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REPORT No. 367/20
PETITION 1079-14
REPORT ON ADMISSIBILITY

KEVIN SMITH AND FAMILY
JAMAICA

Approved electronically by the Commission on December 12, 2020.

Cite as: IACHR, Report No. 367/20, Petition 1079-14. Admissibility. Kevin Smith and family. Jamaica. December 12, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioners:	The International Human Rights Center, Loyola Law School, and Jamaicans for Justice
Alleged victim:	Kevin Smith and family
Respondent State:	Jamaica ¹
Rights invoked:	Articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), and 25 (right to judicial protection) of the American Convention on Human Rights ² in relation to its Articles 1(1) and 2

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	July 29, 2014
Additional information received at the stage of initial review:	April 16, 2019
Notification of the petition to the State:	June 3, 2019
State's first response:	March 11, 2020
Additional observations from the petitioner:	June 4, 2020
Additional observations from the State:	September 8, 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 (right to humane treatment), 8 (right to fair trial), and 25 (right to 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 Kevin Smith (hereafter "Mr. Smith or "the alleged victim" was, without lawful justification, fatally shot by police officers in the parish of St. Catherine, Jamaica on February 27,

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

² Hereinafter "American Convention" or "the Convention".

³ The observations submitted by each party were duly transmitted to the opposing party.

2003. According to the petition, to date, the State has failed to diligently investigate, prosecute, and punish the crime. The petition also alleges that this unlawful killing falls within a well-documented pattern of hundreds of fatal shootings carried out by security forces each year, which the State rarely, if ever, adequately investigates or punishes.

2. According to the petition, Mr. Smith was the son of Albertha Shakespeare (hereafter "Ms. Shakespeare). By way of background, the petition alleges that at about 10:45 p.m. on February 27, 2003, Mr. Smith borrowed his mother's Honda Accord motorcar to move some furniture to the neighborhood where he operated a small grocery store. The petition states that after lending the motorcar to Mr. Smith, Ms. Shakespeare realized she had left some personal belongings, including cash and a Nokia cell phone in the motorcar. Accordingly, she decided to call Kevin on the Nokia phone to see if she could retrieve the money. When she called, a male voice answered and said something to the effect of, "Kevin not here." She called back and heard a voice she thought belonged to Kevin say frantically, "Mother B," which was the nickname he used for her. According to the petition, shortly thereafter, eight people informed Ms. Shakespeare that the police had killed her son.

3. Upon hearing the news of Mr. Smith's death, the petition states that Ms. Shakespeare attended the Portmore Police Station (in St. Catherine) to make inquiries about the circumstances in which Mr. Smith had died. The petition states that an officer named Mr. Green told Ms. Shakespeare that there had been a shootout between the police and a group of men that included Mr. Smith. The petition further alleges that Mr. Green removed two guns from a drawer and told Ms. Shakespeare that, "These are the two guns that were on the scene." According to the petition, Mr. Green did not say that Mr. Smith had been in possession of either gun. Further, the petition states that Mr. Green did not use gloves while handling the guns, which were not covered in plastic or any other protective material.

4. According to the petitioners, other evidence contradicted the claim of the police. In this regard, the petitioners state that Mr. Smith's sister identified the body of Mr. Smith and observed (a) bullet wounds to the head that appeared to have been inflicted at close range; and (b) several bullet wounds to the groin area. In addition, the petitioner claims that a witness told Ms. Shakespeare that when the police starting shooting, two men, including Mr. Smith, ran into his house. The witness further stated that when the police pursued the men into his house, brought them out, and then shot and killed both of them. Given the foregoing, the petitioners state that the Mr. Smith's family came to suspect that Mr. Smith had not been killed in a shoot-out.

5. Following the death of Mr. Smith, the petition states that an investigation was initiated by the Bureau of Special Investigations⁴ ("BSI"). According to the petitioners, the BSI, on March 15, 2006, submitted the alleged victim's case to the Director of Public Prosecutions (DPP). The petitions adds that on April 28, 2006, the DPP ruled that the matter should go to the Coroner's Court (in St. Catherine) for an inquest to be conducted. On June 19, 2007, the case was listed in the Coroner's Court, but the petitioners allege that to date no inquest date has been scheduled. According to the petition: (a) Jamaicans for Justice asked the Coroner's Court for a copy of Mr. Smith's file in September 2007; (b) in response, the Coroner's Court directed them back to the Director of Public Prosecutions; and (c) from June 2009 to August 2011, Jamaicans for Justice sent four unanswered requests (to the Coroner's Court) for more information about Mr. Smith's case.

6. The petitioners complain that the fatal shooting of the alleged victim, together with delays and deficiencies in the investigation and judicial processes are 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.

⁴ 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.

7. The petitioners argue that up to the filing of the petition 10 years had elapsed since the death of Mr. Smith, without any resolution by the Jamaican justice system. In this regard, the petitioners reiterate that the Coroner's Court is yet to set an inquest date. In the circumstances, the petitioners contend there has been an unwarranted delay that justifies an exception to requirement to exhaustion of domestic remedies, pursuant to Article 46(2)(c) of the American Convention. Given the foregoing, the petitioners also affirm that due to the circumstances of this case, the petition is being presented within a reasonable period of time, pursuant to Article 32(2) of the Commission's Rules of Procedure.

8. The petitioners entirely reject the State's arguments. Firstly, the petitioners assert that civil remedies (such as constitutional relief) are neither adequate nor effective remedies; and that the Commission has stated, time and time again, that criminal proceedings are the appropriate and effective remedies that need to be exhausted in cases where there has been a violation of the right to life. Secondly, the petitioners argue that an application to the Supreme Court for an order to compel the Coroner's Court to act is not an adequate remedy because it is a discretionary remedy, and because it shifts the burden of prosecuting the case from the State to the petitioners. Finally, the petitioners reiterate that the petition falls under Article 46(2)(c) of the Convention, which provides an exception to the exhaustion of domestic remedies, where "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies." In this respect, the petitioners insist that the facts demonstrate that there has been unwarranted delay.

9. The State submits that the petition is inadmissible for failure to exhaust domestic remedies to redress the alleged violations. In particular, the State contends, firstly, that the Petitioner has not exhausted civil proceedings in Jamaica in the form of constitutional relief. In this regard, the State contends that 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 further 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.

10. 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.

11. With particular regard to the claim that the State has failed to adequately investigate the killing of Mr. Smith by way of criminal proceedings, the State argues firstly that constitutional relief provides an adequate and effective relief for an alleged breach of the duty to investigate, which the petitioners have failed to exhaust. In this regard, the State contends that the petitioners are therefore obliged to make an application to the Supreme Court to examine whether the Government has fulfilled its duty to investigate as a component of the State's duty to protect the right to life. Secondly, in response to the allegation that the Coroner's Court has not yet held an inquest into the matter, the State argues that section 21 of the Coroners Act provides an adequate and effective remedy that the petitioners have failed to exhaust. According to the State, section 21 permits a judge of the Supreme Court, upon application made by inter alia an interested party, to order that an inquest be held, if he thinks it just and satisfied "that the appropriate Coroner refuses or

neglects to hold an inquest which ought to be held, or which he has been directed by the Director of Public Prosecutions to hold [...]”. The State argues that the petitioners have failed to initiate or exhaust this remedy.

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

12. The parties diverge on the issue of exhaustion of domestic remedies, with the State contending that the petitioners failed to exhaust available civil remedies (particularly constitutional remedies). For the State, 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. On the other hand, the petitioners claim that the circumstances of the petition warrant an exception to the requirement of exhaustion.

13. 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 homicide of the alleged victim (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, the Commission notes that a Coroner’s inquest is yet to be scheduled or completed more than 10 years since the death of the alleged victim. The burden of conducting a criminal investigation falls upon the State; and accordingly, the Commission does not accept the State’s contention that petitioners are obliged to apply to the Supreme Court for an order to compel the Coroner’s Court to act.

14. 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 considers that this the petition was filed within a reasonable period of time pursuant to Article 32(2) of its Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

15. The Commission notes that the petition contains allegations regarding (a) the extrajudicial killing of the alleged victim; (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 victim. The State does not ultimately dispute the delay in the initiation or completion of the Coroner’s inquest.

16. 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 alleged extrajudicial killing of Mr. Smith, and 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 in relation to its Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects), to the detriment of the alleged victim and his surviving family.

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 December, 2020. Antonia Urrejola, First Vice-President; Flávia Piovesan, Second Vice-President; Esmeralda E. Arosemena Bernal de Troitiño, and Julissa Mantilla Falcón, Commissioners.