Julia Mendoza et al.

Petitioners

v.

Republic of Mekinés

State

MEMORIAL FOR THE STATE

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II. STATEMENT OF FACTS

The population of the Federal Republic of Mekinés (Mekinés) is large and diverse, with 55% of the country's 220 million inhabitants identifying as Afro-descendant.[1] There is a large Christian majority comprising 81% of the population, while 2% practice an African-based faith.[2] Under Article 5 of the Constitution, equal protection of human rights is guaranteed.[3] While Mekinés is secular under Article 3 of the Constitution, it is also a democratic state and as such, the three branches of government inevitably reflect the traditional Christian beliefs held by wider society.[4] A media conglomerate oversees most media and disseminates these traditional views on family and religion.[5] Due to their polytheistic nature, lack of core text and structure, minority faiths such as Candomblé are not recognized as religions by the Supreme Constitutional Court.[6] However, steps have been taken to tackle intolerance in the country, such as the establishment of a National Committee for Religious Freedom, and positive action measures for Afro-descendent people.[7]

Helena Mendoza Herrera is the child of Julia Mendoza and Marcos Herrera, who have been separated since 2017. Before domestic proceedings began, Mr. Herrera frequently saw his daughter and approved of Ms. Mendoza raising her to follow her religion, Candomblé.[8] However, in 2020, when Helena was 8 years old, she went through the intense initiation into Candomblé, which involved animal sacrifice, the shaving of her head, scarification of her skin with fish bones and

[1] Hypothetical, §§1, 4.
[2] Hypothetical, §12.
[3] Hypothetical, §§4, 6.
[4] Clarification Question (CQ) 4.
[5] Hypothetical, §35, CQ31.
[6] Hypothetical, §17.
[7] Hypothetical, §15, CQ40.
[8] Hypothetical, §28.

Recogimiento, a period of confinement lasting 21 days.[9] Following this initiation and after Ms. Mendoza's partner Tatiana Reis had moved into their apartment, Mr. Herrera reported the couple to the local Council for the Protection of Children, a body responsible for promoting and enforcing children's rights.[10] The first instance Civil Court found that Ms. Mendoza had prioritized her own interests over those of her daughter, and full custody of Helena was awarded to Mr. Herrera.[11] This was later upheld by the Supreme Court, who stated that by overturning the initial decision, the Court of Appeal had failed to give sufficient weight to the best interests of the child as is required by Article 3 of Federal Law 4.367.90.[12] The Supreme Court found that by forcing Helena to engage with Candomblé, Ms. Mendoza had violated her daughter's right to religious freedom and had jeopardized her development.[13] It also considered her sexual orientation.[14] In the context of the traditional family values that are of paramount importance in Mekinés, it found it in Helena's best interests to stay with her father.[15] No criminal prosecution was initiated.[16]

After Inter-American proceedings were initiated on 11 September 2022, Mekinés argued that more consideration should be given to the sentiments of States within the system.[17] The Inter-American Commission on Human Rights' (the Commission or IACHR) Merits Report No.88/22 found violations of Articles 8(1), 12, 17, 19 and 24 of the American Convention on Human Rights (the Convention or ACHR), Articles 2, 3 and 4 of the Inter-American Convention Against Racism,

[9] CQ8; Supplementary Document, §1.
[10] Hypothetical, §30.
[11] Hypothetical, §33.
[12] CQ2, CQ38.
[13] Hypothetical, §33.
[14] CQ38.
[15] CQ38.
[16] Hypothetical, §32
[17] Hypothetical, §40.

Racial Discrimination, and Related Forms of Intolerance (CIRDI), and recommended a review of Mekinés' judicial practices and full implementation of rights under those conventions.[18] The case was submitted to the Inter-American Court of Human Rights (the Court or IACtHR) on 15 December 2022.[19] An investigation by the National Council of Justice of Mekinés into the alleged partiality of the domestic judges began after this point.[20]

[18] Hypothetical, §§41-42.
[19] Hypothetical, §43.
[20] CQ39.

IV. LEGAL ANALYSIS

A. Provisional measure: transferring custody of Helena Mendoza Herrera to Julia Mendoza is not a matter of extreme urgency, gravity, or irreparable harm

In view of a possible request for provisional measures, the State wants to express that following Article 63(2) ACHR, the Court shall only adopt provisional measures in cases of extreme gravity and urgency, and if there is a risk of irreparable damage.

Firstly, regarding the condition of gravity, the Court has pointed out that the situation must be "*at its most intense or elevated degree*".[21] Helena is surrounded by family, living in a comfortable home with her father while her mother maintains visiting rights, which renders her situation highly stable and is considerate of her well-being. Forcing Helena to re-adapt once again to a different environment, by contrast, would threaten her well-being. It should be stressed that time is an important factor to deal with in custody cases. As the Court assesses in *L.M. v. Paraguay* "*the mere passage of time [...] may become the main grounds for not changing the child's actual situation*".[22] Taking these elements into account, it is evident that Helena does not find herself in a grave situation.

Secondly, to grant a provisional measure there must also be an indication of an imminent risk to fulfill the urgency condition.[23] As demonstrated in the previous paragraph, Helena does not find

[21] *Four Ngöbe Indigenous Communities and Their Members v. Panama*, (Provisional Measures), IACtHR, 28 May 2010, para. 8; *Monagas Judicial Confinement Center ("La Pica") v. Venezuela*, (Provisional measures), IACtHR, 24 November 2009, para. 3.
[22] *L.M. v. Paraguay*, (Provisional Measures), Order of the President of the IACtHR, 23 January 2012, para. 18; *H. v. UK*, ECtHR, 8 July 1987, para. 85.
[23] Ibid.

herself in a grave situation where she would be exposed to an imminent risk. Hence, there is no element of urgency present in the case at hand.

Third and lastly, there is no risk of irreparable harm when Helena stays with her father as none of her rights as a child are compromised.[24] In light of this, it is important to indicate that Ms. Mendoza still has the right to visit Helena, hence the family ties between Helena and her mother are well maintained. Moreover, the passage of time spent at her father's constitutes a *"defining element of ties of affection that would be hard to revert without causing damage to the child"*.[25] Harm would be done to Helena if she would constantly have to switch from one home to the other while waiting for the final decision to be taken. The fact that she can safely stay with her father and continue to see her mother is the best possible way to handle the situation.

In view of the foregoing, Mekinés considers that no provisional measure should be ordered as it has been duly demonstrated that the conditions of gravity, risk and irreparability are not met.

B. Admissibility

1. No exhaustion of domestic remedies regarding the alleged violation under Article 8(1) ACHR

Article 46(1)(a) ACHR stipulates that, in order to determine the admissibility of a petition before the Commission in accordance with Articles 44 or 45 ACHR, it is necessary that remedies under

[24] *Liliana Ortega et al. v. Venezuela,* (Provisional Measures), IACtHR, 9 July 2009, para. 23; *Juan Sebastián Chamorro et al. v. Nicaragua*, (Provisional Measures), IACtHR, 8 February 2023, para 22.
[25] Ibid.

domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.[26]

Mekinés waived its right to preliminary objections and therefore its legal consequences are irrelevant in this instance,[27] as Article 8(1) was not included in the petition sent by the Commission to Mekinés.[28]

The alleged violation under Article 8(1) ACHR established by the Commission is inadmissible as Ms. Mendoza and Ms. Reis did not use the domestic procedures before the National Council of Justice to challenge the alleged partiality of the judges before filing a petition with the Commission.[29] The investigation of the National Council of Justice is still ongoing and has not yet given any conclusions.[30] Hence, the domestic remedies are not exhausted.

Considering the foregoing, Mekinés asks the Court to declare the alleged violation under Article 8(1) ACHR inadmissible.

2. No jurisdiction ratione personae regarding Article 13 ACHR and Article 4(i) and (ii)(a) CIRDI

The contentious jurisdiction of the Court is intended to resolve concrete cases in which it is alleged that an act of the State, carried out against specific persons, is contrary to the Convention.[31] The Court has clarified that "*[t]he contentious jurisdiction of the Court is intended to protect the rights*

[26] *Liakat Ali Alibux v. Suriname*, IACtHR, 30 January 2014, para. 14; *Mémoli v. Argentina*, IACtHR, 22 August 2013, para. 46.
[27] *Perozo et al. v. Venezuela*, IACtHR, 28 January 2009, para. 41.
[28] Hypothetical, §§39-40.
[29] CQ39.
[30] Ibid.
[31] *Usón Ramírez v. Venezuela*, IACtHR, 20 November 2009, para. 154; *Cabrera Garcıa and Montiel Flores v. Mexico*, IACtHR, 26 November 2010, para. 207.

and freedoms of specific individuals, not to resolve abstract questions", as this falls under its advisory jurisdiction.[32]

In this regard, Mekinés notes that the petitioners did not suffer any concrete disadvantage to their rights as protected under Article 13(3) ACHR. There is no causal link between the mere existence of the media conglomerate and any negative effect on the petitioners' right to seek, receive and impart information. Any claim that the petitioners were negatively affected because the media allegedly influenced the Supreme Court judges is a matter of the judges' right to receive information, and a claim that cannot be made by the petitioners as if it were a violation of their own rights. The complaint is therefore an abstract question about the existence of a media conglomerate in Mekinés and must be declared inadmissible.

The complaints under Article 4(i) and (ii)(a) CIRDI must be declared inadmissible on similar grounds. There are no elements showing that Ms. Mendoza personally faced any concrete racist materials inciting hatred that Mekinés would have failed to eliminate, nor can it be argued that she was confronted with concrete disadvantages from any alleged support of racist activities. This complaint would be an abstract question about the existence of certain racist practices in Mekinés and must therefore be declared inadmissible.

[32] *Advisory Opinion OC-14/94, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, IACtHR, (1994), para. 49.

C. Merits

1. Application of the *iura novit curia* principle

The IACtHR has often used its judicial power under the *iura novit curia* principle to analyze possible violations of the ACHR that were not included in the filed petitions or briefs.[33] This is to ensure that a party will not lose the case simply by failing to invoke the correct legal ground. The Court concluded in *Hilaire et al.* that it had *"the power and the duty to apply juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them".*[34]

Hence, Mekinés respectfully requests to retain the prerogative to answer to all alleged violations invoked by the petitioners.

2. Mekinés did not violate Article 8(1) *juncto* Articles 1 and 2 ACHR

Mekinés has not violated Article 8(1) which asserts the right to be heard by an impartial tribunal as it has complied with the rights enshrined in this Article, in relation with Articles 1 and 2 of the Convention.

The judges of Mekinés were impartial since they are, as the Court considered in *Herrera Ulloa,*[35] subjectively free of personal prejudice or bias and impartial from an objective viewpoint.

The subjective element implies that judges shall not have a direct interest. This for example would be the case if a judge arranged to handle a case for personal reasons.[36] Nor shall they have a

[33] *Heliodoro Portugal v. Panama,* IACtHR, 12 August 2008, para. 105; *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, IACtHR, 21 June 2002, paras. 107, 187.
[34] *Hilaire et al.,* IACtHR, paras. 107, 187; *Nicaragua v. US,* ICJ, 27 June 1986, para. 29.
[35] *Herrera Ulloa v. Costa Rica,* IACtHR, 2 July 2004, para. 169-171; *Morris v. UK,* ECtHR, 26 February 2002, para. 58 ; *Pabla KY v. Finland,* ECtHR, 26 June 2004, para. 27.
[36] *Atala Riffo and daughters v. Chile*, IACtHR, 24 February 2012, para. 234.

preference for one of the parties, or be involved in the dispute.[37] As there is no proof that the judges of Mekinés had a personal connection with the case or were somehow influenced by aspects other than legal norms in handling the case, there is no reason to believe that the judges were biased.

The objective element implies that judges must appear to be acting exclusively according to the law and "*without being subject to any influence, inducement, pressure, threat or interference, direct or indirect*".[38] The mere fact that a decision is overturned on appeal or reviewed by another higher judicial body does not provide proof of any external influence. To the contrary, it indicates the ability of judges to independently reconsider the facts at hand taking into account the applicable legal provisions. If anything, the reviewing body only deals with the appeal of a decision the parties are dissatisfied with.[39] Judges should not shy away from overturning decisions. Any other conclusion would possibly create a chilling effect on the judiciary from which any State should refrain. The judges of Mekinés did their job by assessing what they thought was the law, and the appellate Courts did not hesitate to overrule the decisions of lower courts.[40]

With regard to only the Supreme Court's decision, Judge Juan Castillo must also have been part of the decision making, but his opinion on the « evangelical predominance » has been limited by the National Police to Promote Religious Freedom and Combat Intolerance in the Judiciary so there is no reason to believe he was biased in any way.[41]

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[37] *Palamara Iribarne v. Chile,* IACtHR, 22 November 2005, para. 146.
[38] *Apitz Barbera* et al. *("First Court of Administrative Disputes") v. Venezuela,* IACtHR, 5 August 2008, para. 56; Principle 2 of the United Nations Basic Principles on the Independence of the Judiciary, 1985.
[39] *Apitz et al. v. Venezuela*, paras. 55–56; *Barreto Leiva v. Venezuela*, IACtHR, 17 November 2009, para. 98.
[40] Hypothetical, §§33-38.
[41] CQ12.

Consequently, Mekinés has not violated Article 8(1) of the Convention *juncto* Articles 1 and 2 ACHR.

3. Mekinés did not violate Article 7(1) *juncto* Articles 1 and 2 ACHR

According to Article 7(1) of the Convention, *"Every person has the right to personal liberty and security."* The Court has interpreted this very broadly and understands liberty as *"the ability to do or not do all that is lawfully allowed [...] the right of every person to organize his individual and social life in keeping with his own choices and beliefs, and in accordance with the law"*.[42] In its report on the legal standards regarding gender equality and women's rights,[43] the Commission cites a judgment of the Supreme Court of Brazil[44] that affirms that couples have the right to autonomously pursue their life plans. However, this right can only be exercised insofar as it does not violate the rights of third persons.[45]

As will be explained in light of Articles 17 and 19 below, Mekinés did not violate the right of Ms. Reis and Ms. Mendoza to organize their life since their choices resulted in the violation of Helena's rights.

4. Mekinés did not violate Article 13 ACHR

Article 13 ACHR protects the right to seek, receive, and impart information and ideas of all kinds. Article 13(3) specifies that this right may not be restricted by private control over the circulation of ideas and opinions. In Advisory Opinion no. 5, the Court clarified that there can be no

[42] *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, IACtHR, 21 November 2007, para. 52; *I.V. v. Bolivia*, IACtHR, 25 May 2017, para. 148.
[43] IACHR, *Legal Standards: Gender Equality and Women's Rights*, 3 November 2011, p. 88.
[44] *Federal Supreme Court*, Brazil, 5 May 2011.
[45] *Loyaza Tamayo v. Peru*, IACtHR, 17 September 1997*; Cantoral Benavides v. Peru*, IACtHR, 18 August 2000.

monopolies or oligopolies in media if these impede on the free communication and circulation of ideas and opinions.[46]

The Mekinésian media is overseen by a conglomerate of five families who manage print, television and digital media information, with one family also owning a radio channel.[47] There is a legal framework that favors the free expression of ideas, as there are no regulations in place that would restrict companies in the dissemination of information. Social media and radio are also freely available in Mekinés. It would therefore not be correct to state that communication and the circulation of ideas and opinions is impeded in Mekinés. This contrasts with what happens in other countries of the continent.[48]

In conclusion, Mekinés did not violate Article 13 *juncto* Articles 1 and 2 ACHR.

5. Mekinés did not violate Article 19 *juncto* Articles 1 and 2 ACHR

Under Article 19 ACHR, every child has the right to measures of protection required by his condition as a minor on the part of his family, society, and the State. This implies that a heightened protection is granted to children because of their vulnerability. Enhanced and adjusted measures are thus required. Consequently, Mekinés must adopt positive measures to ensure the effective exercise of the rights of every child.[49]

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[46] *Advisory Opinion OC-5/85, Compulsory membership in an association prescribed by law for the practice of journalism*, IACtHR, (1985), para. 56.
[47] Hypothetical, §24; CQ31.
[48] *Granier et al. v. Venezuela*, IACtHR, 22 June 2015, paras. 170-171.
[49] *The "Juvenile Reeducation Institute" v. Paraguay*, IACtHR, 2 September 2004, para. 160.

For the interpretation of the protection due to children under Article 19 ACHR, the IACtHR relies on a "*very comprehensive corpus juris for the protection of the child*",[50] using the UN Convention on the Rights of the Child (CRC) as its principal reference for the interpretation and places the aforementioned CRC's "*four guiding principles*" – the best interests of the child; non-discrimination; child participation; and survival and development – at the center of its jurisprudence. Article 3 CRC reaffirms that the best interests of the child shall be a primary consideration in all actions concerning the child. According to the CRC Committee, no right can be compromised by a negative interpretation of the child's best interest.[51]

5.1. Mekinés complied with its obligation to take protective measures

In interpreting Mekinés' positive obligations under Article 19 ACHR, Articles 24(3) and 19 CRC are of utmost importance. Following Article 24(3) CRC, States Parties must take all effective and appropriate measures to abolish traditional practices prejudicial to the health of children. According to Article 19 CRC, States Parties have to obligation to take all appropriate measures to protect children from all forms of physical or mental violence, injury, abuse, or maltreatment while in the care of their parent(s).

[50] *Street children (Vilagrán - Morales et al.) v. Guatemala*, IACtHR, 19 November 1999, paras. 194–196.
[51] CRC, *General comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration*, 29 May 2013, para. 4.

Violence has been defined as the intentional use of physical force against a child that has a high likelihood of resulting in potential harm to its health.[52] According to the CRC Committee, violence includes '*harmful practices*', such as scarring and violent initiation rites.[53]

The Candomblé initiation ritual Helena underwent involved the shaving of her head, putting her in a bloodbath and throwing blood on her. Even more, she was also cut on her arms and head using fish bones, and she was confined for no less than 21 days.[54] The scars inflicted constitute permanent harm. By using unsanitary fish bones, there is a genuine risk of the wounds getting infected,[55] or of a transmission of diseases as a result of the scarring procedure.[56] Clearly, these practices have a high likelihood of resulting in negative consequences for Helena, including physical, psychological and social harm, as being exposed to violence at such a young age could make children more vulnerable for future instances of violence.[57]

Mekinés had the duty to take measures to protect Helena. It would have otherwise violated its international obligations if it did not take into account the fact that Ms. Mendoza subjected her daughter to these risks.

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[52] WHO, E.G. Krug et al. (eds.), *World Report on Violence and Health*, 2002, p. 5; UNGA, Paulo Sérgio Pinheiro, *Report of the United Nations independent expert for the study of violence against children*, 29 August 2006.
[53] CRC, *General comment No. 13: on the right of the child to freedom from all forms of violence*, 18 April 2011, para. 29; UNGA, *Report of the United Nations independent expert for the study of violence against children*, para. 46.
[54] CQ8.
[55] Babatunde O., Oyeronke A., "Scarification practice and scar complications among the Nigerian Yorubas", *Indian Journal of Dermatology, Venereology and Leprology* 76(5) (2010), 571-572.
[56] Pallangyo P. et al., "Human immunodeficiency virus infection acquired through a traditional healer's ritual: a case report", *Journal of Medical Case Reports* 11(1) (2017), No. 301.
[57] Felitti V.J. et al., "Relationship of childhood abuse and household dysfunction to many of the leading causes of deaths in adults: The Adverse Childhood Experiences (ACE) Study", *American Journal of Preventive Medicine* 14(4) (1998), 245-248.

Hence, by awarding custody to Mr. Herrera, Mekinés complied with its positive obligations in light of Article 19 ACHR *juncto* Articles 19 and 24(3) CRC.

5.2. The Supreme Court of Mekinés duly considered the best interests of the child

When assessing the child's best interests, certain elements must be considered: its identity, the preservation of the family environment, its right to education, its safety, its vulnerability and its right to health.

A first element that must be into account is the child's identity.[58] Religious and cultural values and traditions are part of the child's identity, however these cannot be incompatible with the rights protected under the CRC or the child's best interests.[59] As established above, the practices of scarification[60] are undoubtedly inconsistent with Helena's rights as protected under the CRC and can therefore not be in her best interest. Hence, when determining her best interest, the preservation of Helena's religious and cultural values and traditions cannot outweigh the violence done to her.

A second element to consider is the preservation of the family environment and the maintenance of the child's relations with its family.[61] According to Article 9(3) CRC, a child separated from one or both parents is entitled to maintain personal relations and direct contact with both parents

[58] CRC, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, para. 55.
[59] Ibid.
[60] CQ8.
[61] CRC, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, para. 60.

on a regular basis. In this case, while transferring custody to Mr. Herrera, Mekinés ensured that Ms. Mendoza has the right to regularly visit Helena.[62]

The third element the child's right to education.[63] It is in its best interests to have access to quality education.[64] The Supreme Court acknowledged the fact that Mr. Herrera arranged for Helena's enrollment in a school academically ranked higher than the school she was attending while living with Ms. Mendoza.[65]

The fourth element to take into account is the child's safety.[66] A child must be protected against all forms of violence and injury under Article 19 CRC. Based on the precautionary principle, applying a best-interest approach means also assessing the possibility of future risk and harm for the child's safety.[67] Here, the Supreme Court noted that the initiation practice demonstrates neglect on part of Ms. Mendoza,[68] with neglect as "*the failure to meet children's physical and psychological needs and to protect them from danger when those responsible for children's care have the means and knowledge"*.[69] Since Ms. Mendoza is a practitioner of Candomblé, she is well aware of the harm the initiation into the religion entails. As the custodial parent, she was also in the best position to protect Helena from this harmful ritual, but she did not. In contrast, Mr. Herrera took positive action and removed his daughter from these harmful practices. Additionally, with its

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[62] CQ33.
[63] CRC, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, paras. 32, 79.
[64] Ibid.
[65] Hypothetical, §33.
[66] CRC, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, paras. 32, 71.
[67] Ibid, para. 74.
[68] CQ15.
[69] CRC, *General Comment No. 13: on the right of the child to freedom from all forms of violence*, 18 April 2011, para. 20.

decision to grant Mr. Herrera custody, the Supreme Court ensured Helena's protection against any possible future harm and violence she could endure if she would remain in her mother's custody.

The fifth element to consider is the child's vulnerability.[70] According to the CRC Committee, a range of factors affect children's decision-making, including the ability to assess potential risk and harm.[71] In this case, the Supreme Court applied more scrutiny because Helena was - due to her young age, immaturity and inexperience - unable to appraise the potential risk and harmful consequences of her actions. Moreover, at such a young age there is a big susceptibility to parental influence. In circumstances where parental influence leads to physical harm, the State must take positive measures to protect the child from this harmful influence. Since Helena submitted herself to physical harm in the context of an initiation ritual into a religion adhered by her parent, the parents' influence in relation to the child's vulnerability had to be taken into account by the Supreme Court.

The sixth and last element which must be taken into account when assessing a child's best interest, is the child's right to health.[72] In this case, the Supreme Court duly considered the impact of the practices of scarification, confinement and the bloodbath on Helena's mental and physical health.[73] Firstly, according to scientific studies, violence may result in greater susceptibility to lifelong social, emotional, and cognitive impairments.[74] Secondly, studies have also found that ritual

[70] CRC, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, paras. 32, 76.
[71] CRC, *General comment No. 7 on implementing child rights in early childhood*, 20 September 2006, para. 117.
[72] CRC, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, paras. 32, 77.
[73] CQ8.
[74] Felitti V.J. et al., "Relationship of childhood abuse and household dysfunction to many of the leading causes of deaths in adults: The Adverse Childhood Experiences (ACE) Study", 245-248; Hibbard R.A. et al., "Behavioral risk, emotional risk, and child abuse among adolescents in a nonclinical setting" *Pediatrics* 86(6) 1990, 896-901.

scarification frequently leads to infections, especially when not done with proper tools, such as the unsterilized fish bones used during Helena's initiation into Candomblé.[75] After the scarification, Helena was confined for 21 days,[76] which could have made it even more difficult for such wounds to heal properly. Thirdly, confining such a young girl has enormous consequences for her mental health.[77]

In view of the aforementioned elements, it can only be concluded that Mekinés has taken the best interests of the child into account when adjudging the case at hand.

5.3. The right to be heard, to express their views, and to participate in decisions affecting their rights and interest was respected.

There is a clear relationship between the determination of the best interests of the child and the right of the child to be heard.[78] According to Article 12 CRC, minors have the right to express their views on matters that concern them, with the child's level of maturity being taken into account. Article 12(2) specifically prescribes the right of children to be heard in all legal proceedings concerning them, "*in a manner consistent with the procedural rules of national law.*" In Mekinés, Article 43 of the Children's Rights Act explicitly states that children must be heard in custody decisions from the age of 8 and can choose which parent to live with from the age of 12.[79]

[75] CQ8; Babatunde O., Oyeronke A., "Scarification practice and scar complications among the Nigerian Yorubas", p. 571-572; Ludovico L., Kurland R., "Symbolic or Not-So-Symbolic Wounds: The Behavioral Ecology of Human Scarification.", *Ethology and Sociobiology* 16 (1995), 155-172, p. 160.
[76] CQ8.
[77] Office of the Special Representative of the Secretary-General on Violence Against Children, *Hidden scars: how violence harms the mental health of children*, 7 July 2022, p. 16.
[78] IACHR, *Fulfillment of Children's Rights: National Protection Systems*, 30 November 2017, p. 120.
[79] CQ22, CQ28.

This distinction in the national law acknowledges the child's evolving, but limited, ability to make decisions in its best interests and to be fully aware of the consequences of their decisions.[80] The national courts gave sufficient consideration to Helena's autonomy to the extent appropriate for a 9-year-old child, such as following her wishes regarding which bedroom she preferred. At this age, it is easier for a child to decide on a bedroom than to understand the consequences an initiation ritual would have on her future, such as the effect on her education and religion.[81] It is also well known that during custody proceedings, because of the bond between parent and child, a child may be careful to answer questions in a manner that reflects well on the parent, in an attempt to make them proud or to prevent them from harm. The Supreme Court has been very aware of this phenomenon and took it into account.

In light of the above, it must be concluded that the national courts duly respected Helena's right to be heard and to express her views in matters affecting her rights and interests.

5.4. The child's inherent right to development was respected

The protection due under Article 19 ACHR must be interpreted in light of the child's inherent right to development under Article 6.2 CRC. According to Article 6.2 CRC, the development of the child must be ensured to the maximum extent possible. For the CRC Committee, the concept of "development" is understood in a broad sense, "*as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development*."[82] The IACtHR has emphasized "*that the characteristic of children is that they progressively exercise their rights as*

[80] Betsch T., "What Children Can and Cannot Do in Decision Making", Scientia, University of Erfurt, (2018), p. 2.
[81] *Infra*, Merits Part 6.
[82] CRC, *General comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, para. 12.

they gain personal autonomy".[83] As a young girl, the majority of Helena's rights are exercised through her parents. Because of that, the State has the duty to adjust protective measures when the parent(s) fail to take decisions that ensure the child's progressive development. These measures must be taken in accordance with the child's age, level of maturity and experiences.[84]

It is evident that confining an 8-year-old girl for 21 days, shaving her head as a symbol of death and resurrection, scarring her body with fish bones and putting her in a blood bath[85] causes irreparable harm to that girl. All these practices are traumatic, cause bodily harm, mental distress and cognitive impairment, and are detrimental to her physical, mental and moral development.

Regarding the fact that these practices and Ms. Mendoza's influence may lead to lifelong consequences for Helena's health and development, Mekinés had the positive obligation to take protective measures. By awarding custody to Mr. Herrera, Mekinés complied with its duty under Article 19 ACHR *juncto* Article 6.2 CRC to ensure the development of Helena to the maximum extent possible.

6. Mekinés did not violate Article 12 *juncto* Articles 1 and 2 ACHR

The right to freedom of conscience and religion, enshrined in Article 12 ACHR, is a foundational aspect of democratic society and is closely intertwined with an individual's personal identity and dignity.[86] Every individual has the right under Article 12(1) ACHR to maintain and change their religion or beliefs, and to assert or share those beliefs. However, this right is not unlimited. Article

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[83] *Gelman v. Uruguay*, IACtHR, 24 February 2011, para. 129.
[84] *Atala Riffo and daughters v. Chile*, para. 68; *García and family members v. Guatemala*, IACtHR, 29 November 2012, para. 183.
[85] CQ8.
[86] *"The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, IACtHR, 5 February 2001, para. 79; IACHR, *The Inter-American Legal Framework regarding the Right to Freedom of Expression*, 30 December 2009, para. 56.

12(3) of the Convention provides for the lawful limitation of an individual's right to manifest their religion and beliefs when necessary. Several grounds for restriction are given: to protect the safety, order, health or morals of the public or to protect the rights and freedoms of others. When restriction is necessary in order to protect the rights of others, the conflicting rights must be balanced against each other. This is a form of proportionality test. The IACtHR elaborated on the criteria for balancing competing rights and interests in *Kimel v. Argentina*,[87] where it is stated that must be established whether the impact on the restricted right was "*serious, limited, or moderate*", how important the conflicting rights are, and whether "*the satisfaction of the latter justifies the restriction of the former*".[88] In addition to the proportionality assessment, the overarching principle of the best interests of the child must be considered.[89]

The right of children to freedom of religion is explicitly mentioned in Article 14 CRC. Article 14(2) CRC requires States Parties to respect the rights and duties of parents to provide direction to the child in the exercise of his or her right to freedom of religion in a manner consistent with the evolving capacities of the child. Article 14(3) CRC stipulates that the freedom to manifest one's religion may be subject to limitations that are prescribed by law and are necessary to protect the fundamental rights and freedoms of others. In addition, Article 5(5) of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief states that religious practices or beliefs in which a child is raised "*must not be injurious to his physical or mental health or to his full development*".

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[87] *Kimel v. Argentina*, IACtHR, 2 May 2008, para. 84; *Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, IACtHR, 28 November 2012, para. 274.
[88] Ibid.
[89] *Supra*, Merits Part 5.2.

Following the reasoning of the European Court of Justice in *Centraal Israëlitisch Consistorie van België et al.,* specific practices of religion can be lawfully restricted when the prohibition is limited to the harmful aspects, and not the entire religious act as such.[90] Similar to that case, Mekinés does not want to prohibit the initiation itself, merely the aspect of it that causes excessive harm. The initiation ritual into Candomblé includes a three week period of confinement and the scarring of Helena's skin.[91] Having permanent marks carved into the skin of the head and arms with fishbones and remaining isolated from the outside world would be an intense experience for any individual, but especially for an 8-year old child with a very limited sense of the permanent nature of these scars. Studies have shown that adolescents' attitudes to religion undergo significant changes as they develop.[92] As she reaches maturity, Helena's attitude to Candomblé could change but she will be physically scarred for the rest of her life.

This decision was not based on the view that Ms. Mendoza's faith in its entirety is harmful to Helena, but merely that this specific manifestation of it threatens her safety. The decision of the Supreme Court to grant custody of Helena to Mr. Herrera therefore fell within the sphere of legitimate restrictions under Article 12(3) ACHR as it was necessary to protect Helena's rights and freedoms.

Following the criteria laid out in *Kimel* [93] - severity of the restriction, the importance of the rights concerned and whether it is justified under the circumstances - restricting Ms. Mendoza's right under Article 12(4) ACHR was warranted. Firstly, Mekinés accepts that removing Helena from

[90] *Centraal Israëlitisch Consistorie van België et al*., ECLI:EU:C:2020:1031, 17 December 2020, para. 61.
[91] CQ8.
[92] Petts R., "Trajectories of Religious Participation from Adolescence to Young Adulthood", *Journal for the Scientific Study of Religion* 48(3) (2009), 552–571 at 568.; Elkind D., *The Child's Reality: Three Developmental Themes*, Psychology Press, (1978) at 129.
[93] *Kimel v. Argentina*, para. 84.

her mother's custody is not a measure to be taken lightly, but is necessary for her to continue to develop in a safe environment where her personal rights are respected. Secondly, Ms. Mendoza's right to provide for the religious education of her child in a manner consistent with her own beliefs is in conflict with Helena's own right to freedom of religion under Article 12 and to her right to physical integrity under Article 5(1) ACHR. Both of these rights are non-derogable and moreover absolutely no restrictions are permitted under Article 5.[94]

Furthermore, the Court has stated that *"every human being's possibility of self-determination and free choice of the options and circumstances that give a meaning to his or her existence in keeping with their own choices and beliefs*" is a vital component of ensuring the personal integrity of the individual.[95] In Advisory Opinion OC-17/02 on Juridical Condition and Human Rights of the Child, the Court recognized that minors do not have full decision-making capacity as they are lacking in maturity and life experience.[96] As such, they are "subject to parental authority".[97] As a young child, Helena is vulnerable. Although she decided to undergo the initiation ritual after speaking to her mother,[98] her ability to fully understand the long-lasting consequences of it, specifically the scarification, were limited. Ms. Mendoza failed to responsibly exercise her parental authority and to consider her daughter's right to change her beliefs, should she decide to do so in the future. She did not provide direction to Helena in a manner consistent with her evolving

[94] *Azul Rojas Marín et al. v. Peru*. IACtHR, 12 March 2020, para. 140; *Valenzuela Ávila v. Guatemala*, IACtHR, 11 October 2019, para. 180.
[95] *I.V. v. Bolivia*, para. 150.
[96] *Advisory Opinion OC-17/02, Juridical Condition and Human Rights of the Child*, IACtHR, 28 August 2002, para. 41.
[97] Ibid.
[98] Hypothetical, §29.

capacities, as required by Article 14(2) CRC. For these reasons, the fulfillment of Helena's rights justifies the limitation of her mother's right to freedom of religion.

The right of both Ms. Mendoza and Mr. Herrera to provide Helena with religious and moral education under Article 12(4) ACHR must also be balanced. As the same right is under consideration, the main issue is the best interests of the child, which is discussed in greater detail above.[99] Although the rights of all persons concerned must be considered, when the rights of others conflict with those of a child and complete harmonization is not possible, more importance must be given to whatever serves the best interests of the child.[100]

There is no suggestion that Ms. Mendoza cannot practice Candomblé or raise her child to follow the practice, but she cannot be allowed to inflict irreversible harm upon Helena in the name of her faith. Mr. Herrera was fully supportive of Ms. Mendoza raising Helena to follow Candomblé when it was presumed that doing so would not place her in harm's way.[101] The situation drastically changed when the initiation ritual took place. It is completely reasonable that Mr. Herrera changed his mind when he discovered that his daughter had been permanently scarred and locked away for three weeks. It was only after this breaking point that restricting Ms. Mendoza's right under Article 12(4) ACHR became necessary. Importantly, under Mekinés' sole custody model, Ms. Mendoza still retains visitation rights and the right to supervise decisions concerning Helena's upbringing.[102] In placing Helena in her father's custody, Mekinés was acting in her best interests and within the limits of Article 12(3).

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[99] *Supra*, Merits Part 5.2.
[100] CRC, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, paras. 17, 37-39.
[101] Hypothetical, §28.
[102] CQ33.

The actions of Mekinés were necessary to fulfill its positive obligations under Article 12 ACHR. While Ms. Mendoza's religious freedom was restricted, it was done so in a lawful manner consistent with the ACHR.

7. Mekinés did not violate Article 17 *juncto* Articles 1 and 2 ACHR

Article 17 ACHR grants the right to found a family and protects the institution of the family as a natural and fundamental group unit of the society.

The petitioners allege that their right to family has been violated, claiming their right to raise Helena within the valid family unit that the three of them constitute. The Supreme Court of Mekinés considered that Ms. Mendoza's choice to live with Ms. Reis altered the normalcy of family life and that this notably justified the transfer of custody to Mr. Herrera.[103] In doing so, the Supreme Court based its judgment on a traditional vision of the family, consisting of a mother, a father and children. This conception, which is deeply rooted in Mekinésian culture, does not include same-sex couples such as the petitioners.[104]

Mekinés submits that its conception of the traditional family is entirely in accordance with the ACHR. In a context of custody proceeding, it was therefore legal for the Mekinésian Supreme Court to favor the parent offering the family environment closest to the traditional model.

Firstly, the living-instrument doctrine adopted by the IACtHR states that the conventions must be interpreted in the light of present-day conditions.[105] However, in the case at hand, the current living

[103] CQ38.
[104] CQ21.
[105] *Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, IACtHR, 14 July 1989, para. 37;

circumstances have not shifted towards a general acceptance of different models of family. There are no indications that the population of Mekinés, known to be the largest Christian country in the world,[106] would support non-traditional conceptions of family. As stated by Judge Pérez Pérez,"*The irrefutable fact that there are currently many different concepts of 'family […] does not necessarily mean that each and every one of these must correspond to what the American Convention understands by family - even with an evolving interpretation according to the parameters mentioned […]. Nor does it mean to say that all States Party must recognize all the concepts or models of family*".[107] Furthermore, Mekinés would consider it problematic that the principle of evolutive interpretation leads to forceful social changes in a State Party by imposing new international engagements which it had never undertaken.[108]

Secondly, Mekinés emphasizes that States Parties are allowed discretion in this area. Article 17(2) ACHR clearly states that the right of men and women to raise a family shall be recognized "*if they meet the conditions required by domestic laws*". The national constitutions of the States Parties demonstrate that the family is a fundamental institution in American societies and has deep cultural roots. As an illustration, the Constitution of Paraguay affirms that "*the family is the foundation of society*" and specifies that it comprises "*the stable union of a man and a woman, their children and the community formed with any of their ancestors and descendants"*.[109] Similarly, the Venezuelan Constitution describes family as the "*a natural association of society and as the fundamental unit for the overall development of persons*" and grants State protection to marriage

Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, para. 245; *Atala Riffo and Daughters v. Chile*, para. 83.

[106] Hypothetical, §8.

[107] *Atala Riffo and Daughters v. Chile*, partially dissenting opinion of Judge Alberto Pérez Pérez, para. 2.

[108] *Fedotova and others v. Russia*, EctHR, 17 January 2023, dissenting opinion of Judge Wojtyczek, paras. 2.2, 2.3, and 4.2; *Fedotova and others v. Russia*, EctHR, 17 January 2023, dissenting opinion of Judge Lobov, paras. 17-19.

[109] *Constitution of Paraguay*, 19 June 1992, Art. 49.

or stable *de facto* union between a man and a woman.[110] The constitutions of many other States Parties contain similar provisions.[111] As a consequence of this highly cultural connotation of the family, national regulations show varying degrees of tolerance for alternative family models. By referring to national laws, the ACHR tolerates the legal recognition of a diversity of family patterns, but does not compel it.

This vision is also shared by the Human Rights Committee: "*the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. […] Consequently, States parties should report on how the concept and scope of the family is construed or defined in their own society and legal system*".[112] Hence, the Mekinés national authorities are noticeably best placed to determine a definition of the family that meets their societies' needs.

In conclusion, the lack of a convergent evolution of the notion of family, its status as a natural element of society and its traditional definition present in the constitution of many States Parties, demonstrate that there is no regional consensus and implies a wider discretion. In the case law of the ECtHR, regional consent is used as a method to determine the scope of the margin of appreciation.[113] This reasoning has already been applied by the IACtHR.[114]

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[110] *Constitution of the Bolivarian Republic of Venezuela*, 19 December 1999, Arts. 75 and 77.

[111] *Constitution of Nicaragua*, 9 January 2000, Arts. 70 and 72; *Constitution of Peru*, 29 December 1993, Arts. 4 and 5; *Constitution of the Republic of El Salvador*, 20 December 1983, Arts. 32 and 33.

[112] UN Human Rights Committee, *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, para. 2.

[113] *Fretté v. France*, ECtHR, 26 February 2002, para. 41; *Schalk and Kopf v. Austria*, ECtHR, 24 June 2010, para. 98.

[114] *Claude Reyes et al. v. Chile*, IACtHR, 19 September 2006, para. 78; *Advisory Opinion OC-4/84, Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*. IACtHR, 19 January 1984, paras. 62-63.

Therefore, Mekinés did not violate Article 17 ACHR.

8. Mekinés did not violate Article 24 *juncto* Articles 1 and 2 ACHR

Article 24 ACHR protects the right to equality before the law and equal protection of the law. It is a fundamental element of international law,[115] which the Court has recognized as a norm of jus cogens.[116] Due to the obligations under Article 2 ACHR, this duty also extends to the decisions of the Courts.[117] The prohibited grounds of discrimination, such as race, religion or economic status, are found in Article 1(1) ACHR, and can be applied in the context of Article 24. Yet, this list is not exhaustive, and grounds such as sexual orientation have also been found to be protected by the ACHR.[118]

8.1. The decision was not based on Ms. Mendoza's race or religion.

In this case, the decision of the Supreme Court made a careful assessment of relevant factors that would impact Helena's quality of life. Ms. Mendoza's race was not taken into consideration by the Courts, and would never be a deciding factor in a diverse country such as Mekinés.

The mere adherence to the Candomblé religion in itself was not taken into account. Only the bodily harm inflicted on an 8-year-old child was carefully considered, which is also why no proceedings were ever initiated during the time Ms. Mendoza was raising Helena in the teachings of Candomblé.[119]

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[115] *Yatama v. Nicaragua*, IACtHR, 23 June 2005, para. 185.
[116] *Advisory Opinion OC-18/03, Juridical Condition and Rights of the Undocumented Migrants*, IACtHR, 17 September 2003, paras. 82 and f.
[117] *Yatama v. Nicaragua*, para. 189.
[118] *Advisory Opinion OC-24/17, Gender identity, and equality and non-discrimination with regard to same-sex couples.*, IACtHR, 24 November 2017, para. 68.
[119] Hypothetical, §28.

Hence, no distinction was made on the grounds of race or religion.

8.2. Ms. Mendoza's and Ms. Reis' sexual orientation was not a determining factor

The Commission has stated that in custody proceedings, it is necessary for judicial authorities to examine all factors, including the sexual life of parents, to evaluate their capacity to exercise custody.[120] In *Atala Riffo,* the Court found a violation because the custody decision was only based on stereotypes and discriminatory arguments and was not taken on appropriate grounds to protect the best interests of the children.[121]

The phrasing used by the national Supreme Court related to Ms. Mendoza's and Ms. Reis' sexual orientation is unfortunate and it's important to remark that the State of Mekinés does not condone it, since it admitted there was no evidence for her unfitness on this basis.[122] Nevertheless, the above does not mean that there was discrimination against Ms. Mendoza and Ms. Reis. These considerations must be considered *obiter*, since the judgment was based on two weighty reasons, such as the harm done to Helena in the context of the scarification, and the better living conditions her father offered. The decision would have been the same regardless of Ms. Mendoza's and Ms. Reis' sexual orientation. Mekinés has also instituted measures to protect the rights of LGBTI people in this context, such as the intervention by the Office of the Ombudsperson, which was established complying with the Commission's recommendation to provide public legal aid services for LGBTI persons.[123]

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[120] *Atala and daughters v. Chile*, 17 September 2010, Application of case 12.502, IACHR, para. 69.
[121] *Atala Riffo and daughters v. Chile*, IACtHR, 24 February 2012, para. 146.
[122] CQ38.
[123] CQ2; IACHR, *Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas*, 7 December 2018, p. 133, recommendation 13.

Since Ms. Mendoza's and Ms. Reis' sexual orientation was not a determining factor, Mekinés did not discriminate based on this criterion.

8.3. Basing the decision on socioeconomic status and harm done to the child was justified

The IACtHR has stated that not all differences in legal treatment are discriminatory, and that objective and reasonable justifications can exist for differential treatment.[124] It has also recognized that the best interests of the child are a compelling aim to pursue.[125] In interpreting the best interests, it is pertinent to look at the General Comments of the CRC Committee. The CRC Committee has stated that the development of the child includes the rights of that child to a healthy and safe environment and to education.[126]

Mr. Herrera proved to the Supreme Court that the school he enrolled Helena in had a better academic rating. Due to the violent aspects of Helena's initiation, the Supreme Court also considered that Mr. Herrera offered her a much safer environment. Mekinés recognizes that the Supreme Court took the economic status of Mr. Herrera, Ms. Mendoza and Ms. Reis into account. It had to evaluate which parent was better suited to take care of Helena, and it would not have been in the best interest of the child to ignore the material circumstances of the parents in this decision. Mr. Herrera's house has a beautiful room for Helena, as opposed to Ms. Mendoza's apartment which only has one bedroom. In this respect, the distinction made on economic status was justified by objective and reasonable elements.

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[124] *Advisory Opinion OC-4/84, Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, para. 56.
[125] *Atala Riffo and daughters v. Chile*, para. 108.
[126] CRC, *General Comment No. 7, Implementing child rights in early childhood*, para. 10.

Mekinés would like to reiterate the subsidiary nature of the IACtHR in this case, as it is not the purpose of the Inter-American human rights system to "*examine alleged errors of internal law or facts that may have been committed by the domestic courts*".[127] International human rights organs are subsidiary to the domestic judicial bodies of the States Parties, and petitions containing nothing more than allegations that the domestic courts' decision was wrong or unjust, must be dismissed under the fourth instance formula.[128] This is especially the case in custody matters.[129] A re-evaluation of whether custody should have been granted to Ms. Mendoza is not the purpose of the IACtHR, and the mere conclusion that a different decision could have been made, does not equate to a violation of Ms. Mendoza's rights.

In conclusion, Mekinés did not violate its obligations under Article 24 *juncto* Articles 1 and 2 ACHR.

9. Mekinés did not violate Articles 2, 3 and 4 CIRDI

9.1. No distinction based on race

Articles 2 and 3 of the Convention Against Racism, Racial Discrimination and Related Forms of Intolerance (CIRDI) prohibit racism, racial discrimination and related forms of intolerance in the public and private sphere. Article 1(1) of the CIRDI clarifies that racism is a distinction which nullifies the equal enjoyment of one or more human rights enshrined in other conventions, based on race, color, lineage, or national or ethnic origin.

[127] *Santiago Marzioni v. Argentina*, 15 October 1996, Case 11.673, Report No. 39/96, IACHR, para. 51.
[128] *Juan Carlos Abella v. Argentina*, 18 November 1997, Case 11.137, Report No. 55/97, IACHR, para. 142.
[129] *Atala Riffo and daughters v. Chile*, paras. 65-66.

As discussed above, the Supreme Court was in no way influenced by considerations of Ms. Mendoza's race.[130] The fact that Candomblé religion is of African origin did not matter, since the Mekinés Supreme Court would consider physical harm done to children as a factor in custody proceedings in any religion, regardless of racial origin.

9.2. No indirect discrimination

Article 1(2) CIRDI defines indirect racial discrimination as a practice that has the capacity to entail a particular disadvantage for persons belonging to a specific group based on the reasons set forth in Article 1(1), or puts them at a disadvantage. In *L.R. v. Slovakia*, the Committee on the Elimination of Racial Discrimination (CERD), clarified that measures which are not discriminatory at face value but are discriminatory in fact and effect, can amount to indirect discrimination.[131] However, there is no indirect discrimination when said practice has a reasonable and legitimate objective or justification under international human rights law.

Any argument that the judgment of the Mekinés Supreme Court would lead to indirect discrimination of people of Afro-descent must not be accepted. While it is true that the decision in this case pertains to Candomblé specifically, the judgement concerns a single aspect of a single religion. There is no evidence to suggest it would result in higher levels of discrimination against Afro-descendant people.

The decision was, however, based on the harm done to Helena's physical integrity, and therefore had the best interests of the child as an aim. It should also be considered that this decision had a

[130] *Supra*, Merits part 7.1.
[131] *L.R. v. Slovakia,* Committee on the Elimination of Racial Discrimination, *7* March 2005, para. 10.4.

limited scope: it was taken in the specific case of Helena, and in other cases a combination of factors could lead to different outcomes.

9.3. Mekinés did not violate Article 4(ix) and (xii) CIRDI

Under Article 4 CIRDI, subsection (ix) forbids any restriction or limitation on the use of the language, traditions, customs, and culture of persons in public or private activities, and subsection (xii) forbids the denial of access to social, economic and cultural rights on a racially discriminatory basis. In interpreting the scope of these obligations, Article 5(e)(vi) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is relevant, since it contains a similar obligation for states, namely the Right to Equal Participation in Cultural Activities. The CERD has stated that the recognition of these cultural rights is not limitless because of the universality of human rights. Indeed, regardless of culture or traditions, other human rights should still be respected.[132] This position was also held by the UN Committee on Economic, Social and Cultural Rights (CESCR)[133] and the UN Special rapporteur on Cultural Rights.[134]

In its decision, the Supreme Court of Mekinés placed a restricted limitation on the use of traditions by the practitioners of the Candomblé religion. Letting young children participate in harmful initiation rituals should always be considered when taking the best interest of the child into account, especially when there are other elements such as the better living conditions Mr. Herrera

[132] CERD, *Summary record of the 1724th meeting*, 17 August 2005, para. 23.
[133] CESCR, *General Comment No. 21: Right of everyone to take part in cultural life*, 12 December 2009, para. 19.
[134] Special Rapporteur on Cultural Rights, Karima Bennoune, *Universality, cultural diversity and cultural rights*, 25 July 2018, para. 22.

provides. Ignoring this factor would be contrary to the international obligations of Mekinés to guarantee the child's best interest and to guarantee the respect of physical integrity in its entirety.[135]

9.4. Mekinés did not violate Article 4(i) and (ii)(a) CIRDI *juncto* Article 13(5) ACHR

Article 4(i) CIRDI requires States to prohibit public and private support to racially discriminatory activities, while Article 4(ii)(a) CIRDI requires the State to prohibit the circulation of racially discriminatory materials that incite hatred. The CERD has elaborated on the term incitement, stating that it "*seeks to influence others to engage in certain forms of conduct, including the commission of crime, through advocacy or threats*".[136] Article 13(5) ACHR requires the criminalization of advocacy for racial hatred that constitutes an incitement of lawless violence. According to the Commission, any conviction of this ground "*must be backed up by actual, truthful, objective and strong proof that the person was not simply issuing an opinion (even if that opinion was hard, unfair or disturbing), but that the person had the clear intention of committing a crime and the actual, real and effective possibility of achieving this objective.*"[137]

Some of the Mekinésian media does not always portray the Candomblé religion correctly, and the opinions of executives of certain channels may have been hurtful[138], which the State does not condone. This, however, does not translate to incitement of hatred, since there has never been an advocacy for crimes in this media. It would therefore be an overstatement to say that Mekinés violated Ms. Mendoza's rights by not interfering.

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[135] Arts. 19 and 5(1) ACHR.
[136] CERD, *General Recommendation No. 35: Combating racist hate speech*, 26 September 2013, para. 16.
[137] IACHR, *The Inter-American Legal Framework regarding the Right to Freedom of Expression*, para. 58.
[138] Hypothetical, §25, CQ31.

The obligation under Article 4(i) CIRDI needs to be balanced with Mekinés' obligation to guarantee the freedom of expression under Article 13 ACHR, which is "*a cornerstone upon which the very existence of a democratic society rests*".[139] This right is not absolute,[140] but it also should not be arbitrarily restricted because of statements that "*offend, shock or disturb*".[141]

Mekinés is hesitant to interfere with the national media, as State censorship on media is considered a radical suspension of the freedom of expression.[142] It should be remembered that some criticism of Candomblé might be valid to express, even if it is formulated harshly, as harmful initiation rites performed on children should not be considered a normal occurrence in a democratic society. Mekinés has, due to this careful balancing exercise, made sure to offer no specific support to this media. It has clearly taken a position against any racial prejudice that may be issued by these networks, by instituting positive action measures to guarantee Afro-descendent participation in government, competitions, universities and contracting.[143]

In conclusion, Mekinés did not violate Articles 2, 3 and 4 CIRDI.

10. Mekinés did not violate Article 26 *juncto* Articles 1 and 2 ACHR

The right to cultural life is protected under Article 26 of the American Convention.[144] According to the Commission, the right to freely express their identity in all spheres of cultural life, also

[139] *Advisory Opinion OC-5/85, Compulsory membership in an association prescribed by law for the practice of journalism,* para. 70.
[140] Art. 13(2) and (4) ACHR.
[141] *Handyside v. U.K.*, ECtHR, 7 December 1976, para. 49.
[142] *Alejandra Marcela Matus Acuña et al. v. Chile,* 24 October 2005, Case No. 12.142, Report No. 90/05, para. 35.
[143] CQ40.
[144] *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina,* IACtHR, 6 February 2020, para. 240.

extends to people of African descent.[145] In interpreting the scope of the right to cultural life, the general recommendations of the CESCR play an important role.[146] The CESCR has established that limitations may be necessary when certain negative practices infringe on other human rights, as long as they are proportionate.[147] The UN Special Rapporteur on Cultural Rights also highlighted the importance of "*ensuring that "traditions", "attitudes" and "customary practices" are not elevated above universal human rights standards*".[148]

In its decision, the Supreme Court of Mekinés took into account the best interests of the child, an internationally protected human rights standard.[149] Ignoring the harm done to Helena in favor of the cultural rights of practitioners of the Candomblé religion, would be contrary to the international obligations of Mekinés. This limitation imposed is proportionate: no general ban was made on any Candomblé practices, nor was there a criminalization.[150] Consenting adults can still freely participate in the customs. It is at the point of harming 8-year-old Helena that Mekinés had to draw a line.

In conclusion, Mekinés did not violate Article 26 *juncto* Articles 1 and 2 ACHR.

[145] IACHR, *Report on the Economic, Social, Cultural and Environmental Rights of Persons of African Descent*, 16 March 2021, para. 210.
[146] *Lhaka Honhat*, paras. 239-242.
[147] CESCR, *General Comment No. 21: Right of everyone to take part in cultural life*, para. 19.
[148] Special Rapporteur on Cultural Rights, *Universality, cultural diversity and cultural rights*, para 22.
[149] Art. 24 ICCPR, art. 3.1 CRC art. 19 ACHR, art. 18-3 of the African Charter on Human and Peoples' Rights.
[150] Hypothetical, §32.

V. REQUEST FOR RELIEF

Based on the foregoing submissions, the respondent State of Mekinés respectfully requests this Honorable Court to declare and adjudge in favor of the State that:

1. No provisional measures should be taken.

2. The claims under Article 8(1), Article 13 ACHR and Article 4(i) and 4(ii)(a) CIRDI are inadmissible.

3. Mekinés has not violated its obligations under Articles 7(1), 8(1), 12, 13, 17, 19, 24 and 26 *juncto* Articles 1 and 2 ACHR.

4. Mekinés has not violated Articles 2, 3 and 4 CIRDI.

5. Mekinés has not violated any other provisions under the ACHR or CIRDI.