



THE PERMANENT REPRESENTATIVE
OF THE
UNITED STATES OF AMERICA
TO THE
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C.

September 7, 2016

Mr. Paulo Abrão
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

**Re: Inmates of the Administrative Maximum United States Prison
Petition No. P-387-09
Response to Petition**

Dear Mr. Abrão:

The United States Government has the honor of addressing the Inter-American Commission on Human Rights ("Commission") in regard to the above-referenced matter. We herein enclose our Response to the Petition dated March 9, 2009, which your office received on March 10, 2009, and which Petitioners later supplemented with additional information. Your office forwarded to us the Petition and the related documents via letter dated June 25, 2014, and followed up via letter dated August 30, 2016. We apologize for the delay in filing this Response, and trust this information is useful to the Commission. We thank the Commission for its attention to this matter.

Please accept renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "K. Sullivan", written over a horizontal line.

Kevin K. Sullivan
Interim Permanent Representative

Annexes:

Annex A: Inmates of ADX, Request for Precautionary Measures
MC-294-08, Written Submission of the United States, April 7, 2011.

Annex B: ADX Institutional Supplement FLM 5321.07(1)B (“2015
Institutional Supplement”).

Annex C: Chart of U.S. Bureau of Prisons services available to inmates
housed at ADX.

Annex D: Padilla and Lebrón, Petition No. P-2282-12, U.S. Response to
Petition, Aug. 4, 2016

Annex E: Mexico Border Violence, Case No. 11.072, Second Response of
the Government of the United States of America, May 7, 1996

**PETITION NO. P-387-09, INMATES OF THE
ADMINISTRATIVE MAXIMUM UNITED STATES PRISON (ADX)
RESPONSE OF THE UNITED STATES OF AMERICA**

The Government of the United States appreciates the opportunity to provide observations on the various pieces of correspondence (collectively, “Petition”) forwarded to the United States as part of Petition No. P-387-09, filed on behalf of Jamil Al-Amin and others (collectively, “Inmates of ADX” or “Petitioners”). For the reasons stated below, we urge the Commission to find this matter inadmissible because supervening information reveals the inadmissibility of certain claims, because Petitioners have failed to exhaust domestic remedies, and because Petitioners have failed to state facts that tend to establish a violation of the American Declaration of the Rights and Duties of Man (“American Declaration”).¹ Should the Commission nevertheless declare the Petition admissible and examine its merits, it should dismiss the Petition as meritless.

A. BACKGROUND

This Petition was initially filed on behalf of Mr. Zaid Safarini and other unnamed inmates held at the Administrative Maximum United States Prison (ADX), in Florence, Colorado, by the International Human Rights Clinic at American University (“Clinic”) on March 9, 2009. The Petition alleges that the conditions of confinement at ADX, including mental health care and level of contact with fellow inmates, prison staff, and individuals outside ADX, as well as Petitioners’ alleged inability to enter into the “Step-Down Program” in order to be transferred to lower-security institutions, violate Articles I, II, XXV, and XXVI of the American Declaration.

This matter before the Commission has a lengthy history. In a letter dated November 21, 2008, the Commission forwarded to the United States a request filed by the Clinic for precautionary measures related to ADX. In that letter, the

¹ Petitioners allege that the United States has “violated” certain specific rights recognized in the American Declaration during their detention at ADX. As the American Declaration is a non-binding instrument and does not itself create legal rights or impose legal obligations on member States of the Organization of American States, *see infra* note 5 and accompanying text, 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.

Commission requested information the United States “deems pertinent concerning the situation referred by the applicants.” The Commission designated this “request for information” proceeding with the number MC-298-08, and thereafter sent several follow-up letters requesting additional information. Separately, on March 9, 2009, the Clinic filed the Petition, which the Commission eventually designated as Petition No. P-387-09 but did not forward it to the United States until June 25, 2014. The United States submitted information in response to the Commission’s request for information in MC-298-08 on April 10, 2009. The Commission forwarded to us the Clinic’s response to the April 10, 2009 submission on August 17, 2009.

A working meeting was then held at the Petitioners’ request on October 27, 2010, after which the United States submitted a second written filing reaffirming and expanding upon its oral presentation, enclosed as Annex A. Subsequently, the Clinic sent a letter on May 15, 2013, requesting that Mr. Safarini be removed from the Petition because he had already obtained the relief he sought. As such, this response proceeds on the basis that Mr. Safarini is no longer among the Petitioners in this matter. In that letter and a subsequent letter from the Clinic, dated May 12, 2014, the Clinic requested that 22 other named individuals be added as Petitioners in this matter.²

The Commission did not ultimately issue a precautionary measures resolution in MC-298-08 requesting that the United States take such measures. The Commission informed the United States and the Clinic by letters dated August 16, 2016, that MC-298-08 had been closed. As a result, this response does not address that request, and addresses only P-387-09.

ADX is an administrative institution housing maximum-custody inmates. The facility, which opened on November 30, 1994, is the first institution specifically designed by the U.S. Federal Bureau of Prisons (“Bureau”) to house inmates who require an uncommon level of security due to their history of serious

² Ellis Mosher, Abu Shakur, Donald Heisler, John Powers, Jeffrey Clark, Jamil Al-Amin, Jeremy Pinson, David Spicer, Percy Barron, Greg Murray, Christopher Bowman, Timothy Brown, Harold Cunningham, Dawane Mallett, Damani Nantambu, Kevin Thomas, Christopher Trigg, Ruben Castro, Delroy Edwards, Peter Mauchlin, Raymond Shryock, and Jeff Fort. As discussed below at Section B(1)(b), supervening information has rendered the claims of several of these Petitioners inadmissible. We are aware that Mr. Pinson has a separate matter pending before the Commission forwarded to the United States on November 30, 2015, and we are in the process of evaluating that separate petition.

institutional misconduct, involvement in violent or escape-related behavior, or unusual security needs based on the nature of their offense. The mission of ADX is to confine those inmates under close controls while providing them with opportunities to demonstrate progressively responsible behavior; participate in life-enhancing programs in a safe, secure, and humane environment; and establish readiness for transfer to a less secure institution. The institution's design enhances the safety of staff and inmates and improves program opportunities for the inmate population. The Bureau houses inmates at ADX when it concludes that placement of an inmate at any another facility would pose a risk to the safety and security of the institution, staff, inmates, and the public.

ADX currently houses just over 400 inmates in 9 units. It has a rated capacity of 490 inmates. The placement of an inmate at ADX is rare, with less than one quarter of a percent of the Bureau's inmates housed at ADX (that is, less than one out of every 400 Bureau inmates). There are more than 300 Bureau staff who currently work at ADX, giving it the highest staff-to-inmate ratio within the U.S. federal prison system.

B. DISCUSSION

Petitioners allege that the United States has violated the right to be free from cruel, infamous, or unusual punishment and to humane treatment, the right to due process, and the right to equal protection under the law. They request that the Commission declare the Petition admissible; declare the United States in violation of Articles I, II, XXV, and XXVI of the American Declaration; request that the United States review and modify ADX regulations to allow Petitioners to participate in group meals, recreation, and therapy; request that the United States grant admission for Petitioners into the Step-Down Program or provide concrete and detailed steps eligible Petitioners can take to gain admission irrespective of their prior terrorism convictions or connections; request that the United States modify regulations controlling placement at ADX such that terrorism-related issues cannot serve as a justification for their placement there; and request that the United States modify regulations to ensure that Petitioners are provided a mechanism to seek transfer from ADX that affords due process.

For a petition to be admissible before the Commission, it must satisfy several procedural requirements under the Commission’s Statute and Rules of Procedure (“Rules”). The Petition is inadmissible on numerous such grounds. It is also meritless. The reasons are discussed in turn below.

1. Admissibility

In order for this matter to be admissible, Article 20(c) of the Statute and Article 31 of the Rules require Petitioners to show that they have pursued and exhausted the remedies of the domestic legal system “in accordance with the generally recognized principles of international law;”³ and under Article 34(a) of the Rules, the facts alleged must, if true, “tend to establish a violation of the rights” set out in the American Declaration.⁴ The Petition fails to meet these requirements. Article 34(c) also provides that the Commission shall declare any claims inadmissible when “supervening information or evidence presented to the Commission reveals that a matter is inadmissible or out of order.” Accordingly, the United States respectfully requests that the Commission find the Petition inadmissible under Article 20(c) of the Statute and Articles 31, 34(a), and 34(c) of the Rules, as well as for lack of competence.

- a. *The Commission lacks competence to issue binding decisions on non-States Parties to the American Convention on Human Rights or on matters arising under the American Declaration.*

At the outset, the United States reiterates its longstanding position that the American Declaration is a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of

³ Rules, art. 31(1).

⁴ *Id.*, art. 34(a). 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 identify the American Declaration as an “applicable instrument” with respect to nonparties to the American Convention. The United States is not a party to, nor has it endorsed, any of the other instruments listed in Article 23 of the Rules.

American States (OAS).⁵ The United States has undertaken a political commitment to uphold the American Declaration. Article 20 of the Statute of the Commission sets forth the Commission's powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights ("American Convention"), including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. The United States takes its American Declaration commitments and the Commission's recommendations very seriously but notes, as it has in prior communications, that the Commission lacks competence to issue a binding decision vis-à-vis the United States, including on matters arising under the American Declaration. The Commission also lacks competence to issue a binding decision vis-à-vis the United States on matters arising under international human rights treaties, whether or not the United States is a party, or under customary international law.⁶

b. The Petition is inadmissible under Article 34(c) of the Rules with regard to 11 Petitioners due to supervening information.

Supervening information reveals certain claims in this Petition to be inadmissible under Article 34(c) of the Rules. Of the 22 named individuals added

⁵ United States federal Courts of Appeals have independently held that the American Declaration is nonbinding and that the Commission's decisions do not bind the United States. *See, e.g.,* Garza v. Lappin, 253 F.3d 918, 925 (7th Cir. 2001) ("The American Declaration ... is an aspirational document which ... did not on its own create any enforceable obligations on the part of any of the OAS member nations Nothing in the OAS Charter suggests an intention that member states will be bound by the Commission's decisions before the American Convention goes into effect. To the contrary, the OAS Charter's reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members The Commission's power is only to make 'recommendations,' which, according to the plain language of the term, are not binding."); *accord, e.g.,* Flores-Nova v. Attorney General of the United States, 652 F.3d 488, 493-94 (3d Cir. 2011); *In re Hicks*, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). For a further discussion of the U.S. position regarding the nonbinding nature of the American Declaration, see Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, available at <http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html>.

⁶ *See, e.g.,* Padilla & Lebrón, Petition No. P-2282-12, Response to Petition, Aug. 4, 2016, at 4 (appended as Annex D). We have no objection to the Commission sharing this response with the Petitioners here. The Padilla & Lebrón response contains no privacy-protected information or other information about Mr. Padilla and Ms. Lebrón that, in our view, would preclude sharing it with the Petitioners in this matter.

to this Petition in the Clinic’s letters dated May 15, 2013, and May 12, 2014, 11 of those individuals have since been transferred out of ADX to lower-security prison facilities.⁷ Up-to-date information about the whereabouts of individual inmates in the U.S. federal prison system can be found via the online Bureau Inmate Locator at <https://www.bop.gov/inmateloc/>. The original Petition itself noted that allegations of ongoing violations continue “so long as [the Petitioners] remain at ADX under these conditions.”⁸ Given that these individuals are no longer housed at ADX, the grounds on which the Petition is based for these 11 Petitioners no longer exist. Accordingly, this supervening information renders the claims of these 11 Petitioners inadmissible under Article 34(c) of the Rules, and the Commission should dismiss these claims forthwith or, alternatively, it should archive this matter with respect to these 11 Petitioners under Article 42 of the Rules because the grounds for Petition with respect to them do not subsist.

To the extent the Petitioners have not timely notified the Commission of supervening events having a material bearing on this Petition, the United States would urge the Commission to remind the Petitioners—and all similarly situated petitioners—that it is Petitioners’ duty to provide the Commission with information on material developments in their situations. It is not the Commission’s duty to independently monitor every Petitioner’s domestic situation, as it does not have the resources for such a burdensome task, nor is it the State’s duty to keep abreast of developments and keep the Commission updated.

⁷ The following inmates named in the Petition are no longer held at ADX as of September 6, 2016: Ellis Mosher, Jeffrey Clark, Jamil Al-Amin, Jeremy Pinson, Christopher Bowman, Timothy Brown, Harold Cunningham, Damani Nantambu, Kevin Thomas, John Powers, and Raymond Shryock. As of August 10, 2016, the following named Petitioners remain housed at ADX: Abu Shakur, Delroy Edwards, Donald Heisler, David Spicer, Percy Barron, Greg Murray, Dawane Mallett, Ruben Castro, Peter Mauchlin, Chris Trigg, and Jeff Fort. We acknowledge that Jeremy Pinson has filed a separate petition before the Commission, Petition No. P-1374-10, and are evaluating that petition.

⁸ Petition at 50.

c. The Petition is inadmissible because Petitioners⁹ have failed to exhaust domestic administrative and judicial remedies under Article 20(c) of the Statute and Article 31 of the Rules.

Article 20(c) of the Statute and Article 31(1) of the Rules only allow the Commission to consider a petition after it has verified that domestic remedies have been pursued and exhausted. The Petitioners have failed to exhaust domestic administrative and judicial remedies in this instance, thus rendering their Petition inadmissible before the Commission.

The Commission has repeatedly emphasized that the petitioner has the duty to pursue all available domestic remedies. Article 31(1) of the Rules states that “[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.” As the Commission is aware, the requirement of exhaustion of domestic remedies stems from customary international law, as a means of respecting State sovereignty. It ensures that the State where a human rights violation has allegedly occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system.¹⁰ It is a sovereign right of a State conducting judicial proceedings to have its national system be given the opportunity to determine the merits of a claim and decide the appropriate remedy before resort to an international body.¹¹ The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction.”¹²

The Rules do not require that these domestic remedies be judicial in nature in order to require their exhaustion before a petitioner may have recourse to the Commission, and the Commission has previously considered non-judicial remedies

⁹ For the remainder of this response, the term “Petitioners” will be used to refer to the 11 Petitioners for whom supervening events have not, to our knowledge, rendered their claims inadmissible as of the date this response was filed. These 11 Petitioners are Abu Shakur, Donald Heisler, David Spicer, Percy Barron, Delroy Edwards, Greg Murray, Dawane Mallett, Ruben Castro, Peter Mauchlin, Chris Trigg, and Jeff Fort.

¹⁰ See, e.g., *Interhandel Case (Switzerland v. United States)* [1959] I.C.J. 6, 26–27; *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, 1939 P.C.I.J., Ser. A/B, No. 77.

¹¹ THOMAS HAESLER, *THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS* (1968), at 18–19.

¹² *Velásquez Rodríguez Case*, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No.4 (1988).

as remedies that need to be properly exhausted in order for a matter to become admissible under Article 31.¹³ Inmates at ADX have opportunities at both the administrative and judicial level to challenge the conditions of their confinement at ADX, including entrance into the Step-Down Program and their initial transfer to ADX, and to receive relief through these remedies where appropriate.

i. Eight of the 11 Petitioners have failed to exhaust available and effective domestic administrative remedies.

The Bureau has a three-tiered administrative procedure for inmate grievances, which is codified at 28 C.F.R. § 542.10, et seq. Pursuant to this procedure, the Bureau may consider allegations of constitutional violations, including complaints related to the conditions of confinement, and take action as appropriate.¹⁴ Inmates must first address complaints to the Warden. If dissatisfied with the Warden's decision, inmates can appeal to the Regional Director and ultimately the Director of National Inmate Appeals in Washington, D.C.¹⁵ An inmate will have exhausted his administrative remedies only after seeking review at all three levels.¹⁶

This procedure is readily accessible to ADX inmates. During fiscal year 2015, ADX inmates filed 1,631 requests for administrative relief under this procedure. The requests included challenges of recommendations made by the Step-Down Screening Committee, which is responsible for determining when to initiate an inmate's advancement through each phase of the Step-Down Program and his transfer to lower-security settings, and the decisions to transfer inmates to

¹³ See, e.g., Vázquez & Gil Rendón v. Mexico, Petition Nos. 1352-06 & 580-07, Report No. 67/14, Inadmissibility, July 25, 2014, ¶¶ 39–44 (stating that the petitioners had exhausted domestic remedies even though they had not pursued a special administrative remedy, not because the administrative remedy would not have constituted a domestic remedy, but because that particular special administrative procedure could not have yielded an effective remedy for the petitioners); Cortina González v. Mexico, Petition No. 700-04, Report No. 25/12, Inadmissibility, Mar. 20, 2012, ¶¶ 29–34 (declaring petition inadmissible for failure to exhaust domestic remedies because the petitioner sought *amparo* relief for violations of constitutional principles rather than the proper domestic remedy through the Conciliation and Arbitration Tribunals).

¹⁴ See Yousef v. Reno, 254 F.3d 1214, 1222 (10th Cir. 2001) (affirming that “the [Bureau] can and does evaluate the merits of individual constitutional challenges and may modify particular conditions of an inmate’s confinement.”). See also Porter v. Nussle, 534 U.S. 516, 520 (2002) (holding the exhaustion of administrative remedies is mandatory and “applies to all prisoners seeking redress for prison circumstances or occurrences.”)

¹⁵ 28 C.F.R. §§ 542.14, 542.15(a).

¹⁶ *Id.* §§ 542.14, 542.15(a).

ADX in the first place. This administrative remedy is also effective: in 948 instances in fiscal year 2015, some form of relief was granted to the petitioning inmate. According to ADX records, eight of the 11 Petitioners¹⁷ have failed to exhaust this administrative remedy, either by failing to initiate an administrative claim or by declining to appeal an unfavorable decision by the Warden or the Regional Director.¹⁸ As the Commission has noted, the burden is on the petitioner to “resort to and exhaust domestic remedies to resolve the alleged violations.”¹⁹

ii. Eight of the 11 Petitioners have additionally failed to exhaust available and effective domestic judicial remedies.

The Bureau’s inmates can also pursue judicial remedies in U.S. federal courts to obtain the appropriate relief or to prevent or remedy alleged constitutional violations.²⁰ Inmates housed at ADX have sought, and continue to seek, relief in federal courts, challenging their transfers to ADX, conditions of confinement at ADX, and their lack of advancement through the ADX Step-Down Program on a variety of grounds under the U.S. Constitution and federal statutes.²¹ Petitioners have argued that such remedies need not be exhausted under Article 31(2) of the Rules because to do so would be futile without the assistance of a lawyer, which is not automatically provided in every case by the U.S. government for such

¹⁷ Percy Barron, Ruben Castro, Delroy Edwards, Jeff Fort, Donald Heisler, Peter Mauchlin, Greg Murray, and Abu Shakur.

¹⁸ Between January 1, 2012 and August 15, 2016, Mr. Barron, Mr. Castro, Mr. Edwards, and Mr. Shakur did not request administrative remedies on the issues covered by this Petition. Mr. Heisler and Mr. Murray filed a request for an administrative remedy on certain mental health complaints, but declined to appeal. Mr. Mauchlin filed a request for an administrative remedy on denial of his admission into the Step-Down Program, but declined to appeal.

¹⁹ Vera Mejías v. Chile, Petition No. 157-06, Report No. 11/13, Inadmissibility, Mar. 20, 2013, ¶ (25); *accord* Move Organization v. United States, Case No. I 0.865, Report No. 19/92, Inadmissibility, Oct. 1, 1992 (“*Move Organization* Inadmissibility Decision”), Analysis § (b)(2) (“[T]he remedies acquired, whether they be of a criminal, civil, labor, fiscal, or other nature ... must have been invoked and exhausted as provided [in] the Commission’s [Rules].”).

²⁰ *See* Farmer v. Brennan, 511 U.S. 825, 846 (1994); Wilson v. Seiter, 501 U.S. 294, 304 (1991); Whitley v. Albers, 475 U.S. 312, 319 (1986); Rhodes v. Chapman, 452 U.S. 337, 347 (1981); Simmat v. Bureau of Prisons, 413 F.3d 1225 (10th Cir. 2005).

²¹ *See* Rezaq v. Nalley, No. 07-cv-02483, 2010 WL 5157313 (D. Colo. Dec. 14, 2010); Reid v. Wiley, No. 07-cv-01855, 2008 WL 4406560 (D. Colo. Aug. 21, 2008); Elgarbrowny, Saleh, Nosari v. Fed. Bureau of Prisons, Nos. 05-cv-2467, 06-cv-01747, 07-cv-00021, 2010 WL 5464294 (D. Colo. Dec. 29, 2010); Ahmed Ajaj v. United States, 2006 U.S. Dist. LEXIS 92897 (D. Colo. 2006).

non-criminal proceedings.²² However, evidence indicates that such remedies are frequently effective for inmates proceeding without a lawyer. In fact, inmates bringing claims under the Eighth Amendment of the U.S. Constitution challenging conditions of confinement in prisons have successfully argued certain issues even when they are without legal counsel.²³

Additionally, the Petitioners have been able to obtain counsel to represent them in this matter before the Commission, which demonstrates that they have indeed been able to obtain legal counsel to argue their claims even though the U.S. government did not provide them with counsel. As another example, a prominent law firm has been representing a putative class in a pending class action lawsuit regarding mental health care at ADX. Petitioner Barron²⁴ is a named plaintiff in that case and other Petitioners will be members of the class if it is certified.

Petitioners are not excused from exhausting domestic judicial remedies merely because they would lack the assistance of a lawyer if they do not wish to seek or retain one for a domestic civil proceeding. As we said in another matter over 20 years ago:

²² The Commission decision cited by the Clinic, Michael Edwards, Case 12.067, Omar Hall, Case 12.068, Brian Schroeter and Jeronimo Bowleg, Case 12.086 v. The Bahamas, Report No. 48/01, Merits, Apr. 1, 2001, does not contain the conclusion that fair trial rights are violated when an individual is not provided with free legal aid by the government for constitutional motions, as the Clinic's Petition claims. That decision pertained exclusively to Constitutional motions "in relation to ... criminal proceedings," not in relation to civil proceedings that would be at issue in the current Petition. *Id.* ¶ 206. In fact, the Commission found in that case that "in capital cases, where Constitutional Motions relate to the procedures and conditions through which the death penalty has been imposed and therefore relate directly to the right to life and to humane treatment of a defendant, it is the Commission's view that the effective protection of those rights cannot properly be left to the random prospect as to whether an attorney may be willing or available to represent the defendant without charge." *Id.* So, the decision of the Commission in this case is limited to constitutional motions that relate to criminal proceedings in capital cases, and is not analogous to the situation of the Petitioners in the current matter, who are not facing capital punishment and whose available judicial remedies are civil rather than criminal in nature.

²³ The Eighth Amendment to the U.S. Constitution prohibits the government from imposing cruel and unusual punishment. *See, e.g.,* Foster v. Runnels, 554 F.3d 807 (9th Cir. 2008); McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991); Cummings v. Dunn, 630 F.2d 649 (8th Cir. 1980); Panah v. California Dep't of Corrections, 2015 U.S. Dist. LEXIS 92181 (N.D. Cal. 2015); Grier v. Chu, 2012 U.S. Dist. LEXIS 134173 (S.D.N.Y. 2012); Rodriguez v. Wiley, 2010 U.S. Dist. LEXIS 42676 (D. Colo. 2010); Pinckley v. Anderson, 2007 U.S. Dist. LEXIS 79975 (D. Minn. 2007); Rodriguez v. Smith, 2005 U.S. Dist. LEXIS 12237 (E.D. Pa. 2005). *See also, e.g.,* Feliciano v. Gonzalez, 13 F. Supp. 2d 151 (D.P.R. 1998) (pro se prisoner plaintiff succeeding in obtaining a judgment on the merits when co-party to prisoner represented by counsel); Goff v. Harper, 1997 U.S. Dist. LEXIS 24186 (S.D. Iowa 1997) (same).

²⁴ Petitioner Cunningham is the lead Plaintiff in that action, although, as explained above, he is not one of the 11 Petitioners remaining at ADX. *See* Cunningham v. Fed. Bureau of Prisons, 12-cv-1570-RPM (D. Colo.).

The United States Government considers that the exhaustion principle embodied in Article [31] of the Commission’s [Rules], which is grounded in customary international law, requires that these petitioners, like all others who appear before this Commission, have a duty to engage in serious, good faith efforts to exhaust all available domestic remedies before resorting to the Commission for relief. Efforts that fall short of the “serious, good faith” standard should be rejected as insufficient to overcome the duty to exhaust, unless one of the conditions set forth in Art. [31(2)] can be convincingly shown to have been met. Petitioners have offered no exhibits or other evidence that document diligent but unsuccessful efforts on their part to secure affordable legal counsel in the U.S. The United States Government therefore firmly contends that these petitioners have failed utterly to demonstrate a basis for exemption from the exhaustion rule, under any theory.

Until such time as petitioners have demonstrated convincingly that they have made serious, good faith—even if unsuccessful—efforts to access the U.S. legal system to vindicate their claims, the Commission should reject their claim of indigency as a basis for exemption from the exhaustion requirement. Similarly, the Commission should reject their claim that the operation of the U.S. system of justice renders their ability to exhaust local remedies fundamentally futile, ineffective or impossible.²⁵

Even if the Petitioners are uncertain as to whether their claims will be successful without assistance of counsel, the Commission has remarked that “[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.”²⁶

In any event, according to ADX records, eight of the 11 Petitioners have declined to seek such judicial remedies.²⁷ Of the remaining three, Mr. Barron and

²⁵ Mexico Border Violence, Case No. 11.072, Second Response of the Government of the United States of America, May 7, 1996, at 4 (appended as Annex E). We have no objection to the Commission sharing this letter with the Petitioners here, and that letter contains no privacy-protected information or other information about the *Mexico Border Violence* petitioners that, in our view, would preclude sharing it with the Petitioners in this matter.

²⁶ Sánchez et al. v. United States, Petition No. 65/99, Report No. 104/05, Inadmissibility, Oct. 27, 2005, ¶ 67.

²⁷ Ruben Castro, Delroy Edwards, Jeff Fort, Donald Heisler, Greg Murray, John Powers, Abu Shakur, and David Spicer.

Mr. Mauchlin are both parties to two ongoing civil cases concerning the conditions of their confinement at ADX, both of which are pending and have not yet been resolved in U.S. federal courts.²⁸ As noted above, the Commission has long recognized that international institutions must permit domestic proceedings to run their course, thereby affording the State the opportunity to fashion any appropriate remedy under its domestic law, and has declined in past matters to intervene where domestic litigation remains pending.²⁹ Mr. Mallett has pursued judicial remedies through U.S. federal courts on several occasions, although he does not to our knowledge have any pending federal litigation.³⁰

iii. All 11 Petitioners have therefore failed to exhaust domestic remedies.

Considering the need to exhaust both administrative and judicial remedies, the claims of all 11 Petitioners in this matter are inadmissible for failure to exhaust under Article 20(c) of the Statute and Article 31 of the Rules. Six of the 11 Petitioners (Mr. Castro, Mr. Edwards, Mr. Fort, Mr. Heisler, Mr. Murray, and Mr. Shakur) have failed to exhaust domestic remedies because they have both failed to seek or complete administrative review of their claims as provided for under 28 C.F.R. § 542.10, et seq., and because they have declined to pursue the available and effective domestic judicial remedies. The United States has an independent and impartial judicial system, based firmly on the rule of law, which is available to address the questions raised by these Petitioners.

²⁸ See *Mauchlin v. Davis, et al.*, No. 12-cv-1449-REB-BNB (D. Colo.); *Cunningham, et al. v. U.S. Bureau of Prisons, et al.*, No. 12-cv-1570-RPM (D. Colo.).

²⁹ 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, ¶ 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 19, Analysis § b(2) & Conclusion ¶ I (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 OAS 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. 60113, Inadmissibility, July 16, 2013, ¶¶ 18–19.

³⁰ *Mallett v. Samuels, et al.*, No. 14-cv-2589-LTB (D. Colo. 2014); *Mallett, et al. v. Holder, et al.*, No. 13-cv-2273-LTB (D. Colo. 2012); *Mallett v. Lappin, et al.*, No. 09-cv-1784-ZLW (D. Colo. 2009).

Mr. Barron and Mr. Mauchlin have failed to exhaust domestic remedies because they have failed to seek or complete administrative review of their claims, and because they are both parties to ongoing domestic civil litigation concerning the conditions of their confinement that are still pending in U.S. federal court.

Mr. Mallett has failed to exhaust domestic remedies because he has failed to exhaust administrative review of his claim regarding mental health care.

And, Mr. Spicer and Mr. Trigg have failed to exhaust domestic remedies because although they have completed all three levels of administrative review of one of their claims, thus exhausting the available administrative remedies on those claims, they have declined to pursue administrative remedies on their other claims and have also declined to pursue any of the domestic judicial remedies that are available to them under U.S. law, and which can be effective even if the litigant proceeds without a lawyer.

Because each of the remaining Petitioners has failed to exhaust the domestic administrative and/or judicial remedies that U.S. law provides, that are available to them, and that are effective, each has failed to exhaust domestic remedies within the meaning of Article 20(c) of the Statute and Article 31 of the Rules. The Petition is therefore inadmissible. The Commission must, in line with past practice, dismiss it, and not hold it in abeyance pending exhaustion of remedies.

d. Petitioners have failed to state facts that tend to establish a violation of the American Declaration under Article 34(a) of the Rules.

Petitioners allege that the conditions of confinement at ADX—specifically, the inability of certain inmates to access the Step-Down Program in order to be transferred out of ADX and the restricted conditions and lack of outside contact while housed at ADX—constitute violations of Articles I, II, XXV, and XXVI of the American Declaration. Even if the Commission proceeds to examine the substance of these allegations despite the failure of all Petitioners to exhaust domestic remedies as discussed above, the Commission should find the claims

inadmissible under Article 34(a) of the Rules because the facts stated in the Petition do not tend to establish a violation of the American Declaration.³¹

i. Petitioners are eligible for participation in the ADX Step-Down Program.

Petitioners allege that certain of them have been unable to access the Step-Down Program at ADX. The Step-Down Program is a stratified system of housing that provides inmates with incentives to adhere to the standards of conduct associated with maximum security custody. Under the Step-Down Program, inmates become eligible to progress from the General Population Units to the Intermediate, Transitional, and Pre-Transfer Units after demonstrating periods of good conduct and positive institutional adjustment (more details about the conditions in each Unit are provided below in Section B(1)(d)(ii)(1)). As inmates advance through the Program, they are housed in a less restrictive environment and receive greater privileges. Ordinarily, the time period for an inmate to progress through the Step-Down Program is 36 months, and those successful in the Pre-Transfer step of the Step-Down Program may move out of the ADX to an appropriate and less restrictive Bureau facility. There is no minimum or maximum time period for completion of the Step-Down Program.

Inmates are considered for placement in the Step-Down Program under ADX Institutional Supplement FLM 5321.07(1)B (“2015 Institutional Supplement”), enclosed at Annex B, which governs an inmate’s advancement through and transfer out of the Step-Down Program. Under the 2015 Institutional Supplement, an inmate is eligible to advance through the Step-Down Program if he meets the following criteria: (a) a minimum of six months of clear conduct while housed in J-Unit (the intermediate unit); (b) active participation in and completion of all programs recommended by the Unit team; (c) positive behavior, including respectful and appropriate conduct towards staff and other inmates; and (d) positive overall institution adjustment, including personal hygiene and cell sanitation. An inmate does not need to prove that he has mitigated the reasons for

³¹ See *supra* note 4.

his incarceration at ADX in order to be eligible for placement in the Step-Down Program.

After an inmate is deemed eligible for advancement, the Step-Down Review Committee determines when advancement is appropriate.³² The key question in all advancement decisions is whether the inmate can safely function in a less-restrictive unit without posing a risk to institutional security and order, or to the safety and security of the staff, himself, other inmates, or the public.³³

The 2015 Institutional Supplement requires that inmates receive written notification of the decision concerning a placement in, advancement through, or transfer out of the Step-Down Program. Inmates who are not approved for advancement receive (a) a reason for the denial, unless it is determined that the release of this information could pose a threat to individual safety or institutional security, in which case that limited information may be withheld; and (b) notice to the inmate that the inmate may appeal the decision through Bureau's Administrative Remedy Program. The notice also includes the Regional Director's direction as to when the inmate should next be recommended for transfer out of the Step-Down Program, if relevant. If dissatisfied with a decision, inmates may challenge any recommendations and decisions made by the Committee through the Bureau's Administrative Remedy Program.

As a result, the Petitioners' general claims regarding their inability to access the Step-Down Program are without factual basis. In fact, of the 23 individual Petitioners associated with this Petition at any point in its history, 12 of them (over

³² The Warden decides if an inmate is deemed eligible for advancement. At the Pre-Transfer step of the Program, the decision to transfer someone out of the Program, or ADX, is made by the Regional Director. *See* 2015 Institutional Supplement at 12 (appended as Annex B). All decisions are appealable through the Bureau's Administrative Remedy Program, discussed at Section B(1)(C) *supra*.

³³ The Committee considers the following factors when making this determination: (i) the inmate's conduct while housed at ADX; (ii) the inmate's participation in and completion of programs recommended by the Unit team while housed at ADX; (iii) the inmate's behavior and conduct towards, and interactions with, staff and other inmates while at ADX; (iv) the inmate's overall institution adjustment, person hygiene, and cell sanitation while at ADX; (v) the reason why the inmate was designated to ADX; (vi) the inmate's criminal history; (vii) the inmate's involvement with criminal organizations, if any, and the potential safety and security threat(s) implicated by such involvement; (viii) the inmate's overall adjustment during his history of confinement; (ix) the institution's safety and security needs, including the safety and security of staff; (x) the safety and security needs of the inmate; (xi) the safety and security needs of other inmates; (xii) the safety and security needs of the public; and (xiii) any other relevant factors. ADX Institutional Supplement FLM 5321.067I(1)B.

50%) have been transferred out of ADX.³⁴ This includes individuals who are incarcerated for terrorism-related offenses.³⁵ Additionally, Petitioner Barron is in the Pre-Transfer step of the program, and Petitioner Edwards is in the Transitional step of the program, as of the date of filing this response.

Furthermore, one Petitioner makes specific allegations with regard to his inability to access the Step-Down Program: Mr. Heisler alleges that he has been removed from the Step-Down Program three times (once for threats, once for fighting another inmate, and once for possession of contraband), and that in the third instance, other inmates had not been removed from the Step-Down Program for the same offense. However, he provides no facts to back up this assertion of differential treatment, nor any allegation as to why his first two removals from the Program violate any of his rights. To the contrary, as described above, all inmates are considered for entry into the Step-Down Program if they meet the basic eligibility criteria. Article 28(4) of the Rules requires that petitions contain “an account of the act or situation that is denounced.” The absence of specific facts relating to Mr. Heisler means that, even if the allegations could meet 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.

Therefore, the Commission should dismiss both the general and specific claims with regard to the Petitioners’ eligibility for or participation in the Step-Down Program at ADX because they have failed to state facts that tend to establish a violation of the American Declaration. The relevant claims are inadmissible under Article 34(a) of the Rules.

³⁴ Four of those inmates were transferred after successfully completing the Step-Down program (Petitioners Bowman, Brown, Sarafini, and Shyrock). Five were transferred to another institution where they could receive enhanced mental health services (Petitioners Clark, Cunningham, Powers, Pinson, and Thomas). The remaining three inmates have been transferred to state facilities or for medical treatment (Petitioners Al-Amin, Mosher, and Nantambu).

³⁵ This includes Mr. Safarini, the original named individual on this Petition incarcerated for his role in the hijacking of Pan American Flight 73, whom the Clinic removed from the Petition in 2013 because he had successfully completed the Step-Down Program. *See also, e.g.,* Rezaq v. Nalley, No. 07-cv-02483, 2010 WL 5157313, at *3 (D. Colo. Dec. 14, 2010) (noting the inmate advanced through the Step-Down Program and was transferred to another institution); Elgarbrowny, Saleh, Nosari v. Fed. Bureau of Prisons, Nos. 05-cv-2467, 06-cv-01747, 07-cv-00021, 2010 WL 5464292 (D. Colo. Dec. 29, 2010) (noting that two of the three inmates advanced through the Step-Down Program and were transferred to another institution and that one was in the Transitional Phase); Ahmed Ajaj v. United States, 2006 U.S. Dist. LEXIS 92897 (D. Colo. 2006) (noting that the inmate advanced through the Step-Down Program and was transferred to another institution). All of these cases involve inmates convicted on terrorism-related offenses, who were housed at ADX at one point.

- ii. The Petitioners have failed to state facts that tend to establish a violation based on the conditions of their confinement at ADX.

Petitioners also claim that the conditions of their confinement at ADX, including their reduced outside contact, constitute a violation of various articles of the American Declaration. However, here too Petitioners fail to state facts that tend to establish a violation of the American Declaration, rendering this claim also inadmissible under Article 34(a) of the Rules.

As a preliminary matter, the United States provides below a factual overview of the conditions of confinement at ADX, for the Commission's information. A chart of the services provided in a variety of areas for inmates at ADX is enclosed at Annex C.

(1) General conditions

The sizes of the cells at ADX range from 75 to 87 square feet. The cells in six of the nine housing units (B, C, D, E, F, and G units) are approximately 87 square feet. Each cell has a solid outer door and an inner grill. There is 17 square feet of space between the inner grill and the solid outer door, known as a sallyport. The wall next to the door for each cell also has a window, which is approximately 12 inches by 48 inches. Each cell solid outer door has a window, which is approximately 5 inches by 18 inches, that looks out on to the housing unit range. Each cell also has a window that looks outside, providing the inmate with natural lighting, which is 5 inches by 38 inches, as well as a shower in the cell. The cells in the remaining three units (H, J, and K units), have approximately 75.5 square feet of living space and do not have an inner sallyport or a shower. Each cell has a solid outer door with a window that looks out onto the range, which is 5 inches by 18 inches. Each cell also has a window that looks outside, providing the inmate with natural lighting, which is 5 inches by 38 inches.

Each cell at ADX has a light with three settings (dim, medium, and bright), which the inmate may turn on and off as needed. The inmate controls the setting of the lights from inside his cell, and can turn the light completely off. Each cell has a bed with a mattress and bedding, a sink, a desk, a shelf, and a chair. Inmates may have personal items, such as photographs, reading materials, and legal papers in

their cells.

(2) Recreational opportunities

All inmates are provided with access to both indoor and outdoor recreation, with the amount of time varying by unit, as explained below.³⁶ Inmates who choose to go outside for recreation have access to sunlight and fresh air. Generally, the areas contain pull-up bars, and inmates are allowed to use handballs and soccer balls. Inmates may request instruction in aerobic exercise from ADX Florence Recreation staff, who have training in aerobic exercises that can be performed in the individual recreation areas. Inmates have access to wellness programs, weekly leisure games via the ADX Florence closed circuit television system, a creative arts program offered in a group setting, weekend “brain teaser” games, arts and crafts, a weekly movie program, and special holiday activities. Inmates may also subscribe to periodicals; may borrow leisure reading materials from the institution’s library; may take high school equivalency, Adult Continuing Education, and correspondence classes; may paint, draw, or crochet; may participate in a weekly bingo game; and may participate in art, essay and poetry contests. Inmates may make purchases from the commissary, including food items and additional toiletry and other items, beyond the standard items provided to them free of charge.

With the exception of inmates in disciplinary segregation, each inmate has a 13-inch color television in his cell, which generally provides 24-hour select broadcast channels (52 channels), channels for closed-circuit institutional programming (recreation, education, religious services, and psychology), radio stations, and digital music channels. One of the television channels is utilized to provide bulletins to the inmates also shows the date and time. Thus, ADX inmates may participate in a variety of programming and other services, including recreation, education, religious, and services for re-entry into society.

³⁶ See Section B(1)(d)(ii)(4) *infra*.

(3) Social interaction

Inmates at ADX have many opportunities for social interaction and thus are not held in “solitary confinement” as that term is commonly used. All inmates are given the opportunity to have up to five in-person, non-contact social visits by individuals from outside the prison per month, unless they are subject to some sort of visitation restriction. Inmates may also make social telephone calls to individuals outside the prison, the number of which depends on the inmate’s housing unit, as described below.³⁷ Inmates may send and receive an unlimited amount of legal and social correspondence from individuals outside the prison. Inmates also have the ability to communicate with one another in many ways—they can and do speak to their neighbors in the cells next to, above, or below them and may speak to one another when they go to indoor and outdoor out-of-cell recreation.

Moreover, all inmates at ADX have contact with other persons in the prison on a daily basis. The Warden, Associate Wardens, Captain, and Department Heads perform weekly rounds in each unit for the opportunity to visit with inmates. Correctional officers perform regular 30-minute rounds throughout all three shifts on a daily basis. A member of an inmate’s Unit Team³⁸ visits the inmates every day. Inmates receive regular visits from medical staff, education staff, religious services staff, and psychology staff when they perform their rounds, and upon request if needed. Medical staff visit each unit daily, and inmates also have access to medical and mental health visits upon request.

ADX inmates are able to participate in legal activities, including filing lawsuits. Inmates are able to have an unlimited number of confidential visits and calls with their lawyers, and have access to legal research via an electronic law library located within each unit.

³⁷ See Section B(1)(d)(ii)(4) *infra*.

³⁸ An inmate’s Unit Team consists of Unit Manager, Case Manager, Counsellor and Unit Secretary.

(4) Specific programs and units

ADX uses a stratified system of housing to provide inmates with the incentives to adhere to the standards of conduct associated with a high-security/maximum-custody program. This stratified system employs a phased housing unit, or privilege system. As inmates demonstrate periods of clear conduct and positive institution adjustment, they progress from the more secure areas of the program to less secure areas and eventually to other Bureau facilities. The types of privileges afforded to the inmates are determined by their housing unit assignment. All 11 Petitioners are currently held in General Population, with two nearing completion of the Step-Down Program, so we provide below more detailed information on this housing unit.

(5) General population and Step-Down Unit Program

ADX has a General Population and Step-Down Unit Program that provides inmates with incentives to adhere to the standards of conduct associated with a maximum-security custody program. As inmates at ADX demonstrate periods of clear conduct and positive institutional adjustment, they may progress from the General Population Units (D, E, F, and G) to the Intermediate (J/A), Transitional (which is currently located at the U.S. Penitentiary in Florence, Colorado, adjacent to ADX on the complex), and Pre-Transfer Units (also located at the U.S. Penitentiary in Florence, Colorado). Inmates who are successful in the Pre-Transfer Unit may be transferred to another appropriate Bureau facility. The types of privileges afforded to the inmates are determined by their housing unit assignments in this layered program.

Ordinarily, the minimum time period to complete the program is 36 months. The minimum stay in a general population unit is ordinarily 12 months, the intermediate program is ordinarily six months, the transitional program is ordinarily six months, and the pre-transfer program is ordinarily 12 months. But, there is no minimum or maximum time period for completion of the program.

General Population inmates have access to the programming and opportunities described above, including a television set in each cell. These

inmates receive at least 10.5 hours of out-of-cell recreation per week (alternating between indoor and outdoor). The meals are provided to the inmates in their cells. General Population inmates are permitted to have two 15-minute social phone calls with individuals outside the prison per month. There is no numeric limit on the number of legal visits and calls. General Population inmates may send and receive unlimited amounts of social correspondence with individuals outside the prison.

Inmates in the Intermediate step receive 20.5 hours of out-of-cell recreation per week, split between out-of-cell recreation on the range and outdoor recreation. The inmates are assigned to one of four groups, with as many as eight inmates in a group. The inmates recreate out of their cells on the range with inmates in their assigned group. The outdoor recreation is also with inmates in their assigned group. The meals are provided to the inmates by groups, meaning each group is allowed out of their cells together at one time to come to the front of the range, receive their meals, and then return to their cells while unrestrained. The inmates eat their meals in their cells. The inmates are unrestrained when out of their cells on the range. They may receive up to five social visits per month. Shower stalls are located on the range. The inmates may shower any time they are out on the range.

Two of the Petitioners—Mr. Barron and Mr. Delory—are currently housed in the Transitional and Pre-Transfer Unit, which are located at the United States Penitentiary, High Security, Florence, Colorado, in Bravo-B (B/B) Unit. Each cell in B/B Unit has approximately 80 square feet area of living space and does not have a sallyport or a shower. Each cell has a solid outer door with a window that looks out on to the range and a window that looks outside, providing the inmate with natural lighting. The inmates are assigned to a group and consume their meals on the range with the other inmates in their assigned group. Showers are located on the ranges and inmates may shower at any time they are on the range. The inmates in these units receive a minimum of 30.5 and 35.5 hours of out-of-cell recreation per week, respectively. The inmates' out-of-cell recreation includes recreation in the unit and in the outdoor group recreation area. The inmates receive, respectively, four 15-minute and 300 minutes of social telephone calls with individuals outside the prison per month, and may receive up to five social visits from individuals outside the prison per month.

In addition, ADX has a privilege incentive program for those inmates in the

General Population. The incentive program provides inmates confined in the General Population with additional incentives to participate in programs and enhance the programming opportunities available to them to demonstrate their readiness for release from the General Population. The program encourages progressive development of pro-social behavior and personal skills which enhance successful reentry into both a general population environment and, ultimately, the community. Through this Program, inmates may (a) have certain privileges restored to them that were suspended through the discipline process; (b) participate in additional programs; and (c) obtain a reduction in the projected duration of the inmate's confinement in his unit.

(6) Application to the present matter

The Petitioners have failed to state facts that tend to establish that the conditions of confinement at ADX constitute a violation of the American Declaration. The two Petitioners who make specific allegations concerning their conditions of confinement provide no evidence to support their bare allegations. Mr. Shakur alleges that ADX officials attempt to disrupt inmates' legal studies by placing "mentally ill" inmates in a nearby cell, but offers no specific incident, no date, and no name or information about the alleged offending official, nor any evidence of such an act. Mr. Heisler alleges that his personal property has been "stolen, lost, and misplaced" while at ADX and that he has witnessed "abuse of several inmates by ADX staff," but he provides no evidence linking the former claim to any violation of the American Declaration, and provides no evidence or detail to back up his bare allegation in the latter claim—including about specific instances, parties involved, or remedies sought. The absence of specific facts renders these claims inadmissible under Article 34(a) of the Rules for failure to state facts that tend to establish a violation of the American Declaration.

The rest of the Petition contains only general assertions about the conditions in ADX. However, the general conditions of confinement described above meet the United States' commitments under the American Declaration, as well as its other international commitments and obligations, and are tailored to maintaining a safe and secure maximum security prison environment. In fact, U.S. federal district

courts have upheld the general conditions of confinement at ADX, including restrictions on outside contact, as substantively satisfying U.S. constitutional standards, which are consistent with U.S. commitments under the American Declaration and international human rights commitments and obligations under other instruments.³⁹

In addition, although the decisions of the European Court of Human Rights (“European Court”) do not bear on U.S. commitments under the American Declaration, the Commission may find it informative that in 2012, the European Court determined that the conditions of confinement in the most restrictive environment at ADX—for inmates subject to Special Administrative Measures—did not constitute torture or ill-treatment for purposes of the obligations under the European Convention on Human Rights (“ECHR”).⁴⁰ In particular, the European Court concluded in that case that in certain circumstances, including the circumstances of the individuals concerned, “the United States’ authorities would be justified in considering [them] as posing a significant security risk and justifying strict limitations on their ability to communicate with the outside world.”⁴¹ The European Court based its decision in part on the sufficiency of the procedural protections in place to ensure that inmates are not subjected to these restrictive conditions or their ongoing application arbitrarily. The European Court found that the Bureau “has well-established procedures for reviewing an inmate’s security classification and carrying out reviews of that classification” and that “the United States’ authorities have proved themselves willing to revise and to lift the special administrative measures which have been imposed on terrorist inmates thus

³⁹ See, e.g., *Silverstein v. Fed. Bureau of Prisons*, 2011 WL 4552540 (D. Colo. 2011), *aff’d*, 2014 WL 2119212 (10th Cir. 2014); *Rezaq, et al. v. Nalley*, 677 F.3d 1001 (10th Cir. 2012); *McMillan v. Wiley*, 813 F.Supp.2d 1238, 1250–51 (D. Colo. 2011) (merely asserting that Plaintiff is held in solitary confinement in his cell for 22 to 24 hours a day and claims that he “has little to no human contact” and “has very limited opportunity to speak to other inmates” is insufficient to state an Eighth Amendment claim); *Muhammad v. Finley*, 74 F. App’x 847, 849 (10th Cir. 2003) (upholding district court’s dismissal of an inmate’s claim that disciplinary segregation at the ADX implicated a liberty interest) (unpublished); *Georgacarakos v. Wiley*, 2010 WL 1291833 at *12 (D. Colo. 2010) (citing *Ajaj v. United States*, 293 F. App’x 575, 582-84 (10th Cir. 2008) (unpublished) (finding elements of conditions at ADX did not, individually or in concert, amount to a violation of the Eighth Amendment of the U.S. Constitution, and that “[t]he conditions at ADX ... are not so extreme or inhumane that they could be deemed a significant departure from contemporary standards of decency, applied to the prison context.”)). See also *Hill v. Pugh*, 75 F. App’x 715, 721 (10th Cir. 2003) (ADX conditions “[show] neither an unquestioned and serious deprivation of basic human needs, nor intolerable or shocking conditions.”).

⁴⁰ *Babar Ahmad and Others v. UK*, Applications No. 24027/07, 11949/08, 26742/08, 66911/09, and 67354/09 (Apr. 10, 2012) (“*Babar Ahmad*”).

⁴¹ *Babar Ahmad*, *supra* note 40, ¶ 221.

enabling their transfer to other, less restrictive institutions.”⁴² The European Court even noted that “[t]he range of activities and services provided [in ADX] goes beyond what is provided in many prisons in Europe.”⁴³

In sum, for the reasons discussed above, the Petitioners have failed to state facts that establish a violation of the American Declaration based on the general conditions of confinement at ADX, including restrictions on outside contact, or on the specific allegations by certain Petitioners. The relevant claims are therefore inadmissible under Article 34(a) of the Rules.

iii. The Petitioners have failed to state facts that tend to establish a violation based on the mental health care available at ADX.

The Petitioners further claim that the alleged lack of mental health care at ADX to which they have been subjected constitute a violation of the American Declaration. This claim is likewise inadmissible under Article 34(a) of the Rules for the reasons discussed below.

(1) General information on health care at ADX

As a general matter, the mental health care provided at ADX fully satisfies relevant U.S. commitments under the American Declaration. There have been a number of recent and significant changes to the way in which the Bureau houses and treats inmates with serious mental illness at ADX and in other restrictive housing settings.

Inmates with serious mental illness who are violent or disruptive pose a special challenge to the Bureau. Their behavior often requires removal from the general population, and yet “traditional” forms of restrictive housing, which includes ADX, present challenges to ensure that an inmate’s mental health does not deteriorate during restrictive housing placement. The Bureau is addressing these concerns with a three-pronged approach: (a) by creating specialized secure mental health units, which allows Bureau staff to divert inmates with serious mental

⁴² *Id.*

⁴³ *Id.* ¶ 222.

illness from long-term segregation into less restrictive housing where they can receive more intensive treatment; (b) by providing enhanced mental health services for inmates in ADX, including screening and intensive psychological programming; and (c) by offering mental health care to all Bureau inmates, as a way of reducing and preventing the type of disruptive behavior that often results in segregation.

The Bureau's Program Statement 5310.16, which outlines national policy regarding the care and treatment of inmates with mental illness, was revised on May 1, 2014.⁴⁴ The revised Program Statement provides that any inmate designated to ADX will receive a psychological evaluation prior to transfer to determine whether such placement is appropriate. Inmates with serious mental illness will ordinarily not be placed at ADX unless extraordinary security concerns are identified that cannot be managed elsewhere.⁴⁵ Specific ADX exclusionary criteria are outlined in the Program Statement.⁴⁶ The Bureau adopted these new procedures to ensure screening and classification of inmates prior to, and when, they arrive at ADX, and to ensure those inmates with mental illness are identified, provided accurate diagnosis, and assessed to determine the severity of any mental illness and any suicide risk. These procedures include a requirement for psychological testing as a component of the initial ADX mental health evaluation and a specific format for the evaluation report. The Program Statement also provides for periodic reviews (every 30 days) of all prisoners at ADX to determine whether mental illness has developed since the last screening.

In addition to periodic reviews of inmates at ADX, the Program Statement requires more in-depth mental health evaluations for inmates placed in ADX for an extended period of time. These in-depth reviews are conducted every 12 months for inmates at ADX. These evaluations include a review of records, behavioral observations, a clinical interview, and psychological testing if clinically indicated. The completed reports are reviewed by Central Office staff for concurrence with the inmate's current diagnosis and treatment plan, if applicable. If concerns are noted, Central Office staff consult with the institution psychologist to develop a

⁴⁴ See Program Statement 5310.16, Treatment and Care of Inmates with Mental Illness, *available at* www.bop.gov/policy/progstat/5310_16.pdf.

⁴⁵ *Id.* at 19.

⁴⁶ *Id.* at 19–20.

revised treatment plan, which may include removal from ADX. Related to these periodic reviews and in depth mental health evaluations, the mental health policy notes criteria for removal from ADX for mental health reasons.

Per the Program Statement, inmates in ADX with mental health needs receive services commensurate with their treatment needs. These services are provided in a private area. At a minimum, inmates with mental illness in ADX receive face-to-face mental health contacts consistent with the type and frequency of care indicated by their condition. The offices of the Bureau psychologists are located in the housing units at ADX. Bureau psychologists also make weekly rounds in ADX and provide additional services as needed, which may include crisis intervention and suicide prevention contacts, diagnostic assessments, and individual or group counseling.

Most significantly, the revised Program Statement has led to the development of alternative housing units for the Bureau's most violent, predatory, and disruptive inmates with serious mental illness. The Bureau now operates two types of "secure mental health units" as follows:

1. *Secure Mental Health Step-Down Program (SMH-SDP) units at the U.S. Penitentiary in Atlanta, Georgia, and the U.S. Penitentiary in Allenwood, Pennsylvania.* The SMH-SDPs focus on inmates with serious mental illness, with the exception of inmates with severe personality disorders (who are served by the Secure STAGES Program, as described below). The SMH-SDP is a residential, unit-based program that provides treatment for maximum- and high-security inmates who do not require inpatient treatment but lack the skills to function in the general population. The program incorporates cognitive behavioral treatments, cognitive rehabilitation, psychoeducational components, psychiatric care, and skills training within the context of a modified therapeutic community. Inmates receive significant amounts of out-of-cell and in-cell programming, based on each inmate's individualized treatment plan. The SMH-SDP typically lasts from 12 to 18 months, depending on the severity of the illness and course of treatment. Inmates who complete the program typically transfer to an institution designed to provide enhanced psychological services in an open population setting. The unit at the U.S. Penitentiary in Atlanta,

Georgia, opened in October 2013, with a total capacity of 24 inmates; and the unit at the U.S. Penitentiary in Allenwood, Pennsylvania, opened in August 2015, with a total capacity of 30 inmates. Out-of-cell time varies depending on the inmate's treatment needs and level of functioning.

2. *Secure Steps Toward Awareness Growth and Emotional Strength ("STAGES") Program at the U.S. Penitentiary, High Security, in Florence, Colorado.* Secure STAGES focuses on inmates with personality disorders, primarily those with a history of self-harm behaviors. Like SMH-SDP, it is a residential, unit-based program for maximum- and high-security inmates, and inmates participate in significant amounts of out-of-cell and in-cell programming, based on their individualized treatment plans. The program utilizes Dialectical Behavior Therapy, Rational Self-Analysis, Supported Employment, Seeking Safety, and other cognitive behavioral interventions. All participants are assigned one or more Secure STAGES "mental health companions," who are other inmates trained to assist the participant through the program. Inmates typically spend at least 12 months in the Secure STAGES Program, and the total length will vary depending on treatment. Secure STAGES at the U.S. Penitentiary in Florence opened in November 2014 and has a total capacity of 18 inmates. Out-of-cell time varies depending on the inmate's treatment needs and level of functioning.

These programs are designed to help inmates better manage the symptoms of mental illness, thereby decreasing the risk of violence and allowing inmates to transition back to open population (and, eventually, the community). Both programs are led by doctoral-level psychologists, and staff-to-participant ratios are kept low to ensure effective treatment. Additional treatment includes psychiatric care providers, psychologists, social workers, and treatment specialists. The programs include program incentives for participants, such as increased privileges for good conduct and limited financial rewards.

These residential treatment units allow the Bureau to house seriously mentally ill inmates who require the highest level the security and controls, while still fulfilling the agency's obligations to provide mental health treatment. Inmates in these residential treatment units have a significant history of highly predatory,

violent, aggressive behavior toward staff and/or other inmates. By initially offering treatment in a secure setting, the Bureau can ensure the safety of staff and inmates. Each of these programs includes comprehensive assessments, cognitive behavioral treatments, and skills training in a modified therapeutic community.

In part to determine which inmates should be transferred to these types of programs, as well as to determine the need for additional such programs, the Bureau completed a screening of all inmates housed at ADX as of August 2014, to determine whether those inmates have a serious mental illness. This screening included a screening record review of all inmates and further in-depth clinical interviews of approximately 130 inmates by outside psychiatrists and non-ADX Bureau psychologists. This process resulted in the identification of ADX inmates who had a serious mental illness, who were then further evaluated and transferred from ADX to a treatment program as appropriate. Twenty inmates were transferred from ADX as a result of this process.

In order to enhance the treatment available to inmates at ADX, the Bureau increased the mental health staffing at ADX by hiring three additional full-time psychologists, one psychiatric nurse, and one psychology technician. One of the three additional full-time psychologist positions is to facilitate trauma-related psychological programming. The Bureau also added a Deputy Chief Psychologist for the Federal Correctional Complex in Florence, Colorado, along with a full-time Social Worker, whose priority is those inmates housed at ADX and who provides Reentry Planning Services⁴⁷ within one year of release, as appropriate.

The Bureau constructed and maintains facilities for group therapy at ADX and for private psychological and psychiatric counselling sessions in all the housing units. The Bureau also changed the manner in which telepsychiatry⁴⁸ is conducted at ADX to allow those sessions to take place in private without the presence of correctional officers. The Bureau enhanced the delivery of psychiatry services at ADX by ensuring that inmates receiving psychiatric medications at ADX are seen by a psychiatrist, physician, or psychiatric nurse every 90 days; by implementing procedures to ensure that Health Services notifies the psychiatrist,

⁴⁷ All staff assist inmates in preparation for a successful return to their communities. The Social Worker enhances oversight and direction for this critical area.

⁴⁸ Psychiatric consultation services provided to Health Services and Psychology Departments in institutions without an on-site psychiatrist.

psychiatric mid-level provider, psychiatric nurse, or physician and Psychology Services of inmates who refuse or consistently miss doses of their prescribed psychotropic medications; and by ensuring that all prescribed psychotropic medications are distributed on the pill line.

New policies also require offering inmates with serious mental illness who continue to be housed at ADX due to extraordinary security issues at least seven, and as many as 20, hours of out-of-cell therapeutic and recreational time per week consistent with their individualized treatment plan. Some of those inmates are now housed in the recently opened (August 1, 2015) high-security Adult Alternative Housing program for those inmates who have generally demonstrated that they can function in a less-secure environment within ADX without posing a risk to institutional security and good order, but whose safety needs prohibit them from advancing through the Step-Down Program. This program is designed to lessen any potential negative effects of long-term incarceration while simultaneously providing inmates additional rehabilitative opportunities and opportunities to engage socially with one another.⁴⁹

Finally, ADX supports all inmates with mental illness through creation of wellness programs and recreational activities, specialized training of staff, and care coordination teams.

(2) Petitioners' claims regarding health care are inadmissible

Petitioners make no fact-specific allegations regarding the inadequacy of the mental health care provided to them at ADX. Although several allege that they suffer from a variety of mental health conditions or that they were generally not provided with "any treatment or proper mental health evaluation,"⁵⁰ no specific incidents or facts are cited in the Petition to support this claim. The Petition makes no specific claims regarding the mental health of Mr. Barron, Mr. Murray (conceding that "we do not have more detailed information about their specific situations at this time"⁵¹), Mr. Castro, Mr. Mauchlin, or Mr. Shryock (conceding

⁴⁹ None of the Petitioners are currently housed in this program, although Petitioner Fort was housed in the Program for a period of time.

⁵⁰ Clinic Letter dated May 12, 2014, at 2.

⁵¹ Petition, Clinic Letter dated May 15, 2013, at 4.

that “their current state of mental health is unclear”⁵²). Neither the original Petition nor the Clinic’s supplemental letters provide any details regarding these five Petitioners’ mental health situation, despite the requirement in Article 28(4) of the Rules that petitions must contain “an account of the act or situation that is denounced,” and despite the additional requirements of Articles 28(7) to (9). Without specific facts relating to the allegedly insufficient care provided to the Petitioners, even if the allegations could meet the Article 28 threshold, the claims are inadmissible under Article 34(a) of the Rules for failure to state facts that tend to establish a violation of the American Declaration.

For the five remaining Petitioners, in the absence of properly executed Privacy Act waivers, privacy considerations prevent us from herein describing the specific mental health care or treatment that may have been provided to any of them individually, without a valid privacy waiver permitting disclosure to the Commission.

The Commission should therefore dismiss this claim under Article 34(a) of the Rules for failure to state facts that tend to establish a violation of the American Declaration.

2. Merits

For the reasons set forth above, the Commission should not reach the merits of the Petition because it is inadmissible in its entirety. Should the Commission nevertheless declare the Petition admissible, the United States urges it to find the Petition meritless. While the United States reserves the right to provide further views on the merits in such an eventuality, it reiterates that the Petitioners have presented no specific instances where mental health care services have been denied or were inadequate, and have presented no evidence that the conditions of confinement at ADX constitute a violation of the American Declaration. Indeed, U.S. domestic courts and the European Court have examined these issues and found the opposite. These arguments are elaborated in Section B(1)(d). The Commission should therefore find the Petitioners’ claims meritless. We reserve the

⁵² Petition, Clinic Letter dated May 12, 2014, at 3.

right to submit additional views on the merits should this matter reach the merits stage.

C. CONCLUSION

In sum, the criminal justice and prison systems in the United States embody the protections set forth in the American Declaration. The United States has afforded the Petitioners comprehensive opportunities to have their claims heard in administrative and judicial settings in the U.S. domestic system. The Petition is inadmissible, therefore, because of supervening information under Article 34(c) of the Rules, for Petitioners' failure to exhaust domestic remedies under Article 31 of the Rules, and for Petitioners' failure to state facts which tend to establish a violation under Article 34(a) of the Rules. The Commission should accordingly declare the Petition inadmissible and, in line with its own practice, close this matter. Alternatively, for all the reasons set forth above, the Commission should rule the claims meritless and dismiss the Petition in its entirety.