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**REPORT No. 401/20**

**CASE 13.095**

REPORT ON THE MERITS (PUBLICATION)

T.B AND S.H  
JAMAICA

Approved electronically by the Commission, on December 31, 2020

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## I. INTRODUCTION

8. On August 16, 2011<sup>1</sup>, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition filed by Aids-Free World (the “petitioners”) alleging the international responsibility of Jamaica<sup>2</sup> (“the State” or “Jamaica”) for the violation of several rights of T.B and S.H as a consequence of laws that criminalize same sex relations between consenting adults and create an adverse context for LGBTI persons.

9. On September 21, 2011, the IACHR granted precautionary measures to protect T.B and S.H. and asked the State of Jamaica to adopt the measures necessary to ensure their lives and personal integrity. The request stated that both have suffered aggressions, attacks, threats and harassment on account of their sexual orientation.<sup>3</sup>

10. On June 6, 2017 the IACHR informed the parties that pursuant to Resolution 1/16 on Measures to reduce the procedural backlog it had decided to apply Article 36.3 of its Rules of Procedure and defer the admissibility analysis until the debate and decision on the merits. In addition, the IACHR placed itself at the disposition of the parties to reach a friendly settlement, but no agreement was reached.<sup>4</sup> The parties were allocated the time periods provided for in the IACHR’s Rules of Procedure to present additional observations on the merits of the case. All of the information received by the IACHR was duly transmitted to the parties. On November 11, 2019 the Commission conducted a public hearing on the case during its 174 period of sessions.<sup>5</sup>

## II. POSITION OF THE PARTIES

### A. Petitioners

11. The petitioner argues that T.B and S.H have been victims of a series of attacks derived from their sexual orientation or gender identity. They say that these attacks are motivated by the existence of the Offences Against the Person Act of 1864 (also referred to as “OAPA” and “buggery laws”) which criminalize buggery, defined as anal sex, and “acts of gross indecency” between men, in public or private, with a maximum penalty of 10 years’ imprisonment. They argue that buggery laws are used to prosecute and legitimize discrimination and violence toward LGBTI persons based on sexual orientation and/or gender identity.

12. The petitioners claim that Mr. S.H, a gay man, has often been attacked due to his sexual orientation. They argue that on April 2011, as he was returning home from a shop, two men stepped in front of him in the street and called him “batty man and started pushing him and shoving him back and forth between them. The owner of a hardware store saw what was happening and intervened and told the men to leave Mr. S.H alone and instructed him to go home. As he was departing, the attackers said “batty man, you’re dead”. A few days after, the owner of the store told Mr. S.H that he overheard this group of men planning to kill him.

13. One week later, Mr. S.H was walking along Humber Avenue. A man was washing his parked car. The car was close to the sidewalk, so Mr. S.H walked around the car in the street. As he passed, the man threw water on him and shouted, “no batty man walk around me”. They expressed that Mr. S.H reported these two incidents to the Barnett Street Police Station in a crowded room and before two officers, and after his statement, the supervising officer instructed the other to delete the word “threat” from the report, stating that the first incident merely constituted an assault.

14. Moreover, they argue that a third incident took place on May 31, 2011. When Mr. S.H was walking home from class at about 6:30 p.m at Foster Avenue, the man responsible for the first assault came out of a house and

<sup>1</sup> On October 7, 2011, the petitioners presented additional information to supplement the initial filing.

<sup>2</sup> Pursuant to Article 17(2) of the IACHR Rules of Procedure, Commissioner Margarete May Macaulay, a Jamaican national, did not take part in the discussion or the decision-making process of the instant case.

<sup>3</sup> PM 153/11, X and Z, Jamaica.

<sup>4</sup> Letter from the IACHR of June 6, 2017.

<sup>5</sup> The State did not attend the hearing. On October 24, 2019 the State requested to convene the hearing at a later date, giving the State sufficient notice. The IACHR decided to conduct the hearing pursuant to Article 64.3 of its Rules of Procedure which establishes that if one party, having been duly notified, does not appear, the Commission shall proceed with the hearing.

yelled, “Battyman, didn’t II tell you I don’t want to see you around here anymore” and threw a stone at Mr. S.H who managed to escape without injury. The next day he returned to the Barnett Street Police station to file another report. The officers informed him that stone-throwing was not an assault. When he asked what it was, the police reply was, “it’s just stone-throwing”.

15. Additionally, they expressed that on June 19, 2011 Mr. S.H was walking with a group of friends along Main Street in the north coast resort town of Ocho Rios when a car with three men passed them and one of the passengers shouted “Batty-man”. The car then reversed with the doors open and stopped in front of Mr. S.H and his friends. The occupants told Mr. S.H and his friends that they did not want any “batty man” in Ocho Rios, and that they “kill batty man in that town”. The car followed Mr S. H and his friends while the occupants shouted, among other things that “batty man fi dead”. One of the men in the car threw something at Mr. S.H which missed hitting him. Mr. S.H and his companions took a shortcut, which the car could not follow, and went to the Ocho Rios Police Station. The police took the reports in the lobby then escorted Mr. S.H and his companions to the Ocho Rios transportation center so they could take a bus back to Montego Bay.

16. On the other hand, the petitioners allege that Ms. T.B a Trans woman, who had been assigned male at birth that previously identified herself as a gay man, has suffered discrimination from the time she was a child due to her sexual orientation, gender identity and gender expression. They claim that she lived in Clarendon, Jamaica until March 15, 2011, when her family evicted her from the family home and she had to flee because men threatened to kill her and to set the house on fire because of her sexual orientation. Since then, she has had to move constantly and has stayed in at least eight different places in an effort to avoid homelessness.

17. Specifically, they argue that on March 12, 2011 Ms. T.B suffered a mob attack. That day, sometime before 7 pm, she went to a restaurant to get something to eat. She was at a table with a friend, who has a very feminine appearance, and was staring at some men. These men came over and insulted them and told them that they didn’t want any “fish around here” and were mimicking sound of gunshots. Ms. T. B crossed the street to escape the scene, and as she was crossing she saw people coming from every direction to attack them with bottles, stones and sticks. They rushed into a nearby shop to escape, and then the police came and managed to walk T.B and her friend to the police station. Once inside the Station, the police officers informed them that they were going to charge them with a crime and that if they didn’t cooperate, they could find a dozen charges to file. They claim that from the time they arrived at the station after 7 p.m until about 3 a.m, seven or eight officers harassed and abused the two of them constantly. They argue that they overheard some of the police say “let us kill them here as if we kill them, nothing will come of it”.

18. They claim that at some point the police allowed them to leave the Station, and as they were departing, one of the police officers said “Let this be the last time I see you in Mandeville as I am a plain clothes police and if I see you in Mandeville again I’m going to make the crowd beat you worse than how they were planning to”. According to the petitioners, on May 15, Ms. T.B. mother evicted her from their house. She went to stay with a church deacon where she was mistreated so she had to leave shortly thereafter. Since that time she has moved constantly and is now abroad.

19. With respect to the **admissibility**, the petitioners claim that the petition complies with all the requirements established in the American Convention. With regards to exhaustion of domestic remedies they argue that the petitions qualifies for an exemption under Articles 31 (2) (a) and Article 31 (2) (b) because Section 13 (12) of the Jamaican Charter, the “savings clause”, establishes that nothing relating to sexual offences shall be held inconsistent with or in contravention of the provisions of this chapter, therefore there is no effective domestic remedy available to challenge the constitutionality of the Offences against the Person Act of 1864. They expressed that they filed the petition before the IACHR within a reasonable period of time under Article 32 (2) of the IACHR rules.

20. As regards to legal arguments, the petitioners submit that the Offences Against the Person Act violates the **principle of non-discrimination and equality before the law**, because the existence of the Act provides members of the Jamaican Government with legal justification for discrimination against LGBT persons. They argue that the Act violates the **right to life and to humane treatment** because the law legitimizes abuse

against homosexual and LGBTI Jamaicans and grants permission for agents of the State and private citizens to commit, with impunity, acts of violence against actual or perceived members of the LGBTI community. They express that both T.B and S.H have encountered extreme intimidation and threats of violence from police officers and private citizens due to their sexual orientation, gender identity and gender expression, facing incidents ranging from vague threats of general physical violence to specific threats of murder.

21. Furthermore, they allege that Jamaica has violated the **right to privacy** because the Act constitutes an interference with a person's private life by criminalizing consensual acts even when conducted in private. For instance, after Mr. S.H reported incidents of harassment and abuse to the police, the policeman took his statement and conversed loudly in crowded rooms so others in the station could take notice that Mr. S.H was homosexual. Similarly, when Ms. T.B was forced to find refuge in a police station, the police officers repeatedly told others that they had caught two gay men.

22. They argue that Jamaica breached the **right to freedom of thought and expression** considering that intimate sexual acts between adults or between two homosexual males are an expression of their homosexuality and their identity as homosexuals, therefore the very fact that Offences against the Persons Act is in effect violates the right of expression of "Jamaican homosexuals" and LGBTI persons such as Ms. T.B and S.H.

23. They submit that the State violated the **right to freedom of association** because the law discriminates against LGBTI individuals by denying their right to pursue private interests and to exercise their freedom of association by engaging in intimate or familial association with others. As a result, the LGBTI community in Jamaica is ultimately isolated and LGBTI individuals are prevented from associating with both other LGBTI persons as well as their heterosexual peers. They contend that the State violated the **right to family life**, because the right of the alleged victims to maintain and have access to their families has been denied by Jamaica under the Act, as neither alleged victim communicates regularly with their families. Also, both note in their statements that their familial bonds have been severed because of the violence, persecution, and discrimination they have faced.

24. Furthermore, they claim that the State violated the **right to freedom of movement and residence** because conditions in Jamaica deprive the alleged victims the right to freedom of movement and residence by making them prisoners in their own homes, or worse yet, prisoners to whatever shelter they can find because homosexuals and LGBTI persons often experience persistent homelessness. Both T.B and S.H were forced out of their homes, leaving them without permanent resident. In both cases, the petitioners' families shunned them because they were suspected of homosexuality. This lack of a permanent home forces the petitioners into public where, if they are known or perceived to be gay, they face life-threatening hardship.

25. They argue that the State violated the **right to participate in government** since the Act prevents full participation of homosexual Jamaicans, including the alleged victims, in government, by criminalizing them. Elected politicians will refrain from hiring homosexuals given that they could be imprisoned under Jamaican Law. The Act ensures homosexuals will not be able to fully participate in the conduct of public affairs in Jamaica.

26. They submit that the State violated the **right to health** because the alleged victims are unable to seek accessible and effective HIV prevention, testing and treatment services because of the pervasive discrimination against homosexuals and LGBTI persons including in the public health sector. They argue that an estimated 32,000 people are infected with HIV in Jamaica. They express that according to Jamaica's national AIDS report half of the infected population neither knows their status nor has access to health services. This report draws a connection between the low reporting of HIV and AIDS and the stigma and discrimination that accompanies being gay, and concludes that anti-sodomy laws impeded homosexuals from seeking prevention and treatment.

## **B. State**

27. With respect to the **admissibility** of the petition the State argues that the petitioner did not exhaust domestic remedies at the time of the presentation of the petition as required by article 46 (1) (a) of the

Convention and article 31 of the Commission's Rules of Procedure. It expresses that pursuant to section 19 of the Charter of Fundamental Rights and Freedoms any person who alleges that any of the provisions of the Charter has been, is being or is likely to be contravened in relation to him may apply to the Supreme Court for redress. It alleges that a similar constitutional motion could also have been brought by the petitioners under section 25 of the Constitution had the petitioner opted to bring such a motion before the entry into force of the Charter. The domestic legislation of Jamaica affords due process of law for the protection of the rights that have allegedly been violated.

28. Furthermore, the State submits that the petition does not fall within the exceptions set out in article 462 (a) (c) of the Convention and article 31 (2) (a)(c) of the Rules of Procedure. It argues that the allegation by the petitioner that the savings law clause makes it "impossible" to challenge the Offences against the Person Act is not supported by practice in the domestic legal system. They inform that there is currently a claim pending before the Supreme Court of Jamaica by way of a constitutional motion by a Jamaican national who is seeking orders and declarations pertaining to sections 76, 77 and 79 of the Offences against the Person Act be interpreted as not prohibiting certain fundamental rights and freedoms, including the right to privacy and the right to equality under the charter.

29. The State informs that the claim of Javed Saunja Jaghai and J-Flag v The Attorney General and others before the Constitutional Court which sought the decriminalization of consensual sexual activity between adult males in Jamaica was discontinued. According to the State, Mr. Jaghai stated that he withdrew his application because although he had suffered no physical harm as a result of bringing the claim, he had been threatened. The nature of these threats were not disclosed nor is it clear that the alleged threats are as a direct result of his pursuing the action in Court and there is no indication that the threats had been reported to the authorities and that the authorities had failed to act. Therefore the Courts were prevented from ruling on this matter as a result of its withdrawal. It remains open to a given litigant to bring such a matter before the Court and have it resolved.

30. It adds that it is not in a position to make any predictions on the outcome of such proceedings before the local courts. It submits that it should not be required to show that a challenge to a specific piece of legislation will be successful in order to establish that domestic remedies are available. The existence of a remedy is not necessarily linked to outcome.

31. In addition, the State expresses that pursuant to Article 32 (1) of the Rules of Procedure, the petitions should be lodged within a period of six months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies. As there is no decision, this requirement cannot be complied with. The exceptions to the exhaustion of domestic remedies do not apply in this case. Therefore the more flexible requirement under article 32(2) of the Rules of procedure that the petition be presented in a "reasonable time" does not apply.

32. Moreover, the State contends that the Commission does not have the competence to consider the petition which seeks a determination on whether the domestic legislation is compatible with Jamaica's obligations under the American Convention on Human Rights. They submit that such competence lies exclusively with the Inter-American Court of Human Rights by virtue of article 64 (2) of the American Convention on Human Rights.. The functions of the Commission as outlined in the Convention do not include the power to determine the compatibility of domestic law with the Convention. It adds that a petitioner does not have the *locus standi* either under the Convention or the Rules of Procedure of the Commission to request a declaration from the Commission on the compatibility of a domestic law with the Convention.

33. The State expresses that the Commission lacks competence *rationae personae* because neither T.B or S.H have been the subject of a criminal investigation or prosecution on the ground that they have engaged in any of the acts covered under section 76, 77 or 79 of the Offences against the Persons Act. They argue that petitions must allege a concrete violation before it is admitted by the Commission. They add that the Offences against the Person act are not self- executing norms and as such they can only affect individual rights when additional steps such as enforcement are taken by the State.

34. With respect to the **merits** of the case, the State argues that T.B and S.H allegations are manifestly groundless. It refers that there is no evidence that T.B or S.H have file any complaint concerning any threat to their lives or physical integrity. Furthermore, the whereabouts of T.B are unknown preventing any further investigative steps by the police. On the other hand it argues that the State commenced investigations into the three incidents report by S.H, however he informed the investigators that he did not wish the police to pursue the matters. His where are also unknown, which also prevents further actions.

35. Specifically, the State refers that although T.B and S.H made allegations concerning access to health services at public health facilities, the allegations either relate to a decision not to seek health services or relate to non-specific allegations with no supporting evidence; therefore the Commission should not make any adverse finding with respect to the State responsibility.

36. It also contends that the petition is without merit as the State has no international obligation to repeal the sodomy offence and like offences. It argues that Jamaica is not party to a treaty or any other instrument which specifically bars the retention of the sodomy offence and like offences and, at present, no customary rule has emerged requiring the repeal of the Sodomy offence. The State expresses that there are nine states which continue to criminalize sodomy and similar acts in Latin America and the Caribbean and Jamaica forms part of approximately 72 States throughout the world, out of 193 States, which criminalize sodomy and similar acts. On the other hand, it claims that if arguably a rule of custom has emerged to regard the sodomy offence as impermissible, Jamaica qualifies as a persistent objector to such a purported rule of custom. Jamaica has always and continues to oppose any purported international obligation to remove the sodomy offence.

### III. ANALYSIS OF ADMISSIBILITY

#### A. Competence of the Commission *ratione materiae, ratione personae, ratione temporis, and ratione loci*

37. With respect to the competence *ratione personae*, the Commission notes that the State argued the Commission lacks competence because neither T.B or S.H have been the subject of a criminal investigation or prosecution on the ground that they have engaged in any of the acts covered under section 76, 77 or 79 of the Offences against the Persons Act. On that regard, the IACHR recalls that the petitioner claims that the existence of the law enable the violation of several of his individual rights protected by the American Convention. Taking into account that the petitioner is eligible under Article 44 of the American Convention to present complaints and that the alleged victims are individual who were under the jurisdiction of the Jamaican State when the alleged facts took place, the Commission has competence *ratione personae* to consider the petition. The Commission has competence *ratione loci* to hear the petition inasmuch as it alleges violations of the American Convention that purportedly took place in the territory of a State that is party to said Convention. The IACHR has competence *ratione temporis* as Jamaica ratified the American Convention and presented the deposit of the instrument of ratification on August 7, 1978. Therefore, the obligation to respect and ensure the rights provided for in the American Convention was in force for the State at the date when the facts were alleged to have occurred. Finally, the IACHR has competence *ratione materiae* given that the petition refers to alleged violations of the American Convention.

#### B. Admissibility requirements

##### 1. Exhaustion of domestic remedies and timeliness of the petition

38. Article 46(1)(a) of the American Convention stipulates that to admit a complaint filed with the Inter-American Commission in keeping with Article 44 thereof, that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to enable domestic authorities to hear the alleged violation of a protected right and, where applicable, to have the opportunity to address said violation before it is heard by an international body.

39. The petitioners assert that the exceptions set forth in Articles 46.2(a) and (b) of the American Convention apply as a result of the abovementioned arguments. In turn, the State indicates that the petitioners failed to exhaust domestic remedies and they did not submit the petition within the six-month period.

40. Regarding the State's argument about the possibility to challenge the interpretation of the Offences Against the Person Act before the Supreme Court, the Commission notes that the Constitutional Amendment of 2011 prohibits bringing a constitutional claim against buggery laws and that the only action brought before the Supreme Court was withdrawn, allegedly due to prejudice-based threats relating to the sexual orientation of the applicant, before the court could decide on its admissibility. For this reason, the Commission concludes that the exception to the requirement of prior exhaustion of domestic remedies set forth in Article 46.2(a) of the American Convention applies. Likewise, the Commission finds that the petition was filed in a reasonable time, as some consequences of the denounced acts still persist, and therefore the admissibility requirement of timeliness established in Article 32.2 of the Commission's Rules is met.<sup>6</sup>

## **2. Duplication of proceedings and international res judicata**

41. Article 46(1) (c) of the Convention provides for the admission requirement whereby the subject matter of petitions cannot be "pending in another international proceeding for settlement" and Article 47(d) the Convention stipulates that the Commission shall consider inadmissible any petition if the petition is substantially the same as a petition or communication previously studied by the Commission or by another international organization. In the instant case, the parties have not argued that either of these circumstances applies nor does the case file reveal that they do.

## **3. Characterization of the facts alleged**

42. For purposes of admissibility, the Commission must decide whether the petition reports facts that tend to establish a violation, as stipulated in Article 47(b), or whether the petition is "manifestly groundless" or "obviously out of order," in keeping with subparagraph (c) thereof. The standard for these two requirements is different from that used to decide the merits of a complaint. The Commission is to conduct a *prima facie* evaluation to assess whether the complaint substantiates the apparent or potential violation of a right guaranteed under the Convention, but not for purposes of establishing the existence of a violation. This assessment is a summary analysis that does not prejudge or provide an advance opinion on the merits.

43. Neither the American Convention nor the IACHR Rules of Procedure require petitioners to identify the specific rights that the State allegedly violated in the matter before the Commission, although the petitioners may do so. It is incumbent on the Commission, pursuant to the system's case law, to determine in its admissibility reports which provisions of the relevant inter-American instruments are applicable, the violation of which could be established if the facts alleged were to be proven, based on sufficient evidence.

44. The Commission considers that were the facts alleged by the petitioners to be proven, they may constitute violations of the rights set forth in Articles 5, 11, 22, 24, 25, 26 in connection with the obligations established in Articles 1.1 and 2 of the same instrument, to the detriment of T.B and S.H.

## **IV. FINDINGS OF FACT**

### **A. Jamaica's "buggery" law**

45. The instant case concerns the effect of the Offences against the Person Act of 1864 in the life of T.B and S.H. The law establishes the following:

<sup>6</sup> See IACHR Report No. 80/18, Petition 1850-11. Admissibility. Gareth Henry, Simone Carline Edwards and families. Jamaica. July 2, 2018.



76. (Unnatural Crime): Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.

77. (Attempt): Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour.

79 (Outrages on Decency): Any male person who, in public or private, commits or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for a term not exceeding two years, with or without hard labour.<sup>7</sup>

46. In addition, the Constitution of Jamaica establishes the following:

13. Fundamental rights and freedoms.

(...) 12. Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to-

- a. sexual offences;
- b. obscene publications; or
- c. offences regarding the life of the unborn,

shall be held to be inconsistent with or in contravention of the provisions of this Chapter.<sup>8</sup>

## B. LGBTI persons in Jamaica

47. The IACHR and other international agencies, nongovernmental organizations, and national bodies have voiced their concern over the situation of LGBTI persons in Jamaica and highlighted that the existence of laws that criminalize consensual sexual relations between adults of the same sex in private generates a culture of hostility, discrimination and serious violations against LGBTI persons.<sup>9</sup>

48. In its 2012 Report on the situation of human rights in Jamaica, the Commission expressed that:

Discrimination based on sexual orientation, gender identity and gender expression is widespread throughout Jamaica, and that discrimination against those in the lesbian, gay, bisexual, trans and intersex (LGBTI) communities is entrenched in Jamaican State Institutions. Those who are not heterosexual or cisgender face political and legal stigmatization, police violence, and inability to access the justice system, as well as intimidation, violence and pressure in their homes and communities.

(...) laws against sex between consenting adult males or homosexual conduct may contribute to an environment that, at best, does not condemn, and at worst condones discrimination, stigmatization, and violence against the LGBTI community. The law provides a social sanction for abuse, as LGBTI persons are already thought of as engaged in illegal activity. Because LGBTI individuals are believed to be engaged in criminal activity, it is logical to infer that police are less likely to investigate crimes against them.<sup>10</sup>

49. Furthermore, in 2014 the Commission expressed its concern over the continued violence, discrimination and hostility against LGBTI persons in Jamaica, and a lack of anti-discrimination legislation to address this issue. It expressed particular concern on the situation of homelessness and displacement of young men who have sex with men, and obstacles faced by LGBTI persons in accessing justice and health services, due to a fear

<sup>7</sup> The Offences Against the Person Act.

<sup>8</sup> [Jamaica's Constitution of 1962 with Amendments through 2011](#).

<sup>9</sup> IACHR, [Recognition of the Rights of LGBTI Persons](#), OEA/ser.L/V/II.170, Doc. 184, 7 December 2018, para.241.

<sup>10</sup> IACHR, [Report on the Situation of Human Rights in Jamaica](#), OEA/Ser.L/v/II.144, Doc. 12, 10 August 2012, para 264 and 271.

that disclosing their sexual orientation and gender identity will lead to stigma and further violation, in a country that criminalizes same-sex consensual intimacy between adults.<sup>11</sup>

50. Likewise, in its 2015 Report on Violence against LGBTI Persons, the IACHR expressed its concern on the impact of legislation that criminalizes same-sex consensual intimacy in Jamaica, even when not enforced, particularly with respect to the rights to life, personal integrity, personal liberty, privacy, and access to health and other services. The Commission noted that:

These laws reinforce already existing societal prejudices and severely increase the negative effects of such prejudices on the lives of LGBTI persons. The criminalization of sexual intercourse between men also has a symbolic effect since in the eyes of the legal system where such criminalization is in force, all gay men are criminals. The existence of “buggery” laws is used as a mechanism for social control and domination that enables states to legitimize and contribute to the stigma of LGBTI persons as immoral individuals. Moreover, such laws have been used to justify the arbitrary arrests, detention and even torture of LGBTI people.<sup>12</sup>

51. In its 2014 Report, Human Rights Watch expressed that “high levels of violent crime, public mistrust of police, low levels of crime reporting, low prosecution rates, and a perception that the criminal justice is skewed against the poor are widespread in Jamaican society. However, LGBT Jamaicans, especially those who are poor and unable to live in safer more affluent areas, are vulnerable to violence. Many live in constant fear. They are taunted, threatened, fired from their jobs, thrown out of their homes, beaten, stoned, raped, and even killed”.<sup>13</sup> The report noted that “there has been a groundswell of change in Jamaica in the way it is responding to human rights abuses against LGBT people” but the violence persists”.<sup>14</sup>

52. For its part, Human Rights First indicated in 2015 that in Jamaica “LGBT people experience a climate of generalized societal homophobia. Lesbians, bisexual women, and transgender people face an additional threat of gender-based and/or sexual violence. LGBT people are discriminated against in access to healthcare, employment, and housing”.<sup>15</sup>

53. The US Department of State noted in its 2017 report on Human Rights in Jamaica that “homophobia was widespread in the country” and in its 2018 report recalled that “the NGO J-FLAG reported that through June it received 17 reports of instances of discrimination on the basis of sex, sexual orientation, or gender identity against LGBTI individuals, compared with 15 reports in the previous year. It was difficult to obtain exact statistics, as observers believed these types of human rights violations were underreported. Government agencies were often involved in acts of discrimination”.<sup>16</sup>

54. For its part, the government of the United Kingdom noted in a 2017 report that in Jamaica “LGBT persons are targeted for mob violence, corrective rape, extortion, harassment, forced displacement and discrimination, and are taunted, threatened, fired from their jobs, thrown out of their homes and suffer ill-treatment including being beaten, stoned, raped, or killed”.<sup>17</sup>

### **C. The situation of S.H and T.B**

55. On September 4, 2011 S.H filed a statement before the IACHR concerning the impact that homophobia in Jamaica has had in his life. In his own words:

<sup>11</sup> IACHR, Report on the 153<sup>rd</sup> Session of the IACHR, Monitoring of the IACHR Report on the Situation of Human Rights in Jamaica, December 29, 2014.

<sup>12</sup> IACHR, Violence against LGBTI Persons, OEA/Ser.L/V/II.rev.1, Doc.36, 12 November 2015, paras.56, 74,75; See also Leave no LGBT person behind, Statement by human rights experts on the International Day Against Homophobia, Transphobia and Biphobia, May 16, 2018.

<sup>13</sup> Human Rights Watch, Not Safe at Home, Violence and Discrimination against LGBT people in Jamaica, p.2.

<sup>14</sup> Human Rights Watch, Not Safe at Home, Violence and Discrimination against LGBT people in Jamaica, p.48.

<sup>15</sup> Human Rights First, The World as it Should Be. Advancing the Human Rights of LGBT People in Jamaica, July 2015.

<sup>16</sup> See US Department of State, Jamaica 2017 and 2018 Human Rights Reports;

<sup>17</sup> UK Home Office, Country Policy and Information Note. Jamaica: Sexual orientation and gender identity, February 2017.

(...) Life in Jamaica is hell for me. If you are gay, and it shows, you have to be hiding (...) I refuse to be tested for HIV or other sexually transmitted infections at public health centers, because I have heard from friends who are gay men or men who have sex with men that they often experience discriminatory treatment. They are asked about their sexual conduct and if they admit that they have had sex with a man, they are treated differently. I am concerned that I will experience similar discrimination if I seek sexual health services from providers who are not known within the LGBT community for their tolerance. Therefore, my access to sexual health services, including HIV testing, prevention, and treatment (should I require them), is constrained by my fear of the common discrimination that gay men face (...)

(...) My first experience of physical violence because of my sexual orientation was in April 2011 (...) I was walking along Dome St. off of Humber Avenue in Montego Bay. Two men got in front of me while I was walking. One of them said "batty man", and they went on to say they didn't want any "batty man" around there (...) they both started pushing me. The pushing escalated until they were shoving me back and forth between them (...) there is a hardware store on Dome Street Near Princess Street (...) at the time of this incident, the owner of the hardware store saw what was happening and he intervened. He told the guys to leave me alone and he told me to go home. While I was walking away, the y said, "Batty man, you're dead" (...) (...) A few days after the incident where the two men pushed me around, the owner of the hardware store told me that he overheard this group of men talking. The hardware store owner told me he heard them planning to kill me (...)

(...) the next incident happened a week later (...) I was walking down the street and a man was washing his car (...) As I passed, he threw water on me and then shouted, "No batty man walk round me:". I didn't say anything in return, and went home.

(...) A third incident occurred on May 31, 2011. I left school at about 6.30 pm to go home. I was walking down Foster Avenue and the taller man from the first assault came out of a house and said, "Batty bwoy mi nuh tell yuh she mi nuh wah si yuh roun yah!" (Battyman, didn't I tell you I don't want to see you around here anymore! I didn't say anything but I continued walking. He reached for a stone and threw it at me (...) the next day; I went to the Barnett Street police station to file another report. (...) The officers there told me that stone-throwing was not an assault. I asked them what it was, and the police reply was, "It's just stone-throwing" (...) another officer joined us, who said she was the supervisor for the night. The supervisor said she couldn't give me a receipt for making a report, because no crime had been committed (...)

On the morning of June 19, 2011 I was walking with a group of friends along Main Street in the north coast resort town of Ocho Rios. A car with three men passed us, and one of the passengers shouted "batty-man". The car then reversed with the doors open and stopped in front of us. The occupants told us that they did not want any "batty man" in Ocho Rios and that they kill batty man in that town (...) My friends and I then took a short cut, which fortunately the car could not follow, and went to the Ocho Rios police station. Only three of the five people in my group felt brave enough to go inside the police station to make a report of the incident. The police took the reports in the lobby where anyone in the station could overhear the conversation. The police then escorted my friends and me to the Ocho Rios Transportation centre so that we could take a bus back to Montego Bay (...).<sup>18</sup>

56. On September 29, 2011 T.B presented a declaration to the IACHR highlighting the impact that sodomy laws in Jamaica, has had in her life. In her words:

(...) I have found it difficult to obtain confidential, non-judgmental sexual health services in Jamaica. Because of the non-tolerance in Jamaica, persons find it hard being open because when you're getting tested, they normally tend to ask your orientation if you're positive and you normally have to give a history about your sexuality. So persons who are positive and gay may not know their status because of homophobia and fear. I have had the experience of seeking health services at a public hospital and facing discrimination because of my appearance and mannerisms. I have friends who have had similar experiences in their quest for sexual health services.

On Saturday March 12, 2011 (...) I went up into the town to Kentucky Fried Chicken (KFC) to get something to eat. I was sitting at the table with a friend (...) who has a very feminine appearance and was staring at some guys. The man came and said "Weh yuh a look pan mi fa batty-boy, stop look pan mi" (What are you looking at me for, batty-boy, stop looking at me). I feared a confrontation, so I got up and left (...) the guys came after us while ranting and raving, saying to anyone who would listen "Yuh nuh see a two batty boy? Yuh nuh si dem a gay? Wi nuh wan no fish roun yah! (You don't see they are two batty-boys? You don't see they are gay? We don't want any fish (gays) around here. The men were mimicking sound of gunshots (...) I crossed the street to get away.

<sup>18</sup> Declaration of S.H, September 4, 2011.

As I was crossing the street, I saw people coming from every direction to attack us, so I had nowhere to run. I was shocked that a crowd had spread so quickly (...) we rushed into a nearby shop, Captain's Bakery, to escape (...) someone eventually called the police, who came at about 7 pm. (...) the police took us from Captain's Bakery to the police station. I don't know why they took us to the Station (...) once we were inside the police station, the police officers told us they were going to charge us with a crime. They said that if we didn't cooperate, they could find a dozen charges to file against us. I was confused, because I thought we were the victims. From the time that we arrived at the Station, just after 7pm, until about 3 am, seven or eight officers harassed and abused us constantly. They kept calling their friends into the room to look at us. I was so scared. I was crying, and they were telling me to stop crying. They kept asking me why I put myself in that position. Two of the officers who were there claimed they were guarding us, but whenever they went out of the room, they would tell other people in the Station, " a dem two batty boy dem jus ketch ovah deh suh" (there are the two batty-boys we just caught over there) We overheard some of the police say, "Mek wi kill them yah so far if wi kill dem, nutting nah cum out of it" (let us kill them as if we kill them nothing will come of it".

(...) we kept asking them if we could leave, and we told them we could get someone to come for us. Once our friend came to pick us up, we asked the police to escort us as the mob was still outside (...) just as we were leaving, one of the police officers said, "Let this be the last time I see you in Mandeville as I am a plain clothes police, and if I see you in Mandeville again I'm going to make the crowd beat you worse than how they were planning to.

(...) By Monday, May 14, the story had spread all over my school and because my neighbor had brought the newspaper article about the attack and showed it to everyone (...) when I got home, my sister and my mother told me that men in cars came by the house with guns and said I had to leave or they would burn down the house. My cousin and uncles, who lived in the house with us, said I couldn't stay there any longer. (...) since that time, I have had to move from place to place. (...).<sup>19</sup>

57. On November 6, T.B filed a second declaration expressing that the buggery law promotes discrimination against LGBTI people like her. Specifically she stated:

In Jamaica it is very difficult to access stigma-free public health care as a gay man, especially one who looks like me and is very effeminate (...) In 2009 when I was 17, I went for my first and only HIV test at a public health clinic in Jamaica (...) however, the treatment that I received caused me to leave the clinic before I took the tested and I refused to return to another public health care facility in Jamaica for any other medical care. (...) the nurse handed me a questionnaire to complete. Among other things it had questions about my previous sexual partners. I was afraid to fill it out truthfully because I had only ever had sex with men, which is a crime in Jamaica. Completing the questionnaire would be admitting that I broke the law and could spend up to 10 years in prison. I also did not want to expose myself to further ridicule by admitting that I was gay. So, when the nurse was not looking, I quickly gathered my belongings and left.

In 2011 a friend in Trinidad heard about my situation and paid for me to visit him. He promised to let me stay with him and take care of me. However, when I arrived, and he saw how effeminate I was he refused to take me to his home. He said that he was concerned about what the neighbors would say. I ended up sleeping on the streets in Trinidad for eight months. During that time, I met some Trans women who were also homeless, and they helped me to get hormones to start transitioning. (...) When I left Jamaica for Holland in 2012, I sent a message via email to my mother and told her where I was, but she only responded to ask for money and nothing else. She did not ask how I was doing or how I was surviving (...) I miss my family, my home and my country but I know that I cannot return safely until Jamaica gets rid of the anti-buggery law and becomes more accepting of LGBT people like me.<sup>20</sup>

58. On September 29, 2011 the Director of UN AIDS Caribbean Regional Support Team who works on the HIV response in the region, issued a Statement in which he highlighted the impact that the Offences against the Person Act has in the HIV response. In his words:

(...) The political, social and cultural contexts of Jamaica have severely challenged the implementation of an HIV response. First, as the epidemic spread among men who have sex with men it has been difficult for the State to publicly disclose that it is providing services to men who have sex with men or supporting civil society groups that work with these populations, especially around issues of condom use. For example, when it was revealed that condoms were being provided in prisons, riots occurred in which those suspected of being homosexual were killed

<sup>19</sup> Declaration of T.B, September 29, 2011, para 15-19.

<sup>20</sup> Declaration of TB, November 6, 2019.

and the programme had to be adjusted. The provisions of the Offences against the Person Act, are antagonistic to the public's health and put the lives of men who have sex with men at greater risk.

Second, over the last two decades, the stigma of homosexuality has also meant that the volume of resources that should have been directed at men who have sex with men, a population at higher risk than the general population, have not been targeted at that population. The preventative and treatment measures that were required to ensure the health of men who have sex with men have not been implemented to the scale required.

Third, the fear of discrimination, disclosure of one's status and sexuality and vulnerability in the face of the law and police, in a society of tight social networks has led men who have sex with men to avoid seeking services to address HIV. It has been a serious challenge to work with populations whose existence and sexual behaviors are deemed illegal and immoral in a country with a fear of homophobic violence. In short, legal, cultural and religious codes have made it difficult to address HIV among men who have sex with men in Jamaica.

In the Caribbean, HIV prevalence among men who have sex with men ranges from 6.7 percent in Suriname to 32% in Jamaica, the highest prevalence figure in the region. This is compared to an estimated adult prevalence in the region of 1%, and a national prevalence in Jamaica of 1.7 percent.<sup>21</sup>

59. On the same date, two members of the non-profit Jamaicans for Justice presented a joint declaration underscoring the impact of the Offences against the Persons Act in LGBTI persons. They expressed:

(...) the buggery law impedes access to health care, particularly related to HIV and AIDS. Because buggery is a crime, people are afraid, whether they are homosexual or heterosexual, to seek HIV testing, and prevention services, as well as treatment for other ailments that may be related to their sexual orientation. They are fearful that health care providers will label them homosexual and therefore subject them to the stigma and discrimination associated with that status.

Under Jamaican law, public health officials must encourage those who test HIV positive to report their partners. Because male same sex conduct and buggery are illegal, those who test positive fear that they will be understood to have committed a crime, as will their partners. Consequently, they are reluctant to be tested and to report their partners.

(...) The discrimination, stigmatization, violence, and abuses of fundamental human rights to which homosexuals, actual and perceived, are subject in Jamaica are of grave concern to Jamaicans for Justice. The connection between the buggery law and these violations is, in many cases, direct, and in some instances, less so. The buggery law clearly creates an enabling environment for discrimination against homosexuals, as it criminalizes conduct that is or may be central to their identity as human beings, and it creates the perception that their very status and existence is illegal.<sup>22</sup>

60. On September 2011, the Executive Director of Jamaica AIDS Support for Life presented a declaration highlighting the impact of the buggery law in Jamaica on the right to health. He expressed that:

The buggery law has a deleterious effect on the health-seeking behavior of the homosexuals and MSM whom JASL serves. Because the buggery law legitimizes discrimination against homosexuals or those believed to be homosexual, affected populations are reluctant to access both general health services and specific services related to HIV and AIDS. For example, if an individual seeks medical care and is perceived to be gay, he will immediately become subject to discrimination at the hands of health care providers. This fear of stigmatization, which is well known in Jamaican society, prevents homosexuals and others perceived to be gay from seeking even the most basic health and social services. JASL is aware of cases, for example, where its clients refuse to apply for social security; for fear that they will be singled out by bureaucrats and subject to discriminatory treatment. With respect to HIV and AIDS prevention, testing, treatment, and care services, while JASL is certain that it is not reaching (or able to reach) all vulnerable and/or affected individuals, it has no way of knowing how many people it isn't reaching, who have been driven underground by their fear of the buggery law or desire to avoid further stigmatization.<sup>23</sup>

#### **D. Challenges to the Offences against the Person Act**

<sup>21</sup> Declaration of Ernest Massiah, Director, UNAIDS Caribbean Regional Support Team, September 29, 2011, para 15-19.

<sup>22</sup> Declaration of Carolyn Gomes and Susan Goffe, September 29, 2011, para 26, 27, 32.

<sup>23</sup> Declaration of Kandasi Walton-Levermore, September 2011, para 26-27.

61. In February of 2013 an individual named Javed Saunja Jaghai filed a claim to challenge the constitutionality of sections 76, 77 and 79 of the Offences against the Person Act before the Civil Division of the Supreme Court of Judicature of Jamaica. In August 28, 2014, he withdrew his complaint giving the following reasons:

Jamaica is a very small society with many intolerant individuals, who regularly harm unsuspecting others for choosing to live in a way that displeases them. The incidents referred to above merely confirm what is known to be norm in Jamaica. This sort of intolerance expressed towards gay people plus the several media reported attacks on gay men between 2013 and now, have made me extremely fearful. While I have never been harmed physically, I have been threatened enough times to know that I am vulnerable. I know as well that my loved ones are under threat and they are fearful for my safety. Though the cause and the case are noble, I am no longer willing to gamble with my life or the lives of my parents and siblings.<sup>24</sup>

62. According to public information, in 2015, gay rights activist Maurice Tomlinson filed a new complaint with the Jamaica's Supreme Court of Judicature against the provisions of the Offences against the Person Act that outlaw sexual conduct between consenting men.<sup>25</sup> The outcome of said challenge is unknown.

## V. ANALYSIS OF LAW

### A. The principle of equality and non-discrimination<sup>26</sup>, the right to privacy<sup>27</sup>, the right to humane treatment<sup>28</sup> and the freedom of movement and residence<sup>29</sup>

#### 1. General considerations

63. With regards to the principle of equality and non-discrimination, the Commission and the Court have stated that it constitutes a central and fundamental pillar of the Inter-American human rights system. The notion of equality stems directly from the unity of humankind and is inseparable from the essential dignity of the person, in response to which the latter is incompatible with any situation that might lead to treating a given group deemed to be superior with privilege or, inversely, treating a group deemed inferior with hostility or in any way that might discriminate its enjoyment of the rights that are effectively recognized to those who do not consider themselves subject to said situation. The Court's case law has indicated that, in the current stage of evolution of international law, the basic principle of equality and non-discrimination has been included under the principle of *jus cogens*. It is on this principle that the legal scaffolding of national and international public order is built, and it permeates the entire legal structure.<sup>30</sup>

64. The principle of equality and non-discrimination must be understood in the sense of incorporating two conceptions: "(...) a negative conception related to the prohibition of arbitrary differences in treatment and a positive conception related to the obligation of states to create conditions of real equality with respect to groups who have been historically excluded or who are at a greater risk of being discriminated against."<sup>31</sup>

<sup>24</sup> Affidavit of Javed Saunja Jaghai indicating reasons for withdrawal from claim, August 28, 2014. Appendix to the communication of the petitioners of October 15, 2014.

<sup>25</sup> Library of Congress, [Jamaica: challenge to Law on Homosexuality](#), December 14, 2015.

<sup>26</sup> Article 24 of the American Convention establishes that "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." For its part, Article 7 of the Convention of Belem do Pará establishes that "The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: (...) b. apply due diligence to prevent, investigate and impose penalties for violence against women."

<sup>27</sup> The pertinent part of Article 11 reads as follows: 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation; 3. Everyone has the right to the protection of the law against such interference or attacks.

<sup>28</sup> The pertinent part of Article 5 reads as follows: 1. every person has the right to have his physical, mental, and moral integrity respected.

<sup>29</sup> Article 22.1 of the American Convention establishes that every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provision of the law.

<sup>30</sup> I/A Court H.R. Case Flor Freire v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2016. Series C No. 315. Para. 109.

<sup>31</sup> I/A Court H.R. Case of Furlan and family v. Argentina. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 31, 2012. Series C No. 246. Para. 267.

65. Regarding the first conception, which is the relevant in the present case, dating back to early case law in the matter, the Inter-American Court pointed out that not all differentiated treatment is discriminatory and that is necessary to establish if it is objectively and reasonably justified.<sup>32</sup> This analysis is especially strict when it involves a difference in treatment based on one of the categories established in Article 1.1 of the Convention.

66. As for sexual orientation, since the case of *Atala Riffo and daughters v. Chile*, and in subsequent cases, the Inter-American Court established, in Article 1.1 of the Convention, what was understood by “any other social condition.”<sup>33</sup> In the words of the Court:

The Inter-American court has already established that the sexual orientation and gender identity of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person’s sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.<sup>34</sup>

In that respect, the Inter-American instrument prohibits discrimination in general, including categories such as sexual orientation, which cannot serve as the grounds for denying or restricting any of the rights set forth in the Convention. The above would be contrary to what is established in Article 1.1 of the American Convention.<sup>35</sup>

67. Furthermore, the Court has stated that the scope of the right to non-discrimination due to sexual orientation is not limited to the fact of being a homosexual per se, but includes its expression and the ensuing consequences in a person’s life. The protection against discrimination based on sexual orientation is not only about less favorable treatment for being lesbian or gay. It also covers discrimination because an individual acts on their sexual orientation, by choosing to engage in consensual sexual activity in private, or to enter into a long-term couple relationship with a partner of the same sex.<sup>36</sup>

68. Regarding the right to privacy and autonomy, the Court has pointed out that Article 11 of the Convention prohibits all arbitrary or abusive interference in a person’s private life, setting forth various spheres of the latter such as the private life of their families. In that respect, the Court has contended that the realm of privacy is exempt and immune from abusive and arbitrary intrusion or aggression by third parties or by public authorities.<sup>37</sup> It also pointed out that “privacy is an ample concept that is not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings. Thus, privacy includes the way in which the individual views himself and to what extent and how he decides to project this view to others.”<sup>38</sup>

69. On the basis of the above, the Inter-American Court has pointed out that sexual orientation is part of the private life of persons and therefore it involves a sphere that cannot be subject to arbitrary interference.<sup>39</sup> In the case of *Atala Riffo and daughters v. Chile*, the Court ruled that the fact that a court gave importance to “sexual orientation as a reference,” entailed an exposure of private life.<sup>40</sup>

<sup>32</sup> I/A Court H.R. Proposal to amend the Political Constitution of Costa Rica relative to naturalization. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4. Paras. 55 and 56.

<sup>33</sup> I/A Court H.R. Case of *Atala Riffo and daughters v. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239. Paras. 91 and 93.

<sup>34</sup> I/A Court H.R. Case of *Duque v. Colombia*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of February 26, 2016. Series C No. 310. Para. 104.

<sup>35</sup> I/A Court H.R. Case of *Duque v. Colombia*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of February 26, 2016. Series C No. 310. Para. 105.

<sup>36</sup> Inter-American Court of Human Rights, *Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012, para.133-134.

<sup>37</sup> I/A Court H.R. Case of *Atala Riffo and daughters V. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239. Para. 161.

<sup>38</sup> I/A Court H.R. Case of *Atala Riffo and daughters V. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239. Para. 162.

<sup>39</sup> I/A Court H.R. Case of *Atala Riffo and daughters V. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239. Para. 165.

<sup>40</sup> I/A Court H.R. Case of *Atala Riffo and daughters V. Chile*. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239. Para. 166.

70. In addition, the Commission recalls that the American Convention protects the right to humane treatment, which includes physical, mental and moral integrity, and is one of the most fundamental values in a democratic society.<sup>41</sup> The violation of said right can have several gradations ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors.<sup>42</sup> In cases of arbitrary use of criminal law, the IACHR has considered that the threat of possible arrest, or the mere issuance of an arrest warrant, although not executed, can represent a violation of personal integrity inasmuch as it causes uncertainty and anxiety and can affect the physical and emotional health of the individual.<sup>43</sup>

71. Both the Inter-American Court and the Commission have already determined that the criminalization of same sexual consensual relationships violates the principle of equality and non-discrimination and the right to privacy.

72. In its *advisory opinion on gender identity, and non-discrimination of same sex couples*, the Inter-American Court stated that LGBTI people suffer from official discrimination in the form of state laws and policies that criminalize homosexuality (...) there are still several states in the region that criminalize consensual sexual relations between same sex adults in private, which has been considered by this Court and by several international human rights law bodies as contrary to human rights for violating the rights to equality and non-discrimination as well as the right to privacy.<sup>44</sup>

73. Similarly, the Inter-American Commission has considered that provisions that punish a given group of persons for engaging in a consensual sexual act or practice with another person of the same sex are not admissible, for this is directly at odds with the prohibition on discrimination based on sexual orientation.<sup>45</sup> Specifically in its *Report on Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, the Commission indicated that:

(...) laws that criminalize same-sex intimacy between consenting persons of the same sex in private are incompatible with the principles of equality and non-discrimination according to international human rights law. Thus, and taking into account their impact on violence against LGBT persons, the IACHR urges the States of the region that have laws criminalizing consensual sex between adults of the same sex, “serious indecency” and “gross indecency” laws, and legislation criminalizing cross-dressing, to repeal those laws, and, in the meantime, to impose an explicit and formal moratorium on enforcement of those laws. This would send a clear message to society in general, and law enforcement agents in particular, that such laws cannot be used to threaten or extort LGBT persons or those perceived as such.<sup>46</sup>

74. Moreover, several international human rights bodies and national high Courts have also established the incompatibility of provisions that sanction sexual practices between persons of the same sex with the right to privacy and the principle of non-discrimination and highlighted a link between criminalization and violence against LGBTI persons.

75. In the case of *Toonen v. Australia*, the Human Rights Committee held that laws used to criminalize private consensual same sex relations violate the rights to privacy and to non-discrimination even if they are applied or not or if the victim of the case has been effectively subjected to investigation or trial. Specifically, the Committee reasoned:

<sup>41</sup> IA/Court H.R. Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela. Preliminary Objection, Merits, Reparations and Costs, para. 85.

<sup>42</sup> IA/Court H.R. Case of Loayza-Tamayo v. Peru. Merits. Judgment of September 17, 1997, para.57.

<sup>43</sup> IACHR, *Criminalization of Human Rights Defenders*, OEA/Ser.L/V/II.Doc.49/15, 31 December 2015, par.214.

<sup>44</sup> Corte IDH. Opinión Consultiva OC-24/17 de 24 de noviembre de 2017 solicitada por la República de Costa Rica. Identidad de género, e igualdad y no discriminación a parejas del mismo sexo. Obligaciones estatales en relación con el cambio de nombre, la identidad de género, y los derechos derivados de un vínculo entre parejas del mismo sexo (Interpretación y alcance de los artículos 1.1, 3, 7, 11.2, 13, 17, 18 y 24, en relación con el artículo 1 de la Convención Americana sobre Derechos Humanos, para 39.

<sup>45</sup> IACHR, Report No. 81/13, Case 12.743. Merits. Homero Flor Freire, Ecuador. November, 4, 2013, para 114.

<sup>46</sup> IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, Oas/Ser.L/V/II.rev.1, Doc. 36, 12 November 2015, para 85; See also *IACHR Hails Unconstitutionality Decision on Criminalization of Consensual Sexual Relations between Same Sex Adults in Belize*, August 22, 2016; IACHR, *Report on the Situation of Human Rights in Jamaica*, OEA/Ser.L/V/II.144 Doc.12, 10 August 2012, para 271; IACHR, *Criminalization of Human Rights Defenders*, OEA/Ser.L/V/II.Doc.49/15, 31 December 2015, par.163.



Inasmuch as article 17 is concerned it is undisputed that adult consensual sexual activity in private is covered by the concept of “privacy” and that Mr. Toonen is actually and currently affected by the continued existence of Tasmanian Laws. The Committee considers that Sections 122 (a), (c) and 124 of the Tasmanian Criminal Code “interfere with the author’s privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of Public Prosecutions of Tasmania in 1988 and those of members of the Tasmanian Parliament.”<sup>47</sup>

76. The UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has expressed that “criminalizing homosexuality and other forms of sexual and gender diversity is one of the root causes of grave and pervasive human rights violations on the basis of sexual orientation and gender identity. It also violates international human rights law”.<sup>48</sup>

77. For its part, the United Nations High Commissioner for Human Rights has stated that the criminalization of private consensual homosexual acts violates an individual’s right to privacy and to non-discrimination and constitutes a breach of international human rights law, and recalled that Special procedures mandate holders have emphasized the link between criminalization and homophobic crimes. For instance, the Special Rapporteur on health noted that “sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals.” The Special Rapporteur on extrajudicial executions noted that criminalization increases social stigmatization and makes people “more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity.”<sup>49</sup>

78. The OHCHR has stated that “non-enforcement of a law does not equate to non-discrimination, and still violates human rights. The mere existence of such a law, even if unenforced, can instill a chilling effect in the group being targeted, restricting other rights, such as freedom of expression or association. Even in States that have a policy of non-enforcement of such legislation (sodomy laws), arrest and harassment by law enforcement officials have still been documented, as well as high levels of blackmail and extortion. In order to meet their obligations under international human rights law, States must implement formal decriminalization”.<sup>50</sup>

79. The Special Rapporteur on Torture has considered that “a clear link exists between the criminalization of lesbian, gay, bisexual and transgender persons and homophobic and transphobic hate crimes, police abuse, community and family violence and stigmatization” (...) such laws foster a climate in which violence against lesbian, gay, bisexual and transgender persons by both State and non-State actors is condoned and met with impunity”.<sup>51</sup>

80. Along the same line, the European Court of Human Rights held in the case *Dudgeon v. United Kingdom* that sodomy laws of Northern Ireland violated the right to privacy under the European Convention. According to the European Court:

<sup>47</sup>Human Rights Committee, *Toonen v Australia*, 31 March 1994, para 8.2; See also Human Rights Committee, Concluding observations on the initial report of Sierra Leone, 17 April 2014, CCPR/C/SLE/CO/1, para 11.

<sup>48</sup>[UN Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity](#), Botswana ruling to decriminalize same-sex relations a landmark, says UN expert, 11 June 2019.

<sup>49</sup>Report of the United Nations High Commissioner for Human Rights, [Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity](#), A/HRC/19/41, 17 November 2011, paras 41, 42; Report of the Office of the United Nations High Commissioner for Human Rights, [Discrimination and violence against individuals based on their sexual orientation and gender identity](#), A/HRC/29/23, 4 May 2015, para.43; See also [Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt](#), A/HRC//28/66, 29 December 2014, para 42.

<sup>50</sup>United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, p.57.

<sup>51</sup>[Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment](#), A/HRC/31/57, para. 15. See also [Press release on the implications of the anti-homosexuality Act on the work of Human Rights Defenders in the Republic of Uganda](#), Special Rapporteur on Human Rights Defenders of the African Commission on Human and Peoples Rights, 11 March 2014.

(...) the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par.1 (...) Although no proceedings seem to have been brought in recent years with regard to such acts involving only males over 21 years of age, apart from mental patients, there is no stated policy on the part of the authorities not to enforce the law in this respect. Furthermore, apart from prosecution by the Director of Public Prosecution, there always remains the possibility of a private prosecution.<sup>52</sup>

81. In the case of *Norris v. Ireland*, the European Court of Human Rights determined that the applicant could claim to be a victim of a sodomy law even if he was not prosecuted by it. In its own words:

(...) the Court has held that Article 24 of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it (...) In the Courts' view, Mr. Norris is in substantially the same position as the applicant in the Dudgeon case (...).<sup>53</sup>

82. In addition, several high courts across the world have held that "buggery" laws are incompatible with the right to privacy, liberty and with the principle of non-discrimination and can affect the right to humane treatment of individuals impacted by such laws.

83. For instance, the Supreme Court of the United States determined in the case *Lawrence v. Texas* that a statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the right to liberty under the Due Process Clause of the Constitution. According to the Court:

(...) Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.

(...) the petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.<sup>54</sup>

84. The Constitutional Court of South Africa in the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and others* held that sodomy laws violate the right to equality and dignity. According to the Court:

(...) The discriminatory prohibitions on sex between men reinforce already existing societal prejudices and severely increase the negative effects of such prejudices on their lives.

(...) the impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate. The nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.

(...) I have considered only the common law crime of sodomy on the basis of its inconsistency with the right to equality. This was the primary basis on which the case was argued. In my view, however, the common-law crime

<sup>52</sup>European Court of Human Rights, *Case of Dudgeon v. The United Kingdom*, Judgement, 22 October 1981, para. 41; See also European Court of Human Rights, *Case of Modinos v. Cyprus*, Judgment, 22 April 1993, para 23.

<sup>53</sup>European Court of Human Rights, *Case of Norris v. Ireland*, 26 October 1988, para 31, 32.

<sup>54</sup>Case *Lawrence v. Texas*. Supreme Court of the United States. June 26 of 2003, p. 14, 18. See *Obergefell v. Hodges*. Supreme Court of the United States. June 26, 2015 in which the Supreme Court of the United States considered that "while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty".

of sodomy also constitutes an infringement of the right to dignity which is enshrined in section 10 of our Constitution.

The common law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant portion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human.<sup>55</sup>

85. The Supreme Court of India, held in the case of *Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice*, that a statute that criminalized among other things, homosexual acts, was unconstitutional. The Court reasoned that:

At the very least, it can be said that criminalization of consensual carnal intercourse, be it amongst homosexuals, heterosexuals, bi-sexuals or transgenders, hardly serves any legitimate purpose or interest. Per contra, we are inclined to believe that if Section 377 remains in its present form in the statute book, it will allow the harassment and exploitation of the LGBT community to prevail. We must make it clear that freedom of choice cannot be scuttled or abridged on the threat of criminal prosecution and made paraplegic on the mercurial stance of majoritarian perception.

(...) Section 377 IPC fails to take into account that consensual acts between adults in private space are neither harmful nor contagious to the society. On the contrary, Section 377 trenches a discordant note in respect of the liberty of persons belonging to the LGBT community by subjecting them to societal pariah and dereliction.<sup>56</sup>

86. In *Orozco v. The Attorney General of Belize*, the Supreme Court of Belize held the unconstitutionality of section 53 of the Criminal Code that criminalizes sexual intercourse “against the order of nature”. It therefore went to determine that section 53 excludes consensual private sexual acts between adults.

Inasmuch as section 53 embraces acts involving both males and females the impact on the dignity of a homosexual man is disproportionate given the deep stigmatization caused by them being the primary targets. (...) I hold that section 53 is in breach of the dignity of the Claimant and in violation of section 3 (c). Further, such breach operates to inform the other rights from which the concept of human dignity emanates.<sup>57</sup>

87. In the case of *Jason Jones v. The Attorney General of Trinidad and Tobago*, the High Court of Justice of Trinidad and Tobago held as unconstitutional, sections 13 and 15 of the Sexual Offences Act which prohibited “buggery” and “serious indecency” between two men and criminalized consensual same-sex activity between adults. The Court reasoned that:

To this court, human dignity is a basic and inalienable right recognized worldwide in all democratic societies. Attached to that right is the concept of autonomy and the right of an individual to make decisions for herself/himself without any unreasonable intervention by the State. In a case such as this, she/he must be able to make decisions as to who she/he loves, incorporates in his/her life, who she/he wishes to live with and with whom to make a family. A citizen should not have to live under the constant threat, the proverbial “Sword of Damocles”, that at any moment she/he may be persecuted or prosecuted. That is the threat that exists at present. It is a threat that is sanctioned by the State and that sanction is an important sanction because it justifies in the mind of others in society who are differently minded that the very lifestyle, life and existence of a person who chooses to live in the way that the claimant does is criminal and is deemed of a lesser value than anyone else. It has been so expressed in the recent past by leaders in society. In this way, Parliament has taken the deliberate decision to criminalize the lifestyle of persons like the claimant whose ultimate expression of love and affection is crystallized in an act which is statutorily unlawful, whether or not enforced. This deliberate step has meant, in this circumstance, that the claimant’s rights are being infringed.

<sup>55</sup> Constitutional Court of South Africa, Case of National Coalition Gay and Lesbian Equality and another v. Minister of Justice and others, October 9, 1998, para 23, 26, 28.

<sup>56</sup> Supreme Court of India, case of Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice, September 6, 2018, para. 223 and 239.

<sup>57</sup> Supreme Court of Belize. Caleb Orozco and the Attorney General of Belie, August 10, 2016. P.27.

(...) At this point, the court feels compelled to state in conclusion that it is unfortunate when society in any way values a person or gives a person their identity based on their race, color, gender, age or sexual orientation. That is not their identity. That is not their soul. That is not the sum total of their value to society or their value to themselves. The experiences of apartheid South Africa and the USA during and after slavery, even into the mid and late 20th century, have shown the depths that human dignity has been plunged as a result of presupposed and predetermined prejudices based on factors that do not accept or recognize humanity. Racial segregation, apartheid, the Holocaust - these are all painful memories of this type of prejudice. To now deny a perceived minority their right to humanity and human dignity would be to continue this type of thinking, this type of perceived superiority based on the genuinely held beliefs of some.<sup>58</sup>

88. Finally, with respect to the freedom of movement and residence, the Inter-American court has ruled that the right of freedom of movement and residence, “may be violated formally or by *de facto* restrictions, when the State has not established the conditions or provided the means that allow it to be exercised.”<sup>59</sup> On this point, the Court has established a connection between *de facto* threats and harassment and forced displacement or self-exile when “the State fails to provide the necessary guarantees to ensure they may move and reside freely within the territory in question.”<sup>60</sup>

## 2. Analysis of this case

89. First, the Commission will examine whether the relevant sections of the Offences against the Person Act represent restrictions or differences of treatment with respect to rights recognized in the American Convention. In this regard, the IACHR notes that the Offences against the Person Act in section 76 titled “unnatural crime”, prohibits “the abominable crime of buggery” committed by any person, without identifying sex, gender or sexual orientation. Moreover section 77 punishes the attempt to commit buggery.

90. The Commission considers that said norms constitute a restriction on private life, which has a disparate impact on LGBTI persons in Jamaica, such as the alleged victims, taking into account the aforementioned context, and that the laws of sodomy, when referring to unnatural practices, are generally interpreted to criminalize people who defy traditional norms of sexual orientation, identity and expression of gender and bodily diversity, or who represent sexualities and non-normative identities.<sup>61</sup> As the IACHR has previously indicated, in practice, these laws have a disproportionate impact on gay men and other men who have sex with men. There are accounts that the laws have been enforced against men engaged in acts with other men.<sup>62</sup> In addition, although the majority of these laws “do not specifically address sexual acts between women, rampant homophobia puts women who do have sex with women, or women who do not conform to a more feminine gender identity, at risk. Moreover, trans persons, and gender non-conforming persons also experience a disproportionate impact, given their visibility”.<sup>63</sup>

91. On the other hand, the IACHR notes that section 79 of the aforementioned law contains a difference of treatment with regard to men who have sex with men or homosexual men, since it punishes with up to two years' imprisonment “any act of gross indecency” or its intent, committed from one man to another, either in public or private.

<sup>58</sup> High Court of Justice. Jason Jones and the Attorney General of Trinidad and Tobago, para 173.

<sup>59</sup> I/A Court H. R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 3, 2012, Series C No. 248, para. 220; See also: *Case of the Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of June 15, 2005, Series C No. 124, paras. 119 and 120; and *Case of Manuel Cepeda Vargas v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, para. 197.

<sup>60</sup> I/A Court H. R., *Case of Vélez Restrepo and Family v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of September 3, 2012, Series C No. 248, para. 220; See also: *Case of Valle Jaramillo and Others v. Colombia*, Merits, Reparations, and Costs, para. 139; and *Case of Manuel Cepeda Vargas v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, para. 197.

<sup>61</sup> See for instance ACLU, *Why Sodomy Laws Matter*, in which it is explained the way in which in the United States sodomy laws began to be used against gay people in the late 1960s when the gay rights movement began to make headway; see also IACHR,

<sup>62</sup> See IACHR, *Report on the Situation of Human Rights in Jamaica*, OEA/Ser.L/V/II.144 Doc.12, 10 August 2012, para. 270.

<sup>63</sup> See IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, Oas/Ser.L/V/II.rev.1, Doc. 36, 12 November 2015, para 61; IACHR, *Report on the Situation of Human Rights in Jamaica*, OEA/Ser.L/V/II.144 Doc.12, 10 August 2012 para. 287.

92. In its case law, to determine the arbitrariness of a restriction or difference of treatment, the IACHR has resorted to a proportionality test, consisting of the following scaled elements: ii) the existence of a legitimate aim; iii) the suitability, that is, the determination of whether or not there is a logical relationship of causality between the means and the end; iv) the necessity, that is, the determination of whether or not there are less restrictive and equally suitable alternatives; and v) the proportionality *stricto sensu*, that is striking a balance between the interests at stake and the degree of sacrifice between them.<sup>64</sup>

93. In this case, however, the Commission deems it unnecessary to analyze the legitimacy of the restrictions and difference of treatment contemplated in the Offences against the person act, because, on the one hand, both the IACHR and the Inter-American Court have already established that the existence of buggery and serious or gross indecency laws is contrary to rights recognized in the American Convention such as the principle of non-discrimination and the right to privacy<sup>65</sup>.

94. On the other hand, the Commission recalls that in cases in which the difference in treatment is based in one of the categories forbidden by Article 1.1 of the Convention, such as sexual orientation, the State has the burden to justify its actions on the basis of compelling reasons<sup>66</sup> which implies that the reasons used by the state to justify the restrictions are particularly serious and supported by thorough arguments. In the absence of said justification the difference in treatment will be presumed unconventional.<sup>67</sup>

95. The IACHR notes that in the instant case, the State did not present any justification for the interference in private life and difference of treatment pursuant to the Offences against the Person Act, against T.B and S.H. Therefore, it is not possible to even analyze the first step of the proportionality test, that is, the existence of a legitimate aim, which in the case of the suspect categories set forth in Article 1.1 of the Convention must be assessed strictly in the sense of requiring a compelling need, otherwise the interference and difference of treatment must be presumed unconventional.

96. By virtue of the considerations indicated above, the Commission concludes that the State of Jamaica is responsible for the violation of the principle of equality and non-discrimination and the right to privacy, as enshrined in Articles 11 and 24 of the American Convention, in connection with the obligations established in Articles 1.1 and 2 of the same instrument, to the detriment of T.B and S.H.

97. With respect to the right to human treatment, as stated previously, both the Inter-American Commission and the Inter-American Court, international organizations, and national courts have expressed that there is a link between sodomy laws and human rights abuses against LGBTI persons inasmuch as said laws condone discrimination, stigmatization and violence by providing a social sanction for abuse and contributes to the occurrence of homophobic and transphobic crimes as well as to other abuses. The IACHR has also expressed that the mere existence of sodomy laws can impact mental health by creating anxiety, guilt and depression among LGBTI persons affected by the law.<sup>68</sup>

98. In the instant case, the Commission recalls that both T.B and S.H have suffered a series of acts of violence against them related to their sexual orientation, gender identity and gender expression, including threats of death and physical violence and related to a context of homophobia and violence against LGBTI people in Jamaica. The continuing threats against their lives and integrity forced them to flee Jamaica and seek asylum elsewhere.

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<sup>64</sup> I/A Court H.R., Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2012. Series C No. 257, para. 273; and I/A Court H.R. Case of Atala Riffo and daughters v. Chile. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239. Para. 146.

<sup>65</sup> IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, Oas/Ser.L/V/II.rev.1, Doc. 36, 12 November 2015, para 85; Corte IDH. Caso Flore Freire vs. Ecuador. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 31 de agosto de 2016, parr. 23.

<sup>66</sup> IACHR. Complaint filed with the Inter-American Court of Human Rights. Case of Karen Atala and daughters. Para. XX.

<sup>67</sup> IACHR. Complaint filed with the Inter-American Court of Human Rights. Case of Karen Atala and daughters. Para. XX.

<sup>68</sup> See IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, Oas/Ser.L/V/II.rev.1, Doc. 36, 12 November 2015, para 68;

99. The IACHR believes that by maintaining Offences Against the Person Act in its legislation, the State has contributed to the perpetration of said violence in the terms indicated above, for which reason it considers that it is responsible for the violations of the right to humane treatment, the freedom of movement and residence as enshrined in Articles 5.1 and 22.1 of the American Convention, in connection with the established obligations in Articles 1.1 and 2 of the same instrument, to the detriment of T.B and S.H.

## B. The principle of legality<sup>69</sup>

100. With respect to the principle of legality, the Commission recalls that such principle constitutes a central element of criminal prosecution in a democratic society.<sup>70</sup> Although the decision as to which acts are classified as crimes and trigger the punitive authority of the State belongs, in principle, to a democratic society, in the exercise of its criminal policy, based on its particular historic, social, and other circumstances<sup>71</sup> certain limitations should be observed by States when exercising the power to define criminal offenses.

101. The Inter-American Court has insisted that when drafting the definition of offenses, it is necessary to use strict, unequivocal terms that clearly delimit the illegal conducts, giving full meaning to the principle of criminal legality. This involves a clear definition of the incriminated conduct that establishes its elements and permits it to be delimited from conducts that are not illegal or from illegal conducts punished by non-penal measures. Any ambiguity in the wording of the definition of offenses gives rise to doubts and opens the way to the discretion of the authorities, which is particularly undesirable when establishing the criminal responsibility of individuals and sanctioning them with punishments that severely affect fundamental rights, such as life or liberty.<sup>72</sup>

102. Moreover, both the Commission and the Court have considered that the principle of legality is inseparably linked to that of legitimacy by virtue of the international system that is the basis of the Convention<sup>73</sup>, which implies that norms be adopted for the common good, and that certain conducts should not be criminalized.<sup>74</sup> For instance, in the case *Pollo Rivera v. Peru* the Court established the responsibility of the State for the criminalization of medical doctors who assisted people suspected of participating in terrorist activities, and declared that therapeutic medical activity is encouraged and promoted by law, and even in certain circumstances is a duty of doctors to provide, so it cannot be criminalized.<sup>75</sup> The Court took into account the prohibition of criminalization of medical activities developed in international humanitarian law and international human rights law.<sup>76</sup>

103. The IACHR has already determined in the previous section that the criminalization of private sexual consensual activity between adults violates the principle of equality and non-discrimination, the right to privacy, and the right to humane treatment, taking into account the impact of such norms on the personal integrity of the alleged victims in this case. The Commission considers that the criminalization of conducts that are part of rights recognized by international human rights law constitutes, *per se*, a violation of the principle of legality, taking into account the Inter-American standards referred to in the preceding paragraphs.

<sup>69</sup> Article 9 of the American Convention establishes that “no one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom”.

<sup>70</sup> I/A Court H.R. Case of Norín Catriman et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile. Merits, Reparations and Costs, Judgment of May 29, 2014, para. 161.

<sup>71</sup> IACHR, Report No.176/10, Cases Nos.12.576, 12.611 and 12.612. Merits. Aniceto Norin Catriman, Juan Patricio Marileo Saravia, Victor Ancalaf Llaue et al, para. 116.

<sup>72</sup> I/A Court H.R. Case of J. v. Peru. Preliminary objection, Merits, Reparations and Costs. Judgment of November 27, 2013, para.287.

<sup>73</sup> I/A Court H.R. Advisory Opinion OC-6/86 of May 9, 1986. The word “laws in Article 30 of the American Convention on Human Rights, para. 32.

<sup>74</sup> IACHR, Criminalization of Human Rights Defenders, OEA/Ser.L/V/II.Doc.49/15, 31 December 2015, para 241.

<sup>75</sup> Corte IDH. Caso Pollo Rivera y otros vs. Perú. Fondo, Reparaciones y Costas. Sentencia de 21 de octubre de 2016. Serie C no. 319, para. 256.

<sup>76</sup> Corte IDH. Caso Pollo Rivera y otros vs. Perú. Fondo, Reparaciones y Costas. Sentencia de 21 de octubre de 2016. Serie C no. 319, para. 256; see also I/A Court H.R. Case of De la Cruz Flores v. Peru. Merits, Reparations and Costs. Judgment of November 18, 2004, para.102.

104. By virtue of the considerations indicated above, the Commission concludes that the State of Jamaica is responsible for the violation of the principle of legality as enshrined in Article 9 of the American Convention, in connection with the obligations established in Articles 1.1 and 2 of the same instrument, to the detriment of T.B and S.H.

### C. The right to health<sup>77</sup>

105. With regards to the right to health, both the IACHR and the Inter-American Court of Human Rights have found that said right is protected under Article 26 of the American Convention.

106. The Commission recognizes that the interpretation of Article 26 of the Convention and specific determination of its scope and content can involve certain interpretive complexities. Thus, the Commission finds that analysis of a specific case according to Article 26 of the American Convention should be conducted on two levels. First, it needs to be established if the right in question in the case is derived from “the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States,” as referred by Article 26. That is, Article 26 of the ACHR is the article that identifies the Charter of the OAS as the direct source of these rights, assigning the provisions in that treaty applicable to these issues the character of human rights. As the objective of the Charter of the OAS was not to identify rights but to establish an international organization, outside texts must be used to identify the rights derived from the provisions of that instrument, including, fundamentally, the American Declaration, as well as other relevant provisions of international law.

107. In application of these parameters the Commission and the Court have clearly established that the right to health is one of the rights derived from the economic and social provisions mentioned in Article 26 of the Convention, for which reason it is not necessary to recapitulate that analysis.<sup>78</sup>

108. Based on this, it can be concluded that the Commission understands that Article 26 of the American Convention imposes a series of obligations on States beyond simply limiting regression—this is part of the obligation of progressiveness, but cannot be understood as the only legally actionable obligation in the Inter-American system. Thus, the Commission finds that, taking into account the interpretive framework of Article 29 of the American Convention, Article 26 analyzed in view of articles 1(1) and 2 of the Convention entails, at a minimum, the following immediate and enforceable obligations: (i) general obligations to respect and guarantee, (ii) application of the principle of nondiscrimination to economic, social, and cultural rights; (iii) obligations to take steps or adopt measures to make it possible to enjoy the rights included in that article; and (iv) obligations to provide suitable and effective remedies for protecting those rights. The methodologies or sources of analysis that are pertinent to each of these obligations must be established based on the specific circumstances of each case.

109. Regarding the immediate and enforceable components of the obligation to take steps or adopt measures, the CESCER has indicated, for example, that the adoption of measures in itself is not limited or conditioned on other considerations; thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations. The State also has basic obligations to meet the minimum standards for these rights. These obligations are not subject to steady development but rather must be provided immediately.<sup>79</sup>

<sup>77</sup> Article 26 establishes that the States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

<sup>78</sup> See, *inter alia*, IACHR, Report no 110/18. Case 12.678, Merits. Paola del Rosario Albarracín Guzmán and relatives, October 5, 2018, para 120; IACHR, Report. No. 64/18. Case 12.738. Merits. Opario Lemoth Morris and others (Miskito Divers). Honduras. May 8, 2019, Inter-American Court. Case of Poblete Vilches *et al. v. Chile*. Merits, Reparations, and Costs. Judgment of March 8, 2018. Series C No. 349. Para. 110; Inter-American Court. Case of Cuscul Pivaral *et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment dated August 23, 2018. Series C No. 359. Para. 99.

<sup>79</sup> United Nations Committee on Economic, Social, and Cultural Rights, General Comment 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant), 1990. In this sense, see: IACHR. Report on Poverty and Human Rights in the Americas, OEA/Ser.L/V/II.164 Doc. 147 (September 7, 2017) paras. 236 and 237.

110. In the case *Poblete Vilches v. Chile*, the Inter-American Court, following the methodology provided for, determined that the right to health is a right protected by article 26 of the American Convention and recalled that health is a fundamental human right for the adequate exercise of other human rights. Every human being has the right to enjoy of the highest possible level of health that allows him/her to live with dignity. Health must be understood not only as the absence of diseases, but also as a complete state of physical, mental and social well-being, derived from a lifestyle that allows people reaching a comprehensive balance.<sup>80</sup> The Court also underscored the obligation of States to provide quality and effective health services that promote the improvement of health conditions of the population.<sup>81</sup>

111. The Commission recalls that in order to fulfill their international obligations in respect to the right to health, States must guarantee not only the provision of health services but also duly observe the conditions that lead to a dignified and equal life in society in relation with the right to health. In other words, the Commission underlines the obligation of States to cover in their health policies and normative frameworks the basic and social determinants that allow for the effective realization of the right to health. Among the former is the guarantee of other rights that permit the enjoyment of a healthy life such as access to water and adequate food, the prohibition of torture, or healthy working conditions. In the same way, it is essential to integrate social determinants of health into the actions that States implement regarding this right, such as the equitable distribution of resources, cultural, ethnic and gender perspectives, the effective participation of the population in health policies, as well as the identification of power relations, violence, normative, institutional and social discrimination or harmful family and community environments that impede the realization of the right to health. Within this framework, for the IACHR, States must adopt measures not only regarding the provision of adequate medical services and goods, but also regarding the physical and psychosocial environments that condition individuals' enjoyment of the right to physical and mental health<sup>82</sup>.

112. In this context, the Commission observes that in many cases the existing threats and violations produced regarding the enjoyment of the right to health of LGBTI persons, among other vulnerable populations, also are the result of the omission of States to deal with, precisely, the social determinants of the right to health, such as the validity of a regulatory framework that discriminates against these persons or groups of the population. In this context, the IACHR considers that the laws, practices or policies that criminalize sexual intercourse between two persons of the same sex not only prevent States from designing and implementing specific health policies for these groups, but also directly, seriously and in a discriminatory fashion affect the enjoyment of the right to health.

113. Regarding the content of the right to health, in harmony with the body of international law, the Committee on Economic, Social and Cultural Rights has found that all health services, goods, and facilities must meet requirements of availability, accessibility, acceptability, and quality.<sup>83</sup> Both the Commission and the Court have taken these concepts into account and incorporated them into their analysis of multiple cases.<sup>84</sup>

114. Specifically, the element of accessibility implies among other things that health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in

<sup>80</sup> Inter-American Court. Case of *Poblete Vilches et al. v. Chile*. Merits, Reparations, and Costs. Judgment of March 8, 2018. Series C No. 349, para. 120.

<sup>81</sup> Inter-American Court. Case of *Poblete Vilches et al. v. Chile*. Merits, Reparations, and Costs. Judgment of March 8, 2018. Series C No. 349, para. 120.

<sup>82</sup> In this regard, see Committee on Economic, Social and Cultural Rights. *General Comment No. 14, The Right to the Highest Attainable Standard of Health*. E/C.12/2000/4, on 11 August 2000, paras. 4, 11, 16 and 18; WHO, "Closing the gap in a generation: health equity through action on the social determinants of health: final report of the Commission on Social Determinants of Health (Geneva, 2008); UN. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. A/HRC/41/34, 12 April 2019.

<sup>83</sup> UN, Committee on Economic, Social and Cultural Rights. *General Comment 14*, E/C.12/2000/4, August 11, 2000, para. 12.

<sup>84</sup> IACHR. Report 2/16. Case 12,484. Merits. *Cuscul Pivaral et al. Guatemala*, April 13, 2016, para. 106; Inter-American Court. Case of *Poblete Vilches et al. v. Chile*. Merits, Reparations, and Costs. Judgment of March 8, 2018. Series C No. 349, para. 120.



law and in fact, without discrimination on any of the prohibited grounds.<sup>85</sup> The Commission considers of relevance to recall that the standard of accessibility, as stated by the Court, implies that States must ensure equal treatment of all persons who access health services. In other words, according to article 1.1 of the American Convention on Human Rights, States must ensure to all persons subject to their jurisdiction the access to health services “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>86</sup> The Court has affirmed that the words “any other social condition” includes sexual orientation which, in turn, is not limited to the fact of being a homosexual per se, but includes its expression and the ensuing consequences in a person’s life.<sup>87</sup>

115. The Commission notes that the IACHR and the Inter-American Court as well as several national and international bodies have considered that sodomy laws create obstacles to access the right to health without discrimination. In its 2012 Report on the situation of human rights in Jamaica, the IACHR expressed concern over the fact that,

(...) laws criminalizing sex between men or homosexual conduct --which have the consequence of obstructing access to medical services-- have a direct effect on infection rates and may be a substantial factor contributing to the HIV epidemic in Jamaica. In the Bahamas 10% of gay men are HIV/AIDS positive, which is similar to other English-speaking Caribbean nations that do not criminalize homosexual acts; on the other hand English-speaking Caribbean nations that do criminalize such conduct have a 20-30% rate or higher of infection among the gay male population. In Jamaica itself, approximately 27,000 persons in Jamaica are reported to be infected with HIV, 73% of them between the ages 20 and 49. While the infection rate of the general population is estimated to be 1.6%, 31.1% of gay men are believed to be HIV/AIDS positive.<sup>88</sup>

116. The Inter-American Court considered in its *advisory opinion on gender identity and non-discrimination of same sex couples*, that sodomy laws,

negatively impact the quality of health services, deter people from resort to those services, and they can lead to denial of attention or to non-existence services that respond to the specific health needs of LGBTI people and intersex. In addition, in jurisdictions where their behavior is penalized preventive health measures adjusted to those communities are more likely to be suppressed. In the same way, the fear of being judged and punished can deter those who practice homosexual behavior from access to health services. These problems are aggravated in the case of people who live with HIV.<sup>89</sup>

117. In 2019 the UN Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity expressed that countries that criminalize homosexuality and other forms of sexual orientation and gender identity, create significant barriers in access to health, employment, education and other essential processes, all due to the perception that their very identities are criminal in nature.<sup>90</sup>

118. In its 2010 Report, the Special Rapporteur on the right to health categorized the effects of criminalization of same sex sexual conduct on the right to health in three ways: inhibition of access to health services, violence and abuse, and social stigmatization. The Special Rapporteur affirmed that where same-sex sexual conduct is criminalized, individuals are unable to gain access to effective health services and preventive

<sup>85</sup> I/A Court H.R. Case of Gonzales Lluy et al. v Ecuador. Preliminary objections, merits, reparations and costs, Judgment of September 1, 2015, para. 173.

<sup>86</sup> American Convention on Human Rights. Article 1.1.

<sup>87</sup> I/A Court H.R. Case of Atala Riffo and daughters v. Chile. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239. Paras. 91 and 93.

<sup>88</sup> IACHR, *Report on the Situation of Human Rights in Jamaica*, OEA/Ser.L/v/II.144, Doc. 12, 10 August 2012, para 292.

<sup>89</sup> Corte IDH. Opinión Consultiva OC-24/17 de 24 de noviembre de 2017 solicitada por la República de Costa Rica. Identidad de género, e igualdad y no discriminación a parejas del mismo sexo. Obligaciones estatales en relación con el cambio de nombre, la identidad de género, y los derechos derivados de un vínculo entre parejas del mismo sexo (Interpretación y alcance de los artículos 1.1, 3, 7, 11.2, 13, 17, 18 y 24, en relación con el artículo 1 de la Convención Americana sobre Derechos Humanos, para 39.

<sup>90</sup> UN, *Angola: Decriminalising same sex relations a welcome step for equality*, UN Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity, 25 January 2019.

health measures are not tailored to the needs of LGBT communities. Health professionals may refuse to treat same-sex practicing clients or may respond with hostility.<sup>91</sup>

119. In its concluding observations on Jamaica of 2011, the Human Rights Committee noted that the criminalization of adult consensual sexual relationships does not only have a negative impact on the accessibility of LGBTI persons to health services but it also has a negative impact on public health campaigns against HIV/AIDS.<sup>92</sup>

120. Furthermore, according to the World Health Organization, in countries where same-sex consensual sexual behavior is criminalized, people may be deterred from seeking health services because of fear of being arrested or prosecuted. Moreover, the World Health Organization concluded that in countries where it is against the law to be gay, people perceived as being lesbian, gay, and transgender are often discriminated against and ill-treated by medical providers, “reducing the likelihood that they will seek services in the future.”<sup>93</sup> Refusal to make clinic appointments, refusal to treat or treatments with gross disrespect, violation of medical privacy, private shaming and public disparagement are among the discriminatory practices and abuses that have been reported by LGTBI persons when trying to access to health-care institutions.<sup>94</sup>

121. For its part, the Global Fund to Fight AIDS has noted that,

(...) the criminalization of same-sex sexual acts may fuel violence towards men who have sex with men and women of trans experience. Criminalization of such activity facilitates high levels of violence towards men who have sex with men and people of trans experience. It also leads to stigma in healthcare facilities, limiting disclosure of sexual orientation for men who have sex with men and other LGBTI populations, which could impede the likelihood of testing for HIV. Some men who have sex with men experienced issues of nonverbal stigma and discrimination from healthcare workers, including being knowingly gossiped about, body language that communicated disrespect, and avoidance.<sup>95</sup>

122. In the present case, both T.B and S.H. have expressed that they have suffered a series of restrictions to access health which derive from the context of discrimination against LGBTI persons in Jamaica and the validity of the Offences against the Person Act. Specifically:

-S.H expressed he is afraid to be tested for HIV or other sexually transmitted infections because gay men or men who have sex with men often experience discriminatory treatment. T.B said that she has had the experience of seeking health services at a public hospital and facing discrimination because of her appearance and mannerisms.

-Both expressed that seeking sexual health services, will require answering questions about sexual partners, and that they face the dilemma that, if they answer with the truth, that is, that they have had sex with men, they will be confessing a behavior that is a crime in Jamaica that can be punished with 10 years in prison. On the other hand, if they do not answer with the truth, they cannot receive adequate attention to their particular situation.

123. The Commission has already stated in the previous sections that the validity of the Offences against the Person Act has contributed to a context of violence and discrimination against LGBTI persons, and in particular to the acts of violence that the alleged victims have suffered. The IACHR further considers that the existence of said law has contributed to the discrimination suffered by the alleged victims when accessing health services, derived from their sexual orientation, gender identity or gender expression.

124. The Commission considers that the validity of the Offences against the Person Act has created at least three obstacles to the access to the right to health: 1) it has deterred the access to health of T.B and S.H who

<sup>91</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/14/20), at paras. 17-21.

<sup>92</sup> Criminalization and HIV/AIDS: Concluding observations of the Human Rights Committee on Jamaica (CCPR/C/JAM/CO/3), at para. 9.

<sup>93</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover. New York (NY): United Nations; 2010. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. New York (NY): United Nations General Assembly; 2011

<sup>94</sup> WHO. Sexual Health, human rights and the law. 2015. P. 23.

<sup>95</sup> The Global Fund, Baseline Assessment-Jamaica, Scaling up Programs to Reduce Human Rights Related Barriers to HIV Services, September 2019, p.40.

fear that they will be discriminated against if they seek medical attention due to the context of discrimination against LGBTI persons in Jamaica; 2) in certain occasions in which the alleged victims sought access to health care they have been discriminated against; 3) it has put them in the dilemma of choosing between receiving adequate health care and running the risk of being prosecuted criminally for a conduct protected by the Convention, or not revealing the necessary information and not having proper medical treatment. The IACHR considers that, by maintaining the Offences against the Person Act in its legislation, the State has failed to respect the right to health of the alleged victims in conditions of accessibility that prohibit non-discrimination.

125. By virtue of the considerations indicated above, the Commission concludes that the State of Jamaica is responsible for the violation of right to health, as enshrined in Article 26 of the American Convention, in connection with the obligations established in Article 1.1 of the same instrument, to the detriment of T.B and S.H.

#### **D. Right to judicial protection<sup>96</sup>**

126. The IACHR recalls that States have a general obligation to provide effective judicial remedies to people who allege having been victims of human rights violations (Article 25), which should be in accordance with the rules of legal due process (Article 8(1)). For a remedy to exist it is not enough for it to be provided for by law; rather, it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.<sup>97</sup>

127. In *Boyce et al. v. Barbados*, the Inter-American Court established that Barbados failed to abide by its obligations under Article 2 of the Convention, in relation to Articles 1(1), 4(1) and 25 (1) taking into account that the Constitution prevented judicial challenges to Section 2 of the offences Against the Person Act, which established the mandatory death penalty for any person convicted of murder. According to the Court:

Section 26 of Barbados' Constitution prevents courts from declaring the unconstitutionality of current laws that were enacted or made before the Constitution came into force on November 30, 1966. It is referred to as the "savings clause" because it effectively "saves" such laws from constitutional scrutiny. In effect, Section 26 immunizes pre-constitution laws that are still in effect from constitutional challenge even if the purpose of such challenge is to analyze whether the law violates fundamental rights and freedoms. Such is the case with section 2 of OAPA, which has existed since the enactment of the Offences against the Person Act of 1868. That is, section 2 of OAPA is a law that existed before the current Constitution came into force, and continues to be the law of Barbados. Thus, by virtue of the "savings clause", the constitutionality of Section 2 of OAPA may not be challenged domestically.

Accordingly, in light of the Court's jurisprudence, and to the extent that section 26 of the Constitution of Barbados prevents judicial scrutiny over section 2 of the Offences Against the Person Act, which in turn violates the right not to be arbitrarily deprived of life, the Court finds that the State has failed to abide by its obligations under Article 2 of the Convention, in relation to Articles 1(1), 4(1), 4(2) and 25(1) of such instrument.<sup>98</sup>

128. In the instant case the Commission notes that the Constitution of Jamaica establishes that sexual offences shall not be held to be inconsistent with or in contravention of the provisions of the Constitution. The State argued that it is possible to challenge the relevant sections of the Offences against the Person Act, but did not provide evidence of an available and effective remedy.

<sup>96</sup> Article 25 of the American Convention establishes that: 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

<sup>97</sup> Inter-American Court, *Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.)*. Judgment on Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2006. Series C No. 158. Para. 125; Inter-American Court, *Case of the Yakye Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125. Para. 61; Inter-American Court, *Case of the "Five Pensioners."* Judgment of February 28, 2003. Series C No. 98. Para. 136.

<sup>98</sup> Inter-American Court. *Case of Boyce et al. v. Barbados*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007, para 76 and 80.

129. The Commission recalls that a challenge to sections 76, 77 and 79 of the Offences against the Person Act was filed in 2013, but it was later withdrawn, and another challenge was filed in 2015, but it has yet to be resolved.

130. The IACHR considers that the mere presentation of an action does not prove the availability and effectiveness of a remedy, especially in light of the text of a law that expressly states that sexual offences, such as those regulated in the aforementioned sections of the Offences against the Person Act, cannot be declared unconstitutional. In view of the foregoing, the Commission considers that T.B and S.H did not have an effective remedy for the protection against acts that violate their human rights.

131. By virtue of the considerations indicated above, the Commission concludes that the State of Jamaica is responsible for the violation of the right to judicial protection as enshrined in Article 25.1 of the American Convention, in connection with the obligations established in Articles 1.1 and 2 of the same instrument, to the detriment of T.B and S.H.

## VI. ACTIONS SUBSEQUENT TO REPORT NO. 240/19

132. On December 5, 2019, the Commission approved Report No. 240/19 on the merits of the instant case, which encompasses paragraphs 1 to 131 *supra*, and issued the following recommendations to the State:

1. Provide full reparation for the human rights violations found in the instant report, including both material and nonpecuniary dimensions. This must include economic compensation as well as measures of satisfaction.
2. Adopt the measures of non-repetition necessary to prevent similar incidents from taking place in the future. Specifically:
  - I) Repeal the sections of the Offences against the Persons Act that criminalizes private consensual sexual activity between adults and consensual sexual conduct between men who have sex with men or gay men;
  - II) Adopt a legal framework or modify the existing legislation with a view to prohibiting and punishing all forms of discrimination based on sexual orientation, gender identity or expression - real or perceived - and body diversity;
  - III) carry out collection and analysis of statistical data in a systematic and disaggregated manner in the Jamaica Census regarding the prevalence and nature of violence and discrimination based on prejudice, based on their sexual orientation, gender identity or expression - real or perceived- and body diversity;
  - IV) Adopt the necessary measures to ensure the effective access to health services to LGBTI persons without discrimination.
  - V) apply the standard of due diligence in the prevention, investigation, punishment and reparation of violence against LGBTI persons, regardless of whether violence occurs in the context of the family, community or public sphere, including in the workplace, sectors of education and health. Ensure that investigations are not permeated by prejudice based on the sexual orientation and / or real or perceived gender identity of the victim or the perpetrator.
  - VI) Conduct periodic and sustained training activities for Jamaican public official, particularly for judges, prosecutors, public defenders, other justice operators, security forces and the education, employment and health sectors, on sexual orientation, gender identity and gender expression, body diversity, and the challenges these people face;

- VII) Ensure that Jamaica's educational programs are designed with a gender perspective, guaranteeing the deconstruction of stereotypes and prejudices and based on a model guaranteeing the autonomy of all people, especially LGBTI people. Include comprehensive sexuality education in the school curriculum, in accordance with the progressive capacity of children, which includes a perspective of body, sexual and gender diversity, ensuring that educational policies and programs are specially designed to modify social and cultural patterns of harmful behaviors.

133. On February 26, 2020, the Commission transmitted the report to the State with a time period of two months to inform the Inter-American Commission on the measures taken to comply with its recommendations. On that same date, the IACHR notified the petitioners about the adoption of the report. To date, the IACHR has not received any response from Jamaica regarding Report No. 240/19.

#### **VII. REPORT No. 250/20 AND INFORMATION ABOUT COMPLIANCE**

134. On September 14, 2020 the Commission approved Final Merits Report No. 250/20 in which the Commission reiterated all of its recommendations to the State. On October 2, 2020 the IACHR transmitted the report to the State and the petitioners with a time period of two months to inform the Commission on the measures taken to comply with its recommendations. To date, the Commission has not received any response from the State of Jamaica or the petitioners regarding report No. 250/20.

#### **VIII. FINAL CONCLUSIONS AND RECOMMENDATIONS**

135. On the basis of the determinations of fact and law, the Inter-American Commission concludes that the State is responsible for the violation of Articles 5.1 (Right to Humane Treatment), 11 (Right to Privacy), 22.1 (Freedom of Movement and Residence) 24 (Right to Equal Protection), 25.1 (Right to Judicial Protection), 26 (Right to Health) of the American Convention in connection with the obligations established in Articles 1. 1 and 2 of the same instrument, to the detriment of T.B and S.H.

#### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THAT THE STATE OF JAMAICA,**

1. Provide full reparation for the human rights violations found in the instant report, including both material and nonpecuniary dimensions. This must include economic compensation as well as measures of satisfaction.
2. Adopt the measures of non-repetition necessary to prevent similar incidents from taking place in the future. Specifically:
  - I) Repeal the sections of the Offences against the Persons Act that criminalizes private consensual sexual activity between adults and consensual sexual conduct between men who have sex with men or gay men;
  - II) Adopt a legal framework or modify the existing legislation with a view to prohibiting and punishing all forms of discrimination based on sexual orientation, gender identity or expression - real or perceived - and body diversity;
  - III) carry out collection and analysis of statistical data in a systematic and disaggregated manner in the Jamaica Census regarding the prevalence and nature of violence and discrimination based on prejudice, based on their sexual orientation, gender identity or expression - real or perceived- and body diversity;
  - IV) Adopt the necessary measures to ensure the effective access to health services to LGBTI persons without discrimination.
  - V) apply the standard of due diligence in the prevention, investigation, punishment and reparation of violence against LGBTI persons, regardless of whether violence occurs in the context of the family, community or

public sphere, including in the workplace, sectors of education and health. Ensure that investigations are not permeated by prejudice based on the sexual orientation and / or real or perceived gender identity of the victim or the perpetrator.

- VI) Conduct periodic and sustained training activities for Jamaican public official, particularly for judges, prosecutors, public defenders, other justice operators, security forces and the education, employment and health sectors, on sexual orientation, gender identity and gender expression, body diversity, and the challenges these people face;
- VII) Ensure that Jamaica's educational programs are designed with a gender perspective, guaranteeing the deconstruction of stereotypes and prejudices and based on a model guaranteeing the autonomy of all people, especially LGBTI people. Include comprehensive sexuality education in the school curriculum, in accordance with the progressive capacity of children, which includes a perspective of body, sexual and gender diversity, ensuring that educational policies and programs are specially designed to modify social and cultural patterns of harmful behaviors.

## **IX. PUBLICATION**

136. In light of the above and in accordance with Article 47.3 of its Rules of Procedure, the IACHR decides to make this report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Inter-American Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by Jamaica with respect to the above recommendations until it determines there has been full compliance.

Approved by the Inter-American Commission on Human Rights on the 31 day of the month of December, 2020. (Signed): Joel Hernández García, President; Antonia Urrejola Noguera, First Vice President; Flávia Piovesan, Second Vice President and Julissa Mantilla Falcón, Commissioner.