



United States Department of State

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

~~Washington, D.C. 20520~~
November 4, 2019

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

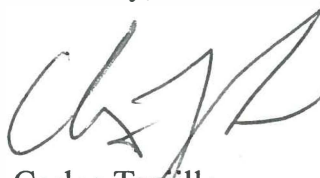
**Re: Widza Mathurin et al.
P-191/14
Response of the United States**

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 Ms. Widza Mathurin, Ms. Paul Pierre, Mr. Emmanuel Charles Pinette, Ms. Carmeline Nazaire, Mr. James Sainvil, Ms. Darline Fleury, and Ms. Sylvania Gustave (Petitioners), and forwarded to the United States as Petition No. P-191/14. 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

Enclosures: As stated.

WIDZA MATHURIN *ET AL.*
P-191/14
RESPONSE OF THE UNITED STATES

The United States appreciates the opportunity to submit these observations on the documents submitted by Ms. Widza Mathurin, Ms. Paul Pierre, Mr. Emmanuel Charles Pinette, Ms. Carmeline Nazaire, Mr. James Sainvil, Ms. Darline Fleury, and Ms. Sylvania Gustave (“Petitioners”) to the Inter-American Commission on Human Rights (“Commission”) and forwarded to the United States as Petition No. P-191/14 (“Petition”).

The Petition is inadmissible and must be dismissed because it fails to meet the Commission’s established criteria in the Rules of Procedure (“Rules”). First, to the extent that Petitioners articulate generalized allegations of violations¹ of the American Declaration of the Rights and Duties of Man (“American Declaration”) beyond those cognizable in relation to Petitioners, the Petition must be dismissed because the Commission lacks competence *ratione personae* to entertain claims based on a theory of *actio popularis*. Second, the Petition is inadmissible under Article 31 of the Rules because Petitioners failed to pursue and exhaust

¹ 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. 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. Att’y Gen. 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 OAS, 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 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.

domestic remedies in the United States. Third, the Petition is inadmissible under Article 32 because it is untimely. Fourth, with respect to Article 34, the Petition is inadmissible because it fails under Article 34(a) to state facts that tend to establish violations of rights set forth in the American Declaration and is manifestly groundless under Article 34(b). Finally, the Petition is inadmissible because Petitioners seek to use the Commission as a “fourth instance” review of U.S. immigration court decisions.

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, but reserves the right to submit further observations.

FACTUAL AND PROCEDURAL BACKGROUND

According to the Petition,² the Petitioners are Haitian nationals who were convicted of at least one felony, or at least two misdemeanors, in the United States and who, as a result of their serious criminal convictions, were removed to Haiti between 2011 and 2013.³ With the exception of Ms. Mathurin, all of the Petitioners were reportedly Lawful Permanent Residents (“LPRs”) of

² For the sake of addressing the claims in the Petition, and without admitting or denying them, the United States discusses here only the relevant facts as presented by Petitioners in the Petition. *See* Pet. at 10-25. As concerns case-specific information about Petitioners, the United States reminds the Commission that the Department of Homeland Security (“DHS”) is the custodian of the majority of records relevant to this matter and that specific statutes, regulations, and policies limit or preclude DHS’ disclosure of personal information contained in its records absent a waiver executed by the subject of the record.

³ *See* Pet. at 3-4, 13 (discussing Ms. Mathurin’s felony conviction for delivery of cocaine), 15 (discussing Mr. Pinette’s convictions for giving a false identification card; resisting an officer; possessing a forged driver’s license; trespassing; unauthorized use of livestock, boat, or vehicle; and trespassing), 18 (discussing Ms. Nazaire’s felony convictions for dealing in stolen property, fraudulent use of a credit card, grand theft, and petty theft), 20 (discussing Mr. Sainvil’s conviction for aggravated assault), 22 (discussing Ms. Fleury’s conviction for drug possession, possession of drug paraphernalia, and petty thefts), and 23 (discussing Ms. Gustave’s convictions for simple battery, resisting an officer without violence, and disorderly conduct).

the United States,⁴ and, with the exception of Ms. Gustave, all of the Petitioners had family members living in the United States, some as U.S. citizens or Legal Permanent Residents, at the time of their removal.⁵ The Petitioners were subject to removal proceedings before immigration judges in immigration courts in the United States, and they were removed only after receiving final orders of removal by immigration judges.⁶ Ms. Mathurin, Mr. Pinette, and Ms. Gustave did not appeal their cases to the Board of Immigration Appeals (“BIA”), according to the Petition.⁷ Ms. Nazaire, Mr. Sainvil, and Ms. Fleury did appeal their cases to the BIA, but none of them was reportedly successful.⁸ Based on the Petition, it does not appear that any of the three subsequently chose to petition the U.S. Court of Appeals with jurisdiction over their case for review.

At the time that the Petition was filed, five of the Petitioners were reported to suffer from health issues—some mental, some physical, some both—though in at least one instance the health issue described arose after the individual’s removal from the United States to Haiti.⁹ According to the Petition, the removal of Petitioners to Haiti had unfortunate consequences for all of them—

⁴ See Pet. at 14 (noting Mr. Pinette’s LPR status), 17 (noting Ms. Nazaire’s LPR status), 20 (noting Mr. Sainvil’s LPR status), 22 (noting Ms. Fleury’s LPR status), and 23 (noting Ms. Gustave’s LPR status).

⁵ See Pet. at 13 (noting Ms. Mathurin’s siblings), 16 (noting Mr. Pinette’s mother), 17-18 (noting Ms. Nazaire’s children, parents, and extended family), 20 (noting Mr. Sainvil’s children, parents, and siblings), and 22 (noting Ms. Fleury’s father and siblings).

⁶ See Pet. at 13 (discussing Ms. Mathurin’s immigration court proceedings), 16 (discussing Mr. Pinette’s immigration court proceedings), 18 (discussing Ms. Nazaire’s immigration court proceedings), 20 (discussing Mr. Sainvil’s immigration court proceedings), 22 (discussing Ms. Fleury’s immigration court proceedings), and 23 (discussing Ms. Gustave’s immigration court proceedings).

⁷ See Pet. at 13, 16, and 23.

⁸ See Pet. at 18, 20, and 22.

⁹ See Pet. at 13 (discussing Ms. Mathurin’s mental illness), 17 (discussing Mr. Pinette’s mental health issues, blood pressure issues, and prostate issues), 18 (discussing Ms. Nazaire’s headaches), 21 (discussing an issue affecting Mr. Sainvil’s ear, which was the result of an accident in detention in the United States, and pain in his leg resulting from a car accident in Haiti), and 24 (discussing Ms. Gustave’s depression, anxiety, and back pain from a prior accident).

primarily, though not exclusively, relating to their inability to access medical services—as well as for their family members in the United States.¹⁰

As the Petition acknowledges, there is a long procedural history before the Commission regarding removals of Haitian nationals from the United States, and much of the factual and contextual information presented in the Petition updates information previously presented to the Commission in Case 05/11, *Gary Resil et al. v. United States (In re Haitian Deportations)*.¹¹ In 2011, the Commission recommended that the United States implement precautionary measures with respect to five Haitian nationals subject to final orders of removal. The Commission has extended its recommendation of those precautionary measures on several occasions since then and, according to the Petition, a request for precautionary measures from one of the Petitioners, Ms. Nazaire, remained pending with the Commission at the time that the Petition was filed.¹²

DISCUSSION

The matter addressed by the Petition is not admissible and must be dismissed because it fails to meet the Commission's established criteria in the Rules. First, to the extent that Petitioners articulate generalized allegations of violations of the American Declaration beyond those cognizable in relation to Petitioners, the Petition must be dismissed because the Commission lacks competence *ratione personae* to entertain claims based on a theory of *actio popularis*. Second, the Petition should be dismissed because the Petitioners have not exhausted the domestic remedies

¹⁰ See Pet. at 14 (discussing Ms. Mathurin's institutionalization, period of homelessness, and reported engagement in prostitution in Haiti), 16 (discussing Mr. Pinette's experience in a private mental health facility in Haiti), 18-19 (discussing Ms. Nazaire's detention, struggle to find a home or job, and inability to afford medical care or medications in Haiti), 21 (discussing Mr. Sainvil's inability to find a job or home in Haiti), 23 (discussing Ms. Fleury's inability to find a job and her concern for her safety in Haiti because of her sexual orientation), and 24 (discussing Ms. Gustave's inability to find a job in Haiti, and the abuse she suffered while living in a group home and, separately, living with a purported relative in Haiti).

¹¹ See Pet. at 10.

¹² *Id.*

available in the United States, as required by Article 31 of the Rules. Third, the Petition is inadmissible because it is untimely under Article 32. Fourth, the Petition is plainly inadmissible under Article 34 of the Rules because it fails under Article 34(a) to state facts that tend to establish violations¹³ of rights set forth in the American Declaration and it is manifestly groundless under Article 34(b). Finally, the Petition is inadmissible because Petitioners seek to use the Commission as a “fourth instance” review of U.S. immigration court decisions.

I. Claims based on *Actio Popularis* are Inadmissible because they Fall Outside the Commission’s Competence *Ratione Personae*

To the extent that Petitioners articulate generalized allegations of violations of the American Declaration beyond those cognizable in relation to Petitioners, the Petition must be dismissed because the Commission lacks competence *ratione personae* to entertain claims based on a theory of *actio popularis*.

The Petition is filed on behalf of six Haitian nationals: Ms. Widza Mathurin, Ms. Paul Pierre, Mr. Emmanuel Charles Pinette, Ms. Carmeline Nazaire, Mr. James Sainvil, Ms. Darline Fleury, and Ms. Sylvania Gustave. Therefore, the Commission has competence to review particularized claims with respect to the six individuals named in the Petition. As it has explained on numerous occasions, the Commission has competence to review individual petitions that allege “concrete violations of the rights of specific individuals, whether separately or as part of a group, in order that the Commission can determine the nature and extent of the State’s responsibility for

¹³ 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.

those violations”¹⁴ The Commission’s governing instruments “do not allow for an *actio popularis*.”¹⁵ Consequently, an individual petition is not the proper means by which to request a decision about alleged violations suffered generally by individuals removed to Haiti. While the matters Petitioners complain about may be a proper subject for a thematic hearing before the Commission,¹⁶ they are improper in the context of an individual petition. The Petition’s reliance on hardships allegedly faced generally by individuals removed to Haiti who are not named in the Petition makes it clear that Petitioners raise claims that are inadmissible. The Commission may not consider any alleged violations outside the context of the particular Petitioners and must decline the invitation to do so by the Petition.¹⁷

II. The Petition is Inadmissible because Petitioners Failed to Exhaust Domestic Remedies

To the extent that Petitioners articulate alleged violations of the American Declaration that fall within the competence of the Commission, the Commission should declare the Petition inadmissible because the Petitioners have not satisfied their duty to demonstrate that they “invoked and exhausted” domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules.

¹⁴ *Operation Gatekeeper* Inadmissibility Decision, Petition No. 65/99, Report No. 104/05, ¶ 51 (Oct. 27, 2005); *accord, e.g.*, Undocumented Migrant, Legal Resident, and U.S. Citizen Victims of Anti-Immigrant Vigilantes v. United States, Case No. 12.720, Admissibility, Aug. 5, 2009, ¶¶ 41–44 (dismissing claims relating to unidentified group of alleged victims of anti-immigrant violence for lack of competence *ratione personae*).

¹⁵ *Operation Gatekeeper* Inadmissibility Decision, *supra* n. 15, ¶ 51. *Accord* International Abductions, Petition No. 11.082, Inadmissibility, Nov. 7, 2014, ¶ 27.

¹⁶ *See* Rules Art. 61.

¹⁷ *See* Pet. at 4 (“Additionally, this petition is filed on behalf of the larger class of deportees from the United States that the Victims represent, as well as the families of the deportees. The larger class of deportees includes both people who have been deported to post-earthquake Haiti and people facing imminent removal to Haiti.”).

The Commission has repeatedly emphasized that a petitioner has the duty to pursue all available domestic remedies.¹⁸ 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.¹⁹ 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 appropriate remedy before there is resort to an international body.²⁰ 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.”²¹

Exhaustion is only realized where such remedy has been pursued to the highest appellate level, resulting in a final judgment.²² The arguments raised in the domestic proceedings must be

¹⁸ 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).

¹⁹ 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.

²⁰ THOMAS HAESLER, THE EXHAUSTION OF LOCAL REMEDIES IN THE CASE LAW OF INTERNATIONAL COURTS AND TRIBUNALS (1968) at 18–19.

²¹ *Velásquez Rodríguez Case*, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

²² See also Draft Articles on State Responsibility, [2001] 2 Y.B. Int’l L. Comm’n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), art. 44; Draft Articles on Diplomatic Protection, [2006] 2 Y.B. Int’l L. Comm’n 24, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2), art. 14, para. 1–2; cmt. 4 (“[I]t is clear that the foreign national

the same as those intended to be raised in international proceedings.²³ In short, “for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.”²⁴ 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.”²⁵

In the instant case, Petitioners have manifestly failed to exhaust their domestic remedies. As noted above, three of the Petitioners—Ms. Mathurin, Mr. Pinette, and Ms. Gustave—failed to appeal their final orders of removal to the BIA for reasons that the Petition leaves unexplained.²⁶ The other three Petitioners—Ms. Nazaire, Mr. Sainvil, and Ms. Fleury—did appeal their cases to the BIA, but none of them was successful, and none of them filed a petition for review of the BIA decision with the federal circuit court with jurisdiction over their case.²⁷ Petitioners, citing the

must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Even if there is no appeal as of right to a higher court, but such a court has discretion to grant leave to appeal, the foreign national must still apply for leave to that court.”).

²³ Draft Articles on Diplomatic Protection, [2006] 2 Y.B. Int’l L. Comm’n 24, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2), art. 14, cmt. 6 (quoting *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15, at p. 46, para. 59) (“In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the basic arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case, the Chamber of the ICJ stated that ‘for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success’.”).

²⁴ *Elettronica Sicula S.p.A. (ELSI)* (United States v. Italy), [1989] I.C.J. 15, 46.

²⁵ *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).

²⁶ See Pet. at 13, 16, and 23.

²⁷ See Pet. at 18, 20, and 22.

Commission's decisions in *Mortlock v. United States* and *Smith & Armendariz v. United States*, argue that their failure to appeal their cases is "irrelevant . . . because they had no opportunity to present humanitarian defenses at any stage of their immigration proceedings."²⁸ However, Petitioners were free to attempt to raise such a defense before the BIA or the federal circuit courts, notwithstanding the unlikelihood that it would succeed. That they believed the BIA and federal circuit courts would be skeptical of such a defense, or would be unable to grant relief or protection on the basis of it consistent with the Immigration and Nationality Act ("INA") and applicable regulations, does not excuse Petitioners' failure to exhaust these domestic remedies. Consistent with the Rules and general principles of international law, the United States is entitled to the opportunity to redress any alleged human rights violations by its own means within the framework of its own domestic legal system before the alleged victims resort to the Commission. Therefore, the Petition must be dismissed for failure to exhaust domestic remedies.

III. The Petition is Inadmissible because it is Untimely

Even if the Commission determines that Petitioners have exhausted their domestic remedies, the Petition should be dismissed as untimely. Under Article 32(1) of the Rules, the Commission will only consider "petitions that are lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies." Here, the Commission received the Petition on February 14, 2014, which, as the Petition acknowledges, was more than six months after all of the Petitioners but Ms. Fleury and Ms. Gustave were removed to Haiti.²⁹ However, even the claims of Ms. Fleury and Ms. Gustave

²⁸ Pet. at 62-63 (discussing *Smith & Armendariz, et al. v. United States*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10, OEA/Ser.L/V/II.139, doc. 5 rev. 1 (2011); *Mortlock v. United States*, Case 12.534, Inter-Am. Comm'n H.R., Report No. 63/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2009)).

²⁹ Pet. at 64.

are untimely because they were notified of the latest decision in their domestic proceedings (remedies they failed to exhaust) more than six months prior to filing the Petition on February 14, 2014—Ms. Fleury, on July 30, 2013, when the BIA dismissed her appeal, and Ms. Gustave, in 2004, when she received her final order of removal from an immigration judge and did not appeal.³⁰ Therefore, none of the claims in the Petition is timely under Article 32(1).

Petitioners’ unsupported assertion that Ms. Mathurin, Mr. Pinette, Ms. Nazaire, and Mr. Sainvil were exempt from the exhaustion requirement under Article 31(2) and therefore filed in a reasonable period of time is unavailing. As explained above, Petitioners are not exempt from the exhaustion requirement and, even if they were, Petitioners have failed to provide facts sufficient for the Commission to conclude that they filed the Petition “within a reasonable period of time,” as required by Article 32(2). The fact that Petitioners “only learned recently of the existence of the possibility of filing a merits petition” with the Commission does not excuse their delay under the Rules.³¹ While the Petition refers generally to the humanitarian situation in Haiti and the difficulties that Petitioners have had communicating with their lawyers, it ignores the fact that Petitioners could have initiated the Petition while they were still in the United States, during the period of time between “exhausting” their domestic remedies (as Petitioners understand that term³²) and being physically removed to Haiti.³³ Petitioners provide no explanation, let alone a

³⁰ See Pet. at 22-23 (discussing the procedural history of Ms. Fleury’s and Ms. Gustave’s respective removals).

³¹ Pet. at 65-66.

³² As best as the United States understands Petitioners’ arguments about exhaustion, that would mean receiving a final order from an immigration judge that the Petitioner did not appeal (Ms. Mathurin, Mr. Pinette, and Ms. Gustave) or receiving a negative decision from the BIA that the Petitioner declined to appeal further (Ms. Nazaire, Mr. Sainvil, and Ms. Fleury).

³³ Pet. at 13 (noting Ms. Mathurin was removed in September 2012, but received her final order of removal on July 30, 2012 and did not appeal), 14-16 (noting that Mr. Pinette was removed in 2011, but received his final order of removal on May 24, 2010 and did not appeal), 17 (noting that Ms. Nazaire was removed in April 2012, but the BIA dismissed her appeal on “February 15, 2002,” which based on the facts provided in the Petition the United States

sufficient one, for why they were unable to file their claims with the Commission during this period.

Nor can Petitioners credibly claim that they are excused from filing within six months of exhaustion or within a reasonable period of time because they “experience ongoing human rights violations similar to those described in *Communities in Alcantara* [*v. Brazil*].”³⁴ In *Communities in Alcantara*, the Commission found that the alleged violations were ongoing because, although the State had initially expropriated the land at issue some 25 years earlier, “many families have had to live under the threat of expropriation” and “the threat of expropriation may qualify as a continuing violation.”³⁵ In other words, at the time of filing their petition, some of the petitioners were still being threatened by the State action that they alleged violated the American Convention and Declaration. Here, by contrast, all of the Petitioners had already been removed from the United States to Haiti (the purported violation of Petitioners’ rights) when they filed the Petition on February 14, 2014. Notwithstanding the adverse consequences that they allege their removals had for them and their families, by their own theory of a violation by the United States, Petitioners could not have been subject to an ongoing violation by the United States at the time of filing.

For these reasons, even if the Commission finds that Petitioners have exhausted their domestic remedies, it should dismiss the Petition as untimely under Article 32 of the Rules.

IV. The Petition is Inadmissible because it Fails to Establish Facts that Could Support a Claim of a Violation of the Declaration and Contains Claims that are Manifestly Groundless

assumes should read “February 15, 2012”), and 20 (noting that Mr. Sainvil was removed in May 2012, but the BIA dismissed his appeal on April 6, 2012).

³⁴ Pet. at 65-66.

³⁵ *Communities in Alcántara v. Brazil*, Case 555-01, Inter-Am. Comm’n H.R., Report No. 83/06, OEA/Ser.L./V/II.127, doc. 4 rev 1, U14-15 (2007), at para. 63-64.

The Petition is also inadmissible because it fails to state facts that tend to establish violations of Petitioners' rights under Article 34(a) of the Rules and contains claims that are manifestly groundless under Article 34(b) of the Rules. The Commission must declare a petition inadmissible when, under Article 34(a), it does not state facts that tend to establish a violation of the American Declaration or, under Article 34(b), the claims in the Petition are manifestly groundless. The Commission Statute explicitly provides that in relation to non-state parties to the American Convention, for purposes of the Statute, human rights are understood to be only the rights set forth in the American Declaration.³⁶ Here, the rights set forth in the American Declaration, contrary to Petitioners' assertions, include neither express nor implied protection from return to a country based upon the general conditions in that country. As Petitioners seek such protection in an instrument that does not afford it, they have failed to state facts that tend to establish a violation of the American Declaration and their claims are manifestly groundless. Their petition is thus inadmissible.

A. The Declaration Does Not Recognize a Right to Protection from Refoulement

Notwithstanding the arguments of Petitioners and prior decisions of the Commission,³⁷ the American Declaration does not incorporate a right of foreign nationals convicted of serious crimes to be protected from return to a country based upon the general conditions in that country. It is well-established that States have the sovereign right to control the admission of foreign nationals, their departure, and their conditions and duration of stay within the country, subject to their obligations under international law.³⁸ Courts of the United States, for instance, have long

³⁶ Statute of the Inter-American Commission on Human Rights, art. 1(2)(b).

³⁷ See generally *Smith & Armendariz* and *Mortlock*.

³⁸ See, e.g., 1928 Convention on the Status of Aliens ("Havana Convention"), Article 1 ("States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory."); Article 6

recognized the federal government's sovereign powers under international law to regulate the admission, exclusion, and expulsion of foreign nationals.³⁹ The United States' sovereign right to remove foreign nationals from its territory is limited only by its non-refoulement obligations under international refugee law and international human rights law. Article 33 of the 1951 Convention relating to the Status of Refugees, which is binding on the United States through its incorporation in the 1967 Protocol relating to the Status of Refugees, prohibits the United States, with limited exceptions, from expelling or returning a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.⁴⁰ Likewise, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") prohibits the United States from expelling, returning, or extraditing a person to any country "where there are substantial grounds for believing that he would be in danger of being subjected to torture."⁴¹ The United States' non-refoulement obligations under the 1967 Protocol and CAT are not self-executing and, accordingly, they do not confer judicially enforceable rights beyond those implemented by Congress by statute.⁴² Regardless, the Petition acknowledges that neither of these

("For reasons of public order or safety, states may expel foreigners domiciled, resident, or merely in transit through their territory.")

³⁹ See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (noting that the Supreme Court, "[i]n accord with 'ancient principles of the international law of nation-states,'" has held "that the power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government'" and that "the Court's general reaffirmations of this principle have been legion.")(internal citations omitted).

⁴⁰ The U.S. Supreme Court has interpreted this language to mean that the United States cannot expel or return a refugee to a country where they are "more likely than not" to have their life or freedom threatened on one of the five protected bases. See *INS v. Stevic*, 467 U.S. 407, 429-30 (1984).

⁴¹ The U.S. Senate provided its advice and consent for ratification of the CAT subject to the understanding that the phrase "where there are substantial grounds for believing that he would be in danger of being subjected to torture" means "if it is more likely than not that he would be tortured."

⁴² See *Yuen Jin v. Mukasey*, 538 F.3d 143, 159 (2d Cir. 2008).

forms of international protection was applicable to Petitioners because they were not at risk of persecution or torture in Haiti, as those terms are understood in U.S. and international law, at the time of their removal.⁴³

Instead, Petitioners claim that, by removing them to Haiti “without due consideration of the humanitarian and human rights crisis in Haiti . . . and the individual circumstances of the deportees,” the United States violated Article I (right to life, liberty, and security of person), Article V (right to protection of honor, personal reputation, and private and family life), Article VI (right to a family and to protection thereof), Article VII (right to protection for mothers and children), Article XI (right to the preservation of health and to well-being), Article XVIII (right to a fair trial), and Article XXVI (prohibition on cruel or unusual punishment) of the American Declaration.⁴⁴

As an initial matter, all of these articles impose limitations on action by the U.S. government in U.S. territory, but none of them protects foreign nationals convicted of serious crimes from being returned by the United States to a country based upon the general conditions in that country. Put another way, even assuming *arguendo* that the facts alleged by Petitioners establish a violation of their rights under the Declaration, that violation was committed in Haiti by Haitian government officials after the U.S. government removed Petitioners from U.S. territory. As a result, the Commission lacks competence *ratione loci* to consider the Petition because the alleged violations of the American Declaration occurred beyond the jurisdiction of the United

⁴³ See Pet. at 54-57. Even if these protections had been applicable to Petitioners, such protections would fall outside the *ratione materiae* competence of the Commission. 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. Article 23 does not list the Refugee Convention, its 1967 Protocol, or the CAT as applicable instruments.

⁴⁴ See Pet. at 4.

States. The applicability of the American Declaration is limited by the jurisdiction of the State. The scope of the commitments undertaken by OAS Member States through the American Declaration is clear from the preamble of the instrument.⁴⁵ The focus of the American Declaration is to strengthen the internal regimes of States through the incorporation of regional standards set forth in the Declaration. The United States undertook a political commitment to do precisely that, and nothing in the text of the American Declaration suggests that OAS member States intended for their commitments under the instrument to apply beyond their respective jurisdictions.

The Commission considers it appropriate to interpret provisions of the American Declaration in light of relevant provisions of the American Convention on Human Rights. Although the United States is not a party to the American Convention, Article 1 of the Convention contains a clear jurisdictional provision that mirrors the applicability of the American Declaration.⁴⁶ This limitation to the application of the Convention is relevant in the present context because it reinforces the limited, jurisdictionally-bound application of human rights commitments undertaken through the American Declaration.

It is axiomatic that the existence of an obligation must be established prior to establishing a breach of such obligation; in the absence of an obligation, there can be no breach or responsibility

⁴⁵ American Declaration, Preamble, para. 4 (“The affirmation of essential human rights by the American States together with the guarantees given by *the internal regimes of the states establish the initial system of protection* considered by the American States as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly *strengthen that system* in the international field as conditions become more favorable.” (emphasis added)).

⁴⁶ See American Convention, Art. 1 (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” (emphasis added)). See also Art. 2 (obligating States to give “Domestic Legal Effects” to the rights contained in the Convention as necessary).

arising therefrom.⁴⁷ Because the American Declaration does not apply beyond the jurisdiction of the State, and because the United States did not exercise jurisdiction in Haiti during the relevant period, the United States could not have violated its commitments under the American Declaration with respect to Petitioners.

Nor is the United States responsible for alleged violations based on a theory of refoulement. The United States does not bear any responsibility for such a violation under the American Declaration because the Declaration does not recognize any protection from refoulement, especially not one for foreign nationals convicted of serious crimes who are not at risk of persecution or torture.

The American Declaration itself speaks directly in support of this position by recognizing that States have the right to protect their citizens against legitimate threats to their welfare. Article XXVIII makes plain that other rights protected under the Declaration, including the rights cited by Petitioners, are “limited” by the State’s inherent duty to protect the “security of all” and to meet “the demands of the general welfare.” Relatedly, Article XXXII sets forth “the duty of every person to obey the law and other legitimate commands of the authorities of his country *and those of the country in which he may be*” (emphasis added). It follows that States may choose to remove foreign nationals with serious criminal records, like Petitioners, whose presence may represent a threat to the security and well-being of society, consistent with States’ non-refoulement obligations under international law.⁴⁸

⁴⁷ See, e.g., The 2001 International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10, 43, UN Doc A/RES/56/83, Annex, UN Doc A/CN.4/L.602/Rev.1, GAOR 56th Session Supp 10, 43, Pt.1 The Internationally Wrongful Act of a State, Ch.I General Principles.

⁴⁸ As further evidence that foreign nationals convicted of serious criminal offenses have no substantive right to remain in a State’s territory, it is noteworthy that refugees who have committed “serious nonpolitical crime[s] outside the country of refuge” are excluded from protection from refoulement under the 1951 Convention relating to the Status

B. Petitioners Fail to Establish a Claim under Articles V, VI, or VII

Article V provides: “Every person has the right to the protection of the law against abusive attacks upon his . . . private and family life.” Article VI provides: “Every person has the right to establish a family, the basic element of society, and to receive protection therefore.” Article VII provides: “All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.” Petitioners argue that by removing them to Haiti and separating them from their families in the United States, the U.S. government violated their rights under Articles V and VI, and the special protections for children provided in Article VI of the American Declaration. Petitioners’ allegations that their removal to Haiti violated Articles V, VI, and VII of the American Declaration should be dismissed for failure to establish a claim and as manifestly groundless.

First, the rights to family and private life established by Articles V and VI were not intended to apply to the Petitioners’ situation. Rather, the language of these Articles makes clear that they were intended to ensure, first, that all persons have the right to procreate and raise a family, and second, that families are not subject to direct violence by the State in its territory. The words “abusive attacks upon . . . private and family life” in Article V clearly imply State action directly aimed at harming family life. The Commission’s own jurisprudence bears out this interpretation. In a case regarding the persecution of the Aché people in Paraguay, for instance, the Commission noted that the sale of children constitutes a “very serious” violation of the right to a family and to receive protection therefor.⁴⁹ Moreover, in the case of the Gelman family in

of Refugees and the 1967 Protocol relating to the Status of Refugees, despite the fact that they have a well-founded fear of persecution in their country of nationality or former habitual residence.

⁴⁹ *Ache Tribe v. Paraguay*, Case 1802, Inter-Am. C.H.R. (1977).

Uruguay, the Commission found the Gelman's petition admissible in part on the basis that Article VI might have been violated by the forced disappearance of Maria Claudi Gelman and the suppression of the identity of her daughter.⁵⁰ Here, there is no similar direct State action, as required by Articles V and VI. Petitioners' removal from the United States was merely the civil consequence of the Petitioners' failure to comply with the terms and conditions bearing upon their residence in the country. As secondary consequences of permissible State action, their removal is not the type of direct state action that Articles V and VI sought to target.⁵¹ Beyond this fundamental defect, the mere fact that an individual subject to removal has family in the country from which he or she is lawfully removed, and who may be adversely effected by such removal, cannot transform such removal into "an abusive attack" upon private or family life within the meaning of Article V; nor can such removal be construed as a denial of the ability to procreate and raise a family within the meaning of Article IV.

With respect to Petitioners' allegations that the United States violated Article VII, the protection of children is not directly implicated here because all of the Petitioners were adults when they committed the crimes that resulted in their removal. The mere fact that Petitioners Nazaire and Sainvil apparently had minor children (none of whom is a petitioner in this matter) at the time they were lawfully removed from the United States cannot, without more, constitute a denial of the right of those children to "special protection, care, and aid" within the meaning of Article VII. Moreover, the fact that Nazaire and Sainvil were removed notwithstanding their minor

⁵⁰ *Juan Gelman et al. v. Uruguay*, Petition No. 438-06, Inter-Am. C.H.R., Report No. 30/07 (2007).

⁵¹ Petitioners also appear to assert, without further explanation, that the United States violated customary international law, as reflected in the Universal Declaration of Human Rights ("UDHR"), by interfering with the family rights of Petitioners. The United States notes that Petitioners fail to provide any analysis explaining how Articles 12 or 16 of the UDHR, which are non-binding under international law, nevertheless create customary international law or how the Commission has the competence to apply those provisions to the United States in this dispute.

children (who apparently lived subsequently with family members residing in the United States) does not mean that the interests of their children were not considered by immigration officials, as the Petition asserts.⁵² Removal of Nazaire and Sainvil simply indicates that the United States does not adhere to Petitioners’ proposed formulation that “equities such as family ties should *always* outweigh criminal history.”⁵³ While Petitioners clearly disagree with the outcome of their removal proceedings, such disagreement is not only insufficient to substantiate a violation of American Declaration rights, but further, reconsideration of those determinations by the Commission is foreclosed by the “Fourth Instance” doctrine, discussed below.

While Petitioners correctly note that the Commission previously found that the United States violated Articles V, VI, and VII by removing foreign nationals without considering on an individualized basis their rights to family and the best interest of their children, the United States respectfully reiterates its view that *Smith & Armendariz* was wrongly decided.⁵⁴ That decision imported jurisprudence from different bodies interpreting different texts in different instruments—namely, the European Court of Human Rights’ (“ECtHR”) interpretation of the European Convention on Human Rights (“ECHR”) and the Human Rights Committee’s interpretation of the International Covenant on Civil and Political Rights (“ICCPR”)—and inappropriately used it to construe the United States’ commitments under the Declaration. Not only was this expansive reading of Articles V, VI, and VII flawed as a methodological matter, but if followed to its natural conclusion it would have the effect of seriously disrupting States’ abilities to perform basic administrative functions necessary to provide for security and promote the general welfare, consistent with Article XXVIII. Tellingly, Petitioners’ arguments here about Article VII also rely

⁵² See *infra*, Section VI.

⁵³ Pet. at 75 (emphasis added).

⁵⁴ See Pet. at 69-70 (discussing *Smith & Armendariz*).

on sources of rights—the American Convention and the Convention on the Rights of the Child—that are not only beyond the Commission’s *ratione materiae* competence with respect to the United States,⁵⁵ but are also instruments to which the United States is not a party.⁵⁶

For these reasons, Petitioners’ argument that their removal violated Articles V, VI, and VII of the Declaration should be dismissed for failure to establish a claim and as manifestly groundless.

C. Petitioners Fail to Establish a Claim under Articles I or XI

Article I provides: “Every human being has the right to life, liberty and the security of his person.” Article XI provides: “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.” Petitioners’ arguments that their removal to Haiti violated these Articles fare no better than their claims under Articles V, VI, and VII and, accordingly, they should be dismissed for failure to establish a claim and as manifestly groundless.

First, the right to life, liberty, and personal security under Article I of the Declaration was not intended to protect foreign nationals convicted of serious crimes from being removed to their country of origin based on general country conditions. Petitioners again cite to the Commission’s decisions in *Smith & Armendariz* and *Mortlock* to support their argument, but neither was decided on Article I grounds.⁵⁷ Petitioners also refer at length to the jurisprudence of the IACtHR and its interpretation of the American Convention, as well as the Human Rights Committee’s interpretation of the ICCPR, but, as noted above, that jurisprudence is not within the Commission’s competence to apply in a dispute involving the United States.⁵⁸ As discussed at length above, any

⁵⁵ See *supra*, note 44.

⁵⁶ Pet. at 72-74.

⁵⁷ See Pet. at 83-84.

⁵⁸ See Pet. at 80-83.

alleged violations of Petitioners' human rights in Haiti are beyond the *ratione loci* competence of the Commission with respect to the United States and the American Declaration does not impose *non-refoulement* obligations that could render the United States responsible for such violations.

To be sure, Petitioners correctly note that the Commission found in *Haitian Centre* that the United States had violated Article I, along with Articles II, XVIII, and XXVII, but that decision is inapplicable to Petitioners' situation. *Haitian Centre* was a dispute about the United States returning Haitian refugees and asylum seekers interdicted at sea—that is, Haitians who had, or who professed to have, a well-founded fear of persecution on the basis of their race, religion, nationality, membership in a particular social group, or political opinion, but who were unable to apply for international protection because they had been prevented from reaching the United States or another country of refuge.⁵⁹ Here, by contrast, all of the Petitioners were physically present in the United States and, accordingly, U.S. law provided them with the opportunity to apply for asylum, statutory withholding of removal, or withholding/deferral of removal under the CAT regulations during the course of their removal proceedings. Petitioners' likely response to this argument—that the general human rights and humanitarian situation in Haiti was such that the United States could not remove *anyone* to Haiti consistent with Article I during the relevant period, regardless of their individual circumstances—is not supported by *Haitian Centre* or the Commission's prior jurisprudence, let alone the text of Article I.

⁵⁹ See *Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Inter-Am. C.H.R. (1997), at para. 167 (“The Commission has noted the petitioners argument that by exposing the Haitian refugees to the genuine and foreseeable risk of death, the United States Government’s policy of interdiction and repatriation clearly violated their right to life protected by Article I.”); para. 55 (quoting from the United States’ brief: “The specific gravamen of petitioners’ complaint is that many of the interdicted Haitians had a reasonable fear that they would be persecuted if returned to Haiti but were denied a proper forum and processing procedures for resolution of these claims, in violation of the Government’s obligations with respect to refugees.”); see also Article 1 of the 1951 Convention relating to the Status of Refugees (defining “refugee”); Article 1 of the 1967 Protocol relating to the Status of Refugees (modifying and incorporating the Convention’s definition of “refugee”).

As for Petitioners' claims under Article XI, those too must fail because neither the text of the Declaration nor the Commission's case law suggests that it incorporates an obligation not to return an individual to a country where they might lack access to certain medications or medical services. As Petitioners concede, the Commission in *Mortlock*—the case on which much of the Petition otherwise relies—made clear that Article XI does not extend to situations where, as here, a petitioner “has not been denied access to medical care in the United States.”⁶⁰ The only Commission decision the Petition cites in support of its argument, *Coulter et al. v. Brazil*, stands for the proposition that Article XI prohibits a State from permitting construction in the lands of indigenous persons without first taking adequate protection for their safety and health.⁶¹ Nothing in that decision suggests that Article XI incorporates an obligation not to return a foreign national to a country where they lack access to certain medical services. Petitioners' other citations—to the IACtHR's interpretation of the American Convention; the Committee on Economic, Social, and Cultural Rights' interpretation of the International Covenant of Economic, Social, and Cultural Rights; and the ECtHR's interpretation of the ECHR—are irrelevant because the Commission lacks the competence to apply that jurisprudence in a dispute involving a non-State party such as the United States.⁶²

Moreover, the text of Article XI itself acknowledges bounds to the right to the preservation of health and well-being by limiting it “to the extent permitted by public and community resources.” While emergency health care services are provided to all regardless of nationality in the United States, universal access to free health care—despite being a topic of considerable

⁶⁰ See *Mortlock*, at para. 95; Pet. at 95-96.

⁶¹ *Coulter et al. v. Brazil*, Case No. 7615, Inter-Am. Comm'n H.R., Report No. 12/85', OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985), at para. 10(b).

⁶² See Pet. at 91-96.

national debate—is not. Further, U.S. law does not require the federal government to take into account access to medical services when determining whether a foreign national should be removed to their country of origin. This reflects Congress’ determination, consistent with Article XI, that public and community resources do not permit otherwise removable foreign nationals to remain in the United States for access to medical services. Even assuming *arguendo* that foreign nationals have a right under Article XI to remain in a State for medical services, that right would still be subject to Article XXVIII of the Declaration and, accordingly, it would be appropriate for Congress, taking into account the “general welfare” of the United States, to limit that right to foreign nationals who have not been convicted of serious crimes.

As discussed at length above, any alleged violations of Petitioners’ human rights in Haiti are beyond the *ratione loci* competence of the Commission with respect to the United States. Petitioners expressly “urge the Commission to reconsider its Article XI analysis in *Mortlock*, and to instead look at whether conditions *in the receiving country* violate an individual’s right to health and well-being under Article XI of the Declaration.”⁶³ Any such violations identified by the Commission are not attributable to the United States.

For these reasons, Petitioners’ argument that their removal violated Articles I and XI of the Declaration should be dismissed for failure to establish a claim and as manifestly groundless.

D. Alleged Violations of Articles XVIII and XXVI

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

⁶³ Pet. at 96.

rights.” Article XXVI provides: “Every accused person is presumed to be innocent until proved guilty. Every 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.” Petitioners’ allegations that their removal to Haiti violated their “procedural rights” under Articles XVIII and XXVI of the American Declaration should be dismissed for failure to establish a claim and as manifestly groundless.

Petitioners have mischaracterized the procedural protections articulated in Articles XVIII and XXVI. Under the American Declaration, procedural guarantees exist to ensure respect for substantive rights to which an individual is entitled—that is, for the “legal rights” referenced in Article XVIII. Thus, no person has a “right” to receive any particular procedure unless the State is depriving him or her of some other protected, substantive right. Because Articles I, V, VI, VII, and XI do not afford Petitioners the substantive right to remain in the United States after having been convicted of serious crimes—nor do they possess any “fundamental constitutional rights” under U.S. constitutional law with respect to the same question—Petitioners are not entitled to any particular level of process concerning their removals under Article XVIII. Nevertheless, as a matter of U.S. domestic law, Petitioners were guaranteed access to numerous administrative and judicial procedures prior to their removal, affording them more than adequate due process.

With respect to Article XXVI, the due process provision protecting the criminally accused, removal proceedings are *not* criminal proceedings. Petitioners were entitled to a fair trial and due process of law under Articles XVIII and XXVI with respect to their criminal charges in the different U.S. states where they were prosecuted. They received those protections in their respective criminal proceedings and Petitioners do not suggest otherwise. In fact, within criminal proceedings, the procedural protections received by foreign nationals are no different from those

received by U.S. citizens. Foreign nationals, like citizens, cannot be convicted unless their crime is proven beyond a reasonable doubt. Foreign nationals, like U.S. citizens, have full rights to appeal their convictions or to challenge the conditions of any subsequent incarceration. Foreign nationals also have the right to be represented by counsel, the right to a trial by jury, the right to cross-examine the government's witnesses, the right against self-incrimination, the right to have improperly obtained evidence suppressed, the right to have evidence of prior criminal convictions excluded, and the right not to be subjected to double jeopardy, ex post facto laws, or bills of attainder, among many other statutory and constitutional protections. In short, the United States has one of the most robust systems of due process in the world, which reflects the United States' commitments under Article XXVI of the American Declaration.

In the immigration setting, however, the United States reiterates its position that Article XXVI—concerned as it is with protecting the rights of criminal defendants—simply does not apply. As the U.S. Supreme Court has repeatedly held, the immigration detention or removal of foreign nationals is predicated on a person's immigration status and does not constitute punishment for a crime. Removal is merely the civil consequence of a foreign national's non-compliance with the terms and conditions upon his or her residence in the country, bearing in mind that no foreign national has a right to live in the United States.⁶⁴ Even if Articles XVIII and XXVI somehow did apply to Petitioners' removal proceedings, which again are not criminal in character, the process

⁶⁴ *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 491 (1999) (“While the consequences of deportation may assuredly be grave, they are not imposed as a punishment Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted. And in all cases, deportation is necessary in order to bring to an end an *ongoing violation* of United States law.” (emphasis in original) (citing *Carlson v. Landon*, 342 U.S. 524, 537 (1952))). See S. Rep. No. 104-249, at 7 (1996) (“Aliens who are required by law or the judgment of our courts to leave the United States are not thereby subjected to a penalty. The opportunity that U.S. immigration law extends to aliens to enter and remain in this country is a privilege, not an entitlement.”).

that they received would have more than exceeded any reasonable set of requirements one might fashion for those Articles. In the United States, foreign nationals have the right to a removal proceedings in immigration court. Within the removal proceedings, foreign nationals have the right to be represented by counsel at no expense to the government, the right to present evidence, the right to examine the evidence against them, the right to cross-examine the witnesses presented by the government, and the right to have a complete record of the proceedings transcribed and prepared for appellate review, including all testimony and evidence presented at the hearing.⁶⁵ During these proceedings, foreign nationals may present applications for relief and protection from removal and may make any arguments they desire. If issued a final order of removal, foreign nationals have the right to appeal to the BIA, which exercises de novo review over questions of law. They may also bring petitions for review in federal court, in which they may raise constitutional claims or questions of law even if certain jurisdictional bars apply.⁶⁶

All of these procedural rights were afforded to Petitioners during their legal proceedings. Petitioners first had their criminal cases heard at state-level trial court proceedings. They then had the opportunity to appeal their convictions within the respective state-level criminal systems. Once their convictions were final, they were party to administrative removal proceedings before immigration judges. After immigration judges ordered them removed, Petitioners had the opportunity to appeal the adverse decision to the BIA and, subsequently, petition a federal circuit

⁶⁵ See 8 U.S.C. § 1229a(b)(4). Moreover, ICE provides all persons in immigration detention with an updated list of free legal service providers in the area when detainees first arrive at its detention centers to ensure that indigent detainees have access to legal representation. Detainees also have access to a law library in the detention facility and opportunities to consult with counsel in person and by phone at the detention facility. Attorney/client phone conversations are not monitored by ICE officials, and initial phone calls to free legal providers are free of charge. Indigent, pro se detainees are also permitted free phone access. See 2011 Operations Manual ICE Performance-Based National Detention Standards (Revised Dec. 2016), pp. 385-91, available at <https://www.ice.gov/doclib/detention-standards/2011/5-6.pdf>.

⁶⁶ See 8 U.S.C. §§ 1252(a), (g), (a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, tit. I, § 106(a), 119 Stat. 305, 310.

court for review. This constellation of administrative and judicial process afforded to Petitioners by the U.S. legal system far exceeded any requirements that might reasonably be found to exist under Articles XVIII and XXVI of the Declaration. They simply were not entitled to the substantive relief or protection they sought. Petitioners' dissatisfaction with the outcome of process they received does not, as Petitioners suggest, constitute a denial of process they were due.

For these reasons, Petitioners' argument that their removal violated Articles XVIII and XXVI should be dismissed for failure to state facts that tend to establish a violation of the American Declaration and as manifestly groundless.

* * *

Based on the foregoing, Petitioners' claims that the United States violated Articles I, V, VI, VII, XI, XVIII, and XXVI of the American Declaration should be dismissed under Article 34(a) of the Rules for failure to state facts that tend to establish a violation of Petitioners' rights and under Article 34(b) of the Rules as manifestly groundless.

V. Petitioners Seek To Use The Commission As A Fourth Instance Review Of United States 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 in administrative and judicial proceedings in the United States. 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."⁶⁷

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

The fourth instance doctrine recognizes the proper role of the Commission as subsidiary to States' domestic judiciaries,⁶⁸ 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, "The 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."⁶⁹ 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 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 courts provide Petitioners with a variety of bases to seek relief or protection from removal, and some of the Petitioners availed themselves of these opportunities. Petitioners argue, among other things, that the United States should have applied different standards in their removal proceedings and now invite the Commission to request that the United States "reopen" their respective immigration proceedings.⁷⁰ Instead of appealing their final orders of removal to the BIA and/or federal courts, as appropriate, Petitioners chose to wait and pursue an "appeal" internationally before this Commission. However, the Commission cannot be used as a substitute for appeal in the U.S. judicial system.⁷¹ Moreover, if the Commission were to accept a petition based on the same humanitarian and hardship arguments that Petitioners have litigated

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

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

⁷⁰ See, e.g., Pet. at 107.

⁷¹ 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 by lower or administrative courts that have not been exhausted (i.e., appealed to the third (highest) chamber of appeal).

and lost in the United States, it would be acting precisely as the type of fourth instance review mechanism it has consistently refused to embody. For this reason as well, it should decline to examine the merits of the Petition.

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. administrative and judicial bodies, 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 body or court] was wrong or unjust in itself, the petition must be dismissed under [the fourth instance formula].”⁷² The Commission has reiterated that “the fact that the outcome [of a domestic proceeding] was unfavorable . . . does not constitute a violation.”⁷³ The fourth instance doctrine precludes the review sought by Petitioners.

VI. Even if Admissible, Petitioners’ Claims Fail on the Merits

The United States reserves the right to submit further observations should the Commission find the Petition to be admissible, but notes at this initial stage that the United States’ removal of Petitioners to Haiti was fully consistent with the rights that Petitioners allege were owed to them under the Commission’s decisions in *Mortlock* and *Smith & Armendariz*. Petitioners argue that those decisions prohibited the United States from removing them without conducting a balancing test that took into account facts specific to their individual circumstances, such as their family ties

⁷² *Marzioni* Inadmissibility Report, para. 51.

⁷³ *Maldonado Manzanilla v. Mexico*, Petition No. 733-04, Report No. 87/07, Inadmissibility, Oct. 17, 2007, para. 58 (quoting and citing *Rodríguez v. Argentina*, Case No. 10.382, Report No. 6/98, Inadmissibility, Feb. 21, 1998, para. 71).

to the United States and their medical issues, as well as the general humanitarian and human rights situation in Haiti.⁷⁴ As the Petition explains it, “the United States must apply to all deportations a balancing test that weighs the public security risk posed by the non-citizen against the equities implicated by the deportation and that takes into account the burden placed on Haiti of reabsorbing additional vulnerable people at this critical moment in time.”⁷⁵ The Petitioners overlook, however, that the United States in fact did just that.

In addition to offering Petitioners the opportunity to seek protection from return to persecution or torture on an individualized basis before an immigration judge, the United States implemented two discretionary measures with respect to Haitians during the relevant period: Temporary Protected Status (“TPS”) and ICE’s April 1, 2011 “Policy for Resumed Removals to Haiti.” In 2010, the Secretary of Homeland Security, recognizing the extraordinary and temporary conditions caused by the earthquake, designated Haiti for TPS, which temporarily allowed certain otherwise removable Haitian nationals to remain and work in the United States. Having been convicted of at least two misdemeanors, or at least one felony, Petitioners were, as a matter of U.S. law, ineligible to be TPS beneficiaries. However, as a matter of policy, ICE only removed Haitian nationals ineligible for TPS because of their criminal records after taking into consideration “adverse factors, such as the severity, number of convictions, and dates since convictions, and balance[ing] these against any equities of the Haitian national, such as duration of residence in the United States, family ties, or significant medical issues.”⁷⁶ As ICE’s policy announcement made clear, the United States was “working with the Government of Haiti and other key partners to

⁷⁴ See Pet. at 5-7.

⁷⁵ Pet. at 9.

⁷⁶ ICE Newsroom, “Policy for resumed removals to Haiti” (April 1, 2011), <https://www.ice.gov/news/releases/policy-resumed-removals-haiti>. This policy remained in effect for the duration of the period during which Petitioners were removed.

resume removals in as safe, humane, and minimally disruptive a manner as possible and to develop a comprehensive reintegration strategy that encompasses a range of services for returned Haitians to smooth their transition into Haitian society, including healthcare assistance and skills training to enhance employment prospects.”⁷⁷ In accordance with this policy, which was consistent with the Commission’s decision in *Mortlock* and *Smith & Armendariz*, ICE determined that Petitioners were eligible for removal to Haiti.

Petitioners concede that the factors in the balancing test that ICE announced were “similar” to those articulated in *Smith & Armendariz*, but argue that it was inadequate for various reasons and that an appropriate balancing test would “always weigh against deportations to Haiti” given “the scale of the ongoing catastrophe” there.⁷⁸ In other words, Petitioners seem to believe that there should be a blanket rule against removing anyone to Haiti, regardless of their individual circumstances—i.e., there should be no balancing test at all. This line of argument exceeds the bounds of *Mortlock* and *Smith & Armendariz* and stretches the rights proclaimed in the American Declaration beyond any reasonable limit.

* * *

The United States understands that the removal of Petitioners caused disruption in their lives and had unfortunate consequences on them and their families. That is true of nearly all removals from the United States. Here, Petitioners’ removal was a collateral consequence of their convictions for committing serious crimes. The United States does not dispute that Petitioners’ lives were adversely affected by these convictions, and that their families—like the families of all individuals who engage in serious criminal activity, whatever their citizenship—have suffered as

⁷⁷ *Id.*

⁷⁸ Pet. at 9, 68.

a result. However, Petitioners could have avoided removal if they either had not committed these serious crimes in the United States or had availed themselves of the opportunity to apply for United States citizenship. The hardship that this chain of events caused for Petitioners does not mean that the conduct of the United States in removing them from its territory was inconsistent with its commitments under the American Declaration, much less that their removals were unlawful or otherwise impermissible. As unfortunate as the effects of these removals may have been for Petitioners and their families, international law permitted the United States to remove Petitioners from its territory.

CONCLUSION

The Commission should declare the Petition to be inadmissible because it fails to meet the Commission's established criteria in the Rules of Procedure. First, to the extent that Petitioners articulate generalized allegations of violations of the American Declaration beyond those cognizable in relation to Petitioners, the Petition must be dismissed because the Commission lacks competence *ratione personae* to entertain claims based on a theory of *actio popularis*. Second, Petitioners failed to exhaust domestic remedies available in the United States, as required by Article 31 of the Rules. Third, even if Petitioners had exhausted their remedies, the Petition is untimely and therefore inadmissible under Article 32 of the Rules. Fourth, with respect to Article 34 of the Rules, the Petition is inadmissible because it fails under Article 34(a) to state facts that tend to establish violations of rights set forth in the American Declaration and it is manifestly groundless under Article 34(b). Finally, the Petition is inadmissible because Petitioners seek to use the Commission as a "fourth instance" review of U.S. immigration court decisions. 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.