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# THE CASE OF *KAREN ATALA AND DAUGHTERS*: TOWARD A BETTER UNDERSTANDING OF DISCRIMINATION, EQUALITY, AND THE RIGHTS OF WOMEN

*Rosa M. Celorio*†

## I. INTRODUCTION

The prohibition of discrimination and the guarantee of equality are cornerstones of the international system of human rights.<sup>1</sup> They are fixtures of the most ratified international treaties in the world<sup>2</sup> and are prominently featured in regional instruments.<sup>3</sup>

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<sup>1</sup> See, e.g., U.N. Human Rights Comm. [HRC (Committee)], General Comment No. 18, Non-Discrimination, ¶¶ 1–3, HRI/GEN/1/Rev.6 (Nov. 10, 1989) [hereinafter HRC (Committee), General Comment No. 18]; U.N. Comm. on Economic, Social, and Cultural Rights [CESCR Committee], General Comment No. 20, Non-Discrimination in Economic, Social, and Cultural Rights, ¶ 2, E/C.12/GC/20 (July 2, 2009) [hereinafter CESCR Committee, General Comment No. 20]; *Yatama v. Nicaragua*, Preliminary Objections, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 184 (Jun. 23, 2005); *Judicial Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 88 (Sept. 17, 2003); Inter-Am. Comm'n H.R., Report on Terrorism and Human Rights, OEA/Ser.L./V/II.116 doc. 5 rev. 1 corr., ¶ 335 (Oct. 22, 2002).

<sup>2</sup> See, e.g., International Covenant on Civil and Political Rights, arts. 2(1), 26, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR Convention]; International Covenant on Economic, Social, and Cultural Rights, arts. 2(2), 3, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter CESCR Convention]; U.N. Convention on the Rights of the Child, art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of all Forms of Discrimination Against Women, arts. 1, 2, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW Convention]; International Convention on the Elimination of all Forms of Racial Discrimination, arts. 1, 2, Dec. 21, 1965, 660 U.N.T.S. 195.

<sup>3</sup> See, e.g., Organization of American States [OAS], American Convention on Human Rights, arts. 1.1, 24, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, arts. 6, 8(b), June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63 [hereinafter Convention of Belém do Pará]; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222; Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 2000, E.T.S. No. 177; African Charter on Human and Peoples' Rights [Banjul Charter], art. 2, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in

They are also found in a number of broadly approved declarations, resolutions and platforms,<sup>4</sup> views from treaty bodies,<sup>5</sup> and jurisprudence issued by the universal and regional human rights monitoring systems.<sup>6</sup>

These obligations have also been at the heart of the development of legal standards in the realm of women's rights.<sup>7</sup> Even though women constitute half of the world's population,<sup>8</sup> they have been subjected historically to inferior treatment on the basis of their sex<sup>9</sup> and still bear the brunt of inequality in their

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Africa [Maputo Protocol], art. 2, July 11, 2003 [hereinafter Maputo Protocol], *available at* <http://www.unhcr.org/refworld/docid/3f4b139d4.html>.

<sup>4</sup> See, e.g., World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶¶ 15, 18, 19, 20–22, 24, 28, 37, 39, 40–41, 63, 91, 95, U.N. Doc. A/CONF.157/23 (July 12, 1993); Declaration on the Elimination of Violence Against Women, Preamble & art. 3, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Feb. 23, 1994); Declaration on the Rights of Indigenous Peoples, Preamble & arts. 2 & 21, G.A. Res. 61/295, U.N. Doc. A/Res/47/1 (Sept. 13, 2007); Human Rights Council [HRC (Council)] Res. 17/19, Human Rights, Sexual Orientation, and Gender Identity, 17th Sess., May 30–June 17, 2007, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 15, 2011).

<sup>5</sup> See Comm. on the Elimination of all Forms of Discrimination Against Women [CEDAW Committee], General Recommendation No. 28, Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of all Forms of Discrimination Against Women, U.N. Doc. C/2010/47/GC.2 (Oct. 19, 2010) [hereinafter CEDAW Committee, General Recommendation No. 28]; CESCR Committee, General Comment No. 20, *supra* note 1; CEDAW Committee, General Recommendation No. 25, Article 4, Paragraph 1, of the Convention on the Elimination of all Forms of Discrimination Against Women (Temporary Special Measures), U.N. Doc. HRI/GEN/1/Rev.7 at 282 (2004) [hereinafter CEDAW Committee, General Recommendation No. 25].

<sup>6</sup> See, e.g., CEDAW Committee, Communication No. 17/2008, ¶¶ 7.6–7.9, U.N. Doc. CEDAW/C/49/D/17/2008 (Sept. 27, 2011); HRC (Committee), *S.W.M. Brooks v. Netherlands*, Communication No. 172/1984, ¶¶ 12.1–16, U.N. Doc. CCPR/C/29/D/172/1984 (Apr. 9, 1987); *Yatama*, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶¶ 178–229; *Case of the Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 130, ¶¶ 110–192 (Sept. 8, 2005); *Maya Indigenous Communities of the Toledo Dist. v. Belize*, Case 12,053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 ¶¶ 157–171 (2004); *D.H. and Others v. Czech Republic*, App. No. 57325/00, Eur. Ct. H.R. (2008).

<sup>7</sup> See generally CEDAW Committee, General Recommendation No. 25, *supra* note 5; CEDAW Committee, General Recommendation No. 28, *supra* note 5; Declaration on the Elimination of Violence Against Women, Preamble & arts. 3 (b), (d), (e), G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Feb. 23, 1994); Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, U.N. Docs. A/CONF.177/20 & A/CONF.177/20/Add.1 (Sept. 15, 1995).

<sup>8</sup> U.N. Dep't of Econ. and Soc. Affairs, *World Population Prospects, 2010 Revision* (June 28, 2011), <http://esa.un.org/wpp/Excel-Data/population.htm> (calculations based on world total population and world female population).

<sup>9</sup> See e.g., Inter-Am. Comm'n H.R. [IACHR], *The Work, Education, and Resources of Women: The Road to Equality in Guaranteeing Economic, Social, and Cultural*

societies.<sup>10</sup>

Accordingly, the leading international treaty on this issue—the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)—is based on the premise “that women have suffered, and continue to suffer several forms of discrimination” due to their sex and gender.<sup>11</sup> This treaty identifies the guarantees of non-discrimination and equality as preconditions for women’s full exercise of their civil, political, economic, social, and cultural rights.<sup>12</sup>

Even though the prohibition of discrimination and the guarantee of equality span as far as the adoption of the Universal Declaration of Human Rights,<sup>13</sup> the definition of their scope in terms of state obligations is still in development.<sup>14</sup> International legal bodies continue to shed light on the scope of the duty of states to address discrimination at the national level, how to achieve the general goal of “equality,” and how these obligations vary according to the subject of protection.<sup>15</sup> This challenging task has mostly been un-

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Rights, OEA/Ser.L/V/II.143 Doc. 59, ¶ 4 (Nov. 3, 2011) [hereinafter IACHR, The Work, Education, and Resources of Women].

<sup>10</sup> See e.g., U.N. SECRETARY-GENERAL, ENDING VIOLENCE AGAINST WOMEN: FROM WORDS TO ACTION, at 29, 34 & 36, U.N. Sales No. E.06.IV.8 (2006); U.N. WOMEN, 2011–2012 PROGRESS OF THE WORLD’S WOMEN: IN PURSUIT OF JUSTICE, at 8 (2012); THE WORLD BANK, WORLD DEVELOPMENT REPORT 2012: GENDER EQUALITY AND DEVELOPMENT, at 13–22 (2012).

<sup>11</sup> CEDAW Committee, General Recommendation No. 25, *supra* note 5, ¶ 5. The Convention not only refers to discrimination on the basis of “sex,” but also on the basis of “gender.” The term “sex” refers to biological differences between men and women. The term “gender” alludes to “socially constructed identities, attributes and roles for women and society’s social and cultural meaning for these biological differences,” which result in hierarchical relationships between women and men, and in the unequal distribution of power between men and women. *Id.*

<sup>12</sup> CEDAW Convention, *supra* note 2, arts. 1–3, 7–14.

<sup>13</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

<sup>14</sup> See generally CESCR Committee, General Comment No. 20, *supra* note 1; Comm. on the Elimination of Racial Discrimination [CERD], General Recommendation No. 31, Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, U.N. Doc. A/60/18 at 98–108 (2005) [hereinafter CERD Committee, General Recommendation No. 31]; CERD, General Recommendation No. 32, Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/GC/32 (Sept. 24, 2009) [hereinafter CERD Committee, General Recommendation No. 32]; Clift v. United Kingdom, App. No. 7205/07, ¶¶ 56–74 (Eur. Ct. H.R. 2010); Kiyutin v. Russia, App. No. 2700/10, ¶¶ 56–74 (Eur. Ct. H.R. 2011); Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 265–275 (Aug. 24, 2010).

<sup>15</sup> See generally CEDAW Committee, General Recommendation No. 25, *supra* note 5; CEDAW Committee, General Recommendation No. 28, *supra* note 5; CERD Committee, General Recommendation No. 31, *supra* note 14; CERD Committee, General

dertaken by United Nations treaty-based bodies and regional human rights tribunals.<sup>16</sup> Such entities are aiming to answer the question of what it entails for a state to “respect, protect and fulfill” or to “respect and ensure” women’s right to non-discrimination and to fully enjoy equality, as well as those of other sectors of the population.<sup>17</sup>

The decisions and reports issued by the organs of the Inter-American human rights system<sup>18</sup> are part of this trend of analysis.<sup>19</sup>

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Recommendation No. 32, *supra* note 14; D.H. and Others v. Czech Republic, App. No. 57325/00, ¶¶ 175–210 (Eur. Ct. H.R. 2008); Opuz v. Turkey, App. No. 33401/02, ¶¶ 183–202 (Eur. Ct. H.R. 2009); Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶¶ 102–114, 160–170 (2011); Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. Comm’n H.R., Report No. 4/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶¶ 44–52 (2001).

<sup>16</sup> See Universal Declaration of Human Rights, *supra* note 13; CEDAW Committee, General Recommendation No. 25, *supra* note 5; CEDAW Committee, General Recommendation No. 28, *supra* note 5; CERD Committee, General Recommendation No. 31, *supra* note 14; CERD Committee, General Recommendation No. 32, *supra* note 14; D.H. and Others, App. No. 57325/00, at ¶¶ 175–210; Opuz, App. No. 33401/02, at ¶¶ 183–202; Jessica Lenahan (Gonzales), Inter-Am. Comm’n H.R., at ¶¶ 102–114, 160–170; Morales de Sierra, Inter-Am. Comm’n H.R., OEA/Ser.L./V/II.111, doc. 20 rev. at ¶¶ 44–52.

<sup>17</sup> See CEDAW Committee, General Recommendation No. 28, *supra* note 5; CESC Committee, General Comment No. 20, *supra* note 1; IACHR, Legal Standards Related to Gender Equality and Women’s Rights in the Inter-American Human Rights System: Development and Application, OEA/Ser.L./V/II. 143 Doc. 60 (Nov. 3, 2011) [hereinafter IACHR, Legal Standards Related to Gender Equality and Women’s Rights]; IACHR, The Work, Education, and Resources of Women, *supra* note 9. See also sources cited *supra* note 16.

<sup>18</sup> The Inter-American human rights system is mainly composed of two organs—the Inter-American Commission on Human Rights and the Court—entrusted by the Member States of the Organization of American States to promote the observance and defense of human rights throughout the hemisphere. See American Convention, *supra* note 3, at arts. 33–73.

The Commission, as part of its mandate, receives, reviews, and investigates individual petitions that allege human rights violations, including those with gender-specific causes, grounded on the obligations contained in key regional human rights instruments, such as the American Convention, the American Declaration of the Rights and Duties of Man, and the Convention of Belém do Pará. Any person, group of persons, or nongovernmental organization may present a petition to the Commission alleging violations of the rights protected in the American Convention and other regional instruments. Petitions can also be presented before the Commission under the American Declaration in cases involving states that are not states parties to the American Convention. The Court for its part adjudicates individual cases related to human rights violations referred to it by the Commission and issues advisory opinions on matters of legal interpretation. See American Convention, *supra* note 3, arts. 34–69.

<sup>19</sup> See discussion on the development of standards related to the obligations to not discriminate and to guarantee equality contained in IACHR, Legal Standards Related to Gender Equality and Women’s Rights, *supra* note 17; IACHR, The Work, Education, and Resources of Women, *supra* note 9, at 3–25; IACHR, The Situation of People of African Descent in the Americas, OEA/Ser.L./V/II. Doc. 62, at 29–35 (Dec. 5, 2011).

Both the Inter-American Commission on Human Rights (“the Commission”) and the Inter-American Court of Human Rights (“the Court”) have begun the process of defining the contours of the obligations not to discriminate and to guarantee equality in the realm of the rights of women.<sup>20</sup> A significant part of this analysis has been dedicated to shedding light on the scope of articles 1(1) and 24 of the American Convention; article II of the American Declaration; and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (“Convention of Belém do Pará”), in light of CEDAW, and other international instruments and treaties.<sup>21</sup> Some important legal developments within this system since 1994 are noteworthy, including subjecting distinctions based on sex to “strict scrutiny,” or rigorous review;<sup>22</sup> the consolidation of the link between discrimination and violence against women and the state’s duty to act with due diligence to address these public problems;<sup>23</sup> the negative and positive components of the state’s obligation to address discrimination at the national level;<sup>24</sup> the recognition of the disproportionate and discriminatory impact on women of restrictions in the exercise of their reproductive rights;<sup>25</sup> and the identification of gender elements related to the content and scope of articles 1.1 and 24 of the

<sup>20</sup> For more analysis, see IACHR, Legal Standards Related to Gender Equality and Women’s Rights, *supra* note 17; Rosa M. Celorio, *The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting*, 65 U. MIAMI L. REV. 819 (2011).

<sup>21</sup> See sources cited *supra* note 20.

<sup>22</sup> *Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am Comm’n H.R., Report No. 4/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 36 (2001).

<sup>23</sup> See, e.g., *Jessica Lenahan v. United States (Gonzales)*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011); *María da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. (2001); *González v. Mexico (Cotton Field)*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009); *Fernández Ortega v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215 (Aug. 30, 2010); *Rosendo Cantú and Other v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216 (Aug. 31, 2010).

<sup>24</sup> See *Case of the Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C.) No. 130, ¶ 141 (Sept. 8, 2005) (holding that the right to equal protection of the law and to non-discrimination mandates that “States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights. Moreover, States must combat discriminatory practices at all levels, particularly in public bodies and, finally, must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals.”).

<sup>25</sup> *Artavia Murillo v. Costa Rica*, Case 12.361, Inter-Am. Comm’n H.R., Report No. 85/10, ¶¶ 128–131 (2010).

American Convention.<sup>26</sup>

Amidst these legal developments, the Inter-American Commission ruled on its first case related to discrimination on the basis of sexual orientation on December 18, 2009, in the context of female victims.<sup>27</sup> The decision was issued in the case of *Karen Atala and Daughters vs. Chile* (“*Karen Atala and Daughters*” or “*Karen Atala*”).<sup>28</sup> This case originated with a petition presented before the Inter-American Commission on Human Rights on November 24, 2004, alleging that the Chilean State was responsible for human rights violations committed in the context of a proceeding where Mrs. Karen Atala, a well-known judge, lost custody of her three daughters—M., V., and R.—based on her sexual orientation by means of a Supreme Court of Justice decision.<sup>29</sup> The Commission ruled in favor of the Petitioners finding a violation of several rights contained in the American Convention, including the right to equal protection and the obligation not to discriminate; the rights to protection of the family and privacy; the rights of the child; and the right to judicial protection and guarantees.<sup>30</sup>

Upon considering that the State of Chile had not properly complied with its recommendations, the Commission sent this case to the Inter-American Court for its contentious review on September 17, 2010.<sup>31</sup> The Court for its part issued a landmark ruling on February 24, 2012, in favor of Karen Atala and M., V., and R.<sup>32</sup> In its ruling, the Court found for the first time that discrimination on the basis of sexual orientation and gender identity is comprehended within the phrase “other social condition” under article 1.1 of the American Convention.<sup>33</sup> The Court also presents groundbreaking analysis in regard to the content of the obligations not to discriminate and to guarantee equality;<sup>34</sup> their link with the right

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<sup>26</sup> See e.g., *Cotton Field*, Inter-Am Ct. H.R. (ser. C) No. 205, ¶¶ 390–402 (Nov. 16, 2009) (indicating how the application of gender-based stereotypes by public officials in their investigation of violence against women cases contravenes the general obligation not to discriminate encompassed in Article 1(1) of the American Convention).

<sup>27</sup> See *Atala and Daughters v. Chile*, Application, Inter-Am. Ct. H.R. (Sept. 17, 2010) [hereinafter *Atala*, Application].

<sup>28</sup> *Id.*

<sup>29</sup> *Atala and Daughters v. Chile*, Petition 1271-04, Inter-Am. Comm’n H.R., Report No. 42/08, OEA/Ser.L/V/II.130, doc. 22, rev. 1 ¶¶ 1–2 (2008) [hereinafter *Atala*, Petition].

<sup>30</sup> See *Atala*, Application, *supra* note 27.

<sup>31</sup> *Id.* ¶¶ 24–39.

<sup>32</sup> *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

<sup>33</sup> *Id.* ¶ 91.

<sup>34</sup> *Id.* ¶ 139.

to privacy and protection of the family of persons;<sup>35</sup> the elements that should inform the pursuance of the best interests of the child as an imperative objective in custody proceedings;<sup>36</sup> and the presence of prejudices and stereotypes in the actions of justice officials as contrary to different dispositions contained in the American Convention, among other considerations.<sup>37</sup>

The author suggests in this Article that both the Commission's and Court's decisions in the case of *Karen Atala and Daughters* represent key contributions to the development of legal standards in five key areas related to the obligations not to discriminate, the guarantee of equality, and the rights of women, including: 1) the scope and reach of the obligations not to discriminate and to guarantee equality under articles 1.1 and 24 of the American Convention; 2) the features of the "rigorous scrutiny" standard and its applicability to prohibited factors of discrimination; 3) the prohibition of discrimination on the basis of sexual orientation and gender identity, and its applicability to individual cases related to women; 4) the correlation of this prohibition with the rights to privacy and to protection of the family under international human rights law; and 5) the content of the best interests of the child under international human rights law.

This Article concludes that further definition by the Inter-American Commission and the Court of the content and scope of the obligations not to discriminate and to guarantee equality in individual cases—such as the one related to *Karen Atala and Daughters*—is paramount to the development of adequate and effective international legal standards related to women's rights.<sup>38</sup> These obligations are of utmost importance as they are not only contained in articles 1.1 and 24 of the American Convention, but they constitute the backbone of the Inter-American and universal systems of human rights. They are also priority women's rights issues pertaining to civil, political, economic, social, and cultural rights. It is also

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<sup>35</sup> *Id.* ¶ 165.

<sup>36</sup> *Id.* ¶¶ 108–09.

<sup>37</sup> *Id.* ¶¶ 145–46.

<sup>38</sup> The Author understands the concept of a "legal standard" as a guideline for the state involved on how to adequately implement at the national level the binding and individual rights contained in the governing instruments of the Inter-American system of human rights, and other international human rights treaties. Therefore, the decisions in the *Karen Atala* case constitute authoritative pronouncements from international legal bodies related to the scope of the individual articles of the American Convention linked to the guarantees of non-discrimination and equality. For more discussion, see generally Celorio, *The Rights of Women in the Inter-American System of Human Rights*, *supra* note 20, at 819.

paramount to understand the connection between the obligations not to discriminate and to guarantee equality with the full panoply of human rights involved in the obligation to respect and guarantee the rights of women, including those related to their sexual orientation, gender identity, privacy, family, and children. Legal developments in this sense would also open the door for the Inter-American Commission and the Court's resolution of cases involving forms of discrimination that affect women based on their sex, and other factors of discrimination still unrecognized as "prohibited" or "suspect" by the international community.

This Article is divided in three parts. First, the Article discusses the Inter-American Commission's merits decision in the case of *Karen Atala and Daughters*, the Commission's allegations before the Inter-American Court of Human Rights, and the Court's ruling in this case. In the second part, it reviews what the Author considers to be the key contributions of the Commission's decision and the Court's ruling to the development of legal standards in the realms of discrimination, equality, and women's rights, in five key areas. In the third part, the Article closes with some final conclusions and observations.

## II. THE CASE OF *KAREN ATALA AND DAUGHTERS*: ITS PATH THROUGH THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

In this section, the Author reviews the processing of the case of *Karen Atala and Daughters* through the organs of the Inter-American system of human rights, namely, the Inter-American Commission and the Court. First, the Article examines the main findings, conclusions, and recommendations of the Commission's merits decision; findings which also constitute the basis for the allegations brought forth by the Commission before the Inter-American Court of Human Rights on September 17, 2010.<sup>39</sup> The Author analyzes the resolution of the Commission in the following order: a) allegations presented by the Petitioners and the State of Chile before the Commission; b) main legal findings and conclusions; c) recom-

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<sup>39</sup> In cases where the relevant state "has accepted the jurisdiction of the Inter-American Court in accordance with article 62 of the American Convention, and the Commission considers that the State has not complied with the recommendations of the report approved in accordance with article 50 of the American Convention, it shall refer the case to the Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary." See Rules of Procedure of the Inter-American Commission on Human Rights, art. 45(1) (2009), available at <http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm>.

mentations issued to the State; and d) processing after merits report.

Second, the Author analyzes some of the main findings and conclusions of the Inter-American Court in its judgment of February 24, 2012.

A. *Processing of Case before the Inter-American Commission*

1. Allegations of the Petitioners and the State

The Petitioners in this case<sup>40</sup> alleged before the Commission that the State of Chile had committed a number of human rights violations in the context of a custody proceeding in detriment of Karen Atala and her daughters M., V., and R.<sup>41</sup> Petitioners claimed that said proceeding—initiated by Karen Atala’s former husband—ended in a ruling by the Supreme Court of Justice of Chile that revoked Mrs. Karen Atala’s custody of her three daughters—ages 5, 6, and 10 at the time of the events—based exclusively on discriminatory prejudices related to her sexual orientation.<sup>42</sup>

The Petitioners sustained before the Commission that Karen Atala married Ricardo Jaime López Allende on March 29, 1993, and that M., V. and R. were conceived in the course of this relationship.<sup>43</sup> The couple decided to end their marriage on March 2002, establishing by mutual agreement that Karen Atala would maintain custody of their daughters.<sup>44</sup> In June of 2002, Karen Atala initiated a relationship with a person of the same sex and began cohabiting with her during November of that year.<sup>45</sup>

On January 15, 2003, Ricardo Jaime López Allende filed a suit claiming custody of his daughters with the Juvenile Court of Villarrica asserting that Karen Atala “is not capable of watching over and caring for them [*sic*], that her new sexual lifestyle choice, in addition to her cohabiting in a lesbian relationship with another woman, are producing and will necessarily produce harmful consequences for the development of these minors”<sup>46</sup> and referred to the risk of the children contracting sexually transmitted diseases

<sup>40</sup> On August 18, 2008, Mrs. Karen Atala provided the Commission updated information on the attorneys that were representing her: Macarena Sáez, Public Liberties. They are also the representatives for this case before the Inter-American Court of Human Rights. See *Atala*, Petition, *supra* note 29, ¶ 1.

<sup>41</sup> *Id.* ¶¶ 1–2.

<sup>42</sup> *Id.* ¶¶ 14–32.

<sup>43</sup> See *Atala*, Application, *supra* note 27, ¶ 40.

<sup>44</sup> *Id.*

<sup>45</sup> *Atala*, Petition, *supra* note 29, ¶ 15.

<sup>46</sup> *Atala*, Application, *supra* note 27, ¶ 41 n. 15.

such as herpes and AIDS.<sup>47</sup>

The Petitioners noted that the custody proceeding was highly publicized in Chile,<sup>48</sup> and consisted of a series of judicial actions, rising to the level of the Supreme Court of Justice on May 31, 2004, which granted permanent custody to the father.<sup>49</sup> They also claimed that as a result of the public nature of the custody proceeding, Karen Atala was the subject of an investigation ordered by the Chilean justice system, the findings of which were disclosed by the media, including facts pertaining to her private life.<sup>50</sup> The Petitioners also noted that the final report of the judge appointed to perform this investigation alluded to her sexual orientation, concluding that it damaged the image of both Karen Atala and the Judicial Branch.<sup>51</sup>

The Petitioners presented a number of legal claims before the Commission pertaining to these events.<sup>52</sup> They mainly argued that Karen Atala was discriminated against throughout the custody proceedings on the basis of prejudicial notions and stereotypes related to her sexual orientation, rather than afforded an objective evaluation of her capacity to be a fit mother.<sup>53</sup> Among its considerations, the Supreme Court considered that Karen Atala had placed her own interests before those of her daughters by deciding to cohabit with a person of the same sex, and this “unique family environment” posed a risk to their development.<sup>54</sup>

This decision from the Supreme Court allegedly took place

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<sup>47</sup> *Id.*

<sup>48</sup> *Atala*, Petition, *supra* note 29, ¶ 16.

<sup>49</sup> The judicial actions in the process included a decision handed down on May 2, 2003 by the Regular Judge of the Juvenile Court of Villarica granting provisional custody of the girls to their father; a first instance ruling handed down by the Acting Judge of the Juvenile Court on October 29, 2003, granting custody to the mother; an injunction not to move the girls issued by the Court of Appeals in Temuco on November 24, 2003 that prevented the girls from being handed over to their mother; a decision by the Court of Appeals of Temuco on March 30, 2004 confirming the first instance decision granting custody to the mother; a second injunction issued by the Supreme Court of Justice of Chile on April 7, 2004 suspending delivery of the girls to their mother; and a decision by the Supreme Court of Justice of Chile on May 31, 2004 granting permanent custody to the father. *See Atala*, Application, *supra* note 27, ¶¶ 47–65.

<sup>50</sup> *Id.* ¶¶ 44–46 (citing to a report prepared by Judge Lenin Lillo Hunzinker, Court of Appeals of Terjucu, April 2, 2003 and Decision of the Court of Appeals of Terruco, May 9, 2003).

<sup>51</sup> *Id.*

<sup>52</sup> *See Atala*, Petition, *supra* note 29, ¶¶ 13–32.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* ¶ 21 (quoting judgment of the Supreme Court of Justice of Chile, May 31, 2004).

even though the factual record—prepared by lower courts that ruled favorably for Karen Atala—was devoid of any evidence indicating that the girls were indeed harmed by their mother’s cohabitation with a person of the same sex.<sup>55</sup> The Petitioners considered that this judgment was particularly serious in a context where the Chilean Civil Code contains a presumption of custody in favor of the mother in cases where parents separate, and limits the grounds on the basis of which a mother can be deprived of the same.<sup>56</sup>

At the heart of the case before the Inter-American Commission, the Petitioners sustained that the Supreme Court discriminated against Karen Atala due to a distinction based on her sexual orientation, neither objective nor reasonable, causing irreparable harm to her and her daughters.<sup>57</sup> They alleged that sexual orientation should be understood as a prohibited factor of discrimination under the phrase “other social condition” contained in article 1.1 of the American Convention.<sup>58</sup>

On the basis of this discrimination and prejudice, the Petitioners further claimed that the State interfered arbitrarily and abusively in the private and family life of Karen Atala and her daughters, and that it violated her daughters’ rights as children due to the biased evaluation of which parent would be more fit to care for them, which ended up harming them, instead of protecting them.<sup>59</sup> The Petitioners also maintained that a series of due process violations were committed during the custody case, in violation of articles 8.1 and 25 of the American Convention.<sup>60</sup>

Throughout the proceedings, the State of Chile argued that the decision of its Supreme Court of Justice had as its primary ob-

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<sup>55</sup> *Id.* ¶ 17.

<sup>56</sup> Article 225 of the Civil Code of Chile stipulates: “If the parents live separately, the mother shall see to the personal care of the children. . . . Be that as it may, when necessary to protect the interests of the child, whether because of mistreatment, neglect, or another just cause, the judge may transfer the care of the child to the other parent.” Cód. Civ. [CIVIL CODE] art. 225. Said article was reportedly the subject of an extensive parliamentary review to protect the best interests of the child, and to limit the grounds based on which a mother may be deprived of custody. *See Atala*, Petition, *supra* note 29, ¶ 25.

<sup>57</sup> *See Atala*, Petition, *supra* note 29, ¶¶ 13–32.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* ¶ 13.

<sup>60</sup> The Petitioners claimed in particular that the State of Chile violated the judicial protection and guarantees contained in articles 8(1) and 25 of the American Convention since the Supreme Court of Justice of Chile issued the custody ruling by means of a disciplinary action (*recurso de queja*), which is a remedy of a purely disciplinary nature designed to correct the faults or abuses committed in judicial decisions. The Petitioners propose that, in this way, the Supreme Court opened a third judicial instance that does not exist in the Chilean criminal procedure. *See id.* ¶ 65.

jective the protection of the best interests of the girls involved.<sup>61</sup> The State sustained that the judgment did not violate the rights of the girls, since it was based on “the imperative need to protect the best interests of the daughters, threatened, according to the evidence in the case, by the conduct of the mother, who opted to cohabit with a partner of the same sex, with whom she proposed to raise her daughters, which was deemed inadvisable for the girls’ upbringing and a risk to their development given the current climate in Chilean society.”<sup>62</sup>

## 2. Main Legal Findings and Conclusions

The Commission admitted this case on July 23, 2008, finding that the allegations could constitute violations of articles 24 (right to equal protection of the law); 11(2) (right to a private life free of arbitrary or abusive interference); 17(1) (right to protection of the family); 8(1) (right to a fair trial); 25 (judicial protection and guarantees) in detriment of Karen Atala; and articles 19 (rights of the child) and 17(4) (the balancing of rights between spouses at the dissolution of marriage) in regard to M., V., and R.<sup>63</sup> The Commission admitted these articles in connection with the obligation to respect and guarantee all rights free from discrimination contained in article 1.1 (obligation to respect rights and non-discrimination provision) of the American Convention.<sup>64</sup> On December 18, 2009, the Commission issued a merits report finding a violation of all of these articles. The Commission’s conclusions are summarized below.

### a. *Legal Analysis Related to the Rights to Equality and Non-Discrimination (Articles 24 and 1(1) of the American Convention)*

The Commission concluded that the State of Chile violated Karen Atala’s right to equal protection free from all forms of discrimination enshrined in article 24 of the American Convention, as it relates to the duty to respect and guarantee rights as established in article 1.1.<sup>65</sup> In its decision, the Commission undertakes a thorough analysis of the “interrelation, scope, and content” of articles 1.1 and 24 of the American Convention, and then proceeds to ap-

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<sup>61</sup> *Id.* ¶ 35.

<sup>62</sup> *Id.* (citing Response of the State of Chile, Ministry of Foreign Affairs, Dept. of H.R., June 15, 2005).

<sup>63</sup> *Atala*, Petition, *supra* note 29, ¶ 4.

<sup>64</sup> *Id.*

<sup>65</sup> *See Atala*, Application, *supra* note 27, ¶ 108.

ply these legal principles to the facts of the case.<sup>66</sup>

The Commission reiterates some principles ingrained in the jurisprudence of the system, namely, that the rights to equality and non-discrimination are central to the Inter-American human rights system; that they entail obligations *erga omnes*<sup>67</sup> of protection that bind all states and generate effects with respect to third parties; and the connection between the principles of equality and non-discrimination.<sup>68</sup>

In its reasoning, the Commission also offers its view of the different “conceptions” of the principles of equality and non-discrimination.<sup>69</sup> One conception is predicated in the prohibition against any form of “arbitrary difference in treatment”—defined as any distinction, exclusion, restriction, or preference.<sup>70</sup> A second conception is premised on the obligation to “ensure conditions of true equality for groups which have been historically excluded, and are at greater risk of discrimination.”<sup>71</sup> The Commission considers that even though both variants may be at issue in certain cases, each of them “warrants a different response from the State, and a different treatment under the American Convention.”<sup>72</sup>

There are other groundbreaking elements to the Commission’s analysis. The Commission innovatively finds that sexual orientation is covered by the phrase “other social condition” contained in article 1.1.<sup>73</sup> The Commission interprets article 1.1 as an open clause in accordance with current times and evolving social conditions and follows the precedent of other international bodies—such as the European Court, the Human Rights Committee, and the Economic, Social, and Cultural Rights Committee—in the flexible interpretation of the non-discrimination clause contained in major human rights treaties.<sup>74</sup>

The Commission goes further and also concludes that sexual

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<sup>66</sup> *Id.* ¶ 74–108.

<sup>67</sup> The Commission refers in particular to an advisory opinion titled *Juridical Condition and Rights of Undocumented Migrants*. *Id.* ¶ 74; *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion, OC-18/03, Inter-Am. Ct. H.R., (ser. A) No. 18, ¶ 173(5) (Sept. 17, 2003) (“That the fundamental principle . . . of equality and non-discrimination, which is of a preemptory nature entails obligations *erga omnes* of protection that bind all States and generate effects with regard to parties, including individuals.”).

<sup>68</sup> *See Atala*, Application, *supra* note 27, ¶ 77.

<sup>69</sup> *Id.* ¶ 80.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *See id.*

<sup>73</sup> *Id.* ¶ 94.

<sup>74</sup> *Atala*, Application, *supra* note 27, ¶ 95.

orientation is a “suspect category” of discrimination, subject to a particularly rigorous standard of review, or “strict scrutiny.”<sup>75</sup> In this regard, the Commission begins its analysis by stating that this rigorous standard is applicable to categories that are expressly referenced in the non-discrimination clauses contained in international human rights treaties.<sup>76</sup> These expressly referenced grounds are considered “suspect,” and, therefore, potentially based on the prejudices and stereotypes that underlie discrimination,<sup>77</sup> the application of this “strict standard of review” shifts the burden of proof to the state, and demands that very “weighty reasons” are presented to justify a given distinction.<sup>78</sup> Even though not expressly referenced in article 1.1, the Commission also applies the strict scrutiny standard to “sexual orientation” as a prohibited ground of discrimination—including homosexuality, its expression, and its necessary consequences on a person’s life plans.<sup>79</sup> It does this following the precedent issued by the European Court of Human Rights, among other international bodies.<sup>80</sup>

Applying this analysis to the facts of the case, the Commission made some key findings. It first established that the decision of the Chilean Supreme Court was based on Karen Atala’s sexual orientation, despite the State’s arguments.<sup>81</sup> The State had maintained that the Supreme Court’s decision was not based on Karen Atala’s sexual orientation, but on her cohabitation with a partner of the same sex, and the effect that situation could have on M., V., and R.<sup>82</sup> The Commission instead found that the decision was based on Karen Atala’s expression of her sexual orientation as displayed by the language used by the Supreme Court of Chile.<sup>83</sup> The Supreme Court had referred explicitly in the judgment to “the absence of a male parent in the home,” and the impact it could have on the girls’ “mental and emotional wellbeing”; the “exceptional family environment of M., V., and R.,” different from that “of their

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<sup>75</sup> *Id.* ¶ 94.

<sup>76</sup> The Commission describes this more standard test as involving several elements, including: a) the existence of a legitimate goal, the suitability or logical means-to-end relationship between the goal sought and the distinction; b) the existence of other alternatives; and c) proportionality—understood as a balance among the interests involved, and the level of sacrifice demanded from one party in comparison to the level of benefit to the other. *See id.* ¶ 86.

<sup>77</sup> *Id.* ¶ 88.

<sup>78</sup> *Id.* ¶ 89.

<sup>79</sup> *Id.* ¶ 96.

<sup>80</sup> *Atala*, Application, *supra* note 27, ¶ 92.

<sup>81</sup> *See id.* ¶ 96.

<sup>82</sup> *See id.*

<sup>83</sup> *See id.* ¶¶ 97–98.

schoolmates and neighborhood acquaintances, exposing them to the risk of isolation and discrimination”; and the consideration that Karen Atala had “placed her freedom to express her homosexuality above the girls’ right to grow up in a normally structured and socially accepted family in accordance with the corresponding traditional model.”<sup>84</sup>

Secondly, the Commission—applying the strict scrutiny standard—considered that the State had a legitimate end in its actions by aiming to protect the interest of Karen Atala’s daughters by means of the custody decision.<sup>85</sup> It did not find, however, that the decision met the “suitability” requirement, since there was no evidence indicating that Karen Atala’s sexual orientation—or the expression of it in her life plans—posed a treat to her daughters.<sup>86</sup> Therefore, the Commission found that the Supreme Court based its decision on assumptions of risk grounded on prejudices and stereotypes regarding the characteristics and behavior of a given social group.<sup>87</sup> In conclusion, the Commission deemed other aspects of the test irrelevant to the decision.<sup>88</sup>

b. *The Right to a Private Life of Karen Atala (Article 11.2 of the American Convention)*

The Commission also established in its merits report that the State—by means of a custody decision rooted in prejudices based on sexual orientation—violated the right of Karen Atala to live free from abusive and arbitrary interferences in her private life, a right protected under article 11(2) of the American Convention.<sup>89</sup> Among its findings, and based on European Court precedent, the Commission highlighted that sexual orientation is a fundamental component of the private life of an individual, which should be free from arbitrary and abusive interferences by the state in the absence of weighty and convincing reasons.<sup>90</sup>

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<sup>84</sup> See *id.* ¶ 98.

<sup>85</sup> *Id.* ¶ 99.

<sup>86</sup> *Atala*, Application, *supra* note 27, ¶ 103.

<sup>87</sup> See *id.*

<sup>88</sup> *Id.* ¶ 105.

<sup>89</sup> *Id.* ¶ 117.

<sup>90</sup> See *id.* ¶ 113 (“There is a clear nexus between the sexual orientation and the development of the identity and life plan of an individual, including his or her personality, and relations with other human beings,” referencing *E. B. v. France*, App. No. 43546/02 ¶ 91 (Eur. Ct. H.R. 2008); *Smith and Grady v. United Kingdom*, App. Nos. 33985/96 & 33986/96 ¶ 89 (Eur. Ct. H.R. 1999); *Lustig-Prean and Beckett v. United Kingdom*, App. Nos. 31417/96 & 32377/96 ¶ 82 (Eur. Ct. H.R. 1999); *Karner v. Austria*, App. No. 40016/98 ¶ 37 (Eur. Ct. H.R. 2003).

In regard to the specific facts of this case, the Commission considered that while it may be necessary for judicial authorities in the framework of a custody proceeding to review aspects of a person's private life, a person's sexual orientation, on its own, is not a relevant criterion to determining a person's capacity to exercise custody over his or her children.<sup>91</sup> Therefore, in this particular case, the Commission held that the State's interference in the private life of Karen Atala was arbitrary, since the custody decision was based on discriminatory prejudices predicated on her sexual orientation, and not in an objective assessment of each of the parents' capacity to exercise custody of their daughters.<sup>92</sup>

c. *The Right to Private and Family Life of Karen Atala and her Daughters (Articles 11.2 and 17.1 of the American Convention)*

The Commission in its merits report established a connection between an individual's right to a private life with his or her right to protection of the family protected under article 17.1 of the American Convention.<sup>93</sup> The right to protection of the family underscores the central role of the family in a person's existence and life plans.<sup>94</sup> The Commission also held that the right to a private and family life extends to the development of relations between family members and the role of emotional relations in the life project of each of its members.<sup>95</sup>

In this particular case, the Commission held that a family comprising Karen Atala and her daughters was established in March of 2002, and after this arrangement was agreed-upon, the girls' father filed suit to secure custody for himself.<sup>96</sup> Therefore, the Commission held that the judgment denied the girls the opportunity to grow up alongside their mother. It also denied their mother the possibility of contributing to their development and upbringing, thereby altering their family life plans in a dramatic and irreparable fashion.<sup>97</sup> Thus, the Commission appealed to the Court to find that the State of Chile interfered arbitrarily and abusively in the family life of Karen Atala and M., V., and R. in violation of articles 11.2 and 17.1 of the American Convention, in conjunction with the

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<sup>91</sup> See *Atala*, Application, *supra* note 27, ¶ 114.

<sup>92</sup> *Id.* ¶ 115.

<sup>93</sup> *Id.* ¶ 118.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* ¶ 122.

<sup>96</sup> *Id.* ¶ 120.

<sup>97</sup> See *Atala*, Application, *supra* note 27, ¶ 121.

obligation contained in article 1.1 thereof, by means of amending the custody regime solely on the basis of discriminatory prejudices regarding Karen Atala's sexual orientation.<sup>98</sup>

d. *The Rights of the Child and the Equal Rights of Spouses Following the Dissolution of a Marriage (Articles 19 and 17.4 of the American Convention)*

The Commission's ruling advances important standards related to the rights of the child, along with the rights of spouses vis-à-vis their children after a marriage is dissolved.<sup>99</sup> The ruling reiterates the duty of states under article 19 of the American Convention to offer special protection to children—an obligation particularly important in cases where parents separate.<sup>100</sup> It also underscores the importance under article 17.4 of adopting special protection measures for children when their parents dissolve their marriage and of safeguarding the right of each parent to participate in the upbringing of their children free from any form of discrimination, as a key to furthering the best interests of the children involved.<sup>101</sup>

The Commission also highlights several rights of children that are protected under the Convention on the Rights of the Child during legal proceedings that could end in their separation from their parents.<sup>102</sup> It underscores foremost the obligation of State parties to hear the opinions of children in judicial processes that directly affect them.<sup>103</sup>

In light of these standards, the Commission held that the custody decision handed down by the Supreme Court of Justice of Chile did not advance the best interests of M., V., and R. by separating them “arbitrarily, permanently, and irreparably” from their mother in the absence of clear evidence of harm to their welfare.<sup>104</sup> The Commission considered that the decision also stigmatized the girls “for having a homosexual mother and for living in a family not accepted by general Chilean society, thus embracing and legitimizing the prejudices and stereotypes toward homosexual couples and children raised by such couples,” which were advanced by the father's custody suit.<sup>105</sup> In this context, the

<sup>98</sup> *Id.* ¶ 123.

<sup>99</sup> *See id.* ¶¶ 126–127.

<sup>100</sup> *Id.* ¶ 126.

<sup>101</sup> *Id.* ¶ 127.

<sup>102</sup> *Id.* ¶¶ 129–130.

<sup>103</sup> *Atala*, Application, *supra* note 27.

<sup>104</sup> *Id.* ¶ 131.

<sup>105</sup> *Id.*

Commission considered particularly serious that the Supreme Court failed to take into account the girls' preferences and needs during the custody proceedings, in contrast to what occurred in lower courts.<sup>106</sup> The Commission underscores that:

. . . the girls' best interests cannot be used by the State as a pretext to discriminate against a specific group of people, and that removing children from their home environment must be an exceptional measure, on account of the irreparable damage it can cause to the structure of the family and their life plans.<sup>107</sup>

In the end, the Commission stated that the girls were entitled to a justice system that would look out for their interests during all stages of the proceedings by considering their opinion and by investigating and assessing the capacity of both parents to care for them—an objective analysis that did not take place in the custody proceeding at issue.<sup>108</sup>

*e. Right to a Fair Trial and to Judicial Protection (Articles 8.1 and 25 of the American convention)*

The Commission in its ruling also established a link between the guarantee of impartiality that must permeate all judicial proceedings under article 8.1 of the American Convention and the use of discriminatory prejudices to ground a legal decision.<sup>109</sup> The Commission reiterated that the guarantee of impartiality demands that the judge acting within the framework of a legal process approach the facts “of the case subjectively free of all prejudice and also offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality.”<sup>110</sup> The Commission noted that the proceedings encompassed a series of prejudices and discriminatory stereotypes advanced by Ms. Atala's former husband in his suit, later reflected in the provisional custody judgment issued by the Regular Judge of the Juvenile Court in Villarica on May 2, 2003, and then in the judgment issued by the Supreme Court of Justice of Chile.<sup>111</sup>

### 3. Recommendations to the State

Based on the considerations outlined above, the Commission found the State of Chile responsible for the violation of the rights

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<sup>106</sup> *Id.* ¶ 132.

<sup>107</sup> *Id.* ¶ 135.

<sup>108</sup> *Id.* ¶ 133.

<sup>109</sup> *Atala*, Application, *supra* note 27, ¶¶ 137–150.

<sup>110</sup> *Id.* ¶ 141.

<sup>111</sup> *Id.* ¶ 143.

to equality and non-discrimination; private and family life; to protection of the family; to the special protection of girls; to the equal balancing of rights between the spouses; and to judicial guarantees and protection, established in articles 8.1, 11.2, 17.1, 17.4, 19, 24, and 25.1 of the American Convention, in relation to the general obligation not to discriminate contained in article 1.1 of said instrument.<sup>112</sup>

In its report No. 139/09,<sup>113</sup> the IACHR recommended that the Chilean State:

1. Provide Karen Atala and M., V., and R. with comprehensive redress for the human rights violations that arose from the decision to withdraw her custody on the basis of her sexual orientation, taking into consideration their situation and needs; and
2. Adopt legislation, public policies, programs, and directives to prohibit and eradicate discrimination on the basis of sexual orientation from all spheres of public power, including the administration of justice. These measures must be accompanied by adequate human and financial resources to guarantee their implementation, as well as training programs for the public officials involved in upholding those rights.

#### 4. Process After Merits Report

In this case, the Commission gave the State of Chile several months to undertake steps to comply with the recommendations issued by the Commission.<sup>114</sup> After noting the absence of substantive progress in the implementation of its recommendations, the Commission decided to present this case to the Inter-American Court of Human Rights for its contentious review on September 17, 2010.<sup>115</sup>

##### a. *Processing of the Case Before the Inter-American Court of Human Rights*

The processing of the case of *Karen Atala and Daughters* before the Court included analysis of extensive documentation and information submitted by the representatives, the State, and the Commission;<sup>116</sup> the presentation of a significant number of amicus

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<sup>112</sup> *Atala*, Application, *supra* note 27, ¶ 23.

<sup>113</sup> *Id.* ¶ 24.

<sup>114</sup> *Id.* ¶¶ 25–29.

<sup>115</sup> *Id.* ¶ 39.

<sup>116</sup> *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 7–11 (Feb. 24, 2012).*

briefs;<sup>117</sup> and the convening of a public hearing on August 23rd and 24th of 2011.<sup>118</sup> The Court also undertook a judicial diligence, visiting Chile to interview Karen Atala's daughters to gather their observations in relation to the case.<sup>119</sup>

The Court issued its final judgment on February 24, 2012. In its judgment, the Court found a number of violations under the American Convention to the detriment of Karen Atala and M., V., and R. echoing a significant part of the Commission's analysis presented before the Court, but also adding new elements related to the content of the obligations not to discriminate, to guarantee equality, the rights of the child, and the rights to a private and family life, to be discussed in more detail in the following section.<sup>120</sup>

More concretely, in its judgment, the Court found that the State of Chile was responsible for the violations to the rights to equality and the obligation not to discriminate contained in Article 24 of the American Convention, in relation to the obligation to respect and guarantee provided for in article 1.1 of the same instrument, to the prejudice of Karen Atala.<sup>121</sup> It also found violations for the same articles, in relation to the rights of the child contained in article 19 of the American Convention, to the detriment of M., V., and R., as well as their right to be heard, provided for in article 8.1 of the same instrument.<sup>122</sup> The Court also found a violation of the rights of Karen Atala to a private life and to the guarantee of impartiality contained in the American Convention in regard to the disciplinary investigation undertaken against her.<sup>123</sup> Lastly, the Court found violations to the rights to private life and protection of the family—contained in articles 11.2 and 17.1 of the American Convention—to the prejudice of Karen Atala and M., V., and R.<sup>124</sup>

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<sup>117</sup> *Id.* ¶ 10.

<sup>118</sup> *Id.* ¶ 7.

<sup>119</sup> *Id.* ¶¶ 12–13, 67–71.

<sup>120</sup> *Id.* ¶¶ 72–k, 238.

<sup>121</sup> *Id.* ¶ 314(1).

<sup>122</sup> *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 314(2), (5).

<sup>123</sup> *Id.* ¶ 314(6).

<sup>124</sup> *Id.* ¶ 314(4).

III. THE CASE OF *KAREN ATALA AND DAUGHTERS* AND ITS  
CONTRIBUTION TO LEGAL STANDARDS RELATED TO  
DISCRIMINATION, EQUALITY, AND WOMEN'S RIGHTS

The Author suggests in this Article that the Commission and Court's decisions in the case of *Karen Atala and Daughters* make key contributions to the development of legal standards related to the content of the obligations not to discriminate, to guarantee equality, and to respect and ensure women's rights. The potential legacy of these judgments will be reviewed in five areas: 1) the scope and reach of the obligations not to discriminate and to guarantee equality under articles 1.1 and 24 of the American Convention; 2) the features of the "rigorous scrutiny" standard of review of different treatment based on prohibited factors of discrimination; 3) the obligation not to discriminate on the basis of sexual orientation and gender identity, and its applicability to individual cases related to women; 4) the correlation of this prohibition with the rights to privacy and to protection of the family under international human rights law; and 5) the content of the best interests of the child under international human rights law.

In the analysis presented in this section, the Author considers the cognizable trend in the international community to recognize the multidisciplinary nature of gender equality issues.<sup>125</sup> This tendency includes the recognition of a continuum of legal obligations of a negative and positive nature, threading a body of civil and political rights, with fundamental economic, social, and cultural rights, positioning women as rights-holders.<sup>126</sup> This web of rights includes not only the right of women to live free from discrimination and violence, but also their right to privacy and protection of the family; their right to be free from discrimination on the basis of sexual orientation and gender identity; their rights as children when applicable; and their entitlement to a diversity of judicial protections and guarantees in civil and criminal matters.<sup>127</sup> Therefore, the Commission and Court decisions in the case of *Karen Atala and*

<sup>125</sup> See generally CEDAW Committee, General Recommendation No. 28, *supra* note 5, ¶¶ 14-20; IACHR, The Work, Education, and Resources of Women, *supra* note 9.

<sup>126</sup> See CEDAW Convention, *supra* note 2, Introduction.

<sup>127</sup> See *id.*, arts. 1, 2, 16; CEDAW Committee, General Recommendation No. 19, Violence Against Women, U.N. Doc A/47/38 (Jan. 29, 1992) [hereinafter CEDAW Committee, General Recommendation No. 19]; CEDAW Committee, General Recommendation No. 12, Violence Against Women, U.N. Doc A/44/38 (1989) [hereinafter CEDAW Committee, General Recommendation No. 12]; CEDAW Committee, General Recommendation No. 21, Equality in Marriage and Family Relations, U.N. Doc A/49/38 (Feb. 4, 1994) [hereinafter CEDAW Committee, General Recommendation No. 21].

*Daughters*—and their potential legacy—should be studied and examined together, considering the comprehensive nature of the aforementioned body of human rights involved in the full respect and guarantee of women’s human rights.

A. *The Contours of the Obligations Not to Discriminate and to Guarantee Equality under the American Convention: The Implicit Content of “Other Social Condition”*

There are several noteworthy elements in the Inter-American Court’s analysis of the reach of the obligations not to discriminate and to guarantee equality under articles 1.1 and 24 of the American Convention in the *Karen Atala and Daughters* judgment. The Court solidifies some of the principles advanced by the Commission in its merits ruling reiterates, some of its legal precedent related to discrimination and equality, and pushes the boundary of these standards by presenting some ground breaking features related to sexual orientation, gender identity, and the response of state authorities to social prejudice and stereotypes.

Of utmost significance, is that the Court—as the Commission had done in its merits report—finds that sexual orientation is a prohibited factor of discrimination under article 1.1 of the American Convention, even though this factor is not explicitly included in the enumerated grounds.<sup>128</sup>

It should be noted also that the Court advances a broad reading of discrimination on the basis of sexual orientation, not only limited to the exercise of homosexuality, but also its expression and the necessary consequences of the same in the life project of persons, reaffirming the analysis advanced in the Commission’s ruling.<sup>129</sup> In this way, the Court follows previous cases issued by the European Court of Human Rights alluding not only to sexual orientation, but its exercise, as a relevant aspect of the private life of an individual.<sup>130</sup>

The Court’s ruling has broad implications for human rights throughout the Americas, as it means that all of the rights pro-

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<sup>128</sup> *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 91; *Atala*, Application, *supra* note 27, ¶ 95; American Convention, *supra* note 3, art. 1.1 (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”).

<sup>129</sup> *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 133.

<sup>130</sup> *See id.*

tected under the American Convention should be ensured in a non-discriminatory manner in regard to a person's sexual orientation, and the expression and the design of a life plan based on sexual orientation. The Court makes very clear that the Convention prohibits any norms, acts, or discriminatory practices based on the sexual orientation of a person, and no norm, decision, or internal law practice—performed by either states or individuals—can restrict the rights of a person on the basis of his or her sexual orientation in any way.<sup>131</sup>

But the Court also extends this recognition to gender identity, which opens a very important avenue for transgender and transsexual persons, and other marginalized groups, to bring their cases before the Inter-American system.<sup>132</sup> This is a very bold move by the Court since the facts before it in *Karen Atala and Daughters* centered mainly on discrimination on the basis of sexual orientation, as opposed to gender identity discrimination.<sup>133</sup> The statement of the Court pertaining to gender identity seems less enunciative, and it remains to be seen how the Court will address the differences and particularities of discrimination on the basis of gender identity in future cases.<sup>134</sup>

To offer an open interpretation to the non-discrimination clause contained in article I.1, the Court also presents a nuanced analysis of the practice from international and regional protection bodies to prohibit discrimination on the basis of sexual orientation.<sup>135</sup> It also treats the American Convention as a “living instrument,”<sup>136</sup> the application of which should respond to the evolution of times and current life conditions<sup>137</sup> and should follow the princi-

<sup>131</sup> *Id.* ¶ 91.

<sup>132</sup> *Id.* See also Int'l Comm'n of Jurists, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, 6 n.2 (2007), available at [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf) (“‘Gender Identity’ has been defined as “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”). See also U.N. High Comm’r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, HRC Council, 19th Sess., U.N. Doc. A/HRC/19/41 (Nov. 17, 2011) (discussing priority concerns of persons based on their gender identity).

<sup>133</sup> See *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 16–58.

<sup>134</sup> *Id.* ¶ 91.

<sup>135</sup> *Id.* ¶¶ 87–88.

<sup>136</sup> *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 83.

<sup>137</sup> *Id.* ¶ 85.

ple of the norm most favorable to the human person.<sup>138</sup> This judgment seems to continue the practice reflected in the Court's *Cotton Field Judgment* of referring in detail to pronouncements issued by international, regional, and national bodies and institutions as an important reference in its development of innovative legal standards related to gender equality issues.<sup>139</sup>

Even though the Court does refer to international tendencies related to sexual orientation, it seems to establish a difference between what it considers a tendency and a consensus-based argument that could be used as a pretext to discriminate.<sup>140</sup> The Court explicitly notes its rejection of arguments advanced by the State of Chile pointing to the lack of consensus inside some countries in the Americas as to the rights of sexual minorities, finding this argument invalid.<sup>141</sup> It is interesting to draw a comparison between the approach of the Inter-American Court and the mixed use by the European Court of Human Rights of the issue of consensus, and the margin of appreciation European States should have in this area.<sup>142</sup> The European Court has interpreted this margin of appreciation in different ways—at times broadly and at other times narrowly, depending on the issue examined.<sup>143</sup>

It is worth mentioning as well that in its review of discrimination on the basis of sexual orientation, the Court also combines both classic and innovative elements in its analysis of the general content of the obligation not to discriminate.<sup>144</sup>

In this regard, referring to its former precedent, it clarifies

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<sup>138</sup> See *id.* ¶ 84.

<sup>139</sup> See *González v. Mexico (Cotton Field)*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 113–136, 147–164, 249–286 (Nov. 16, 2009).

<sup>140</sup> *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 92. The Court however does refer to the four OAS General Assembly resolutions related to sexual orientation and gender identity issued by the same entity since 2008. See *id.* ¶ 86. These resolutions have notably evolved over time from using violence-based language in regard to state obligations, to a more discrimination and gender equality-oriented mandate. OAS, Resolutions on Human Rights, Sexual Orientation, and Gender Identity, AG/RES. 2435 (XXXVIII-O/O8), AG/RES. 2504 (XXXIX-O/O9), AG/RES. 2600 (XL-O/10), AG/RES. 2653 (XLI-O/11).

<sup>141</sup> *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 92.

<sup>142</sup> See, e.g., *Schalk and Kopf v. Austria*, App. No. 30141/04, ¶¶ 49–64 (Eur. Ct. H.R. 2010); *Goodwin v. United Kingdom*, App. No. 28957/95, ¶¶ 71–93 (Eu. Ct. H.R. 2002); *Karner v. Austria*, App. No. 40016/98, ¶¶ 29–43 (Eur. Ct. H.R. 2003); *Smith and Grady v. United Kingdom*, App. Nos. 33985/96 and 33986/96, ¶¶ 69–112 (Eur. Ct. H.R. 1999).

<sup>143</sup> See cases cited *supra* note 142.

<sup>144</sup> See *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 78–82.

that article 1.1 of the American Convention is a norm of a general nature whose content extends to all the dispositions in the treaty, which means that any treatment which can be considered discriminatory in respect to any of the rights guaranteed therein is *per se* incompatible with the same.<sup>145</sup> States should abstain from performing actions that in any way either directly or indirectly create *de facto* or *de jure* situations of discrimination, and states are obligated to adopt positive measures to address situations of discrimination existing in their societies, to the prejudice of a determined group of persons.<sup>146</sup> This involves a special duty of protection that a state should exercise with respect to the actions and practices of third parties, that under its tolerance and acquiescence, create, maintain, or favor discriminatory situations.<sup>147</sup>

The Court, however, does maintain a somewhat strict distinction between the contents of articles 1.1 and 24 of the American Convention—a precedent set in its case *Apitz Barbera and Others*—while the Commission advances a somewhat organic view of the relationship between both articles.<sup>148</sup> In its earlier jurisprudence,

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<sup>145</sup> *Id.* ¶ 78.

<sup>146</sup> *Id.* ¶ 80.

<sup>147</sup> *Id.*

<sup>148</sup> As noted by the Author previously, the Court continues to underscore the distinction between the obligations contained in articles 1.1 and 24 of the American Convention, holding in the case of *Apitz Barbera v. Venezuela*:

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

See *Apitz-Barbera v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, ¶ 209 (Aug. 5, 2008). This position was reiterated by the Court in the judgments of *Fernández-Ortega* and *Rosendo-Cantú*. By contrast, the Commission in *Atala* established that:

The development of the right to equal treatment and nondiscrimination points to the existence of several conceptions of it. For example, one conception is related to the prohibition of arbitrarily different treatment—with different treatment understood as meaning distinction, exclusion, restriction, or preference—and another is related to the obligation of ensuring conditions of true equality for groups that have historically been excluded and are at greater risk of discrimination. Although both views may be present in certain cases, each warrants a different response from the State and a different treatment under the American Convention. To this must be added the fact that under the different conceptions of the right of equality, a State's actions and fail-

the Court had advanced a more interrelated link between these two articles.<sup>149</sup>

The Author notes overall that the open interpretation of the non-discrimination clause by both the Commission and the Court decisions is a paramount gain for legal standards related to discrimination in the realm of the Inter-American system, as well as for sectors and communities particularly exposed to this human rights violation, such as women.<sup>150</sup> A flexible interpretation of arti-

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ures to act may be related to rights enshrined in the American Convention or they may be related to any undertaking of the State that does not affect the enjoyment of Convention-protected rights. Therefore, although certain criteria can be used as a basis, the applicable Convention provisions must be determined in each specific case by means of an analysis that takes into account the individual or group of people affected; the reasons behind the alleged discrimination; the rights or interests involved; the actions or omissions that gave rise to it; as well as other considerations.

*Atala*, Application, *supra* note 27, ¶¶ 80–81. See also Celorio, *The Rights of Women in the Inter-American System of Human Rights*, *supra* note 20, at 861 n.229.

<sup>149</sup> See, e.g., Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 85 (Sept. 17, 2003).

<sup>150</sup> For example, the CESCR Committee has stated the following in regard to the open interpretation of the non-discrimination clause contained in article 2(2) of the International Covenant on Economic, Social, and Cultural Rights:

The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. The Committee’s general comments and concluding observations have recognized various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive. Other possible prohibited grounds could include the denial of a person’s legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric institution, or the intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability.

CESCR Committee, General Comment No. 20, *supra* note 1, ¶ 27.

The CEDAW Committee has also pronounced over the issue of “intersectionality” and the need for states to identify the factors that can combine with sex to foster discrimination against women:

Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men. States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on

cle 1.1 of the American Convention creates a space favorable to the recognition of new forms of discrimination affecting women, as well as other groups which may not yet be recognized by the international community, or that may be in an incipient stage of recognition.

For example, the Committee on Economic, Social, and Cultural Rights has identified a number of “implied grounds” it considers contained in the clause “other status” within the Covenant on Economic, Social, and Cultural Rights,<sup>151</sup> aside from the “express grounds”<sup>152</sup> already enumerated in that clause. The Committee identifies “implied grounds” to include: disability, age, marital and family status, health status, place of residence, and the economic and social situation of an individual<sup>153</sup>—all grounds that have been used to discriminate against women historically.<sup>154</sup>

Offering an open interpretation to the prohibition of discrimination is also a key component to understanding the concept of *intersectionality* in this context, meaning the multiple forms of discrimination a woman may face based on a range of factors combined with her sex.<sup>155</sup> Discrimination against women rarely happens in isolation and is often compounded by other factors, such as sexual orientation, gender identity, age, race, and economic status, among others.<sup>156</sup> As stated by the Committee on Economic, Social, and Cultural Rights, this “cumulative discrimination has a unique and specific impact on individuals and merits particu-

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the women concerned. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and General Recommendation No. 25.

CEDAW (Committee), General Recommendation No. 28, *supra* note 5, ¶ 18.

<sup>151</sup> The International Covenant on Economic, Social, and Cultural Rights provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

CESCR (Convention), *supra* note 2, art. 2(2).

<sup>152</sup> The Committee has identified among the “express grounds”: discrimination on the basis of race and color, sex, language, religion, political or other opinion, national or social origin, property and birth. *See* CESCR (Committee), General Comment No. 20, *supra* note 1, ¶¶ 19–26.

<sup>153</sup> *See id.* ¶¶ 27–35.

<sup>154</sup> *See e.g.*, CEDAW (Committee), General Recommendation No. 28, *supra* note 5, ¶ 18; HRC (Committee), General Comment No. 18, *supra* note 1; THE WORLD BANK, WORLD DEVELOPMENT REPORT 2012, *supra* note 10, at 13–22.

<sup>155</sup> *See* CEDAW (Committee), General Recommendation No. 28, *supra* note 5, ¶ 18.

<sup>156</sup> *See id.* ¶ 18.

lar consideration and remedying.”<sup>157</sup> For example, a vast amount of persons who suffer discrimination on the basis of sexual orientation are also women of different ages, races, ethnicities, and socio-economic groups.<sup>158</sup> Lesbian and transgender women, moreover, face an acute risk to human rights violations due to prevailing gender inequality and its effect on family relations and social dynamics.<sup>159</sup>

The current international human rights law system needs to be responsive to the experience of marginalization that certain groups of the population face, and an open interpretation of the non-discrimination clause contained in human rights treaties is fundamental to this goal.<sup>160</sup> The Author also believes in the need to interpret the instruments of the Inter-American and universal systems of human rights as “living” documents, in light of the current times and emerging forms of discrimination, and taking into account the evolving nature of the international human rights law system, its values, and standards.<sup>161</sup> The Commission and Court’s decisions in the case of *Karen Atala and Daughters* show how international, regional, and national precedent can be combined and interpreted in ways that offer the most protection to groups and sectors who have historically suffered, and continue to bear, alarming forms of discrimination.

*B. The Features of Rigorous Scrutiny Analysis: The Legal Examination of Different Treatment on the Basis of Prohibited Factors of Discrimination*

The Inter-American Court also innovatively found that distinctions based on sexual orientation should be subjected to rigorous scrutiny.<sup>162</sup> This entails a shift in the burden of proof, requiring from the state the presentation of very weighty reasons to justify

<sup>157</sup> CESCR (Committee), General Comment No. 20, *supra* note 1, ¶ 17.

<sup>158</sup> U.N. High Comm’r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, HRC (Council), 19th Sess., U.N. Doc. A/HRC/19/41 ¶¶ 21, 29, 63, 67 (Nov. 17, 2011).

<sup>159</sup> *Id.* ¶ 21.

<sup>160</sup> *See, e.g.*, CESCR (Committee), General Comment No. 20, *supra* note 1, ¶¶ 15–35.

<sup>161</sup> For more analysis on this principle, see *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 114 (Oct. 1, 1999); *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC 10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 37 (Jul. 14, 1989).

<sup>162</sup> *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 124 (Feb. 24, 2012).

that the decision at issue did not have a discriminatory objective or effect, following precedent from the European Court of Human Rights, including the well-known case of *Karner v. Austria*.<sup>163</sup>

In applying this rigorous standard of scrutiny, the Court advances important principles that the Author considers may have long-lasting effects in the examination of potential allegations of bias, mistreatment, and prejudice contained in a judicial process.<sup>164</sup> This analysis can be particularly useful for the Inter-American Commission, due to its historical application of the “fourth instance doctrine” and the fact that as a matter of practice the Commission does not review cases where the main allegations are centered on errors of fact and law incurred by domestic tribunals.<sup>165</sup> This is a tricky doctrine to apply in cases like *Karen Atala and Daughters*, since it is very challenging to examine whether discrimination has been present in a judicial process without reviewing the main judicial actions and the processing of the case by domestic courts.

Firstly, the Court established that to determine whether a difference of treatment has been applied by means of a particular legal decision, it is not necessary that the entire decision be based on the sexual orientation of a person.<sup>166</sup> Applying the precedent set in the European Court judgment of *E.B. v. France*, the Inter-American Court considered it sufficient that sexual orientation was considered either explicitly or implicitly in the adoption of a specific legal decision.<sup>167</sup> In this regard, the Court advances a “nexus” test, where it analyzes whether there was a link—either causal or decisive—between the sexual orientation of Karen Atala and the decisions issued by the Supreme Court of Chile and the Juvenile Court of Villarica.<sup>168</sup> To determine the existence of this nexus, the

<sup>163</sup> *Id.* ¶ 124, n.143 (referring to cases from the European Court of Human Rights, *Karner v. Austria*, App. No. 40016/98, ¶ 37 (Eur. Ct. H.R. 2003) and *Kozak v. Poland*, App. No. 13102/02, ¶ 92 (Eur. Ct. H.R. 2010)).

<sup>164</sup> *Id.* ¶¶ 100–146. These principles could potentially be applied in cases before the Inter-American Commission that allege the influence of prejudice and stereotypes in the resolution of a judicial process concerning violence against women issues. *See, e.g.*, *Nunes da Silva v. Brazil*, Petition 337-03, Inter-Am. Comm’n H.R., Report No. 93/09, OEA/Ser.L/V/II, doc. 51 (2009); *Loaiza López Soto v. Venezuela*, Petition 1462-07, Inter-Am Comm’n H.R., Report No. 154/10, OEA/Ser.L/V/II, doc. 5, rev. 1 (2011).

<sup>165</sup> For a detailed analysis of the fourth instance doctrine, see *Santiago Marzioni v. Argentina*, Case 11.673, Inter-Am. Comm’n H.R., Report No. 39/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 48–51 (1997). *See also Atala*, Petition, *supra* note 29, ¶¶ 59–60.

<sup>166</sup> *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 94.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* ¶ 95.

Court enumerates a few factors that must be reviewed, including the arguments advanced by the national judicial authorities, their conduct, the language used, and the context in which the judicial decisions were produced.<sup>169</sup> Reviewing thoroughly a series of judicial actions in this case, including the reasoning presented in the custody complaint filed by the father of M., V., and R.; the reasoning advanced by the Supreme Court of Justice of Chile; and the provisional custody decisions; the Court determined that the process was centered around the sexual orientation of Karen Atala and the presumed consequences that cohabitation with a same-sex partner could produce on the three girls.<sup>170</sup> Therefore, the Court considered that a difference in treatment had been made in the context of the custody proceeding based on a prohibited factor of discrimination contained in article 1.1 of the Convention.<sup>171</sup>

Then the Court proceeded to determine whether this difference in treatment was justified based on the justification presented by the State of Chile, namely the best interest of the children involved and the presumed harm that they would have suffered founded on the sexual orientation of their mother.<sup>172</sup> In this regard, the Court affirms the legitimate and imperative nature of the best interests of the child as an objective, as well as the special protection principle contained in article 19 of the American Convention and the dispositions of the Convention on the Rights of the Child—what the Court has consistently referred to as the “corpus juris” related to the rights of the child.<sup>173</sup> The Court, however, clarifies that the sole abstract reference to the best interests of the child as a legitimate objective, without proving in a concrete fashion the risks and harms which have been provoked by the sexual orientation of the mother to her children, is insufficient to justify a custody determination.<sup>174</sup> A custody decision cannot be based on stereotypical notions related to the capacity of either of the parents to exercise their care-taking role.<sup>175</sup>

Using this foundation as a basis, the Court proceeds to analyze four of the main arguments advanced by the Supreme Court related to the potential impact of same-sex cohabitation on the girls involved, and whether these arguments furthered their best inter-

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.* ¶¶ 96–98.

<sup>171</sup> *Id.*

<sup>172</sup> *Atala Rizzo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 99.

<sup>173</sup> *Id.* ¶ 108.

<sup>174</sup> *Id.* ¶ 109.

<sup>175</sup> *Id.* ¶ 111.

ests.<sup>176</sup> In regard to the “presumed social discrimination” allegedly suffered by the girls due to their mother’s cohabitation with a same-sex partner, the Court considers this an illegitimate foundation for a custody decision, as intolerance cannot be used a pretext to further discrimination.<sup>177</sup> The Court establishes that the law should aim to advance society and not legitimize different forms of discrimination in violation of human rights.<sup>178</sup> As to the potential “confusion of roles,” the Court concluded that the Supreme Court of Chile did not present weighty reasons showing that the sexual orientation of Karen Atala and her cohabitation with a partner of the same-sex did have a negative impact on the psychological and emotional well being, the sexual orientation, and the social relations of the girls.<sup>179</sup> The Court also rejected the Supreme Court argument that Karen Atala had privileged her interests above those of her daughters in cohabiting with a person of the same-sex, as it was unreasonable to expect that she would sacrifice a crucial part of her identity to retain custody of her daughters.<sup>180</sup> The Court also considered arguments advancing a traditional or normal family model to be inadequate, as it did not deem that the American Convention advances such a model.<sup>181</sup>

Therefore, the Court considered that even though the Supreme Court and Villarica Juvenile Court’s decisions sought to further the protection of the best interests of the children, it was not proven that the reasoning contained in these judgments was adequate to further that goal.<sup>182</sup> It considered instead that these decisions were based on “abstract, stereotyped and discriminatory arguments,” in violation of article 24 of the American Convention, in relation to article 1.1 of the same instrument.<sup>183</sup>

The Author however hopes that the Court will delve in greater detail into the elements that compose the application of the “rigorous scrutiny standard,” and what would be the determining criteria to apply this standard to certain factors of discrimination either explicitly or implicitly contained in article 1.1 of the American Convention.<sup>184</sup>

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<sup>176</sup> *Id.* ¶ 113.

<sup>177</sup> *Id.* ¶ 119.

<sup>178</sup> *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 120.

<sup>179</sup> *Id.* ¶ 130.

<sup>180</sup> *Id.* ¶ 139.

<sup>181</sup> *Id.* ¶ 142.

<sup>182</sup> *Id.* ¶ 146.

<sup>183</sup> *Id.*

<sup>184</sup> *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 87. The Court does refer to *Clift v. United Kingdom*, decided by the European Court of

For example, the Author is interested in seeing whether the aforementioned analysis of the Court is reconciled with the Commission's more nuanced review of the strict scrutiny standard in its merits report.<sup>185</sup> The Commission in its merits decision on the case of *Karen Atala and Daughters* refers to a "strict scrutiny" standard of review and delves in more detail into the elements that should guide this analysis.<sup>186</sup> At its core, the Commission is pondering whether these distinctions are "objective and reasonable" in light of a state's advanced aim, and the burden of proof falls on a state involved to present "weighty reasons" to justify them.<sup>187</sup>

In the past, the Commission has referred to the elements of this rigorous test, highlighting in particular that a distinction based on reasonable and objective criteria: 1) pursues a legitimate aim; and 2) employs means which are proportional to the end sought.<sup>188</sup> This test is similar to the one applied by the European Court of Human Rights to factors it deems should be subject to a more rigorous level of scrutiny.<sup>189</sup>

The Commission in its merits report goes further, however, requiring the state to advance a pressing social need to justify the distinction, and to also show that the distinction complied with the elements of suitability, necessity, and proportionality.<sup>190</sup> For the Commission, it is not sufficient for a state to argue the existence of a legitimate goal. Instead, the end sought must be particularly important or weighty.<sup>191</sup> The measure must also be strictly necessary to attain the goal, meaning that no other less harmful alternative exists, and the measure must also be proportional to the end sought, entailing an appropriate balance of interests in terms of the levels of sacrifice and benefit.<sup>192</sup> Therefore, the analysis of different treatment based on the sexual orientation of a person

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Human Rights, in which the European Court reaffirms how categories included under "other status"—protected under Article 14 of the European Convention—often constitute personal characteristics of persons, in the sense that they tend to be innate or inherent to the person involved. *Id.* ¶ 87 (citing *Clift v. United Kingdom* App. No. 7205/07, ¶¶ 55–63 (Eur. Ct. H.R. 2010)).

<sup>185</sup> See *Atala*, Application, *supra* note 27, ¶¶ 85–108.

<sup>186</sup> See *id.* ¶¶ 85–89.

<sup>187</sup> See *id.*

<sup>188</sup> See *Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. Comm'n H.R., Report No. 4/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 36 (2001).

<sup>189</sup> See, e.g., *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, ¶ 29 (Eu. Ct. H.R. 1999).

<sup>190</sup> See *Atala*, Application, *supra* note 27, ¶¶ 85–89, 101–108.

<sup>191</sup> *Id.* ¶¶ 88–89.

<sup>192</sup> *Id.*

should be more rigorous.<sup>193</sup>

The Commission does conclude along with the Court that the objective identified by the State of Chile to justify the custody decision—to advance the best interests of the child of M., V., and R.—constitutes a pressing social need, but fails to find a logical causal relationship between the accomplishment of this objective and the custody decision.<sup>194</sup> The Commission considered that the custody decision was based on discriminatory prejudices, and not in an objective assessment of the parents' capacity to exercise custody over their daughters.<sup>195</sup> Therefore, the Commission found that the decisions in this case did not meet the suitability requirement, and the Commission did not consider it necessary to refer to the other elements of the strict scrutiny test.<sup>196</sup>

In its merits report, the Commission also refers to sexual orientation as a “suspect category” of distinction, meriting a strict scrutiny analysis to ensure it is not grounded in prejudice.<sup>197</sup> As mentioned earlier, the Commission reaches this finding on the basis of previous cases ruled by international bodies and well-known national Courts subjecting distinctions based on sexual orientation to a particularly rigorous standard of review.<sup>198</sup> The Court does not use this terminology or employ this line of analysis in its judgment.<sup>199</sup>

The Commission's analysis is also useful in its presentation of the elements assessed by different international bodies and national tribunals to consider that a prohibited ground to discriminate amounts to being “suspect.”<sup>200</sup> Some of the factors weighed by courts and bodies are: “immutability” (understood as a characteris-

<sup>193</sup> *Id.* ¶ 86.

<sup>194</sup> *See id.* ¶¶ 101–108.

<sup>195</sup> *See id.* ¶ 105.

<sup>196</sup> *See Atala*, Application, *supra* note 27, ¶¶ 96–108.

<sup>197</sup> *See id.* ¶¶ 90–95.

<sup>198</sup> *See id.* ¶¶ 81–83 (citing *S.L. v. Austria*, App. No. 45330/99, ¶ 37 (Eur. Ct. H.R. 2003); *E. B. v. France*, App. No. 43546/02, ¶ 91 (Eur. Ct. H.R. 2008); Corte Constitucional [C.C.] [Constitutional Court], enero 28, 2009, Sentencia, C-029/09, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], febrero 7, 2007, Sentencia, C-075/07, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], febrero 8, 2005, C-101/05, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); *Nat'l Coal. for Gay & Lesbian Equality v. Minister of Justice*, 1998 (12) BCLR 1517 (CC) at 14–16 (S. Afr.); *Watkins v. U.S. Army*, 847 F.2d 1329 (9th Cir. 1988), *vacated en banc*, 875 F.2d 699, 728 (9th Cir. 1989); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009).

<sup>199</sup> *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 78–146 (Feb. 24, 2012).

<sup>200</sup> *See Atala*, Application, *supra* note 27, ¶¶ 85–89.

tic that is difficult to control and that a person cannot change without modifying his or her identity); the history of marginalization and exclusion of a given group; and the manifest irrationality of dividing social responsibilities on the basis of this factor.<sup>201</sup> Although not mentioned in the merits report, the limited political participation of a given group has also been considered by national courts as an element to determine whether a given discrimination factor is “suspect.”<sup>202</sup>

The Commission itself has established in the past that distinctions based on grounds expressly identified in article 1.1 of the American Convention, such as sex and race, are subject to a particularly strict scrutiny,<sup>203</sup> and reiterates this finding as a matter of consensus in its merits report.<sup>204</sup> Even though the European Court does not refer to “suspect categories” per se, it has also applied a particularly rigorous level of scrutiny to distinctions based on grounds identified as as prohibited under article 14 of the European Convention on Human Rights.<sup>205</sup>

However, as more prohibited factors of discrimination are identified by international courts—beyond those expressly identified in the non-discrimination clauses of human rights treaties—more analysis will be needed as to whether these factors will automatically become “suspect” as well, meriting a strict scrutiny analysis.<sup>206</sup> For example, it remains to be seen whether all of the express and implied grounds recognized by the Committee on Economic, Social, and Cultural Rights under “other status” will also be consid-

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<sup>201</sup> *Id.* ¶ 94.

<sup>202</sup> See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (discussing U.S. federal and state cases shedding light on this element).

<sup>203</sup> See, e.g., IACHR, Access to Justice for Women Victims of Violence in the Americas, OEA/Ser.L/V/II, doc. 68, ¶¶ 80, 83 (Jan. 27, 2007); IACHR, Report on Terrorism and Human Rights, *supra* note 1, ¶ 338; *Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. Comm’n H.R., Report No. 4/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 36 (2001); IACHR, Annual Report 1999: Considerations Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-Discrimination, OEA/Ser.L/V/II.106, doc. 6 (Apr. 13, 1999).

<sup>204</sup> See *Atala*, Application, *supra* note 27, ¶ 88.

<sup>205</sup> *Abdulaziz, Cabales and Balkandali v. United Kingdom*, App. Nos. 9214/80; 9473/81; 9474/81, ¶ 78 (Eur. Ct. H.R. 1985) (discussing sex); *Hoffmann v. Austria*, App. No. 12875/87, ¶ 33–36 (Eur. Ct. H.R. 1993) (discussing religion); *Timishev v. Russia*, App. Nos. 55762/00 & 55974/00, ¶ 56 (Eur. Ct. H.R. 2005) (discussing race).

<sup>206</sup> See, e.g., *Atala*, Application, *supra* note 27, ¶¶ 85–96; *Kiyutin v. Russia*, App. No. 2700/10, ¶ 56 (Eur. Ct. H.R. 2011). See also Roberto P. Saba, *Igualdad, Clases y Clasificaciones: ¿Qué es lo Sospechoso de las Categorías Sospechosas?* [Equality, Classes, and Classification: What is Suspect of the Suspect Categories?], in *TEORÍA Y CRÍTICA DEL DERECHO CONSTITUCIONAL* (Roberto Gargarella, ed., 2008).

ered suspect categories of discrimination by international legal bodies.<sup>207</sup>

As indicated earlier, sexual orientation has many elements in common with categories such as race and sex in terms of immutability—as a feature vital to a person’s identity—along with the history of marginalization that has affected this group, the irrational division of responsibilities in a society based on this factor, and the still-limited political participation of this community.<sup>208</sup> However, is it reasonable to compare “sexual orientation” with other implied factors of discrimination identified by the Committee on Economic, Social, and Cultural Rights, such as economic situation, place of residence, or marital status? Some of these factors might not be considered “immutable,” while at the same time they have undoubtedly been used historically to marginalize married and unmarried women in many rural and low-income zones, regions, and countries.<sup>209</sup> A challenge for international legal bodies is to identify which among this group of elements will be most preeminent or relevant to determine whether a specific ground of discrimination reaches the “suspect” level.

The European Court of Human Rights has already afforded some important analysis on this issue recently, and it will be interesting to see how other regional tribunals—such as the Inter-American Court of Human Rights—approach this area in the future.<sup>210</sup> In the case of *Kiyutin v. Russia*, the European Court recently analyzed whether the ground of “health status” could be considered as included within the prohibited factors listed in article 14 of the European Convention of Human Rights, and shared some important analysis regarding the elements that render a discriminatory ground subject to a especially rigorous level of scrutiny.<sup>211</sup>

In *Kiyutin v. Russia*, the applicant alleged that he had been the victim of discrimination on account of his health status in his application for a Russia residence permit.<sup>212</sup> He was required to undergo a medical examination during which he tested positive for HIV, which resulted in the rejection of his application.<sup>213</sup> The

<sup>207</sup> CESCR (Committee), General Comment No. 20, *supra* note 2, ¶¶ 18–35.

<sup>208</sup> See HRC Council Res. 17/19, Human Rights, Sexual Orientation, and Gender Identity, 17th Sess., May 30–June 17, 2007, U.N. Doc. A/HRC/17/L.9/Rev.1 ¶¶ 48–73 (June 15, 2011).

<sup>209</sup> See THE WORLD BANK, WORLD DEVELOPMENT REPORT 2012, *supra* note 10, at 20; IACHR, The Work, Education, and Resources of Women, *supra* note 9, ¶¶ 309–312.

<sup>210</sup> See *Kiyutin*, App. No. 2700/10.

<sup>211</sup> *Id.* ¶ 56.

<sup>212</sup> *Id.* ¶ 3.

<sup>213</sup> *Id.* ¶ 9.

Court considered the applicant's claims under article 14 of the European Convention, in conjunction with article 8.<sup>214</sup> In its analysis of whether the applicant's health status fell under the "other status" clause within the meaning of article 14, the Court reasoned that the list of discriminatory factors set out in Article 14 is not exhaustive and that this open interpretation has not been limited to characteristics "which are personal in the sense that they are innate or inherent."<sup>215</sup> Accordingly, the Court considered that a distinction based on account of a person's health status, including conditions such as HIV infection, should be covered by the term "other status" in the text of article 14 of the Convention.<sup>216</sup> In its application of a more rigorous standard of review, the Court placed heavy emphasis on the marginalization that persons infected with HIV have suffered historically.<sup>217</sup>

As stated by the European Court of Human Rights, the Author proposes that the history of discrimination, marginalization, and exclusion suffered by a given group of the population based on a specific status is a factor of paramount importance in determining whether certain distinctions should be considered "suspect" for judicial review purposes.<sup>218</sup> Many of the prejudices and stereotypes that underlie arbitrary distinctions are the product of this history, and are fueled by social intolerance.<sup>219</sup> This is particularly important in the current context where a great deal of discrimination—for example, against women—is indirect, or results from the discriminatory impact of seemingly neutral policies.<sup>220</sup>

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<sup>214</sup> *Id.* ¶ 39.

<sup>215</sup> *Id.* ¶ 56, citing *Clift v. United Kingdom*, App. No. 7205/07, ¶¶ 56–58 (Eu. Ct. H.R. 2010) (considering it clear that while the court has consistently referred to the need for a distinction based on a "personal" characteristic in order to engage Article 14, the protection conferred by that Article is not limited to different treatment based on characteristics that are personal in the sense that they are innate or inherent. Therefore, the European Court of Human Rights includes within "other status" the different treatment of various categories of prisoners depending on the sentences imposed.).

<sup>216</sup> *Kiyutin*, App. No. 2700/10, ¶¶ 56–58.

<sup>217</sup> *Id.* ¶ 64.

<sup>218</sup> *Id.* ¶ 63.

<sup>219</sup> For more analysis on this issue, see REBECCA J. COOK & SIMONE CUSACK, *GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES* 104–130 (2010).

<sup>220</sup> For discussion from treaty bodies in regard to the problem of indirect discrimination, see CESCR (Committee), General Comment No. 20, *supra* note 2; CEDAW (Committee), General Recommendation 28, *supra* note 3; HRC (Committee), *Althammer v. Austria*, Communication No. 998/2001, ¶¶ 23–25, UN Doc. CCPR/C/78/D/998/2001 (Aug. 8, 2003); Comm. on the Elimination of Racial Discrimination [CERD], *L.R. v. Slovakia*, Communication No. 31/2003, ¶ 10.4, U.N. Doc. / C / 66 / D / 31 / 2003 (Mar. 7, 2005).

The Author hopes that the above-mentioned analysis from both the Court and the Commission related to potentially prejudicial different treatment, leads the way to more rulings identifying and reviewing thoroughly the features of the “rigorous scrutiny” or “strict scrutiny” test; the “weighty reasons” that need to be advanced by a state implicated to justify different treatment on the basis of prohibited factors; and what makes a discriminatory factor of discrimination merit the application of a “strict” or “rigorous scrutiny” standard.

C. *Discrimination on the Basis of Sexual Orientation through the Lens of Women*

One of the most important legacies of the case of *Karen Atala and Daughters* is that it exemplifies how discrimination can manifest itself in the realm of sexual orientation, and how it can happen to a woman at many levels.<sup>221</sup> This individual and concrete case illustration is crucial at this stage in the definition of state obligations oriented to guarantee women’s rights, in order to foster the adequate and effective state implementation of standards at the national level.<sup>222</sup> The case of *Karen Atala* evidences the many facets of discrimination, its varied intersections, the settings and sectors that perpetrate it, and its casualties. It also offers a female face to discrimination on the basis of sexual orientation, as its main victims are women and girls.<sup>223</sup>

Karen Atala was deprived of custody of her daughters on the basis of her cohabitation with a partner of the same sex, and all the notions and prejudices associated with this kind of living arrangement—a key feature of sexual orientation discrimination. She suffered discrimination as a result of forming a life plan based on a crucial component of her identity. At a second level, she was discriminated against as a mother, with the judicial application of socially accepted conceptions of how a good and capable mother should act. At a third level, Karen Atala was discriminated against for her family choices, by selecting a model that does not conform to convention, devoid of a father figure. This discrimination hap-

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<sup>221</sup> See generally *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012); *Atala*, Application, *supra* note 27.

<sup>222</sup> For a review of the impact that legal standards can have on the administration of the justice system in regard to violence and discrimination against women, see IACHR, *Legal Standards Related to Gender Equality and Women’s Rights*, *supra* note 17.

<sup>223</sup> See *id.*

pened within a custody proceeding and was perpetrated by the justice branch, which sends a powerful message in support of the marginalization of lesbian and gay parents from a fundamental human experience. The discrimination that Karen Atala underwent is striking considering that she is a well-known judge in her country and most discrimination happens against women from low-income and rural sectors.<sup>224</sup>

This exemplification and individualization of cases pertaining to the specific situation of women is also fundamental in the current trend in international human rights law favoring the prohibition of discrimination on the basis of sexual orientation and gender identity.<sup>225</sup> This marked trend initiated with a line of cases focusing on the right to privacy and the criminalization of consensual homosexual conduct<sup>226</sup>, and has transitioned into a more nuanced analysis of the obligations not to discriminate and to guarantee equality in contexts such as the family, the employment sector, in pension benefits, and in custody settings, in order to prevent contravention of the right to equality, the obligation not to discriminate, and the protection of the right to privacy of persons.<sup>227</sup> This line of cases also includes a tendency to grant civil, political, economic, social, and cultural rights to homosexual persons analogous to those guaranteed to heterosexual persons.<sup>228</sup> The European Court has also started ruling on issues related to gender

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<sup>224</sup> See generally THE WORLD BANK, WORLD DEVELOPMENT REPORT 2012, *supra* note 10; IACHR, The Work, Education, and Resources of Women, *supra* note 9.

<sup>225</sup> For more discussion of legal developments pertaining to discrimination on the basis of sexual orientation, see Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity, and International Human Rights Law: Contextualizing the Yogyakarta Principles*, 82 HUM. RTS. L. REV. 207 (2008).

<sup>226</sup> See *e.g.*, HRC (Committee), Toonen v. Australia, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994); Dudgeon v. United Kingdom, App. No. 7525/76 (Eur. Ct. H.R. 1981); S.L. v. Austria, App. No. 45330/99 (Eur. Ct. H.R. 2003).

<sup>227</sup> See, *e.g.*, HRC (Committee), Young v. Australia, Communication No. 941/2000, U.N. Doc. CCPR/C/78/C/941/2000 (Aug. 6, 2003); Smith and Grady v. United Kingdom, App. Nos. 33985/96 and 33986/96, ¶¶ 94–112, 136 (Eur. Ct. H.R. 1999); Lustig-Prean and Beckett v. United Kingdom, App. Nos. 31417/96 and 32377/96 (Eur. Ct. H.R. 1999).

<sup>228</sup> See, *e.g.*, HRC (Committee), Young, Communication No. 941/2000; Karner v. Austria, App. No. 40016/98 (Eur. Ct. H.R. 2003); Corte Constitucional [C.C.] [Constitutional Court] enero 28, 2008, Sentencia C-029/09 (Colom.); Corte Constitucional [C.C.] [Constitutional Court] abril 16, 2007, Sentencia C-336/08 (Colom.); Corte Constitucional [C.C.] [Constitutional Court] febrero 7, 2007, Sentencia C-075/07 (Colom.); Corte Constitucional [C.C.] [Constitutional Court] octubre 3, 2007, Sentencia C-811/07 (Colom.); Corte Constitucional [C.C.] [Constitutional Court] septiembre 18, 2008, Sentencia T-912/08 (Colom.); M. v. H., [1999] S.C.R. 3, 6 (Can.); Egan v. Canada, [1995] S.C.R. 513, 603 (Can.).

identity and the same has been consistently recognized as a prohibited factor of discrimination, although at a slower pace than sexual orientation.<sup>229</sup>

The case of *Karen Atala and Daughters* is also noteworthy from the perspective of women's rights because it shows how traditional conceptions of motherhood can be intertwined with prejudices related to sexual orientation in a given custody case, such that they trigger human rights violations in an area traditionally relegated to the decision-making of domestic tribunals.<sup>230</sup> The Inter-American Court skillfully recognizes this issue in its decision by rejecting as illegitimate the arguments presented by the Supreme Judicial Court of Chile alluding to a supposed privileging of interests, in Karen Atala's choice to live with a partner of the same sex.<sup>231</sup> The Court emphasizes how unreasonable it considers it to be that the justice system would expect Karen Atala to sacrifice a crucial part of her identity to retain custody of her daughters.<sup>232</sup> For the Court, to expect that a mother conditions her life options for her children, advances a traditional conception of the social role of women as mothers, where it is expected socially that women undertake the main responsibility for the raising of their children, thereby renouncing a crucial part of their identity.<sup>233</sup> The Commission itself in the report refers to how the Supreme Judicial Court of Chile's ruling sent a stereotypical message "equating homosexuality with maternal inadequacy."<sup>234</sup>

There have been cases ruled by the international community related to custody matters delving into sexual orientation issues, but these have mostly focused on the situation of homosexual male parents, and not necessarily on women.<sup>235</sup> Probably the most well-known is the case of *Salgueiro Da Silva Mouta v. Portugal*, decided by the European Court of Human Rights, where said tribunal found that a difference in treatment based on the sexual orientation of

<sup>229</sup> See, e.g., *Goodwin v. United Kingdom*, App. No. 28957/95 (Eur. Ct. H.R. 2002); see also Int'l Comm'n of Jurists, *The Yogyakarta Principles*, supra note 133; HRC (Council) Res. 17/19, Human Rights, Sexual Orientation, and Gender Identity, 17th Sess., May 30–June 17, 2007, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 15, 2011).

<sup>230</sup> *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 139–140 (Feb. 24, 2010).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* ¶ 139.

<sup>233</sup> *Id.* ¶ 140.

<sup>234</sup> *Id.* ¶¶ 98, 116.

<sup>235</sup> The Author notes, however, that there have been important decisions from international bodies—such as the European Court of Human Rights—related to the adoption of children by women in same-sex relationships. See, e.g., *E.B. v. France*, App. No. 43546/02, ¶ 91 (Eur. Ct. H.R. 2008).

either of the parents in the context of a tuition proceeding violated article 8 (right to a private and family life) in relation to article 14 (non-discrimination on the basis of sex and gender) of the European Convention on Human Rights.<sup>236</sup>

The facts of this case are very similar to those in the case of *Karen Atala and Daughters*, and both the Commission and the Court relied heavily on this judgment in their respective rulings.<sup>237</sup> In *Salgueiro Da Silva Mouta*, the father was deprived of the custody of his daughter by means of a Court of Appeals ruling that echoes many of the same values, stereotypes, and traditional notions in the judgment issued by the Supreme Court of Chile in the case of *Karen Atala and Daughters*.<sup>238</sup>

It is well accepted internationally that traditional notions of the role of motherhood, what constitutes a family, and the artificial assignment of social roles within this institution, have been applied historically to the detriment of women, exposing them to an infer-

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<sup>236</sup> See *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96 (Eur. Ct. H.R. 1999).

<sup>237</sup> See *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 95; *Atala*, Application, *supra* note 27, ¶ 106.

<sup>238</sup> Some of the considerations advanced by the relevant court in the custody decision were:

Even if that were not the case, however, we think that custody of the child should be awarded to the mother. The fact that the child's father, who has come to terms with his homosexuality, wishes to live with another man is a reality which has to be accepted. It is well known that society is becoming more and more tolerant of such situations. However, it cannot be argued that an environment of this kind is the healthiest and best suited to a child's psychological, social and mental development, especially given the dominant model in our society, as the appellant rightly points out. The child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife. 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; such are the dictates of human nature and let us remember that it is [the applicant] himself who acknowledged this when, in his initial application of 5 July 1990, he stated that he had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria.

*Atala*, Application, *supra* note 27, ¶ 30.

The European Court considered that this language from the Lisbon Court of Appeals, far from "being merely clumsy or unfortunate" as the Government advanced, suggested that the applicant's homosexuality was a decisive factor in the final decision. Therefore, the European Court found that the Court of Appeals made a distinction on account of the father's sexual orientation; a distinction not acceptable under the European Convention. *Atala*, Application, *supra* note 27, ¶ 35.

ior and discriminatory treatment in society.<sup>239</sup> The Commission itself has repeatedly noted the alarming consequences of the discrimination perpetrated against women and stereotypical notions of their social and family roles, including exposure to acts of violence against women, as well as their repetition.<sup>240</sup>

In this light, the Author hopes that both the Inter-American Commission and the Court's rulings in the case *Karen Atala and Daughters* promote a discussion of the intricacies and content of the obligations to protect, respect, and fulfill the right of women to live free from any form of discrimination perpetrated by the judiciary, particularly in family law cases.<sup>241</sup> In this regard, the CEDAW Committee has underscored that protection against discrimination should be provided by competent tribunals, and enforced by sanctions and remedies, where appropriate.<sup>242</sup> States parties to CEDAW should also "ensure that all Government bodies and organs are fully aware of the principles of equality and non-discrimination on the basis of sex and gender," through adequate training and awareness-raising programs.<sup>243</sup> As mentioned earlier, the Committee has

<sup>239</sup> See IACHR, Status of Women in the Americas, OEA/SER.L./V/II.98, doc. 17 rev. 13 (Oct. 13, 1998); U.N. Secretary-General, *1999 World Survey on the Role of Women in Development: Globalization, Gender, and Work: Report of the Secretary General*, U.N. Doc. A/54/227 (Aug. 18, 1999); CEDAW (Committee), General Recommendation No. 21, *supra* note 127, ¶¶ 11–12; Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. Comm'n H.R., Report No. 4/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 32 (2001).

<sup>240</sup> Morales de Sierra, Case 11.625, Inter-Am. Comm'n H.R., OEA/Ser.L./V/II.111, doc. 20 rev. ¶¶ 35, 36; María da Penha Maia Fernandes v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 55 (2001) (noting disproportionate exposure of female victims to violence and state's failure to prosecute perpetrators); IACHR, Access to Justice for Women Victims of Violence in the Americas, *supra* note 205, ¶¶ 59–122 (reporting on violence and discrimination against women and the state's duty to amend discriminatory norms, practices, and policies); González v. Mexico (*Cotton Field*), Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 138–143 (Nov. 16, 2009) (discussing widespread murder and disappearances of Mexican women and girls as acts of femicide).

<sup>241</sup> CEDAW (Committee), General Recommendation No. 28, *supra* note 5, ¶ 9. The Committee has commented generally on the content of the duties to "respect, protect, and fulfill." The obligation to "respect" requires states parties to refrain from adopting laws, policies, regulations, programs, administrative procedures, and institutional structures that directly or indirectly result in the denial of women's equal enjoyment of their civil, political, economic, social, and cultural rights. The obligation to "protect" requires states parties to eliminate customs and other practices that prejudice and perpetuate the notion of the inferiority or superiority of either of the sexes and of stereotyped roles for men and women. The obligation to "fulfill" requires that states parties take steps to ensure that women and men enjoy equal rights *de jure* and *de facto*, including, where appropriate, the adoption of temporary special measures, among other interventions.

<sup>242</sup> *Id.*, ¶¶ 17–18.

<sup>243</sup> *Id.*, ¶¶ 19–26.

also clarified that CEDAW's obligations extend not only to sex-based discrimination, but also to that which is gender-based, including sexual orientation.<sup>244</sup>

The Commission in its application requested from the Inter-American Court non-repetition measures in order to prevent discrimination on the basis of sexual orientation in the future from the judiciary in Chile, including the adoption of legislation, public policies, programs, and initiatives to "prohibit and eradicate discrimination on the basis of sexual orientation in all areas of the exercise of public power, including the administration of justice."<sup>245</sup> The Court in its ruling echoed the rectification measures it ordered in its landmark *Cotton Field* judgment,<sup>246</sup> considering that the reparations ordered should have as their objective the transformation of the social context of discrimination which facilitated discrimination against Karen Atala.<sup>247</sup>

The Author hopes that the Court in future judgments related to discrimination builds on this case and its previous judgments, by illustrating in a more concrete fashion which kinds of measures can be implemented by a state within its justice system to end discrimination, and to prevent its repetition, and measures to guarantee the institutionalization and sustainability of remedial measures.<sup>248</sup>

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<sup>244</sup> *Id.*, ¶¶ 4, 5, 17.

<sup>245</sup> See *Atala*, Application, *supra* note 27, ¶ 168.

<sup>246</sup> For more discussion, see Celorio, *The Rights of Women in the Inter-American System of Human Rights*, *supra* note 20; see also *Cotton Field*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 446–543 (Nov. 16, 2009).

<sup>247</sup> *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 267–272 (Feb. 24, 2012). The Court alluded to how the acts of discrimination reviewed in the case of Karen Atala and M., V., and R. were related to the reproduction of stereotypes which are associated to the structural and historical discrimination suffered by sexual minorities, particularly in matters related to access to justice, and national laws. Therefore, the Court ordered measures related to training of public officials in regards to: i) human rights, sexual orientation, and non-discrimination; ii) the protection of the rights of the LGBTI community; and iii) discrimination, overcoming gender stereotypes against the LGBTI population. The courses should be directed to public officials at the regional and national levels, in particular to justice officials from all areas and levels of the justice branch.

<sup>248</sup> See, e.g., *González*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 495; *Fernández Ortega v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215 (Aug. 30, 2010); *Rosendo Cantú and Other v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 34 (Aug. 31, 2010); IACHR, Access to Justice for Women Victims of Violence in the Americas, *supra* note 205, ¶ 44.

*D. Discrimination, the Right to Privacy, and the Family Context: Positive and Negative State Obligations Under International Human Rights Law*

One of the key contributions of the Commission and Court's decisions in the case of *Karen Atala and Daughters* is their analysis related to the link between the prohibition of discrimination and the rights to privacy and to protection of the family under international human rights law.<sup>249</sup>

In regard to the right to privacy, firstly, the Inter-American Court coupled its pronouncements related to discrimination in the custody proceeding, by adding how they had repercussions for the right to privacy of Karen Atala under article 11.2 of the American Convention.<sup>250</sup> In particular it referred to how the proceeding advanced a stereotyped vision of the scope of the sexual orientation of Karen Atala, generating an arbitrary interference in her private life, since sexual orientation constitutes a part of the intimacy of a person, and is not relevant to review of aspects of paternity or motherhood.<sup>251</sup>

Second, the Court referred to the disciplinary investigation of Karen Atala by the judicial branch, and how it had interfered arbitrarily with her right to a private life in contravention of article 11.2 of the American Convention.<sup>252</sup> The Court perceived no nexus between a desire to protect the image of the "judicial branch" and Mrs. Atala's sexual orientation.<sup>253</sup> The Court established in particular that sexual orientation and its exercise cannot constitute, under any circumstance, an adequate foundation to undertake a disciplinary proceeding, since there is no correlation between a person's fulfillment of professional duties and her sexual orientation.<sup>254</sup>

The Commission for its part presents a multi-layered analysis related to the right to privacy in its merits decision, applicable not only to sexual orientation issues, but to the exercise of human rights in general, including those pertaining to women.<sup>255</sup> The Commission innovatively amplifies the areas pertaining to a woman's private sphere—or what international legal bodies denominate as an "intimate zone" of decision-making—shielded from

<sup>249</sup> *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 109–123.

<sup>250</sup> *Id.* ¶ 167.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* ¶ 221.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Atala*, Application, *supra* note 27, ¶¶ 109–117.

arbitrary state intervention.<sup>256</sup> Some of the zones identified are the development of a person's identity, personality, aspirations, and decisions over his or her sexual life, and his or her personal and family relations.<sup>257</sup> The Commission refers to them not only as components of this "intimate zone," but also goes further and associates them with the autonomy of an individual, and his or her life plan.<sup>258</sup> This analysis leads the Commission to conclude that "sexual orientation constitutes a fundamental component of the private life of an individual," which should be free from arbitrary and abusive interferences by the state.<sup>259</sup> It also specifies that there is a clear nexus between the sexual orientation and the development and life plan of a person, "including his or her personality, and relations with other human beings."<sup>260</sup>

The Commission's decision also smartly establishes a link between discrimination, prejudices, and stereotypes, and how these can be used as a pretext or background for a state's arbitrary and unjustified intervention in a person's zone of intimacy.<sup>261</sup> The Commission applies a rigorous standard of review—demanding the presentation of "weighty and convincing reasons"—to justify a state's intervention in this protected zone on the basis of an individual's sexual orientation, echoing precedent from the European Court of Human Rights.<sup>262</sup> This analysis is significant since it lays the groundwork for future cases that may be dealt with by the Court pertaining to areas fundamental to women's rights and their right to privacy, such as the ability to undertake fundamental decisions related to their reproductive rights and health.<sup>263</sup>

The Author also considers the Commission's decision useful to women's rights in the realm of privacy in setting limits on the assessment of a person's sexual life in a custody proceeding—a vi-

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<sup>256</sup> For more analysis, see, for example, the Commission's analysis in *Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. Comm'n H.R., Report No. 4/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 47 (2001); *X v. Argentina*, Case 10.506, Inter-Am. Comm'n H.R., Report No. 38/96, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 91 (1997).

<sup>257</sup> See *Atala*, Application, *supra* note 27, ¶¶ 110–11.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* ¶ 111.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* ¶ 115.

<sup>262</sup> *Id.* ¶¶ 111, 113.

<sup>263</sup> See, e.g., *Artavia Murillo v. Costa Rica*, Case 12.361, Inter-Am. Comm'n H.R., Report No. 85/10, ¶¶ 72–76 (2010); *I.V. v. Bolivia*, Petition 270-07, Inter-Am. Comm'n H.R., Report No. 40/08, OEA/Ser.L./V/II.134 doc. 5 rev. 1 ¶¶ 4, 80 (2009). See also *Artavia Murillo (in vitro fertilization) v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶¶ 43–100 (November 28, 2012).

tal part of a woman's autonomy and life plan.<sup>264</sup> The Commission recognizes that "it is not only reasonable, but necessary, for a judicial authority" to ponder several factors to determine a parent's capacity to exercise custody over his or her children—factors which may include "the private, sexual and emotional life" of the persons involved.<sup>265</sup> The examination of these factors, however, should be consistent with states' international obligations, and the elements examined must be relevant to a mother's capacity to exercise custody over her children.<sup>266</sup>

The decisions of the Commission and the Court in the case of *Karen Atala and Daughters* can also constitute a very important contribution to the treatment of the "family" in international human rights law.<sup>267</sup> Probably the most palpable legacy will be felt in three areas: i) the conceptualization of the family model in international human rights law; ii) the connection between the right to privacy and protection of the family under the American Convention; and iii) when an international legal body should enter and assess cases related to family law.<sup>268</sup>

The family has been the central character in much of the discrimination that women have suffered historically.<sup>269</sup> It is widely recognized today that women have faced substantial limitations in the exercise of their civil, political, economic, social, and cultural rights within the family, leading to discrimination and its extreme forms, such as domestic violence.<sup>270</sup> At the root of this discrimination has been women's social assignment of child-rearing roles, requiring them to tend to the home within the so-called "private sphere"—a space traditionally undervalued in society.<sup>271</sup> CEDAW recognizes this disadvantage in its article 16, prohibiting all forms of discrimination against women in matters related to marriage

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<sup>264</sup> See *Atala*, Application, *supra* note 27, ¶¶ 69, 114.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> See *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 167–178 (Feb. 24, 2012); *Atala*, Application, *supra* note 27, ¶¶ 118–123.

<sup>268</sup> *Atala*, Application, *supra* note 27, ¶¶ 118–123.

<sup>269</sup> See, e.g., U.N. Secretary-General, *In Depth Study on All Forms of Violence Against Women*, ¶¶ 69–91, 111–125, U.N. Doc. A/61/122/Add.1 (July 6, 2006); World Health Org., *Multi-Country Study on Women's Health and Domestic Violence against Women: Initial Results on Prevalence, Health Outcomes and Women's Responses*, at 3 (2005); Elimination of Domestic Violence Against Women, G.A. Res. 58/147, U.N. Doc. A/Res/58/147 (Feb. 19, 2004).

<sup>270</sup> See Elimination of Domestic Violence Against Women, G.A. Res. 58/147, U.N. Doc. A/Res/58/147 (Feb. 19, 2004).

<sup>271</sup> CEDAW (Committee), General Recommendation No. 21, *supra* note 127, ¶ 11.

and its dissolution, including the custody of children, the administration of property, the selection of a family name, profession, and occupation, among other issues.<sup>272</sup> CEDAW solidifies the important notion that human rights violations can happen in the realm of the family, and that the state has obligations in the protection of family members, especially those more at risk of abuses, such as women.<sup>273</sup> CEDAW has also broadened the concept of the “family” in its general recommendations and reaffirmed that women should be treated by the state with equality and justice in all models.<sup>274</sup>

In furthering these principles, the Court in groundbreaking fashion determined that the American Convention does not envision a closed conception of the family, and does not advance a “traditional model.”<sup>275</sup> The Court considers that the concept of family life is not only to be reduced to marriage, but extends to all other *de facto* family ties where the parties have a common life outside of marriage.<sup>276</sup> In this case, the Court deemed that the language used by the Supreme Judicial Court of Chile—the supposed need of the girls to grow in a “family structured normally and appreciated in the social medium,” and not in an “exceptional family”—reflected a limited and stereotyped perception of the concept of the family which has no basis in the American Convention.<sup>277</sup>

In similarity to the European Court of Human Rights’ judgment in the case of *Schalk and Kkopf v. Austria*,<sup>278</sup> the Commission in its decision also treats the unit of Karen Atala and her daughters as a “family,” even though it does not conform to traditional social notions, and she is a homosexual cohabiting with a partner of the

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<sup>272</sup> See CEDAW (Convention), *supra* note 2, art. 16.

<sup>273</sup> See generally CEDAW (Committee), General Recommendation No. 21, *supra* note 127.

<sup>274</sup> *Id.* The CEDAW (Committee) has established that:

The form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires.

*Id.* ¶ 13.

<sup>275</sup> *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 142 (Feb. 24, 2012).*

<sup>276</sup> See *id.*

<sup>277</sup> *Id.* ¶ 145.

<sup>278</sup> In its judgment in the case of *Schalk and Kkopf*, the European Court of Human Rights found that “a same-sex couple living in a stable *de facto* partnership, falls within the notion of ‘family life’ under Article 8” of the European Convention of Human Rights. See *Schalk v. Austria, App. No. 30141/04, ¶ 94 (Eur. Ct. H.R. 2010).*

same sex.<sup>279</sup> The Commission holds that the change in custody regime not only interfered in an arbitrary fashion in an intimate zone in the life of Karen Atala, but it also abusively impinged in her “family life plan,”<sup>280</sup> and emphasizes the right of Karen Atala to establish family relations based on her sexual orientation, even though her choices might not be tolerated by a social majority.<sup>281</sup> This principle is fundamental for the protection of women’s rights, in benefit of those women forming families which are not traditional, such as same-sex couples, single-heads of households, mixed-race households, and widows.<sup>282</sup>

The Inter-American Court in its judgment also delves into the connection between the rights to privacy and the family, and how the family nucleus conformed by both Karen Atala and her daughters, previous to the onset of the custody proceedings, was protected by both articles 11.2 and 17 of the American Convention, even though the girls also had a family relationship with their father.<sup>283</sup> The Court considered that a family nucleus existed since there was frequent, personal, and affectionate contact between Karen Atala, her partner, her oldest son, and her three daughters.<sup>284</sup> Therefore, it concluded that the unsuitability of the custody measure also constituted an arbitrary interference in the rights to private and family life under articles 11.2 and 17.1, in relation to article 1.1 of the American Convention, to the prejudice of Karen Atala and her daughters.<sup>285</sup> The Commission in its ruling also recognizes this intimate connection between the right to privacy and protection of the family under the American Convention and international human rights law.<sup>286</sup>

The rulings of the Court and the Commission also bring added value to when international legal bodies are supposed to intervene in a family law matter.<sup>287</sup> International legal bodies have read a right to protect the family into international human rights law—and this right is also contained in several treaties—but they are

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<sup>279</sup> See *Atala*, Application, *supra* note 27, ¶ 116.

<sup>280</sup> *Id.* ¶ 115.

<sup>281</sup> *Id.* ¶ 116; see also CEDAW (Committee), General Recommendation 21, *supra* note 127, ¶ 13.

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<sup>283</sup> *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 169–178 (Feb. 24, 2012).

<sup>284</sup> *Id.* ¶ 177.

<sup>285</sup> *Id.* ¶ 178.

<sup>286</sup> See *Atala*, Application, *supra* note 27, ¶¶ 118–119, 122–123.

<sup>287</sup> See *id.* ¶¶ 68–69; *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 64–66.

slowly shedding light on what kind of state interventions are necessary in this regard.<sup>288</sup> Several tribunals have highlighted the double nature of the right to protection of the family, involving: a) a “positive obligation”—which entails protecting the family as a fundamental unit in society; and b) a “negative obligation”—involving the duty to abstain from arbitrary and abusive interferences in this sphere.<sup>289</sup> Many of the efforts from international legal bodies have been devoted to shedding light on the scope of state obligations toward cases of violence against women, domestic violence, and child abuse, and the definition of the contours of the reach of the obligations to “prevent,”<sup>290</sup> “protect,”<sup>291</sup> and to act with “due diligence” in this regard.<sup>292</sup> The Commission and Court rulings in the case of *Karen Atala and Daughters* are clear in that an international tribunal should intervene in a custody matter—traditionally relegated to the domestic sphere—when discriminatory notions and stereotypes have been the basis for the resolution of a custody case, in lieu of an objective assessment of the capacity of the parents involved to care for their children.<sup>293</sup>

The Commission’s decision in the case of *Karen Atala and Daughters* is also key in that it displays how international human rights law and state obligations toward the family evolve over time,

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<sup>288</sup> See, e.g., Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 66 (Aug. 28, 2002).

<sup>289</sup> See, e.g., *id.*; *Escher v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 200, ¶ 113 (July 6, 2009).

<sup>290</sup> See, e.g., *Jessica Lenahan v. United States (Gonzales)*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶¶ 119, 124, 129 (2011); *María da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 56 (2001); *Opuz v. Turkey*, App. No. 33401/02, ¶¶ 78, 79, 84, 189–190 (Eur. Ct. H.R. 2009); *E and Others v. United Kingdom*, App. No. 33218/96, ¶¶ 88, 97, 115 (Eur. Ct. H.R. 2002); *Z and Others v. United Kingdom*, App. No. 29392/95, ¶ 73 (Eur. Ct. H.R. 2001).

<sup>291</sup> See, e.g., *Gonzales*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶¶ 111, 128, 129; *María da Penha Maia Fernandes*, OEA/Ser.L./V/II.111, doc. 20 rev. ¶¶ 53, 54, 58; *Opuz*, App. No. 33401/02, ¶¶ 149, 189–190; *E and Others*, App. No. 33218/96, ¶¶ 88, 99, 110, 111, 116; *Z and Others*, App. No. 29392/95, ¶¶ 73, 74, 109, 111; CEDAW (Committee), *Yildirim v. Austria*, Communication No. 6/2005, U.N. Doc. CEDAW/C/39/D/6/2005, ¶ 3.1 (Oct. 1, 2007); CEDAW (Committee), *Goekce v. Austria*, Communication No. 5/2005, U.N. Doc. CEDAW/C/39/D/5/2005, ¶ 3.1 (Aug. 6, 2007).

<sup>292</sup> See, e.g., *Gonzales*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶¶ 111, 124, 128, 129; *Opuz*, App. No. 33401/02, ¶¶ 78, 79, 84, 149, 189–190; CEDAW (Committee), *Yildirim*, Communication No. 6/2005, ¶ 3.5; CEDAW (Committee), *Goekce*, Communication No. 5/2005 ¶ 12.1.5.

<sup>293</sup> See *Atala*, Application, *supra* note 27, ¶¶ 68–69; *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 64–66 (Feb. 24, 2012).

and should be interpreted in light of current social realities.<sup>294</sup> It illustrates how the decisions issued by the regional and universal regional human rights systems should respond to the passage of time and actual needs, based on the given features of social discrimination at a point in time.<sup>295</sup> It is also key to consider the values of the international system at the relevant historical stage of interpretation.<sup>296</sup>

The Author considers that one fundamental message of these two decisions is that the contemporary values of the international human rights law system—pluralism, equality, tolerance, and justice—should also apply to the family as well as to the behavior of public authorities toward this institution and its members.

*E. Toward a Better Understanding of Children's Rights in Family Matters: Deconstructing the "Best Interests of the Child" as an Objective in Custody Cases*

The Author considers that one of the most important legacies of the Inter-American Court judgment in the case of *Karen Atala and Daughters* is the analysis it presents related to the best interests of the child principle, and its advancement in matters pertaining to their custody and care.<sup>297</sup> The Court had previously analyzed the content of article 19 of the American Convention and the principle of special protection contained in said provision.<sup>298</sup> In this framework, it had referred and applied the notion of an international *corpus juris* related to the rights of the child, including the Convention on the Rights of the Child and other regional instruments.<sup>299</sup> The Court had also established how the separation of a child from his or her household must be exceptional, and preferably

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<sup>294</sup> See *Atala*, Application, *supra* note 27, ¶¶ 118–123.

<sup>295</sup> *Id.* ¶¶ 81, 90.

<sup>296</sup> *Id.*

<sup>297</sup> *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 ¶¶ 100–155 (Feb. 24, 2012).

<sup>298</sup> See, e.g., Juridical Status and Human Rights of the Child, Advisory Opinion, OC 17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 60 (Aug. 28, 2002); *Juvenile Reeducation Inst. v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 147 (Sept. 2, 2004); *Gómez Paquiyauri Brothers v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶¶ 163–164, 171 (July 8, 2004); *Bulacio v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 133 (Sept. 18, 2003); *Villagrán Morales v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 191 (Nov. 19, 1999).

<sup>299</sup> See cases cited *supra* note 298.

temporary.<sup>300</sup>

The Court, however, in the case of *Karen Atala and Daughters* does push the boundary of the principle of special protection in custody cases, adding groundbreaking content related to its link with the obligation not to discriminate in international human rights law.<sup>301</sup> The Court advanced a series of human rights principles that are paramount for tribunals to consider when issuing custody decisions with long-lasting effects on the children and the parents involved, in harmony with human rights and the principle of non-discrimination.<sup>302</sup>

In this regard, the Court found that the discriminatory treatment suffered by Karen Atala had repercussions on the girls, as it became the foundation for the custody decision that ended up separating them from their mother.<sup>303</sup> This decision discriminated not only against Karen Atala, but also against M., V., and R. in contravention to article 24 of the American Convention, in relation to articles 19 and I.1 of the same instrument.<sup>304</sup> This is a finding of utmost importance as it skillfully clarifies that discrimination against any of the parents in a custody case does not further the best interest of the child and serves to discriminate against the children involved.<sup>305</sup> Moreover, the best interests of the child as an objective, cannot be used to discriminate, as this can harm both the children and the parents at issue.<sup>306</sup>

The Court also skillfully refers to the standard of harm that must be applied in cases that could result in the removal of children from the custody of either parent.<sup>307</sup> Harm that can be a determining factor in a custody decision needs to be real and proven, not speculative, imaginary, or based on stereotypes.<sup>308</sup> A nexus needs to be present between the conduct of the parent and the alleged harm on the development of the child involved—an assessment which is key to ensure that decisions are not based in stereo-

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<sup>300</sup> *Juridical Status and Human Rights of the Child*, Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 77.

<sup>301</sup> See e.g., *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 100–155.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* ¶¶ 131, 133.

<sup>304</sup> *Id.* ¶¶ 123, 131, 133, 153.

<sup>305</sup> *Id.* ¶ 123.

<sup>306</sup> *Id.* ¶ 127; see also Comm. on the Rights of the Child [CRC (Committee)], General Comment No. 7, Implementing Child Rights in Early Adulthood, U.N. Doc. CRC/C/GC/7/Rev.1 ¶ 7 (Sept. 20, 2006).

<sup>307</sup> *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 119–128 (Feb. 24, 2012).

<sup>308</sup> *Id.*, ¶¶ 109–110.

types.<sup>309</sup> The Court bases its analysis on a variety of sources, such as judgments issued by high courts in other countries in the Americas,<sup>310</sup> and studies submitted to the Court by experts showing that children are not harmed from living with homosexual parents.<sup>311</sup>

Lastly, the Court advances analysis related to the content of the children's right to be heard in legal processes that concern them.<sup>312</sup> The Court incorporates this element into the content of article 8.1<sup>313</sup> and as a judicial protection and guarantee by referencing article 12 of the Convention on the Rights of the Child, along with the General Comment issued by the Committee on the Rights of the Child interpreting the scope of this provision.<sup>314</sup>

The Court reiterates some of the principles advanced by the Committee on the Rights of the Child related to the content of the right to be heard, including: i) that the point of departure should not be that the child cannot express his or her own opinions; ii) that the child only needs to have sufficient understanding to be capable of forming adequately his or her own opinion over this issue; iii) that the child can express his or her opinions without pressure and can choose whether she or he wants to be heard; iv) that those responsible for hearing the child inform him or her of the issues, options, and possible decisions that could be adopted and their consequences; v) that the capacity of the child should be assessed to duly take into account his or her opinions; vi) to communicate to the child the influence those opinions have had in the process; and vii) that the level of understanding of a child is not necessarily tied to his or her biological age.<sup>315</sup>

The Court also establishes that the right to be heard includes a correlative right for the children's opinions to be taken into account, in function of her or his age and maturity level.<sup>316</sup> This means that the court at issue needs to explain in the judgment the process and modalities it adopted for hearing the child, and how it

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<sup>309</sup> *Id.*, ¶ 125.

<sup>310</sup> *Id.*, ¶ 126.

<sup>311</sup> *Id.*, ¶ 128.

<sup>312</sup> *Id.*, ¶ 196.

<sup>313</sup> The Commission referred to M., V., and R's right to be heard under article 19 of the American Convention. See *Atala*, Application, *supra* note 27, ¶¶ 124–136.

<sup>314</sup> *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 196–98.

<sup>315</sup> *Id.*, ¶ 198. CRC (Committee), General Comment No. 12, The Right of the Child to be Heard, U.N. Doc. CRC/C/GC/12 ¶¶ 20–21, 25, 28, 30 (July 20, 2009) [hereinafter CRC (Committee), General Comment No. 12].

<sup>316</sup> *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 200.

takes into account her or his declarations and preferences.<sup>317</sup> In this particular case, the Court found that the girls' right to be heard was violated since the Supreme Court never explained in its judgment how it incorporated their preferences, in contrast with the lower courts.<sup>318</sup>

Another very interesting note about the content of the right to be heard in the case of *Karen Atala and Daughters* is that the Court actually made the effort to interview M., V., and R. about this process.<sup>319</sup> The interests of the girls had been represented before the Commission and the Court at all times by their mother and the Petitioners and later representatives.<sup>320</sup> But the Court noted that there was no manifestation in the file before it evidencing that the girls were in agreement with the representation of either of the parents before the Court.<sup>321</sup>

Curiously though, the Court provides minor details in its judgment regarding this diligence—which is a first for the Court in children's rights cases—only indicating that it was undertaken by personnel from the Court Secretariat and the psychiatrist of the girls.<sup>322</sup> The judgment indicates that the hearing was private, without the presence of either of the parents, conducted more as a separate conversation with each child.<sup>323</sup> The girls were 12, 13, and 17 years-old at the time of this diligence, and two of them participated.<sup>324</sup> The Court limits its analysis to stating that the girls knew and understood themes related to the alleged violations in which they have been identified as victims, and two of the girls manifested their own opinions regarding this case, as well as some of their expectations and interests.<sup>325</sup> The Author notes that the judgment does not add any more analysis of how the children's opinions were considered in the judgment, and the Court notes the reserved nature of the diligence.<sup>326</sup>

The Committee on the Rights of the Child is very clear in its General Comment No. 12 that the right of all children to be heard and to be taken seriously constitutes one of the fundamental values of the Convention on the Rights of the Child, along with the rights

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<sup>317</sup> *Id.* ¶ 208.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* ¶¶ 67–71.

<sup>320</sup> *See Atala*, Application, *supra* note 27, ¶¶ 10–39.

<sup>321</sup> *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 67.

<sup>322</sup> *Id.* ¶ 69.

<sup>323</sup> *Id.* ¶¶ 69–70.

<sup>324</sup> *Id.* ¶¶ 68–70.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* ¶¶ 67–71, 196–200.

to non-discrimination, the right to life and development, and the primary consideration of the child's best interest.<sup>327</sup> The Committee also explains how article 12 of the Convention on the Rights of the Child not only establishes a right itself, but should also be considered in the interpretation and implementation of all other Convention rights.<sup>328</sup> If the child's participation is to be effective and meaningful, it needs to be understood as a process, and not as an isolated event.<sup>329</sup> The Committee also urges states parties to pay special attention to the right of the girl child to be heard, to receive support, if needed, to voice her view, and her view to be given due weight, as gender stereotypes and patriarchal values undermine and place severe limitations on girls in the enjoyment of the right set forth in article 12.<sup>330</sup>

The Author is hopeful that the Court will illustrate the meaning of these principles through its future resolution of children's rights cases.<sup>331</sup> It will also be important to study in the coming years the impact of this diligence on the Commission's processing of individual cases related to the rights of the child, and other human rights concerns which affect them.

#### IV. CONCLUSIONS

The obligations not to discriminate and to guarantee equality constitute a basic pillar of the international human rights law system. Therefore, a more nuanced understanding of their content is needed to fully understand the adequate application of international human rights law at the national level, and the development of more legal standards in this area in the future.

Applying a flexible interpretation to clauses such as article 1.1 of the American Convention is a step in the right direction to providing important guidelines and insights to states as to how to address the needs of groups which have been traditionally

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<sup>327</sup> CRC (Committee), General Comment No. 12, *supra* note 315, ¶ 2.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* ¶ 133.

<sup>330</sup> *Id.* ¶ 77.

<sup>331</sup> *See, e.g.*, Fornerón and Daughter v. Argentina. Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 242, ¶¶ 20–148 (Apr. 27, 2012). In this case, submitted by the Inter-American Commission before the Court on November 29, 2010, it was alleged that Mr. Fornerón's biological daughter was given in adoption to a married couple without the father's consent, who had no access to the child. It was also claimed that the State had not ordered any visiting rights regime despite the multiple requests presented by Mr. Fornerón in more than ten years. *See also* Fornerón and Anibal Fornerón v. Argentina, Case 12.584, Inter-Am. Comm'n H.R., Report No. 83/10, ¶¶ 22–24 (2010).

discriminated against in their societies. It also opens the door to the identification, recognition, and thorough analysis of factors of discrimination that have yet to be recognized by the international community. Each ground of discrimination has its own complexity that needs to be reviewed by international bodies in order for states to have insight into the reach of their obligations to address discrimination, and how these concepts have evolved.

Within this framework, it is important not to forget that women have been a central character among those affected by marginalization and exclusion at the global level. The elimination of discrimination against women is widely recognized as a pillar and precondition for the full guarantee of women's rights. The concept of discrimination on the basis of sex has evolved since the onset of the human rights system from a biology-based notion, to the persistence of stereotypes and social patterns that promote the disadvantaged treatment of women. Toward these, a state's obligations are comprehensive and have different layers.

As the Commission has stated in the past, the continuum of human rights obligations to address discrimination against women is not only negative in nature; it also requires positive action from states.<sup>332</sup> It requires the guarantee of the equality of women in the law; the elimination of norms that are either discriminatory, or have a discriminatory impact on women; the eradication of discriminatory practices and stereotypes; and the organization of the entire state structure to confront discrimination with due diligence. Moreover, it is important that international judgments continue to illustrate how discrimination against women can be indirect and inherent in laws, policies, and judicial decisions issued with the "so-called" objective to protect the best interests of the children involved. The state has the immediate obligation to organize its state structure in order to prevent and address these discriminatory patterns with due diligence, and the intervention of international legal bodies is paramount in illustrating how to safeguard this guarantee at the national level.

Moreover, a thorough understanding of the limiting effect of intersectional discrimination in the exercise of women's civil, political, economic, social, and cultural rights cannot be underestimated. It demands from the state the recognition of sectors which are at a disadvantage in the exercise of their rights—such as women, children, indigenous peoples, people of African descent, per-

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<sup>332</sup> See Jessica Lenahan v. United States (*Gonzales*), Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 117 (2011).

sons living in conditions of poverty, migrants, women affected by disabilities, etc.—and to adopt policies to redress this past history of discrimination.<sup>333</sup>

Since the obligations entailed are broadly encompassing, the development of more legal standards is needed—refined by international bodies—defining the content and scope of the obligations not to discriminate and to guarantee equality in individual cases. Due to the complex nature of the issue of discrimination, states need concrete guidance on how to best comply with the individual obligations contained in instruments such as the American Convention, the Inter-American Convention, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, and CEDAW, among other international treaties. Moreover, the definition of appropriate strategies at the national level to adequately and effectively implement these legal standards requires the participation of the relevant disadvantaged groups.

In this regard, the further definition by the Inter-American Commission and the Court of the content and scope of the obligations not to discriminate and to guarantee equality in individual cases—such as in the case of *Karen Atala and Daughters*—is paramount to the development of adequate and effective international legal standards pertaining to discrimination and its pernicious effect on women. A more nuanced and concrete understanding of the obligations contained in articles 1.1 and 24 of the American Convention is also fundamental to the protection of human rights in general in the hemisphere of the Americas. In this regard, it is key that the decisions of the Commission and the Court pertaining to the case of *Karen Atala and Daughters* are studied together, as each provides its own contribution to the development of standards in the realms of discrimination and equality.

For the Author, it is important that the Inter-American system—along with the universal system of human rights—can respond to the evolution of discrimination over time, serving to create spaces and avenues where the needs of historically marginalized groups are addressed.

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<sup>333</sup> IACHR, The Work, Education, and Resources of Women, *supra* note 9, ¶¶ 59–67.

