REPORT Nº 43/10
PETITION 242-05
ADMISSIBILITY
MOSSVILLE ENVIRONMENTAL ACTION NOW
UNITED STATES*
March 17, 2010

I. SUMMARY

1. On March 8, 2005, the Inter-American Commission on Human Rights (the "Inter-American Commission" or the "IACHR") received a petition and request for precautionary measures, dated March 7, 2005, from Nathalie Walker and Monique Harden from Advocates for Environmental Human Rights (the "petitioners") against the United States of America (the "State" or the "U.S."). The petition was presented on behalf of the residents of Mossville, Louisiana and Mossville Environmental Action Now, a nonprofit volunteer organization whose members are current and former residents of that city ("Mossville residents" or the "alleged victims").

2. The petition complains that the Mossville residents suffer or are put at risk of various health problems caused by toxic pollution released from fourteen chemical-producing industrial facilities that have been granted permits to operate in and around that city. The petitioners allege that scientific evidence from several sources, including governmental agencies, supports the serious and disproportionate levels of chemicals in the blood of Mossville residents, as well as high levels of respiratory and other illnesses connected with the released chemicals. Despite this evidence, there allegedly continues to be exposure to chemicals and no remedy has been provided for the public health crisis in Mossville. Based upon these circumstances, the petitioners further allege that the State environmental policies expose Mossville residents, the majority of which are African-Americans, to a disproportionate pollution burden, resulting in what they refer to as environmental racism, in breach of their right to equality before the law, guaranteed under Article II of the American Declaration of the Rights and Duties of Man (the "American Declaration"). The petitioners' first submissions also contain allegations of violations of the American Convention on Human Rights (the "American Convention"). Moreover, the petitioners argue that the State is responsible for the violations of Mossville residents' rights to life, health and private life in relation to the inviolability of the home guaranteed, respectively, by Articles I, V, IX, XI, and XXIII of the American Declaration.

3. The State submits that the petition is inadmissible because it fails to characterize a violation of any of the rights in the American Declaration. It also alleges that the petitioners failed to exhaust domestic remedies in raising their claims under the laws of Louisiana and/or through possible tort actions. In this connection, the U.S. argues that the petitioners already successfully challenged environmental regulations, which ultimately resulted in their revision. Consequently, the State requests the IACHR to declare the petition inadmissible.

4. As set forth in this report, having examined the contentions of the parties on the question of admissibility and without prejudging the merits of the matter, the Inter-American Commission concludes that the case is admissible, with respect to the allegations concerning a possible violation of Articles II and V of the American Declaration, as they meet the requirements provided in Articles 31 to 34 of its Rules of Procedure. Based on the foregoing, the IACHR decides to notify the parties of its decision and to continue with its analysis of the merits as regards the alleged violation of Articles II and V of the American Declaration, publish this report and include it in its Annual Report to the General Assembly of the OAS.

II. PROCEEDINGS BEFORE THE INTER-AMERICAN COMMISSION

* Commission Member Dinah Shelton did not take part in the discussion and voting on this case, pursuant to Article 17.2 of the Inter-American Commission's Rules of Procedure.

5. On March 14, 2005, the Inter-American Commission acknowledged receipt of the petition and request for precautionary measures. On March 24, 2005, the petitioners transmitted a "First Amended and Superseding Petition", dated March 22, 2005. The IACHR acknowledged receipt on March 28, 2005 and on June 20, 2005, requested specific information from the petitioners,[1] which was received on August 23, 2005, by means of a communication dated August 19, 2005. The IACHR acknowledged receipt on the following day.

6. On November 29, 2005, the IACHR requested specific additional information from the petitioners within one month. In a note dated December 6, the petitioners requested an extension of time until January 31, 2006 to furnish their response, which was granted by the IACHR by note dated December 12, 2005. The petitioners submitted their response on January 30, 2006 and the IACHR duly acknowledged receipt on the next day.

7. The Inter-American Commission transmitted the pertinent parts of the petition and the petitioners' response to the State on March 8, 2006, with a request for its observations on the matter, and notified the petitioners thereof on the same date. The State acknowledged receipt on May 10, and requested an additional thirty days to file its response. Its response was sent on August 4, 2006, which the IACHR forwarded to the petitioners on August 16. Following an exchange of correspondence, the petitioners submitted the "Second Amended Petition and Observations on the Government's Response" on June 13, 2008, which was transmitted to the State on June 20, 2008. A revised version of this petition, dated June 23, was received on July 2, 2008, and transmitted to the State on July 8, 2008.

8. To summarize, the IACHR received: the "Petition concerning the United States Government's Failure to Protect the Human Rights of the Residents of Mossville, Louisiana, United States of America," dated March 7, 2005; the "First Amended & Superceding [*sic*] Petition Concerning the United States Government's Failure to Protect the Human Rights of the Residents of Mossville, Louisiana, United States of America," dated March 22, 2005; the "Petitioners[*'*] Response to Commission Inquiry of November 29, 2005," dated January 31, 2006; the "Second Amended Petition and Petitioners' Observations on the Government's Reply Concerning the United States Government's Failure to Protect the Human Rights of the Residents of Mossville, Louisiana, United States of America," dated June 13, 2008; and the "Second Amended Petition and Petitioners' Observations on the Government's Reply Concerning the United States Government's Failure to Protect the Human Rights of the Residents of Mossville, Louisiana, United States of America," dated June 23, 2008, with a new appendix A. Because of the dates on which the superseding information was received, the "First Amended & Superceding [*sic*] Petition Concerning the United States Government's Failure to Protect the Human Rights of the Residents of Mossville, Louisiana, United States of America," dated March 22, 2005, was not transmitted to the State and was not considered by the Inter-American Commission.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

9. According to the petition, Mossville is a community currently composed of around 375 households, whose residents are predominantly African-American, located in an area of approximately 5 square miles in Calcasieu Parish, Louisiana. The petition indicates that Mossville is a historic community founded in the 1790's by African-Americans, who sustained themselves by fishing, farming and hunting, and who developed cultural and religious traditions that were based on preserving environmental

[1] On two occasions, on July 12, and July 29, 2005, the petitioners requested extensions of time to submit information, which the IACHR granted, first until July 29, 2005 and then until August 19, 2005.

conditions. Nonetheless, the petition claims that since the 1930's, the State has authorized a total of fourteen industrial facilities to manufacture, process, store, and discharge toxic and hazardous substances in close geographic proximity to Mossville, facilitated by generous industrial tax incentives and zoning, and by enacting environmental and public health laws that fail to require safe distances between hazardous industrial development and residential areas. The petitioners submit that this allegedly resulted in extensive environmental damage and associated severe health problems for the residents of Mossville.

10. The petitioners refer to a study which reported that serious health problems suffered by Mossville residents are associated with exposure to toxic industrial pollution, and that 91% of the persons surveyed reported at least one health problem known to be related to exposure to the chemicals produced by the local industrial facilities. The petitioners indicate, for example, that 84% of the Mossville residents surveyed present nervous system problems; 71% cardiovascular problems; 57% skin problems; and that in addition to physical problems, the toxic exposure also impacts the mental health of some Mossville residents.[2] The petitioners assert that scientific evidence demonstrates that the declining health of Mossville residents is directly related to industrial pollution.

11. Moreover, the petition indicates that all of the alleged victims who had their blood tested by the U.S. Agency for Toxic Substances and Disease Registry (the "ATSDR") were found to have an average concentration of dioxins[3] in their blood three times higher than the national average. In addition to dioxin, the petitioners also present data concerning other toxic chemicals present in the Mossville air and water, which exceed quality standards established by the state of Louisiana. They further indicate that there are regularly noxious odors, flaring smokestacks, disruptive noise pollution and that some of the alleged victims had to leave their home in Mossville due to the danger of contamination. The petitioners state that the Mossville area industrial facilities themselves report that, on average annually, they pollute the air, water, and land with a total of over four million pounds of toxic chemicals, scientifically known to cause cancer and damage to the immune, respiratory, cardiovascular, nervous and reproductive systems.[4]

12. The petitioners complain that the State continues approving and issuing environmental permits that allow industrial facilities to generate massive amounts of toxic chemicals close to the Mossville community. Also, they submit that the State presents misleading information about the significance of the dioxin exposure in Mossville and deny the residents of that city participation in its dioxin exposure investigation. Further, the petitioners argue that permits for polluting facilities are granted disproportionately in the African-American community of Mossville, which they consider follows a pattern of environmental racism in Louisiana, where historic and unincorporated communities settled by African-Americans have become surrounded by hazardous industrial facilities. They submit that governmental and academic research has documented the racial inequalities that result in hazardous industrial facilities operating in close proximity to communities heavily populated by African-American people, and the inferior environmental protection for these communities of color.

13. The petitioners further state that because Mossville is not an incorporated community, unlike neighboring ones, it is the Calcasieu Parish government which renders decisions regarding

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[2] The petition indicates that the University of Texas randomly chose 100 Mossville residents to participate in a symptom survey, the conclusion of which was that Mossville is a "very sick community". Marvin Legator, University of Texas Medical Branch at Galveston, Mossville Health Symptom Survey (1998), appendix 4 of the petition. The petitioners also support their allegation with statements of current and former Mossville residents describing the effects of the pollution on their physical and mental health (such as chronic stress and depression) and that of their family.

[3] According to U.S. Geological Survey, dioxins are highly toxic chemicals which persist in the environment for extended periods (online: http://toxics.usgs.gov/definitions/dioxins.html). According to the World Health Organization: short-term exposure of humans to high levels of dioxins may result in skin lesions, and altered liver function; long-term exposure is linked to impairment of the immune system, the developing nervous system, the endocrine system and reproductive functions. Chronic exposure of animals to dioxins has resulted in several types of cancer (online: http://www.who.int/mediacentre/factsheets/fs225/en/).

[4] The petitioners refer to the Toxic Release Inventory (TRI) from 1987-2006, a database of industrial pollution emissions complied from annual reports that industrial companies are required to submit to the EPA pursuant to the Emergency Planning and Community Right-to-Know Act, United States Code, title 42, Section 11023.

approval of industrial development. The information in the petition indicates that the Calcasieu Parish is around 1,094 square miles and comprises around 72,000 households, whose population is 73.6% white. In comparison, Mossville is around 5 square miles (less than 1% of the parish area) and comprises around 375 households (less than 1% of the parish population), of which 68% is African-American. However, of the 27 industrial facilities operated in the parish, 14 are located in and around Mossville. As a consequence, the parish enjoys an overall healthy environment, when the environment in Mossville is deemed to be "unhealthy."[5] Further, the petitioners refer to a 2002 study conducted by ATSDR which shows that the blood-dioxin level of the persons tested in Calcasieu Parish was in general lower than the national average, but the Mossville residents who were tested had an average blood-dioxin concentration four times higher than the parish. The petitioners also argue that according to the Environmental Protection Agency ("EPA") National Emission Trends (for 1999) 75% of all sulfur dioxides released in Calcasieu Parish as a whole were released by facilities within approximately one-half mile of Mossville. Consequently, they contend that the African-Americans living in Mossville bear a racially disproportionate burden of industrial pollution. Moreover, it is argued that because the health-based standards in the regional area of Calcasieu are not exceeded, the Mossville residents have no legal remedy to trigger the requirements for sulfur dioxide reductions.

14. The petitioners note that the facilities that produce the greatest amount of pollution began their activities at a time when racial discrimination was accepted by governments in the southern U.S., when the African-Americans living in Mossville did not have a legal right to vote or to participate in the taking of decisions. However, the petitioners argue that although racist government policies have since been abolished, the Mossville residents are still provided inferior and unequal environmental protection from the ASTDR, the EPA and other regulatory agencies. They believe this is reflected in the responses given by these agencies, which have allegedly essentially obstructed any progress to the requests from Mossville residents for medical services, studies of the sources of dioxin emissions, and moratoriums on the issuance of environmental permits.[6]

15. With regard to the admissibility of the petition, the petitioners argue that they should be excused from exhausting domestic remedies, pursuant to Article 31.2.a of the IACHR's Rules of Procedure. With regard to constitutional remedies, the petitioners argue that while the U.S. Constitution safeguards the right to life by restricting the government from depriving any person of life without due process of law, it provides no remedy for life-threatening industrial hazards approved by the government. They submit that the U.S. Supreme Court has interpreted the Constitution to provide no guarantee of a certain minimal level of safety and security, and that federal courts have consistently held that there is no implied right to a healthy environment under the Constitution and have consistently dismissed such claims.[7]

16. As for the right to equal protection, the petitioners argue that the U.S. Supreme Court has held that only intentional acts of discrimination violate the equal protection clause under the Constitution, not acts that only result in discriminatory effect. Therefore, discrimination claims cannot be brought under the U.S. Constitution based upon the racially disproportionate impact of problems like pollution.[8] They indicate that a federal court of appeals also recently adopted this position in a similar case of industrial

[5] Environmental Defense Scorecard, Air Quality Index, County [*sic*] of Calcasieu, appendix 16 of the petition.

[6] In support of this contention, the petitioners present correspondence between Mossville Environmental Action Now and the ATSDR between August 1997 and May 2000, appendix 8 of the first petition; they also refer to M. Lavelle & M. Coyle, *Unequal Protection: The Racial Divide in Environmental Law*.

[7] The petitioners refer to *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 195-96 (1989); Upper W. Fork River Watershed Association v. Corps of Engineers, 414 F. Supp. 908 (N.D.W.Va.), aff'd 556 F.2d 576 (4th Cir. 1977) cert denied 434 U.S. 1073; and *Tanner v. Armco Steel*, 340 F. Supp 532, 537(S.D.Tex.1972): "[n]o legally enforceable right to a healthful environment (…) is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution", citing *Lindsey v. Normet*, U.S.405 U.S. 56 (1972).

[8] The petitioners cite Alexander v. Sandoval, 532 U.S. 275 (2001) and Washington v. Davis, 426 U.S. 29 (1976).

pollution.[9] The petitioners further contend that in the U.S. legal system the right to privacy constitutes a limitation on government action that interferes with recognized freedoms; however, the Supreme Court has narrowly limited the right privacy (under the due process clause of the Fourteenth Amendment) to issues of family planning, child-rearing, procreation and abortion,[10] Therefore, a claim that environmental degradation violates the right to private life and to the inviolability of the home would be beyond the scope of privacy rights under the Constitution.

B. Position of the State

17. The State claims that the petition is inadmissible, because it fails to show a breach of a duty under the American Declaration, and because the petitioners failed to exhaust domestic remedies.

18. The State rejects the allegations of violations of the American Declaration because it asserts that they are based on an erroneously expansive interpretation of state commitments, unsupported by the texts of those articles or by customary international law, and rely on a flawed analysis of international law. The State contends that there is no such right as the right to a healthy environment, either directly, or as a component of the rights to life, health, privacy and inviolability of the home, or equal protection and freedom from discrimination. Moreover, the State argues that while the protection of human rights and of the environment are both important, there is no substantive right of individuals under international human rights law to a safe or healthy environment, either in the treaties to which the State is a party or as a matter of customary international law. The State underscores that while some countries may choose to create a right to a healthy environment in their domestic law, this does not create customary international law on the subject. Further, the State argues that even if one were to assert that customary international law somehow existed on the topic, no such rule could bind the U.S. as it has never accepted such a rule, and in fact objects to the creation of such a norm, making it what is known as a "persistent objector" so that any such norm would not apply to it.[11]

19. The State also argues that there is no enforceable mandate under the American Declaration to establish emission limits for all the different chemicals released by industrial facilities; protect against the multiple, cumulative and synergistic impacts of toxic pollution from existing industrial facilities; or reduce excessive air pollution occurring in small areas within designated air quality control regions. Likewise, the State argues that absent a clear showing of intentional discrimination, there is no enforceable mandate under the American Declaration to prevent the installation or clustering of toxic and hazardous facilities in close geographic proximity to residential areas; or to remedy practices that allegedly impose racially disproportionate pollution burdens.

20. Regarding the requirement of exhaustion of domestic remedies, the State submits that the petitioners failed to mention that they previously successfully challenged the environmental regulations issued by the EPA, which resulted in their revision.[12] The State also argues that the petitioners failed to address the possibility of actions under the laws of the State of Louisiana, or possible tort actions against the industrial facilities which allegedly caused the alleged victims injuries. In this connection, the State submits that the petitioners omitted to refer to a successful settlement between the Mossville residents and a company whose industrial actions allegedly directly affected Mossville residents by groundwater pollution and expenses for related environmental remediation.[13]

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[9] The petitioners refer to *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3rd Cir.2001).

[10] The petitioners cite Paul v. Davis, 424 U.S. 693, 712-13 (1976); Bowers v. Hardwick, 478 U.S. 186, 195 (1986); and Lawrence v. Texas, 539 U.S. 558 (2003), which extended the right to privacy for intimate relationships for persons of same sex, but did not create a new privacy right.

[11] The State refers to Asylum Case (Colombia/Peru), 1950 I.C.J. 266, at 278-279 (November 20, 1950).

[12] The State refers to Mossville Environmental Action Now v. EPA, 370 F.3d 1232 (D.C. Cir.2004), *reh'g denied,* April 15, 2005, holding that EPA failed to properly set emissions limits on hazardous air pollutants emitted as required by the Clean Air Act.

[13] The State refers to Georgia Gulf Corporation Form 10-K filing with the United States Securities and Exchange Commission for the Fiscal Year Ending December 13, 1999, at pages 6-7.

21. The State finally submits that rather than establishing their exemption from the exhaustion requirement, the petitioners' argument that no remedy exists under the U.S. law for the protection of their rights shows that their allegations are based on an overly broad and erroneous interpretation of the commitments of the United States under the American Declaration, as the rights they invoke do not exist under this international law instrument or any other to which the U.S. is subject.

IV. ANALYSIS OF ADMISSIBILITY

A. Jurisdiction

22. As a preliminary matter, the Inter-American Commission observes that the first and second submissions of the petitioners contain allegations of violations of the American Convention on Human Rights (the "American Convention"), but that the third --and last-- submission received has no reference to that international instrument. While the United States, as a signatory of the American Convention is obliged under general principles of treaty interpretation to refrain from acts which would defeat its object and purpose,[14] this instrument is not binding upon the State and the IACHR is thus not competent to entertain the claims of the petitioners under this instrument.

23. Upon considering the rest of the record before it, the Inter-American Commission finds that it is competent *ratione personae* to analyze under the American Declaration the claims raised in the petition. Under Article 23 of the IACHR's Rules of Procedure, the petitioners are authorized to file complaints alleging violations of rights protected under the American Declaration. The alleged victims are persons whose rights are protected under that international instrument. The State is bound to respect the provisions of the American Declaration and the IACHR is competent to receive petitions alleging violations of that instrument by the State by virtue of its ratification of the OAS Charter on June 19, 1951 and in conformity with Article 20 of the IACHR's Statute and Article 52 of its Rules of Procedure.

24. Given that the petition alleges violations of rights protected under the American Declaration that have taken place in the territory of the United States, the Inter-American Commission concludes that it has the competence *ratione loci* to take cognizance of it. Moreover, the petition is based on facts that occurred at a time at which the obligations undertaken by the State pursuant to the OAS Charter and the American Declaration were in effect, so the Inter-American Commission has competence *ratione temporis* to examine this matter. Finally, inasmuch as the petitioners allege a violation of Articles I, II, V, IX and XI of the American Declaration, the IACHR is competent *ratione materiae* to examine the complaint. Therefore, the Inter-American Commission finds that it is competent to address the claims raised in the petition.

B. Admissibility requirements

1. Exhaustion of domestic remedies

25. The Inter-American Commission must verify whether the remedies of the domestic system have been pursued and exhausted in accordance with generally recognized principles of international law, pursuant to with Article 31.1 of its Rules of Procedure. Article 31.2 of the Rules of Procedure, however, specifies that this requirement does not apply if the domestic legislation 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.

26. In the present case, the State claims that the petitioners failed to exhaust domestic remedies. More specifically, it argues that the petitioners failed to address the possibility of actions under

[14] IACHR Report n°52/01, Case 12.243, Juan Raul Garza (United States) April 4, 2001, para. 94, footnote 48; see also Vienna Convention on the Law of Treaties, 8 I.L.M. 679 (1969), Article 18(a).

federal law or the laws of the state of Louisiana. In response to this argument, the petitioners submit that an exception to the rule of exhaustion of domestic remedies applies because each of their claims would have no reasonable prospect of success before the U.S. courts through constitutional, civil, statutory or tort claims. They allege in this regard that the U.S. Constitution or other laws of the state of Louisiana do not recognize the specific human rights violations allegedly suffered, or else provide inadequate and ineffective remedies. With respect to constitutional remedies, the petitioners submit the following:

a. The right to health is not recognized in the Constitution[15] and the Supreme Court has interpreted the U.S. Constitution to provide no guarantee of a certain minimal level of safety and security.[16] Also, the Constitution does not guarantee a legally enforceable right to a healthy environment;[17]

b. The Supreme Court has held that only purposeful acts of discrimination violate the equal protection clause under the Constitution, not acts that only result in a racially disproportionate impact, preventing them from presenting their claim of *de facto* unequal protection before the domestic courts;[18] and

c. The right to privacy in the U.S. constitutes a limitation on government action that interferes with recognized freedoms, but the Supreme Court has found that it includes only those personal rights implicit in "the concept of ordered liberty"[19] such that "neither liberty nor justice would exist if [the right] were sacrificed,"[20] and has narrowly limited its scope to issues of family planning, child-rearing, and abortion.[21]

27. Similarly, they argue that there are no remedies available under federal civil rights law for violations based on actions that may unintentionally result in unequal treatment based on race under the law. In particular, they submit that the Supreme Court has ruled that the U.S. Code[22] only prohibits acts of *intentional* discrimination and not acts that result in a discriminatory effect.[23] They indicate that the Federal Court of Appeals for the 3rd Circuit dismissed a civil rights lawsuit brought by African-American residents against a state environmental agency for issuing an air pollution permit increasing existing levels of industrial pollution in their community, claiming that this constituted a discriminatory effect and

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[15] The petitioners cite Long Beach v. New York, 445 F. Supp. 1203, 1212 (D.N.J. 1978), quoting Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971): "[G]enerally it has been held that there is no constitutional right to [environmental] protection." They also refer to Gasper v. Louisiana Stadium & Exposition Dist., 418 F. Supp. 716, 720-22 (E.D. La. 1976); Upper W. Fork River Watershed Ass'n v. Corps of Engineers, 414 F. Supp. 908, 931-32 (N.D.W.Va. 1976), aff'd mem. 556 F.2d 576 (4th Cir. 1977); Pinkey v. Ohio Environmental Protection Agency, 375 F. Supp. 305, 309-10 (N.D.Ohio 1974); Hagedorn V. Union Carbide Corp., 363 F.Supp. 1061, 1064-65 (N.D.W.Va. 1973); Virginians for Dulles v. Volpe, 344 F. Supp. 573, 579 (E.D.Va. 1972), aff'd in part and rev'd in part, 541 F.2d 442 (4th Cir.1976); and Tanner v. Armco Steel, 340 F. Supp 532, 537 (S.D. Tex. 1972).

[16] The petitioners refer to DeShaney v. Winnebago Country Dept. of Social Serv., 489 U.S., 195-96 (1998); and Culver-Union Township Ambulance Service v. Steindler, 629 N.E.2d 1231 (Ind. 1994).

[17] The petitioners cite Lindsey v. Normet, 405 U.S. 56 (1972). They also mention Benzman v. Whitman, 523 F.3d 119 (2d Cir. 2008), in which a claim was brought by residents against the EPA for misleading statement that air quality was safe after the destruction of World Trade Center towers, and in which the Federal Appeals Court found that legal remedies are not always available for every instance or arguably deficient government performance; and refer to Lombardi v. Whitman, 485 F.3d 73, 83-85 (2d Cir. 2007), in which the claim was similar and the Federal Court stated: "We rejected the claim, primarily on the ground that, absent an allegation of intent to harm, a viable substantive due process violation could not be asserted against government officials. . ."

[18] The petitioners refer to McClesky v. Kemp, 481 U.S. 279, 292 (1987); and Washington v. Davis, 426 U.S. 229, 239 (1976).

[19] The petitioners cite Roe v. Wade, 410 U.S. 113, 152 (1973).

[20] The petitioners cite Palko v. Connecticut, 302 U.S. 494, 503 (1977).

[21] The petitioners cite Paul v. Davis, 424 U.S. 693, 712-13 (1976); Bowers v. Hardwick, 478 U.S. 186, 195 (1986); and Lawrence v. Texas, 539 U.S. 558 (2003).

[22] Title VI of Civil Rights Act of 1964, as amended, U.S. Code title 42, section 2000d *et seq.*

[23] The petitioners cite *Alexander v. Sandoval,* 532 U.S. 275 (2001)

ruled that "Title VI proscribes only intentional discrimination, [and thus] plaintiffs do not have a[n] enforceable right."[24]

28. With respect to tort claims against the State, the petitioners also argue that Mossville residents have no recourse against the State under tort laws, as the sovereign immunity doctrine generally precludes a lawsuit against the federal government unless it has consented to such a lawsuit.[25]

29. With respect to administrative challenges, the petitioners stress that the pollutants released by the 14 industrial facilities comply with the environmental standards set by the EPA. Because the review of a state agency's actions is restricted to a finding of whether its acts or omissions comply with the affirmative mandates of the law, the petitioners submit that a determination of whether the state's agencies comply with their mandatory duties under the law is irrelevant in the present case, as it is those laws themselves that fail to remedy the environmental degradation and associated health threats.

30. The State claims that the petitioners omitted to mention a previous successful settlement between one of the companies whose industrial actions allegedly directly caused damages to the alleged victims.[26] The petitioners rebut this position by arguing that this lawsuit, which resulted in a settlement, was based on a pipeline leak that had been neglected for years and caused groundwater contamination in violation of environmental permits, but did not resolve the larger health issues and other matters related to the pollution levels that are authorized by government regulators. The information in the record before the IACHR indicates that $42.1 million was paid in 1998 by one of the companies (CONDEA Vista) to around 80 Mossville residents who had filed lawsuits in 1995 and 1996 and that residences were also purchased by the company, due to groundwater contamination. There is no indication that this action was related to the State conduct in permitting or regulating the activities of the company in question.

31. The IACHR is quite conscious of the distinction between the actions taken by the industrial facilities, and those taken by the State. As indicated in this report, the petitioners claim that the State's approval and facilitation of the exploitation of 14 polluting industrial facilities in and around Mossville is the consequence of policies bearing a discriminatory impact, and resulted in severe health problems for the residents of that city in violation of their right to privacy and to the inviolability of the home. The IACHR finds that a settlement between one of the 14 companies and some of the Mossville residents, which resulted in monetary compensation and the purchase of properties, does not illustrate the existence of an effective remedy against the conduct of the State itself in regulating, or failing to properly control such activities.

32. Article 31.1 of the IACHR's Rules of Procedure provides that, for a petition to be admissible: "the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law." These principles do not merely refer to the formal existence of such remedies but also to the requirement that they be adequate and effective.[27] It has been clarified that only those recourses that are suitable for remedying allegedly committed violations must be exhausted. In domestic law systems, there are often multiple remedies, but not all are necessary applicable or effective in all circumstances.[28] The IACHR has recognized that remedies may be considered ineffective when it is demonstrated that any proceedings raising the claims before domestic

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[24] The petitioners refer to *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3rd Cir.2001).

[25] The petitioners refer to *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907); and to Federal Tort Claims Act, U.S. Code title 28, sections 1346(b) and 2671-2680.

[26] The State refers to Georgia Gulf Corporation Form 10-K filing with the United States Securities and Exchange Commission for the Fiscal Year Ending December 13, 1999, at pages 6-7.

[27] See, *inter alia*, IACHR, Report No105/09, P592-07, Admissibility, Hul'Qumi'Num Treaty Group (Canada) October 30, 2009, para. 31.

[28] See, *inter alia,* IACHR, Report No 69/04, P504/03, Community of San Mateo de Huanchor and its members, (Peru) Admissibility, October 15, 2004.

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 underlying issue of a petition had been raised.[29] In order to meet this standard, however, there must be evidence before the IACHR upon which it can effectively evaluate the likely outcome should a claim be pursued by the petitioners at the domestic level. Mere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.[30]

33. With respect to the allegations of discrimination, both the State and the petitioners agree that it would not be possible to successfully bring an action before the domestic courts for disproportionate, discriminatory impact without a clear showing of discriminatory intent. Therefore, the IACHR is satisfied that the claims of the petitioners regarding the alleged disproportionate discriminatory pollution burden on the Mossville residents and the related consequences on the community would have no reasonable prospect of success through domestic proceedings. The petitioners are thus excused from exhausting domestic remedies on this claim, pursuant to Article 31.2.a of the IACHR's Rules of Procedure.

34. Similarly, the allegations pertaining to the right to privacy and inviolability of the home appear to fall outside the scope of the rights to privacy as recognized by the national courts. The IACHR therefore understands that it would be futile for the petitioners to claim before the domestic courts that the State's approval and facilitation of the exploitation of 14 polluting industrial facilities in and around Mossville resulted in a violation of their right to privacy and to the inviolability of their home, and thus does not require them to present such claims before the domestic courts.

35. However, the information presented by the petitioners does not demonstrate the futility of challenging the actions of the EPA of other state agencies if they result in a violation of the right to life and to personal integrity of the Mossville residents. On the contrary, the example provided by the State shows a successful settlement and a revision of the regulations set by the EPA.[31] Although the petitioners argue that this litigation addressed a very specific problem and did not change the situation as presented in the petition, it nonetheless demonstrates that it would noy necessarily be futile to challenge the standards set by the EPA or other state agencies, if it can be proved that these standards result in severe environmental degradation and associated health threats. In fact, it seems that others have challenged such standards. Moreover, the IACHR is not convinced by the argument of the petitioners that because the agencies are acting in conformity with the law, a challenge of their conduct would have no reasonable prospect of success. The Clean Air Act, referred to by the petitioners, specifically requires the EPA to set standards that provide an adequate margin of safety to protect public health.[32] Similarly, the Water Pollution Control Act also referred to by the petitioners, sets forth that any standard shall be at that level which the EPA determines provides an ample margin of safety.[33]

36. Therefore, the IACHR does not find that the information presented by the petitioners justifies an exception to the rule of exhaustion of domestic remedies, and concludes that the claims related to an alleged violation of the right to life and the right to health are inadmissible.

37. Based on the foregoing, the IACHR concludes that the exception to the requirement of exhaustion of domestic remedies, as set forth at Article 31.2.a of its Rules of Procedure is applicable to the allegations pertaining to the right to equality before the law, to privacy and to inviolability of the home.

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[29] See, *e.g.,* IACHR Report n° 51/00, Case 11.193, Gray Graham (United States), para. 60.

[30] See IACHR Report n°87/03, Case 12.006, Oscar Sirí Zuñiga (Honduras), para. 43.

[31] Mossville Environmental Action Now v. EPA, 370 F.3d 1232 (D.C. Cir.2004), *reh'g denied,* April 15, 2005.

[32] Clean Air Act, 42 USC Sec.7409 (b)(1).

[33] Federal Water Pollution Control Act, as amended, July 29, 2008, 33 U.S.C. 1319 (a)(4).

2. Timeliness of the petition

38. Article 32.2 of the IACHR's Rules of Procedure states that in cases in which the exceptions to the prior exhaustion requirement are applicable, the petition must be presented within what the IACHR deems to be a reasonable period of time. For this purpose, the IACHR shall consider the date on which the alleged human right violation occurred and the circumstances of each case.

39. The Inter-American Commission has already determined that an exception to the rule requiring the prior exhaustion of domestic remedies is applicable in this case. Consequently, it must determine whether the petition was lodged within a reasonable time, as required by Article 32.2 of its Rules of Procedure. The record before the IACHR indicates that the alleged violations of the Mossville residents' human rights are of an ongoing nature, as they began with the establishment of the industrial facilities, and continued at least up to the time of the presentation of the petition in March 2005. Given the circumstances of this case, and the ongoing nature of the allegations, the IACHR concludes that the petition was lodged before it within a reasonable time.

3. Duplication of proceedings

40. There is no information in the record indicating that the subject of this petition is pending settlement in another procedure under an international government organization of which the State is a member, or that the case essentially duplicates a petition pending or already examined and settled by the IACHR or another international governmental organization of which the State is a member. The State has not opposed the petition on the ground of duplication. The Inter-American Commission therefore finds no bar to the admissibility of the petitioners' claims under Article 33 of its Rules of Procedure.

4. Colorable claim

41. Article 27 of the IACHR'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." In addition, Article 34 of its Rules of Procedure requires the Inter-American Commission to declare a petition inadmissible when it does not state facts that tend to establish a violation of the rights referred to in Article 27 of the Rules or where statements of the petitioner or of the State indicate that it is manifestly groundless or out of order. The standard for deciding these points differs from the standard for a decision on the merits of a complaint. The IACHR must make a *prima facie* assessment to determine whether the complaint shows valid evidence of an apparent or potential violation of a right guaranteed by the American Declaration--not to establish whether a violation exists. This is a summary analysis that does not constitute prejudgment of, or an opinion on, the merits.

42. In the present case, the petitioners allege that the issuance of environmental permits to industrial facilities by the U.S. government and the resulting environmental pollution has a disproportionate impact upon the Mossville residents as African-Americans. The State argues that there is no enforceable mandate under the American Declaration, absent a clear showing of intentional discrimination, to prevent the installation of toxic and hazardous facilities in proximity to residential areas, or to remedy practices that allegedly impose racially disproportionate pollution burdens. The violation of the right to equality in the present case occurs, according to the petitioners, by affording unequal environmental protection based on race without any reasonable justification; creating a pattern of environmental racism that serves no legitimate aim; and establishing inadequate and ineffective means for achieving environmental protection, with knowledge that people of color bear the significantly disproportionate burden of such inadequate and ineffective measures. The IACHR recalls that the right to equal protection under international human rights law has been interpreted as prohibiting not only intentional discrimination, but also any distinction, exclusion, restriction or preference which has a discriminatory effect[34] and that "the notion of equality before the law set forth in the American Declaration

[34] See, *e.g.,* I/A Court H.R., Advisory Opinion OC-18/03 of September 18, 2003, Ser. A N° 18, paras. 83-96; and UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989.

relates to the application of substantive rights and to the protection to be given to them in the case of acts by the State or others."[35] Without prejudging on the merits of the petition, the IACHR finds that the allegations contained in the petition, if proven, could characterize a violation of the right to equality before the law, as enshrined in Article II of the American Declaration.

43. Concerning the rights to privacy and to the inviolability of the home, the petition alleges that the noxious effects of the pollution on Mossville residents amount to a breach of their rights to privacy and inviolability of the home under Articles V and IX of the American Declaration. In support of this contention, the petitioners refer to the European Court of Human Rights, which held that a State's failure to prevent a plant from polluting nearby homes violated the right to privacy[36] and argue that in the present case, the State should have ensured adequate environmental protection to guarantee the rights to privacy and inviolability of the home of Mossville residents. The State argues that this claim is based on an erroneously expansive interpretation of the American Declaration, unsupported by the texts of those provisions or by customary international law. The Inter-American Commission has clarified previously that in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of the international and inter-American human rights systems more broadly, in the light of developments in the field of international human rights law since the instrument was first adopted and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the American Declaration are properly lodged. Bearing in mind the circumstances of the present case, as well as the complex questions of facts and law raised in the petition, the Inter-American Commission finds that the allegations concerning the rights to privacy cannot be regarded as manifestly out of order within the meaning of Article 34 of the Rules of Procedure, and call for an examination of the merits.[37] With respect to the petitioners' claim of a violation of Article IX, the Inter-American Commission notes that no specific facts or arguments have been presented to demonstrate how it would apply to the facts alleged, and accordingly deems it inadmissible.

44. Finally, the IACHR notes that the first and second submissions contain allegations of violation of Article XXIII of the American Declaration as included in the rights to privacy and to inviolability of the home, without legal arguments or presentation of evidence justifying this inclusion. Moreover, the IACHR observes that this allegation was not included in the third submission. Therefore, the IACHR considers that the factual and legal elements as set forth in the petition do not allow it to recognize a colorable claim of Article XXIII of the American Declaration and will therefore refrain from analyzing this allegation on the merits.

V. CONCLUSION

45. Based on the factual and legal arguments set forth above, and without prejudging the merits of the case,

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[35] See IACHR Report N°75/02, Case 11.140, Mary and Cary Dann (United States), December 27, 2002, para. 143 and IACHR Report N°51/01, Case 9903, Ferrer-Mazorra et al. (United States), April 4, 2002, para. 238.

[36] The petitioners cite EHCR, *Lopez Ostra v. Spain*, App. No. 16798/90, (December 9, 1994); and ECHR, *Fadeyeva v. Russia,* n°55723/00, June 9, 2005, in which the European Court held that in order to constitute a violation of the right to private life, "complaints relating to environmental nuisances have to show, firstly, that there was an actual interference with the applicant's private sphere, and, secondly, that a level of severity was attained." The Court also pointed out that the State's responsibility in environmental cases may arise from a failure to regulate private industry and that accordingly, the claims have to be analyzed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (right to private and family life), and to strike a balance between the competing interests of the applicant's rights and the community as a whole.

[37] The IACHR notes that in its Report n°76/09, P1473/06, La Oroya (Peru), Admissibility, August 5, 2009, it did not consider that the allegations that "excessive environmental contamination represents an intrusion into the personal and family life of individuals" could characterize a violation of the right to privacy under Article 11 of the American Convention on Human Rights (see also Report n°69/04, P504/03, Community of San Mateo de Huanchor and its members, (Peru) Admissibility, October 15, 2004). Nonetheless, in the opinion of the IACHR, the factual and legal allegations contained in the present petition differ and call for an examination on the merits.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES TO:

1. Declare the present petition admissible with respect to the alleged violations of Articles II and V of the American Declaration;

2. Declare the present petition inadmissible with respect to Article I, IX, XI, and XXIII of the American Declaration;

3. Notify the parties of this decision;

4. Continue with the analysis of the merits of the case; and

5. Publish this report in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 17th day of the month of March, 2009. (Signed: Felipe González, President; Paulo Sérgio Pinheiro, First Vice-President; María Silvia Guillén; José de Jesús Orozco Henríquez and Rodrigo Escobar Gil, members of the Commission).