



United States Department of State

*United States Permanent Mission to the  
Organization of American States*

*Washington, D.C. 20520*

July 18, 2019

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

**Re: Ward Churchill, P-1586-13  
Response of the United States**

Dear Dr. Abrão:

The U.S. Government has the honor of submitting to the Inter-American Commission on Human Rights this response to the Petition your office transmitted to us on April 25, 2019. The Petition, with exhibits, was submitted on behalf of Ward Churchill and forwarded to the United States as Petition No. P-1582-13. The Petition was apparently submitted to the Commission on September 10, 2012. Please find enclosed the United States' response to the Petition. We trust this information is useful to the Commission and thank the Commission for its attention to this matter.

Please accept renewed assurances of my highest consideration.

Sincerely,



Carlos Trujillo  
Ambassador

Attachments:

1. Churchill v. University of Colorado at Boulder *et al.*, No. 11SC25 (Colo. Sept. 10, 2012).
2. Churchill v. University of Colorado at Boulder, 293 P.3d 16 (Colo. App. Nov. 24 2010), *aff'd on other grounds*, 2012 CO 54, 285 P.3d 986.
3. Churchill v University of Colorado, No. 06CV11473, 2009 WL 2704509 (Colo. Dist. Ct. July 07, 2009).

**WARD CHURCHILL**  
**P-1582-13**  
**RESPONSE OF THE UNITED STATES**

The United States appreciates the opportunity to submit these observations on the documents submitted by the Petitioner to the Inter-American Commission on Human Rights (“Commission”) and forwarded to the United States as Petition No. P-1582-13 (“Petition”). The Petition was received by the Commission in September 2012 and forwarded to the United States in April 2019.

The Petition is inadmissible and must be dismissed because it fails to meet the Commission’s established criteria in Articles 31 and 34 of the Rules of Procedure (“Rules”). The Petition is inadmissible and must be dismissed under Article 31 of the Rules because Petitioner failed to pursue and exhaust domestic remedies in the United States. The Petition also fails to meet the Commission’s established criteria in Articles 34 of the Rules. Specifically, the Petition is inadmissible under Article 34(a) of the Rules because Petitioner’s claims are beyond the *ratione materiae* competence of the Commission; in the alternative, the Petition is inadmissible under Article 34 of the Rules because the Petition fails under Article 34(a) to state facts that tend to establish “violations”<sup>1</sup> of rights set forth in the American Declaration of the

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<sup>1</sup> The United States has consistently maintained that the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member States of the OAS. U.S. 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. Lapin* 253 F.3d 918, 925 (7th Cir. 2001); *accord, e.g.*, *Flores-Nova v. Attorney General of the United States*, 652 F.3d 488, 493-94 (3rd Cir. 2011); *In re Hicks*, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in *Garza*, “[n]othing 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 language of the Commission’s statute similarly shows that the Commission does not have the power to bind member states.” *Accord* the language of the Commission’s Statute, art. 20 (setting forth recommendatory but not binding powers). As the American Declaration of the Rights and Duties of Man is a non-binding 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. The United States respects its political commitment to uphold the American Declaration. For a further discussion of the U.S. position regarding the nonbinding nature of the

Rights and Duties of Man (“American Declaration”) and is manifestly groundless under Article 34(b). Finally, consideration of the Petition would run afoul of the Commission’s Fourth Instance doctrine.

Accordingly, the United States respectfully requests that the Commission find the Petition inadmissible. Should the Commission nevertheless declare the Petition admissible and examine its merits, the United States urges it to deny the Petitioners’ request for relief, as the Petition is without merit.

## **I. BACKGROUND<sup>2</sup>**

### **A. Factual Background**

Petitioner was a tenured professor and chair of the University of Colorado's Department of Ethnic Studies whose employment could only be terminated for cause.<sup>3</sup> In January 2005, Petitioner was scheduled to speak at Hamilton College.<sup>4</sup> As that speech approached, the college’s newspaper publicized an essay by Petitioner in which he compared the victims of the 9/11 World Trade Center terrorist attack to Adolf Eichmann, a Nazi war criminal and architect of the holocaust. This publication generated significant national attention surrounding Churchill and his essay.

In light of this controversy, on February 3, 2005, the University of Colorado Board of Regents held a special meeting.<sup>5</sup> The Regents unanimously voted to authorize Interim Chancellor Philip DiStefano to create an ad hoc panel to investigate Churchill’s academic works.<sup>6</sup> Specifically, DiStefano announced that his office would seek to answer two questions: (1) “[D]oes Professor Churchill’s conduct, including his speech, provide any grounds for

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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.

<sup>2</sup> Unless otherwise stated, the following section is taken, at times verbatim, from Churchill v. University of Colorado at Boulder *et al.*, No. 11SC25 (CO Sup. Ct. Sept. 10, 2012) (hereinafter, “CO SC Opinion”).

<sup>3</sup> *Id.* para. 3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* para. 4.

<sup>6</sup> *Id.*

dismissal for cause as described in the Regents' Laws?" and, (2) "[I]f so is this conduct or speech protected by the First Amendment against university action?"<sup>7</sup>

The preliminary inquiry concluded that Petitioner's controversial statements, including those in his 9/11 essay, were protected by the First Amendment.<sup>8</sup> As such, the controversial statements could not serve as the grounds of a for-cause dismissal of a tenured employee such as Petitioner. In the course of the inquiry, however, the ad hoc panel received several complaints that Petitioner had engaged in repeated instances of academic misconduct in his published scholarly writings.<sup>9</sup> DiStefano filed a formal complaint and the University initiated a formal investigation into the academic integrity of Petitioner's scholarship.<sup>10</sup>

The University of Colorado uses a nine-member Standing Committee on Research Misconduct ("Standing Committee"), composed entirely of faculty members to investigate research misconduct.<sup>11</sup> On March 29, 2005, DiStefano issued a report requesting the Standing Committee to convene and address the allegations against Churchill with respect to nine alleged incidents of academic misconduct. The Standing Committee then empaneled an inquiry committee to conduct a preliminary review to determine whether the nine allegations against Petitioner had potential merit. The inquiry committee reviewed Petitioner's academic record, interviewed Petitioner, and accepted written submissions from Petitioner responding to the allegations of academic misconduct.<sup>12</sup> On August 19, 2005, the inquiry committee unanimously ruled that seven of the allegations of academic misconduct had merit and should be further investigated.<sup>13</sup> In response to the inquiry committee's recommendation, the Standing Committee formed a special investigative committee in January 2006.<sup>14</sup>

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<sup>7</sup> See *Churchill v. University of Colorado at Boulder et al.*, Brief of Amicus Curiae State of Colorado, No. 11SC25 (Feb. 7, 2012) (hereinafter, "CO SC Amicus").

<sup>8</sup> CO SC Opinion at para. 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* para. 6. During the pendency of the investigation, Petitioner received the same benefits and pay, retained his tenured status, and was allowed to teach classes and speak openly. *Id.*

<sup>11</sup> *Id.* para. 7.

<sup>12</sup> *Id.* para. 8.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* para. 9 (The investigative committee comprised three tenured faculty members from the University who were not on the standing committee and two tenured faculty members from other universities).

The Investigating Committee consisted of five professors from the University of Colorado and other universities who were not members of the Standing Committee and who had established reputations for academic integrity, fairness, and openmindedness.<sup>15</sup> As part of the selection process, the standing committee consulted with Petitioner to choose the members of the Investigating Committee and considered whether any of the potential members had any biases or conflicts of interest.<sup>16</sup> For six months, the Investigating Committee interviewed witnesses and reviewed hundreds of pages of documents submitted by Petitioner in his defense.<sup>17</sup> The Investigating Committee unanimously agreed that Petitioner engaged in academic misconduct and submitted a 102–page report to the standing committee.<sup>18</sup>

The Standing Committee reviewed the report, as well as Petitioner’s written response to it.<sup>19</sup> On June 13, 2006, the Standing Committee issued its own report unanimously agreeing that Petitioner had committed “serious, repeated, and deliberate research misconduct.”<sup>20</sup> After receiving the reports from the Investigating Committee and Standing Committee, DiStefano issued a notice of intent to seek Petitioner’s dismissal, alleging that Petitioner’s “pattern of serious, repeated and deliberate research misconduct falls below minimum standards of professional integrity expected of University faculty and warrants [his] dismissal from the University of Colorado.”<sup>21</sup>

Pursuant to section III.A.1 of Regent Policy 5–I, Petitioner requested a formal hearing to appeal his proposed dismissal to a five-member panel of tenured professors known at the Faculty Senate Committee on Privilege & Tenure (“Senate Committee”).<sup>22</sup> The Senate Committee granted Petitioner’s request and set a hearing in which the University was required to prove that

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<sup>15</sup> CO SC Amicus at 6.

<sup>16</sup> CO SC Opinion at para. 9.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (Two members recommended that Churchill be suspended for two years, two members recommended that he be suspended for five years, and one member recommended that his tenure be revoked and his employment be terminated).

<sup>19</sup> *Id.* para. 10.

<sup>20</sup> *Id.* (Six members recommended that Churchill’s employment be terminated, two members recommended that he be suspended for five years, and one member recommended that he be suspended for two years.).

<sup>21</sup> *Id.* para. 11.

<sup>22</sup> *Id.*

Petitioner's academic misconduct fell below the minimum standards of professional integrity by "clear and convincing evidence," as set forth in section III.B.2.o of Regent Policy 5–I.<sup>23</sup> The committee held a seven-day hearing at which it considered both the evidence against Petitioner and the evidence presented by his defense that the entire investigation into his academic record was a pretext to terminate his employment in retaliation for the content of his constitutionally protected free speech.<sup>24</sup> Petitioner was represented by an attorney and was afforded an opportunity to present an opening statement, cross-examine adverse witnesses, present expert witnesses, and submit a written closing argument, as mandated by section III.B.2 of Regent Policy 5–I.<sup>25</sup> Pursuant to section III.B.2.m of Regent Policy 5–I, a complete written transcript and a video of the entire hearing were made by a court reporter and a videographer.<sup>26</sup> On May 3, 2007, the Senate Committee unanimously concluded that the University had proven by clear and convincing evidence that Petitioner's conduct fell below the minimum standards of professional integrity.<sup>27</sup> The Senate Committee summarized its findings in a report sent to both Petitioner and DiStefano, pursuant to section III.C of Regent Policy 5–I.<sup>28</sup>

The Senate Committee's report found that Petitioner had committed "three acts of evidentiary fabrication by ghostwriting and self-citation, two acts of evidentiary fabrication, two acts of plagiarism, and one act of falsification in his academic writings."<sup>29</sup> It also stated that Petitioner failed to prove by clear and convincing evidence that he had been denied adequate due process by the standing committee or that the standing committee's finding was a pretext to punish him for his constitutionally protected free speech.<sup>30</sup> The President of the University, Hank Brown, reviewed the reports from all three committees (the reports from the Investigating Committee, the Standing Committee, and the Senate Committee).<sup>31</sup> The President agreed with the numerous recommendations of committee members who opined that Petitioner should be

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* para. 12.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* para. 13.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (Two members of the faculty senate committee recommended that Petitioner's employment be terminated, and three members recommended that he be demoted to associate professor and suspended for one year.).

<sup>31</sup> *Id.* para. 14.

dismissed from the University.<sup>32</sup> The President forwarded his recommendation that Petitioner's employment be terminated to the Board of Regents as required by section I.D of Regent Policy 5-I.<sup>33</sup>

### B. Procedural History

The Board of Regents, as a constitutional body that is not part of the legislative or executive branches, occupies a unique position in Colorado's governmental structure.<sup>34</sup> Among the constitutional powers vested in the Board of Regents is the power "to enact laws for the government of the University."<sup>35</sup> Pursuant to this authority, the Board of Regents enacted Laws of the Regents.<sup>36</sup> These laws define both the grounds and the process for dismissing a tenured member of the of the University's faculty.<sup>37</sup> The Regents enacted Regent Policy 5-I to implement the requirement of the Laws of the Regents that no faculty member be dismissed "except for cause and after being given and an opportunity to be heard," as well as the faculty member's right to a hearing before the Senate Committee.<sup>38</sup>

The University followed Regent Policy 5-I in the weeks and months preceding its dismissal of Professor Churchill.<sup>39</sup> Pursuant to section IV of Regent Policy 5-I, Petitioner requested a hearing before the University Regents.<sup>40</sup> Prior to this hearing, Petitioner submitted a written argument in his defense.<sup>41</sup> At the hearing, the Regents considered Petitioner's written argument; the reports from the Investigating Committee, the Standing Committee, and the Senate Committee; and the recommendation of President Brown.<sup>42</sup> Petitioner's counsel made arguments in defense to the Regents at that hearing.<sup>43</sup> On July 24, 2007, by a vote of eight to

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Churchill v University of Colorado, No. 06CV11473, 2009 WL 2704509 (Colo. Dist. Ct. July 07, 2009) (hereinafter, "CO Trial Opinion") (citing Subryan v. Regents of the University of Colorado, 698 P.2d 1383, para. 11 (Colo. App. 1984)).

<sup>35</sup> *Id.* (citing Subryan, 698 P.2d at 1383).

<sup>36</sup> *Id.* para. 12.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* para. 14.

<sup>39</sup> *Id.*

<sup>40</sup> CO SC Opinion, para. 15.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

one, the Regents terminated Petitioner's employment, describing his conduct as falling below the minimum standards of professional integrity and academic honesty.<sup>44</sup>

Petitioner chose not to seek review of the Regent's decision to terminate his employment in district court, as provided for in Colorado Rule of Civil Procedure 106(a)(4). Under Colorado Rule of Civil Procedure 106(a)(4), a party may seek review of a decision of a "governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions" in district court for an abuse of discretion. As the Colorado Court of Appeals explained, "[o]ne who asserts that he lost a suit because the judge was biased may have a remedy under C.R.C.P. 106 seeking to reverse an abuse of discretion, but he does not have the right to sue the judge in a civil suit for damages."<sup>45</sup>

Nevertheless, Petitioner instead brought a civil suit in district court under 42 U.S.C. § 1983 against the Regents in their individual capacities alleging that they had violated his constitutionally protected free speech rights by initiating an investigation into his academic integrity and by terminating his tenured employment in retaliation for his publication of a controversial essay.<sup>46</sup> The trial court found that "it is clear that the Board of Regents performed

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<sup>44</sup> *Id.*

<sup>45</sup> *Churchill v. Univ. of Colorado at Boulder*, 293 P.3d 16, 30 (Colo. App. 2010), *aff'd* on other grounds, 2012 CO 54, 285 P.3d 986 (hereinafter, "CO Appellate Opinion").

<sup>46</sup> *Id.* at 1. Prior to trial, the parties (i.e., Petitioner and the University) agreed to simplify the proceedings by stipulating that the University, as an arm of state government, would waive its state sovereign immunity in exchange for Petitioner's dismissal of the Regents as individual defendants in both their individual and official capacities. Under the stipulation, however, the University reserved the right to raise any defenses that may have been available to the Regents in their capacity as individual defendants. One such affirmative defense raised by the University was that the Regents were absolutely immune from suit under Section 1983 because their decision to terminate Petitioner's employment amounted to a protected quasi-judicial action. If a party is entitled to immunity, then the case may be dismissed immediately. Here, however, the parties agreed to preserve the University's claim of quasi-judicial absolute immunity and wait to resolve the issue until after the jury reached a verdict.

The jury found in Petitioner's favor that Petitioner's "'protected speech [was] a substantial or motivating factor in the decision to discharge' him from his tenured position and that the University had not 'shown by a preponderance of the evidence that [Petitioner] would have been dismissed for other reasons'." Following a question from the jury, the trial judge instructed that "[i]f you find in favor of [Petitioner], but do not find any actual damages, you shall nonetheless award him nominal damages in the sum of one dollar." Accordingly, the jury found that Petitioner suffered no actual economic or noneconomic damages and awarded him nominal damages in the amount of one dollar. CO Trial Opinion, para. 21.

The University then filed a motion for judgment as a matter of law based on its argument—preserved but not yet ruled upon—that the Regents were absolutely immune from suit arising from



a quasi-judicial function and acted in a quasi-judicial capacity when it heard Professor Churchill's case and terminated his employment."<sup>47</sup> As a result, the trial court dismissed Petitioner's claim on the grounds that the Regents' quasi-judicial actions were entitled to absolute immunity and dismissed Petitioner's claim for equitable remedies as such remedies are not available under Section 1983 for quasi-judicial officials.<sup>48</sup> The Colorado Court of Appeals affirmed the opinion of the trial court.<sup>49</sup> The Supreme Court of the State of Colorado affirmed the court of appeals' opinion, on slightly different grounds.<sup>50</sup> Petitioner's petition for writ of certiorari was denied by the United States Supreme Court.<sup>51</sup>

## II. DISCUSSION

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Petitioner's termination claim because their decision to terminate Petitioner constituted a quasi-judicial act entitled to immunity. The trial court ruled in favor of the University that the Regent's decision was a quasi-judicial action and, thus, the Regents were absolutely immune from suit under Section 1983; the court vacated the jury verdict, including the award of one dollar.

*See* CO SC Opinion, paras. 18, 23-25.

<sup>47</sup> CO Trial Opinion, para. 35. *See also id.* paras. 35-48 (When a governmental body applies "preexisting legal standards or policy considerations to present or past facts presented to the governmental body, then one can say with reasonable certainty that the governmental body is acting in a quasi-judicial capacity...." The Board of Regents determined whether grounds for dismissal existed under the Laws of the Regents. In doing so, The Regents "applied preexisting legal standards or policy considerations to past or present facts." [. . .] Just as a judge must apply the applicable legal standards to determine "the rights, duties, or obligations of specific individuals," the Laws of the Regents allow the dismissal of a tenured faculty member only for very limited reasons. . . . One of the safeguards available in the judicial system is that "the proceedings are adversary in nature." Under the Laws of the Regents, "the individual concerned shall be permitted to have counsel and the opportunity to question witnesses as provided in the rules of procedure governing faculty dismissal proceedings." Quasi-judicial immunity applies when proceedings are "conducted by a trier of facts insulated by political influence." In this case, the Privilege and Tenure Hearings Panel of the Faculty Senate was the "trier of fact" that determined whether the grounds for dismissal had been demonstrated against Professor Churchill. That "trier of fact" unanimously determined that Professor Churchill engaged in "conduct below the minimum standards of professional integrity," which is one of the permissible grounds for dismissal.).

<sup>48</sup> *Id.* (the trial court also issued a directed verdict in favor of the University on Petitioner's bad faith investigation claim).

<sup>49</sup> CO Appellate Opinion.

<sup>50</sup> CO SC Opinion, at 1-2 (The Supreme Court held that the Regents' decision to terminate Petitioner's employment "was a quasi-judicial action functionally equivalent to a judicial process. Hence, the Regents are entitled to absolute immunity concerning their decision to terminate Churchill." The Supreme Court further found that the trial court did not abuse its discretion when it ruled that Petitioner was not entitled to equitable remedies. Finally, the Supreme Court held that Petitioner's bad faith claim was barred by qualified immunity because the Regents' investigation into Petitioner's academic record "does not implicate a clearly established statutory or constitutional right or law.").

<sup>51</sup> *Churchill v. Univ. of Colo. at Boulder, et al.*, 133 S.Ct. 1724 (Apr. 1, 2013).

The matter addressed by the Petition is not admissible and must be dismissed because it fails to meet the Commission’s established criteria in Articles 31 and 34 of the Rules of Procedure (“Rules”). Petitioner has not exhausted the domestic remedies available in the United States, as required by Article 31 of the Rules. The Petition is also plainly inadmissible under Article 34 of the Rules. In particular, the Petition fails under Article 34(a) to state facts that tend to establish violations<sup>52</sup> of rights set forth in the American Declaration, raises claims beyond the *ratione materiae* competence of the Commission, and it is manifestly groundless under Article 34(b). Finally, review of the Petition would run afoul of the Commission’s Fourth Instance doctrine.

#### **A. FAILURE TO EXHAUST DOMESTIC REMEDIES**

The Commission should declare the Petition inadmissible because the Petitioner has not satisfied his duty to demonstrate that he has “invoked and exhausted” domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules.

The Commission has repeatedly emphasized that a 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, this provision of the Rules is based on the general requirement of exhaustion of domestic remedies reflected in customary international law, as a means of ensuring that international proceedings respect State sovereignty. The requirement of exhaustion ensures that the State having jurisdiction over an alleged human rights violation has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system.<sup>53</sup> A State conducting domestic proceedings within its national system has the sovereign right to be given the opportunity to determine the merits of a claim and decide the

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<sup>52</sup> As the American Declaration of the Rights and Duties of Man is a non-binding 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. *See supra*, n. 1.

<sup>53</sup> *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. 76.

appropriate remedy before there is resort to an international body.<sup>54</sup> The Inter-American Court of Human Rights (“IACtHR”) 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.”<sup>55</sup>

The Commission has repeatedly emphasized that the petitioner has the duty to pursue all available domestic remedies.<sup>56</sup> Although remedies may be considered ineffective when a claim has “no reasonable prospect of success” before domestic courts, “for example because the State’s highest court has recently rejected proceedings in which the issue posed in a petitioner had been raised[,] [m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.”<sup>57</sup> The Commission has also found that, “in order to give the State the opportunity to correct alleged violation of rights ... before an international proceeding is brought, judicial remedies pursued by alleged victims must meet reasonable procedural requirements established under domestic law.”<sup>58</sup> These reasonable requirements may include timeframes for filing certain types of claims.<sup>59</sup>

In the instant case, Petitioner plainly failed to exhaust the remedies available to him. Under Colorado Rule of Civil Procedure 106(a)(4), a party may seek review of a decision of a “governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions” in district court. Under Colorado Rule of Civil Procedure 106(a)(4), a district court is empowered to set aside any decision that is “clearly erroneous, without evidentiary support in the

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<sup>54</sup> THOMAS HAESLER, *THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS* (1968) at 18–19.

<sup>55</sup> Velásquez Rodríguez Case, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

<sup>56</sup> *See, e.g.*, Paez Garcia v. Venezuela, Petition No. 670-01, Report No. 13/13, Mar. 20, 2013, Analysis § B(1) and Conclusion ¶ 35 (finding petition inadmissible for failure to exhaust because petitioner did not avail himself of remedies available to him in the domestic system).

<sup>57</sup> Sanchez et al. v. United States, Petition 65/99, Report No. 104/05, Oct. 27, 2005, ¶ 67. *See also* Kenneth Walker v. United States, Case No. 12.049, Report No. 62/03, Admissibility, Oct. 10, 2003 (finding inadmissible the petition of a Canadian who asserted that he could not return to the United States to pursue a claim due to the risk of criminal penalties, in light of the availability of alternative actions that would permit him to continue to pursue the claim).

<sup>58</sup> Magi v. Argentina, Petition No. 951-01, Report No. 106/13, Inadmissibility, Nov. 5, 2013, ¶ 33.

<sup>59</sup> Under C.R.C.P. 106(a)(4), a party may seek review of a decision of a “governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions” in district court for an abuse of discretion. Such actions must be filed within thirty days of the lower body’s final decision. C.R.C.P. 106(b).

record, or contrary to law.”<sup>60</sup> As the trial court noted in its decision on Petitioner’s Section 1983 suit, “[t]he remedy available to [Petitioner] is the same remedy available to every litigant subject to a quasi-judicial decision.”<sup>61</sup> The Supreme Court of Colorado, in considering the remedies available to Petitioner, explained as follows:

[W]e consider whether the Regents' decision is without any alternate form of review, such that the application of absolute immunity from Section 1983 would grant the Regents complete impunity from a serious allegation of a constitutional violation. The court of appeals reasoned that such alternate review was available to Churchill under C.R.C.P. 106(a)(4), which provides judicial relief from administrative decisions that lack jurisdiction or constitute an abuse of discretion. Churchill did not seek review pursuant to C.R.C.P. 106(a)(4).

Churchill argues that the court of appeals erred because Rule 106(a)(4) enables a reviewing court to set aside a quasi-judicial administrative decision only if it is found to be arbitrary and capricious. Churchill contends that this standard strongly shifts a presumption of legality in the Regents' favor because all they would need to prove at a C.R.C.P. 106(a)(4) review hearing is that their decision was based on some credible evidence. Thus, Churchill argues, even if he had been terminated solely on the basis of his free speech in violation of the First Amendment, then the Regents' action could survive C.R.C.P. 106(a)(4) review by presenting their pre-textual reason for his termination—alleged academic misconduct.

Although it is true that a lack of evidence is one basis for a court reviewing an administrative decision under C.R.C.P. 106(a)(4) to find that a decision was arbitrary and capricious, it is not the only basis. Relevant here, an administrative decision is per se arbitrary and capricious if it violates a party's constitutional rights. Even if the record supports a constitutional basis for his termination, appellate review for an abuse of discretion still provides Churchill a meaningful opportunity to argue that the University's stated reason was merely a pretext for an unconstitutional purpose.

Accordingly, if Churchill could establish in a C.R.C.P. 106(a)(4) hearing that one reason for his termination was retaliation for his free speech, a reviewing court would be compelled to reject the Regents' decision as arbitrary and capricious. Thus, Churchill's

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<sup>60</sup> Churchill v University of Colorado, No. 06CV11473, 2009 WL 2704509 (Colo. Dist. Ct. July 07, 2009) (quoting Leichliter v. State Liquor Licensing Authority, 9 P.3d 1153, 1154, para. 47 (Colo. App. 2000)).

<sup>61</sup> *Id.*

argument that a holding that the Regents were entitled to absolute immunity from Section 1983 liability grants them carte blanche to violate the First Amendment rights of the University's employees is incorrect. Instead, such violations must be policed through the C.R.C.P. 106(a)(4) review process. Although C.R.C.P. 106(a)(4) does not provide for the same remedies in terms of economic damages, it nevertheless ensures that the Regents are not above the law and provides relief from conduct violating the Constitution.

Another basis for setting aside an administrative decision as arbitrary and capricious would be a showing at a C.R.C.P. 106(a)(4) hearing that the administrative decision—makers held some institutional bias or personal grudge against the affected party. Any appearance of impropriety sufficient to cast doubt on the impartiality of the Regents and the investigating faculty members would be grounds for a reversal of the underlying administrative decision to terminate Churchill's employment. Hence, we conclude that the proper forum for Churchill's continued assertion that the Regents' investigation and ultimate termination of his employment was tainted by the personal animus that many at the University allegedly held against him was in the C.R.C.P. 106(a)(4) context.<sup>62</sup>

Petitioner chose not seek judicial review of the Regent's decision to terminate his employment in district court, as provided for in Colorado Rule of Civil Procedure 106(a)(4).

Because Petitioner chose not to seek judicial review of the Regent's decision to terminate his employment in district court, his assertion that he "exhausted all available domestic remedies" is plainly erroneous,<sup>63</sup> and the Petition must accordingly be rejected. Instead of seeking judicial review of the Regent's decision to terminate his employment in district court, Petitioner sought instead to bring suit against the Regents in their individual capacities. This approach is akin to a non-prevailing defendant who, instead of appealing an adverse judgment against him, attempts instead to sue a judge in her personal capacity and fails. Indeed, as the Colorado Court of Appeals explained, "[o]ne who asserts that he lost a suit because the judge was biased may have a remedy under C.R.C.P. 106 seeking to reverse an abuse of discretion, but he does not have the right to sue the judge in a civil suit for damages."<sup>64</sup> Pursuing a remedy that is not applicable in a given matter, while neglecting to pursue and exhaust appropriate domestic remedies, is manifestly insufficient to satisfy the requirement that a Petitioner invoke and

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<sup>62</sup> CO SC Opinion, at paras. 62-66.

<sup>63</sup> Petition at 45.

<sup>64</sup> CO Appellate Opinion, at 30.

exhaust all domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules.<sup>65</sup> Therefore, this Petition must be dismissed.<sup>66</sup>

## **B. FOURTH INSTANCE DOCTRINE PRECLUDES REVIEW OF U.S. COURT DECISIONS**

The Petition plainly constitutes an effort by Petitioners to use the Commission as a “fourth instance” body to review claims already heard and rejected by U.S. courts. The Commission has repeatedly stated that it may not “serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction,” a doctrine the Commission calls the “fourth instance formula.”<sup>67</sup>

The fourth instance doctrine recognizes the proper role of the Commission as subsidiary to States’ domestic judiciaries,<sup>68</sup> and indeed, nothing in the American Declaration, the OAS Charter, the Commission’s Statute, or the Rules gives the Commission the authority to act as an appellate body. As the Commission has explained, “[t]he Commission...lacks jurisdiction to substitute its judgment for that of the national courts on matters that involve the interpretation and explanation of domestic law or the evaluation of the facts.”<sup>69</sup> It is not the Commission’s place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a state’s domestic courts in weighing evidence and applying domestic law, nor does the

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<sup>65</sup> Although Petitioner argues that domestic remedies are inadequate and ineffective due to the outcome of his Section 1983 suit, Petition at paras. 136-37, Petitioner’s own litigation choices are not a sufficient basis upon which to substantiate a claim that he has been denied access to remedies under domestic law or has been prevented from exhausting them, or that domestic law does not provide protection of the rights allegedly violated, within the meaning of Article 31(2) of the Rules.

<sup>66</sup> It should be noted that Petitioner pursued only his First Amendment freedom of expression claim against the Regents under 42 U.S.C. § 1983. However, his Petition includes a broad array of claims, including allegations of violations of his rights to life and personal integrity, equality, culture, employment, property, honor and reputation, basic civil rights, judicial protection, and due process. However, Petitioner did not pursue or exhaust remedies in U.S. courts with respect to any of these claims. Therefore, even if the Commission were to construe Petitioner’s misguided Section 1983 suit to satisfy the Commission’s exhaustion requirement—which it should not—that suit would only be sufficient to satisfy the exhaustion requirement with respect to Petitioner’s freedom of expression claim under Article IV of the American Declaration; it is plainly insufficient to constitute exhaustion of domestic remedies for the various other claims Petitioner now brings before the Commission.

<sup>67</sup> See *Marzioni v. Argentina*, Case No. 11.673, Report No. 39/96, Inadmissibility, Oct. 15, 1996, ¶ 51.

<sup>68</sup> See *Castro Tortorino v. Argentina*, Case No. 11.597, Report 7/98, Admissibility, Mar. 2, 1998, ¶ 17.

<sup>69</sup> *Macedo García de Uribe v. Mexico*, Petition No. 859-03, Report No. 24/12, Inadmissibility, Mar. 20, 2012, ¶ 40.

Commission have the resources or requisite expertise to perform such a task. Under the fourth instance doctrine, the Commission's review of Petitioner's claims is precluded.

The United States' domestic law provided Petitioner with a basis to seek relief for claims of unconstitutional termination from employment and, as described in detail above, U.S. courts identified which remedies were available to petitioner. The central theory of Petitioner's claims in both fora is the same: that the United States is responsible for a violation of Petitioner's right to freedom of expression through attribution of a decision by the Regents of the University of Colorado, who are "above the law" due to the absence of a remedy. Indeed, the bulk of Petitioner's submission to the Commission seeks to re-litigate the merits Petitioner's academic misconduct investigation, which led to his termination. Rather than appealing the Regents' decision to terminate Petitioner's employment in a U.S. court, however, Petitioner chose instead to pursue an "appeal" internationally. It is well-established that the Commission cannot be used as a substitute for appeal in the U.S. judicial system.<sup>70</sup> Moreover, if the Commission were to accept a petition based on the same secondary arguments that Petitioner has litigated and lost in U.S. courts, it would be acting precisely as the type of fourth instance review mechanism it has consistently refused to embody.

The Commission must consequently decline this invitation to sit as a court of fourth instance. Acting to the contrary would have the Commission second-guessing the legal and factual determinations of U.S. courts, conducted in conformity with due process protections under U.S. law and fully consistently with U.S. commitments under the American Declaration. The Commission has long recognized that "if [a petition] contains nothing but the allegation that the decision [by a domestic court] was wrong or unjust in itself, the petition must be dismissed under [the fourth instance doctrine]."<sup>71</sup> The Commission has reiterated that "the fact that the

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<sup>70</sup> The phrase 'fourth instance formula' invokes a fourth chamber sitting above the lower, appellate, and supreme courts; the underlying principle of subsidiarity would apply with equal force where the Commission is invited to operate as an appellate chamber with respect to decisions that have not been exhausted (i.e., appealed to the third (highest) chamber of appeal).

<sup>71</sup> *Marzioni* Inadmissibility Report, *supra* note 42, ¶ 51.

outcome [of a domestic proceeding] was unfavorable ... does not constitute a violation.”<sup>72</sup> The fourth instance doctrine precludes the review sought by Petitioner.

### C. THE COMPETENCE OF THE COMMISSION IS LIMITED

Petitioner makes numerous claims that the United States has violated his rights; however, several of the alleged violations refer to facts that do not establish a violation of Petitioner’s rights under the Declaration or, instead, refer to rights under instruments beyond the *ratione materiae* competence of the Commission. Therefore, the Petition is further inadmissible with respect to these claims.

Under Article 34(a), the Commission may only consider petitions that state facts tending to establish a violation of the rights referred to in Article 27 of the Rules. 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 [(‘American Convention’)] 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 such as the United States. The United States is not a party to any of the other instruments listed in Article 23, and in any event, Article 23 does not list the ICCPR, UNDRIP, or other instruments beyond the American Declaration cited by Petitioner.

Moreover, Petitioners’ claims with respect to the collective rights of indigenous peoples are not admissible because the American Declaration does not speak to collective rights and the Commission lacks competence to expand its review beyond the Declaration. The American Declaration sets forth human rights, fundamental freedoms, and duties of individuals, not of collectives. This fact is evidenced in the Declaration’s plain text. The articles cited in the Petition begin with the words “[e]very human being,”<sup>73</sup> “[a]ll persons,”<sup>74</sup> “[e]very person,”<sup>75</sup> or “[e]very accused person.”<sup>76</sup> All of the other rights, and all of the duties, similarly begin with language

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<sup>72</sup> Maldonado Manzanilla v. Mexico, Petition No. 733-04, Report No. 87/07, Inadmissibility, Oct. 17, 2007, ¶ 58 (quoting and citing Rodríguez v. Argentina, Case No. 10.382, Report No. 6/98, Inadmissibility, Feb. 21, 1998, ¶ 71).

<sup>73</sup> American Declaration, art. I.

<sup>74</sup> *Id.* at art. II.

<sup>75</sup> *Id.* at art. IV.

<sup>76</sup> *Id.* at art. XXVI.



referring to individual persons.<sup>77</sup> As such, these provisions of the American Declaration, on their face, do not set forth “social or collective” rights alleged by Petitioner to have been violated by the United States.<sup>78</sup>

Moreover, the Commission must decline to review the Petition through the rubric of the UNDRIP because it lacks competence to apply any instrument beyond the American Declaration with respect to the United States.<sup>79</sup> *A fortiori*, the Commission lacks competence to apply provisions in such instruments setting forth collective rights, such as the many articles of the UNDRIP declaring collective rights of indigenous peoples—*pueblos indígenas*. These collective rights, while important, must be contrasted with the human rights enjoyed and exercised by indigenous *individuals* and all other individuals by virtue of having been “born free and equal, in dignity and in rights, ... endowed by nature with reason and conscience,” and which are the rights recognized and protected by the American Declaration.<sup>80</sup>

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<sup>77</sup> Because the United States is not a party to the American Convention, the Commission’s jurisdiction with respect to the United States is limited to claims grounded in the American Declaration. *See, e.g.*, Commission Statute, art. 20. Even if the Commission were to look to the American Convention, it would have to conclude that the American Convention is similarly limited to safeguarding the human rights and fundamental freedoms of individual human beings, and does not apply to collectives such as indigenous peoples. American Convention, art. 1(2) (defining “person” as every human being).

<sup>78</sup> *See* Petition, paras. 203-208.

<sup>79</sup> *See, e.g.*, U.S. Hearing Presentation, *Ameziane v. United States*, Case No. 12.865, 164th Period of Sessions, Mexico City, Sept. 7, 2017 (“*Ameziane* U.S. Hearing Presentation”), available at <<https://www.youtube.com/watch?v=sbN4tBcBbtQ>> (U.S. delegation providing legal reasons for Commission’s lack of competence over extraneous instruments).

<sup>80</sup> American Declaration, pmb. ¶ 1. *See also, e.g.*, “U.S. Announcement of Support for the United Nations Declaration on the Rights of Indigenous Peoples,” reprinted in *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 265 (Elizabeth R. Wilcox ed., 2010) (“U.S. Announcement of Support”), available at <<https://www.state.gov/documents/organization/179316.pdf>>. *See also, e.g.*, U.N. GAOR, 61st Sess., 107th plen. mtg. at 21, U.N. Doc. A/61/PV.107 (Sept. 13, 2007) (“UNDRIP Vote Record Part I”) (United Kingdom at UNDRIP’s adoption stating that “since equality and universality are the fundamental principles underpinning human rights, we do not accept that some groups in society should benefit from human rights that are not available to others,” and that “[w]ith the exception of the right to self-determination, we therefore do not accept the concept of collective human rights in international law”); *id.* at 24–25 (“The Swedish Government has no difficulty in recognizing collective rights outside the framework of human rights law” but “it is the firm opinion of the Swedish Government that individual human rights prevail over the collective rights mentioned in the Declaration.”); U.N. GAOR, 61st Sess., 108th plen. mtg. at 5, U.N. Doc. A/61/PV.108 (Sept. 13, 2007) (“UNDRIP Vote Record Part II”) (Slovakia stressing that “international human rights protection is based on the principle of the individual character of human rights”; that the UNDRIP “clearly distinguishes between the individual character of the human rights of indigenous individuals and the collective rights indispensable for their existence, well-being and integral development as peoples”; and that “[t]hose collective rights should not be considered as human rights”).

Furthermore, the UNDRIP consists of aspirational statements of political and moral commitment, and are not binding under international law. The instrument was not intended to create new international law, nor does it reflection States' existing obligations under international law.<sup>81</sup> The United States supports the instrument as explained in its December 2010 Announcement of Support, recognizes its significant moral and political force, and looks to the principles of the UNDRIP in its dealings with federally recognized tribes.<sup>82</sup> However U.S. support for the UNDRIP did not change the U.S. domestic legal framework with respect to tribal rights.

Consequently, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States.<sup>83</sup> As such, Petitioner's claims,<sup>84</sup> which at base are rooted in these instruments, are inadmissible under Article 34(a) as outside the Commission's competence.

#### **D. FAILURE TO ESTABLISH FACTS THAT COULD SUPPORT A CLAIM OF VIOLATION OF THE AMERICAN DECLARATION**

As established above, the Commission should find this Petition inadmissible because Petitioner failed to exhaust his domestic remedies and because the fourth instance doctrine precludes review. The Petition is also inadmissible because it fails to state facts that tend to

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<sup>81</sup> See e.g., U.S. Announcement of Support, *supra* n. 80, at 264 ("The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force."); "American Declaration on the Rights of Indigenous Peoples," DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 251–52 (CarrieLyn D. Guymon ed., 2016) ("U.S. Objections to OAS DRIP") (noting that the OAS DRIP is not legally binding and does not create new law), available at <<https://www.state.gov/documents/organization/272128.pdf>>. See also, e.g., UN Vote Record Part I, *supra* n. 80, at 12–15, 17, 22, 26 (United Kingdom, Colombia, Guyana, Australia, Canada, and New Zealand stating that UNDRIP is not binding); *id.* at 12–13, 17 (Australia, Colombia, and Canada adding that UNDRIP does not reflect customary international law); UN Vote Record Part II, *supra* n. 80, at 3, 5 (Nepal and Turkey delegates stating that UNDRIP is not binding).

<sup>82</sup> See U.S. Announcement of Support, *supra* n. 80, at 264.

<sup>83</sup> See, e.g., U.S. Hearing Presentation, *Ameziane v. United States*, Case No. 12.865, 164th Period of Sessions, Mexico City, Sept. 7, 2017 ("Ameziane U.S. Hearing Presentation"), available at <https://www.youtube.com/watch?v=sbN4tBcBbtQ> (U.S. delegation providing legal reasons for Commission's lack of competence over extraneous instruments).

<sup>84</sup> See, e.g., Petition at paras. 203-208 (referring to the UN Declaration on the Rights of Indigenous Peoples).

establish violations of Petitioner's rights under Article 34(a) of the Rules and contains claims that are manifestly groundless under Article 34(b) of the Rules.

i. Right to Life and Personal Integrity (Article I)

Petitioner alleges that he was deprived of his life and personal security in violation of Article I of the American Declaration.<sup>85</sup> However, based on allegations presented by the Petitioner himself, this claim is manifestly groundless and should be dismissed under Article 34(b). Petitioner was not deprived of his life or personal security and has articulated no facts to evidence action by the United States prejudicing his rights thereto. In the Petition, Petitioner refers to alleged death threats, hate mail, and vandalism by private actors. However regrettable such acts, if substantiated, may be, they are not attributable to the state and do not constitute violations of Article I of the American Declaration. There are no facts in the record to support Petitioner's allegation that officials "attacked" him in violation of his rights to life or personal security.<sup>86</sup> Nor is there any indication that the United States "fueled threats made on his life."<sup>87</sup>

To buttress his claim in this regard, Petitioner refers to the decision of the Inter-American Court on Human Rights in *Velásquez-Rodríguez v. Honduras*,<sup>88</sup> which concerned the abduction and disappearance of university student Manfredo Velásquez by agents operating under the authority of the State of Honduras. In that case, the Inter-American Court found that States party to the American Convention have, under Article 1(1) of the Convention, "a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."<sup>89</sup> Notwithstanding the fact that the United States is neither party to the American Convention nor subject to the jurisdiction of the Inter-American Court, even the reasoning of the Court's decision is inapposite to Petitioner's claim because there is no violation of Petitioner's rights to life or personal security by the United States that it has failed to

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<sup>85</sup> Petition at paras. 154-159.

<sup>86</sup> *Id.* para. 159.

<sup>87</sup> *Id.*

<sup>88</sup> Petition at para. 156 (citing Inter-Am. Ct. H.R., *Velásquez-Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988, Series C, No. 4, para. 174.).

<sup>89</sup> Inter-Am. Ct. H.R., *Velásquez-Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988, Series C, No. 4, para. 174.

investigate. Similarly, Petitioner's reliance on Inter-American Court decisions concerning state responsibility for murder,<sup>90</sup> the massacre of a village by government forces,<sup>91</sup> government-ordered assassination,<sup>92</sup> and obligations related to the prohibition of torture<sup>93</sup> is profoundly misplaced. Petitioner has provided no facts to suggest that the United States failed to uphold its commitments under Article I of the American Declaration and his claim is therefore inadmissible under Article 34(a) of the Rules. In this regard, Petitioner's claim under Article I of the American Declaration is manifestly groundless and should be dismissed under Article 34(b).

ii. Right to Equality (Article II)

Article II of the American Declaration provides that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." Petitioner alleges that his termination from the University of Colorado was discriminatory, and in particular, based on the focus of some of his scholarly work on indigenous issues.<sup>94</sup> Even assuming *arguendo* that the subject-matter of one's scholarship would be sufficient to constitute impermissible discrimination within the meaning of Article II of the American Declaration, there are simply no facts to support Petitioner's threadbare allegation that he was terminated on the basis that some of his scholarship concerns indigenous issues. Such spurious allegations are insufficient to satisfy a petitioner's burden under Article 34(a) of the Rules to state facts that tend to establish a violation of the American Declaration, rendering this claim inadmissible. Moreover, Petitioner's claim under Article II should be dismissed as manifestly groundless under Article 34(b).

iii. Right to Freedom of Expression (Article IV)

Article IV of the American Declaration provides that "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any

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<sup>90</sup> Petition at para. 156 (citing Inter-Am. Ct. H.R., Case of Kawas-Fernández, Merits, Reparations and Costs, Judgment of April 3, 2009, Series C No 196, para. 74).

<sup>91</sup> *Id.* (citing Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs, Judgment of June 15, 2005, Series C No. 124, para. 203).

<sup>92</sup> *Id.* (citing Inter-Am. Ct. H.R., Giraldo Cardona Case, Provisional Measures, Resolution of June 19, 1998).

<sup>93</sup> *Id.* para. 157 (citing Inter-Am. Ct. H.R., Maritza Urrutia Case, Judgment of November 27, 2003, para. 92).

<sup>94</sup> *Id.* para. 209.

medium whatsoever.” Petitioner does not allege facts that tend to establish a violation of Article IV. Petitioner continued his activism following an investigation into professional misconduct that resulted in his termination from a faculty position at the University of Colorado. By his own account, “Professor Churchill’s voice was, and continues to be, critical to challenging mainstream histories.”<sup>95</sup> Petitioner’s failure to adhere to the University’s standards of academic integrity led to termination from his position, but such termination did not infringe upon the right articulated at Article IV of the Declaration, a right that Petitioner continues to enjoy. Accordingly, Petitioner’s claim under Article IV of the Declaration is inadmissible under Articles 34(a) and 34(b) of the Rules.

Petitioner turns to a host of other instruments to buttress his claim under this provision, including the International Covenant on Civil and Political Rights, the American Convention, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter on Human and Peoples’ Rights.<sup>96</sup> However, as noted above, under Article 34(a), the Commission may only consider petitions that state facts tending to establish a violation of the rights referred to in Article 27 of the Rules. 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 [(‘American Convention’)] 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 such as the United States. Again, the United States is not a party to any of the other instruments listed in Article 23, and in any event, Article 23 does not list the ICCPR or other instruments cited by Petitioner.<sup>97</sup>

Moreover, Petitioner’s reliance on interpretations of Article 13 (Freedom of Thought and Conscience) of the American Convention by the Inter-American Court are not relevant to the present assessment.<sup>98</sup> Judgments of the Inter-American Court of Human Rights construing the

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<sup>95</sup> Petition at para. 212.

<sup>96</sup> *See id.* paras. 172-176.

<sup>97</sup> Petitioner’s attempt to construe a “right to academic freedom” are unavailing because no such right is included in the American Declaration. *See* Petition at paras. 183-189. References to instruments beyond the American Declaration in support of this theory are inapposite for the reasons described above.

<sup>98</sup> *See* Petition at paras. 177-181, 192-195.

American Convention on Human Rights do not govern U.S. commitments under the American Declaration. States party to the American Convention have undertaken obligations under international law that cannot be applied to the United States because the United States has undertaken no such obligations. Because, in the judgments cited by Petitioner, the Inter-American Court is applying the provisions of Article 13 of the American Convention—an instrument distinct from the American Declaration whose terms are far broader and more particular than those of Article IV of the American Declaration—the court’s interpretation of such provisions, even by analogy, are not applicable to the claims stated in the Petition.

It bears emphasizing that the facts in this matter establish that Petitioner was clearly terminated because of his academic misconduct.<sup>99</sup> An extensive investigation resulted in a determination by the Board of Regents of the University of Colorado that Petitioner’s conduct fell below the minimum standards of professional integrity and academic honesty. This conduct was found to have included plagiarism, evidentiary fabrication, and falsification. Petitioner’s failure to adhere to the University’s standards of academic integrity, rather than his speech, led to termination from his position at the University of Colorado. Accordingly, Petitioner’s claim under Article IV of the Declaration is inadmissible under Articles 34(a) and 34(b) of the Rules.

iv. Right to Due Process (Article XXVI) and Judicial Protection (Article XVIII)<sup>100</sup>

Article XXVI of the American Declaration provides that “[e]very person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.” Article XVIII provides that “[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice,

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<sup>99</sup> See discussion *supra*, Section I.A (Factual Background).

<sup>100</sup> Throughout the Petition, Petitioner appears to associate Article XVII with alleged violations of Articles XXVI and XVIII of the American Declaration without articulating a specific violation of Article XVII. To the extent that Petitioner is implicitly alleging a failure of the United States to uphold its commitments under Article XVII in this context, this section is intended to respond to such allegations.

violate any fundamental constitutional rights.” Petitioner alleges that the United States has violated these rights in three ways.<sup>101</sup>

First, Petitioner alleges that the University of Colorado violated his rights to due process of law and judicial protection by allegedly failing to investigate death threats made to him. Whatever role Petitioner believes the University should have played in such investigation—obviously University administrators are not “officials responsible for investigating crimes and administering justice, from the highest levels”<sup>102</sup>—there is no indication that Petitioner was denied due process or judicial access in connection with such allegations within the meaning of Articles XXVI and XVIII of the American Declaration. Therefore, these allegations fail to state facts that tend to establish a violation of Articles XXVI and XVIII of the American Declaration and should be dismissed under Article 34(a) of the Rules; these allegations should also be rejected as baseless under Article 34(b).

Second, Petitioner alleges that the University violated Petitioner’s right to due process during its administrative proceedings to terminate his employment. The Colorado Supreme Court provided extensive documentation of the process Petitioner was afforded; the Colorado trial court summarized such process accordingly:

[T]he Board of Regents’ decision occurred with sufficient procedural protections . . . including: (1) the right to notice of charges; (2) the right to request a hearing before a faculty committee; (3) the right to challenge the participation of a member of the faculty committee; (4) the requirement that the University prove that grounds for dismissal exist by clear and convincing evidence; (5) the requirement that the University transcribe the hearing; (6) the right to representation by counsel; (7) the right to examine each University witness; (8) the right to present witnesses; (9) the right to present oral and written closing arguments; (10) the right to respond to the faculty committee’s findings; (11) the right to request a hearing before the Board of Regents; (12) the requirement that the Board of Regents consider only the evidence in the record; (13) the requirement that the Board of Regents take final action in a public meeting; and (14) the right of judicial review of the

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<sup>101</sup> Petition at paras. 166-170.

<sup>102</sup> *Id.* para. 168 (quoting IACHR, Second Report on the Situation of Human Rights Defenders, at para. 244).

Board of Regents’ decision under C.R.C.P. 106. Professor Churchill received the full panoply of rights available in judicial proceedings.<sup>103</sup>

To be sure, Petitioner takes issue with the process he received, as well as the result of this process, but dissatisfaction with the process received is insufficient to substantiate a claim that Petitioner was denied process he was due. In this regard, Petitioner’s alleged violations of Articles XXVI and XVIII of the American Declaration are manifestly groundless and should be dismissed under Article 34(b) of the Rules. Petitioner has also failed to state facts that tend to establish a violation of Articles XXVI and XVIII of the American Declaration and this claim should be dismissed under Article 34(a) of the Rules.

Finally, Petitioner alleges that the quasi-judicial immunity afforded to the Regents deprived Petitioner of a remedy and, as such, violated his right to judicial protection. As explained in greater detail above,<sup>104</sup> Petitioner chose not seek review of the Regent’s decision to terminate his employment in district court—as provided for in Colorado Rule of Civil Procedure 106(a)(4)—but instead attempted to bring suit against the Regents in their individual capacities. That decision was Petitioner’s alone. As noted by the Colorado Court of Appeals, “[o]ne who asserts that he lost a suit because the judge was biased may have a remedy under C.R.C.P. 106 seeking to reverse an abuse of discretion, but he does not have the right to sue the judge in a civil suit for damages.”<sup>105</sup> Petitioner cannot now rely upon his unsuccessful litigation choices as the basis for an alleged human rights violation. In this regard, too, Petitioner has also failed to state facts that tend to establish a violation of XVIII of the American Declaration and this claim should be dismissed under Article 34(a) of the Rules; Petitioner’s alleged violation of Article XVIII is manifestly groundless and should be dismissed under Article 34(b).

v. Right to protection of honor, personal reputation, and private and family life  
(Article V)

Article V of the American Declaration provides that “[e]very person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.” Petitioner alleges that the United States failed to uphold its commitment under

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<sup>103</sup> CO Trial Opinion, at para. 49.

<sup>104</sup> See discussion *supra*, text accompanying nn. 60-66.

<sup>105</sup> CO Appellate Opinion, at 30.



Article V of the American Declaration because the University of Colorado “attempted to discredit his entire body of scholarship.”<sup>106</sup> Petitioner’s claims must fail because the right related to family and private life established by Article V does not apply to his situation. Rather, the language of Article V makes clear that it is intended to ensure that persons are not subject to direct action by the state. The words “abusive attacks upon” in Article V require more than incidental interference. Rather, they require a degree of state action directly aimed at harming honor and reputation, and which is “abusive,” *i.e.*, that involves a misuse of state power.

The Commission’s jurisprudence bears out this textually supported interpretation of Article V and related rights. For example, in *Eduardo Cirio v. Uruguay*, the Commission found that the State violated a petitioner’s right to honor when it presented the military officer “as lacking in moral and military honor, by stripping him of his status and benefits as punishment for criticizing the activities of the armed forces, and by degrading him both in rank and status.”<sup>107</sup> Conversely, in *Radyo Koulibwi v. Saint Lucia*, the Commission found a petitioner’s claim alleging that the state had violated his right to honor and personal reputation by denying him a permanent radio broadcast license, which allegedly “exposed him to ridicule and speculation about his reputation,” inadmissible under Article 34 of the Rules.<sup>108</sup>

Here, there is no direct state action. As detailed above, an investigation into Petitioner’s professional conduct—which is the basis of Petitioner’s complaint under Article V—was the administrative consequence of Petitioner’s academic misconduct. As a secondary consequence of a public university’s application of minimum standards of professional integrity and academic honesty, an investigation into academic misconduct is not the type of direct state action that Article V sought to target. Indeed, any expansion of Article V to cover the secondary consequences of lawful and reasonable action by a public university, as in this case, would have the effect of seriously disrupting the ability of such institutions to make critical determinations necessary to uphold the professional integrity of faculty and staff. Furthermore, the university’s investigation into the academic integrity of Petitioner’s scholarship was legitimate and

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<sup>106</sup> Petition at para. 162.

<sup>107</sup> *Eduardo Cirio v. Uruguay*, Case 11.500, Inter-Am. C. H.R., Report No. 124/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006), para. 95.

<sup>108</sup> *Radyo Koulibwi v. Saint Lucia*, Case 11.870, Report No. 87/01, OEA/Ser.L/V/II.114 Doc. 5 rev. at 282 (2001), paras. 15, 36.

reasonable given the complaints that had been made regarding potential fabrication of facts, plagiarism, and improper citation.

Moreover, Petitioner's selective citation to the Commission's Second Report on the Situation of Human Rights Defenders—addressing the “stigmatization and disparagement of human rights defenders as a result of criminalization”—is misplaced; no such situation prevails in the United States generally or in Petitioner's case in particular.<sup>109</sup> Similar references to the Commission's recommendations about a state's use of its criminal justice system to prosecute human rights defenders are similarly not applicable to the instant case.<sup>110</sup> And Petitioner's attempt to transform the Commission's “recommendations” in its First Report on the Situation of Human Rights Defenders into “obligations” binding upon states is incorrect as a matter of law and reason.<sup>111</sup> In sum, Petitioner's cynical use of this Commission's important efforts to protect human rights defenders as a shield from scrutiny and a sword to allege human rights violations should be dismissed as baseless under Article 34(b) of the Rules.<sup>112</sup> Petitioner has provided no facts to suggest that the United States failed to uphold its commitments under Article V of the American Declaration and therefore Petitioner's claim is inadmissible under Article 34(a).

vi. Rights to employment (Article XIV), property (Article XXIII), and cultural integrity (Article XIII)

Petitioner asserts that alleged violation of his right to freedom of expression “also had the corollary effect of violations of his rights” to employment, property, and cultural integrity.<sup>113</sup> Petitioner's claims that rights reflected in these provisions of the American Declaration have been violated by the United States is baseless and Petitioner has plainly failed to establish facts that could support a violation of these provisions of the Declaration.

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<sup>109</sup> See Petition at para. 160 (quoting IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II. Doc. 66, December 31, 2011, para. 122).

<sup>110</sup> See *id.* para. 161 (quoting IACHR, Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II.124, Doc. 5 rev. 1, March 7, 2006, paras. 96 (“First Report”)). Petitioner's references to the Commission's recommendations with respect to impunity and obligations under the Convention are similarly inapposite.

<sup>111</sup> Compare First Report, para. 342, with Petition at para. 161.

<sup>112</sup> Petition at para. 162.

<sup>113</sup> *Id.* para. 165.

Article XIV provides that “[e]very person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.” It bears noting at the outset that the right to work under Article XIV is qualified by “under proper conditions,” and the protection “to follow his vocation freely” is similarly qualified “insofar as existing conditions of employment permit.” Petitioner has not been deprived of his right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit. “Under proper conditions” in Article XIV is most reasonably understood to denote the material conditions of performance, i.e., ‘working conditions’, and Petitioner had no cause to complain about these. “Insofar as existing conditions of employment permit” in Article XIV is most reasonably understood to refer to the external limitation on the ability of individuals to pursue their vocation, insofar as pursuing a vocation will necessarily be limited by circumstance and the availability of employment opportunity. Article XIV does not, however, guarantee continued employment in a given position. Although Petitioner was terminated from his position for academic misconduct, such termination cannot be construed to violate Article XIV because the American Declaration does not purport to guarantee an individual’s continued employment in any given position. As such, this claim is inadmissible under Article 34(a) and baseless under Article 34(b) of the Rules.

Article XXIII provides that “[e]very person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.” Petitioner has failed to articulate any facts to suggest that his right to own private property has been impaired by the United States and, as such, this claim is inadmissible under Article 34(a) of the Rules. The claim is also inadmissible as baseless under Article 34(b) of the Rules.

Article XIII provides that “[e]very person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.” Again, Petitioner has failed to articulate any facts that suggest his ability to take part in

the cultural life of the community, to enjoy the arts, and to participate in the benefits resultant from intellectual progress, especially scientific discoveries, has been impaired by the United States. Nor has he stated facts that tend to establish that his moral and material interests in inventions or authored works has not been protected. As such, this claim is inadmissible under Article 34(a) and baseless under Article 34(b) of the Rules.

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Based on the foregoing, Petitioner's claims should be dismissed under Article 34(a) of the Rules for failure to state facts that tend to establish a violation of Petitioner's rights and under Article 34(b) of the Rules as manifestly baseless.

### III. CONCLUSION

The Commission should declare the Petition to be inadmissible because it fails to meet the Commission's established criteria in Articles 31 and 34 of the Rules of Procedure. Petitioner failed to exhaust domestic remedies available in the United States, as required by Article 31 of the Rules. Moreover, claims presented in the Petition are beyond the *ratione materiae* competence of the Commission. The Petition is also plainly inadmissible under Article 34 of the Rules. In particular, the Petition fails under Article 34(a) to state facts that tend to establish violations of rights set forth in the American Declaration; it is manifestly groundless under Article 34(b). Therefore, the Commission should declare the Petition inadmissible and, in line with its own practice, close this matter. Should the Commission nevertheless declare the Petition admissible and proceed to examine its merits, the United States reserves the right to submit further observations should this Petition reach the merit stage.