REPORT Nº 26/06
PETITION 434-03
ADMISSIBILITY
ISAMU CARLOS SHIBAYAMA *ET AL.*
UNITED STATES([*])
March 16, 2006

I. SUMMARY

1. On June 13, 2003, the Inter-American Commission on Human Rights (hereinafter the "Commission") received a petition dated June 10, 2003 from Karen Parker, an Attorney at Law in San Francisco, California, and the Japanese Peruvian Oral History Project, a nongovernmental organization formed in 1991, against the Government of the United States of America (hereinafter the "State" or "United States") on behalf of Isamu Carlos Shibayama, Kenichi Javier Shibayama, and Takeshi Jorge Shibayama (hereinafter the "Petitioners"), brothers of Japanese ancestry who have lived in the United States since 1944.

2. The Petitioners' petition and subsequent observations claim that the State is responsible for violations of their rights under Articles I, II, V, VIII, XII, XIV, XVIII, XXV and XXVI of the American Declaration of the Rights and Duties of Man (hereinafter the "American Declaration" or the "Declaration"), based upon allegations that the Petitioners were seized by the United States in Peru in 1944 and forcibly taken to the United States, held in custody in an internment camp in Texas from March 23, 1944 until September 9, 1946, were improperly denied permanent resident status in the United States until 1956, and were subsequently denied appropriate reparations under the Civil Liberties Act of 1988 and applicable principles of international human rights and humanitarian law. The Petitioners also argue that the Commission is competent to consider the claims in their petition and that they have exhausted domestic remedies that are available to them or have no meaningful possibility to pursue further remedies concerning their claims.

3. The State argues that the petition is inadmissible because the Commission is not competent *ratione temporis* to consider the Petitioners' claims, as the facts alleged in the petition occurred before the creation of the Commission and the adoption of the American Declaration. The State also contends that the petition would be inadmissible for failure to pursue and exhaust domestic remedies.

4. As set forth in the present report, having examined the information available and the contentions on the question of admissibility, and without prejudging the merits of the matter, the Commission decided that it is competent to consider and admits the claims in the present petition relating to Articles II, XVIII and XXVI of the American Declaration, to continue with the analysis of the merits of the case, to transmit the report to the parties, and to publish the report and include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCEEDINGS BEFORE THE COMMISSION

5. On June 13, 2003, Karen Parker and the Japanese Peruvian Oral History Project filed a petition with the Commission on behalf of Isamu Carlos Shibayama, Kenichi Javier Shibayama, and Takeshi Jorge Shibayama alleging violations of their rights under the American Declaration by the United States.

6. Following its initial review of the petition, in a note dated September 2, 2003 the Commission requested additional information from the Petitioners concerning certain aspect of their

[*] Commission Member Professor Paolo Carozza did not take part in the discussion and voting on this case, pursuant to Article 17.2 of the Commission's Rules of Procedure.

claims, to which the Petitioners responded through additional submissions dated September 30, 2003 and October 8, 2003 and received by the Commission on, respectively, October 3, 2003 and October 15, 2003. Upon consideration of the Petitioners' additional submissions, the Commission transmitted the pertinent parts of the original petition together with the additional information to the United States by means of a note dated May 18, 2004 with a request for observations within 2 months as established by the Commission's Rules of Procedure. By note of the same date, the Commission informed the Petitioners that the pertinent parts of their complaint had been transmitted to the State.

7. In a note dated July 14, 2004, the State requested an extension of time of 30 days within which to deliver its response to the petition, which the Commission granted by communication dated July 19, 2004. Subsequently, by letter dated December 20, 2004 and received by the Commission on December 21, 2004, the State provided the Commission with its response to the Petitioners' petition. Through a note dated December 22, 2004, the Commission transmitted the State's response to the Petitioners with a request for a reply within one month.

8. Subsequently, in a letter dated January 23, 2005, the Petitioners requested an extension of time of one month within which to deliver their reply, which the Commission granted by note dated February 1, 2005. In a communication dated March 1, 2005, the Petitioners provided the Commission with their reply to the State's response, the pertinent parts of which the Commission transmitted to the State by note dated March 7, 2005 with a response requested within one month.

9. In a letter dated March 31, 2005 and received by the Commission on the same date, the State delivered its response to the Petitioners' reply, which the Commission transmitted to the Petitioners by note dated April 5, 2005.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

10. According to the petition, the Petitioners Isamu Carlos Shibayama, Kenichi Javier Shibayama, and Takeshi Jorge Shibayama are brothers of Japanese ancestry who, together with their parents and three sisters, were citizens and residents of Peru in and before 1944. The petition also states that in March 1944, the Petitioners and their family were seized by the United States in Peru, their identity and nationality documents were taken, and they were loaded on a U.S. ship at gunpoint and taken to the United States where they were held in custody at the Crystal City internment camp in Texas from March 23, 1944 until September 9, 1946. The Petitioners indicate that they were three of more than 2,200 persons of Japanese ancestry who were citizens and residents of 13 Latin American countries and who were taken by the United States during World War II as part of a plan to exchange prisoners or internees with the government of Japan.

11. Further, the Petitioners state that at the time of their abduction, they were minors and spoke only Spanish, and that during their time in internment they were taught in Japanese or English, neither of which they understood.

12. The Petitioners claim that at the end of World War II, the United States labeled them "illegal aliens" because they had no documentation. According to the petition, while another 900 of the remaining Japanese Latin Americans were forcibly shipped to Japan, the Petitioners' family was relocated to Seabrook Farms, a vegetable processing plant in New Jersey, after Peru refused to let them return. The petition also states that the Petitioner Isamu Carlos Shibayama, who by then was old enough to work, was paid low wages and had 30% of his wages taxed because he was labeled an illegal alien. The family remained at the plant until March 1949 when they relocated to Chicago.

13. Concerning their immigration status, the Petitioners indicate that the U.S. government granted their parents permanent resident status on September 22, 1952 retroactive to their entry into the United States in 1944 and that their sisters also had their status changed by marrying American citizens. According to the Petitioners, however, their status as illegal aliens remained unchanged, with no

explanation, until June 22, 1956 when they were given permanent resident status through a prearranged reentry into the United States from Canada.[1]

14. According to the Petitioners, 32 years later, in 1988, the United States enacted the Civil Liberties Act of 1988, 50 U.S.C. app. § 1989 (1994) (hereinafter the "CLA"), whose purpose was to provide restitution of $20,000.00 to persons of Japanese ancestry interned during World War II, an official apology, and funds for public education about the internment.[2] The petition indicates that the Office of Redress Administration in the Civil Rights Division of the U.S. Department of Justice was responsible for administering payments under the CLA and the legislation gave the U.S. Court of Federal Claims exclusive jurisdiction over claims brought for denials of CLA redress.

15. The petition states that at the time of enactment of the CLA, the Petitioners' father had passed away, but that their mother and one sister had filed for and received the restitution payment and apology under the Act. The Petitioners also indicate that they and their other two sisters filed for and were denied relief under the CLA. The information indicates that the denial was based upon the fact that, at the time of their internment, the Petitioners and their sisters did not have status as U.S. citizens or permanent residents, which was among the conditions necessary to qualify for redress under the Act.[3]

16. Pertinent to the issue of exhaustion of domestic remedies, the Petitioners indicate that following the denial of their claims under the CLA, they and other Latin Americans of Japanese descent pursued a class action against the U.S. government that was subsequently settled by some of the parties through an agreement known as the "Mochizuki" settlement. Under the agreement, the named Plaintiffs and similarly situated persons would be eligible to receive restitution of $5,000.00.[4]

17. The petition states that while the Petitioners' sisters accepted the settlement, the Petitioners themselves refused and filed their own suit against the United States in the U.S. District Court for Northern California based upon, *inter alia*, the U.S. Constitution, civil rights law, and humanitarian law, and sought declaratory and other equitable remedies. Following a motion by the U.S. Attorney, however, the District Court transferred the matter to the U.S. Court of Federal Claims, which subsequently ordered on December 19, 2002 that the Petitioners were not eligible to restitution under the CLA because they were not American citizens or permanent resident aliens at the time of their internment. The Court also denied the constitutional, civil rights and humanitarian law claims on jurisdictional grounds.[5]

18. Based upon these circumstances, the Petitioners claim that the United States is responsible for violations of their rights under Articles I (right to life, liberty and personal security), II (right to equality before the law), V (right to protection of honor, personal reputation, and private and family life), VIII (right to residence and movement), XII (right to education), XIV (right to work and to fair remuneration), XVIII (right to a fair trial), XXV (right of protection from arbitrary arrest) and XXVI (right to due process of law). The Petitioners assert as part of these claims that the seizure and internment of Latin Americans of Japanese ancestry constituted war crimes and crimes against humanity and that these acts could be characterized as an "ethnic cleaning scheme." The Petitioners also seek

[1] The petition indicates that the Petitioner Isamu Carlos Shibayama had served in the United States Armed Forces from April 30, 1952 until April 7, 1954 but had been denied naturalization under Pub. L. No. 86 on December 17, 1953 because he did not have a lawful admission for permanent residence or a lawful admission for other than permanent residence and one year's continuous residence in the United States prior to induction into the armed forces of the United States. According to the record, Pub. L.No. 86 provided for the naturalization of persons serving in the Armed Forces of the United States after June 24, 1950 based upon prescribed criteria. See Petitioners' Petition dated June 10, 2003, Appendix A (U.S. Court of Federal Claims, Shibayama v. United States, Decision of December 19, 2002, p. 5)

[2] Petitioners' Observations dated September 30, 2003, Appendix 4 (Civil Liberties Act of 1988, 50 App. U.S.C. § 1989).

[3] Petitioners' Observations dated September 30, 2003, Appendix 4 (Civil Liberties Act of 1988, 50 U.S.C. § 1989b-7(2)).

[4] Petitioners' Observations dated September 30, 2003, Appendix 5 (Carmen Mochizuki *et al*. v. United States, Case No. 97-294C, Settlement Agreement dated June 10, 1998 (U.S. Court of Federal Claims).

[5] Petitioners' Petition of June 10, 2003, Appendix A (Isamu Carlos Shibayama, Kenichi Javier Shibayama, Takeshi Jorge Shibayama v. United States, Case No. 00-4C, Opinion of December 19, 2002 (U.S. Court of Federal Claims), at pp. 32-41.

corresponding remedies including cessation of continuing violations, a full apology including public acknowledgment of the facts and acceptance of responsibility, commemoration and paying tribute to the victims, inclusion of the accurate record of violations in educational materials and curricula, and expungement of the label "illegal alien" from the Petitioners' government files.

19. Concerning the admissibility of these claims, the Petitioners state that their representatives were authorized under Article 23 of the Commission's Rules of Procedure to lodge the petition on their behalf. They also claim that they have exhausted domestic remedies, as they have no meaningful possibility to pursue further appeals in the case.

20. In particular, the Petitioners state that the U.S. Court of Federal Claims is a limited jurisdiction court established to adjudicate non-tort claims against the United States arising from contracts with the U.S. government, refunds from prior payments, or monetary relief based on a federal statute mandating compensation. According to the Petitioners, while they had initially filed their claims in the U.S. District Court in order to raise constitutional, civil rights and humanitarian law issues (hereinafter the "non-CLA claims"), that Court focused on the CLA claims and transferred the matter to the U.S. Court of Federal Claims, which subsequently dismissed their action. The Petitioners also indicate that they had intended to make a motion to revive their non-CLA claims by having them transferred back to the U.S. District Court once their CLA claims were dealt with. They state, however, that in the interim, several other cases involving Latin Americans of Japanese ancestry had their matters re-transferred back to the District Court to address the non-CLA issues, that the District Court had dismissed those claims, that the U.S. Court of Appeals for the Ninth Circuit upheld these findings, and the U.S. Supreme Court denied certiorari to review the findings.[6]

21. The Petitioners therefore contend that by the time the U.S. Court of Federal Claims ruled on their CLA claims, the appeals court in their jurisdiction had already ruled against their constitutional, civil rights and humanitarian law claims and the U.S. Supreme Court had denied review those findings. Consequently, if they filed a motion to have their matter transferred back to the District Court, the Petitioners state that they ran a considerable risk of sanctions for a "frivolous" action.

22. The Petitioners also state that while they potentially had a right to appeal the U.S. Court of Federal Claims decision on their CLA claims to the Federal Court of Appeals for the District of Columbia, that Court was subject to the same legislative restrictions as the Claims Court in respect of non-CLA claims and was also subject to the denial of certiorari by the U.S. Supreme Court on the non-CLA claims. In these circumstances, the Petitioners likewise claim that the potential of sanctions for pursing frivolous appeals was considerable in that court. Further, the Petitioners argue that the unmistakable language in the statute relating to eligibility made any chances of challenging the denial of their CLA claims on appeal remote.[7]

23. With respect to the issue of timeliness, the Petitioners state that the U.S. Court of Federal Claims filed the denial of the Petitioners' claims on December 19, 2002, that the Petitioners received notice of the decision on December 22, 2002, and that their petition was filed with the Commission on June 10, 2003. Accordingly, the Petitioners argue that they lodged their petition within the 6-month time period under the Commission's Rules.

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[6] Petitioners' Petition of June 10, 2003, p. 4, n. 13, citing Kato v. Reno, U.S.S.C. Case No. 01-7, cert. denied October 3, 2001.

[7] According to the Petitioners, this conclusion was supported by subsequent legislative developments that confirmed the view of Congress that the CLA did not apply to Latin Americans of Japanese ancestry who were not American citizens or permanent resident aliens at the time of their internment. Petitioners' Petition dated June 10, 2003, p. 4 citing, *inter alia*, US Department of Justice regulations for implementing the CLA. The Petitioners also indicate that the only other possible ground of appeal would relate to rules of the PRUCOL, or "permanently residing under color of law", doctrine, but that the Court of Federal Claims also rejected this ground for their claim and that, in their judgment, there was not even the remotest possibility that they could prevail under this doctrine. Petitioners' Response of March 1, 2005, pp. 5-6.

24. Further, the Petitioners indicate that they have no claims filed in another forum that duplicate their petition and therefore that they have satisfied the requirements of Article 33 of the Commission's Rules of Procedure.

25. Regarding the State's objections to the Commission's competence *ratione temporis* to consider their claims, the Petitioners argue that the initial violations alleged in their petition in connection with their abduction and internment occurred under a policy that is still ongoing. In this regard, the Petitioners claim, without further elaboration, that this ongoing policy is demonstrated by the "present use of a similar scheme as part of the State's counterterrorism actions." The Petitioners also argue that despite a ruling by the U.S. Supreme Court in 2002 in the case National Railroad v. Morgan that a continuing policy cannot constitute a continuing violation of civil rights, the Commission is not bound by this precedent and therefore can conclude that the ongoing application of a policy by a state can amount to a continuing human rights violation. The Petitioners also argue that this approach is consistent with the long-held international view rule that there are no statutory limitations for war crimes and crimes against humanity.

26. The Petitioners also claim in this connection that there has been a continuing pattern of violations since their initial abduction and internment. According to the Petitioners, this pattern includes the denial to them of permanent resident status until 1956 when their status was changed through a prearranged reentry into the United States from Canada as well as their efforts from 1989 to the present to obtain redress under the 1988 Civil Liberties Act.

27. Further, the Petitioners dispute the State's assertion that they have not been denied remedies because they voluntarily refused to participate in the Mochizuki settlement, as the Petitioners assert that they had valid reasons for rejecting the settlement agreement. In particular, the Petitioners argue that the settlement resulted in the Latin American Japanese receiving only one-quarter of the redress money paid to Japanese Americans, the settlement provided that attorneys could not seek legal fees, which the Petitioners contend could have negative consequences for other claimants or actions that might be brought in the future, and the acceptance of the settlement was contingent upon the Petitioners signing a statement that they would not undertake any legal action against the United States for any wrongs committed against them as part of the internment scheme. Finally, the Petitioners assert that apology letters were only given to those Latin Americans of Japanese ancestry who accepted the small sum under the settlement and therefore that the United States has effectively not apologized to them.

B. Position of the State

28. With respect to the factual background to the Petitioners' complaint, the United States indicates that it disputes many of the Petitioners assertions, including their suggestion that the United States' policies during World War II were part of a systematic "ethnic cleansing" scheme, but nevertheless considers that the following facts are relevant to the issue of admissibility:

1. Early in 1944, the Petitioners were relocated from Peru to the United States.

2. From late 1944 to early 1946, the Petitioners were interned at a World War II internment camp in Crystal City, Texas.

3. In 1988, the United States enacted the Civil Liberties Act (CLA), which provided redress payment of $20,000 to persons of Japanese ancestry interned during World War II. The CLA also included an official apology to internees and their families and supplied funds for public education regarding internment.

4. In 1992, the United States Department of Justice's Office of Redress Administration notified the Petitioners and other members of their families that they were ineligible for restitution under the CLA because they were not U.S. citizens or permanent resident aliens at the time of their internment.

5. Petitioners then joined a class action lawsuit against the United States Government. The parties reached a court-approved settlement, providing the Petitioners and the other members of

> the class $5,000 in restitution for their internment. Mochizuki v. United States, 43 Fed. Cl. 97 (Fed. Cl. 1999). The Petitioners, however, refused the settlement.
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> 6. The Petitioners then filed a separate lawsuit in the United States District Court for the Northern District of California, alleging Fifth Amendment violations under the United States Constitution and international human rights violations. The Petitioners sought declaratory and other equitable remedies under the CLA. Their claims were transferred to the United States Court of Federal Claims.
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> 7. On December 19, 2002, the Court of Federal Claims ruled that the Petitioners were not eligible for redress under the CLA because they were not United States citizens or permanent resident aliens at the time of their internment. Shibayama v. United States, 55 Fed. Cl. 720 (Fed. Cl. 2002).
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> 8. Following the Court of Federal Claims decision, the Petitioners failed to exercise their right of appeal to the United States Court of Appeals for the Federal Circuit.[8]

29. In light of these facts, the State asserts that the petition should be declared inadmissible because the Commission lacks competence *ratione temporis* to hear the matter and because the Petitioners have failed to pursue and exhaust domestic remedies.

30. More particularly, the State contends that in order to declare a petition admissible, the Commission must be satisfied that it has, *inter alia*, competence *ratione temporis*, which the State asserts is an established principle of international law that prohibits the retroactive application of international norms.[9]

31. In the present proceeding, the State argues that the crux of the Petitioners' allegations is that they were forcibly abducted from Peru by U.S. military forces in 1944, when the Commission was not created until some 13 years later in 1959 and the American Declaration did not come into existence until 1948. The State therefore asserts that for the Commission to assert jurisdiction *ratione temporis* in respect of these claims would cause the Commission to be in clear contravention of established international legal norms.

32. The State also argues that the Petitioners have failed to demonstrate that the alleged facts are "continuing violations". Rather, the State contends that all of the purported subsequent violations are premised on the allegedly wrongful actions arising before 1948. In this respect, the State argues that the Inter-American Court has adopted a strict interpretation of what constitutes a permissible "ongoing illicit act", requiring a showing that acts within the Court's jurisdiction occurred "on or after the date" a State assumed its commitments under the relevant treaty,[10] and that other judicial bodies have shared this approach.[11] The State therefore contends in the present case that the acts at issue cannot be alleged to have continued beyond the Shibayamas' release from the Crystal City Internment Camp in 1946.

33. The State also rejects the Petitioners' contention that ongoing acts include the claim that the Petitioners have received no redress and that the acts of seizure and detention are part of a "continuing policy" in which the United States is still participating. In particular, the State argues that the detention of all World War II internees ended in 1946 and rejects any contention that the myriad of due process rights that internees subsequently exercised may constitute evidence of a continuing policy of

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[8] State's response dated December 20, 2004, pp. 1-2.

[9] State's response dated December 20, 2004, pp. 3-4, citing*, inter alia*, Vienna Convention on the Law of Treaties, Art. 28; Petition 12.049, Case 62/03, Kenneth Walker, United States, Annual Report of the IACHR 2003, para. 38; UNHRC, R.A.V.N. v. Argentina, Communication No. 343/1988 (5 April 1990), para. 2.3.

[10] State's response dated December 20, 2004, pp. 4-5, citing*, inter alia*, I/A Court H.R., *Cantos Case*. Preliminary Objections. Judgment of September 7, 2001. Ser. C. No. 85.

[11] State's response dated December 20, 2004, p. 5, citing Eur. Court H.R., Posti and Rahko v. Finland, App. No. 27824/95 (2002), para. 40.

seizure and detention. The State also denies that the absence of an "appropriate apology" by the United States indicates that the policy is still in place, particularly since the U.S. government has in fact already made a full apology for the wrongful internment of people of Japanese ancestry who were taken from Latin American countries.[12]

34. With respect to the Petitioners' arguments on the denial of appropriate reparations, the State emphasizes that the sole reason that the Petitioners did not receive redress for their detention is because they refused a class action settlement agreement in which the U.S. government agreed to make a $5,000.00 redress payment to each eligible member of the class, including the Petitioners. As such, the State asserts that the Petitioners are essentially asking the Commission to provide remedies for events for which the United States has already offered redress.[13] In sum, the State argues that the Petitioners have not received redress by their own choice and are attempting to use the Commission to circumvent and replace a remedy that the domestic courts found "fair reasonable and adequate."

35. Further, the State argues that in order for the Commission to find competence *ratione temporis* in this case, it would have to embark on a "dangerously slippery slope" without any temporal boundaries to possible claims, such that virtually any alleged historical wrong could be re-characterized as a continuing violation through an artful allegation that the failure to provide compensation for the historical wrong constitutes a new or continuing wrongful action. The State asserts that this approach would be unjust, would not be an appropriate use of the Commission's limited resources, and would exceed the limits of its jurisdiction.

36. With respect to exhaustion of domestic remedies, the State asserts that the Petitioners have failed to satisfy the requirements in the Commission's Rules, as the denial of CLA relief by the Court of Federal Claims could have been appealed to the U.S. Court of Appeals for the Federal Circuit but the Petitioners failed to do so. The State also argues in this respect that according to the Commission's jurisprudence, a fear of receiving an unfavorable judgment, in the present case in light of the U.S. Supreme Court's denial of certiorari for other claimants, is not sufficient reason to refrain from contesting a ruling.[14] Further, the State argues that the U.S. Supreme Court's decision not to take the appeal of other claimants has absolutely no bearing on the appellate rights or chances of the Petitioners, particularly since the Petitioners' claim under the CLA is highly factual and therefore less likely to be affected by other appeals.

37. Moreover, the State argues that none of the specific exceptions to the exhaustion rules under Article 31.2 of the Commission's Rules of Procedure apply, as the CLA does provide for due process, as evidenced by its granting of the Court of Federal Claims' review of administrative processes. Also according to the State, not only have the Petitioners not been denied access to remedies under domestic law but they have actually refused existing remedies. Finally, the State asserts that there was no unwarranted delay in reaching a final judgment by the U.S. court system because, owing to the Petitioners' decision not to appeal their claim, the appellate courts did not have an opportunity to review the matter.

IV. ADMISSIBILITY

38. The Commission has considered the admissibility of the present complain pursuant to Articles 30 and 34 of its Rules of Procedure and makes the following determinations.

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[12] State's response dated December 20, 2004, p. 6, citing James Rainez, "US Apologizes to Internees", Los Angeles Times, June 13, 1998, at B1.

[13] State's response dated December 20, 2004, pp. 6-7, citing U.S. Ct. of Fed. Claims, Order Granting Preliminary Approval of Settlement Agreement", in Mochizuki v. U.S., 41 Fed. Cl. 54 (1998) (approving a settlement agreement reached between the class and the United States).

[14] State's response dated December 20, 2004, p. 8, citing Petition 12.006, Case 87/03, Oscar Sirí Zuñiga, Honduras, Annual Report of the IACHR 2003, para. 43.

A. Competence of the Commission *ratione personae, ratione materiae, ratione temporis* and *ratione loci*

39. The Commission must first consider whether it is competent to consider the Petitioners' petition. In this regard, the Commission notes that the United States of America deposited its instrument of ratification of the OAS Charter on June 19, 1951, at which time the American Declaration became a source of legal obligation for the United States, and the State has been subject to the Commission's jurisdiction since 1959, the year in which the Commission was created.[15] In addition, according to the information presented, the Petitioners' representatives are authorized under the terms of Article 23 of the Commission's Rules of Procedure to present the petition on behalf of the Petitioners, and the Petitioners are natural persons whose rights are protected under the American Declaration. Accordingly, the Commission considers that it is competent *ratione personae* to consider the petition.

40. In addition, the Petitioners claim that the United States is responsible for violations of their rights under Articles II, V, VIII, XII, XIV, XVIII, XXV and XXVI of the American Declaration and, as noted above, the Commission is authorized to consider allleged violations of the American Declaration in respect of those OAS Member States that have not ratified the American Convention. Accordingly, the Commission considers that it is competent *ratione materiae* to consider the petition.

41. Further, the Commission considers that it is competent *ratione loci,* given that the petition indicates that the facts alleged occurred while the Petitioners were under the authority and control or otherwise within the jurisdiction of the United States.

42. Finally, with respect to the Commission's competence *ratione temporis*, the Commission notes that as part of their claims, the Petitioners have alleged violations of their rights to equal treatment, to a fair trial, and to due process of law under Articles II, XVIII and XXVI of the American Declaration on the basis that they were excluded from receiving reparations under the Civil Liberties Act of 1988 because they were not considered U.S. citizens or permanent residents at the time of their internment, notwithstanding that that they had suffered the same circumstances as other individuals of Japanese origin who were eligible under the legislation. The Commission considers that the enactment of the Civil Liberties Act of 1988 and the Petitioners' subsequent efforts to obtain reparations under that statute fall within the jurisdiction *ratione temporis* of the Commission and therefore that the Commission is competent to address these aspects of the Petitioners' claims.

B. Duplication

43. The Petitioners have stated that they have no claims filed in any other forum that duplicate their petition before the Commission. The State has not contested the issue of duplication of procedures. The Commission therefore finds no bar to the admissibility of the Petitioners' claims under Article 33 of the Commission's Rules of Procedure.

C. Exhaustion of Domestic Remedies

44. Article 31.1 of the Commission's Rules of Procedure specifies that, in order to decide on the admissibility of a matter, the Commission must verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with generally recognized principles of

[15] According to Article 20 of the Statute of the IACHR and the jurisprudence of the inter-American system, in respect of those OAS member states that are not parties to the American Convention on Human Rights, the Commission may examine communications submitted to it and any other available information, to address the government of such states for information deemed pertinent by the Commission, and to make recommendations to such states, when it finds this appropriate in order to bring about more effective observance of fundamental human rights. *See also* Charter of the Organization of American States, Arts. 3, 16, 51, 112, 150; Regulations of the Inter-American Commission on Human Rights, Arts. 26, 51-54; I/A. Court H.R., Advisory Opinion OC-10/8 "Interpretation of the Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights," July 14, 1989, Ser. A No. 10 (1989), paras. 35-35; IACHR, James Terry Roach and Jay Pinkerton, United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87 paras. 46-49.

international law. Article 31.2 of the Commission's Rules of Procedure, however, specifies that this requirement does not apply if the domestic legislation of the state concerned does not afford due process of law for protection of the right allegedly violated, if the party alleging the violation has been denied access to domestic remedies or prevented from exhausting them, or if there has been an unwarranted delay in reaching a final judgment under the domestic remedies.

45. Additionally, the Inter American Court of Human Rights has observed that domestic remedies, in order to accord with generally recognized principles of international law, must be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they are designed.[16]

46. According to the record in this case, the Petitioners have pursued some administrative and judicial proceedings in the United States in an effort to obtain remedies for the matters alleged in their complaint, including an application to the Office of Redress Administration in the Civil Rights Division of the U.S. Department of Justice and an action before the U.S. Court of Federal Claims. In addition, according to the Petitioners, they had commenced claims before the U.S. District Court based on the U.S. Constitution, civil rights and international humanitarian law. They argue, however, that the determination of these claims by the District Court was postponed when that Court transferred the matter to the U.S. Court of Federal Claims and that, by the time the U.S. Court of Federal Claims decided their CLA claims, proceedings that raised identical non-CLA claims by similarly-situated claimants had been dismissed by the U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit and were denied review by the U.S. Supreme Court. The Petitioners further assert that in light of the decisions that had already been taken by the courts in their jurisdiction on these non-CLA issues, pursuing the action in the federal courts would have no chance of success and indeed could have led to penalties for pursuing frivolous claims before the Courts.

47. The State has not provided any specific observations concerning additional remedies that might be available to the Petitioners on their non-CLA claims. The State has argued, however, that the Petitioners were obliged to appeal the decision of the U.S. Court of Federal Claims on their CLA claims to the U.S. Court of Appeals and that a fear of receiving an unfavorable decision was insufficient justification for failing to pursue this remedy. In addition, the State argues that the Petitioners cannot claim the benefit of an exception to the exhaustion of domestic remedies rule, as their refusal to participate in the Mochizuki settlement precludes them from claiming that they did not have access to a remedy for their alleged violations, and because the administrative and judicial proceedings pursued by them in the United States have afforded them due process of law.

48. In connection with these submissions, the Commission observes that according to its jurisprudence and that of other human rights bodies, remedies may be considered ineffective when it is demonstrated that any proceedings raising the claims before domestic courts would appear to have no reasonable prospect of success, for example because the State's highest court has recently rejected proceedings in which the issue posed in a petition had been raised.[17] In order to meet this standard, however, there must be evidence before the Commission upon which it can effectively evaluate the likely outcome should a claim be pursued by the Petitioners. Mere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.[18]

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[16] I/A Court H.R., *Velásquez Rodríguez Case*, Merits. Judgment of July 29, 1988, Ser. C. No 4, (1988), paras. 64-66.

[17] See e.g. Petition 65/99, Report 104/05, Victor Nicholas Sanchez *et al*., United States, Annual Report of the IACHR 2005, para. 67; Case 11.193, Report 51/00, Gray Graham, United States Annual Report of the IACHR 2000, para. 60; Case 11.753, Report 108/00, Ramon Martinez Villareal, United States, Annual Report of the IACHR 2000, para. 70; Case 12.379, Report 19/02, Mario Alfredo Lares-Reyes *et al*., United States, Annual Report of the IACHR 2002; para. 61.

[18] See, e.g., Petition 65/99, Report 104/05, Victor Nicholas Sanchez *et al.*, United States, Annual Report of the IACHR 2005, para. 67; Case 12.006, Report 87/03 Oscar Sirí Zuñiga, Honduras, Annual Report of the IACHR 2003, para. 43. See similarly Eur. Comm. H.R., Whiteside v. U.K, App. 20357/92, (Dec.) March 7, 1994, 76A D.R. 80.

49. In the present complaint, the record indicates that the Petitioners have pursued some, but not all, of the domestic remedies potentially pertinent to the claims raised before the Commission. At the same time, the information available calls into question the possibility that further proceedings in respect of the Petitioners' claims under the Civil Liberties Act or under the U.S. Constitution, civil rights law or international humanitarian law might reasonably be successful. With respect to the CLA proceedings, the record indicates that the Petitioners' claims at the administrative level and before the U.S. Court of Federal Claims were denied because the Petitioners failed to satisfy the conditions necessary to qualify as an "eligible individual," which was defined under § 1989b-7(2) of the Act as follows:

> (2) the term "eligible individual" means any individual of Japanese ancestry…who is living on the date of the enactment of this Act [Aug. 10, 1988] and who, during the evacuation, relocation, and internment period-
>
> (A) was a **United States citizen or a permanent resident alien; and (B)(i) was confined, held in custody, relocated, or otherwise deprived of liberty or property** as a result of -
> (I) Executive Order Numbered 9066, dated February 19, 1942…[19] [emphasis added]

50. The record indicates that the Petitioners were, in fact, neither United States citizens nor permanent resident aliens at the time of their internment in the United States and therefore appear to be excluded from redress on the plain wording of the legislation. The State has not provided submissions on this point, but rather has asserted generally that fear of an unfavorable judgment is not sufficient justification for the Petitioners not having pursued an appeal and that the Petitioners' claims under the CLA are "highly factual" and therefore that it is unlikely that the appeals of others might affect the Petitioners' appeals. The State has not, however, identified any factual or legal grounds upon which the Petitioners might receive a decision on appeal different that that given by the Office of Redress Administration or the U.S. Court of Federal claims. To the contrary, developments surrounding the enactment of the CLA, including the US Department of Justice regulations for implementing the CLA and the U.S. government's settlement in the Mochizuki case, reinforce the view that the CLA was never intended to apply to interned Latin Americans of Japanese ancestry like the Petitioners.[20] In these circumstances, and in light of the clear wording of the CLA governing eligibility for redress, the Commission is satisfied based upon the evidence before it that an appeal by the Petitioners to the U.S. Court of Appeals for the Federal Circuit would have no reasonable prospect of success.

51. With respect to the Petitioners' non-CLA claims under the U.S. Constitution, civil rights law, and international humanitarian law, the record indicates that individuals similarly situated to the Petitioners had raised these claims unsuccessfully before the U.S. Court of Appeals for the Ninth Circuit and that the U.S. Supreme Court denied certiorari review of those findings in October 2001.[21] Moreover, the Petitioners have indicated that they may have faced the prospect of penalties had they pursued such claims in the face of the existing precedents. The State has not disputed these allegations and has not

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[19] Civil Liberties Act of 1988, 50 U.S.C. § 1989b-7(2), cited in Petitioners' Petition of June 10, 2003, Appendix A (Isamu Carlos Shibayama, Kenichi Javier Shibayama, Takeshi Jorge Shibayama v. United States, Case No. 00-4C, Opinion of December 19, 2002 (U.S. Court of Federal Claims), at pp. 2-3).

[20] Petitioners' observations of September 30, 2003, Appendix 4 (Department of Justice, 28 C.F.R. Part 74, Order No. 1359-89, Redress Provisions for Persons of Japanese Ancestry, Fed. Reg. Vol, 54,No. 159 (August 18, 1989), p. 34160 (indicating that persons of Japanese ancestry who were sent to the United States from other American countries were excluded from redress payments under the CLA due to the threshold eligibility requirements).

[21] According to the record, in cases brought by two similarly-situated Latin Americans of Japanese descent, Koshio Henry Shima and Kay Kato and others, the U.S. Court of Appeals for the Ninth Circuit dismissed the claimants' claims for damages under the Federal Tort Claims Act, including allegations of the existence of a policy of invidious discrimination and violations of international humanitarian law, on the basis that their claims were statute-barred by the two year limitation period under the Act. In October 2001, the U.S. Supreme Court denied certiorari in the Kato case. Petitioners' Supplementary information dated September 30, 2003, Appendix 1 (Koshio Henry Shima v. US, Order dated July 7, 2000 granting Defendant's motion to dismiss (U.S. District Court for the Central District of California); Kay Sadao Kato *et al*. v. US, Order dated April 3, 2000 granting Defendant's motion to dismiss (U.S. District Court for the Central District of California); Appendix 2 (Koshio Henry Shima v. Ashcroft, Order dated April 17, 2001 dismissing appeal (U.S. Court of Appeals for the Ninth Circuit); Kay Sadao Kato *et al*. v. US, Order dated December 11, 2000 dismissing appeal (U.S. Court of Appeals for the Ninth Circuit); Appendix 3 (Kay Sadao Kato et al. v. U.S *et al*., Petition for Writ of Certiorari filed June 29, 2001 and 2001 U.S. Supreme Court 2001 term order list dated October 1, 2001 denying certiorari).

otherwise indicated why the same courts might have reached a different conclusion in the circumstances of the Petitioners' claims. Accordingly, based upon the information presented the Commission concludes that the Petitioners would have no reasonable prospect of success in pursuing non-CLA claims before the U.S. courts.

52. Based upon the above analysis, the Commission finds that additional remedies pursued by the Petitioners would not be effective within the meaning of applicable principles of international law and therefore that their claims are not barred from consideration under Article 31.1 of its Rules of Procedure.

D. Timeliness of the Petition

53. In the petition under consideration, the Commission has concluded that the Petitioners were excused from exhausting domestic remedies on the ground that such remedies would, on the information presented, have no reasonable prospect of success. Accordingly, under Article 32.2 of the Commission's Rules of Procedure, the Commission must determine whether the petition under review was presented within a reasonable period. In this connection, the Commission observes that the Petitioners were informed on December 22, 2002 of the decision of the U.S. Court of Federal Claims rejecting their claims and their petition was received by the Commission on June 13, 2003. In these circumstances, the Commission considers that the petition was not lodged beyond the time period prescribed under Article 32 of the Commission's Rules of Procedure.

E. Colorable Claim

54. Article 27 of the Commission's Rules of Procedure mandates that petitions state facts "regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments." The Commission has concluded that it is competent to entertain the Petitioners' claims under Articles II, XVIII and XXVI insofar as they relate to the enactment of the Civil Liberties Act in 1988 and the subsequent efforts by the Petitioners to obtain redress under that legislation through administrative and judicial procedures in the United States.

55. After carefully reviewing the information and arguments provided by the Petitioners and the State in respect of these claims, and without prejudging the merits of the matter, the Commission considers that the petition states certain facts falling within the Commission's competence *ratione temporis* as defined in paragraph 42 above that, if proven, tend to establish violations of rights guaranteed under the Declaration. In particular, concerning the Petitioners' claims of violations of the right to equality under Article II of the American Declaration, the Commission notes that the inter-American human rights system requires that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought,[22] and that distinctions based on grounds explicitly enumerated under pertinent articles of international human rights instruments are subject to a particularly strict level of scrutiny whereby states must provide an especially weighty interest and compelling justification for the distinction.[23] Further, with respect to the rights to due process and to judicial protection as provided for under Articles XVIII and XXVI of the American Declaration, the Inter-American Court and Commission have held that states not only have the paramount responsibility to conduct themselves so as to ensure the free and full exercise of human rights, but also a duty under established principles of international law to provide adequate and effective

[22] See, e.g., I/A Court H.R., Advisory Opinion OC-4/84, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, January 19, 1984, Series A Nº 4, para. 54; Case 9903, Report Nº 51/01, Ferrer-Mazorra *et al.* (United States), Annual Report of the IACHR 2000, para. 238.

[23] IACHR, Report on Terrorism and Human Rights (2002), para. 338, citing, *inter alia*, Repetto, Inés, Supreme Court of Justice (Argentina), November 8, 1988, Judges Petracchi and Bacqué, para. 6; Loving v. Virginia, 388 US 1, 87 (1967) Eur. Court H.R., Abdulaziz v. United Kingdom, Judgment of 28 May 1985, Ser. A Nº 94, para. 79.

remedies for any violations that do occur.[24] In light of these and other pertinent principles articulated within the inter-American human right system, the Commission concludes that the Petitioners' petition should not be declared inadmissible under Article 34 of the Commission's Rules of Procedure.

V. CONCLUSIONS

56. The Commission concludes that it is competent to examine the Petitioners' claims under Articles II, XVIII and XXVI of the American Declaration and that these claims are admissible in accordance with the Commission's Rules of Procedure.

57. On the basis of the findings of fact and law set forth above, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES TO:

1. Declare the claims in the petition to be admissible in respect of Articles II, XVIII and XXVI of the American Declaration.

2. Transmit this report to the parties.

3. Continue with the analysis of the merits of the case.

4. Publish this report and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on the 16th day of the month of March, 2006. (Signed): Evelio Fernández Arévalos, President; Florentín Meléndez, Second Vice-President; Clare K. Roberts, Freddy Gutiérrez Trejo and Víctor E. Abramovich, Commissioners.

[24] See I/A Court H.R., *Velásquez Rodríguez Case.* Judgment of 28 July 1988. Series C Nº 4, at para. 154, para. 167; I/A Court H.R.. *Velásquez Rodríguez Case.* Compensatory Damages. Judgment of 21 July 1989, Series C Nº 7, paras. 25-26, 50-51, citing, *inter alia*, Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J. Series A, No. 9, p. 21; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184; I/A Court H.R, Advisory Opinion OC-11/90, *Exceptions to Exhaustion of Domestic Remedies (Articles 46.1, 46.2.a, and 46.2.b American Convention on Human Rights)*, August 10, 1990, Series A Nº 11, para. 23; I/A Court H.R., *Aloeboetoe et al. Case*, *Reparations.* Judgment of 10 September 1993, Series C Nº 15, paras. 51-52.