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Creating Legacy Today: The First LGBT Ruling by the Inter-American Court of Human Rights

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CREATING LEGACY TODAY: THE FIRST LGBT RULING BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Jessica Stern†

It is a great honor to speak at a symposium on Rhonda Copelon's legacy. I once had the pleasure of hearing Rhonda speak to a small group of dedicated activists at the Center for Women's Global Leadership, and her passion infused the room and sent everyone furiously taking notes. In talking about her work, I know that same inspiration will guide us today.

I have been asked to speak today about the case of Karen Atala, a lesbian judge and mother from Chile who made history on March 21st of 2012 by winning the first-ever lesbian, gay, bisexual, transgender ("LGBT")-specific case to go before the Inter-American Court of Human Rights.¹ Rhonda Copelon supported Karen's work both legally and emotionally, so it is a fitting topic today.

But before I go into Karen Atala's case, I want to note another LGBT Chilean who recently made headlines. Daniel Zamudio, a clothing salesman, was attacked in a park in Santiago on March 3rd, and he died on Tuesday of this week.² The suspects allegedly beat him and burnt him with cigarettes for more than an hour. According to a summary of police reports published online:

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¹ *Atala Riffo & Daughters v. Chile, Merits, Reparations, and Costs*, Judgment Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012), available at http://corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf.

² *Chile Prosecutors Seek Murder Charges over Gay Attack*, BBC NEWS, Mar. 28, 2012, <http://www.bbc.co.uk/news/world-latin-america-17544423>.

[The attackers] hit him again. This time stronger and with kicks, punches in the head, face, testicles, legs, and all over the body. [One of the accused] admits that he kicked Zamudio a couple of times, but by then Zamudio was already passed out and bleeding through the nose and face. The same person also reported that the attackers didn't even need to hold Zamudio still when they carved swastikas into his flesh, three in total, using the neck of a soda bottle that they broke minutes before on his head.³

He was already unconscious. Daniel Zamudio was only twenty-four when he died. The non-discrimination bill that might have protected him has languished in the Chilean Parliament for seven years.⁴

Despite setbacks and persistent intolerance embodied in tragedies like Daniel Zamudio's death, the idea that discrimination on the basis of sexual orientation and gender identity is a violation of human rights has found acceptance in the last decades, making enormous strides in the jurisprudence and legislative decisions of many countries and international bodies. The good news I am here to share today is that the growing trend in customary international law is to find a protected class based on sexual orientation, and increasingly gender identity, with the European Court of Human Rights, the United Nations human rights bodies, the Inter-American System, courts and national legislatures globally regularly concluding that discrimination on the basis of sexual orientation and/or gender identity violates human rights.⁵ Now, I would like to explore this point within the context of a specific case concerning another Chilean.

³ *Who Are the Nazis Who Attacked Daniel Zamudio?*, CLINIC ONLINE, Mar. 20, 2012, <http://www.theclinic.cl/2012/03/20/quienes-son-los-nazis-que-atacaron-a-daniel-zamudio/> (translated by author).

⁴ Chile's Congress passed the law one month following Zamudio's murder, seven years after it was first proposed. *Chile Passes Anti-Discrimination Law Following Daniel Zamudio's Death*, HUFFINGTON POST, (Apr. 4, 2012, 9:55 PM), http://www.huffingtonpost.com/2012/04/05/chile-discrimination-law-daniel-zamudio-gay-death_n_1405406.html; see also *Chile: President Signs Anti-Discrimination Law*, N.Y. TIMES, July 12, 2012, <http://www.nytimes.com/2012/07/13/world/americas/chile-president-signs-anti-discrimination-law.html>. Chile's President signed it into law in July 2012. The law criminalizes "any distinction, exclusion or restriction that lacks reasonable justification, committed by agents of the state or individuals, and that causes the deprivation, disturbance or threatens the legitimate exercise of fundamental rights." Law No. 20609, July 12, 2012 (Chile) available at <http://bcn.cl/scdh> (translated by author).

⁵ See Brief for Int'l Gay and Lesbian Human Rights Comm'n et al. as Amici Curiae Supporting Petitioner at 10–11, *Karen Atala & Daughters v. Chile*, Case 12.502, Inter-Am. Ct. H.R., CDH-S/2092 (2011) [hereinafter 2011 IGLHRC Brief], available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/563-1.pdf>.

A. *The Case of Karen Atala*

In a widely publicized case, Karen Atala lost custody of her three daughters, who were then ages five, six, and ten years old, in 2004.⁶ When she and her husband of nine years decided to separate, they agreed that their daughters should remain with her. However, when she fell in love with another woman, that all changed. On January 30, 2003, within weeks of Karen's then-partner moving into her home, the girls' father filed a legal action claiming that the children would suffer harm if they lived in a home with their lesbian mother and her partner.⁷

The case made its way all the way through the Chilean courts, and in reference to Ms. Atala's sexuality, the Supreme Court of Chile issued a homophobic verdict, plain and simple. On May 31, 2004, three of the five justices on the Supreme Court overturned the decisions of both the trial court and the court of appeals. They characterized the daughters as being in a "situation of risk" that placed them in a "vulnerable position in their social environment, since clearly their unique family environment differs significantly from that of their school companions."⁸ The Court changed lives when, with derogatory assumptions, it stated:

[G]iven their ages, the potential confusion over sexual roles that could be caused in [the daughters] by the absence from the home of a male father and his replacement by another person of the female gender poses a risk to the integral development of the children from which they must be protected.⁹

With those words, Karen lost her children.

B. *Regional Redress*

Karen Atala was not only a devoted mother, but also an adept lawyer and judge who built a legal team that determined in 2004 that while she had exhausted domestic remedies, there was an opportunity to seek justice from the regional human rights system. As party to the American Convention on Human Rights, the Government of Chile is bound to its provisions, like all other States parties of the Americas. This means that if an individual cannot obtain justice at the domestic level, under specific circumstances, the In-

⁶ Brief for Int'l Gay and Lesbian Human Rights Comm'n et al. as Amici Curiae Supporting Petitioner at 5, *Karen Atala Riffo v. Chile*, Case P-1271-04, Inter-Am. Comm'n H.R. (Jan. 19 2006) [hereinafter 2006 IGLHRC Brief], available at www.nycbar.org/pdf/report/Atala.pdf.

⁷ See *id.*

⁸ *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 57.

⁹ *Id.* ¶ 57.

ter-American human rights system may have jurisdiction to intervene and require that the State take certain actions.

For those of us who know what it means to be systematically discriminated against by state action that is racist, sexist, Islamophobic, able-bodyist, transphobic, homophobic, and/or discriminatory in some other way, it may be a relief to know that there are norms and standards beyond national borders that we can turn to when domestic mechanisms fail.

C. *The Procedural History*

To summarize, much happened in Karen Atala's pursuit of justice through the Inter-American human rights system. From 2004 to 2007, at the behest of and with assistance from the Inter-American Commission on Human Rights ("Commission"), the parties attempted to reach what is termed a "friendly settlement." During that time, various NGOs—including IGLHRC, the International Women's Human Rights Clinic ("IWHR Clinic") of CUNY School of Law under Rhonda's supervision, and ten other groups—submitted an amicus brief to the Commission in support of Karen Atala.¹⁰ In late 2007, Karen Atala and her legal team informed the Commission that negotiations failed and requested that the Commission admit Karen Atala's case to the Commission's own review. Over protest by Chile, the Commission admitted her case.

In December 2009, the Commission issued a landmark decision finding that Chile violated Karen Atala's right to freedom from discrimination guaranteed by the American Convention on Human Rights.¹¹ Furthermore, the Commission required the Government of Chile to provide Karen Atala with "comprehensive redress for the human rights violations that arose from the decision to withdraw her custody on the basis of her sexual orientation" and also called upon Chile to "adopt legislation, public policies, programs and initiatives to prohibit and eradicate discrimination on the basis of sexual orientation."¹² Progress, at least of the formal variety, leapt forward.

Over 2010, the State of Chile met in an inter-governmental working group to address the Commission's recommendations. However, the Commission ultimately concluded that the State "failed to comply with the recommendation to provide reparations" and that "the measures outlined by the State of Chile, al-

¹⁰ 2006 IGLHRC Brief, *supra* note 6.

¹¹ *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 2 n.5.

¹² *Id.*

though relevant, are of a general character and are not directed in a specific way to avoid repetition of the violations that occurred.”¹³ As a result, the Commission submitted the case to the jurisdiction of the Inter-American Court of Human Rights.

In July 2011, the Inter-American Court of Human Rights announced that it would hear the case of *Karen Atala and Daughters v. Chile* in late August of 2011.¹⁴ IGLHRC, the IWHR Clinic, and the law firm Morrison & Foerster, carrying on Rhonda’s legacy, and thirteen other parties submitted a joint amicus brief.¹⁵ IGLHRC and the IWHR Clinic built an argument that sexual orientation and gender identity should be found to be a protected class under the American Convention on Human Rights as held under international law. Attorneys from Morrison & Foerster focused on the custody issue at hand, arguing that sexual orientation and gender identity should not be factors in custody determinations. The brief’s other parties included thirteen other organizations, including Human Rights Watch, Amnesty International, and the New York City Bar Association.

D. *The Verdict*

On March 21, 2011, the Inter-American Court ruled in favor of *Karena Atala*. The court found that the Government of Chile must pay *Atala* \$50,000 in damages plus \$12,000 in court costs.¹⁶

More significantly, however, the decision reads, “any regulation, act, or practice considered discriminatory based on a person’s sexual orientation is prohibited. Consequently, no regulation, decision, or practice of domestic legislation, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on their sexual orientation.”¹⁷

E. *The Implications*

The court’s verdict will have far-reaching implications that courts, human rights defenders, NGOs, lawyers, and, crucially, LGBT people should now apply. The following are some of the reasons why.

¹³ *Karen Atala and Daughters v. Chile*, Case 12.502, Inter-Am. Comm’n H.R., Report No. 42/08 ¶ 39 (2010).

¹⁴ *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 7.

¹⁵ 2011 IGLHRC Brief, *supra* note 5.

¹⁶ *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 299, 306.

¹⁷ *Id.* ¶ 91.

First, the court's decision is legally binding, and the Government of Chile has already agreed to abide by its terms. At this crucial moment in Chile's history, the decision may reinforce domestic progress including on the non-discrimination bill that has been revitalized by Daniel Zamudio's murder.

Second, the court has relatively little history of work on discrimination, so its decision to hear a case about discrimination on the basis of sexual orientation means that the Inter-American Court of Human Rights has taken the extraordinary step of establishing its understanding of discrimination at least in part based on its understanding of homophobia. This is remarkable. Compared with most jurisdictions where sexual orientation and gender identity are late-day add-ons, interpreted into existing norms, and even designated as a less egregious manifestation of discrimination than issues like religion or race, this decision stands to put sexual orientation and gender identity at the center of the court's understanding of a fundamental right.

Third, the court's favorable verdict amounts to the first decision by a regional human rights court, outside of the European Court of Human Rights, to rule explicitly in favor of LGBT rights.¹⁸ The significance of this cannot be overstated.

Fourth, the favorable decision by the court contributes to the growing perception that sexual orientation and gender identity should not only not be ignored but in fact constitute a protected class that must be protected from discrimination. Again, the significance of this development cannot be overstated.

As I conclude, I want to recall at this conference about legacy that Tuesday not only brought the death of Daniel Zamudio but also of Adrienne Rich, the feminist and lesbian essayist and American poet who, though older, was in many ways Rhonda Copelon's contemporary. We mourn her passing for she, like Rhonda, contributed so much to the struggle for gender and sexual justice. In fact, in her defiant 1968 poem about the struggle for women's rights, she wrote:

*I'd rather
taste blood, yours or mine, flowing
from a sudden slash, than cut all day*

¹⁸ As early as 1999, the European Court held that the discharge of members of the Royal Air Force on the basis of their homosexuality violated the European Convention on Human Rights. *Smith and Grady v. United Kingdom*, App. Nos. 33985/96 and 33986/96 (Eur. Ct. H.R. 1999).

*with blunt scissors on dotted lines
like the teacher told.*¹⁹

Let it be that the legacies of Rhonda Copelon and of Adrienne Rich, the work we both honor today and carry forward in our own practice, put an end to senseless deaths like that of Daniel Zamudio, put an end to the injustice done to LGBT parents like Karen Atala, and paves the way for the long lives, safety, joy, and liberation of us all.

¹⁹ ADRIENNE RICH, *On Edges*, in *LEAFLETS: POEMS 1965–1968* 45 (1st ed. 1969), available at <http://www.poetryarchive.org/poetryarchive/singlePoem.do?poemId=430>.

