Inter-American Commission on Human Rights

In the Matter of

KAREN ATALA RIFFO AND HER DAUGHTERS (CHILE)
Petition P-1271-04

BRIEF OF
THE ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN RIGHTS CLINIC
AT YALE LAW SCHOOL
AS AMICUS CURIAE

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INTEREST OF *AMICUS CURIAE*

The Allard K. Lowenstein International Human Rights Clinic is a Yale Law School course that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. Its projects have included efforts to promote the work of regional and international organizations that develop and protect human rights. The Clinic has prepared briefs and other submissions for the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, and various bodies of the United Nations, as well as for national courts, including courts in the United States and in other countries in the Americas. The Clinic has a longstanding commitment to the protection of human rights for women, children, and sexual minorities and has a significant interest in the admission of this case and in ensuring consideration of claims that allege violations of the rights of such vulnerable groups.

SUMMARY OF ARGUMENT

The Inter-American Commission on Human Rights (the "Commission") should admit Karen Atala Riffo's petition against the State of Chile for violations of the American Convention on Human Rights (the "American Convention" or "Convention"). The Allard K. Lowenstein International Human Rights Clinic, as *amicus curiae*, argues that (1) this case is admissible because the petition of Ms. Atala and her daughters states facts that present colorable violations of the American Convention, and (2) although cases involving issues of child custody and family can be sensitive, the Convention itself defines the Commission's obligations with respect to such

cases, and the Commission should not distinguish between these and other kinds of cases when a petition alleges violations of rights protected by the American Convention.

The Commission's duty is to determine whether the petition alleges facts that state a *prima facie* violation of the Convention. The petition does not ask the Commission to review mere errors of fact or law as a court of "fourth instance," but rather to evaluate whether the State of Chile has failed to comply with its obligations under the American Convention. The petition of Ms. Atala and her daughters calls on the Commission to determine, *inter alia*, whether the State of Chile's interference in their private life and family was arbitrary or abusive and thus violated the American Convention.

The Commission has admitted cases, including cases focusing on child custody determinations, where it is necessary to protect the right to private life and the family. The European Court of Human Rights ("European Court") has similarly admitted cases involving such issues.

By fulfilling its duty under the American Convention to evaluate the admissibility of this case as it would evaluate the admissibility of any other, the Commission will reinforce the principle that children, sexual minorities, women, and families are entitled to the full protection of the Convention.

BACKGROUND

Karen Atala's nine-year marriage to Jaime López Allende ended in March 2002. In connection with their separation, the couple decided that Ms. Atala would have custody of their three daughters, Victoria, Regina, and Matilde, and that the daughters would visit López on a weekly basis. Three months after this custody decision was made, Ms. Atala began a relationship with Emma de Ramón, and in November 2002, Ms. de Ramón moved into the home

Ms. Atala shared with her daughters. In January 2003, López brought suit for custody, alleging that because of her sexual orientation, Ms. Atala should not have custody of their daughters.

López's petition for custody of the girls marked the onset of a series of very public intrusions into Ms. Atala's personal life that she maintains affected her both emotionally and professionally. Chilean newspapers published articles with headlines such as, "Lawyer demands custody of his daughters because ex-wife is a lesbian." These newspaper headlines led to the appointment of an "extraordinary visitor" to the criminal court in Villarica, where Ms. Atala sat as a judge, in order to "investigate privately the facts that had been submitted to public knowledge and opinion via the newspaper '*Las Ultimas Noticias*.'"[1] Ms. Atala alleges that López was responsible for the press leaks that triggered the investigation of her professional conduct.

On October 29, 2003, the court granted custody of the girls to Ms. Atala. In this decision, Judge Cárdenas Beltrán explained that

> the presence of the mother's partner in the house in which the minors live with their mother does not constitute grounds for removing her daughters from her personal care. Nor has the existence of concrete facts that prejudice to the well being of the minors derived from the presence of the mother's partner in the home been proven.[2]

The court also emphasized that the girls had expressed a preference for living with their mother: "In the final hearing which took place on October 8, 2003, Regina and Victoria expressed their

[1] Petition of Karen Atala Riffo and Daughters Against the State of Chile, Inter-Am. C.H.R., ¶ 10 (Nov. 12, 2004) ("Petition") (all English-language quotations from the Petition are unofficial translations).
[2] *Id.* ¶ 19 ("la presencia de la pareja de la madre en la casa en que vivieron las menores con su madre no configura causal de inhabilidad para ejercer el cuidado personal de sus hijas. Por su parte, tampoco se ha acreditado la existencia de hechos concretos que perjudiquen el bienestar de las menores derivados de la presencia de la pareja de la madre en el hogar").

desire to return to live with their mother and in the case of Matilde, only a slight preference for the maternal figure was detected."[3]

López appealed the lower court's ruling awarding Ms. Atala custody, and the Second Hall of the Court of Appeals of Temuco issued an order awarding Mr. López custody for the duration of the appeal. In March 2004, the Court of Appeals of Temuco unanimously confirmed the lower court decision to award custody to Ms. Atala.[4]

On April 5, 2004, Mr. López filed a *recurso de queja*[5] with the Supreme Court of Chile ("Supreme Court" or "Court") challenging the lower court's decision. On May 31, 2004, the Supreme Court invalidated the lower court decision and ordered that the girls remain in the custody of their father. The Court noted that psychologists and social workers had submitted expert reports finding that Ms. Atala's sexual orientation "did not compromise the rights of her daughters."[6] Although it gave these reports "great value,"[7] the Court also emphasized that in cases involving family law and minors, the opinions of professionals are "only elements of the opinion that judges must personally form, in contemplating the evidence as a whole."[8] The Court observed that evidence had also been produced

> with respect to the deterioration experienced by the social, familial and educational environments which surround the existence of the minors, ever since the mother started cohabitating with her homosexual partner, and . . . that the girls could be objects of social discrimination due to this fact . . . .[9]

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[3] *Id.* ("en la última de las audiencias realizadas con fecha 8 de octubre de 2003, Regina y Victoria expresaron su deseo de volver a vivir con su madre y en el caso de Matilde solo se detectó una leve preferencia por la figura materna").
[4] *Id.*
[5] Article 545 of the Organic Code of the Judiciary explains that "the exclusive purpose of the *recurso de queja* is to amend serious errors or abuses committed in the rendering of judgments." Organic Code of the Judiciary, art. 545, *available at* http://www.oas.org/juridico/spanish/chi_res9.pdf.
[6] Petition, ¶ 33 (citing Decision of Supreme Court of Chile of 31 May 2004, ¶ 15) ("no vulneraría los derechos de sus hijas").
[7] *Id.* (citing Decision of Supreme Court of Chile of 31 May 2004, ¶ 15) ("se hizo valer").
[8] *Id.* (citing Decision of Supreme Court of Chile of 31 May 2004, ¶ 14) ("son sólo elementos de la convicción que deben formarse personalmente los jueces, al ponderar en su conjunto los medios de prueba").
[9] *Id.* (citing Decision of Supreme Court of Chile of 31 May 2004, ¶ 15) ("respecto al deterioro experimentado por el entorno social, familiar y educacional en que se desenvuelve la existencia de las menores, desde que la madre

The Court relied on two specific evidentiary submissions for this conclusion. First, the Court cited evidence from an undisclosed source that "friends' visits to the shared home have diminished and almost ceased from one year to the next."[10] Second, the Court stated that "the testimony of people close to the minors, like the domestic workers in the house, make reference to the girls' games and attitudes that are demonstrative of confusion as to the sexuality of the mother."[11]

Based on this evidence, the Court concluded that Ms. Atala had "privileged her own interests, postponing those of her daughters, especially in initiating a cohabitation with her homosexual partner in the same house in which she carries out the upbringing and personal care of her daughters."[12] The Court found that

> aside from the effects that this cohabitation may cause in the well-being and psychological and emotional development of the daughters, given their ages, the eventual confusion as to sexual roles that may be produced by the absence in the home of a father of the masculine sex, and his replacement by another person of the feminine sex, comprises a risk situation for the integral development of the minors from which they should be protected.[13]

The Court stated that their "uncommon familial environment" would put the girls "in a state of vulnerability in their social surroundings" because it would "expos[e] them to being objects of

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empezó a convivir en el hogar con su pareja homosexual y a que las niñas podrían ser objeto de discriminación social derivada de este hecho").

[10] *Id.* (citing Decision of Supreme Court of Chile of 31 May 2004, ¶ 15) ("las visitas de sus amigas al hogar común han disminuido y casi han cesado de un año a otro").

[11] *Id.* (citing Decision of Supreme Court of Chile of 31 May 2004, ¶ 15) ("el testimonio de personas cercanas a las menores, como son las empleadas de la casa, hacen referencia a juegos y actitudes de las niñas demostrativas de confusión ante la sexualidad maternal").

[12] *Id.* (citing Decision of Supreme Court of Chile of 31 May 2004, ¶ 16) ("ha antepuesto sus propios intereses, postergando los de sus hijas, especialmente al iniciar una convivencia con su pareja homosexual en el mismo hogar en que lleva a efecto la crianza y cuidado de sus hijas").

[13] *Id.* (citing Decision of Supreme Court of Chile of 31 May 2004, ¶ 17) ("aparte de los efectos que esa convivencia puede causar en el bienestar y desarrollo psíquico y emocional de las hijas, atendida sus edades, la eventual confusión de roles sexuales que puede producírseles por la carencia en el hogar de un padre de sexo masculino y su reemplazo por otra persona del género femenino, configura una situación de riesgo para el desarrollo integral de las menores respecto de la cual deben ser protegidas").

isolation and discrimination."[14] It found that these factors "paint a picture that involves the risk of harms, which could prove irreversible, to the interests of the minors,"[15] and that the lower court judges had "incurred a grave breach or abuse" because they had not "privileged the superior rights of the minors to live and develop in the bosom of a family that is normally structured and appreciated in the social environment, according to the appropriate traditional model."[16]

ARGUMENT

I. THE PETITION IS ADMISSIBLE BECAUSE IT STATES FACTS THAT TEND TO ESTABLISH THAT THE STATE'S INTERFERENCE WITH MS. ATALA'S PRIVATE LIFE AND FAMILY WAS "ARBITRARY OR ABUSIVE."

The requirements for admissibility under Articles 44 through 51 of the American Convention are clearly satisfied in this case. Article 47 of the American Convention provides that a petition is admissible except in the following circumstances:

> a. any of the requirements indicated in Article 46 [which requires the petitioner to exhaust domestic remedies and to file the petition within six months of the final decision, bars the admission of a petition that is currently the subject of another international proceeding, and establishes certain formalities for petitioners that are nongovernmental organizations] has not been met;
>
> b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention;
>
> c. the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or

[14] *Id.* (citing Decision of Supreme Court of Chile of 31 May 2004, ¶ 18) ("su entorno familiar excepcional . . . un estado de vulnerabilidad en su medio social . . . exponiéndolas a ser objeto de aislamiento y discriminación").
[15] *Id.* (citing Decision of Supreme Court of Chile of 31 May 2004, ¶ 19) ("ellas configuran un cuadro que irroga el riesgo de daños, los que podrían tornarse irreversibles, para los intereses de las menores").
[16] *Id.* (citing Decision of Supreme Court of Chile of 31 May 2004, ¶ 20) ("incurrido en falta o abuso grave . . . haber preterido el derecho preferente de las menores a vivir y desarrollarse en el seno de una familia estructurada normalmente y apreciada en el medio social, según el modelo tradicional").

> d. the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.[17]

The Commission's review at the admissibility stage is much more limited than when it evaluates the merits of a petition. When deciding whether a petition is admissible, the Commission "must undertake a *prima facie* evaluation to determine whether the petition establishes an apparent or potential violation of a right guaranteed by the Convention and not to establish whether a violation has occurred."[18] To be admissible, a petition need only allege a colorable violation of a right protected by the Convention.[19] Complex questions of law and arguments requiring in-depth analysis should be reserved for a decision on the merits.[20] In addition, the Commission must base its decision on the facts as set forth in the petition: "For purposes of admissibility, the IACHR must at this time *determine only* whether the facts *as set forth*, if proven, could characterize a violation, as stipulated in Article 47.b of the Convention . . . ."[21] Finally, the provisions of the Convention must be interpreted in favor of the petitioner whenever possible: "[T]he Convention [must] be interpreted in favor of the individual, who is the object of international protection, as long as such an interpretation does not result in modification of the system."[22] Thus, if a petition states facts that establish a colorable violation of the Convention and the other requirements are met, the Commission should declare the petition admissible. Any ambiguities must be resolved in favor of the petitioner.

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[17] American Convention on Human Rights, art. 47, O.A.S. Treaty Ser. No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978.
[18] *Moreno v. Chile*, Case 12.233, Inter-Am. C.H.R., Report No. 58/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 at 202, ¶ 46 (2003); *see also Stokes v. Jamaica*, Petition No. P28/04, Inter-Am C.H.R., Report No. 65/04, OEA/ser. L/V/II.122 doc. 5 rev. 1, ¶ 77 (2004); *Giraldo v. Colombia*, Case 11.656, Inter-Am. C.H.R., Report No. 71/99, OEA/ser. L/V/II.106 doc. 3 rev. (1999).
[19] *Moreno*, ¶ 46.
[20] *See Stokes*, ¶ 78; *Moreno*, ¶ 47.
[21] *Godoy v. Argentina*, Petition No. 12.324, Inter-Am. C.H.R., Report No. 4/04, OEA/ser. L/V/II.122 doc. 5 rev. 1, ¶ 42 (Feb. 24, 2004) (emphasis added).
[22] *Matter of Viviana Gallardo and Others*, Inter-Am. Ct. H.R. (ser. A) No. G 101/81, ¶ 16 (1981).

The admissibility requirements of Articles 46 and 47 have clearly been met in this case. Ms. Atala and her daughters have exhausted domestic remedies; indeed, had other remedies been available, the Chilean Supreme Court would not have been able to hear Mr. López's *recurso de queja*, since that procedural vehicle is available only when all other remedies have been exhausted.[23] There has been no allegation that the petition is untimely, the subject of another proceeding, manifestly groundless or out of order, or the same as one previously studied by the Commission or another international entity.

The petition also meets the requirements of Article 47(b) that it "state facts that tend to establish a violation of the rights guaranteed by this Convention,"[24] including that the State of Chile violated the Convention when it arbitrarily interfered in the private life and family of Ms. Atala and her daughters. Article 11 of the American Convention provides:

> 1. Everyone has the right to have his honor respected and his dignity recognized.
>
> 2. No one may be the object of *arbitrary or abusive interference* with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
>
> 3. Everyone has the right to the protection of the law against such interference or attacks.[25]

Because the Article 11 claim raised in this case has not previously been considered by the Commission, *amicus curiae* has a strong interest in bringing this particular issue to the

[23] Organic Code of the Judiciary, art. 545, *available at* http://www.oas.org/juridico/spanish/chi_res9.pdf (noting that the *recurso de queja* "is only available if the error or abuse has been committed in interlocutory judgments that put an end to the trial or make its continuation impossible or in final judgments not subject to any kind of ordinary or extraordinary challenge"). Further, even assuming it were possible for Ms. Atala to file a new case, material *res judicata*, which is created by a *recurso de queja*, exhausts domestic remedies. *See Olmedo Bustos v. Chile ("Last Temptation of Christ" Case)*, Inter-Am. Ct. H.R. (ser. C) No. 73 (2001) (admitting petition challenging limits on the showing of a film after local remedies had been exhausted through the use of a *recurso de protección*, which created material *res judicata* under Chilean law).

[24] American Convention, art. 47(b).

[25] American Convention, art. 11 (emphasis added).

Commission's attention and setting out how the allegations of the petition relating to this claim clearly meet the admissibility requirements of the Convention.[26]

Although the Commission has issued few decisions interpreting Article 11, its opinions in *Ms. "X" v. Argentina* and *De Sierra v. Guatemala* indicate that interference in private life or family is arbitrary when it is unreasonable, unnecessary, or not proportional to the state's objective.[27] In *Ms. "X,"* the Commission explained that "'arbitrary interference' refers to elements of injustice, unpredictability and unreasonableness."[28] In that case, the Commission evaluated whether the challenged state action—personal searches of female visitors to prisons—involved these elements. It based its calculation on whether such action was necessary, reasonable, and proportional to the objective to be achieved.[29] The Commission explained, "To justify restricting visitors' rights, it is not sufficient to invoke security reasons. After all, the issue entails balancing the interests on the one hand of family members and prisoners to enjoy visitation rights free from arbitrary and abusive interference, and on the other the state's interest in guaranteeing the security within prisons."[30] The legitimacy of limits on rights protected by Article 11 thus depends on balancing the state's objective against the individual interests at stake.

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[26] The petition also alleges violations of Articles 1, 2, 5, 17, 19, and 24.

[27] Article 11 prohibits "arbitrary *or* abusive interference." American Convention, art. 11 (emphasis added). To the best of *amicus curiae*'s knowledge, the Inter-American Commission has not articulated the meaning of "abusive" separately from the meaning of "arbitrary." As this brief argues, however, the petition in this case clearly alleges facts that would establish that the Chilean Supreme Court's intervention in Ms. Atala's private life or family was arbitrary; the case is therefore admissible on that ground.

[28] *Ms. "X" v. Argentina*, Case 10.506, Inter-Am. C.H.R., Report No. 38/96, OEA/ser. L/V.II.95 doc. 7 rev., ¶ 92 (1996).

[29] *Id.* (noting that these elements "were already considered by this Commission when it addressed the issues of the necessity, reasonableness, and proportionality of the searches and inspections" under Article 32(2)); *see also De Sierra v. Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/00, OEA/Ser.L/V/II.111 doc. 20 rev. at 929, ¶ 47 (2000) ("The guarantee against arbitrariness is intended to ensure that any such regulation (or other action) comports with the norms and objectives of the Convention, and is reasonable under the circumstances.").

[30] *Ms. "X,"* ¶ 70.

In evaluating a challenge under Article 11 in the *De Sierra* case, the Commission again emphasized that the state's action must be necessary and proportional. The state in that case sought to justify the discriminatory laws that limited Article 11 rights "on the basis that they serve to protect the family, in particular the children."[31] The Commission emphasized that a gender-based distinction is based on "reasonable and objective criteria" if it "(1) pursues a legitimate aim and (2) employs means which are proportional to the end sought."[32] The Commission concluded that the legislation in question in *De Sierra* was discriminatory and "infringe[d] on the victim's personal sphere in a manner which cannot be justified."[33] If the challenged state action is not necessary for achieving, or employs means that are not reasonable or proportional to, the state's objectives, the action is arbitrary and violates the Convention.

In evaluating the proportionality of a response, the Commission considers the reasons offered by the state for the challenged action in light of the severity of the interference at issue. When the interference is severe, the reasons offered by the state must be strong. Actions that involve the separation of members of a family, for example, are only justified if necessary to meet a "*pressing need* to protect public order, and where means are proportional to that end."[34] In such cases, "the reasons justifying [the] interference . . . must be *very serious indeed*."[35]

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[31] *De Sierra*, ¶ 49.

[32] *Id.* ¶ 31; *see also Statehood Solidarity Committee v. United States*, Case 11.204, Inter-Am. C.H.R. 727, Report No. 98/03, OAE/ser. L/V/II.118, doc. 5 rev. 2, ¶ 90 (2003) (holding that the state may create "distinctions among different situations and establish categories for certain groups of individuals, so long as it pursues a legitimate end, and so long as the classification is reasonably and fairly related to the end pursued by the legal order").

[33] *De Sierra*, ¶ 50.

[34] *Progress Report of the Office of the Rapporteur on Migrant Workers and Their Families in the Hemisphere*, Inter-Am. C.H.R. 1539, OEA/ser. L/V/II.106 doc. 3 rev, ¶ 21 (1999) (emphasis added) (quoting *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, Inter-Am. C.H.R. OEA/Ser.L/V/II.106, doc. 40 rev., ¶ 166 (2000)).

[35] *Id.* (emphasis added). The Human Rights Committee, the entity charged with monitoring compliance with the International Covenant on Civil and Political Rights ("ICCPR"), has suggested, in interpreting the provision of the ICCPR that protects privacy, that the state's reasons for interfering with this right must be "essential." Human Rights Committee, *General Comment No. 16*, U.N. Doc. HRI\GEN\1\Rev.1 at 21, ¶ 7 (1994) ("As all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be

The requirement that interference with private life and family be reasonable, necessary, and proportional is supported by precedent of the European Court interpreting the European Convention for Protection of Human Rights and Fundamental Freedoms ("European Convention").[36] The European Court's jurisprudence may be viewed as persuasive because: (1) the Commission has previously cited decisions of the European Court concerning admissibility requirements;[37] (2) the European Convention, like the American Convention, protects the right to respect for private and family life;[38] and (3) the European Court has developed experience in deciding family law cases. The Inter-American Court of Human Rights has also explicitly approved the practice of considering other treaties in interpreting the provisions of the American Convention.[39]

The European Court requires strong and sufficiently supported reasons when the challenged state interference is severe, such as in the context of child welfare: "[I]t is an interference of a very serious order to split up a family. Such a step must be supported by

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able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant.").

[36] European Convention for Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953, *as amended by* Protocol Nos. 3, 5, 8, and 11.

[37] *See* Petition No. 129/2002, Inter-Am. C.H.R. 504, Report No. 16/04, OEA/ser. L/V/II.122 doc. 5 rev. 1, ¶ 36 (2004) ("In its jurisprudence, this Commission has shared the view of the European Court of Human Rights that a petitioner may be excused from exhausting domestic remedies with respect to a claim where it is apparent from the record before it that any proceedings instituted on that claim would have no reasonable prospect of success in light of prevailing jurisprudence of the state's highest courts."); Petition No. 12.379, Inter-Am. C.H.R. 493, Report No. 19/02, OEA/ser. L/V/II.117 doc. 5 rev. 1, ¶ 61 (2002) ("The Commission has previously shared the view of the European Court of Human Rights that in accordance with general principles of international law, a petitioner need not exhaust domestic remedies if on the evidence such proceedings would be obviously futile or have no reasonable prospect of success.").

[38] Article 8 of the European Convention protects "the right to respect for . . . private and family life" and provides that public authorities may not interfere with the exercise of this right "except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others." European Convention, art. 8.

[39] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)*, Inter-Am. Ct. H.R., Advisory Opinion OC-5/85 (ser. A) No. 5, ¶ 51 (1985) ("[I]t is frequently useful—and the Court has just done it—to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the manner in which a certain right has been formulated."); *see also id.* ¶ 50 (comparing provisions of the American Convention concerning free expression with relevant provisions of the European Convention and the ICCPR).

sufficiently sound and weighty considerations in the interests of the child; as the [former European] Commission rightly observed, it is not enough that the child would be better off if placed in care."[40] In *K. & T. v. Finland*, the Court held that it will apply a stricter level of scrutiny when evaluating restrictions placed on parental rights of access to children than when evaluating the initial decision to take a child into foster care, because "[s]uch further limitations [on parents' right of access to children] entail the danger that the family relations between the parents and a young child are effectively curtailed."[41] The Court stated, "The reasons relied on by the national authorities were relevant but, in the Court's view, not sufficient to justify the serious intervention in the family life of the applicants."[42] The Court has also emphasized that the state's reasons must be sufficiently supported. In *Elsholz*, the Court found that the evidence presented was not sufficient to support the state's reasons for interfering with a relationship between a father and his child:

> [T]aking into account the importance of the subject matter, namely, the relations between a father and his child, the Regional Court should not have been satisfied, in the circumstances, with relying on the file and the written appeal submissions without having at its disposal psychological expert evidence in order to evaluate the child's statements.[43]

In light of the important interests at stake in a decision that affects the relationship between members of a family, the European Court found that the authorities, relying only on the written

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[40] *Olsson v. Sweden*, App. No. 10465/83, Eur. Ct. H.R., ¶ 72 (Mar. 24, 1988) (rejecting challenge by couple to decision to place children in care of others); *see also id.* ¶ 67 ("According to the Court's established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued . . . ."); *Eriksson v. Sweden*, Case No. 11/1988/144/209, Eur. Ct. H.R., ¶ 71 (May 23, 1989) ("[T]he severe and lasting restrictions on access [of the mother to her child] . . . are not proportionate to the legitimate aims pursued."); *cf. Dudgeon v. The United Kingdom*, App. No. 7525/76, Eur. Ct. H.R., ¶ 52 (Oct. 22, 1981) (requiring "particularly serious reasons" to justify interference with the enjoyment of sexual relations).

[41] *K. & T. v. Finland*, App. No. 25702/94, Eur. Ct. H.R., ¶ 155 (July 12, 2001).

[42] *Id.* ¶ 168; *cf. Hokkanen v. Finland*, Case No. 50/1993/445/524, Eur. Ct. H.R., ¶ 64 (Aug. 24, 1994) (finding that the court's decision to transfer custody to the grandparents was not disproportionate to the state's objective).

[43] *Elsholz v. Germany*, Case No. 25735/94, Eur. Ct. H.R., ¶ 52 (July 13, 2000) (in a case involving a father's efforts to see his child, who had been born out of wedlock); *see also Olsson*, ¶ 74 (requiring the national authorities to show that they "were reasonably entitled to think that it was necessary to take the children into care").

submissions without hearing expert evidence, did not have a reasonable basis for interfering with that relationship. Thus, where the challenged action limits the relationship between a parent and child, the reasons given for the action must be very serious and have sufficient support to warrant such an action.

The facts alleged in the petition of Ms. Atala and her daughters clearly tend to establish that the Chilean Supreme Court's decision was not necessary, reasonable, or proportional to the aim to be achieved and therefore exceeded the limits of legitimate state interference with their private lives or their family. The Court failed to provide reasons sufficient to demonstrate that the challenged action—depriving Ms. Atala of custody of her children—was necessary or justified in the circumstances. The Court terminated Ms. Atala's custody on the basis of a report from an unidentified source that the girls had received fewer visits from school friends and unqualified opinions by domestic workers in the home that the girls' games and attitudes manifested ambiguity about their mother's gender role. Based on this testimony, the Court speculated that the girls might suffer stigma and developmental harm because of Ms. Atala's cohabitation with her partner. Yet there was no indication that the alleged decreased visits or confusion about gender roles were caused by the presence of Ms. Atala's partner in the home. This speculation was also contrary to the expert opinions of psychologists and social workers who testified that the girls were at no risk of harm, as well as the girls' own testimony that they preferred to live with their mother. The possibility of harm based on uncorroborated allegations of fewer visits from school friends and the testimony of workers in the home about their observations of the girls' apparent confusion about their mother's sexuality is not the kind of strong and serious reason that would have been necessary to justify terminating Ms. Atala's custody of her daughters.

An interference with private life and family must also be the least restrictive means of achieving the state's objectives and be closely tailored to the ends sought. As the Commission has explained in evaluating personal searches of visitors to a prison, "[a]ny restriction to human rights must be proportional and closely tailored to the legitimate governmental objective necessitating it."[44] In the context of freedom of expression, the Commission has explained that if there are multiple options available to the state to achieve its objective, "that which least restricts the right must be selected" and any restriction "must be so framed as not to limit the right protected by Article 13 more than is necessary."[45]

The European Court has similarly emphasized that the state must adopt the least restrictive means when such serious interests are at stake. In *K. & T.*, a case alleging a violation of Article 8 of the European Convention, the European Court emphasized that the state, in deciding to remove a newborn from its mother's care, did not even consider whether there were other ways of protecting the child.[46] Although the Court noted that it would not speculate about what the best measures would have been in that particular case,

> when such a drastic measure for the mother, depriving her totally of her new-born child immediately on birth, was contemplated, it was incumbent on the competent national authorities to examine whether some less intrusive interference into family life, at such a critical point in the lives of the parents and child, was not possible.[47]

When the challenged action is severe, it is incumbent on the state to explore whether other, less severe options would have been available to achieve the same objective.

There is no indication that the Chilean Supreme Court considered less restrictive means of protecting the girls from any risk of harm that might have been possible in the circumstances.

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[44] *Ms. "X,"* ¶ 70; *cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Inter-Am. Ct. H.R., ¶ 46 (explaining in the context of freedom of expression that "the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it")
[45] *Id.* ¶ 46.
[46] *K. & T.*, ¶ 168.
[47] *Id.*

Before taking such a drastic step as terminating Ms. Atala's custody, the Court was obligated, at the very least, to consider other, less severe means of protecting them from whatever harm it might have identified. The state has not alleged that any other options other than terminating custody were even considered. Terminating a parent's custody based on speculation of harm, without considering other options, clearly constitutes a *prima facie* violation of the Convention.

Further, although the Commission has not addressed the issue of whether a decision to interfere in private life and family based on sexual orientation is *per se* unreasonable under the American Convention, the petition's allegation that the Chilean Supreme Court's decision was based on such a discriminatory factor nonetheless sets forth a colorable *prima facie* violation. The European Court has, in analogous circumstances, held that denying custody based on a parent's sexual orientation is *per se* unreasonable. In *Salgueiro da Silva Mouta v. Portugal*, the applicant claimed that he was denied custody of his daughter based on his sexual orientation. The national court, in awarding custody to the daughter's mother,

> took account of the fact that the applicant was a homosexual and was living with another man in observing that "The child should live in . . . a traditional Portuguese family" and that "It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations."[48]

According to the European Court, the decision was "based on considerations regarding the applicant's sexual orientation" and such a distinction "is not acceptable under the Convention."[49] As a result, the Court held that it "cannot therefore find that a reasonable relationship of proportionality existed between the means employed and the aim pursued."[50]

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[48] *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, Eur. Ct. H.R., ¶ 34 (Mar. 21, 2000).
[49] *Id.* ¶ 36.
[50] *Id. But see Fretté v. France*, App. No. 36515/97, Eur. Ct. H.R., ¶¶ 42-43 (Feb. 26, 2002) (admitting claim but finding that rejection of petitioner's application *to adopt*—a request to establish a family relationship, in contrast to a request to sever a family relationship—on the basis of sexual orientation did not violate the European Convention).

The European Court has similarly held that denying custody based on a parent's religion is discriminatory and therefore *per se* unreasonable. In *Hoffmann v. Austria*, the petitioner's former husband had argued that if the children were left in the care of the petitioner, who had become a Jehovah's Witness shortly before they divorced, "there was a risk that they would be brought up in a way that would do them harm."[51] Lower courts and social welfare workers found no evidence of harm to the children, but the Supreme Court nonetheless awarded custody to the father.[52] According to the European Court, however, even if there were evidence that the mother's religion might have a negative effect on the children's well-being, if the only reason for the award of custody is religion, that decision violated the right to privacy together with the right to be free from discrimination: "Notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable."[53] As a result, the Court concluded that it "[could] not find that a reasonable relationship of proportionality existed between the means employed and the aim pursued."[54] If the state's aims were to give effect to impermissible distinctions based on prohibited grounds, such aims could not be considered proportional to the challenged action.

As in *Hoffman* and *Mouta*, the decision of the Supreme Court of Chile to deny custody was based on prohibited grounds. The Court denied custody based on the risk that the children would suffer stigma as a result of their mother's sexual orientation and cohabitation with her partner. An interference in private life and family based solely on a difference in sexual orientation—like a difference in religion—is impermissible. Consequently, there is no

[51] *Hoffmann v. Austria*, App. No. 12875/87, Eur. Ct. H.R., ¶ 10 (May 26, 1993).
[52] *Id.* ¶ 15.
[53] *Id.* ¶ 36.
[54] *Id.*

reasonable relationship of proportionality, and the petition alleges facts sufficient to state a violation of Article 11's prohibition on arbitrary or abusive interference.

II. THE PETITION ALLEGES VIOLATIONS OF RIGHTS PROTECTED BY THE AMERICAN CONVENTION AND THEREFORE IS NOT BARRED BY THE FOURTH INSTANCE DOCTRINE.

Chile has argued that the petition is inadmissible under the fourth instance doctrine, but this doctrine does not bar the admission of petitions that allege violations of rights protected by the Convention. Because the petition of Ms. Atala and her daughters alleges violations of the Convention, it cannot be barred by the fourth instance doctrine.

The fourth instance doctrine, articulated in the Commission's decision in *Marzioni v. Argentina*, provides that the Commission may not serve as a "fourth instance" of review of national court decisions. "The Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of the Convention is involved."[55] This doctrine bars admission of a petition that "contains nothing but the allegation that the decision was wrong or unjust in itself,"[56] and thereby prevents the Commission from "serv[ing] as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction."[57] When, however, a petition "portrays a claim that a domestic legal decision constitutes a disregard of the right to a fair trial, or if it appears to violate any other right

[55] *Marzioni v. Argentina*, Case 11.673, Inter-Am. C.H.R., Report No. 39/96, OEA/Ser.L/V/II.95 doc. 7 rev. at 76, ¶ 50 (1997).
[56] *Bedoya de Vivanco v. Peru*, Petition No. 369/01, Inter-Am. C.H.R., Report No. 45/04, OEA/ser. L/V/II.122 doc. 5 rev. 1 ¶ 42 (2004); *see also Aguilar v. Panama*, Case 11.716, Inter-Am. C.H.R., Report No. 7/01, OEA/ser. L/V/II.111 doc. 20 rev. ¶ 17 (2001) (finding case inadmissible under fourth instance doctrine, noting that "the judicial protection the Convention recognizes includes the right to fair, impartial, and swift proceedings that offer the possibility, but not the guarantee, of a favorable result").
[57] *Bedoya*, ¶ 42; *see also Ramirez v. Colombia*, Case 11.403, Inter-Am. C.H.R., Report No. 48/9, OEA/ser. L/V/II.102 doc. 6 rev. 8, ¶ 38 (1998) (petition alleging mere error of law or fact inadmissible).

guaranteed by the Convention,"[58] the Commission has "full authority" to admit and hear the petition.[59] The Commission's "task is to ensure the observance of the obligations undertaken by the States parties to the Convention,"[60] and it will therefore admit a petition where "it is clear that there has been a violation of one of the rights protected by the Convention."[61] Thus, if a petition meets the criteria of Article 47(b) and alleges facts that, "if proven true, could constitute violations of rights protected by the American Convention,"[62] it must be admitted.

The petition in this case clearly alleges facts that, if proven true, would constitute a violation of Article 11, among other articles. Article 11 imposes obligations on the state with regard to decisions about family relationships, and petitions that allege *prima facie* violations of its terms are admissible like any other. It is incumbent on the Commission to hear and decide petitions that allege facts that tend to establish that the action challenged was arbitrary or abusive. The petition of Ms. Atala and her daughters presents such facts, and the Commission's admission of the petition is therefore not contrary to the fourth instance doctrine.

III. THE COMMISSION, LIKE THE EUROPEAN COURT, ADMITS PETITIONS ALLEGING VIOLATIONS OF PROTECTED RIGHTS IN THE CONTEXT OF FAMILY LAW.

Ms. Atala's is not the first case involving family law or custody disputes to reach the Commission. The decisions of the Commission make clear that cases involving custody and family law are admissible when a violation of the Convention has been appropriately alleged. In *De Sierra*, for example, the Commission admitted a challenge to several articles of the

[58] *Marzioni*, ¶ 51.
[59] *Id.* ¶ 61 ("The Commission has full authority to adjudicate irregularities of domestic judicial proceedings which result in manifest violations of due process or of any of the rights protected by the Convention."); *see also López-Aurelli*, Case 9850, Inter-Am. C.H.R., Report No. 74/90, OEA/ser.L/V/II.79, doc. 12, rev. 1 (1991) (absence of due process violated Convention and case was admissible).
[60] *Tortino v. Argentina*, Case 11.597, Inter-Am. C.H.R., Report No. 7/98, OEA/ser. L/V/II.98 doc. 7 rev. ¶ 20 (1998).
[61] *Id.* ¶ 18.
[62] *Merciadri de Morini v. Argentina*, Case 11.307, Inter-Am. C.H.R., Report No. 102/99, OEA/ser. L/V/II.106 doc. 3 rev. ¶ 27 (1999).

Guatemalan Civil Code that pertain to women and marriage.[63] More recently, the Commission admitted the case of Sonia Arce Esparza, in which Ms. Arce Esparza alleged that Article 1749 of the Chilean Civil Code violated her rights by authorizing her husband to act as the sole administrator of her property.[64] The Commission has also found custody cases to be admissible. In *"X" & "Z,"* for example, the Commission decided that a petition alleging violations in connection with a custody battle was admissible.[65] These cases demonstrate that the Commission admits petitions involving custody or family law when they allege facts that would establish that the state interference in private life and family is arbitrary or abusive and thus a violation of Article 11.

The European Court routinely hears and decides cases concerned with family law where there have been allegations that the state has interfered with privacy in violation of the European Convention. The Court has heard a range of family law cases involving issues relating to the formation and maintenance of family relationships, such as custody, adoption, and care of children,[66] including cases that involve claims of discrimination on the basis of sexual orientation and religion in custody decisions.[67] Even though the European Court's margin of appreciation doctrine, which has no exact parallel in the Inter-American Commission's jurisprudence,

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[63] *De Sierra*, ¶ 20. The petition challenged Articles 109, 110, 113, 114, 115, 131, 133, 255, and 317 of the Civil Code of the Republic of Guatemala.
[64] *Sonia Arce Esparza v. Chile*, Case 71/01, Inter-Am. C.H.R., Report No. 59/03, OEA/Ser.L/V/II.118 doc. 70 rev. 2 at 213 (2003).
[65] *Case of "X" & "Z" v. Argentina*, Case 11.676, Inter-Am. C.H.R. 582, Report No. 71/00, OEA/ser. L/V/II.111 doc. 20 rev. ¶ 37 (2000) (noting that "the facts that the petitioner alleges could characterize violations of Articles 8, 17, 19 and 25 of the American Convention" and concluding "that the petition is admissible under the terms established in Article 47(b)").
[66] *See, e.g.*, *Marckx v. Belgium*, App. No. 6833/74, Eur. Ct. H.R., ¶ 28 (Jun. 13, 1979) (challenge to Belgian law that required mothers of illegitimate children to register for maternal affiliation in order to establish a state-recognized family bond); *Rasmussen v. Denmark*, App. No. 8777/79, Eur. Ct. H.R., ¶ 33 (Nov. 28, 1984) (challenge to law that prevented father from initiating paternity determination); *Eriksson*, ¶ 56 (challenge to custody determination and to manner of protecting best interests of child); *Olsson*, ¶ 58 (challenge to authority's decision to take children into protective custody and to manner of implementing care plan); *K. & T.*, ¶ 148 (challenge to decision to place children in foster care).
[67] *Mouta*, ¶ 22; *Hoffmann*, ¶ 36.

sometimes grants states discretion to interpret the right to freedom from arbitrary or abusive interference in private life or family in light of local conditions,[68] the European Court nonetheless "must determine whether the reasons adduced to justify the interferences at issue are 'relevant and sufficient'."[69] As the European Court has emphasized, the "margin of appreciation should not . . . be interpreted as granting the State arbitrary power, and the authorities' decision remains subject to review by the European Court for conformity with the requirements of [Convention] provisions."[70] Therefore, while the European Court may sometimes, in the merits phase, grant states some latitude in deciding how to interpret Convention rights, it admits petitions that allege a violation of the European Convention in the context of family law just as it does for any other type of violation.

CONCLUSION

The petition of Karen Atala and her daughters clearly states facts that, if proven, tend to establish that the decision of the Supreme Court of Chile to deprive Ms. Atala of custody of her daughters was "arbitrary or abusive" and thus violated their rights under Article 11 of the American Convention. Even if the Commission ultimately finds no violation of Article 11 in this case, it is only by admitting Ms. Atala's case that the Commission can determine whether the Chilean State's interference was indeed "arbitrary or abusive." The European Court has similarly fulfilled its duty to admit and review cases that allege violations of rights protected by

[68] *K. & T.*, ¶ 154; *see also Elsholz*, ¶ 48 ("[T]he national authorities have the benefit of direct contact with all the persons concerned . . . . [T]he Court's task is not to substitute itself for the domestic authorities. . . but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation.").
[69] *Olsson*, ¶ 68. In *Hokannen*, for example, the European Court emphasized that "[t]he Court's role is not to substitute itself for the competent Finnish authorities . . . but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation." *Hokkanen*, ¶ 55.
[70] *Fretté*, ¶ 41; *see also K. & T.*, ¶ 154 (Court will "review under the Convention the decisions taken by those authorities in the exercise of their power of appreciation").

the European Convention. Only through this process of review can individuals whose rights have been violated obtain relief and the protected rights be given content. If the Commission fails to admit the petition of Ms. Atala and her daughters, it will allow a serious allegation of a violation of Convention rights to stand unexamined. Therefore, *amicus curiae* Allard K. Lowenstein International Human Rights Clinic at Yale Law School respectfully submits that the Commission should admit this petition.