



Organization of
American States



Inter-American Commission on Human Rights

Application before the Inter-American Court of Human Rights
In the case of
Karen Atala and daughters
(Case 12.502)
Against the State of Chile

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**APPLICATION OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS BEFORE THE
INTER-AMERICAN COURT OF HUMAN RIGHTS AGAINST THE STATE OF CHILE
CASE 12.502
KAREN ATALA AND DAUGHTERS**

I. INTRODUCTION

1. The Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission", "the Commission", or "the IACHR"), files before the Inter-American Court of Human Rights (hereinafter "the Inter-American Court", or "the Court") an application in case 12.502, Karen Atala and her daughters, against the State of Chile (hereinafter "the State of Chile", "the State", or "Chile") for the discriminatory treatment and the arbitrary interference in the private and family life suffered by Mrs. Karen Atala due to her sexual orientation; violations which occurred within the framework of a legal process that resulted in the loss of care and custody of her daughters. The case also concerns the failure to take into account the best interests of the girls, M., V., and R., whose custody and care were determined without observing their rights, and on the basis of discriminatory prejudices incompatible with Chile's human rights obligations.

2. The Commission requests the Inter-American Court to establish the international responsibility of the State of Chile, which it has incurred in violation of Articles 11 (right to private and family life); 17 (right to a family); 19 (special protection of the girls); 24 (right to equality and non-discrimination); and 8 and 25 (right to judicial guarantees and judicial protection), in relation to the obligations established in Article 1.1 of the American Convention on Human Rights (hereinafter "the American Convention", or "the Convention").

3. The present case has been processed in accordance with the provisions of the American Convention and it is referred to the Court pursuant to the transitional disposition contained in Article 79.2 of the Rules of the Court. A copy of Report 139/09, prepared in accordance with Article 50 of the Convention, has been included as an annex to this application.¹

4. The Commission submits this case to the Inter-American Court's jurisdiction based on the fact that the State of Chile has not effectively implemented the recommendations contained in Report 139/09. The Commission considers that the present case will allow the Inter-American Court for the first time to pronounce on the issue of discrimination based on sexual orientation under the American Convention, and on the use of discriminatory prejudices in the exercise of public power, in particular, in the judicial resolution of family relationships. In addition, the Inter-American Court will be able to pronounce on sexual orientation as an essential aspect of the private life of persons which, as such, should remain free from arbitrary interferences.

II. OBJECT OF THE APPLICATION

5. The purpose of the present application consists in respectfully requesting the Court to conclude and declare that

- a) The State of Chile is responsible for the violation of the right to equality and non-discrimination, established in Article 24 of the American Convention in

¹ IACHR, Report No. 139/09 (merits), Case 12.502, *Karen Atala and her daughters*, December 18, 2009. Annex 1.

relation to the obligations contained in Article 1.1 of the same instrument, to the detriment of Karen Atala;

- b) The State of Chile is responsible for the violation of the right to a private life enshrined in Article 11.2 of the American Convention in relation to the obligations laid down in Article 1.1 of the same instrument, to the prejudice of Karen Atala;
- c) The State of Chile is responsible for the violation of the right to a private and family life, set out in Articles 11.2 and 17.1 of the American Convention in relation to the obligations established in Article 1.1 of the same instrument, to the detriment of Karen Atala and M., V., and R.;
- d) The State of Chile is responsible for the non-fulfillment of its obligations of special protection of girls and of ensuring the equality of rights of spouses following the dissolution of marriage, established in Articles 19 and 17.4 of the American Convention in relation to the obligations enshrined in Article 1.1 of the same instrument, to the prejudice of M., V., and R.;
- e) The State of Chile is responsible for the violation of the rights to judicial guarantees and judicial protection, established in Articles 8.1 and 25.1 of the American Convention in relation to the obligations enshrined in Article 1.1 of the same instrument, to the prejudice of Karen Atala.

6. In consequence of the foregoing, the Inter-American Commission requests that the Court orders the State of Chile to:

- a) Grant reparations for the pecuniary and non-pecuniary damage caused as a consequence of the violations alleged in the present application.
- b) Investigate and enforce the corresponding legal consequences against the members of the judiciary that discriminated against and arbitrarily interfered with Karen Atala's private and family life, and that failed to fulfill their international obligations to guarantee the best interests of M., V., and R.
- c) Publically acknowledge its international responsibility and publish the relevant parts of the ruling eventually issued by the Court.
- d) Order rehabilitation measures.
- e) Adopt measures to prevent the repetition of these violations, including 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.
- f) Pay the costs and legal expenses incurred in the proceedings in the present case.

III. REPRESENTATION

7. In accordance with the provisions of Article 24 of the Rules of the Court, the Commission has designated Commissioner Luz Patricia Mejía, and its 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, have been designated to act as legal advisors.

IV. JURISDICTION OF THE COURT

8. In accordance with Article 62.3 of the American Convention, the Inter-American Court has jurisdiction to examine any case relating to the interpretation and application of the provisions of the Convention submitted to it, as long as the State parties in the case have recognized or recognize the Court's jurisdiction.

9. The State of Chile ratified the American Convention on August 21, 1990 and accepted the contentious jurisdiction of the Court on the same date. The alleged violations in the present application occurred on the territory of the State of Chile after the date of entry into force of the American Convention and its acceptance of the Court's jurisdiction.

V. PROCEEDINGS BEFORE THE INTER-AMERICAN COMMISSION²

10. On November 24, 2004, the Commission received a petition lodged by Ms. Karen Atala represented by attorneys from the Public Liberties Association, the Public Interest Clinic of the Universidad Diego Portales, and the Ideas Foundation;³ it acknowledged receipt of the petition on December 6, 2004. On January 24, 2005, the petitioner sent a communication to the Commission in which she named the attorney Macarena Sáez as her representative in this proceeding. On March 23, 2005, the Commission forwarded the petition to the Government and gave it two months to respond. On June 15, 2005, the Government of Chile submitted its comments on the petition, which were transmitted to the petitioners on June 22, 2005.

11. On August 4, 2005, the Commission wrote to the parties communicating its decision to invoke article 37(3) of its Rules of Procedure in order to expedite the processing of the petition, bearing in mind the ages of Ms. Karen Atala's three minor daughters. In said communication, the Commission requested the petitioners, in accordance with the provisions of article 38(1) of its Rules of Procedure, to submit additional observations on the merits within one month. The petitioners responded that same day confirming that they had no further observations to add on the merits of the case. On August 5, 2005, the Commission forwarded the petitioner's observations to the State and requested it to present its additional observations on the merits within two months. On October 11, 2005, the State confirmed that it had no additional observations on the merits of the matter either.

12. On September 19, 2005, the Commission wrote to both parties, placed itself at their disposal, in accordance with Article 41(1) of its Rules of Procedure, with a view to reaching a friendly settlement, and requested them to reply within 15 days regarding their interest in initiating the procedure provided at Article 48(1)(f) of the American Convention. The State replied to the Commission on October 4, 2005, saying that it "reserve[d] the right under Article 41 of the IACHR Rules of Procedure to express its position in that respect at any time during the review of the instant petition." The aforesaid communication was relayed to the petitioners on October 12, 2005.

13. On March 7, 2006, a hearing on the case, attended by the petitioners and the State of Chile, was held at the headquarters of the IACHR in Washington, D.C., in the framework of its 124th Regular Period of Sessions. As a result of the hearing, the State of

² The procedural steps mentioned in this section may be found in the case file of the proceedings of the case before the IACHR. Annex 3.

³ The petitioner specifies that the Ideas Foundation is represented by Francisco Estévez Valencia and names as her representatives before the IACHR the attorneys Verónica Undurraga Valdez, Claudia Moraga Klenner, Felipe González Morales, and Domingo Lovera Parmo.

Chile expressed to the petitioners its intention to initiate negotiations with a view to reaching a friendly settlement of the case. The petitioners informed the IACHR on March 31, 2006, that a meeting had been held to discuss general aspects that would enable the parties to identify the foundations of a friendly settlement agreement and they requested the IACHR to appoint a representative to facilitate the process. That letter was conveyed to the State on April 11, 2006, together with the information that the IACHR had decided to place itself at the disposal of the parties in order to reach a friendly settlement of the matter. The petitioners, in a communication to the IACHR dated August 9, 2006, informed of the progress in the dialogue between the State of Chile and the petitioners aimed at reaching a friendly settlement favorable to both parties. In the communication, the petitioners also reiterated their request for the active involvement of the IACHR in the development of a friendly settlement.

14. On August 11, 2006, the IACHR transmitted the aforesaid communication to the State, placed itself at the disposal of the parties, and granted the State 10 days to indicate its interest in proceeding with this option. In a communication dated August 22, 2006, the Chilean State replied and said communication was forwarded to the petitioners by the IACHR on September 6, 2006. The parties attended three meetings convened by the IACHR in the framework of its 126th (October 25, 2006), 128th (March 5, 2007), and 129th (July 19, 2007) Regular Periods of Sessions to discuss possible points of agreement for a potential friendly settlement. On October 11, 2006, October 25, 2006, and January 30, 2007, the petitioners provided the IACHR with information on progress in the discussions with the State.

15. The petitioners submitted additional observations to the IACHR on July 19, 2007. On October 11, 2007, the petitioners sent a communication to the IACHR in which they confirmed the conclusion of the negotiations for a friendly settlement, requested the IACHR to move forward with its examination of the petition, and requested that it approve the report on admissibility. Both communications were transmitted to the State on November 15, 2007, with the request that it reply within one month. On December 19, 2007, the State submitted its reply, which was forwarded to the petitioners on December 21, 2007, together with a request that they answer within one month.

16. On January 10, 2008, the Commission sent a communication to both parties to inform them that, in view of the conclusion of the friendly settlement process, it had decided to proceed with the admissibility stage. In accordance with Article 30(5) of its Rules of Procedure, the Commission requested the government of Chile to present additional observations on the admissibility of the case within one month. On February 4, 2008, the State requested a 30-day extension to submit its reply, and on the same day the Commission granted it an extension of 15 days. On March 31st and April 16th of 2008, the State presented additional observations to the Commission, which were forwarded to the petitioners on April 18, 2008.

17. On July 23, 2008, the IACHR approved Report No. 42/08 on admissibility. The Commission forwarded that report to the petitioners and to the State on August 8, 2008 and gave the petitioners a period of two months to submit additional observations on the merits. In addition, it made itself available to the parties, pursuant to the provisions of Article 48(1)(f) of the American Convention, for the purpose of reaching a friendly settlement of the matter. In a note dated August 18, 2008, Mrs. Karen Atala provided updated information on the petitioner organizations who are representing her: Jorge Contesse, Human Rights Center of the Universidad Diego Portales; Helena Olea, Humanas Corporation, Regional Human Rights and Gender Justice Center; and Macarena Sáez, of

Public Liberties. The Commission forwarded copy of this note to the State in a communication dated September 30, 2008.

18. In a note dated September 9, 2008, the petitioners informed the IACHR that they were not interested in discussing a possible friendly settlement in this case. In a communication dated October 8, 2008, the petitioners requested a 30-day extension to submit their observations on the merits, which was granted by the IACHR on October 21, 2008.

19. On December 15, 2008, the petitioners submitted their observations on the merits, which were forwarded to the State on February 4, 2009. On April 3, 2009, the State requested a two-month extension to submit its observations on the merits, which was granted by the IACHR on April 16, 2009. In a note dated August 3, 2009, the State submitted its observations, which were forwarded to the petitioners on August 19, 2009, granting them a period of one month to submit additional observations.

20. A series of *amicus curiae* briefs in support of the petitioners have been received during the processing of the case. On September 27, 2005, the *Asociación por los Derechos Civiles* submitted an *amicus curiae* brief, which was forwarded to both parties on October 12, 2005. On October 21, 2005, the Commission received an *amicus curiae* brief from the *Red Iberoamericana de Jueces*, which was forwarded to the parties on March 10, 2006. The Commission also received a brief from the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM)⁴ on January 19, 2006, and this brief was sent to the parties on February 24, 2006.

21. On January 20, 2006, the Commission received an *amicus curiae* brief supporting the petitioners' claims. This brief was submitted by Dorothy L. Fernandez and Margaret L. Wu of Morrison & Foerster (San Francisco, California) and Charles E. Tebbe III and Rachel M. Wertheimer of Morrison & Foerster (New York, New York) and the following institutions – New York City Bar Association, Human Rights Watch, International Gay and Lesbian Human Rights Commission, International Women's Human Rights Law Clinic at the City University of New York, Lawyers for Children, Inc., Legal Aid Society of New York, Legal Momentum, and the National Center for Lesbian Rights. It was forwarded to the parties on December 2, 2008.

22. On March 1, 2006, the Commission received an *amicus curiae* brief submitted by the *Corporación Opción*, which was sent to both parties on March 20, 2006. The Commission received an *amicus curiae* brief on October 26, 2006, submitted by the Allard K. Lowenstein Human Rights Clinic at Yale Law School in the United States, which was forwarded to the parties on November 9, 2006. Finally, the Commission received an *amicus curiae* brief on April 28, 2008 submitted by LGTB Legal Peru, which was forwarded to the parties on May 15, 2008.

23. During its 137th period of ordinary sessions, the Commission considered the merits report No. 139/09, drafted in accordance with Article 50 of the Convention, which was approved on December 18, 2009. The final section of said report stated that:

In light of the considerations of fact and law set out in this report, the Inter-American Commission concludes that the State of Chile did violate the right of Karen Atala to live free from discrimination provided for in Article 24 of the American Convention, in

⁴ The *amicus curiae* brief of CLADEM was submitted with the sponsorship of Dr. María Ysabel Cedano and Dr. Jeannette Llaja Villena.

relation to articles 1.1 and 2 of the same instrument. 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.⁵

24. In the above-mentioned Report, the Commission recommended that the State of Chile

1. Provide Karen Atala and M., V., and R. with comprehensive redress for the human rights violations that arose from the decision to withdraw her custody on the basis of her sexual orientation, taking into consideration their situation and needs.

2. Adopt 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.⁶

25. The Report on the merits No. 139/09 was notified to the State on February 17, 2010 with a time limit of two months to inform the IACHR about the measures taken in compliance with its recommendations. On the same date it requested the petitioners to present their position with respect to submitting the case to the Inter-American Court. On March 5, 2010, the Commission sent the petitioners the relevant parts of the merits report No. 139/09, in a reserved character.

26. In a communication received on April 5, 2010, the petitioners expressed their interest in having the case submitted to the Inter-American Court should the State of Chile not comply with the recommendations.

27. On April 6, 2010, the State requested an extension of four months "starting from the date on which the extension is granted" to present its observations on the implementation of the recommendations issued by the IACHR in the merits report. On that occasion, the State informed that the merits report No. 139/09 was circulated to the relevant state organizations, which were requested to designate a representative to form a working group on the "ways in which the recommendations mentioned in the Report on the merits referred to could be implemented."⁷

28. This communication was sent to the petitioners on April 7, 2010. On April 13, 2010, the petitioners presented their response to the IACHR requesting that the case be sent to the Inter-American Court. In their brief, the petitioners objected to the extension requested by the State, indicating that the working conditions of the group did not reflect a true commitment from the State.

29. On April 26, 2010 the Commission granted the requested extension for a period of four months. In the same communication, the Commission requested that the

⁵ IACHR, Report No. 139/09 (merits), Case 12.502, *Karen Atala and her daughters*, December 18, 2009, para. 161. Annex 1.

⁶ IACHR, Report No. 139/09 (merits), Case 12.502, *Karen Atala and her daughters*, December 18, 2009, para.162. Annex 1.

⁷ The State pointed out as a ground for requesting an extension, that the authorities had recently assumed their responsibilities after the change of government, as well as the emergency the country was going through at that time due to the earthquake.

State present two reports during the said period with regard to the progress and compliance with the recommendations. The first report was to be presented on June 29, 2010 and the second report on August 29, 2010.

30. On the date indicated, the State presented its first compliance report, wherein it referred to two meetings of the working group,⁸ and its proposals regarding both recommendations of the IACHR.

31. With regard to the recommendation to offer reparations to the victims, the State stressed that the option was for Karen Atala to initiate a *Juicio de Hacienda* before the ordinary courts of justice, in which the State Defense Council would intervene directly to represent the public interest.

32. In regards to the recommendation to adopt legislative measures, public policies, programs and initiatives to prohibit and eradicate discrimination based on sexual orientation in all areas of the exercise of public power, the State referred to a legislative bill containing anti-discriminatory measures. In this regard, it observed that this procedure is not free from challenges and mentioned that there have been meetings with various religious groups concerned by the processing of the said project.

33. According to the State, the working group proposed other measures such as: offering awareness-raising courses by the Executive Council of the Judicial Academy on sensitive areas at the national level on the basis of the international law of human rights; undertaking a study by the Secretary General of the Government on a timetable for non-discrimination training; drafting and implementing regulations and manuals aimed at preventing discrimination in the public workforce; undertaking publicity campaigns; developing a competition of best practices on diversity and non-discrimination among the various actors of Chilean society; and finding ways to allocate the resources of the Fund for the Strengthening of Civil Society in order to empower the social organization related to various themes, among these non-discrimination and sexual diversity.

34. The State also mentioned the International Seminar "Respecting and Guaranteeing Fundamental Rights. The Challenges for Judicial Power" that took place between May 6, and 7, 2010. The seminar was aimed at judicial personnel and lawyers to raise awareness of the obligations to respect and guarantee fundamental rights incumbent on the State of Chile and the challenges these present for the judiciary.

35. The State also referred to the series of measures and policies in force in the area of non-discrimination, adopted in advance of Report No. 139/09.

36. In its final report on compliance, presented on August 28, 2010, the State referred to the Judiciary's lack of participation in the working group. Specifically, the Supreme Court of Justice stated that "it lacks the initiative and the power to participate and adopt possible reparation measures in favor of the claimant." In regard to progress in the implementation of the recommendations, the State repeated that it was Karen Atala's responsibility to initiate a *Juicio de Hacienda* to claim the corresponding reparations. At this point, the State offered to award scholarships to Mrs. Atala's daughters, to redress the damage suffered because of the "public exposure created by the case."

⁸ The State mentioned the participation of representatives from the following authorities: Justice Ministry, Ministry of the Government Secretary General, the Ministry of the Presidential Secretary General, National Women's Service, State Department of Defense and Ministry of Foreign Affairs.

37. With respect to the second recommendation, the State highlighted that the Office of Social Organizations and its Diversity and Non-Discrimination Department are undertaking various measures such as the training of public officials scheduled for the second semester of 2010; the sixth edition of the Competition on Best Practices; the dissemination of a questionnaire to public employees to uncover the reality of the problem and to identify the need for training; support for organizations that work for the protection of the human rights of these groups; and co-ordination and meetings with organizations representing sexual minorities.

38. The State also mentioned a number of activities scheduled for 2011, of a similar nature to those mentioned in the preliminary report, referred to above in para. 33. The State added that the non-discrimination bill is undergoing the second constitutional stage, implying an advanced state of progress. Finally, the State of Chile requested a new extension from the Commission to continue with the measures aimed at complying with the recommendations.

39. After examining the information supplied by the State and the observations made by the petitioners, the Commission considers, in the first place, that the State has failed to comply with the recommendation to provide reparations to the victims. It is appropriate to mention that according to the information submitted by the petitioners, the State has not been in contact with the victims to discuss appropriate reparations. In the second place, with respect to the recommendation to adopt legislative measures, public policies, programs and initiatives to prohibit and eradicate discrimination based on sexual orientation in all areas of the exercise of public power, the Commission considers that the measures outlined by the State of Chile, although relevant, are of a general character and are not directed in a specific way to avoid the repetition of the violations that occurred in the present case. In addition, some of the measures mentioned by the State have not yet been implemented, and with respect to the rest, the Commission has no information as to actual results to be able to measure the effectiveness of the said measures. By virtue of the foregoing, the Commission decided not to grant the extension requested and to submit the case to the jurisdiction of the Inter-American Court.

VI. FINDINGS OF FACT

1. Dissolution of the marriage of Karen Atala and Ricardo Jaime López Allende

40. On March 29, 1993, Karen Atala married Ricardo Jaime López Allende⁹. M., V., and R. were born of this marriage in 1994, 1998, and 1999, respectively¹⁰. In 1994, they moved to live in Temuco in southern Chile, and in 1995 they changed their residence to Villarica, 80 kilometers from Temuco¹¹. In March 2002, Karen Atala and Ricardo Jaime López Allende decided to end their marriage. As part of the dissolution of their marriage¹², they established by mutual consent that Karen Atala would maintain the

⁹ Annex 1. Suit for Custody filed by Ricardo Jaime López Allende with the Regular Juvenile Court of Villarica, January 14, 2003; and Annex 2. Answer by Mrs. Karen Atala to the suit for custody, January 28, 2003.

¹⁰ Annex 23. Psychological Reports on M., V., and R., in the case file of María Isabel Thieres Riquielme, November 15, 2002.

¹¹ Annex 2. Answer by Mrs. Karen Atala to the suit for custody, January 28, 2003.

¹² Annex 2. Answer by Mrs. Karen Atala to the suit for custody, January 28, 2003; and Annex 12. Decision issued by Viviana Cárdenas Beltrán, Acting Judge, Juvenile Court of Villarica, October 29, 2003.

custody and care of the girls in Villarica, with a weekly visitation schedule at the home of their father in Temuco¹³.

2. Custody suit filed by Ricardo Jaime López Allende on January 15, 2003

41. On January 15, 2003, the father of M., V., and R. filed a suit for custody with the Juvenile Court of Villarica because “their physical and emotional development was seriously at risk”¹⁴ should they continue to live in the care of their mother. In the suit, Mr. López maintains that Mrs. Karen Atala “is not capable of watching over and caring for them, that her new sexual lifestyle choice, in addition to her cohabiting in a lesbian relationship with another woman, are producing and will necessarily produce harmful consequences for the development of these minors ...”¹⁵ and that due to the sexual practices of a “lesbian couple,” the girls are under constant risk of contracting sexually transmitted diseases such as herpes and AIDS.¹⁶

42. Mrs. Karen Atala responded to the custody suit filed by Mr. López on January 28, 2003 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.”¹⁷ Regarding the suit, Mrs. Atala alleges 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 our daughters”¹⁸ and she asserts that “the allegations made regarding my sexual identity have nothing to do with my 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.”¹⁹ Finally, Mrs. Atala alleged that neither the Chilean Civil Code nor the law on minors consider a “different sexual choice” as being grounds for “disqualification as a parent.”²⁰

43. A series of media outlets covered the custody suit, including newspapers with national circulation such as *Las Últimas Noticias* and *La Cuarta*.²¹

3. Investigation by Judge Lenin Lillo of March 17, 2003

44. Parallel to the custody proceeding, on March 17, 2003, the full Court of Appeals of Temuco appointed Judge Lenin Lillo²² to conduct a special visit at the criminal

¹³ Annex 2. Answer by Mrs. Karen Atala to the suit for custody, January 28, 2003; and Annex 12. Decision issued by Viviana Cárdenas Beltrán, Acting Judge, Juvenile Court of Villarica, October 29, 2003.

¹⁴ Annex 1. Suit for Custody filed by Ricardo Jaime López Allende with the Regular Juvenile Court of Villarica, January 14, 2003.

¹⁵ Annex 1. Suit for Custody filed by Ricardo Jaime López Allende with the Regular Juvenile Court of Villarica, January 14, 2003.

¹⁶ Annex 1. Suit for Custody filed by Ricardo Jaime López Allende with the Regular Juvenile Court of Villarica, January 14, 2003.

¹⁷ Annex 2. Answer by Mrs. Karen Atala to the suit for custody, January 28, 2003.

¹⁸ Annex 2. Answer by Mrs. Karen Atala to the suit for custody, January 28, 2003.

¹⁹ Annex 2. Answer by Mrs. Karen Atala to the suit for custody, January 28, 2003.

²⁰ Annex 2. Answer by Mrs. Karen Atala to the suit for custody, January 28, 2003.

²¹ Annex 3. *Lawyer Demands Custody of his Daughters because Spouse/Judge is a Lesbian*, Newspaper *La Cuarta*, February 28, 2003; *Lawyer Demands Custody of his Daughters because his Former Wife is a Lesbian*, Newspaper *Las Últimas Noticias*, March 1, 2003.

²² Annex 5. Report prepared by Judge Lenin Lillo Hunziker, Court of Appeals of Temuco, April 2, 2003.

court where Mrs. Karen Atala was serving as a judge, in order to directly investigate the facts that had been publicly disclosed regarding her private life.²³ The visit is ordered based on three elements, including articles that appeared in the newspapers, *Las Últimas Noticias* and *La Cuarta*, that made public the custody suit and made reference to the "lesbianism"²⁴ of Mrs. Karen Atala. The facts established during the investigation conducted by Judge Lenin Lillo include the fact that Mrs. Karen Atala began to be visited in her office by a large number of women starting in mid-2002, among them her current partner; that Judge Atala used the Court's fax to send information associated with sexual minorities; and that Mrs. Karen Atala had informed the employees and judges of the court directly of her sexual orientation.²⁵

45. In his final report, the Judge concludes:

This visitor is not inclined to issue value judgments regarding the sexual inclination of Judge Atala. However, it is impossible to get around 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 Mrs. Atala and the Judicial Branch. All the foregoing takes on a seriousness that merits the Court's notice²⁶.

46. The Court of Appeals of Temuco accepted the report prepared by the Judge on April 2, 2003, and drew up charges against Mrs. Karen Atala. However, the Court never imposed disciplinary sanctions on Judge Atala.²⁷

4. Provisional custody granted to the father on May 2, 2003

47. In the context of the custody suit, the girls' father filed a suit for provisional custody on March 10, 2003, with a view to establishing custody of his daughters before the conclusion of the proceeding given the "incompetence that the sexual choice made by the mother and respondent, Jacqueline Karen Atala Riffo, 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 with her social environment."²⁸ The girls' father emphasizes the right of the girls to live in a family made up of a father and mother of different sexes, despite acknowledging that the respondent had a better economic situation than did Mr. López.²⁹ On March 13, 2003, Mrs. Karen Atala answered the provisional custody motion filed by her former spouse, asking that it be rejected in its entirety, given that:

The legal representative of the petitioner seeks 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 my client is a lesbian and acknowledges her condition as

²³ Annex 5. Report prepared by Judge Lenin Lillo Hunzinker, Court of Appeals of Temuco, April 2, 2003.

²⁴ Annex 5. Report prepared by Judge Lenin Lillo Hunzinker, Court of Appeals of Temuco, April 2, 2003.

²⁵ Annex 5. Report prepared by Judge Lenin Lillo Hunzinker, Court of Appeals of Temuco, April 2, 2003.

²⁶ Annex 5. Report prepared by Judge Lenin Lillo Hunzinker, Court of Appeals of Temuco, April 2, 2003.

²⁷ Annex 6. Decisions of the Court of Appeals of Temuco April 2, 2003 and May 9, 2003.

²⁸ Annex 8. Suit for Provisional Custody by Mr. Ricardo Jaime López Allende, March 10, 2003.

²⁹ Annex 8. Suit for Provisional Custody by Mr. Ricardo Jaime López Allende, March 10, 2003.

such does not affect her maternal abilities and her ability to produce an environment with love, affection, respect, and tolerance for purposes of the education and development of the girls as human beings and future citizens of our country.³⁰

48. On May 2, 2003, the Regular Judge of the Juvenile Court of Villarica granted provisional custody of the girls to the father, and regulated the mother's visits, even though he expressly acknowledged that there was no evidence to presume legal incompetence of the mother that would justify changing the existing custody arrangement.³¹ The relevant text of the decision is transcribed below:

Whereas, as provided by Article 225 of the Civil Code, if the parents live separately, the mother shall see to the personal care of the children. 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.

Whereas the judge has the unpleasant judicial task of resolving which parent is more suited to exercise the minors' right of Custody, for which he must use objective criteria – such as the merits of the proceeding – and making a judgment as to probability, ruling on the motion given the urgency merited by the well-being of the girls, regarding which parent they should remain with.

...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 should thus be considered sufficient just cause on the basis of which there is no conclusion other than that the petitioner presents more favorable arguments on behalf of the best interest of the girls, that in the context of a heterosexual and traditional society take on great importance. Thus, considering that there are sufficient indications for changing the legally established duty to provide personal care, the petitioner's request shall be granted....³².

49. In response, on May 13, 2003, Mrs. Karen Atala sought to prevent the Regular Judge in the Juvenile Court of Villarica from continuing to hear the custody proceeding based on his having incurred grounds for involvement [*implicancia*] as contained in the Organic Code of the Courts.³³ Mrs. Karen 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 bottom 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,"³⁴ among other prejudgments made on the merits of the case. On May 14, 2003, the Regular Judge of the Juvenile Court of Villarica declared the "grounds sufficient" 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.³⁵

³⁰ Annex 9. Response with Respect to Motion for Provisional Custody filed by the representative of Mr. Ricardo Jaime López Allende, March 13, 2003.

³¹ Annex 10. Decision on Suit for Provisional Custody Issued by Luis Humberto Toledo Obando, Regular Judge of the Juvenile Court of Villarica, May 2, 2003.

³² Annex 10. Decision on Suit for Provisional Custody Issued by Luis Humberto Toledo Obando, Regular Judge of the Juvenile Court of Villarica, May 2, 2003.

³³ Annex 11. Petition to bar Judge Luis Humberto Toledo Obando, May 13, 2003.

³⁴ Annex 11. Petition to bar Judge Luis Humberto Toledo Obando, May 13, 2003.

³⁵ 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

5. First instance decision granting custody of the girls to Karen Atala on October 29, 2003

50. 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, 2003.³⁶ The Judge rejected the petition for custody based on the view that the existing evidence had established that the sexual orientation of the respondent was not an impediment to developing 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 assume the personal care of the minors in accordance with Article 42 of Law No. 16.618.³⁷ The Judge also concluded that “no concrete evidence has been shown that the presence of the mother’s partner in the home is harmful to the well-being of the girls.” The Judge also felt 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.”³⁸

51. In her evaluation regarding the alleged incapacity of Karen Atala to be a mother, because she has acknowledged being a lesbian and because she was living with a partner of the same sex, the Judge 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, reviewing the existing research and literature on the subject, and confirming that homosexuality is not a psychological disorder, and that children raised in homosexual families do not suffer psychological and social disadvantages and significant differences in their development as compared to children raised in heterosexual families, and will not necessarily be discriminated against by their peers.³⁹

52. The Judge also considered psychological reports on the minors and psychological reports on the respondent and the petitioner, concluding that the scenario in which two persons of the same sex raise a child does not present impediments from a psychological perspective, as demonstrated in the large majority of the studies. Regarding the quality of care that Karen Atala provided for her daughters, the Judge considered a report issued by a nurse at Villarica Hospital verifying the girls’ regular health check-ups and educational reports, confirming the academic achievements of the girls, as well as other sources that demonstrated the mother’s constant concern for the health and education of her daughters. The Judge also points out that although the complaint stated that the girls

preceding article, said declaration shall be made known to the official whose involvement or recusal has been sought, ordering him to abstain from participating in the matter in question as long as the motion is not resolved.”

³⁶ Annex 12. Decision issued by Viviana Cárdenas Beltrán, Acting Judge, Juvenile Court of Villarica, October 29, 2003.

³⁷ Annex 12. Decision issued by Viviana Cárdenas Beltrán, Acting Judge, Juvenile Court of Villarica, October 29, 2003.

³⁸ Annex 12. Decision issued by Viviana Cárdenas Beltrán, Acting Judge, Juvenile Court of Villarica, October 29, 2003.

³⁹ For example, the Acting Judge takes into consideration the fact that the report from the Psychology Department of the University of Chile concludes that “the evidence is emphatic in indicating that the ability to love children, care for them, protect them, respect their rights, and promote their life choices, among them their sexual choices, is unrelated to the sexual identity or choices of the parents.”. See. Annex 12. Decision issued by Viviana Cárdenas Beltrán, Acting Judge, Juvenile Court of Villarica, October 29, 2003; and Annex 13. Report of the Department of Psychology of the University of Chile, issued by Soledad Larrain Heiremans, April 2003.

had been subject to mistreatment by Karen Atala, it never describes concrete acts, and the evidence submitted, particularly in the form of psychological reports, presented nothing that would lend credence to any type of mistreatment of the girls by their mother.⁴⁰

53. On the petitioner's argument regarding the girls' risk of contracting sexually transmitted diseases, the judge considered medical certificates for Karen Atala and her partner confirming that there is no evidence of such diseases, among other proof. On the moral danger the minors allegedly faced, the judge 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" and 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."⁴¹

54. Regarding the potential discrimination raised by relatives and witnesses for the petitioner, the Acting Judge also concluded that "the minors have not been the subject of any discrimination to date and what the witnesses and relatives of the petitioner indicate is a fear of possible future discrimination. On this point, it should be mentioned that this court must base its decision on definite and proven facts in the case and not on mere suppositions or fears..."⁴²

55. Finally, in the decision, the Judge 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 living with their mother, and in the case of M. only a slight preference for the mother was detected." The Judge noted that Article 12 of the Convention on the Rights of the Child guarantees the minor 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, and that Article 36 of Law No. 16.618 provides that the Juvenile Court Judge, must if possible "always hear the adolescent and pre-adolescent minor when he deems this to be advisable." The Judge observed that what the minors stated in the hearing was given consideration but did not influence her 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 goal."⁴³

6. Appeal to the Court of Appeals of Temuco of November 11, 2003 and injunction granted on November 24, 2003

56. 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.

⁴⁰ Annex 12. Decision issued by Viviana Cárdenas Beltrán, Acting Judge, Juvenile Court of Villarrica, October 29, 2003.

⁴¹ Annex 12. Decision issued by Viviana Cárdenas Beltrán, Acting Judge, Juvenile Court of Villarrica, October 29, 2003.

⁴² Annex 12. Decision issued by Viviana Cárdenas Beltrán, Acting Judge, Juvenile Court of Villarrica, October 29, 2003.

⁴³ Annex 12. Decision issued by Viviana Cárdenas Beltrán, Acting Judge, Juvenile Court of Villarrica, October 29, 2003.

However, in the interim, on November 11, 2003, the girls' father filed an appeal of the decision and later a provisional petition for an injunction, arguing that carrying out the decision would mean a radical and violent change in the girls' current status quo.⁴⁴

57. On November 24, 2003, the Court of Appeals of Temuco granted the injunction, keeping custody with the father.⁴⁵ With respect to this injunction, Karen Atala's representative filed a disciplinary complaint against the Judges Loyola López and Lenin Lillo because on January 7, 2004 Judge Lillo and Judge Loyola had disqualified themselves from the case *ex officio*, based on recusal and involvement, respectively.⁴⁶ Therefore, despite having prior knowledge of the grounds for involvement and recusal that affected them, the two Judges participated in the decision dated November 24, 2003, suspending the decision to return the minors to their mother on December 18, 2003. Chile's Supreme Court of Justice ruled on her complaint on July 2, 2004, declaring by majority that there was no fault or abuse on the part of the Judges, but indicating in the text of the decision that "it is noted that the Judges Gálvez, Oyarzún, and Rodríguez Espoz, without prejudice to what has been decided here, almost issued a severe warning to the judges being challenged due to the omission about which the complaint was filed."⁴⁷

58. On March 30, 2004, the Court of Appeals of Temuco confirmed unanimously the decision appealed by the girls' father, sharing the considerations of the first instance judge, and rendered without effect the injunction granted on November 24, 2003⁴⁸.

7. Filing of *recurso de queja* with the Supreme Court of Justice on April 5, 2004 and second injunction granted on April 7, 2004

59. On April 5, 2004, the girls' father filed a *recurso de queja* with the Supreme Court of Chile challenging the Judges of the Court of Appeals of Temuco and petitioned that the girls remain in his care on a provisional basis.⁴⁹ The girls' father argued that in the appeals decision the judges being challenged had committed a fault and serious and notorious abuse by having given preference to the rights of the mother over the rights of the daughters; by having failed in their legal duty to protect the vulnerability of the girls; and by having violated the principles governing the evaluation of evidence in conscience in cases involving family matters. More specifically, the appellant 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." The Court granted the requested injunction on April 7, 2004.⁵⁰

⁴⁴ Annex 14. Appeal filed by the representative of Ricardo Jaime López Allendes, November 11, 2003; Petition for injunction filed by the representative of Ricardo Jaime López Allendes on November 22, 2003.

⁴⁵ Annex. 16. Granting of injunction by the Court of Appeals of Temuco, November 24, 2003.

⁴⁶ Annex 17. Declaration of disqualification of Judges Archibaldo Loyola and Lenin Lillo Hunzinker, January 7, 2004.

⁴⁷ Annex 19. Ruling of the Supreme Court of Justice of Chile, July 2, 2004.

⁴⁸ Annex 18. Judgment of the Temuco Court of Appeals, March 30, 2004.

⁴⁹ Annex 20. *Recurso de queja* and petition for injunction filed by the representative of Ricardo Jaime López Allende, April 5, 2004.

⁵⁰ Annex 21. Granting of injunction by the Supreme Court of Chile, April 7, 2004.

8. Decision of Chile's Supreme Court of Justice of May 31, 2004

60. On May 31, 2004, the Fourth Chamber of Chile's Supreme Court of Justice, in a split three-to-two decision, admitted the *recurso de queja* and granted permanent custody to the father.⁵¹ The text of the Supreme Court's decision establishes that Karen Atala put her own interests before those of her daughters when she chose to express her sexual orientation and began to live with a same sex partner,⁵² and the decision considered testimony indicating that the girls could become confused regarding their sexual roles and could be subject to social discrimination in the future.⁵³

61. In its analysis, the Court states 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.⁵⁴ Therefore, the Court declares 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."⁵⁵

62. In this context, the Court concludes:

In the trial over the custody of the López Atala minors opinions were accepted from different psychologists and social workers indicating that the homosexuality of the mother would not violate the rights of her daughters, nor make her unfit to exercise her rights as their mother, since she is a normal person from a psychological and psychiatric perspective. On the other hand, 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 the to possibility that the girls could be the target of social discrimination arising from this fact, given that visits by their friends to the shared home have dwindled almost to nothing from one year to the next. For its part, the testimony of persons close to the girls, such as the house maids, 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 scheme at their home.

Apart from the effects that 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 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 protected⁵⁶.

⁵¹ Annex 22. Judgment of the Supreme Court of Justice of Chile, May 31, 2004.

⁵² Annex 22. Judgment of the Supreme Court of Justice of Chile, May 31, 2004, para. 16.

⁵³ Annex 22. Judgment of the Supreme Court of Justice of Chile, May 31, 2004, paras. 15 and 17.

⁵⁴ Annex 22. Judgment of the Supreme Court of Justice of Chile, May 31, 2004, para. 11. The Court emphasizes paragraph 2 of Article 225, which provides that "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" and its third paragraph provides that "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".

⁵⁵ Annex 22. Judgment of the Supreme Court of Justice of Chile, May 31, 2004, para. 12.

⁵⁶ Annex 22. Judgment of the Supreme Court of Justice of Chile, May 31, 2004, para. 12.

63. The Court 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 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 environment, according to the proper traditional model, and have incurred serious fault or abuse, that must be corrected through admission of the instant *recurso de queja*.”⁵⁷

64. On the other hand, the two judges of the Chamber of the Supreme Court who voted to reject the *recurso de queja*, established regarding the nature of that remedy 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 *recurso de queja* 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.⁵⁸ Then and discarding as a legal imperative the possibility that the *recurso de queja* 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 4⁵⁹.

65. The judges deemed that in accordance with Article 225 and the preference its gives to the mother for the care of children in the 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.”⁶⁰ In this analytical context, the judges felt that 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 that the “opinions that appear in the record from both psychologists and social workers indicate that the mother’s sexuality does not injure 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

⁵⁷ Annex 22. Judgment of the Supreme Court of Justice of Chile, May 31, 2004, para. 12.

⁵⁸ Annex 22. Judgment of the Supreme Court of Justice of Chile, May 31, 2004, dissenting vote of Judges José Benquis C. and Orlando Álvarez H., para. 2.

⁵⁹ Annex 22. Judgment of the Supreme Court of Justice of Chile, May 31, 2004, para. 12.

⁶⁰ Annex 22. Judgment of the Supreme Court of Justice of Chile, May 31, 2004, dissenting vote of Judges José Benquis C. and Orlando Álvarez H., para. 6.

absolutely normal person.”⁶¹ 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 has 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.”⁶²

9. Relevant legal provisions

66. The system for the custody of children of separated parents in Chile is governed by Articles 225, 226, and 227 of the Civil Code, as they relate to Article 242 of the same Code and Article 42 of Law No. 16.618, the Law on Minors. The texts of those articles are as follows:

Article 225: If the parents live separately, the mother shall see to the personal care of the children.

In 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 (...)

Article 226: In the case of physical or moral incompetence of both parents, the judge may entrust the personal care of children to another competent person or persons (...).

Article 242: (...) In any case, in order to make his decisions, the judge shall attend, as his primary consideration, to the best interest of the child and shall give due consideration to the child’s opinion, according to this age and maturity.

Article 42 of Law No. 16.618: For the purposes of Article 226 of the Civil Code, it shall be understood that one or both parents are physically or morally incompetent:

1. When they are mentally disabled;
2. When they suffer from chronic alcoholism;
3. When they do not tend to the raising, personal care, or education of their child;
4. When they allow their child to take to the streets or public places as vagrants or beggars, whether openly or under pretext of a profession or job;
5. When they have been convicted of kidnapping or abandoning minors;
6. When they mistreat or provide a bad example to the minor or when the minor’s residence in the home constitutes a danger to his morality;
7. When any other causes place the minor in moral or material danger.

67. Regarding the nature of the challenged *recurso de queja*, the Organic Code of the Courts of Chile provides in Article 545 that:

The sole purpose of the *recurso de queja* is to correct serious faults or abuses committed in the issuance of rulings of a jurisdictional nature. 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

⁶¹ Annex 22. Judgment of the Supreme Court of Justice of Chile, May 31, 2004, dissenting vote of Judges José Benquis C. and Orlando Álvarez H., para. 3.

⁶² Annex 22. Judgment of the Supreme Court of Justice of Chile, May 31, 2004, dissenting vote of Judges José Benquis C. and Orlando Álvarez H., para. 3.

or single instance rulings issued by arbiters or arbitrators are excepted, in which case the *recurso de queja* shall be admissible, in addition to the cassation appeal with respect to procedure.

The decision that accepts the *recurso de 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 de queja* filed against a first or single instance final decision issued by arbiters or arbitrators is involved.

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.

VII. BASIS OF LAW

68. Considering that the arguments presented by the parties and the documentary evidence submitted relates to a judicial process with a firm decision regarding an aspect that is primarily within the competency of the domestic judicial authorities, the Commission wishes to clarify that the objective of the present application is not to establish whether the custody of M., V. and R. corresponded to Karen Atala or their father. The argumentation the Commission makes in the following sections has as its objective to prove that in the custody process the judicial authorities compromised the international responsibility of the State of Chile for having applied standards incompatible with the American Convention.

69. The Commission understands that in the framework of a proceeding related to custody it is not only reasonable, but necessary, for a judicial authority to examine a variety of factors to determine and evaluate the capacity of the father or the mother to exercise custody over their children, in order to protect the best interest of the children. These aspects may include the private, sexual and emotional life of the persons involved, when relevant to the best interest of the children. However, the Commission underscores that the consideration of these factors should be consistent with the international obligations of the States. Therefore, the Commission will argue in the following sections that the consideration of the sexual orientation of Karen Atala in the custody proceeding was not in conformity of such obligations.

1. Right to equality and non discrimination (articles 24 and 1(1) of the American Convention)

70. Article 24 of the American Convention provides that:

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

71. Article 1.1 of the American Convention provides 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 the 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.

72. The Commission will present the arguments in the following order: (1) considerations on the interrelation, scope, and content of Articles 1.1 and 24 of the American Convention; (2) differences in treatment, suspect categories, and the strict scrutiny test; (3) sexual orientation as a suspect category for distinction; and the (4) specific analysis of the case at hand.

73. In section four the Commission will argue, first of all, that Karen Atala received a different treatment in her daughters' custody proceedings on account of her sexual orientation. The Commission will also establish that actions of the state authorities do not pass the strict scrutiny test for distinctions based on suspect categories.

1.1 Considerations on the interrelation, scope, and content of Articles 1.1 and 24 of the American Convention and their application to this case

74. The Commission and the Inter-American Court have repeatedly maintained that the right to equality and nondiscrimination is the central, basic axis of the inter-American human rights system. They have also established that it "entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals."⁶³

75. Since its earliest jurisprudence on the principle of equality, the Inter-American Court has emphasized 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. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.⁶⁴

76. Regarding the concept of "discrimination," although the American Convention and the International Covenant on Civil and Political Rights do not define the term, the Commission, the Court, and the United Nations Human Rights Committee have used the definitions contained in the International Convention on the Elimination of All Forms of Racial Discrimination and in the Convention on the Elimination of All Forms of Discrimination against Women in finding that discrimination is:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.⁶⁵

⁶³ I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, paragraph 173 (5).

⁶⁴ I/A Court H.R., Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Series A No. 4, paragraph 55.

⁶⁵ United Nations, Human Rights Committee, General Comment 18, *Non-Discrimination*, 10/11/89, CCPR/C/37, paragraph 7; I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, paragraph 92; Fourth Progress Report of the Special

77. Regarding the interrelation between the principle of equality and nondiscrimination, the Court has ruled that “the element of equality is difficult to separate from nondiscrimination” and that there is:

an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and nondiscrimination States are obliged to respect and guarantee the full and free exercise of rights and freedoms without any discrimination. Noncompliance by the State with the general obligation to respect and guarantee human rights, owing to any discriminatory treatment, gives rise to its international responsibility.⁶⁶

78. Similarly, Article 1.1 of the American Convention has been used to interpret the word “discrimination” as contained in Article 24. In particular, in the analysis of reasonability habitually used to determine whether a State is internationally responsible for violating Article 24 of the American Convention, the invocation of the “categories” specifically listed in Article 1.1 has certain effects. This matter will be analyzed below in paragraphs 94 and 95.

79. With regard to the articles’ scope, the Inter-American Court has differentiated between the autonomous and subordinated clauses of the American Convention; thus, in its earliest jurisprudence it ruled that Article 1.1 enforces a ban on discrimination in the exercise and enforcement of the rights that the Convention enshrines, whereas Article 24 prohibits such discrimination as regards not only the rights protected by the Convention, but in “all laws enacted by the State and in their enforcement.”⁶⁷ This distinction was reiterated recently in the following terms by the Inter-American Court in the case of *Apitz Barbera et al. v. Venezuela*:

The difference between the two articles lies in that the general obligation contained in Article 1.1 refers to the State’s duty to respect and guarantee “nondiscrimination” in the enjoyment of the rights enshrined in the American Convention, while Article 24 protects the right to “equal treatment before the law.” In other words, if the State discriminates upon the enforcement of conventional rights containing no separate nondiscrimination clause a violation of Article 1.1 and the substantial right involved would arise. If, on the contrary, discrimination refers to unequal protection by domestic law, a violation of Article 24 would occur⁶⁸.

80. Nevertheless, the development of the right to equal treatment and nondiscrimination points to the existence of several conceptions of it. For example, one conception is related to the prohibition of arbitrarily different treatment – with different treatment understood as meaning distinction, exclusion, restriction, or preference⁶⁹ – and

Rapporteurship on Migrant Workers and their Families in the Hemisphere, OEA/Ser.L/V/III.117, doc.1 rev.1, *IACHR Annual Report 2002*, March 7, 2003, paragraph 87.

⁶⁶ I/A Court H.R., *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A no. 18, paragraph 85.

⁶⁷ I/A Court H. R., *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of January 19, 1984, Series A No. 4, paragraph 54; I/A Court H. R., *Yatama Case*, Judgment of June 23, 2005, Series C No. 127, paragraph 186.

⁶⁸ I/A Court H.R., Case of *Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 5, 2008, Series C No. 182, paragraph 209.

⁶⁹ See: United Nations, Human Rights Committee, General Comment 18, *Non-discrimination*, 10/11/89, CCPR/C/37, paragraph 7; I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, paragraph 92; Fourth Progress Report of the Special

another is related to the obligation of ensuring conditions of true equality for groups that have historically been excluded and are at greater risk of discrimination. Although both views may be present in certain cases, each warrants a different response from the State and a different treatment under the American Convention. To this must be added the fact that under the different conceptions of the right of equality, a State's actions and failures to act may be related to rights enshrined in the American Convention or they may be related to any undertaking of the State that does not affect the enjoyment of Convention-protected rights.

81. Therefore, although certain criteria can be used as a basis, the applicable Convention provisions must be determined in each specific case by means of an analysis that takes into account the individual or group of people affected; the reasons behind the alleged discrimination; the rights or interests involved; the actions or omissions that gave rise to it; as well as other considerations.

82. The different aspects of the right to equal treatment have been reflected in rulings by the Inter-American Court in various cases and advisory opinions, in which it has held that to effectively ensure the right to equality and nondiscrimination, States "must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of the population when exercising their rights," "must combat discriminatory practices at all levels, particularly in public bodies," and, finally, "must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals."⁷⁰

83. In the case at hand, for example, the Commission notes that the petitioners presented a series of allegations involving several of the issues referred to in the preceding paragraphs. Thus, they argued that Ms. Karen Atala received arbitrarily different treatment as a consequence of her sexual orientation in the context of judicial proceedings relating to her interest in maintaining custody of her daughters (a legal matter at the domestic level) but that, additionally, this had a serious impact on their private and family life (rights set out in the American Convention). In addition, although the central argument focuses on the differential treatment received at trial, they also presented contentions regarding the historical prejudice faced by people with specific sexual orientation and the effects of those prejudices on the legal proceedings in question.

84. The Commission therefore believes that the instant case involves issues covered by the scope of both Article 1.1 and Article 24 of the American Convention and, consequently, arguments will be presented in light of those provisions.

1.2 Differences in treatment, suspect categories, and the strict scrutiny test

85. The Inter-American Court has repeatedly stated that the American Convention does not prohibit all distinctions in treatment.⁷¹ The Court has established a

Rapporteurship on Migrant Workers and their Families in the Hemisphere, OEA/Ser.L/V/II.117, doc.1 rev.1, *IACHR Annual Report 2002*, March 7, 2003, paragraph 87.

⁷⁰ I/A Court H. R., *Case of the Girls Yean and Bosico*, Judgment of September 8, 2005, Series C No. 130, paragraph 141; and *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, paragraph 88; cited in: I/A Court H. R., *Case of López Álvarez*, Judgment of February 1, 2006, Series C No. 141, paragraph 170. See also: *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, paragraph 44; *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of January 19, 1984, Series A No. 4 paragraph 54; cited in I/A Court H. R., *Yatama Case*, Judgment of June 23, 2005, Series C No. 127, paragraph 185.

⁷¹ I/A Court H. R., *Case of Castañeda Gutman v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 6, 2008, Series C No. 184, paragraph 211; citing: *Proposed Amendments of the*

difference between “distinction” and “discrimination,” whereby the former are differences that are compatible with the American Convention because they are reasonable and objective, whereas the latter are arbitrary differences that have a negative effect on human rights.⁷²

86. Since evaluating whether a distinction is “reasonable and objective” is done on a case-by-case basis, the Commission, the Court, and other international courts and agencies have made use of a standard test involving several elements. Those elements include, for example, the existence of a legitimate goal, the suitability or logical means-to-end relationship between the goal sought and the distinction, the existence of other alternatives, and the proportionality, understood as the balance between the interests at stake and the level of sacrifice required from one party compared to the level of benefit of the other.

87. In addition, in assessing measures that the State claims are neutral, it is important to evaluate the effects of such measures on certain groups and whether they have a disproportionately negative impact.

88. When distinctions, however, are based on certain categories that are expressly referenced in the nondiscrimination clauses of international human rights treaties, consensus exists that the examination or test used to quantify the reasonableness of the differential treatment must be particularly strict. This is because by their very nature, those categories are considered “suspect”⁷³ and, consequently, it is assumed that the distinction is incompatible with the American Convention. Thus, only “weighty reasons” may be invoked as justification, and those must be studied in close detail.⁷⁴ This strict analysis serves to guarantee that the distinction is not based on the prejudices and/or stereotypes that generally surround suspect categories of distinction.

89. In practical terms, this means that after presenting such a distinction, the burden of proof falls on the State, and the general criteria referred to in paragraph 86 above must be subject to close scrutiny wherein it is not enough for the State to argue the existence of a legitimate goal, but the goal sought through the distinction must represent a particularly important purpose or a pressing social need.⁷⁵ Furthermore, it is not enough for

Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Series A No. 4, paragraph 56; *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, paragraph 46; and *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, paragraph 89.

⁷² I/A Court H. R., *Case of Castañeda Gutman v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 6, 2008, Series C No. 184, paragraph 211; citing: *Juridical Condition and Rights of the Undocumented Migrants*, *supra* note 68, paragraph 84.

⁷³ The criteria used to determine which categories are suspect will be analyzed in paragraph 102 below.

⁷⁴ IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, paragraphs 80 and 83; IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, doc.5 rev.1 corr., October 22, 2002, paragraph 338; IACHR, Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, paragraph 36; IACHR, *Annual Report 1999*, Considerations regarding the compatibility of affirmative action measures designed to promote the political participation of women with the principles of equality and nondiscrimination, Chapter VI; IACHR, Report No. 38/96, *X and Y* (Argentina), October 15, 1996, paragraphs 73 and 74. In this report, the Commission determined the importance of the goal sought as an “absolute necessity.”

⁷⁵ IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, paragraphs 80 and 83; IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, doc.5 rev.1 corr., October 22, 2002, paragraph 338; IACHR, Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, paragraph 36; IACHR, *Annual Report 1999*, Considerations regarding the compatibility of affirmative action measures designed to promote the political participation of women with the principles of equality and nondiscrimination, Chapter VI; European Court of Human Rights, *Salgueiro da Silva Mouta*

the measure to be suitable or for a logical causal relationship to exist between it and the goal sought; instead, it must be strictly necessary to attain that goal, meaning that no other less harmful alternative exists.⁷⁶ Finally, to meet the proportionality requirement, the existence of an appropriate balance of interests in terms of the level of sacrifice and the level of benefit, must be argued.

1.3 Sexual orientation as a suspect category of distinction

90. In accordance with the practice of the Court and the Commission,⁷⁷ the American Convention must be interpreted in light of current social conditions in the nations of the Hemisphere and the current status of international human rights precedents. Hence, the Inter-American Court has ruled that human rights treaties such as the Convention are “living instruments” that must be interpreted in accordance with current times and evolving conditions.⁷⁸ In addition, following the precedent set by the International Court of Justice, the Court has stated that “an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation.”⁷⁹

91. The Commission notes that sexual orientation does not explicitly appear in the text of the nondiscrimination clause contained in Article 1.1 of the American Convention. The language used in the clause does, however, indicate that it is an open provision, allowing the inclusion of additional categories under the wording “other social condition.”

92. Both the European Court and the Human Rights Committee have ruled on a series of cases alleging different treatment on the basis of sexual orientation. Those cases have dealt both with the application of criminal and disciplinary sanctions and with the failure to recognize rights that do accrue to heterosexual people both individually and in their lives as couples. In those cases, both bodies have consistently held that sexual orientation is covered by the prohibited forms of discrimination in the corresponding international

v. Portugal, Application No. 33290/96, December 21, 1999, paragraph 29; European Court of Human Rights, *Belgian Linguistics Case* (Merits), Judgment of July 23, 1968, p. 34; ECHR, *Case of Lustig-Prean and Beckett* (*supra* note 14), paragraph 80; ECHR, *Case of Smith and Grady* (*supra* note 14), paragraph 87.

⁷⁶ IACHR, Report No. 38/96, *X and Y* (Argentina), October 15, 1996, paragraph 74; IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, January 20, 2007, paragraph 83. Similarly, see: European Court of Human Rights, *Karner v. Austria*, Application No. 40016/98, July 24, 2003, paragraph 41; European Court of Human Rights, *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, December 21, 1999, paragraph 29; European Court of Human Rights, *Belgian Linguistics Case* (Merits), Judgment of July 23, 1968, p. 34.

⁷⁷ See, for example: IACHR, Report No. 75/02, *Mary and Carrie Dann* (United States), Case 11.140, *Annual Report 2002*, paragraph 124; IACHR, Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, paragraph 32.

⁷⁸ I/A Court H. R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999, Series A No. 16, paragraph 114.

⁷⁹ I/A Court H. R., *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 of July 14, 1989, Series A No. 10, paragraph 37; citing: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 16 - 31.

treaties.⁸⁰ They have also established that strict scrutiny must apply when the distinction is based on sexual orientation.⁸¹

93. In addition to the consensus existing within the case system described in the previous paragraph, the Committee on Economic, Social and Cultural Rights recently ruled that “sexual orientation” is an implicit motivation for discrimination covered by the category of “any other social condition.”⁸²

94. Within comparative law, it is also possible to identify a series of decisions that have ruled on the prohibition of discrimination based on sexual orientation on the grounds that it is a suspect category and that have subjected all distinctions based on that criterion to a strict examination or test.⁸³ It should be noted that in several of these cases sexual orientation was not explicitly referred to in the Constitution and/or law at issue. The criteria used to reach these conclusions have included the following: the historic marginalization and exclusion faced by homosexual people; the immutability of sexual orientation, understood as meaning it is a characteristic that is difficult to control and which a person cannot abandon without sacrificing his or her identity; and the manifest irrationality of dividing social responsibilities on the basis of sexual orientation.⁸⁴

95. In light of the considerations analyzed in this section, the Commission states that sexual orientation is covered by the phrase “other social condition” contained in Article 1.1, with all the consequences that this implies with respect to the other rights enshrined in the American Convention, including Article 24. Therefore, a difference in treatment based

⁸⁰ United Nations Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992 (1994), paragraph 8.7; Human Rights Committee, *Case of Young v. Australia*, Communication 941 of 2000, CCPR/C/78/D/941/2000 (2003), paragraph 2.1; European Court of Human Rights, *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, December 21, 1999, paragraph 28.

⁸¹ European Court of Human Rights, *S.L. v. Austria*, Application No. 45330/99, ECHR 2003-I, paragraph 37; European Court of Human Rights, *L. and V. v. Austria*, Application Nos. 39392/98 and 39829/98, January 9, 2003, paragraph 45; European Court of Human Rights, *Karner v. Austria*, Application No. 40016/98, July 24, 2003, paragraph 41; European Court of Human Rights, *E. B. v. France*, Application No. 43546/02, January 22, 2008, paragraph 91.

⁸² United Nations Committee on Economic, Social and Cultural Rights, General Comment 20, *Non-Discrimination in Economic, Social and Cultural Rights* (2009), paragraphs 15 and 27.

⁸³ See, for example, the Judgments of the Constitutional Court of Colombia, C-029 (2009), C-075-07 (2007); Constitutional Court of South Africa, Case CCT 11/98, *The National Coalition for Gay and Lesbian Equality*, October 9, 1998; *Perry Watkins v. United States Army*, United States Court of Appeals for the Ninth Circuit, 1988, 847 F.2d 1329, vacated en banc 875 F.2d 699 (9th Cir. 1989). See also: Supreme Court of Iowa, *Katherine Varnum and Others v. Thomas Brien*, No. 07-1499, April 3, 2009 (holding that legislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution) and the Supreme Court of Connecticut, *Elizabeth Kerrigan v. Commissioner of Public Health et al.*, 289 Conn. 135 (October 28, 2008).

⁸⁴ See, for example, *Perry Watkins v. United States Army*, United States Court of Appeals for the Ninth Circuit, 1988, 847 F.2d 1329, vacated en banc 875 F.2d 699 (9th Cir. 1989); See also: Supreme Court of Iowa, *Katherine Varnum and Others v. Thomas Brien*, No. 07-1499, April 3, 2009 (holding that legislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution) and the Supreme Court of Connecticut, *Elizabeth Kerrigan v. Commissioner of Public Health et al.*, 289 Conn. 135 (October 28, 2008).

The Constitutional Court of Colombia has applied the following criteria to determine whether or not a category of distinction is suspect: “(i) it is based on people’s permanent features, which they cannot voluntarily abandon without the risk of losing their identity; (ii) they have historically been subjected to patterns of cultural perception that tend to denigrate them; and (iii) they do not *per se* constitute criteria on the basis of which a rational and equitable distribution or allocation of property, rights, or social responsibilities can be carried out.” Constitutional Court of Colombia, Judgment C-101/05, discussed in: IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V.II. doc.68, January 20, 2007, paragraph 80, note 113.

on a person's sexual orientation is suspect; it is presumed to be incompatible with the American Convention; and the corresponding State is obliged to prove that it passes the strict scrutiny test described above.

1.4 Analysis of the specific case

1.4.1 The decision of the Chilean Supreme Court was based on Karen Atala's sexual orientation

96. The Chilean State has argued that the Supreme Court's decision was not based on Karen Atala's sexual orientation but on her cohabiting with a partner of the same sex and the effect that situation could have on M., V., and R. However, the Commission underscores that a person's sexual orientation as a prohibited criterion for discrimination and a suspect category under Article 1.1 of the American Convention is not restricted to homosexuality *per se*, but also includes its expression and its necessary consequences on people's life plans. The Commission will therefore argue that sexual orientation, in the sense described, was the basis for the Supreme Court's decision.

97. According to the facts that the Commission has taken as established, the judgment of the Supreme Court of Justice ruled that Karen Atala should not retain custody of her daughters on the grounds that Ms. Atala was cohabiting with a person of her same sex. That fact is, in and of itself, evidence that the judicial authorities made a distinction in enforcing the law for determining family matters with respect to Karen Atala that was based on an expression of her sexual orientation, namely her decision to enter into a relationship and establish a life with her partner.

98. The language used by the Supreme Court leads to this conclusion. The judgment sets out a set of factors as "justified grounds" for awarding custody to Mr. López, including Karen Atala's sexual orientation and her cohabitation with a same-sex partner; the harmful effects that "the absence of a male parent in the home" could have on the girls' "mental and emotional wellbeing";⁸⁵ the "exceptional family environment" of M., V., and R., which "is significantly different from that of their schoolmates and neighborhood acquaintances, exposing them to the risk of isolation and discrimination";⁸⁶ and the fact that Karen Atala "placed her freedom to express her homosexuality above the girls' right to grow up within a normally structured and socially accepted family in accordance with the corresponding traditional model."⁸⁷

99. In addition, the provisional custody decision handed down on May 2, 2003, also involved a distinction made on the grounds of Ms. Atala's sexual orientation. This can be seen in the text of the decision, which states that although there were no grounds for legal disqualification, Karen Atala had, in expressing her sexual orientation, "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."⁸⁸ Of special relevance is the statement holding "that the petitioner presents more favorable

⁸⁵ Judgment of the Supreme Court of Justice of Chile, May 31, 2004, paragraph 17.

⁸⁶ Judgment of the Supreme Court of Justice of Chile, May 31, 2004, paragraph 18.

⁸⁷ Judgment of the Supreme Court of Justice of Chile, May 31, 2004, paragraph 20.

⁸⁸ Resolution of the provisional custody suit, handed down by Luis Humberto Toledo Obando, Regular Judge of the Juvenile Court of Villarica, May 2, 2003.

arguments on behalf of the best interest of the girls, that in the context of a heterosexual and traditional society take on great importance".⁸⁹

100. The Commission believes that the language used by the two judicial authorities constitutes clear evidence that the treatment given to Ms. Karen Atala was based on an expression of her sexual orientation which, as explained in the previous sections, is a suspect category and, as such, any action or different treatment based on that category is assumed to be incompatible with the Convention and must be subject to strict scrutiny.

1.4.2 Application of strict scrutiny to the State's actions

101. At this juncture the Commission holds that the different treatment given to Ms. Karen Atala throughout the custody proceedings was not justified by a pressing social need and did not comply with the requirements of suitability, necessity, and proportionality.

102. With reference to the goal sought, the Commission notes that the State justified the actions of the judicial authorities in terms of the best interests of Karen Atala's daughters and its special duty of protection toward them as minors. The Commission believes this goal to be not only a legitimate aim, but also a pressing social need that, moreover, is in line with its international obligations under Article 19 of the American Convention. The Commission therefore holds that this requirement has been satisfied.

103. Regarding the second element – the suitability of the Supreme Court's decision and of the provisional custody ruling – the Commission notes that in this case no information was submitted to indicate that Karen Atala's sexual orientation or the expression thereof in her life plans posed a threat to her daughters. On the contrary, although evidence was given that the girls wished to continue to live with their mother, that the home environment was appropriate for them, that Ms. Atala protected their interests, and that living with their mother's partner was having no negative effect on the girls, both judicial authorities based their decisions on assumptions of risk derived from prejudice and mistaken stereotypes regarding the characteristics and behavior of a given social group.

104. The nonexistence of risk to the girls on account of Karen Atala's sexual orientation was acknowledged by the State before the IACHR when it explained that neither of the parents was disqualified from maintaining custody.⁹⁰

105. The Commission concludes that although the State sought the pressing social need of protecting the best interests of M., V., and R. as minors, there was no logical causal relationship between the means and the end since the decisions were based on discriminatory prejudices and not in an objective assessment of the parents' capacity to exercise custody over their daughters. Consequently, the judicial decisions under analysis did not meet the requirement of suitability and hence they constituted arbitrary distinctions that are incompatible with the Convention. The Commission therefore believes it would be irrelevant to address the other aspects of the test.

106. Significantly, in a case in which a homosexual father was denied custody on the basis of his sexual orientation, the European Court concluded that the decision was

⁸⁹ Resolution of the provisional custody suit, handed down by Luis Humberto Toledo Obando, Regular Judge of the Juvenile Court of Villarica, May 2, 2003.

⁹⁰ IACHR, Hearing, Case 12.502, *Karen Atala and Daughters*, 124th regular session, March 7, 2006.

discriminatory in that it bore no relation to the protection of the children.⁹¹ Several domestic courts have ruled in a similar fashion.⁹²

107. Regardless that that State's actions do not even pass the standard of suitability, the Commission points out that the actions of the judicial authorities in the case at hand were not only unsuited to pursuing the goal sought, but that they could have had a negative effect on the girls. As analyzed in the section dealing with Articles 17(4) and 19 of the American Convention, the judicial officials did not gather adequate evidence to objectively establish which of the two parents was better equipped to take on their daughters' custody and care. In addition, the Supreme Court of Justice refused to hear the girls' opinions and wishes, as they were required to do by the applicable international standards.

108. In light of the above considerations, the Commission requests the Court to conclude and declare that the Chilean State did violate, with respect to Karen Atala, the right to the equal treatment of the law enshrined in Article 24 of the American Convention, in conjunction with Article 1.1 thereof.

2. The right to a private life of Karen Atala (Article 11.2 of the American Convention)

109. Article 11.2 of the American Convention provides that:

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.

110. The IACHR points out that one of the main objectives of Article 11 is to protect people from arbitrary actions by state authorities that could interfere in their private lives.⁹³ This right guarantees that individuals have spheres into which no one can intrude, such as "the ability to pursue the development of one's personality and aspirations,

⁹¹ European Court of Human Rights, *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, December 21, 1999, paragraphs 21 and 24.

⁹² In Argentina, the family court of Córdoba ruled that homosexuality and cohabitation with a homosexual partner cannot constitute grounds for denying one of the parents custody of the children, rejecting arguments related to "the moral danger they could face":

The analysis for awarding custody of the children cannot and must not center on the parent's "unconventional" sexual behavior, since that in no way is a factor indicating a lack of suitability for the task of parenting. The important and relevant issue in determining the custody of the children is whether one parent or the other, regardless of their sexuality, is or can be a good parent; to do otherwise would be to establish mere groundless speculations, which would constitute a source of currently unacceptable discrimination.

See: Family Court of Córdoba, *Case of L.S.F. and A.C.P.*, Divorce, August 2003.

Similarly, in the United States, the Supreme Judicial Court of Massachusetts ruled in the case of *Bezio v. Magdalena Patenaude* that a state must not deprive parents of the custody of their children "simply because their households fail to meet the ideals approved by the community... [or] simply because the parents embrace ideologies or pursue life-styles at odds with the average"; consequently, in the absence of evidence suggesting a correlation between the mother's homosexuality and her fitness as a parent, a decision to revoke custody was ruled inadmissible.

Massachusetts Supreme Judicial Court, *Brenda A. Bezio v. Magdalena Patenaude*, 381 Mass. 563, 410 N.E.2d 1207 (September 22, 1980).

⁹³ IACHR, Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, paragraph 47.

determine one's identity"⁹⁴, and areas of activity that are wholly their own and part of their autonomy, such as decisions, interpersonal and family relations, and the home.⁹⁵

111. 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, and his or her personal and family relations⁹⁶. Sexual orientation constitutes a fundamental component of the private life of an individual that should be free from arbitrary and abusive interferences by the State, in the absence of weighty and convincing reasons⁹⁷. There is a clear nexus between the sexual orientation and the development of the identity and life plan of an individual, including his or her personality, and relations with other human beings.

112. Article 11.2 specifically prohibits "arbitrary or abusive" interference with this right by state authorities, which may include elements of "injustice, unpredictability, and unreasonableness."⁹⁸ The Commission has established that the guarantee against arbitrariness is intended to ensure that any regulation or other measure is consistent with the norms and objectives of the Convention and is reasonable in the given circumstances.⁹⁹

113. The European Court has ruled that official interferences on the basis of an individual's sexual orientation affect an intimate part of the person's private life, requiring the State to present particularly convincing and weighty reasons to justify them.¹⁰⁰

⁹⁴ IACHR, Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, paragraph 47.

⁹⁵ IACHR, Report No. 38/96, *X and Y* (Argentina), October 15, 1996, paragraph 91.

⁹⁶ For example, in regards to the privacy of homosexual couples and their families, the Constitutional Court of South Africa has established that:

Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

Judgment of Constitutional Court of South Africa, Case CCT 11/98, *The National Coalition for Gay and Lesbian Equality*, October 9, 1998, paragraph 32.

⁹⁷ The Commission has established in the past that the right to privacy can be implicated in denying intimate visits to women in jail based on their sexual orientation. In the case of *Martha Lucía Alvarez Giraldo* the petitioner alleged that her personal integrity, honor and equality, had been affected by the denial by penitentiary authorities to authorize the exercise of her right to intimate visits due to her sexual orientation. She alleged that the authorities made a distinction between the right to intimate visits for heterosexuals and homosexuals in jail. The State alleged for its part that to authorize intimate visits to homosexuals would affect the internal disciplinary regime of the jail establishments, since in its opinion, "the Latin American culture is not tolerant to homosexual practices in general". The Commission admitted this complaint considering that these facts could characterize a violation of article 11(2) of the American Convention. See, IACHR, Report No. 71/99, Case 11.656, *Martha Lucía Alvarez Giraldo*, Colombia, May 4, 1999.

⁹⁸ IACHR, Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, paragraph 47;

IACHR, Report No. 38/96, *X and Y* (Argentina), October 15, 1996, paragraph 91.

⁹⁹ IACHR, Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, paragraph 48.

¹⁰⁰ European Court of Human Rights, *E. B. v. France*, Application No. 43546/02, January 22, 2008, paragraph 91; European Court of Human Rights, *Smith and Grady v. the United Kingdom*, Applications Nos. 33985/96 and 33986/96, September 27, 1999, paragraph 89; *Lustig-Prean and Beckett v. the United Kingdom*, Applications Nos. 31417/96 and 32377/96, September 27, 1999, paragraph 82; European Court of Human Rights, *Karner v. Austria*, Application No. 40016/98, July 24, 2003, paragraph 37.

114. The State holds that the judgment in question arose from a custody hearing, which implies “submitting an important part of one’s private life to judicial examination, and this is a necessary and inherent consequence of all family proceedings.”¹⁰¹ As was previously established by the Commission, it might be necessary for judicial authorities in the framework of a custody proceeding to review aspects of a person’s private life, as long as those aspects are relevant to determine the capacity of the parents to exercise custody over their children, or that those aspects can pose a risk to the children involved. The Commission however underscores that a person’s sexual orientation, by itself, is not relevant criteria to determine a person’s capacity to exercise custody over his or her children, and does not pose a risk to the same.

115. The Commission holds that in the present case 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 not in an objective assessment of each of the parents’ capacity to exercise custody of their daughters. The decision to change the existing custody regime not only arbitrarily interfered in an intimate zone in the life of Karen Atala, the exercise of her sexual orientation, but also it abusively impinged in her family life plan.

116. It should also be noted that the Supreme Court’s ruling sent a message equating homosexuality with maternal inadequacy. As the petitioners stated, the judgment sent the children the message that “their mother was not fit to take care of them, regardless of the love and security they had at home; that society would not accept them as the daughters of a lesbian mother.” The Commission reiterates that the right to privacy protects the right to determine one’s own identity and to establish personal and family relations on the basis of that identity, even if it is not accepted or tolerated by a majority within society.

117. In light of the above considerations, the Commission requests the Court to conclude and declare that the State of Chile violated Karen Atala’s right to freedom from arbitrary and abusive interference in her private life on account of her sexual orientation, in breach of Article 11(2) of the American Convention, in conjunction with Article 1(1) thereof.

3. The right to private and family life of Karen Atala and her daughters (Articles 11.2 and 17.1 of the American Convention)

118. The Inter-American Court has ruled that people’s right to freedom from arbitrary and abusive interference in their private lives, as protected by Article 11 of the American Convention, also covers the private lives of their families.¹⁰² The scope of an individual’s right to private and family life must be interpreted in conjunction with Article 17.1 of the American Convention, which recognizes the central role of the family in a person’s existence and life plans.¹⁰³ It is such a basic right under the American Convention

¹⁰¹ Comments on the merits by the State of Chile, Minister of Foreign Affairs, Human Rights Directorate, July 29, 2009.

¹⁰² I/A Court H. R., *Case Escher et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of July 6, 2009, Series C No. 199, paragraph 113; I/A Court H.R., *Case of Tristán Donoso v. Panama*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of January 27, 2009, Series C No. 193, paragraph 55.

¹⁰³ Article 17.1 of the American Convention provides that:

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

that it cannot be suspended even in the most extreme circumstances.¹⁰⁴ Similarly, the Inter-American Court has ruled that “one of the most grave interferences is that which leads to division of a family.”¹⁰⁵

119. Regarding the custody of children and private and family life, the European Court of Human Rights has examined matters relating to custody of children by homosexual parents in terms of Article 8 (respect for private and family life) and Article 14 (nondiscrimination) of the European Convention,¹⁰⁶ and it has required respondents to argue particularly convincing and weighty reasons to justify state interference in a family comprising a homosexual parent and his/her children.¹⁰⁷

120. The established facts in this case indicate that Karen Atala and Ricardo Jaime López decided to end their marriage in March 2002. As part of the dissolution, they mutually agreed that Karen Atala would retain custody of M., V., and R. in Villarica, with weekly visits to their father’s home in Temuco. It thus follows that a family comprising Karen Atala and her daughters was established in March 2002, and that after this regime was set up, the girls’ father filed suit to secure custody for himself.

121. The Commission underlines that the decision adopted by the Supreme Court of Justice of Chile led to the absolute separation of the girls from their mother and damaged their emotional and affective relationship. As the petitioners claim, the judgment denied the girls the opportunity to grow up alongside their mother and it denied their mother the possibility of contributing to their development and upbringing, thus dramatically and irreparably altering their family life plans.

122. According to the Commission’s conclusions in the section on the right to equality before the law and nondiscrimination, the tribunals did not undertake an objective evaluation of the capacity of the father and the mother to take care of their daughters. Instead they based their assessment on discriminatory concepts. Therefore, the decisions and their consequences did not constitute a legitimate determination, but an illegitimate and arbitrary interference instead. The right to a private and family life extends to the development of relations between family members and the role of emotional relations in the life project of each of its members.

123. The IACHR therefore requests the Court to conclude and declare that the State did interfere arbitrarily and abusively in the family life of Ms. Karen Atala and of M., V. and R., in violation of Articles 11.2 and 17.1 of the American Convention, in conjunction with the obligation contained in Article 1.1 thereof, by amending the custody regime solely on the basis of discriminatory prejudices regarding Karen Atala’s sexual orientation.

4. The rights of the child and the equal rights of spouses following the dissolution of a marriage (Articles 19 and 17.4 of the American Convention)

¹⁰⁴ IACHR, Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), January 19, 2001, paragraph 40.

¹⁰⁵ I/A Court H. R., *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, paragraph 72.

¹⁰⁶ European Court of Human Rights, *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, December 21, 1999, paragraph 23.

¹⁰⁷ European Court of Human Rights, *E. B. v. France*, Application No. 43546/02, January 22, 2008, paragraph 91.

124. Article 19 provides 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.

125. In turn, Article 17.4 provides that:

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.

126. The jurisprudence of the inter-American human rights system has determined that States are obliged to adopt measures to afford particular protection to children, with greater care and responsibility in accordance with the principle of the child's best interest.¹⁰⁸ Article 19 of the American Convention must be construed as an added right which the Convention establishes for those who, because of their physical and emotional development, require special protection.¹⁰⁹

127. As part of its analysis on the scope of this duty of special protection, the Inter-American Court has ruled that "the child must remain in his or her household, unless there are determining reasons, based on the child's best interests, to decide to separate him or her from the family. In any case, separation must be exceptional and, preferably, temporary."¹¹⁰ Article 17.4 of the American Convention also emphasizes the importance of special state protection for children when their parents dissolve their marriage and guarantees the right of each parent to participate in the upbringing of their offspring in a way that is nondiscriminatory and appropriate for the children.¹¹¹

¹⁰⁸ I/A Court H. R., *Case of the Gómez Paquiyauri Brothers*, Judgment of July 8, 2004, Series C No. 110, paragraphs 124, 163-164, and 171; I/A Court H. R., *Case of Bulacio*, Judgment of September 18, 2003, Series C No. 100, paragraphs 126 and 134; and I/A Court H. R., *The "Street Children" Case (Villagrán Morales et al.)*, Judgment of November 19, 1999, Series C No. 63, paragraphs 146 and 191. See also: I/A Court H. R., *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, paragraphs 56 and 60.

¹⁰⁹ I/A Court H. R., *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, paragraph 54. See also: I/A Court H. R., *Case of the "Juvenile Reeducation Institute,"* Judgment of September 2, 2004, Series C No. 112, paragraph 147.

¹¹⁰ I/A Court H. R., *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002, Series A No. 17, paragraph 77. The Court has highlighted the *travaux préparatoires* of the Convention on the Rights of the Child, which considered the need for separations of children from their family nucleus to be duly justified and preferably temporary, and for the child to be returned to his or her parents as soon as circumstances allow. *Ibid.*, paragraph 75.

¹¹¹ In the case of *María Eugenia Morales de Sierra*, the Commission discusses the criteria that the State and its agents must use to ensure an appropriate balance of the rights and responsibilities of men and women in a marriage and after its dissolution, pursuant to Article 17 of the American Convention. In that case, a series of articles of the Civil Code of Guatemala were challenged on the grounds that they assigned different roles to each spouse within the conjugal home. For example, the husband was responsible for sustaining the home financially, represented the marital union, controlled the jointly held property, and took charge of the assets and the minor children. The wife, in contrast, could only work outside the home if it did not undermine her domestic duties and with the permission of her husband. The Constitutional Court described this distinction as "a source of legal certainty and security" and said it was intended to protect the family. The Commission found that "far from ensuring equality of rights and adequate balancing of responsibilities within marriage," the cited provisions institutionalized imbalances in the rights and duties of the spouses. It said that they applied stereotyped notions of the roles of women and men that perpetuated *de facto* discrimination against women in the family sphere, and that had the further effect of impeding the ability of men to fully develop their roles within the marriage and family. See, generally: IACHR, Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), 19 January 2001.

128. In response to the custody suit presented by Jaime López to revoke the custody already held by Karen Atala, under Article 17.4 of the American Convention the Chilean State was obliged to strike an appropriate balance between the corresponding responsibilities and rights, and it failed to meet that obligation by using discriminatory criteria and by basing its decision on prejudices and stereotypes regarding homosexual people.

129. The Convention on the Rights of the Child protects various rights of the child during legal proceedings that could lead to their separation from one of their parents.¹¹² In Article 8 of that Convention, the signatory states agree to refrain from “unlawful interference” in children’s family relations, and Article 9 provides that a child shall not be separated from his or her parents against their will, except when competent authorities determine that such separation is necessary to protect the child’s best interest, such as in cases of abuse or neglect. Article 12 requires State parties to hear the opinions of the child in legal matters that directly affect him or her:

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.

130. The Committee on the Rights of the Child has ruled that the obligation contained in Article 12 of the Convention requires the State parties to guarantee this right in custody proceedings before their judicial systems as well as in other matters, emphasizing their obligation to listen to the children and pay due attention to their opinions.¹¹³ States must not begin with the assumption that a child is incapable of expressing her or his own views; on the contrary, they must presume that the child has that ability, since it is not up to the child to prove his or her own capacity.¹¹⁴

131. The Commission again states that the custody decision handed down by the Supreme Court of Justice of Chile did not pursue or uphold the best interests of M., V., and

¹¹² The Inter-American Court has established that the Convention on the Rights of the Child is part of a comprehensive international *corpus juris* to protect children that serves to “establish the content and scope of the general provision established in Article 19 of the American Convention.” I/A Court H. R., *The Street Children Case (Villagrán Morales et al.)*, Judgment of November 19, 1999, Series C No. 63, paragraph 194.

¹¹³ See, generally: Committee on the Rights of the Child, General Comment 12 (2009), *The right of the child to be heard*, July 20, 2009, paragraphs 28 and 32.

¹¹⁴ See, generally: Committee on the Rights of the Child, General Comment 12 (2009), *The right of the child to be heard*, July 20, 2009, paragraph 20. The Committee also notes that the Convention imposes no specific age limit for a child to express his or her opinions, and that the importance of those opinions cannot be judged merely by the child’s age, since a child’s level of understanding is not necessarily linked to his or her biological age. Decision-makers must inform children of the outcome of the proceedings in which they were heard and explain how their views were taken into account, since this information may encourage a child to insist, agree, or present an alternative proposal or, in the case of judicial or administrative proceedings, lodge an appeal or complaint. The Committee encourages the signatory states to pay particular attention to the right of girls to be heard and for due consideration to be given to their opinions, as gender stereotypes and patriarchal values undermine and place severe limitations on girls in the enjoyment of their rights under Article 12. See: Committee on the Rights of the Child, General Comment 12 (2009), *The right of the child to be heard*, July 20, 2009, paragraphs 21, 29, 45, and 77.

R., by separating them arbitrarily, permanently, and irreparably from their mother in the absence of clear evidence of harm to their welfare. The judgment also stigmatized the girls for having a homosexual mother and for living in a family not accepted by general Chilean society, thus embracing and legitimizing the prejudices and stereotypes toward homosexual couples and toward children raised by such couples set out in their father's custody suit.

132. The Commission notes as particularly serious in the custody proceedings, the Supreme Court's failure to take the girls' preferences and needs into account, in contrast to what occurred at the lower courts. The decision of the acting judge of the Villarica Children's Court of October 29, 2003, not only confirms that the girls were heard, but also states that their preference for living with their mother was duly considered in the decision to award custody to Karen Atala, in light of their ages and maturity. In contrast, the Supreme Court of Justice of Chile made no efforts to hear the girls and, instead, issued a judgment without clear and objective grounds or reasons that separated them from their mother on the basis of her sexual orientation.

133. The girls were entitled to a justice system that would look out for their interests at all stages in the proceedings by listening to them and by investigating and impartially and objectively assessing the capacity of both parents to care for them. It has been established that the Chilean Supreme Court's assessment of Karen Atala's capacity as a mother was not objective and was primarily informed by her sexual orientation. In its reasoning the Supreme Court applied prejudices and stereotypical ideas about what a responsible mother should be and about the type of family that is considered normal and socially acceptable. These prejudicial ideas and the Supreme Court's explicit tolerance of the potential for society to reject anything different or nontraditional clearly placed Karen Atala at a disadvantage vis-à-vis her former husband in the custody proceedings and in the determination of her capacity as a mother, which had an irreparable impact on the life plans and development of M., V., and R. That can be seen in the evidence submitted at a hearing before the IACHR, when the girls described their separation from their mother as "traumatic, abrupt, and unexpected... since they had expressed their wish to remain with their mother," and they claimed they felt "anger at not having been heard in the proceedings, and that the judges' decision had mocked them."¹¹⁵

134. The Commission also notes that through its excessive and extreme custody ruling, the Supreme Court failed to take due account of the importance to the girls of maintaining a direct relationship with their mother, in light of their tender years. As reported by the petitioners, Karen Atala cannot comply with the biweekly regime of visits that was ordered because her job requires her to work at the weekends and she has to live in Santiago, whereas her daughters live in Temuco¹¹⁶. Karen Atala is also kept uninformed of her daughters' development and welfare and of activities requiring parental participation, such as graduations and medical procedures, and she faces obstacles put in place by her former husband that prevent her from maintaining a private relationship with them.

135. The Commission finally notes that the judgment of the Chilean Supreme Court, in light of its discriminatory social messages, could result in the girls rejecting their mother's lifestyle on account of her sexual orientation and cohabitation with a same-sex partner, which is in breach of the tolerance and pluralism that should prevail in a democratic, inclusive society. The Commission again states that the girls' best interests cannot be used by the State as a pretext to discriminate against a specific group of people, and that

¹¹⁵ IACHR, Hearing, Case 12.502, *Karen Atala and Daughters*, 124th regular session, March 7, 2006.

¹¹⁶ After the custody proceeding, a biweekly regime of visits was established for Karen Atala.

removing children from their home environment must be an exceptional measure, on account of the irreparable damage it can cause to the structure of the family and their life plans.

136. Based on these considerations, the Commission requests the Court to conclude and declare that the decision of the Supreme Court of Chile undermined the best interests of M., V., and R., and the State's duty of special protection, by irrevocably separating them from their mother in an arbitrary and abusive fashion, without taking account of their preferences and needs, and on the basis of discriminatory prejudices regarding their mother's sexual orientation, in breach of Articles 19 and 17.4 of the American Convention, in conjunction with the obligation of respecting and ensuring those rights contained in Article 1.1 thereof.

5. Right to a fair trial and to judicial protection (Articles 8.1 and 25 of the American Convention)

137. Article 8.1 of the American Convention stipulates:

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.

138. Article 25 of the Convention provides that:

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.

139. The Inter-American Court of Human Rights has ruled that "a remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective."¹¹⁷

140. One key component in the effectiveness of existing judicial remedies, and for due compliance with the guarantees of due process, is the impartiality of the judges who hear those remedies. The Inter-American Court has ruled that the right to be heard by an impartial judge or court is a fundamental guarantee of due process.¹¹⁸

141. Impartiality demands that the judge acting in a dispute approach the facts "of the case subjectively free of all prejudice and also offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality."¹¹⁹ With reference to the European Court's precedent, the Inter-American Court has stated that:

¹¹⁷ I/A Court H. R., *Judicial Guarantees in States of Emergency (Arts. 27.2, 25, and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, paragraph 24.

¹¹⁸ See: I/A Court H. R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of August 5, 2008, Series C No. 182; I/A Court H. R., *Constitutional Court Case*, Judgment of January 31, 2001, Series C No. 71, paragraph 75. This right is also enshrined in the International Covenant on Civil and Political Rights (Article 14) and in the European Convention on Human Rights (Article 6).

¹¹⁹ I/A Court H. R., *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of August 5, 2008, Series C No. 182, paragraph

The European Court of Human Rights has explained that personal or subjective impartiality is to be presumed unless there is evidence to the contrary.¹²⁰ Thus, the objective test entails determining whether the judge in question provided convincing elements to eliminate legitimate or grounded fears regarding his or her impartiality.¹²¹ That is so since the judge must appear as to act without being subject to any influence, inducement, pressure, threat, or interference, be it direct or indirect, and only and exclusively in accordance with – and on the basis of – the law.¹²²

142. The Commission points to the Inter-American Court’s ruling that “in order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, the Court may have to examine domestic proceedings”¹²³ to establish their compatibility with the American Convention. In light of the above, the domestic proceedings must be considered as a whole, including the rulings of the appellate courts. The role of the international court is to establish whether the proceedings as a whole, as well as the way the evidence was produced, were in accordance with the Convention.¹²⁴

143. The Commission notes that the entire custody proceedings involved a series of prejudices and discriminatory stereotypes advanced by Ms. Atala’s former husband in his suit. As has already been noted in this report, the arbitrary difference in treatment was reflected in the subjective assessment given to the parties’ arguments, in the decisions that enabled Mr. López to retain custody throughout the proceedings, and finally in the judgment handed down by the Supreme Court of Justice.

144. At the start of the custody proceedings, Ms. Karen Atala was on an equal footing with her former husband for obtaining custody of their daughters. However, some judicial authorities centered almost exclusively on Ms. Atala’s sexual orientation, and therefore, applied a different standard of evaluation for her and placed her in a position of clear disadvantage on the basis of an issue not provided for in law for informing such decisions. As has been noted, a person’s sexual orientation is completely irrelevant for determining the fitness of a parent for retaining custody of their children. This, in turn, enabled stereotypical views of homosexuality to be the focus of the judges’ discussions and, ultimately, for the court to adopt arbitrary decisions based exclusively on prejudice and not on the applicable law. As has been indicated in paragraph 106, the presence of discriminatory prejudices is evident from a reading of the Supreme Court of Justice decision.

56; citing: *Pullar v. the United Kingdom*, Judgment of June 10, 1996, Reports of Judgments and Decisions 1996-III, § 30; *Fey v. Austria*, Judgment of February 24, 1993, Series A No. 255-A p. 8, § 28.

¹²⁰ I/A Court H. R., *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of August 5, 2008, Series C No. 182, paragraph 56; citing: *Daktaras v. Lithuania*, No. 42095/98 (Sect. 3) (bil.), ECHR 2000-X – (10.10.00), § 30.

¹²¹ *Piersack v. Belgium*, Judgment of October 1, 1982, Series A No. 53; and *De Cubber v. Belgium*, Judgment of October 26, 1984, Series A No. 86.

¹²² I/A Court H. R., *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of August 5, 2008, Series C No. 182, paragraph 56.

¹²³ I/A Court H. R., *Case of Herrera Ulloa*, Judgment of July 2, 2004, Series C No. 107, paragraph 146; *Case of Myrna Mack Chang*, Judgment of November 25, 2003, Series C No. 101, paragraph 200; and I/A Court H. R., *Case of Juan Humberto Sánchez*, Judgment of June 7, 2003, Series C No. 99, paragraph 120.

¹²⁴ I/A Court H. R., *Case of Juan Humberto Sánchez*, Judgment of June 7, 2003, Series C No. 99, paragraph 120; I/A Court H. R., *Bámaca Velásquez Case*, Judgment of November 25, 2000, Series C No. 70, paragraph 189; and I/A Court H. R., *The “Street Children” Case (Villagrán Morales et al.)*, Judgment of November 19, 1999, Series C No. 63, paragraph 222.

145. Indeed, one of the judges who decided the matter expressly stated that although there were no indications of legal grounds for disqualifying the mother and for changing the existing custody arrangements, Mr. López's arguments assumed a particular importance within the context of a "heterosexual and traditional" society.¹²⁵

146. The Commission highlights the content of the extraordinary visit decreed by the Court of Appeals of Temuco as an example of the impartiality and the discriminatory prejudices present in the Chilean justice system during the time the custody proceeding occurred.¹²⁶ The established facts show that this visit was requested by the Court of Appeals of Temuco as follow-up to the publications in Chilean newspapers concerning the custody suit and Karen Atala's sexual orientation. The report of that visit investigates the sexual and sentimental life of Karen Atala and includes conclusions based on prejudices and stereotypes that were embraced by the Court of Appeals of Temuco, highlighting the incompatibility between the "peculiar" emotional relationship of Karen Atala and the image of the justice system¹²⁷:

This visitor is not inclined to issue value judgments regarding the sexual inclination of Judge Atala. However, it is impossible to get around 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 Mrs. Atala and the Judicial Branch. All the foregoing takes on a seriousness that merits the Court's notice.

147. As Karen Atala stated regarding that report and its conclusion on the incompatibility between her image and that of the judiciary: "That claim constitutes denigrating treatment by assuming that my being a homosexual – a peculiarly intimate and immutable aspect of my personality – was shameful for me and for the public service in which I practice professionally."¹²⁸ The Commission underscores as well the impact of this visit in the custody proceeding as it pertains to the realm of prejudice. Minister Lenin Lillo later participated in the concession of the injunction of November 24, 2003, which retained in the father the custody of the girls during the custody proceeding. The Commission highlights that the same Minister disqualified himself from the case *ex officio* on January 7, 2004 for having participated in the extraordinary visit.

148. The Commission believes that there is a relationship between the guarantee of impartiality that must prevail in all judicial proceedings under Article 8.1 of the American Convention and the use of discriminatory prejudices to ground a decision. The Commission has already dealt in length with the reasons why the decisions that determined the outcome of the proceedings were incompatible with the right to equal treatment and nondiscrimination. The Commission has already expressed its concern at the use by a country's judiciary of discriminatory prejudices present within society in adopting decisions that should be based exclusively on law. The Commission does not believe it is necessary to repeat its position on this point.

¹²⁵ Resolution of the provisional custody suit, handed down by Luis Humberto Toledo Obando, Regular Judge of the Juvenile Court of Villarica, May 2, 2003.

¹²⁶ The Commission discusses this issue since it was presented by the petitioners as an element of context in their filing of November 24, 2004, and included as part of the facts in IACHR Report No. 42/08, *Karen Atala and Daughters*, Report on Admissibility, Petition 1271-04, Chile, July 23, 2008, paragraph 23.

¹²⁷ Report prepared by Judge Lenin Lillo Hunzinger, Court of Appeal of Temuco, April 2, 2003; Resolutions of the Court of Appeal of Temuco of April 2, 2003, and May 9, 2003.

¹²⁸ Petition of November 24, 2004.

149. Suffice it to say in this section that a distinction of arbitrary treatment arising in the context of judicial proceedings, in addition to constituting a violation of the right of equality, must be analyzed in terms of the guarantees of due process. Thus, the disadvantage at which Karen Atala was placed by the judicial authorities in the proceedings by their consideration of her sexual orientation as a key element in her fitness as a mother, together with the evident use of discriminatory prejudices against homosexuals in the decisions that resolved the case, lead to the conclusion that Ms. Karen Atala was not heard with due guarantees in her daughters' custody proceedings, was not afforded the guarantee of impartiality, and was ultimately denied effective access to justice.

150. In consideration of the foregoing, the Commission requests the Court to conclude and declare that the Chilean State did violate Karen Atala's right to a fair trial and to judicial protection, as enshrined in Articles 8.1 and 25.1 of the American Convention, in conjunction with Article 1.1 thereof.

VIII. REPARATIONS AND COSTS

151. By reason of the facts alleged in the present claim and of the consistent jurisprudence of the Inter-American Court which establishes that "it is a principle of international law that any violation of an international obligation that has produced damage entails the obligation to repair it adequately"¹²⁹, the Commission presents to the Court its views on the reparations and costs that the State of Chile must grant as a consequence of its responsibility for the violations of human rights to the prejudice of the victims.

152. Taking into account that the Rules of the Court grant the victims autonomous representation, the Commission merely outlines below the criteria and general claims with regard to reparations and costs which it considers the Court should apply in the present case. The Commission understands that it is up to the victims and their representatives to state their claims in greater detail, in accordance with Article 63 of the American Convention. Nevertheless, in case the victims' representatives do not make use of this right, the Court is requested to grant a procedural opportunity to the Inter-American Commission so that it may specify the relevant claims. In addition, in due course the Commission will inform the Court whether it has any observations with regard to quantifying the claims from the victims' representatives.

1. Duty to Provide Reparations

153. In the present case, the Inter-American Commission has requested that the Honorable Court conclude and declare that the State of Chile has incurred international responsibility for the violation of the rights to equality and non-discrimination, private and family life, to family, to the special protection of girls, judicial guarantees and judicial protection, established in Articles 24, 11.2, 17.1, 17.4, 19, 8.1 and 25.1 of the American Convention, in relation to the general obligations to respect and guarantee enshrined in Article 1.1 of the same instrument.

154. Article 63.1 of the American Convention establishes that

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

¹²⁹ I/H Court H.R., *Case of Cantoral-Huamaní and García-Santa Cruz*, Judgment of July 10, 2007, Series C No.167, para.156; I/H Court H.R., *Case of Zambrano Vélez and others*. Judgment of July 4, 2007. Series C No. 166, para. 103; and I/A Court H.R., *Case of Escué Zapata*. Judgment of July 4, 2007, Series C No.165, para. 126.

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.

155. As the Court has consistently held in its jurisprudence, "Article 63.1 embodies an accepted tenet that is a fundamental principle of the contemporary International Law on the responsibility of States. The occurrence of a wrongful act that is attributable to a State gives rise to the State's international liability, and its resulting duty to make reparation for and remove the consequences of the violation."¹³⁰

156. The duty to provide reparations, which is governed in all its aspects by international law (scope, nature, formalities and determination of the beneficiaries), cannot be modified or unfulfilled by the State obligated by invoking provisions of domestic law.¹³¹

2. Beneficiaries

157. Article 63.1 of the American Convention requires the reparation of the consequences of a violation and the payment of fair compensation. In the Commission's view, the beneficiaries of the reparations which the Court should order are: Karen Atala and her daughters, M., V., and R.

3. Reparation Measures in the Present Case

158. Reparations are essential to ensuring that justice is done in the individual case and they raise the Court's decision above the sphere of a moral verdict. The reparation of an injury caused by a breach of an international obligation requires, wherever possible, full restitution (*restitutio in integrum*), which consists in reinstating the situation prior to the violation. When this is not possible, reparations consist of measures that tend to make the effect of the violations committed disappear.¹³² These measures comprise the different means whereby a State may face the international responsibility it incurred, which, according to international law, consist of the means of restitution, compensation, rehabilitation, redress and non-repetition.¹³³

¹³⁰ I/A Court H.R., *Case of La Cantuta v. Peru*, Judgment of November 29, 2006, Series C No. 162, para. 200; I/A Court H.R., *Case of the Miguel Castro Castro Prison v Peru*. Judgment of November 25, 2006. Series C No. 160, para. 414; I/A Court H.R., *Case of Montero-Aranguren et. al. (Detention Center of Catia) v Venezuela*. Judgment of July 5, 2006. Series C No. 150, para. 116.

¹³¹ I/A Court H.R., *Case of Cantoral-Huamani y García-Santa Cruz v Peru*. Judgment of July 10, 2007. Series C No. 167, para. 190; I/A Court H.R., *Case of Zambrano Vélez and others v Ecuador*. Judgment of July 4, 2007. Series C No.166, para.148; I/A Court H.R., *Case of la Cantuta v Peru*. Judgment of Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para. 200; I/A Court H.R., *Case of the Miguel Castro Castro Prison v Peru*. Judgment of November 25, 2006. Series C No. 160, para. 415.

¹³² I/A Court H.R., *Case of the Gómez-Paquiyaúri Brothers v Peru*. Judgment of July 8, 2004, para. 190; I/A Court H.R., *Case of the 19 Tradesmen v Colombia*. Judgment of June 12, 2002, para. 223; I/A Court H.R., *Case of Myrna Mack-Chang*. para. 237; *Case of Cantos v Argentina*, para. 108 and *Case of Caracazo v Venezuela*. Reparations and Costs (Article 63.1 of the American Convention on Human Rights). Judgment of August 29, 2002. Series C No. 95, para. 78.

¹³³ See United Nations, Final Report presented by Theo Van Boven, Special Reporter for the Restitution, Compensation and Rehabilitation for victims of gross violations of Human Rights and Fundamental Freedoms, E/CN.4/Sub2/1990/10, July 26, 1990. See also I/A Court H.R., *Case of Blake*. Reparations (Article 63.1 of the American Convention on Human Rights). Judgment of January 22, 1999. Series C No. 48, para. 31; *Case of Suárez Rosero*, Reparations (Article 63.1 of the American Convention on Human Rights). Judgment of January 20, 1999. Series C No. 44 para. 41, and I/A Court H.R., *Case of Castillo Páez*. Reparations (Article 63.1 of the American Convention on Human Rights). Judgment of November 27, 1998, Series C No.43.

159. The Court has established the essential characteristics that should guide a fair indemnification designed for pecuniary compensation, in an adequate and effective manner, of the damages suffered as a result of violations of human rights. In addition, the Court has established that indemnification has a purely compensatory character, and that this should be granted to a sufficient extent and in a way adequate to compensate for the pecuniary as well as the non-pecuniary damages caused.¹³⁴

160. In its jurisprudence on reparations, the Court has been consistent in establishing that pecuniary damages include consequential damage and lost profits, as well as non-pecuniary or moral damage both for the victims as well as for their immediate family in certain cases.¹³⁵

161. Concerning non-pecuniary damage, the Court has established that:

[n]on pecuniary damage may cover both the suffering and distress caused to the direct victim and the victim's relatives, the impairment of the values of major personal significance, and the non-pecuniary changes to the victim's or the victim's family's living conditions. Since accurately quantifying non-pecuniary damage is impossible, such damage can only be compensated, for the purpose of providing comprehensive reparation to the victim, in two ways. In the first place, through the payment of such a sum of money or the provision of such goods or services of monetary worth as may be determined by the Court, in fairness and at its reasonable judicial discretion. And, in the second place, through public action or works aimed at seeking to recover the victim's memory, giving recognition to the victim's human dignity, the consolation of their next of kin or the transmission of a message of official disapproval of the corresponding violations of human rights, and preventing any further human rights violations.¹³⁶

162. Without prejudice to the claims that the representatives of the victims may file at the corresponding procedural opportunity, the IACHR requests that the Court, based on the evidence at its disposal, establishes in equity the amount of compensation corresponding to the pecuniary and non-pecuniary damage caused as a consequence of the violations alleged in the present application.

163. Due to the nature of the present case, the Commission also requests the Court to order the State of Chile to investigate and enforce the corresponding legal consequences *vis-à-vis* 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 M., V., and R.

¹³⁴ I/A Court H.R., *Case of La Cantuta*. Judgment on Merits, Reparations and Costs. Judgment of November 29, 2006, Series C No. 162, para. 210; I/A Court H.R., *Case of Hilaire, Constantine and Benjamin and others*. Judgment of June 21, 2002. Series C No. 94, para. 203; I/A Court H.R., *Case of Garrido and Baigorria*. Reparations (Article 63.1 of the American Convention on Human Rights). Judgment of August 27, 1998. Series C No. 39, para. 41.

¹³⁵ I/A Court H.R., *Case of La Cantuta*. Judgment on Merits, Reparations and Costs. Judgment of November 29, 2006, Series C No. 162, paras 213 and 214; I/A Court H.R., *Case of the Miguel Castro Castro Prison v Peru*. Judgment of November 25, 2006. Series C No. 160, para. 423.

¹³⁶ I/A Court H.R., *Case of La Cantuta*. Judgment on Merits, Reparations and Costs. Judgment of November 29, 2006, Series C No. 162, para. 216; I/A Court H.R., *Case of the Miguel Castro Castro Prison v Peru*. Judgment of November 25, 2006. Series C No. 160, para. 430; I/A Court H.R., *Case of the Ituango Massacres v Colombia*. Judgment of July 1, 2006. Series C. 148, para. 383; I/A Court H.R., *Case of the Pueblo Bello Massacre v Colombia*. Judgment of January 31, 2006. Series C No. 140, para. 254.

164. Additionally, the Commission requests the Court to order other measures of indemnity, rehabilitation and non-repetition, as indicated below in a general manner. These measures ought to be designed with special attention to the individual wishes and needs of the victims.

165. In addition, the Commission requests that the Court orders from the State indemnity measures that include, at the least, a public recognition of international responsibility and the publication of the relevant parts of the judgment which the Court eventually issues.

166. The Commission also requests the Court to order rehabilitation measures in favor of the victims.

167. Finally, the Commission considers that the State of Chile must adopt measures in order to ensure that violations such as those alleged in the application are not repeated. In its merits report, the Commission observed with special concern that the prejudice against homosexual individuals described in the complaint lodged by Mr. López, establishing a link between "carelessness" and "neglect" with the "sexual preference of the mother", and having "a lesbian cohabitation" with sexually transmitted diseases,¹³⁷ were vindicated and legitimated by the Supreme Court of Justice and the Regular Judge of the Villarica Juvenile Court when issuing their judgment on provisional custody. In doing so, the said judicial authorities not only discriminated against Mrs. Karen Atala, but perpetuated and contributed to the same stereotypes¹³⁸ which have generated the historical discrimination against a certain group of individuals, in this case, homosexual persons.

168. In this sense, and in the same way as its recommendations in its Report on the merits No. 139/09, the Commission requests that the Court orders the State of Chile to adopt rectification measures, such as 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. These measures, as the Court has indicated, must have a transformative purpose and be accompanied by adequate human and financial resources to guarantee their implementation and the necessary training for the officials involved in guaranteeing those rights.

4. Costs and Expenses

169. In view of the consistent jurisprudence of the Court, the costs and expenses must be understood to be included in the concept of reparation enshrined in Article 63.1 of the American Convention, in as much as the activity manifested by the victim, her privies or her representatives in invoking international proceedings implies expenditure and commitments of an economic nature which must be compensated.¹³⁹

¹³⁷ Annex 1. Custody suit filed by Ricardo Jaime López Allende with the Juvenile Court of Villarica, January 15, 2003.

¹³⁸ For example, on the ability of homosexual parents to care for their children and to create a healthy home environment, it promotes prejudices against homosexual people by claiming that they are against family values and that they reject traditional forms of family life in favor of a selfish existence, totally concentrated on their partners and unable to develop other ties of affection.

¹³⁹ I/A Court H.R., *Case of La Cantuta v. Peru*, Judgment on the Merits, Reparations and Costs. Judgment of November 29, 2006, Series C No. 162, para. 243; I/A Court H.R., *Case of the Miguel Castro Castro Prison v Peru*. Judgment of November 25, 2006. Series C No. 160, para. 455; I/A Court H.R., *Case of the Dismissed Congressional Employees (Agaudo-Alfaro et al.)* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, para. 152

170. In the present case, the Commission requests that the Court, once that the victims have been heard, orders that the State of Chile pays the costs and expenses originating in the proceedings in the present case both at the domestic level as well as before the Inter-American system of human rights.

IX. PETITION

171. Based on the arguments of fact and law above, the Inter-American Commission on Human Rights requests that the Court decides and declares that

- a) The State of Chile is responsible for the violation of the right to equality and non-discrimination, established in Article 24 of the American Convention in relation to the obligations enshrined in Article 1.1 of the same instrument, to the prejudice of Karen Atala;
- b) The State of Chile is responsible for the violation of the right to a private life enshrined in Article 11.2 of the American Convention in relation to the obligations enshrined in Article 1.1 of the same instrument, to the prejudice of Karen Atala.
- c) The State of Chile is responsible for the violation of the right to a private and family life, contained in Articles 11.2 and 17.1 of the American Convention in relation to the obligations enshrined in Article 1.1 of the same instrument, to the prejudice of Karen Atala and M., V., and R.;
- d) The State of Chile is responsible for the non-fulfillment of its obligations of special protection for girls and to ensure the equality of rights of spouses following the dissolution of marriage, established in Articles 19 and 17.4 of the American Convention in relation to the obligations enshrined in Article 1.1 of the same instrument, to the prejudice of M., V., and R.;
- e) The State of Chile is responsible for the violation of the rights to judicial guarantee and judicial protection, established in Articles 8.1 and 25.1 of the American Convention in relation to the obligations enshrined in Article 1.1 of the same instrument, to the prejudice of Karen Atala.

and in consequence, that it orders the State of Chile to

- a) Make reparation of the pecuniary and non-pecuniary damage caused as a consequence of the violations alleged in the present application.
- b) Investigate and enforce the corresponding legal consequences against the members of the judiciary that discriminated against and arbitrarily interfered with Karen Atala's private and family life, and that failed to fulfill their international obligations to ensure the best interests of M., V., and R.
- c) Publically acknowledge its international responsibility and publish the relevant parts of the ruling eventually issued by the Court.
- d) Order rehabilitation measures.
- e) Adopt measures to prevent the repetition of these violations, including 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.
- f) Pay the costs and legal expenses incurred in the proceedings in the present case.

X. EVIDENCE

1. Documentary Evidence

172. Below is a list of the documentary evidence currently available:

- Annex 1** IACHR, Report No. 42/08 (Admissibility), Petition 1271-04, Karen Atala and daughters, Chile, July 23, 2008.
- Annex 2** IACHR, Report No. 139/09 (merits), Case 12.502, Karen Atala and daughters, Chile, December 18, 2009.
- Annex 3** Case file of the proceedings before the Inter-American Commission on Human Rights.
- Annex 1.** Suit for Custody filed by Ricardo Jaime López Allende before the Regular Judge of the Juvenile Court of Villarica on January 15, 2003.
- Annex 2.** Answer by Mrs. Karen Atala's to the suit for custody, January 28, 2003.
- Annex 3.** Press Release. *Lawyer demands custody of his daughters because Spouse/Judge is a Lesbian*, Newspaper la Cuarta, February 28, 2003.
- Annex 4.** Press Release. *Lawyer demands custody of his daughters because his Former Wife is a Lesbian*, Newspaper Las Últimas Noticias, March 1, 2003.
- Annex 5.** Report prepared by Minister Lenin Lillo Hunzinker, Court of Appeals of Temuco, April 2, 2003.
- Annex 6.** Decision of the Court of Appeals of Temuco, April 2, 2003.
- Annex 7.** Decision of the Court of Appeals of Temuco, May 9, 2003.
- Annex 8.** Suit for Provisional Custody of Mr. Ricardo Jaime López Allende, March 10, 2003.
- Annex 9.** Response with Respect to Motion for Provisional Custody filed by the representative of Mr. Ricardo Jaime López Allende, March 13, 2003.
- Annex 10.** Decision on Suit for Provisional Custody Issued by Luis Humberto Toledo Obando, Regular Judge of the Juvenile Court of Villarica, May 2, 2003.
- Annex 11.** Petition to bar Judge Luis Humberto Toledo Obando, May 13, 2003.
- Annex 12.** Decision Issued by Viviana Cárdenas Beltrán, Acting Judge, Juvenile Court of Villarica, October 29, 2003.
- Annex 13.** Report of the Department of Psychology of the University of Chile, issued by Soledad Larrain Heiremans, April 2003.
- Annex 14.** Appeal filed by the representative of Ricardo Jaime López Allende, November 11, 2003.

- Annex 15.** Petition for Injunction filed by the representative of Ricardo Jaime López Allende, November 22, 2003.
- Annex 16.** Granting of Injunction by the Court of Appeals of Temuco, November 24, 2003.
- Annex 17.** Declaration of disqualification of Judges Archibaldo Loyola and Lenin Lillo Hunzinker, January 7, 2004.
- Annex 18.** Ruling of the Temuco Court of Appeals, March 30, 2004.
- Annex 19.** Ruling of the Supreme Court of Justice of Chile, July 2, 2004.
- Annex 20.** *Recurso de queja* and petition for injunction filed by the representative of Ricardo Jaime López Allende, April 5, 2004.
- Annex 21.** Grant of Injunction by Supreme Court of Chile, April 7, 2004.
- Annex 22.** Judgment of the Supreme Court of Justice of Chile, May 31, 2004.
- Annex 23.** Psychological Reports on M., V., and R., in the case file of María Isabel Thieres Riquielme, November 15, 2002.
- Annex 24.** *Curriculum vitae* of Michael O' Flaherty, expert witness of the Commission.
- Annex 25.** *Curriculum vitae* of Allison Jernow, expert witness of the Commission.
- Annex 26.** *Curriculum vitae* of Emilio García Méndez, expert witness of the Commission.
- Annex 27.** *Curriculum vitae* of expert witness of the Commission.

173. The Commission declares that the copies of the documents sent as annexes are the best available and attainable up to this point.

2. Expert Evidence

174. The Commission requests that the Court receive the opinions of the following experts:

- Michael O' Flaherty, who will declare on the international standards of human rights related to sexual orientation and their link to the rights to equality, non-discrimination, and privacy. The objective of this expert opinion includes the treatment that international law has given to sexual orientation as a prohibited factor of discrimination, as well as an aspect related to an individual's privacy. Within this context, the expert will refer to the relevant jurisprudence in the universal system, in other regional human rights systems, and, if relevant, in comparative law. These questions bear upon the Inter-American public interest.
- Allison Jernow, will declare on the use of sexual orientation as a factor in court decisions regarding custody, in light of international human rights standards in the matter of equality, non-discrimination, private and family life. The expert will also refer to the relationship between the standards of international human rights law and the themes of custody in the present case. These questions bear upon the Inter-

American public interest.

- The expert witness whose named will be advised upon short notice, will declare on legislative and other measures that a State must adopt to prevent forms of discrimination based on sexual orientation in the exercise of public power, and in particular, of judicial power. The expert will refer to the different elements that must be taken into account at the time of formulating and applying public policies to eradicate and prevent the use of discriminatory prejudices based on sexual orientation in the said spheres. These questions bear upon the Inter-American public interest.
- Emilio García Méndez, who will declare about the international standards on the human rights of children applicable in cases related to care and custody. The purpose of the opinion includes the way in which the best interests of the children, and the right to participate and be heard in procedures concerning them, must be reflected in the actual practice of the judicial authorities who decide such cases. In addition, the expert will refer to the harmful consequences on the best interests of children when discriminatory prejudices are applied in such decisions. These questions bear upon the Inter-American public interest.

XI. INFORMATION ON THE VICTIMS' REPRESENTATIVES

175. In accordance with the provisions of the Rules of the Court, the Inter-American Commission informs the Court that in a communication of April 5, 2010, the petitioners state that "for the purposes of these proceedings, before both the IACHR and eventually before the Inter-American Court of Human Rights, briefs to all the petitioners should be sent to the home of one of their representatives, [REDACTED]

".

176. In the same document, the petitioners point out that "to the effect of these proceedings, the victims have established their address at [REDACTED]

Washington, D.C.
September 17, 2010