

OEA/Ser.L/V/II.
Doc. 300
12 October 2020
Original: English

REPORT No. 283/20
PETITION 1078- 14
REPORT ON ADMISSIBILITY

WINSTON MALCOLM, SENIOR AND WINSTON MALCOLM, JUNIOR AND FAMILY
JAMAICA

Approved electronically by the Commission on October 12, 2020.

Cite as: IACHR, Report No. 283/20, Petition 1078-14. Admissibility. Winston Malcolm, Senior and Winston Malcolm, Junior and family. Jamaica. October 12, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	International Human Rights Clinic of the Loyola Law School and Jamaicans for Justice
Alleged victim:	Winston Malcom, Senior, Winston Malcolm, Junior and family
Respondent State:	Jamaica ¹
Rights invoked:	Articles 4 (right to life), 5 (humane treatment), 8 (fair trial), and 25 (judicial protection) of the American Convention on Human Rights in relation to its Articles 1(1) and 2.

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	July 29, 2014
Additional information received at the stage of initial review:	August 14, 2018, April 15, 2019
Notification of the petition to the State:	June 3, 2019
State's first response:	December 5, 2019
Additional observations from the petitioner:	May 5, 2020, July 1, 2020
Additional observations from the State:	August 26, 2020

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (deposit of instrument of ratification made on August 7, 1978)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Articles 4 (right to life), 5 (humane treatment), 8 (fair trial), and 25 (judicial protection) of the American Convention in relation to its Articles 1(1) and 2
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes; under the terms of section VI
Timeliness of the petition:	Yes; under the terms of section VI

V. ALLEGED FACTS

1. This petition claims that Winston Malcolm, Senior and his son Winston Malcolm, Junior³ were, without lawful justification, fatally shot by police officers at their home on December 21, 2007; and that the

¹ In keeping with Article 17(2)(a) of the Commission's Rules of Procedure Commissioner Margarette May Macaulay, a Jamaican national, did not participate in the deliberations or decision in this matter.

² The observations submitted by each party were duly transmitted to the opposing party.

³ Hereafter referred to collectively as "the alleged victims" and individually as "Malcolm Sr." and "Malcolm Jr."

State has failed to hold these police officers account for this unlawful action. They condemn a widespread pattern of extrajudicial executions in Jamaica and structural defects in the criminal investigation of these incidents, resulting in a virtually absolute impunity for these killings.⁴

2. According to the petitioners, the alleged victims lived in a house that was part of a family compound located in St. Catherine, Jamaica. In this regard, the petitioners affirm that there were several dwelling houses on this compound (mainly occupied by relatives of the alleged victims). On the morning of December 21, 2007, the petitioners allege that members of the Jamaica Constabulary Force (JCF), accompanied by military personnel, executed a search warrant, conducting a raid on the compound, which included the house occupied by the alleged victims. According to the petitioners, four police entered and began to search the compound for guns and valuables, and asking questions about names, date of birth, and occupation of each person present. According to the petition, the police claimed that the alleged victims were suspected of being members of a criminal gang, who were concealing firearms, amidst a gang feud in the area.

3. During the raid, the petitioners claim that the police officers questioned Malcolm Sr. before proceeding to kick in the door to Malcolm Jr.'s room. According to the petitioners Malcolm Jr.'s girlfriend and another acquaintance were in the room at this time. The petitioners allege that the police sent the girlfriend and acquaintance out of the room and subsequently began to punch Malcolm Jr. in the chest. According to the petitioners, Malcolm Sr. called out from his room about police brutality but the police continued to punch Malcolm Jr. Malcolm Sr. continued to protest until the police brought him outside of the house to join other family members. Shortly, thereafter, the petitioners claim that the police then took Malcolm Sr. back inside his house.

4. The petitioners allege that subsequently, with both Malcolm Jr. and Malcolm Sr. inside the house, witnesses heard multiple shots fired. According to the petitioners, witnesses observed soldiers and police officers dragging the bodies of the alleged victims from inside the house, across the ground of the compound before throwing their bodies into a jeep, which then drove away. The petitioners contend that police officers' recollection of events strongly contradicts the version documented by civilian eyewitnesses. In particular, two officers, Corporal Malica Reid and Constable Omar Simmons claimed that they knocked on the front door of the residence; no one answered so they pushed open the door; as they did, both heard a gunshot, became "fearful for their lives," and immediately returned fire.

5. The petitioners claim that an investigation was initiated by the Bureau of Special Investigations⁵ (BSI), but that there were gross deficiencies and delays in this investigation. The petitioners identify some of these deficiencies as follows: (a) the guns and bodies were removed from the scene before investigators even arrived; (b) witness statements were not completely gathered until 3 or 4 months after the actual incident; (c) forensic evidence was not in the custody of the forensic division until 3 weeks after the crime and tests were not completed until 6 months later; (d) ballistic evidence was not placed in the custody of the ballistics expert until three weeks after the fatal shootings of the alleged victims; (e) failure to conduct fingerprint analysis on the relevant guns. The petitioners also claim that while the ballistic and forensic reports show the date of receipt, there is no record of the chain of custody between the crime scene and each respective laboratory. With respect to the post mortem examinations on the alleged victims, the petitioners contend that the injuries are not consistent with police accounts (of returning fire randomly after being shot at). With respect to Malcolm Jr, his body showed evidence of bullet wounds to the throat and chin, upper right chest, left abdomen, right hip, and twice in the left arm; and multiple contusions to abdomen tissues. With respect to Malcolm Sr., his body had an entry wound in the center of his forehead, depression in the back of the skull, and another entry wound in the front abdomen. The petitioners also allege that (a) the post-mortem examinations were not conducted until 20 days after the deaths of the alleged victims; and (b) that sections of both post mortem examination reports are missing.⁶

⁴ The petitioners refers notably to a report published by the IACHR, Inter-Am. Comm'n H.R., Press Release No. 59/08, *IACHR Issues Preliminary Observations on Visit to Jamaica* (Dec. 5, 2008)

⁵ According to the petitioners the Bureau of Special Investigations was, at the time of the deaths of the alleged victims, an agency of the Jamaica Constabulary Force was responsible for investigating fatal shooting by the police. The petitioners also indicate that in August 2010, the Independent Commission of Investigations (INDECOM) was established as a Commission of Parliament, and has largely taken over this role from the BSI.

⁶ The petitioners state that there are blank pages from the bottom of page five to the top of page eleven.

6. The petitioners also complain of long delays in the judicial processes that ensued following the deaths of the alleged victims. According to the petitioners, the BSI referred their investigation to the Director of Public Prosecutions (DPP) in 2008, for a ruling. The DPP subsequently referred the case to the Coroner's Court in 2009. Despite follow up by the petitioners, Coroner's Court did not initiate any preliminary consideration of the case until September 29, 2011. On this occasion, the Coroner's Court referred the matter to the Special Coroner's Court.⁷ The case was initially scheduled for hearing by the Special Coroner on January 25, 2012, and then rescheduled April 3, 2012. However, no hearing took place on April 3, 2012; and since then, according to the petitioners, up to the filing of their petition, the Special Coroner had not initiated or completed the hearing.

7. The petitioners complain that the fatal shooting of the alleged victims, together with delays and deficiencies in the investigation and judicial processes part of a widespread pattern of unlawful killings and impunity that has been documented by various international governmental and non-governmental actors, as well as the government of Jamaica itself. The petitioners contend that it is a well-documented fact that the Jamaican justice system is replete with numerous failings, particularly in cases of excessive force and extrajudicial killings by police officers; and that most notably, these include "lack of effective, prompt, and thorough investigations".

8. The petitioners entirely reject the State's arguments. The petitioners emphasize that (a) civil remedies are not adequate or effective remedies for a case of extra-judicial killing (and therefore do not need to be exhausted); (b) criminal proceedings represent the appropriate and effective remedy where there has been an alleged violation of the right to life; and (c) there has been unwarranted delay in conducting criminal proceedings by the State as it relates to the deaths of the alleged victims. On the issue of delay, the petitioners claim that they were not aware of the completion of inquest of the Special Coroner until they received the response of the State to the petition before the Commission.

9. Further, the petitioners state that (a) the inquest was completed almost eight years after the death of alleged victims; (b) the family of the alleged victim were unable to obtain a copy of the verdict of the Special Coroner's Court until March 2020 – almost five years after the completion of the inquest. The petitioners also contend that warrants for the arrest of the police officers were not issued until July 11, 2019, four years after the end of the inquest by the Special Coroner and over 11 years after the incident. The petitioners argue that the subsequent run away of the police officers is attributable to the State as part of the overall delay in adequately and effectively conducting criminal proceedings into the deaths of the alleged victims. Ultimately, the petitioners contend that until both police officers are arrested and put on trial, the State cannot claim that it has discharged its duty to prosecute those responsible for the deaths of the alleged victims. Citing a newspaper article, the petitioners subsequently mention that one of the police officers (Malica Reid) was arrested on July 30, 2019. However, a date for trial has been set for October 2022, more than 13 years after the deaths of the alleged victims. The petitioners also note that the other officer (Omar Simmonds) has not yet been arrested.

10. The petitioners argue that up to the filing of the petition, nearly seven years had elapsed since the deaths of the alleged victims, without any resolution by the Jamaican justice system. Accordingly, the petitioners this reflects a failure on the part of the State to provide available, appropriate and effective domestic remedies. In the circumstances, the petitioners contend there has been an unwarranted delay that warrants an exception to requirement to exhaustion of domestic remedies, pursuant to Article 46(2)(c).

11. The State submits that the petition is inadmissible for failure to exhaust domestic remedies, and for failure to state any prima violations of the American Convention.

12. With respect to the issue of exhaustion of domestic remedies, the State submits that the petitioners have not exhausted civil proceedings in Jamaica in the form of constitutional relief for the alleged

⁷ The petitioners state that in 2008, Jamaica's, Coroner's Act was amended in 2008 to establish the Office of the Special Coroner. This Office deals specifically with cases where a death occurred due to actions of state agents.

violations of human rights. According to the State, Section 19(1) of the Constitution of Jamaica recognizes the rights of persons to approach the Supreme Court of Jamaica for redress for human rights violations; and that these include violations of the right to life, and the right not to be subjected to cruel and inhumane treatment. The State submits that civil proceedings can adequately address alleged human rights violations as: (1) it allows for the facts to be ventilated by assessing the State's responsibility for human rights violations; and (2) provides for compensation, which is an adequate form of relief.

13. The State takes note of the traditional position of the Commission on the primacy of criminal proceedings (as opposed to civil remedies) in clarifying the facts, apportioning criminal responsibility and applying sanctions where appropriate. Nonetheless, the State submits that civil proceedings and attendant remedies are sufficient for ventilating the facts, ascribing responsibility, and providing relief by way of compensation if the State is found responsible for human rights violations. Accordingly, the State invites the Commission to depart from its previously held position, as applied to Jamaica, in so far as suggesting that civil remedies are inadequate or ineffective remedies for alleged breaches of non-derogable rights by the State. In this regard, the State submits that civil proceedings are an adequate and effective remedy and must be pursued by the petitioners regardless of whether the State has failed to adequately pursue criminal proceedings. The State also argues that the criminal justice process can only establish individual criminal responsibility of the accused; and that the establishment of individual criminal responsibility, even for a State agent, does not equate to State responsibility (for the criminal behavior of the individual). By contrast, the State argues that, civil proceedings, in Jamaica, can determine the State's liability for violating human rights as the basis for any relief, including compensation.

14. Regarding petitioners claims regarding the State's failure to effectively investigate and prosecute the alleged human rights violations against the alleged victims, the State denies that there was any significant delay with regard to the initial investigation; and that any delays that occurred were insignificant, and ultimately did not derogate from the overall effectiveness of the investigation. In this regard, the State submits that the Special Coroner and a jury finally completed an inquest into the deaths of the alleged victims on August 28, 2015. On this date, the State indicates that the jury found that two police officers - Corporal Malica Reid and Constable Omar Simmons were criminally responsible for the death of the alleged victims. Consequently, the State asserts that the Office of the Director of Public Prosecution ruled that both police officers should be tried in the criminal courts in connection with the homicides of the alleged victims. The State mentions that both police officers have absconded, but that the Special Coroner's Court has issued warrants for their arrest. The State indicates that upon apprehension, these officers will be placed on trial before the Supreme Court of Jamaica. According to the State, it "acknowledges and regrets the delay in the holding of the inquest but submits that the delay did not undermine the integrity and effectiveness of the criminal justice process". The State further submits notes that the subsequent delay in the prosecution, due to the abscondment of the two police officers cannot be attributed to the State. The State argues that it has exercised all reasonable efforts to locate and prosecute the police officers; and that therefore, the petitioners allegations that the State has failed to prosecute the police officers is manifestly groundless.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

15. The parties diverge on the issue of exhaustion of domestic remedies, with the State contending that the petitioners failed to exhaust available civil remedies for compensation. On the other hand, the petitioners claim that the circumstances of the petition warrant an exception to the requirement of exhaustion.

16. With regard to the State's argument regarding the lack of exhaustion in the form of civil redress, the Commission reiterates that in cases like this, it is not necessary to exhaust civil action before resorting to the Inter-American system. This is because that remedy would not redress the main claim made concerning the alleged homicides of the alleged victims (by police officers) followed by the alleged failure of due diligence in investigation, prosecution, and punishment of those responsible, together with delay in conducting such an investigation. The Commission reiterates that under international standards applicable to cases like this one, where serious human rights violations such as homicide are alleged, the appropriate and effective remedy is precisely the filing and the undertaking of an effective criminal investigation aimed at the

clarification of the facts and, if necessary, individualize and prosecute the persons responsible. Based on the record, it appears that the Special Coroner's inquest was not completed until 2015, and that to date, the police officers responsible for the deaths of the alleged victims have yet to be prosecuted by the State. Only one of the officers has been arrested, and his trial is not scheduled until October 2022. In view of the foregoing, the IACHR concludes that the exception to the rule of exhaustion of domestic remedies, as provided for in Article 46.2.c of the Convention, is applicable. In view of the context and elements of the petition, the Commission concludes that the admissibility requirements relating to the filing deadline are satisfied.

VII. ANALYSIS OF COLORABLE CLAIM

17. The Commission notes that the petition contains allegations regarding (a) the extrajudicial killing of the alleged victims; (b) long delays (lasting up to more than a decade) as well as critical deficiencies in the investigative/judicial processes that ensued following the deaths of the alleged victims. The State does not ultimately dispute the delay in the initiation or completion of the Special Coroner's inquest. Further, the State acknowledges that the State has not yet completed prosecutions of the police officers involved in the homicides of the alleged victims, despite the verdict of the Special Coroner that these police officers were criminally responsible for the deaths of the alleged victims.

18. In view of the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the IACHR believes that, the allegations concerning the purported extrajudicial killings, the delays in investigation and judicial criminal proceedings are not manifestly unfounded. Accordingly, the Commission considers that the alleged facts, if proved, could all establish violations of the rights enshrined in Articles 4 (life), 5 (humane treatment), 8 (fair trial), and 25 (judicial protection) in relation to its Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects), to the detriment of the alleged victims and their surviving families.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 5, 8 and 25 of the American Convention in relation to its Articles 1(1) and 2; and;

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 12th day of the month of October, 2020. Joel Hernández, President; Antonia Urrejola, First Vice-President; Flávia Piovesan, Second Vice-President; and Julissa Mantilla Falcón, Commissioners.