same time it argued that "it is not accurate that the respective chamber of the Court of Appeals of Temuco […] included two Judges legally disqualified to act, given that since the grounds for disqualification were not invoked, it is understood that the party with the right to invoke it waived the exercise of their right."

Considerations of the Court

234. The Court reiterates that the personal impartiality of a judge is to be presumed, unless there is evidence to the contrary (*supra* para. **¡Error! No se encuentra el origen**

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[256] Report prepared by Judge Lenin Lillo of the Court of Appeals of Temuco of April 2, 2003, *supra* note **¡Error! Marcador no definido.**, page 5934.

[257] See disciplinary standards (*supra* para. **¡Error! No se encuentra el origen de la referencia.**).

de la referencia.)[258]. In an analysis of subjective impartiality, the Court should attempt to determine the personal interests or reasons of a judge in a particular case[259]. As to the type of evidence required to prove subjective impartiality, the European Court has indicated the need to ascertain whether the judge has displayed hostility or ill will if he has arranged to have a case assigned to himself for personal reasons[260].

235. The Court has already established (*supra* paras. 222 and 230) that the extraordinary visit affected Ms. Atala's right to equality, non-discrimination and private life. Likewise, it has concluded that it was discriminatory to include Ms. Atala's sexual orientation or her relationship with her partner in the disciplinary investigation, since this had no bearing whatsoever on her professional performance (*supra* para. 221 and therefore there were no grounds to conclude that Ms. Atala's sexual orientation could result in a disciplinary offense. However, the report on the visit to her work place determined that the findings regarding Ms. Atala's sexual orientation "take on a great seriousness that merits the Court's [of Appeals of Temuco] notice. (*supra* para. **¡Error! No se encuentra el origen de la referencia.**).

236. Furthermore, the Court notes the circumstances in which the extraordinary visit took place, since prior to and during the visit, officials and employees of the Court of Villarrica were questioned several times to ascertain Ms. Atala´s sexual orientation and habits (*supra* paras. 228 and 229). It also notes that the conclusions of the report on the visit, which was submitted to the Court of Appeals, were approved on the same day in their totality by said Court, which immediately proceeded to file disciplinary charges against Ms. Atala, among other things, because of her sexual orientation.

237. Bearing in mind the foregoing, the Court considers that prejudices and stereotypes were evident in the report, which demonstrated that those who prepared and approved said report were not objective regarding this matter. On the contrary, they expressed their personal position regarding Ms. Atala's sexual orientation in a disciplinary sphere in which a judicial reprimand for this fact was neither acceptable nor lawful. Consequently, the Court finds that the extraordinary visit and the disciplinary investigation were conducted without the necessary subjective impartiality, and that therefore the State violated Article 8.1 in relation to Article 1.1 of the American Convention to the detriment of Karen Atala Riffo.

238. With regard to Judge Loyola, the Court notes that the file does not contain any evidence that would corroborate the allegation that Mr. Loyola, at a private meeting held in March 2003, had suggested to Ms. Atala that she hand over the custody of her daughters to the father. On the other hand, the Court reiterates that the guarantee of judicial

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[258] In European case law, see ECHR, *Case Kyprianou v. Cyprus*, (No. 73797/01), Judgment of January 27, 2004, para. 119 ("In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary"), citing ECHR, *Case of Hauschildt v. Denmark*, (No. 10486/83), Judgment of May 24, 1989, para. 47.

[259] *Cf.* ECHR, *Case Kyprianou*, *supra* note **¡Error! Marcador no definido.**, para. 118 ("a subjective approach, that is endeavoring to ascertain the personal conviction or interest of a given judge in a particular case").

[260] *Cf.* ECHR, *Case Kyprianou*, *supra* note **¡Error! Marcador no definido.**, para. 119 ("As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will or has arranged to have a case assigned to himself for personal"). Also see ECHR, *Case Bellizzi v. Malta*, (No. 46575/09), Judgment of June 21, 2011. Final, November 28, 2011, para. 52 and the *Case of Cubber v. Belgium*, (No. 9186/80), Judgment of October 26, 1996, para. 25. The European Court also noted that the subjective impartiality of a judge may be determined, according to the specific circumstances of the Case, based on the judge's conduct of the proceeding, the content, arguments and language used in the decision, or the reasons for carrying out the investigation, which would indicate a lack of professional distance regarding the decision. *Cf.* ECHR, *Case Kyprianou v. Cyprus*, (No. 73797/01), G.C., Judgment of December 15, 2005, paras. 130 to 133.

impartiality should be respected by the judicial authorities *ex officio*. Therefore, any judge whose impartiality could be legitimately and objectively called into question, should disqualify himself from participating in adopting the decision[261]. Accordingly, Mr. Lillo should not have participated in the decision of November 24, 2003, after having conducted the extraordinary visit in the context of the disciplinary investigation. Nevertheless, the Court finds that immediately after this ruling the Court of Appeals of Temuco endorsed the considerations of the first instance judge and rendered without effect the injunction[262].

VII
REPARATIONS
(APPLICATION OF ARTICLE 63.1 OF THE AMERICAN CONVENTION)

239. Based on the provisions of Article 63.1 of the American Convention[263], the Court has indicated that any violation of an international obligation that has caused damage entails the duty to provide adequate reparation[264], and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary International Law on State responsibility[265].

240. The State argued that this case "has not entailed a violation of the human rights of Ms. Karen Atala's or those of her three daughters." However, taking into account the violations of the American Convention declared in the preceding chapters, the Court will now consider the requests for reparations made by the Commission and the representatives, as well as the State's observations thereof, in light of the criteria embodied in the Court's case law regarding the nature and scope of the obligation to make reparations, in order to adopt the measures to required to redress the damage to the victims.

241. The reparation of damage caused by a breach of an international obligation requires, wherever possible, full restitution (*restitutio in integrum*), which consists of reinstating the situation prior to the violation. Where this is not feasible, as happens in the majority of cases involving human rights violations, the Court shall decide measures to guarantee the infringed rights, repair the damage caused by the violations and establish an amount in compensation to make good on the damage caused[266]. Therefore, the Court has considered the need to order several measures of reparation in order to fully redress the damage

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261 *Cf.* ECHR, *Case of Micallef v. Malta*, (No. 17056/06), G.C., Judgment of October 15, 2009, para. 98 ("What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw"); ECHR, *Case Castillo Algar v. Spain*, (No. 28194/95), Judgment of October 8, 1998, para. 45.

262 Judgment of The Court of Appeals of Temuco of March 30, 2004 (record of appendices to the petition, volume V, page 2643).

263 Article 63 provides: 1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

264 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C No. 7, para. 25; *Case of Fontevecchia and D`Amico*, *supra* note 28, para. 97.

265 *Cf. Case of Castillo Páez v. Peru. Reparations and Costs.* Judgment of November 27, 1998. Series C No. 43, para. 50 and *Case of Fontevecchia and D`Amico*, *supra* note 28, para. 97.

266 *Cf. Case of Velásquez Rodríguez v. Honduras. supra* nota **¡Error! Marcador no definido.**, para. 26 and *Case of Fontevecchia and D`Amico*, *supra* note 28, para. 98.

caused, and therefore, in addition to pecuniary compensation, the measures of restitution, satisfaction and guarantees of non-repetition are especially relevant[267].

242. This Court has held that reparations must have a causal nexus with the facts of the case, the violations declared, the damages verified and the measures requested to repair the consequences of those damages. Therefore, based on the considerations of the merits and the violations of the Convention declared in the preceding chapters, the Court must adhere to this concurrence in order to rule properly and according to law[268].

A. Injured Party

243. Under the terms of Article 63.1 of the Convention, the Court considers the injured party to be that person who has been declared the victim of a violation of some right enshrined in the Convention.[269] In the case at hand, the Court found that the State violated the human rights of Karen Atala Riffo and her daughters M., V., and R. ((*supra* paras. **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.**, **¡Error! No se encuentra el origen de la referencia.**, 222, 230 and 237). In relation to the girl V., for the purposes of reparations, the terms set forth in paragraph 71 of this Judgment shall apply.

244. The Court notes that the representatives have requested that the reparations be extended to persons that the Inter-American Commission did not name as alleged victims in this case. Specifically, they requested "the full reparation of pecuniary and non-pecuniary damages" allegedly caused to: i) María del Carmen Riffo Véjar, mother of Karen Atala and grandmother of M., V., and R.; ii) Emma Zelmira María de Ramón Acevedo, partner of Karen Atala until 2010; iii) Sergio Ignacio Vera Atala, eldest son of Karen Atala; iv) Judith Riffo Véjar, great aunt of the children M., V., and R; and v) Elías Atala Riffo, brother of Karen Atala.

245. However, the Court points out that the Commission did not argue, either in its Merits report or in the application, that these persons are victims of violations of the rights enshrined in the American Convention. Consequently, and having regard to the Court's case law[270], the Court does not consider the family members of the victims in the present case as the "injured party" and accordingly determines that they shall be entitled to

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[267] *Cf. Case of the Mapiripán Massacre supra* note 93, para. 294 and *Case of Barbani Duarte et al., supra* note 91, para. 2

[268] *Cf. Case of Baldeón García v. Peru. Merits, Reparations, and Costs.* Judgment of April 6, 2006. Series C No. 183 and *Case of Fontevecchia and D`Amico*, *supra* note 28, para. 101.

[269] *Cf. Case of Bayarri v. Argentina*, *Preliminary Objection, Merits, Reparations, and Costs.* Judgment of October 30, 2008. Series C No. 187, para. 126 and *Case of Fontevecchia and D`Amico*, *supra* note 28, para. 101.

[270] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 1, 2009. Series C No. 198, para. 112 and *Case of Mejía Idrovo v. Ecuador, Preliminary Objection, Merits, Reparations, and Costs.* Judgment of July 5, 2011. Series C No. 228, para. 131.

reparations solely as beneficiaries, that is, in the event of the victims' deaths, in accordance with domestic law[271].

246. International jurisprudence and, in particular, the case law of the Inter-American Court has repeatedly held that a judgment *per se* constitutes a form of reparation.[272] Nonetheless, considering the circumstances of the case under examination and the burdens placed upon the victims due to the violations of Articles 24, 11.2, 17.1, 17.4, 19, and 8.1 of the American Convention committed against Ms. Atala and the girls M., V. and R., the Court deems it appropriate to order certain measures of reparation, as explained in the following paragraphs.

B. Obligation to investigate and enforce legal consequences for the officials responsible

247. The Commission requested that the Court order the State to "investigate and enforce the corresponding legal consequences *vis-à-vis* for the members of the judiciary who discriminated against and arbitrarily interfered with the private and family life of Karen Atala, and who failed to fulfill their international obligations to guarantee the best interests of [the girls] M., V., and R."

248. The representatives presented no arguments in this regard.

249. The State indicated that the Commission's request "appears to depart from the jurisprudence" of the Inter-American Court, and expressed its "deep concern" over the request for sanctions against members of the judiciary. The State argued that the Court does not have the authority to "to investigate and sanction the individual conduct of [State] agents who may have [committed] [human rights] violations [as it is only competent] to [adjudge] the international liability of States."

250. In this regard, the Court notes that the Commission did not specify certain matters that would enable the Court to consider this request in depth. For example, it did not indicate whether domestic laws make provision for the disciplinary authorities to investigate the commission of discriminatory acts. Moreover, the specificities of this case were not analyzed in relation to other previous cases in which such measures have been ordered. Consequently, the Court considers that the request submitted by the Commission is not valid.

C. Other measures of full redress: satisfaction and guarantees of non-repetition

251. The Court shall determine other measures that seek to redress the non-pecuniary damage, and shall order measures of public scope or repercussion[273].

1. Rehabilitation: Medical and psychological treatment for the victims

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[271] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") supra* note **¡Error! Marcador no definido.**, para. 114 and *Case of April Alosilla et al. v. Peru. Merits, Reparations, and Costs.* Judgment of March 4, 2011. Series C No. 223, para. 90.

[272] *Cf. Case of Neira Alegría et al. v. Peru. Reparations and Costs*. Judgment of September 19, 1996. Series C No. 29, para. 56 and *Case of Fontevecchia and D`Amico*, *supra* note 28, para. 102.

[273] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and Costs.* Judgment of May 26, 2001. Series C No. 77, para. 84 and *Case of Barrios Family*, *supra* note 31, para. 326.

252. The Commission requested that rehabilitation measures be ordered in favor of the victims. In this regard, the representatives and the State did not present any comments on that request, while the representatives referred to these measures in the context of their request for compensation for pecuniary damage. (*infra* para. **¡Error! No se encuentra el origen de la referencia.**).

253. The Court notes that the evidence offered by the psychiatrists shows several indications that Ms. Atala and her daughters suffer as a consequence of the human rights´ violations that occurred in this case.

254. As in other cases[274], the Court deems it necessary to order a measure of reparation that provides adequate care for the physical and mental ailments suffered by the victims, addressing their specific needs. Therefore, having confirmed the violations and damages suffered by the victims in the present case, the Court orders the State to provide them, freely and immediately, with appropriate and effective medical and psychological care for up to four years. In particular, the psychological treatment must be provided by State institutions and personnel specialized in treating victims of acts such as those that occurred in the instant case. When providing said treatment, the specific circumstances and needs of each victim must be take into account, so that they are offered family and individual treatment, as agreed upon with each one, after an individual evaluation[275]. The treatments must include the provision of medicines and, where appropriate, transportation or other expenses that are directly related and are strictly necessary.

255. In particular, and where possible, the treatment must be provided at the health centers nearest to the victims' places of residence. The victims who request this measure of reparation have a period of six months from notification of this Judgment to advise the State, either in person or through their legal representatives, of their wish to receive medical or psychological care.

2. Satisfaction

a) Publication of the Judgment

256. The Commission requested that the Court order the State to publish the relevant parts of the Judgment issued by the Court.

257. Similarly, the representatives requested the publication of "an excerpt of the proven facts and the complete operative portion [...] twice, on two successive Sundays, in the newspapers "El Mercurio", "La Tercera", "Las Últimas Noticias", and "La Cuarta." Furthermore, the representatives asked the Court to require that the State publish the complete text of the Judgment on the Chilean judiciary's home page "during a period of no less than six months."

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[274] *Cf.* Case *Barrios Altos v. Peru. Reparaciones and Costs*. Judgment of November 30, 2001. Series C No. 87, paras. 42 and 45 and *Case of Barrios Family*, *supra* note 31, para. 329.

[275] *Cf.* Case *19 Comerciantes V. Colombia*. Merits, Reparations and Costs. Judgment of July 5, 2004. Series C No. 109, para. 278 and *Case of Barrios Family*, *supra* note 31, para. 329.

258. The State presented no argument against the reparation sought by the Commission and the representatives.

259. In this regard, the Court considers that, as it has ordered in other cases[276], the State shall publish the following, within six months from the notification of this Judgment:

- the official summary of the Judgment written by the Court, once only, in the Official Gazette;

- the official summary of the Judgment written by the Court, once only, in a newspaper of broad national circulation, and

- the present Judgment in its entirety, to be posted on a government website for a period of one year.

b) Public act acknowledging international liability

260. The Commission requested that the Court order the State to publicly acknowledge its international responsibility.

261. Similarly, the representatives requested a public act of apology to the victims "both verbal and written" to be presided over by the highest State authorities, including "the President of the Republic and the President of the Supreme Court."

262. The State did not comment on the requests from the Commission or the representatives.

263. The Court has determined that in certain cases it is justified that the States acknowledge their responsibility through a public act, in order to achieve its full effect[277]. In this particular case, it is appropriate to adopt a measure of that nature and the State shall make reference to the human rights violations described in this Judgment. The State shall ensure the participation of those victims who wish to be present, and shall invite the organizations that represented the victims in national and international proceedings. The conduct and other details of the public ceremony shall be duly discussed in advance with the victims' representatives. The State is granted a period of one year from the notification of this Judgment to comply with this obligation.

264. Regarding the State authorities who should be present or participate in this act, the Court, as it has done in other cases, states that these authorities must be of high rank. It will be up to the State to decide to whom this task should be entrusted. However, the Judicial Branch must be represented at the ceremony.

3. Guarantees of non-repetition

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276 *Cf. Case of Barrios Altos supra* note **¡Error! Marcador no definido.**, Operative Paragraph 5.d) and *Case of Fontevecchia and D`Amico*, *supra* note 28, para. 108.

277 *Cf. Case of Cantoral Benavides v. Peru. Reparations, and Costs.* Judgment *of December* 3, 2001. Series C No. 88, para. 81 and *Case of the Massacre of Pueblo Bello v. Colombia. Merits, Reparations and Costs*. Judgment of January 31, 2006. Series C No. 140, para. 254.

265. The arguments presented by the Commission and the representatives regarding measures to prevent the repetition of these violations include: i) the training of public officials; and ii) adoption of domestic legislation, reforms and the updating of laws against discrimination.

266. The State argued that these requests "are not admissible" because "[Chilean] national legislation is not discriminatory." It considered that "the application of legislative measures of non-repetition [is only justified] when the international Court declares that a general violation of a fundamental right exists on the part of a State, violations which have not been proven in this case, and should not be, in order to get around the subject of the proceeding." The State argued that "Ms. Atala's statement was not correct" when she indicated at the public hearing that "the judgment of the Supreme Court has given rise to discriminatory case law against homosexual mothers involved in custody battles." The State also mentioned and attached a number of judicial decisions issued by courts of first instance and the Supreme Court in order to demonstrate the Chilean national jurisprudence adheres to international law [278].

267. The Court emphasizes that some discriminatory acts analyzed in the previous chapters relate to the perpetuation of stereotypes that are associated with the structural and historical discrimination suffered by sexual minorities (*supra* para. 92), particularly in matters concerning access to justice and the application of domestic law. Therefore, some reparations must have a transformative purpose, in order to produce both a restorative and corrective effect[279] and promote structural changes, dismantling certain stereotypes and practices that perpetuate discrimination against LGBT groups. It is on this basis that the Court will analyze the requests of the Commission and the representatives.

a. Training for public officials

268. The Commission emphasized the importance of implementing "training programs for judicial authorities" and "campaigns to foster a climate of tolerance regarding a problem that has been hidden."

269. The representatives urged the Court to order that the State "include mandatory courses on human rights with a special emphasis on topics related to gender and

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[278] *Cr.* Judgments of lower courts: *Judgment RIT No. C-178-2005* issued by the Family Court of Santa Cruz; *Judgment RIT No. C-917-2005* issued by the Family Court of Temuco; *Judgment RIT No. C-1075-2008* issued by the Second Family Court of Santiago, and *Judgment RIT No. C-1049-2010* issued by the Family Court of Villarrica. Judgments issued by the Supreme court of Justice of Chile: *Vásquez Martínez*, Case file No. 559-2004 of December 13, 2006; *Albornoz Agüero,* Case file No. 4183-2006 of April 18, 2007; *Massis and Sánchez*, Case file No. 608-2010 of June 24, 2010; *Mesa and De La Rivera*, Case file No. 4307-2010 of August 16, 2010; *Poblete con Díaz*, Case file. 5770-2010 of November 18, 2010; *Barrios Duque*, Case file. 1369-09 of January 20, 2010; *Encina Pérez*, Case file No. 5279-2009 of April 14, 2010; *"Episodio Chihuío"*, Case file No. 8314-09 of January 27, 2011; *Farías Urzúa*, Case file No. 5219-2010 of July 2011; *Iribarren González*, Case file No. 9474-2009 of December 21, 2011; *Silva Camus*, Case file No. 1198-2010 of December 20, 2010; *Figueroa Mercado*, Case file No. 3302-2009 of May 18, 2010; *González Galeano*, Case file No. 682-2010 of August 19, 2011; *Ríos Soto*, Case file No. 6823-2009 of August 25, 2011; *Brothers Vergara Toledo*, Case file No. 789-2009 of August 4, 2010; *Prats González*, Case file No. 2596-2009 of July 8, 2010; *Aldoney Vargas*, Case file No. 4915-2009 of May 5, 2011; *Linares Solís*, Case file No. 2263-2010 of April 27, 2011; *Ortega Fuentes*, Case file No. 2080-2008 of April 8, 2010; *Robotham and Thauby*, Case file No. 5436-2010 of June 22, 2011; *Juan Llaupé et al.*, Case file No. 5698-2009 of January 25, 2011, and *Soto Cerna*, Case file No. 5285-2010 of June 11, 2011. Judgments issued by the Constitutional Court: *Case file No. 786-07* of June 13, 2007, and *Case file No. 1309-09* of April 20, 2010 (record of Merits, volume XII, pages 5882, 5912, 5913, 5914, 5956 to 6325, and record of Merits, volume XIII, pages 6325 to 7039).

[279] *Cf. Case González et al. ("Cotton Field ")*, *supra* note **¡Error! Marcador no definido.**, para. 450.

discrimination based on sexual orientation, gender identity and expression." The representatives considered that these courses "should be imparted by the Administrative Corporation of the Judiciary at all levels" of the justice system. Furthermore, they requested a budget allocation for the National Human Rights Institute to enable it to implement programs for the prevention of "discrimination, dissemination, and human rights education and research."

270. The State reported that training has been carried out "on diversity and non-discrimination issues, especially for officials of different public institutions throughout the national territory, with the aim of disseminating the different national and international instruments for the protection of diversity."

271. The Court takes notes the advances made by the State in its training programs and activities directed at public officials. Notwithstanding this progress, the Court orders the State to continue implementing continuous educational programs and training courses in: i) human rights, sexual orientation, and non-discrimination; ii) protection of the rights of LGBTI community; and iii) discrimination, overcoming gender stereotypes of LGBTI persons and homophobia. The courses must be directed at public officials at the regional and national levels, and particularly at judicial officials of all areas and levels of the judicial branch.

272. In these programs and training courses, special mention must be made of both the present Judgment and the various precedents of the *corpus iuris* of human rights related to the prohibition of discrimination based on sexual orientation and the obligation of all authorities and officials to guarantee that all persons, without discrimination based on sexual orientation, may enjoy each and every one of the rights established in the Convention. To this end, special attention should be paid to norms or practices in domestic law which, either intentionally or because of their results, may have discriminatory effects on the exercise of rights by persons belonging to sexual minorities.

b. Adoption of domestic measures, reforms, and adaptation of laws against discrimination

273. The Commission requested the Court to order the State of Chile to "adopt [...] legislation, public policies, programs and initiatives to prohibit and eradicate discrimination based on sexual orientation in all areas of the exercise of public power, including the administration of justice."

274. The representatives requested that the Court order measures aimed at reforming existing legislation in Chile. Specifically, they requested that a "Message of Utmost Urgency" be sent regarding the draft law establishing anti-discriminatory measures (Bulletin 3815-07) in order to ensure that said draft legislation expressly prohibits discrimination based on sexual orientation and "provides legal remedies to lodge a claim" for a violation. In addition, the representatives called for the repeal and amendment of all regulations that "pursuant to Article 2 of the Convention would [enter into] conflict with the right to equality between people, perpetuating and validating discrimination based on sexual orientation."

275. The State indicated that the Supreme Court's decision does not assume "the presence of a constant and protected practice in the law (or in the insufficient regulation thereof) that might allow [...] domestic courts [...] to interpret custody laws in a discriminatory manner with regard to the parents' sexual orientation." The State added that "Chilean legislation concerning the determination of custodial rights does not establish direct or indirect [...] discrimination due to the sexual preference of the parents."

276. Furthermore, the State pointed out that the right to equality is fully guaranteed in the Chilean constitution, namely in "Articles 1, 5, 19.2, 19.3, 19.17, 19.20 and 19.22 of the Fundamental Charter" and "a [...] measure to ensure effective protection in Article 20." The State also specified that the National Congress is currently debating a draft law on non-discrimination (Bulletin 3815-07) which "expressly" establishes certain prohibited categories and "another judicial measure to guarantee their adequate protection and respect." Similarly, in relation to legislative initiatives, the State noted that the Chilean government has submitted "the draft law agreement on cohabitation (Bulletin 7873-07)" which seeks to "improve the legal status and equality of persons of different sexual orientations." As documentary proof, the State referred to a report prepared by Mr. Claudio Nash in which he states that Chilean law on the determination of custody does not establish direct or indirect discrimination due to the sexual orientation of the parents, and procedural law does not indicate that the sexual orientation of one's parents "renders them incapable of carrying out their role."

277. Similarly, the State indicated that there are currently "innumerable public policies, programs and state initiatives aimed at eradicating discrimination in all its forms, including those based on sexual orientation." The State noted that the Directorate of Social Organizations for the General Ministry of Government prepared the Program on Sexual Diversity 2011, aimed at "promoting a policy of respect for all persons [...] ensuring that arbitrary discrimination against minorities does not occur."

278. The State declared that, with regard to its public policies to combat discrimination, the Division of Social Organizations ("DOS"), attached to the General Ministry of Government, has been implementing a program known as "Tolerance, Not Discrimination" since the year 2000. The State explained that in 2006, this program was converted into the Department of Diversity and Non-Discrimination in order to promote the social integration of persons and groups who are vulnerable to discrimination, including sexual orientation, as one of the classified discriminatory criteria. This department, acting through the Diversity and Non-Discrimination Units, has implemented a number of programs, projects and activities designed to promote non-discrimination against sexual minorities"[280].

Considerations of the Court

279. The Court recalls that Article 2 of the Convention requires States Parties to adopt, in accordance with their constitutional processes and the provisions of the Convention, the legislative or other measures necessary to render effective the rights and freedoms

[280] The State mentioned the following programs: the edition of the "Diagnostics of Public Services on Diversity and Non-Discrimination," which corresponds to a survey on public programmatic services in 12 regions throughout the country in 2007; the organization of a meeting between Social Action Gay, Trans Alliance, the Aphrodite Syndicate of Valparaíso, and the Regional Ministerial Secretariat of Government in the framework of the aforementioned diagnostics; training in diversity and non-discrimination for national officials; support for public events organized by the LGBT movement, such as the Gay Parade; the Second National Meeting of Trans-Feminine Organizations "Difficulties, Advances, and Challenges in the Promotion and Defense of Human Rights," organized by the "Amanda Jofré" syndicate and the Tavesnavia Transvestite Association in 2006; the First Day of Training "Strategic Planning of the Diversity Network in Biobió," organized the Network of Sexual Diversity Organizations, among others, in 2007; the First National Meeting "Gender, Family, and Sexual Diversity," organized by ACCIONGAY in 2009; the design of the Sexual Diversity Program for 2011, from which the following actions have been implemented: the seminar "Sexual Diversity and Discrimination in Chile" held on January 27, 2011, and 12 meetings of the "Roundtable on Sexual Diversity" created by the Division of Social Organizations with the goal of bringing together representatives of the gay, lesbian, bisexual, transgender, transsexual, and inter-sexual communities (GLBTTI), colleges, foundations, corporations, and international institutions. *Cf.* Brief of final arguments presented by the State (record of merits, volume XII, pages 5833-5837).

protected by the Convention[281]. In other words, the States not only have the positive obligation to adopt the legislative measures necessary to guarantee the exercise of the rights enshrined therein, but they must also avoid promulgating laws that may impede the free exercise of these rights, as well as preventing the amendment or suppression of any laws which protect those rights[282].

280. In the case at hand, the Court limited itself to examining the relationship between the legal application of certain laws with possible discriminatory practices. The Court did not analyze the compatibility of a particular law with the American Convention, nor was this matter pertinent to the case. Also, the representatives did not provide sufficient facts that would suggest that the violations resulted from a problem with the laws *per se*. Therefore, the Court considers that it is not appropriate, in the circumstances of the present case, to order the adoption, modification or adjustment of specific domestic laws.

281. Furthermore, as previously established in its case law, this Court recalls that it is cognizant that the State authorities are subject to the rule of law and, therefore, are required to apply the provisions in force in their legal system.[283] But when a State is Party to an international agreement such as the American Convention, all its organs, including its judges and all other entities linked to the administration of justice, are also subject to it. This obliges them to remain vigilant and to ensure that the effects of the Convention's provisions are not impaired by the application of other laws contrary to its purpose and aim.

282. The judges and entities engaged in the administration of justice at all levels are required to undertake "Convention control" *ex officio* between domestic law and the American Convention in the context of their respective competencies and the corresponding procedural regulations. In this task, the judges and other organs of the justice system must take into account not only the Convention, but also the interpretation thereof by the Inter-American Court, in its role as the final authority on the interpretation of the American Convention[284].

283. Thus, for example, the region's highest Courts, such as the Constitutional Chamber of the Supreme Court of Costa Rica,[285] the Constitutional Court of Bolivia,[286] the Supreme Court of Justice of the Dominican Republic,[287] the Constitutional Court of Peru,[288] the

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281 *Cf. Case Gangaram Panday v. Suriname. Preliminary Objections*. Judgment of December 4, 1991. Series C No. 12, para. 50 and *Case Chocrón Chocrón*, *supra* note 26, para. 1

282 *Cf. Case Gangaram Panday*, *supra note* 281, para. 50 and *Case Chocrón Chocrón*, *supra* note 26, para. 1

283 *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 and *Case of Fontevecchia and D`Amico*, *supra* note 28, para. 93.

284 *Cf. Case Almonacid Arellano et al.*, *supra* note **¡Error! Marcador no definido.**, para. 124 and *Case Fontevecchia and D`Amico*, *supra* note 28, para. 93.

285 *Cf.* Judgment of May 9, 1995 issued by the Constitutional Chamber of the Supreme Court of Costa Rica. Held unconstitutional. Vote 2313-95 (File 0421-S-90), considering clause VII.

286 *Cf.* Judgment issued on May 10, 2010 by the Constitutional Court of Bolivia (File No. 2006-13381-27-RAC), para. III.3 on "The Inter-American System of Human Rights. Basis and effects of the Judgments issued by the Inter-American Court of Human Rights."

287 *Cf.* Order No. 1920-2003 issued on November 13, 2003 by the Supreme Court of the Dominican Republic.

288 Judgment issued on July 21, 2006 by the Constitutional Court of Peru (File No. 2730-2006-PA/TC), consideration 12 and judgment 00007-2007-PI/TC issued on June 19, 2007 by the plenary of the Constitutional Court of Peru (Callao College of Lawyers, Congress of the Republic), consideration 26.

Supreme Court of Justice of Argentina,[289] the Constitutional Court of Colombia[290], the Supreme Court of Mexico[291] and the Supreme Court of Panama[292] have cited and applied such a control, taking into account the interpretations offered by the Inter-American Court.

284. In conclusion, based on the treaty control mechanism, legal and administrative interpretations and proper judicial guarantees should be applied in accordance with the principles established in the jurisprudence of this Court in the present case [293]. This is of particular importance in relation to sexual orientation as one of the prohibited categories of discrimination pursuant to Article 1.1 of the American Convention (*supra* paragraph C.2).

D) Compensation for pecuniary and non-pecuniary damages

285. The Court has developed case law on the concepts of pecuniary[294] and non-pecuniary[295] damages and the scenarios in which it is proper to pay them.

1. Pecuniary damage

286. The Commission asked the Court to "set a fair amount of compensation that corresponds to the pecuniary damage [...] caused."

287. The representatives requested payment for "consequential damages that [Ms. Atala] has had or will have to defray in the future, as well as the loss of legitimate earnings or profits that she has incurred or will incur." Such compensation would contemplate:

(i) expenses related to "psychiatric and therapeutic care [...] and the costs of prescriptions for numerous medicines, which the petitioner has incurred and which in future will generate costs estimated at" $62,205 USD (sixty-two thousand, two hundred and five dollars of the United States of America);

ii) transportation expenses, bearing in mind that Ms. Atala's three daughters live in Temuco and that "the projection made regarding future expenses, is calculated until the time the youngest girl comes of age", which would amount to $38,752 USD

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289 *Cf.* Judgment issued on December 23, 2004 by the Supreme Court of Argentina (File No. 224. XXXIX), "Espósito, Miguel Angel s/ Incidental Proceeding of Limitation on the Criminal Action commenced by the Defense," considering clause 6 and Judgment of the Inter-American Court of Human Rights of the Supreme Court of Argentina, Mazzeo, July Lilo, et al., cassation recourse and unconstitutionality. M. 2333. XLII. Et al. of July 13, 2007, para. 20.

290 *Cf.* Judgment C-010/00 issued on March 19, 2000 by the Constitutional Court of Colombia, para. 6.

291 *Cf.* Plenary of the Supreme Court of Justice of Mexico, Record 912/2010, Decision of July 14 2011.

292 *Cf.* Supreme Court of Justice of Panama, Decision No. 240 of May 12, 2010 in compliance with the Judgment of the Inter-American Court of Human Rights, of January 27, 2009, in the case of Santander Tristan Donoso v. Panama.

293 *Cf. Case López Mendoza v. Venezuela. Merits Reparations and Costs*. Judgment of September 1, 2011. Series C No. 233, para. 228.

294 *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and Costs.* Judgment of February 22, 2002. Series C No. 91, para. 43; *Case of Fontevecchia and D`Amico*, *supra* note 28, para. 114

295 The Court has held that non-pecuniary harm "may encompass both the suffering and injuries caused to the direct victim and close relatives or friends, the impairment of very significant values [...], as well as non-pecuniary alterations in the conditions of existence of the victim of her family." *Case of the "Street Children" , supra* note **¡Error! Marcador no definido.**, para. 84 and *Case of Fontevecchia and D`Amico*, *supra* note 28, para. 120.

(thirty-eight thousand, seven hundred and fifty-two dollars of the United States of America); and

iii) with respect to loss of future earnings, the representatives argued that Ms. Atala could not adequately dispose of her property, located in the town of Villarrica, due to the time she spent making regular visits. The representatives argued that the victim was unable to rent her property or obtain any income from it, and considered that the calculation of damages should be performed equitably. They proposed the sum of $96,600 USD (ninety-six thousand, six hundred dollars of the United States of America), basing the claim on the amount of the last payment Ms. Atala made on her home and a document from the Central Bank of Chile stating the daily values of the UF (Chilean readjustment unit), and considering that the payment is in most cases equal to the income from the rental. The representatives also argued that "this legitimate income [...] would have been produced had it not been for the arbitrary decision of the Supreme Court which decided on the separation of her daughters."

288. The State considered that, since no discriminatory act occurred, "the requested indemnities are not appropriate." The State also argued, based on *Silva Mouta v. Portugal*, that "the European Court did not grant any compensation [since…] having declared the existence of a violation [...] this constitute[d] in itself a just [reparation] for the damages allege[d]." Finally, the State noted that its officials attempted to reach an amicable agreement "which did not materialize because of the large [...] amounts requested by the alleged victim [that] did not correspond to the scale of the alleged damage."

289. In its case law, the Court has developed the concept of pecuniary compensation and has held that this contemplates "the loss or decrease of the victims' income, the expenses incurred […] and the pecuniary consequences that are connected with the facts of the case" [296].

290. Concerning the alleged loss of income caused to Ms. Atala due to her being unable to rent out her home in Villarrica or obtain some other economic gain from it, given the need to use it while visiting her daughters, the representatives based their claims on a chart from June 2004 to December 2010, and from January 2011 to October 2017, when Ms. Atala's youngest daughter would no longer be a minor. The representatives estimated the lost profits at $47,400 USD (equivalent to $23,700,000 Chilean pesos) for the first period and $49,000 USD (equivalent to $24,600,000 Chilean pesos) for the second, for a total of US $96,600. They indicated that the Court should use this chart as a guide for the fair estimation of lost earnings.

291. The principle of equity has been used in the jurisprudence of this Court to quantify non-pecuniary damages[297], pecuniary damages[298] and lost earnings[299]. However, the use of this criterion does not mean that the Court may act discretionally in setting the amounts of

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[296] *Cf. Case Bámaca Velásquez*, *supra* note **¡Error! Marcador no definido.**, para. 43 and *Case Fontevecchia and D`Amico*, *supra* note 28, para. 114.

[297] *Cf. Case Velásquez Rodríguez*, *supra* note **¡Error! Marcador no definido.**, para. 27 and *Case Family Barrios*, *supra* note 31, para. 378.

[298] *Cf. Case Neira Alegría et al. supra* note **¡Error! Marcador no definido.**, para. 50 and *Case Family Barrios*, *supra* note 31, para. 373.

[299] *Cf. Case Neira Alegría et al. supra* note **¡Error! Marcador no definido.**, para. 50 and *Case Family Barrios*, *supra* note 31, para. 373.

compensation.[300] It is up to the parties to clearly specify the proof of harm suffered as well as the specific connection between the pecuniary claim, the facts of the case and the violations alleged. In the present matter, the representatives only attached a copy of Ms. Atala's last payment for the aforementioned house along with a list of the daily values of the UF from the Central Bank.[301] The Court finds that this does not constitute a sufficiently detailed and clear argument for determining the relationship between the UFs, the payment of the mortgage note, the chart demonstrating lost earnings and the amount of lost future income which, based on this information, the Court was asked to order in equity.

292. Furthermore, given that there must exist a causal nexus between the facts analyzed by the Court, the violations declared previously and the alleged loss of future income (*supra* paras. 287 and 291), the Court reiterates that it is not its task to assess the evidence contained in the custody file in the present case as regards which of the parents of the three daughters offered a better home for them. Therefore, it is not appropriate for the Court to rule on the representatives' argument that the loss of earnings related to the house in Villarrica would not have occurred without the arbitrary judgment of the Supreme Court of Justice.

293. A similar conclusion is reached in analyzing Ms. Atala's transportation expenses for her visits to her daughters. Indeed, if the Court has not made a determination as to which of the parents had a right to custody, then it cannot assess the economic impact of the visiting schedule established in the domestic custody orders.

294. Finally, in relation to the costs related to medical treatment and the purchase of medicines, the Court notes that there is proof in the record regarding these expenses and their relationship to the effects that Ms. Atala's loss of the custody of her daughters had on her[302]. The Court finds that this provides sufficient evidence to conclude that the violations declared in this Judgment could have had negative effects on Ms. Atala's emotional and psychological well-being. However, the amount requested for medicine expenses incurred until 2010 ($14,378 USD) is not clearly shown in the attached certificates. On the other hand, the Court notes that Ms. Atala received medical attention for health issues even before the custody process had commenced. Thus, the Court cannot precisely determine which components of her medical treatment were exclusively related to the damage suffered because of the violations declared in this case. Regarding the payment of future expenses for medical treatment from 2012 to 2017, the Court finds that said expenses shall be covered through the implementation of the rehabilitation measure for medical and psychological care already ordered (*supra* paras. 254 and 255). Therefore, based on the criterion of equity, the Court sets the sum of US$ 10,000 to cover the costs already incurred for medical and psychological care.

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300 *Cf. Case of Aloeboetoe et al. v. Suriname. Reparations and Costs*. Judgment of September 10, 1993. Series C No. 15, para. 87.

301 *Cf.* Copy of the value of Development Unit- statistical database (record of appendices to the Brief on Motions, Arguments, and Evidence, Volume VI, page 2925).

302 *Cf.* The medical certificates for psychiatric and therapeutic attention and prescription drugs attached to the brief on motions, arguments, and evidence; and the projection of future medical and pharmaceutical expenses performed by the expert, Dr. Claudia Figueroa Morales. According to this psychiatrist's certificate, Ms. Atala was assisted on 314 occasions from June 2003 until December 2010, for a total value of $12,560,000 Chilean pesos, equivalent to approximately $25,120 USD (twenty-five thousand, one hundred and twenty US dollars). *Cf.* Attachments to the ESAP, Volume VI, p. 2762. According to the certificates from Dr. Figueroa Morales, Ms. Atala incurred the following expenses in medical appointments and medicines: a) From June 2003 to June 2006, $5,775,000 Chilean pesos (Attachments to the ESAP, TVI F2764), and from June 2006 until May 2008, $268,000 Chilean pesos (Attachments to the ESAP, Volume VI, p. 2763). Dr. Figueroa Morales indicated that Karen Atala "will require permanent psychiatric care until her children are independent, meaning about seven more years considering the age of the youngest daughter." *Cf.* Record of appendices to the application, Volume II, p. 797.

2. Non-pecuniary damages

295. The Commission requested that the Court establish in equity the amount of compensation corresponding to the non-pecuniary damage caused.

296. The representatives requested that the Court order the State to pay "pecuniary compensation" to repair the "suffering and afflictions caused by the violation of [Ms. Atala´s] fundamental rights," the "obvious detriment to her life plan," and the "mother and daughters' painful separation and mutual loss." The representatives' requested the sum of $100,000 USD (one hundred thousand dollars of the United States of America) in compensation for non-pecuniary damages, for each of the victims.

297. The State reiterated the arguments put forward regarding pecuniary damages (*supra* para. 288).

298. The Court notes that in the public hearing Ms. Atala indicated that, during the disciplinary investigation conducted against her (*supra* para. 227), she felt "profoundly humiliated, exposed, as if [she] had been stripped naked and thrown into the public square." She also stated that the decision of the Supreme Court of Chile which ruled on the *recurso de queja* (remedy of complaint) had a direct impact on her identity as a mother when it "deprived her of her daughters" for being a lesbian, causing her "humiliation [...] as a woman," and stigmatizing her as "incapable" of being a mother and "raising her own children." Furthermore, the victim declared that because of these events, her reputation, professional activities and her social and family relations were all affected. Finally, the experts who conducted a psychological evaluation of Ms. Atala and her daughters diagnosed various damages related to the discriminatory acts, as well as impairment of her private and family life as mentioned in this Judgment.

299. In this regard, the Court finds that the declared violations gave rise to different kinds of damage in the victims' daily lives, different levels of stigma and distress. In view of the compensation ordered by the Court in other cases, and in consideration of the circumstances of the present case, the suffering caused to the victims, as well as the change in their living conditions and other intangible consequences, the Court deems it appropriate to establish, in equity, the sum of $20,000 USD (twenty thousand dollars of the United States of America) for Ms. Atala and $10,000 USD (ten thousand dollars of the United States of America) for each of the girls M., V., and R. as compensation for non-pecuniary damages.

E) Costs and expenses

300. As the Court has indicated on previous occasions, costs and expenses are included in the amount provided for reparations under Article 63.1 of the American Convention[303].

301. The Commission requested that the Court "order the State of Chile [to] pay the costs and expenses that ar[ose] from filing the [...] case, both in the domestic courts and in the Inter-American Human Rights System."

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[303] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and Costs.* Judgment of August 27, 1998. Series C. No. 39, para. 79 and *Case of Fontevecchia and D`Amico*, *supra* note 28, para. 124.

302. The representatives requested that the victims be granted an additional allowance for attorney fees, both at the national and international levels. The amount requested in their brief containing pleadings, motions and evidence amounted to $80,200 USD (eighty thousand, two hundred dollars of the United States of America). In the final written arguments a number of charges were included for which the representatives requested, in total, a sum larger than that amount[304].

303. For its part, the State did not present any comments on the representatives' claims for costs and expenses.

304. The Court has indicated that the claims of victims or their representatives for costs and expenses, and the evidence supporting these, must be submitted to the Court at the first procedural opportunity, that is, in the brief of motions and pleadings, without prejudice to the fact that such claims may later be updated, according to new costs and expenses that may be incurred during the proceedings[305]. As to the reimbursement of costs and expenses, the Court must prudently assess their scope, which includes expenses incurred before domestic authorities as well as those that stemming from the proceedings before the Inter-American system, taking into account the circumstances of the specific case and the nature of international human rights jurisdiction. This assessment may be based on the principle of equity and taking into account the expenses stated by the parties, providing that their *quantum* is reasonable[306].

305. In the case at hand, the Court notes that the case file contains no evidence to support the costs and expenses requested by the representatives. Indeed, the amount requested for fees was not accompanied by any specific evidentiary argument relating to its reasonableness or its scope. Nonetheless, the Court finds that it is possible to assume that during both domestic as well as Inter-American proceedings the victim had financial expenditures.

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[304] The representatives set the fee per hour of work at US$200 (two hundred dollars of the United States of America). Furthermore, in the brief of final arguments they specified the following amounts for costs and expenses counted in hours of work: i) "[c]osts of filing the *Recurso de Queja* (Remedy of Complaint) in Chile: US$20,000" (twenty thousand dollars of the United States of America); ii) "[c]osts of filing the petition before the Inter-American Commission on Human Rights" ("50 hours for preparing the complaint "; "50 hours for preparing the hearing before the ICDH", and "1 hour of work during the hearing before the ICHR ": US $20,200 (twenty thousand dollars of the United States of America); iii) "[c]osts incurred during the proceeding to reach an amicable agreement" ("50 hours of preparation for 5 meetings [...] with State representatives "; "66 hours of travel between Santiago and Washington -3 round trips of 11 hours each way ", and "150 hours of preparation of 10 briefs (15 hours for each brief) filed before the ICHR ": US$53,200 (fifty three thousand, two hundred dollars of the United States of America); iv) "[c]osts incurred in preparing the petition filed before the Inter-American Court of Human Rights" ("80 hours of preparation of the petition and "457 hours of work up until the time of filing the brief of final arguments: US$91,400 (ninety-one thousand four hundred dollars of the United States of America), and v) "[c]osts incurred in the preparation of the hearing and final arguments before the Inter-American Court of Human Rights" ("120 hours of preparation for the hearing"; "100 hours of preparation" of the brief of final arguments," and "travel to Bogotá by 6 lawyers for the hearing, at a cost of US$2,000 per person": US$56.000 (fifty-six thousand dollars of the United States of America). With regard to the proceeding ordered by the Court and held in Santiago de Chile (*supra* para. **¡Error! No se encuentra el origen de la referencia.**), on February 6, 2012 the representatives reported that Ms. Atala "has had to defray the costs of transport Ms. Alicia Espinoza and her young daughters, who were not in Santiago for the purpose of ensuring their appearance at [said] proceeding," for which reason they requested that the Court "take into consideration the costs incurred by Ms. Atala when determining the costs of this process" (record of Merits, volume XII, pages 7513 and 7514). However, no receipts of expenses were attached in relation to this last request.

[305] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez, supra* note 160, para. 275 and *Case of Fontevecchia and D`Amico*, *supra* note 28, para. 127.

[306] *Cf. Case Garrido and Baigorria, supra* note 303, para. 82 and Case of *Fontevecchia and D`Amico*, *supra* note 28, para. 127.

306. Taking into account the arguments presented by the parties, as well as the absence of probative material, the Court finds in equity that the State must pay $12,000 USD (twelve thousand dollars of the United States of America) to the victim for costs and expenses. This amount shall be paid within the term of one year as of the notice of this Judgment. Ms. Atala Riffo shall, in turn, pay the sum she considers appropriate to the persons who acted as her representatives in the proceedings before the domestic and Inter-American courts. Likewise, the Court specifies that in the process of monitoring compliance with this Judgment, it may order the State to reimburse the victim or her representatives for reasonable expenses that they may incur at that procedural stage.

F) Method of compliance with the payments ordered

307. The State shall make the payment of the compensation for pecuniary and non-pecuniary damages directly to the victims or to their legal representatives, as well as the reimbursement of costs and expenses, within the term of one year as of the notice of this Judgment, pursuant to the terms of the following paragraphs.

308. Should the beneficiary die before payment of the respective compensation is made to her, such amounts shall inure to the benefit of her heirs, pursuant to the provisions of the applicable domestic legislation.

309. The State shall discharge its pecuniary obligations by tendering United States dollars or an equivalent amount in Chilean currency, using for the corresponding estimate the exchange rate between both currencies in force in New York, United States of America on the day prior to the day payment is made.

310. If, for reasons attributable to the beneficiary of the compensations or her successors, it is not possible for them to receive the amounts ordered within the indicated period, the State shall deposit those amounts in an account held in the beneficiary's name or in a certificate of deposit from a reputable Chilean financial institution, in United States dollars and under the most favorable financial terms allowed by law and banking practices. If, after 10 years, the compensation has not been claimed, these amounts shall be returned to the State with the accrued interest.

311. The amounts allocated in this Judgment as compensation and reimbursement of costs and expenses shall be delivered to the persons indicated in their entirety, pursuant to the provisions of this Judgment, without deductions derived from future taxes.

312. If the State should fall into arrears with its payments, it shall pay interest on the amount owed corresponding to banking interest rates on arrears in Chile.

313. As to the compensation ordered in favor of the girls M., V. and R., the State shall deposit the amounts in a solvent Chilean financial institution in United States dollars. The investments shall be made within the term of one year, under the most favorable financial terms allowed by law and banking practice, while the beneficiaries are minors. Said amounts may be withdrawn when the girls come of age, or before if this is in the girls' best interest, as the case may be, as established by a competent judicial authority. If, after 10 years counted from the time each of the girls comes of age, the corresponding indemnities have not been claimed, these amount shall be returned to the State with the accrued interest. As regards the girl V., for the purposes of reparations, the terms set forth in paragraph 71 of this Judgment shall apply.

VIII
OPERATIVE PARAGRAPHS

314. Therefore,

THE COURT

DECIDES,

Unanimously that:

1. The State is responsible for the violation of the right to equality and non-discrimination enshrined in Article 24, in conjunction with Article 1.1 of the American Convention on Human Rights, to the detriment of Karen Atala Riffo, under the terms of paragraphs 94 to 99, 107 to 146 and 218 to 222 of this Judgment.

Unanimously that:

2. The State is responsible for the violation of the right to equality and non-discrimination enshrined in Article 24, in conjunction with Articles 19 and 1.1. of the American Convention, to the detriment of the girls M., V. and R., under the terms of paragraphs 150 to 155 of this Judgment.

Unanimously that:

3. The State is responsible for the violation of the right to privacy enshrined in Article 11.2, in conjunction with Article 1.1. of the American Convention, to the detriment of Karen Atala Riffo, under the terms of paragraphs 161 to 167 and 225 to 230 of this Judgment.

Judge Diego García-Sayán and Judges Margarette May Macaulay and Rhadys Abreu Blondet voted in favor of the following operative paragraph. Judges Manuel E. Ventura Robles, Leonardo A. Franco and Alberto Pérez Pérez voted against. Therefore, pursuant to Articles 23.3 of the Statute of the Inter-American Court of Human Rights and 16.4 of the Rules of Procedure of the Inter-American Court of Human Rights, it is decided that:

4. The State is responsible for the violation of Articles 11.2 and 17.1, in conjunction with Article 1.1 of the American Convention to the detriment of Karen Atala Riffo and of the girls M., V. and R., under the terms of paragraphs 168 to 178 of this Judgment.

Unanimously that:

5. The State is responsible for the violation of the right to be heard enshrined in Article 8.1, in conjunction with Articles 19 and 1.1 of the American Convention to the detriment of the girls M., V. and R., under the terms of paragraphs 196 to 208 of this Judgment.

Unanimously that:

6. The State violated the guarantee of impartiality enshrined in Article 8.1, in conjunction with Article 1.1 of the American Convention, with respect to disciplinary investigation, to the detriment of Karen Atala Riffo, under the terms of paragraphs 234 to 237 of this Judgment.

By five votes in favor and one against the Court finds that:

7. The State did not violate the judicial guarantee of impartiality enshrined in Article 8.1 of the American Convention, in relation to the decisions of the Supreme Court of Justice and the Juvenile Court of Villarrica, under the terms of paragraphs 187 to 192 of this Judgment.

Dissenting Judge Margarette May Macaulay.

AND ORDERS

Unanimously that:

1. This Judgment constitutes *per se* a form of reparation.

2. The State shall provide medical and psychological or psychiatric care, free of charge and in an immediate, appropriate and effective manner, through its specialized public health institutions to those victims who so request it, under the terms of paragraphs **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.** of this Judgment.

3. The State shall issue the publications indicated in paragraph **¡Error! No se encuentra el origen de la referencia.** of this Judgment, within a period of six months as of notification of this Judgment.

4. The State shall hold a public act of acknowledgment of international responsibility with regard to the facts of this case, under the terms of paragraphs **¡Error! No se encuentra el origen de la referencia.** of **¡Error! No se encuentra el origen de la referencia.** of this Judgment.

5. The State shall, within a reasonable period of time, continue to implement permanent education programs and training courses directed at public officials at the regional and national levels, and particularly judicial officials in all areas and at all levels of the Judicial Branch, under the terms of paragraphs **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.** of this Judgment.

6. The State shall pay the amounts stipulated in paragraphs **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.** of this Judgment, as compensation for pecuniary and non-pecuniary damages and

reimbursement of costs and expenses, as corresponds, under the terms and conditions stated in paragraph **¡Error! No se encuentra el origen de la referencia.** of this Judgment.

7. The State shall, within the term of one year as of notification of this Judgment, submit a report to this Court concerning the measures adopted in compliance with this Judgment.

8. The Court shall monitor full compliance with this Judgment, by virtue of its authority and in compliance with its duties according to the American Convention on Human Rights, and shall consider this case concluded once the State has fully complied with the measures ordered in this Judgment.

Judge Alberto Pérez Pérez informed the Court his Partially Dissenting Opinion, which is attached to this Judgment.

Done in Spanish and English, the Spanish text being authentic, in San Jose, Costa Rica, on February 24, 2012.

Diego García-Sayán
President

Manuel E. Ventura Robles

Leonardo A. Franco

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

PARTIALLY DISSENTING OPINION OF JUDGE ALBERTO PÉREZ PÉREZ
IN THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF *ATALA RIFFO AND DAUGHTERS v. CHILE*
FEBRUARY 24, 2012

1. I have voted against operative paragraph 4, according to which "the State is responsible for violating Articles 11.2 and 17.1" of the American Convention, in consideration that it should only have mentioned a violation of Article 11.2, because given the facts of the present case: I) it is sufficient to declare a violation of Article 11.2, and II) it is not necessary or prudent to declare a violation of Article 17 which could be taken as an implicit pronouncement on the interpretation of various provisions of said Article.

I. IT IS SUFFICIENT TO INVOKE ARTICLE 11.2

2. The American Convention on Human Rights enshrines rights related to the family in Article 11.2 and Article 17, and similarly contains important references to the family in Articles 19, 27.2 and 32.1:

> *Article 11. Protection of Honor and Dignity*
> 1. Everyone has the right to have his honor respected and his dignity recognized.
> 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home or his correspondence, or of unlawful attacks on his honor or reputation.
> Everyone has right to the protection of the law against such interference or attacks.
> *Article 17. Protection of the Family*
> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
> 2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of non-discrimination established in this Convention.
> 3. No marriage shall be entered into without the free and full consent of the intending spouses.
> 4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.
> 5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.
>
> *Article 19. Rights of the Child*
> Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the State.
>
> *Article 27. Suspension of Guarantees*
> 1. in time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the grounds of race, color, sex, language, religion or social origin.
>
> 2. The foregoing provision does not authorize the suspension of the following Articles: 3 (Right to Juridical Personality); Article 4 (Right to Life); Article 5 (Right to Humane Treatment); 6 (Freedom from Slavery); 9 (Freedom from Ex Post Facto Laws); 12 (Freedom of Conscience and Religion); 17 (Rights of the Family); 18 (Right to a Name); Article 19 (Rights of the Child); Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
> 3. (…).

Article 32. Relationship between Duties and Rights
1. Every person has responsibilities to his family, his community and mankind.
2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

3. The European Convention for the protection of human rights and fundamental freedoms contains two provisions that are relevant in this respect, corresponding to Articles 11 and 17.2 of the American Convention:

Article 8 — Right to respect for private and family life
1 Everyone has the right to respect for his private and family life, his home and his correspondence.
2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12 — Right to marry
Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

4. Therefore, the case law of the European Court of Human Rights (ECHR), which the judgment cites appropriately and with persuasive value, refers to the provisions of the European Convention that correspond to Articles 11.2 and 17.2 of the American Convention[1], since there are no provisions referring to the matters contemplated in paragraphs 1, 3, 4 and 5 of Article 17.

5. It is of particular importance to examine judgments in which the ECHR considered cases involving cohabiting couples of the same sex or gender[2] in light of Article 8 of the European Convention, and in relation to Article 14. As the judgment of this Court clearly states in paragraph 174:

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[1] In cases similar to this one, the rule that prohibits discrimination is also invoked, which states the following: *Article 14 — Prohibition of discrimination* - the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground, such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[2] Perhaps it would have been appropriate to also cite the judgment in the case *P. V. v. Spain* (application N° 35159/09), delivered on November 30, 2010 and made final on April 11, 2011. In this case, the applicant is a male-to-female transsexual who had previously been married to P.Q.F., with whom she had a son in 1998. When the couple was legally separated, the judge approved an agreement concluded between the spouses whereby the custody of the child was awarded to the mother and parental responsibility to both parents jointly. In addition, the agreement established contact arrangements for the father to spend time with the child. Two years later, the mother applied to have her ex-spouse deprived of parental responsibility and to have the contact arrangements and any communication between father and son suspended. She argued that the father had shown a lack of interest in the child, and was undergoing hormonal treatment with a view to gender reassignment and usually wore make-up and dressed as a woman. The domestic court dismissed the mother's application in respect of the first point and, as regards the contact arrangements, the judge decided to restrict the visits, which were later gradually extended. The court's decision, in relation to the facts, was based on a psychological report, according to which P. was experiencing "emotional instability" that "entailed a real and significant risk of disturbing the emotional well-being and development of the child's personality, in view of his age (he was six years old at the time of the expert report) and the stage of development at the time; and, as regards the law, on the best interests of the child. It was not based on the father's status as a transsexual. The ECHR considered that the Spanish courts, unlike the ruling in the case of *Salgueiro da Silva Mouta v. Portugal*, had not based their decision on the applicant's sexual orientation, but had taken into account her "emotional instability" and had given priority to "the interests of the child," adopting more restrictive contact arrangements to enable the child to become gradually accustomed to his father's gender change, and had subsequently extended these arrangements despite the fact that "the applicant's sexual status remained the same."

> "..in the case *Schalk and Kopf V. Austria*, the European Court revised its case law in force at that time, which only accepted that the emotional and sexual relationship of a same-sex couple constitutes "private life," but had not considered what constituted "family life," despite the applicants having lived together in a long-term relationship. Applying a broader concept of family, the European Court established that "a cohabiting same-sex couple living in a stable *de facto* partnerships, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would," considering it "artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8[3]". [Footnotes omitted.]

6. It also indicates (para. 173), correctly, that, "in the of case *X, Y and Z v. United Kingdom*, the European Court of Human Rights, following an ample concept of family, acknowledged that a transsexual, their female partner and a child may comprise a family, stating that:

> When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.[4]"

7. For greater clarity, and also keeping in mind any future recourse to the case law or rulings of other bodies for the protection of human rights, I shall briefly outline the facts of each case cited, as well as the EHCR's conclusions of law.

Case Schalk and Kopf v. Austria

8. *The facts of the case* may be summarized as follows: the applicants, born in 1962 and 1960, respectively, are a same-sex couple living in Vienna. In 2002 they began formalities to be able to marry, but the Austrian authorities considered that they lacked the capacity to contract marriage, given that both applicants were men and, according to Article 44 of the Civil Code, only two persons of opposite sex can marry (paras. 7 to 9). In Austria, the Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*) provides same-sex couples with "a formal mechanism for recognizing and giving legal effect to their relationships," with similar characteristics to those of marriage in many aspects (such as "inheritance law, labor, social and social security law, fiscal law, the law on administrative procedure, the law on data protection and public service, passports and registration issues, as well as the law on foreigners" (paras. 16 to 22). However, a number of differences between marriage and registered partnerships remain in several other aspects, particularly with regard to the possibilities of adoption or access to artificial insemination.

9. *The legal considerations* begin (paras. 24-26) with an analysis of European Union Law (Article 9 of the Charter of Fundamental[5] Rights and various Directives), and in particular of the laws of the 47 Member States of the Council of Europe (paras. 27 to 34). Only six of these currently grant same-sex couples equal access to marriage; another 13 States have "some kind of legislation permitting same-sex couples to register their relationships." One

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[3] The judgment in the case *Schalk and Kopf v. Austria* (No. 30141/04) was delivered by a Chamber of the European Court of Human Rights on June 24, 2010, and became final on November 22, 2010, according to Art. 44.2 of the Convention (text established by Protocol N° 11).

[4] The judgment in the case of *X, Y and Z v. United Kingdom* (No. 21830/93) was delivered by the Grand Chamber on April 22, 1997.

[5] The text of this provision states: "*Article 9 -Right to marry and to found a family* – which guarantees "the right to marry and to found a family, according to the national laws governing the exercise of that right." As noted, the reference to "men and women" disappears, but there is a general remit to the provisions of national laws.

State "recognizes cohabiting same-sex couples for limited purposes, but does not offer them the possibility of registration." With reference to the material, parental and other consequences, the ECHR states that "the legal consequences of registered partnership vary from almost equivalent to marriage to giving relatively limited rights." The ECHR then considers the general principles and their application to the specific case, and finally examines the applicability of Article 14 taken in conjunction with Article 8 and the allegation that it had been violated.

10. *General principles*. The ECHR recalls that, according to its established case-law, "Article 12 secures the fundamental right of a man and a woman to marry and to found a family," and that the exercise of this right "gives rise to personal, social and legal consequences." Although it is subject to the national laws of the Contracting States, "the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired" (para. 49). Furthermore, the ECHR observes that it "has not yet had an opportunity to examine whether two persons who are of the same sex can claim to have a right to marry," but that "certain principles might be derived" from its case-law relating to transsexuals, which initially found that "the attachment to the traditional concept of marriage which underpins Article 12 provided sufficient reason for the continued adoption by the respondent State of biological criteria for determining a person's sex for the purposes of marriage" (paras. 50-51). In the *Christine Goodwin*[6] case, the Court departed from that case-law, noting that there had been "major social changes in the institution of marriage" since the adoption of the Convention, citing Article 9 of the European Charter and, taking into consideration the "widespread acceptance of the marriage of transsexuals in their assigned gender," found that "the terms used in Article 12… no longer had to be understood as determining gender by purely biological criteria." Consequently, "the impossibility for a post-operative transsexual to marry in her assigned gender violated Article 12" (para. 52). In two other cases concerning marriages between a woman and a male-to-female transsexual,[7] the ECHR had determined (para. 53) that the complaint concerning the legal requirement to end their marriage in order for the transsexual to "obtain full legal recognition of her change of gender" was "manifestly ill-founded." The ECHR noted that "domestic law only permitted marriage between persons of opposite gender, whether such gender is derived from attribution at birth or from a gender recognition procedure, while same-sex marriages were not permitted," and that "Article 12 enshrined the traditional concept of marriage as being between a man and a woman." Although the Court acknowledged that "several Contracting States had extended marriage to include same-sex couples," it noted that "this reflected their own vision [of said States] of the role of marriage in their societies" but "did not flow from an interpretation of the fundamental right enshrined, as laid down ….in the Convention in 1950". Therefore, it fell "within the State's margin of appreciation how to regulate the effects of the change of gender on pre-existing marriages." Furthermore, if the applicants should opt to divorce, they would have the possibility to enter into a civil partnership, something that "contributed to the proportionality of the gender recognition regime complained of."

11. *Application to the specific case*. The ECHR stated that Article 12 grants the right to marry to "*men and women,"* ("*l´homme et la femme*") and, although the wording of said Article taken in isolation could be interpreted as "to exclude a marriage between two men or two women," considered in the context it should be borne in mind that, "in contrast, all other substantive Articles of the Convention grant rights and freedoms to "everyone" or

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[6] *Christine Goodwin v. United Kingdom* (no. 28957/95), Grand Chamber Judgment, July 11, 2002.

[7] *Parry v. the United Kingdom* (dec.), no. 42971/05, ECHR 2006-XV, and *R. and F. v. the United Kingdom* (dec.), no. 35748/05, November 28, 2006.

state that "no one" may be subjected to certain types of prohibited treatment." The choice of the words "men and women" should be considered "deliberate", particularly in "the historical context" of the 1950s decade, when "marriage was clearly understood in the traditional sense of being a union between partners of different sex." As regards the "connection between the right to marry and the right to found a family," in the case of *Christine Goodwin* the ECHR reached the conclusion that "the inability of any couple to conceive or parent a child" does not exclude *per se* the right to marry. However, this finding "does not allow for any conclusion regarding the issue of same-sex marriage" (para. 56). Although "the Convention is a living instrument which is to be interpreted in present-day conditions," and the institution of marriage "has undergone major social changes," the ECHR noted that "there is no European consensus regarding same-sex marriages," which are only permitted in six out of 47 States Party to the Convention (para. 58). The case under consideration should be distinguished from the *Christine Goodwin* case*,* which had recognized "a convergence of standards concerning the marriage of transsexuals in their assigned gender" and involved a "marriage between partners who are of different gender," if this is not defined by purely biological criteria (para. 59). [Thus, the ECHR was agreeing with the assertion of the non-governmental organizations intervening in the case, according to which "while the Court had often underlined that the Convention was a living instrument that should be interpreted in present-day conditions, it had only used that approach to develop its jurisprudence when it had perceived a convergence of standards among Member States".]

12. *Influence of Article 9 of the European Charter*. As to Article 9 of the European Charter (explained in the official commentary), the deliberate elimination of the reference to "men and women" makes the provision broader in its scope that the corresponding articles in other human rights instruments, but "the reference to domestic law reflects the diversity of national regulations, which range from allowing same-sex marriage to explicitly forbidding it" and leaving any decisions on this matter to the States[8] (para. 60). Having regard to Article 9 of the Charter, the ECHR concluded that "would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex," for which reason said Article was applicable to the case, but emphasized that "the question of whether or not to allow same-sex marriage is left to regulation by the national laws" of each State (para. 61). The Court noted that "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another," and that the ECHR "must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society" (para. 62). Consequently, it found that "Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage" (para. 63), and ruled that there had been no violation of said Article (para. 64).

13. *Applicability of Article 14 taken in conjunction with Article 8*. According to the ECHR, "Article 14[9] complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions" (para. 89). In several judgments (the last of which was in 2001[10]), the ECHR had held that "the notion of family" in Article 12 also included de facto unions, "where the parties are living together out

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[8] According to the commentary, "it may be argued that there is no obstacle to recognizing same-sex relationships in the context of marriage," but there is "no explicit requirement that domestic laws should facilitate such marriages"

[9] For the text, see note 1.

[10] *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI, May 10, 2001.

of wedlock," but in the case of same-sex couples it had only recognized that their relationship constitutes "private life" but not "family life" (paras. 91-92). In the case of *Schalk and Kopf v. Austria,* the ECHR changed that jurisprudence (as correctly indicated in para. 174 of the judgment to which this vote refers), considering that since 2001 there had been "a rapid evolution in social attitudes towards same-sex couples in many Member States", and "a considerable number" of these had "afforded legal recognition to same-sex couples." Similarly, certain provisions of European Union law also reflect "a growing tendency to include same-sex couples in the notion of 'family'" (para. 93). "In view of this evolution," the ECHR considered it "artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8", and that, "consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would." (Para. 94).

14. *Alleged violation of Article 14 taken together with Article 8.* Having concluded that the facts of the case fell within "the notion of 'private life' as well as 'family life'", and that Article 14 taken together with Article 8 was applicable (para. 95), the ECHR then considered whether it had been violated (paras. 96-110). To reach this determination it would have to find "a difference in the treatment of persons in relevantly similar situations," which would be "discriminatory if it has no objective and reasonable justification"; in other words, if it does not pursue a "legitimate aim or if there is not a reasonable relationship of proportionality between the means employed the aim sought to be realized." In that respect, the States "enjoy a margin of appreciation" (para. 96). On the one hand, "just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification," but on the other hand, the States are usually allowed "a wide margin" when it comes to "general measures of economic or social strategy" (para. 97), and one of the relevant factors for determining the scope of the margin of appreciation may be "the existence or non-existence of common ground." The ECHR started from "the premise that same-sex couples are just as capable as different-sex couples of entering into stable and committed relationships," and therefore are in a "relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship" (para. 99). Nevertheless, the Court decided that, although the applicants had not been permitted to marry, a law subsequent to lodging their complaint but prior to the judgment (the Registered Partnerships Act[11]), which entered into force on January 1, 2010) had provided alternative legal recognition (para. 102). While there is "an emerging European consensus toward legal recognition of same-sex couples," which has "developed rapidly over the past decade," the States that provide for legal recognition are not yet a majority. This question must therefore be considered as one of "evolving rights with no established consensus, where States must also enjoy a margin appreciation in the timing of the introduction of legislative changes" (para. 105). In conclusion, having examined the juridical status of registered partnerships and the differences that persist with respect to marriages, the ECHR said that it did not see "any indication that the respondent State has exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership" (para. 109) and found that there had been no violation of Article 14 taken in conjunction with Article 8 (para. 110).

Case X, Y and Z v. United Kingdom

15. *The facts of the case* may be summarized as follows: the first applicant, "X", a female-to-male transsexual, was born in 1955. However, from the age of four years "X" felt like a sexual misfit and was drawn to "masculine" behaviour roles. This discrepancy caused him to

[11] *Supra*, para. 6.

suffer suicidal depression during adolescence. In 1975, he began hormonal treatment and began to live and work as a man. Since 1979 he has lived in a permanent and stable union with the second applicant, "Y", a woman born in 1959. Shortly after beginning that relationship, "X" underwent gender reassignment surgery. The third applicant, "Z"[12], was born in 1992 to "Y" as a result of artificial insemination by a donor (IAD). Subsequently, "Y" gave birth to another child by the same method. The complaint brought before the ECHR was prompted by the fact that the United Kingdom authorities had denied "X"'s application to be registered as the father of "Z" in the civil registry.

16. *Considerations of law.* Citing several previous rulings, the ECHR recalled that "the notion of 'family life' in Article 8 is not confined solely to families based on marriage and may encompass other de facto relationships," and added that "when deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means (para. 36)." As a starting point, I consider that "regard must be had to the fair balance that has to be struck between the competing interests of individual and of the community as a whole" and that "the State enjoys a certain margin of appreciation" (para. 41). On the specific point of parental recognition (para. 44), the ECHR observed that "there is no common European standard with respect to the granting of parental rights to transsexuals" and that it has not been established "that there exists any generally shared approach amongst the High Contracting Parties with regard to the manner in which the social relationship between a child conceived by AID and the person who performs the role of father should be reflected in law." The Court added that, "although the technology of medically assisted procreation has been available in Europe for several decades, many of the issues to which it gives rise, particularly with regard to the question of filiation, remain the subject of debate. For example, there is no consensus amongst the Member States of the Council of Europe on the question of whether the interests of a child conceived in such a way are best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor's identity." Therefore, since the issues in the case "touch on areas where there is little common ground" amongst the Member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, the respondent State must be afforded a wide margin of appreciation." In conclusion it stated, "given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States, the Court is of the opinion that Article 8 cannot, in this context, be taken to imply an obligation for the respondent State to formally recognize as the father of a child a person who is not the biological father." Therefore (para. 52), "the fact that the law of the United Kingdom does not allow special legal recognition of the relationship between X and Z does not amount to a failure to respect family life within the meaning of that provision."

17. Clearly, the extensive citation of judgments by the ECHR does not imply that the Inter-American Court should take these as required precedents. As mentioned previously (*supra,* para. 4), these rulings have "persuasive value" to the extent that the arguments contained therein may be intrinsically convincing, something that will depend, in good measure, "on the status of the Court from which they emanate, and on the personality of the judge who drafted the judgment."[13] In view of the status of the ECHR and the similarity

[12] In his concurring opinion, Judge L-E. Pettiti stated that "Should there be another case like this one, it would no doubt be desirable for the Commission and the Court to suggest to the parties that a lawyer be instructed specifically to represent the interests of the child alone."

[13] *Cfr.* Alberto Pérez Pérez, "Reseña de la vida jurídica angloamericana," in *Revista de Derecho Jurisprudencia y Administración*, t. 61, pages. 109-120 (the citation is from page 112).

between its functions and those of the Inter-American Court, the judgments cited in this reasoned vote are of great importance, as we shall see in Chapter II.

II. IT IS NOT NECESSARY OR PRUDENT TO INVOKE ARTICLE 17.1

18. As I have already indicated, I do not consider it necessary or prudent to declare a violation of Article 17, which could be taken as an implicit pronouncement on the interpretation of different provisions of said Article. Indeed, Article 17 contains a number of provisions connected with each other, beginning with the declaration of principle that "the family is the natural and fundamental group unit of society," followed by the provision, within the same paragraph 1, whereby the family "is entitled to protection by society and the State," and further on several provisions that could be interpreted (a point on which in this vote makes no pronouncement) in a way that presupposes that the family is based on a heterosexual marriage or de facto union. The right to not "be the object of arbitrary or abusive interference with his private life, (or) his family", enshrined in Article 11.2, is a specific and autonomous aspect of the general duty of protection, so therefore it is not necessary to invoke Article 17.1 cumulatively with Article 11.2. The determination that some of the facts themselves violate a general duty and a specific duty (or the corresponding rights) does not change the nature or severity of the violation, and nor does it lead to different reparations being ordered than if only invoking the provision that enshrines the right or specific duty. Instead, invoking Article 17.1 includes the aforementioned declaration of principle, and, by implication, could encompass the rest of Article 17.

19. The declaration of principle regarding the family contained in Article 17.1 essentially agrees with the provisions of many Latin American constitutions:

> *Bolivia:* Article 62. The State recognizes and protects families as the fundamental nucleus of society, and guarantees the social and economic conditions necessary for their integral development. All family members have equal rights, obligations and opportunities.
> Article 63. I. Marriage between a woman and a man is constituted by legal ties and is based on the equal rights and duties of the spouses.
> II. Free or de facto unions which are stable and monogamous and entered into by a woman and a man without legal impediment, shall have the same effects as a civil marriage, both as regards the personal and patrimonial relations of the spouses and as regards the children adopted or born of these unions.
>
> *Brazil*: Article 226. The family, which is the foundation of society, shall enjoy special protection from the State.
> This article continues with specific provisions related to wedlock or marriage, and the "stable union between a man and a woman as a family entity," among other matters.
>
> *Chile*: Article 1 (in Chapter I, Bases of Institutionality). Men are born free and equal in dignity and rights.
> The family is the basic core of society.
> The State recognizes and defends the intermediate groups through which society organizes and structures itself and guarantees them the necessary autonomy to fulfill their own specific objectives.
> The State is at the service of the individual and its goal is to promote common welfare. To this effect, it must contribute to the creation of the social conditions which permit each and every one of the members of the national community to achieve the greatest possible spiritual and material fulfillment, with full respect for the rights and guarantees established by this Constitution.
> It is the duty of the State to safeguard national security, provide protection for the people and the family, promote the strengthening of the latter, further the harmonious integration of all sectors of the Nation and guarantee everyone the right to participate in national life with equal opportunities.

Colombia: Article 5. The State recognizes, without any discrimination whatsoever, the primacy of the inalienable rights of the individual and protects the family as the basic institution of society.
Article 42. The family is the basic nucleus of society. It is formed on the basis of natural or legal ties, by the free decision of a man and a woman to contract matrimony or by their responsible resolve to comply with it.
The State and society guarantee the integral protection of the family. The law may determine the inalienable and unseizable family patrimony. The family's honor, dignity and intimacy are inviolable.
Family relations are based on the equality of rights and duties of the couple and on the mutual respect of all its members. Any form of violence in the family is considered destructive of its harmony and unity, and shall be sanctioned according to law.
The children born within matrimony or outside it, adopted or conceived naturally or with scientific assistance, have equal rights and duties. The law shall regulate parental responsibility to the offspring.
The couple has the right to decide freely and responsibly the number of their children and shall support them and educate them while they are minors or dependents.
The forms of marriage, the age and qualifications to contract it, the duties and rights of the spouses, their separation and the dissolution of the marriage ties, shall be determined by civil law.
Religious marriages shall have civil effects under the terms established by law.
The civil effects of all marriages shall be determined by divorce in accordance with civil law.
Also, decrees of annulment of religious marriages issued by the authorities of the respective faiths shall have civil effects within the limits established by law.
The law shall determine matters relating to the civil status of individuals and the consequent rights and duties.

Costa Rica: Article 51. The family, as the natural unit and foundation of society, is entitled to the special protection of the State. Mothers, children, the elderly and the infirm and destitute are also entitled to such protection.
Article 52. Marriage is the essential foundation of the family and is based on the equality of rights between spouses.
Article 53. Parents have the same obligations toward children born out of wedlock as to those born within it.
Every person has the right to know who his parents are, in accordance with the law.

Cuba: Article 35. The State protects the family, motherhood and marriage.
The State recognizes the family as the main nucleus of society and attributes to it the important responsibilities and functions in the education and development of the new generations.
Article 36. Marriage is the union voluntarily established between a man and a woman, who are legally fit to marry, in order to live together. It is based on full equality of rights and duties of the partners, who must provide for the support of the home and the integral education of the children through a joint effort compatible with the social activities of both.
The law regulates the formalization, recognition and dissolution of marriage and the rights and obligations deriving from such acts.

Ecuador: Article 67. The family in its various forms is recognized. The State shall protect it as the fundamental core of society and shall guarantee conditions that integrally favor the achievement of its purposes. The family shall be constituted by legal or *de facto* ties and shall be based on the equal rights and opportunities of its members.
Marriage is the union between a man and a woman and shall be based on the free consent of the persons entering into this bond and on equality of rights, obligations and legal capacity.
Article 68. The stable and monogamous union between two free individuals without any other marriage ties who establish a common-law home, for the period of time and under the conditions and circumstances stipulated by law, shall enjoy the same rights and obligations as those families bound by formal marriage ties.
Adoption shall only be permitted for different gender couples.

El Salvador: Article 32. The family is the fundamental basis of society and shall have the protection of the State, which shall dictate the necessary legislation and create the appropriate institutions and services for its integration, well-being and social, cultural and economic development.
The legal foundation of the family is marriage which rests on the juridical equality of the spouses. The State shall promote marriage; but the lack of it shall not affect the enjoyment of the rights established in favor of the family.
Article 33. The law shall regulate the personal and patrimonial relations between the spouses and between them and their children, establishing the rights and reciprocal duties on an equitable

basis; and shall create the necessary institutions to guarantee its applicability. Likewise it shall regulate family relationships resulting from the stable union of a man and a woman.

Nicaragua: Article 70. The family is the fundamental nucleus of society and has the right to protection by society and the State.
Article 71. It is the right of Nicaraguans to form a family. ….The law shall regulate and protect this right. …
Article 72. Marriage and stable *de facto* unions are protected by the State; they rest on the voluntary agreement between a man and a woman, and may be dissolved by mutual consent or by the will of one of the parties, as provided by law.
Article 73. Family relations rest on respect, solidarity and absolute equality of rights and responsibilities between the man and woman.
Parents must work together to maintain the home and provide for the integral development of their children, with equal rights and responsibilities. Furthermore, children are obligated to respect and assist their parents. These duties and rights shall be fulfilled in accordance with to the relevant legislation.

Paraguay: Article 49. Protection of the Family
The family is the foundation of society. Its comprehensive protection shall be promoted and guaranteed. The family comprises the stable union of a man and a woman, their children and the community formed with any of their ancestors and descendents.
Article 50. Right to Constitute a Family
Everyone has the right to constitute a family, in whose formation and development a woman and a man shall have the same rights and obligations.
Article 51. Marriage and the Effects of De Facto Partnerships
The law shall establish the formalities to be observed for marriage between a man and a woman, the requirements for contracting it, the grounds for separation or dissolution and its effects, as well as provisions for the administration of goods and other rights and obligations between spouses.
A de facto partnership between a man and a woman, having no legal impediments to contracting marriage and being characterized by stability and monogamy, produces a similar effect to marriage, in accordance with the provisions established by law.
Article 52. Union in Marriage
The union in marriage of a man and a woman is one of the fundamental elements in the formation of a family.

Peru: Article 4. The community and the State extend special protection to children, adolescents, mothers and the aged in a situation of abandonment. They also protect the family and promote marriage. They recognize the latter as natural, fundamental institutions of society.
The form of marriage and grounds for separation and dissolution are governed by law.
Article 5. The stable union between a man and a woman who, free of any matrimonial impediment, establish a common-law home gives rise to a joint estate subject to the provisions for conjugal partnerships, insofar as these are applicable.

Uruguay: Article 40. The family is the basis of our society. The State shall safeguard its moral and material stability, for the optimum development of children within society.
Article 41. Parents a duty and a right to care and educate their children so that they may develop their full physical, intellectual and social capabilities. Those having responsibility for a large number of offspring have the right to compensatory assistance, provided that they need this.
The law shall make the necessary provision to ensure that children and young people are protected against physical, intellectual or moral neglect by their parents or guardians, as well as against exploitation and abuse.
Article 42. Parents have the same duties to children born out of wedlock as to those born within it. Motherhood, whatever the condition or status of the woman, has the right to the protection of society and to assistance in the event of abandonment.

Venezuela: Article 75. The State shall protect families as a natural association of society and as the fundamental unit for the overall development of persons. Family relationships are based on equal rights and duties, solidarity, common effort, mutual understanding and reciprocal respect among family members. The State guarantees protection to the mother, father or other person acting as head of a household.
Children and adolescents have the right to live, be raised and develop in the bosom of their original family. When this is impossible or contrary to their best interest, they shall have the right to a substitute family, according to law. Adoption has effects similar to those of parenthood, and is

established in all cases for the benefit of the adopted child, according to law. International adoption shall be subordinated to domestic adoption.
Article 76. Motherhood and fatherhood are fully protected, whatever the marital status of the mother or father. Couples have the right to decide freely and responsibly the number of children they wish to conceive and are entitled to have access to the information and means necessary to guarantee the exercise of this right. The State guarantees overall assistance and protection for motherhood, in general, from the moment of conception, throughout pregnancy, delivery and the puerperal period, and guarantees full family planning services based on ethical and scientific values.
The father and mother have the shared and inescapable obligation of raising, nurturing, educating, maintaining and caring for their children, and the latter have the duty to provide care when the former are unable to care for themselves. The necessary and appropriate measures to guarantee the enforceability of the obligation to provide alimony shall be established by law.
Article 77. Marriage between a man and a woman, which is based on free consent and absolute equality of rights and duties of the spouses, is protected. A stable *de facto* union between a man and a woman which meets the requirements established by law shall have the same effects as marriage.

20. I agree with the notion of an evolving interpretation that considers the American Convention as a living instrument to be understood according to present-day circumstances, but on the understanding that in order to make progress in that area it is necessary to reach a consensus, or common ground or a convergence of standards among the States Party (see *supra*, para. 9 (11). This is the case as regards the recognition that discrimination based on sexual orientation should be understood as prohibited (paras. 83 to 93 of the Judgment), since a clear concept exists in this respect, not only among the States Party to the American Convention, but also among all Member States of the OAS, expressed in the resolutions of the General Assembly cited (note 97).

21. The same cannot be said with respect to the evolution of the notion of the family and its status as the foundation or basic or natural element of society, which continues to be present in the Constitutions of many States Party (*supra,* para. 19). The irrefutable fact that there are currently many different concepts of 'family, as stated in note 191 of the judgment[14], does not necessarily mean that each and every one of these must correspond to what the American Convention understands by family - even with an evolving interpretation according to the parameters mentioned (*supra,* paras. 9 (11) and 18)- as the "natural and fundamental element of society," or to what the States Party with similar provisions understand as such. Nor does it mean to say that all States Party must recognize

[14] The text of note 191 states the following (cursives added): "The United Nations Committee on the Elimination of Discrimination Against Women, General Recommendation No. 21 (13th period of sessions, 1994). Equality in marriage and in family relationships, para. 13 ("*the form and the concept of the family can vary from State to State and even between regions within a State. Whatever form its takes, and whatever the legal system, religion, custom or tradition within the country*, the treatment of women in the family, both at law and in private, must conform to the principles of equality and justice for all people, as Article 2 of the Convention requires"); Committee on the Rights of the Child, General Comment No. 7. Implementing Child Rights in Early Childhood, CRC/C/GC/7, September 30, 2005, paras. 15 and 19 ("The Committee recognizes that *'family' here refers to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family and other traditional and modern community-based arrangements*, provided that these are consistent with children's rights and best interests. […] the Committee notes that in practice *family patterns are variable and changing in many regions*, as is the availability of informal networks of support for parents, with an overall trend towards greater diversity in family size, parental roles and arrangements for bringing up children"); Human Rights Committee, General Comment No. 19 (39th period of sessions, 1990). The Family (Article 23), HRI/GEN/1/Rev.9 (Vol.I), para. 2 ("*The Committee notes that the concept of family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition*"). *Cfr.* United Nations, Human Rights Committee, General Comment No. 16 (32nd period of sessions, 1988). Right to Privacy (Article 17), HRI/GEN/1/Rev.9 (Vol.I), para. 5 ("Regarding the term "family", the objectives of the Covenant require that for the purposes of Article 17, this term be given a broad interpretation that includes all those comprising the family, as understood in the society of the State Party concerned.")

all the concepts or models of family. Indeed, in General Comment N° 19, the Human Rights Committee, in the same paragraph in which it notes that :

> "*…the concept of family may differ in some respects from State to State, and even between regions within a State, so that it is not possible to give a standard definition of the concept.*"

22. Emphasizes that:

> "…when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in Article 23. Consequently States *Parties should report on how the concept and scope of the family is construed or defined in their own society and legal system. Where diverse concepts of family, "nuclear" and "extended", exist within a State, this should be indicated with an explanation of the degree of protection afforded to each one. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States Parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic laws and practice.*" (Cursives added)

23. In other words, it is one of the areas in which it is most essential to allow a *national margin of appreciation.* For this purpose it will be necessary to conduct an inquiry, which is not appropriate to undertake in this case, but should be done whenever the point is raised in a case brought before this Court and the arguments in that regard presented by the parties and by any *amici curiai* are heard.

24. All this reaffirms my conviction that in this case it is not necessary or prudent to declare a violation of paragraph 1 of Article 17 which could be taken as an implicit pronouncement on the interpretation of the different provisions of said Article.

Alberto Pérez Pérez
Judge

Pablo Saavedra Alessandri
Secretary