Case of Julia Mendoza et al. v. State of Mekinés

Memorial for the State

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III. STATEMENT OF FACTS

The respondent State of Mekinés is among the largest, most populous, and most ethnically diverse countries in the Western Hemisphere.[1] Despite its history of colonization predicated on enslaved labor, Mekinés boasts a regionally-dominant and diverse economy and has forged a constitutional democracy premised on "promoting the common good, without prejudice based on origin, race, sex, color, age, or any other form of discrimination."[2] To this end, the country has not only established a strong constitutional basis for racial equality,[3] but has sought to curtail the systemic challenges resulting from its brutally-imposed colonial past. For example, Mekinés has established a National Human Rights Ombudsperson within its Ministry of Women, Family, and Human Rights (MWFHR) and instituted a variety of targeted initiatives.[4] This includes the launch of a Data from Zero Discrimination hotline where Mekinesians can report on instances of observed racial violence.[5]

Mekinés has rejected the theocratic roots of its colonial past, declaring its government to be secular and codifying the freedom of belief and the independence of state and religious institutions from each other.[6] Notwithstanding its Roman Catholic tradition, Mekinés has become increasingly diverse with regard to its religious makeup, with a majority of its citizens now affiliating with other branches of Christianity and nearly 20% of citizens not identifying as Christian at all.[7]

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[1] Problem, para. 1; Notably, approximately 55% of the Mekinés population identifies as Afro-descendant. Problem para. 4.
[2] Problem, paras. 2 & 4.
[3] *Id*.; *See also* para. 16, which describes the Mekinesian Constitution's codification of access to justice as a fundamental right.
[4] Problem, para. 5.
[5] Problem, paras. 13-14.
[6] Problem, paras. 6-7.
[7] Problem, para. 12.

The Mekinés MWFHR monitors complaints and assaults relating to religiously-based discrimination and intolerance and conducts public-facing research regarding the status of religious intolerance in the country–a practice that has drawn attention to structural and data-related challenges that remain throughout Mekinesian society.[8] Notably, in response to public feedback on the issue, the State recently created the National Committee for Religious Freedom composed of civil society leaders to advise the MWFHR on matters relating to religious tolerance.[9] As with other countries in the region, Mekinés faces ongoing challenges in its efforts to combat the enduring legacy of its colonial domination.[10]

Another dominant focus of Mekinés' democratic government in recent years has been the enhancement of welfare protections relating to its most vulnerable class of citizens–its children.[11] For example, the MWFHR has been restructured to prioritize combatting pedophilia, advocacy for adoption, combatting suicide, and addressing violence against women.[12] Additionally, pursuant to the Children's Rights Act, autonomous Councils for the Protection of Children (Child Protection Councils) were established to ensure the far-reaching enforcement of children's rights as an "absolute priority" at the local level.[13] These Child Protection Councils are the first to receive reports of potential child abuse, including alleged abuse tied to religious practice.[14] These reports are conveyed to the Mekinesian Public Prosecution Service.[15] Finally, in the interest of advancing scientifically-sound research relating to the family to inform public

[8] Problem, para. 12
[9] Problem, para. 15.
[10] *See, e.g.*, Problem, para. 14.
[11] Problem, para. 9.
[12] *Id*.
[13] Problem, para. 22.
[14] Problem, para. 23.
[15] Problem, paras. 22-23.

policies both domestically and internationally, Mekinés created the National Observatory for the Family under its newly-minted National Secretariat for the Family.[16]

The State is both a member of the Organization of American States (OAS) and a State Party to the American Convention on Human Rights (ACHR or Convention), and recently ratified in 2019, with reservations, the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance (CIRDI).[17] Additionally, Mekinés is a known international proponent of Convention on the Elimination of All Forms of Racial Discrimination (CERD) since its ratification in 1970.[18]

In the matter at hand, Helena Mendoza Herrera, aged 10, was placed in the custody of her father, Mr. Marcos Herrera, after her mother and former caregiver, Ms. Julia Mendoza, permitted her minor child to undergo an initiation ritual associated with Candomblé, a minority Afro-Mekinesian belief system.[19] The initiation ritual involves scarification of the hands and head with sharpened fishbones, requires the person to have a clean shaven head and be doused in animal blood, and mandates a prolonged isolation period which lasts twenty-one days.[20] It is widely regarded to be a long and intense ritual, and permanently alters the initiate's skin and appearance.[21] After Helena underwent the practice Mr. Herrera filed a case with his regional Council for the Protection of Children, highlighting his concerns over his child's physical safety, possibly forced religious entrapment, as well as Helena's continuing education and development.[22]

[16] Problem, para. 17.
[17] Problem, para. 3.
[18] Problem, para. 3.
[19] Problem, para. 29;12.
[20] Clarification, 8.
[21] *Ibid*.
[22] Problem, para. 30.

The local Child Protection Council found the complaint credible and sufficiently severe to warrant an immediate complaint with the local court's criminal division alleging both battery and deprivation of liberty.[23] The Child Protection Council further expressed concerns over the religious practices and lifestyle of Ms. Mendoza, including her relationship with Ms. Tatiana Reis.[24] Prosecutors declined to bring criminal charges against Ms. Mendoza and referred the matter to Mekinés family court, which ruled that the minor child should be placed in the custody of her father, given the religiously-based physical abuse that occurred under Ms. Mendoza's care and the superior economic and developmental environment Mr. Herrera could provide.[25] The Family Court judge assigned to the case invoked arcane perspectives regarding the effect of exposing children to same-sex relationships when awarding custody to Mr. Herrera. On appeal, the Mekinesian Appellate Court fiercely rebuked this analysis and held that custody should be restored to Ms. Mendoza solely on the ground that her rights as a parent had been unfairly infringed upon as a result of the family court judge's bias towards same-sex relationships.[26]

Mr. Herrera appealed the appellate court's ruling to the Mekinés Supreme Court, arguing that the judgment patently conflicted with Mekinesian law, which prioritizes the best interests of the child in custody disputes over any affected rights of a parent.[27] The Court awarded custody to Mr. Herrera, citing the lower appellate court's failure to adhere to established case law, statutes, and constitutional provisions to prioritize the best interests of the child within custody disputes, including as it relates to psychological and socioeconomic harms.[28] The Court expressed careful consideration of Helena's ability to choose and practice the religion of her choice.[29]

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[23] Problem para. 31.
[24] Problem, para. 31.
[25] Problem, paras. 31-32.
[26] Problem, paras. 33-34.
[27] Problem, para. 36.
[28] Problem, para. 37.
[29] Problem, para. 38.

Nevertheless, the Court determined that by acting on her minor daughter's request for religious initiation, Ms. Mendoza had impermissibly imposed her religious practice on her child and violated Helena's freedom of religion.[30] The court further stipulated that the allegations of discrimination upon which the appellate court rested its decision were insufficiently proven.[31]

Having exhausted their legal options within Mekinés, Ms. Mendoza and her partner, Ms. Reis, petitioned the IACHR.[32] They claimed that the Supreme Court's custody decision represented a violation of their rights to equal protection (Article 24), and freedom of religion and conscience (Article 12), as well as violations of the rights of the child (Article 19) and family (Article 17) under the Convention.[33] They also alleged that the State violated Articles 2, 3, and 4 of the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance (CIRDI).

IV. LEGAL ANALYSIS

i. Preliminary Objections

A. This Court should find that it may not undertake a review of alleged violations under the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance (CIRDI) because Mekinés has not accepted the jurisdiction of this Court in connection with its ratification of the CIRDI.

The Court may not act on any alleged violations under CIRDI as Mekinés did not accept the jurisdiction of the Court in respect of CIRDI. While the State ratified the CIRDI, it did not consent to the jurisdiction of this Court as required under Article 19 of the treaty.[34] Therefore, in

[30] Problem, para. 38.
[31] Problem, para. 37.
[32] Problem, para. 39.
[33] Problem, para. 39. Petitioners based their claims on their interpretations of Articles 24, 12, 19, and 17 of the IACHR, respectively.
[34] Problem, para. 40.

the event the Court considers the merits of this case, it should limit its consideration to alleged violations under the American Convention in respect of which Mekinés has accepted the jurisdiction of this Court.

B. The Court should not exercise jurisdiction or justification to intervene in light of the principle of subsidiarity and in accordance with the appropriate application of the fourth instance formula and the margin of appreciation doctrine.

i. The principle of subsidiarity supports a finding in the instant case that this Court should not intervene on the basis that domestic authorities acted properly and did not fail to ensure the human rights of Ms. Mendoza and Ms. Reis.

Subsidiarity is a well-established legal principle that aims to achieve an appropriate balance between the international tribunal and courts operating at the domestic level.[35] Its application employs a structural analysis to aid a regional court of human rights in relation to appropriate parameters in the exercise of its jurisdiction vis a vis the decisions taken by domestic authorities. The principle of subsidiarity, one of the foundational principles of the European human rights system, holds that the European Court of Human Rights (ECHR) should intervene only where a State's domestic authorities fail to ensure respect for the rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).[36] Indeed, in Protocol No. 15 amending the European Convention the principle of subsidiarity was added to the Preamble of the Convention.[37]

[35] *See generally* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 39 (2003).
[36] European Court of Human Rights, Note by Jurisconsult, *Interlaken Follow-Up: Principle of Subsidiarity*, para. 2, page 2 (July 7, 2010) [*Interlaken Follow-Up*].
[37] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 213, 24 June 2013, Preamble.

The principle of subsidiarity provides that the Court can and should intervene only where the domestic authorities fail in ensuring respect for the rights enshrined in the Convention.[38] In *Scordino v. Italy*, the ECHR held that "the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on national authorities" and, further, "the machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights" pursuant to Article 13 and 35 § 1 of the Convention.[39] Thus, the ECHR has recognized that the decision of the national judiciary of the member States should take precedence before applicants bring their complaint to the ECHR. Given that the decisions of other international tribunals have assisted this Court in instances where similar law or facts are at issue, Respondent urges this Court to have regard to the application of the principle of subsidiarity by other international tribunals in the instant case and, applying that doctrine, defer to the decisions of the Mekenisian courts.

Here, Ms. Mendoza and Ms. Reis had the opportunity to argue their case at every level of the judiciary in the State of Mekinés. Accordingly, the State of Mekinés fulfilled its human rights obligation to the petitioners under Article 8 (Right to Fair Trial) and Article 25 (Right to Judicial Protection) and, broadly, under Article 1 (Obligation to Respect Rights) of the American Convention.

In the light of the foregoing, the courts of Mekinés did not fail in their task of ensuring that the rights of Julia and Tatiana were respected. Thus, this Court must decline jurisdiction to hear this case under the principle of subsidiarity as judicial intervention is not required here.

ii. This Court should apply the "fourth instance formula" to this case because Ms. Mendoza and Ms. Reis had their case adjudicated at every level of the Mekinés judiciary and a final judgment was rendered.

[38] *Interlaken Follow-Up*, page 2, para. 2.
[39] *Interlaken Follow-Up*, page 3, para. 7.

The "fourth instance formula" – related but distinct from the principle of subsidiarity – dictates that a court or tribunal must decline jurisdiction where a competent court or tribunal that has jurisdiction over the same matter has already rendered a final judgment.[40] This formula is based on the principle of *res judicata*, according to which a matter that has already been adjudicated by a competent court cannot be re-litigated.[41] Professor Jo M. Pasqualucci, a leading commentator on the Inter-American Court, notes that it does not fall within the jurisdiction of the ACHR to act as an appellate body with the authority to examine every alleged error of domestic law or fact that national courts may have committed while acting within their jurisdiction.[42] Overall, the fourth instance formula recognizes the importance of the finality of domestic judicial decisions and promotes respect for the decisions of other courts and tribunals.[43]

The Inter-American Commission and this Court have applied the fourth instance formula previously and should do so in the instant case. In Case 9260, the Commission considered the petition of Mr. Clifton Wright, a Jamaican man convicted of murder. Upon review of the case, the Commission found that since Mr. Wright fully exhausted his domestic judicial options, the case could not be heard by the IACHR. It found that undertaking the review would have the effect of reviewing "the holdings of the domestic courts of the OAS member states" contrary to the proper role of the Court.[44]

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[40] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* 93 (2003). *See also* James A. Sweeney, *The European Court of Human Rights in the Post-Cold Era: Universality in Transition* (2013) 33 (noting the distinction between the principles).
[41] Pasqualucci, p. 93.
[42] Pasqualucci, p. 93. *See also* Diego Rodriguez Pinzon, *The "Victim" Requirement, The Fourth Instance Formula and The Notion Of "Person" In The Individual Complaint Procedure of The Inter-American Human Rights System*, 7 ILSA Journal of International & Comparative Law 369 (2001).
[43] European Court of Human Rights, *Practical Guide on Admissibility Criteria*,72 (updated) 31 August 2022 [*Practical Guide on Admissibility*].
[44] *Clifton v. Jamaica*, Case 9620, Inter-Am. Ct. H.R. 154, Report No. 29/88, OEA/Ser.L./V/II.74, doc. 10 rev. 1 (1988).

Other courts have applied the fourth instance formula in human rights cases, including the European Court of Human Rights.[45] The fourth instance formula was first applied in a case concerning Article 6 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the right to a fair trial.[46] The practice of the ECHR is to refrain from questioning the findings and conclusions of the domestic courts with regard to 1) the establishment of the facts of the case; 2) the interpretation and application of domestic law; 3) the admissibility and assessment of evidence at the trial; 4) the substantive fairness of the outcome of a civil dispute; or 5) the guilt or innocence of the accused in criminal proceedings.[47]

There, the Court found the application inadmissible under Article 35 § 3 on the basis that it was incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application.[48] In *X v. Germany*, the applicant was not satisfied with the decision of the German courts, and thus brought a case forward where the European Commission on Human Rights rejected the application stating that "the alleged facts did not amount to a violation of a right protected by the Convention."[49] Additionally, the UN Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights, consistently applies the fourth instance formula to ensure that its role as a supervisory body of the treaty is maintained given that its role is *not* to act as an appellate court.[50]

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[45] *Interlaken Follow-Up*, para. 9, para. 29.
[46] *Practical Guide on Admissibility*, 74.
[47] *Practical Guide on Admissibility*, 73-4.
[48] European Convention on Human Rights, art. 35 sect. 3
[49] *Interlaken Follow-Up*, p. 10, para. 39.
[50] *See, e.g.*, Human Rights Committee, Communication No. 1763/2008, *Pillai v. Canada*, Views adopted on 25 March 2011, para 11.2; Communication No. 1881/2009, *Masih v. Canada*, Views adopted on 24 July 2013, dissenting opinion of Committee member Mr Shany, joined by Committee members Mr. Flinterman, Mr. Kälin, Sir Rodley, Ms. Seibert-Fohr and Mr. Vardezelashvili, para 2.

Several of the first cases heard within the European Human Rights system were fourth instance applications. A case which served to clarify the application of the fourth instance formula was *Perlala v. Greece.* There, the Court underscored that it was "not the Court's role to assess itself the facts which have led a national court to adopt one decision rather than another."[51] The Court noted that to do otherwise, "the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action."[52]

This Court's approach parallels that of the European human rights system. This Court has observed that, rather than assessing the facts that led a national court to adopt a certain decision, when it comes to reviewing and hearing cases, "the Court is obliged to examine whether it has jurisdiction *ratione materiae* at every stage of the proceedings . . ."[53] Further, this Court has determined that "it is not within the jurisdiction *ratione materiae* of either the Inter-American Court or Commission to assume the role of national authorities and become an appeals court of fourth instance."[54] Indeed, where the Court or Commission acts as "an appeals court of the fourth instance" they are opening the floodgates for petitions that should remain at the domestic level, hindering the ability to hear and adjudicate cases involving serious and egregious violations of human rights obligations. Moreover, where a petition "contains nothing more than the allegation that the domestic court's decision was wrong or unjust, the Commission must apply the fourth instance formula and declare the petition inadmissible *ratione materiae*."[55] The basic premise of the fourth instance formula is "that the Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial

[51] *Perlala v. Greece*, App. No. 17721/04, (February 22, 2007). *See also Interlaken Follow-Up*, p. 10, para. 32.
[52] *Interlaken Follow-Up*, p. 10, para. 32.
[53] *Tănase v. Moldova*, App. No. 7/08, para. 131 (April 27, 2010).
[54] Pasqualucci, 92.
[55] Pasqualucci, 92.

guarantees, unless it considers that a possible violation of the Convention is involved."[56] Ultimately, the role of international human rights bodies is to ensure that treaty commitments are observed. Further examination into the decisions rendered by the domestic courts is warranted "only insofar as the mistakes entailed a possible violation of any of the rights set forth in the Convention."[57]

The IACHR applied the foregoing logic in *Marzioni v. Argentina*, a case considered by a leading commentator as fundamental in the "evolution of the standards of the Inter-American system, considering the current trend in the hemisphere of transition to democracy."[58] *Marzioni* establishes that "states with functioning judiciaries in the framework of a democratic society will benefit from a degree of deference that the Commission gives to domestic courts."[59]

In order for the Court to grant review of an alleged violation, the violation must be "manifestly arbitrary" and thereby serves as a signal to States with pronounced problems in their judiciaries where there is a clear and compelling need to improve the independence and impartiality of the administration of justice. This is best exemplified in the case *Carranza v. Argentina*. There, Mr. Gustavo Carranza petitioned the IACHR, alleging that the Republic of Argentina violated his "right to a fair trial (Article 8), right to privacy (Article 11), the right to have access to public service (Article 23(1)(c)), and the right to judicial protection (Article 25)."[60] The Commission held that Argentinian courts did not provide adequate reasoning behind their decision denying the petitioner judicial recourse under the logic that they deemed his case

[56] *Santiago Marzioni v. Argentina*, Case 11.673, Inter-Am. Ct. H.R. 76, OEA/Ser.L./V/II.95, doc. 7 (1997), para 35 [*Marzioni v. Argentina*.]
[57] *Marzioni v. Argentina,* para 35. Rep. No. 34/97, Inter-Am. Ct. H.R., OEA/ser.LI./V/., doc. 6 (1997); *Melba del Carmen Suárez Peralta v Ecuador*, para 83. Case No. 12.683, Inter-Am Ct. H.R., 26 January 2012; *Marco Bienvenido Palma Mendoza et al. v Ecuador*, para 53. Case No. 12.004, Inter-Am Ct. H.R, 24 February 2011.
[58] Pasqualucci, 92.
[59] Pasqualucci, 92.
[60] *Carranza v. Argentina,* Case 10.087, Inter-Am. Ct. H.R. 254, OEA/ser.L/VII, doc. 7, rev. 1, para. 1 (1998).

non-justiciable. The Commission determined this decision to be "manifestly arbitrary" and as such, a violation of Article 25 and Article 8(1) of the American Convention.

Unlike the Argentinian courts in *Carranza*, the Mekensian courts did not arrive at their decision under "manifestly arbitrary" reasoning. Rather, the Supreme Court of Mekinés made its decision by carefully balancing the inherent rights of Helena, the minor child, and the comparative benefits and costs of awarding custody to one or another of her parents. Ultimately, the Supreme Court rendered its decision on the basis of its duty to protect the rights of children – in this case, eight-year-old Helena.

On a policy level, hearing this case risks compromising the judicial economy of the Inter-American Human Rights system, opening it to the real possibility of system overload by petitions essentially seeking appellate review. Cases should remain at the domestic level when it is evident, as it is here, that the domestic courts acted fairly and thoroughly. Here, the appellate level domestic court saw an error in the lower level court's decision and corrected it with an impartial analysis that respected the legal rights of the parties, consistent with the rights to judicial protection under Article 25 of the ACHR. Both the appellate court and the Supreme Court of Mekinés decried the decision of the family court judge and decided the case, in their own analysis, strictly on judicially permissible grounds. The vastly differing decisions between the appellate level court and the Supreme Court show that the Mekinés judiciary is not corrupt nor being influenced by any outside source – Ms. Mendoza and Ms. Reis were given access to justice in the form of a fair trial and the opportunity to appeal the trial court's decision and have their case heard by the highest court in Mekinés.

Moreover, should the Court hear this case, it will encourage applicants to use the Court as an opportunity to file complaints when a judgment is not rendered in their favor at the

domestic level. Past decisions by this Court support the position that a petitioner must have both exhausted all legal recourse at the domestic level and that the domestic court's judgment must have violated the rights of the petitioner under the American Convention.[61]

In summary, it is not this Court's role to disregard the limits of its jurisdiction in respect of domestic decisions. The domestic courts decisions in this case did not act impartially and did not lack reasons for the decisions rendered. The Supreme Court of Mekinés' decision was not arbitrary. Rather, the Court rendered its decision appropriately on the basis of the State's duty to protect the rights of children – in this case, the minor child, eight year-old Helena. Under the fourth instance formula, this Court must defer to the decision of the Mekinés Supreme Court or risk becoming an appeals court of the fourth instance for cases that should appropriately remain at the domestic level.

iii. The margin of appreciation doctrine applies in this case and should be invoked by the Court.

The margin of appreciation doctrine recognizes the discretion afforded to States in the interpretation and application of international human rights treaties or standards. Similar to the fourth instance formula, the margin of appreciation doctrine falls under the broad concept of "substantive subsidiarity."[62] In cases where international law provides a general framework for human rights protections, the margin of appreciation doctrine leaves room for states to make decisions that reflect their unique social, cultural, and political circumstances.[63] The rationale is clear: international human rights standards cannot be applied to every Member State across the

[61] *See generally* Inter-Am. Ct. H.R., *Carranza v. Argentina*, Case 10.087, 254, OEA/ser.L/VII, doc. 7, rev. 1, para. 1 (1998); Inter-Am Ct. H.R., *Santiago Marzioni v. Argentina*, Case 11.673, 76, OEA/Ser.L./V/II.95, doc. 7 (1997), para 35; Inter-Am. Ct. H.R., *Clifton v. Jamaica*, Case 9620, 154, Report No. 29/88, OEA/Ser.L./V/II.74, doc. 10 rev. 1 (1988).
[62] *Interlaken Follow*-Up, p. 12, para. 40.
[63] Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights,* 4 Human Rights Quarterly 474, 475 (1982).

OAS system with complete and total uniformity, given the diversity of legal systems, traditions, and cultural values. The doctrine recognizes that States have a certain degree of flexibility in determining how they will meet their human rights obligations, provided they do not violate the core values and principles of these obligations.[64] The scope of the margin of appreciation will depend on the specific context of each case and may be subjected to clear tests to determine its applicability in a given case.[65]

The ECHR adopted the margin of appreciation doctrine in the foundational decision, *Handyside v. United Kingdom*, where it held the Court should connect "the elements of subsidiarity, necessity, and international supervision in the review of rights' restrictions."[66] The ECHR further defined the margin of appreciation doctrine in *Lawless v. Ireland* where it held that "states should be allowed 'a certain discretion-a certain margin of appreciation... in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.'"[67] The ECHR approaches the doctrine by dividing human rights obligations into ranked categories. The categories divide cases into groups that concern "'core' or 'fundamental' rights", property rights and then dissimilar rights such as freedom of religion, free (non-political) speech, and the right to privacy."[68] Regarding the third category, "the European Court has granted deference to domestic authorities, generally upholding domestic decisions."[69]

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[64] *See generally* Onder Bakircioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, 8 German Law J. 711 (2007).
[65] *See* Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* 2 (2002).
[66] *See Handyside v. United Kingdom*, App. No. 5493/72, Eur. Ct. H.R., at IT 47-48 (1976).
[67] *Lawless v. Ireland*, App. No. 332/57, Eur. Ct. H.R. 132 (1958).
[68] Pablo Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between Jurisprudence of the European and Inter-American Court of Human Rights*, 11 NW. U. J. Int'l Hum. Rts. 28, 30 (2012).
[69] Contreras, 30.

This Court, following the practice of the ECHR, first invoked the term "margin of appreciation" in a 1984 advisory opinion where proposed amendments to constitutional rules regulating naturalization in Costa Rica were at issue.[70] There, this Court addressed the alleged incompatibilities of the constitutional amendments proposed with the right to nationality and the right to equal protection under the American Convention. The amendment required a different period of residence to acquire Costa Rican nationality, "depending on whether the applicants qualify as native-born nationals of other countries of Central America, Spaniards and Ibero-Americans or whether they acquired the nationality of those countries by naturalization."[71] In deciding whether the different treatment was in accordance with the right to equality it looked to the European Court's holding in the *Belgium Linguistic Case.* It determined that only those differences having "no objective and reasonable justification" can be considered discriminatory, and this Court reasoned that, in addressing cases regarding different treatment, it should be recognized that "[o]ne is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case *a certain margin of appreciation* in giving expression to them."[72]

Following the ECHR, the IACHR has applied the requirement of a proportionality test in assessing the application of the margin of appreciation doctrine. The proportionality test requires States to determine "if the rights violation could have been avoided by other policies in pursuit of the same social objectives."[73] The test must assess: "(1) the legitimacy of the social objective pursued; (2) how important the restricted/derogated right is, e.g., as a foundation of a democratic

[70] *Proposed Amendments to the Naturalisation Provisions of the Political Constitution of Costa Rica,* Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4 (Jan. 19, 1984).
[71] *Id*. at para. 52.
[72] *Id*. at para, 56.
[73] Andreas Follesdal, *Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights,* 15 Int'l J. of Const. L. 359, 365 (2017).

society (3) how invasive the proposed interference will be; (4) whether the restriction of the right is necessary; and (5) whether the reasons offered by the national authorities are relevant and sufficient."[74] As developed by the ECHR, all five prongs should be satisfied to defer to the domestic court's decision as to whether there is a violation.[75]

In *Artavia-Murillo v. Costa Rica* on in vitro fertilization (IVF), Costa Rica invoked the application of the doctrine. There, the IACHR rejected the State's argument regarding its margin of appreciation on the basis that Costa Rica had failed to balance arguments for the right to life against other competing rights, to privacy and family life.[76] In *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius,* by contrast, where discriminatory legislation targeting married Mauritian women was under consideration, the UN Human Rights Committee underlined the margin of states in regulating family life and implicitly applied the margin of appreciation doctrine, noting that "the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions."[77]

The most relevant application of the margin of appreciation doctrine for the IACHR would, in the words of a leading commentator, "largely be restricted to balancing among the rights of the American Convention on Human Rights, or articles with a similar 'necessity' clause where balancing may be appropriate."[78] Article 12(3) (Freedom of Conscience and Religion) would fall within this category. Further, and consistent with the application of the doctrine by the

[74] Follesdal, 365.
[75] Follesdal, 365.
[76] Follesdal, 369.
[77] Communication No. R.9/35 (2 May 1978), U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981), para. 9.2(b)2(ii).
[78] Follesdal, 368.

ECHR, the IACHR would accordingly wish to analyze whether the State in question has undertaken the "proportionality test."[79]

Here, Petitioners allege that the Mekinesian courts violated their Right to Freedom of Conscience and Religion under Article 12 of the American Convention. Looking to the ECHR, rights such as freedom of religion fall into the category where deference to the domestic authorities is warranted, and generally uphold the domestic decisions. This Court should apply the margin of appreciation doctrine in the instant case in like manner to the ECHR.

The application of the proportionality test in assessing whether a margin of appreciation is justified would reveal that all four prongs of the test were indeed satisfied. In the instant case, the legitimacy of the social objective pursued is met as the Court is focused on the rights of the child and rights of the family, a legitimate and important social objective. Subsequently, this fulfills the second prong of the test, as the rights of the child and rights of the family are fundamental rights in the foundation of a democratic society. Thus, under the third prong of the proportionality test, if the IACHR were to interfere, it would be particularly invasive considering that the case deals with integral rights within the Mekinesian democracy in respect of which the Mekinesian courts should be granted deference. Finally, regarding the fourth prong, the restriction of rights, in this case, the Petitioners right to have full custody of Helena, is a necessary restriction because the Petitioners' actions, allowing Helena to undergo a physically and mentally harmful and medically unnecessary procedure, violate the minor child's rights, and the Mekinés courts provide relevant and sufficient reasoning for their decision to restrict the Petitioners' rights in this way, satisfying the fifth and final prong of the proportionality test.

[79] Follesdal, 368.

The application of the margin of appreciation doctrine in respect of determining whether a violation of human rights obligations has occurred is a sound and beneficial practice that supports substantive subsidiarity and judicial economy. In light of the foregoing, and in view of the fact that the State of Mekinés has not violated Petitioners' rights under the American Convention (or indeed the CIRDI), this Court should grant deference to the domestic courts under the margin of appreciation doctrine and dismiss the petition.

ii. Analysis of Issues of Law

A. Mekinés has complied with its duty, pursuant to Articles 17 and 19 of the American Convention, in combination with Article 1(1), "to take positive steps to ensure protection of children against mistreatment" occurring in the form of an internationally-recognized harmful practice.

The State has complied with its duties as a party to the American Convention as well as other international legal standards in the case at hand. Specifically, Mekinés has taken positive actions to fully meet its obligations relating to the rights of the family (Article 17) and the rights of the child (Article 19) under the ACHR by utilizing its judicial institutions to prioritize Helena's best interests and remove her from the custody of her mother, given the threats of physical harm, psychological and developmental damage, and overarching threats to individual and public health presented to the courts.

i. The State complied with its unquestioned duty to protect the minor child when it acted to protect Helena from further exposure to violence and physical harm within her mother's home.

Article 17 of the American Convention provides that "[i]n the case of dissolution [of the family unit], provision shall be made for the necessary protection of any child *solely on the basis of their own best interests*" (emphasis added).[80] Moreover, Article 19 of the ACHR clarifies that

[80] American Convention on Human Rights, art. 17(4), Nov. 22, 1969.

"[e]very 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."[81] These concrete obligations have been interpreted by this Court as aligning with the standards articulated under the Convention on the Rights of the Child (CRC) and other relevant international legal instruments and interpretive guidance concerning understandings of adolescent health and development.[82] The Supreme Court of Mekinés properly and wholly appropriately applied these principles in determining Helena's custodial circumstances, particularly insofar as they related to the child's physical safety.[83]

According to this Court, a core element of child protection is the requirement to take positive action "to ensure protection of children against mistreatment"[84] a principle reflected in the domestic laws of Mekinés.[85] As such, Helena's physical well-being and treatment informed and impelled the custodial decision in question.[86] Substantiated allegations of physical mistreatment in the form of an internationally-recognized harmful practice[87] catalyzed the proceedings against Ms. Mendoza and remained at the heart of the Supreme Court's decision to place her child in Mr. Herrera's custody.[88] The UN Commission on Human Rights lists scarring as a recognized traditional practice that deserves governmental oversight and progressive steps

[81] American Convention, art. 19.
[82] *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/2002 Inter-Am. Ct. H.R. (August 28, 2002) at para. 2 (p.63) [*Juridical Condition*]. *See also* General Comment No. 13, para. 29; Inter-Am. Ct. H.R., *Velasquez-Rodrigues v. Honduras*, p. 25 (July 29, 1988).
[83] Problem, para. 37; Clarifications, para. 15.
[84] *Juridical Condition,* para. 9.
[85] Clarifications, para. 2.
[86] Problem, para. 37; Clarifications, para. 15.
[87] Committee on the Rights of the Child & Committee on the Elimination of Discrimination against Women, *Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices*, Section V(9), CRC/C/GC/Rev. 1.
[88] Problem, para. 37; Clarifications, para. 15.

towards eradication due to the harmful effects on the health of women and children it poses.[89] Further, violence against children is addressed by the African Charter on Human and Peoples' Rights (ACHPR), particularly the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (AWP), and the African Charter on the Rights and Welfare of the Child (ACRWC). The latter's Preamble emphasizes the importance of "the virtues of …[African] cultural heritage, historical background and the values of the African civilization…"[90] Article 1 establishes that "[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged."[91] Article 21 stresses States' obligation to "…take all appropriate measures to eliminate…" those harmful social and cultural practices that negatively affect children.[92]

Here, the State determined that Ms. Mendoza's gravely dangerous decision to subject her eight-year-old daughter to a prolonged, unsterilized process which is often agonizing and is a permanently disfiguring process of scarification rose to a level of physical mistreatment severe enough to warrant a termination of custody in the best interests of the child. The process, which is rooted in religious and cultural practices, involves "cuts of the skin, removal of skin parts burns and branding, chemical imprinting, skin lacerations and a variety of other techniques."[93] Sharp implements are first used to cut the skin. Once the incisions have been made, practitioners apply an irritant such as soot, clay, ash, or mud to the open wounds to accentuate the scars. As a

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[89] Halima Embarek Warzazi (Special Rapporteur), *Final report of the Special Rapporteur on traditional practices affecting the health of women and children*, E/CN.4/Sub.2/1996/6 (14 June 1996), para. 37 (listing "scarring" as one among many harmful traditional practices).
[90] African Union, *African Charter on the Rights and Welfare of the Child*, Preamble, *opened for signature*, July 1, 1990 [African Charter]
[91] African Charter, art. 1.
[92] African Charter, art. 21.
[93] Roland Garve et al., *Scarification in sub-Saharan Africa: social skin, remedy and medical import*, 22 Tropical Med. & Int'l Health. 708, 715 (2017).

result, the process of scarification is painful and permanently disfiguring, regardless of how it is done.[94] Even with parental consent, the Supreme Court's custodial ruling should stand and did not constitute a violation of the ACHR; rather, Mekinés satisfied its overarching obligation in relation to child protection in the instant matter.

a. Petitioner's claim that the violence and physical harm Helena endured was justified under domestic and international concepts of freedom of religion and belief is baseless.

It is essential to recognize that the physical violence to which Ms. Mendoza subjected her daughter in the name of her faith cannot be justified on the basis of an international consensus regarding the freedom of religion or associated intrinsic parental rights. Indeed, the Article 11 of the ACHR explicitly provides that "[f]reedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others."[95] In the instant case, the faith-based initiation ritual under scrutiny interfered with Helena's rights and was therefore well beyond the scope of religious protections as they are defined within the Inter-American human rights system.[96] Therefore, allegations that Ms. Mendoza and her partner had their rights to freedom of conscience under Article 12 of the Convention violated by the Supreme Court must fail.[97]

Additionally, the scarring ritual at the heart of the custody case here unequivocally represents an internationally-recognized harmful practice that is wholly at odds with the minor child's right to "maximal survival and development," as well as her "right to protection from all forms of physical and mental violence" as it has been defined and expounded upon by the UN

[94] *Id.*
[95] American Convention, art. 11(3).
[96] American Convention, art. 11(3).
[97] Problem, para. 39.

Committee on the Rights of the Child (CRC Committee).[98] In particular, General Comment 13 adopted by the CRC Committee is explicit in its understanding that "all forms of violence [toward children], however light, are unacceptable," and that infrequency, a lack of malicious intent, or a lack of severity of violence cannot legitimate justifications for such conduct. [99] Furthermore, scarring–even where undertaken for ritual religious purposes–is expressly included among the impermissible harmful practices that may not be practiced on children according to widespread interpretations of international human rights law.[100]

Religious belief, parental consent, cultural acceptance, and even voluntary submission on the part of the harmed child may not validate any form of violence or physical harm.[101] In fact, the dominant understanding of children's rights under international human rights law recognizes that many cultural, religious, and tradition-based harmful practices often retain widespread endorsement not only within communities, but within the family unit.[102] Indeed, parents are frequently the perpetrators of impermissible violence against children, often acting out of the belief that are aiding their child's development or genuine religious conviction.[103] Nevertheless, multiple UN human rights bodies have clarified the incompatibility of child rights with parental powers that extend to the perpetration or authorization of harmful traditional practices, irrespective of their basis in parents' culture, tradition, religious belief or other belief system.[104]

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[98] International NGO Council on Violence against Children, *Violating Children's Rights: Harmful practices based on tradition, culture, religion or superstition.* (Oct. 2012) [International NGO Council].
[99] CRC General Comment 13, para. 3.
[100] CRC General Comment 13, para. 31. *See also* African Charter on the Rights and Welfare of the Child, art. 21(1) (July 1, 1990).
[101] CRC General Comment 13, para. 3.
[102] International NGO Council at page 41.
[103] International NGO Council.
[104] *See, e.g.*, Office of the High Commissioner for Human Rights, *Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children* (n.d.); Committee on the Rights of the Child, *General Comment 13: The right of the child to freedom from all forms of violence* CRC/C/GC/13 (Apr. 18, 2011) para. 47. *See generally*, International NGO Council.

Additionally, while international law generally recognizes the right of the child to manifest her beliefs, as Mekinsian Justice Juan Castillo reiterated in his holding,[105] this recognition must be necessarily tempered according to not only the "evolving capacities of the child,"[106] but overarching State obligations to promote health, public safety, and morals.[107] This Court has reiterated this child's rights-based understanding of violence against children in its own advisory opinion regarding the interpretive insights provided by the CRC,[108] and the Mekinés Supreme Court's custody decision in the instant case indisputably aligns with these principles of protection and prevention.[109] The holding further comports with informative recommendations from international experts that States "ensure accountability and appropriate remedies and end impunity" while exercising caution when criminally prosecuting parents who have committed harmful practices against their children according to the children's individual best interests.[110]

ii. The Supreme Court's holding should stand, as the ritual to which Helena was subjected resulted in unacceptable social isolation with the potential to gravely inhibit the child's psychological development.

The State's removal of the minor child from Ms. Mendoza's custody was further justified given Ms. Mendoza's decision to subject her eight-year-old daughter to complete isolation for a period of twenty-one days.[111] This sequestration patently violated not only the American

[105] Problem, para. 38.
[106] Convention on the Rights of the Child, art. 14 (Nov. 20, 1989).
[107] *Id.*
[108] *Juridical Condition*, para. 8.
[109] Problem, para. 37.
[110] International NGO Council, p. 42.
[111] Clarifications, para. 8.

Convention,[112] but also the CRC.[113] It is well-established among medical and child development experts that isolation has profound and lasting detrimental effects on the human psyche.[114] Indeed, longstanding medical and psychiatric acknowledgement of the serious health effects of solitary confinement aligns with the European Court of Human Rights' (ECHR) repeated determinations that the practice is so inhumane as to constitute a violation of international law.[115] These effects are especially grave for children,[116] a fact which has been recognized in this Court's past determination that all forms of solitary confinement as punishment for minors are violative of the Convention.[117] If this Court and analogous adjudicatory bodies have determined that the use of isolation-–including for periods as short as 24 hours—constitutes torture when applied to adults and children much older and more cognitively developed than Helena,[118] the State of Mekinés must be deemed justified in its reaction to the minor child's three-week-long isolation here.

Accordingly, the potential destruction of the personality risked during Helena's isolation ritual stands in direct contrast to international consensus that any determination of the best interests of the child by courts must prioritize the healthy and holistic development of the adolescent personality. Furthermore, ritual or punitive isolation, like scarification, is explicitly

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[112] Anthony Giannetti, *The Solitary Confinement of Juveniles in Adult Jails and Prisons: A Cruel and Unusual Punishment*, 30 Buff. Pub. Int. L.J. 31 (2011-2012), citing *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle XXII(3), OEA/Ser/L/V/ 1. 131 doc. 26 (March 14, 2008).
[113] Committee on the Rights of the Child, *General Comment No. 10, Children's Rights in Juvenile Justice*, CRC/C/GC/10 (April 25, 2007).
[114] World Health Organization, Regional Office for Europe, *Prisons and Health* (2014) at 31; Andres B. Clark, *Juvenile Solitary Confinement as a Form of Child Abuse.* 45 *J. Am. Acad. Psychiatry Law* 35-57, 35 (2017).
[115] *See, e.g.,* European Court of Human Rights, *Khider v. France* 39364/05 (July 7, 2009); European Court of Human Rights, *Ilascu and Others v. Moldova and Russia* 48787/99, 349 (August 7, 2004).
[116] *See, e.g.*, Clark, *Juvenile Solitary Confinement*; World Health Organization: Regional Office for Europe, *Prisons and Health* at 30 (2014).
[117] Organization of American States, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Principle XXII(3), OEA/Ser/L/V/ 1. 131 doc. 26 (March 14, 2008) [Principles].
[118] Inter-Am. Ct. H.R., *Miguel-Castro-Castro v. Peru* (Nov. 25, 2006) at paras. 319, 322-23, 330, 340, 341; OAS, Principles. Principle XXII(3); IACHR Precautionary Measure, *62 Children held in the Juvenile Center of Provisional Confinement, Guatemala* (Nov. 24, 2004).

understood to be a harmful practice, a position the human rights community has recently amplified due to the often outsized effects of such practices on female children.[119] In addition to the immediate psychological harm and developmental stagnation solitary confinement of all types can present, research demonstrates that the practice can have long-lasting effects on girls' education–an impairment which can, in turn, have profound repercussions on the economic status of affected women.[120] Thus, the decision by the Mekinés Supreme Court to remove Ms. Mendoza's minor child from her is wholly justified when one considers not only established interpretations of the rights of the child under the American Convention, but the undeniable international consensus that deems the type of prolonged isolation seen in the instant case to be a gross violation of human rights.[121] As was the case with the religious scarring discussed above, no amount of religious conviction nor demonstrated consent on the part of Helena or her mother could legitimate the practice of solitary confinement under the law.[122]

iii. **The holding here is valid under established and intuitive understandings of the "best interests of the child" doctrine, given that the maternal conduct preceding the custodial hearings amounted to serious threats to the health of not only Helena but the Mekinés public at large, justifying protective intervention on the part of the State.**

Finally, the ritual central to the case at hand presented grave risks to public and individual health in addition to its impermissible use of violence and isolation. As such, the Mekinés Supreme Court's decision to revoke Ms. Mendoza's custodial rights over her daughter was fundamentally justified under both the Convention and widely-held conceptions of international law.

[119] International NGO Council, p. 30.
[120] International NGO Council, p. 32.
[121] *See generally* International NGO Council.
[122] *See* supra Section IV(ii)(A)(iv).

The World Health Organization (WHO) defines "health" to mean "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[123] This holistic standard has been widely mirrored by the international community, including this Court.[124] As such, holistic conceptions of health under this definition fall naturally within judicial decision making among State Parties. In the instant case, Ms. Mendoza's behavior wantonly endangered the health of her daughter, including her physical, mental and social well-being, justifying the Supreme Court's decision to terminate her parental rights.

In addition to the previously discussed violence and psychological injuries endured by the minor child as a consequence of harmful traditional practices, the initiation ritual under scrutiny here risked not only the health of the child, but that of the public at large. First and foremost, the act of scarification Helena endured was inherently risky as it requires multiple incisions to be made in the skin, resulting in blood loss from those cuts and opening the body up to possible infection through those open wounds–a risk reinforced and indeed elevated by Ms. Mendoza's subsequent decision to permit her daughter to be isolated in a manner where she could not be adequately monitored for signs of illness.[125] Second, the scarring implements utilized in the ritual were not medical instruments, but fishbones.[126] It is beyond argument that fishbones are not sterile medical instruments, and their use in the ritual further heightened Helena's susceptibility to infection.[127]

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[123] World Health Organization, Constitution, Preamble (July 22, 1946).
[124] *See, e.g.*, International Committee on Economic, Social and Cultural Rights, *General Comment No. 14, Right to Health* E/C.12/2000/4 (August 11, 2000); IACHR Press Release, *States in the Americas Must Take Urgent Action to Effectively Protect Mental Health and Ensure Universal Access to It in the Context of the COVID-19 Pandemic* No. 243/20 (Oct. 2, 2020).
[125] Roland Garve et al., *Scarification in sub-Saharan Africa: social skin, remedy and medical import*, 22 Tropical Med. & Int'l Health. 708, 715 (2017); Clarifications, para. 8.
[126] Clarifications, para. 8.
[127] Clarifications, para. 8; Roland Garve et al., *Scarification in sub-Saharan Africa: social skin, remedy and medical import*, 22 Tropical Med. & Int'l Health. 708, 715 (2017).

Finally, the ritual required the throwing of goat or sheep's blood on Helena to "bathe" her and to "cleanse" her spirit.[128] This constitutes a clear threat to both public health and Helena's own individual health in violation of the Convention. Medical science indicates that bloodborne pathogens in the goat or sheep blood present risk insofar as such pathogens can be transmitted from the animal blood to a human, in this case, the minor child, through the multiple open cuts created through the scarification process on the head and arms.[129] This undue risk to Helena's health is in clear violation of her rights under both the Convention and the CRC.[130] Specifically, Article 14 of the CRC dictates that while "States parties shall respect the right of the child to freedom of thought, conscience and religion", this right is subject to limitations which include protections in the name of public health and in the name of protecting the minor child's rights to health.[131]

In short, Ms. Mendoza's decision to allow an unsterilized, non-medical instrument to repeatedly cut into her daughter's skin exposed the minor child to serious, even life-threatening, infections.[132] Furthermore, the ritualistic dousing of eight-year-old Helena in an animal blood bath while she was experiencing multiple open wounds is medically and morally indefensible, given the potentially deadly or debilitating pathogens to which the minor child could have been exposed to through the process.[133] Taken together, these obvious and grave risks to individual and public health more than justify the Supreme Court's decision to terminate Ms. Mendoza's

[128] Clarification, 2 - 3
[129] United States Dept. of Labor, Occupational Safety and Health Administration, *Fact Sheet: OSHA's Bloodborne Pathogens Standard* (2011); Ingrid Koo, *Zoonotic Diseases Passed from Animals to Humans.*
[130] American Convention on Human Rights, art. 12(3) (Nov. 22, 1969); CRC, art. 14.
[131] CRC, art. 14.
[132] Garve, p. 715 (2017); Clarifications, para. 8; Problem, para. 29.
[133] United States Dept. of Labor, Occupational Safety and Health Administration, *Fact Sheet: OSHA's Bloodborne Pathogens Standard* (2011); Ingrid Koo, *Zoonotic Diseases Passed from Animals to Humans.*

custodial rights over her daughter under the standards previously set forth by this Court and other human rights tribunals and bodies.

> iv. **Despite representations by petitioners, Helena could not meaningfully and independently give informed consent to the physically and psychologically harmful practices at issue, and the Supreme Court appropriately considered the minor child's input regarding her custodial circumstances.**

In addition to the foregoing health and safety human rights concerns presented by Helena's involvement in the ritual facilitated through her mother's ill-conceived consent, Helena's age at the time of the initiation presented an additional basis for the Supreme Court to properly terminate Ms. Mendoza's custody of her child. Put simply, a fundamental issue in this custody case is the failure of Ms. Mendoza to consider the maturation level of her eight-year-old minor child to undertake a decision with potentially life threatening consequences and serious health (physical, mental and social) impacts.[134] In *Atala Riffo and Daughters v. Chile,* this Court determined that a State Party to the ACHR should approach the incorporation of/deference to a child's input in matters of personal well-being to the extent "the child is capable of forming his or her own views in a reasonable and independent manner."[135] Accordingly, States are obliged to recognize the limited autonomy and inherent vulnerability of children, incorporate their input in proceedings relating to them on a graduated basis that provides deference commensurate with biological age and educational advancement, and act upon the knowledge that "the ultimate objective of protection of children in international instruments is the harmonious development of their personality."[136] In *Gelman v. Uruguay*, this Court underscored that the rights of the child "implies the possibility of all human beings to self-determination and to freely choose the

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[134] *See supra* Section B(1).
[135] Inter-Am. Ct. H.R., *Atala Riffo and Daughters v. Chile,* para. 200 (February 24, 2012) [*Atala Riffo and Daughters v. Chile*].
[136] *Id.* at paras. 199-200. *See also* Rafael Silva Nino de Zepeda, *Inter-American Children and their Rights: A Critical Discourse Analysis of Judicial Decisions of the Inter-American Court of Human Rights*, 552-76 Int'l J. of Children's Rights 30 (2022).

circumstances and options regarding their existence.... in a progressive manner in the sense that the minor of age develops a greater level of personal autonomy with time."[137] These rules and insights present two clear implications for the matter at hand: (1) Helena did not meaningfully provide consent to the ritual instigating the termination of Ms. Mendoza's parental rights, and (2) when the Mekinesian courts assessed Helena's custodial circumstances, they demonstrated compliance with the standards set forth by this Court concerning the consideration of child preferences and the rights of the family in the judicial proceedings under scrutiny here. As such, the Supreme Court's decision to grant custody of the minor child to her father is sound and should not be set aside.

a. The harmful practice underlying the State's termination of Ms. Mendoza's parental rights cannot be justified on grounds that the minor child provided consent to the ritual.

Any assertions to the effect that the physical mistreatment was justified on the basis that Helena asked to participate in the scarification ritual should be rejected by this Court. Well-established conceptions of childhood decision-making capacity and the exercise of informed consent in international law establish that Helena could not have consented, at the age of eight, to the harmful traditional practices she endured.[138] While the Supreme Court in this instance complied with its obligation to consider Helena's cognitive capacity to make decisions regarding her religious expression and preferences as they relate to her living situation, consideration does not amount to absolute deference,[139] and no level of consent on Helena's part would justify Ms. Mendoza's decision to allow her daughter to be subjected to permanent bodily modification through a harmful practice.[140]

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[137] Inter-Am. Ct. H.R., *Gelman v. Uruguay*, para. 129 (Feb. 24, 2011)
[138] *See generally* International NGO Council.
[139] *See, e.g., Atala Riffo and Daughters v. Chile*; Clarifications, para. 22.
[140] See *supra* Section IV(B).

First, Helena's age at the time of her request and ritualistic initiation falls well below international conceptions of independent, developmentally appropriate deference to a minor's decision-making as she was, at the time, eight years old. Scientific research indicates that the decision-making capacities of children aged eight are far from sufficiently developed in a way that would justify interpreting Helena's "consent" to the ritual process as legally meaningful.[141] Furthermore, there is no basis in international law on which Helena's consent in the scarification process is sufficient to override the State's positive obligation to protect its minor citizens from physical harm. Indeed, the Inter-American Institute of Children has declared that no child under the age of twelve may be criminally prosecuted for their acts, aligning with the position that pre-adolescent decision-making capacities are too underdeveloped and potentially vulnerable to undue influences to legally qualify as consent.[142] This understanding of the deeply limited decision-making capacity of minors Helena's age is further consistent with determinations by the other international human rights bodies that there can be no meaningful consent given by minors to harmful practices such as child marriage and female genital mutilation.[143] In short, to interpret consent by minors to clearly harmful practices on the grounds that they are voluntarily expressing their religious beliefs would be to fundamentally undermine the well-established international regime prohibiting such practices.[144]

B. The Mekinesian courts complied with this Court's past decisions regarding the appropriate consideration of a minor's preferences and the rights of the family when deciding Helena's custodial circumstances.

[141] Petronella Grootens-Wiegers, et al. *Medical decision-making in children and adolescents: developmental and neuroscientific aspects*. 17 BMC Pediatrics 120 (May 8, 2017).
[142] *Juridical Condition*, p. 7.
[143] *See generally* International NGO Council.
[144] *Id.*

The Mekinés courts appropriately considered both Helena's input and this Court's past interpretation of the rights of the family when adjudging the custody and parental rights of Ms. Mendoza and Mr. Herrera. This Court has held that in custody proceedings, as with all matters relating to minors, courts are to prioritize the best interests of the child and to consider her preferences to the extent appropriate based on age and cognitive development.[145] At each jurisdictional level, the Mekinés courts complied with this fundamental guidance.[146] While Petitioners may contend that the Supreme Court's decision to grant custody to Mr. Herrera was prima facie evidence of the State's inadequate assessment of Helena's preferences based on the child's statements describing the comfort of her mother's home and positive to neutral experience during the initiation ritual, such a stance stops well short of fully acknowledging this Court's articulated understanding of this judicial obligation.[147] Indeed, Helena's young age, limited education, and relatively inconsistent articulations of her own preferences support the Court's decision to transfer custody of the child to Mr. Herrera, whose home offers a comparatively safe and enriching environment and who has not demonstrated conduct constituting physical and psychological endangerment in contrast to Ms. Mendoza.[148] Accordingly, the Supreme Court's custodial decision should stand.

Furthermore, it should be noted that the decision in question here aligns with the Convention's broader mandates regarding the rights of the family as they have been interpreted by this Court. Specifically, the Supreme Court appropriately weighed the "specific parental behaviors and their negative impact on the well-being and development of the child,"[149] while

[145] *Juridical Condition*, p. 7; *Atala Riffo and Daughters v. Chile*.
[146] Clarifications, para. 28.
[147] Problem, para. 38; Clarifications, para. 22.
[148] Problem, para. 37; Clarifications, para. 38.
[149] *Atala Riffo and Daughters v. Chile,* para. 109.

"favor[ing], in the broadest possible terms, the development and strength of the family unit" and prioritizing the best interests of the child above all else.[150] In the instant case, the Supreme Court carefully considered the concrete decisions made by Ms. Mendoza to allow her daughter to go through a harmful initiation process to be dispositive in the custody decision.[151] Despite the intolerant language used by government and judicial actors at certain points during the proceedings,[152] the Supreme Court's central focus was on Helena's holistic well-being in light of her mother's tangibly harmful actions.[153] This stands in direct contrast to instances where bigoted perceptions and stereotypes served as the sole basis for a loss of custody.[154] Indeed, the Supreme Court's decision to revoke Ms. Mendoza's custodial rights did *not* turn on her sexual orientation alone, but rather the appellate court's failure to follow appropriate case law mandating holistic consideration of the best interests of the child.[155] A significant factor within this assessment was Helena's potential exposure to violence.[156] Furthermore, the Mekinesian courts promoted the strength of the family unit by granting custody to Mr. Herrera instead of a foster family or public institution, permitting Ms. Mendoza visitation rights, and demonstrating a willingness to place Helena into the care of her mother and Ms. Reis.[157]

V. REQUEST FOR RELIEF

For the foregoing reasons, the Respondent State of Mekinés respectfully requests this Court to:

1. Decline to adjudge on any claims under of violation under the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance (CIRDI).

[150] *Atala Riffo and Daughters v. Chile*, para. 169.
[151] Problem, para. 37.
[152] *See* Clarifications, para. 38.
[153] Problem, para. 37.
[154] *See, e.g.*, *Atala Riffo and Daughters v. Chile.*
[155] Problem, para. 37.
[156] *Id*.; Clarifications, para. 38.
[157] Problem, para. 35; Clarifications, para. 33.

2. Declare the petition inadmissible based on the conclusions in IV.A and B.
3. In the alternative, adjudge that Petitioners' rights were not infringed upon by Mekinesian courts, and the custody determination by the Supreme Court was proper; and
4. Determine that the State is not responsible for violations under Articles 8, 12, 17, 19, and 24 of the Convention and Articles 2, 3, and 4 of the CIRDI; and
5. Declare that Mekinés has fulfilled or is in the process of fulfilling its obligations under the Convention and CIRDI.

Respectfully,

The Respondent State of Mekinés