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REPORT No. 368/20
PETITION 1081- 14
REPORT ON ADMISSIBILITY

KEMAR WALTERS AND FAMILY
JAMAICA

Approved electronically by the Commission on December 12, 2020.

Cite as: IACHR, Report No. 368/20, Petition 1081-14. Admissibility. Kemar Walters and family.
Jamaica. December 12, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioners:	International Human Rights Clinic of the Loyola Law School and Jamaicans for Justice
Alleged victim:	Kemar Walters and family
Respondent State:	Jamaica ¹
Rights invoked:	Articles 3 (Right to Juridical Personality), 4 (Right to Life), 5(Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), and Article 25 (Right to Judicial Protection) of the American Convention on Human Rights ² in relation to Articles 1(1) and 2 thereof

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	July 29, 2014
Additional information received at the stage of initial review:	April 15, 2019
Notification of the petition to the State:	June 5, 2019
State's first response:	Dec 17, 2019
Additional observations from the petitioner:	May 5, 2020, November 20, 2020
Additional observations from the State:	Aug 5, 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 3 (Right to Juridical Personality), 4 (Right to Life), 5(Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), and Article 25 (Right to Judicial Protection) of the American Convention in relation to Articles 1(1) and 2 thereof
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

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 Hereinafter "American Convention" or "the Convention"

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

V. ALLEGED FACTS

1. The petitioners claim that Kemar Walters (“the alleged victim”) was, in December 2004, the subject of forced disappearance and presumed extrajudicial killing at the hands of officers of the Jamaica Constabulary Force. The petitioners further allege that to date, the State has failed to diligently investigate, prosecute, and punish this crime; and that this crime 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. The petitioners indicate that description of the events leading to the disappearance of the alleged victim are reconstructed from several press accounts.⁴

2. According to the petitioners, the alleged victim was a 20 year-old man who worked as a mechanic apprentice at his father’s auto body repair garage in the Washington Boulevard area of the parish of St. Andrew. On December 23, 2004, the petitioners claim that the alleged victim went to work at his father’s auto body repair garage. The petitioners further allege that (a) Oliver Duncan (who had been a customer for the past year), came to the garage driving a blue Honda CRV, which had been reported stolen from Montego Bay on November 20, 2004; and (b) Oliver Duncan gave Kemar Walters a ride in the blue Honda CRV to purchase automobile parts at a hardware store in Washington Plaza,(a shopping mall) located on Washington Blvd in St. Andrew.

3. While at the mall, the petitioners allege that at around 1 pm, a group of police officers, namely, Officers Henry, Edwards and Lawrence of the Organized Crime Investigation Division (“OCID”), approached the alleged victim and Oliver Duncan. These officers were in an unmarked red Honda Civic driven by Officer Edwards. According to the petition, the police vehicle stopped alongside the Honda CRV and the officers emerged to approach with guns in hand. The police officers inspected the Honda CRV and questioned both the alleged victim and Olive Duncan. Oliver Duncan claimed that the vehicle was his, but unsatisfied with this answer, the police handcuffed the alleged victim and Oliver Duncan and placed them in the back of the unmarked red Honda Civic. According to the petitioners, these officers were all part of an ongoing investigation into an island-wide car-stealing ring. However, the petitioners state that there were allegations that some of these officers were in fact complicit in the operation, accepting bribes to look the other way or participating in actual car stealing operations. Oliver Duncan was alleged to be a major participant in that ring, as was the father of the alleged victim.

4. According to the petitioners, Officer Henry indicated that alleged victim and Oliver Duncan should be taken to OCID headquarters, but Officer Edwards wanted to question them further about other stolen cars and called Officers Lynch and Silvera, who arrived at the scene in an unmarked white Toyota Corolla. Officers Edwards, Lynch and Silvera departed with the alleged victim and Oliver Duncan in the white Toyota Corolla, while Officer Henry departed in the Honda CRV, and Officer Lawrence in the Honda Civic. According to the petitioners, this was the last time that the alleged victim was seen alive.

5. The petitioners provide a chronology of events subsequent to the arrest of the alleged victim and Oliver Duncan, which are set out in the following paragraphs.

6. The alleged victim was first taken to a police station in the parish of St. Catherine where he was beaten repeatedly and allegedly held for “ransom” in relation to the auto theft ring. The relative contacted for the ransom could hear Kemar Walters being beaten in the background, “while begging for mercy.” At the same time, Oliver Duncan was shot in the leg. The alleged victim was later taken to the swamplands of the Jam World Entertainment Complex in the parish of St. Catherine where he was shot and killed. It is alleged that his body was buried somewhere in Constitution Hill, in the parish of St. Andrew. Meanwhile, Oliver Duncan was taken to Green Bay in the parish of St. Catherine where he was tortured while handcuffed to a rail until he revealed the location of stolen cars and money, and thereafter he was killed.

⁴ In this regard, the petitioners cite several press reports covering the 2009 trial of some of the police officers involved in the alleged disappearance/killing of the alleged victim, and in particular, the testimony of one of the officers – Officer Henry, who gave evidence for the prosecution against his police colleagues.

7. Officer Henry made several unsuccessful attempts to contact Officer Edwards, following which he decided to call Officer Barrett, his superior, to express concern for the safety of Duncan and Walters. After reassuring Officer Henry, Officer Barrett ordered Officer Henry to park the blue Honda CRV in a private location (which ultimately turned out to be in the area of the Port Royal Road, Kingston). Subsequently, Officer Henry received a call from Officer Edwards instructing him to meet Officers Edwards, Lynch, Silvera, and Lawrence at Harbour View (in Kingston), and thereafter all five officers went to an abandoned building near Port Royal Road (in Kingston). Officer Henry asked Officer Edwards about Walters and Duncan, who responded that both had been fatally shot. Officer Edwards indicated that he had shot Oliver Duncan while another (unnamed officer) had shot the alleged victim. Officer Edwards said they needed gasoline to burn the Honda CRV. Ultimately, the five officers took the Honda CRV to a wooded area where Officers Edwards, Lynch, and Silvera threw debris and gasoline onto the CRV and lit it on fire. On December 25, 2004, the burnt out shell of the Honda CRV was discovered and an investigation was initiated by forensic experts.

8. In the interim, Claudette Angus, the mother of the alleged victim, attempted to locate her son by visiting police stations several times and filing a missing persons' report with the Internal Affairs Bureau of the JCF. Following the filing of the missing persons' report, police officers attempted to find alleged victim and Oliver Duncan by going to various lock-ups and morgues, but did not find the missing men.

9. Efforts were then made to falsify or conceal evidence connecting the five officers to the disappearance of the alleged victim and Oliver Duncan. On January 10, 2005, in response to inquiries about the missing men made beginning in December 2004, Officer Barrett dictated false statements for the involved officers to write, claiming that on the day the alleged victim and Oliver Duncan disappeared, the officers had been in Kingston apprehending a man who was driving a stolen Toyota Tundra. A station diary placed Officer Edwards in downtown Kingston at the time of the detention of the alleged victim and Duncan. Officer Barrett also took the SIM cards from the officers' cellphones, saying that investigators were conducting cell site analysis. Officer Barrett said he would deal with witnesses for an identification parade and any other witness matters.

10. On January 6, 2005, the Criminal Investigations Bureau (CIB) took over the investigation of the disappearance of the alleged victim and Oliver Duncan. Subsequently, in the same month, the Police Commissioner requested the assistance of Scotland Yard in the investigation. On January 14, 2005, Officer Lawrence was identified in an identification parade and was taken into custody. He was charged with two counts of assault and two counts of false imprisonment. After two weeks in custody, Lawrence was released on \$150,000 JD (about \$2,300 USD in 2005) bail after appearing in the Corporate Area Criminal Court on January 23, 2005. Ultimately, Officer Lawrence went on trial in July 2007, but was ultimately freed in August 2007 primarily because the prosecution was unable to locate two main witnesses (to link him to the crimes). Officer Henry was also arrested in December 2004 but released after witnesses failed to identify him in an identification parade. Similarly, two other officers later identified in 2009 as Officers Lynch and Edwards, were taken into custody on January 12, 2005, but were released after they were also not identified in two identification parades.

11. According to the petitioners, no further investigative steps were taken until February 2008, when the police announced that the case would be reopened. This had alleged been prompted by the publication of Jamaica Gleaner newspaper articles, and the strength of the information and evidence provided detailing the auto theft ring. Based on this investigation, the Director of Public Prosecutions (DPP) initiated prosecutions against some of the police officers associated with the disappearance of the alleged victim. In this regard, in June 2009, Officer Henry was re-arrested whereupon he became a witness for the prosecution. He provided a statement that implicated other members of the OCID. Based on his statement other officers involved in the disappearance were arrested and charged (in June 2009). Officers Edwards and Lynch were both charged with double murder, and Officer Barrett was charged with accessory to murder after the fact. Officer Silvera was believed to be a fugitive and has never been charged with the crime.

12. The petitioners indicate that the trial of these officers was scheduled for April 16, 2012 but was then adjourned to October 2012 due to issues with Officer Barrett's legal representation. The petitioners state that they have no information on the cause of the delay the between June 2009 and April 2012. According

to the petitioners, the trial of Officers Barrett, Edwards and Lynch did not ultimately commence until October 29, 2012. The trial was conducted before the Supreme Court (Home Circuit Court) before a judge and jury of twelve. The main witness for the prosecution was Officer Henry. The defense argued that Officer Henry was the "mastermind" behind the killings and was trying to cover-up his crime by accusing his colleagues. According to the petitioners, on January 9, 2013, after five hours of deliberation, the jury returned a verdict for acquittal for Officer Barrett. On that same day, the jury foreman reported that the jurors were unable to reach a verdict as to Officers Edwards and Lynch. In this regard, the petitioners state that with respect to Officer Lynch, seven jurors voted for a not guilty verdict; four voted for a guilty verdict, and one juror abstained from voting. In respect to Officer Edwards, nine voted for a guilty verdict while three voted for a not guilty verdict. According to the petitioners, the jury vote was sufficient to constitute a guilty verdict under Jamaica Jury Act a guilty verdict under the Jury Act, which does not require a unanimous verdict. Nevertheless, the petitioners contend that the presiding judge instructed the jurors to continue deliberating as to Officers Edwards and Lynch, saying that he "couldn't accept the verdict." Ultimately, the jurors deliberated for another hour, but without any change in their decisions on Officers Edwards and Lynch. The presiding judge then ordered a retrial of Officers Edwards and Lynch. According to the petitioners, to date, there is no evidence that the retrials of Officers Edwards and Lynch have taken place.

13. With respect to exhaustion of domestic remedies, the petitioners contend that there has been unwarranted delay on the part of the State which entitles the petitioners to an exception to the requirement to exhaust domestic remedies, as prescribed by Article 46(2)(c) of the American Convention. In this regard, the petitioners emphasize that (a) the disappearance and alleged killing of the alleged victim took place in December 2004; (b) it took the State almost five years to bring charges against Officers Barrett, Lynch and Edwards; (c) it took almost another four years for their trial to take place; and (d) to date, there has been no indication that Officers Lynch and Barrett have been retried. Given the foregoing, the petitioners also affirm that the 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.

14. 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 dispute the State's contention that it has fulfilled its duty to investigate, and prosecute those responsible for the death/disappearance of the alleged victim, and to do so in a timely manner. In this regard, the petitioners emphasize that after 16 years (following the death/disappearance of the alleged victim), the State has failed to conclude criminal proceedings. In this regard, the petitioners emphasize that in the absence of any evidence to the contrary, the retrial of Officers Lynch and Edwards has not yet taken place, more than five years since the conclusion of the first trial (concluded in 2013). In this regard, the petitioners note that the family alleged victim still does not know where his body is. Further the petitioners are not aware of any efforts made to locate the body of the alleged victim. Given the foregoing, the petitioners reaffirm that they are entitled to an exception to the exhaustion of domestic remedies pursuant to Article 46(2) (c) of the Convention (based on unwarranted delay).

15. The State submits that the petition is inadmissible for failure to exhaust domestic remedies to redress the alleged violations. The State also contends that the allegation that the State has not fulfilled its duty to investigate and prosecute the matter is manifestly groundless.

16. With respect to the issue of domestic remedies, the State contends, firstly, that the petitioners have 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 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.

17. 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. 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. The State instead submits that civil proceedings is an adequate and effective remedy and must be pursued by the Petitioner regardless of whether the State has failed to adequately pursue the criminal process.

18. In the absence of any initiation or exhaustion of civil remedies by the petitioners (in the form of constitutional relief), the State argues that there has been no 'unwarranted delay' on the part of the State as claimed by the petitioners.

19. The State contends that it has discharged its obligation to investigate and prosecute. In this regard, the State submits three police officers were ultimately prosecuted and tried in 2012, resulting in an acquittal for one officer, and an order for the retrial of two other officers. The State notes that the trial judge's decision to not accept the majority verdict (regarding Officer Edwards) falls squarely within the ambit of domestic law, which ought not to be considered by the Commission. With regard to the retrial of these officers, the State submits that the Director of Public Prosecutions entered a *nolle prosequi* (discontinuation of criminal proceedings) conditional on the amendment of the Evidence (Special Measures) Act. This amendment would enable the witnesses to give evidence via live link. According to the State these witnesses were overseas and it would be have been costly to bring them to Jamaica for the retrials. The State affirms that the requisite amendments have now been made to the Evidence (Special Measures) Act; and accordingly, the Office of the Director of Public Prosecution Office will be placing the matter before the courts again. The State also indicates that defense counsel caused much of the delay in the prosecution of the police officers. The State contends that, on four occasions, the trial had to be adjourned, as defense counsel was unavailable. Accordingly, the State submits that as a matter of principle, the actions of private individuals cannot be attributed to the State.

20. The State concludes that it performed its duty to investigate and prosecute the matter; and that the petitioners' allegations to the contrary are manifestly groundless and fail to demonstrate any violation of any right recognized in the American Convention.

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

21. 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.

22. 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 forced disappearance and 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 and forced disappearance 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) it took the State almost five years to bring charges against Officers Barrett, Lynch and Edwards; (b) it took almost another four years for their trial to take place; and (c) to date (16 years after the presumed extrajudicial killing and disappearance of the alleged victim) , there has been no indication that Officers Lynch and Barrett have been retried.

23. 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 the petition was filed within a reasonable period pursuant to Article 32(2) of its Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

24. The Commission notes that the petition contains allegations regarding (a) the forced disappearance of the alleged victim; (b) the alleged extrajudicial killing of the alleged victim; and (c) long delays (lasting up to more than a decade) in the investigative/judicial processes that ensued following the death/disappearance of the alleged victim.

25. 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 and forced disappearance of the alleged, 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 3 (Right to Juridical Personality), 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), and Article 25 (Right to Judicial Protection) of the American Convention on Human Rights in relation to Articles 1(1) and 2 thereof to the detriment of the alleged victim and his surviving family.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 3, 4, 5, 7, 8 and 25 of the American Convention in relation to its Articles 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. Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; and Julissa Mantilla Falcón, Commissioners.