THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
ORGANIZATION OF AMERICAN STATES

WASHINGTON, D.C.
September 1, 2015

Mr. Emilio Alvarez Icaza L.
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

Re: Jurijus Kadamovas et al., Petition No. P-1285-11
Response of the United States

Dear Mr. Icaza:

The United States appreciates the opportunity to provide the attached observations on the various communications forwarded to it in the above-referenced matter.

Please accept my appreciation for your attention to this matter.

Sincerely,

Michael J. Fitzpatrick
Interim Permanent Representative

Enclosures: As stated.

JURIJUS KADAMOVAS ET AL., PETITION NO. P-1285-11

RESPONSE OF THE UNITED STATES

The Government of the United States appreciates the opportunity to provide observations on the various communications forwarded to it in Petition No. P-1285-11, *Jurijus Kadamovas et al. v. United States*. This matter is inadmissible under Articles 28, 31, and 34 of the Rules of Procedure ("Rules") for the reasons set forth in detail in this Response, and the Commission must therefore dismiss it.

This matter has been the subject of numerous letters since 2011. Federal prisoners Robert L. Bolden, Sr., and Jurijus Kadamovas sent a letter to the Commission dated August 12, 2011, purporting to lodge claims not only on their own behalf, but also on behalf of fellow prisoners German Sinnistera, Arboleda Ortiz, Iouri Mikhel, and Alejandro Umana, while at the same time admitting that "we could not meet with every individual listed."[1] The letter contained no specific allegations with respect to these other individuals. The Commission forwarded the letter to the United States on December 27, 2011, and requested precautionary measures. Thereafter, the Death Penalty Litigation Clinic of Kansas City, Missouri, sent the Commission a letter dated February 27, 2012, which the Commission forwarded on March 19, 2012, making admissibility arguments and alleging "violations"[2] of the American Declaration of the Rights and Duties of Man ("American Declaration" or "Declaration"), on behalf of Petitioner Bolden only. The United States, the Commission, and Petitioner Bolden then engaged in several rounds of correspondence related to Petitioner Bolden's medical condition. The most recent of these, according to the United States' records on this matter, was a letter from the Death Penalty Litigation Clinic dated November 14, 2012, forwarded by the Commission on December 5, 2012. No communication subsequent to the August 2011 letter was purported to be filed on behalf of anyone other than Petitioner Bolden.

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1 August 12, 2011, letter at 2.

2 As the American Declaration of the Rights and Duties of Man is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States, the United States understands that a "violation" in this context means an allegation that a country has not lived up to its political commitment to uphold the American Declaration.

For purposes of this response, the United States refers to the various individuals listed in the August 2011 letter collectively as the "Petitioners," and the various communications collectively as the "Petition." The United States will address the various Petitioners in turn.

A. PETITIONERS SINNISTERA, ORTIZ, MIKHEL, AND UMANA

The Commission must dismiss the Petition with respect to Petitioners Sinnistera, Ortiz, Mikhel, and Umana for failure to meet the threshold requirements for consideration of petitions in Article 28 of the Rules. Their names appear only in the August 2011 letter. In that letter, Petitioners Kadamovas and Bolden admit that they have not even spoken to all these individuals (they do not specify which ones they have spoken to), and the letter does not provide any details on their situation, despite the Article 28(4) requirement that petitions must contain "an account of the act or situation that is denounced," and despite the requirements of Article 28(7)–(9). The absence of any facts relating to these persons also means that, even if they met the Article 28 threshold, their claims are inadmissible under Article 34(a) of the Rules for failure to "state facts that tend to establish a violation of the rights" in the American Declaration.[3] Indeed, the August 2011 letter makes no mention of the Declaration at all. Accordingly, the Commission should expressly dismiss consideration of these individuals under the Petition. Moreover, the United States has become aware that Petitioner Sinnistera died of natural causes on March 7, 2013, in an Indiana hospital. This development provides an additional reason the Commission should dismiss this matter with respect to Petitioner Sinnistera, following the practice of its July 17, 2013, letter in which the Commission informed the United States that it had archived several matters in which the petitioners had died.[4]

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[3] Article 34(a) of the Rules provides that "[t]he Commission shall declare any petition or case inadmissible when … it does not state facts that tend to establish a violation of the rights referred to in Article 27 of these Rules of Procedure … ." Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments … ." Article 20 of the Commission's Statute and Article 23 of the Rules, in turn, identify the American Declaration as an "applicable instrument" with respect to nonparties to the American Convention.

[4] *See* Letter from Michael J. Fitzpatrick to Emilio Alvarez Icaza Re Melissa L., Jesús L., and Yolanda L. R., P-1515-06, and 15 Others, July 22, 2015 (urging the Commission to archive or close various petitions and cases in which the petitioner had died or that had been on the Commission's docket for many years with no action, under the practice of the July 17, 2013, Commission letter).

B. PETITIONER KADAMOVAS

Petitioner Kadamovas signed the August 2011 letter along with Petitioner Bolden but does not appear to have pursued his Commission claims further over the course of four years despite many opportunities to do so, particularly in 2012 during the several rounds of correspondence involving Petitioner Bolden. In light of his obvious lack of interest in prosecuting his Commission case, the Commission should consider Petitioner Kadamovas's claims abandoned and close consideration of him under the Petition.[5]

Even if the Commission continues to consider Petitioner Kadamovas's claims, it should dismiss them for failing to meet the threshold requirements in Article 28—for example, the August 2011 letter contains no information on whether he has submitted his claims to another international settlement proceeding. Moreover, even if Petitioner Kadamovas's claims did meet the Article 28 threshold, they are plainly inadmissible under 34(a) of the Rules for failure to state facts that tend to establish a violation of the American Declaration. The August 2011 letter makes no attempt to describe how his criminal trial and his treatment in prison implicate any U.S. commitments under the Declaration,[6] and the consular notification allegation is not cognizable under the Declaration for reasons described below.[7]

In the August 2011 letter, Petitioner Kadamovas admits that he filed two lawsuits regarding his treatment in prison and one remained pending, and asserts that he took his claims to the Commission because he "feels he has exhausted all avenues of relief." A petitioner's subjective belief that he need not exhaust domestic remedies, however, is not enough. As the Commission has stated, Article 31 requires a petitioner to *pursue* domestic remedies,[8] and indeed Kadamovas has

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5 The Commission will recall that the United States has recommended on several occasions that it should adopt, as part of a more effective case-management strategy, a policy or rule by which it archives or closes matters in which the petitioner has not prosecuted the matter for a specified period of time. *See, e.g.*, Letter from Michael J. Fitzpatrick to Emilio Alvarez Icaza Re Anant Kumar Tripati, Petition No. P-459-08, Aug. 6, 2015, at 4–5. This is certainly the case for Kadamovas, Sinnistera, Ortiz, Mikhel, and Umana.

6 *Compare, e.g.*, Vázquez & Gil v. Mexico, Petition Nos. 1352-06 and 580-07, Report No. 67/14, Inadmissibility, July 25, 2014, ¶¶ 56–59 (finding petition inadmissible under the American Convention on Human Rights analogue to Article 34(a) of the Rules because the petitioners failed to state facts that tend to establish a violation of the rights in the American Convention).

7 *See infra* text accompanying notes 19–21.

8 *See, e.g.*, Vera Mejías v. Chile, Petition No. 157-06, Report No. 11/13, Inadmissibility, Mar. 20, 2013, ¶ 25 ("[B]y virtue of the complementary nature of the American Convention, the petitioner should resort to and

pursued them and continues to do so. His appeal from his criminal conviction is pending in the U.S. Court of Appeals for the Ninth Circuit,[9] and he has two pending civil claims related to prison conditions before the U.S. District Court for the Southern District of Indiana.[10] As such, because Petitioner Kadamovas is still exhausting domestic remedies, the exhaustion requirement in Article 31 precludes the Commission from considering his claims, and it must deem them inadmissible.[11]

C. PETITIONER BOLDEN

Of the various Petitioners, only Petitioner Bolden has made any real attempt to frame his allegations as implicating rights recognized in the American Declaration and to describe how he has satisfied the Commission's procedural requirements. Yet he, like the others, fails to demonstrate the admissibility of his claims. A federal jury convicted Petitioner Bolden in 2006 for killing a guard during a bank robbery and he was sentenced to death. The U.S. Court of Appeals for the Eighth Circuit affirmed his conviction and sentence on direct appeal in 2008, and the U.S. Supreme Court denied his petition for *certiorari* in 2010.

Thereafter, Petitioner Bolden filed a petition for *habeas corpus* relief in the U.S. District Court for the Eastern District of Missouri, alleging a range of grounds for vacating or correcting his sentence, including failure to preserve his purported

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exhaust domestic remedies to resolve the alleged violations."); Move Organization v. United States, Case No. 10.865, Report No. 19/92, Decision of the Commission as to the Admissibility of Case 10.865, Oct. 1, 1992 ("*Move Organization* Inadmissibility Decision"), Analysis § (a)(12) (petitioner "must invoke and exhaust" domestic remedies).

9 *See, e.g.*, Opening Brief of Appellant, United States v. Kadamovas, No. 07-99009 (9th Cir. May 2, 2013).

10 *See* Kadamovas et al. v. Lockett, 2:11-cv-00258-WTL-WGH (S.D. Ind. Sep. 28, 2011); Kadamovas v. Caraway, 2:14-cv-00179-WTL-WGH (S.D. Ind. Jun. 12, 2014).

11 *See, e.g.*, Undocumented Migrant, Legal Resident, and U.S. Citizen Victims of Anti-Immigrant Vigilantes v. United States, Petition No. 478-05, Report No. 78/08 & 78/09, Admissibility, Aug. 5, 2009, ¶ 60 & Decision ¶ 3 (declaring case inadmissible with respect to one petitioner "because the presumed victim is pursuing a civil domestic remedy"); Cherokee Nation v. United States, Case No. 11.071, Report No. 6/97, Inadmissibility, Mar. 12, 1997 ("*Cherokee Nation* Inadmissibility Decision"), ¶ 41 (finding petition inadmissible because "[t]here are still available, domestic remedies in the United States to be invoked and exhausted" and accordingly closing the case); *Move Organization* Inadmissibility Decision, *supra* note 8, Analysis § b(2) & Conclusion ¶ 1 (finding petition inadmissible for failure to exhaust because petitioner "has invoked and is currently pursuing" domestic remedies). An examination of the Commission's inadmissibility reports with respect to other Organization of American States member states reveals a number of other matters in which the Commission dismissed the petition as inadmissible because the petitioner was still pursuing domestic remedies. *See, e.g.*, Guimarães v. Brazil, Petition No. 1242-07, Report No. 60/13, Inadmissibility, July 16, 2013, ¶¶ 18–19.

right to consular notification procedures under the Vienna Convention on Consular Relations (VCCR), ineffective assistance of counsel, prosecutorial misconduct, and deprivation of his rights to a fair trial and meaningful appellate review. The *habeas* petition, twice amended, remains pending before the district court,[12] and Petitioner Bolden can appeal any eventual denial by the district court to the Eighth Circuit Court of Appeals.

Petitioner Bolden has also filed numerous civil lawsuits related to his allegations that he receives inadequate medical care and nutrition in prison and alleging inadequate access to the law library, computer services, and to legal services. Petitioner Bolden continues to litigate at least one of these lawsuits in the U.S. District Court for the Southern District of Indiana, the district where his prison is located, alleging the Federal Bureau of Prisons has denied him adequate medical treatment required under the U.S. Constitution.[13] Separately, the U.S. District Court for the Eastern District of Missouri dismissed a third lawsuit because Petitioner Bolden had filed it under the wrong law and in the wrong federal district; the court noted that Petitioner Bolden could instead file the suit under a different law (28 U.S.C. § 2241) in the district where his prison is located.[14]

In sum, it is evident that Petitioner Bolden, like Petitioner Kadamovas, continues to exhaust domestic remedies, and that additional remedies remain available for him to pursue that hold the prospect of providing effective relief for the wrongs alleged in his Petition before the Commission. Because he is still pursuing domestic remedies,[15] and because additional domestic remedies remain available for him to pursue,[16] he has not fulfilled the Article 31 exhaustion requirement and the Commission must accordingly dismiss the Petition.

Petitioner Bolden claims in the February 2012 letter that he is excused from exhaustion by Article 31(b) because attempting exhaustion would be futile; and by Article 31(c) because there has been unwarranted delay in rendering a final

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12 *See, e.g.*, Order, Bolden v. United States, 4:10-CV-2288-CEJ (E.D. Mo. Mar. 9, 2015) (confirming that the court will consider Bolden's claims in his revised amended motion under 28 U.S.C. § 2255).

13 *See, e.g.*, Complaint, Bolden v. Federal Bureau of Prisons, 2:14-CV-00103-WTL-MJD (S.D. Ind. Apr. 9, 2014).

14 Memorandum and Order, Bolden v. United States, 4:10-CV-2288-CEJ (E.D. Mo. Mar. 6, 2015). *See also, e.g.*, Magi v. Argentina, Petition No. 951-01, Report No. 106/13, Inadmissibility, Nov. 5, 2013, ¶¶ 34–35 (finding petition inadmissible for failure to exhaust where a remedy was available in the domestic system, but the petitioner failed to follow the correct domestic law procedures that would have allowed access to that remedy).

15 *See Move Organization* Inadmissibility Decision, *supra* note 8, Analysis § (a)(12).

16 *See Cherokee Nation* Inadmissibility Decision, *supra* note 11, ¶ 41.

judgment. The fact that a litigant may bear a weighty burden does not render his claim "futile" or excuse lack of exhaustion, and as the Commission has stated, "[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies."[17] Petitioner Bolden argues that "[i]f the Government continues to deny [him] adequate medical care, he will die before he can fully exhaust his domestic remedies."[18] What has actually transpired since the February 2012 letter, however, has completely undermined this argument: Petitioner Bolden, represented by sophisticated counsel, has put substantial effort into litigating several lawsuits in the federal courts over the past five years—totaling thousands of pages of motions and exhibits—and he continues to vigorously advance these claims. As for unwarranted delay, the amount of time taken in each of Petitioner Bolden's lawsuits is not unusual, particularly in light of the large number of motions and other documents Petitioner Bolden himself has filed and continues to file with the courts.

Finally, Petitioner Bolden, a Canadian national, argues that the United States' commitments under several articles of the American Declaration are implicated by a purported failure to go through proper consular notification procedures when he was arrested. This claim is inadmissible under Article 34(a) for failure to state facts that tend to establish a violation of the rights in the American Declaration. Claims concerning consular notification do not raise a violation of a human right enshrined in any international instrument to which the United States is a party or has endorsed. Thus, Article 20 of the Commission's Statute and Articles 23 and 27 of the Rules preclude their consideration by the Commission.

Consular notification is, quite simply, not a human right. The VCCR's consular notification protections are based on principles of reciprocity, nationality, and function, and persons do not enjoy these protections by mere virtue of their human existence. Neither is consular notification a necessary component of the right to due process in criminal proceedings. In *Avena*, the International Court of Justice—which, unlike the Commission, had a mandate in that case to interpret the VCCR—noted that neither the text, nor the object and purpose, nor the *travaux* of

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[17] Sánchez *et al.* v. United States ("Operation Gatekeeper"), Petition No. 65/99, Report No. 104/05, Inadmissibility, Oct. 27, 2005, ¶ 67.

[18] February 27, 2012, letter at 6.

the VCCR support the conclusion that consular notification is an essential element of due process in criminal proceedings.[19]

Moreover, the American Declaration's due process rights are not defined by the provisions of the VCCR. The availability of consular notification and access is premised on the existence of consular relations between governments. Moreover, consular access and assistance is undeniably a right exercised by the detained individual's State of nationality, through its consular officers, in order to facilitate that State's access to its national, as clearly stated in the introductory clause of Article 36(1). As the plain text of Article 36(1)(c) of the VCCR provides: "*consular officers* shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation" (emphasis added). Nothing in this provision suggests that the right to access may be privately enforced by the detained individual.[20] It is instead up to representatives of the individual's State of nationality to determine whether to provide assistance, and the VCCR does not provide the detained individual any right or authority to demand it. While the State of nationality may diplomatically protest any failure to observe the terms of the VCCR and attempt to negotiate a solution, the individual does not have a judicially enforceable right to compel compliance. To accept the argument that Petitioner Bolden's consular notification claim amounts to a human rights violation under the American Declaration would require the untenable conclusion that any foreign national who does not receive consular assistance, because of an absence of consular relations or because his government did not provide assistance, cannot receive a fair trial or due process of law.

Thus, because consular notification is not a right in the American Declaration, nor a component of any right therein, Article 34(a) of the Rules prevents the Commission from entertaining Petitioner Bolden's (or Petitioner Kadamovas's) consular notification claims. Although this claim is inadmissible, however, the United States wishes to emphasize that it takes its consular notification and access obligations under the VCCR very seriously and has made significant efforts over the past several years, discussed in detail in other

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[19] Matter of Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 12, ¶ 124 (Mar. 31).

[20] This is also the prevailing view among U.S. courts that have examined this question. *See, e.g.*, Gandara v. Bennett, 528 F. 3d 823, 827–29 (11th Cir. 2008); Cornejo v. County of San Diego, 504 F. 3d 853, 855 (9th Cir. 2007).

proceedings before the Commission, to meet the U.S. goal of across-the-board compliance by domestic authorities. The United States is always willing to provide the Commission, at the Commission's request, updates as to its robust consular notification outreach efforts.[21]

D. PRECAUTIONARY MEASURES

As noted, the Commission requested precautionary measures in this case on December 27, 2011. The United States once again respectfully submits that the Commission does not have authority to request or require that the United States adopt precautionary measures. The practice of requesting precautionary measures is based on Article 25(1) of the Rules, which states:

> [T]he Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures. Such measures, whether related to a petition or not, shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system.

Importantly, this rule was approved by the Commission and not by the Member States of the Organization of American States (OAS) themselves. Through this rule, the Commission apparently considers itself to possess not only the power to *request* that a State adopt precautionary measures—which implies that the State may choose to decline the request—but also to *require* the measures, in a manner akin to the Inter-American Court of Human Rights ("Court"). This is evident from terms used in other subparagraphs of Article 25, which speak of the Commission

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[21] For example, the U.S. Department of State recently released a revised Fourth Edition of its Consular Notification and Access Manual. *See* UNITED STATES DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTIONS FOR FEDERAL, STATE, AND LOCAL LAW ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES AND THE RIGHTS OF CONSULAR OFFICIALS TO ASSIST THEM (4th ed. 2014). The United States takes this opportunity to clarify a matter addressed in the Commission's recent merits report in *Tercero v. United States*, Case No. 12.994, Report No. 51/15, Aug. 25, 2015. Contrary to the Commission's possible implication to the contrary, *id.* ¶ 128, while the Manual acknowledges an international law obligation on the part of federal, state, and local officials to inform a detained foreign national of the option of consular notification and notify the consulate if the national so requests, nowhere does it state or imply that the national thereby has an individual *right* to consular notification. Moreover, the American Bar Association, whose consular notification guideline is described at *id.* ¶ 129, is a non-governmental organization, not the national body that regulates the U.S. legal profession akin to a *Colegio de Abogados* in many Latin American countries. Its use of the term "right" in its guideline on consular notification does not constitute a statement of the U.S. position on this question of international law.

granting, extending, modifying, and lifting the precautionary measures—as opposed to making, modifying, or withdrawing a *request* for such measures. Communications sent by the Commission over the years also refer to precautionary measures with language evincing the belief that when the Commission requests precautionary measures, it is in effect imposing them and that their implementation is not optional.[22]

While the Commission's arrogation of such a power is perhaps understandable, it is not within the mandate given to the Commission by the OAS Member States. Article 25(1)'s reference to purported sources of a precautionary measures power—Article 106 of the OAS Charter, Article 41(b) of the American Convention on Human Rights ("American Convention"), Article 18(b) of the Commission's Statute, and Article XIII of the American Convention on Forced Disappearance of Persons—do not change this reality. Article 106 of the Charter established the Commission to promote the observance and protection of human rights, but makes no further mention of its specific powers. Article 41(b) of the American Convention and Article 18(b) of the Statute empower the Commission to make recommendations to OAS Member States "for the adoption of progressive measures in favor of human rights" and "appropriate measures to further the observance of those rights," but are silent on precautionary measures, and *a fortiori* on any power to require them. Whatever precautionary measures power may have been sanctioned by States Parties to the American Convention on Forced Disappearance of Persons in that treaty's Article XIII is not applicable to the United States as a nonparty to that Convention.

The Commission's Statute does, in fact, refer to *provisional* measures, but only in the context of States Parties to the American Convention. Even there, it does not give the Commission the power to request or require such measures directly of a Member State. Instead, the Statute merely gives the Commission the power to request the Inter-American Court of Human Rights ("Inter-American Court") to take provisional measures in serious and urgent cases involving States Parties to the American Convention that have accepted the jurisdiction of the Inter-American Court, where the case has not yet been submitted to the

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[22] *See, e.g.*, Gray v. United States, PM-844-04, and Several Other Matters, Update on Precautionary Measures Granted, July 17, 2013, at 1–2 (with respect to several executed petitioners, Commission referring to precautionary measures previously "granted"; noting "that all the beneficiaries were executed while the precautionary measures were still in effect"; and deciding to "lift" the measures).

Inter-American Court.[23] Article 63(2) of the American Convention, in turn, empowers the Inter-American Court to act on such a request. There is no provision in the Statute or the American Convention that provides authority for the Commission to request the Inter-American Court to issue provisional measures with respect to a nonparty to the American Convention, for the Inter-American Court to do so, or for the Commission to itself require any OAS Member State—American Convention party or not—to take precautionary measures. For a nonparty to the American Convention the Commission is empowered, at most, to make a nonbinding recommendation that it take precautionary measures.[24]

As such, the United States has construed the Commission's request for precautionary measures as a nonbinding recommendation that the United States take precautionary measures. The United States respectfully declines that recommendation, and requests that the Commission withdraw the recommendation. For Petitioners Ortiz, Mikhel, and Umana, the Commission has no information whatsoever on which to ground a determination that they face irreparable harm—no specific facts, no information about remaining domestic remedies, or otherwise—beyond the bare fact that they were sentenced to death; and Petitioner Sinnistera, as noted above, has already died of natural causes. The Commission has only slightly more information about Petitioner Kadamovas. Moreover, Petitioners are not, in fact, in imminent danger of irreparable harm. None is currently scheduled to be executed, and some are still pursuing domestic remedies. The U.S. Department of Justice is continuing to review the federal execution protocol used by the Federal Bureau of Prisons as well as policy issues related to the death penalty, and no executions will occur during the pendency of that review.

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[23] Commission Statute, art. 19(c).

[24] *Id.*, art. 20(b) (Commission has power "to make recommendations" to nonparties to the American Convention "when it finds this appropriate, in order to bring about more effective observance of fundamental human rights … .").

E. CONCLUSION

In sum, the Petition is inadmissible for failure to meet the threshold requirements for consideration under Article 28, for failure to state facts that tend to establish a violation of the rights in the American Declaration under Article 34, and for failure to exhaust domestic remedies under Article 31. The Commission should accordingly declare the Petition inadmissible and, in line with its own practice, close this matter. It should not hold the Petition in abeyance pending exhaustion of domestic remedies. Holding an inadmissible petition in abeyance—by explicitly deciding to hold the petition or by simply taking no action and allowing the matter to remain open on the Commission's docket—has no basis in the Rules and sets a poor example for future petitions that are similarly deficient. The United States reserves the right to submit observations on the merits should this matter reach the merits stage.