



United States Department of State

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

Washington, D.C. 20520

April 3, 2019

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

Re: Pete Carl Rogovich, P-1663-13
Further Observations of the United States

Dear Dr. Abrão:

The United States Government has the honor of submitting to the Inter-American Commission on Human Rights ("Commission") further observations on the communications forwarded to the United States in the above-referenced matter, including the submission on behalf of Mr. Rogovich dated May 10, 2018, which were transmitted to the United States via a letter on October 12, 2018. Please find enclosed the United States' observations. 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,

A handwritten signature in dark ink, appearing to read 'Ch. J. Trujillo'.

Carlos Trujillo
Ambassador

Enclosures: as stated

PETE CARL ROGOVICH, P-1663-13
FURTHER OBSERVATIONS OF THE UNITED STATES

We appreciate the opportunity to provide further observations on the communications forwarded to the United States in the above-referenced matter, including the submission on behalf of Mr. Rogovich dated May 10, 2018, which was transmitted to the United States via a letter on October 12, 2018.

The United States recalls its submission of February 12, 2016, in this matter. In that submission, we explained that the Petition is inadmissible and does not demonstrate a breach of any commitment of the United States under the American Declaration. The United States requested that the Commission rule the Petition inadmissible for failure to exhaust domestic remedies, as a domestic court was actively considering several of the claims Petitioner has also brought before the Commission; and because the Petition does not state facts that tend to establish a violation of the American Declaration.

The United States further recalls that the Petition raised “five legal claims,”¹ and that the United States submitted in its prior submission that the claims in the Petition lack merit because the Petition does not show a failure to live up to the commitments the United States has made under the American Declaration. However Petitioner now introduces new claims in his “additional observations on the merits,” not included in the Petition. Allowing Petitioner to expand the scope of the Petition by introducing new claims at this stage challenges the integrity of the Commission’s practice of joining the admissibility and merits consideration of a petition. Nothing in the Rules permits Petitioner, at this stage, to introduce new claims beyond those in the Petition. Moreover, the Commission’s stated purpose for invoking Article 36(3) of the Rules of Procedure (“the Rules”) to defer an admissibility decision is to reduce its procedural backlog.² However, allowing Petitioner to introduce new claims at this stage would undermine the stated purpose of such joinder because it would require additional submissions on the

¹ Petition at 11.

² See Letter of January 10, 2018.

admissibility of such new claims. Accordingly, and because Petitioner has not first established the admissibility of those new claims pursuant the Rules, they must be deemed inadmissible. The United States therefore regards the scope of the Petition to remain those claims raised by Petitioner in the Petition.

In his most recent submission, Petitioner again alleges that the United States has “violated”³ certain specific rights recognized in the American Declaration of the Rights and Duties of Man (“American Declaration”). As noted in numerous prior submissions, the United States has undertaken a political commitment to uphold the American Declaration, a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS).⁴ Article 20 of the Statute of the Commission sets forth the Commission’s powers that relate specifically to OAS member States that, like the United States, are not parties to the legally binding American Convention on Human Rights, including to pay particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the State, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted. The Commission lacks competence to issue a binding decision vis-à-vis the United States on matters arising under other international

³ As the American Declaration is a nonbinding instrument and does not create legal rights or impose legal duties on member states of the Organization of American States, *see infra* note 2, 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.

⁴ 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 appeal have independently held that the American Declaration is nonbinding and that the Commission’s decisions do not bind the United States. *See, e.g.,* *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001); *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* Commission Statute, art. 20 (setting forth recommendatory but not binding powers). For a further discussion of the U.S. position regarding the nonbinding nature of the American Declaration, *see* Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988, available at <http://www1.umn.edu/humanrts/iachr/B/10-esp-3.html>.

human rights treaties, whether or not the United States is a party, or under customary international law.⁵

As such, Petitioner's claims, which at base are rooted in authorities beyond the American Declaration, are inadmissible under Article 34(a) as outside the Commission's competence. Although Petitioner references specific provisions of the American Declaration, in every instance, he now invokes an array of other international instruments, as well as customary international law, to substantiate his claims that international legal obligations have been violated. This recourse to international instruments and customary international law beyond the American Declaration—authorities that were not raised in the Petition—supports the position taken in our prior submission that the claims raised by Petitioner do not implicate provisions of the American Declaration: Petitioner now looks to various sources of international law in his attempt to construe cognizable claims. The assertion that Petitioner “has no other forum within the United States legal system to assert his international rights” does not and cannot expand the competence of the Commission.⁶ The Commission lacks the competence *ratione materiae* to entertain the claims contained in the Petition that lie beyond the American Declaration.

With respect to Petitioner's remaining claims, these should be dismissed because the Commission lacks competence to sit as a court of fourth instance. 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.”⁷ The fourth instance formula recognizes the proper role of the Commission as subsidiary to States' domestic judiciaries,⁸ 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. The

⁵ Petitioner's reference to Article 38 of the Statute of the International Court of Justice—which establishes the competence of the ICJ—suggests a fundamental misapprehension of the competence of the Commission. *See* Petitioner's submission of May 10, 2018, at 2 fn. 5.

⁶ Petitioner's submission of May 10, 2018, at 10.

⁷ *Marzioni v. Argentina*, Case No. 11.673, Report No. 39/96, Inadmissibility, Oct. 15, 1996, ¶ 51 (“*Marzioni Inadmissibility Report*”).

⁸ *See* *Castro Tortorino v. Argentina*, Case No. 11.597, Report No. 7/98, Admissibility, Mar. 2, 1998, ¶ 17.

Commission has elaborated on the limitations that underpin the fourth instance formula in the following terms: “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.”⁹ 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 formula, the Commission’s review of Petitioner’s claims is precluded. Petitioner raised before domestic courts the very allegations he makes in 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 both state and federal courts at multiple levels, 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 formula].”¹⁰ Moreover, the mere result that “facts before multiple state and federal courts have not translated into any remedy”¹¹ does not empower the Commission to sit in judgment as another layer of appeal. The Commission has also reiterated that “the fact that the outcome [of a domestic proceeding] was unfavorable ... does not constitute a

⁹ *Macedo García de Uribe v. Mexico*, Petition No. 859-03, Report No. 24/12, Inadmissibility, Mar. 20, 2012 (“*Macedo* Inadmissibility Report”), ¶ 40. The Commission has interpreted and applied the fourth instance formula in the same way for OAS Member States that are parties to the legally binding American Convention and for those, including the United States, for which review is instead undertaken pursuant to the nonbinding American Declaration, where there must be even more deference. *See, e.g., id.* at ¶ 40 (emphasis added) (“The judicial protection afforded by the [American] Convention [on Human Rights] includes the right to fair, impartial, and prompt proceedings which give rise to the possibility, *but never the guarantee*, of a favorable outcome. Thus, the interpretation of the law, the relevant proceeding, and the weighing of the evidence is, among others, a function to be exercised by the domestic jurisdiction, which cannot be replaced by the IACHR.”).

¹⁰ *Marzioni* Inadmissibility Report, *supra* note 42, ¶ 51.

¹¹ Petitioner’s submission of May 10, 2018, at 23.

violation.”¹² The fourth instance formula precludes the review sought by Petitioner.

* * *

The United States takes note that Petitioner has realized a substantial degree of the relief sought in the Petition. Petitioner acknowledges that he was transferred out of solitary confinement in July 18, 2017.¹³ Petitioner further acknowledges improvement in the healthcare he is receiving while in detention, an issue still being litigated.¹⁴ These factual developments moot one or more of the claims in the Petition.

The Commission should declare the Petition to be inadmissible because Petitioner has not stated facts that tend to establish a violation of any rights in the American Declaration. Moreover, Petitioner failed to demonstrate he had exhausted domestic remedies and now introduces a new claim that is out of order, further reasons this Petition should be found inadmissible. Further, the Commission should decline the invitation to operate as a court of fourth instance to review Petitioner’s claims which have been carefully adjudicated by the courts of the United States. Should the Commission nevertheless declare the Petition admissible and examine its merits, the United States urges it to find the Petition without merit and deny Mr. Rogovich’s request for relief.

¹² 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).

¹³ Petitioner’s submission of May 10, 2018, at 3.

¹⁴ *Id.* at 36, 38.