INTER-AMERICAN COURT OF HUMAN RIGHTS

Julia Mendoza et al.

Petitioners

v.

State of Mekinés

Respondent

REPRESENTATIVES OF THE VICTIMS

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STATEMENT OF FACTS

The Federal Republic of Mekinés ("**Mekinés**") **i**s a multi-ethnic country with an intense history of colonisation and slavery.[1] The constitution of Mekinés, adopted in 1950, expressly recognizes the human rights of all persons, placing responsibility on the State to promote the common good without any form of discrimination.[2] While Mekinés declared itself secular in 1889, it heavily repressed and criminalized the rites of its majority Afro descendants until 1940.[3]

Presently, Mekinés has a majority of evangelical Christians,[4] with symbols of Catholicism in governmental offices despite Mekinés' declared Secularism.[5] The President of Mekinés is likewise Catholic, and has professed to defend values aligned to Catholicism such as the traditional family and the repudiation of 'gender ideology'.[6] The President of Mekinés also appointed a like-minded Justice to the Supreme Constitutional Court of Mekinés, who described himself as a proponent of the practices of Catholicism.[7] As such, practitioners of alternative religions face discrimination, with the religions of African Origin, such as Candomblé and Umbanda, not even being recognised as religions in Mekinés.[8] Crimes motivated along religious lines are on the rise in Mekinés, a problem that has only been exacerbated by the government's unwillingness to acknowledge religious intolerance and by the lack of power associated institutions have to make change given their non-binding authority.[9] Mekinés also renamed the Ministry of Human Rights to the Ministry

[1] Hypothetical, §1.
[2] *Ibid.*, §4.
[3] *Ibid.*, §6.
[4] *Ibid.*, §12.
[5] *Ibid.*, §7.
[6] *Ibid.*, §10.
[7] *Ibid.*, §19.
[8] *Ibid.*, §17.
[9] *Ibid.*, §15.

of Women, Family and Human Rights, disbanding the National Committee to Combat LGBTI+ Rights, clearly emphasising and aligning with Catholic values.[10]

Julia Mendoza (hereafter: Julia) is a practitioner of Candomblé.[11] She is currently in a homosexual relationship with Tatiana Reis (hereafter: Tatiana).[12] She was previously married to Marcos Herrera (hereafter: Marcos) and had a daughter with him named Helena Mendoza Herrera (hereafter: Helena).[13] After the divorce, she was awarded custody of Helena, and raised her under the precepts of Candomblé with the consent of Marcos.[14] Helena chose of her own accord to practice Candomblé herself, and underwent its rituals of *Recogimiento*.[15]

Marcos was displeased with Julia's new relationship, and reported this to the Regional Council for the Protection of Children.[16] The Regional Council alleged deprivation of liberty and battery of Helena, and asserted that same-sex parenting and the practice of Candomblé interfered with the parental and psychological framework of Helena. The Regional Council maintained that these elements diminished Julia's ability to assume her role as Helena's parent , and that the practice of Candomblé restricted Helena's worldview.[17]

The Regional Council referred their concerns to the Trial Court, which ruled against Julia and removed Helena from the custody of her mother. The Trial Court reasoned that Marcos could

[10] *Ibid.*, §25.
[11] *Ibid.*, §28.
[12] *Ibid.*, §29.
[13] *Ibid.*, §28.
[14] *Ibid.*, §28.
[15] *Ibid.*, §29.
[16] *Ibid.*, §30.
[17] *Ibid.*, §31.

provide a more highly rated school and a more comfortable room for Helena at his house. The Trial Court also highlighted the importance of family structure, claiming that Julia could not provide a 'normal' family life which comprises of heterosexual parents. They also claimed that her practice of Candomblé altered the normalcy of this family life.[18]

Subsequently, Helena successfully pleaded in the Appellate court that even the Roman Catholic religion imposes practices such as baptisms on children without demanding that they be mature enough to consent.[19] The Appellate Court also noted the aggressiveness, prejudice, discrimination and disregard of the right to a homosexual identity that the Trial Court espoused, which misrepresented the facts and disregarded the best interests of Helena.[20] The Appellate Court stated that homosexuality is not a pathology, but normal human behaviour, and that allegations regarding Julia's sexual orientation are unrelated to Julia's role as a mother.[21] The Appellate court noted that both the Civil Code of Mekinés and the Children's Rights Act do not consider sexual orientation as a ground of 'parental unfitness', and that there was thus no grounds for the loss of custody.[22] The Appellate Court found that Julia exhibited no pathology that prevented her from performing her role as a parent, and that the presence of her partner posed no risk to Helena's well-being. Lastly, the Appellate Court highlighted that Helena herself wanted to practice Candomblé, and so Helena's rights were not infringed.[23] For these reasons, the Appellate court ordered for custody to be returned to Julia and Tatiana.[24]

[18] *Ibid.*, §33.
[19] *Ibid.*, §34.
[20] *Ibid.*, §35.
[21] *Ibid.*, §34.
[22] *Ibid.*, §34.
[23] *Ibid.*, §35.
[24] *Ibid.*, §35.

Marcos appealed against the Appellate Court's decision, alleging that the decision was inconsistent with federal law, and that the rights of Julia were prioritised over that of Helena's. The Supreme Court overturned the Appellate Court's decision, again emphasizing the better living conditions that Marcos could provide.[25] The Supreme Court claimed that Julia had forced Helena to practice Candomblé, and that in granting custody to Julia, the lower court failed to examine Helena's psychological and socioeconomic development.[26]

Consequently, Julia filed a petition to the Inter-American Commission on Human Rights on behalf of herself and her daughter.[27] The Commission declared the case admissible and found violations of Articles 8(1), 12, 17, 19 and 24 of the American Convention on Human Rights ("**ACHR**") and Articles 2, 3 and 4 of the Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance ("**CIRDI**").[28] Mekinés failed to comply with the recommendations of the Commission, and the case was therefore submitted to the Inter-American Court of Human Rights ("**IACtHR**"), alleging violation of the same articles.[29]

[25] *Ibid.*, §37.
[26] *Ibid.*, §38.
[27] *Ibid.*, §39.
[28] *Ibid.*, §41.
[29] *Ibid.*, §43.

LEGAL ANALYSIS

I. Admissibility

1. Exhaustion of domestic remedies

The State of Mekinés has ratified the IACtHR, and thus accepts the jurisdiction of the IACtHR. Under Article 46(1)(a) of the ACHR, before filing a petition with the IACtHR, a petitioner must exhaust domestic remedies. The petitioners submit that Julia has exhausted all domestic remedies, with their case having been ruled upon by the Supreme Court of Mekinés, which is the court of last resort.[30]

2. Timelines of Submission

Under Article 46(1)(b) of the ACHR, the petition must be lodged with the IACtHR within six months of the notification of the final judgment at the domestic level. The Supreme Court of Mekinés reached its judgement on May 5th, 2022,[31] while Julia filed her petition on September 11th, 2022.[32] This is well within the six months as prescribed in Article 46(1)(b) of the ACHR as the duration between the domestic judgement and submitted petition is only four months and six days.

3. Jurisdiction ratione personae: Julia Medoza's competence to file a petition

Under Article 44 of the ACHR, the victim of a human rights violation must be a natural person that is duly identified and individualized in the petition. Julia and Tatiana are citizens of Mekinés, a member state of the Organization of American States. They are natural persons as defined under

[30] *Ibid.*, §37.
[31] *Ibid.*, §37.
[32] *Ibid.*, §39.

Articles 1(1) and 1(2) of the ACHR. They therefore have the competence to file a petition with the IACtHR.

4. The alleged necessity of Julia acting on the behalf of her daughter Helena

The requirement of concrete identification of the victim ensures not only that the person presenting himself or herself as a victim was indeed under the jurisdiction of the State, but also that the complaint does not aim at denouncing a general and abstract situation, without any concrete dimension. The IACtHR has stated that its jurisdiction is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions.[33]

Both Julia and Helena have both suffered violations of their human rights from the actions of the State of Mekinés. As natural persons, who were affected by the Supreme Court judgment in awarding the change of custody, there has been a specific wrong inflicted on distinguishable persons, falling within the procedural rules under Article 44 of the ACHR.

[33] *Advisory Opinion OC-14/94*, IACtHR, (1994), §49.

II. Arguments on the merits

1. Mekinés violated the Victim's right to a fair trial by an independent and impartial tribunal under article 8(1) of the ACHR

1.1 The ruling against Julia and Tatiana's by the Supreme Court of Mekinés was not duly justified

States have an obligation to analyse claims and evidence made at trial in a 'complete and serious manner'.[34] Moreover, the courts must 'duly justify' their judgments, with the IACtHR finding that judgments not 'duly justified' are arbitrary.[35]

Such 'duly justified' decisions are defined as 'reasoned and objective legal substantiation', regarding the legal issue at hand. This then is used to prove the need for the legal measure taken, in accordance with the facts of the case pursuant to the legal and conventional requirements of the court.[36]

The final judgment in the Supreme court was not duly justified because it was not legally substantiated. The legal grounds for the 'loss of custody due to parental unfitness' is set out in the Civil Code of Mekinés and the Children's Rights Act, and neither consider sexual orientation or religious belief to be a sufficient ground for removal.[37] However, it was the very grounds of religious belief that the Supreme Court of Mekinés based their reasoning on, resulting in a legal reasoning that is not substantiated by domestic law, and thus arbitrary.[38]

[34] *Wong Ho Wing v. Peru,* IACtHR, (2015), §228.
[35] *Claude Reyes et al. v. Chile,* IACtHR, (2006), §119.
[36] *Palamara-Iribarne v. Chile,* IACtHR, (2005), §216.
[37] Hypothetical, §34.
[38] *Ibid.,* §38.

While the court did rely on other legal principles such as the social-economic development of Helena, despite this being a relevant factor in determining the appropriateness of custody, it is by no means a sufficient reason of its own to displace Julia's custody of Helena.[39] Referring to the Appellate Court's judgment, it was more important to consider Julia's ability to be a responsible parent, and whether she exhibited any 'pathology' that would inhibit her ability to perform this role.[40]

While the Supreme Court tried to claim that Julia had violated Helena's right to religious freedom because Julia 'forced' Helena to participate in the practice of Candomblé,[41] it does not adhere to the facts, which state that Helena was the one who wanted to participate in the practice of Candomblé,[42] and did also with Marcos' consent.[43] The court also did not manage to rebut Julia's point that even Catholics engaged in the baptism of children, and attract the same breach of religious freedom that the Supreme Court alleged was infringed upon.

In the light of the Supreme Court's dismissal of pertinent facts, and the incoherence of the Supreme Court's reasoning on religious freedom, its judgment on the case cannot be said to have reasoned and objective legal substantiation. As such, the Supreme Court of Mekinés should be found to have acted arbitrarily, and infringed Julia's right to have her claims viewed in a complete and serious manner befitting a fair trial.

[39] *Ibid.*, §37.
[40] *Ibid.*, §35.
[41] *Ibid.*, §38.
[42] *Ibid.*, §29.
[43] *Ibid.*, §28.

1.2 Helena was subjected to a court which was not impartial

States must ensure that the court who hears the case 'must be competent, independent and impartial'.[44] The IACtHR draws upon the definition agreed within the European's Court of Human Rights, where impartiality involves both subjective and objective tests.[45]

The 'subjective test' is whether the judge is free of 'personal prejudice or bias', while the objective test is whether the judicial process is 'impartial from an objective viewpoint'. The 'personal prejudice or bias' within the subjective test is explained further by the IACtHR as any 'direct interests, pre-established viewpoints on, or preference for one of the parties'.[46] The 'objective viewpoint' within the objective test is defined as whether there are ascertainable facts that may raise 'doubts' as to the judge's impartiality.[47]

It is clear that one judge on the Supreme Court of Mekinés was not impartial. Regarding the subjective test, a newly appointed judge of the Supreme Court, Juan Castillo, has publicly claimed to be a 'proponent of a society based on dominant religious practices' and would ignore 'other forms of worship and religion'.[48] He also publicly stated that his appointment was 'a leap for the evangelicals of Mekinés', which has already raised concerns as to his bias against 'Afro-Mekinésian religions' such as Candomblé.[49] From this Judge's public statements alone, it is clear that he wields strong personal convictions that go against the interests of Julia, as practicing

[44] *Cruz Sánchez et al. v. Peru,* IACtHR, (2015), §398.
[45] *Herrera-Ulloa v. Costa Rica,* IACtHR, (2004), §170.
[46] *Palamara-Iribarne v. Chile,* IACtHR, (2005), §146.
[47] *Ibid.,* §147.
[48] Hypothetical, §19.
[49] *Ibid.,* §19.

members of Candomblé.[50] He has a pre-established viewpoint against the place of Candomblé in Mekinésian society, which has the potential to motivate the judgment of the Supreme Court of Mekinés where the evangelisation of Candomblé is viewed as a breach of the religious freedoms of the child.[51] Additionally, his claim that he was a 'leap' forwards for 'evangelicals of Mekinés' also imputes potential favoritism for parties who share his evangelical faith, such as Marcos.[52] As such, the subjective test is fulfilled on the facts surrounding the judgment of the Supreme Court.

Regarding the objective test, the above-mentioned facts of the Supreme Court judge also fulfil the test of 'ascertainable facts' to determine that the judge was not impartial from an 'objective standpoint'. As such, there is evident bias within the bench of the Supreme Court, which has rendered doubt over the impartiality of that tribunal. As such, the state has breached Julia's right to fair and impartial trial.

2. Mekinés violated the Victim's right to freedom of conscience and religion under Article 12 of the ACHR

2.1 The practice of Candomblé is sufficiently cogent, serious, cohesive and important

A religion or belief must have a level of cogency, seriousness, cohesion and importance.[53] The purpose of Article 12 is to protect the way of life of people and the way that individuals may apprehend their own personal and social life and convictions.[54]

[50] *Ibid.,* §28.
[51] *Ibid.,* §38.
[52] *Ibid.,* §30.
[53] *Campbell and Cosans v. United Kingdom,* ECtHR, (1982), §36.
[54] *Arrowsmith v. The United Kingdom,* EComHR, (1977).

The practice of Candomblé falls within the ambit of Article 12(1), both as a 'religion' and as a 'belief'. The cogency of Candomblé is highlighted in its African origins, being entrenched through generations of 'Afro-descendants'.[55] Its seriousness and importance is evident from its established rituals and beliefs, and is a religion followed by around 2% of the population of Mekinés.[56] While it lacks a central text or single God to be worshipped, this does not take away from the convictions of the practitioners of Candomblé, and the seriousness of their belief.[57] As such, the practice of Candomblé should be protected by Article 12 of the ACHR.

2.2 Mekinés restricted Helena's right to manifest her religious belief under Article 12(3) by placing her in the custody of Marcos

The State has an negative obligation to refrain from interfering with the manifestation of one's religious belief, which includes the performance of rituals privy to one's religion. The ICCPR illustrates four types of manifestation of one's religion: worship, observance, practice and teaching.[58] Worship is further defined under the Human Rights Committee as comprising ritual and ceremonial acts.

By moving Helena from Julia's custody to Marcos, this will restrict her manifestation of her belief in Candomblé. Helena has previously chosen to initiate herself into the religion of Candomblé.[59] The practice of Candomblé involves the ritual of *Recogimiento*, which entails the established

[55] Hypothetical, §5.
[56] *Ibid.*, §12.
[57] *Ibid.*, §17.
[58] *Metropolitan Church of Bessarabia and others v. Moldova*, ECtHR, (2001), §114.
[59] Hypothetical, §29.

customs of making small incisions in a person's skin for the purpose of protection, and staying within the community for a period of time. These rites require involvement of the Candomblé community, and cannot be performed alone.[60]

As such, the removal of Helena from her family that shares her Candomblé religious beliefs and placing her within a Roman Catholic family and a Roman Catholic school, will put her in an environment that is hostile and foreign to her religion.[61] The state mandated custody arrangement would thus serve to isolate Helena from her chosen religious community and prevent her from performing her religious rights, which are central to the manifestation of her Candomblé religious beliefs. Therefore, the state would breach Helena's rights under Article 12(3).

2.3 The practice of Candomblé is not subject to limitations prescribed by law, nor necessary to protect public safety, morals or health

Article 12(3) creates an exception to the freedom to manifest one's religion, if such a limitation is prescribed by law, and necessary to protect public safety, morals or health. The first limb of this test is a factual inquiry of whether any applicable laws are in effect that curtain the manifestation of Candomblé. On the present facts, there is no such limitation, and even the Candomblé ritual of *Recogimiento* is described as 'lawful custom'.[62]

Whether a limitation is 'necessary' under the second limb of the test depends on whether the judicial system strikes a fair balance between the goals of society as a whole and those who hold

[60] *Ibid.*, §29.
[61] *Ibid.*, §30.
[62] *Ibid.*, §29.

the belief that the state seeks to limit.[63] In the context of conscientious objection against military service, the European Court of Human Rights ruled that the state needed to show that the right to conscientious objection was not compatible with the State's right to territorial integrity through national service. The fact that there were other available solutions to achieve the state's goal of national service rendered the state's quashing of conscientious objection to be unnecessary, and thus rendered them in breach of the freedom of thought and conscience.

As such, under the second limb of necessity within the test of Article 12(3), it must be shown that restricting the manifestation of Candomblé strikes a fair balance between the right to practice Candomblé and the right of the State to public safety, order and morals. On the facts, the practice of Candomblé does not step into the public sphere, involving that of personal rituals and seclusion within its own religious community.[64] There is no danger to public safety, no degradation of public morals nor any threat to public health through the lawful customs practiced by the followers of Candomblé, and as such there is no necessity nor pertinent ground to limit the manifestation of Helena's religious belief.

2.4 Julia's right under Article 12(4) to provide for the religious and moral education of Helena according to her own convictions was infringed

Per Article 12(4), parents have the right to provide for the religious and moral education of their children that is in accord with their own convictions. On plain reading, this states that Julia, as the mother of Helena and a believer of Candomblé, thus has a right to educate Helena with the precepts

[63] *Savda v. Turkey*, ECtHR, (2012), §93.
[64] Hypothetical, §29.

of Candomblé as well.[65] Additionally, she was originally awarded custody of Helena,[66] and as such her own convictions take precedence over that of her ex-husband. As such, the court failed to take note of Julia's right, instead characterising it as a violation of Helena's religious freedom.[67]

3. Mekinés violated the Victim's rights of the family and of the child under Articles 17 and 19 of the ACHR

3.1 Correlation between Article 17 and 19 of the ACHR

The separation of children from their family nucleus is both a violation of their right to family under Article 17 of the ACHR[68] and the rights of the child under Article 19 of the ACHR.[69]

This is because the IACtHR has noted that the special position of children within the family is critical, with the family unit being described as "a focal point" of child protection.[70] As such, the special protection due to children under Article 19 is closely linked to the protection of his or her family, where entrenchment and protection of the family unit is the primary protector of children from exploitation and abuse.[71] As such, the protection of the rights of the child involve the protection of their family unit, tying Article 17 and 19 together.

[65] *Ibid.*, §28.
[66] *Ibid.*, §28.
[67] *Ibid.*, §38.
[68] *Advisory Opinion OC-17/02*, IACtHR, (2002), §71.
[69] *V.R.P., V.P.C. et al. v. Nicaragua*, IACtHR, (2018), §311.
[70] *Advisory Opinion OC-17/02*, IACtHR, (2002), §62.
[71] *Ibid.*, §66.

3.2 Mekinés has a positive obligation to protect the family unit by reforming practices involving the parental rights of homosexual parents

Mekinés has a positive obligation to protect the family,[72] by 'adapting internal law' to the provisions of the ACHR, with special reference to Article 17.[73] Such adaptation requires the State to eliminate 'norms and practices' that impede the exercise of the rights within the ACHR, and is satisfied with the 'reform or repeal' of laws or practices that have that effect.[74]

Homosexual parents are right holders within article 17(1) of the ACHR.[75] While Article 17(2) seems to limit Article 17 rights holders to 'men' and 'women', the IACtHR in Advisory Opinion No. 24 considered that such a formulation would not provide a restrictive definition of how marriage should be understood, or how a family should be founded. Instead, this formulation of 17(2) only expressly establishes treaty protection of a particular form of marriage, and does not necessarily imply that this is the only form of family protected by the American Convention.[76] As such, there is no exclusive concept of 'family' defined under Article 17 of the ACHR.

The classification of family is thus a fact-sensitive inquiry, with the European Court of Human Rights stating that a cohabiting same-sex couple living in a 'stable *de facto* partnerships' would fall within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would.[77] Additionally, such a family unit would 'share in each other's lives', and enjoy a 'physical and emotional closeness' between each member of the family unit.[78]

[72] *Ibid.*, §87.
[73] *Fornerón and daughter v. Argentina,* IACtHR, (2012), §130.
[74] *Ibid.*, §131.
[75] *Atala Riffo and daughters v. Chile*, IACtHR, (2012), §177.
[76] *Advisory Opinion OC-24/17*, IACtHR, (2017), §174.
[77] *Atala Riffo and daughters v. Chile,* IACtHR, (2012), §174.
[78] *Ibid.*, §176.

As such, the family unit comprising Julia, Tatiana and Helena falls within this definition, with Julia and Tatiana having cohabitated after three years of a stable relationship,[79] Helena and Tatiana enjoying an excellent relationship,[80] and sharing in each other's lives in the house in which they all lived together.[81] Therefore, the family unit comprising Julia, Tatiana and Helena should thus enjoy the protection owed by the State.

However, Mekinés failed to adapt internal laws which only promoted a traditional family structure. The executive branch of Mekinés had practiced policies that restricted family rights to traditional family structures, and relied on a governmental body, the Ministry of Women, Family and Human Rights, to do so.[82] The failure to reform or repeal these practices renders Mekinés in breach of its obligation to protect all family structures, and not merely the traditional one, breaching their obligations under Article 17(1).

3.3 The decision by Mekinés to award custody of Helena to Marcos was a not in her best interests

It is in Helena's best interests to allow her to remain in her current family unit with Julia and Tatiana. The mere fact that the child could be placed in a more financially favourable environment for their upbringing does not *per se* justify a mandatory measure of separation, since the latter can be addressed with less drastic means such as specific financial assistance or 'social counselling'.[83]

[79] Hypothetical, §29.
[80] Clarification Questions, §22.
[81] *Ibid.*, §22.
[82] Hypothetical §26.
[83] *Ramírez Escobar et al. v. Guatemala,* IACtHR, (2018), §279.

The separation of a child from their parents will only be regarded to have been in the child's best interests in extreme circumstances, such as when a child is subjected to violence or is 'living on the street'.[84] Outside of such exceptional circumstances, children should remain within their family unit.[85]

The high bar placed by the IACtHR is justified because children progressively exercise their rights as they gain personal autonomy. Such rights are primarily exercised through their parents and families in their early childhood, which is another reason why separating them from their families necessarily undermines the exercise of their rights.[86]

Additionally, Article 17(4) of the ACHR provides that in the case of dissolution of marriage, the children must be protected according to their best interests. It 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 non-discriminatory and appropriate for the children'.[87]

Helena's circumstances do not reflect the high standard necessary for the separation of the child from their family. Helena has faced no neglect, abuse or homelessness, and Julia does not suffer from any pathology that would interfere with her capability to act in a parental role.[88] The reasons given by the Supreme Court of Mekinés were also insufficient. The Supreme Court alleged that the socioeconomic and psychological development of the child were paramount in its justification

[84] *The "Street Children" (Villagrán-Morales et al.) v. Guatemala,* IACtHR, (1999), §185.
[85] *Advisory Opinion OC-17/02,* IACtHR, (2002), §77.
[86] *Gelman v. Uruguay,* IACtHR, (2011), §129.
[87] *López et al. v. Argentina,* IACtHR, (2019), §171.
[88] Hypothetical, §35.

for the removal of custody.[89] However, this line of reasoning is rebutted by the highly analogous case of *Ramírez Escobar et al. v. Guatemala*, whereby the perceived failings of the original family unit of Julia and Tatiana should have invoked the positive obligation to assist the family unit with duly qualified state institutions and staff.[90] Such assistance is rendered to give effect to the child's right to grow under the protection and responsibility of his parents.[91]

Additionally, the Supreme Court failed to address how Helena was exercising her rights through Julia, such as her right to self-determination and religious freedom by choosing to initiate herself into the Candomblé religious belief.[92] The removal of Helena from Julia's custody would thus also serve to further restrict the exercise of her rights. As such, the Supreme Court's reasoning behind the removal of custody is insufficient and incorrect for such an act to be in the best interests of Helena, infringing upon her right as a child to remain with her family.

4. Mekinés violated the Victim's right to equal protection and non-discrimination under Article 24 of the ACHR and Articles 2, 3 and 4 of the CIRDI.

4.1 Julia faced discrimination for her sexual orientation

Article 24 of the IACtHR states that everyone is 'entitled, without discrimination to equal protection of the law'. The scope of this statement as provided in Article 1(1) includes 'race, color, sex, … or any other social condition'. Social conditions include being a member of the LGBTI+

[89] *Ibid.*, §37.
[90] *Advisory Opinion OC-17/02*, IACtHR, (2002), §78.
[91] *Ibid.*, §62.
[92] Hypothetical, §29.

community as shown by cases stressing the state's obligation to protect members of this community.[93] Protection involves refraining from taking steps that create or cause discrimination and reversing any discriminatory situations that exist. Such state protection was seen in the case of *Duque v Columbia* regarding a man who was denied his survivor's pension for his husband due to his sexual orientation. This case outlines the state's duty to ensure non-discrimination in their laws and systems.[94]

The state in the present case did not provide protection against discrimination and therefore breached Julia's right to equal treatment by the law. In deciding that she was unfit to care for her daughter, the trial judge asserted that Julia was unable to fulfil her maternal role. Her alleged unfitness as a mother was not based on facts but rather on Julia's sexual choices.[95] It is clear that the trial judge's prejudice against lesbian couples affected his decision. The decision was then affirmed at the highest court which is emblematic of how the state has perpetuated discrimination by infringing on Julia's right to custody of her daughter. The law therefore created the discriminatory practice of removing children from the custody of LGBTI+ couples in violation of Article 24.

Even if there are concerns about social stability and morality,[96] they are not relevant. However, the Inter-American courts suggest that the rights under the IACtHR such as equal treatment by the law are absolute rights which remain unaffected by the 'presumed lack of consensus in some

[93] *Yatama v. Nicaragua,* IACtHR, (2005).
[94] *Duque v. Colombia,* IACtHR, (2012), §192.
[95] Hypothetical, §33.
[96] *Ibid.,* §8.

countries' with regards to LGBTI+ issues.[97] The state hence cannot excuse their discrimination by claiming to be protecting their core values.

4.2 Julia faced discrimination for her practice of Candomblé

Julia's right to non-discrimination for her religion is found in Articles 2,3 and 4 of the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance ("**CIRDI**"). The preamble for CIRDI emphasizes 'promoting respect for human rights, equality, non-discrimination and tolerance'. It also states CIRDI's aim to reinforce the principles of legal equality and non-discrimination found in earlier international instruments such as The 1965 International Convention on the Elimination of All Forms of Racial Discrimination ("**CERD**").

Article 2 of CIRDI states that 'all human beings have the right to equal treatment before the law and to protection against racism, discrimination and intolerance, in the public or private sphere'. This right necessitates that states adopt protective measures, investigate and try to adequately grant reparations for all cases without discriminating against the parties involved.[98]

Article 2(1(d)) and Article 6 of the CERD similarly emphasise the need for equal treatment by the law in terms of protection and remedies by tribunals and other State institutions. This was illustrated in the CERD case of *Mahai Dawas and Yousef Shava v. Demark.*[99] The main issue presented to the court under Articles 2 and 6 of the CERD was whether the state party fulfilled its obligation to investigate the racially motivated crime.

[97] *Flor Freire v. Ecuador,* IACtHR, (2016), §124.
[98] *Velásquez-Rodríguez v. Honduras,* IACtHR, (1988), §172.
[99] CERD. *Opinion of the Committee on the Elimination of Racial Discrimination under Article 14 of the International Convention on the Elimination of all forms of Racial Discrimination,* (2009), §7.2.

The state failed to protect Julia because the lack of sufficient investigation into her case enabled discrimination rather than combating it. Several concerns have been raised about the Supreme Court judge, Juan Castillo's religious influences as a staunch Evangelical Christian.[100] Such influence presents itself in the lack of investigation into the allegedly violating ritual.[101] He affirmed the trial judge's finding that Helena was forced into the community against her will and harmed by the ritual.[102] Yet, when she was asked, Helena made clear that she felt no discomfort and enjoyed the initiation process.[103] This shows how the prejudice and ignorance of the judges resulted in unequal treatment of Julia who lost custody of her daughter because of such discrimination.

There is also a growing trend of parents losing custody of their children due to their indigenous religions.[104] Such precedence indicates that Julia was bound to be discriminated against by Judges. It is clear that the religious discrimination resulted in an unequal application of the law in this case, a clear infringement of Julia's right.

Article 3 of CIRDI provides for the Individual and collective rights to 'Equal recognition, enjoyment, exercise and protection of all human rights and fundamental freedoms enshrined in their domestic law and international instruments'. Article 2(2) of CERD similarly demands granting 'free and equal enjoyment of human rights and fundamental freedoms'. In fact, CERD

[100] Hypothetical, §19.
[101] *Ibid.,* §38.
[102] *Ibid.,* §30.
[103] Clarification Questions, §21.
[104] Hypothetical, §23.

has interpreted that failure to remedy discrimination in any case, reflects lack of state legislation which effectively outlaws racial discrimination in the matter at hand.[105]

In the present case, the history of parents who practice Candomblé losing custody of their children indicates the lack of protection. In refusing to recognise, Candomblé as a religion, the state failed to safeguard the rights of those who practice Candomblé.[106] The reluctance to acknowledge religious discrimination by refusing to acknowledge the existence of minority religions like Candomblé has allowed racially motivated crimes to go unpunished.[107] The systemic discrimination allowed the courts to equate Julia's religious practices to abuse with no investigation into the facts. The state's failure to correct the system, in spite of its past failures, infringes on the rights of all those who practice the Candomblé religion. Julia faces the burden of this infringement first hand through loss of the custody of her daughter. While Mekinés may remain a predominantly Christian society, they need to tackle the discriminatory practices against minority religions. This begins by altering their public policy and legislation to ensure greater equality.

Article 4 of CIRDI recognizes the collective rights of indigenous people to their spiritual beliefs and practice of these beliefs. Article 2(2) of CERD is applied in cases with facts involving the limitations of the right of indigenous communities to practice their religion.[108] To achieve the aim of recognizing their rights, CERD recommends that State parties ensure greater participation by

[105] CERD. *Opinion of the Committee on the Elimination of Racial Discrimination under Article 14 of the International Convention on the Elimination of all forms of Racial Discrimination*, (1998), §3.1.
[106] Hypothetical, §17.
[107] *Ibid.*, §18.
[108] CERD. *Concluding observations on the combined fifteenth and sixteenth periodic reports of Colombia*, (2015), §16.

indigenous peoples in decision making bodies such as representative institutions and public affairs.[109] An infringement of the rights outlined in these articles includes the failure to protect those who have faced violence as a result of their religion as this limits their ability to openly practice their religion.

The state of Mekinés lacks representation from minority religions such as Candomblé. While they created the National Committee for Religious Freedom, this committee does not have the authority to enact real change.[110] The result of this is the pre-eminence of the Evangelical Christian religion in most state functions. Hence, there is a reluctance to recognise religious intolerance,[111] and a lack of trust in the authorities that are meant to protect the marginalised groups.[112] The lack of investigation into and punishment of such crimes deepens the historically rooted systemic discrimination in Mekinés.[113] There is hence a failure to protect victims of religious hate crimes. Such failure infringes on the rights of all those who practice Candomblé to comfortably practice their rituals without fear of being violently discriminated against. Furthermore, the State's failure to protect their rights translates to other forms of injustice such as Julia being labelled abusive for practicing her right to pass her culture down to her child. While Christianity will remain the dominant religion in Mekinés, the state needs to ensure that indigenous groups can co-exist without having their right to their beliefs infringed upon.

[109] *Ibid.*
[110] Hypothetical, §15.
[111] *Ibid.*
[112] Hypothetical, §12.
[113] *Ibid.*, §14.

REQUEST FOR RELIEF

The petitioners respectfully request this Honourable Court to declare the present case admissible and to rule that the State has violated Articles 8(1), 12, 17, 19 and 24 of the ACHR, read together with Articles 2,3 and 4 of the CIRDI. Additionally, the petitioners respectfully request the Court to order Mekinés to:

a. return Helena to the custody of Julia and Tatiana;
b. recognize religions of an African origin, in particular Candomblé and Umbanda;
c. educate the public on the rituals of these religions to clear misconceptions;
d. adapt the domestic legislation regarding religious and sexual orientation in accordance with international human rights conventions such as CIRDI;
e. protect the human rights of victims of hate crimes;
f. ensure that the Mekinés judiciary receive intensive training to ensure that they respect and protect everyone’s human rights without any discrimination;
g. pay a fair compensation for the psychological damage suffered by the victims;
h. publicly acknowledge the State’s responsibility.