

## UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

### INTER-AMERICAN SYSTEM

#### INTER-AMERICAN COURT DECIDES FIRST CASE ON THE RIGHTS OF GAY AND LESBIAN PARENTS

On February 24, 2012 the Inter-American Court of Human Rights (IACtHR, Court) ruled that Chile violated a mother's human rights when the Supreme Court of Chile refused to grant her custody of her three daughters due to her sexual orientation. This is the first time the Court has found that discrimination based on sexual orientation violates the American Convention on Human Rights (American Convention).

Petitioner Karen Atala, herself a criminal judge, was originally granted custody over her three daughters when she and her husband filed for divorce in 2002. However, in March 2003, Atala's ex-husband sued for custody in juvenile court, claiming that her lesbian relationship was harmful to the girls and placed them at risk of contracting a sexually transmitted infection, and that Atala was incapable of caring for them. After one juvenile court judge was disqualified for issuing a ruling based on assumptions and stereotypes, an acting juvenile court judge granted Atala custody of her daughters, a decision the appellate court later affirmed. Then, in May 2004, the Supreme Court of Chile overruled the appellate decision and granted Atala's ex-husband permanent custody of the girls. The Supreme Court found that living with their mother and her same-sex partner could cause the girls to become confused about sexual roles and could subject them to "ostracism and discrimination" in their school and neighborhood.

In November 2004, Atala's representatives presented her case before the Inter-American Commission on Human Rights (IACHR, Commission), which found the case admissible in July 2008 and issued a merits decision in December 2009. The Commission found that Chile had violated Atala's right to privacy in her family life as set forth in Article 11 of the American Convention, her right to a family (Article 17), special protection

of girls (Article 19), equality and non-discrimination (Article 24), judicial guarantees (Article 8), and judicial protection (Article 25). The Commission requested that the State investigate the alleged discrimination against Atala due to her sexual orientation, publicly acknowledge its international responsibility to protect against such discrimination, and adopt measures to prevent discrimination based on sexual orientation. When the State failed to comply with the measures outlined by the Commission, the Commission presented the case to the Court in September 2010. In February 2012, the Court issued a decision in favor of Atala.

Significantly, the Court ruled that the principal of equality and non-discrimination has reached *jus cogens* status in the international community, meaning it is a universal right that states cannot limit, even in times of emergency. The Court noted that sexual orientation in particular is protected by the European Convention on Human Rights and Fundamental Liberties, the International Covenant for Civil and Political Rights, and the International Covenant for Economic, Social and Cultural Rights, and is furthermore included in Article 1 of the American Convention, which lists characteristics that states cannot use to discriminate against people. However, the list is not exhaustive, as demonstrated by the inclusion of a final characteristic, "any other social condition," which allows the Court flexibility in interpreting the American Convention. To that end, the Court explained that human rights instruments are "living" instruments. As such, the Court's interpretations of the Convention should reflect the evolution of society and favor extending the Convention's protections rather than limiting them. The Court then affirmed the Commission's findings that Chile had violated Atala's human rights under Articles 8, 11, 19, & 24 of the American Convention.

The State countered Atala's claim that the Supreme Court had discriminated against her in deciding her custody case based on her sexual orientation, arguing that when Chile ratified the Convention, it did not consider sexual orientation to

be a protected right. The State argued that the Supreme Court correctly considered Atala's sexual orientation because her sexual orientation could have "adverse effects" on her daughters, including evoking discrimination against them. The Court responded that it is the State's duty to protect people against discrimination.

The *Atala v. Chile* decision is the first case in the Inter-American System to hold that the American Convention protects against discrimination based on sexual orientation. Now, laws throughout Latin America that discriminate based on sexual orientation will be explicitly considered contrary to the American Convention and a violation of human rights. Countries that have accepted the binding jurisdiction of the Court must abide by this decision that prohibits discrimination based on sexual orientation. Moreover, by noting that the interpretation of the American Convention's Article 1 must necessarily evolve over time, the Court has reaffirmed the principle that protections may be extended to groups not explicitly mentioned in the instrument.

#### HAITI VIOLATES THE RIGHTS OF A HAITIAN HUMAN RIGHTS DEFENDER

In November 2011, the Inter-American Court of Human Rights (IACtHR, Court) published its decision in *Fleury and others v. Haiti* (available here in Spanish), holding that Haiti had violated the rights of human rights defender Lysias Fleury and his family when they arbitrarily arrested and beat him. Since the 2006 release of a report by the Inter-American Commission on Human Rights (IACHR, Inter-American Commission) on the situation of human rights defenders in the Americas, some Organization of American States (OAS) member states have reported improved protections for human rights defenders. Yet human rights defenders continue to be subject to murder, assault, forced disappearances, and threats throughout the Americas.

Human rights defenders in Haiti are known to face significant threats and violence from criminal gangs, members

of paramilitary groups, and the police. Prior to his attack, Fleury worked for the National Episcopal Commission of Justice and Peace (Comisión Episcopal Nacional de Justicia y Paz), a non-governmental organization that represents victims of domestic violence, kidnapping, and illegal detention. In June 2002, five policemen picked Fleury up at his home and took him to a police station where they held him for seventeen hours without providing an arrest warrant or any information on why they were detaining him. The police beat Fleury severely during his detention, breaking his arm and leg and perforating his eardrum. After forcing Fleury to sign a statement indicating that they had not mistreated him, the police offered to release him in exchange for payment. Fleury eventually returned to work, but was unable to live with his family for fear that his presence would put their lives in grave danger.

In February 2003, Fleury identified the police who beat him for the Inspector General of the National Police. Since that time, however, there has been no evidence of disciplinary sanctions against the police who beat him or an investigation into the wrongdoing. In 2007, Fleury came to the United States and brought his case before the Inter-American Commission with the help of the American University, Washington College of Law International Human Rights Clinic. While in the U.S., the U.S. Government granted Fleury asylum, and his family joined him in 2009. The Inter-American Commission found Fleury's case admissible in February 2004, and in March 2009, released a merits report.

The Commission found that Haiti violated Fleury's right to be free from torture and cruel, inhuman, and degrading treatment (Article 5 of the American Convention on Human Rights); the right to personal liberty (Article 7); the right to judicial guarantees (Article 8) and judicial protection (Article 25); and the right of Fleury and his family to personal integrity (Article 5). The Court held that the State's treatment of Fleury was particularly egregious because signatories to the convention have a duty to protect human rights and defenders of human rights. After the State failed to respond to its recommendations regarding Fleury's case, the Inter-American Commission referred the case to the Court in July 2009. The Court granted the State of Haiti an extended period to respond to Fleury's allegations after the January 2010

earthquake, but the State never responded to the complaint.

In its November 2011 decision, the Court upheld the Inter-American Commission's findings and additionally ruled that Haiti had violated the right of Fleury's family to travel and to residence (Article 22) when they were forced to flee Haiti and were thus unable to see Fleury for five years. The Court also found that Haiti had failed to guarantee Fleury's right to association (Article 16). The Court ordered the State to pay monetary damages to Fleury and his family, and to undertake an investigation into the police actions against Fleury and punish those responsible.

The *Fleury* Case brings international attention to the precarious situation of human rights defenders in Haiti, who continue to face severe danger despite the protective measures implemented by some states. Such measures include encouraging respect for human rights defenders, training police about respecting human rights and creating national days recognizing victims of human rights violations. Despite these efforts, human rights defenders continue to be targeted and attacked. The increased international pressure and attention will hopefully encourage Haiti and other OAS member states comply with their obligations under the American Convention and to increase protection for human rights defenders within their borders.

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## EUROPEAN COURT OF HUMAN RIGHTS

### EUROPEAN COURT UPHOLDS LGBT PROVISIONS OF SWEDISH HATE-SPEECH LAW

The European Court of Human Rights (ECtHR) has, for the first time in its freedom of expression jurisprudence, declared valid a restriction on inflammatory speech against homosexuals. In a decision issued on February 9, the Court ruled that Sweden did not violate the European Convention on Human Rights (ECHR) Article 10—freedom of expression—by criminally prosecuting four people for handing out leaflets accusing homosexuals of deviant behavior that was morally destructive toward society. Although Article 10

provides the right to “hold opinions and to receive and impart information and ideas,” the Court concluded that this freedom comes with responsibilities and corresponding restrictions, including Article's 10(2) limitations for “the protection of the reputation or rights of others.”

In the case of *Vejdeland v. Sweden*, four Swedish citizens claimed that their purpose in placing about 100 leaflets in student lockers was to start a debate about the lack of objectivity in schools and not to express contempt for homosexuals as a group. The Swedish Supreme Court, however, found that the leaflets had “gone beyond what could be considered an objective discussion of homosexuals as a group” and convicted the citizens of agitation against a national or ethnic group. The Court recognized that the Swedish Penal Code has an expansive condemnation of speech that threatens or expresses contempt for “group[s] of persons with allusion to race, colour, national or ethnic origin, religious beliefs or sexual orientation,” and mandates that violators “should be convicted of agitation against a national or ethnic group.” Although the law allows for imprisonment, the sentences on appeal were limited to a fine and one case of probation.

The ECtHR has generally accepted a state's hate speech restrictions when aimed at limiting discrimination on grounds of racism, xenophobia, and anti-Semitism. The Court has historically relied both on the Article 10(2) exception and Article 17, which provides, in part, that no state or person shall “engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms” set forth in the ECHR. The Court has previously ruled on a case-by-case basis that certain specific activities — for example, Holocaust denialism, passing out white supremacy pamphlets, and placing a sign in a window that reads “Islam out of Britain-Protect the British People” with a picture of the burning World Trade Center — are not protected expression. The Court was clear when it stated in *Erbakan v. Turkey* that Article 10 protections do not extend to “concrete words constituting hate speech that might be offensive to individuals or groups.”

Adding homophobic speech to unprotected expression follows the steady evolution by the ECtHR and its governing body, the Council of Europe (COE), on the rights of lesbian, gay, bisexual and transgendered

(LGBT) individuals. The COE has recognized the value of hate crime laws in preventing discrimination and in a 2010 Committee of Ministers recommendation on combating discrimination based on sexual orientation, explicitly suggested extending hate speech protections to sexual orientation. Sweden is one of eighteen COE member states (which are subject to the ECtHR), as of 2010, to include protections for sexual orientation in its hate-speech law. In a broad legal and sociological study on discrimination against LGBT individuals conducted by the COE's commissioner for human rights, Sweden repeatedly ranks among the most approving and protective of LGBT individuals.

The ECtHR's recognition of the legitimacy of Sweden's interest in restricting hate speech aimed at homosexuals is unsurprising not just because of the Court's support of such laws, but also its general jurisprudence supporting LGBT rights — including the Court's consistent holding since *Mouta v. Portugal* in 1999 that sexual orientation is protected under Article 14 — freedom from discrimination. On issues such as decriminalization of homosexual acts, adoption rights, ability to serve in the military, and participation in gay-rights parades, the Court has been generally consistent in its support for extending human rights protections to LGBT individuals, with the exception that the ECtHR has not extended these protections to same-sex marriage. The Court reiterated its stance on same-sex marriage in the March 2012 decision of *Gas and Dubois v. France*, when it held that the ECHR does not require member states to allow same-sex marriage, even where the lack of recognition affects the adoption rights of same-sex couples.

The *Vejdeland* decision and the ECtHR's general LGBT jurisprudence fall in line with an emerging trend of recognizing LGBT issues as a subject of human rights. Although not initially a topic of concern when the human rights field emerged in the mid-20th century, the concept has since been advocated by the U.N. Secretary General Ban Ki-Moon, who has referenced it on numerous occasions. In January 2012, Secretary General Ban Ki-Moon told leaders of the African Union — many of whom hail from countries where criminalization and marginalization of the LGBT community are an acute concern — that LGBT discrimination has

been “sanctioned by many states for far too long.” U.S. Secretary of State Hillary Clinton brought the issue to the forefront in a December 2011 speech recognizing International Human Rights Day. Clinton advocated for LGBT rights to be made a worldwide priority and said, “Like being a woman, like being a racial, religious, tribal, or ethnic minority, being LGBT does not make you less human. And that is why gay rights are human rights, and human rights are gay rights.”

#### **EUROPEAN COURT FINDS ITALY VIOLATED ENDANGERED MIGRANTS' RIGHTS IN RETURNING THEM TO LIBYA**

The European Court of Human Rights (ECtHR) stepped into the controversy over immigration in Europe and held that Italy's intercepting migrants at sea and returning to them to Libya would expose the migrants to inhumane treatment without an opportunity to have their claims for refugee status heard. At the core of the decision is the recognition of systematic human rights violations in Gaddafi-era Libya, as well as in Somalia and Eritrea. The ECtHR concluded that parties to the European Convention on Human Rights are bound to ensure foreign nationals' safety before returning them to their country of origin.

The immediate effect of the ECtHR's February 2012 decision is limited because the 2009 bilateral agreement it arose from has largely been suspended since the beginning of the Libyan uprising. In 2008, Italy and Libya entered into a treaty that strengthened their ties and, in 2009, added a protocol that provided for joint efforts to intercept and return boats of migrants departing from Libya. The case, *Hirsi Jamaa v. Italy*, came before the ECtHR after Italian authorities intercepted a boat in May 2009 carrying approximately 200 migrants. The migrants were transferred to a military vessel and returned to Tripoli without any effort by the Italian authorities to identify the migrants or consider their claims for refugee status. The case was brought on behalf of 13 Eritrean nationals and seven Somali nationals.

After resolving jurisdictional issues, the Grand Chamber of the ECtHR found that Italy violated the European Convention on Human Rights, specifically Article 3 (prohibition on inhumane and degrading treatment), Article 4 of Protocol 4 (prohibition

on collective expulsion), and Article 13 (right to an effective remedy) in relation to the other violations. Relying largely on the work of human rights groups and the office of the United Nations High Commissioner on Refugees (UNHCR), the ECtHR responded to the applicants' claim of a violation of *non-refoulement* — the prohibition of being sent back to a place where there is a real risk of inhuman or degrading treatment. The ECtHR found that Italy knew or should have known that the migrants were at risk of torture or other inhumane conditions both in Libya and in their countries of origin. The ECtHR found the migrants were likely to be returned to Somalia and Eritrea because Libya has not signed the Geneva Convention on Refugee Status and has no form of asylum or protection procedures for refugees. On the issue of collective expulsion, the Court found that Italy forced aliens as a group to leave without individual examinations on the boat. The case was the first time the Court recognized such a violation where the expelled group never physically entered the country.

Italy's agreement with Libya is indicative of a continent-wide concern over increasing immigration. According to a report from Human Rights Watch, in 2008 Italy received the fourth-highest number of asylum seekers in the industrialized world and saw its numbers for both asylum applications and boat migrants nearly double from the previous year. Italy's objections to increasing immigration are both economic and cultural, with former Prime Minister Silvio Berlusconi quoted as saying, “We don't want Italy to become a multiethnic, multicultural country. We are proud of our culture and of our traditions.”

Europe as a whole has not embraced the Italian policy to the same extent, but the EU and its Frontex agency, created in 2004 to enforce the EU's external borders, have previously entered into negotiations with Libya in an effort to form a broader agreement on stemming the flow of African migrants leaving through Libya, largely under the control of Libyan smugglers.

The *Hirsi Jamaa* decision, while recognizing Europe's immigration concerns, focused on the likely effect on the migrants. In arriving at the decision, the ECtHR found that “by transferring the applicants to Libya, the Italian authorities, in full

knowledge of the facts, exposed them to treatment proscribed by the Convention.” The decision was widely recognized by human rights groups as a broader recognition of priorities in the conflict over immigration. The UNHCR called *Hirsi Jamaa* a “landmark” case that “represent[s] a turning point regarding State responsibilities and the management of mixed migration flows.”

The broader effect of the decision will come in how the states form their policies in the wake of the Arab Spring and the Eurozone economic crisis. Italy has already reentered general talks with Libya about reestablishing the countries’ connections post Gaddafi. Reports by UNHCR and Amnesty International find thousands of displaced people from Libya and Egypt have either already attempted to depart through Libya or are displaced in border regions. How European nations react to displacement issues is still uncertain, but *Hirsi Jamaa* sets a strong precedent that a proper investigation of the human rights in the country of origin must be part of the equation.

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## AFRICAN HUMAN RIGHTS SYSTEM

### AFRICAN COMMISSION SIGNS ANNUAL JOINT DECLARATION ON CRIMES AGAINST FREEDOM OF EXPRESSION

On June 25, 2012, the African Commission on Human and People’s Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, joined by the United Nations (UN) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, and the Organization of American States (OAS) Special Rapporteur for Freedom of Expression, issued the 14<sup>th</sup> joint declaration on crimes against freedom of expression. As the regional expert on freedom of expression, the ACHPR Special Rapporteur was established in 2004 with the mandate to monitor states’ policy on freedom of expression and compliance with international standards. As such, the

ACHPR Special Rapporteur, joined by the other regional experts, released the joint declaration setting standards for states to protect freedom of expression. Issued annually since 1999, the declaration seeks to provide guidelines for states to take measures to protect freedom of expression—particularly freedom of speech. Accordingly, the 2012 declaration focused on crimes against freedom of expression against journalists, media actors, and human rights defenders; denounced state impunity for crimes against freedom of expression; and emphasized states’ responsibility to fight against attacks on freedom of expression.

Freedom of expression is among the most basic human rights, and it arguably lays the foundation for other rights by providing a means for the exchange of information. That is, in addition to affording individuals the ability to freely exchange ideas, freedom of expression enables journalists, human rights defenders, as well as other media actors to monitor and report on states’ compliance with international human rights standard, thereby creating a mechanism for accountability. As such, the persecution of individuals for exercising their freedom of expression—including in Africa—remains an impediment for the advancement of international human rights in the content.

Recently, various African states have engaged in attempts to suppress the freedom of expression, which makes the declaration timely. For instance, South Africa in 2011 passed legislation limiting journalists’ access to information deemed to be government secrets, effectively hindering freedom of expression. Similarly, the Ethiopian government has implemented anti-terrorism legislation that, in practice, limited freedom of expression by criminalizing publication and dissemination of pro-opposition information as an act of terrorism, which subsequently led to the detention of journalists. Although numerous African states continue to pass legislation limiting freedom of expression domestically, the ACHPR issued the Declaration of Principles on Freedom of Expression in Africa in its 32<sup>nd</sup> Session in 2002, calling on African states that are a party to the African Charter on Human and Peoples’ Rights to guarantee freedom of expression. The most recent declaration issued by the experts from regional human

rights systems supplements the ACHPR’s efforts to promote freedom of expression in Africa.

Violence against those attempting to exercise their right to freedom of expression—journalists, media actors, and human rights defenders, particularly women—remains a concern in many countries in Africa. Journalists in Uganda, for instance, face constant harassment. The Human Rights Network for Journalists in Uganda (HRNJ), an organization of human rights journalists, has reported fifty cases of assaults against journalists this year. To combat state impunity for such conduct, the declaration indicates that “[s]tates have an obligation to take measures to prevent crimes against freedom of expression in countries where there is a risk of these occurring and in specific situations where authorities known or should have known of the existence of a real and immediate risk of such crimes, and not only in where those risk request State protection.” The declaration further provides general principles calling on states to: (1) “condemn attacks committed in reprisal for the exercise of freedom of expression;” (2) criminalize attack on freedom of expression and adopt laws that reflect the cases seriousness of such crimes; (3) protect individuals who are likely to be attacked for exercising their freedom of expression; and (4) in armed conflict, states should afford the same protection to journalist as civilians.

More specifically, the declaration outlines legal measures that governments should adopt to ensure the protection of freedom of expression, such as enacting separate criminal provisions or enhancing existing penalties. Concerning non-legal measures, the declaration calls on governments to provide State-supported training, operating manuals, and guidelines for law enforcement agencies, as well as State-supported training for civilians who are likely to be targeted or attacked for exercising their freedom of expression. States are also responsible for adopting special protection programs tailored to “local needs and challenges” to mitigate the dangers faced by individuals in specific contexts in which “there is an ongoing and serious risk” of crimes against freedom of expression.

The declaration also recognizes the importance of justice for crimes against

the freedom of expression, calling on states to provide for the independent, speedy, and effective investigation of such crimes and, for victims, to “ensure effective access to information about circumstances, investigation and prosecution of crimes against freedom of expression.” During the investigation of a crime with some evidence indicating crimes against freedom of expression, authorities are encouraged to pursue the investigation with a presumption that it is in fact a crime against freedom of expression to ensure that “relevant lines of enquiry related to the victim’s expressive activities have been exhausted.” The trials of perpetrators and instigators must take place in public, before impartial and independent tribunals. Governments are also urged to create an independent agency with specific jurisdiction to investigate allegations involving state agencies to guarantee that the investigation is not tainted by the influence of an implicated government agent. States should allocate resources necessary to ensure the effective and efficient operation of these systems.

Beyond the prosecution and punishment of perpetrators and instigators, the declaration calls for civil remedies for victims of crimes against freedom of expression independent of the outcome of criminal prosecution. Even if there is a criminal conviction, the declaration ensures monetary restorations proportional to the damages the victim—or victims—suffered without having to pursue independent civil action.

In addition to the general obligations of states, the declaration also focused on the role of inter-governmental organizations, non-states actors, media organizations, and other civil society organizations in the fight against crimes against freedom of expression. Specifically, inter-governmental organizations should monitor states’ compliance and prioritize the problems of crimes against freedom of expression. Furthermore, given that the majority of victims of crimes against freedom of expression are journalists and media actors, the declaration calls for the media

to take measures to ensure the safety of employees and provide trainings or guidance focusing on risk awareness and self protection. Finally, the declaration calls for civil society organization and the media to join efforts on the fight against crimes against freedom of expression by monitoring and reporting on such crimes.

Although not a legally binding document, the declaration articulates benchmarks for states and other stakeholders to protect the fundamental right to freedom of expression and calls upon states incorporate its guiding provisions into their domestic legal systems. The declaration symbolizes the efforts of international actors to provide a universal solution to the growing violence against journalists, media actors, and human rights defenders, who together play an important role in individuals’ ability to obtain information.

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The screenshot shows the homepage of 'The Human Rights Brief' website. At the top, it says 'The Human Rights Brief' and 'Center for Human Rights and Humanitarian Law'. Below that is a navigation bar with links like 'International Legal Updates', 'From the Field', 'Washington College of Law', and 'Get Involved'. There is also a search bar. The main content area features a large article titled 'One Strike, You're Out: Egypt's Expanded Emergency Law Poses a Risk to the Right to Collective Bargaining'. Below this are sections for 'REGIONAL UPDATES' and 'UPDATES', each with smaller article thumbnails. On the right side, there are social media icons, a 'SIGN UP FOR HUMAN RIGHTS BRIEF UPDATES' form, and a section for 'NEW PRINT EDITION OF THE HUMAN RIGHTS BRIEF'.

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