

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF DWAYNE JONES
AND REQUEST FOR A DECLARATION THAT JAMAICA IS IN BREACH OF ITS
OBLIGATIONS UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS AND
THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

Case No. 15.080

Petition No. P-265-16

BRIEF OF AMICUS CURIAE
HUMAN RIGHTS WATCH

Submitted to the Commission on May 1, 2023

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I. INTRODUCTION

1. Human Rights Watch (“*HRW*” or “*Amicus*”) respectfully submits this brief to the Inter-American Commission on Human Rights (“*Commission*”) as *amicus curiae* in support of the Petition filed by International Human Rights Advocates (“*Petitioner*”), seeking a declaration, *inter alia*, that Jamaica’s failure to investigate the murder of Dwayne Jones, a transgender teenager, is contrary to the American Convention on Human Rights (“*American Convention*”).

II. SUMMARY OF ARGUMENT

2. Over almost two decades of on-the-ground reporting and witness interviews, HRW has documented widespread discrimination and violence against lesbian, gay, bisexual, and transgender (“*LGBT*”) individuals in Jamaica. The 2013 brutal mob attack and killing of Dwayne Jones, a 16-year-old transgender individual, and the subsequent failure of Jamaican authorities to arrest the perpetrators, is just one example of the many ways in which LGBT Jamaicans are regularly subjected to violations of their fundamental human rights. As explained in detail in Part IV below, anti-LGBT discrimination in Jamaica permeates every level of society: LGBT Jamaicans face discrimination and violence at home, at school, in the workplace, and in the justice system. Indeed, police in Jamaica often fail to investigate or punish crimes against LGBT individuals, and even themselves engage in discrimination and abuse. The systemic failure of Jamaican authorities to address violence motivated by sexual orientation or gender identity has led to a culture of impunity for such crimes, and perpetuates discrimination and violence against LGBT Jamaicans that continues to this day.
3. The Inter-American Court of Human Rights (“*IACtHR*”) and this Commission have found that the American Convention imposes upon States Parties obligations to investigate human rights violations effectively. As explained in Part V.A.1 below, a *substantive* obligation to investigate arises out of Articles 8(1) (right to a fair trial) and 25 (right to judicial protection), which together provide the right to an *effective remedy*. As the IACtHR’s and Commission’s jurisprudence makes clear, an effective remedy for a human rights violation requires a serious and timely investigation to determine the truth of what

happened and to identify the perpetrators. For an investigation to be effective, it must involve consideration of possible discriminatory motives, among other factors.

4. Additionally, as explained in Parts V.A.2 to 4, the American Convention imposes upon States Parties a *procedural* obligation to investigate. This obligation arises out of Article 1(1)—which requires States Parties both to “respect” and to “ensure” human rights and freedoms—read in conjunction with other articles of the Convention that enumerate those rights and freedoms. As the IACtHR and Commission have confirmed, the obligation to “ensure” human rights is a positive obligation that requires States Parties to take affirmative steps, depending on the right at issue. With respect to the fundamental rights protected under Articles 4 (right to life), 5 (right to humane treatment), and 7 (right to personal liberty), the affirmative steps include steps to effectively investigate, prosecute, and punish alleged violations of those rights. States Parties’ compliance with the procedural obligation to investigate violations of the rights to life, humane treatment, or personal liberty is especially critical in cases involving children under the age of 18, who the IACtHR has recognized are deserving of “special protection.” More generally, the failure to investigate may contribute to a culture of impunity and to the repetition of serious human rights violations.
5. Part V.B describes how the jurisprudence of the IACtHR and Commission on the obligation to effectively investigate human rights violations is consistent with that of other human rights bodies, in particular the European Court of Human Rights (“*ECtHR*”) and the African Commission on Human and Peoples’ Rights (“*African Commission*”). These bodies have similarly found that, to guarantee certain fundamental rights under the European Convention on Human Rights (“*ECHR*”) and the African Charter on Human and Peoples’ Rights (“*African Charter*”)—including the right to life—States Parties must conduct an effective investigation into violations of those rights. The ECtHR has found that a State’s failure to comply with this procedural obligation may *itself* give rise to a violation of the ECHR.
6. Recognizing the importance of the duty to investigate to ensuring the rights of LGBT Jamaicans, as well as the consistent treatment of the duty to investigate as both a

substantive obligation under the American Convention and a procedural obligation inherent to the guarantee of fundamental rights such as the right to life, the right to humane treatment, and the right to personal liberty, the *Amicus* urges the Commission to:

- Find that Jamaica’s failure to investigate anti-LGBT violence based on sexual orientation or gender identity, including the murder of 16-year-old Dwayne Jones, violates the substantive obligation to provide an effective remedy provided in Articles 8(1) and 25 of the Convention;
- Clarify that Articles 4(1), 5(1), and 7(1), read in conjunction with Articles 1(1), 8(1), and 25, impose a procedural obligation to investigate incidents of anti-LGBT discrimination and violence, which includes the obligation to consider a possible discriminatory motive, and that this obligation is especially important in cases involving children; and
- Harmonize its jurisprudence with that of the ECtHR and African Commission by holding that Jamaica’s failure to comply with the procedural obligation to investigate violations of Articles 4(1), 5(1), and 7(1) in the case of Dwayne Jones itself constitutes a violation of these articles.

III. STATEMENT OF INTEREST

A. History and Mandate of Human Rights Watch

7. HRW is an international nonprofit, nongovernmental organization that investigates and reports on violations of fundamental human rights worldwide with the goal of securing the respect of those rights for all persons. By exposing and calling attention to human rights violations committed by both State and non-State actors, the *Amicus* seeks to bring international public opinion to bear upon offending governments and others to end abusive practices. HRW has previously filed *amicus* briefs before various international tribunals and human rights bodies, including the Commission.

8. HRW is known for accurate and impartial fact-finding. To ensure its independence, HRW does not accept government funding, directly or indirectly, or support from any private funder that could compromise its objectivity in reporting on human rights violations.

B. Human Rights Watch’s Work on Lesbian, Gay, Bisexual, and Transgender Rights

9. In 2004, HRW created its LGBT Rights Program, which seeks to document and highlight the violence and inequality that LGBT people around the world face based on their sexual orientation or gender identity.
10. HRW recently conducted field research and interviewed LGBT persons facing systemic violence and discrimination on the basis of their sexual orientation or gender identity across a number of jurisdictions including Malaysia,¹ Iraq,² Afghanistan,³ the United States,⁴ Central America (including El Salvador, Guatemala, and Honduras),⁵ Mexico,⁶ Panama,⁷

¹ See generally HRW, “*I Don’t Want to Change Myself*”: *Anti-LGBT Conversion Practices, Discrimination, and Violence in Malaysia* (Aug. 10, 2022), <https://www.hrw.org/report/2022/08/10/i-dont-want-change-myself/anti-lgbt-conversion-practices-discrimination-and>.

² See generally HRW, “*Everyone Wants Me Dead*”: *Killings, Abductions, Torture, and Sexual Violence Against LGBT People by Armed Groups in Iraq* (Mar. 23, 2022), <https://www.hrw.org/report/2022/03/23/everyone-wants-me-dead/killings-abductions-torture-and-sexual-violence-against>.

³ See generally HRW, “*Even If You Go to the Skies, We’ll Find You*”: *LGBT People in Afghanistan After the Taliban Takeover* (Jan. 26, 2022), <https://www.hrw.org/report/2022/01/26/even-if-you-go-skies-well-find-you/lgbt-people-afghanistan-after-taliban-takeover>.

⁴ See generally HRW, “*I Just Try to Make It Home Safe*”: *Violence and the Human Rights of Transgender People in the United States* (Nov. 18, 2021), <https://www.hrw.org/report/2021/11/18/i-just-try-make-it-home-safe/violence-and-human-rights-transgender-people-united>.

⁵ See generally HRW, “*Every Day I Live in Fear*”: *Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States* (Oct. 7, 2020), <https://www.hrw.org/report/2020/10/07/every-day-i-live-fear/violence-and-discrimination-against-lgbt-people-el-salvador>.

⁶ See generally HRW, *Mexico: Barriers for Trans People in Guanajuato State* (June 21, 2022), <https://www.hrw.org/news/2022/06/21/mexico-barriers-trans-people-guanajuato-state>.

⁷ See generally HRW, *Panama: New Trans Discrimination Cases Under Covid-19 Measures* (July 13, 2020), <https://www.hrw.org/news/2020/07/13/panama-new-trans-discrimination-cases-under-covid-19-measures>.

Brazil,⁸ and Malawi⁹—confirming that LGBT people around the world face an increased risk of human rights abuses, including executions, torture, violence, unequal treatment, and discrimination in health, jobs, housing, and education.

11. HRW’s LGBT Rights Program aims to integrate LGBT rights into the broader rubric of human rights. To that end, HRW advocates for laws and policies that will protect the dignity of all people by allowing LGBT individuals to enjoy their fundamental human rights.

C. Human Rights Watch in Jamaica

12. HRW has conducted extensive research in Jamaica on the subject of LGBT rights. In November 2004, HRW released “Hated to Death: Homophobia, Violence, and Jamaica’s HIV/AIDS Epidemic” (“*2004 HRW Report*”).¹⁰ The 2004 HRW Report was based primarily on research conducted during a three-week field visit to Jamaica in June 2004 and includes first-hand accounts by more than 75 people living with, or at high risk of, HIV/AIDS, including sex workers, gay men and women, and people who had been incarcerated.¹¹
13. In October 2014, HRW published its second report based on field research in Jamaica, “Not Safe at Home: Violence and Discrimination Against LGBT People in Jamaica” (“*2014 HRW Report*”).¹² The 2014 HRW Report was based primarily on interviews conducted by

⁸ See generally HRW, “*I Became Scared, This was Their Goal*”: Efforts to Ban Gender and Sexuality Education in Brazil (May 12, 2022), <https://www.hrw.org/report/2022/05/12/i-became-scared-was-their-goal/efforts-ban-gender-and-sexuality-education-brazil>.

⁹ See generally HRW, “*Let Posterity Judge*”: Violence and Discrimination Against LGBT People in Malawi (Oct. 26, 2018), <https://www.hrw.org/report/2018/10/26/let-posterity-judge/violence-and-discrimination-against-lgbt-people-malawi>.

¹⁰ See generally HRW, *Hated to Death: Homophobia, Violence, and Jamaica’s HIV/AIDS Epidemic* (Nov. 15, 2004), <https://www.hrw.org/report/2004/11/15/hated-death/homophobia-violence-and-jamaicas-hiv/aids-epidemic> (hereinafter, “2004 HRW Report”).

¹¹ *Id.* at 8.

¹² See generally HRW, *Not Safe at Home: Violence and Discrimination Against LGBT People in Jamaica* (Oct. 21, 2014), <https://www.hrw.org/report/2014/10/21/not-safe-home/violence-and-discrimination-against-lgbt-people-jamaica> (hereinafter, “2014 HRW Report”).

HRW with 71 self-identified LGBT individuals in Jamaica in April and June 2013.¹³ Most of these individuals were identified with the help of Jamaican nongovernmental organizations (“NGOs”).¹⁴ All interviewees were given pseudonyms to protect their safety.¹⁵ None was compensated for participating.¹⁶ The 2014 HRW Report also includes information collected during HRW’s interviews with Jamaican Government officials, United Nations (“UN”) officials, representatives of NGOs specializing in HIV/AIDS or human rights, academics, health-care workers, and members of the Jamaican police force.¹⁷ HRW requested information related to the treatment of sexual minorities from the Commission of Police, but HRW’s queries remained unanswered at the time the 2014 HRW Report was completed.¹⁸

14. Many LGBT Jamaicans interviewed by HRW described the investigative shortcomings that victims of violence face. Both the 2004 and 2014 HRW Reports highlight the Jamaican police’s recurrent “fail[ure] to investigate complaints of homophobic violence.”¹⁹ As a result of this perceived complacency, LGBT Jamaicans reported “not bother[ing] to report homophobic violence because they did not believe that police would take any action to address it.”²⁰ HRW determined that “[LGBT Jamaicans] are reluctant to appeal to the police for protection, as police routinely deny them assistance . . . and arrest or detain men whom they suspect of being gay. In some cases, the police attack them and promote homophobic violence by others.”²¹ This pattern is borne out in HRW’s reporting of

¹³ *Id.* at 8.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 9.

¹⁹ 2004 HRW Report, *supra* note 10, at 11; *see* 2014 HRW Report, *supra* note 12, at 69.

²⁰ 2004 HRW Report, *supra* note 10, at 27; *see* 2014 HRW Report, *supra* note 12, at 17–18.

²¹ 2014 HRW Report, *supra* note 12, at 27; *see* 2014 HRW Report, *supra* note 12, at 17–18, 27–37.

specific incidents of violence against LGBT Jamaicans: of the 56 cases documented in HRW's 2014 Report, victims were aware of police arrests made in only four cases.²²

15. To assist the Commission in its consideration of the issues raised by the Petitioner in this case, the *Amicus* respectfully submits this account of the profound impact of Jamaica's failures to protect LGBT individuals and to investigate and punish violations of fundamental rights experienced by LGBT individuals in Jamaica, based in large part on HRW's thorough in-country research.²³

IV. HUMAN RIGHTS WATCH REPORTS DOCUMENT PERVASIVE DISCRIMINATION AND VIOLENCE AGAINST LGBT JAMAICANS ACROSS ALL AREAS OF LIFE

16. Numerous first-hand accounts, many conducted or compiled directly by HRW, demonstrate the gross human rights violations that LGBT Jamaicans suffer, including regular harassment and discrimination at school, at work, at home, and in their communities.²⁴ They also demonstrate how Jamaica's maintenance of laws that criminalize homosexual conduct and ongoing failure to effectively investigate and punish violence motivated by sexual orientation or gender identity perpetuate these abuses. As explained in a 2008 report by HRW, anti-sodomy laws "promote violence and give it

²² 2014 HRW Report, *supra* note 12, at 27.

²³ *See infra* Part IV.

²⁴ *See generally* 2014 HRW Report, *supra* note 12; 2004 HRW Report, *supra* note 10. Other human rights organizations have likewise reported on the widespread homophobia in Jamaica. *See, e.g.*, Rainbow R.R. & Hum. Dignity Tr., *A Caribbean Outlier: Repeal Anti-LGBTQI+ Laws in Jamaica* 1 (Feb. 21, 2023), https://issuu.com/rainbow_railroad/docs/a-caribbean-outlier-repeal-anti-lgbtqi-laws-in-jam ("To this day, Jamaica has failed to take any material action in response to the IACHR's findings and the clear recommendations set out in its report, or to even acknowledge the urgency of this critical issue. Even in the face of the wave of progress experienced by its Caribbean neighbours, Jamaica's homophobic laws remain in force, and . . . LGBTQI+ Jamaicans continue to suffer horrific violence, discrimination and persecution, and lack the most basic protections under the law."); Amnesty Int'l, *Amnesty International Report 2017/18: The State of the World's Human Rights* 35 (2018), <https://www.amnesty.org/en/documents/pol10/6700/2018/en> ("LGBTI people faced persistent discrimination, harassment and violence in . . . Jamaica."); Hum. Rts. First, *"The World as it Should Be": Advancing the Human Rights of LGBT People in Jamaica* 1 (July 2015), <https://humanrightsfirst.org/wp-content/uploads/2022/11/HRF-Jamaica-Report-final.pdf> (reporting a "climate of generalized societal homophobia" in Jamaica and noting that "LGBT Jamaicans often face serious violence and discrimination because of their sexual orientation or gender identity").

impunity. They hand police and others the power to arrest, blackmail, and abuse.”²⁵ The 2014 HRW report further described:

Human Rights Watch interviewed LGBT people who said that when they tried to report a crime, police made derogatory comments and failed or refused to take a report, even well after the [Jamaica Constabulary Force Policy on Diversity] was established. The fact that police themselves are sometimes perpetrators of violence and extortion against LGBT people makes LGBT victims even more unlikely to seek police assistance.²⁶

17. This Commission and other human rights bodies have called on Jamaica to address discrimination against LGBT individuals, including through measures to prevent, investigate and punish crimes against LGBT Jamaicans. On December 31, 2020, for example, the Commission found that Jamaica’s anti-sodomy laws “condone discrimination, stigmatization and violence by providing a social sanction for abuse”²⁷ and recommended that Jamaica take measures that included repealing the anti-sodomy laws; applying the “standard of due diligence in the prevention, investigation, punishment and reparation of violence against LGBTI persons”; and ensuring 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.”²⁸ The same year, the UN Human Rights Council urged Jamaica to “[e]nsure that cases of violence against lesbian, gay, bisexual and transgender persons are thoroughly investigated, that the convicted perpetrators are prosecuted and, if convicted, punished with appropriate sanctions and that the victims have

²⁵ HRW, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism* 5 (Dec. 17, 2008), <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>.

²⁶ 2014 HRW Report, *supra* note 12, at 27.

²⁷ *See Henry v. Jamaica*, Case 13.637, Inter-Am. Comm’n H.R., Report No. 400/20, ¶ 86 (2020).

²⁸ *See id.* at ¶ 121(2)(I), (IV).

access to effective remedies.”²⁹ Other human rights bodies have issued similar recommendations.³⁰

18. Despite these calls for reform, and while many of Jamaica’s Caribbean neighbors have recently struck down their own anti-sodomy laws,³¹ Jamaica has failed to act. To the contrary, its “homophobic laws remain in force, and . . . LGBTQI+ Jamaicans continue to suffer horrific violence, discrimination and persecution, and lack the most basic protections under the law.”³²

A. LGBT Jamaicans Are Regularly Subjected to Harassment and Discrimination

19. HRW has documented deep-seated anti-LGBT discrimination at every level of Jamaican society, fueled by “elements of the religious, media, music, and political establishments.”³³

²⁹ Hum. Rts. Council, *Report of the Working Group on the Universal Periodic Review: Jamaica*, ¶ 107.19, U.N. Doc. A/HRC/46/18 (2020); *see also id.* ¶¶ 107.15, 107.17 to 107.18, 107.57, 108.16 to 108.31.

³⁰ *See, e.g.,* Hum. Rts. Comm’n, *Concluding Observations on the Fourth Periodic Report of Jamaica*, ¶¶ 15–18, U.N. Doc. CCPR/C/JAM/CO/4 (2016) (recommending Jamaica “ensure that cases of violence against lesbian, gay, bisexual and transgender persons are thoroughly investigated” and that “victims have access to effective remedies,” among other recommendations, *id.* ¶ 18); Comm’n on Econ., Soc. & Cultural Rts., *Concluding Observations on the Combined Third and Fourth Periodic Reports of Jamaica, Adopted by the Committee at Its Fiftieth Session (29 April–17 May 2013)*, ¶¶ 8–9, U.N. Doc. E/C.12/JAM/CO/3-4 (2013) (urging Jamaica to “[d]ecriminalize same-sex relations between consenting adults,” among other recommendations, *id.* ¶ 9(a)); Comm’n on the Rts. of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Jamaica*, ¶¶ 16–17, 24–25, U.N. Doc. CRC/C/JAM/CO/3-4 (2015) (expressing concern “about gaps in the overall data apparatus of the State Party, in particular with respect to . . . lesbian, gay, bisexual, transgender and intersex children,” *id.* ¶ 16, as well as “the high rate of crime and violence” affecting children, *id.* ¶ 24); Comm’n on the Prot. of the Rts. of All Migrant Workers & Members of Their Fams., *Concluding Observations on Jamaica in the Absence of a Report*, ¶ 62, U.N. Doc. CMW/C/JAM/CO/1 (2017) (“The Committee notes with concern reports that emigration is mostly driven by poverty, unemployment, social exclusion and discrimination, including violence targeting lesbian, gay, bisexual and transgender persons, which may put Jamaican migrant workers and members of their family in precarious and/or insecure situations.”).

³¹ *See* Rainbow R.R. & Hum. Dignity Tr., *supra* note 24, at 9–10 (noting that Belize, Trinidad and Tobago, Antigua and Barbuda, St. Kitts and Nevis, and Barbados all struck down their laws between 2016 and 2022 and that challenges are pending in Dominica and St. Lucia); *see also* Hum. Dignity Tr., *Maps of Countries that Criminalise LGBT People* (2023), <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation>.

³² Rainbow R.R. & Hum. Dignity Tr., *supra* note 24, at 1; *see also* U.S. State Dep’t, *Jamaica 2021 Human Rights Report* 17, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/jamaica> (hereinafter, “2021 U.S. State Department Report”) (“There is no comprehensive antidiscrimination legislation protecting the rights of LGBTQI+ persons.”).

³³ 2014 HRW Report, *supra* note 12, at 11.

For instance, Christianity has a strong influence in Jamaica, and religious leaders and organizations openly condemn “homosexual behavior.”³⁴ In 2014, for example, a coalition of religious groups organized a rally—attended by an estimated 25,000 people—against the so-called “homosexuality agenda.”³⁵ Popular media has also fueled widespread homophobia, in the form of sensationalist articles and cartoons that demonize LGBT people as “dangerous” or wanting “special rights.”³⁶ A number of popular Jamaican musicians have released songs with inflammatory, anti-LGBT rhetoric, calling “for gay and lesbian people to be shot in the head,”³⁷ and politicians have likewise used inflammatory language decrying “the homosexual lifestyle.”³⁸ This discourse has contributed to an atmosphere of anti-LGBT hatred and discrimination that endangers LGBT individuals, and excludes them from religious and public spaces. It is therefore no surprise that a Community Experience and Needs Assessment Survey (“*Community Experience Survey*”) taken by the Jamaica Forum for Lesbians, All-Sexuals, and Gays (“*J-FLAG*”) in 2019 revealed that LGBT Jamaicans often feel “very unsafe” in non-LGBT

³⁴ *Id.* at 11; *see id.* at 11–12.

³⁵ *Id.* at 12.

³⁶ *Id.* at 13; *see id.* at 12–14. In October 2018, the *Jamaica Observer* published online a cartoon depicting an offensively stereotyped gay man wearing a purple outfit and carrying a purse, smirking as he heads through a doorway marked “US/Canada.” Clovis Brown, *Thursday, October 18, 2018 [cartoon]*, *Jamaica Observer: Clovis Toons* (Oct. 18, 2018), <https://www.jamaicaobserver.com/cartoon/thursday-october-18-2018-2>. A man with an “Inter-American Commission on Human Rights” shirt states “we will examine Jamaica’s homophobic law to see how it threatens gay rights!” as he lifts a velvet rope and allows the man in purple to pass through the doorway. *Id.* A third person in a shirt labeled “common sense” remarks: “What a corrupt way to enter the USA an’ Canada!” *Id.*

³⁷ *See* 2014 HRW Report, *supra* note 12, at 14–15; HRW, “I Have to Leave to Be Me: Discriminatory Laws Against LGBT People in the Eastern Caribbean 24–25 (Mar. 21, 2018), <https://www.hrw.org/report/2018/03/21/i-have-leave-be-me/discriminatory-laws-against-lgbt-people-eastern-caribbean>; Erin MacLeod & Kate Chappell, “*Man Is a King*”: *Controversial Star Buju Banton Comes Home to Jamaica*, *The Guardian* (Dec. 7, 2018) <https://www.theguardian.com/music/2018/dec/07/buju-banton-return-jamaica-long-walk-to-freedom-tour> (noting the return to Jamaica of Buju Banton, singer of the anti-LGBT song “Boom Bye Bye”; human rights activist Peter Tatchell stated he was “confident that Banton will continue to put the past behind him” but that “it would be even better if he could acknowledge and apologise for those violently homophobic lyrics”); 2004 HRW Report, *supra* note 10, at 52 (documenting allegations of Buju Banton’s participation in a mob attack of six gay men in their home).

³⁸ *See* 2014 HRW Report, *supra* note 12, at 16; *see id.* at 16–17.

entertainment spaces; public spaces, such as streets and plazas; and faith-based spaces, such as churches.³⁹

20. LGBT Jamaicans interviewed by HRW described the ways in which anti-LGBT discrimination and violence has particularly profound and tragic impacts on Jamaica's LGBT youth. In 2014, for example, HRW interviewed 13 gay, homeless youth, many of whom described being kicked out of their homes after their family members learned that they were gay.⁴⁰ According to HRW:

LGBT-identified youth comprise up to 40 percent of the nation's homeless youth population. . . . Living at the margins of Jamaican society, they are vulnerable to rape, violence and disease. . . . [M]any young LGBT people were almost entirely uprooted, having been expelled by their families and forced to move on from each place that briefly became home.⁴¹

One 18-year-old interviewed by HRW in 2014 had been living on the streets for four years after being subjected to "constant teasing, bullying, and attacks" and being forced to leave his grandparents' home.⁴² Another youth who had been living on the streets of Kingston for several years described an incident in which a car "slammed into him and dragged him down the road for about a minute as the driver yelled 'homosexuals.'"⁴³ Although police took him to the hospital afterwards, he did not file a complaint and the police did not investigate the incident further.⁴⁴ The results of J-FLAG's 2019 Community Experience Survey corroborate earlier HRW reports, with 21 percent of all respondents, and more than half of the trans women and trans men who responded to the survey, stating that they had

³⁹ J-FLAG, *The Jamaican LGBT Community Experience and Needs Assessment Survey Results* 18 (Dec. 2019), <https://www.equalityjamaica.org/wp-content/uploads/2021/08/The-Jamaican-LGBT-Community-Experience-and-Needs-Assessment-Survey-Results.pdf> (hereinafter, "2019 J-FLAG Community Experience Survey").

⁴⁰ 2014 HRW Report, *supra* note 12, at 45.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 46.

⁴⁴ *Id.*

been homeless or displaced at some point in their life—often after family members kicked them out of the home because of their LGBT identity.⁴⁵

21. Another 43 percent of respondents to the Community Experience Survey stated that they had been bullied in school because of their gender identity or sexual orientation, with 80 percent of those who had been bullied reporting verbal abuse or harassment.⁴⁶ Approximately one third of respondents stated that they had experienced physical harassment or assault in school.⁴⁷ Notably, this bullying did not only stem from other children; 22 percent of respondents stated that they had been bullied by their teachers.⁴⁸

22. Many LGBT Jamaicans continue to face discrimination well into adulthood, including when seeking access to health care or employment, as explained in further detail below.⁴⁹

As HRW reported in 2014:

LGBT patients faced a combination of ignorance and discrimination in accessing healthcare, including incidences of homophobia and transphobia among health workers. In some cases, the fear or negative responses from health care providers keeps LGBT individuals from accessing care.⁵⁰

23. HRW also interviewed LGBT Jamaicans who had lost their means of employment due to their assumed sexuality. One individual recounted that he was fired because he was gay and that his manager “said that [he] was bringing the organization disrepute.”⁵¹ As a result of being fired, this individual became homeless and had been living on the street for about three years by the time HRW interviewed him.⁵² Another individual explained that his

⁴⁵ 2019 J-FLAG Community Experience Survey, *supra* note 39, at 46–47.

⁴⁶ *Id.* at 30.

⁴⁷ *Id.* at 31.

⁴⁸ *Id.*

⁴⁹ *See infra* Parts IV.D and E.

⁵⁰ 2014 HRW Report, *supra* note 12, at 39.

⁵¹ *Id.* at 42.

⁵² *Id.*

manager, upon hearing that this individual was gay, told him to look for a new job and said “we don’t tolerate these things in the company.”⁵³ None of the individuals interviewed by HRW had attempted to file a complaint or otherwise seek redress for wrongful dismissal due to a lack of legal protections.⁵⁴

B. LGBT Jamaicans Face Constant Threats of Physical Violence

24. The rampant anti-LGBT discrimination across Jamaican society often manifests in physical violence against LGBT individuals, which often goes unpunished by authorities. As the 2014 HRW Report explains: “In many cases, perpetrators appear to have been private actors who felt that they had the moral authority to ‘rid the community’ of LGBT people and had no fear of arrest from the authorities.”⁵⁵ Violence, including beatings and murder, and the constant threat of violence, are thus part of many LGBT Jamaicans’ daily lives.⁵⁶
25. In interviews held between April and June 2013, HRW heard 56 accounts of physical violence experienced by 44 LGBT individuals, “the vast majority of which appeared to be directly as a result of their sexual orientation or gender identity.”⁵⁷ Commonly reported incidents included arson or threats of arson—apparently motivated by a desire to force LGBT individuals from their communities—as well as shootings or stabbings. One transgender woman interviewed by HRW, for example, recounted that her neighbors told her she would be “dead before the year end,” and shortly thereafter she returned home to see that her house was on fire.⁵⁸ She told HRW that by the time she arrived home, “[p]eople were standing outside, [and that] some seemed happy.”⁵⁹ Twelve LGBT individuals

⁵³ *Id.*

⁵⁴ *Id.* at 43.

⁵⁵ *Id.* at 21.

⁵⁶ *See generally id.* at 21–26.

⁵⁷ *Id.* at 21.

⁵⁸ *Id.* at 25.

⁵⁹ *Id.*

interviewed by HRW said “they knew of a friend, partner, lover, or associate who had been murdered because of their real or perceived sexual orientation or gender identity.”⁶⁰

26. HRW also documented at least 10 accounts of mob attacks in which “gay men [] were set upon by groups ranging from 5 to 40 men.”⁶¹ One individual interviewed by HRW after a mob attack explained that he and his friends traveled alone to avoid such violence:

[My friend] went by himself [to the hospital] because if he went with one of us he would have been stigmatized. Persons would say things, “Those guys are gay,” “Look at those battymen there.” Most of the time we go alone [to avoid this]. Later that evening, I saw him. He went to the police, but the police didn’t make any effort, he told me.⁶²

None of the individuals interviewed by HRW were aware of any investigation or arrests made in relation to these attacks.

27. Between 2011 and 2020, J-FLAG documented 26 reports of similar mob violence against LGBT Jamaicans.⁶³ During the same time period, J-FLAG reported more than 170 accounts of physical assault and more than 100 reports of threats of violence, along with accounts of targeted murders, violent robbery, and sexual abuse.⁶⁴ As J-FLAG noted in its report, it is unknown how the COVID-19 pandemic affected the ability or willingness of LGBT individuals to report human rights violations in 2020, which saw a decrease in the total number of reported violations as compared to previous years.⁶⁵

⁶⁰ *Id.* at 23.

⁶¹ *Id.* at 24; *see id.* at 24–25; 2004 HRW Report, *supra* note 10, at 52–54 (describing other incidents of mob violence).

⁶² 2014 HRW Report, *supra* note 12, at 25.

⁶³ J-FLAG, *Human Rights Violations 2011-2020 Analysis Report* 16, <https://www.equalityjamaica.org/wp-content/uploads/2023/01/Human-Rights-Violations-2011-2020-Analysis-Report.pdf> (hereinafter, “2011-2020 J-FLAG Analysis Report”).

⁶⁴ *Id.* at 19.

⁶⁵ *Id.* at 1.

28. Reports of sexual assaults against LGBT Jamaicans are also common and have been documented by HRW. For example, two lesbian women interviewed by HRW reported that in 2012, they were raped at gunpoint while returning home from a party:

[The men] ambushed them and forced them inside their house at gunpoint. Initially they thought it was a robbery. Winnie R. told Human Rights Watch, “I said that they could take whatever they want. One of the gunmen said, ‘We’re not here to take your stuff.’ The other gunman said, ‘You not with nuh man [You aren’t with guys].’”⁶⁶

The men then threatened to kill both women if they reported the violent, four-hour attack to the police.⁶⁷ The women went to the police anyway, but the police verbally abused them and refused to help.⁶⁸ Officers told them: “You’re sodomites, look at her, a sodomite them, why did you come to the police station?” and “[d]irty lesbian girl deserve what you get.”⁶⁹ Numerous other first-hand accounts to HRW detail similar violent crimes motivated by anti-LGBT hatred or bias, and indicate that the perpetrators do not fear repercussions from authorities.⁷⁰

29. Violence against transgender men and women is often especially cruel. One transgender sex worker reported to HRW that she was propositioned for sexual services at knifepoint by two men.⁷¹ They first attempted to sexually assault her, but when they discovered that she had male genitals, one yelled: “You are a batty man.” While one of the men choked her, the other stabbed her.⁷² They broke her nose and slashed her throat.⁷³ She escaped

⁶⁶ 2014 HRW Report, *supra* note 12, at 29.

⁶⁷ *Id.* at 30.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See id.* at 26; 2004 HRW Report, *supra* note 10, at 19–20 (describing police involvement in beating of LGBT individuals); *id.* at 20 (describing how police used anti-LGBT slurs and provoked crowd to beat LGBT individuals).

⁷¹ 2014 HRW Report, *supra* note 12, at 28.

⁷² *Id.*

⁷³ *Id.*

and told the police, who recorded an interview but did nothing else to follow up on the incident.⁷⁴

30. Recent reports demonstrate that LGBT Jamaicans continue to face horrific violence at the hands of their neighbors, authorities, and even their own family members. For example, 32.5 percent of respondents to J-FLAG’s 2019 Community Experience Survey stated that they had experienced violence within the last 12 months, a figure that increased significantly for individuals with low levels of education.⁷⁵ Of the respondents who had experienced violence during their lifetime, an overwhelming majority reported that the incident was linked to their LGBT identity, noting that their attackers used anti-LGBT slurs or explicitly addressed their identity during the attacks.⁷⁶ Rainbow Railroad, a non-profit organization that helps LGBT people escape persecution, reported an increased number of requests for assistance from LGBT Jamaicans each year since 2019, with 322 requests received in 2021 alone.⁷⁷ In 2022, Rainbow Railroad reported 221 instances of LGBT Jamaicans being “beaten up, shot at or ‘chopped’ (i.e. attacked / wounded with a machete),” along with an additional 101 reports of family based violence against LGBT Jamaicans in 2020 and 2021.⁷⁸ The United States Department of State Jamaica Human Rights Report for 2022 further reported that “[t]wo LGBTQI+ community members were killed in their home in August” and that “[t]he NGO Equality for All Foundation reported that during the year it received 13 complaints of violence against LGBTQI+ persons, a number of cases similar to previous years.”⁷⁹ This report also notes that under-reporting of violence against

⁷⁴ *Id.*

⁷⁵ 2019 J-FLAG Community Experience Survey, *supra* note 39, at 20.

⁷⁶ *Id.* at 22.

⁷⁷ See Rainbow R.R. & Hum. Dignity Tr., *supra* note 24, at 5.

⁷⁸ *Id.* at 6.

⁷⁹ U.S. State Dep’t, *Jamaica 2022 Human Rights Report* 16–17, <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/jamaica/> (hereinafter, “2022 U.S. State Department Report”).

LGBT Jamaicans remains a problem, as “many victims were reluctant to go to the police due to expected inaction.”⁸⁰

C. Inadequate Response by Police

31. The violence suffered by LGBT Jamaicans often does not receive an adequate response from authorities, who regularly decline to investigate or punish such conduct.⁸¹ As detailed in HRW’s 2014 Report, police in Jamaica have declined to intervene even as attacks against LGBT individuals were actively taking place.⁸² HRW also spoke with multiple witnesses who stated that police either “made derogatory comments and failed or refused to take a report” when victims attempted to report a crime, or themselves engaged in verbal or physical violence against LGBT individuals.⁸³ For instance, one witness told HRW that in January 2013:

[P]olice stood by and watched while a crowd of about 30 people—shouting insults regarding his sexual orientation and armed with knives, machetes, and sticks—beat him for about 20 minutes. He said police finally removed him from the crowd and placed him in a police van to protect him from the mob but then handcuffed and beat him.⁸⁴

32. Another individual interviewed by HRW described her distrust of the police after having been groped by a police officer and, on a separate occasion, being verbally abused after trying to make a report of robbery and sexual assault.⁸⁵ In addition, LGBT victims may not report violence because it would require them to admit their sexual orientation to police, thereby incriminating themselves under Jamaica’s laws prohibiting same-sex conduct.⁸⁶

⁸⁰ *Id.* at 17.

⁸¹ 2014 HRW Report, *supra* note 12, at 27–31; 2004 HRW Report, *supra* note 10, at 27–32.

⁸² 2014 HRW Report, *supra* note 12, at 27.

⁸³ *Id.*

⁸⁴ *Id.*; *see also id.* at 28–32 (detailing further incidents of the police’s failure to investigate and prosecute).

⁸⁵ *Id.* at 17–18, 29–30.

⁸⁶ J-FLAG, et al., *Human Rights Violations of Lesbian, Gay, Bisexual, and Transgender (LGBT) people in Jamaica: A Shadow Report* 9–10 (Oct. 2011).

Indeed, five witnesses told HRW that they had themselves been threatened by police with arrest and asked to pay a substantial sum in order to avoid imprisonment or the risk of having their sexual orientation or gender identity exposed.⁸⁷ In only four of the 56 cases of violence documented by HRW in 2014 were the victims aware of any arrests of suspects by the police.⁸⁸

33. The most recent report on Jamaica by the Commission noted that the justice system “has proven ineffective in responding to the needs of the people” and “contributes to the perpetuation of violence by failing to hold perpetrators accountable.”⁸⁹ The report also describes widespread discrimination in Jamaica based on sexual orientation, gender identity, and gender expression, which is “entrenched in Jamaican State institutions.”⁹⁰ As the Commission recognized, “[t]hose who are not heterosexual or cisgender face political and legal stigmatization, police violence, an inability to access the justice system, as well as intimidation, violence, and pressure in their homes and communities.”⁹¹
34. The likelihood that police will decline to investigate, and may even engage in further abuse, contributes to extremely low levels of reporting by the victims of anti-LGBT crimes. As one transgender woman interviewed by HRW in 2014 explained, she “would never dare go to the police” because she had “heard terrible things about gay people going to the police and police turning on them” as a result of their sexual orientation or gender identity.⁹² Data collected by J-FLAG indicates that this belief remains widespread among LGBT Jamaicans. In examining reported cases of human rights violations that occurred between January 2018 and July 2020, J-FLAG observed that “[m]ost LGBT Jamaican citizens did

⁸⁷ 2014 HRW Report, *supra* note 12, at 36–37.

⁸⁸ *Id.* at 27; *see also* 2004 HRW Report, *supra* note 10, at 27–31 (providing further accounts of the police’s failure to protect LGBT individuals while they were being attacked and to investigate after the fact).

⁸⁹ Inter-Am. Comm’n H.R., *Report on the Situation of Human Rights in Jamaica*, OEA/Ser.L/V/II.144, doc. 12, ¶ 63 (2012).

⁹⁰ *Id.* ¶ 264.

⁹¹ *Id.*

⁹² 2014 HRW Report, *supra* note 12, at 17.

not report their last physical or sexual assault to the police.”⁹³ J-FLAG noted that many victims “did not think that the police would do anything” and “feared reprisals from the offender.”⁹⁴ In its 2020, 2021, and 2022 reports on Jamaica, the United States Department of State similarly recognized that many LGBT Jamaicans who have experienced violence do not report these crimes to the police due to fear of discrimination or police inaction.⁹⁵

D. Unequal Access to Health Care

35. HRW has documented numerous cases of LGBT Jamaicans facing discrimination in accessing health care, including incidences of homophobia and transphobia by health practitioners. For example, one transgender woman interviewed by HRW described the cruelty she experienced at Kingston Public Hospital while seeking treatment for a knife attack:

The doctor asked me what happened. I told him the story. He called the porter and said, “You have to look at this.” He called various people to look at me. He pulled down my pants He said, “You should not let [men] sex you.” He called about three porters and another man [a patient] to look at me. . . . Some guys [auxiliary staff] wanted to know if I was a woman, and for me to let them see my breasts.⁹⁶

36. Fear of such treatment prevents many LGBT individuals in Jamaica from accessing necessary health care. Even those that *do* access care may not share information about their sexual orientation or HIV status with doctors and nurses, for fear of a negative response or to prevent such confidential information from being shared with others. HRW spoke with individuals whose personal medical information had not been protected.⁹⁷ One 28-year-old gay man who visited a clinic for an HIV test stated that he “was afraid to

⁹³ J-FLAG, *National Dialogue on Human Rights in Jamaica* 15 (2021), <https://www.equalityjamaica.org/research-publications> (hereinafter, “2021 J-FLAG Report”).

⁹⁴ *Id.*

⁹⁵ 2022 U.S. State Department Report, *supra* note 79, at 17; 2021 U.S. State Department Report, *supra* note 32, at 17–18; U.S. State Dep’t, *Jamaica 2020 Human Rights Report* 17–18, https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/jamaica__trashed/.

⁹⁶ 2014 HRW Report, *supra* note 12, at 39–40.

⁹⁷ *See* 2004 HRW Report, *supra* note 10, at 41–44.

disclose his sexual orientation to health workers, whom he saw discussing clients' confidential information.”⁹⁸ J-FLAG's 2019 Community Experience Survey revealed that the majority of respondents did not feel comfortable discussing their sexual orientation in any medical setting, regardless of the type of facility they were in.⁹⁹

37. Access to treatment is further limited by health practitioners who fail to provide adequate care to LGBT individuals. For example, HRW spoke with one senior Ministry of Health official who shared the case of a gay man with Human papillomavirus (*HPV*) that remained untreated due to health practitioners' refusal to provide proper care:

They can't officially turn away people I sent him to surgery with a referral for HPV lesion removal. They gave him medication for fever, and antibiotics, and then . . . instead of taking care of him, they discharged him and said to return. This happened six or seven times throughout the year from 2011–2012.¹⁰⁰

38. Anti-LGBT discrimination in the Jamaican health care system continues to this day. For example, in its 2021 Country Report on Human Rights in Jamaica, the United States Department of State reported that Jamaica's continuing “legal prohibition of sexual conduct between men disproportionately affected HIV treatment for subpopulations such as men who have sex with men and individuals who are lesbian, gay, bisexual, transgender, queer, or intersex (LGBTQI+), where HIV infection levels were higher than average.”¹⁰¹ In addition, the 2022 Country Report on Human Rights in Jamaica highlighted that LGBT Jamaicans may be subjected to coercive medical and psychological practices, including “unnecessary surgical procedures for intersex children” and conversion therapy.¹⁰²

⁹⁸ 2014 HRW Report, *supra* note 12, at 41.

⁹⁹ 2019 J-FLAG Community Experience Survey, *supra* note 39, at 37.

¹⁰⁰ 2014 HRW Report, *supra* note 12, at 40.

¹⁰¹ 2021 U.S. State Department Report, *supra* note 32, at 16.

¹⁰² 2022 U.S. State Department Report, *supra* note 79, at 17.

E. Employment Discrimination

39. LGBT Jamaicans additionally struggle to obtain and maintain employment, and HRW has documented numerous instances of anti-LGBT harassment and discrimination in the workplace. In 2013, HRW interviewed five individuals “who had lost employment primarily because of their assumed sexuality.”¹⁰³ Others told HRW that they “move regularly to protect themselves from violence,” which hampers their ability to find and hold a job.¹⁰⁴
40. More recently, approximately 51 percent of respondents to J-FLAG’s 2019 Community Survey felt that being openly LGBT impacted their ability to get jobs.¹⁰⁵ More than one third of respondents stated that they had negative experiences in the workplace, most commonly verbal abuse and discrimination.¹⁰⁶ In its 2022 Human Rights Report for Jamaica, the United States Department of State further observed a “strong stigma in the workplace against . . . members of the LGBTQI+ community” that likely disincentivizes reporting of workplace harassment, suggesting that the numbers reported by J-FLAG likely undercount actual incidents of anti-LGBT discrimination in the workplace.¹⁰⁷

F. Homelessness, Housing Discrimination, and Exile

41. Even at home, LGBT Jamaicans are not safe from discrimination and threats of violence. Several individuals interviewed by HRW described how they were forcibly evicted from their homes or threatened with violence if they chose to stay. For example, two individuals interviewed by HRW detailed how their landlord repeatedly called them “abominations” and stated that “he did not want ‘this nasty thing’ in his house.”¹⁰⁸ On the day that they moved out, the landlord “began yelling outside that we were lesbians, that this was why

¹⁰³ 2014 HRW Report, *supra* note 12, at 42.

¹⁰⁴ *Id.*

¹⁰⁵ 2019 J-FLAG Community Experience Survey, *supra* note 39, at 29.

¹⁰⁶ *See id.* at 42–43.

¹⁰⁷ 2021 U.S. State Department Report, *supra* note 32, at 22.

¹⁰⁸ 2014 HRW Report, *supra* note 12, at 43.

we were leaving, that we had been there too long, that we were bringing destruction to his house and business.”¹⁰⁹ Another individual interviewed by HRW had to abandon his home due to constant threats from neighbors:

As I turned the corner, one of the guys said, “Me no want a battyman go by my shop.” He got up and started to flick his knife open. When I ignored him, he said, “You a battyman?” I started to back away and then I just turned [to] go back by my avenue. The guy yelled, “Leave the community within 24 hours, or else.”¹¹⁰

The next day, members of the community threw stones at the LGBT individual’s house for 20 to 30 minutes, yelling, “Battymen them there so. Come out of the community.”¹¹¹

42. As detailed in Part IV.A above, a significant number of LGBT youths are kicked out of their homes by their own families after revealing their sexual orientation or gender identity. Several gay, homeless youth interviewed by HRW, including three boys under the age of 18, were kicked out of their homes in Kingston and Montego Bay.¹¹² A 2014 report by VICE News similarly documented a community of LGBT Jamaicans who had “found refuge” in the storm drainage systems of Kingston after being forced out of their homes.¹¹³ A follow-up report published in 2016 reported that LGBT individuals made up at least 40 percent of Jamaica’s overall homeless youth population and that “[d]espite widespread media attention in the wake of VICE News’s [2014] report, the very same group of homeless youth [were] still on the streets[.]”¹¹⁴ These youths, many of whom survive

¹⁰⁹ *Id.* at 44.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 45; see also 2004 HRW Report, *supra* note 10, at 54–55 (recounting, among others, the stories of Daniel S. and Lillie P., young LGBT individuals who were forced to leave their families’ homes upon discovery of their sexual orientations; in Daniel S.’s case, he was violently ousted by men in the community who threatened to kill him).

¹¹³ “*Jamaica’s Gully Queens*,” Vice.com (July 28, 2014), https://www.vice.com/en_us/article/kwpm4n/young-and-gay-jamaicas-gully-queens-288.

¹¹⁴ Roxy Rezvany, *The Challenges of Running a Queer Homeless Shelter in Jamaica*, Vice.com (Mar. 22, 2016), https://www.vice.com/en_us/article/yvx7bk/the-struggle-for-queer-shelters-in-jamaica.

through sex work, lack any support system and are particularly vulnerable to rape, violence, and disease.

43. More recently, 60 percent of respondents to J-FLAG's 2019 Community Experience Survey reported that being openly LGBT affected their access to living spaces.¹¹⁵ Between 2011 and 2020, J-FLAG documented numerous reports of displacement or expulsion from home, with 12 such reports in 2019 and 13 in 2020.¹¹⁶
44. The constant harassment, abuse, and violence, coupled with a lack of support from public officials, cause LGBT Jamaicans to fear for their lives. J-FLAG's 2019 Community Experience Survey revealed that the majority of respondents were uncomfortable being openly LGBT in Jamaica,¹¹⁷ with approximately 48 percent of respondents reporting that they felt unsafe in Jamaica, compared to only 12 percent who felt safe.¹¹⁸ As a result, many LGBT Jamaicans choose to leave the country altogether; indeed, 76 percent of respondents to J-FLAG's 2019 survey were interested in leaving, the majority of whom explained that they wanted to do so because of their sexual orientation or gender identity.¹¹⁹ Notably, 100 percent of trans women who participated in the survey stated that they wanted to leave Jamaica.¹²⁰

V. STATES' OBLIGATIONS UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS INCLUDE BOTH THE SUBSTANTIVE AND PROCEDURAL OBLIGATIONS TO INVESTIGATE EFFECTIVELY VIOLATIONS OF THE CONVENTION

45. The IACtHR and this Commission have previously acknowledged that Articles 4, 5, and 7 of the American Convention, read in conjunction with Articles 1(1), 8(1), and 25, oblige States Parties not only to respect the right to life under Article 4, the right to humane

¹¹⁵ 2019 J-FLAG Community Experience Survey, *supra* note 39, at 29.

¹¹⁶ 2011-2020 J-FLAG Analysis Report, *supra* note 63, at 20.

¹¹⁷ 2019 J-FLAG Community Experience Survey, *supra* note 39, at 17.

¹¹⁸ *Id.* at 18.

¹¹⁹ *Id.* at 49.

¹²⁰ *See id.*

treatment under Article 5, and the right to personal liberty under Article 7 but also to guarantee the full enjoyment of those rights by conducting an effective investigation into any deprivation thereof.¹²¹ In addition, Articles 8 and 25 of the Convention, which together provide for the right to an effective remedy, separately require States Parties to conduct an effective investigation into alleged human rights violations. The IACtHR’s jurisprudence is consistent with that of other human rights bodies, including the African Commission and the ECtHR, which has found that a State’s failure to effectively investigate may *itself* give rise to a violation of the ECHR—separate and apart from a violation of the substantive right at issue.

46. Both the IACtHR and these other human rights bodies have also elaborated the elements of an “effective” investigation. Among other factors, an effective investigation requires consideration of any possible discriminatory motives, including discrimination based on a victim’s sexual orientation or gender identity.

A. Jurisprudence of the Inter-American Court of Human Rights and Inter-American Commission on Human Rights

47. The Court has long interpreted Article 1(1) of the American Convention—which requires States Parties to both “respect” and “ensure” the specific rights and freedoms enumerated in other articles¹²²—as incorporating a positive “obligation to guarantee” the enjoyment of those substantive rights.¹²³ This obligation requires States Parties “to undertake a series of actions, depending on the specific substantive right at issue,” which include investigating alleged violations of the substantive rights protected under Articles 4, 5, and 7.¹²⁴ As the

¹²¹ The Inter-American Court provides an authoritative interpretation of the American Convention, notwithstanding that Jamaica has not consented to its jurisdiction. Indeed, the Commission regularly relies on the Court’s case law when analyzing petitions brought against Jamaica. *See, e.g., Henry v. Jamaica, supra* note 27, ¶¶ 52–99; *T.B. v. Jamaica*, Case 13.095, Inter-Am. Comm’n H.R., Report No. 401/20, ¶¶ 63–131 (2020).

¹²² American Convention Article 1(1).

¹²³ *See Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 173–78 (July 29, 1988).

¹²⁴ *Cantoral-Huamani v. Perú*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 176, ¶ 101 (July 10, 2007); *see id.* ¶¶ 101–02 (July 10, 2007) (“[T]he obligation to guarantee the rights protected in Articles 4, 5, and 7 of the Convention entails the obligation to investigate the facts that affected these substantive rights. . . . The State incurs international responsibility when it fails to comply with

IACtHR has explained, “[t]he obligation to investigate constitutes a means of guaranteeing the rights protected” in these articles.¹²⁵ Similarly, Articles 8(1) and 25 of the American Convention, read in conjunction with Article 1(1), guarantee “the right of access to justice,” which in turn requires that States Parties “investigate, prosecute, and punish, as appropriate, those eventually found responsible” for violating rights protected under the Convention.¹²⁶

48. This part sets out the previous jurisprudence of the IACtHR and Commission recognizing that, to ensure the human rights protected under the American Convention, States must conduct an effective investigation into alleged violations of those rights.

1. *The substantive obligation to conduct an effective investigation under Articles 8(1) and 25*

49. Articles 8 and 25 of the American Convention set forth the substantive rights to a fair trial and to judicial protection, respectively. As early as its 1987 decision on preliminary objections in *Velásquez Rodríguez v. Honduras*, the Court interpreted Articles 8(1) and 25 of the Convention as together obliging States Parties to the Convention “to provide *effective* judicial remedies to the victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)).”¹²⁷ Read in conjunction with Article 1(1) of the Convention, these articles require States Parties to “ensure the right of the presumed victims or their next of kin that everything necessary is

this obligation.”); *Servellón-García v. Honduras*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 152, ¶ 119 (Sept. 21, 2006) (“The Court has established that one of the conditions to effectively guarantee the rights to life, humane treatment, and personal liberty is the compliance with the duty to investigate violations to the same, which derive from Article 1(1) of the Convention, along with the substantive right that must be protected, or guaranteed.”).

¹²⁵ *Cantoral-Huamani v. Perú*, *supra* note 124, ¶¶ 101–02.

¹²⁶ *Vicky Hernández v. Honduras*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 422, ¶ 103 (Mar. 26, 2021).

¹²⁷ *Velásquez-Rodríguez v. Honduras*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1, ¶ 91 (June 26, 1987); *see also Vicky Hernández v. Honduras*, *supra* note 126, ¶ 103.

done to know the truth of what happened and to investigate, prosecute, and punish, as appropriate, those eventually found responsible.”¹²⁸

50. The IACtHR has observed that, in order for an investigation to constitute an effective remedy as required under Articles 8(1) and 25, it “must be carried out with seriousness and not be a simple formality condemned from the onset to be unsuccessful.”¹²⁹ In other words, the American Convention requires not only that States Parties investigate but also that such investigations be *effective*, with the investigating body actually trying to obtain the desired result of determining the truth and identifying the perpetrators.¹³⁰ To that end, States Parties should, as soon as authorities become aware of an alleged human rights violation, “initiate, *ex officio* and without delay”¹³¹ an investigation that incorporates the following “principal guidelines:”

[T]he recovery and preservation of evidence in order to contribute to any potential criminal investigation of those responsible; the identification of possible witnesses and obtaining their statements, and the determination of the cause, manner, place and time of the fact investigated. It is also necessary to conduct a thorough examination of the scene of the crime, and ensure that rigorous tests are performed by qualified professionals using the most appropriate procedures, and this entails guaranteeing the proper chain of custody.¹³²

¹²⁸ *Vicky Hernández v. Honduras*, *supra* note 126, ¶ 103.

¹²⁹ *Chitay Nech v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212, ¶ 192 (May 25, 2010).

¹³⁰ *Id.*; *see also Vicky Hernández v. Honduras*, *supra* note 126, ¶ 103 (“requires the investigating body to . . . take all the necessary steps and make all the required inquiries to determine the truth, using all available legal means”).

¹³¹ *González v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 290 (Nov. 16, 2009).

¹³² *Vicky Hernández v. Honduras*, *supra* note 126, ¶ 106; *see also Azul Rojas Marín v. Perú*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 402, ¶ 194 (Mar. 12, 2020); *Servellón-García v. Honduras*, *supra* note 124, ¶ 120; *Sánchez v. Honduras*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 128 (June 7, 2003); *Gómez Virula v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 393, ¶ 73 (Nov. 21, 2019).

As the IACtHR has also established, one of the conditions of an effective investigation is consideration of possible discriminatory motives. In *Azul Rojas Marín v. Perú*, for example, the IACtHR held that:

[W]hen there are specific indications or suspicions of violence based on discrimination, the State must do everything reasonable, according to the circumstances, to collect and secure the evidence, use all practical means to discover the truth, and issue fully reasoned, impartial and objective decisions, without omitting suspicious facts that could indicate violence based on discrimination.¹³³

Indeed, a State Party's failure to investigate possible discriminatory motives "may, in itself, constitute a form of discrimination" contrary to the American Convention.¹³⁴ This Commission has also recognized, in the context of alleged violations of the right to life, that "the State has the obligation to investigate such acts on its own initiative and to punish those responsible; and also to conduct an investigation that takes into account whether the murder was committed because of the gender expression, gender identity or sexual orientation of the victims."¹³⁵ Notably, the Court has explained that a failure to effectively investigate alleged violations of human rights leads to "an environment of impunity that facilitates and promotes the repetition of" those violations and sends a message that such acts are "tolerated and accepted as part of daily life."¹³⁶ Particularly in cases involving members of a vulnerable group—such as LGBT persons—the obligation to investigate thus plays a critical role in discouraging further human rights violations.¹³⁷

¹³³ *Azul Rojas Marín v. Perú*, *supra* note 132, ¶ 196; *see also Vicky Hernández v. Honduras*, *supra* note 126, ¶ 107.

¹³⁴ *Azul Rojas Marín v. Perú*, *supra* note 132, ¶ 196; *see also Vicky Hernández v. Honduras*, *supra* note 126, ¶ 107.

¹³⁵ Inter-Am. Comm'n H.R., *Chapter V: Follow-up of Recommendations Issued by the IACHR in its Country or Thematic Reports* ¶ 170 (2014), <https://www.oas.org/en/iachr/docs/annual/2014/docs-en/Annual2014-chap5-Jamaica.pdf>; *see also* Inter-Am. Comm'n H.R., *Violence Against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, OAS/Ser.L/V/II.rev.2, doc. 36, ¶ 46 (2015); *Vicky Hernández v. Honduras*, Case 13.051, Inter-Am. Comm'n H.R., Report No. 157/18, ¶ 58 (2018); *Azul Rojas Marín v. Perú*, Case 12.982, Inter-Am. Comm'n H.R., Report No. 24/18, ¶ 96 (2018).

¹³⁶ *González v. Mexico*, *supra* note 131, ¶ 388.

¹³⁷ *Vicky Hernández v. Honduras*, *supra* note 126, ¶ 134.

51. The IACtHR and Commission have found violations of Articles 1(1), 8(1), and 25 of the American Convention where these elements of an effective investigation were not met. For example, in *Gayle v. Jamaica*, the Commission concluded that Jamaica had violated Articles 8 and 25 where its examination of the death of an individual in police custody was ineffective: “[D]ue control was not exercised over the scene of Mr. Gayle’s beating, no forensic tests were conducted at the scene, none of the weapons or implements were recovered or examined, no police sketches were made from witness statements, and there were no attempts to form identification parades or lineups.”¹³⁸ In *González v. Mexico*, the Court similarly examined alleged “irregularities” in the investigations and concluded that:

The irregularities in the handling of evidence, the alleged fabrication of guilty parties, the delay in the investigations, the absence of lines of inquiry that took into account the context of violence against women in which the three women were killed, and the inexistence of investigations against public officials for alleged serious negligence, *violate the right[s] of access to justice and to effective judicial protection*, and the right of the next of kin and of society to know the truth about what happened.¹³⁹

The Court explained in *Chitay Nech v. Guatemala* that, in light of States Parties’ obligations under Articles 8(1) and 25, the Court must “analyze whether the State has carried out the investigation of the facts with due diligence and in a reasonable time period.”¹⁴⁰ It found in that case that the State had unreasonably delayed an investigation and therefore violated Articles 8(1) and 25(1) of the Convention.¹⁴¹ Most recently, in *Vicky Hernández v. Honduras*, the Court noted that “the State recognized that the authorities had not conducted the investigations satisfactorily and, therefore, acknowledged its responsibility for a violation of the rights to judicial guarantees and judicial protection contained in Articles 8(1) and 25 of the American Convention.”¹⁴²

¹³⁸ *Gayle v. Jamaica*, Case 12.418, Inter-Am. Comm’n H.R., Report No. 92/05, ¶ 89 (2005).

¹³⁹ *González v. Mexico*, *supra* note 131, ¶ 388 (emphasis added).

¹⁴⁰ *Chitay Nech v. Guatemala*, *supra* note 129, ¶ 191.

¹⁴¹ *Id.* ¶ 209.

¹⁴² *Vicky Hernández v. Honduras*, *supra* note 126, ¶ 113.

2. *The procedural obligation to conduct an effective investigation under Article 4(1), read in conjunction with Article 1(1)*

52. Article 1(1) of the American Convention imposes a substantive obligation on States Parties to “respect” the right to life, the right to humane treatment, and the right to personal liberty set out in Articles 4, 5, and 7, respectively. As the IACtHR has repeatedly held, the obligation under Article 1(1) of the Convention to “ensure” these rights also imposes upon States Parties the procedural obligation “to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishments on them, and to ensure . . . the victim adequate compensation.”¹⁴³ Among other measures, this includes establishing “an effective system of justice” capable of conducting effective investigations into alleged human rights violations.¹⁴⁴
53. This obligation is particularly important to ensuring the right to life under Article 4, which has long been recognized as “play[ing] a fundamental role in the American Convention because it is the essential presumption for the exercise of the other rights.”¹⁴⁵ Indeed, the IACtHR has been explicit that “the investigation of cases of violation of the right to life is an *essential element* when determining the State’s international responsibility” under Article 4, read in conjunction with Article 1(1).¹⁴⁶ Safeguarding the right to life requires States Parties “to effectively investigate deprivation of the right to life and to punish all those responsible . . . as not doing so would create, within the environment of impunity, conditions for this type of facts [sic] to occur again, which is contrary to the duty to respect and ensure the right to life.”¹⁴⁷

¹⁴³ *González v. Mexico*, *supra* note 131, ¶ 236; *see Vicky Hernández v. Honduras*, *supra* note 126, ¶ 96.

¹⁴⁴ *Vicky Hernández v. Honduras*, *supra* note 126, ¶ 96.

¹⁴⁵ *Id.* ¶ 85.

¹⁴⁶ *Id.* ¶ 97 (emphasis added).

¹⁴⁷ *Mack Chang v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 156 (Nov. 25, 2003).

54. With regard to what constitutes an “effective” investigation of alleged violations of the right to life, the IACtHR has specified:

The State authorities conducting an investigation shall, *inter alia*, a) identify the victim; b) collect and preserve evidence related to the death in order to assist with any investigation; c) identify possible witnesses and obtain testimonies in relation to the death under investigation; d) determine the cause, manner, place and time of death, as well as any pattern or practice which may have brought about such death, and e) distinguish between natural death, accidental death, suicide and homicide. In addition, it is necessary that a thorough investigation of the crime scene be conducted and rigorous autopsies and analyses of human remains be performed by competent professionals, using the best available procedures.¹⁴⁸

It has further stated that “[a]ny deficiency or fault in the investigation affecting the ability to determine the cause of death or to identify the actual perpetrators or masterminds of the crime will constitute failure to comply with the obligation to protect the right to life.”¹⁴⁹

55. A State Party’s failure to effectively investigate alleged violations of the right to life may give rise to a violation of the right to life under Article 4. In *Abella v. Argentina*, for example, the Commission held that Argentina had violated Articles 4, 5(2), and 25(1) in part because it failed to conduct an “immediate, exhaustive and impartial investigation of the facts” surrounding an alleged summary execution.¹⁵⁰ In *González v. Mexico*, the IACtHR recognized that the American Convention sets forth “a procedural obligation to protect the rights to life, personal integrity and personal liberty by means of a serious investigation,” noting that the ECtHR has similarly “developed the concept of the ‘procedural obligation’ to carry out an effective official investigation” of violations of the right to life and that the Court itself had relied on this concept in previous cases.¹⁵¹ On that basis, and in part because the State Party had failed to conduct an adequate investigation

¹⁴⁸ *Baldeón-García v. Perú*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 96 (Apr. 6, 2006).

¹⁴⁹ *Id.* ¶ 97.

¹⁵⁰ *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, ¶ 427 (1997).

¹⁵¹ *González v. Mexico*, *supra* note 131, ¶¶ 292, 294.

into the deaths of three women, the IACtHR found a violation of Articles 4(1) and 1(1) of the Convention. Subsequently, in *Vicky Hernández v. Honduras*, the IACtHR found a violation of Article 4(1) based in part on the fact that investigations into the death of a trans woman were “inadequate to determine what happened and the corresponding responsibilities.”¹⁵² Notably, the IACtHR in *Vicky Hernández v. Honduras* also found that a general “context of impunity in cases of acts of violence against trans women” in Honduras was relevant to the determination that the State Party was responsible for violating the right to life.¹⁵³

3. *The procedural obligations to conduct an effective investigation under Article 5(1), read in conjunction with Article 1(1)*

56. The IACtHR has similarly established that compliance with the obligation to investigate is one of the conditions to guaranteeing the right to humane treatment under Article 5(1) of the American Convention.¹⁵⁴ As the IACtHR explained in *González v. Mexico*, this means that States Parties are required “to start *ex officio* and immediately an effective investigation that allows it to identify, prosecute, and punish the responsible parties, when there is an accusation or well-grounded reason to believe that an act of torture” or other cruel, inhuman or degrading treatment has been committed.¹⁵⁵
57. This Commission has previously found a violation of Article 5 in connection with a State’s failure to meet this obligation. In *Thomas v. Jamaica*, for example, the Commission observed that the State’s obligations to “investigate and punish any violation of the rights recognized in the Convention” flow from Article 1(1).¹⁵⁶ It concluded that Jamaica had violated Articles 5(1) and (2), read in conjunction with Article 1(1), where it failed to

¹⁵² *Vicky Hernández v. Honduras*, *supra* note 126, ¶ 100.

¹⁵³ *Id.*

¹⁵⁴ *See Servellón-García v. Honduras*, *supra* note 124, ¶ 119.

¹⁵⁵ *González v. Mexico*, *supra* note 131, ¶ 246 (internal citation omitted).

¹⁵⁶ *Thomas v. Jamaica*, Case 12.069, Inter-Am. Comm’n H.R., Report No. 50/01, ¶¶ 41–46 (2001).

investigate reported incidents of excessive use of force by prison officials, for example by identifying and speaking with possible witnesses to the events at the prison.¹⁵⁷

58. The IACtHR has also found that a failure to meet the procedural obligation to investigate may give rise to a violation of Article 5 of the American Convention. For example, in *Cantoral-Huamani v. Perú*, the IACtHR found a violation of Article 5(1) with respect to the victims where the investigation into their deaths was still in its “initial phase” 18 years after they were killed.¹⁵⁸ It also found that the State’s failure to elucidate the circumstances of the victims’ deaths or to effectively identify, investigate, and punish the “authors” of the crime violated the right to humane treatment of the victims’ next of kin.¹⁵⁹ As the IACtHR explained: “in addition to failing to make any progress in the investigations or to resolve any of the hypotheses of how the facts occurred for 18 years, [the State] mislaid important elements of the investigation, such as the original autopsy reports, causing frustration and impotence, as well as the need to conduct an exhumation, which caused profound anxiety and feelings of anguish.”¹⁶⁰ In *González v. Mexico*, the IACtHR similarly found that the State’s failure to comply with its procedural obligation to effectively investigate the deaths of three women contributed to a finding of a violation of Article 5(1). In addition, the IACtHR examined “the effect on the mental and moral integrity of the victims’ next of kin as a result of what happened to the latter [and] the investigations conducted to determine what occurred.”¹⁶¹ It determined that:

The irregular and deficient actions of the state authorities when trying to discover the whereabouts of the victims after their disappearance had been reported; the lack of diligence in determining the identity of the remains, the circumstances and causes of the deaths; the delay in the return of the bodies; the absence of information on the evolution of the investigations, and

¹⁵⁷ *Id.*

¹⁵⁸ *Cantoral-Huamani v. Perú*, *supra* note 123, ¶ 126.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* ¶ 116.

¹⁶¹ *González v. Mexico*, *supra* note 131, ¶ 412.

the treatment accorded the next of kin during the whole process of seeking the truth has caused them great suffering and anguish.¹⁶²

The IACtHR concluded that this constituted degrading treatment contrary to Articles 5(1) and 5(2) of the Convention.

4. *The procedural obligations to conduct an effective investigation under Article 7(1), read in conjunction with Article 1(1)*

59. The IACtHR and Commission have also found that Article 7(1) of the American Convention, read in conjunction with Article 1(1), includes a procedural obligation of States Parties to investigate violations of the right to personal liberty. The failure of a State Party to comply with this obligation, for example by failing to conduct an effective investigation into a detention or forced disappearance, may give rise to violations of the American Convention. In *Piche Cuca v. Guatemala*, this Commission heard allegations of violations of the right to personal liberty arising out of forced recruitment into the military. Noting that “the Government of Guatemala neither conducted a full and impartial investigation to determine who was responsible for the reported acts, nor punished the guilty parties, nor compensated the victims’ relatives,” the Commission found violations of Article 7, 11, and 22 of the Convention.¹⁶³
60. The IACtHR recalled in *García v. Guatemala* that in cases of a forced disappearance, the State Party must “take all necessary measures to investigate and, as appropriate, punish those responsible, to establish the truth of what happened, and to locate the whereabouts of the victim and inform his next of kin.”¹⁶⁴ Notably, this obligation “subsists until the fate or whereabouts” of the victim is determined.¹⁶⁵ Where a State Party fails “to comply with its obligation to initiate an investigation into the forced disappearance of [a victim], *ex officio*, using all the legal means available and with due diligence, and it has not respected

¹⁶² *Id.* ¶ 424.

¹⁶³ *Piché Cuca v. Guatemala*, Case 10.975, Inter-Am. Comm’n H.R., Report No. 36/93, Resolution ¶ 4 (1993).

¹⁶⁴ *García v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 258, ¶ 154 (Nov. 29, 2012).

¹⁶⁵ *Id.*

the guarantee of a reasonable time,” the IACtHR has found that the State violated its obligation to “ensure” the rights recognized in Article 7(1).¹⁶⁶

5. *The special protections owed to children under Article 19*

61. The procedural obligation to investigate is particularly important in cases involving children who, “because of their physical and emotional development, require special protection.”¹⁶⁷ As the IACtHR has recognized, children under the age of 18 “have the same rights as all human beings [. . .] and also special rights derived from” their status as children pursuant to Article 19 of the Convention.¹⁶⁸ In past cases involving alleged violations of children’s rights, the IACtHR has found that the special protection that children require should be understood as an additional, complementary right.¹⁶⁹ Accordingly, in cases involving children, a State “has the same obligations it has regarding to any person, yet compounded by the added obligation established in Article 19 of the American Convention,” which requires States to be “all the more diligent and responsible in its role as guarantor” of rights in such cases.¹⁷⁰
62. The IACtHR has also explained that the interpretation of Article 19 must take into account not only other provisions of the American Convention and related agreements and instruments, but also “the system of which it is part,”¹⁷¹ which notably includes the

¹⁶⁶ *Id.* ¶ 155.

¹⁶⁷ *Juvenile Reeducation Institute v. Paraguay*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 147 (Sept. 2, 2004).

¹⁶⁸ *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 54 (Aug. 28, 2002).

¹⁶⁹ *See Juvenile Reeducation Institute v. Paraguay*, supra note 167, ¶¶ 148, 190.

¹⁷⁰ *Id.* ¶ 160.

¹⁷¹ *Gómez-Paquiyaury Brothers v. Perú*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 164 (July 8, 2004); *accord Villagran-Morales et al. v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 192 (Nov. 19, 1999).

Convention on the Rights of the Child¹⁷² and the UN Committee on the Rights of the Child's authoritative interpretations of that convention.¹⁷³

63. States Parties are thus obliged to “take positive steps to ensure exercise and full enjoyment of” the rights of children,¹⁷⁴ and in so doing to consider the special protections that children require by virtue of their status. In cases involving violations of the right to physical integrity, the UN Committee on the Rights of the Child has specified that States’ obligations “to assume their responsibilities toward children” include special obligations of due diligence and “the obligation to investigate and to punish those responsible” for violations of the rights of children.¹⁷⁵ The IACtHR has also found a violation of Article 19, in combination with Articles 4, 5, or 7, where a State Party failed to fulfill its obligations with respect to the rights to life, humane treatment, or personal liberty in circumstances involving a child.¹⁷⁶

B. The Requirements of an Effective Investigation Under International Human Rights Law

64. Other international and regional human rights bodies have likewise recognized that the full and effective enjoyment of human rights and freedoms depends on States’ compliance with a procedural obligation to investigate violations of those rights. Indeed, under the jurisprudence of the ECtHR, a State’s failure to conduct an effective investigation may give rise to a violation of the ECHR *separate and apart from* a violation of the substantive obligation to respect the right. The ECtHR and other human rights bodies have also

¹⁷² Jamaica ratified the Convention on the Rights of the Child on May 14, 1991.

¹⁷³ *Gómez-Paquiyaury Brothers v. Perú*, *supra* note 171, ¶¶ 166–67; *Villagran-Morales et al. v. Guatemala*, *supra* note 171, ¶¶ 194–95 (“Both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention”); *Juridical Condition and Human Rights of the Child*, *supra* note 168, ¶ 88.

¹⁷⁴ *Juridical Condition and Human Rights of the Child*, *supra* note 168, ¶ 88.

¹⁷⁵ Comm. on the Rights of the Child, *General Comment No. 13: The Right of the Child to Freedom from All Forms of Violence*, U.N. Doc. CRC/C/GC/13, ¶ 5 (2011).

¹⁷⁶ See *Río Negro Massacres v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 150 (Sept. 4, 2012); *Juvenile Reeducation Institute v. Paraguay*, *supra* note 167, ¶ 190.

elaborated the contours of an “effective” investigation into human rights violations and—consistent with the jurisprudence of the IACtHR and Commission—make clear that such investigations require consideration of possible discriminatory motives.

65. This part describes the previous jurisprudence of the ECtHR and the African Commission recognizing that States have a procedural obligation to conduct an effective investigation into alleged violations of human rights, and describing the elements of an “effective” investigation. It also describes the jurisprudence of the ECtHR finding that a failure to comply with the procedural obligation to effectively investigate may give rise to an independent violation of the ECHR.

1. *States’ Procedural Obligation to Effectively Investigate Human Rights Violations*

66. The IACtHR’s previous decisions holding that Articles 1(1), 4(1), 5(1), 7(1), 8(1), and 25 of the American Convention together impose on States Parties both substantive and procedural obligations to effectively investigate human rights violations are consistent with the jurisprudence of other human rights regimes.
67. The ECtHR, for example, has long held that States’ general duty under Article 1 of the ECHR to “secure to everyone within their jurisdiction the rights and freedoms” defined in the ECHR, when read in conjunction with other articles, “requires by implication that there should be some form of effective official investigation” in the case of an alleged human rights violation.¹⁷⁷ In *Silih v. Slovenia*, the ECtHR recalled that such procedural obligations have consistently been implied where they are “necessary to ensure that the rights guaranteed under the [ECHR] are not theoretical or illusory, but practical and effective.”¹⁷⁸ Thus, the ECtHR has found that “the State’s obligation to carry out an effective investigation” is considered an obligation inherent in Article 2, which protects the

¹⁷⁷ *McCann and Others v. The United Kingdom* [GC], Judgment, Eur. Ct. H.R., Application no. 18984/91, ¶ 161 (Sept. 27, 1995); see also *Assenov and Others v. Bulgaria*, Judgment, Eur. Ct. H.R., Application no. 24760/94, ¶ 102 (Oct. 28, 1998).

¹⁷⁸ *Silih v. Slovenia* [GC], Judgment, Eur. Ct. H.R., Application no. 71463/01, ¶ 153 (Apr. 9, 2009).

right to life;¹⁷⁹ Article 3, which prohibits torture or inhuman or degrading treatment;¹⁸⁰ and Article 5, which protects the right to liberty and security.¹⁸¹ In *S.M. v. Croatia*, the ECtHR summarized its case law on the procedural obligation under Articles 2 and 3 of the ECHR, concluding that the procedural requirements in these articles require a State’s authorities to “institut[e] and conduct[] an investigation capable of leading to the establishment of the facts and of identifying and—if appropriate—punishing those responsible.”¹⁸² Likewise, Article 5 requires authorities to “conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.”¹⁸³ The obligation to investigate extends to violations by private individuals, as well as State actors.¹⁸⁴

68. The ECtHR has undertaken a rigorous examination of the elements of an “effective” investigation. In short, such investigation: must be promptly instituted, and carried out by institutions and persons who are independent from those targeted by the investigation; it must pursue all obvious lines of inquiry to establish the circumstances of the case and identify the perpetrators; and it must allow the victim or next of kin to participate.¹⁸⁵

¹⁷⁹ *Id.* ¶ 154; *Nachova and Others v. Bulgaria* [GC], Judgment, Eur. Ct. H.R., Application nos. 43577/98 and 43579/98, ¶ 110 (July 6, 2005).

¹⁸⁰ *Bouyid v. Belgium* [GC], Judgment, Eur. Ct. H.R., Application no. 23380/09, ¶ 116 (Sept. 28, 2015).

¹⁸¹ *Cyprus v. Turkey* [GC], Judgment, Eur. Ct. H.R., Application no. 25781/94, ¶ 147 (May 10, 2001).

¹⁸² *S.M. v. Croatia* [GC], Judgment, Eur. Ct. H.R., Application no. 60561/14, ¶ 313 (June 25, 2020).

¹⁸³ *Cyprus v. Turkey*, *supra* note 181, ¶ 147.

¹⁸⁴ *See M. and Others v. Italy and Bulgaria*, Judgment, Eur. Ct. H.R., Application no. 40020/03, ¶ 100 (July 31, 2012); *Iorga v. Moldova*, Judgment, Eur. Ct. H.R., Application no. 12219/05, ¶ 26 (Mar. 23, 2010).

¹⁸⁵ *See, e.g., X and Others v. Bulgaria* [GC], Judgment, Eur. Ct. H.R., Application no. 22457/16, ¶¶ 185–189 (Feb. 2, 2021); *Armani da Silvia v. The United Kingdom*, [GC], Judgment, Eur. Ct. H.R., Application no. 5878/08, ¶¶ 232–235, 237 (Mar. 30, 2016); *Mocanu and Others v. Romania* [GC], Judgment, Eur. Ct. H.R., Application nos. 10865/09, 45886/07, and 32431/08, ¶¶ 320–325 (Sept. 17, 2014); *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], Judgment, Eur. Ct. H.R., Application no. 39630/09, ¶¶ 183–185 (Dec. 13, 2012); *Al-Skeini and Others v. The United Kingdom* [GC], Judgment, Eur. Ct. H.R., Application no. 55721/07, ¶¶ 166–167 (July 7, 2011); *Tahsin Acar v. Turkey* [GC], Judgment, Eur. Ct. H.R., Application no. 26307/95, ¶¶ 222–225 (Apr. 8, 2004); *Kelly and Others v. The United Kingdom*, Judgment, Eur. Ct. H.R., Application no. 30054/96, ¶¶ 95–98 (May 4, 2001).

69. It also requires consideration of a discriminatory motive. In *M.C. and A.C. v. Romania*, for example, the ECtHR noted that “[w]hen investigating violent incidents, such as ill-treatment, State authorities have a duty to take all reasonable steps to uncover any possible discriminatory motives,” including involving a particular race, gender, or sexual identity.¹⁸⁶ This generally requires States to collect and secure evidence, conduct the investigation with the aim of determining the truth of what happened, and deliver “fully reasoned, impartial and objective decisions” that take account of any facts that may be indicative of discrimination.¹⁸⁷ As the ECtHR has explained, “[t]reating violence and brutality arising from discriminatory attitudes on an equal footing with violence occurring in cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”¹⁸⁸
70. Similarly, the African Commission has explained that Article 1(1) of the African Charter—which obliges States Parties to “recognize” and “give effect to” the rights enshrined in the Charter—“places on the State Parties the positive obligation of . . . punishing the violation” of those rights by private individuals.¹⁸⁹ To meet this obligation, States must “take the appropriate measures to pay compensation for the prejudice suffered by the victims,”¹⁹⁰ including through an effective investigation into every situation involving a violation of rights protected under the Charter.¹⁹¹ In particular, the African Commission has found that the procedural obligation to investigate is crucial to guaranteeing the right to life, which is protected under Article 4 of the African Charter. As the African Commission explained in its General Comment No. 3 on the right to life:

¹⁸⁶ *M.C. and A.C. v. Romania*, Judgment, Eur. Ct. H.R., Application no. 12060/12, ¶ 113 (Apr. 12, 2016); *see also Sabalić v. Croatia*, Judgment, Eur. Ct. H.R., Application no. 50231/13, ¶ 94 (Jan. 14, 2021).

¹⁸⁷ *Identoba and Others v. Georgia*, Judgment, Eur. Ct. H.R., Application no. 73235/12, ¶ 67 (May 12, 2015).

¹⁸⁸ *M.C. and A.C. v. Romania*, *supra* note 186, ¶ 113.

¹⁸⁹ *Association of Victims of Post Electoral Violence and Interights v. Cameroon*, Communication 272/2003, Afr. Comm’n H.P.R., ¶ 89 (Nov. 2009).

¹⁹⁰ *Id.*

¹⁹¹ *See Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/2002, Afr. Comm’n H.P.R., ¶¶ 144–146 (May 2006) (referring to IACtHR jurisprudence).

The failure of the State transparently to take all necessary measures to investigate suspicious deaths and all killings by State agents and to identify and hold accountable individuals or groups responsible for violations of the right to life constitutes in itself a violation by the State of that right. This is even more the case where there is tolerance of a culture of impunity. All investigations must be prompt, impartial, thorough and transparent.¹⁹²

71. As the African Commission noted in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, a State’s routine failure to “‘effectively ensure’ that [] incidents of violence are actually investigated and punished . . . sends a message that such attacks are justified.”¹⁹³ To avoid such an environment of impunity, States must “‘demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses.’”¹⁹⁴

2. *The Procedural Obligation as an Independent Violation of the ECHR*

72. Under the ECtHR framework, a States’ failure to comply with the procedural obligation to investigate a human rights violation may *itself* give rise to an independent violation of the ECHR. In *Šilih v. Slovenia*, the ECtHR recalled, in the context of the right to life, that it had “‘consistently examined the question of procedural obligations under Article 2 separately from the question of compliance with the substantive obligation and, where appropriate, has found a separate violation of Article 2 on that account.’”¹⁹⁵ It concluded that “‘the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty,’”¹⁹⁶ and found a violation of Article 2 “‘in its procedural aspect’” based on the State’s failure to investigate the death of the applicants’ son with the appropriate level of due diligence and to hold those responsible to account through judicial proceedings.¹⁹⁷ Notably, the ECtHR—like the IACtHR—has recognized

¹⁹² Afr. Comm’n H.P.R., *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Art. 4)*, ¶ 15 (Nov. 18, 2015).

¹⁹³ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, *supra* note 191, ¶¶ 159–160.

¹⁹⁴ *Id.*

¹⁹⁵ *Šilih v. Slovenia*, *supra* note 178, ¶ 158.

¹⁹⁶ *Id.* at 159.

¹⁹⁷ *Id.* at 211.

that children are “especially vulnerable” to human rights violations,¹⁹⁸ and has also found a violation of the procedural limb of Article 2 where a State failed to conduct an effective investigation into the death of a child¹⁹⁹.

73. The ECtHR’s assessment of the procedural obligation to investigate as independent from any substantive obligation equally applies in the case of the Article 3 prohibition of torture or inhuman or degrading treatment. In *X and Others v. Bulgaria*, the ECtHR determined that there had been a violation of the procedural limb of Article 3 based on investigating authorities’ failure to “make use . . . of the available investigation and international cooperation mechanisms,” to “take all reasonable measures to shed light on the facts of the present case,” or to “undertake a full and careful analysis of the evidence before them.”²⁰⁰
74. Similarly, the ECtHR has independently considered the procedural aspect of the Article 5 right to liberty and security. In *Cyprus v. Turkey*, it addressed allegations of an unlawful detention “from the angle of the procedural requirements of Article 5.”²⁰¹ Thus, while the Court found that “it has *not* been established that during the period under consideration any of the . . . missing persons were *actually* being detained by the . . . authorities,”²⁰² it nevertheless determined that there had been a continuing violation of Article 5 based on the State Party’s failure to conduct an effective investigation into the whereabouts of missing individuals *believed* to be detained.²⁰³

¹⁹⁸ *Derenik Mkrтчhyan and Gayane Mkrтчhyan v. Armenia*, Judgment, Eur. Ct. H.R., Application no. 69736/12, ¶ 49 (Nov. 30, 2021).

¹⁹⁹ *Id.* ¶¶ 67–68.

²⁰⁰ *X and Others v. Bulgaria*, *supra* note 185, ¶ 228.

²⁰¹ *Cyprus v. Turkey*, *supra* note 181, ¶ 149.

²⁰² *Id.* ¶ 151 (emphasis added).

²⁰³ *Id.* ¶ 150.

VI. JAMAICA’S FAILURE TO EFFECTIVELY INVESTIGATE ANTI-LGBT DISCRIMINATION AND VIOLENCE, AND IN PARTICULAR THE MURDER OF DWAYNE JONES, VIOLATED JAMAICA’S OBLIGATIONS UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS AND THE AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN

75. Jamaica’s failure to investigate effectively incidents of anti-LGBT discrimination and violence, and in particular its failure to investigate effectively the murder of Dwayne Jones, is contrary to the established jurisprudence of the IACtHR, the Commission, and other human rights bodies. As explained in further detail in Part IV.C above, Jamaican police consistently fail to take any action in response to reports of anti-LGBT discrimination and violence, and even engage in such conduct directly. By allowing crimes against LGBT individuals to go unpunished and partaking in said anti-LGBT discrimination and violence, Jamaican authorities have contributed to a culture of impunity and failed to ensure the protection of fundamental human rights of LGBT Jamaicans.
76. In light of these facts and the serious negative impact to LGBT Jamaicans, this Commission should find that Jamaica violated the substantive obligation to provide an effective remedy provided in Articles 8(1) and 25 of the Convention. In addition, HRW urges this Commission to clarify that Articles 4(1), 5(1), and 7(1), read in conjunction with Articles 1(1), 8(1), and 25, impose a procedural obligation to investigate incidents of anti-LGBT discrimination, which includes the obligation to consider a possible discriminatory motive to these crimes and is especially important in cases involving children. Finally, HRW urges this Commission to harmonize its jurisprudence with that of the ECtHR and African Commission by holding that Jamaica’s failure to effectively investigate violations of Articles 4(1), 5(1), and 7(1) is *itself* sufficient to find a violation of those rights.

A. Jamaica’s Laws and Conduct Violated the Right to a Fair Trial (Article 8(1) of the Convention) and the Right to Judicial Protection (Article 25 of the Convention)

77. As detailed in Part V.A.1 above, the Court and Commission have long held that Articles 8(1) and 25 together require States Parties to provide an effective remedy to victims of human rights violations, which in turn requires that States effectively investigate such violations. Jamaica has failed to comply with this obligation by failing to take sufficient steps to ensure that police effectively investigate reports of anti-LGBT discrimination and

violence. Indeed, as detailed above, Jamaican police often fail to take *any* action to address reported anti-LGBT crimes, and even participate in discriminatory or violent conduct. This has created an atmosphere of impunity for such crimes, and deters LGBT Jamaicans from reporting such crimes to the police due to fear or the expectation that police will not act. Jamaica’s systemic failures to provide effective remedies to the victims of anti-LGBT discrimination and violence are contrary to the American Convention and constitute violations of Articles 8(1) and 25.

78. Further, Jamaica’s specific failure to effectively investigate the murder of transgender teenager Dwayne Jones violated Articles 8(1) and 25. Indeed, as explained in Petitioner’s brief, Dwayne Jones was brutally attacked and murdered by a mob on July 22, 2013.²⁰⁴ To date—nearly ten years later—*no* arrests have been made in the case, despite the fact that officers interviewed witnesses to the murder and that under Jamaican law, any participation in a mob attack would be sufficient to impose criminal liability on the participant.²⁰⁵ Further, the investigation into Dwayne Jones’ murder was ineffective because it was not prompt nor thorough; did not allow an opportunity for interested parties to give evidence; failed to provide protection from intimidation and violence for witnesses; and failed to produce a reasoned, impartial report on what happened.²⁰⁶ Neither is there any indication that Jamaican police considered Dwayne Jones’ trans identity as a discriminatory motive of the crime, despite evidence that the attack was accompanied by anti-LGBT slurs and epithets. Jamaica has thus, in the words of the ECtHR, “turn[ed] a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”²⁰⁷

²⁰⁴ Petitioner’s Consolidated Admissibility and Merits Submission in the Case of Dwayne Jones v. Jamaica, Case No. 15.080, ¶ 38 (Feb. 27, 2023).

²⁰⁵ *Id.* ¶ 39.

²⁰⁶ *Id.* ¶ 42.

²⁰⁷ *Sabalić v. Croatia*, *supra* note 186, ¶ 94.

B. Jamaica’s Laws and Conduct Violated the Rights to Life (Article 4(1), Humane Treatment (Article 5(1), and Personal Liberty (Article 7(1)), in Conjunction with the Obligation to Respect Rights (Article 1(1))

79. Jamaica has additionally breached its procedural obligations to guarantee the rights to life, humane treatment, and personal liberty by not effectively investigating violations of those rights.
80. As explained in Part IV above, LGBT Jamaicans are subjected to constant violence and threats of violence, including murder. Significant portions of the LGBT population report feeling “unsafe” in Jamaica, and many have chosen to flee the country altogether rather than living under constant threat. As noted above, this includes 100 percent of trans women who responded to a 2019 survey by J-FLAG, all of whom wanted to leave Jamaica because of their sexual orientation or gender identity.²⁰⁸ Jamaica’s failure to investigate reported deaths, killings, and violence against LGBT Jamaicans contributes to and maintains a hostile, anti-LGBT atmosphere in Jamaica, in which LGBT Jamaicans are not even safe at home. It also violates the procedural obligations inherent in Article 4 on the right to life, Article 5 on humane treatment, and Article 7 on personal liberty, read in conjunction with Article 1(1) of the American Convention.
81. In particular, Jamaica’s failure to take steps sufficient to determine the truth of what happened to 16-year-old Dwayne Jones—including the possible discriminatory motives for the mob attack—or to identify and punish *any* of the perpetrators, violates the procedural obligations to effectively investigate violations of Articles 4(1), 5(1), and 7(1), as well as Jamaica’s obligations under Article 19 to ensure the rights of children.
82. As noted in Parts V.A.2 to 4 above, this Commission and the IACtHR have already recognized that the procedural obligation to effectively investigate is crucial to ensure the rights to life, humane treatment, and personal liberty. HRW urges the Commission to hold that Jamaica’s failure to comply with this obligation is itself sufficient to find a breach of Articles 1(1), 4(1), 5(1), and 7(1) of the Convention. This finding would be consistent with the jurisprudence of the European Court of Human Rights and the African Commission. It

²⁰⁸ 2019 J-FLAG Community Experience Survey, *supra* note 39, at 49.

would also confirm the importance of the duty to investigate to ensuring the full enjoyment of fundamental human rights and freedoms set out in the American Convention.

VII. CONCLUSION

83. As the IACtHR and Commission—along with other human rights bodies such as the ECtHR and African Commission—have long recognized, the obligation to investigate violations of human rights is a critical element of guaranteeing the full enjoyment of those rights. Jamaica’s procedural obligation to investigate deaths and incidents of violence against LGBT Jamaicans is necessary to show that such crimes will not be tolerated, to address widespread and ongoing anti-LGBT discrimination in Jamaica, and to guarantee LGBT Jamaicans’ rights to life, humane treatment, personal liberty, a fair trial, and judicial protection. HRW respectfully asks this Commission to find that Jamaica’s failure to investigate anti-LGBT violence based on sexual orientation or gender identity, including the murder of 16-year-old Dwayne Jones, violated the substantive obligation to provide an effective remedy provided in Articles 8(1) and 25 of the American Convention. It also requests that the Commission clarify that Articles 4(1), 5(1), and 7(1), read in conjunction with Articles 1(1), 8(1), and 25, impose a procedural obligation to investigate incidents of anti-LGBT discrimination, which includes the obligation to consider a possible discriminatory motive and is especially important in cases involving children, and that Jamaica’s failure to comply with this obligation itself constitutes a violation of these articles.

Respectfully submitted,



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