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CASE 13.637

REPORT ON THE MERITS (PUBLICATION)

GARETH HENRY AND SIMONE CARLINE EDWARDS
JAMAICA

Approved electronically by the Commission on December 31, 2020

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I. INTRODUCTION

8. On December 22, 2011¹, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition filed by Gareth Henry, The Jamaica Forum of Lesbians, All-Sexuals and Gays (J-Flag)², the Human Dignity Trust and Freshfields Bruckhaus Deringer LLP (the “petitioners”) alleging the international responsibility of Jamaica³ (“the State” or “Jamaica”) for the violation of several rights of Gareth Henry and Simone Carline Edwards as a consequence of laws that criminalize same sex relationships between consenting adults and create an adverse context for LGBTI persons.

9. The Commission approved its Admissibility Report No. 80/18 on July 2, 2018.⁴ On July 17, 2018, the IACHR notified the report to the parties and placed itself at their disposition to reach a friendly settlement, but no agreement was reached. 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.

II. POSITION OF THE PARTIES

A. Petitioners

10. The petitioners allege that Jamaica is in violation of its obligations under the American Convention by continuing to criminalize private consensual sexual activity between adult males, and by protecting from domestic legal challenges these colonial-era “buggery” and “gross indecency” laws. Petitioners submit that this perpetuates Jamaica’s culture of violent homophobia and encourages the State and the general population to persecute not only male homosexuals, but also the broader lesbian, gay, bisexual, trans, and intersex (LGBTI) community.

11. The petitioners argue that specific sections of the Offenses Against the Person Act of 1864 (also referred to as “OAPA” and “buggery laws”) 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. Henry, a gay man, was often harassed and beaten from the time he was a child due to his sexual orientation. They allege that Mr. Henry was forced to leave his hometown and family due to the homophobic attacks, and was compelled to move from place to place. From December 2003 to March 2007, petitioners claim that Mr. Henry was often harassed by police officers. In particular, they claim that Mr. Henry was brutally assaulted two times by police officers because of his sexual orientation.

13. The petitioners assert that the first attack occurred on Christmas Day of 2003, when Mr. Henry was beaten by an officer in front of a crowd of 70 people who encouraged the attack. They claim that Mr. Henry attempted to report the incident two times without success because police either refused to file the report or required him to submit information about the assailant that was inaccessible to him.

14. The petitioners express that the second assault occurred on February 14, 2007, just after police agents identified him as a gay man. They allege that a mob of 200 people was chasing other gay men and chanting that

¹ The petition was resubmitted on May 31, 2012 and on July 29, 2013.

² On July 29, 2013 the petitioners submitted an amended petition in which J-Flag was withdrawn as petitioner.

³ Pursuant to Article 17(2) of the IACHR Rules of Procedure, Commissioner Margarette May Macaulay, a Jamaican national, did not take part in the discussion or the decision-making process of the instant case.

⁴ IACHR. Report No 80/18. Petition 1850-11. Admissibility. Gareth Henry, Simone Carline Edwards and families. Jamaica. July 2, 2018. The IACHR declared the petition admissible in relation to Articles 4, 5, 8, 11, 13, 16, 17, 22, 24, 25 and 26 in connection with Articles 1.1 and 2 of the American Convention and Article XI of the American Declaration, and inadmissible with respect to Articles I, II, IV, V, VIII, IX, XVIII and XXII of the American Declaration.

gay people must be killed, and that the officers, rather than protect Mr. Henry, insulted and beat him. They claim that Mr. Henry was able to report the crime to the police after two attempts, but he was asked to provide a witness in order to proceed with the investigation. They allege that the same day of the attack and the day after, police officers showed up at his home and threatened him. They assert that Mr. Henry suffered severe injuries as a consequence of this second assault, and that on this occasion he sought medical care for the first time following an attack. They allege that he had previously avoided doing so because health care personnel also discriminate against LGBTI people.

15. The petitioners affirm that, in his role as an advocate for LGBTI rights and HIV/AIDS prevention, Mr. Henry and his colleagues were not allowed to provide information and express their views on those issues, and were verbally and physically attacked multiple times in public spaces by police officers and third parties when they were doing advocacy work in the community. Petitioners allege that Mr. Henry reported many of these attacks, but police never investigated them. Petitioners allege that subsequent homophobic aggression led Mr. Henry to flee his country, and that he was granted asylum in Canada in June 2008 and obtained the citizenship in 2015.

16. On the other hand, the petitioners allege that Simone Carline Edwards is a lesbian woman who suffered a homophobic attack on August 29, 2008, that almost killed her. Petitioners claim that Ms. Edwards and her brothers, one of whom is also gay, were shot multiple times in her home in Spanish Town by two men who belong to a homophobic gang. They claim that Ms. Edwards lost one of her kidneys and part of her liver as a result. Petitioners allege that Ms. Edwards recognized one of the assailants, and that her brother identified one of the gunmen in an identification parade. They add that Ms. Edwards's brother asked for witness protection but it was refused. They argue that Ms. Edwards was never informed of any progress on the police investigation and that she and her brother were never asked to go to court. They report that, despite the identifications made by the Edwards, the only assailant who had been captured was later released, and that the second gunman was never arrested. They claim that Ms. Edwards and her family were not able to return to their home after the shooting because they were afraid of reprisals, and that she and her daughter were compelled to continuously move from place to place. They indicate that she fled Jamaica in September 2009 after receiving two more homophobic threats, and that she was granted asylum in the Netherlands.

17. The petitioners claim that Mr. Henry's and Ms. Edwards' families were also targeted for discrimination and violence on the basis of Mr. Henry's and Ms. Edwards' sexual orientation. They allege that Mr. Henry's mother, sister and other family members also sought asylum in Canada due to discrimination based on their relationship with him. The petitioners likewise allege that Ms. Edwards and her daughter were forced to separate for two years, until she was able to bring the child to the Netherlands. They assert that one of Ms. Edwards's brothers also sought asylum in the Netherlands, as he was targeted and wounded during the shooting of August 29, 2008 because he is gay. They add that another of Ms. Edwards's brothers had to leave his job because he was harassed based on his siblings' sexual orientation.

18. As regards to legal arguments, the petitioners submit that the buggery laws violate the **principle of non-discrimination and equality before the law**, because they perpetuate an unjust and illegitimate difference in treatment on the basis of sexual orientation and endanger the bodily integrity of homosexual men in Jamaica. They claim that there is interconnectivity between the discriminatory effect of the buggery laws and homophobia in Jamaica.

19. They argue that the buggery laws violate the **right to life and to humane treatment** because it constitutes an invitation and sanction to both public bodies and private individuals to act violently against homosexuals and fails to ensure that gay citizens live a dignified life. In particular, Mr. Henry has received death threats, physical and verbal abuse. Due to the risks he faced in Jamaica he was granted asylum in Canada.

20. Furthermore, they allege that Jamaica has violated the **right to privacy** because sodomy laws violate the fundamental right to privacy which protects personal choice and autonomy and requires active steps to be taken by states to protect individuals from interference. They argue that Mr. Henry has suffered various direct attempts by the police to threaten or intimidate him at his residence.

21. They argue that Jamaica breached the **right to freedom of thought and expression** considering that intimate sexual acts between two homosexual males are an expression of their homosexuality and their identity as homosexuals, therefore the very fact that buggery laws are maintained violates the right of expression of Jamaican homosexuals such as Mr. Henry.

22. They submit that the State violated the **right to freedom of association** because high profile activists such as Mr. Henry have received death threats as a result of their public association with gay activism and have had to flee Jamaica. In general, as a result of the persistence violence against their members, gay networks and organizations are forced to go underground to protect their members.

23. They contend that the State violated the **right to family life**, through buggery laws, as homosexuals have been attacked in front of their families, and in some instances driven into exile. In the case of Mr. Henry, as a result of the frequent attacks he suffered he had to leave his family several times. Also, in order to protect his family from the repercussions of being associated with him, he had to stop using his real last name.

24. They claim that the State violated the **right to freedom of movement and residence** because the persecution and harassment against Mr. Henry forced him to repeatedly move away from the communities in which he resided. They argue that communities believe they are entitled to forcefully remove gays from the community because private consensual acts of intimacy between homosexuals are criminalized.

25. They argue that the Jamaican state violated the **right to judicial protection** given that section 13 (2) of the Constitution exempts legislation setting out sexual offences from being declared inconsistent with the Constitution, thus there is no available remedy to declare the unconstitutionality of buggery laws.

26. They submit that Jamaica violated the **right to health** because buggery laws are an obstacle to effective access to health information and care. They informed that Mr. Henry encountered virulent opposition in his attempts to distribute condoms and lubricant to prevent the transmission of HIV.

B. State

27. The State did not submit any observations on the merits. Therefore, the present section is based only on the arguments it made during the admissibility stage as these may concern the merits.

28. The State argues that the rights that the petitioner alleged to have been violated by virtue of the acts denounced within sections 76, 77 and 79 of the Offences against the Person Act are rights which are protected by the Constitution of Jamaica.

29. It alleges that the claims expressed in the petition include estrangement from his family, fear for his own life and instances of denial of the right to freedom of movement. By virtue of section 19 of the Charter of Fundamental Rights and Freedoms of Jamaica, the petitioner enjoys the right to seek constitutional redress in respect of an actual incident of such violation outlined in his petition which resulted in a denial of the right to life, humane treatment, respect for private and family life, freedom of thought and expression and association and freedom of movement. It adds that there are various instances in which persons who perceive themselves threatened as a result of their sexual orientation have sought and received protection from the authorities. The State, including law enforcement, have sought to protect the rights of homosexual persons from abuse and it is therefore incorrect for the petitioner to claim that he would be unable to obtain protection from the authorities.

30. Further, it explains that despite claims that the authorities take no action where the LGBTI community is involved in a matter, the petition filed before the IACHR contains numerous examples of police responding to reports of crimes committed concerning members of the community. Where an alleged crime is not reported to the relevant authorities or an alleged crime is not reported, the State can take no action. There is no indication that a number of incidents complained of have been reported to the authorities.

31. Specifically, with respect to the investigation on Ms. Edwards attack, it noted that she did not participate in the police investigation or the prosecution of the criminal matter after she provided the initial information leading to the arrest of the first alleged gunman. The petitioner has provided no information to support her suggestion that the second gunman was not arrested and that the first gunman was released because members of the LGBTI community were victims in the case.

32. The State indicates that the Jamaica Constabulary Force (JFC) is guided by policies and directives that direct members of the force in their professional dealings with persons of minority groups such as lesbians, gays and transgender persons. The force is expected at all times to uphold the human rights of every person and trains its members to uphold such human rights in their dealings with members of the public. This approach has created a context within which members of the JFC are expected to take steps to prevent acts of violence against all persons including members of the LGBTI community.

33. The State notes that the petitioner is not barred from presenting a Constitutional motion seeking redress for the rights allegedly violated or challenging aspects of the relevant sections of the Offences Against the Person Act. They argue that a motion seeking to challenge the legislation in question was withdrawn, therefore it remains open to a litigant to bring such matter before the Court. Lastly, it underscores that the Offences Against the Person Act and the Sexual Offences Act are currently being reviewed by a Joint Select Committee of Parliament which should complete its review within the year.

34. With respect to the **right to judicial protection**, the State argued that a challenge to the constitutionality of laws relating to sexual offences is not the only remedy available to the petitioner. The petitioner also enjoys the right to seek constitutional redress for actual acts which he has alleged amounted to a violation of his rights under the Convention.

III. FINDINGS OF FACT

A. Jamaica's "buggery" law

35. The instant case concerns the effect of the Offences against the Person Act of 1864 in the life of Gareth Henry and Simone Carline Edwards. The law establishes the following:

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.⁵

36. 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-

⁵ The Offences Against the Person Act.

- 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.⁶

B. LGBTI persons in Jamaica

37. 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.⁷

38. 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.⁸

39. 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 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.⁹

40. 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.¹⁰

41. 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

⁶ [Jamaica's Constitution of 1962 with Amendments through 2011](#).

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

⁸ 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.

⁹ IACHR, [Report on the 153rd Session of the IACHR, Monitoring of the IACHR Report on the Situation of Human Rights in Jamaica](#), December 29, 2014.

¹⁰ 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.

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”.

¹¹ 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”.¹²

42. 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”.¹³

43. 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”.¹⁴

44. 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”.¹⁵

C. The situation of Gareth Henry and Simone Edwards

45. On May 31, 2012 Gareth Henry presented a declaration to the IACHR highlighting the impact that homophobia in Jamaica has had in his life. In his words:

This widespread homophobia, together with the high profile nature of my work, placed me and my family at high risk of persecution, torture, ill-treatment and death in my country. This persecution led me and my mother to leave Jamaica in 2008, and to seek asylum in Canada. Only this year, my sister and her young family were forced to join us as they had been harassed because of their relationship with me.

(...) my work was dangerous and frightening. On a number of occasions, confrontations with the police arose. One night, a large group of seven to nine men started throwing stones at me and my fellow volunteers, and were calling us “batty men” and “lesbians” and we had to run for our lives. We came across some police officers; however they ordered us to leave the area, telling us that we should not be giving out condoms and talking to “batty men” and “whores”. As we left the area, the police officers hurled insults at us like “batty men, fi dead” (gay men must die) and “if you unnu come back yah we going to beat you unnu” (if you return we will beat you up). I reported this abuse to the police, but they did not provide assistance. I was terrified, but remained committed to participating in outreach activities with JAS. Instead, we had to develop strategies to avoid being the victims of violence, such as always working in groups. I continued to have similar confrontations with the police, on later occasions.¹⁶

46. The alleged victim sought asylum in Canada. On June 16, 2008 the Canadian Refugee Protection Division determined that Gareth Henry and other person are Convention Refugees and therefore accepted their claims.

¹⁷

47. On November 26, 2018 Mr. Henry filed an additional declaration before the IACHR with respect to his knowledge of the situation of LGBTI persons in Jamaica. He asserted that:

¹¹ Human Rights Watch, Not Safe at Home, Violence and Discrimination against LGBT people in Jamaica, p.2.

¹² Human Rights Watch, Not Safe at Home, Violence and Discrimination against LGBT people in Jamaica, p.48.

¹³ Human Rights First, The World as it Should BE. Advancing the Human Rights of LGBT People in Jamaica, July 2015.

¹⁴ See US Department of State, Jamaica 2017 and 2018 Human Rights Reports;

¹⁵ UK Home Office, Country Policy and Information Note. Jamaica: Sexual orientation and gender identity, February, 2017.

¹⁶ Declaration of Gareth Henry, 31 May 2012. Appendix B to the petition of May 31, 2012.

¹⁷ Decision of the Refugee Protection Division of June 16, 2008. Appendix J of the Petition of May 31, 2012.

Currently, however, no change is forthcoming. The Government of Jamaica has repeatedly failed to take steps either to repeal the laws criminalizing private consensual same sex intercourse in Jamaica or to protect LGBTI Jamaicans from the violence and homophobia that it creates and supports. In 2014, a Joint Select Committee of the Parliament of Jamaica began a review the Offences Against the Person Act and other legislation relating to the offences and punishment in the legislation, with a focus on the protection of women, children, the elderly and the disabled from violence and abuse. However, it has yet to complete the review after four years. As I explain above, the situation on the ground continues to remain dire.¹⁸

48. On October 14, 2014 Simone Carline Edwards filed a declaration before the Commission underscoring her experience as a lesbian woman in Jamaica:

I am a lesbian, but because of the hostility towards homosexuality in Jamaica, I had to live a double life and hide my sexual orientation from almost everyone, including some members of my family, the people I have worked with and the community at large (...)

On the evening of 29 August 2008, I was outside the Spanish Town Home I lived in with Dwaine, Silvera and Peta-Gay. It was right after Hurricane Gustav hit Jamaica. My daughter Khalya and my niece were asleep in the house. Peta-Gay was not there that night: she was at her boyfriend's house which was nearby. Dwaine and Silvera, and a friend of Silvera's named Marcus, were outside the house with me. We were looking for the car keys, which I thought had fallen outside in the water which had flooded the street. As we were looking for the keys, it started to rain. We ran to get out of the rain and that was when I saw two men. One of them pulled out his gun and started shooting. The shooting happened quickly. I yelled something like "Gunman! Run!" to my brothers and Marcus. The second man also took out a gun and started chasing them. The gunman was saying things throughout the shooting, not all of which I can clearly remember. However, I remember one of the gunmen saying words to the effect of "battyman fe dead" ("gay men must die")

During the shooting, I was hit in the stomach. I remember falling to the ground, closing my eyes and pretending I was dead. As I lay on the ground, more shots were fired. My brothers and Marcus had by then run away and I saw the gunmen go into my neighbor's house. One of them said words to the effect of "yes we get di lesbian but the battyman dem get aweh" (we killed the lesbian but the gay men got away) (...).

(...) the police took me to Spanish Town General Hospital. When I arrived at the hospital I was put on a stretcher. It was there that I saw my two brothers, both on stretchers as well. I later learnt that they too had been injured: Silvera was shot three times in the upper body and Dwaine was shot five times in the shoulder and upper body. Marcus, who had hid under a bed in the house, had not been hit. At the hospital, I had an emergency operation. I lost one of my kidneys and a part of my liver. I was the most seriously injured of us three.¹⁹

49. The alleged victim fled Jamaica in 2009 and sought asylum in the Netherlands. On March 23, 2010 she was granted asylum by the Secretary of State for Security and Justice.²⁰

D. Challenges to the Offences against the Person Act

50. 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

¹⁸ Additional Declaration of Gareth Henry, 26 November 2018. Appendix to the Additional Observations on the Merits by the Petitioner of November 26, 2018.

¹⁹ Declaration of Simone Carline Edwards, October 14, 2014. Appendix to the communication of the petitioners of October 15, 2014.

²⁰ Decision of the Secretary of State for Security and Justice of March 23, 2010. Appendix to the communication of the petitioners of October 15, 2014.

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.²¹

51. 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.²² The outcome of said challenge is unknown.

IV. ANALYSIS OF LAW

A. The principle of equality and non-discrimination²³, the right to privacy²⁴, the right to humane treatment²⁵ and the freedom of movement and residence²⁶

1. General considerations

52. 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.²⁷

53. 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."²⁸

54. 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.²⁹ 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.

²¹ 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.

²² Library of Congress, [Jamaica: challenge to Law on Homosexuality](#), December 14, 2015.

²³ 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."

²⁴ 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.

²⁵ The pertinent part of Article 5 reads as follows: 1. every person has the right to have his physical, mental, and moral integrity respected.

²⁶ 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.

²⁷ 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.

²⁸ 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.

²⁹ 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.

55. 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.”³⁰ 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.³¹

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.³²

56. 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.³³

57. 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.³⁴ 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.”³⁵

58. 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.³⁶ 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.³⁷

59. 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.³⁸ 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

³⁰ 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.

³¹ 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.

³² 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.

³³ Inter-American Court of Human Rights, *Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012, para.133-134.

³⁴ 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.

³⁵ 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.

³⁶ 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.

³⁷ 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.

³⁸ *Ia/Court H.R. Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs, para. 85.

effects caused by endogenous and exogenous factors.³⁹ 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.⁴⁰

60. 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.

61. 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.⁴¹

62. 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.⁴² 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.⁴³

63. 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.

64. 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:

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

³⁹ IA/Court H.R. Case of Loayza-Tamayo v. Peru. Merits. Judgment of September 17, 1997, para.57.

⁴⁰ IACHR, *Criminalization of Human Rights Defenders*, OEA/Ser.L/V/II.Doc.49/15, 31 December 2015, par.214.

⁴¹ 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.

⁴² IACHR, Report No. 81/13, Case 12.743. Merits. Homero Flor Freire, Ecuador. November, 4, 2013, para 114.

⁴³ 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.

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.⁴⁴

65. 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”.⁴⁵

66. 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.”⁴⁶

67. 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”.⁴⁷

68. 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”.⁴⁸

69. 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:

(...) 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

⁴⁴Human 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.

⁴⁵ [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.

⁴⁶ 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.

⁴⁷United 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.

⁴⁸ [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.

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.⁴⁹

70. 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 (...).⁵⁰

71. 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.

72. 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.⁵¹

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

⁴⁹European 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.

⁵⁰European Court of Human Rights, *Case of Norris v. Ireland*, 26 October 1988, para 31, 32.

⁵¹ *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”.

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.⁵²

74. 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.⁵³

75. 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.⁵⁴

76. 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.

(...) 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

⁵² 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.

⁵³ 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.

⁵⁴ Supreme Court of Belize. Caleb Orozco and the Attorney General of Belie, August 10, 2016. P.27.

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.⁵⁵

77. 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.”⁵⁶ 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.”⁵⁷

2. Analysis of this case

78. 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.

79. 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.⁵⁸ 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 homosexual behavior.⁵⁹ 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.”⁶⁰

80. 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.

81. 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; ii) the suitability, that is, the determination of whether or not there is a logical relationship of causality

⁵⁵ High Court of Justice. Jason Jones and the Attorney General of Trinidad and Tobago, para 173.

⁵⁶ 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 Mowana 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.

⁵⁷ 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.

⁵⁸ 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,

⁵⁹ See IACHR, *Report on the Situation of Human Rights in Jamaica*, OEA/Ser.L/V/II.144 Doc.12, 10 August 2012, para. 270.

⁶⁰ 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.

between the means and the end; iii) 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.⁶¹

82. 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 privacy⁶².

83. 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 reasons⁶³ 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.⁶⁴

84. 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 Gareth Henry and Simone Carline Edwards. 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.

85. 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 Gareth Henry and Simone Carline Edwards.

86. 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.

87. In the instant case, the Commission recalls that both Gareth Henry and Simone Carline Edwards have suffered a series of acts of violence against them related to their sexual orientation, 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.

88. 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 Gareth Henry and Simone Carline Edwards.

⁶¹ 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.

⁶² 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;

⁶³ IACHR. Complaint filed with the Inter-American Court of Human Rights. Case of Karen Atala and daughters. Para. XX.

⁶⁴ IACHR. Complaint filed with the Inter-American Court of Human Rights. Case of Karen Atala and daughters. Para. XX.

B. The principle of legality⁶⁵

89. With respect to the principle of legality, the Commission recalls that such principle constitutes a central element of criminal prosecution in a democratic society.⁶⁶ 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 circumstances⁶⁷ certain limitations should be observed by States when exercising the power to define criminal offenses.

90. 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.⁶⁸

91. 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 Convention⁶⁹, which implies that norms be adopted for the common good, and that certain conducts should not be criminalized.⁷⁰ 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.⁷¹ The Court took into account the prohibition of criminalization of medical activities developed in international humanitarian law and international human rights law.⁷²

92. 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.

93. 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 Gareth Henry and Simone Carline Edwards.

⁶⁵ 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”.

⁶⁶ I/A Court H.R. Case of Norín Catrیمان et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile. Merits, Reparations and Costs, Judgment of May 29, 2014, para. 161.

⁶⁷ IACHR, Report No.176/10, Cases Nos.12.576, 12.611 and 12.612. Merits. Aniceto Norin Catrیمان, Juan Patricio Marileo Saravia, Victor Ancalaf Llaupé et al, para. 116.

⁶⁸ I/A Court H.R. Case of J. v. Peru. Preliminary objection, Merits, Reparations and Costs. Judgment of November 27, 2013, para.287.

⁶⁹ 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.

⁷⁰ IACHR, Criminalization of Human Rights Defenders, OEA/Ser.L/V/II.Doc.49/15, 31 December 2015, para 241.

⁷¹ 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.

⁷² 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.

C. Right to judicial protection⁷³

94. 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.⁷⁴

95. 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.⁷⁵

96. 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.

97. 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.

98. 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 Gareth Henry and Simone Carline Edwards did not have an effective remedy for the protection against acts that violate their human rights.

99. 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 Gareth Henry and Simone Carline Edwards.

⁷³ 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.

⁷⁴ 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 Yakyé 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.

⁷⁵ 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.

V. ACTIONS SUBSEQUENT TO REPORT NO. 159/19

100. On September 28, 2019, the Commission approved Report No. 159/19 on the Merits of the instant case, which encompasses paragraphs 1 to 99 *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 homosexuals;
 - 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) 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.
 - V) 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;
 - VI) 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.

101. On November 21, 2019, 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.

102. On December 9, 2019, the State presented its response to the Commission. The State expresses that the transmission of the Merits Report to the petitioner was a contravention to Article 50 of the American Convention on Human Rights and Article 44(2) of the IACHR Rules of Procedure. According to the State, Article 50 enshrines the principle of confidentiality, which precludes the Commission from sharing the preliminary Merits Report with any party except the State. Furthermore, it contends that this constitutes a serious breach of due process and the most effective remedy would be to re-issue a new confidential Merits Report.

103. The State claims that the Commission is not precluded from considering or receiving additional observations of the parties prior to transmitting a Merits Report to the States because the breach of confidentiality entails that the Commission has yet to transmit a Merits Report to the State, in accordance with the Convention. Therefore, it expresses that if it is considered prudent to re-issue a Merits Report, the States observations on the merits should be considered or incorporated.

104. On the same date of its response to the Commission regarding the Merits Report 159/19, the State presented its additional observations on the merits of case 13.637. The State argues that the Commission lacks the competence to review, in the abstract, the lawfulness of the sodomy offence and like offences, and it is not bound by any international norm precluding the retention of the sodomy offence.

105. The State considers that the Commission lacks competence *ratione personae* on the case, because in accordance with the jurisprudence of the Commission, for Gareth Henry and Simone Edwards to have standing as victims, the petition must show that the impugned laws have been applied to their detriment. The petition cannot simply allege, on behalf of the homosexual community of Jamaica, that the impugned laws are in contravention of the American Convention without showing concrete adversity.

106. The State submits that although there are decisions from the European Court of Human Rights, Human Rights Committee and the Inter-American Human Rights System, which have found sanctions against same-sex intimacy as unlawful *per se*, this jurisprudence does not give a compelling basis for concluding that Jamaica would be in breach of its international obligations by retaining the sodomy offence and like offences. The relevant jurisprudence has not consistently interpreted human rights instruments as establishing a broad human right to engage in sexual intimacy with whomever one wants, in whatever fashion one wants, provided there is consent.

107. In conclusion, the State argues that there is no compelling justification for interpreting the American Convention as imposing an obligation on Jamaica to remove the sodomy offence as: 1) there is no evidence that the State parties to the American Convention had any intention to impose such an obligation; 2) no subsequent agreement has been reached by State parties to impose such an obligation; 3) Custom does not impose such an obligation; and 4) even if custom imposes such obligation, Jamaica is not bound by it as it is a persistent objector. Therefore, it requested the IACHR to find that Gareth Henry and Simone Edwards are not victims in the instant case.

108. The Commission recalls that Articles 50 and 51 of the American Convention establish that:

Article 50

1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report.
2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it.
3. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit.

Article 51

1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.
2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

109. Moreover, the IACHR Rules of Procedure establish in Articles 44 and 47 the following:

Article 44. Report on the Merits

After the deliberation and vote on the merits of the case, the Commission shall proceed as follows:

1. If it establishes that there was no violation in a given case, it shall so state in its report on the merits. The report shall be transmitted to the parties, and shall be published and included in the Commission's Annual Report to the OAS General Assembly.

2. If it establishes one or more violations, it shall prepare a preliminary report with the proposals and recommendations it deems pertinent and shall transmit it to the State in question. In so doing, it shall set a deadline by which the State in question must report on the measures adopted to comply with the recommendations. The State shall not be authorized to publish the report until the Commission adopts a decision in this respect.

3. It shall notify the petitioner of the adoption of the report and its transmittal to the State. In the case of States Parties to the American Convention that have accepted the contentious jurisdiction of the Inter-American Court, upon notifying the petitioner, the Commission shall give him or her one month to present his or her position as to whether the case should be submitted to the Court. When the petitioner is interested in the submission of the case, he or she should present the following:

a. the position of the victim or the victim's family members, if different from that of the petitioner;

b. the reasons he or she considers that the case should be referred to the Court; and

c. the claims concerning reparations and costs.

Article 47. Publication of the Report

1. If within three months from the transmittal of the preliminary report to the State in question the matter has not been solved or, for those States that have accepted the jurisdiction of the Inter-American Court, has not been referred by the Commission or by the State to the Court for a decision, the Commission, by an absolute majority of votes, may issue a final report that contains its opinion and final conclusions and recommendations.

2. The final report shall be transmitted to the parties, who, within the time period set by the Commission, shall present information on compliance with the recommendations.

3. The Commission shall evaluate compliance with its recommendations based on the information available, and shall decide on the publication of the final report by the vote of an absolute majority of its members. The Commission shall also make a determination as to whether to include it in the Annual Report to the OAS General Assembly, and/or to publish it in any other manner deemed appropriate.

110. As indicated above, Article 50 of the American Convention establishes that the Merits Report must be notified to the State, which is not at liberty to publish it. Said provision does not refer to the transmission of the Merits Report to the petitioner. In addition, Article 44 of the Rules of Procedure of the American Commission establishes that if in the Merits Report the IACHR establishes one or more violations, it shall prepare a preliminary report with the proposal and recommendations it deems pertinent and shall transmit it to the State in question, which should not be authorized to publish the report. Pursuant to Article 44, the Commission should also notify the petitioner of the adoption of the report and its transmittal to the State.

111. According to the Inter-American Court, the preliminary and reserved nature of the Merits Report of Article 50 of the American Convention, means that the State does not have the power to publish it, so in, compliance

with the principles of equality and procedural balance of the parties, it is reasonable to consider that the Commission cannot either publish the preliminary report.⁷⁶

112. Through its practice, as an authorized interpreter of its rules of procedure, the Commission has understood that as a mechanism that contributes to the procedural balance and equality of the parties, in cases in which it decides Merits Reports regarding countries that did not ratify the American Convention, or the contentious jurisdiction of the Court, after the adoption, it corresponds to notify both parties not only of the adoption of a Merits Report but also its content. This does not affect the confidential or reserved nature of the Preliminary Merits Report because both parties remained obligated to preserve the confidentiality of the Report and are not allowed to publish it.

113. In the present case, the State argued that the notification of the Preliminary Merits Report to the petitioner constituted a violation of its right to due process. However, it did not adequately explain the reasons that support its allegation. The Commission recalls that the Merits Report No. 159/19 was notified to the petitioner on November 21, 2019, at which time it was indicated that “this report is to remain confidential until such time as the Commission decides to make it public”. From the foregoing, it is possible to conclude that the notification of the Preliminary Merits Report to the petitioner complied with the American Convention and Rules of Procedure of the IACHR.

114. On the other hand, the Commission notes that according to the State, as consequence of the notification of the Merits Report, the Commission should reissue its Preliminary Merits Report, and in it, it should take into account its additional observations on the merits, which as indicated, were remitted on December 9, 2019 to the IACHR.

115. The Commission reiterates that the notification of the Preliminary Merits Reports to the petitioner did not violate the right to due process of the State. Beyond this, the Commission notes that there is not a causal relationship between the notification of the Merits Report to the petitioner, and the opportunity sought by the State for its observations on the merits to be taken into account at the stage of the present case before the IACHR.

116. The Commission recalls that according to Article 37.1 of its rules of procedure upon opening a case, the Commission shall set a period of four months for the petitioners to submit additional observations on the merits. The pertinent parts of those observations shall be transmitted to the State in question, so that it may submit its observations within four months. The Executive Secretariat shall evaluate requests for extensions, however, it shall not grant extensions that exceed six months from the date the initial request for observations was sent to each party.

117. In the instant case, the Commission notified the parties of the adoption of the Admissibility Report on August 1, 2018. On March 18, 2019, the IACHR notified the State the observations regarding the merits presented by the petitioner and requested its observations within four months of the date of transmission of the communication. The State did not present its observations nor requested an extension before the deliberation and decision of the case on September 28, 2019, that is after more than six months after the notification of the observations of the merits presented by the petitioner. Therefore, it is not possible to consider at this stage said observations because they were presented beyond the prescribed time limit. Moreover, pursuant to Article 74 of the Rules of Procedure of the Commission, at this stage it is not appropriate to reevaluate the content of the Merits Report but to verify the compliance of the State with the recommendations made in said report prior to decide on the publication of the final report.

⁷⁶ Corte IDH, Caso Trabajadores de la Hacienda Brasil Verde vs. Brasil. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 20 de octubre de 2016. Serie C no. 318, párr.24.

VI. REPORT No. 249/20 AND INFORMATION ABOUT COMPLIANCE

118. On September 14, 2020 the Commission approved Final Merits Report No. 249/20 in which the Commission reiterated all of its recommendations to the State. On September 29, 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 regarding report No. 249/20.

119. On November 27, 2020 the petitioners informed that Jamaica has not taken any steps to repeal the laws which criminalize consensual same sex relationships between consenting adults. In respect of the Commission's other recommendations, petitioners informed that while Jamaica has introduced some measures which go to satisfaction of the recommendations in the period since the petition was first submitted to the Commission in 2011, on the basis of evidence publicly available Jamaica has not taken any additional steps to comply with any of the Commission's Recommendations since the approval of report No. 249/20.

VII. FINAL CONCLUSIONS AND RECOMMENDATIONS

120. 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), and 25.1 (Right to Judicial Protection) of the American Convention in connection with the obligations established in Articles 1. 1 and 2 of the same instrument, to the detriment of Gareth Henry and Simone Carline Edwards.

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 homosexuals;
 - 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) 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.
 - V) 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;
 - VI) 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.

VIII. PUBLICATION

121. 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, Commissioners.