

OEA/Ser.L/V/II  
Doc. 36  
April 27, 2020  
Original: English

**REPORT No. 26/20**  
**CASE 12.545**  
MERITS REPORT (PUBLICATION)

ISAMU CARLOS SHIBAYAMA, KENICHI JAVIER SHIBAYAMA, AND  
TAKESHI JORGE SHIBAYAMA  
UNITED STATES OF AMERICA

Approved electronically by the Commission on April 22, 2020

**Cite as:** IACHR. Report No. 26/20. Case 12.545. Merits (PUBLICATION). Isamu Carlos Shibayama et al. United States. April 22, 2019.



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**I. SUMMARY**

1. On June 11, 2003, the Inter-American Commission on Human Rights (the “Inter-American Commission” or “IACHR”) received a petition presented by Karen Parker and the Japanese Peruvian Oral History Project (the “petitioners”) that alleges the international responsibility of the United States of America (the “State” or “U.S.”) for violations of the human rights of Isamu Carlos (“Arthur”) Shibayama, Kenichi Javier Shibayama, and Takeshi Jorge Shibayama (the “Shibayama brothers”).

2. The Commission approved its admissibility report No. 26/06 on March 16, 2006.<sup>1</sup> On March 21, 2006, the Commission notified this report to the parties and placed itself at the disposition of the parties to reach a friendly settlement. The parties enjoyed the time periods provided for in the IACHR’s Rules of Procedure to present additional observations on the merits. On March 21, 2017, the Commission held a hearing on the merits of the case. The State was not present at this hearing. All the information received by the Commission was duly transmitted to the parties.

3. Petitioners alleged that the Shibayama brothers and their family, Peruvians of Japanese ancestry, were kidnapped from Peru by the United States and held in U.S. internment camps in Texas during World War II as potential hostages to be exchanged with Japan. Following the end of the war, they were released from detention but neither repatriated to Peru nor granted legal immigration status in the U.S., but rather labeled “illegal aliens.” In 1988, the U.S. passed the Civil Rights Act (CLA), which provided some reparation to Japanese Americans who were interned during World War II, but excluded those who were not citizens or permanent residents at the time of their internment, thus excluding many Japanese Latin Americans, including the Shibayama brothers, and allegedly violating their rights to due process, to an effective remedy, and to equality before the law. The brothers’ claims for reparation remain unredressed to this day.

4. The State alleged that the exclusion of the Shibayama brothers from redress under the CLA, and their lack of redress to date, does not constitute a violation of equality under the law, as citizenship and legal permanent residency are valid distinctions in the making of laws that require the U.S. government to make payments, and that they have effectively enjoyed their due process and fair trial rights in all legal proceedings relating to the CLA and other related claims brought before the federal courts.

5. On the basis of determinations of fact and law, the Inter-American Commission concluded that the State is responsible for the violation of articles II (equality before the law) and XVIII (fair trial and effective remedy) of the American Declaration on the Rights and Duties of Man (the “American Declaration”). The Commission formulated the corresponding recommendations to the State.

**II. POSITIONS OF THE PARTIES**

**A. Petitioners**

6. Petitioners alleged that the Shibayama brothers and their family, Peruvians of Japanese ancestry, were kidnapped from Peru by the United States and held in the U.S. internment camp at Crystal City,

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<sup>1</sup> IACHR. Report No. 26/06. Case 12.545. Admissibility. Isamu Carlos Shibayama et al. United States. March 16, 2006. Alleged violations admissible: Articles II, XVIII and XXVI of the American Declaration on the Rights and Duties of Man.

Texas from March 23, 1944 to September 9, 1946. They alleged that the Shibayamas, like more than 2,200 Latin Americans of Japanese ancestry from 13 different Latin American countries, were kidnapped and interned by the U.S. for use in hostage exchanges with Japan during this period. They alleged that this scheme constituted an ethnic cleansing scheme “under which whole communities of Latin Americans of Japanese ancestry were arrested under a United States plan, removed from their countries, and held in detention camps in Panama and the United States pending being sent to Japan to exchange for Americans of European ancestry held by Japan” and constitutes “war crimes and crimes against humanity.” They further alleged that these are “continuing violations,” insofar as the U.S. maintains a policy of detaining non-U.S. citizens and “programs directed at violating the rights under international law of persons on the basis of their religion and national origin.”

7. Petitioners alleged that after the end of the war, the Shibayamas were released into the U.S., as Peru would not accept their return and their Peruvian identity documents had been confiscated by U.S. personnel, but were considered “illegal aliens” by the U.S. They indicated that the Shibayama brothers were ultimately able to regularize their immigration status to permanent residence in 1956 by leaving the country and reentering.

8. They alleged that when the Civil Liberties Act of 1988 (CLA), which provided some reparation to persons of Japanese ancestry who were interned during WWII and were U.S. citizens or permanent residents at that time, was passed, the brothers were unable to receive reparation under the Act because of their immigration status at the time of their internment. They alleged that the brothers subsequently elected to opt out of the 1998 *Mochizuki* settlement, which provided a lesser amount of reparation for similarly-situated Japanese Latin Americans who had been excluded from reparation under the CLA, in order to pursue their CLA and remaining constitutional and international humanitarian law claims in federal court. They indicated that these claims were dismissed by the Court of Federal Claims in 2003.

9. In this regard, petitioners alleged violations of their right to **equality before the law**, because they were excluded from receiving reparations under the CLA due to their ethnicity, nationality and immigration status at their time of internment, notwithstanding that they had suffered the same circumstances as other individuals of Japanese ancestry who were eligible to receive reparation. Regarding their right to an **effective remedy**, they argued that the procedures to receive reparation for the violations alleged “are neither simple nor brief,” and that litigation of their claims has been prohibitively expensive. In this regard, they alleged that the relatively small sum offered by the CLA required petitioners to search for four years before finding a pro bono attorney willing to represent the cases of Japanese Latin Americans denied redress under the CLA; that the *Mochizuki* settlement “added to the named Petitioners’ feeling of being humiliated and dishonored” by the State; that the *Mochizuki* settlement prohibited attorneys’ fees, disadvantaging the Shibayamas’ ability to continue litigating their claims afterwards; and that the transfer of venue of their case from the district court in California to the Court of Federal Claims in Washington, DC, created additional litigation costs. At the merits hearing, petitioners additionally referred to a lack of full and complete information about the fate of their family members and lack of disclosure of government records concerning the deportation of Japanese Peruvians to the U.S., for which reason they alleged violations of the **right to the truth**. Notwithstanding, petitioners did not indicate that they had pursued any legal or other action to gain access to government-held information.

10. Petitioners requested a number of remedies, including a 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, expungement of the label “illegal alien” from the Petitioners’ government files, and disclosure of information about the kidnapping and internment of Japanese Latin Americans that remains classified by the U.S. government.

## **B. State**

11. At the merits stage, the State presented arguments relating to the admissibility of the case—concretely, the Commission’s alleged lack of competence to consider the matter—which will not be addressed in this report, as they were previously decided by the Commission in Admissibility Report No. 26/06.

12. The State alleged that the right to **equality before the law** “does not mean that there are no permissible distinctions that may be made among persons in the law. This is especially true in the drafting of laws such as the [CLA] which establish eligibility for government resources and benefits. In such laws, citizenship and legal permanent residency are legitimate factors for States to take into account when determining how to divide their limited resources.”

13. The State further denied responsibility for violations of the right to a **fair trial and due process**, as “at no time have Complainants been denied the ability to raise challenges to the [CLA] in U.S. courts. Petitioners admit that they voluntarily abandoned their [international human rights and humanitarian law claims] at least in part, as a result of the outcomes in other cases.” It further alleged that Article XXVI (**due process**) of the American Declaration is limited by its terms to persons accused of an offense, for which reason it is inapplicable in the Shibayamas’ case, and that petitioners’ claims related to the CLA are an attempt to use the IACHR as a prohibited “fourth instance” review.

14. The State added, “Please be assured that the United States acknowledges the suffering experienced by the Shibayama family and those similarly situated, which Isamu and Bekki Shibayama bravely and movingly described in their testimony before the Commission [at the merits hearing]. Nevertheless, as a purely legal matter, the petition in this case is both inadmissible and the Commission lacks competence to pronounce on its merits. [...]”

### III. PRIOR CONSIDERATION

15. In Admissibility Report No. 26/06, the Commission concluded that it is not competent *ratione temporis* to consider the majority of the legal claims presented in the initial petition (including arbitrary detention, right to residence and freedom of movement, and education, among others), as they relate to facts that occurred prior to the U.S.’ deposit of its instrument of ratification of the OAS Charter on June 19, 1951, on which date the American Declaration became a source of legal obligation for the U.S.<sup>2</sup> Notwithstanding, the Commission will discuss below the facts relating to the Shibayama brothers’ kidnapping from Peru, internment in the U.S., and subsequent release, as a matter of relevant background and context and because they are necessary to understand the scope of their claims relating to equality before the law and their right to integral reparation.

16. Likewise, the Commission observes that at the merits stage, the petitioners alleged violations of the right to truth; notwithstanding, they did not provide any information indicating the exhaustion of domestic remedies for this claim, for which reason the Commission will not consider it in this merits report.

### IV. FINDINGS OF FACT

#### A. Background

17. On February 19, 1942, President Franklin D. Roosevelt issued Executive Order No. 9066, authorizing the creation of wartime internment camps in the United States.<sup>3</sup> Approximately 120,000 civilians of Japanese ancestry were relocated and detained in these camps,<sup>4</sup> the majority of whom were U.S. citizens.<sup>5</sup> In 1980, the U.S. Congress passed a law authorizing the creation of a Commission to examine “the impact of Executive Order No. 9066 on American citizens and permanent resident aliens,” culminating in the 1982

<sup>2</sup> See IACHR. Report No. 26/06. Case 12.545. Admissibility. Isamu Carlos Shibayama et al. United States. March 16, 2006, paras. 39-40.

<sup>3</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>4</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>5</sup> U.S. National Archives, Japanese Relocation During World War II (last reviewed Apr. 10, 2017), available at: <https://www.archives.gov/education/lessons/japanese-relocation>.

report *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians*, which contained an appendix regarding Japanese Latin Americans, and the 1983 report *Personal Justice Denied Part 2: Recommendations*.<sup>6</sup>

18. The appendix to *Personal Justice Denied* on Japanese Latin Americans found that, while not conducted pursuant to Executive Order No. 9066, during World War II (WWII), the U.S. “expanded its internment program [...] to Latin America on the basis of ‘military necessity.’ On the [U.S.] invitation, approximately 3,000 residents of Latin America were deported to the United States for internment to secure the Western Hemisphere from internal threats and to supply exchanges for American citizens held by the Axis. Most of these deportees were citizens, or their families, of Japan, Germany and Italy.”<sup>7</sup> While this began as a program “to detain potentially dangerous diplomatic and consular officials of Axis nations and Axis businessmen[, it] grew to include enemy aliens who were teachers, small businessmen, tailors and barbers—mostly people of Japanese ancestry.”<sup>8</sup> Some 2,264 Latin Americans of Japanese ancestry were deported to and interned in the U.S. during World War II, of whom about 80 percent were Japanese Peruvians.<sup>9</sup>

19. While internment of Japanese Latin Americans was justified as a security measure, a “curious wartime triangle trade” in internees developed, as “some Latin American countries, particularly Peru, deported Japanese out of cultural prejudice and antagonism based on economic competition; the United States, in turn, sought Latin American Japanese internees to exchange with Japan for American citizens trapped in territories Japan controlled. The same dynamic often affected Germans and Italians.”<sup>10</sup> The U.S. apparently recognized at the time that this deportation and hostage-exchange scheme violated international law; in 1943, the State Department supported a plan to create internment camps in Peru as it was “reluctant to encourage Peru to breach international law by sending all its Peruvian Japanese from a nonbelligerent state directly to a belligerent one,” though this plan never materialized.<sup>11</sup>

20. Of the 2,264 Japanese Latin American internees, approximately 800 were sent to Japan in hostage exchanges; at least 930 were voluntarily deported to Japan following the war; and as of 1947, only about 300 remained in the U.S., including the Shibayama family.<sup>12</sup> In preparing this report, the IACHR encountered reference to only about 100 Japanese Peruvians who were able to return to Peru after WWII.<sup>13</sup>

21. Although comprehensive research concerning the lives and fates of Japanese Latin Americans deported from Latin America during WWII and evaluating “the need for this extensive, disruptive program” remains to be carried out—particularly in the archives and government records of the involved countries—the U.S.’ report *Personal Justice Denied* observed that there appeared to be “no reliable evidence of planned or contemplated acts of sabotage, subversion, or espionage” in Peru during WWII. It concluded, “Whatever justification is offered for this treatment of enemy aliens, many Latin American Japanese never

<sup>6</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>7</sup> “Appendix: Latin Americans,” in *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* (Washington, DC and Seattle: Civil Liberties Public Education Fund and U. of Washington, 1997). Originally published in two vols. (1982-83) [hereinafter “*Personal Justice Denied*”]. Submitted with petitioners’ letter of Mar. 7, 2017.

In this regard, the Commission notes that it has received information from other individuals and groups during the processing of this case regarding the fates of thousands of German Latin Americans and others of European ancestry, and their families, who were subjected to similar regimes of internment and deportation to the U.S. for internment during this period. See Letter from Heidi Gurcke Donald (German American Internee Coalition) to the IACHR (May 17, 2006); see also Heidi Gurcke Donald, *We Were Not the Enemy: Remembering the United States’ Latin-American Civilian Internment Program of World War II* (Lincoln, NE: iUniverse, 2006).

<sup>8</sup> “Appendix: Latin Americans,” in *Personal Justice Denied*. Submitted with petitioners’ letter of Mar. 7, 2017.

<sup>9</sup> Letter of Juan Kudo to Valerie O’Brian, Office of Reparations Administration (Nov. 29, 1988). Submitted with initial petition; Declaration of Grace Shimizu in *Mochizuki* settlement (Jan. 7, 1999). Submitted with petitioners’ letter of Sept. 30, 2003.

<sup>10</sup> “Appendix: Latin Americans,” in *Personal Justice Denied*. Submitted with petitioners’ letter of Mar. 7, 2017.

<sup>11</sup> “Appendix: Latin Americans,” in *Personal Justice Denied*. Submitted with petitioners’ letter of Mar. 7, 2017.

<sup>12</sup> Letter of Juan Kudo to Valerie O’Brian, Office of Reparations Administration (Nov. 29, 1988). Submitted with initial petition; “Appendix: Latin Americans,” in *Personal Justice Denied*. Submitted with petitioners’ letter of Mar. 7, 2017.

<sup>13</sup> “Appendix: Latin Americans,” in *Personal Justice Denied*. Submitted with petitioners’ letter of Mar. 7, 2017.

saw their homes again after remaining for many years in a kind of legal no-man's-land. Their history is one of the strange, unhappy, largely forgotten stories of World War II."<sup>14</sup>

## **B. The Shibayama brothers**

22. Isamu, Kenichi, and Takeshi Shibayama are brothers of Japanese ancestry who were born in Lima, Peru and whose native language is Spanish.<sup>15</sup> Isamu Shibayama was born on June 6, 1930, and died on July 31, 2018 in San Jose, California.<sup>16</sup> Kenichi Shibayama was born on January 5, 1937, and Takeshi Shibayama was born on July 18, 1938.<sup>17</sup> Their parents were Yuzo and Tatsue Shibayama, and their siblings are Fusako Elisa, Kikue Yolanda, and Akiko Rosa, born in Peru, and George and Kazuko Frances, born in the U.S.<sup>18</sup> In Peru, Yuzo and Tatsue Shibayama had a successful business importing textiles and manufacturing dress shirts, and the Shibayama brothers' grandparents owned a department store in Callao, Peru.<sup>19</sup>

## **C. The Shibayama family's abduction from Peru, internment at Crystal City, Texas, and life upon release from internment**

23. The Shibayama brothers' grandparents, a Peruvian citizen and permanent resident, were among the first Japanese Peruvians to be abducted from Peru by U.S. personnel, sometime in late 1942 or early 1943.<sup>20</sup> The grandparents were "brought to the United States on a [U.S.] military troop transport ship, interned at Seagoville [Texas] and subsequently [...] sent to Japan in exchange for [U.S.] citizens of European ancestry."<sup>21</sup> The Shibayama family never saw them again, a fact that particularly impacted Isamu Shibayama, who prior to that time was largely raised by his grandparents.<sup>22</sup>

24. After the first Japanese Peruvian hostages "were placed on a U.S. Army transport and shipped to an unknown destination, some of the Japanese Peruvian men went into hiding, including [the Shibayamas'] father, whenever a U.S. transport arrived in the harbor" at Callao, Peru.<sup>23</sup> Finally, their mother, Tatsue, was jailed for refusing to disclose the whereabouts of her husband, Yuzo; her oldest daughter, then age 11, accompanied her to the jail so that her mother would not be alone.<sup>24</sup> When Mr. Shibayama heard of this, he turned himself in to the authorities, and the parents and their six children were seized by U.S. personnel.<sup>25</sup> On March 1, 1944, the Shibayama brothers, their three sisters, and their parents were abducted

<sup>14</sup> "Appendix: Latin Americans," in *Personal Justice Denied*. Submitted with petitioners' letter of Mar. 7, 2017.

<sup>15</sup> Joint Stipulation of Facts, Defendant's Statement of Facts, and Plaintiffs' Statement of Facts in *Shibiyama et al. v. U.S.* (Fed. Cl. submitted Aug. 2, 2000) [hereinafter "Stipulation of Facts"]. Submitted with initial petition.

<sup>16</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition; New York Times, Isamu Shibayama Dies at 88, His Quest for Reparations Unfulfilled (Aug. 17, 2018), available at: <https://www.nytimes.com/2018/08/17/obituaries/isamu-shibayama-dies-at-88-his-quest-for-reparations-unfulfilled.html>.

<sup>17</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>18</sup> INS, Reopened Deportation Hearing transcript (Aug. 10, 1954). Submitted with initial petition.

<sup>19</sup> Declaration of Rose Nishimura in *Mochizuki* settlement (Jan. 6, 1999). Submitted with petitioners' letter of Sept. 30, 2003.

<sup>20</sup> Stipulation of Facts in *Shibiyama et al. v. U.S.* (Fed. Cl. submitted Aug. 2, 2000). Submitted with initial petition.

About these early deportations, *Personal Justice Denied* established: "Normal legal proceedings were ignored and none of the Peruvians were issued warrants, granted hearings, or indicted after arrest. On entering the United States [...] private citizens were sent to INS internment camps in Texas. In most cases passports had been confiscated before landing, and the State Department ordered American consuls in Peru and elsewhere to issue no visas prior to departure. [...] Categorical classifications of some as 'believed to be dangerous' enabled the deportation of many private citizens because the United States was unwilling to investigate the need to deport each individual." "Appendix: Latin Americans," in *Personal Justice Denied*. Submitted with petitioners' letter of Mar. 7, 2017.

<sup>21</sup> Stipulation of Facts in *Shibiyama et al. v. U.S.* (Fed. Cl. submitted Aug. 2, 2000). Submitted with initial petition.

<sup>22</sup> Isamu Shibayama's testimony at merits hearing.

<sup>23</sup> Declaration of Rose Nishimura in *Mochizuki* settlement (Jan. 6, 1999). Submitted with petitioners' letter of Sept. 30, 2003.

<sup>24</sup> Declaration of Rose Nishimura in *Mochizuki* settlement (Jan. 6, 1999). Submitted with petitioners' letter of Sept. 30, 2003.

<sup>25</sup> Stipulation of Facts in *Shibiyama et al. v. U.S.* (Fed. Cl. submitted Aug. 2, 2000). Submitted with initial petition.



in Peru by the U.S. Armed Forces.<sup>26</sup> At that time, their Peruvian identification documents were seized by U.S. personnel and never returned.<sup>27</sup>

25. The Shibayamas were thus among the 700 Japanese and 70 German individuals deported from Peru to the U.S. from January to October 1944.<sup>28</sup> During this period, Peru “pushed for additional Japanese deportations, but the United States could not commit the shipping and did not want to augment the hundreds of Japanese internees awaiting repatriation” in the U.S.<sup>29</sup>

26. The Shibayama family was placed on the U.S.S. Cuba under armed guard and transported to the U.S.<sup>30</sup> Isamu Shibayama, then 13 years old, recalled being kept below deck during the 21-day trip, during which time he was allowed on deck two times a day for 10 minutes each time, under constant armed guard by U.S. military personnel “with guns and whips.”<sup>31</sup> The younger children were held with their mother elsewhere on the ship.<sup>32</sup> On reaching the U.S., “the Shibayama family was taken off the U.S.S. Cuba at gunpoint by [U.S. armed forces personnel] and entered involuntarily into the [U.S.]”<sup>33</sup>

27. They entered via New Orleans, Louisiana on March 21, 1944, where they were led off the ship, ordered to strip off their clothes *en masse*, and sprayed with DDT, an insecticide.<sup>34</sup> Then, after a two-day train journey, they arrived at Crystal City Internment Camp, Crystal City, Texas on or about March 23, 1944.<sup>35</sup> Once in the U.S., internees were under State Department custody, held in camps operated by the INS (Department of Justice, DOJ).<sup>36</sup> In this regard, “despite their involuntary arrival, deportees [from Latin America] were treated by the INS as having illegally entered [the U.S.]. Thus the deportees became illegal aliens in U.S. custody who were subject to deportation proceedings, i.e., repatriation.”<sup>37</sup> Congruent with this legal interpretation, the INS later characterized these facts as the Shibayama siblings’ mother having “brought [them] to the United States” for the purpose of “voluntary internment in this country because of the war with Japan.”<sup>38</sup>

28. Later review found that internment’s “bad effects were evident: lack of privacy, family breakdown, listlessness and uncertainty about the future.”<sup>39</sup> In the Crystal City internment camp, the school-age Shibayama children were taught exclusively in Japanese, though they spoke only Spanish.<sup>40</sup>

<sup>26</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>27</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>28</sup> Along with some 130 “enemy aliens” from Bolivia, Costa Rica, and Ecuador. “Appendix: Latin Americans,” in *Personal Justice Denied*. Submitted with petitioners’ letter of Mar. 7, 2017.

<sup>29</sup> “Appendix: Latin Americans,” in *Personal Justice Denied*. Submitted with petitioners’ letter of Mar. 7, 2017.

<sup>30</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>31</sup> Stipulation of Facts in *Shibayama et al. v. U.S.* (Fed. Cl. submitted Aug. 2, 2000). Submitted with initial petition; Declaration of Rose A. Nishimura in *Mochizuki* settlement (Jan. 6, 1999). Submitted with petitioners’ letter of Sept. 30, 2003.

<sup>32</sup> Stipulation of Facts in *Shibayama et al. v. U.S.* (Fed. Cl. submitted Aug. 2, 2000). Submitted with initial petition.

<sup>33</sup> Stipulation of Facts in *Shibayama et al. v. U.S.* (Fed. Cl. submitted Aug. 2, 2000). Submitted with initial petition.

<sup>34</sup> Stipulation of Facts in *Shibayama et al. v. U.S.* (Fed. Cl. submitted Aug. 2, 2000). Submitted with initial petition; Declaration of Rose A. Nishimura in *Mochizuki* settlement (Jan. 6, 1999). Submitted with petitioners’ letter of Sept. 30, 2003.

<sup>35</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition; Stipulation of Facts in *Shibayama et al. v. U.S.* (Fed. Cl. submitted Aug. 2, 2000). Submitted with initial petition.

<sup>36</sup> “Appendix: Latin Americans,” in *Personal Justice Denied*. Submitted with petitioners’ letter of Mar. 7, 2017.

<sup>37</sup> “Appendix: Latin Americans,” in *Personal Justice Denied*. Submitted with petitioners’ letter of Mar. 7, 2017.

<sup>38</sup> INS, Reopened Deportation Hearing transcript (Aug. 10, 1954). Submitted with initial petition. The siblings subsequently corrected this assertion to establish that they and their parents “were brought to this country forcibly for internment here.” *Id.*

They may have been classified in this way because “About half the Japanese internees were family members, including Nisei, who asked to join their husbands and fathers in camps pending deportation to Japan; family members were classified as ‘voluntary internees.’” “Appendix: Latin Americans,” in *Personal Justice Denied*. Submitted with petitioners’ letter of Mar. 7, 2017.

<sup>39</sup> “Appendix: Latin Americans,” in *Personal Justice Denied*. Submitted with petitioners’ letter of Mar. 7, 2017.

<sup>40</sup> Stipulation of Facts in *Shibayama et al. v. U.S.* (Fed. Cl. submitted Aug. 2, 2000). Submitted with initial petition.



29. On March 30, 1946, the U.S. served arrest warrants on the Shibayama family, charging them with not possessing passports or immigration visas.<sup>41</sup> As Peru largely refused to accept its Japanese deportees back after the war, on September 9, 1946, the Shibayama family was paroled from Crystal City Internment Camp as “illegal aliens” and relocated to Seabrook Farms, New Jersey.<sup>42</sup> There, Isamu Shibayama worked rather than attending high school, in order to help support his family of eight, for about \$0.60 per hour, which was taxed at a rate of 30 percent due to his classification as an “illegal alien.”<sup>43</sup> From the time of the family’s arrival to Seabrook Farms until March 1949, their father, Yuzo Shibayama, sought to have his family returned to Peru, but was denied because the family did not possess their Peruvian identity documents,<sup>44</sup> leaving the family functionally stateless during this period.<sup>45</sup> In March 1949, Mr. Shibayama obtained a sponsor for the family and they relocated to Chicago, Illinois.<sup>46</sup> Yuzo Shibayama’s granddaughter testified at the merits hearing that he spent the rest of his life, until his death in 1976, struggling to provide for his family and regain what he had lost after being deported from Peru, and expressed her belief that “the U.S. government killed my grandfather’s spirit.”<sup>47</sup>

30. Notwithstanding his lack of immigration status in the U.S., Isamu Shibayama was required to register for the draft during the Korean War, and served in the U.S. Armed Forces, including a deployment to Germany, from April 30, 1952 until April 7, 1954; he then continued to serve in a Reserve unit until he was honorably discharged on May 27, 1960.<sup>48</sup> While in the Armed Forces, his supervisor sought to help him naturalize as a U.S. citizen in order to obtain a higher security clearance, under the provisions of a law that provided for the naturalization of servicemembers.<sup>49</sup> His application was denied, however, because he had not been lawfully admitted to the U.S. within the meaning of the Immigration and Nationality Act (INA), and the then-Immigration and Naturalization Service (INS) reopened deportation proceedings against the Shibayama siblings in consequence.<sup>50</sup>

31. In particular, the record of the family’s entrance to the U.S. consisted of an “I-404, Certificate of Admission of Alien,” and “there was no examination by immigration officers.”<sup>51</sup> The Shibayamas were further unable to produce identity documents proving their citizenship in these proceedings because the U.S. had taken those documents from them prior to their arrival in the U.S.<sup>52</sup> From the record, it appears that the INS found the siblings to be deportable, for which reason they applied for suspension from deportation or, in the alternative, “for the privilege of voluntary departure and preexamination,” or the possibility to exit the U.S., apply for a visa, and reenter the country in order to adjust to a lawful immigration status.<sup>53</sup> On November

<sup>41</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>42</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition; “Appendix: Latin Americans,” in *Personal Justice Denied*. Submitted with petitioners’ letter of Mar. 7, 2017.

<sup>43</sup> Stipulation of Facts in *Shibiyama et al. v. U.S.* (Fed. Cl. submitted Aug. 2, 2000). Submitted with initial petition.

<sup>44</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

*Personal Justice Denied* indicates that the U.S. “sought to return internees who were not classified as dangerous and who refused deportation to Axis countries, to their points of origin in Latin America. But the common hemispheric interests that bred the deportation had dissolved, and the government now had to negotiate about returning internees to Latin America using weak, hastily-written wartime agreements, for the United States had not exacted initial guarantees defining the deportees’ postwar fate. [...] Peru [...] wanted to restrict the return of Japanese (but not German) internees.” “Appendix: Latin Americans,” in *Personal Justice Denied*. Submitted with petitioners’ letter of Mar. 7, 2017.

<sup>45</sup> Petitioners’ testimony at merits hearing.

<sup>46</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>47</sup> Bekki Shibayama’s testimony at merits hearing.

<sup>48</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002); INS, Reopened Deportation Hearing transcript (Aug. 10, 1954); Stipulation of Facts in *Shibiyama et al. v. U.S.* (Fed. Cl. submitted Aug. 2, 2000). Submitted with initial petition.

<sup>49</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition; Isamu Shibayama’s testimony at merits hearing.

<sup>50</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition; *see also* INS, Reopened Deportation Hearing transcript (Aug. 10, 1954). Submitted with initial petition.

In contrast to Isamu Shibayama’s treatment by immigration authorities, there were apparently some similarly-situated Japanese Peruvians who were abducted and brought to the U.S. without lawful immigration status but were able to naturalize as citizens under the same law after serving in the Armed Forces. *See* Letter of Juan Kudo to Valerie O’Brian, Office of Reparations Administration (Nov. 29, 1988). Submitted with initial petition.

<sup>51</sup> INS, Reopened Deportation Hearing transcript (Aug. 10, 1954). Submitted with initial petition.

<sup>52</sup> Petitioners’ testimony at merits hearing.

<sup>53</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

23, 1955, the INS issued a decision indicating that they should be granted the latter relief, for which reason in 1956, the Shibayama brothers traveled to Canada, applied for an immigrant visa, reentered the United States, and received permanent resident status.<sup>54</sup> Takeshi Shibayama became a naturalized U.S. citizen on January 28, 1964.<sup>55</sup> Isamu Shibayama became a naturalized U.S. citizen on September 8, 1970.<sup>56</sup>

32. About this experience, the Shibiymas' sister, Rose Nishimura, stated, "We did not want to come to this land. We were forcibly brought here by the [U.S.] government on a [U.S.] military transport and put in a barbed wire enclosed camp administered by the [INS]. So how can it be said we were illegal aliens?"<sup>57</sup>

#### D. Claims for redress under the Civil Rights Act of 1988 and subsequent legal actions

33. In response to the reports *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* (1982), and *Personal Justice Denied Part 2: Recommendations* (1983), commissioned by the U.S. Congress, the Congress passed the Civil Liberties Act of 1988 (CLA), with the stated purpose to, *inter alia*:

- (1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;
- (2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens;
- (3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event;
- (4) make restitution to those individuals of Japanese ancestry who were interned; [...]
- (6) discourage the occurrence of similar injustices and violations of civil liberties in the future; and
- (7) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.<sup>58</sup>

34. The CLA provided for restitution payments of US\$ 20,000 to eligible individuals under the Act; an "eligible individual" was defined as:

- (2) [...] 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[...]<sup>59</sup>

35. The plain language of the legislation thus makes clear that U.S. citizenship or permanent residence at the time of internment, or retroactive to the time of internment,<sup>60</sup> is a necessary precondition to receiving this payment.<sup>61</sup>

<sup>54</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>55</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>56</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>57</sup> Declaration of Rose Nishimura in *Mochizuki* settlement (Jan. 6, 1999). Submitted with petitioners' letter of Sept. 30, 2003.

<sup>58</sup> Text of the Civil Liberties Act of 1988. Submitted with initial petition.

<sup>59</sup> Civil Liberties Act of 1988, 50 U.S.C. § 1989b-7(2).

<sup>60</sup> The Shibayama brothers' mother and one sister, for example, obtained reparation under the CLA because they later received retroactive permanent resident status: their mother was apparently able to adjust her status in or about 1952 without leaving the U.S., and their sister married a U.S. citizen and was thus able to adjust status with retroactive effect. *See, e.g.*, initial petition at 1; INS, Reopened Deportation Hearing transcript (Aug. 10, 1954). Submitted with initial petition.

<sup>61</sup> Text of the Civil Liberties Act of 1988. Submitted with initial petition; *see also* IACHR. Report No. 26/06. Case 12.545. Admissibility. Isamu Carlos Shibayama et al. United States. Mar. 16, 2006, paras. 49-50.

36. Kenichi, Takeshi, and Isamu each applied for redress under the CLA, and were informed that their applications had been denied on November 10, 1992, April 22, 1993, and June 28, 1993, respectively, because they were not permanent residents during their internment and did not later obtain that status retroactively.<sup>62</sup> Isamu appealed his denial on August 17, 1993, arguing that he was “permanently residing under color of law” during the relevant period and that the DOJ should be estopped from asserting that he was an illegal alien when he entered the U.S.<sup>63</sup> On February 13, 1996, the Chief of the Appellate Section of the DOJ Civil Rights Division issued a decision affirming the denial of Isamu Shibayama’s claim because the “permanently residing under color of law” doctrine applies only to eligibility for certain government benefits, but not to actual determinations of immigration status, and “the CLA only provided compensation for individuals who were United States citizens, permanent resident aliens during the internment period or who had acquired retroactive permanent resident alien status after the war, and because Mr. Is[amu] Shibayama could not satisfy these requirements, his appeal was denied.”<sup>64</sup>

37. On June 11, 1998, a preliminary court order was issued in *Mochizuki v. U.S.*<sup>65</sup> to certify a class of individuals including “persons of Japanese ancestry who were living in Latin America before World War II and who were interned in the United States [between 1941 and June 30, 1946]” and their heirs, which ultimately resulted in a settlement payment of \$5,000 per person.<sup>66</sup> The Shibayama brothers chose to opt-out of the class and subsequent settlement in September 1998, and filed suit in the U.S. District Court for the Northern District of California on February 18, 1999, seeking declaratory and injunctive relief for breach of fiduciary duty and violation of federal civil rights and humanitarian law.<sup>67</sup> The suit was subsequently transferred to the Court of Federal Claims.<sup>68</sup>

38. According to the U.S. National Archives, the Office of Reparations Administration (ORA), which administered reparations under the CLA, ultimately “provided \$20,000 in redress to more than 82,219 eligible claimants, totaling more than \$1.6 billion. Among the estimated 82,219 individuals paid, 189 were Japanese Latin American claimants eligible for the full \$20,000 in redress compensation under the Act because they had the required permanent residency status or U.S. citizenship during the defined war period. In addition, ORA paid \$5,000 to 145 Japanese Latin Americans [under the *Mochizuki* settlement].”<sup>69</sup>

#### **E. Lawsuit before the Court of Federal Claims**

39. The Shibayama brothers’ lawsuit was dismissed by the Court of Federal Claims by order dated January 3, 2003.<sup>70</sup> Regarding the brothers’ claims for reparation under the CLA, the Court granted the U.S.’ motion to dismiss Mr. Kenichi Shibayama as barred by the applicable statute of limitations, and granted the U.S.’ motion for summary judgment on the administrative record as to review of the ORA’s denial of the claims of Mr. Isamu Shibayama and Mr. Takeshi Shibayama and, alternatively, Mr. Kenichi Shibayama.<sup>71</sup> It further granted the U.S.’ motion for summary judgment on the administrative record of the Shibayamas’ claims under the Fifth Amendment, 42 U.S.C. § 1981 and the Administrative Procedures Act; and granted the U.S.’ motion to dismiss the Shibayamas’ claims for: violation of international humanitarian law, disbursement of U.S. funds for public education about “the alleged unlawful abduction and detention of Latin Americans of Japanese ancestry by the United States” and restitution for excessive income taxes assessed (based on the Shibayamas’ status as “illegal aliens”).<sup>72</sup> Petitioners “stressed” in the initial petition “that at the hearing that

<sup>62</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>63</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>64</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>65</sup> 41 Fed. Cl. 54 (1998).

<sup>66</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>67</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>68</sup> Order of Transfer (N.D. Cal. Oct. 12, 1999). Submitted with initial petition.

<sup>69</sup> National Archives, Japanese Americans: Search the Compensation and Reparations for the Evacuation, Relocation, and Internment Index (Redress Case Files) (last reviewed Feb. 22, 2017), available at: <https://www.archives.gov/research/japanese-americans/redress>.

<sup>70</sup> Order of the U.S. Court of Federal Claims (Jan. 3, 2003); see also Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002). Submitted with initial petition.

<sup>71</sup> Order of the U.S. Court of Federal Claims (Jan. 3, 2003). Submitted with initial petition.

<sup>72</sup> Order of the U.S. Court of Federal Claims (Jan. 3, 2003). Submitted with initial petition.

they had at the Claims Court, the judge directly and movingly apologize[d], on behalf of the United States government, to the Petitioners.”<sup>73</sup>

40. The Shibayamas alleged that at the time of their internment they were permanently residing in the U.S. “both directly and under color of law,” for which reason they should receive reparation under the CLA. In this regard, they argued that they were “clearly not illegal aliens at any time during their internment. At no time did Plaintiffs ever violate a single provision of United States immigration laws that the United States did not itself excuse. Their presence in the United States was entirely at the whim of the United States itself—the United States went and got them and the United States maintained the[m] here. They cannot be legal and illegal at the same time. At no time during the time Plaintiffs were under the control of the United States did they ever have a fixed departure date. Accordingly, they were residing continuously and legally here [within the meaning of the law].”<sup>74</sup>

41. Notwithstanding, the Court found that the brothers “obtained permanent residence by entry into the United States with an immigrant visa rather than by suspension of deportation. Their permanent resident status dated from their entry in 1956 rather than their entry in 1944,” and reiterated that “permanently residing under color of law” is a doctrine that applies to eligibility for public benefits, but does not actually determine or grant legal status.<sup>75</sup>

42. After dismissing the Shibayamas’ CLA claims, the Court of Federal Claims found that jurisdiction was proper with it to consider the Shibayamas’ remaining claims because, although the Shibayamas initially asserted claims for both equitable and legal relief, they also asserted that “Plaintiffs will continue to suffer violation of their rights as beneficiaries of the CLA unless [the U.S. is] enjoined to provide full restitution of all of the benefits to which they were entitled under the CLA,” for which reason the court concluded that “all the plaintiffs’ claims are predicated on the government’s denial of the statutory amount of restitution and at bottom seek only the payment of the \$20,000.”<sup>76</sup>

43. The Court of Federal Claims rejected the Shibayamas’ equal protection claim under the Fifth Amendment, citing the precedent *Obadele v. U.S.*<sup>77</sup> and finding that they had not “explained why the court should not find a compelling government interest in Congress’ determination to compensate only United States citizens and permanent resident aliens under the CLA.”<sup>78</sup>

44. The Commission understands that the Shibayamas’ international humanitarian law claims (i.e. that the brothers’ international abduction and internment during WWII violated the law of war and *jus cogens* norms) were rejected by the Court of Federal Claims because the court understood their case to be about reparation under the CLA, not about the morality or legality of the U.S.’ actions during WWII. Supporting this interpretation, the Court quoted the Shibayamas’ counsel at oral argument stating that “the acts [that] Congress seeks [to] redress are *jus cogens* violations and because *jus cogens* violations carry with them an obligation for redress one could easily construe the statute” to apply to the Shibayamas.<sup>79</sup> In this regard, the judge stated at oral argument,

Well, I mean, we’re interpreting and discussing a restitution act. We’re not really discussing at this time the morality of what was done to this group of people or the absence of morality of what was done to these people. We’re discussing whether the Restitution Act applies to this particular group of plaintiffs and, if so, why and if not, why not? But really not challenging the existence of the Act or what it stipulates.<sup>80</sup>

<sup>73</sup> Initial petition at footnote 14.

<sup>74</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002) at 29-30. Submitted with initial petition.

<sup>75</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002) at 30-32. Submitted with initial petition.

<sup>76</sup> Id. at 33 (citing *Kanemoto v. Reno*, 41 F.3d 641, 646 (Fed. Cir. 1994)).

<sup>77</sup> 52 Fed. Cl. at 440-444.

<sup>78</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002) at 37. Submitted with initial petition.

<sup>79</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002) at 40. Submitted with initial petition.

<sup>80</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002) at 39-40. Submitted with initial petition.

45. Finally, the Court of Federal Claims rejected the Shibayamas' claims for disbursement of funds for public education and restitution for excessive income taxes because plaintiffs did not identify a jurisdictional basis for the court to provide the relief they requested.<sup>81</sup>

46. As addressed at length in the Admissibility Report, the Shibayamas did not appeal this decision due to fear of sanction by the court for making a "frivolous" filing, as individuals similarly situated to the petitioners had raised the non-CLA claims under the U.S. Constitution, civil rights law, and international humanitarian law unsuccessfully before the U.S. Court of Appeals for the Ninth Circuit, and the U.S. Supreme Court had denied certiorari review of their case October 2001. For this reason, the Commission was satisfied that further appeal of the Shibayamas' non-CLA claims had "no reasonable prospect of success" in U.S. courts.<sup>82</sup>

## V. ANALYSIS OF LAW

### A. Application of the American Declaration and interpretation in light of developments in international human rights law since its adoption

47. The American Declaration is a source of legal obligation that may be applied by the Inter-American Commission to the U.S. on the basis of the State's commitment to uphold respect for human rights as provided for and defined in the Charter of the Organization of American States (OAS).<sup>83</sup> The U.S. deposited its instrument of ratification of the OAS Charter on June 19, 1951. Article 20 of the Commission's Statute, as well as its Rules of Procedure, authorize the IACHR to examine the alleged violations of the Declaration raised by the petitioners against the State, relating to acts or omissions that occurred after the U.S. joined the OAS.

48. The Commission has long held that it is necessary to consider the provisions of the American Declaration in the broader context of both the inter-American and international human rights systems, in light of developments in international human rights law since the Declaration was adopted and having regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged.<sup>84</sup> Pursuant to the principles of treaty interpretation, the Inter-American Court of Human Rights has likewise endorsed an interpretation of international human rights instruments that takes into account developments in the *corpus juris* of international human rights law over time and in present-day conditions. It is necessary for the Commission to take other instruments into account as well because one instrument may not be used as a basis to deny or limit other favorable or more extensive human rights that individuals might otherwise be entitled to under international or domestic law or practice.<sup>85</sup>

49. Developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may additionally be drawn from the provisions of other prevailing

<sup>81</sup> Opinion of the U.S. Court of Federal Claims (Dec. 19, 2002) at 41. Submitted with initial petition.

<sup>82</sup> IACHR, Report No. 26/06, Case 12.545, Admissibility, Isamu Carlos Shibayama et al. United States, Mar. 16, 2006, paras. 50-51; *see also* Order in *Shima v. US* (C.D. Cal. July 7, 2000) (granting Defendant's motion to dismiss); Order in *Kato et al. v. US* (C.D. Cal. Apr. 3, 2000) (granting Defendant's motion to dismiss); Order in *Shima v. Ashcroft* (9th Cir. Apr. 17, 2001) (dismissing appeal); Order in *Kato et al. v. US* (9th Cir. Dec. 11, 2001) (dismissing appeal); Petition for Writ of Certiorari in *Kato et al. v. US et al.* filed June 29, 2001 and 2001 U.S. Supreme Court 2001 term order list dated Oct. 1, 2001 denying certiorari). Submitted with petitioners' letter of Sept. 30, 2003.

<sup>83</sup> IACHR, Report No. 3/87, Case 9647, Roach and Pinkerton, United States (1987), paras. 48-49; I/A Ct. H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 of July 14, 1989, [hereinafter "*Interpretation of the American Declaration*"], para. 47 ("[T]he member states of the [OAS] have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the [OAS] cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.")

<sup>84</sup> IACHR, Report No. 50/16, Case 12.834, Merits (Publication), Undocumented Workers, United States, Nov. 30, 2016, para. 68. *See* I/A Ct. H.R., *Interpretation of the American Declaration*, Advisory Opinion OC-10/89 of July 14, 1989, para. 37. *See also* ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31 ("an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation").

<sup>85</sup> IACHR, *Report on Terrorism and Human Rights* (2002), para. 45 (citations omitted). *See also* IACHR, Report No. 109/99, Case 10.951, Coard et al. United States, Sept. 29, 1999, para. 42.



international and regional human rights instruments. In particular, this includes the American Convention on Human Rights, which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration. While the Commission clearly does not apply the American Convention in relation to Member States that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the Declaration.<sup>86</sup>

**B. Right to equality before the law (Art. II),<sup>87</sup> in relation to the right to a fair trial and effective remedy (Art. XVIII)<sup>88</sup>**

**1. General considerations regarding equality before the law and the right to an effective remedy**

50. The principles of equality before the law, equal protection, and non-discrimination are among the most basic human rights, and are in fact recognized by the Inter-American Court as *jus cogens* norms, “because the whole legal structure of national and international public order rests on it.”<sup>89</sup> In line with the Human Rights Committee, the Commission has further understood “discrimination” to mean “any distinction, exclusion, restriction, or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>90</sup>

51. The principle of equality and non-discrimination incorporate both “the prohibition of arbitrary differences of treatment,” and “the obligation of States to create conditions of real equality for groups that have been historically excluded or that are at greater risk of being discriminated against.”<sup>91</sup> With regard to the former, while Article II of the American Declaration does not prohibit all distinctions in treatment in the enjoyment of protected rights and freedoms, it does require that any permissible distinctions be based on an 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

<sup>86</sup> See IACHR, *Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System* (2000), para. 38; IACHR, *Garza v. United States*, Case No. 12.275, Annual Report of the IACHR 2000, paras. 88-89.

<sup>87</sup> Article II provides, “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”

<sup>88</sup> Article XVIII provides, “Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”

<sup>89</sup> See I/A Ct. H.R. *Judicial Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of Sept. 17, 2003, para. 101. See also IACHR, Report No. 50/16, Case 12.834, Merits (Publication), *Undocumented Workers, United States*, Nov. 30, 2016, para. 72 (citing IACHR, Report N<sup>o</sup> 80/11, Case 12.626, *Jessica Lenahan (Gonzales) et al.* (United States), July 21, 2011, para. 107; IACHR Report 40/04, Case 12.053, *Maya Indigenous Community* (Belize), October 12, 2004, para. 163; IACHR Report 67/06, Case 12.476, *Oscar Elias Bicet et al.* (Cuba), October 21, 2006, para. 228; IACHR, *Report on Terrorism and Human Rights* (2002), para. 335).

See also, Int’l Covenant on Civil and Political Rights (Articles 2, 26); Int’l Covenant on Economic, Social and Cultural Rights (Articles 2.2, 3); European Convention on Human Rights (Article 14); African Charter on Human and People’s Rights (Article 2).

<sup>90</sup> IACHR, Report No. 50/16, Case 12.834, Merits (Publication), *Undocumented Workers, United States*, Nov. 30, 2016, para. 75 (citing U.N. Human Rights Committee, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.1 (1994), General Comment 18, Non-discrimination, p. 26).

<sup>91</sup> See, e.g., I/A Ct. H.R. *Furlán and family v. Argentina*. Judgment of Aug. 31, 2012, para. 267.



proportionate to the end sought.”<sup>92</sup> Further, 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.<sup>93</sup> Regard should also be given to the fact that “[O]ne of the American Declaration’s objectives . . . was to assure in principle ‘the equal protection of the law to nationals and aliens alike in respect to the rights set forth.’”<sup>94</sup>

52. Further, with respect to the rights to due process and to judicial protection as provided for under Article XVIII, 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 remedies for any violations that do occur.<sup>95</sup> In this regard, in the inter-American system, access to justice is not only a fundamental human right but also an essential pre-requisite for the protection and promotion of all other rights. For this reason, it is a fundamental principle that the formal existence of a remedy in law is not sufficient;<sup>96</sup> States must further ensure that legal remedies are adequate and effective in practice to establish whether a human rights violation has occurred, and to provide redress.<sup>97</sup> An effective remedy is one that is capable of producing the result for which it was designed,<sup>98</sup> has a useful effect (*effet utile*), and is not illusory.<sup>99</sup>

## 2. The Shibayama brothers’ exclusion from the CLA

53. The U.S. Congress, in 1988, chose to recognize and grant reparation to individuals of Japanese ancestry interned during WWII for the “fundamental injustice” of their “evacuation, relocation, and internment” during WWII. Petitioners argued that the exclusion of the Shibayama brothers from receiving this reparation because they were not considered U.S. citizens or permanent residents at the time of their internment, violates their right to equality before the law. The State and petitioners do not dispute—and in fact jointly stipulated in domestic litigation—that the Shibayama brothers were interned by the U.S. government during WWII; the record makes clear that the only basis for their exclusion from the CLA is that their legal permanent resident status dates to 1956, not to their initial entry to the country in 1944. The State defended itself by arguing that their exclusion from the terms of the Civil Liberties Act is legitimate because “in the drafting of laws such as the [CLA] which establish eligibility for government resources and benefits [...] citizenship and legal permanent residency are legitimate factors for States to take into account when determining how to divide their limited resources.”<sup>100</sup>

<sup>92</sup> IACHR, Report No. 50/16, Case 12.834, Merits (Publication), *Undocumented Workers*, United States, Nov. 30, 2016, para. 74; IACHR, Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al.*, United States, Apr. 4, 2001, para. 238 (citing as support of its position Eur. Ct. H.R., *Belgian Linguistics Case*, July 23, 1968, Series A N° 6, 1 E.H.R.R. 252, p. 35, para. 10).

<sup>93</sup> 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 N° 94, para. 79).

<sup>94</sup> IACHR, Report No. 113/14, Case 11.661, Merits, *Manickavasagam Suresh*, Canada, Nov. 7, 2014, para. 86; IACHR, Report No. 51/01, Case 9903, *Rafael Ferrer-Mazorra et al.*, United States, Apr. 4, 2001, para. 239. See also IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System* (2000), para. 96.

<sup>95</sup> See I/A Ct. H.R., *Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988, para. 154, 167; I/A Ct. H.R., *Velásquez Rodríguez*, Compensatory Damages. Judgment of July 21, 1989, 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 Ct. 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), Aug. 10, 1990, Series A N° 11, para. 23; I/A Ct. H.R., *Aloboetoe et al. v. Surinam*. Reparations. Judgment of Sept. 10, 1993, paras. 51-52.

<sup>96</sup> See, among others, I/A Ct. H.R. *Hilaire et al. v. Trinidad and Tobago*, Judgment of June 21, 2002, para. 145; *Case of 19 Merchants v. Colombia*, Judgment of July 5, 2004, para. 191; *Serrano Cruz Sisters v. El Salvador*, Judgment of Mar. 1, 2005, para. 69.

<sup>97</sup> See, e.g., IACHR, *Toward the Closure of Guantánamo* (2015), para. 153; see also I/A Ct. H.R. *Judicial Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of Sept. 17, 2003, para. 109; IACHR, *Report on Persons Deprived of Liberty* (2011), para. 246 (citing I/A Ct. H.R., *Velásquez Rodríguez v. Honduras*. Judgment of July 29, 1988, para. 66; *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 Am. Conv. H.R.). Advisory Opinion OC-9/87 of Oct. 6, 1987, para. 24).

<sup>98</sup> IACHR, *Report on Persons Deprived of Liberty* (2011), para. 246 (citing I/A Ct. H.R. *Velásquez Rodríguez v. Honduras*, para. 66).

<sup>99</sup> See, for example, I/A Ct. H.R. *Case of the Constitutional Tribunal v. Peru*, Judgment of Jan. 31, 2001, paras. 73, 75; *Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, Judgment of Aug. 5, 2008, para. 138; see also I/A Ct. H.R. *Maldonado Ordóñez v. Guatemala*. Judgment of May 3, 2016, párr. 109.

<sup>100</sup> State’s observations on the merits (Jan. 22, 2007).

54. The Commission observes, as a threshold issue, that the distinction at issue in this case is nationality, which is subject to a particularly strict level of scrutiny and thus triggers a “presumption of invalidity.”<sup>101</sup> In particular, “strict scrutiny” in the inter-American system requires: 1) that the distinction be based on very compelling reasons, meaning that it is not sufficient for a State to argue the existence of a legitimate end; rather, the purpose served by making the distinction must be some overriding or imperative public interest;<sup>102</sup> 2) there must be no other less restrictive measure available, meaning that it is not sufficient that the measure be suitable or that some logical causal relationship exists between the measure and the end being sought;<sup>103</sup> 3) it must be strictly proportional, meaning that the State must be able to show that a proper balance of interests has been struck between what has been sacrificed and what has been gained;<sup>104</sup> and 4) the burden of proof to demonstrate these elements rests with the State.<sup>105</sup> The purpose of applying strict scrutiny is to guarantee that the distinction is not based on the prejudices and/or stereotypes that generally surround suspect categories of distinction.<sup>106</sup>

55. The Commission finds that the exclusion of the Shibayama brothers from receiving reparation under the CLA constitutes a clear violation of their right to equality before the law, as the State has not met its burden of demonstrating its compelling interest in making the distinction, the lack of less restrictive alternatives, and strict proportionality of the measure. The Commission considers that, given the State’s recognition of the “fundamental injustice” of internment and the need to compensate and apologize to the people who suffered that regime, it is unreasonable and clearly disproportionate to distinguish eligibility for compensation based on nationality, which is a factor that bears no rational relationship to the nature or form of suffering caused by internment to the people subjected to it. Moreover, the State’s stated interest in limiting its economic liability to individuals who at the time of their internment were not citizens or permanent residents is not compelling in the sense of representing an “overriding public interest:” the relatively low amount of compensation (\$20,000) relative to the State’s available resources, and the extremely small number of potential beneficiaries affected by the nationality-based restriction, in comparison with the approximately 82,000 beneficiaries ultimately compensated under the law—including 189 Japanese Latin Americans who acquired retroactive permanent residency—makes plain that alleged fiscal concerns cannot justify the State’s failure to compensate individuals who suffered under the same regime. Given these considerations, the Commission will not analyze the remaining factors.

56. The Commission further observes the fundamental inequity of refusal to compensate individuals whose immigration status was irregular at the time of their internment due to the State’s own failure to regularize them, which underlines the unreasonableness of later excluding the petitioners from receiving reparation. The Commission notes that it is not in controversy that in 1944, the U.S. arrested, transported, and entered the Shibayamas into the U.S., then detained them against their will. Following this period, the Commission notes that the Shibayamas, like many of the approximately 300 Japanese Latin Americans who remained in the U.S. following WWII, fell into a sort of legal no-man’s-land, as their situation—having been brought into the U.S. by the U.S. government, yet not being “lawfully admitted” within the meaning of the immigration laws—was not foreseen in the existing legal framework. Given this unusual situation, INS officials then attempted to resolve their immigration status using then-existing immigration laws, given the lack of a tailored response from the Congress or Executive to regularize the Japanese Latin Americans’ status in a rational manner. This, in turn, led to wild inequalities in the way that reparation was later disbursed under the CLA—according to which the brothers’ mother and sister were able to receive

<sup>101</sup> See, e.g., IACHR, Report No. 64/12. Case 12.271. Merits. *Benito Tide Méndez*. Dominican Republic. Mar. 29, 2012, para. 228.

<sup>102</sup> Id. at para. 229 (citing IACHR, *Access to Justice for Women Victims of Violence in the Americas* (2007), paras. 80, 83; *Report on Terrorism and Human Rights* (2002), para. 338; Report No. 4/01, *María Eugenia Morales de Sierra* (Guatemala), Jan. 19, 2001, para. 36; Annual Report 1999, *Considerations regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-Discrimination*, Chapter VI; ECHR, *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, Dec. 21, 1999, para. 29; *Belgian Linguistics (Merits)*, Judgment of July 23, 1968, p. 34; *Lustig-Prean y Beckett v. U.K.*, Apps. Nos. 31417/96 and 32377/96, Sept. 27, 1999, para. 80; *Smith and Grady v. U.K.*, Apps. Nos. 33985/96 y 33986/96, Sept. 27, 1999, para. 87).

<sup>103</sup> Id. at para. 229; IACHR, Report No. 38/96, *X and Y* (Argentina), Oct. 15, 1996, para. 74; IACHR, *Access to Justice for Women Victims of Violence in the Americas* (2007), para. 83. See also, ECHR, *Karner v. Austria*, App. No. 40016/98, 24 July 2003, para. 41; *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, Dec. 21, 1999, para. 29; *Belgian Linguistics (Merits)*, Judgment of July 23, 1968, p. 34.

<sup>104</sup> Id. at para. 229; IACHR, Application filed with I/A Ct. H.R., *Case of Karen Atala and Daughters v. Chile*, Sept. 17, 2010, para. 89.

<sup>105</sup> IACHR, Report No. 64/12. Case 12.271. Merits. *Benito Tide Méndez*. Dominican Republic. Mar. 29, 2012, para. 228.

<sup>106</sup> See, e.g., IACHR, Application filed with I/A Ct. H.R., *Case of Karen Atala and Daughters v. Chile*, Sept. 17, 2010, para. 88.

reparation, because they received retroactive lawful status, but the brothers, having regularized their status via “voluntary departure and preexamination,” were unable to. The failure of the State to take an equitable approach to the situation of the Japanese Latin Americans after the war, too, was a root cause of this later inequality in the distribution of reparations under the CLA.

57. Finally, and in line with the above analysis, the Commission finds that the legal decisions that the Shibayama brothers received from the Office of Reparations Administration, and later from the federal courts, likewise constituted violations of their right to equality before the law, in connection with the right to an effective remedy, because these decisions declared the validity of and applied this discriminatory law that violated the petitioners’ right to equality.

### **3. The Shibayama brothers’ remaining claims for reparation**

58. The Shibayama brothers have additionally alleged their inability to obtain reparation for alleged violations of their rights that are not covered by the Civil Liberties Act: in particular, their claims based on international humanitarian law for forced transfer from Peru and for alleged excessive taxation based on classification as “illegal aliens.” The Commission recalls that it is not competent *ratione temporis* to declare the existence of the alleged underlying violations in this case; however, it is plainly competent to review the existence and effectiveness of the remedy they sought before the federal courts to obtain a judgment on the merits of their claim, as this litigation happened between 1999 and 2003.

59. The Commission considers that the decision of the Court of Federal Claims makes evident that federal litigation did not constitute an effective remedy for the Shibayama brothers, in the sense that it did not result “capable of producing the result for which it was designed,” that is, to review the merits of their claims that were different from the CLA. In this regard, petitioners initially filed their complaint alleging violations of their rights based on the CLA, the Fifth Amendment (equal protection), international humanitarian law, and a variety of other federal statutes in the Northern District of California; it was then transferred to the Court of Federal Claims, which has exclusive jurisdiction over CLA claims; and the Court of Federal Claims then dismissed petitioners’ CLA claims, but rather than transferring the remaining claims back to the district court, further interpreted the entirety of petitioners’ complaint as being “predicated on the government’s denial of the statutory amount of restitution and at bottom seek[ing] only the payment of the \$20,000,” for which reason it dismissed the entire complaint, considering that none of those remaining claims constituted a basis for granting relief under the CLA (i.e. disbursing the \$20,000 payment). In this way, the petitioners were not afforded a remedy to consider the merits of their claims that were substantively different from the CLA.

### **4. Conclusions**

60. On the basis of the above analysis, the Commission concludes that the State is responsible for the violation of the rights to equality before the law and an effective remedy established in articles II and XVIII of the American Declaration, to the detriment of Isamu Carlos, Kenichi Javier, and Takeshi Jorge Shibayama.

## **VI. ACTIONS SUBSEQUENT TO REPORT No. 154/18**

61. On December 7, 2018, during its 170 period of sessions, the Commission approved Report No. 154/18 on the merits of this matter, with the following recommendations to the State:

1. Make integral reparation for the human rights violations established in this report, including both the material and moral dimensions, and adopt measures for economic compensation and measures of satisfaction. In this regard, the State should take into account the specific reparations requested by the petitioners as the parties come to an agreement about what constitutes integral reparation in this case.

2. Adopt the necessary measures to ensure full disclosure of government information relating to the program of deportation and internment of Japanese Latin Americans during World War II, as well as relating to the fates of the individuals subject to this program

62. On January 30<sup>th</sup>, 2019, the IACHR transmitted the report to the State, with a time period of two months to present information on the measures taken to comply with the recommendations set forth in the report. The Commission did not receive any response from the United States or the petitioners regarding Report No. 154/18.

#### **VII. ACTIONS SUBSEQUENT TO REPORT No. 99/19**

63. On June 21<sup>st</sup>, 2019, the IACHR approved Final Merits Report No. 99/19 in which the Commission reiterates all of its recommendations to the State. On July 3, 2019, the IACHR transmitted the report to the State and the petitioners with a time period of two months to inform the Commission on the measures taken to comply with its recommendations. To date, the Commission has not received any response from the United States or the petitioners regarding Report No. 99/19.

#### **VIII. FINAL CONCLUSIONS AND RECOMMENDATIONS:**

64. From the available information to the date of the approval of this report, the Commission notes that the United States has not complied with the recommendations set forth in the merits report.

65. On the basis of determinations of fact and law, the Inter-American Commission concludes that the State is responsible for the violation of articles II (equality before the law) and XVIII (fair trial and effective remedy) of the American Declaration. In consequence,

#### **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REITERATES THAT THE UNITED STATES OF AMERICA:**

1. Provide integral reparation for the human rights violations established in this report, including both the material and moral dimensions, and adopt measures for economic compensation and measures of satisfaction. In this regard, the State should take into account the specific reparations requested by the petitioners as the parties come to an agreement about what constitutes integral reparation in this case.
2. Adopt the necessary measures to ensure full disclosure of government information relating to the program of deportation and internment of Japanese Latin Americans during World War II, as well as relating to the fates of the individuals subject to this program.

#### **IX. PUBLICATION**

66. In light of the above and in accordance with Article 47.3 of its Rules of Procedure, the IACHR decides to make this report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Inter-American Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until it determines there has been full compliance.

Approved by the Inter-American Commission on Human Rights on the 22 days of the month of April, 2020. (Signed): Joel Hernández García, President; Antonia Urrejola Noguera, First Vice President; Flávia

Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño and Julissa Mantilla Falcón, Commissioners.

The undersigned, Marisol Blanchard, Chief of Staff of the Executive Secretariat of the Inter-American Commission on Human Rights, in keeping with Article 49 of the Commission's Rules of Procedure, certifies that this is an accurate copy of the original deposited in the archives of the IACHR Secretariat.



Marisol Blanchard  
Chief of Staff of the Executive Secretariat of the IACHR