INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
Maurice Tomlinson v. Jamaica
Petition No. P-1628-18

OBSERVATIONS OF JAMAICA ON ADMISSIBILITY

I. INTRODUCTION

1. The State of Jamaica ("State" or "Jamaica") is honoured to have the opportunity to offer its observations on the petition filed on behalf of Maurice Tomlinson ("Petition") before the Honourable Inter-American Commission on Human Rights ("Commission").

2. The Petition alleges that Jamaica, due to its non-recognition of same-sex marriage, has violated: Article 1 (right to freedom from discrimination), Article 5 (right to respect for physical, mental and moral integrity), Article 7 (right to liberty), Article 8 (right to a hearing for determination of rights), Article 11 (right to privacy), Article 13 (right to freedom of expression), Article 17 (right to family life), Article 24 (right to equal protection before the law), and Article 25 (right to judicial protection) of the American Convention on Human Rights ("American Convention").[1]

3. However, the State submits that the American Convention does not recognize a right to same-sex marriage. Accordingly, the Petition is inadmissible as the Commission lacks competence *ratione materiae* and/or in the alternative, the Petition is inadmissible as it is manifestly groundless.

II. THE AMERICAN CONVENTION DOES NOT RECOGNIZE A RIGHT TO SAME-SEX MARRIAGE

4. The Commission lacks competence *ratione materiae vis-à-vis* any petition or complaint that alleges the violation of rights which the American Convention does

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[1] Petition, paras. 80, 195.

not recognize or protect.[2] This precludes the Commission from making any findings concerning violations of those alleged rights.

5. The State submits that the only right to marry that is recognized in the American Convention is the right of a man to marry a woman and *vice versa*. Thus, any alleged right to same-sex marriage or like relationships is outside the scope of both the American Convention and the Commission's contentious jurisdiction.

6. Further and in the alternative, where a petition does not state facts which tend to show a violation of a right guaranteed by the American Convention or where the allegations in a petition are manifestly groundless, the petition is inadmissible under Articles 47(b) and 47(c) of the American Convention and Article 34 of the 2013 Rules of Procedure of the Commission ("Rules"). Either ground can be satisfied by concluding that a violation of a human right is not evident or apparent, even if the facts alleged in a petition are assumed to be true.[3] The State submits that as the American Convention does not recognize same-sex marriage, this entails that, even assuming the material facts alleged in the Petition to be true, they do not tend to establish a violation of any of the rights protected by the American Convention.

A. <u>Jamaica's Definition of Marriage</u>

7. The State submits that the definition of marriage in the Constitution of Jamaica gives effect to the right to marry as established in Article 17(2) of the American Convention, which recognizes the right of men to marry women and *vice versa*.

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[2] *See Romeel Eduardo Diaz Luna v. Peru*, Case 430/00, Inter-Am. C.H.R. Report No. 85/05, October 24, 2005, para. 21: *"The Commission has ratione materiae competence as the petition alleges violations of human rights protected by the American Convention"; Case of Las Palmeras v Colombia,* Inter-American Court of Human Rights, Judgment of February 4, 2000 (Preliminary Objections), para. 34: *"[…] Although the Inter-American Commission has broad faculties as an organ for the promotion and protection of human rights, it can clearly be inferred from the American Convention that the procedure initiated in contentious cases before the Commission, which culminates in an application before the Court, should refer specifically to rights protected by that Convention".*

[3] *Members of the Trade Union of Workers of the National Federation of Coffee Growers of Columbia v Colombia,* Petition 374-05, Inter-Am. C.H.R., Report No. 15/15, 24 March 2015, para. 51.

8. Section 18 of the Constitution of Jamaica, as amended by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, states that:

> *18.-(1) Nothing contained in or done under any law in so far as it restricts (a) marriage; or (b) any other relationship in respect of which any rights and obligations similar to those pertaining to marriage are conferred upon persons as if they were husband and wife, to one man and one woman shall be regarded as being inconsistent with or in contravention of the provisions of this Chapter.*
>
> *(2) No form of marriage or other relationship referred to in subsection (1), other than the voluntary union of one man and one woman may be contracted or legally recognized in Jamaica.*

9. Thus, the Constitution of Jamaica, in barring the recognition of same-sex marriage or like relationships, restricts the definition of marriage to the right to marry as it is recognized in the American Convention. Therefore, there is no violation of the American Convention, and the Petition alleging otherwise is inadmissible.

10. However, the State notes that the Commission has declared that:

> *[…] in view of the pro personae principle and the progressive development of international human rights standards on the subject, it is possible to affirm the existence of an international obligation to recognize unions of persons of diverse sexual orientation or gender identity […].*[4]

11. The Commission, for reasons to follow, is invited to depart from this view in so far as it suggests that the American Convention recognizes a right to same-sex marriage or like unions or that there is an international obligation to recognize same.

B. Approach to Treaty Interpretation

12. It is submitted that to determine whether the American Convention recognizes a right to same-sex marriage, it is necessary to ensure that the American Convention

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[4] *Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas*, Inter-Am. C.H.R. Report, 7 December 2018, OEA/Ser.L/V/II.170, para. 223.

is interpreted in accordance with the rules of treaty interpretation as laid down in Article 31 of the Vienna Convention of the Law of Treaties ("VCLT").[5]

13. The general rule of interpretation established by Article 31 of the VCLT is summarized in Article 31(1) and states that: "*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".

14. Further, Article 31(3) of the VCLT, states that:

> *[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation and (c) any relevant rules of international law applicable in the relations between the parties.*

15. The Inter-American Court of Human Rights ("IACtHR") has promoted the principle of *pro personae* or *pro homine.*[6] This principle refers to the maxim that the interpretation most favourable to an individual should be preferred or the interpretation which limits the protection that the rights recognized in the American Convention provide, should not be preferred.[7] Furthermore, the IACtHR has utilized an "evolutionary" interpretation, applying changing circumstances and attitudes to the American Convention on the ground that it is a living instrument.[8] However, the IACtHR itself concluded that:

> *However, the application of [the pro homine] principle cannot displace the use of the other methods of interpretation, nor can it ignore the results achieved as a result of them, since all of them must be understood as a whole. Otherwise, the*

[5] *Case of Artavia Murillo et al. ("in vitro fertilization") v. Costa Rica,* Inter-American Court of Human Rights, Judgment of November 28, 2012, paras. 173, 191, 245; *The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22.7, and 22.8 in relation to Article 1 (1) of the American Convention on Human Rights),* Inter-American Court of Human Rights, Advisory Opinion OC-25/18, May 30, 2018 ("*Advisory Opinion on Asylum*"), paras. 134-137, unofficial English translation available at: https://www.refworld.org/cases,IACRTHR,5c87ec454.html.
[6] *Advisory Opinion on Asylum,* para. 136.
[7] *Advisory Opinion on Asylum,* paras. 136, 149.
[8] *Advisory Opinion on Asylum,* para. 137.

> *unrestricted application of the pro homine principle would lead to the delegitimization of the interpreter's actions.*[9]

16. Thus, the principle of *pro personae* and an "evolutionary" interpretation were never intended to replace nor to act as a substitute for the rules of treaty interpretation laid down in Article 31 of the VCLT.[10] Instead, it is submitted that the rules of interpretation codified in Article 31 of the VCLT determines whether or how these methods of interpretation are to be applied. Thus, the observations to follow are structured around the rules contained in Article 31 of the VCLT.

1. **The ordinary meaning of the American Convention precludes a right to same-sex marriage**

17. It is submitted the issue of whether the purported right to same-sex marriage exists in the American Convention, ultimately turns on the interpretation of Article 17(2), the only place where the right to marry is recognized in the American Convention.

18. It is submitted that there must be a minimum core to the right to marry *i.e.*, the American Convention cannot be interpreted as obliging States to recognize any form of marriage. Instead, the American Convention identifies the base from which States may operate. Thus, a State may recognize any form of marriage it deems appropriate, but it cannot be found to be in breach of the American Convention unless it fails to give, what the American Convention identifies, as the minimum core of the right to marry.

19. Considering that the only provision addressing the right to marry specifically refers to a heterosexual concept of marriage, the Commission is invited to find that the only purpose that the reference to a heterosexual concept of marriage at Article 17(2) serves, is to identify the minimum core of the right to marry. That is, for the purposes of the American Convention, a State is not precluded from

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[9] *Advisory Opinion on Asylum*, para. 149.
[10] *See Advisory Opinion on Asylum*, paras. 148-149.

recognizing any other form of marriage, but it is obliged to recognize, at minimum, marriage as between a man and a woman.

i. Article 17(2) identifies the minimum core of the right to marry

20. The fact that the ordinary meaning of words used in Article 17(2) refers to a heterosexual concept of marriage is acknowledged by the European Court of Human Rights ("ECtHR)[11] the Human Rights Committee ("HRC"),[12] and the IACtHR.[13] Further, all courts have on this basis concluded that there is no right to same-sex marriage,[14] with the exception of the IACtHR.[15] In the ***Case of Schalk and Kopf v Austria***, the ECtHR noted that:

> *54. Article 12 grants the right to marry to "men and women". […] Furthermore, Article 12 grants the right to found a family.*
>
> *55. The applicants argued that the wording did not necessarily imply that a man could only marry a woman and vice versa. The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention*

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[11] *Case of Schalk and Kopf v Austria*, App. No. 30141/04, ECtHR, 24 June 2010 ("*Schalk and Kopf v Austria*"), paras. 54-63 (This case addressed Article 12 of the European Convention on Human Rights which provides that *"[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right*"); *Sheffield and Horsham v United Kingdom* (1998) 5 BHRC 83, paras. 66-70; *Case of Cossey v The United Kingdom* [1991] 2 FLR 492, paras. 43-48; *The Case of Rees v The United Kingdom,* App No. 9532/81, ECtHR, 17 October 1986, paras. 48-51.

[12] *Ms. Juliet Joslin et al v New Zealand*, Communication No. 902/1999, Human Rights Committee, U.N. Doc. A/57/40 at 214 (2002), paras. 8.1-8.3 (This case addressed Article 23(2) of the International Covenant on Civil and Political Rights ("ICCPR") which provides that "[*t]he right of men and women of marriageable age to marry and to found a family shall be recognized*").

[13] *Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights),* Inter-American Court of Human Rights, Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, ("*Advisory Opinion on Gender Identity*"), para. 182.

[14] *See supra*, fns. 11-12.

[15] *Advisory Opinion on Gender Identity*, para. 228.

was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex. […]

63. In conclusion, the Court finds that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple such as the applicants access to marriage.

64. Consequently, there has been no violation of Article 12 of the Convention.[16]

21. It is submitted that any interpretation that does not treat Article 17(2) as identifying the minimum core of the right to marry, renders the reference to a heterosexual concept of the right to marry as meaningless. The Petition itself does not mention Article 17(2) of the American Convention and thus has not offered an alternative interpretation.[17] However, the *Advisory Opinion on Gender Identity*, upon which the Petition relies, reasoned that:

    […] regarding Article 17(2) of the Convention, the Court considers that although it is true that, taken literally, it recognizes the "right of men and women of marriageable age to marry and to raise a family," this wording does not propose a restrictive definition of how marriage should be understood or how a family should be based. In the opinion of this Court, Article 17(2) is merely establishing, expressly, the treaty-based protection of a specific model of marriage. In the Court's opinion, this wording does not necessarily mean either that this is the only form of family protected by the American Convention.[18]

22. It is submitted that the proposition that "*Article 17(2) is merely establishing, expressly, the treaty-based protection of a specific model of marriage*" clearly and explicitly shows that the minimum core of the right to marry is that of a man to marry a woman and *vice versa*. This is as the only purpose of giving specific protection to a given model of marriage, is to highlight that model as the minimum core of the right to marry. If Article 17(2) identifies the concept of marriage that the American Convention protects, then there is no foundation for the view that a State violates the American Convention by failing to recognize same-sex marriage.

23. Further, the only consequence of Article 17(2) not imposing a restrictive definition of marriage is that a State is free to go beyond what the American Convention provides in defining marriage. It, however, does not entail that the American

[16] *Schalk and Kopf v Austria*, paras. 54-63.
[17] *See* Petition, paras. 171-178 (The Petition only examines Article 17(1) and then proceeds to examine Articles 8 and 25 of the American Convention).
[18] *Advisory Opinion on Gender Identity*, para. 182.

Convention recognizes same-sex marriage as a human right, which is what is required for the Petition to be admissible.

24. The IACtHR also relied on a decision of the International Court of Justice which noted that where parties use a generic word, it is presumed they have the intention that the meaning of the word would evolve over time.[19] Thus, it is noteworthy that Article 17(2) does not use only a broad or generic term such as "marriage", instead it identifies the "right to marry", as being for men and women (or a man and a woman, in the singular). It is submitted the fact that the American Convention did not merely use the generic term of "marriage" shows the absence of any expectation that any evolving concept of marriage would automatically be incorporated into the American Convention.

25. Thus, Article 17(2) establishes the minimum core of the right to marry or the base from which States may operate from, *i.e.*, the right of a man to marry a woman and *vice versa*. Accordingly, the American Convention does not recognize a right to same-sex marriage, *i.e.*, there is no obligation on States to recognize same-sex marriage.

ii. The principle of non-discrimination cannot create a right to same-sex marriage

26. The State notes that an important component of Article 17(2), that forms part of the context and the object and purpose of the American Convention, is the principle of non-discrimination. The State also notes that the IACtHR has declared that:

> *The establishment of a differentiated treatment between heterosexual couples and couples of the same sex regarding the way in which they can form a family – either by a de facto marital union or a civil marriage – does not pass the strict test of equality (supra para. 81) because, in the Court's opinion, there is no purpose acceptable under the Convention for which this distinction could be considered necessary or proportionate.*[20]

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[19] *Advisory Opinion on Gender Identity*, para. 188, referring to *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, paras. 64, 66.
[20] *Advisory Opinion on Gender Identity*, para. 220.

Thus, it is important to consider this principle to appreciate the full meaning of Article 17(2) of the American Convention.

27. The principle of non-discrimination, which the IACtHR defines as "*any exclusion, restriction or preference that it is not objective or reasonable and which adversely affects human rights"*,[21] regulates the manner in which States protect recognized human rights.[22] That is, States must ensure the protection of all human rights in a non-discriminatory manner.[23]

28. Therefore, there is no discrimination, without first showing that there is an adverse impact on a recognized human right. Further, the principle of non-discrimination is not an independent source of rights and thus cannot be used to justify the existence of a right, which is otherwise non-existent or expand the scope of a right, beyond its intended scope of application.[24] That is, the principle of non-discrimination can only operate within the established scope of the rights and freedoms recognized in the American Convention.[25]

29. Accordingly, the principle of non-discrimination applied to the right to marry, simply requires that the minimum core of the right must be applied in a non-discriminatory manner. In this regard, it is important to note that Article 17(2) only requires that conditions imposed by a State on the right of men and women to marry comply with the principle of non-discrimination.

30. It is submitted that any distinction between persons due to a State failing to recognize same-sex marriage, would be consistent with a similar distinction made by the American Convention when it established the minimum core of the right to marry as being for men and women (or a man and a woman), *i.e.*, the right of a man to marry a woman and *vice versa*. Further, as discrimination requires an adverse impact on a human right, the absence of a right to same-sex marriage

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[21] *Juridical Condition and Rights of Undocumented Migrants*, Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of September 17, 2003, Requested by the United Mexican States, ("*Advisory Opinion on Undocumented Migrants*"), para. 84.
[22] *Advisory Opinion on Undocumented Migrants*, para. 96.
[23] *Advisory Opinion on Undocumented Migrants*, para. 96.
[24] *Case of Eweida and Others v The United Kingdom*, App Nos. 48420/10, 59842/10, 36516/10, ECtHR, 15 January 2013, ("*Eweida et al v UK*"), para. 85.
[25] *Eweida et al v UK*, para. 85.

entails that the failure to recognize such a concept of marriage is not a form of discrimination.

31. Thus, it is submitted that the proper interpretation of Article 17(2), considering the principle of non-discrimination, is that the minimum core of the right to marry, which is the right of a man to marry a woman or *vice versa*, should be applied in a non-discriminatory fashion. The principle of non-discrimination cannot create a right to same-sex marriage as it cannot alter the fact that Article 17(2) manifestly establishes the minimum core of the right to marry as being for men and women (or a man and a woman) and not any two persons.

2. The Context, Object and Purpose of the American Convention bars the existence of any right to same-sex marriage

i. The Concept of "Family"

32. The context of Article 17(2) also includes Article 17(1), which states "*the family is the natural and fundamental group unit of society and is entitled to protection by society and the state*".

33. The IACtHR and the ECtHR noted the use of the broad or generic word "family" and concluded that same-sex couples are included within it using an evolutionary interpretation.[26] The State disagrees with this conclusion for the reasons to follow. However, notably, the ECtHR and the HRC has nonetheless affirmed that there is no right to same-sex marriage.[27] The State submits that the clear and consistent jurisprudence with respect to the right to marry, except that of the IACtHR, is sound.

34. It is important to recall that the concept of "family" is referred to in Article 17(2) when it states that "*[t]he right of men and women of marriageable age to marry* ***and to raise a family*** *shall be recognized".* Thus, it is submitted that the meaning of the concept of "family" in the American Convention must be ascertained firstly in reference to the minimum core of the right to marry *i.e.*, with its heterosexual nature. Accordingly, while the concept of "family" may extend to relationships not

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[26] *Advisory Opinion on Gender Identity*, paras 189-193; *Schalk and Kopf v Austria*, para. 95.
[27] *See supra,* para. 20 & fns. 11-12.

based on marriage, it cannot act as the foundation for a new right to same-sex marriage.

35. Furthermore, the principle of *lex specialis* requires that specific clear language should prevail over general language.[28] The clear intent was to address the right to marry in Article 17(2) and nowhere else. Thus, preference should be given to ordinary meaning established from Article 17(2), rather than giving reliance to the broad term of "family".

36. In any event, the IACtHR acknowledged that there was no contemplation of same-sex unions being included in the concept of "family" at the time of the adoption of the American Convention.[29] Thus, it is submitted that only a subsequent international development, of at least of a regional customary norm, can justify interpreting the word "family" as necessarily including same-sex couples. It is notable that the ECtHR relied on the evolution of State practice in Europe as the basis for finding that same-sex couples were entitled to protection of their "family life".[30] It is submitted a similar methodology must be employed in this case.

37. The Commission, in 2018, identified only eight (8) States of the thirty-five (35) States of the Organization of American States ("OAS"), which recognize same-sex marriage.[31] Therefore, too few States in the OAS recognize same-sex marriage or comparable relationships for same-sex couples in their concept of a family, to support a conclusion that a regional norm has evolved in this way.

38. Considering the foregoing, the concept of "family" fails to provide a compelling basis for inferring the existence a right to same-sex marriage or for departing from the ordinary meaning of Article 17(2) of the American Convention.

ii. The drafters of the American Convention intended to codify the right to marry as it existed in custom

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[28] International Law Commission, *Fragmentation of International law: Difficulties Arising from the Diversification and Expansion of International Law-Report of the Study Group of the International Law Commission*, UN Doc A/CN.4/L.682 (13 April 2006), para. 56.
[29] *Advisory Opinion on Gender Identity*, para. 186.
[30] *Schalk and Kopf v Austria*, paras. 93-94.
[31] *See Advances and Challenges towards the Recognition of the Rights of LGBTI Persons in the Americas*, Inter-Am. C.H.R. Report, 7 December 2018, OEA/Ser.L/V/II.170, para. 224.

39. It is submitted that the context includes the rules of international law that existed at the time of the drafting of a treaty.[32] It is submitted the ordinary meaning of Article 17(2) is confirmed when the state of custom at the time of the adoption of the American Convention is examined. Therefore, the American Convention cannot be interpreted as automatically incorporating any change in the right to marry, as it exists in custom.

40. The fact that the drafters intended to recognize rights as they existed in custom, including the right to marry, may be supported with reference to the preamble. It states,

> *Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.*

41. For a rule of custom to emerge, there must be widespread, consistent State Practice indicating an acceptance of a legal obligation to act in a particular manner.[33] In 1969, when the American Convention was adopted, no State recognized same-sex marriage or otherwise gave legal recognition to same-sex couples. Further, while the 1948 American Declaration of the Rights and Duties of Man, which the IACtHR references,[34] does not refer to "marriage", the 1948 Universal Declaration of Human Rights and the 1966 ICCPR refer to marriage as between "men" and "women". Thus, when the American Convention was adopted, and at the time of Jamaica's ratification of the American Convention in 1978, "same-sex marriage" would not have been a possibility, as marriage then would have been defined

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[32] *See Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, para. 63: "*[...] It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion*"; *Schalk and Kopf v Austria*, para. 55.
[33] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion, I.C.J., February 25, 2019, para. 149.
[34] *See e.g., Advisory Opinion on Gender Identity*, para. 184.

exclusively for heterosexual relationships. It was approximately three decades later when a few states began to recognize same-sex marriage.[35]

42. Considering the state of custom at the time of the adoption of the American Convention, it is submitted that the reference to the right of men and women to marry was a deliberate measure to reflect the heterosexual concept of the right to marry, as it existed in custom. As this was the intent of the drafters of the American Convention, attempts to infer the right to same-sex marriage should not succeed, in the absence of any relevant amendment to the American Convention or any subsequent agreement between the State Parties establishing such a right.

3. **There has been no subsequent agreement between the Parties establishing a right to same sex marriage**

43. Article 31(a) and (b) of the VCLT requires the unanimous agreement of State Parties with respect to interpreting a treaty in a given fashion.[36] Thus, it is submitted that consistent with the non-recognition of same-sex unions by State parties to the American Convention, such as Jamaica, Barbados, Dominica and Grenada, there has been no State party agreement establishing that the American Convention should be interpreted as requiring that State Parties recognise same-sex unions. As noted by Judge Eduardo Vio Grossi in his separate opinion in 2017 "*even today, there is no treaty or other instrument that is binding for the States of the Americas that refers to marriage between persons of the same sex*".[37]

44. Furthermore, the practice of States, such as Jamaica, which bars the recognition of same-sex marriage in its Constitution, also precludes the existence of a subsequent practice of State parties establishing an agreement between themselves that the American Convention should be interpreted as imposing an obligation to recognise same-sex unions. It is to be noted that Jamaica's decision

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[35] Notably, the Netherlands recognized same-sex marriage in 2000. The State notes that Denmark recognised same sex unions (not same-sex marriage) in 1989 pursuant to the Registered Partnership Act and Norway recognised same sex partnership (not same-sex marriage) through Law No. 40 of 30 April 1993 on Registered Partnerships for Homosexual Couples.

[36] International Law Commission, *Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, Conclusion 4: Definition of subsequent agreement and practice, paras. 4, 16, available at: http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/1_11_2018.pdf&lang=EF.

[37] *Advisory Opinion on Gender Identity*, Separate Opinion of Judge Eduardo Vio Grossi, para. 89.

to bar the recognition of same-sex marriage in its supreme law – the Constitution – cements Jamaica's intention to adhere to its practice of not recognizing same-sex marriage.

4. Existing Custom does not recognize a right to same-sex marriage

45. Article 31(3)(c) of the VCLT provides that together with context *"any relevant rules of international law applicable in relations between the parties"* should also be considered in the interpretation of a treaty. Thus, existing rules of custom binding on Parties to the American Convention are relevant. However, the State reiterates that even if custom develops to recognize a right to same-sex marriage, the American Convention codifies the right to marry as being for men and women. Thus, the Parties to the American Convention would need to agree to have the American Convention recognize a right to same-sex marriage.

46. In any event, the State notes that existing custom does not recognize a right to same-sex marriage. Thus, the ordinary meaning of the American Convention is bolstered, not displaced, by existing State practice and *opinio juris*.

47. One hundred and forty-nine (149) States throughout the world, out of one hundred and ninety-three (193) States, do not recognise same-sex marriage or like relationships.[38] The State therefore submits that the practice of these States constitutes overwhelming evidence of the absence of any obligation to recognize same-sex marriage or like relationships. Specific to the Inter-American region, Judge Eduardo Vio Grossi, in his separate opinion of 2017 acknowledged that at the time *"only six of the 23 State Parties to the Convention and eight of the 34 Member States of the OAS have laws on marriage between same sex couples."*[39] Thus, there is no rule in custom applicable to Jamaica in its relations to other

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[38] Only thirty States (30) recognize same-sex marriage, mostly only within recent years. These include: Australia (2017), Austria (2017), Belgium (2003), Brazil (2013), Canada (Civil Marriage Act 2005), Columbia (2016), Costa Rica (Supreme Court decision of 2018 mandates Parliament to legalise same sex marriage by May 26, 2020), Denmark (2012), Ecuador (2019), Finland (2017), France (2003), Germany (2017), Iceland (2010), Luxembourg (2015), Malta (Marriage Act and other Laws (Amendment) Act 2017), New Zealand (2013), Norway (2009), Portugal (2010), South Africa (*Minister of Home Affairs v Fouire* [2006]), Spain (2005), Sweden (2009), Taiwan (2019), United Kingdom (January 2020), United States (*Obergefell et al v Hodges, director, Ohio Department of Health et al* [2015]), Netherlands (2001), Uruguay (2013). Only 14 States recognize civil unions only.

[39] *Advisory Opinion on Gender Identity*, Separate Opinion of Judge Eduardo Vio Grossi, para. 89.

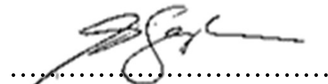
Parties to the American Convention, obliging Jamaica to recognize same-sex marriage.

5. <u>Conclusion on the Interpretation of the American Convention</u>

48. Therefore, it would be manifestly unreasonable to interpret the American Convention as recognizing a right to same-sex marriage or to have a similar relationship recognized in law. This is as the aim of treaty interpretation is to reflect, in good faith, the actual intent of the parties to a convention. Furthermore, to interpret the American Convention as recognizing such a right, undermines legal certainty, as States which have always adhered to the concept of marriage, expressly recognized by the American Convention, would suddenly be found to be in breach of the American Convention, without any material change to its obligations.

III. CONCLUSION

49. Considering the foregoing, the Commission is invited to refuse the admission of the Petition on the ground that the American Convention does not recognize a right to same-sex marriage or like relationships.



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for **The Attorney-General of Jamaica**

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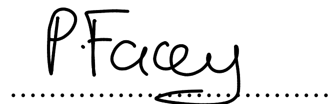

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